

SAN PATRICIO COUNTY

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November 1, 2002

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OPINION COMMITTEE

Dear Mr. Cornyn;

I am the County Attorney for San Patricio County. I am requesting an opinion concerning a matter of public interest in the City of Aransas Pass, which is one of the larger municipalities in San Patricio County. A dispute concerning the respective duties of the city attorney and municipal judge of Aransas Pass has led to the resignation of the judge. The city attorney is of the opinion that when a municipal judge elects to proceed to trial in a case in which the state is not represented by counsel, the judge may examine the state's witnesses in order to make an informed and intelligent ruling. The former judge is of the opinion that the Code of Criminal Procedure now prohibits such practice. The city council has asked this office for guidance, since I am authorized to prosecute cases in municipal court.

My brief on the issue accompanies this letter, and I ask that you consider the matter and issue an opinion.

Sincerely,



David Aken
County Attorney

Amended Requestor's Brief

ISSUE:

At trial of a case, may a municipal judge examine the state's witnesses if the state is not represented by counsel when the case is called for trial?

DISCUSSION:

Former Article 45.36 of the Texas Code of Criminal Procedure allowed "the justice to examine the witness if the State is not represented by counsel." Many municipal courts utilized that provision to facilitate a trial without a prosecutor. Former Article 45.36 has been recodified as Article 45.031, which provides:

If the state is not represented by counsel when the case is called for trial, the justice or judge may:

- (1) postpone the trial to a date certain;
- (2) appoint an attorney pro tem as provided by this code to represent the state; or
- (3) proceed to trial.

The procedures for the appointment of an attorney pro tem for the state are provided in great detail in Article 2.07. It may be argued that by setting forth such copious details, the legislature intended that counsel for the state be present at all trials in municipal courts, pursuant to requirement of Article 45.201 that all prosecutions in municipal court be conducted by the city attorney or deputy city attorney.

It may be argued that if a municipal judge proceeds to trial of a case in which the state is not represented by counsel, that Article 45.032 requires the entry of a directed verdict of "not guilty." The language of Article 45.032 is as follows:

If, upon the trial of a case in justice or municipal court, the state fails to prove a prima facie case of the offense alleged in the complaint, the defendant is entitled to a directed verdict of "not guilty."

Thus it may be argued that Articles 45.201, 45.031, 2.07 and 45.032, considered together, create a strong presumption that if a municipal judge tries a case when counsel for the state is absent, the outcome shall be a directed verdict of "not guilty."

However, that outcome is not the specific mandate of such Articles, nor is questioning of the state's witnesses by the municipal judge specifically prohibited. It may be argued that in the absence of such specific mandate and prohibition, that the municipal judge may follow the long-established practice in Texas in which municipal judges asked questions of witnesses to enable them to make intelligent rulings. It may be argued that such practice falls far short of presenting or prosecuting the

state's case. It may be argued that the absence of legislative provisions specifically prohibiting a municipal judge from examining the state's witnesses at trial in the absence of a prosecutor furthers long followed traditions of informality in the trial of cases at the justice and municipal levels.

Article 45.001 sets forth the objectives of the rules governing procedures in justice and municipal courts. One of those reasons is "to process cases without unnecessary expense or delay." It may be argued that allowing a municipal judge to examine the state's witnesses would satisfy the objectives of Article 45.

CONCLUSIONS:

Although there are specific legislative requirements that the state's cases be prosecuted by counsel, there is also a provision in Article 45.031 that allows a municipal judge to proceed to trial if the state is not represented by counsel, and there is no specific legislative provision prohibiting a municipal judge from following the traditional practice of municipal judges' questioning the state's witnesses at such trials.