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SOME SUGGESTIONS FOR SPEEDING CRIMINAL APPEALS

FROM time immemorial man has complained of the law's delays. If the primary function of criminal justice is to deter crime¹ by insuring immediate conviction, then a prompt final disposition of criminal prosecutions is indispensable to such function; and if no conviction is warranted, it is desirable that there be a prompt and diligent reversal, in order that any deterrent effect which may have resulted from the prosecution of the case may not be offset by a protracted appeal and that any inconvenience or injury to an innocent defendant may not be needlessly prolonged. If as is often said, "time is the criminal's best defense," it is in part because of the delay which is all too often incident to the right of appeal. The efforts of a diligent prosecutor who has contributed to a speedy conviction may be virtually nullified when an appellate court, because of either inability under the existing procedure or unwillingness, fails to dispose of the appeal so as to preserve the effect of the conviction. The greater the time required for an appeal the greater the chance that following reversal the prosecutor may dismiss or compromise the case, regarding retrial as impracticable.

In Texas, as elsewhere, there has been appreciable dissatisfaction with the results achieved by the administration of criminal justice. Although there is no reason to believe that the problems of delay incident to appeal of criminal cases are more pressing or less ably dealt with than in other jurisdictions generally, the Texas Court of Criminal Appeals has drawn unfavorable comment

¹ TEX. PEN. CODE (1925) art. 2: "The object of punishment is to suppress crime and reform the offender."

in connection with this problem from observers both within² and outside³ the State.

It is seldom apparent from the reported opinions in criminal cases on appeal just how much time has passed between conviction and final disposition by the court, and statistics reflecting the average time consumed in an appeal are unavailable. It appears, however, that at least four factors materially influence the time expended in the disposition of criminal cases on appeal: (1) the subject matter of appeals in criminal cases; (2) the time allowed by statute for the completion of the several stages of an appeal; (3) the nature and contents of the record on appeal; and (4) the appellate opinions.

I. THE SUBJECT-MATTER OF APPEALS

Article 813 of the Texas Code of Criminal Procedure provides that the defendant shall have the right of appeal in all cases, without specifying whether the appeal may be only from conviction, as at common law, or may be initiated prior to conviction. The volume of appealed criminal cases, for which Texas has become notorious,⁴ can perhaps be diminished if the right of appeal is reserved for those who deserve it and is not extended to those who seek only to defer, by whatever available means, the final reckoning. Certain devices for reduction of the volume of appeals have come to be accepted in other jurisdictions, some of which merit consideration. Among these developments are the certification of questions in criminal cases, discretionary appeals in certain instances, and discouragement of appeals lacking in merit by a policy of reversal for substantial reasons only.

² See *Report of Committee on Criminal Law and Criminal Procedure* (1928) 47 PROC. TEX. BAR ASSO. 85, 86; Note (1939) 2 TEX. BAR J. 111; *Report of Committee on Criminal Law and Procedure* (1946) 9 TEX. BAR J. 238, 239; Williams, *Speed Up the Trial* (1946) 9 TEX. BAR J. 389; cf. Carter, *The Texas Court of Criminal Appeals* (1932) 11 TEX. L. REV. 1, 21.

³ See ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939) 134, 221.

⁴ *Id.* at 134.

Article 421 of the American Law Institute Code of Criminal Procedure provides:

"If upon a motion to quash an indictment or information or any count thereof or if after verdict or finding of guilty but before sentence any question of law shall arise which in the opinion of the trial court is so important and doubtful as to require the decision of the appellate court, the trial court may, if the defendant consents, certify the case to the appellate court so far as may be necessary to present the question of law arising therein, and thereupon all proceedings in the cause shall be stayed to await the decision of the appellate court."

Certification is provided for in the criminal codes of a number of states.⁵ The Texas Rules of Civil Procedure provide for certification of questions from the Court of Civil Appeals to the Supreme Court,⁶ and there seems to be nothing to preclude a similar procedure of certification of questions to the Court of Criminal Appeals from criminal cases in the District Courts.

It has been suggested that a principal factor contributing to the number of appeals in the different states is that in some jurisdictions as in Texas an appeal is a matter of right, while in others an appeal is allowed upon a matter of fact only with the permission of either the trial judge or the appellate tribunal.⁷ The experience of the English Court of Criminal Appeal in reducing the number of appealed cases affords a striking example of the effectiveness of a statute⁸ allowing only discretionary appeals as to matters of fact.⁹

⁵ Alabama, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, Rhode Island, Vermont, Wisconsin and Wyoming.

⁶ TEX. RULES CIV. PROC. (1941) Rules 461-66.

⁷ See Potts, *Speeding Up Criminal Appeals; A Book Review* (1940) 18 TEX. L. REV. 249, 259.

⁸ Criminal Appeal Act, 1907, 7 Edw. VII, c. 23, § 3(b).

⁹ Potts, *Speeding Up Criminal Appeals; A Book Review* (1940) 18 TEX. L. REV. 249, 259: "During its first twenty-four years the court had before it each year an average of 428 applications for leave to appeal, but on an average granted only seventy-three of them per year. In addition to the seventy-three appeals allowed by the higher court, five appeals were allowed by the trial courts, and twenty-two appeals per year went up as a matter of right because they involved questions of law. In this way an average of only 110 cases per year were actually heard by the Court of Criminal Appeal for England and Wales, embracing a population of thirty-seven million people, whereas Texas, with one-sixth the population had more than six times the number of appealed cases."

Rule 52(a) of the new Federal Rules of Criminal Procedure provides that "Any error, defect irregularity or variance which does not affect the substantial rights shall be disregarded." Such a provision, if adopted in Texas, would do much to discourage frivolous appeals, especially if coupled with a provision for disciplining counsel who deliberately cause such appeals to be taken. The case of *Parrish v. State*,¹⁰ in which an attorney was taxed with the costs of an appeal which he so negligently prosecuted that it did not present an issue upon which the appellate court could pass, furnishes an analogy for the disciplining of counsel who wilfully take frivolous appeals.¹¹

II. THE TIME ALLOWED FOR THE SEVERAL STAGES OF AN APPEAL

Article 826 of the Texas Code of Criminal Procedure provides that:

"An appeal may be taken by the defendant at any time during the term of the court at which conviction is had."

Article 760, subsection five of the Code provides that a statement of facts in a felony case may be filed within ninety days from the date on which notice of appeal is given. The same article further provides that when an appeal is taken from the judgment in any criminal prosecution the defendant is entitled to thirty days after the day of adjournment of court in which to prepare and file a statement of facts and bills of exception; and that upon a showing of good cause the trial judge may extend the time for such filing, although the time for filing shall not be so extended as to delay the filing within ninety days from the date the notice of appeal is given. Moreover, if the term of the trial court may by law continue more than eight weeks, the statement of facts and bills of exception shall be filed within thirty days after final judgment is

¹⁰ 67 Tex. Crim. Rep. 558, 150 S. W. 453 (1912).

¹¹ It remains to be considered, however, whether any effective means may be devised of preventing the attorney from passing the burden of the costs of appeal to his client as part of his fee.

rendered, unless the court extends the time for filing. Such provisions may be thought to offer a temptation to defendants to delay, or at least to avail themselves of the time allowed, whether it is necessary or not.¹² In a number of other jurisdictions considerably less time is allowed to the defendant within which to take an appeal. In England, for example, only ten days after conviction are allowed for the taking of an appeal;¹³ in California only five days are allowed.¹⁴ The matter of the time allowed for filing statements of facts and bills of exception, however, presents greater difficulty. Doubtless the period—as much as ninety days in Texas¹⁵—could be shortened without impairing the rights of defendants, although provision for extensions in meritorious cases, at the discretion of the trial judge, is vital here. Some states allow less time than Texas. Massachusetts, for example, allows a maximum of five days after verdict or after an adverse ruling or judgment for the filing of exceptions.¹⁶ In reference to appeals generally it has been said that

“It should be presumed in this modern day of crowded bookshelves, that the lawyers, . . . immediately after trial, could be prepared to argue expertly with every intelligence and pertinent authority the points, and that the trial judge exercised his functions diligently. The undisputed fact should be indulged that learned judges en banc could decide after full argument from a learned bar the simple questions involved in the usual appeal.”¹⁷

Whether or not these presumptions be thought extravagant, it should be recognized that the bulk of appeals do not present questions so abstruse or susceptible of lengthy research as to require more than a few days' preparation. Of course, the efforts of diligent counsel could be undone by pigeonholing of appeals in the appellate courts. This disadvantage is inherent where as in Texas the

¹² See ORFIELD, *op. cit. supra* note 3, at 125.

¹³ Criminal Appeal Act, 1907, 7 EDW. VII, c. 23, § 7 (1).

¹⁴ CAL. PEN. CODE (Deering, 1941) § 1239(2).

¹⁵ TEX. CODE CRIM. PROC. (1925) art. 760, sub. 5.

¹⁶ Mass. Stat. 1927, c. 278, § 31.

¹⁷ Rucker, *The Necessity of Oral Appeal* (1946) 21 IND. L. J. 13, 18.

appellate court entirely suspends activities for vacation.¹⁸ The remedy for this problem is a year-round term, with staggered vacations for the justices.

The problems of decreasing the lapse of time between submission of the case to the appellate court and the final appellate disposition is inextricably bound up with the matters of the content of the record on appeal and of the rendering of appellate opinions, both to be discussed hereafter.

A further source of delay is the lapse of time caused by rehearings, the time allowed for filing motions therefor, and the further time allowed for submission of the case for rehearing. In Texas fifteen days are allowed for filing motions for rehearing.¹⁹ It has been urged that most of the delay in connection with rehearings can be eliminated by reducing the frequency of resort to rehearings.²⁰ Orfield has observed that the most effective way to do this is to improve the working methods of the appellate court, and that rehearings generally result from the court's failure to properly understand the record and to apply legal principles.²¹ He points out that the United States Supreme Court rarely grants a rehearing.²² He stresses the importance of helpful oral argument by counsel, and of careful and responsible examination of the appellate papers by the appellate justices, and of their taking an attitude of joint responsibility for the opinions given by their court.²³

III. THE RECORD ON APPEAL

The Texas Court of Criminal Appeals regards a statement of facts and bills of exception, both in narrative form, as necessary to raise any question on appeal other than those of the sufficiency

¹⁸ TEX. REV. CIV. STAT. (1925) art. 1804.

¹⁹ Supreme Court Rules for the Court of Criminal Appeals, 104 Tex. 659 (1912); TEX. RULES CIV. PROC. (1943) Rule 458.

²⁰ ORFIELD, *op. cit. supra* note 3, at 137.

²¹ *Id.* at 137.

²² *Ibid.*

²³ *Ibid.*

of the indictment and of the regularity of the record.²⁴ Only if the trial judge certifies the necessity of presenting the testimony in question-and-answer form may the statement of facts and the bills of exception be presented in such form.²⁵ At common law testimony was presented in narrative form because there were no stenographers to record questions and answers.²⁶ Relatively few states still require the use of the narrative form on appeal; and the American Law Institute Code of Criminal Procedure provides for the use of the question-and-answer form on appeal.²⁷ The majority practice of using this form obviates the need for expending the time and effort necessary to reduce the testimony to narrative form.

Several factors are to be considered in determining whether the question-and-answer form or the narrative form is the preferable manner of stating the facts and presenting the bills of exception on appeal. From the standpoint of the appellant's attorney, the question-and-answer form is the cheapest, simplest and most expeditious method of getting a record into the appellate court.²⁸ The more serious question, perhaps, is whether an undue burden is placed on the appellate judges in requiring them to read a voluminous transcript in order to obtain an understanding of the proceeding in the trial court. However, there has been some disposition of even the busiest judges to express a preference for reading evidence in question-and-answer form, apparently because of the ease with which may be read a transcript of the testimony in the words in which it was given.²⁹ Other objections to the use of the narrative form are that it places appellant's attorney under too great a burden in that he is required to review the whole transcript, and that the narrative form becomes secondary information of the

²⁴ *Lynch v. State*, 90 Tex. Crim. Rep. 648, 236 S. W. 480 (1921); *Johnson v. State*, 137 Tex. Crim. Rep. 82, 128 S. W. (2d) 384 (1939).

²⁵ TEX. CODE CRIM. PROC. (1925) art. 760, sub. 3.

²⁶ See ORFIELD, *op. cit. supra* note 3, at 142.

²⁷ AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) §§ 445, 447.

²⁸ See Note (1929) 7 TEX. L. REV. 423, 427.

²⁹ *Id.* at 128.

proceedings in the trial court, causing them to appear otherwise than as they actually were, whereas the question-and-answer form more accurately relates what transpired.³⁰ It has been suggested that the appellant in his brief might be required to include a brief summary containing only points of the trial proceedings which are material to the appellate issues.³¹ Such a presentation should be effective both to lighten the task of the appellant's attorney and to remove the difficulties experienced by the Texas Court of Criminal Appeals as indicated in its opinion in *Rutherford v. State*.³²

"... a bill of exceptions should be so explicit that the matters may be comprehended without recourse to inferences and so as to enable the appellate court to fully understand all the facts on which the rulings depend; it must set out the proceedings below sufficiently to enable the court to know that an error has been committed, and be so full that in and of itself it will disclose all that is necessary to make manifest the alleged error, and must state enough of the evidence or facts proven to render intelligible the rulings involved, and it cannot be aided either by a statement in reply to a motion for new trial, or by the statement of facts, nor will the appellate court supply omissions or aid the bill by inferences or presumptions... We must decline to look to a statement of facts in order to determine the error in a bill of exceptions unless specific reference to some particular part of such statement of facts is made in the bill. To do so would be a violation of the rule laid down in opinions almost without number rendered by this court, and would be to lay down a precedent which would involve us in endless and hopeless work in trying to discover from the statement of facts evidence of matters complained of in the bills of exception which do not follow these rules."

Moreover, use of the question-and-answer form need not cause an undue increase, or indeed any at all, in the bulkiness of the record, if the latter is limited rather stringently to those documents and portions of the testimony which are necessary to a proper review of the case.

It may well be questioned whether bills of exception are neces-

³⁰ *Id.* at 127.

³¹ *Id.* at 129.

³² 102 Tex. Crim. Rep. 310, 312, 277 S. W. 669, 670 (1925).

sary. The federal courts do not require them; Rule 51 of the new Federal Rules of Criminal procedure provides that:

"Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

The simple record suffices on a federal criminal appeal to present objections.³³

It appears that the bulk of written matter, in addition to the record proper, which the appellate court is called upon to peruse could be substantially reduced by simplifying appellate briefs, or by omitting them altogether where possible and practicable. The Texas Court of Criminal Appeals does not require briefs.³⁴ This omission, of course, would place greater emphasis on oral argument, which is at present limited to forty minutes for each side.³⁵ An increase in the time allowed for argument, if such argument becomes a more significant part of the presentation of an appeal, might, together with the saving of time and expense attendant upon the making and printing of bulky briefs, make the substitution well worth considering, both from the standpoint of court and counsel.

IV. APPELLATE OPINIONS

Article 847 of the Texas Code of Criminal Procedure requires that:

"In each case decided, the Court of Criminal Appeals shall deliver a written opinion, setting forth the reasons for such decision."

The desirability of such a comprehensive requirement may well

³³ FED. RULES CRIM. PROC. (1946) Rule 39(b)(1).

³⁴ TEX. CODE CRIM. PROC. (1925) art. 856.

³⁵ See Carter, *The Texas Court of Criminal Appeals* (1932) 11 TEX. L. REV. 1, 22.

be questioned. Besides making for further delay, the requirement may in the case of judges encourage or permit labored and prolix opinions from any judges who may regard less elaborate opinions as inadequate or unworthy, and increase needlessly the volume of written law. Perhaps Article 847 should be repealed or amended so as to permit memorandum opinions in criminal cases. In recent years it has become the practice of the Texas Supreme Court, although none too frequently, to render such opinions in cases which present no necessity for the development of the law of the jurisdiction. By this time, there should be comparatively few areas and aspects of the Texas Penal Code which have not been adequately expounded in decisions. It has been advocated that written opinions be abolished altogether and that there be substituted therefor edited oral opinions as recorded and transcribed by the court reporter, as is the practice in the English Court of Criminal Appeal.³⁶ Such a practice would require of the justices a high degree of learning and attentiveness to argument and the presentation of the appeals; but one could hardly quarrel with a system because it encourages the development of such qualities. To render acceptable oral opinions should not be beyond the capabilities of judges who, as in Texas, are specialists in criminal law, and whose elevation to such positions should presuppose ability and experience in the criminal law of the jurisdiction. Prompt publication of opinions following the decision would generally be possible, with the maximum deterrent effect upon the public and to the greatest benefit of all parties concerned with the appeal.

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³⁶ See Taft, *The Delays of the Law* (1908) 18 YALE L. J. 28, 32.

