

MECHANICS OF APPEALS: COURTS OF RECORD AND COURTS OF NON RECORD

Outline with Case Cites, Statutory References, and Practice Notes

By Pamela Harrell Liston, J.D.

Prepared for TMCEC 17th Annual Prosecutor's Conference

- I. All error is waived if the defendant pays the fine. There is no appellate review or collateral attack remedy once the defendant has paid the fine. The case is over at that point. *Fouke v. State*, 529 S.W.2d 772, 773 (Tex. Crim. App. 1975).
- II. Courts of Record – Perfection of Appeal
 - A. Record must be requested for a record to be made
 - (1) The judge or either party can request a record be made. TEX. GOV'T CODE ANN. § 30.00010(c). If a recording is requested, it is error for a judge to refuse one even for a pre-trial motion. *State v. Sanchez*, 135 S.W.3d 698, 700 (Tex. App. – Dallas 2003), *aff'd*, 138 S.W.3d 324 (Tex. Crim. App. 2004).
 - (2) If no record is made, no appellate review on the evidence at trial or the merits of the case can be held. See *State v. McKenzie*, 2006 Tex. App. LEXIS 10417 (Tex. App. – Dallas 2006) (not designated for publication).¹ The appellate court can, however, still review a narrow legal issue that is adequately presented in the clerk's record. *State v. Sanchez*, 135 S.W.3d 698, 700 (Tex. App. – Dallas 2003, *aff'd*, 138 S.W.3d 324 (Tex. Crim. App. 2004).
 - (3) Municipalities with courts of record must either provide a court reporter or a recording device for cases tried before the municipal court of record. TEX. GOV'T CODE ANN. § 30.00010 (a) – (d). If a record is requested and an audio recording is made but is not clear enough for the court reporter to later transcribe, the State will most likely lose appeal.
 - B. Motion for New Trial (MNT)
 - (1) A MNT **must** be filed with the trial court before a Notice of Appeal can be filed. TEX. GOV'T CODE ANN. § 30.00014(c).

¹ Other cases which address the issue of absence of a record to be made are: *Marciglio v. State*, 862 S.W.2d 206 (Tex. App. – Houston [1st Dist.] 1993, no pet.) and *Mitchell v. State*, 2000 Tex. App. LEXIS 8498 (Tex. App. – Houston [14th Dist.]) (not designated for publication).

- (2) MNT must be filed within 10 days of judgment. TEX. GOV'T CODE ANN. § 30.00014(c).² The court may extend the deadline for good cause for up to 90 days from the original filing deadline. *Id.*
- (a) All points of error must be in the MNT.³ The appellate court will determine each appeal on the basis of the errors that are set forth in the appellant's MNT. If a point of error is not included in the MNT, it is waived. TEX. GOV'T CODE § 30.00014(c). EXCEPTION #1: a constitutional challenge to a penal statute which can be raised for the first time on appeal. See *Murray v. State*, 01-89-00756-CR, 1991 Tex. App. LEXIS 224 (Tex. App. – Houston [1st Dist.] 1991, no pet.)(citing *Casares v. State*, 768 S.W.2d 298 (Tex. Crim. App. 1989).
- (b) The State may file a reply to the MNT, but Court may rule even if no reply is filed.
- (c) The court may or may not hold a hearing on the MNT.
- (3) A MNT is deemed overruled by operation of law if it is not ruled on before 30 days. TEX. GOV'T CODE ANN. § 30.00014(c).
- (4) If MNT is granted, the court will set the new court date and case will be tried again as soon as practicable.

C. Notice of Appeal (NOA)

- (1) NOA must be given not later than the 10th day after the date on which the motion is overruled. TEX. GOV'T CODE ANN § 30.00014(d). The court may extend the deadline for good cause for up to 90 days from the original filing deadline. *Id.*
- (2) NOA must be filed with the trial court within 10 days of the ruling on the MNT. TEX. GOV'T CODE ANN. § 30.000114(d).
- (3) An appeal bond must be filed that conforms to the provisions of TEX. GOV'T CODE § 30.00015.

D. Record on Appeal

- (1) The parties must file the Reporter's Record and a written list of items to be included in the clerk's record with the municipal clerk with 60 days of the NOA. TEX. GOV'T CODE ANN. § 30.00020. The municipal judge shall approve the record, and the municipal court clerk shall send the record to the appellate court. TEX. GOV'T CODE ANN. §§ 30.00020 (b) and (c).
- (2) A certified court reporter must prepare the certified record. Appellant shall pay for the reporter's record. TEX. GOV'T CODE ANN. § 3000.00019. If no reporter's

² See *Preston v. State*, 2003 Tex. App. LEXIS 8322 (Tex. App. – Houston [1st Dist.] 2003)(not designated for publication) for discussion of 10-day time limit to file MNT.

³ Cases discussing the requirement for all points of error to first appear in MNT are as follows: *Brooks v. State*, 226 S.W.3d 607 (Tex. App. – Houston [1st Dist.] 2007); *Preston v. State*, 145 S.W.3d 683 (Tex. App. – Corpus Christi 2004); *Purnell v. State*, 921 S.W.2d 432 (Tex. App. – Houston [1st Dist.] 1996); *Lambert v. State*, 908 S.W.2d 53 (Tex. App. – Houston [1st Dist.] 1995); *Martinez v. State*, 744 S.W.2d 224 (Tex. App. – Houston [14th Dist.] 1987); *White v. State*, 2004 Tex. App. LEXIS 5371 (Tex. App. – Houston [1st Dist.] 2004)(not designated for publication); *Mitchell v. State*, 2000 Tex. App. LEXIS 8498 (Tex. App. – Houston [14th Dist.])(not designated for publication).

record exists, i.e., the trial was not recorded, the appeal can go forward on the clerk's record if any error appears in the clerk's record. *State v. Sanchez*, 135 S.W.3d 698, 700 (Tex. App. – Dallas 2003), *aff'd*, 138 S.W.3d 324 (Tex. Crim. App. 2004).

- (3) A \$25 clerk's fee must be paid and the clerk must note payment of the fee on the docket of the court. (This is not the fee for the reporter's record. This fee is to the clerk for preparation of the clerk's record). TEX. GOV'T CODE ANN. § 30.00014(f). The municipality shall establish the fee by ordinance. *Id.*

E. Appellate Court

(1) The appellate court is the county criminal court, county criminal court of appeal, or municipal court of appeal. IF there is no CCC, CCCA, or MCA, the county court at law has jurisdiction of the appeal. TEX. GOV'T CODE ANN. § 30.00014(a). (In Dallas County, for example, the appellate court is the County Criminal Court of Appeals of Dallas County. See TEXAS GOVERNMENT CODE §§ 25.0591 and 25.0594).

(2) The case will be appealed to the county court of the county where the municipal courthouse is located, not where offense is committed. TEX. GOV'T CODE ANN. § 30.00014(a). See also *Abouk v. Fuller*, 738 S.W.2d 297, 298 (Tex. App. – Dallas 1987). EXCEPT, a City of Amarillo conviction can be appealed to either Potter or Randall Counties per TEX. GOV'T CODE ANN. § 30.00931.

F. NOA from decision of county court to Court of Appeals must be filed within 30 days of appealable order. TEX. R. APP. PROC. 26.2.

III. Non Record Courts

A. Appeal is de novo. TEX. CRIM. PROC. CODE ANN. art. 45.042.

B. Motion for New Trial

- (1) MNT is not necessary for perfection of appeal.
- (2) MNT, if filed, must be filed within 1 day of judgment. TEX. CODE CRIM. PROC. ANN. art. 45.037.
- (3) If court grants MNT, it must do so within 10 days. TEX. CODE CRIM. PROC. ANN. art. 45.038.
- (4) If court does not rule on MNT within 11 days, it is overruled by operation of law. TEX. CODE CRIM. PROC. ANN. art. 45.038.
- (5) State is not entitled to a new trial. TEX. CODE CRIM. PROC. ANN. art. 45.040.

C. Appellate court is County Court. TEX. CODE CRIM. PROC. ANN. art. 45.042.

D. Appeal bond is required (an amount at least 2X the amount of the fine and costs) for appeal to be perfected. TEX. CODE CRIM. PROC. ANN. art. 45.0426. Appeal bond must be filed along with NOA within 10 days after the date of judgment or court loses jurisdiction for appeal and final judgment is entered. TEX. CODE CRIM. PROC. ANN. art. 45.0426.

E. "27.14 Letter" can be filed which is a plea of guilty or no contest and waiver of jury and case is appealed directly to county court without first being tried in municipal court. Appeal bond must be paid within 31 days after court receives 27.14 notice. TEX. CODE CRIM. PROC. ANN. art. 27.14.

IV. State's Appeals

- A. The State can appeal the following types of orders. TEX. CODE CRIM. PROC. ANN. art. 44.01.
- (1) An order that dismisses a complaint;
 - (2) An order that arrests or modifies a judgment;
 - (3) An order that grants a new trial;
 - (4) An order that sustains a claim for former jeopardy;
 - (5) An order that grants a motion to suppress evidence, a confession, or an admission if jeopardy has not yet attached (prosecutor must certify that appeal is not for purposes of delay);
 - (6) An order under Chapter 64 of the Code of Criminal Procedure which relates to Forensic DNA testing.
- B. The State can appeal an illegal sentence. TEX. CODE CRIM. PROC. ANN. art. 44.01 (b)
- C. The State has other limited rights of appeal under article 44.01 of the TEXAS CODE OF CRIMINAL PROCEDURE.
- D. The District or County Attorney must consent to appeal; therefore, the NOA (which must be filed within 20 days of appealable action) must contain either the signature of the District or County Attorney or state that the appeal is taken with permission of the District or County Attorney.⁴ TEX. CODE. CRIM. PROC. art. 44.01. The NOA must be filed within 20 days of the appealable order. TEX. R. APP. PROC. 26.2 and TEX. CODE. CRIM. PROC. 44.01 (d).

V. Appeal from county court to Court of Appeals from a written decision in appeal originating in a court of record:

- A. The briefs and record on appeal that were submitted to the county court are transferred to Court of Appeals as is.⁵

⁴ In *Muller v. State*, 829 S.W.2d 805 (Tex. Crim. App. 1992), the Court of Criminal Appeals decided that Article 44.01(d) authorizes only the prosecuting attorney (in this case the County Attorney) "to make an appeal by personally authorizing-in some fashion-the specific notice of appeal in question" prior to the expiration of the deadline for perfecting an appeal. The Court of Criminal Appeals stated in *Muller*, 829 S.W.2d at 810:

We do not suggest that Article 44.01 necessarily requires that a State's notice of appeal must, in all cases, reflect the personal signature of the prosecuting attorney. However, the plain meaning of the literal text of Article 44.01(d) requires the prosecuting attorney to "make an appeal" by personally authorizing-in some fashion-the specific notice of appeal in question. More specifically, to comply with the statute, he must either physically sign the notice of appeal *or* personally instruct and authorize a subordinate to sign the specific notice of appeal in question. [Footnote omitted]. Because of the jurisdictional limitations of Article 44.01 ... we further read the statute to require this personal authorization to occur prior to the expiration of the fifteen day window of appeal.

Further, in *State v. Blankenship*, 146 S.W.3d 218 (Tex. Crim. App. 2004), the Court of Appeals decided that a timely-made assertion in the City's amended notice of appeal that the "County Attorney has consented to the City Attorney prosecuting this appeal" is "in some fashion" a written express personal authorization by the County Attorney of this specific notice of appeal in this particular case. Therefore, in *Blankenship*, the statement in the notice of appeal that the County attorney consented was enough to meet the statute.

⁵ See *Brooks v. State*, 226 S.W.3d 607 (Tex. App. – Houston [1st Dist.] 2007); *Martin v. State*, 13 S.W.3d 133 (Tex. App. – Dallas 2000); *Bailey v. State*, 15 S.W.3d 622 (Tex. App. – Dallas 2000); and *Preston v. State*, 2003 Tex. App. LEXIS 8322 (Tex. App. – Houston [1st Dist.] 2003)(not designated for publication).

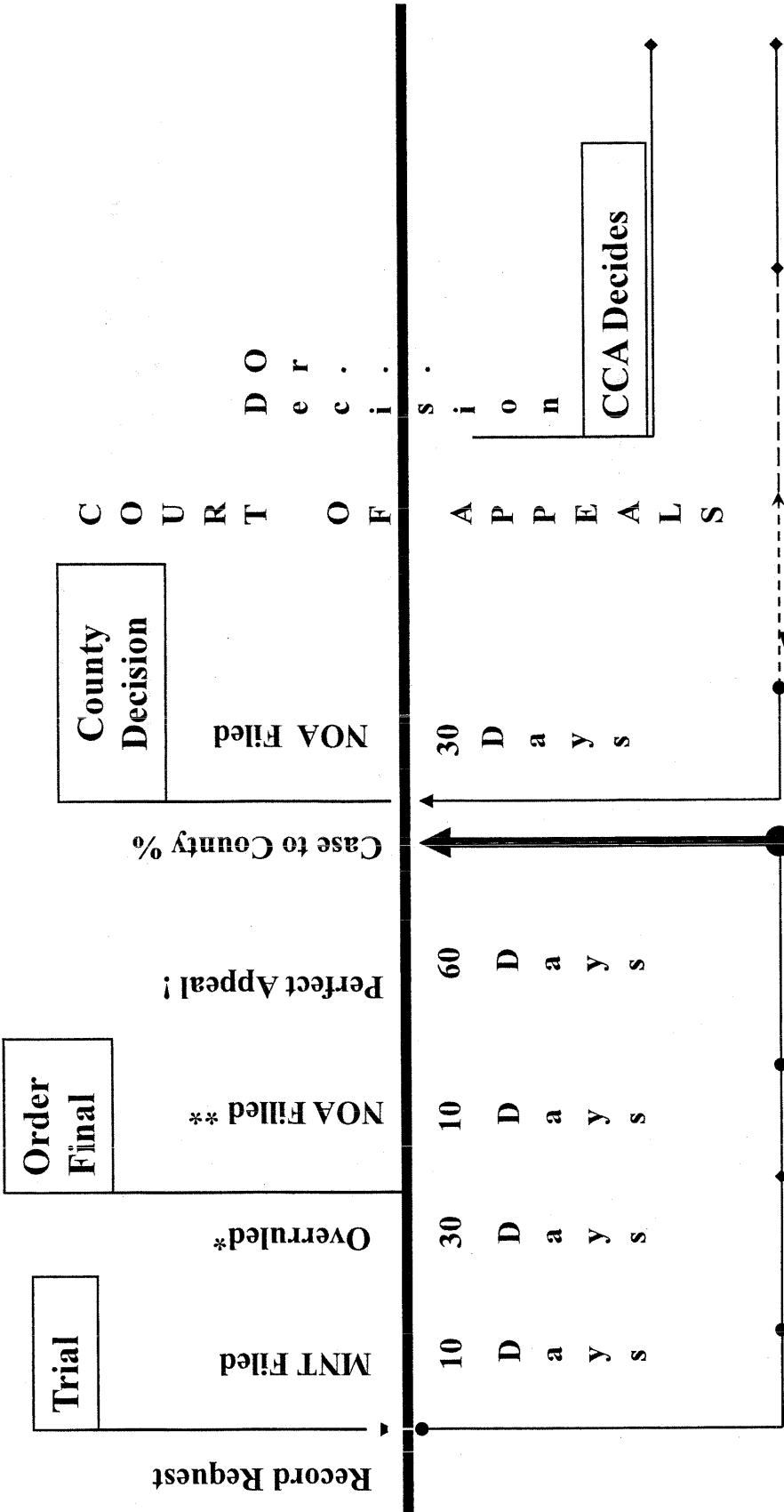
- B. Clerk of county court transfers papers to Court of Appeals. There are no new filings by the parties. TEX. CODE CRIM. PROC. ANN. art. 44.18.
- VI. Appeal from county court to Court of Appeals from a trial de novo originating from a non record court:
- A. Notice of Appeal (NOA)
- (1) If no MNT, Appellant has 30 days of appealable order to file NOA. TEX. R. APP. P. 26.2 (a)(1).
 - (2) If timely filed MNT, Appellant has 90 days of appealable order to file NOA. TEX. R. APP. P. 26.2 (a)(2).
 - (3) State has 20 days to file NOA. TEX. R. APP. P. 26.2.
- B. Record on Appeal
- (1) Clerk must file Clerk's Record within 60 days of imposition of sentence. TEX. R. APP. P. 35.2. This deadline may be extended and also depends on other factors. See TEX. R. APP. P. 35.2 and 35.3.
 - (2) Reporter must file Reporter's Record within 60 days of imposition of sentence. This deadline may be extended and also depends on other factors. TEX. R. APP. P. 35.2 and 35.3.
- VII. Appeal from Court of Appeals (applies to both COR and NCOR) to Court of Criminal Appeals
- A. Review by Court of Criminal Appeals is Discretionary. TEX. R. APP. P. 66.2
- B. File petition for review that complies with Rules 66 and 68 of the TEXAS RULES OF APPELLATE PROCEDURE.
- C. See Rules 69 and 70 of the TEXAS RULES OF APPELLATE PROCEDURE for required actions and briefing requirements if review is granted.
- VIII. Habeas Corpus
- A. A writ of habeas corpus is a collateral attack outside of the traditional appellate routes that can effect appellate review. A writ of habeas corpus is based on a violation of a defendant's rights such as a constitutional right when the defendant is restrained in his liberty because of the violation. See Chapter 11 of the TEXAS CODE OF CRIMINAL PROCEDURE.
- (1) Articles 11.09 and 11.14 of the TEXAS CODE OF CRIMINAL PROCEDURE govern petitions for writ of habeas corpus for misdemeanors.
 - (2) An petition seeking habeas corpus must state that applicant is confined or restrained.⁶ See TEX. CODE CRIM. PROC. ANN. art. 11.14 for requisites of application.
 - (3) An application is made to the county judge where misdemeanor was committed. If no county court in county, then to judge whose residence is nearest courthouse. TEX. CODE CRIM. PROC. ANN. art. 11.09.
 - (4) The county judge will set a time and place to examine the cause of the applicant and set a time to hear the motion. TEX. CRIM. PROC. ANN. art. 11.10.

⁶ A defendant convicted of a misdemeanor offense may attack the validity of the conviction by way of habeas corpus if he is either (1) confined or restrained as a result of a misdemeanor charge or conviction or (2) is no longer confined, but is subject to collateral legal consequences resulting from the conviction. *Ex Parte Rinkevich*, 222 S.W.3d 900, 902 (Tex. App. – Dallas 2007, no pet.)

- B. Possible results in the context of municipal court convictions include dismissing the application or discharging the defendant from restraint.
- C. Examples of how writs of habeas corpus might arise in the municipal court context are *Ex Parte Rinkevich*, 222 S.W.3d 900 (Tex. App. – Dallas 2007, no pet.) and *State v. Morales*, No. 05-09-00159-CR, 2010 Tex. App. LEXIS 407 (Tex. App. – Dallas 2010).

Best of luck in your appellate endeavors!

COURT OF RECORD



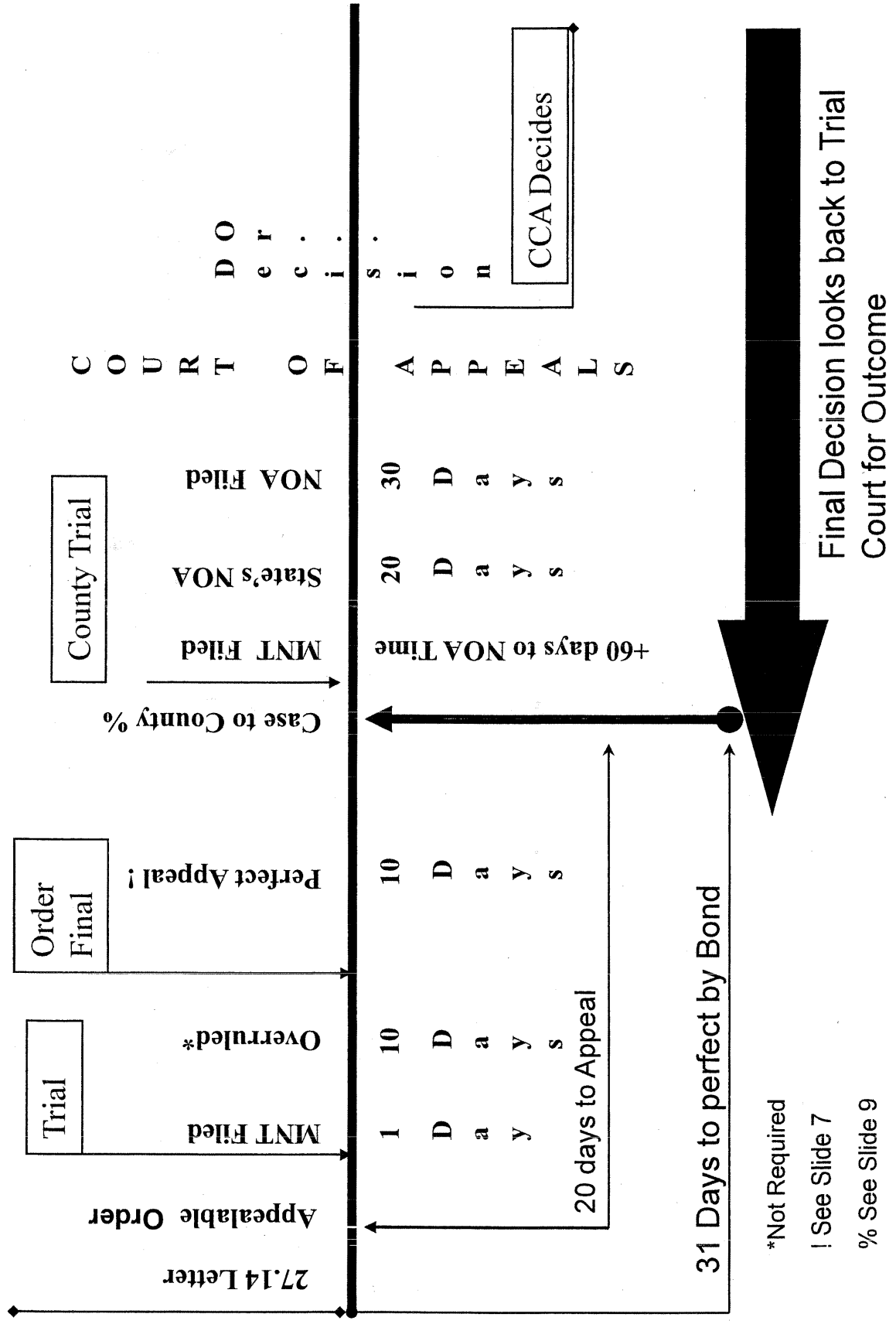
*Ext. to 90 days

** Trial Court/Clerk Notes Date

! See Slides 7-10

% See Slide 11

COURT OF NON-RECORD



COURT STRUCTURE OF TEXAS

MARCH 1, 2010

Supreme Court
(1 Court -- 9 Justices)
-- Statewide Jurisdiction --
• Final appellate jurisdiction in civil cases and juvenile cases.

Court of Criminal Appeals
(1 Court -- 9 Judges)
-- Statewide Jurisdiction --
• Final appellate jurisdiction in criminal cases.

State Highest Appellate Courts

Civil Appeals

Criminal Appeals

Courts of Appeals
(14 Courts -- 80 Justices)
-- Regional Jurisdiction --
• Intermediate appeals from trial courts in their respective courts of appeals districts.

State Intermediate Appellate Courts

Appeals of Death Sentences

District Courts
(453 Courts -- 453 Judges)
(356 Districts Containing One County and 97 Districts Containing More than One County)
-- Jurisdiction --
• Original jurisdiction in civil actions over \$200 or \$500,¹ divorce, title to land, contested elections.
• Original jurisdiction in felony criminal matters.
• Juvenile matters.
• 13 district courts are designated *criminal district courts*; some others are directed to give preference to certain specialized areas.

State Trial Courts of General and Special Jurisdiction

County-Level Courts
(503 Courts -- 503 Judges)

<p>Constitutional County Courts (254) (One Court in Each County) -- Jurisdiction -- • Original jurisdiction in civil actions between \$200 and \$10,000. • Probate (contested matters may be transferred to District Court). • Exclusive original jurisdiction over misdemeanors with fines greater than \$500 or jail sentence. • Juvenile matters. • Appeals de novo from lower courts or on the record from municipal courts of record.</p>	<p>Statutory County Courts (231) (Established in 85 Counties) -- Jurisdiction -- • All civil, criminal, original and appellate actions prescribed by law for constitutional county courts. • In addition, jurisdiction over civil matters up to \$100,000 (some courts may have higher maximum jurisdiction amount).</p>	<p>Statutory Probate Courts (18) (Established in 10 Counties) -- Jurisdiction -- • Limited primarily to probate matters.</p>
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County Trial Courts of Limited Jurisdiction

Justice Courts²
(822 Courts -- 822 Judges)
(Established in Precincts Within Each County)
-- Jurisdiction --
• Civil actions of not more than \$10,000.
• Small claims.
• Criminal misdemeanors punishable by fine only (no confinement).
• Magistrate functions.

Municipal Courts³
(915 Cities -- 1,490 Judges)
-- Jurisdiction --
• Criminal misdemeanors punishable by fine only (no confinement).
• Exclusive original jurisdiction over municipal ordinance criminal cases.⁴
• Limited civil jurisdiction in cases involving dangerous dogs.
• Magistrate functions.

Local Trial Courts of Limited Jurisdiction

1. The dollar amount is currently unclear.
2. All justice courts and most municipal courts are not courts of record. Appeals from these courts are by trial de novo in the county-level courts, and in some instances in the district courts.
3. Some municipal courts are courts of record -- appeals from those courts are taken on the record to the county-level courts.
4. An offense that arises under a municipal ordinance is punishable by a fine not to exceed: (1) \$2,000 for ordinances that govern fire safety, zoning, and public health or (2) \$500 for all others.

Example
Of State's Notice of
Appeal

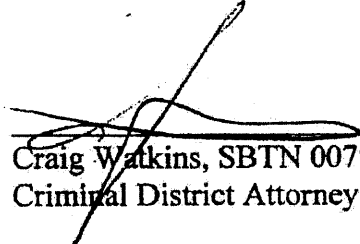
APPEAL NO. _____
CCCA NO. MC-08-R-0002-D
ROWLETT MC CAUSE NO. E001244

STATE OF TEXAS § IN COUNTY CRIMINAL
v. § COURT OF APPEALS
RYAN SCOTT MORALES § DALLAS COUNTY, TEXAS


STATE'S NOTICE OF APPEAL

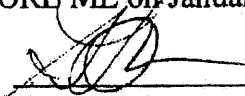
To the Honorable Judge Kristin Wade:

The State of Texas, by and through the Dallas County Criminal District Attorney Craig Watkins, gives the Court notice of its intent to appeal the Court's written order of January 16, 2009, affirming the judgment of the Rowlett Municipal Court granting the Defendant's "Motion to Enter Judgment of Acquittal" sustaining a claim of former jeopardy. The State will prosecute this appeal to the Fifth District Court of Appeals pursuant to article 44.01(a)(4) of the Texas Code of Criminal Procedure. See TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(4) (Vernon Supp. Pamph. 2005). I certify that this appeal is not taken for purposes of delay.


Craig Watkins, SBTN 00791886
Criminal District Attorney

SUBSCRIBED AND SWORN TO BEFORE ME on January 27, 2009.

 SHARON L. FULLER
Notary Public
STATE OF TEXAS
My Comm. Exp. May 27, 2012


NOTARY PUBLIC FOR
THE STATE OF TEXAS
My commission expires May 27, 2009

RECEIVED
JUL 07 2009 *AR*
TW405105

NO. 70901291A

STATE OF TEXAS

§ IN THE MUNICIPAL COURT

VS.

§
§
§
§
§
§

OF TEMPLE

ANTIONCE Whitman
DEFENDANT

BELL COUNTY, TEXAS

APPEAL BOND

THAT WE, *Antione Whitman*, AS PRINCIPAL, and the undersigned, _____ and _____, as Sureties, acknowledge ourselves indebted to the State of Texas in the penal sum of _____, and No/100 Dollars (\$ _____), _____ of (\$ _____), for the payment of which

How much was appeal?

we hereby jointly and severally bind ourselves, our heirs and legal representatives, _____, whereas, on the *July* day of *7*, 200*9*, in the _____ cause, in the Municipal Court, in the City of Temple, BELL County, Texas, a judgment was rendered and entered against the said Principal, as Defendant, for a plea of Nolo of the offense of *Disobeying a warning sign with worker present* upon a complaint filed in said court, from which said judgment Defendant has appealed to the County Court of BELL County, Texas.

Now, if the said *Defendant*, shall well and truly make personal appearance before the County Court of BELL County, Texas at the next regular meeting place of said Court and there remain from day to day and from term to term of said Court until discharged by due course of law, then the foregoing obligation shall be null and void; otherwise to remain in full force and effect.

FILED FOR RECORD
JUL 13 2009
SHELLEY COSTON
COUNTY CLK, BELL CO. TEXAS

EXAMPLE

of 27.14 letter

Willie Williams
Attorney at Law
1234 Main Street
Texas Town, Texas 71111

Ms. Claire Clerk
Clerk of the Texas Town Municipal Court
1000 Municipal Way
Texas Town, Texas 71111

RE: 27.14 Appeal in Cause No. ABCD1234, *State of Texas v.*
John Smith

Dear Clerk:

Please accept this letter as the appearance for John Smith in the above referenced case pursuant to Article 27.14(b) of the Texas Code of Criminal Procedure.

The Defendant, John Smith, hereby waives jury trial and enters a plea of Nolo Contendere in the above-referenced case. Defendant gives notice of intent to appeal.

Please advise me of the fine and court costs assessed by the court in this case and the amount of the appeal bond required by the court. Please allow thirty-one (31) days for appeal.

Thank you for your cooperation.

Sincerely,

Willie Williams

SBN: 87654321

Tania Robinson
Court Coordinator



Josie Massar
Court Reporter

COUNTY CRIMINAL COURT OF APPEALS

Kristin Wade, Judge
No. MC-09-R-0008-D
MICHAEL E. REDICK, Appellant
V.
THE STATE OF TEXAS, Appellee

Example
of Opinion in Court of
Appeals where no record
was made

On Appeal from the Municipal Court of Record of the City of Rowlett, Dallas County,
Texas
Citation # 173090

OPINION

This is an appeal from the Rowlett Municipal Court of Record in Dallas County, Texas. The Appellant was charged with the class C misdemeanor offenses of disregarding warning signs pursuant to Texas Transportation Code section 472.022. Trial was held before the Judge, where Appellant represented himself pro se. Appellant was found guilty and assessed a fine of \$125.00 plus court costs.

Appellant, in his pro se brief, asserts several factual insufficiency arguments. However, Appellant did not provide the Court with a copy of the Reporter's Record. TEX.GOV'T CODE ANN. SECTION 30.00019 (b) (Vernon 2005) requires the Appellant to provide a record. Without a record it is impossible for this Court to determine if Appellant properly preserved any error.

JUDGMENT AFFIRMED.

Entered this the 23rd day of March 2010.

Judge Kristin Wade