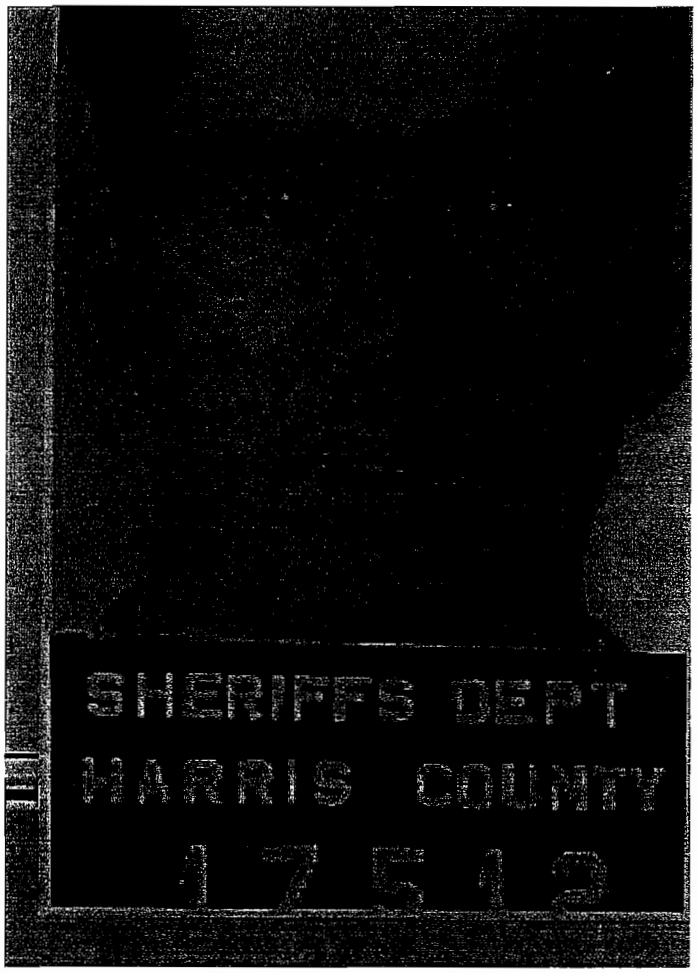
NOTE TO SELF:

The Legacy...



...of Preston Armour Tate

Marshall A. Shelsy, Staff Attorney, Harris County Criminal Courts at Law,
1201 Franklin Street, 7th Floor, Houston, Texas 77002
Voice 713.755.5394, Fax 713.755.8931, email marshall_shelsy@ccl.hctx.net

Table of Contents

2 Tex. 481, *; 1847 Tex. LEXIS 94, **
http://www.time.com/time/magazine/article/0,9171,904848,00.html?promoid=googlep

TIME
CNN

Is This Strict Construction?

Monday, Mar. 15, 1971

Despite its growing reputation for splintered decisions, judicial restraint and conservatism, the Burger Court last week confounded the instant image makers. In two decisions that drew only a single dissent, the court expanded the constitutional rights of the poor, continuing a trend that typified the heyday of Supreme Court liberalism under Chief Justice Earl Warren.

In a unanimous decision, the court held that states cannot jail a man solely because he is too poor to pay a traffic fine. At issue was the case of Preston A. Tate, a Houston laborer and chronic scofflaw who had been fined $425 for nine traffic offenses. Unable to ante up, Tate was sent to a prison farm to work off his fine because, he said in a habeas corpus petition, "I am too poor."

The court in finding Tate's imprisonment a violation of his right to equal protection of the laws, sharply limited the traditional power of American judges to sentence poor defendants to "$30 or 30 days." The Constitution, said Justice William Brennan, forbids states to "limit the punishment to payment of the fine if one is able to pay, yet convert the fine into a prison term for an indigent defendant." In taking away the jail alternative, Brennan suggested various other means in which courts might deal with the poor, including the collection of fines on an installment plan.

Blistering Dissent. On a related poverty question, the court ruled that indigents who want divorces do not have to pay fees to start proceedings. Since marriage is so basic and the state has a monopoly on the means to divorce, said Justice John Harlan for the majority, the Constitution's due-process clause prohibits any state "from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." The victors in the class action were eight New Haven women, all on welfare, who wanted to divorce their husbands but could not raise the average $60 that is necessary for filing fees and court costs.

"If ever there has been a looser construction of the Constitution in this court's history," said Justice Hugo Black in a blistering ad lib accompanying his written dissent, "I fail to think what it is." Black drew a sharp distinction between the protected rights of poor criminal defendants brought to court against their will and the private, civil claims of the impoverished who come into court on their own. Black predicted that the decision will encourage divorces at taxpayers' expense and lead to a future court-imposed right to counsel for the poor in divorce and other civil proceedings. "Is this strict construction?" he asked. The court's most avowed "strict constructionists," Chief Justice Burger and Justice Harry Blackmun, sat in stony silence.

William Dixon v. The State of Texas.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF TEXAS

2 Tex. 481; 1847 Tex. LEXIS 94

December, 1847, Decided

: [**1] Appeal from Polk County.

DISPOSITION: Affirmed.

HEADNOTES

Fines Not Debts.

[1] Fines imposed for a violation of the laws, for the punishment of crimes and misdemeanors, are not debts within the scope and meaning of that provision of the Constitution which prohibits imprisonment for debt.

Constitutional Law--Fines--Commitment.

[2] The forty-seventh section of the Act of 1836 for "punishing crimes and misdemeanors," which provides that "For all fines assesed and costs of prosecution in criminal cases not capital, the person convicted may stand committed to prison by the order of the court, until such fine and costs be paid," etc., it not unconstitutional.

1 Fines imposed for violation of penal laws are not debts within the meaning of the provisions of the Constitution, prohibiting imprisonment for debt. Dixon v. State, 2 T., 481; Luckey v. State, 14 T., 400, 402; Ex parte Mann, 39 T. Cr., 491. Nor is a fine imposed for contempt. Ex parte Robertson, 27 T. App., 628.

2 Laws providing for commitment until the fine and costs are paid are constitutional, and the court has no power to remit any part of such fine or costs. Dixon v. State, 2 T., 481; Luckey v. State, 14 T., 400; Smedley v. State, 30 T., 214, 223.

COUNSEL:

No appearance for appellant.

Harris, Attorney-General, for the State.

JUDGES: WHEELER, Justice.

OPINION BY: WHEELER

OPINION

WHEELER, Justice. --The appellant was convicted under the first section of the Act of 1840 "to suppress gaming." 4 Stat., 106. The jury fixed his punishment at imprisonment for one day and a fine of $ 50. Whereupon he was committed to prison for one day, and until he should pay the amount of fine assessed by the jury.

Subsequently, the fine and costs not having been paid, the prisoner moved the court to discharge him from custody, which the court refused, and the prisoner appealed.

The act, "punishing crimes and misdemeanors" (1 Stat., 187, sec. 47) provides that, "For all fines assessed, and costs of prosecution in criminal cases not capital, the person convicted may stand committed to prison by order of the court until such fine and costs be paid; and when it shall be made to appear to the court that the person so committed hath no estate or means to pay such fine and costs, it shall be the duty of the court to discharge such person from further imprisonment for such fine and costs, as in its discretion may deem proper."

We are required to pass upon the constitutionality of this provision; and it is supposed to conflict with that provision of the Constitution which prohibits imprisonment for debt. Const., art. 1, sec. 15.

The words "imprisonment for debt" have a well defined and well known meaning, and have never been understood or held to apply to criminal proceedings. 4 Hill 581; 5 Id., 605; 15 Wend. 461. It is not to be supposed, and it will scarcely be contended, that it ever entered into the minds of the framers of the Constitution that they were to be understood as having any application to the administration of the criminal laws; or that they were to have the effect to prevent the punishment of crimes. It was well known to them that the abolition of imprisonment for deft in other States, where it had been effected, had been held to consist with the enactment of laws for the punishment by imprisonment of criminal frauds perpetrated to avoid the payment of debts. How, then, can it be supposed that they intended that it should extend to the prevention of imprisonment for other crimes, when no such inference is deducible from the language employed? It could not have been their intention to degrade the subject of misfortune to the level of the criminal, and to confound debt with crime. There is nothing to be found in the legislation of the country to warrant such a supposition. On the contrary, they have been made the subject of distinct and quite dissimilar provisions--the constitutional guaranty having been given as a shield to protect the unfortunate debtor; and section 47 of the act punishing crimes and misdemeanors, having been enacted to punish, and thereby restrain the offender against the laws of society.

The fine and costs imposed for offenses are not so properly the principal as an incident--not the end, but a means of enforcing obedience to the laws. In the formation of the organic law, it can not have been intended that the convicted culprit shall go wholly acquitted of punish-

ment, because a pecuniary liability may have arisen as incident to, or as a means of enforcing the punishment annexed to his offense.

The object of the imprisonment authorized by section 47 is not so much to enforce payment, as to insure punishment; and without it a numerous class of the worst offenders, those whose offenses are most pernicious and demoralizing to society, would be licensed to violate the laws, and would set them at defiance with impunity.

The great object and design of penal laws is the prevention of crime. This they seek to attain by means of punishments. Such is the imprisonment imposed in the present instance, being inflicted as a punishment consequent upon a violation of the laws and a contumacious refusal to submit to the pecuniary penalty imposed. It is the consequence which the law attaches to such refusal. **Hence, if the party does not so refuse, but is unable to satisfy the pecuniary penalty, the law provides for his discharge; thus making the imprisonment to depend not upon the fact or question of his pecuniary liability, but upon his refusal to submit to the judgment of the law. It is only in the event of such refusal that the law contemplates a continued imprisonment.**

This is the view also which has been taken in other States whose statutory regulations upon this subject are analogous to our own. 2 Yerg. 247; 5 Id., 186; Id., 368.

The constitutional prohibition of imprisonment for debt was intended, as we think, for a class of persons very different from and far more meritorious than those embraced in the provision of section 47; and we do not think that that section conflicts either in letter or spirit with the provision in question. Nor do we see in section 47 anything inconsistent with the provision of the Constitution and law which authorizes the jury to assess the amount of the fine in certain cases. Both provisions may well have effect and stand together. When the fine is ascertained and fixed, a refusal to pay it may be followed by the consequence contemplated in section 47, and it is entirely indifferent by what means the law has provided that it may be ascertained. Whether by the court or the jury, the consequence is the same. We are of the opinion that there is no error in the judgment, and that it be affirmed.

Affirmed.

238

HABEAS CORPUS

MINUTES OF THE COUNTY CRIMINAL COURT AT LAW NO. 1 OF HARRIS COUNTY, TEXAS.

AT AUGUST TERM, A. D. 1968

NO. 245832 X

PRESTON A. TATE X AUGUST 30TH, A. D. 1968

VS. X HABEAS CORPUS

THE STATE OF TEXAS X

THIS DAY came on to be heard before me this application for the Writ of HABEAS CORPUS against Herman Short, Chief of Police, City of Houston, Texas, and the said respondent Herman Short, Chief of Police, City of Houston, Texas, having made due return of the said Writ of HABEAS CORPUS herein served upon him and having produced before me the person of the said Preston A. Tate I proceeded to hear the said application, and after having examined the Writ and the return of the respondent Herman Short, Chief of Police, City of Houston, Texas, and all papers and documents attached thereto, and having heard the testimony offered on both sides, I am of the opinion that legal cause has been shown for the imprisonment or restraint of the said Preston A. Tate.

I am of the opinion that the said Preston A. Tate is legally held in custody and under restraint of his liberty by the said respondent Herman Short, Chief of Police, City of Houston, Texas. It is therefore ordered and adjudged that the application of the said Preston A. Tate herein be denied, and that the said Preston A. Tate be and he is now hereby remanded to the custody of the said respondent Herman Short, Chief of Police, City of Houston, Texas.

To which action of the Court the Relator in open court excepts and gives notice of Appeal to the Court of Criminal Appeals of the State of Texas at Austin, Texas.

$500.00 Bond remains in effect pending ruling by the Court of Criminal Appeals in Austin, Texas.

* * * * * * * * *

On this the 10th day of September, A. D. 1968, Carol S. Vance, Esq., District Attorney of Harris County, Texas, presented the following Bills of Information to County Criminal Court at Law No. 1 of Harris County, Texas, which were thereupon, in accordance with law, filed and docketed in this Court and all necessary process ordered issued thereon, to wit:

THE STATE OF TEXAS VS. NO:

246172 John Spencer, Jr.

246176 Homer Ray Mc Clendon

246180 Howard Sanders

246184 Phillip Lazare

246188 Eugene Mc Carty

246192 Kathy Mericle Connell

246196 Fredda C. Otis

Ex parte Preston A. TATE

No. 42209

COURT OF CRIMINAL APPEALS OF TEXAS

445 S.W.2d 210; 1969 Tex. Crim. App. LEXIS 1223

July 16, 1969

OPINION BY: MORRISON

OPINION

Petitioner is an inmate of the prison farm of the City of Houston by virtue of a capias growing out of six traffic court convictions with aggregate fines of $ 425.00.

We overrule appellant's contention that because he is too poor to pay the fines his imprisonment is unconstitutional. His status as an indigent does not render this petitioner immune from criminal prosecution.

The relief prayed for is denied.

TATE v. SHORT

No. 324

SUPREME COURT OF THE UNITED STATES

401 U.S. 395; 91 S. Ct. 668; 28 L. Ed. 2d 130; 1971 U.S. LEXIS 74

January 14, 1971, Argued
March 2, 1971, Decided

SUMMARY:

In the Corporation Court of Houston, Texas, the petitioner was convicted of nine traffic offenses which were punishable by fines only, and he was fined a total of $ 425. He was unable to pay the fines because of indigency, and pursuant to a state statute and municipal ordinance, the Corporation Court ordered him imprisoned for 85 days, each day of imprisonment serving as a substitute for $ 5 of the fines. His petition for habeas corpus was denied by the County Criminal Court of Harris County, and the Texas Court of Criminal Appeals affirmed, rejecting the petitioner's contention that because he was too poor to pay the fines his imprisonment was unconstitutional (445 SW2d 210).

On certiorari, the United States Supreme Court reversed and remanded the case. In an opinion by Brennan, J., expressing the view of seven members of the court, it was held that imprisonment of the petitioner solely because of his indigency constituted invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment.

Black, J., concurred in the result.

Harlan, J., concurred in the court's judgment, but on the basis of due process rather than equal protection.

Blackmun, J., concurring in the court's opinion, stated that the court's decision might encourage legislatures to eliminate fines and to make jail terms the only punishment for a broad range of traffic offenses.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner accumulated fines of $ 425 on nine convictions in the Corporation Court of Houston, Texas, for traffic offenses. He was unable to pay the fines because of indigency [1] and the Corporation Court, which otherwise has no jurisdiction to impose prison sentences, [2] committed him to the municipal prison farm according to the provisions of a state statute and municipal ordinance [3] which required that he remain there a sufficient time to satisfy the fines at the rate of five dollars for each day; this required that he serve 85 days at the prison farm. After 21 days in custody, petitioner was released on bond when he applied to the County Criminal Court of Harris County for a writ of habeas corpus. He alleged that: "Because I am too poor, I am, therefore, unable to pay the accumulated fine of $ 425." The county court held that "legal cause has been shown for the imprisonment," and denied the application. The Court of Criminal Appeals of Texas affirmed, stating: "We overrule appellant's contention that because he is too poor to pay the fines his imprisonment is unconstitutional."445 S. W. 2d 210 (1969). We granted certiorari, 399 U.S. 925 (1970). We reverse on the authority of our decision in *Williams* v. *Illinois*, 399 U.S. 235 (1970).

1 At the habeas corpus hearing the assistant district attorney appearing for the State stipulated: "We would stipulate he is poverty stricken, and that his whole family has been for all periods of time therein, and probably always will be." Petitioner's uncontradicted testimony at the hearing was that, prior to his imprisonment, he earned between $ 25 and $ 60 a week in casual employment. He also received a monthly Veterans Administration check of $ 104. He has a wife and two children dependent on him for support. We were advised on oral argument that under Texas law his automobile was not subject to execution to collect the fines.

2 Tex. Code Crim. Proc., Art. 4.14 (1966) provides:

"The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, and arising within such corporate limits."

3 Tex. Code Crim. Proc., Art. 45.53 (1966), provides in pertinent part:

"A defendant placed in jail on account of failure to pay the fine and costs can be discharged on habeas corpus by showing:

"1. That he is too poor to pay the fine and costs; and

"2. That he has remained in jail a sufficient length of time to satisfy the fine and costs, at the rate of $ 5 for each day."

Houston Code § 35-8 provides:

"Each person committed to the county jail or to the municipal prison farm for non-payment of their fine arising out of his conviction of a misdemeanor in the corporation court shall receive a credit against such fine of five dollars ($ 5.00) for each day or fraction of a day that he has served."

The Illinois statute involved in *Williams* authorized both a fine and imprisonment. Williams was given the maximum sentence for petty theft of one year's imprisonment and a $ 500 fine, plus $ 5 in court costs. The judgment, as permitted by the Illinois statute, provided that if, when the one-year sentence expired, Williams did not pay the fine and court costs, he was to remain in jail a sufficient length of time to satisfy the total amount at the rate of $ 5 per day. We held that the Illinois statute as applied to Williams worked an invidious discrimination solely because he was too poor to pay the fine, and therefore violated the Equal Protection Clause.

Although the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency. [4] In *Morris* v. *Schoonfield*, 399 U.S. 508, 509 (1970), four members of the Court anticipated the problem of this case and stated the view, which we now adopt, that

"the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."

4 Houston Code § 35-9 provides:

"Additional credit against the fine of each prisoner may be granted by the superintendent of the municipal prison farm for good conduct, industry and obedience; provided, however, that such additional credit shall not exceed in time more than one-half (1/2) day credit on his fine for each day's work."

An implementing regulation of the Fines Bureau Division of the Houston Corporation Court interprets this provision as follows:

"If a person appears in court and is found guilty and does not have money to pay his fine, he is committed to jail to serve the amount of the fine at the rate of $ 5.00 per day. In certain cases a person may be allowed $ 7.50 credit per day."

It does not appear that petitioner was granted the increased credit for any of the 21 days he served before his release.

Our opinion in *Williams* stated the premise of this conclusion in saying that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." 399 U.S., at 244. Since Texas has legislated a "fines only" policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.

There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines. We repeat our observation in *Williams* in that regard, 399 U.S., at 244-245 (footnotes omitted):

"The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.

"It is unnecessary for us to canvass the numerous alternatives to which the State by legislative enactment -- or judges within the scope of their authority -- may resort in order to avoid imprisoning an indigent beyond the statutory maximum for involuntary nonpayment of a fine or court costs. Appellant has suggested several plans, some of which are already utilized in some States, while others resemble those proposed by various studies. The State is free to choose from among the variety of solu-

tions already proposed and, of course, it may devise new ones." [5]

> 5 Several States have a procedure for paying fines in installments. *E. g.*, Cal. Penal Code § 1205 (1970) (misdemeanors); Del. Code Ann., Tit. 11, § 4332 (c) (Supp. 1968); Md. Ann. Code, Art. 38, § 4 (a)(2) (Supp. 1970); Mass. Gen. Laws Ann., c. 279, § 1A (1959); N. Y. Code Crim. Proc. § 470-d (1)(b) (Supp. 1970); Pa. Stat. Ann., Tit. 19, § 953 (1964); Wash. Rev. Code § 9.92.070.
>
> This procedure has been widely endorsed as effective not only to collect the fine but also to save the expense of maintaining a prisoner and avoid the necessity of supporting his family under the state welfare program while he is confined. See, *e. g.*, Final Report of the National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code § 3302 (2) (1971); American Bar Association, Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 2.7 (b), pp. 119-122 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 18 (1967); ALI, Model Penal Code § 302.1 (1) (Proposed Official Draft 1962). See also Comment, Equal Protection and the Use of Fines as Penalties for Criminal Offenses, 1966 U. Ill. L. F. 460; Note, The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines, 64 Mich. L. Rev. 938 (1966); Note, Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution, 22 Vand. L. Rev. 611 (1969); Note, Fines and Fining -- An Evaluation, 101 U. Pa. L. Rev. 1013 (1953); J. Sellin, Recent Penal Legislation in Sweden 14 (1947); Cordes, Fines and Their Enforcement, 2 J. Crim. Sci. 46 (1950); S. Rubin, H. Weihofen, G. Edwards, & S. Rosenzweig, The Law of Criminal Correction 253 and n. 154 (1963); E. Sutherland & D. Cressey, Principles of Criminology 276 (6th ed. 1960). See also *Williams* v. *Illinois*, 399 U.S., at 244-245, n. 21.

We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.

The judgment of the Court of Criminal Appeals of Texas is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE HARLAN concurs in the judgment of the Court on the basis of the considerations set forth in his opinion concurring in the result in *Williams* v. *Illinois*, 399 U.S. 235, 259 (1970).

CONCUR BY: BLACKMUN

CONCUR

MR. JUSTICE BLACKMUN, concurring.

The Court's opinion is couched in terms of being constitutionally protective of the indigent defendant. I merely add the observation that the reversal of this Texas judgment may well encourage state and municipal legislatures to do away with the fine and to have the jail term as the only punishment for a broad range of traffic offenses. Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions and leaves only possible Eighth Amendment considerations. If, as a nation, we ever reach that happy point where we are willing to set our personal convenience to one side and we are really serious about resolving the problems of traffic irresponsibility and the frightful carnage it spews upon our highways, a development of that kind may not be at all undesirable.

Ex Parte Preston A. Tate

No. 42,209

Court of Criminal Appeals of Texas

471 S.W.2d 404; 1971

October 6, 1971

OPINION BY: MORRISON

ON MOTION FOR REHEARING

The original opinion is withdrawn and the following is substituted in lieu thereof.

This is an appeal from the refusal of the County Criminal Court at Law No. 1 of Harris County, Texas, to grant the appellant's relief prayed for in his application for writ of habeas corpus. This cause has been remanded to this Court by the United States Supreme Court with directions to proceed in accordance with its opinion. See *Tate v. Short*, 401 U.S. 395, 28 L. Ed. 2d 130, 91 S. Ct. 668, and Ex Parte Tate, 445 S.W.2d 210 for the previous opinions in this cause.

In this cause the United States Supreme Court said that Tate may not be imprisoned because he is too poor to pay his accumulated traffic fines. In doing so they stated:

> "There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines. We repeat our observation in *Williams* in that regard, 399 U.S. at 244-245, (footnotes omitted):
>
> "'The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.'
>
> ". . . . We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.
>
> "The judgment of the Court of Criminal Appeals of Texas is reversed and the case is remanded for further proceedings not inconsistent with this opinion."

It now appears that the Legislature has provided "alternative means" for collection of fines and costs from defendants, in their revisions of Arts. 42.15, 43.03, 43.04, 43.05, 45.50, 45.51 and 45.52, V.A.C.C.P. This Court has discussed the impact of these amendments on persons currently confined under the old versions of the statutes in *Ex Parte Scott*, 471 S.W.2d 54, No. 44,123 (6-23-71). As this Court said in Scott:

> **"Under these amendments, the trial court may, when a defendant is to be fined, order the defendant to pay the entire fine and costs at the time of the pronouncement of sentence, order the defendant to pay the entire fine and costs at a later date, or order the defendant to pay specified portions of the fine and costs at designated intervals. The old statutes did not provide for delayed or installment payments; they required that the defendant pay the entire fine in a lump sum at the time of sentence or go to jail until he paid.**
>
> "The new amendments are not ex post facto laws as regards their application to the appellant. A law which changes the punishment for a crime after the crime has been committed is an ex post facto law as prohibited by TEX. CONST., Art. I, Sec. 16 and U.S. CONST., Art. I, Sec. 10, only if it inflicts a greater punishment than did the previous law. *Roon v. North Dakota*, 196 U.S. 319, 49 L. Ed. 494, 25 S. Ct. 264; Hill v. State, 158 Tex. Crim. 313, 256 S.W.2d 93; *Millican v. State*, 145 Tex. Crim. 195, 167 S.W.2d 188. Compare *In re Hunt*, 28 Tex. Civ. App. 361, 13 S.W. 145; *Ex Parte Alegria*, Tex., 464 S.W.2d 868; and *Donald v. Jones*, 445 F.2d 601 (5th Cir. 1971, No. 30,389). In the case at bar, the punishment has not

> been substantially altered; the only change has occurred in the method of collection of the fine and costs. This change has the effect of mitigating the punishment, because it makes it easier for a defendant to pay his fines. In the case at bar it means that the petitioner probably need not be imprisoned as it appears that he can pay the remainder of his fine and costs if he is allowed to do so on an installment or deferred payment basis."

This cause is remanded to County Court at Law No. 1 of Harris County, Texas, for further proceeding as may be consistent with the opinion of the Supreme Court of the United States and this opinion and so that the benefits of our legislative revisions may be complied with. [1]

1 Compare *Spurlock v. Noe*, 467 S.W.2d 320, 9 Cr.L. 2212 (Ky.Ct.App. 1971).

It is so ordered.

Ex parte Rafael MINJARES, Jr

No. 57136

COURT OF CRIMINAL APPEALS OF TEXAS

582 S.W.2d 105; 1979 Tex. Crim. App.

March 23, 1979

OPINION BY: ODOM

OPINION

OPINION ON PETITIONER'S MOTION FOR REHEARING

The Court on its own motion has withdrawn during term time the mandate issued in this cause, and has withdrawn the original opinion on petitioner's motion for rehearing and substitutes the following in lieu thereof.

This is an appeal from an order entered in the County Court at Law of El Paso County denying relief on petitioner's application for habeas corpus.

On September 23, 1977, petitioner was convicted in the Municipal Court of El Paso on nine traffic complaints. [1] Total of fines and costs in those cases was $ 788 with the highest single case being a $ 200 fine and $ 2.50 costs. The Municipal Court ordered petitioner committed to the custody of the Chief of Police until the $ 788 judgment "is fully paid or until he is otherwise legally discharged by the due course of law." By contract with the city, the sheriff had custody of petitioner and held him in the county jail for 62 days before the hearing in county court on petitioner's writ was held, at the conclusion of which petitioner was released on bail pending disposition of this appeal. Stipulations at the hearing showed petitioner received $ 5 per day credit against his fines plus $ 2.50 per day good time credit, for a total of $ 465 credit against the $ 788 judgment.

1. Although nine were stipulated, only seven were set out.

Petitioner's contention on original submission was that under Article 5118a, V.A.C.S., he was entitled to discharge from custody when he had earned credit sufficient to discharge the largest single fine levied against him. On original submission the court disposed of the issue this way:

> "We conclude that petitioner is not entitled to the relief requested. Judgments in misdemeanor convictions imposing pecuniary fines as punishment have been held not concurrent but cumulative. In *Ex parte Hall* (158 Tex.Cr.R. 646), 258 S.W.2d 806 (Tex.Cr.App.1953) fines were assessed in seven cases. This Court held that the judgments against the defendant in each of the seven cases were independent of one another, that they could not be discharged concurrently, and that the defendant's satisfaction of the fine and costs in one of the seven judgments was not a satisfaction of the fine and costs in either or all of the other judgments."

Petitioner argues this holding is in conflict with this language from Article 5118a, supra:

> "This Act shall be applicable regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine. A prisoner under two (2) or more cumulative sentences shall be allowed commutation As if they were all one sentence." (Emphasis added.)

Petitioner rests his position on the emphasized language, arguing that treating all $ 788 worth of fines as one "sentence" renders a punishment in excess of the maximum allowed within the jurisdiction of the Municipal Court. That position misconstrues the statute: Art. 5118a does not transform petitioner's nine fines into one; it merely provides that for Commutation purposes of the statute the fines are to be treated As if they were one. Thus, for fines and cumulated jail terms, good time credits cannot be earned concurrently against Each fine or jail term, but to the contrary, treating them as one, good time credits can be earned only against the aggregate punishment. We adhere to the disposition of this issue reached on original submission.

In our opinion on original submission we also went beyond the issue raised by petitioner and held Art. 5118a, supra, does not apply to Municipal Court judgments. We therefore held petitioner could not be awarded $ 2.50 per day good time credit against his fines. That issue had not been raised and had the effect of reducing petitioner's credits for his 62 days' confinement from $ 465 to $ 310. Appellant challenges that holding

and urges the above quoted language from Art. 5118a as authority for the proposition that good time credits should be awarded "regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine." We agree that the absence of a formal sentence in Municipal Court prosecutions should not render Art. 5118a inapplicable.

Our holding on original submission was based on a reading of a sentence taken out of context. Article 5118a provides in part:

> "In order to encourage county jail discipline, a distinction may be made in the terms of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts; the reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict county jail rules, and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct, industry and obedience may be granted the inmates of each county jail by the sheriff in charge. A deduction in time not to exceed one third (1/3) of the original sentence may be made from the term or terms of sentences when no charge of misconduct has been sustained against the prisoner. This Act shall be applicable regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine. . . ."

The opinion on original submission relied heavily upon the use of the word "sentence" in the next to last sentence quoted above, and concluded that because there is no "sentence" in Municipal Court convictions, [2] the statute does not apply. The language immediately following the excerpt previously relied on states that the statute applies "regardless of whether the judgment of conviction is a fine or jail sentence or a combination of jail sentence and fine." The sentence before says it applies to "the inmates of each county jail." We hold petitioner is entitled to such good time credits as he had earned while an inmate of the county jail, and the absence of a formal sentence may not be used to deny him that credit. On the record before us petitioner has credits of $ 465 toward discharge of his $ 788 of fines and costs.

2. See Article 42.02, V.A.C.C.P.

We have found further grounds not raised in the briefs that entitle petitioner to immediate discharge from custody. In the record appears an order of the judge who heard petitioner's writ application. The order recites that after a hearing petitioner was found to be indigent. It is a matter of constitutional law that a defendant "may not be imprisoned because he is too poor to pay his accumulated traffic fines." *Ex parte Tate*, Tex.Cr.App., 471 S.W.2d 404; Tate v. Short, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130.

On remand the County Court at Law from which this appeal was prosecuted shall (1) determine the cause numbers of the Municipal Court cases, (2) set aside the commitment to custody issued by the Municipal Court, and (3) remand petitioner to the Municipal Court for execution of the judgments on the fine and costs remaining due by arrangement in the Municipal Court of a schedule of payments or other means legally authorized. See Articles 42.15, 43.07, 45.06, 45.50, 45.52(b), V.A.C.C.P. See also *Ex parte Sheppard*, Tex.Cr.App., 548 S.W.2d 414. Petitioner is entitled to credit for $ 465.00 against the $ 788 total assessed in those cases.

Petitioner's motion for rehearing is granted, the order of the County Court at Law denying relief is set aside, and the cause is remanded to the County Court at Law for further proceedings in conformity with this opinion.

It is so ordered.

DISSENT BY: DOUGLAS

DISSENT

DOUGLAS, Judge, dissenting.

The opinion on original submission was correct.

The majority opinion leaves the impression that there is no difference between a judgment and a sentence and treats them as the same. In *Ex parte Hayden*, 152 Tex.Cr.R. 517, 215 S.W.2d 620 (1948), the Court wrote, " "Judgment' and "sentence' are not the same thing; the two are distinct and independent. . . ." In that case the convictions were for misdemeanor offenses. The trial court granted probation and ordered the relators discharged. The sheriff refused to discharge them and the habeas corpus proceeding followed.

Under consideration was a Texas constitutional provision, Section 11-A of Article 4, which provides:

> "The Courts of the State of Texas having original jurisdiction of criminal actions shall have the power, after conviction, to Suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the

> Legislature may prescribe." (Emphasis supplied).

House Bill No. 120, Chapter 452, Acts of the 50th Legislature, Regular Session, page 1049, Vernon's Annotated Code of Criminal Procedure, Article 781b, authorized probation in misdemeanor cases. At that time there were no sentences imposed in any misdemeanor cases. This Court held that since the constitutional provision allowing probation referred only to sentences it did not apply to misdemeanor cases because in those only judgments were entered. See *Ex parte Waggoner,* 276 S.W.2d 106 (Tex.Cr.App.1954).

In *Gilderbloom v. State*, 160 Tex.Cr.R. 471, 272 S.W.2d 106 (1954), the Court noted that *Ex parte Hayden*, supra, held that the adult probation law had no application except in those cases where a sentence had been made mandatory by the Legislature and followed that case. Neither case has been overruled.

As construed by this Court thirty years ago and until this case, there is a great difference between a judgment and a sentence.

Following the Hayden and other cases, relator was not entitled to have the judgments treated as one sentence. This Court held the statute that treated the judgment as a sentence was unconstitutional.

The majority apparently thinks it bad that the original opinion discussed something not raised in appellant's brief. The writer knows of no rule that this Court is bound by any brief in discussing the law applicable to a case. If discussing a matter not raised in the brief is wrong, why does the majority discuss the question of indigency which was not raised in appellant's brief?

The writer of the majority opinion has often discussed matters not raised by the brief. One interesting example is found in *Lechuga v. State*, 532 S.W.2d 581 (Tex.Cr.App.1975). In that case the trial court found the defendant guilty and assessed punishment at three years' confinement. At the defendant's request a motion for new trial was granted. The same judge then assessed punishment at five years, probated. *Lechuga* was apparently happy to get it because he did not appeal. After probation was granted, *Lechuga* committed several crimes and because of these his probation was revoked. He appealed from the order revoking probation. The majority of the then five judge Court held that the punishment of five years' probation was more than three years' confinement in the Department of Corrections and reversed the conviction. This was a matter not raised in the brief.

When a federal prisoner is placed in a county jail, he is still a federal prisoner. Can the sheriff give him credit for good time?

When a city prisoner is placed in a county jail for an unpaid fine, he is still a city prisoner. Under the majority ruling a double standard is created. One in custody for a fine set in a municipal court and who is confined in a city jail does not get good time credit from the sheriff. Where, as in this case, there is a contract with a county to handle prisoners for a city until their fines are paid, the majority allows good time credit not allowed to the vast majority of those convicted in city courts because they are in different jails. Should a city prisoner in a county jail have more rights than a city prisoner in a city jail?

For the reasons stated in the opinion on original submission and here, the relief sought should be denied.

CODE OF CRIMINAL PROCEDURE (Vernon's 2007)

Art. 45.001. OBJECTIVES OF CHAPTER.

The purpose of this chapter is to establish procedures for processing cases that come within the criminal jurisdiction of the justice courts and municipal courts. This chapter is intended and shall be construed to achieve the following objectives:

(1) to provide fair notice to a person appearing in a criminal proceeding before a justice or municipal court and a meaningful opportunity for that person to be heard;

(2) to ensure appropriate dignity in court procedure without undue formalism;

(3) to promote adherence to rules with sufficient flexibility to serve the ends of justice; and

(4) to process cases without unnecessary expense or delay.

Art. 45.002. APPLICATION OF CHAPTER.

Criminal proceedings in the justice and municipal courts shall be conducted in accordance with this chapter, including any other rules of procedure specifically made applicable to those proceedings by this chapter. If this chapter does not provide a rule of procedure governing any aspect of a case, the justice or judge shall apply the other general provisions of this code to the extent necessary to achieve the objectives of this chapter.

Art. 45.041. JUDGMENT.

(a) The judgment and sentence, in case of conviction in a criminal action before a justice of the peace or municipal court judge, shall be that the defendant pay the amount of the fine and costs to the state.

(b) The justice or judge may direct the defendant:

(1) to pay:

(A) the entire fine and costs when sentence is pronounced;

(B) the entire fine and costs at some later date; or

(C) a specified portion of the fine and costs at designated intervals;

(2) if applicable, to make restitution to any victim of the offense; and

(3) to satisfy any other sanction authorized by law.

(b-1) Restitution made under Subsection (b)(2) may not exceed $5,000 for an offense under Section 32.41, Penal Code.

(c) The justice or judge shall credit the defendant for time served in jail as provided by Article 42.03. The credit shall be applied to the amount of the fine and costs at the rate provided by Article 45.048.

(d) All judgments, sentences, and final orders of the justice or judge shall be rendered in open court.

Art. 45.045. CAPIAS PRO FINE.

(a) If the defendant is not in custody when the judgment is rendered or if the defendant fails to satisfy the judgment according to its terms, the court may order a capias pro fine, as defined by Article 43.015, issued for the defendant's arrest. The capias pro fine shall state the amount of the judgment and sentence, and command the appropriate peace officer to bring the defendant before the court immediately or place the defendant in jail until the business day following the date of the defendant's arrest if the defendant cannot be brought before the court immediately.

(b) A capias pro fine may not be issued for an individual convicted for an offense committed before the individual's 17th birthday unless:

(1) the individual is 17 years of age or older;

(2) the court finds that the issuance of the capias pro fine is justified after considering:

(A) the sophistication and maturity of the individual;

(B) the criminal record and history of the individual; and

(C) the reasonable likelihood of bringing about the discharge of the judgment through the use of procedures and services currently available to the court; and

(3) the court has proceeded under Article 45.050 to compel the individual to discharge the judgment.

(c) This article does not limit the authority of a court to order a child taken into custody under Article 45.058 or 45.059.

Art. 45.046. COMMITMENT.

(a) When a judgment and sentence have been entered against a defendant and the defendant defaults in the discharge of the judgment, the judge may order the defendant confined in jail until discharged by law if the judge at a hearing makes a written determination that:

(1) the defendant is not indigent and has failed to make a good faith effort to discharge the fine and costs; or

(2) the defendant is indigent and:

(A) has failed to make a good faith effort to discharge the fines and costs under Article 45.049; and

(B) could have discharged the fines and costs under Article 45.049 without experiencing any undue hardship.

(b) A certified copy of the judgment, sentence, and order is sufficient to authorize such confinement.

Art. 45.047. CIVIL COLLECTION OF FINES AFTER JUDGMENT.

If after a judgment and sentence is entered the defendant defaults in payment of a fine, the justice or judge may order the fine and costs collected by execution against the defendant's property in the same manner as a judgment in a civil suit.

Art. 45.048. DISCHARGED FROM JAIL.

(a) A defendant placed in jail on account of failure to pay the fine and costs shall be discharged on habeas corpus by showing that the defendant:

(1) is too poor to pay the fine and costs; or

(2) has remained in jail a sufficient length of time to satisfy the fine and costs, at the rate of not less than $50 for each period of time served, as specified by the convicting court in the judgment in the case.

(b) A convicting court may specify a period of time that is not less than eight hours or more than 24 hours as the period for which a defendant who fails to pay the fines and costs in the case must remain in jail to satisfy $50 of the fine and costs.

Art. 45.049. COMMUNITY SERVICE IN SATISFACTION OF FINE OR COSTS.

(a) A justice or judge may require a defendant who fails to pay a previously assessed fine or costs, or who is determined by the court to have insufficient resources or income to pay a fine or costs, to discharge all or part of the fine or costs by performing community service. A defendant may discharge an obligation to perform community service under this article by paying at any time the fine and costs assessed.

(b) In the justice's or judge's order requiring a defendant to participate in community service work under this article, the justice or judge must specify the number of hours the defendant is required to work.

(c) The justice or judge may order the defendant to perform community service work under this article only for a governmental entity or a nonprofit organization that provides services to the general public that enhance social welfare and the general well-being of the community. A governmental entity or nonprofit organization that accepts a defendant under this article to perform community service must agree to supervise the defendant in the performance of the defendant's work and report on the defendant's work to the justice or judge who ordered the community service.

(d) A justice or judge may not order a defendant to perform more than 16 hours per week of community service under this article unless the justice or judge determines that requiring the defendant to work additional hours does not work a hardship on the defendant or the defendant's dependents.

(e) A defendant is considered to have discharged not less than $50 of fines or costs for each eight hours of community service performed under this article.

(f) A sheriff, employee of a sheriff's department, county commissioner, county em-

ployee, county judge, justice of the peace, municipal court judge, or officer or employee of a political subdivision other than a county is not liable for damages arising from an act or failure to act in connection with manual labor performed by a defendant under this article if the act or failure to act:

(1) was performed pursuant to court order; and

(2) was not intentional, wilfully or wantonly negligent, or performed with conscious indifference or reckless disregard for the safety of others.

Text of subsection effective on January 1, 2008, on approval by the voters of H.J.R. 6, 80th Leg., R.S.
Text of subsection as added by Acts 2007, 80th Leg., R.S., Ch. 1113, Sec. 5
According to Section 7, Ch. 1113, Acts 80th Leg., R.S., Subsection (g) takes effect September 1, 2007.

(g) This subsection applies only to a defendant who is charged with a traffic offense or an offense under Section 106.05, Alcoholic Beverage Code, and is a resident of this state. If under Article 45.051(b)(10), Code of Criminal Procedure, the judge requires the defendant to perform community service as a condition of the deferral, the defendant is entitled to elect whether to perform the required governmental entity or nonprofit organization community service in:

(1) the county in which the court is located; or

(2) the county in which the defendant resides, but only if the entity or organization agrees to:

(A) supervise the defendant in the performance of the defendant's community service work; and

(B) report to the court on the defendant's community service work.

Text of subsection as added by Acts 2007, 80th Leg., R.S., Ch. 1263, Sec. 17

(g) A community supervision and corrections department or a court-related services office may provide the administrative and other services necessary for supervision of a defendant required to perform community service under this article.

Text of subsection effective on January 1, 2008, on approval by the voters of H.J.R. 6, 80th Leg., R.S.
According to Section 7, Ch. 1113, Acts 80th Leg., R.S., Subsection (h) takes effect September 1, 2007.

(h) This subsection applies only to a defendant charged with an offense under Section 106.05, Alcoholic Beverage Code, who, under Subsection (g), elects to perform the required community service in the county in which the defendant resides. The community service must comply with Sections 106.071(d) and (e), Alcoholic Beverage Code, except that if the educational programs or services described by Section 106.071(e) are not available in the county of the defendant's residence, the court may order community service that it considers appropriate for rehabilitative purposes.

Art. 45.0491. WAIVER OF PAYMENT OF FINES AND COSTS FOR INDIGENT DEFENDANTS.

A municipal court, regardless of whether the court is a court of record, or a justice court may waive payment of a fine or costs imposed on a defendant who defaults in payment if the court determines that:

(1) the defendant is indigent; and

(2) discharging the fine and costs under Article 45.049 would impose an undue hardship on the defendant.

Art. 45.050. FAILURE TO PAY FINE; CONTEMPT: JUVENILES.

(a) n this article, "child" has the meaning assigned by Article 45.058(h).

(b) A justice or municipal court may not order the confinement of a child for:

(1) the failure to pay all or any part of a fine or costs imposed for the conviction of an offense punishable by fine only; or

(2) contempt of another order of a justice or municipal court.

(c) If a child fails to obey an order of a justice or municipal court under circumstances that would constitute contempt of court, the justice or municipal court, after providing notice and an opportunity to be heard, may:

(1) refer the child to the appropriate juvenile court for delinquent conduct for contempt of the justice or municipal court order; or

(2) retain jurisdiction of the case, hold the child in contempt of the justice or municipal court, and order either or both of the following:

(A) that the contemnor pay a fine not to exceed $500; or

(B) that the Department of Public Safety suspend the contemnor's driver's license or permit or, if the contemnor does not have a license or permit, to deny the issuance of a license or permit to the contemnor until the contemnor fully complies with the orders of the court.

(d) A justice or municipal court may hold a person in contempt and impose a remedy authorized by Subsection (c)(2) if:

(1) the person was convicted for an offense committed before the person's 17th birthday;

(2) the person failed to obey the order while the person was 17 years of age or older; and

(3) the failure to obey occurred under circumstances that constitute contempt of court.

(e) A justice or municipal court may hold a person in contempt and impose a remedy authorized by Subsection (c)(2) if the person, while younger than 17 years of age, engaged in conduct in contempt of an order issued by the justice or municipal court, but contempt proceedings could not be held before the person's 17th birthday.

(f) A court that orders suspension or denial of a driver's license or permit under Subsection (c)(2)(B) shall notify the Department of Public Safety on receiving proof of compliance with the orders of the court.

(g) A justice or municipal court may not refer a child who violates a court order while 17 years of age or older to a juvenile court for delinquency proceedings for contempt of court.

Art. 45.203. COLLECTION OF FINES, COSTS, AND SPECIAL EXPENSES.

(a) The governing body of each municipality shall by ordinance prescribe rules, not inconsistent with any law of this state, as may be proper to enforce the collection of fines imposed by a municipal court. In addition to any other method of enforcement, the municipality may enforce the collection of fines by:

(1) execution against the property of the defendant; or

(2) imprisonment of the defendant.

(b) The governing body of a municipality may adopt such rules and regulations, not inconsistent with any law of this state, concerning the practice and procedure in the municipal court as the governing body may consider proper.

(c) The governing body of each municipality may prescribe by ordinance the collection, after due notice, of a special expense, not to exceed $25 for the issuance and service of a warrant of arrest for an offense under Section 38.10, Penal Code, or Section 543.009, Transportation Code. Money collected from the special expense shall be paid into the municipal treasury for the use and benefit of the municipality.

(d) Costs may not be imposed or collected in criminal cases in municipal court by municipal ordinance.

EX PARTE MIRLO LUANA GONZALES, Applicant

NO. 72,606

COURT OF CRIMINAL APPEALS OF TEXAS

945 S.W.2d 830; 1997

May 21, 1997, Delivered

OPINION BY: HOLLAND

OPINION

OPINION

In this original application for writ of habeas corpus, applicant contends she is illegally restrained by an order of contempt in the 220th District Court of Bosque County. Applicant asserts that (1) her restraint violates TEX. CONST. art. I, § 18, and various other statutes, because she is being imprisoned for failure to pay a debt; and (2) she was deprived of counsel at the hearing in which the trial judge found her in contempt of court and sentenced her to ninety days in the Bosque County Jail.

Applicant was convicted of burglary of a habitation and sentenced to five years confinement, probated, and a $ 3,000 fine. After the trial judge announced her sentence, applicant indicated her desire to appeal and requested a court-appointed attorney. The judge conducted a hearing on applicant's indigency. Applicant testified she did not have any dependents and that she was living with her fiance. She worked two or three days a week installing sheet rock and rode to work with a neighbor. Applicant stated that looking for a different job with a steady income was difficult because she did not have adequate transportation. Applicant was in the process of repaying her father for money he posted on her trial bond and retaining her trial attorney. Additionally, applicant still owed her trial attorney $ 1,400. Applicant maintained she could not afford to pay for a statement of facts or hire an attorney for purposes of an appeal.

The trial judge asked applicant how much money she could "come up with on a monthly basis" to which applicant responded, "probably about fifty a week." The trial court made a "limited finding of indigency in regard to statement of facts and in regard to appointed -- or in regard to counsel on appeal." [1] The judge appointed applicant appellate counsel and ordered the court reporter to prepare a statement of facts. Applicant was ordered to pay $ 50.00 per week to the district clerk for the statement of facts and the attorney on appeal until further order of the court. [2]

1 The judgment reflects a contrary conclusion stating that the "Court found that [applicant] is not indigent. However, due to the limitations of time within which [applicant] must act to perfect her appeal, the Court appointed" an attorney for applicant on appeal.

2 This payment was not a condition of applicant's probation.

A few months later, the State filed a Motion to Show Cause alleging applicant failed to make any of the $ 50.00 weekly payments ordered by the trial court. Appearing pro se at the hearing on the motion, applicant informed the judge she was employed at Taco Bell working eight hours a day, six days a week. She was living by herself and paying rent on a house her father vacated. Applicant was still without transportation and rode to work each day with a neighbor. The judge told applicant

> **you better be making these payments, Ms. Gonzales, or you are not going to like what happens.** And I am going to tell you, you are going to need to have an attorney representing you if you don't tend to business . . . . Otherwise you may be going to jail.

The trial judge continued the hearing for three weeks to see what kind of progress applicant made on the payments.

When the hearing resumed, applicant, again appearing pro se, still had not made a payment. The trial judge stated

> I believe I had previously admonished you about retaining an attorney and told you that I did not find that you were indigent so I would [sic] appoint you an attorney.
>
> * * * I don't find you are in a situation where you're indigent as I determine that to be, so I'm not going to appoint you an attorney.

The State produced evidence of applicant's failure to make any of the $ 50.00 payments. [3] The record of the hearing demonstrates that applicant did not understand the proceeding and repeatedly asked the judge for explanations. Applicant did not put on any evidence nor did she argue in her own behalf. The judge held applicant in contempt and sentenced her to ninety days in jail. The judge provided that applicant's sentence would be suspended after thirty days if applicant paid Bosque County $ 750.00, the amount past due on her court ordered payments.

3 There was evidence that applicant made one $ 50.00 payment, however, it was made outside the dates alleged at the hearing.

I.

In her first ground for review, applicant claims that her confinement resulting from her failure to make the court ordered weekly payments amounts to her being imprisoned for failure to pay a debt in violation of TEX.CONST.art. I, § 18. [4] She notes this Court's opinion in Curry v. Wilson, 853 S.W.2d 40 (Tex. Crim. App. 1993) provides some background on the issue.

4 TEX.CONST. art. I, § 18 provides

No person shall ever be imprisoned for debt.

While applicant phrases his argument in an "imprisonment for debt" context, he is really making an Equal Protection claim. These concepts are interrelated. We have said that art. I, § 18 is inapplicable to criminal proceedings:

> In general, the liability to pay money growing out of contract constitutes a debt within the meaning of the constitutional guaranty. . . . Hence the phrase imprisonment for debt has no application to criminal proceedings, nor to imprisonment meted out as a punishment for violation of the laws and for a refusal to submit to the penalty imposed.

Ex parte Robertson, 27 Texas Ct. App. 628, 11 S.W. 669 (1889); Dixon v. State, 2 Tex. 481 (1847).

A.

The defendant in Curry was appointed counsel for his criminal trial. After the defendant was acquitted, the trial court notified the defendant that it was aware he had the resources to pay for his representation, and that pursuant to Tex.Code Crim. Proc. Ann. Art. 26.05(e), he would be required to repay the costs of the legal services provided by the county. In a writ of prohibition to this Court the defendant claimed art. 26.05(e), the Texas recoupment statute, violated the Due Process and Equal Protection provisions of the Texas and Federal Constitutions. We held art. 26.05(e) did not violate Due Process or Equal Protection in the manner argued by the defendant.

The issue in the instant case, which was left open in Curry, is whether a defendant can be held in contempt and confined for violating an order made pursuant to art. 26.05(e). Tex.Code Crim.Proc. Ann. art. 26.05(e) states

> **if the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay the amount that it finds the defendant is able to pay.**

While art. 26.05 provides for the recoupment of legal fees, it does not set forth the procedure by which to do so, nor the consequences resulting from a failure to make such payments.

Rather than contempt proceedings, applicant argues that the trial court should have utilized the procedures for collection of fees and expenses set forth in Tex.Code Crim.Proc. Ann. arts. 42.12 and 43.03. Article 42.12 requires that prior to making payment of fines, costs, restitution, or reimbursement for court appointed counsel a condition of probation, the trial court "consider" a probationer's ability to make such payments ordered by the court. Tex.CodeCrim.Proc. Ann. art. 42.12, § 11(b); Pennington v. State, 902 S.W.2d 752, 754 (Tex. App.-- Fort Worth 1995, pet. ref'd). Article 43.03 provides that if a defendant sentenced to pay a fine or costs defaults in payment, the court may not order the defendant confined unless the court

> (1) determines that the defendant is not indigent or determines that the defendant wilfully refused to pay or failed to make sufficient bona fide efforts le-

> gally to acquire the resources to pay . . ..; and
>
> (2) determines that no alternative method discharging fines and costs . . . is appropriate for the defendant.

Tex.CodeCrim.Proc. Ann. art. 43.03(d). Applicant claims the trial court's action in attempting to collect payments outside the guidelines of arts. 42.12 and 43.03 resulted in the type of Equal Protection violation the United States Supreme Court discussed in Williams v. Illinois, 399 U.S. 235, 26 L. Ed. 2d 586, 90 S. Ct. 2018 (1970) and Tate v. Short, 401 U.S. 395, 28 L. Ed. 2d 130, 91 S. Ct. 668 (1971).

In Williams, the Court held that a State may not keep a defendant incarcerated beyond the maximum period of confinement authorized by statute on the basis that the defendant is unable to pay the fine imposed as part of his sentence. In Tate, the Supreme Court held that the defendant could not be imprisoned for failure to pay a fine imposed for violating a "fine only" statute due to his indigent status. Tate, 401 U.S. at 397-98. The Court found equal protection violations in Williams and Tate because the defendants suffered confinement solely due to their financial inability to pay a fine whereas those defendants with access to funds could avoid imprisonment.

Applicant does not explain how the equal protection violations the Court found in Williams and Tate apply to this case or how following the procedures outlined in arts. 42.12 and 43.03 would prevent such violations from occurring here. We note that neither art. 42.12 nor art. 43.03 directly applies to applicant because the trial court's judgment is being appealed. As such, the court was not obligated to order payments according to the guidelines of arts. 42.12 and 43.03. As best we can ascertain, applicant's argument is that following the procedures in arts. 42.12 and 43.03 cited above before a trial court finds a defendant in contempt and orders him confined for failure to make payments pursuant to art. 26.05(e) would safeguard against an Equal Protection violation arising from a defendant's confinement based solely on his indigent status. To an extent, we agree.

It would be illogical for a trial court to appoint a defendant counsel and then find the defendant in contempt and sentence him to prison for failure to reimburse the county for the expense of his defense without first considering his ability to make payments. This is true even if a trial court appoints counsel for a non-indigent defendant due to time constraints, as occurred in the instant case. Article 26.05 mandates as much, proving that "the court shall order the defendant to pay the amount that it finds the defendant is able to pay." If the court ignores the defendant's ability to make payments, whether the payments are a condition of probation or for the costs of one's legal defense, it is possible that a defendant may be imprisoned solely due to his indigent status. Language in both Williams and Tate suggests there is a distinction between a defendant who fails to make payments solely due to his indigent status and a defendant who has the funds to make payments, but refuses to do so. See Williams, 399 U.S. at 242 n.19 (stating that "nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs"); Tate, 401 U.S. at 400 (emphasizing its holding did not "suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so") (emphasis added). In the first case, a court is not likely to find an equal protection violation. The requirement of article 26.05(e), as well as that of 42.12 and 43.03, that the trial court take into consideration a defendant's ability to make payments recognizes the importance of this distinction.

B.

Another case we can look to for guidance is Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). In Fuller, the Supreme Court upheld the validity of an Oregon recoupment statute which required that several conditions be satisfied before a defendant could be required to repay the costs of his legal defense, including the provision that "the court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them." Id. at 45. The Oregon statute also provided that an individual could be held in contempt for failure to repay unless he showed that "his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment . . . ." Id. at 46 (emphasis added). The statute contained the type of constitutional safeguard suggested in Williams and Tate, that is, imprisonment for failure to satisfy a monetary obligation should be based upon a defendant's refusal to pay rather than a defendant's mere financial inability to pay. See id. (noting "defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no 'manifest hardship' will result").

We find instructive the fact that the Fuller Court upheld the validity of a recoupment statute specifically allowing for enforcement through contempt. Although noting the defendant did not raise an "imprisonment for debt" issue, the Court nonetheless stated that the Oregon recoupment statute was "not a collection device used by the State to enforce debts to it, but [] a sanction imposed for 'an intentional refusal to obey the order of the court.'" Id. at 48 n.9.

We agree that finding a defendant in contempt and ordero enforce a court order. Our recoupment statute should operate in the same manner. **Accordingly, we hold that, at a minimum, a trial court may not order a defendant confined for failure to repay the costs of his legal defense pursuant to art. 26.05(e) unless the court considers the defendant's ability to make the payment. The trial court's power to order reimbursement should be limited to the extent a defendant is reasonably able to do so. See art. 26.05(e) (stating "the court shall order the defendant to pay the amount that it finds the defendant is able to pay"). If that requirement is followed, there is no reason a defendant could not be held in contempt and confined for failure to satisfy a court's order under art. 26.05.** The next logical step in our analysis of this case would be to apply this rule to the facts here and decide if the trial court considered applicant's ability to reimburse the county. However, due to our disposition of applicant's second ground for review, we need not make that determination.

II.

In his second ground for review applicant claims the trial court's failure to advise her of her right to counsel at the contempt hearing deprived her of due process under U.S. CONST. amend. VI and XIV, due course of law under TEX. CONST. art. I, § 10, and the right to effective assistance of counsel as guaranteed by both constitutions and Tex.CodeCrim.Proc. Ann. art. 1.051. **We agree.**

A.

The right to counsel is fundamental and essential to a fair trial. See Gideon v. Wainwright, 372 U.S. 335, 342, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963). The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. It is well settled that the Sixth Amendment right to counsel is not forfeitable, but may only be waived by the conscious and intelligent decision of the person who holds the right. Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). The Texas constitution also specifically guarantees the assistance of counsel. TEX. CONST. art. I, § 10. The Texas Legislature has taken steps to ensure this constitutional mandate by enacting a statutory right to representation in criminal proceedings. [5]

5 Tex.Code Crim.Proc. Ann. art. 1.051 provides in pertinent part

> (a) A defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding. . . .
>
> * * *
>
> (c) An indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement . . . .

We have not found any case from this Court addressing an individual's right to counsel at a contempt hearing. However, other courts have considered this issue in the context of a contempt hearing resulting from failure to pay child support. Although the cases are not binding authority on this Court, we find the decisions helpful to the resolution of the instant case.

In Ex parte Goodman, 742 S.W.2d 536 (Tex. App. -- Ft. Worth 1987, orig. proceeding), relator was found in contempt for failure to pay child support and sentenced to 120 days in jail. [6] Relator challenged the validity of the contempt hearing because he was not afforded assistance of counsel and the record did not show he waived such right. Goodman, 742 S.W.2d at 539. The court of appeals stated

6 The procedural history of Goodman is as follows: At the contempt hearing, relator was sentenced to 144 days in jail, to be suspended after serving 24 days, during a 48 month period of probation. Subsequently, relator's ex-wife filed a Motion to Revoke Probation alleging relator failed to make the child support payments due. At the hearing on the motion, the court found relator failed to comply with the order suspending his commitment by failing to make the payments due and was committed to custody to serve 120 days unless he tendered payment of $ 6,643.80, the child support past due.

> it is settled law in this State that when an indigent is charged with contempt, is not represented by counsel and has not intelligently waived the right to assistance of counsel, a court may not, without violating the constitutional right to assistance of counsel, impose imprisonment as a punishment for disobedience of a child support order.

Id. (citations omitted). Quoting the Texas Supreme Court, the court of appeals noted "contempt proceedings are generally criminal in their nature whether they grow out of criminal or civil actions." Id. at 540. In view of this, the court stated, "we find it inescapable that the right to counsel afforded to those accused of a crime by the provisions of the Texas Code of Criminal Procedure apply equally to alleged constructive criminal contemnors." The criminal code provisions the court cited, which included art. 1.051, all address a defendant's right to counsel and right to appointment of counsel if indigent. See Tex.CodeCrim.Proc. Ann. art. 1.051 ("A defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding"); art. 15.17 ("The magistrate shall inform in clear language the person arrested . . . of his right to have an attorney present, . . ., of his right to request the appointment of counsel if he is indigent and cannot afford counsel . . ."); art. 26.04 ("Whenever the court determines . . . that an accused charged with a felony or a misdemeanor punishable by imprisonment is too poor to employ counsel, the court shall appoint one . . ."). The court held "the appearance without counsel of an alleged constructive contemnor at a contempt hearing requires the court to advise the alleged contemnor of his right to be represented by counsel and his right to request the appointment of counsel if he is indigent and cannot afford counsel."

We agree with the court of appeals' reasoning in Goodman. Like our sister court, we recognize that contempt proceedings are quasi-criminal in nature. See Ex parte Cardwell, 416 S.W.2d 382, 384 (Tex. 1967). Accordingly, proceedings in contempt cases should conform as nearly as practicable to those in criminal cases. See Ex parte Sanchez, 703 S.W.2d 955, 957 (Tex. 1986); Deramus v. Thornton, 160 Tex. 494, 333 S.W.2d 824 and as the Goodman court asserted, that right to counsel should similarly extend to criminal contemnors.

We also note that "the right to counsel turns on whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or 'civil.' " Ex parte Strickland, 724 S.W.2d 132, 134 (Tex. App. -- Eastland 1987, orig. proceeding) (quoting Ridgway v. Baker, 720 F.2d 1409 (5th Cir.1983)). "No person may be deprived of his liberty who has been denied the assistance of counsel . . . ." Argersinger v. Hamlin, 407 U.S. 25, 37-38, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972). Contemnors are entitled to procedural due process protections before they may be held in contempt; this is especially true when the results of a contempt proceeding may lead to incarceration. Cf. Ex parte Keene, 909 S.W.2d 507, 507-08 (Tex. 1995) (holding contemnor unlawfully confined because trial court did not advise him of his right to counsel or of his right to appointed counsel in violation of Family Code § 14.32 (f) which provides that if incarceration is possible result of contempt proceedings, "the court shall inform a respondent who is not represented by an attorney of his right to be represented and his right to the appointment of an attorney if he is indigent"). We note that several federal circuits addressing this issue have held that a defendant in a contempt proceeding who faces imprisonment as a result of the proceeding is entitled to representation. See, e.g., United States v. Anderson, 553 F.2d 1154, 1155 (8th Cir. 1977) (stating due process requires right to counsel be extended to contempt proceeding where defendant may be imprisoned); In re Di Bella, 518 F.2d 955, 959 (2nd Cir. 1975) (holding defendant entitled to counsel in civil contempt proceeding where defendant faced with prospect of imprisonment); see also United States v. Bobart Travel Agency, Inc., 699 F.2d 618, 620 (2nd Cir. 1983) (recognizing "contempt is an area of the law in which counsel's advice is often indispensable"); Brooks v. United States, 686 A.2d 214, 233 (D.C.App. 1996) (Ruiz, J., concurring) (due process requires assistance of counsel in contempt proceedings that result in incarceration); Wisconsin v. Pultz, 206 Wis. 2d 111, 556 N.W.2d 708, 717 (Wis. 1996) (trial court must advise pro se defendant in contempt proceeding which might result in incarceration that he is entitled to be represented by an attorney, and if found indigent, entitled to appointment of counsel).

For the foregoing reasons, we hold that a contemnor is entitled to representation, either by retained or appointed counsel, in a contempt proceeding.

Turning to the instant case, we note that applicant was held in contempt and sentenced to ninety days in jail. It is clear that the of applicant's liberty. Based upon this fact, coupled with our view that the Code of Criminal Procedure provisions entitling a defendant to representation should apply to criminal contemnors, **we**

find applicant had a right to be represented by counsel at the contempt proceeding.

B.

Having found that applicant was entitled to representation, we must now determine whether applicant was informed of this right. We find that the trial court had the duty to assure that applicant was aware of her right to retain an attorney or to be appointed counsel if the court determined she was indigent. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of the trial court, in which the accused-- whose life or liberty is at stake-- is without counsel." Zerbst, 304 U.S. at 465. This Court has held "the appearance of a criminal defendant in court without counsel [] necessitates an examination by the trial judge" as to whether the defendant is aware of his right to representation. Oliver v. State, 872 S.W.2d 713, 716 (Tex. Crim. App. 1994).

The State argues the record reflects applicant was admonished of her right to counsel. First, the States claims she was informed of this right prior to the hearing when the judge stated "and I am going to tell you, you are going to need to have an attorney representing you if you don't tend to business." However, we do not find that statement can be interpreted to convey to applicant her right to representation or appointment of counsel at the contempt proceeding. The State also points to a place in the statement of facts where the trial court stated "I believe I had previously admonished you about retaining an attorney and told you that I did not find that you were indigent so I would [sic] appoint you an attorney." Although the judge claimed to have admonished applicant of her right to counsel, after a thorough search of the record, we cannot find any such admonishment. Finally, the State notes applicant announced she was ready to proceed with the contempt hearing. From the record, however, it is obvious that applicant did not understand the contempt proceedings. She did not understand the words "contempt," "indigent," and "cumulation," nor the concept that she could not be forced to testify at the contempt hearing. That applicant stated she was ready to proceed does not in any way detract from either her right to representation or the trial court's obligation to inform her of that right.

There is nothing in the record to suggest applicant intended to waive her right to counsel. "It is essential that no criminal defendant be subjected to formal adversarial judicial proceedings without a lawyer unless there is a basis for concluding that he knowingly, voluntarily, and intelligently relinquished or abandoned his right to the assistance of counsel." Id. at 715 (citing North Carolina v. Butler, 441 U.S. 369, 60 L. Ed. 2d 286, 99 S. Ct. 1755 (1979)). Because applicant was not notified of her right to counsel at the contempt hearing, we cannot conclude her pronouncement that she was ready to proceed amounted to an abandonment of her right to representation. Cf. Oliver, 872 S.W.2d at 716 ("It is apparent from the settled case law of this Court and the United States Supreme Court that failure to request counsel does not amount to the volrrectly asserts that applicant was not entitled to have an attorney appointed to represent her until such time as the court determined that she was indigent. Regardless of applicant's financial resources, however, she was entitled to know that she had a right to representation at the contempt hearing. A defendant--indigent or otherwise--is entitled to be represented by counsel in a criminal matter. Tex.CodeCrim.Proc.Ann. art. 1.051(a), (c); Johnson v. State, 894 S.W.2d 529, 532 (Tex. App. -- Austin 1995, no pet.). **The error here was the fact that the trial court failed to inform applicant of this right.**

Trial judges presiding over contempt proceedings should recognize that under the rule we announce today, a defendant must be informed of his right to representation, and if found indigent, his right to appointment of counsel.

We grant applicant's writ of habeas corpus and order that she be released based upon our finding that her conviction for contempt and the incarceration arising out of that conviction are void for the reason which we have stated.

HOLLAND, JUDGE

Delivered May 21, 1997

CONCUR BY: BAIRD; KELLER

DISSENT BY: BAIRD; KELLER

DISSENT

BAIRD, Judge

CONCURRING AND DISSENTING OPINION

Applicant contends she is illegally restrained by an order of contempt in the 220th District Court of Bosque County. Specifically, she contends: 1) her restraint violates Tex. Const. art. I, § 18, and various statutes, because she is being imprisoned for the failure to pay a debt; and, 2) she was deprived of counsel at the contempt hearing.

I agree with the majority that applicant had a right to be represented by counsel at the contempt proceeding. Ante, at 836. Additionally, I agree with the majority that the trial judge failed to inform applicant of this right. Ante, at 837. Therefore, I join part II of the ma-

jority opinion. However, for the following reasons I dissent to part I of the majority opinion because I do not believe the trial judge is presently authorized to order recoupment.

Tex. Code Crim. Proc. Ann. art. 26.05(e) provides:

> If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay the amount that it finds the defendant is able to pay. [1]
>
> 1 All emphasis is supplied unless otherwise indicated.

In Curry v. Wilson, 853 S.W.2d 40 (Tex.Cr.App. 1993), we considered whether a trial judge may seek recoupment of monies expended for the legal representation of an indigent. Curry was charged with involuntary manslaughter, and received appointed counsel. Following his acquittal, Curry was ordered to pay for his representation and a payment plan was established for recoupment. Id., 853 S.W.2d at 42-43. We granted review to determine whether a trial judge could order recoupment of monies expended on behalf of a defendant who had been acquitted. Id., 853 S.W.2d at 44. We held article 26.05(e) authorized the trial judge "to order repayment of the county funds expended for applicant's appointed legal defense by virtue of [the judge's] determination that applicant was financially able to offset those costs." Curry, 853 S.W.2d at 45.

Even though the trial judge had issued a capias pro finum, the warrant was withdrawn and we did not address whether Curry was illegally restrained for failure to make payments as per the recoupment order. Id., 853 S.W.2d at 43. Therefore, the question we did not reach in Curry is expressly presented in the instant case: Is applicant illegally restrained?

Under the plain language of art. 26.05(e), recoupment is authorized only for "legal services provided." The costs of the legal services provided are not known until the criminal matter becomes final. In cases such as Curry v. Wilson, the matter is final when the defendant is acquitted or the prosecution is otherwise terminated. However, when the trial level prosecution ends in a conviction and sentence, the matter may be far from over. In such cases the defendant may file a motion for new trial. In such an event, the matter will not be final until the motion was granted, denied or overruled by operation of law. And, in the latter instances, the defendant may pursue an appeal. These legal services will normally include preparation of a statement of facts, a brief on behalf of the appellant and perhaps a motion for rehearing. Additional legal services may be required if either the State or the appellant seeks discretionary review. And, if such review is granted, the parties will again be required to file briefs and perhaps travel to Austin to present oral argument. Finally, upon our decision, legal services may be required to either filed or respond oral argument.

Because the costs of the legal services provided in a criminal matter are subject to any number of variables, they are undeterminable until the criminal matter becomes final. Therefore, I would use this case to establish the following bright-line rule regarding recoupment:

> 1. If the trial level prosecution ends with an acquittal or is otherwise terminated, recoupment is authorized and may begin immediately;
>
> 2. If the trial level prosecution ends with a conviction and sentence, and the defendant opts not to appeal, recoupment is authorized and may begin at the time the time for the filing of a motion for new trial or giving notice of appeal has expired;
>
> 3. If the trial level prosecution ends with a conviction and sentence, and the defendant opts to appeal, recoupment is authorized but may not begin until the mandate of affirmance has issued; or,
>
> 4. If the trial level prosecution ends with a conviction and sentence and the trial judge grants a new trial, or the case is appealed and the appeal results in an acquittal or reversal of some phase of the trial level prosecution, recoupment is not authorized until the occurrence of either 1, 2, or 3. [2]
>
> 2 Additionally, I would hold that in cases under 2 or 3 the better method of obtaining recoupment is either Tex. Code Crim. Proc. Ann. art. 42.12, § 11(a)(8) or 43.03.

The instant criminal matter is not final because none of these events have occurred. Therefore, the trial judge is not authorized to order recoupment.

Consequently, applicant is illegally restrained.

With these comments, I respectfully dissent to part I of the majority opinion.

BAIRD, Judge

Overstreet, Mansfield and Price, JJ., join this opinion.

(Delivered May 21, 1997)

En Banc

KELLER, J.

CONCURRING AND DISSENTING OPINION

I agree that a defendant may be held in contempt and confined for violating an order made pursuant to art. 26.05(e). I also agree that a contemnor is entitled to legal representation in a contempt proceeding. But I do not agree with the majority's conclusion that applicant is entitled to relief from the order of contempt in this case.

The majority determines that applicant is entitled to relief because she was not informed of her right to have counsel at the hearing. First, that is not the basis of applicant's claim. In her Amended Petition for Writ of Habeas Corpus, she alleges that the trial court's failure to *appoint* counsel violated her rights under various constitutional and statutory provisions. She does not claim that the court failed to inform her that she had a right to counsel. Since the majority, as I understand it, accepts the trial court's finding that applicant was not indigent, applicant's claim should fail - the court was not required to appoint counsel to a non-indigent.

Second, as applicant concedes in her Amended Petition, the trial court "insisted that the Applicant hire] a lawyer." The judge told applicant that if she did not make her payments, she would need a lawyer. He asked her if she understood that and she replied, "Yes." This is the admonishment to which the judge later referred when he told her that he was not going to appoint an attorney because she was not indigent. Though applicant was not told in so many words that she had a right to counsel, the judge's comments put applicant on notice that she needed an attorney. It seems to me that such a statement necessarily informed her that she had a right to counsel. And, again, applicant does not argue that the court failed to inform her of the right to counsel.

In short, the majority grants relief on the basis of a claim not made by applicant. And, even if she had claimed that the court failed to inform her of her right to counsel, applicant would not be entitled to relief. I therefore join Parts I and IIA of the majority opinion but, with respect, I dissent to Part IIB.

KELLER, J.

DELIVERED: May 12, 1997

TEXAS

MUNICIPAL COURT - JUSTICE COURT

NEWS

VOL. XV, NO. 11 JUNE, 2002

EL PASO SUED OVER JAILING INDIGENTS

The City of El Paso has been sued over allegedly jailing persons unable to pay fines assessed at the Court.

The lawsuit was filed in late March and alleges the City has violated the United States Constitution. It has been filed by El Paso attorney Fernando Chacon.

In the suit, Chacon alleges the City is "engaging in and condoning a continuing pattern and practice of incarcerating people unable to pay their misdemeanor traffic fines due to their status as indigents."

Named in the lawsuit are the City of El Paso, El Paso County, the El Paso County Sheriff, the Mayor and City Council of El Paso and the Municipal Court Judges.

Continued on page 2

Inside

EL PASO SUIT *Continued*

There are presently four plaintiffs named in the case. Chacon has requested the case be certified a class action so more people may be added.

Among the four plaintiffs suing the City and its officials are Jorge Herrera, a high school student who laid out $9,500 in traffic fines by staying in jail 47 days and Juan Reyes, who has received recent tickets for no belt and failure to maintain financial responsibility. Reyes claims to be disabled, unable to pay, and he fears an arrest warrant will be issued.

The plaintiffs are requesting an unspecified amount of money damages and want the City to change its policies toward jailing indigent defendants unable to pay assessed fines.

The case has not been set for

derland Saturday, March 30, 2002

Samaniego

wsuit targets jailing of indigents for fines

Jennifer Shubinski
El Paso Times

El Paso lawyer Fernando Chacon has filed a federal lawsuit over the city's alleged practice of jailing indigent people for their inability to pay traffic fines – a practice he believes is unconstitutional.

"These people are going before a judge, not given an attorney, not told they can file a writ of habeas corpus, so they can get out (of jail). It's reprehensible," Chacon said.

Named in the lawsuit are El Paso County, Sheriff Leo Samaniego, the city of El Paso, the mayor, the City Council and municipal court judges.

Assistant City Attorney Laura Gordon said that she was aware of the lawsuit but that she couldn't talk in detail about pending litigation.

"I feel confident the city is complying with all the statues and ordinances," she said. "We're doing everything we're supposed to do."

El Paso County Sheriff's Department spokesman Rick Glancey said, "We can't discuss any elements of any pending litigation."

he lawsuit, Chacon alleges that the city and county are "engaging in and condoning a continuing pattern and practice of incarcerating people unable to pay their misdemeanor traffic fines due to their status as indigents."

Chacon said the practice violates U.S. Constitution.

"The issue is the Constitution prohibits ... (a person) from being jailed because of the inability to pay fines," he said. "It is against the equal protection clause and the due process clause."

Chacon is seeking class certification so he can add plaintiffs to the four already named in the lawsuit. He is seeking restitution for an unspecified amount and wants the city to change its policy.

One of the plaintiffs, Raymond Telles High School student Jorge Herrera, 17, of the 5300 block of Beatonne, was jailed for 47 days for failing to pay $9,500 in traffic tickets.

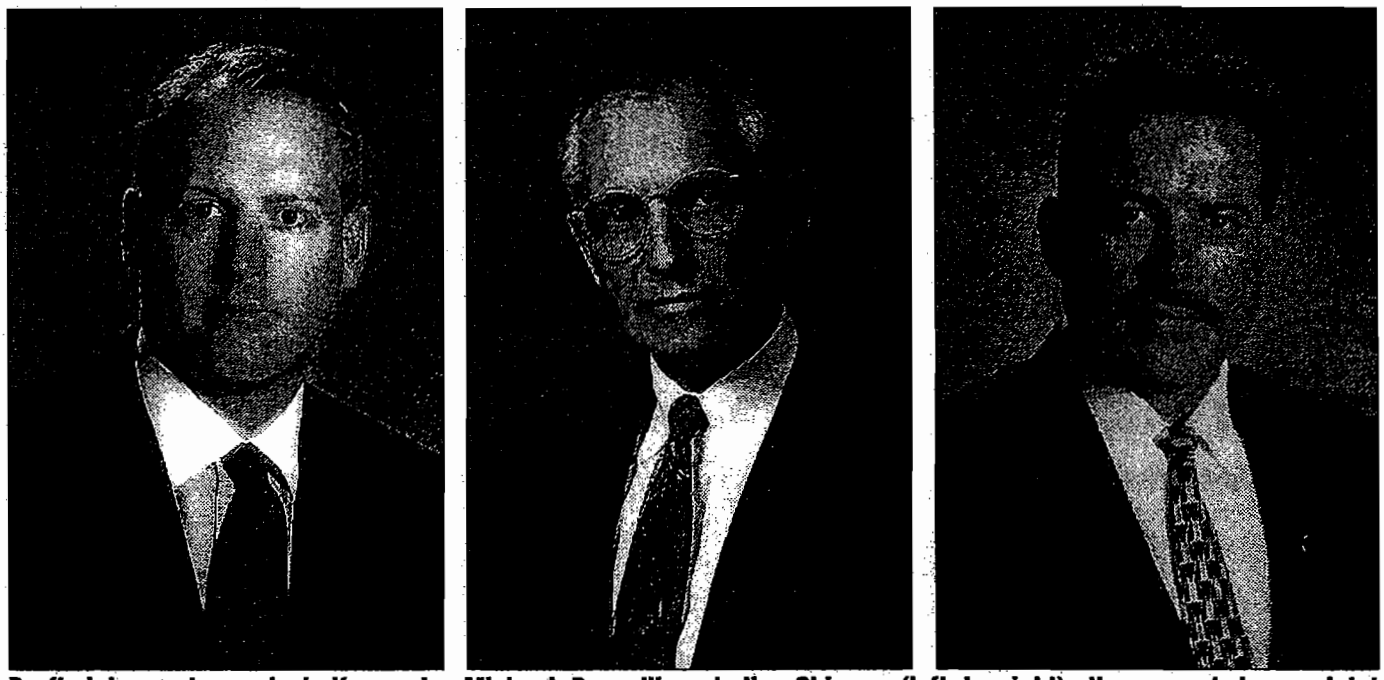
"I am indigent and was incarcerated for failure to pay fines from traffic tickets," said Herrera in an affidavit files with the lawsuit.

Juan Francisco Reyes, 53, of the 1000 block of Sunland Park said in an affidavit that he is poverty-stricken and that he worries an arrest warrant will be issued for him because of recent tickets.

Reyes, who is disabled and lives on $530 a month from Social Security, was test-driving a car with California plates for his sister when he was pulled over and cited for no registration, for not wearing a seat belt and for ure to maintain financial responsibility. The fines total more than $500.

Jennifer Shubinski may be reached at jshubinski@elpasotimes.com

PLAINTIFF ALLEGES CITY FAILED TO GIVE DETAINEES INDIGENCY HEARINGS



Drafted by partners Jack Krona Jr., Michael Pezzulli and Jim Skinner (left to right), the amended complaint in *DeLeon* broadens the scope and potential size of a brewing Haltom City controversy.

by MIRIAM ROZEN

It didn't take Celestina DeLeon long to conclude there was something different about Haltom City.

North Richland Hills police arrested DeLeon, a 27-year-old mother of five and resident of Fort Worth, while she drove her 1990 Honda Accord two-door in January 2001. The police stopped her because her car matched a description of a vehicle seen fleeing from a gas station after a theft. Although police discovered DeLeon wasn't the suspect they were looking for, police did find out she had outstanding misdemeanor tickets in Tarrant County and Haltom City.

DeLeon says she was incarcerated for a few days in the Tarrant County Detention Center, after which she says she pleaded guilty at her arraignment to violating a park curfew. The judge released her for time served, and DeLeon then was transferred to the Haltom City jail.

In Haltom City on Jan. 6, 2001, DeLeon pleaded guilty to multiple misdemeanor traffic violations. She says she didn't have an attorney. "I didn't even know I could get an attorney, so I didn't ask for one, and they didn't offer one," DeLeon says.

Her fines totaled $2,400. To enter her guilty plea, DeLeon signed a Haltom City Municipal Arraignment form that stated: "If I cannot pay the fines, then I shall sit them out in the Haltom City Jail at the rate of $100 per day." "I knew right away it wasn't right, because it wasn't anything like Fort Worth," DeLeon recalls.

In her "Plaintiff's First Amended Complaint and Class Action" filed on Feb. 18 in the U.S. District Court for the Northern District in Fort Worth, DeLeon alleges that the Haltom City municipal judge at the time and Haltom City's council members (excluding Mayor Calvin White) violated DeLeon's and possibly 5,000 other detainees' constitutional rights during an unspecified time period by failing to provide detainees with indigency hearings or appointed counsel, or informing them of their rights to counsel at critical stages of proceedings. The complaint alleges that the defendants violated the detainees' constitutional rights to due process and counsel, and their rights to be free from unlawful seizure — all of which are protected under the Fourth, Fifth, Sixth and 14th amendments of the U.S. Constitution.

In her complaint, DeLeon says that at her Haltom City plea hearing she told the municipal judge she did not have the money to pay the fines, and the judge sentenced her to serve out her fines at $100 a day — with a promise, she recalls, of extra credit earned if she helped with chores, such as cleaning police cars and mopping floors.

Drafted by partners Jack Krona Jr., Michael Pezzulli and Jim Skinner of Dallas' Pezzulli Krona Skinner, the amended complaint significantly broadens the scope and potential size of a brewing Haltom City controversy that began in August 2002 after those same lawyers drafted a dozen complaints alleging that

◀ continued from page 9

female detainees, including DeLeon, were sexually assaulted or harassed while incarcerated.

In her amended complaint — *Celestina DeLeon, Individually and on Behalf of All Others Similarly Situated v. City of Haltom City, et al.* — now pending before U.S. District Judge John McBryde, DeLeon alleges that while she "was wrongfully incarcerated" she was subjected to "unconstitutional conditions of confinement . . . forced to wear sexually degrading clothing for the sole purpose of degrading her . . . [and] sexually harassed by male jailers who intentionally invaded her privacy for no legitimate purpose." The jail, as a matter of policy, required all detainees to wear their jumpsuits without any undergarments, alleges DeLeon's lawyer Pezzulli. As a result, DeLeon alleges in her complaint that the women's breasts and genital areas were exposed on the video camera system when they had to use the toilet.

The city's lawyer insists the municipal court did conduct indigency hearings for defendants.

DeLeon alleges in her amended complaint that city council members "had final authority for all policies relating to the staffing and operation of the Jail," and that they had "final authority to institute high-level supervisory and information systems to ensure that the council was reasonably informed of the Jail's conditions."

DeLeon seeks unspecified compensatory and punitive damages for herself and all other former Haltom City detainees as a well as a permanent injunction preventing the municipality from detaining defendants without indigency hearings.

"They never asked me if I wanted a lawyer," DeLeon alleges.

Wayne Olson, a partner in Fort Worth's Taylor, Olson, Adkins, Sralla & Elam who serves as regular outside council for Haltom City, vehemently denies the allegations in DeLeon's amended complaint. He insists the city's municipal court under Judge Jack Byno did conduct indigency hearings for defendants. He says the Haltom City Arraignment Form signed by DeLeon — which stated, "If I cannot pay the fines, then I shall sit them out in the Haltom City Jail at the rate of $100 per day" — "had nothing to do with indigency." Olson contends, "I think the language is merely there to state how much credit would be given for time served."

He also says that the city's not-yet-filed response to the amended complaint "will address the fact that the City Council is not responsible for the jail facility." He says that the council members don't have a supervisory role over the jail or the municipal court.

Jim Jeffrey, founder of the Law Office of Jim Jeffrey in Arlington and the lead lawyer representing the city in this case, did not return two phone calls seeking comment on the amended complaint before presstime on Feb. 27.

Byno did not return five phone calls seeking comment. On Jan. 14, Byno resigned from the bench. In a Jan. 15, 2003, article, the *Fort Worth Star-Telegram* reported Byno as saying, "It's time to move on," and that he wanted to "become a normal guy again."

DeLeon's amended complaint alleges that Byno was the judge who sentenced her in January 2001. But on the arraignment form DeLeon signed, Byno's printed name at the bottom is crossed out and signed by a visiting judge. DeLeon says she initially thought she appeared before Byno, but in an interview with *Texas Lawyer* she says it may have been another judge.

Krona says he will investigate further when more depositions are taken but that his client told him she had been before Byno and the allegations remain the same even if she did appear before a visiting judge.

Indigency Hearings

Kyle Knapp, who was appointed as Byno's interim successor by the Haltom City Council, says that he does conduct indigency hearings on a regular basis in the Haltom City municipal court. He says he does not know if Byno conducted them. Knapp says he also conducted them in the past when he served as a substitute or alternate for Byno. Knapp says that his court uses a different arraignment form than the one signe by DeLeon in 2001, which specified the $100 per da rate for those who couldn't pay their fines.

On Knapp's Haltom City municipal arraignmen form there is a section labeled "Indigency Finding. The form notes that if the court finds the defendan indigent, the "defendant shall be released in order t complete community service in lieu of paying th fine."

DeLeon seeks a permanent injunction preventing the municipality from detaining defendants without indigency hearings.

In other Texas municipalities, such as Dallas and Houston, indigents are not sent to jail for misdemeanor violations similar to DeLeon's unless they opt for sentences over the chance to settle their fines by doing community service.

"If they come to court on a regular arraignment and they say they are indigent and they cannot pay the fine, they would never get sent to jail," says Nelly Santos, the assistant director for the municipal court judicial department in Houston, noting that such incarceration would violate a defendant's constitutional rights.

Since he began serving on the municipal bench in Haltom City in January, Knapp says two city council members and mayor White have asked him whether he conducts indigency hearings. "I thought it was a nonsensical question," says Knapp, because as a municipal judge he knows he must conduct indigency hearings.

White did not return a phone call seeking comment. But Olson, Haltom City's regular outside counsel, says he believes the mayor and council members have been concerned recently about indigency hearings because, given plaintiffs lawyers' recent open-records requests, they had anticipated a complaint would be filed related to indigency findings.

Knapp says he has not discussed with Byno the controversy over municipal court practices. "The only conversation I've had is to thank him for leaving me some good people to work with," Knapp says.

Knapp says a couple of defendants a week provide him with enough evidence of their indigency that he assigns them to community service to settle their fines as an alternative to jail sentences.

Knapp also says the city has halted, for the time being, the practice of sending jail inmates out on work detail to perform services, such as landscaping chores and cleaning city-owned vehicles, to reduce the size of their fines and thereby reduce their jail time.

Olson says those practices ceased not because they were regarded as illegal but because the newspaper headlines about the litigation dogged the city enough that officials didn't want to add fuel to the controversy.

Miriam Rozen's e-mail address is mrozen@texaslawyer.com.

THE 2005 HHS POVERTY GUIDELINES

One Version of the [U.S.] Federal Poverty Measure

[*Federal Register* Notice with 2005 Guidelines – Full Text]
[Prior Poverty Guidelines and *Federal Register* References Since 1982]
[Frequently Asked Questions (FAQs)]
[Information Contacts/References – Poverty Guidelines/Thresholds/Lines and Their History]
[Computations for the 2005 Poverty Guidelines]

There are two slightly different versions of the federal poverty measure:

- The poverty thresholds, and
- The poverty guidelines.

The **poverty thresholds** are the original version of the federal poverty measure. They are updated each year by the **Census Bureau** (although they were originally developed by Mollie Orshansky of the Social Security Administration). The thresholds are used mainly for **statistical** purposes — for instance, preparing estimates of the number of Americans in poverty each year. (In other words, all official poverty population figures are calculated using the poverty thresholds, not the guidelines.) Poverty thresholds since 1980 and weighted average poverty thresholds since 1959 are available on the Census Bureau's Web site. For an example of how the Census Bureau applies the thresholds to a family's income to determine its poverty status, see "How the Census Bureau Measures Poverty" on the Census Bureau's web site.

The **poverty guidelines** are the other version of the federal poverty measure. They are issued each year in the *Federal Register* by the **Department of Health and Human Services** (HHS). The guidelines are a simplification of the poverty thresholds for use for **administrative** purposes — for instance, determining financial eligibility for certain federal programs. (The full text of the *Federal Register* notice with the 2005 poverty guidelines is available here.)

The poverty guidelines are sometimes loosely referred to as the "federal poverty level" (FPL), but that phrase is ambiguous and should be avoided, especially in situations (e.g., legislative or administrative) where precision is important.

Key differences between poverty thresholds and poverty guidelines are outlined in a table under Frequently Asked Questions (FAQs). See also the discussion of this topic on the Institute for Research on Poverty's web site.

2005 HHS Poverty Guidelines

Persons in Family Unit	48 Contiguous States and D.C.	Alaska	Hawaii
1	$ 9,570	$11,950	$11,010
2	12,830	16,030	14,760
3	16,090	20,110	18,510
4	19,350	24,190	22,260
5	22,610	28,270	26,010
6	25,870	32,350	29,760
7	29,130	36,430	33,510
8	32,390	40,510	37,260
For each additional person, add	3,260	4,080	3,750

SOURCE: *Federal Register*, Vol. 70, No. 33, February 18, 2005, pp. 8373-8375.

The separate poverty guidelines for Alaska and Hawaii reflect Office of Economic Opportunity administrative practice beginning in the 1966-1970 period. Note that the poverty thresholds — the original version of the poverty measure — have never had separate figures for Alaska and Hawaii. The poverty guidelines are not defined for Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, the Republic of the Marshall Islands, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and Palau. In cases in which a Federal program using the poverty guidelines serves any of those jurisdictions, the Federal office which administers the program is responsible for deciding whether to use the contiguous-states-and-D.C. guidelines for those jurisdictions or to follow some other procedure.

The poverty guidelines apply to both aged and non-aged units. The guidelines have never had an aged/non-aged distinction; only the Census Bureau (statistical) poverty thresholds have separate figures for aged and non-aged one-person and two-person units.

Programs using the guidelines (or percentage multiples of the guidelines — for instance, 125 percent or 185 percent of the guidelines) in determining eligibility include Head Start, the Food Stamp Program, the National School Lunch Program, the Low-Income Home Energy Assistance Program, and the Children's Health Insurance Program. Note that in general, cash public assistance programs (Temporary Assistance for Needy Families and Supplemental Security Income) do NOT use the poverty guidelines in determining eligibility. The Earned Income Tax Credit program also does NOT use the poverty guidelines to determine eligibility. For a more detailed list of programs that do and don't use the guidelines, see the Frequently Asked Questions (FAQs).

The poverty guidelines (unlike the poverty thresholds) are designated by the year in which they are issued. For instance, the guidelines issued in February 2005 are designated the 2005 poverty guidelines. However, the 2005 HHS poverty guidelines only reflect price changes through calendar year 2004; accordingly, they are approximately equal to the Census Bureau poverty thresholds for calendar year 2004. (The 2004 thresholds are expected to be issued in final form in August 2005; a preliminary version of the 2004 thresholds is now available from the Census Bureau.)

The computations for the 2005 poverty guidelines are available.

The poverty guidelines may be formally referenced as "the poverty guidelines updated periodically in the Federal Register by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2)."

Go to Information Contacts and References on the Poverty Guidelines/Thresholds/Lines and Their History

Go to Frequently Asked Questions (FAQs).

Return to the main Poverty Guidelines, Research, and Measurement page.

Last Revised: March 23, 2005