

Criminal Law 2020 – What's Hot & What's Not COVID & Beyond

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I. Criminal Law 2020 – Hotter than Hot

2020 has been a transformational year for criminal law and truthfully we just won't know how much of a revolution we've experienced this year for years to come. Coming in to 2020, many issues were white-hot such as marijuana legalization and #MeToo – and it will be interesting to track their trajectory going forward. The real story is the dramatic changes COVID brings to the criminal practice in 2020 and beyond. Close behind is the nation-wide pre-eminence of the Black Lives Matter movement.

II. COVID's Impact – What's Hot

a. Remote Court – Hot – (But Not Jury Trials)

Criminal courts are doing as much as they can remotely. But like a bathroom with a toilet that just exploded – the criminal justice system may as well have an “out of order” sign posted on the door. The system isn't working and cases aren't moving for a variety of factors.

The biggest single factor breaking the courts is the inability to have jury trials.

Two main obstacles stand in the way of jury trials. The practical reality there likely won't be enough people who show up for jury duty – and the legal limitations.

A criminal defendant has the right to confront their accuser in open court under the 6th Amendment to the United State's Constitution's Confrontation clause. There has already been much litigation about cross-examining witnesses through video – and it is fairly well established it violates the confrontation clause. See *Coy v. Iowa*, 487 US 1012 (1987) and *Maryland v. Craig*, 497 US 836 (1990). Slight exceptions have been made for child witnesses testifying via closed circuit television. *Cervantes v. State*, 594 S.W.3d 667 (Tex.App. – Waco, 2019).

Additionally, Appellate Courts typically afford juries major deference on appeal. A cornerstone of the jury system is the jury is only feet away from a witness and can (in theory) gauge truth from lies. Zoom doesn't help the matter and if it did – then the appeal judges are in an equal position to the jury to decipher the truth.

Courts have threatened to impose jury trials as part of emergency orders. In forcing a jury trial virtually, however, a Court would be highly vulnerable to reversal for violation of the

confrontation clause under the 6th Amendment. Courts are unlikely to begin a laborious “Zoom” trial knowing they will probably have to do it again.

An obvious concern is jurors might not show up even if summoned. Jurors are, after all, voters too and they may resent a particular judge violating their comfort norms.

A class c misdemeanor speeding ticket trial in Travis County gained notoriety recently – but in that case the Defense lawyer’s waiver was rumored to be a “publicity stunt.” The trial was laborious and filled with technical glitches.

b. Black Lives Matter - Hot

It is anyone’s guess as to how the major events surrounding the murders of George Floyd & Breonna Taylor and the rising tide of the ‘Black Lives Matter’ movement affect and shape juror attitudes and opinions. We’ve all seen countless newsreels during 2020 including stories about protests, police defunding, and instances of civil unrest. We simply won’t know the effect this has on many jurors until courts get going again. Stay tuned.

c. GA-13 - Hot

On March 29, 2020, Governor Abbott signed Executive Order GA-13. This order partially suspended the rights of certain repeat offenders to be released on bond during the pandemic. This order has been heavily contested and litigated as many larger counties seek legal tools and weapons which allow them to depopulate jails and prisons during the pandemic. The Governor’s rationale, as argued by the State’s Counsel, was so as not to allow victims to be forced to live and shelter in place with their abusers.

GA-13 was initially struck down by a District Judge and then was reversed on appeal. Most courts have easy-enough end arounds to try and help people get and stay out of jail during the pandemic – but Bexar County recently made a public appeal to the Governor to reverse his order.

Nevertheless, in a summer filled with cases not moving and no trials – GA-13 has provided criminal lawyers at least one issue for which we can nerd-out.

d. Domestic Violence – Hot

The pandemic may very well produce some mind-boggling or inexplicable statistics about domestic violence. On one hand, arrests have dropped yet with families locked-in together at close proximity it’s also foreseeable the actual incidents of domestic violence and abuse may be, in fact, going up. Cases might be filed later where police were called originally or the police may play more of a mediator-role rather than take one of the people to jail.

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Because of these counterforces between the lack of arrests, alternative measures taken by police, and the lock-in aspects of the pandemic – we may never have an in-focus picture of the actual impact of domestic violence from the COVID pandemic.

e. Rights to access the internet - Hot

A hot topic prior to COVID was a criminal defendant's right to access the internet – particularly in sex related charges.

In 2017, the Supreme Court filed the landmark decision *Packingham v. North Carolina*, 137 S.Ct. 730 (2017). In that case, a North Carolina sex offender posted on Facebook he had a traffic ticket thrown out. In doing so, he violated a North Carolina statute which made it a crime for a sex offender to access social media. The SCOTUS unanimously struck down the North Carolina law and held social media in the 21st century is the equivalent of the “town square” for first amendment purposes. In staunchly defending free speech, the Court also recognized access to the internet for services such as health, banking, and shopping are simply too central to everyday life to make blanket restrictions.

The State and even the Courts have shown resistance during the past two years to enforcing *Packingham* rationalizing exceptions to still keep sex offenders and persons accused of sex offenses off of social media. The pandemic, however, has caused the State and the Courts to yield to “the new normal.” That is, focus has now shifted from keeping persons away from the internet altogether – to monitoring their usage.

III. COVID – Not Hot

a. Arrests – Not Hot

Arrests have been down dramatically in 2020 beginning in March and April. How much, we simply don't know yet. Texas Department of Public Safety (“DPS”) regularly publishes statistics on crime – but there is a lag of reporting of several years.

Some of the obvious factors are people are simply being in public less. Less bars are serving alcohol, less people are driving around the streets with drugs. Less high-schoolers are having raging parties... and on and on and on.

Another factor is most bigger cities and counties are doing everything possible to keep jail populations low. This means it is likely police have (or had) marching orders not to arrest for certain low-level offenses.

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Yet another factor could simply be police officers may feel uncomfortable putting offenders in their police car for an hour not knowing whether that person may be positive for COVID.

Police were almost certainly issuing citations or simply making police reports instead of making arrests. Examples would include issuing a theft citation for shoplifting instead of taking a person to jail.

Another more complex example of a possible interaction during the pandemic could look like this:

Officer answers a call for a domestic dispute and finds one or both parties has minor injuries and/or bruising. Instead of trying to determine who was the perpetrator and taking that person to jail – the officer would instead threaten the perpetrator with jail unless they leave immediately and stay in a hotel for the night. The police may or may not file charges on the individual later – but they attempt to resolve the immediate conflict short of jail.

b. DWI – Not Hot

For reasons discussed above – DWI numbers are much lower. Again, without restaurants, bars and clubs being open – it stands to reason the numbers would be far lower. Further, DWI arrests tend to be very laborious for police officers including conducting field sobriety tests, attaining blood warrants, conducting blood draws, and then taking the person to jail. It is entirely rational to think police may not want to risk their own health by prolonged exposure to strangers.

Not only this, but DWI prosecution had been falling even before the pandemic. Arrests have been going down due to factors such as increased transportation options (Lyft & Uber), more thorough prosecution tactics including blood draws, and less borderline arrests due to the difficulty of DWI investigation.

c. Plea Bargaining – Not Hot

The criminal courts and their backlogs are currently getting nothing but worse. New arrests are coming in, but cases are not getting resolved in volumes we're accustomed to. Again, the main issue is the inability to have jury trials.

Here's why: The jury trial acts as the single biggest pressure mechanism to the parties in a case. A criminal defendant has a constitutional right to a jury trial and State Courts recognize

the prosecution has a right to a jury trial as well. What this means is either side can veto a bench trial.

Each side in a criminal case typically applies pressure to the other in relation to the jury trial. This is what induces realistic and productive plea bargaining. The criminal defendant's currency is freedom, money, and often the stress, anxiety, and the toll criminal charges take in their lives. The prosecutor's currency is their time, effort, and usually trying to make an accuser satisfied they are receiving justice. The prosecutor threatens immediate and worse punishment of a criminal defendant and in turn, an effective criminal defense lawyer monopolizes the prosecutors time, makes the prosecutor fear losing and thereby upsetting the accuser – which often motivates the prosecutor to reduce the plea offer.

Without the threat of a jury trial, though, and the ability to veto other resolutions – neither side is really able to apply any pressure to the other.

A criminal defendant has little reason to plead guilty during this pandemic. They can go to a COVID-filled prison for 10 years now if they accept the state's offer – or they can stay free on bond for another 18 months. Not much of a choice.

IV. Pre-COVID Hot

a. Marijuana Legalization- Hot

House Bill 63

The 2019 legislative session had two major events worth note. First, was Texas House Bill 63 which passed with overwhelming bi-partisan support on April 30, 2019 and with the support of Governor Abbott. The bill would have reduced possession of marijuana from a class b misdemeanor (0 to 180 days of jail) to a class c misdemeanor (fine only – max of \$500).

Despite passing the house, Lt. Governor Patrick did not allow the bill to be taken up by the Texas Senate thus killing the measure. Though the measure would not have legalized marijuana and ultimately failed, the Texas House's 103-42 vote in favor of the bill almost certainly is a preview of things to come.

House Bill 1325

House Bill 1325 was adopted by the Texas House, Senate, and was signed into law by the Governor. It took effect on June 10, 2019. It is the bill making CBD products legal in Texas.

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The bill's reach, though, had many unintended consequences which will likely be addressed by future Texas legislatures. Namely, the bill legalized "hemp" and defined it as having less than 0.3% THC.

The effect of new definition of "hemp" in Texas is complicated. In summary, the definition now calls into question whether a person found in possession of the leafy green substance with the peculiar odor is committing a crime or not. Previously, police were not legally required to test the marijuana to see if it has 0.3% or greater THC content. Now, they do have to test it. The testing is expensive and opens avenues of attack for the defense.

HB 1325 has caused certain counties to quit prosecuting simple possession of marijuana cases such as Dallas and Denton. It also calls into question whether searches based on the odor of marijuana (very common) are still, in fact, legal.

b. #Metoo - Hot

Remember this? This was an issue which was only getting hotter heading into the pandemic. Cold cases based on older outcries of sexual abuse are still being investigated if not currently prosecuted. The investigation of these types of cases wouldn't be as affected by the pandemic as typical "street crimes" such as theft, DWI or assault. These investigations are typically full of interviews which can often be done remotely.

c. Opioids - Hot

America's opioid crisis is probably only being made worse by COVID. The investigation and prosecution of opioid abuse are still ongoing issues. Not only are abusers of opioids being prosecuted still, but it's not uncommon for the doctors prescribing them and in some instances the retail chains which may be turning a blind-eye to some of the abuses to be brought into the fold.

V. Post-COVID Predictions

a. Back-log

Statistics show cases are piling up. Without the jury trial mechanism to apply pressure to both the prosecution and the defense – the cases are being resolved at far slower a pace. Courts may be faced with a back-log they won't get rid of any time soon.

b. Remote Court – not going away

Some changes are probably here to stay. Municipal courts are becoming quite efficient at remote dockets and some developers have even created platforms such similar to Zoom and Microsoft Teams specifically for Court docket.

Courts will likely seize on some of the more advantageous and helpful online practices while jettisoning others. Also, the increase in remote court proceedings expands the ability to practice law to further and further jurisdictions.

c. Juries

Americans and Texans have been put through ‘the ringer’ in 2020 and there is simply no telling how they’ll react when they have jury duty. Will they applaud or be angered by government? Will they applaud or be angered by unruly behavior?

The only thing certain is things will never be the same.