

Criminal Procedure: Tricky Issues

1

What happens
when...?

The defendant comes in
to enter a plea, but the
citation (ticket) hasn't
been filed yet?

- **Do not** enter the case in your system based on their citation!
- **Do** take the defendant's information and call them or send them a summons once the citation has been filed.
- **May** sit down and have a general discussion with others (L.E., prosecutors) about getting cases timely filed

2

Why not just take the citation?

- After all, the defendant is here and wants to dispose of it now. If we send them away, they may never come back. Isn't it a win-win to just scan their ticket into our system and take the plea and payment?
- No. In many cases the ticket was actually sent to another court. So, the defendant assumes it has been taken care of since they paid you, and then gets arrested when they ignore notices from the other court of the pending case.

3

What if they mail in payment and we have no citation?

- Remember that normally mailing in payment in full is considered a plea of nolo (no contest). But, if you don't have a **charging instrument** (citation or complaint), you don't have a case. So, there isn't anything for the defendant to enter a plea to.
- You don't have **jurisdiction**, and therefore you have no **authority to act**.

4

What if they mailed in their payment and we have no citation?

- If you receive a mailed payment for a case that hasn't been filed, you should immediately notify the prosecutor. If the prosecutor can quickly get the case filed, you can apply the payment to the case, and enter the plea of nolo. If they cannot get it filed quickly, you should mail the payment back. It is an auditing nightmare to hold money in your court without a case that it goes to.

5

What happens when...?

An electronic copy of a citation is filed?

6

Electronic Citations

- If a defendant is released on a citation, a duplicate copy of the citation must be filed with the court, and that duplicate copy serves as a complaint to which the defendant may enter a plea.

Code of Criminal Procedure Art. 27.14(b)

- That duplicate copy **can** be an electronic copy.

7

Electronic Citations vs. “Data Dumps”

- However, often what the court receives electronically is **not** a duplicate copy of the citation, but instead is just data that is uploaded from the citation.
- These electronic “data dumps” from the Automatic Ticket Downloader are not duplicate copies, and so are **not** charging instruments that give your court **jurisdiction** over a case.

8

What happens when...?
The case isn't filed in the right court?

9

“Improper Filing” Comparison

Jurisdiction issue

- Wrong **kind of case**
- Court dismisses **automatically**.
- If you don't dismiss the case, a judgment convicting the defendant would be **void** (worthless and unenforceable).

Venue issue

- Wrong **location**
- Court transfers **if** the defendant makes the request **or** if your county has transfer rules telling you to transfer.
- If filed in wrong **county**, defendant must be found not guilty at trial.

10

Officers Consistently Filing in Improper Venue

- From time to time, counties face issues of cases deliberately being filed in the wrong court for various reasons.
- The best way to address this issue is by having a sit-down meeting with all the involved stakeholders. If that is insufficient, the county should adopt administrative transfer rules providing for automatic transfer when the venue rules are not being followed.

11

What happens when...?

The officer mailed the citation to the defendant?

12

Mailed Citations

- The most common situation where this occurs is when the defendant is injured in an accident and taken to the hospital. Law enforcement decides to charge the defendant with an offense and mails them a citation.
 - *Instead of mailing a citation, proper procedure would be for the officer to file a complaint.*
- One problem is that the defendant never signed the citation promising to appear and may not know when to appear. The court should mail this defendant a summons to appear.

13

What happens when...?

The case is outside of the **statute of limitations**?

14

Statute of Limitations

15

What is...?

What is the statute of limitations in a criminal case filed in justice court?

- A **statute of limitations** is a law limiting how long after something occurs a civil or criminal case can be filed.
- Misdemeanor criminal cases must be filed within 2 years of the date of the offense.
Code of Criminal Procedure Art. 12.02
Criminal Deskbook Chapter 2.C.3.

16

Statute of Limitations – “Tolling”

- A sworn **complaint** stops the statute of limitations from running out.
 - The legal term for this is that the complaint **tolls** the statute of limitations.
- However, a **citation (ticket)** does not! Many cases ended up without having complaints filed, and the statute of limitations ran out, costing counties millions of dollars in revenue.

17

Statute of Limitations – Required Complaint

- This caused a change in the law where now a complaint must be filed if:
 - The defendant pleads not guilty, or
 - Doesn't appear by their appearance date!

Code of Criminal Procedure Arts. 12.05, 27.14(d)

- This complaint should be filed by police or prosecutors. Since filing the complaint tolls the statute of limitations, it directly benefits the state. The court **should not** take actions designed to benefit one side over the other.

18

What if the statute of limitations runs out?

- It is unethical for a prosecutor to continue to prosecute a case after the statute of limitations.
- It is unethical for a court to continue to pursue a case after the statute of limitations runs out.
 - Remember that this **does not** apply to cases where the defendant has been convicted!
- The prosecutor should file a motion to dismiss if the statute of limitation has run out.

19

What happens when...?

A private citizen wants to file a complaint?

- **Do** recommend that they speak with law enforcement or a prosecutor.
- **Do not** refuse to accept the filing if they insist.
- **Do** evaluate a filed complaint for probable cause on each element of the offense.
- **Do** issue a summons for the defendant if the offense is properly alleged.
- **Do** set the case for pretrial hearing so that the prosecutor can elect how to proceed.

20

What happens when...?

The defendant doesn't appear by their appearance date?

21

Tools in the Toolbox

- There are many tools available to a court to secure a defendant's appearance when they fail to appear and enter a plea by their appearance date.
- For a full and detailed explanation of these options, see Chapter 3 of the Criminal Procedure Deskbook, including the flowchart.
- For most courts, the first step is a courtesy letter, which reminds the defendant of their obligation and sets a new "appearance date."

22

New Criminal Charge

- Frequently, not showing up by their appearance date will constitute a new criminal charge of either **Failure to Appear (FTA)** or **Violate Promise to Appear (VPTA)**.
 - Complaints alleging these offenses should be filed by law enforcement or prosecutors.
 - These new offenses must be processed the same as any other new offense, not treated as “late fees” or “penalties” tacked on to the original case.

23

FTA vs. VPTA

FTA

- Penal Code Sec. 38.10
- Defendant released from custody on condition that they subsequently appear (bond or sign citation).
- Defendant intentionally fails to appear as promised.
- Class C (\$1-500 fine)

VPTA

- Transportation Code Sec. 543.009
- Defendant charged with Rules of the Road offense signs citation promising to appear.
- Defendant willfully violates that promise.
- \$1-200 fine range

24

FTA & VPTA

- What is a Rules of the Road offense?
 - Offense under Chapters 541-600 of the Transportation Code
- What if both FTA/VPTA seem appropriate?
 - must charge VPTA; *Azeez v. State*
- For purposes of FTA, a defendant is “in custody” when they have been detained by a peace officer, even if they are issued a citation rather than being booked into jail.
- See Ch. 3 of Criminal Deskbook for more

25

Issuance of Arrest Warrant

- The court is authorized to issue an **arrest warrant**, which is an order for law enforcement to go pick the defendant up and bring them to court.
 - Code of Criminal Procedure Art. 45.014(b)(3)
- However, there are several safeguards that **must** be followed to ensure that the defendant’s rights are not violated.

26

Issuance of Arrest Warrant – Complaint

- An arrest warrant **may not** issue solely based on the filing of a citation or “ticket” in justice court. A sworn complaint, alleging either the original offense (sometimes called the **underlying offense**) or a new offense of FTA or VPTA **must** be filed before a warrant or **capias** may be issued.
 - A **capias** is an order, very similar to a warrant, ordering a law enforcement officer to bring the defendant directly to the court. This is different than a **capias pro fine**, which is the order to bring a defendant who **has been convicted but not satisfied the judgment**, to court to determine how the judgment may be satisfied.

27

Issuance of Arrest Warrant – Notice

- An arrest warrant **based on the defendant’s failure to appear** (whether the warrant is for the original offense, FTA, or VPTA) **may not** issue until the court has given a notice by mail or telephone providing:
 - A date and time when the defendant must appear before the justice or judge;
 - The name and address of the court with jurisdiction in the case;
 - Information regarding alternatives to the full payment of any fine or costs owed by the defendant, if the defendant is unable to pay that amount;
 - Notice that the defendant may be entitled to jail credit if incarcerated after commission of the offense; **and**
 - An explanation of the consequences if the defendant fails to appear before the justice or judge as required.
 - Code of Criminal Procedure Art. 45.014(e)

28

Referral to collections/Omni

- Remember that we earlier discussed referring defendants who do not satisfy the judgment to collections and/or to Omni.
 - **Collections** – outside entities that attempt to get the defendant to appear or to satisfy a judgment.
 - **Omni** – company with a contract with DPS; defendants in Omni can't renew driver license.
- You can also refer defendants who do not appear to enter a plea in a case to collections and/or to Omni.
- See Chapter 3 of the Criminal Deskbook for specifics.

29

What happens when...?

The defendant mails in a guilty plea plus a request for the amount of the appeal bond?

- The court **must** mail the defendant a notice (found on TJCTC's website) which gives them the amount of the fine and costs in the case and the amount of the appeal bond, along with information on alternatives to paying the fine and costs.

30

What Happens When...?

The defendant mails in a guilty plea plus a request for the amount of the appeal bond?

How many days do they have to perfect their appeal?

- The defendant then has **30 days** (instead of 10) to perfect their appeal by posting an appeal bond.

CCP Art. 27.14

Criminal Deskbook Chapter 4.A.1.

31

30 Days to Appeal – Written Plea

- The 30 days is calculated from the time that the defendant **receives** the notice.
- But how does the court know precisely when that is?
- No way to know, best practice is to be consistent.
 - Caselaw indicates presuming 3 days to mail is reasonable.
 - “Mailbox rule” says something mailed on due date is timely if received within 10 days.
 - If you aren’t sure if the appeal was timely or not, send it up to the county court.

32

What happens when...?

The complaint doesn't have any prior offenses listed, but I **know** they have priors!

- **Do not** use any outside knowledge to change how you process cases.
- **Do** rely on the charging instrument to dictate how the case is processed.
- Information is “outside knowledge” even if it is contained in your court software system.

33

What happens when...?

The defendant says they are a sovereign citizen and I have no power or authority over them?

- **Do not** allow yourself to get emotionally frustrated or caught up in the defendant's arguments.
- **Do** follow all applicable procedures and ensure due process for the defendant.
- **Do** go to **tjctc.org**, go into the webinar archive, and watch our webinar on sovereign citizens.

34

What happens
when...?

The defendant refuses to
enter a plea?

- **Do not** just convict the defendant automatically.
- **Do** remember that a defendant never owes money unless they plead guilty, plead nolo, or are proven guilty at trial.
- **Do** enter a plea of not guilty on behalf of the defendant.

CCP Art. 45.024

Criminal Deskbook Chapter 6

35

What happens
when...?

The defendant wants to
change their plea?

- **Do** allow the defendant to withdraw a plea of not guilty and enter a plea of guilty or nolo.
- **Do not** allow a defendant to withdraw a guilty/nolo plea and enter a not guilty plea **unless** the guilty plea was **not** given freely, intelligently, and voluntarily.

36

Free, Intelligent, Voluntary

- If a defendant enters a plea of guilty based on a plea deal offered by a prosecutor, you **must** allow them to reconsider their plea if you do not approve the plea deal.
- A defendant should be held to their plea only if they are intending to plead guilty to an offense, and they understand what the offense is. If a defendant is entering a plea simply to secure release from custody, or because they aren't informed of their options, they should be allowed to withdraw the plea.
 - CCP Art. 45.0241

37

What happens
when...?

The defendant wants to
enter a plea by phone?

- **Do not** accept pleas by telephone. How do you know who you are talking to? Many courts have taken pleas by phone, rendered judgment, and then the defendant came back months later to dispute the conviction. Getting it in writing every time is by far the best practice.

38

What happens when...?

A defendant who hasn't been convicted mails in a partial payment?

39

Mail in a partial payment?

- Remember earlier that payment in full constitutes a plea of nolo? But a partial payment **does not**.
- Also remember that a defendant doesn't owe any money until they are convicted – pleading guilty, pleading nolo or proven guilty at trial
- ***So, a defendant who hasn't pled guilty/nolo or gone to trial cannot mail in a partial payment without including a plea of guilty or nolo.***

40

So, what if they do it?

- Best practice is to contact the defendant and let them know that to start them on a payment plan and take this first payment, you will need a written plea of guilty or nolo.
- If the payment covers the court costs entirely, as well as any minimum fine, you can also accept the payment as a payment in full, thus making it a plea of nolo. Remember you must create a written judgment.

41

What happens when...?

Someone wants to come pay the ticket for their spouse/child/parent/employee?

42

Paying someone else's fine?

- As we just discussed, for someone to owe a fine, they first need to be convicted.
- Accepting “payment in full” from someone other than the defendant is allowing them to enter a nolo plea for the defendant.
 - This results in a criminal conviction for the defendant.
 - Would you want someone who isn't your attorney entering a plea for you in a criminal case??

43

What about with kids?

- This applies even for children who are underage. If you have a child in your court, the parent may not enter the plea for them. The child must enter a plea for themselves.
- If and when the defendant is **convicted**, anyone can pay the fine and costs for them.
 - *So, we need a plea of guilty or nolo from the defendant **before or with** the other person's payment.*

44

What happens when...?
Someone wants a **continuance**?

45

Continuances

- A motion for **continuance**, or **postponement**, means that a party wants to change the date of a hearing or trial to a later date.
 - They may have a conflict with that date, or simply want more time to prepare.
- A court should use discretion in determining whether there is good cause for the continuance. Factors that may be weighed would include the amount of notice that was given, the reason for the continuance, and the number of previous continuances granted.

46

Required Continuance

- If a party received less than three business days' notice of the trial setting, the court **must** grant the motion for continuance, which may be **oral or written**.

Code of Criminal Procedure Art. 29.035.

See also Code of Criminal Procedure Arts. 29.04-29.08.

- Otherwise, the court can require a motion for continuance to be in writing if desired.

47

What happens when...?

The defendant doesn't appear for their jury trial?

48

Bond Forfeiture

- If the defendant doesn't appear for trial and an appearance bond was posted, the court can begin proceedings for them to **forfeit** the bond amount. For example, if the court set a \$300 appearance bond, and the defendant no-shows, a bond forfeiture would result in a judgment against the defendant for \$300.
- Information on bond forfeiture is found in Ch. 22 of the CCP and Ch. 3 of the Criminal Deskbook

49

FTA charges

- Charges of **Failure to Appear (FTA)** under Sec. 38.10 of the Penal Code, as described above, can also be filed against the defendant if they had posted an appearance bond promising to appear at trial.

50

Assess Costs of Empaneling the Jury

- If the defendant fails to appear for their jury trial, the costs of **empaneling the jury** may be assessed against them.
 - *Empaneling the jury is the process in which a jury is selected.*
- These costs could include the pay that the jurors receive, as well as the costs of mailing the jury summons, etc.
- The judge can decide to not assess these costs on the defendant if the defendant shows good cause for not appearing.

Code of Criminal Procedure Art. 45.026

51

Report to Omni

- As described earlier, the defendant could also be reported to Omni and be placed on a driver's license non-renewal status with DPS.

Ch. 706, Transportation Code

52

What happens when...?

The prosecutor doesn't appear for a criminal trial?

53

No prosecutor?

- If no prosecutor is present when the case is called for trial, there are 3 options:
 - Continue the case to another date;
 - The judge appoints a **prosecutor pro tem**, which is another attorney to prosecute the case, who must be paid by the county; or
 - Proceed to trial.

Code of Criminal Procedure Art. 45.031

Criminal Deskbook Chapter 6

54

Proceeding to Trial

- Proceeding to trial **does not** mean the court will hear evidence.
- When the court proceeds to trial without a prosecutor, the State cannot put on evidence, therefore they can not prove the case beyond a reasonable doubt.
- This means that the defendant **must** be found not guilty.
- Finding the defendant not guilty when the State fails to put on evidence is **not** the same as **dismissing** the case.

55

What happens when...?

The defendant or a witness in a criminal trial doesn't speak English or is deaf?

- The court **must** provide an interpreter if the defendant or a witness has difficulty with speaking or understanding English or is deaf.

Arts. 38.30, 38.31, CCP

- For information on interpreter qualifications and resources to help you locate interpreters, please see Chapter 6, Sec. B of the Criminal Deskbook.

56

Language Access Resources

- <https://www.txcourts.gov/lap/>
- <https://ncaj.org/tools-for-justice/language-access-project>

57

What happens when...?

The jury makes the wrong decision in a criminal trial?

58

Finders of Fact

- In a jury trial, the jury is the **finder of fact**. That means they get to decide what happened, which witnesses were credible, and the end result.
- In a bench trial, the judge is the finder of fact.
- Sometimes, a jury may make a decision you wouldn't have made. That is OK and part of the jury process.

59

Directed Verdicts

- If the State fails to put on evidence of any of the elements, you should order the jury to find the defendant not guilty. This is called a **directed verdict**.
- However, you should only do this if they put on **no evidence** on at least one element. If they put on some evidence, which you personally find not credible, a directed verdict would be inappropriate.

Code of Criminal Procedure Art. 45.032

60

What happens when...?

The defendant misses a payment on their payment plan?

61

Missed Payment on Payment Plan

- A reminder notice (or courtesy letter) can frequently resolve the issue.
- If that fails, you can send the defendant a notice to appear in court and show cause why they should not have a *capias pro fine* issued against them.
- Remember that if the defendant is indigent, you **must** offer community service to satisfy the fine and costs before considering a *capias pro fine*.
- Also you may wish to consider a full or partial waiver if the defendant is indigent and struggling with payment plans or community service.

62

What happens when...?

The defendant doesn't appear for their "show cause hearing" when they haven't paid the judgment?

- If a defendant fails to satisfy a criminal judgment, the court must send a notice of a show cause hearing to determine if there is good cause for that failure.
- If the defendant doesn't appear, the court can issue a capias pro fine to have the person arrested and brought to the court directly.

63

What happens when...?

The court isn't available when the defendant is arrested on a capias pro fine?

64

Capias Pro Fine Procedure

- Remember that a capias pro fine is an order to bring the defendant directly to the court so that the judge can hear why the judgment has not been satisfied.
- But what if the court is unavailable?
- In that situation, the defendant can be taken instead to jail, but **must** be released within **one business day**.
 - The defendant could also instead be brought directly to any other justice of the peace in your county to dispose of the case.

65

Capias Pro Fine Procedure - Jail

- While the defendant is in jail, any other justice of the peace of the county acting as a magistrate may dispose of the capias pro fine by holding the hearing, granting time served, granting community service, waiving fines and costs in full or in part, or when appropriate, by committing the defendant to lay out the fine and costs in jail.

66

What happens when...?

Someone in jail for another offense wants jail credit on my case?

67

Locked up on Other Charges, Wants Jail Credit in Justice Court

- Many inmates who are incarcerated for serious offenses also have fine-only misdemeanors pending in justice court.
- They often will contact the court seeking jail credit toward their misdemeanor for the jail or prison time for the more serious offense. They are entitled to credit on the offense in your court for any time in jail **for any jail or prison sentence which occurs both:**
 - 1) after the commission of the offense in your court, **and**
 - 2) after Sept. 1, 2021.

Code of Criminal Procedure Art. 45.041

68

What if sentence is pre-Sept. 2021?

- If the sentence was before Sept. 1, 2021, a way that the court can dispose of the case legally would be to first ensure that there is a judgment.
 - This means that if the defendant hasn't pled guilty or nolo, the court must get such a plea in writing and generate a judgment.
- The court could then determine that the defendant is unable to immediately pay, and that community service would be an undue hardship, and then waive the fine and costs entirely under Art. 45.0491.

69

What happens when...? The State wants to appeal?

- The State has a **very** limited right to appeal in criminal cases. The only issues that would arise in a justice court case that trigger the State's right to appeal would be an order dismissing the complaint, granting a motion for new trial, or sustaining a claim of **double jeopardy** by the defendant.

Code of Criminal Procedure Art. 44.01.

- Double jeopardy is the concept that you can't be prosecuted twice for the same conduct.

70

What happens when...?

The defendant pleads guilty or nolo and now wants to appeal?

- **This is fine!** Many new judges are confused with this idea of admitting guilt without a trial, and then wanting an appeal. What exactly is the defendant contesting?
- They may just wish to test the waters of the county court. Any defendant who has been convicted may appeal as long as they timely file an appeal bond.
- Remember that a defendant can mail in a plea of guilty/nolo and ask for appeal bond amount under Art. 27.14, and the court must send the notice of appeal bond amount (including information on things like community service, payment plans, and waiver of fines)

71

What happens when...?

The defendant **pays the fine and costs** and now wants to appeal?

- Now **this** is a problem! The Court of Criminal Appeals (the highest criminal court in the state of Texas) has found that once the fine and costs are paid **in full**, that there is no remaining issue, and therefore no appeal can be had.

Fouke v. State, 529 S.W.2d 772 (1975)

72

What happens when...?

The county court wants to send the appeal back down to the justice court?

73

Writ of Procedendo?

- A **writ of procedendo** is a tool used by courts of appeal to send a case back to the trial court to “proceed” on the original judgment. Sometimes, county courts attempt to use this tool to send a case back to a justice court following an appeal.
- **However, this is improper** for appeals from justice court since the justice court judgment is vacated and ceased to exist once the appeal was perfected.

Code of Criminal Procedure Art. 45.043

74

What if the Appeal was Improper?

- An appeal is **perfected**, meaning the case is ready for the county court to take jurisdiction, when the defendant posts a timely appeal bond.
- If the appeal was never perfected, the judgment of the justice court still exists, so the county court **may** send the case back to justice court on the grounds that the appeal was never perfected.
- If an appeal bond is not timely filed, the appellate court does not have jurisdiction over the case and shall **remand**, or send back, the case to the justice court for enforcement of the judgment.

Code of Criminal Procedure Art. 45.0426.