OFFICE OF STATE PROSECUTING ATTORNEY
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Statutory Construction Update
2018-2019 Term

Texas Court of Criminal Appeals
For the 86th Texas Legislature

The Office of State Prosecuting Attorney has exclusive jurisdiction in the Court of Criminal Appeals. Therefore, we thoroughly review its decisions, including all statutory construction cases. Recognizing that most legislators are busy enacting law, this update provides a concise chronicle of the Court of Criminal Appeals' most recent cases to advise you of the judiciary's binding interpretation of criminal statutory law.

Index of Statutes Construed

I. Constitutionality

A. Conspiracy to Violate the Texas Open Meetings Act

TEX. GOV'T CODE § 551.001(1)
Closed Meeting
"a meeting to which the public does not have access."

TEX. GOV'T CODE § 551.001(2)
Deliberation
"a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business."

TEX. GOV'T CODE § 551.001(4)
Meeting
(A) a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or
(B) except as otherwise provided by this subdivision, a gathering:

(i) that is conducted by the governmental body or for which the governmental body is responsible;
(ii) at which a quorum of members of the governmental body is present;
(iii) that has been called by the governmental body; and
(iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

TEX. GOV'T CODE § 551.002(6)
Quorum
"a majority of a governmental body, unless defined differently by applicable law or rule or the charter of the governmental body."

TEX. GOV'T CODE § 551.143
Conspiracy to Circumvent Chapter; Offense; Penalty
(a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

TEX. GOV'T CODE § 551.144
Closed Meeting; Offense; Penalty
(a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:

(1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
(2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
(3) participates in the closed meeting, whether it is a regular, special, or called meeting.

State v. Doyal,__S.W.3d__, PD-0254-18 (Tex. Crim. App. 2019):

"TOMA's punishment of meeting for the purpose of deliberations reaches speech, and not just conduct."

The Court stated, "Section 551.143 imposes criminal punishment for

doing something that conflicts with the purpose of TOMA. It requires a person to envision actions that are like a violation of TOMA without actually being a violation of TOMA and refrain from engaging in them."

The Court opined that a broad view of what constitutes a "walking quorum" would constrain one-on-one lobbying for votes or even one-on-one discussions.

"[T]he language in § 551.143 is potentially very broad and lacks any reasonable degree of clarity on what it covers. We also conclude that protected speech is likely to be chilled because of the great degree of uncertainty about what communications government officials may engage in."

B. Disorderly Conduct by Displaying a Firearm in a Manner Calculated to "Alarm"

TEX. PENAL CODE § 42.01(a)(8)
Disorderly Conduct
A person commits an offense if he "intentionally or knowingly . . . displays a firearm or other deadly weapon in a public place in a manner calculated to alarm."

TEX. PENAL CODE § 46.035
Unlawful Carrying of Handgun by License Holder
(a) A license holder commits an offense if the license holder carries a handgun on or about the license holder's person under the authority of Subchapter H, Chapter 411, Government Code, and intentionally displays the handgun in plain view of another person in a public place. It is an exception to the application of this subsection that the handgun was partially or wholly visible but was carried in a shoulder or belt holster by the license holder.

State v. Ross, __S.W.3d__, PD-1066-17 (Tex. Crim. App. 2019):

Section 42.01(a)(8) is not unconstitutionally vague. "Alarm" is construed to mean "'striking with fear,' particularly in a sudden or exciting manner, makes that term both comprehensible to the ordinary person and evenhandedly enforceable. This construction gives an ordinary person notice of how to conform his/her conduct with the law.

Reconciling Section 42.01(a)(8) with Section 46.035, a plurality held: "If a person simply carries a firearm on his person in plain view of another in a public place, then without any more information, the actor cannot be said to have displayed a firearm 'in a manner calculated to alarm.'" "But if the actor knows that a particular manner of displaying his firearm, beyond merely carrying it on his person, is objectively likely to alarm an ordinary, reasonable person, he may not intentionally or knowingly display his weapon in that manner."

Finally, the Court held that a charging instrument that tracks the text of Section 42.01(a)(8) provides adequate notice. The State is not required to allege the facts constituting the offense.

II. Code of Criminal Procedure

A. Appointed Attorney Compensation

TEX. CODE CRIM. PROC. art. 2.07
Attorney *Pro Tem*
(c) If the appointed attorney is not an attorney for the state, he is qualified to perform the duties of the office for the period of absence or disqualification of the attorney for the state on filing an oath with the clerk of the court. He shall receive compensation in the same amount and manner as an attorney appointed to represent an indigent person.

TEX. CODE CRIM. PROC. art. 26.05
Compensation of Counsel Appointed to Defend
(b) All payments made under this article shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county. On adoption of a schedule of fees as provided by this subsection, a copy of the schedule shall be sent to the commissioners court of the county.
(c) Each fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates[.]

State ex rel. Wice v. Fifth Judicial District Court of Appeals, __S.W.3d__, WR-86,920-02 (Tex. Crim. App. 2018):

"Article 26.05 does not permit judges to expand that authority by individually setting a fee outside the range of what has been collectively agreed upon as reasonable." The minimum and maximum in the fee schedule fix the outer limits. "By requiring the judges to set both minimum *and* maximum hourly rates, it is clear the legislature was concerned not only with attorneys receiving a fair rate of payment, but also with counties not being forced to pay excessive fees." Therefore, the opt-out provision in the county's fee schedule that authorized setting a fee outside the range here contravenes the plain text of Article 26.05.

B. Habeas Relief and New Scientific Evidence

TEX. CODE CRIM. PROC. art. 11.073
Procedure Related to Certain Scientific Evidence
(a) This article applies to relevant scientific evidence that:
(1) was not available to be offered by a convicted person at the convicted person's trial; or
(2) contradicts scientific evidence relied on by the state at trial.
(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:
(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:
(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and
(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been

presented at trial, on the preponderance of the evidence the person would not have been convicted.

Ex parte Chaney, 563 S.W.3d 239 (Tex. Crim. App. 2019):

The now well-established invalidity of human bite-mark comparison as a science constitutes new scientific evidence for purposes of Article 11.073. Because "[t]he body of scientific knowledge underlying the field of bitemark comparisons . . . evolved since his trial in a way that contradicts the scientific evidence relied on by the State at trial," the Court held that Chaney would not have been convicted if the new evidence had been presented.

C. Suppression is Not a Remedy for a Violation of Article 18.21

TEX. CODE CRIM. PROC. art. 18.21[1]
Pen Registers and Trap and Trace Devices; Access to Stored Communications; Mobile Tracking Devices
Sec. 13 Exclusivity of Remedies
"The remedies and sanctions described in this article are the exclusive judicial remedies and sanctions for a violation of this article other than a violation that infringes on a right of a party guaranteed by a state or federal constitution."

TEX. CODE CRIM. PROC. art. 38.23
Evidence not to be Used
(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

Sims v. State, 569 S.W.3d 634 (Tex. Crim. App. 2019):

"[W]e conclude that the exclusivity provisions in the Stored Communications Act and Article 18.21 prevail as exceptions to the general Article 38.23(a) remedy of suppression when dealing with nonconstitutional violations of the SCA and Article 18.21. This harmonizing interpretation gives effect to each word, phrase, clause, and sentence in all three statutes to the greatest, reasonable extent possible."

III. Penal Code

A. Vicarious Liability Based on Another Who Lacked Intent

TEX. PENAL CODE § 7.01
Parties to an Offense
(a) "A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both."

TEX. PENAL CODE § 7.02
Criminal Responsibility for Conduct of Another
(a)(2) "A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense[.]"

Johnson v. State, 560 S.W.3d 224 (Tex. Crim. App. 2018):

The use of "other person" in Section 7.02(a)(2) does not mean that the "other

[1] Article 18.21 was repealed by the 85th Legislature, effective January 1, 2019. The topic is now covered by Chapter 18B, Texas Code of Criminal Procedure, and Section 13 was recodified in Article 18B.553.

person" must have had the intent to commit the offense. "Section 7.02(a)(2) requires evidence that the defendant intended commission of the crime and did something to help the other to commit it; it does not require evidence of the other person's intent[.]" Therefore, in this case, the Court held that the husband's guilt of theft as a party was not dependent on a showing that his wife, the primary actor, intended to commit the offense.

B. Anti-Defensive "Voluntary Intoxication" Instruction at Punishment for Extraneous Offenses

TEX. PENAL CODE § 8.04
Intoxication
(a) Voluntary intoxication does not constitute a defense to the commission of crime.
. . .
(d) For purposes of this section "intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

TEX. CODE CRIM. PROC. art. 37.07 § 3
Verdict Must be General; Separate Hearing on Proper Punishment
(a)(1) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act . . . .

Smith v. State,__S.W.3d__, PD-0715-17 (Tex. Crim. App. 2019):

Though not recommended, "the law permits a trial judge to issue a punishment-phase voluntary-intoxication instruction under Penal Code Section 8.04(a)—as long as he is careful" to expressly limit it to the jury's consideration of any extraneous-offense evidence.

C. Proving Age of Minority for Capital Cases

TEX. PENAL CODE § 12.31
Capital Felony
(a) An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole or by death. An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for:

(1) life, if the individual committed the offense when younger than 18 years of age; or
(2) life without parole, if the individual committed the offense when 18 years of age or older.

TEX. PENAL CODE § 8.07
Age Affecting Criminal Responsibility
(c) No person may, in any case, be punished by death for an offense committed while the person was younger than 18 years.

Franklin v. State,__S.W.3d__, PD-0787-18 (Tex. Crim. App. 2019):

Age of majority—18 and over—is not an element of the offense that the State has to prove. Considering Sections 8.07(c) and 12.31 together, the Court held that 12.31 is a defensive issue that the defendant bears the burden of proving. The defendant must produce some evidence to show that he was under 18 at the time of the offense. Once the defendant has satisfied that burden, the State must then prove, beyond a reasonable doubt, that the defendant was at least 18.

D. Indecency with a Child by Touching the Breast

TEX. PENAL CODE § 21.11
Indecency with a Child
(a) A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex and regardless of whether the person knows the age of the child at the time of the offense, the person:

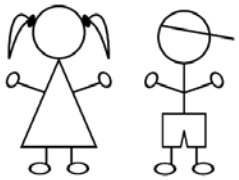
(1) engages in sexual contact with the child or causes the child to engage in sexual contact;

. . .

(c) In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or

(2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.



Arroyo v. State, 559 S.W.3d 484 (Tex. Crim. App. 2018):

The Court held: "a 'breast' does not have to belong to a female or be developed." In doing so, it recognized that "[t]he modern definition of 'sexual contact' applicable to the indecency offense contains no references to age or gender."

The Court declined to rule on whether "breast" is synonymous with "chest" for purposes of deciding whether a victim's testimony that only referred to "chest" constitutes sufficient evidence.

E. Organized Retail Theft

TEX. PENAL CODE § 31.16
Organized Retail Theft
(b) A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of:
(1) stolen retail merchandise; or
(2) merchandise explicitly represented to the person as being stolen retail merchandise.

Lang v. State, 561 S.W.3d 174 (Tex. Crim. App. 2018):

"In view of the ambiguous statutory language and the relevant legislative history, we conclude that the organized retail theft statute was not intended to target the conduct of ordinary shoplifters acting alone, such as appellant, and instead requires proof of some activity that is distinct from the act of theft itself."

Therefore, the Court held:

> we conclude that appellant's conduct in stealing items from HEB and then attempting to leave the store with those items does not establish that she intentionally conducted, promoted, or facilitated an activity in which she received, possessed, concealed, stored, bartered, sold, or disposed of stolen retail merchandise. As we have explained above, the statute requires proof of some activity undertaken with respect to stolen retail merchandise that goes beyond the conduct inherent in ordinary shoplifting.

F. Tampering with a Governmental Record

TEX. PENAL CODE § 37.01
Definition of Governmental Record
(2) "Governmental record" means:
(A) anything belonging to, received by, or kept by government for information, including a court record;
(B) anything required by law to be kept by others for information of government; . . .

TEX. PENAL CODE § 37.10
Tampering with a Governmental Record
(a) A person commits an offense if he:
(1) knowingly makes a false entry in, or false alteration of, a governmental record;
(2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record;
(3) intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record;
(4) possesses, sells, or offers to sell a governmental record or a blank governmental record form with intent that it be used unlawfully;
(5) makes, presents, or uses a governmental record with knowledge of its falsity; or
(6) possesses, sells, or offers to sell a governmental record or a blank governmental record form with knowledge that it was obtained unlawfully.

. . .

(c)(1) Except as provided by Subdivisions (2), (3), and (4) and by Subsection (d), an offense under this section is a Class A misdemeanor unless the actor's intent is to defraud or harm another, in which event the offense is a state jail felony.

. . .

(f) It is a defense to prosecution under Subsection (a)(1), (a)(2), or (a)(5) that the false entry or false information could have no effect on the government's purpose for requiring the governmental record.

TEX. OCC. CODE § 1701.355
Continuing Demonstration of Weapons Proficiency
(a) An agency that employs one or more peace officers shall designate a firearms proficiency officer and require each peace officer the agency employs to demonstrate weapons proficiency to the firearms proficiency officer at least annually. The agency shall maintain records of the weapons proficiency of the agency's peace officers.
. . .

(c) [Texas Commission on Law Enforcement] by rule shall define weapons proficiency for purposes of this section.

TEX. LOC. GOV'T CODE § 341.012
Police Reserve Force
(a) The governing body of a municipality may provide for the establishment of a police reserve force. . . .
. . .
(d) The chief of police shall appoint the members of the reserve force.

Chambers v. State,__ S.W.3d__, PD-0771-17 (Tex. Crim. App. 2019):

The Court held that, to qualify as a "governmental record," it is not necessary that the record be "required by law." Therefore, the firearms proficiency records created at the direction of the Police Chief were governmental records "received by" and "kept by" the Indian Lake Police Department even though Texas Commission on Law Enforcement could not legally require the Chief to generate or keep the records because his staff was comprised of "appointed" volunteer reserve (not "employed") officers.

Next, the Court stated that the defense in subsection (f) does not impose a "purpose" requirement for the definition of "governmental record." Based on the text, "effect on the government's purpose" applies only as a defensive issue to subsections (a)(1)-(2) and (a)(5).

Defining "defraud," the Court held "intent to defraud a government entity requires not only an intent to cause the entity to rely upon a false representation to act (or refrain from acting) on a certain matter, but also that the government has the right or duty to act on that matter." Applying this definition, the Court held that the Chief did not have the intent to defraud or harm because TCOLE had no legal authority to demand the firearms proficiency records. The crime was a "legal impossibility." Again, the Court emphasized, officers were "appointed" volunteer reserve officers that TCOLE had no authority over.

Alfaro-Jimenez v. State,__S.W.3d__, PD-1346-17 (Tex. Crim. App. 2019):

A fake social security card is not a governmental record under subsections (a)(4) and (5) of Section 37.10. "[T]hose subsections do not provide for a conviction by merely proving that the defendant intended for a fake document to be taken as a genuine governmental record." In contrast, "Section 37.10(a)(2) is designed for the prosecution of someone who presents a counterfeit governmental record as if it were authentic."