

JULY 2016 – CRIMINAL PROCEDURE & EVIDENCE

1. Was the prosecution of Jeff and C.J. Initiated within the statute of limitations? Explain your answer.

Yes. It was within the statute of limitations. The limitations period is three years for felonies in general. TCCP art. 12.01(7). Examinees that missed this question did not know the general statute of limitations.

2. Could the magistrate have issued a summons instead of an arrest warrant? Explain your answer.

Yes, the magistrate was authorized to issue a summons instead of an arrest warrant. This is because “[a] summons may be issued in any case where a warrant may be issued.” TCCP art. 15.03(b). Examinees that missed this believed the judge had no authority to summon a person to answer for the commission of a crime and others thought only an arrest warrant could be used. Some examinees thought that after a person was indicted a summons could not be used and others could not distinguish an arrest warrant from a summons.

3. Can Jeff be denied bail? Explain your answer.

No. Jeff has a constitutional right to bail Tex. Const. art. 1, §11. Examinees that missed this made assumptions that were not contained in the question about criminal history. Others did not answer the call of the question but made a list of reasons of why bail could be denied.

4. What is a personal bond, and what is one way in which it differs from a bail bond?

A personal bond has a monetary amount that the person must pay if he fails to appear, but it does not require any sureties or other security. A bail bond does require sureties or other security for the person to be released. TCCP art. 17.02-17.03. Examinees that missed this question thought a personal bond was when an individual put up money for bail.

5. How should the magistrate rule on your objection, and would your answer be different if the proceedings were a jury trial instead of an examining trial?

The magistrate should sustain the objection. It would not make any difference in the answer if this were a jury trial “[t]he same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial.” TCCP art. 16.07. Examinees that missed this did not know that the rules of evidence apply to an examining trial. They may have confused it with a grand jury proceeding.

6. Does Jeff have the right to address the grand jury? Explain your answer.

No, Jeff does not have the right to address the grand jury. “No one other than a witness or the state’s attorney may address the grand jury. “No one other than a witness or the state’s attorney may address the grand jury about a matter that is before it. The accused, or the attorney for the accused, may, on their own initiative, address the grand jury only if the state’s attorney permits.” Stern v. State 869 S.W.2d 614, 621 (Tex. App.- Houston [14th Dist.] 1994, writ denied); see also TCCP art. 20.04 (stating that the accused or the attorney for the accused may address the grand jury “if approved by the State’s attorney”). Examinees that missed this either missed the call of the question or confused this with the Sixth Amendment right to counsel in the post indictment setting.

7. Does the law authorize Prosecutor to comply with the request of the grand jurors? Explain your answer.

No. “Only grand jurors may be in the grand jury room while the grand jury is deliberating.” TCCP art. 20.011(b) (However, at other times, “[t]he grand jury may send for the attorney representing the state and ask for advice upon any matter of law or upon any question arising respecting the proper discharge of their duties.” TCCP art. 20.05). Examinees that got the answer wrong neglected to note that the grand jury was in deliberations.

8. Was it proper for the grand jury to charge Jeff and C.J. in the same indictment? Explain your answer.

Yes, it was proper. Jeff and C.J. may be charged in the same indictment because they were charged with the same offense. C.f. TCCP art. 36.09 (“Two or more defendants who are jointly or separately indicted or complained against for the same offense or any offense growing out the same transaction may be, in the discretion of the court, tried jointly or separately as to one or more of the defendants.....”) Jackson v. State 486 S.W.2d 764, 766 (Tex. Crim. App. 1972) (“the language ‘acting together’ in an indictment is surplusage when two or more defendants are charged with the same offense”); Lopez v. State, 725 S.W.2d 487, 489 (Tex. App. Corpus Christi 1987) (same). Examinees that missed this question got it confused with severance for trial versus what may be changed in an indictment.

9. What procedural step should you take to challenge the indictment, and when should you take it?

You should file a motion to set aside (quash) the indictment for failure to allege an offense. See TCCP ART. 27.08; Studer v. State, 799 S.W.2d 263 272-73 (Tex. Crim App. 1990). You should file the motion before trial. See TCCP art. 1.14(b); Studer, 799 S.W.2d at 272-73. Examinees made up dates or used civil standards and deadlines to answer the question.

10. What procedural step, if any, can you take to try to prevent Prosecutor from mentioning this fact at trial? If Prosecutor mentions this fact at trial, what should you do to preserve the issue for appeal? Explain your answer.

You should file a motion in limine to try to prevent Prosecutor from mentioning this fact at trial. If Prosecutor mentions this fact at trial, you should object and obtain a ruling to preserve the issue because a motion in limine by itself does not preserve the issue. See TRE 103; see also Webb. V. State, 760 S.W.2d 263, 275 (Tex. Crim. App 1988). Examinees that missed this question did not consider other bad acts evidence as admissible and so some concluded a Motion to Suppress was appropriate.

11. What procedural step, if any, can Jeff take to attempt to prohibit Prosecutor from introducing at trial the three Valenti handbags that Officer took from Sarah? Explain your answer.

There is no such procedural step. Jeff has no standing to file a motion to suppress (because he had no privacy or other interest or expectation of privacy in the handbags when they were seized from Sarah). See McInnis v. State, 657 S.W.2d 113, 114-115 (Tex. Crim. App. 1983); Johnson v. State, 583 S.W.2d 399, 404 (Tex. Crim. App. 1979); see also Fuller v. State, 829 S.W.2d 191, 201-02 (Tex. Crim. App. 1992); State v. Brady, 763 S.W.2d 38 (Tex. App-Corpus Christi 1988, no pet.); cf. U.S. Const. amend. IV; TCCP art. 38.23. Examinees missed the fact that Jeff had no standing to complain about the search of Sarah.

12. If Jeff pleads guilty, but the Court rejects the plea agreement, will Jeff be bound by his guilty plea and have given up his right to a trial? Explain your answer.

No, Jeff will not be stuck with his guilty plea. If the Court rejects the plea agreement, “the defendant shall be permitted to withdraw the defendant’s plea of guilty or nolo contendere.” TCCP art. 26.13 (a)(2). Examinees that missed this just did not know the law.

13. What action, if any can you take to change the seating of the prospective jurors?

You can make a motion for the jury to be shuffled. See Williams v. State, 719 S.W.2d 573 (Tex. Crim. App. 1986) (stating that “a defendant has an absolute right to have the jury panel reshuffled on demand”) see generally TCCP art. 35.11. Most people got this right but some confused it with a question about the number of jury strikes a party gets.

14. How many peremptory challenges may Jeff, C.J., and Prosecutor each exercise?

You may exercise 6, C.J.’s attorney may exercise 6, and Prosecutor may exercise 12. See TCCP art. 35.15(b) (“If two or more defendants are tried together each defendant shall be entitled to six peremptory challenges and the State to six for each defendant.”). Most examinees missed the number of strikes allowed and the fact the prosecutor got double the strikes because there were two defendants. Also, many applied civil jury law about opposing interests among defendants.

15. Under the Code of Criminal Procedure, what two procedural steps must occur after the jury is impaneled and before any evidence is introduced at trial? Explain your answer.

The first two steps are: (a) the indictment is ready by the prosecutor; and (b) a plea of not guilty shall be stated. TCCP art 36.01 (a)(1)&(2). If these steps are skipped, they can be fixed by reading the indictment to the jury, having the accused enter a plea, and having the State reintroduce the evidence (or the parties can stipulate to the evidence). See Warren v. State, S.W.2d 414, 415 (Tex. Crim. App. 1985). Most examinees that missed this question missed that the indictment had to be read, mentioned opening statements, or the jury charge.

16. How should the Court rule on your objections? Explain your answer.

The Court should overrule your objection. Jeff’s statements were not introduced for the truth of the matter but rather because they are an operative fact constituting part of the crime. See United States v. Ostrander, 999 F.2d 27, 32 (2nd Cir. 1993) (holding that statements were admissible because they were introduced not for the truth of the matter but because they were false and were intended to induce the other persons in the fraud); see also United States v. Ballis, 29 F.3d 1399, 1405 (5th Cir. 1994) (holding it was error to exclude statements as hearsay because they were offered to prove that they were made and were not criminal as charged); United States v. Kirk, 844 F.2d 660, 663 (9th Cir. 1988) (statements made in alleged time-share condominium conspiracy by salespeople were not hearsay because they were introduced to show that misrepresentations were made and the effect on the hearer). Examinees that missed this question thought it was hearsay. Others got that this was admissible, but did not give the correct reason as to why.

17. Was Prosecutor required to tell you about this testimony prior to trial? Explain your answer.

No, prosecutor was not required to tell you about this testimony before trial unless you requested notice of prior bad act evidence. [Or, yes, Prosecutor was required to tell you about this evidence prior to trial if you requested notice of prior bad act evidence.] See TRE 404(b). Examinees that missed this cited the Michael Morton Act and Brady disclosures. They did not understand bad acts evidence and the requirement for the request for notice.

18. How should the Court rule on your objection? Explain your answer.

The Court should overrule your objection. Jeff's statement are admissible either as an admission by a party opponent, see TRE 801 (d), or as an admission against interest, see TRE 803 (24). Very few missed this question

19. How should the Court rule on your objection? Explain your answer.

The Court should overrule your objection. This testimony is admissible as a statement made during and in furtherance of a conspiracy. See TRE 801 (d) (2) (E). Examinees that missed this question thought this was hearsay instead of a statement in furtherance of a conspiracy.

20. Is this evidence admissible at sentencing? Explain your answer.

This evidence is admissible if Prosecutor can show beyond a reasonable doubt that Jeff committed this act. See TCCP act. 37.07 § (a) (1); See also Mitchell v. State, 931 S.W.2d 950, 952-53 (Tex. Crim. App. 1996 (en banc)). Very few people knew that this had to be proven beyond a reasonable doubt and many did not understand that other bad acts are admissible at sentencing.