



**THE ATTORNEY GENERAL  
OF TEXAS**

**GERALD C. MANN**

**J**  
**ATTORNEY GENERAL**

**AUSTIN 11, TEXAS**

Honorable L. Morgan Williams  
District Attorney  
Jourdanton, Texas

Dear Sir:

Opinion No. 0-2888  
Re: The filing of complaints  
where several offenses arise  
out of one transaction.

Your request for opinion has been received and carefully considered by this department. We quote from your request as follows:

"I have been requested to write to your department for a ruling on the following matter:

"In a county which operates under the fee basis, what is the test as to how many complaints can be filed against a defendant for acts constituting various violations of the criminal law. In other words, where a party, for illustration, is drunk, disturbs the peace and fights, can three complaints be filed against the defendant, and upon conviction in one case, will such conviction be a bar to the prosecution of the remaining cases. All acts growing out of the same transaction.

"In this connection, Vol. 4, Texas Jurisprudence, page 891, § 50, it is held: 'Of course, when the previous conviction was for an entirely separate and distinct offense, such as affray, it is no bar whatever to a subsequent prosecution for assault.' Citing, *McCraw vs. State*, 73 Texas Criminal Reports 45, and *Decker vs. State*, 58 Criminal Reports 159.

"Also, '...where the defendant has been acquitted of the charge of unlawfully carrying brass knucks, and is then prosecuted for an assault with such weapons.' Citing *Chisom vs. State*, 77 Crim. Rep. 397.

"Vol. 12, Tex. Jur., page 566, § 246, lays down the following rule, 'One may be convicted for running a bawdy house, and also for vagrancy, because the transactions are not identical in point of time.' Also, 'the playing of the game of dice is a continuous offense, each bet is distinct and separate violation of the law and a conviction of one offense does not bar a trial for another.' Citing, *Parks vs. State*, 123 S.W. 1109.

"It is my opinion that the test as to the number of cases that may be prosecuted against a defendant depends upon whether or not the points of time are identical or whether a continuous transaction, and the facts in each case must be disclosed."

Sections 241, 242, 245, and 246, pages 560-561-562-565-566-567, 12 Texas Jurisprudence, read as follows:

"241. Several Offenses Arising Out of One Transaction. - The same transaction may constitute several distinct and separate offenses, in which case the defendant may be separately prosecuted and punished for each, and a conviction or acquittal for one will not constitute a bar to a trial for the others. And the fact that two distinct offenses are committed contemporaneously, or that one is committed in aid of the other, does not make them any the less distinct. Thus if the accused slays two persons with the intent or volition to kill both they are separate offenses although occurring at the same time, and a conviction or acquittal for one offense does not bar a prosecution for the other; an assault with intent to murder and carrying a pistol unlawfully are different offenses, though growing out of the same transaction; and a conviction on a charge of driving an automobile without lights does not bar a prosecution for transporting liquor in the automobile, though the defendant put out his lights to aid in concealing his transportation of the liquor. Further illustrations will be found in the articles dealing with specific crimes.

"242. Prosecution for Part of Single Crime. - The State may not split up one crime and prosecute it in parts, and a prosecution for any part of a single crime bars any further prosecution for the whole or a part of the same crime. Where the act charged constitutes but one crime, though it is divisible into different parts or degrees, the state may cut or carve out of it but one offense, and having prosecuted and convicted the defendant of this offense, may not prosecute further the transaction out of which the offense was carved. As large an offense may be carved out of the transaction as possible, yet the state may cut only one. So where several articles of property are stolen at the same time and place a conviction for stealing part of them will bar a subsequent prosecution for stealing any of the other articles. This doctrine of carving applies with more force to a former conviction than to an acquittal.

"245. Where Several Offenses are Charged or Proved. - Where a defendant has been tried on several counts and convicted under one he is thereby acquitted of the others,

and may not later be tried upon the ones for which he was so acquitted. Thus where there are several counts in an indictment and only one is submitted to the jury, this amounts to an acquittal upon the abandoned counts, and the defendant may not upon a subsequent trial be prosecuted on the abandoned counts. Moreover, where two or more similar but separate acts constituting separate offenses are placed in evidence under an indictment or information under which a conviction of either offense can be had, and neither the state nor the court elects one particular act on which conviction is sought, a plea of former conviction will be good upon a subsequent prosecution based on any of the acts or offenses proved, it being uncertain for which one the conviction was had. But the rule is otherwise where an election is made and the jury restricted to one particular act.

"246. Continuous Offenses. - Where an offense is a continuous one, a conviction bars all further or other prosecutions up to the time of the conviction, unless the indictment or information carves out the time of the commission of the offense, and the evidence, as well as the pleading, is confined to the time so carved out. The transaction is a continuous one where there is one design, one impulse, and one purpose upon the part of the accused; but is not continuous if it consists of a single act, or a series of acts, or where, in order to consummate it, an interval of time is required. Thus one may be convicted for running a bawdy-house and also for vagrancy because the transactions are not identical in point of time. And while the playing of the game of dice is a continuous offense, each bet is a distinct and separate violation of the law, and a conviction of one offense does not bar a trial for another. But one conviction for the statutory offense of opening places of business on Sunday is a bar to prosecutions for opening at other times on the same day; in order for the state to carve prosecutions in cases of this character, the statute must prescribe or the legislative intent must be clear that it was the purpose to make each act or performance punishable."

Opinion NO. 0-71 of this department holds that where the same transaction may constitute several distinct and separate offenses, the defendant may be separately prosecuted for each and a fee may be collected in each case. The opinion also holds that where the act charged constitutes but one crime, though it is divisible into different parts or degrees, the State may cut or carve out of it but one offense and, having prosecuted and convicted the defendant of this offense, the State may not prosecute further the transaction or act out of which the offense was carved. We enclose herewith a copy of said opinion.

The illustration contained in your letter where a party is drunk (in a public place we assume), disturbs the peace and fights, is apparently covered by the following articles of our Texas Penal Code, to-wit:

Article 473, Vernon's Annotated Texas Penal Code:

"If any two or more persons shall fight together in a public place they shall be fined not exceeding one hundred dollars."

Article 474, Vernon's Annotated Texas Penal Code:

"Whoever shall go into or near any public place or into or near any private house and shall use loud and vociferous, or obscene, vulgar, or indecent language or swear or curse, or yell or shriek, or expose his person, or rudely display any pistol or other deadly weapon, in a manner calculated to disturb the inhabitants of such place or house, shall be fined not to exceed one hundred dollars."

Article 475, Vernon's Annotated Texas Penal Code:

"A 'public place,' as used in the two preceding articles, is any public road, street or alley of a town or city, or any store or work shop or any place at which people are assembled or to which people commonly resort for purposes of business, amusement or other lawful purpose."

Article 477, Vernon's Annotated Texas Penal Code:

"Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

You are respectfully advised that it is the opinion of this department:

1. That where the same transaction may constitute several distinct and separate offenses, the defendant may be separately prosecuted (under separate indictments or complaints) and punished for each and a fee may be collected in each case.

2. That the offenses of affray (denounced by Article 473, V.A.T.P.C., supra) disturbance (denounced by Article 474, V.A.T.P.C., supra) and public drunkenness (denounced by Article 477, V.A.T.P.C., supra) given in your illustration, are separate and distinct criminal offenses in law, and may be separately prosecuted under separate complaints and legal convictions had thereon even though arising out of and in the same transaction.

3. That where the act charged constitutes but one crime, though it is divisible into different parts or degrees, the state may cut or carve out of it but one offense and, having prosecuted and convicted the defendant of this offense, the state may not prosecute further the transaction or act out of which the offense was carved.

4. That where an offense is a continuous one, (such as keeping a disorderly house - See Novey vs. State, 138 SW 139) a conviction bars all further or other prosecutions up to the time of conviction, unless the indictment or information carves out the time of the commission of the offense, and the evidence, as well as the pleading, is confined to the time so carved out.

Very truly yours,

ATTORNEY GENERAL OF TEXAS

By /s/ Wm. J. Fanning  
Wm. J. Fanning  
Assistant

WJF:AW-ds

APPROVED NOV 20, 1940

/s/ Gerald C. Mann

ATTORNEY GENERAL OF TEXAS

APPROVED OPINION  
COMMITTEE  
BY /s/ B.W.B.  
CHAIRMAN