



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-89,018-02

IN RE HONORABLE JOHN YEAGER, RELATOR

**ON APPLICATION FOR A WRIT OF MANDAMUS
IN CAUSE NO. C-1-CR-17-100063 IN TRAVIS COUNTY COURT AT LAW NO. 2
FROM TRAVIS COUNTY**

**HERVEY, J., filed a concurring opinion in which KELLER, P.J., and KEASLER, J.,
joined.**

CONCURRING OPINION

The Court holds that Judge Shepperd of Travis County Court at Law No. 2 erred when he issued a writ of mandamus enjoining Judge Yeager of the City of Austin Municipal Court from assessing punishment after a jury convicted a defendant on a not-guilty plea, and it orders him to withdraw his order. TEX. CODE CRIM. PROC. art. 37.07. I agree that the law is too unsettled to warrant mandamus relief and concur in the Court's judgment. I write separately to explain why I think Article 37.07 prevents a municipal court judge from assessing punishment after a defendant is convicted by a jury on a not-guilty plea.

Article 37.07 states in relevant part that,

Sec. 1. (a) The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue.

(b) If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

(c) If the charging instrument contains more than one count or if two or more offenses are consolidated for trial pursuant to Chapter 3 of the Penal Code, the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them.

Sec. 2. (a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed. If the jury fails to agree on the issue of guilt or innocence, the judge shall declare a mistrial and discharge the jury, and jeopardy does not attach in the case.

(b) Except as provided by Article 37.071 or 37.072, if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that (1) in any criminal action where the jury may recommend community supervision and the defendant filed his sworn motion for community supervision before the trial began, and (2) in other cases where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury, except as provided in Section 3(c) of this article and in Article 44.29. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

* * *

Id. art. 37.07, §§ 1(a)–(c), 2(a)–(c).

Section 1(b) sets up a general rule that the jury shall assess punishment in all cases when a defendant pleads not guilty and goes to the jury.¹ *Id.* art. 37.07, § 1(b). The only exception is when Section 2 requires otherwise. *Id.* Section 2(b) requires the judge to assess punishment in non-capital cases “if a finding of guilty is returned . . .” unless the defendant files a sworn motion before trial requesting probation and the jury could recommend probation, or if the defendant elects in writing before voir dire for the jury to assess punishment. *Id.* art. 37.07, § 2(b). If Section 2(b) applies to trials when a defendant is found guilty by a jury on a not-guilty plea, the general rule of Section 1(b) would be mostly a dead letter. Construing the statute that way doesn’t make much sense. But when Section 2(b) is interpreted in light of Section 2(a), everything makes sense.

Section 2(a) says that, “[i]n all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, . . .” the court shall bifurcate the trial. *Id.* art. 37.07, § 2(a). I believe that the “other than” clause creates a prohibition and that it does not give justice and municipal court judges the option to bifurcate trials.² And if that limitation runs to Section 2(b), as I believe it does,³ a jury would assess punishment in

¹Jury trials are the default for justice and municipal courts, but a defendant can waive his right to a jury in writing and proceed to a bench trial. TEX. CODE CRIM. PROC. art. 45.027. If a defendant does not waive a jury and fails to appear, however, the judge can impose a reimbursement fee to “pay for the costs incurred for impaneling the jury.” *Id.* art. 45.026.

²If a defendant wants a bifurcated trial, he can appeal to a county court or other proper court. TEX. CODE CRIM. PROC. art. 45.042; *see id.* art. 37.07, § 2(a) (requiring a bifurcated trial in all criminal cases in county court).

³Judge Yeager asserts that, if the “other than justice court and municipal courts” limitation runs to Section 2(b), it must also run to Section 2(c), which requires that “[p]unishment shall be assessed on

all justice and municipal court trials when the defendant pleads not guilty and is convicted by a jury, but in *all other criminal cases* the judge would assess punishment unless the defendant files a sworn motion for probation before trial and the jury could recommend probation, or if the defendant so elects in writing before the commencement of voir dire.

Id. art. 37.07, § 1(b), 2(a), 2(b).

That makes more sense to me. Justice and municipal courts deal with fine-only offenses, and the legislature might have believed that in such cases, if the defendant chooses to go to a jury, that jury should also get to assess his punishment.

With these comments, I concur in the judgment of the majority.

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each count on which a finding of guilty has been returned.” TEX. CODE CRIM. PROC. art. 37.07, § 2(c). Even if that were true, Section 1(b) and (c) require the jury to “return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them” and to assess punishment in all cases unless the penalty is fixed by law. *Id.* art. 37.07, §§ 1(b)–(c).

I also note Article 45.036, which requires justice and municipal court judges to verify that the jury’s verdict is in proper form, and if so, to enter the judgment according to the verdict. *Id.* art. 45.036.