Notes

Scenario 1- Neither snow nor rain…

At an initial appearance docket, a defendant does not show up. The clerk prepares charges for violate promise to appear. Upon reviewing the complaint and the file for the charges, you see that the defendant has received two citations in the mail. One was for speeding and one was for following too closely. On the face of the ticket in the file, on the defendant's signature line, it simply says mailed. You request the prosecutor to review the charges. The prosecutor steps away for a moment to call the officer. You ask the prosecutor if the defendant refused to sign, and the prosecutor says that the defendant was never stopped. The officer says that he saw the person speeding and following too closely and he pulled up next to the car and pointed at them to pull over, but then he drove off after another car. He took down their plate number, and later filed and mailed the citation.

What should you do?

Is there a probable cause issue?

Are the underlying charges valid?

Would a nonappearance charge be valid?

Scenario 2 – Police Problems and School Offenses

Your local police chief is disgruntled with the court. For years, the city police officers (serving as SROs) have liberally handed out citations for common juvenile misbehavior. The prosecutor has grown tired of having so much time taken up by these school citations. The school and police officers have been reluctant in following all of the new complaint filing rules, but are starting to follow them. In your opinion and the prosecutor's, the schools are still not handling enough of the discipline, and complaints are still coming in for things that should not be taken so seriously. The prosecutor realizes that he can adopt additional filing rules for school offenses. He decides to add the following:

- All complaints for school based offenses must be accompanied by a statement from the affiant as to why the child defendant is morally blameworthy. (You think this

will help with the 8.07 presumption and any 8.08 issues under the Penal Code).
- All complaints must be accompanied by a list of at least 3 alternative remedies already attempted by the school and/or SRO.

The chief and the school is upset by the additions and throws fits. The prosecutor then decides to add the following:

- All complaint for school offenses must be typed in Comic Sans 18 pt type triple spaced and must be printed in a color other than black.
- All complaint for school offenses must be filed on Thursday mornings between 7:45 and 8:30 am.

Is there a problem with the new rules?

Scenario 3 – Citations for Toys

The city council has gotten into the holiday spirit. They created a "citation" that says the following:

> ***You have been cited to help Santa bring joy to those in need this Holiday Season. This citation will be dismissed when you bring: a Wal-Mart or General Dollar Gift card(s), toy(s), boxed or canned food items, game(s) with a receipt value of $20.00 or more to the XXXXXXXX Municipal Court. Sponsored by Judge XXXXXXX, Judge XXXXXXX & the XXXXXXX Municipal Court***

The city asks if you'll support the gift drive by using this type of diversion.

What is the best way to respond?

Scenario 4 – Indigency Issues

Levi has been stopped 5 separate times for traffic issues and faces multiple charges, including expired registration, no insurance, and failing to stop at a stop sign, and up to $3,400 in fines, fees, and costs. Levi does not show up to answer to these charges and you

issue warrants for his arrest. After his arrest, he is brought before you. He pleads no contest, but says he does not have the money to pay.

How should you handle this?

Can you commit the person to jail for 3 weeks to discharge the find?

The 14th Amendment requires that a defendant convicted of a fine-only offense must be provided an 'alternative means' (time payment or community service) to discharge a judgment to avoid incarceration. *Tate v. Short*, 401 U.S. 395 (1971). C.C.P. Art. 45.041(b-2) provides that, after a plea or finding of guilt, if a judge determines that the 'defendant is unable to immediately pay the fine and costs,' a judge shall allow a defendant to pay in specified portions at designated intervals. A judge must allow a defendant to pay the fine and costs in designated intervals and may not automatically convert a fine and costs into a jail term solely because a defendant cannot immediately pay.

If a defendant is unable to pay the full fine and costs at the plea and sentencing, a court may require a defendant to complete a sworn Application for Time Payment, Extension, or Community Service.

Would the options be different if you saw Levi after issuing a capias pro fine?

After a defendant fails to pay in full, C.C.P. Art 45.046(a) requires judges, before committing a defendant to jail, to conduct a hearing and make a written determination that:

1. A defendant is **not indigent** and has failed to make a good faith effort to discharge the fine and costs, OR
2. A defendant **is indigent** AND:
    a. Has failed to make a good faith effort to discharge the fine and costs under Article 45.049 (perform community service), AND
    b. Could have discharged the fines and costs under Article 45.049 (perform community service) without experiencing any undue hardship.

A judge who commits a defendant to jail must document this determination in writing. A certified copy of the judgment,

sentence, and order are sufficient to authorize confinement of a defendant. A judge may find that a defendant is **indigent** and made a good faith effort to discharge by community service but was unable to perform community service without experiencing any undue hardship. If so, a judge should sign a written order fully discharging the fine and costs and notify a jailer in writing to immediately release the defendant..

Scenario 5 – Drug-impaired Driving

A driver was arrested for DWI after a collision with a parked car. The officer smelled a strong odor of marijuana. The officer performed the HGN test, but no other field sobriety tests. The officer observed HGN and also that the driver had bloodshot eyes, was unsteady on her feet, and was unable to answer simple questions, such as what her name and telephone number were. The driver refused both a breath and blood test.

The officer comes to you as a magistrate seeking a blood search warrant. May you issue one?

Article 18.01(j) of the Code of Criminal Procedure provides that any magistrate who is an attorney licensed by this state may issue a search warrant under Article 18.02(10) to collect a blood specimen from a person who: (1) is arrested for an offense under Section 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, Penal Code; and (2) refuses to submit to a breath or blood alcohol test. Here, the driver was arrested for DWI (Section 49.04 of the Penal Code) and refused both a breath and blood test. Under that statute, the magistrate may issue a blood warrant.

If the driver consented to the breath test, took it, and it registered no alcohol in the system, but then refused to give blood for a test, could the magistrate issue a blood search warrant?

The statute says the person has to refuse a breath OR blood test, so it could be issued.

Scenario 6 – Midnight Bail

You get a call in the middle of the night from the jail. You are told that a person has been arrested (within the last 60 minutes) on charges of misdemeanor assault, and you are asked to come in to

magistrate and set bail. You explain to the officer that you have just taken some medicine a few hours earlier that precludes you from driving to the court right then and that you are planning on coming to the jail for a regular visit in the morning around 10 a.m.

The officer asks if you'd like him to go ahead and set bail so you don't have to make a trip to the jail in the morning. Is this okay for him to do?

Several articles in the Code of Criminal Procedure grant the ability to take bail to people who are not magistrates. Article 17.05 tells us that a bail bond can be taken from the defendant by a peace officer if authorized by Article 17.20, 17.21, or 17.22. Article 17.20 states that, for misdemeanors, a sheriff or other peace officer may take of the defendant a bail bond. Reading only Articles 17.05 and 17.20, it would seem that an officer may *set* and *take* bail at any time for a misdemeanor. While there is an alarming shortage of substantial discussion regarding the setting of bail by peace officers, this authority should only be exercised in rare circumstances. The Court of Criminal Appeals, in *Hokr v. State*, stated that an officer's authority should be limited to situations in which no magistrate is available, or in arrests pursuant to a warrant in which the proper magistrate (the one who issued the warrant) is unavailable.[i] The Court also stated that a person arrested when a magistrate is unavailable can be detained until the magistrate's normal working hours without violating the statutory requirement of an appearance without unreasonable delay.[ii] The Court here has clearly stated a preference for bail to be set by a magistrate, even if it means waiting for the magistrate to come on duty. This might limit the need for middle-of-the-night magistrations, although courts and officers should remain mindful of the time limitations on presentation before a magistrate,[iii] the determination of probable cause,[iv] and release on bail.[v]

Scenario 7 – Minor P.I. and Drugs

A minor has been charged with public intoxication in your court. The cause of the intoxication is reportedly abuse of prescription drugs. The defendant appears in court before you and pleads no contest. You set a fine, but you know the offense if punished under Chapter 106 of the Alcoholic Beverage Code.

Does this defendant, charged with a drug-related offense, have to take an alcohol awareness class or complete alcohol-related community service?

Notes

H.B. 642 amended the Alcoholic Beverage Code and the Code of Criminal Procedure to authorize a judge to require defendants, as a condition of community supervision or deferred disposition for certain alcohol offenses listed in Section 106.071(a) of the Alcoholic Beverage Code, to attend and complete either an alcohol awareness program, approved under Section 106.115 of the Alcoholic Beverage Code **or a drug education program**, approved by the Department of State Health Services. Two Subsections of Article 45.051 of the Code of Criminal Procedure (Deferred Disposition) were also amended. Subsection (b) authorizes a judge, during the deferral period, to require the defendant to participate in an alcohol or drug abuse treatment or education program, such as a drug education program that is designed to educate persons on the dangers of drug abuse and is approved by the Department of State Health Services in accordance with Section 521.374 of the Transportation Code, or an alcohol awareness program described by Section 106.115 of the Alcoholic Beverage Code.

H.B. 642 rectified a dilemma familiar to many judges: state law required minors accused of Public Intoxication to attend an alcohol awareness course even in instances where the defendant's intoxication was caused by substance other than alcohol (e.g., marijuana, prescription drugs, methamphetamine, etc.). Courts are increasingly aware of the dangerous use of "designer drugs." See, Edward Minevitz, "Designer Drugs: How Drivers Might Be Circumventing Intoxicated Driving Laws" *The Recorder* (January, 2014) at 11. While the amendment to Article 45.051(b)(6) refers to "drug education program" and "alcohol awareness program" it does not refer to "drug and alcohol driving awareness program" (DADAP). Courts should not read too much into the omission. DADAP remains authorized under Section 106.115 as an authorized course for minors placed on deferred disposition despite the omission in Article 45.051(b)(6)

Scenario 8 – Girlfriend in Trouble

You receive a call from the jail, which surprises you as you are not on call this evening. The officer tells you that your girlfriend has been arrested and wants to know if you want to come handle the magistration or if you want him to just release her on a PR bond.

How should you respond?

Notes

Last year a judge publically reprimanded for violation of Canon 2B for a similar situation. The judge magistrated someone with whom he had a romantic relationship, allowed her to be released on a PR bond, and did so knowing that another judge who did not have a conflict of interest was willing and available to conduct the magistration. The judge's intervention in a criminal case involving his girlfriend created the appearance and the reality that he was allowing his relationship with her to influence his judicial conduct and judgment, that he was giving her favorable treatment, and that she was in a special position to influence the judge. The fact that the judge had previously been disciplined for engaging in the same or similar conduct in aid of his girlfriend was an aggravating factor in determining the level of discipline in this case and demonstrated that his actions in this instance were both willful and persistent.

[i] Under Article 15.16, a person arrested under warrant is to be taken before the magistrate who issued the warrant or before the magistrate named in the warrant, if the magistrate is in the same county as the person arrested. *Hokr v. State*, 545 S.W.2d 463 (Tex. Crim. App. 1977).

[ii] *Id*.

[iii] Article 14.06, Code of Criminal Procedure, requires presentation before the magistrate without unreasonable delay, but not later than 48 hours.

[iv] Determinations of probable cause within 48 hours of arrest generally comply with requirement for a prompt determination. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

[v] Article 17.151 states that the defendant is to be released on personal bond or by reducing the bail required within 90 days if he is accused of a felony. The limit is 30 days if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days. A defendant can be held for 15 days if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less. A defendant accused of a misdemeanor punishable by a fine only may not be held more than five days..