



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Alex Jung  
County Attorney  
Gillespie County  
Fredericksburg, Texas

Dear Sir:

Opinion No. O-3553

Re: Are the forms submitted,  
for use in entering plea  
of guilty and deposit of  
money to pay fine and  
costs in "drunk driving"  
cases, objectionable?

You have asked our opinion as to whether the use of  
the following forms in "drunk driving" cases is objectionable:

Form No. 1:

No. \_\_\_\_\_

The State of Texas, |

In the District Court of  
Gillespie County, Texas

Vs. |

Term,  
A. D. 194 \_\_\_\_\_

To the Honorable Said District Court:

Now comes \_\_\_\_\_,  
defendant in the above entitled and numbered cause,  
and respectfully agrees that said cause may be tried  
during his absence at the \_\_\_\_\_ Term, or at  
any succeeding Term, of this Court; and for such pur-  
pose, this defendant does hereby enter his appearance  
herein and requests that this agreement be entered of  
record.

\_\_\_\_\_  
Defendant."

Form No. 2:

"No. \_\_\_\_\_

The State of Texas, |  
Vs. |

In the District Court of  
Gillespie County, Texas.

\_\_\_\_\_|

\_\_\_\_\_, Term,  
A. D. 194\_\_\_\_\_.

To the Honorable Said District Court:

Now comes \_\_\_\_\_  
defendant in the above entitled and numbered cause  
and hereby enters a plea of guilty herein to the  
charge pending against him of 'Operating an automomobile  
while under the influence of intoxicating  
liquors.'

Wherefore, this defendant  
requests that his said plea be entered of record  
herein.

\_\_\_\_\_  
Defendant."

Form No. 3:

\_\_\_\_\_  
"Fredericksburg, Texas  
\_\_\_\_\_, 1941

Mr. E. L. Schmidt, Clerk,  
District Court,  
Gillespie County,  
Fredericksburg, Texas.

Dear Sir:

I am herewith depositing with you the sum of  
\$\_\_\_\_\_, which sum it is estimated to cover a  
\$50.00 fine and costs in Cause No. \_\_\_\_\_,  
State Vs. \_\_\_\_\_, pending in the District  
Court of Gillespie County, Texas, in event such  
District Court should fix my punishment in that  
sum in such cause.

You are hereby authorized and directed to apply such sum so hereby deposited on such fine and costs or fine or costs as such District Court may assess against me in said cause, if any.

It is understood that the penalty to be assessed in said cause is solely within the province of such District Court and that such District Court is not bound by any statement or representation of any arresting officer or other person to the contrary, if any.

RECEIVED from \_\_\_\_\_ the above  
sum of \$ \_\_\_\_\_ for deposit with me and  
disposition as above stated.

\_\_\_\_\_  
Clerk,  
District Court of Gillespie  
County, Texas."

We understand from your letter of inquiry that these forms are intended for use between terms of court in prosecutions under Article 802, Vernon's Penal Code of 1925, in which the defendant desires to enter his plea of guilty without the necessity of his being present at any stage of the trial. Article 802, as amended by Acts 1941, 47th Legislature, Regular Session, House Bill No. 73, is as follows:

"Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this State, or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not less than ten (10) days nor more than two (2) years, or by a fine of not less than Fifty Dollars (\$50) nor more than Five Hundred Dollars (\$500), or by both such fine and imprisonment."

Article 580, Vernon's Code of Criminal Procedure of 1925, provides as follows:

"In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of misdemeanor when the punishment or any part thereof is imprisonment in jail. When the record in the appellate court shows that the defendant was present at the commencement, or any portion of the trial, it shall be presumed in the absence of all evidence in the record to the contrary that he was present during the whole trial."

In the case of Cain vs. State, 15 Texas Court of Appeals 41, it was held that, since Article 596, Code of Criminal Procedure (1879), required the personal presence of the defendant at a trial for a misdemeanor punishable wholly or in part by imprisonment in jail, the waiver of defendant's presence at the trial of such a case was in violation of law. But in that case the court further held that, since the punishment assessed was a fine only, and defendant was represented at the trial by counsel, his absence did not render the judgment void. Article 596, Code of Criminal Procedure of 1879, provided:

"In all prosecutions for felonies, the defendant must be personally present on the trial, and he must likewise be present in all cases of indictment or information for misdemeanors where the punishment or any part thereof is imprisonment in jail."

The identity of substance with the first sentence of Article 580, above quoted, will be seen.

The Texas Court of Criminal Appeals has recently held that, where the judgment in a misdemeanor case assessed a jail penalty, it was error for the court to try the case in the absence of the accused. (See Henderson v. State, 127 S. W. (2d) 902; Stewart v. State, 127 S. W. (2d) 903).

Since it appears that the law of Texas clearly requires the presence of the accused at his trial for a misdemeanor, the punishment of which may be confinement in jail, we are impelled to advise against the use of any procedure which is in violation of that law (even though the judgment may not

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be void, where the only penalty assessed is a fine). This is particularly true where, as in your case, the court is at liberty to disregard any agreement between the defendant and the prosecuting attorney that the punishment will be by fine only.

It is therefore our opinion that the right of a defendant in a misdemeanor case, in which he may be punished by confinement in jail, to be present at the trial of his case, may not legally be waived in advance of the trial.

In view of our opinion that the purpose for which the submitted forms are intended seems clearly to be in violation of law, it becomes unnecessary to pass upon the sufficiency of the forms to accomplish that purpose.

Yours very truly

APPROVED DEC 19, 1941

*W. R. Allen*

FIRST ASSISTANT  
ATTORNEY GENERAL

ATTORNEY GENERAL OF TEXAS

*W. R. Allen*

By

W. R. Allen  
Assistant

WRA:RS

