

CAPITAL MURDER DEFENSE COURSE

PART I

TRIAL OF A CAPITAL MURDER CASE

TEXAS CRIMINAL DEFENSE LAWYERS PROJECT

SOUTH TEXAS COLLEGE OF LAW

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**Mark Stevens
310 S. St. Mary's Street, Suite 1505
San Antonio, Texas 78205
(210) 226-1433**

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I. PURPOSE OF PAPER

This paper will discuss the law concerning pre-trial motions most commonly filed in state courts by Texas lawyers.

II. RESOURCES

A. Creativity is a valuable resource for criminal lawyers. If your reading of the law and analysis of your case convinces you that an issue can best be raised by pre-trial motion, do so. When your creativity has been exhausted, there are two other good general resources. The first is other lawyers. If you know a good lawyer is trying a case, go to the court's file and examine the motions. Copy them liberally. The second source consists of a variety of written sources, the most useful of which are listed below.

1. 7 & 8 M. MCCORMICK & T. BLACKWELL, TEXAS CRIMINAL FORMS AND TRIAL MANUAL (Texas Practice 9th ed. 1985).
2. M. TEAGUE & B. HELFT, TEXAS CRIMINAL PRACTICE GUIDE (1979).
3. S. LOSCH,
4. R. MOSS, CRIMINAL DEFENSE SOURCE BOOK, Lakeland Press (1974).

III. PROCEDURAL CONSIDERATIONS

A. In General

1. Article 28.01 of the Texas Code of Criminal Procedure permits the trial court to set pre-trial hearings before the trial on the merits. The following matters may be determined:

- a. Arraignment and appointment of counsel;
- b. Pleadings of defendant;
- c. Special pleas;
- d. Exceptions to the charging instrument;

- e. Motions for continuance;
- f. Motions to suppress evidence;
- g. Motions for change of venue;
- h. Discovery;
- i. Entrapment;
- j. Motion for appointment of interpreter.

2. "The trial court has discretion to 'set any criminal case for a pre-trial hearing before it is set for trial upon its merits'. The purpose of the pre-trial hearing is to enable the judge to dispose of certain matters prior to trial and thus avoid delays during the trial." *Johnson v. State*, 803 S.W.2d 272, 283 (Tex. Crim. App. 1990), *cert. denied*, 111 S. Ct. 2914 (1991)(citations ommitted).

B. Time Limitations

1. Seven Days If Hearing Set

a. "When a criminal case is set for such pre-trial hearing, any such preliminary matters not raised or filed seven days before the hearing will not thereafter be allowed to be raised or filed, except by permission of the court for good cause shown; provided that the defendant shall have sufficient notice of such hearing to allow him not less than 10 days in which to raise or file such preliminary matters." Tex. Code Crim. Proc. Ann. art. 28.01 § 2 (Vernon 1989).

b. Notice is sufficient if it is by announcement by the court in open court in the presence of the defendant or counsel; if it is by personal service upon the defendant or counsel; or, if it is deposited in the mail to either the defendant or counsel at least six days prior to the hearing. Tex. Code Crim. Proc. Ann. art. 28.01 § 3 (Vernon 1989).

c. Failure to comply with the seven day rule can have devastating consequences. In *Postell v. State*, 693 S.W. 2d 462 (Tex. Crim. App. 1985), the trial court ordered defendant to elect who would assess punishment during the pre-trial hearing. Defendant objected to being forced to elect before voir dire, and, after his objection was overruled, he elected the court. Punishment was assessed at life imprisonment. The court of criminal appeals held that where a pre-trial hearing is held in accordance with article 28.01, the defendant may be required to file all his pleadings and motions, including his election to have the jury assess the punishment. *Id.* at 463-64. *See also Saenz v. State*, ___ S.W. 2d ___, ___ No. 08-91-00044-CR (Tex. App. -- El Paso September 30, 1992)(no error in denying identification hearing where seven day rule was not complied with).

d. Failure to comply with the time limits for filing other pre-trial

motions, set out in article 28.01 § 2, does not waive the defendant's right to a hearing on his motion for change of venue, because such matters are of constitutional dimension. *Faulder v. State*, 745 S.W. 2d 327, 338 (Tex. Crim. App. 1987). Such a hearing may be held after the jury is empaneled, and before the defendant enters his plea to the indictment. *Foster v. State*, 779 S.W. 2d 845, 854 (Tex. Crim. App. 1989).

2. At Least Ten Days Are Allowed

a. Article 28.01 permits the court to require that all motions be filed within seven days of any pre-trial hearing. The other side of the coin are articles 27.11 and 27.12.

b. Tex. Code Crim. Proc. Ann. art. 27.11 (Vernon 1989) allows the defendant "ten entire days, exclusive of all fractions of a day after his arrest . . . to file written pleadings." See *Oliver v. State*, 646 S.W. 2d 242, 244 (Tex. Crim. App. 1983).

c. Tex. Code Crim. Proc. Ann. art. 27.12 (Vernon 1989) allows the defendant ten full days to file written pleadings after service of indictment, where he is entitled to be served with an indictment. See *Johnson v. State*, 567 S.W. 2d 214, 216 (Tex. Crim. App. 1978).

3. Other Deadlines

a. Some motions must be filed at least "before the date on which the trial on the merits commences," unless the trial court orders compliance with article 28.01. *E.g.*, Tex. Code Crim. Proc. Ann. art. 1.14(b)(Vernon Supp. 1991)(objections to defects in charging instruments).

C. Presence Of The Defendant

1. "The defendant must be present at the arraignment, and his presence is required during any pre-trial proceeding." Tex. Code Crim. Proc. Ann. art. 28.01 § 1 (Vernon 1989).

2. The trial court erred in holding a motion to dismiss on speedy trial grounds in the absence of the defendant and his appointed lawyer. *Riggall v. State*, 590 S.W. 2d 460, 461-62 (Tex. Crim. App. 1979).

3. A meeting entailing a motion by the defense which was overruled, a request to make a bill of exceptions, instructions by the trial court regarding jury shuffle procedures and the use of strikes and some general discussion regarding publicity was a "pre-trial proceeding" within the meaning of art. 28.01, and therefore the trial court erred in conducting this meeting in appellant's absence. The error, however, was harmless. *Adanandus v. State*, ___ S.W. 2d ___, ___ No. 70,897 (Tex. Crim. App. June 16, 1993), slip op. 8-11.

D. When Mandatory And When Permissive

1. As a general rule, the court is not required to conduct pre-trial hearings. *Moore v. State*, 700 S.W. 2d 193, 205 (Tex. Crim. App. 1985). "Article 28.01 . . . is not a mandatory statute, but is one directed to the court's discretion." *Calloway v. State*, 743 S.W. 2d 645, 649 (Tex. Crim. App. 1988).

2. In at least three instances, however, Rule 104(c) of the Texas Rules of Criminal Evidence requires hearings outside of the hearing of the jury:

- a. Hearings on the admissibility of confessions;
- b. Hearings on preliminary matters "when the interests of justice require;" and,
- c. Hearings "when an accused is a witness, if he so requests."

3. "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." Tex. R. Crim. Evid. 103(c).

E. Objections Outside The Jury's Presence--Rule 52(b)

1. "When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." Tex. R. App. Proc. 52(b).

2. Under Rule 52(b), error may be preserved by a pre-trial motion, in which case defendant need not re-object in the jury's presence. *See Wyle v. State*, 777 S.W. 2d 709, 715 n.5 (Tex. Crim. App. 1989); *Maynard v. State*, 685 S.W. 2d 60, 65 (Tex. Crim. App. 1985). Error is waived, however, if when the previously objected to evidence is offered at trial, counsel affirmatively states he has "no objection." *James v. State*, 772 S.W. 2d 84, 97 (Tex. Crim. App. 1989); *Moody v. State*, __S.W.2d __, __ No. 70,883 (Tex. Crim. App. January 15, 1992), slip op. 18.

3. It is essential to distinguish motions to suppress, which do preserve error, from motions in limine, which do not. In making this determination, the courts are not bound by the style or form of the motion, but instead should look at its substance. A motion to suppress seeks to exclude specific evidence, and not just a broad category of evidence. *Carlisle v. State*, 818 S.W.2d 156, 158-159 (Tex. App.--Houston [1st Dist.] 1991).

F. Argument

1. "The counsel of the defendant has the right to open and conclude the argument upon all pleadings of the defendant presented for the decision of the judge." Tex. Code

Crim. Proc. Ann. art. 28.02 (Vernon 1989).

IV. SAMPLE MOTIONS