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OPINIONS COMMITTEE



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January 11, 2000

The Honorable John Cornyn
Office of the Attorney General
C/O Susan D. Gusky
Chair of the Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-41844-01
I.D. # 41844

Dear General Cornyn,

I respectfully request an opinion (formal or letter opinion) on the following questions:

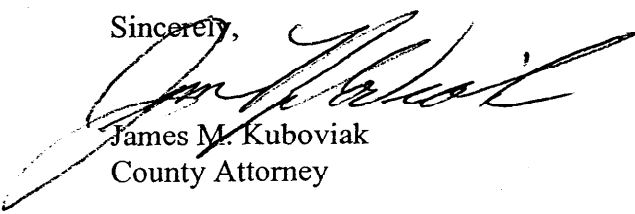
- (1) When a defendant is serving time in jail for failure to pay the fines and court costs on multiple class C misdemeanor cases, are the fines and court costs discharged concurrently or consecutively?
- (2) If the fines and court costs are discharged consecutively, does the Justice of the Peace need to send a judgement to the jail in writing stating such?
- (3) When a defendant spends time in jail on multiple class C charges prior to being sentenced on those charges, does the jail time run concurrently or consecutively?

I have enclosed herewith, a brief on the above questions that the Brazos County Sheriff received from the Brazos County Justices of the Peace.

The Brazos County Sheriff's Office now seeks an opinion from your office and has made that request through my office.

Thank you in advance for your cooperation.

Sincerely,


James M. Kuboviak
County Attorney

The question posed is: Under 42.08 of the Texas Code of Criminal Procedure, when a defendant is serving time in jail for failure to pay the fines and court costs on multiple class C misdemeanor cases, are the fines and court costs still discharged concurrently or consecutively?

On the question of whether jail time should run concurrently or consecutively on multiple class C misdemeanors, courts have historically concluded that the time spent in jail to satisfy the fines and court costs on one case does not satisfy the fines and court costs on other cases. *Ex parte Minjares*, 582 S.W. 2d 105 (Tex. Crim. App. 1979) (en banc) (on mtn r'hrng), *Ex parte Hall*, 258 S.W. 2d 806 (Tex. Crim. App. 1953), *Ex parte Williams*, 109 S.W. 2d 171 (Tex. Crim. App. 1937), *Ex parte Banks*, 53 S.W. 688 (Tex. Crim. App. 1899), *Southern Political Consulting, Inc. v. State*, 788 S.W. 2d 452 (Tex. App. - Houston [1st Dist.], 1990), *Rocky Mountain v. State*, 789 S.W. 2d 663 (Tex. App.-Houston [1st Dist.], 1990).

This question has also been addressed in an opinion issued by the Attorney General's Office in Opinion Number JM-107 on December 29, 1983. Opinion Number JM-107 relied on the language of Article 42.08 from the 1982-1983 Texas Code of Criminal Procedure to say that jail time on multiple class C offenses runs consecutively. However, the wording in Art. 42.08 that was the basis for Opinion Number JM-107 has changed significantly in 17 years. In 1983 Art. 42.08 read:

"When the same defendant has been convicted in two or more cases, *and the punishment assessed in each case is confinement in an institution operated by the Department of Corrections or the jail for a term of imprisonment*, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction, except that in the discretion of the court, the judgment in the second and subsequent

convictions may either be that the punishment shall begin when the judgment and sentence in the preceding conviction has ceased to operate, or that the punishment shall run concurrently with the other case or cases, and sentence and executions shall be accordingly.” (emphasis added)

The 1999 Art. 42.08 omits the above italicized language. This is crucial because Opinion Number JM-107 seems to specifically rely on the italicized language in reaching the conclusion that only in cases involving imprisonment can the sentences be served concurrently.

The current relevant statutory provision is Article 42.08(a) of the Texas Code of Criminal Procedure. Article 42.08(a) of the Texas Code of Criminal Procedure provides:

“ (A) When the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction. Except as provided by Sections (b) and (c) of this article, in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases , and sentence and execution shall be accordingly; provided, however, that the cumulative total of suspended sentences in felony cases shall not exceed 10 years, and the cumulative total of suspended sentences in misdemeanor cases shall not exceed the maximum period of confinement in jail applicable to the misdemeanor offenses, though in no event more than three years, including extensions of periods of community supervision under Section 22, Article 42.12, of this code, if none of the offenses are offenses under Chapter 49, Penal Code, or four years, including extensions, if any of the offenses are offenses under

Chapter 49, Penal Code.”

The question therefore is whether the statutory changes in Article 42.08 affect the conclusions reached in JM-107.

It is our position that the jail time in this situation should run consecutively. This position is supported by the many cases cited above. As noted in JM-107, the service of jail time in this situation is not a punishment for the offense, as no jail time can be assessed for class C misdemeanors. Texas Penal Code 12.41. The jail time is therefore an enforcement action that a court must resort to only after the fines and court costs have not been paid as directed. Op. Tex. Att’y Gen. No. JM-107(1983). As an enforcement action, it does not follow that someone can accumulate numerous class C offenses and spend the same amount of time in jail for the non payment of numerous fines and court costs as someone who has failed to pay the fines and court costs for one class C. For example, if a defendant has six class C citations, where the fines and court costs on all six are \$200 each. He fails to pay the \$1200 that is owed to the Justice of the Peace and capias pro fines are issued. He is arrested on the capias pro fines. If his fines and court costs are to be served out in jail concurrently, he would only have to serve out enough time to pay for his highest fine and court costs, in this case \$200. Pursuant to Article 45.048 of the Texas Code of Criminal Procedure, he would get credit at the rate of \$100 per day. Also, according to *Ex parte Minjares*, the defendant would be entitled to any good time credit that he earned during his stay in jail at the rate prescribed in Art. 42.032 of the Texas Code of Criminal Procedure. This would mean that for not paying \$1200 in fines and court costs the defendant would serve, at most, two days in jail. This would be the same amount of time that a defendant would spend in jail for not paying a single \$200 judgment.

It should also be pointed out that Article 43.03(b) of the Texas Code of Criminal Procedure, which may seem to suggest that confinement should run concurrently, does not apply to the situation above. Article 43.03(b) states,

“A term of confinement for default in payment of fine or costs or both *may not exceed the maximum term of confinement authorized for the offense* for which the defendant was sentenced to pay the fine or costs or both. If a court orders a term of confinement for default in payment of fines or costs under this article at a time during which a defendant is serving another term of confinement for default or is serving a term of confinement for conviction of an offense, the term of confinement for default runs concurrently with the other term of confinement, unless the court orders the terms to run consecutively under Article 42.08 of this code.” (emphasis added)

Because there is no term of confinement for fine only class C offenses under 12.41 of the Texas Penal Code, this provision does not apply to the above situation.

Because it is believed that the answer to the first question is that the time should run consecutively, the second question need not be reached. However, if you should decide that Article 43.03(b) does apply to our situation and the time therefore runs concurrently, the second question is: If a Justice of the Peace wants to have a defendant serve out their time on multiple class C offenses consecutively, does each judgment need to state that the time must run consecutively? If it is decided that time spent in jail for failure to pay class C offenses runs concurrently, then it is our position that the Justice of the Peace must write wording on each judgment to notify the jail that those judgments are to be served consecutively and not concurrently.

The third question is: Does the time a defendant spends in jail on multiple class C's prior

to being sentenced on them run consecutively or concurrently? It is our position that the time should run consecutively.

Article 45.041 gives us the other statutory provisions that must be looked at for this question. Art. 45.041(c) states,

“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.”

Under Article 42.03(b) we see that,

“In *all* criminal cases the judge of the court in which the defendant was convicted *shall* give the defendant credit on his sentence for the time that the defendant has spent in jail in said cause, other than confinement served as a condition of community supervision, from the time of his arrest and confinement until his sentence by the trial court.”

(emphasis added)

This office has previously decided whether 42.03 applies to justice courts in MW-386 and found that it does apply. Op. Tex. Att’y Gen. No. MW-386(1981). It is clear that a defendant in a class C misdemeanor case shall receive credit for time spent in jail pre-sentence. Article 45.048 provides that the rate at which a defendant receives credit is “not less than \$100 for each day or part of a day of jail time served.” Putting the two statutes together it is clear that the a defendant arrested on any class C misdemeanor gets credit for any time served in jail at a rate of not less than \$100 per day. What is not clear is whether the time that a defendant spends in jail pre-sentencing on multiple class C’s runs consecutively or concurrently.

For example, if a defendant received six tickets in Justice of the Peace Precinct One, Brazos County for speeding, running a stop sign and failure to present a driver’s license, fail to

maintain financial responsibility, fail to signal intent before changing lanes, fail to yield right of way to an emergency vehicle and he pleads guilty to those offenses in Justice of the Peace Precinct One, Brazos County and is sentenced to pay \$200 (including court costs) on each offense. The defendant then fails to pay for the fines and court costs on all six. However, before the capias pro fines are issued on the first six citations, the defendant gets pulled over in Justice of the Peace Precinct Two, Brazos County for another speeding charge and also receives a citation for failing to maintain financial responsibility. On these two charges the defendant violates his promise to appear by failing to appear in Justice of the Peace Precinct Two, Brazos County within ten days after these citations are issued. Warrants are issued for his arrest for the violate promise to appear and the two original citations out of the stop in Justice of the Peace Precinct Two, Brazos County. By this time the capias pro fines have been issued by the court for failing to pay the six citations from Justice of the Peace Precinct One, Brazos County. At this point, the defendant is arrested for public intoxication in Justice of the Peace Precinct Three, Brazos County and all of the warrants and capias pro fines are discovered and the defendant is arrested and transported to the Brazos County Jail on the public intoxication and all outstanding warrants and capias pro fines. The defendant appears before the magistrate one day later. The defendant has previously plead guilty to all of the offenses in Justice of the Peace Precinct One, Brazos County. The defendant now pleads guilty to all of the offenses that occurred in Precinct Two and fines are assessed. The defendant pleads not guilty to the public intoxication charge from Precinct Three and a bond amount is set. Several days later the defendant has consecutively laid out the fines on all other class C's and he then posts bond on the public intoxication. Approximately three months later the defendant has a trial on the public intoxication charge and is found guilty and assessed fines and costs. If the law is that Class C's

are laid out consecutively, it is clear that the defendant is to be credited from his date of arrest for the first six offenses (Precinct 1) consecutively since all of the time served on these offenses is post sentencing. The first question is: On the offenses that occurred in Precinct Two, the defendant was not sentenced on those charges until he had already spent one day in jail. Does the defendant receive consecutive or concurrent credit for the one day that he spent in jail toward the four charges in Precinct Two prior to being sentenced in court for those four charges? The second question is: On the Precinct Three arrest, the defendant chose not to make that bond until the lay out time on the other class C's was completed. The defendant is later found guilty at trial on the public intoxication and is sentenced to a \$200 fine and court costs. The question is: Is the court required to give the defendant credit for all of the days that the defendant spent in jail laying out the fines and court costs on all other cases prior to bonding out on the public intoxication toward his fine and court costs that have been assessed in the public intoxication case.

I have found no cases that specifically address these questions. The only case that was found that alludes to any pre-sentence time being served is in *Ex parte Hall*, 258 S.W.2d 806. In that case the defendant was arrested on seven charges of unlawful sale of whiskey in a dry area. The defendant was arrested on January 26, 1953 and plead guilty to the charges on January 27, 1953. This case concluded that jail time on all seven cases was to run consecutively, however, it did not address the specific issue of pre and post sentencing credit. From this case it would seem that since there was no specific delineation between pre and post sentencing credit, the court treated all jail time credit as if it ran consecutively. This again follows the logic used in JM-107 that jail time on class C misdemeanors is not for punishment, but only enforcement.