

## PROBATION LAW IN TEXAS

### Historical Background

Prior to 1913 if a defendant were convicted of a criminal offense the sentencing authority had one of two options - the judge could assess penitentiary time or a jury could recommend that no punishment be assessed.

It had consistently been held that legislation permitting trial courts to suspend pronouncement or imposition of sentences was constitutional.

See Baker v State 70 Tex. Cr. R. 618, 150 S.W. 998 (1913)

See also McNew v State 608 S.W. 2d 166 (TCA-1980)

However, the suspension of the execution of the sentence and the setting aside and annulment of a former judgment by a trial court was held to be an unconstitutional infringement on the pardoning power of the governor.

See Snodgrass v State 67 Cr. R. 615, 150 S.W. 162 (1912)

Nevertheless in Baker v State 70 Tex. Cr. R. 618, 158 S.W. 998(1913) the Court upheld a second version of the former Suspended Sentence Act by holding that Article III, Section 1 of the Texas Constitution did not conflict with the Governor's constitutional pardoning power in that it did not relieve from punishment after conviction as that term is used in the constitution, but provided that in certain types of cases no punishment should be imposed unless the individual should once again violate the law.

Article III, Section 1 of the Texas Constitution delegates to the Legislature law-making authority including the right to define crimes and fix penalties thereof.

Baker held that defining crimes and fixing penalties was a Legislative function and the Legislature was authorized to provide in certain cases that no punishment, under certain conditions, should be imposed.

In 1935 the voters enacted Article 4, Section 11A to the Texas Constitution. This amendment provided that the Courts of the State of Texas having original jurisdiction of criminal actions shall have the power, after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe.

Thus, Article 4, Section 11A is a limited grant of clemency to the courts by the people.

Ex parte Giles 502 S.W. 2d 774 (Tex.Cr.App.-1973)

It provides that after conviction the trial court may suspend the imposition or execution of sentence and place a defendant on probation.

See Burson v State 511 S.W. 2d 948 (Tex. Cr. App.-1974)

See also McNew v State, supra.

The probation statutes have been revised on several occasions.

The Suspended Sentence Act was enacted in 1925.

The Adult Probation and Parole Law was enacted in 1947 and again in 1957.

In 1957 the old Suspended Sentence Act was finally repealed.

The current probation statute, although having undergone numerous changes, was enacted in 1965.

Under the current probation statute providing for regular probation, punishment is assessed but the imposition of the sentence is not.

### **Organization of Probation Entities**

Since 1965 there has been several major changes affecting probation departments. Prior to 1977 probation departments were wholly a creature of local government bodies. The district judges, with the advice and consent of the commissioners court, were responsible for employing department personnel, designating titles and fixing salaries. Salaries and other expenses were paid from the funds of the county.

In 1977 the Legislature established the Texas Adult Probation Commission. While probation departments were still established under the auspices of the district judges, the State now contributed funds for the operation of the probation departments. In addition, the TAPC established minimum standards for caseloads, programs, facilities, and equipment, and other aspects of the operation of a probation office necessary for the provision of adequate and effective probation services.

In 1989 the Legislature consolidated the Texas Adult Probation Commission with the Texas Department of Corrections and the Board of Pardons and Paroles and established the Texas Department of Criminal Justice. Effective January 1, 1990 the Texas Adult Probation Commission became the Community Justice Assistance Division of the Texas Department of Criminal Justice. One major change with consolidation was that the CJAD was no longer a part of the judicial branch of government; it was now organized under the executive branch of government.

See Article 4, Section 11B of the Texas Constitution

The Community Justice Assistance Division was no longer governed by a commission of judges; it was now governed by the Texas Board of Criminal Justice. The governing body of judges became the Judicial Advisory Council to the Community Justice Assistance Division (and to the Board of Criminal Justice).

See V.T.C.A., Government Code Chapter 493.003 (b)

Article 42.12, Section 2(2) of the Code of Criminal Procedure defines “community supervision” as the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which:

- (A) criminal proceedings are deferred without an adjudication of guilt; or
- (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.

The phrases “under a continuum of programs and sanctions” was added to the definition of probation in 1989.

In 1993, the Legislature change “probation” to “community supervision” and renamed “adult probation departments” to “community supervision and corrections departments.”

The new definition contemplates that as part of probation, a probationer must now submit to a continuum of programs and sanctions, as well as the traditional conditions of probation. Unfortunately the Legislature does not define the terms “programs” and “sanctions.” Thus we are left with little guidance as to what is to be considered a “program” and what is to be considered a “sanction.”

Article 42.12, Section 2 (1) defines courts as the courts of record having original criminal jurisdiction. Thus justice courts, constitutional county courts, and municipal courts do not fall within this definition. A justice of the peace cannot place a misdemeanor on community supervision and then order the community supervision and corrections department to supervise him/her. Consequently, probation departments can supervise all felony probationers and all Class A and B misdemeanor probationers.

However, a CSCD may be required to supervise certain Class C misdemeanants in order for them to discharge their sentence.

See Article 43.09 V.A.C.C.P. (Fine Discharge);

Article 43.02, Section 8 (a) V.A.C.C.P. (Pronouncing Sentence; Time; Credit for Time Spent);

Article 42.035 V.A.C.C.P. (Electronic Monitoring); and

Article 42.036 (Community Service)

### **Pre- and Post-sentence Investigation Reports**

Article 42.12, Section 9 (a), Code of Criminal Procedure, states that before the imposition of sentence by a judge in a felony case, and before the imposition of sentence by a judge in a misdemeanor case the judge shall direct a supervision officer to report to the judge in writing on the circumstances of the offense with which the defendant is charged, the amount of restitution necessary to adequately compensate a victim of the offense, the criminal and social history of the defendant, and any other information relating to the defendant or the offense requested by the judge.

It is not necessary that the report contain a sentencing recommendation, but the report must contain a proposed client supervision plan describing programs and sanctions that the community supervision and corrections department would provide the defendant if the judge suspended the imposition of the sentence or granted deferred adjudication.

Note: It is error for a trial judge to fail to order the preparation of a PSI report in a felony case when the defendant so requests. This is true even if the defendant is not eligible for community supervision.

See Whitelaw v. State, 29 S. W. 3d 129 (Tex. Cr. App. – 2000)

Nevertheless failure to order a PSI report is not automatically reversible error but is subject to a harm analysis.

See Yarbrough v. State, 57 S. W. 3d 611 (Tex. App. – Texarkana, 2001)

Moreover a felony defendant can now waive the preparation of the PSI report.

See Griffith v. State, 135 S. W. 3d 337 (Tex. Cr. App. – 2005).

Note: The views of the victim regarding whether or not a defendant should be granted community supervision can be contained in the PSI report.

See Fryer v. State, 68 S. W. 3d 628 (Tex. Cr. App. – 2002).

Past Court rulings have held that almost any type of information, including hearsay, extraneous offenses, prior bad acts, and juvenile records can be included in a PSI report.

See Wilson v. State, 108 S. W. 3d 328 (Tex. App. – Fort Worth, 2003).

See also, Bell v. State, 155 S. W. 3d 635 (Tex. App. – Texarkana, 2005).

#### Exceptions to preparing a PSI report

The judge is not required to direct a supervision officer to prepare a report in a misdemeanor case if:

- 1) the defendant requests that a report not be made and the judge agrees to the request; or
- 2) the judge finds that there is sufficient information in the record to permit the meaningful exercise of sentencing discretion and the judge explains this finding on the record.

A judge is not required to direct an officer to prepare a presentence report in a felony case if:

- 1) punishment is to be assessed by a jury;
- 2) the defendant is convicted of or enters a plea of guilty or nolo contendere to capital murder;
- 3) the only available punishment is imprisonment; or
- 4) the judge is informed that a plea bargain agreement exists, under which the defendant agrees to a punishment of imprisonment, and the judge intends to follow the agreement.

If a presentence report in a felony case is not required, the judge may direct the officer to prepare a postsentence report containing the same information that would have been required for the presentence report, other than a proposed client supervision plan and any information that is reflected in the judgment. See Article 42.12, Section 9, (k), Code of Criminal Procedure.

If the postsentence report is ordered, the officer shall send the report to the clerk of the court not later

than the 30<sup>th</sup> day after the date on which sentence is pronounced or deferred adjudication is granted, and the clerk shall deliver the postsentence report with the papers in the case to a designated officer of the Texas Department of Criminal Justice.

The judge may not inspect a report and the contents of a report may not be disclosed to any person unless:

- 1) the defendant pleads guilty or nolo contendere or is convicted of the offense; or
- 2) the defendant, in writing, authorizes the judge to inspect the report.

Note: Nevertheless a trial judge may not inspect a PSI report in a deferred adjudication case. There must be a finding of guilt in order for the trial judge to look at the report.

See Ex rel. Bryan v. McDonald, 662 S. W. 2d 5 (Tex. Cr. App. – 1984), in which the Court stated that an inspection of pre-sentence reports prior to a determination of guilt violates the due process clause to the Texas Constitution.

Before sentencing a defendant, the judge shall permit the defendant or his counsel to read the presentence report. Unless waived by the defendant the defendant or his counsel have at least 48 hours before sentencing to read the report. See Article 42.12, Section 9 (d), Code of Criminal Procedure.

Note: A defendant is not entitled to personally examine the PSI report provided his attorney has reviewed the contents of the report.

See Torrance v. State, 59 S. W. 3d 275 (Tex. App. – Fort Worth, 2001)

The judge shall allow the defendant or his attorney to comment on a presentence investigation or a postsentence report and, with the approval of the judge, introduce testimony or other information alleging a factual inaccuracy in the investigation or report.

If the defendant contests some of the statements made in a PSI report, then the State can call witnesses to testify to the truthfulness of those statements.

See Heiligmann v. State, 980 S. W. 2d 713 (Tex. App. – San Antonio, 1998)

The judge shall allow the attorney representing the state access to any information made available to the defendant.

Note: A prosecuting attorney may not be apprised of the contents of a PSI report until after a finding of the defendant's guilt has been made.

See Norton v. State, 755 S. W. 2d 522 (Tex. App. – Houston [1<sup>st</sup> Dist.], 1988)

### **Admonishments**

In accepting a plea of guilt, a trial judge does not need to inform the defendant of which conditions the court can impose on the defendant if the court were to grant the individual community supervision.

See Harvill v. State, 13 S. W. 3d 478 (Tex. App. – Corpus Christi, 2000)

However, when a trial court chooses to admonish the defendant on the availability of community supervision, it must do so accurately.

See Ex parte Williams, 704 S. W. 2d 773 (Tex. Cr. App. – 1986).

See also, Tabora v. State, 14 S. W. 3d 332 (Tex. App. – Houston [14<sup>th</sup> Dist.], 2000)

In 2009 the Legislature enacted S. B. 1263. This bill provides that before accepting a plea of guilty or a plea of nolo contendere by a defendant charged with a misdemeanor involving family violence, the court must admonish the defendant by using the following statement:

“If you are convicted of a misdemeanor offense involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition, pursuant to federal law under 18 U. S. C. Section 922 (g) (9) or Section 46.04 (b), Penal Code. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.”

In addition this bill states that the court can provide this admonishment orally or in writing. Finally this bill becomes effective for an offense committed on or after September 1, 2009.

## **Types of Community Supervision**

“Regular” community supervision, deferred adjudication, and “shock” probation are considered three different types of community supervision.

See King v. State, 942 S. W. 2d 667 (Tex. App. - Eastland, 1977)

See also Keeling v. State, 929 S. W. 2d 144 (Tex. App. - Amarillo, 1996)

### **1) Regular community supervision**

**A. Court-ordered community supervision.** Article 42.12, Section 3 of the Code of Criminal Procedure provides that the trial judge may, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty or nolo contendere suspend the imposition of the sentence and place the defendant on community supervision. Moreover, the trial judge can impose a fine on the defendant and still grant him community supervision.

This authority to grant probation is independent of any recommendation by a jury.

In order to grant probation the maximum punishment assessed against the defendant cannot exceed 10 years imprisonment.

Ordinarily, in first, second, and third degree felony cases, the Court may fix the period of probation without regard to the term of punishment assessed, but in no event may the period of probation be

greater than 10 years or less than the minimum prescribed for the offense for which the defendant was convicted. Nevertheless H. B. 1678, enacted in 2007, amended Article 42.12, Section 3 (b), Code of Criminal Procedure, to provide that while ordinarily the maximum term of community supervision in a felony case is ten years, it will be five years for a third degree controlled substances offense or a third degree felony property offense other than the offense of online solicitation of a child. However this change became applicable only to those defendants initially placed on community supervision on or after September 1, 2007.

If the probationer is grant “regular” community supervision for a sex offense in which the victim was a child (younger than 17) then the minimum term of community supervision must be five years. See Article 42.12, Section 3 (e), Code of Criminal Procedure.

In a Class A or B misdemeanor case, the maximum period of probation is two years, with no minimum term of probation prescribed by law.

The term of community supervision need not be coextensive with the sentence assessed but suspended; the term can be longer than the maximum sentence assessed against the defendant. Thus, in Chauncey v. State, 877 S. W. 2d 305 (Tex. Cr. App. - 1994), the Texas Court of Criminal Appeals held that nothing in the plain language of Article 42.12, Section 3, Code of Criminal Procedure, limited the trial court, in assessing the term of community supervision, to a term that did not exceed the maximum sentence of imprisonment statutorily allowable for the offense.

**B. Jury Recommended Community Supervision** - Article 42.12, Section 4(a) of the Code of Criminal Procedure provides that when there is a felony conviction other than:

- A) a state jail felony conviction for which suspension of the imposition of the sentence occurs automatically \*
- B) indecency with a child if the victim were younger than 14;
- C) aggravated sexual assault if the victim were younger than 14;
- D) sexual assault if the victim were younger than 14;
- E) aggravated kidnapping with the intent to violate or abuse the victim sexually if the victim were younger than 14;
- F) sexual performance of a child; or
- G) murder;

and the punishment assessed by the jury does not exceed ten years, the jury may recommend probation.

\* It appears that the only state jail felony offenses for which a jury can recommend community supervision are those that are not as follows:

- 1) possession of less than one gram of a controlled substance in Penalty Group 1;
- 2) possession of fewer than 20 units of a controlled substance in Penalty Group 1-A;
- 3) possession of less than one gram of a controlled substance in Penalty Group 2;
- 4) possession of marijuana of 5 lbs. or less but more than 4 oz; or

- 5) possession of an unauthorized prescription form or an unauthorized prescription for a controlled substance listed in Schedule II or III;

The reason for this is that H. B. 1759, which authorized juries in 2005 to recommend community supervision for state jail felony offenses did not change Article 42.12, Section 4 (e), Code of Criminal Procedure, which states that a defendant is only eligible to receive community supervision from a jury if before the trial begins the defendant files a written sworn motion with the judge that the defendant has not previously been convicted of a felony in this or any other state. Thus if the defendant is convicted of one of the above specified offenses but has never had a previous felony conviction, then the person is ineligible to receive community supervision from a jury. However, if the defendant is convicted of one of the above specified offenses and has had a previously felony conviction, the person still cannot receive community supervision from a jury. Therefore the only circumstances under which a jury can recommend community supervision under this provision of the law is if the defendant has been convicted of a state jail felony offense other than one of the above specified offenses and the person has never had a previous felony conviction.

When the jury recommends probation, it may also assess a fine applicable to the offense for which the defendant was convicted.

The jury can only recommend that the court grant the defendant community supervision. The jury cannot determine the length of the term of community supervision. This decision, in both felony and misdemeanor cases, remains with the trial judge.

See Article 42.12, Section 4 (b), Code of Criminal Procedure

When the jury recommends probation, it may recommend that the imprisonment or fine or both such fine and imprisonment found in its verdict be probated.

However while a jury can recommend that the assessment of hard time be probated and the fine be imposed, the jury cannot recommend that the defendant serve a hard time sentence and probate the fine.

Ex parte McIver 586 S.W. 2d 851 (Tex.Cr.App.-1979); see also, Harris v. State, 185 S. W. 3d 524 (Tex. App. – Amarillo, 2006).

In order for the jury to consider recommending probation in a felony or misdemeanor case, the defendant must file before the trial begins a written sworn motion with the trial judge.

The filing of a motion for probation after the jury has returned a verdict of guilty and before the penalty phase of the trial begins is untimely.

Brown v State 475 S.W. 2d 938 (Tex.Cr.App.-1971)

In order to be eligible to receive probation for a jury, sworn motion must state that the defendant has never before been convicted of a felony in this or any other State.

The jury in its verdict must make a finding to this effect.

Thus, the defendant must present some evidence that s/he has never been convicted in this or another state of a felony.

Deferred adjudication is not a previous conviction for purposes of eligibility for jury-recommended community supervision in a later case.

See Ex parte Welch, 981 S. W. 2d 183 (Tex. Cr. App. – 1998)

A defendant is ineligible to receive probation from a jury if he has been convicted of a felony in the federal system.

Phillips v State 704 S.W. 2d 557 (Tex. App. - Beaumont, 1986)

The mere fact that a revocation proceeding is appealed does not affect the finality of the defendant's underlying conviction for purposes of applying for probation.

Bannach v. State, 704 S. W. 2d 331 (Tex. App. - Corpus Christi, 1985)

The burden of proof as to a defendant's eligibility for probation is upon the defendant.

Baker v State 519 S.W. 2d 437 (Tex.Cr.App.-1975)

A jury may not recommend probation in its verdict unless both the sworn motion and the evidence show, and the jury finds in its verdict, that the defendant has never before been convicted of a felony in this or any other state.

Green v State 658 S.W. 2d 303 (Tex. App. - Houston [1st Dist.], 1983)

Evidence as to a defendant's eligibility for probation can be shown at either the guilt/innocence or punishment phase of the trial.

Green v State, supra, dicta

Testimony in proof of eligibility for probation does not have to come from the defendant alone; it can be shown upon proof by another witness.

Trevino v State 577 S.W. 2d 242 (Tex.Cr.App.-1979)

In Trevino v. State, supra, in support of the application for probation, the defendant's wife testified that she was fifty-three years old, the defendant was forty-two years old; she and the defendant had been married for twenty-two years, she had known the defendant for ten years prior to their marriage; and, to her knowledge, the defendant had never been convicted of a felony. In this case, Mrs. Trevino testified, in effect, that she had known the defendant since he was ten years old *and that he had not been convicted of a felony during that time.*

This is sufficient to require the submission of a charge on probation.

Note: The witness must testify that the defendant has never had a felony conviction.

The jury need not be charged on the issue of probation in the absence of evidence before the jury to support the motion for probation.

Walker v State 440 S.W. 2d 653 (Tex.Cr.App.-1969)

Green v State, supra

The mere filing of the motion is not sufficient.

Palasota v State 460 S.W. 2d 137 (Tex.Cr.App.-1970)

Green v State, supra

In Grantham v. State, 659 S. W. 2d 494 (Tex. App. - Fort Worth, 1983) the prosecutor asked the defendant if he agreed or disagreed with the jury's verdict and whether he admitted his guilt to the offense charged. The State argued that because the defendant had applied for probation, the questions complained of were permissible at the punishment stage of the trial to determine whether the defendant felt any remorse or regret for the offense.

Held: A question that goes to the issue of the defendant's remorse, regret, or contrition regarding his conduct is relevant to the application for probation.

A jury can only recommend probation; it is the responsibility of the court to grant probation.

However, if a jury recommends probation, the court must follow its recommendation.

Shappley v State 520 S.W. 2d 766 (Tex.Cr.App.-1974)

In addition the Court may always grant a defendant probation in its absolute and unreviewable discretion where the punishment does not exceed ten years and the defendant is otherwise eligible to receive probation from the trial judge.

Kemner v State 589 S.W. 2d 403 (Tex.Cr.App.-1979)

While a jury does not decide which conditions to impose on a defendant, it is considered good practice to enumerate in the court's charge the probationary conditions which the court may impose if probation is recommended by the jury. Nevertheless, failure to do so is not harmful to the accused or restrictive of the court's authority under the statute.

Flores v State 513 S.W. 2d 66 (Tex.Cr.App.-1974)

An accused should be entitled to have all of the allowable statutory terms and conditions of probation enumerated in the court's charge to the jury upon a proper objection or request.

It is error for the trial court to overrule a defendant's proper objection. However, such error is subject to the harmless error test.

Brass v State 643 2d 443 (Tex. App.-Houston [14th Dist.], 1982)

### **Eligibility to Receive Regular Community Supervision from a Trial Judge**

- 1) A defendant can receive regular community supervision even if he has been on community supervision before.
- 2) A defendant can receive regular community supervision even if he has been in prison before.

- 3) A defendant cannot receive regular probation from the judge if he is adjudicated guilty for:
- A) Murder
  - B) Capital murder
  - C) Indecency with a child by contact
  - D) Aggravated kidnapping (for any reason)
  - E) Aggravated sexual assault
  - F) Aggravated robbery;
  - G) a Controlled Substances offense if the punishment is increased because the offense occurred in a drug free zone and the defendant had been previously convicted of a controlled substances offense in which punishment was increased because it occurred in a drug free zone;
  - H) Sexual Assault
  - I) Sexual performance by a child;
  - J) Injury to a child if punishable as a first degree felony and the victim were a child 14 years of age or younger;
  - K) Criminal solicitation to commit capital murder that is punishable as a first degree felony;
- and
- L) Continuous sexual abuse of a young child or children (because the minimum punishment for this offense is 25 years in prison;

or

When it is shown that a deadly weapon was used or exhibited during the commission of a felony offense or during immediate flight therefrom.

An affirmative finding can now be made against a defendant who was a party to the occurrence. See Article 42.12, Section 3g(c) (2), V.A.C.C.P.

If a trial judge grants regular community supervision to a defendant convicted of a 3g offense, the sentence is not void even if the probation order is invalid. Thus the defendant cannot question a later decision to revoke his probation or attack the validity of the judgment via a habeas corpus proceeding. See Ex parte Williams, 65 S. W. 3d 656 (Tex. Cr. App. – 2001), modifying its previous holding in Heath v State 817 S.W. 2d 335 (Tex.Cr.App.-1991).

### **Early Termination or Discharge**

Ordinarily, a trial court has the authority to reduce or terminate the period of community supervision at any time, after the defendant has satisfactorily completed one-third of the original probationary period or two years, whichever was the lesser period.

See Article 42.12, Section 20 (a), Code of Criminal Procedure

A trial court can take judicial notice that a probationer has satisfactorily completed the requisite period of community supervision and on its own motion discharge the person from community supervision.

See State v. Cuellar, 815 S. W. 2d 295 (Tex. App. - Austin, 1991).

Nevertheless a trial court is without authority to discharge a person on “regular” community supervision who has yet to serve the requisite period on community supervision.

See Hall v. State, 509 S. W. 2d 627 (Tex. Cr. App. - 1974).

A person placed on “regular” community supervision for an intoxication offense cannot receive early termination. Moreover a person placed on “regular” community supervision for a state jail felony offense prior to September 1, 2007 is not eligible for early termination. However in 2007 H. B. 1678 amended Subsection (b) of this Section to provide that henceforth while a defendant placed on “regular” community supervision for a state jail felony offense will be eligible for early termination and may be allowed to withdraw the defendant’s plea of guilt or have the verdict set aside and then have the court dismiss all criminal charges, a probationer granted “regular” community supervision for a 3g offense will no longer be eligible for early termination or be allowed to withdraw the defendant’s plea of guilt or have the verdict set aside and then have the court dismiss all criminal charges.

See Article 42.12, Section 20 (b), Code of Criminal Procedure

Moreover, for offenses subject to the Sex Offender Registration Act committed on or after September 1, 1999, Article 42.12, Section 20 (b), supra, now precludes a probationer placed on “regular” community supervision for said offenses from receiving an early termination from community supervision and from having his conviction set aside and having his civil rights restored.

### **Early Review**

In 2007 H. B. 1678 amended Article 42.12, Section 20 (a), Code of Criminal Procedure, to provide that on completion of one-half of the original community supervision period or two years, whichever is more, the judge must review the defendant’s record and consider whether to reduce or terminate the period of community supervision. Moreover this bill states that before conducting the review, the judge must notify the attorney representing the state and the defendant. Nevertheless this bill further states that the judge need not consider reducing or terminating the term of community supervision if the defendant is delinquent in paying the required restitution, fines, costs, or fees that the defendant has the ability to pay or the defendant has not completed court-ordered counseling or treatment. However this bill specifies that if the judge determines that the defendant has failed to satisfactorily fulfill the conditions of community supervision, the judge must advise the defendant in writing of the requirements for satisfactorily fulfilling those conditions.

Since this provision is found in Section 20 (a) of Article 42.12, supra, and since Article 42.12, Section 20 only deals with “regular” community supervision, it would appear that the mandated review period is inapplicable for defendants granted deferred adjudication. Moreover, since this provision states that the review period only applies upon completion of one-half of the term of community supervision or two years, *whichever is more* (emphasis added) and since the maximum term of community supervision for a misdemeanor is two years, it would appear that this provision is inapplicable to misdemeanor cases. Further, for those probated cases that fall within this provision of

the law, the review period will only be necessary for a defendant initially placed on community supervision on or after September 1, 2007.

**Eligible for Early Review** – Those defendants:

- placed on regular community supervision for a state jail felony offense on or after September 1, 2007; and
- placed on regular community supervision on or after September 1, 2007 for an offense for which the term of community supervision is more than two years.

**Ineligible for Early Review** – If an otherwise eligible defendant is:

- delinquent in paying the required restitution, fines, costs, or fees that the defendant has the ability to pay or;
- has not completed court ordered counseling or treatment.

**Ineligible defendants** – Those defendants:

- granted regular community supervision for a misdemeanor offense;
- placed on deferred adjudication community supervision;
- placed on regular community supervision for a 3g offense on or after September 1, 2007;
- placed on regular community supervision for an intoxication offense;
- placed on regular community supervision for state jail felony offense before September 1, 2007; and
- placed on regular community supervision for an offense that requires the defendant to register as a sex offender.

**Date Term of Community Supervision Ends**

The term of community supervision ends on the day before the anniversary date on which the person had originally been placed on community supervision.

See Nesbit v. State, 175 S. W. 3d 565 (Tex. App. – Dallas, 2005)

See also, Pino v. State, 189 S. W. 3d 911 (Tex. App. – Texarkana, 2006).

In Nesbit v. State, 227 S. W. 3d 64 (Tex. Cr. App. – 2007) the Texas Court of Criminal Appeals agreed with the intermediate court of appeals that the trial court did not have the jurisdiction to revoke the defendant's community supervision based on a motion to revoke filed the day after his term of community supervision expired; i.e., April 29, 2004.

**2) Deferred Adjudication**

Article 42.12, Section 5 of the Code of Criminal Procedure provides that when in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.

A person granted deferred adjudication and placed on probation has not been convicted of a criminal offense. A “conviction” always involves an adjudication of guilt. Since the procedures delineated in Article 42.12, Section 5, *supra*, do not involve an adjudication of guilt until after probation is revoked, a trial judge’s action in deferring the proceedings without entering an adjudication of guilt is not a “conviction.” See McNew v State 608 S.W. 2d 166 (Tex. Cr.App.-1978). Instead, deferred adjudication is probation before conviction and operates to suspend the imposition of an adjudication rather than the imposition of a sentence. See Reed v State 702 S.W. 738 (Tex. App.-San Antonio, 1985).

Deferred adjudication differs from regular probation in that while under regular probation, punishment is assessed but not imposed, under deferred adjudication, punishment is not even assessed.

Only the trial judge can grant deferred adjudication.

Moreover, if the defendant pleads “not guilty” to the charge, he is precluded from receiving deferred adjudication.

See however, State v Sosa, 830 S.W. 2d 204 (Tex. App.-San Antonio, 1992) in which the San Antonio Court of Appeals approved the actions of a trial judge, who, after a finding of the defendant’s guilt upon a plea of not guilty to the charge of possession of a controlled substance and prior to the assessment of punishment, allowed the defendant to withdraw his plea of “not guilty,” enter a plea of guilty and then granted the defendant deferred adjudication.

In a felony case the period of deferred adjudication community supervision may not exceed ten years.

In a misdemeanor case the period of deferred adjudication community supervision may not exceed two years.

Article 42.12, Section 5 (a), Code of Criminal Procedure, states that for a defendant charged with indecency with a child, sexual assault, or aggravated sexual assault, regardless of the age of the victim and for a defendant charged with a sex offense against a child (younger than 17), the period of community supervision may not be less than five years.

Article 42.12, Section 5 (a), Code of Criminal Procedure now mandates that the court must admonish a defendant as to the possible consequences of a violation of probation under deferred adjudication. Although the law does not specify what these consequences might be, it is assumed that the court must inform the defendant that he could be sentenced anywhere within the range of punishment provided by statute.

Note: For defendants granted deferred adjudication community supervision and for whom a motion to proceed with an adjudication of guilt is conducted on or after June 15, 2007, that person may now

appeal the decision to adjudicate guilt.

Nevertheless, the Court of Criminal Appeals has noted that this measure does not specify at what point in the proceedings that this admonishment must be given.

Thus, in Price v. State, 866 S. W. 2d 606 (Tex. Cr. App. - 1993), the Texas Court of Criminal Appeals held that a trial court's failure to inform a misdemeanant of the consequences of being placed on deferred adjudication prior to the granting of the deferred adjudication did not invalidate the court's action.

Moreover, the failure to warn a misdemeanant after granting him deferred adjudication of the consequences of being placed on deferred adjudication is subject to a harmless error test.

See Price v. State, 890 S. W. 2d 478 (Tex. App. - Dallas, 1994)

### **Eligibility to Receive Deferred Adjudication**

Article 42.12, Section 5 (a), Code of Criminal Procedure, states that a judge may place on deferred adjudication community supervision a defendant charged with indecency with a child, sex assault, or aggravated sexual assault, regardless of the age of the victim or a defendant charged with sexual offense against a child (younger than 17) only if the judge makes a finding in open court that placing the defendant on community supervision is in the best interest of the victim.

### **Ineligibility to Receive Deferred Adjudication**

A trial judge can grant deferred adjudication to a defendant charged with a 3g offense.

However a trial judge can no longer grant deferred adjudication for the following offenses:

- A) Aggravated sexual assault punishable as a capital offense;
- B) Continuous sexual abuse of a young child or children;
- C) Aggravated sexual assault if the victim of the offense were younger than six years;
- D) Aggravated sexual assault if the victim were younger than 14 years of age and if the defendant:
  - i) causes serious bodily injury or death;
  - ii) places the victim in fear that death, serious bodily injury, or kidnapping will be imminently inflicted;
  - iii) by acts or words occurring in the presence of the victim threatens to cause death, serious bodily injury or kidnapping of any person;
  - iv) uses or exhibits a deadly weapon;
  - v) acts in concert with another who engages in aggravated sexual assault; or
  - vi) administers or provides flunitrazepam to the victim with the intent of facilitating the commission of the offense;
- E) an offense under Sections 49.04 – 49.08, Penal Code; or
- F) indecency with a child, sexual assault, aggravated sexual assault, regardless of the age of the victim, or a felony described by Section 13B (b) of Article 42.12 and has previously been

placed on community supervision for indecency with a child, sexual assault, aggravated sexual assault, regardless of the age of the victim, or a felony described by Section 13B (b) of Article 42.12.

Note: In 2007 under H. B. 2115, Subdivision (1) of Subsection (d) of Article 42.12, Section 5, supra, was amended to now provide that a judge could grant deferred adjudication unless the defendant was charged with an offense under Sections 49.04 – 49.08 of the Penal Code. Thus persons charged with the offense of operating a motor vehicle in a public place while intoxicated and while the vehicle is being occupied by a passenger who is younger than 15 years of age will no longer be eligible for deferred adjudication community supervision. Moreover this change became effective for all new offenses committed on or after September 1, 2007. However for offenses committed prior to September 1, 2007 persons are still eligible to receive deferred adjudication community supervision.

Upon written motion filed thirty days after entering a plea and the deferment of adjudication, the defendant has the right to request final adjudication.

Upon violation of any condition of probation, the State may file a motion to proceed to an adjudication of guilt.

If the court grants the State's motion, the court can assess any punishment within the range prescribed by law.

Moreover, in a hearing to proceed to an adjudication of guilt, a defendant is entitled to present evidence at a punishment phase of the hearing.

See Issa v. State, 826 S. W. 2d 159 (Tex. Cr. App. - 1992)

Nevertheless, failure to object to the denial of the opportunity to be heard waives error.

Regan v State 832 S.W. 2d 125 (Tex.App.-Houston, [1st Dist.], 1992)

A defendant arrested on a motion to proceed to adjudication is entitled to reasonable bail pending the adjudication hearing.

Ex parte Laday 594 S.W. 2d 102 (Tex.Cr.App.-1980)

### **Early Dismissal**

Ordinarily a trial judge can discharge a defendant placed on deferred adjudication and dismiss the charges against him at any time during the term of supervision, even the day after the first day of the term of supervision. See *State v. Juvrud*, 187 S. W. 3d 492 (Tex. Cr. App. – 2006).

The exception is that a judge may not dismiss the proceedings and discharge a defendant who is charged with an offense requiring the defendant to register as a sex offender prior to the expiration of the term of community supervision.

Note: In 1995 the Legislature amended Article 42.12, Section 5 (c), Code of Criminal Procedure, to

specify that a judge could only dismiss the deferred adjudication proceedings and discharge a defendant where the victim was a child younger than 17 and the defendant was charged with sexual performance of a child; possession or promotion of child pornography; indecent exposure; prohibited sexual conduct; kidnapping with the intent to violate or abuse the victim sexually; or burglary with intent to commit a sexually related offense if in the judge's opinion the best interest of society and the defendant would be served and the defendant had successfully completed at least two-thirds of the period of community supervision. This provision is now applicable only for offenses committed on or after September 1, 1995 but prior to September 1, 1999.

Note further: For defendants charged with sex offenses committed prior to September 1, 1995 and placed on deferred adjudication, they may be discharged from community supervision at any time.

### **3) "Shock" Probation**

Article 42.12, Section 6(a), Code of Criminal Procedure, provides that the jurisdiction of a court in which sentence requiring confinement in the penitentiary is imposed shall continue for 180 days from the date the execution of the sentence actually begins.

Before the expiration of 180 days from the date the execution of the sentence actually begins, the judge on his own motion, or the motion of the State or on the motion of the defendant, may suspend further execution of the sentence and place the defendant on community supervision.

#### **Eligibility criteria:**

The defendant

- 1) must otherwise be eligible for community supervision; and
- 2) must never have been incarcerated in a penitentiary serving a sentence for a felony.

Article 42.12, Section 10(a) of the Code of Criminal Procedure states that in a felony case, only the judge who originally sentenced the defendant may suspend execution thereof and place the defendant under community supervision pursuant to Section 6 except that if the judge who originally sentenced the defendant is deceased or disabled or if the office is vacant, then the presiding judge of the administrative judicial district for that court may deny the motion or appoint a judge to hear the motion.

Article 42.12, Section 7(a) of the Code of Criminal Procedure states that the jurisdiction of the courts in this state in which a sentence requiring confinement in a jail is imposed for a conviction of a misdemeanor shall continue for 180 days from the date the execution of the sentence actually begins.

Under the "shock probation" provisions in Section 6 and 7 the trial court's jurisdiction starts from the date the execution of the sentence actually begins. However, neither the Legislature nor the Court has ever explained when the sentence actually begins. In Houlihan v State, 579 S.W. 2d 213 (Tex.Crim.App.-1979) the Court noted the Legislature's curious use of the language "from the date

the execution of the sentence actually begins.” The Court stated that it could not, nor needed, to know what situations were contemplated by the Legislature when it so obviously, carefully used and reiterated the phrase. The language is clear and unambiguous and read literally, it meant that from the date a defendant actually began his sentence. Then in a footnote the Court said that for purposes of this opinion, it assumed that execution of sentence actually began on either the day the defendant was arrested and confined in the Harris County Jail or the following day when he was delivered to the Texas Department of Corrections. The Court held it was unnecessary to decide which date was truly contemplated by the Legislature and that it would not do so.

The period in which a trial court can grant “shock” probation is jurisdictional. Once the 180 day period has transpired, the court can no longer grant “shock” probation.

See State ex rel. Bryan v McDonald 642 S.W.2d 492 (Tex.Cr.App.-1982)

As of the last Court of Criminal Appeals decision, a defendant must serve at least some time in the penitentiary in order to be eligible for “shock” probation.

See Smith v State 789 S.W. 2d 590 (Tex.Cr.App.-1990) which held that a defendant could not be shocked out of a county jail.

This opinion may be somewhat suspect. At the time this defendant was granted “shock” probation, the statute provided that the judge must find that the defendant would not benefit from further incarceration “in a penitentiary.” Since this opinion was rendered, this phrase has been deleted in the statute.

For example, in State v. Dean, 893 S. W. 2d 697 (Tex. App. - Houston [14th Dist.], 1995), the Fourteenth Court of Appeals in Houston ruled that a defendant does not have to be actually confined in the institutional division in order to be eligible for “shock” probation, noting that since the Court of Criminal Appeals had ruled on this matter the Legislature had deleted the above mentioned phrase.

A trial judge can grant “shock” probation to a defendant who has been paroled from the institutional division.

See McGee v State 790 S.W. 2d 350 (Tex. App.-Beaumont, 1990)

#### **4) Boot Camp**

Article 42.12, Section 8(a) of the Code of Criminal Procedure provides that the jurisdiction of a court in which a sentence requiring confinement in the institutional division is imposed for conviction of a felony shall continue for 180 days from the date on which the convicted person is received into custody by the institution division.

After the expiration of 75 days but prior to the expiration of 180 days from the data on which the convicted person is received into custody by the institutional division, the judge of the court that imposed the sentence may suspend further execution of the sentence imposed and place the person on community supervision.

Note: For those cases for which the defendant was convicted of an offense committed prior to September 1, 2003, the Court's authority to suspend the further execution of a "boot camp" sentence continues only until 90 days from the date on which the convicted person is received into custody by the institutional division.

### **Eligibility Criteria:**

A defendant can be placed in a state boot camp program only if:

- 1) the person is otherwise eligible for community supervision;
- 2) the person is 17 years of age or older but younger than 26 years and is physically and mentally capable of participating in a program that requires strenuous physical activity; and
- 3) the person is not convicted of an offense punishable as a state jail felony.

### **F. State Jail Felony Community Supervision**

#### **Eligibility for Jury Recommended Community Supervision**

H. B. 1759, which was signed into law by the Governor on May 27, 2005, amends Article 42.12, Section 4 (d), Code of Criminal Procedure, to provide that a jury may now, under certain circumstances, recommend to the court that a defendant convicted of a state jail felony offense, be granted community supervision. This measure further specifies that the only exception under which a state jail felon cannot ask a jury to recommend community supervision is when the defendant is automatically entitled to community supervision from the judge. Prior to this change in the law, a person convicted of a state jail felony offense could only ask the judge to grant, and not a jury to recommend, community supervision. This change became application to a defendant who, on or after September 1, 2005, filed a motion for jury-recommended community supervision, regardless of whether the offense with which the defendant was charged was committed before, on or after September 1, 2005.

H. B. 1759 did not change Article 42.12, Section 4 (e), Code of Criminal Procedure, which states that a defendant is only eligible to receive community supervision from a jury if before the trial begins the defendant files a written sworn motion with the judge that the defendant has not previously been convicted of a felony in this or any other state. Thus if the defendant is convicted of certain state jail felony drug possession offenses (see below) but has never had a previous felony conviction, then the person is ineligible to receive community supervision from a jury (because the sentence is already automatically probated). However, if the defendant is convicted of certain state jail felony drug possession offenses and has had a previously felony conviction, the person still cannot receive community supervision from a jury (because the defendant is ineligible for consideration of community supervision by a jury). Therefore the only circumstances under which a jury can recommend community supervision under H. B. 1759 is if the defendant has been convicted of a state jail felony offense other than certain state jail felony drug possession offenses and the person has never had a previous felony conviction.

Ordinarily on conviction of a state jail felony offense, the judge may suspend the imposition of the sentence and place the defendant on community supervision or may order the sentence to be executed.

See Article 42.12, Section 15(a), Code of Criminal Procedure.

However upon conviction of a state jail felony for:

- 1) possession of less than one gram of a controlled substance in Penalty Group 1;
- 2) possession of fewer than 20 units of a controlled substance in Penalty Group 1-A;
- 3) possession of less than one gram of a controlled substance in Penalty Group 2;
- 4) possession of marijuana of 5 lbs. or less but more than 4 oz; or
- 5) possession of an unauthorized prescription form or an unauthorized prescription for a controlled substance listed in Schedule II or III;

the defendant's sentence must be automatically probated unless the person has previously been convicted of a felony for all cases in which a judgment has not been entered before September 1, 2003.

Moreover, unless a trial judge makes an affirmative finding that the defendant does not require imposition of treatment conditions to successfully complete the period of community supervision, then the trial judge must require the defendant, as a condition of community supervision, to comply with the substance abuse treatment standards developed by CJAD.

H. B. 1610, which was signed into law by the Governor on June 15, 2007 amended Article 42.12, Section 15 (a), Code of Criminal Procedure, in order to provide that if a defendant charged with a certain low level state jail felony drug possession offense has previously had a conviction for any state jail felony offense for which punishment has been reduced to a Class A misdemeanor, then the defendant will still be entitled to be granted automatic community supervision for the drug possession offense. In addition this bill provided that if the conviction for a low level state jail felony drug possession offense resulted from an adjudication of the guilt of a defendant previously placed on deferred adjudication community supervision for the offense, then the defendant would not be entitled to automatic community supervision although the court in its discretion could still grant the defendant community supervision. Finally this new law became applicable for all defendants convicted of one of these specified offenses on or after September 1, 2007.

Previous to this change, unless certain defendants charged with a low level state jail drug possession case had had a prior felony conviction, the drug possession charge had to be automatically probated. Nevertheless if a defendant were convicted of a state jail felony offense but the person's punishment was reduced to a Class A misdemeanor in accordance with Section 12.44, Penal Code, the defendant still had a felony conviction which would prevent a subsequent charge of possession of a low level state jail drug offense from being automatically probated. This bill changed this situation.

Moreover, previous to this change, unless a defendant had a "conviction," the drug possession charge

had be automatically probated. Therefore since a person granted deferred adjudication did not have a prior felony conviction, if a person were placed on deferred adjudication for a low level state jail drug possession case and violated the conditions of the person's community supervision, the only recourse the court had was to place the defendant on "regular" community supervision. The court could not adjudicate the defendant guilty and then sentence the person to a state jail felony facility. See Holcomb v. State, 146 S. W. 3d 404 (Tex. App. – Austin, 2004). This bill reversed this situation by allowing a court to adjudicate the guilt of a low level state jail drug possession felon and sentence the person to a state jail felony facility.

### **State Jail "Shock" Probation**

The trial judge can also grant a defendant charged with a state jail felony offense "shock probation." Thus at any time after the 75<sup>th</sup> day after the date the defendant is received into custody of a state jail, the judge on the judge's own motion, on the motion of the attorney representing the state, or on the motion of the defendant may suspend further execution of the sentence and place the defendant on community supervision.

This authority to grant shock probation continues from the 76<sup>th</sup> day of confinement to the final day of the defendant's sentence.

See Article 42.12, Section 15 (f) (2), Code of Criminal Procedure.

### **Term of Community Supervision for a State Jail Felony Offense**

The minimum period of "regular" community supervision a judge may impose for a state jail offense is two years and the maximum period is five years. Nevertheless the judge has the authority to extend the maximum period of community supervision for a state jail offense to not more than ten years.

See Article 42.12, Section 15 (b), Code of Criminal Procedure

Nevertheless, it appears that the maximum term of community supervision for a person charged with a state jail felony offense and granted deferred adjudication community supervision is ten years. See Article 42.12, Section 5 (a), Code of Criminal Procedure.

### **Conditions of Community Supervision**

Article 42.12, Section 11(a) of the Code of Criminal Procedure provides that the court having jurisdiction of the case shall determine the terms and conditions of community supervision and may, at any time, during the period of community supervision alter or modify the conditions.

In addition, this section states that a judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.

A condition of community supervision is invalid if it has all three of the following characteristics: 1) it has no relationship to the crime, 2) it relates to conduct that is not in itself

criminal, and 3) it forbids or requires conduct that is not reasonably related to the future criminality of the defendant or does not serve the statutory ends of community supervision.  
See Marcum v. State, 983 S. W. 2d 762 (Tex. App. - Houston [14th Dist.], 1998)

The granting of probation creates a contractual relationship between the court and the probationer. The court extends clemency to the probationer if he will keep and perform certain requirements and conditions, the violation of which will authorize the revocation of probation.  
Bradley v State 564 S.W. 2d 727 (Tex. Cr. App.-1978)  
Bowen v State 649 S.W. 2d 384 (Tex. App.-Fort Worth, 1983)

Article 42.12, Section 11(a), supra, lists a number of conditions which the trial court can impose on a defendant.

In addition to the statutorily provided conditions, the trial judge can impose “special” conditions.  
See Hernandez v State 556 S.W. 2d 337 (Tex.Cr.App.-1977)

The court’s discretion to add probation conditions is a wide one, limited only by the requirement that such conditions be reasonable.

Reasonable conditions of probation are those that contribute significantly to the rehabilitation of the convicted person and to the protection of society.  
See Gibbons v State 775 S.W. 2d 790 (Tex. App.-Dallas, 1989)

The conditions of probation should be clearly set out in the probation order by the judge granting probation so that the probationer and the authorities may know with certainty what the conditions are.  
Cox v State 445 S.W. 2d 200 (Tex.Cr.App.-1969).

The mere imposition of an unauthorized condition of probation, which is not utilized as the basis of a subsequent revocation of probation, cannot be used to set aside an otherwise valid conviction.  
Coleman v State 640 S.W. 2d 889 (Tex.Cr.App.-1982)

Failure to object at the time that a condition of community supervision is imposed by the trial court waives appellate review of that condition.  
See Speth v. State, 6 S. W. 3d 530 (Tex. Cr. App. - 1999)

### **A. Waiver of Extradition**

In Ex parte Johnson, 610 S. W. 2d 757 (Tex. Cr. App. – 1981), the defendant entered into a parole agreement with the Parole and Pardon Board of the State of Illinois which contained the following provision:

“I do further agree that, should I be charged with a violation of my Illinois parole or should be in another state, I will waive extradition and will not resist being returned to an Illinois Correctional Center.”

There are cases from other jurisdictions in which waivers of extradition have been recognized and enforced without the necessity of formal extradition proceedings.

See Cook v. Kern, 330 F. 2d 1003 (5<sup>th</sup> Cir. 1964)

Forester v. California Adult Authority, 510 F. 2d 58 (8<sup>th</sup> Cir. 1975)

We hold that formal extradition proceedings are not necessary to the return of absconding parolees or probationers who have signed a prior waiver of extradition as a condition of their release.

See also, Ex parte Stowell, 940 S. W. 2d 241 (Tex. App. – San Antonio, 1997).

## **B. Jail Time as a Condition of Probation**

Article 42.12, Section 12 of the Code of Criminal Procedure provides that when a court having jurisdiction of a misdemeanor case grants probation to the defendant, the Court may require as a condition of probation that the defendant submit to a period of detention in a county jail to serve a term of imprisonment not to exceed 30 days.

Article 42.12, Section 12 of the Code of Criminal Procedure provides that in a felony case the court may require as a condition of probation that the defendant submit to a period of detention in a county jail to serve a term of imprisonment not to exceed 180 days.

The judge may impose periods of confinement as a condition of community supervision in increments smaller than the maximum periods provided for [county jail time] but may not impose periods of confinement that if added together exceed the maximum periods allowable by law.

Moreover, a judge that requires as a condition of community supervision that the defendant serve a term in a community corrections facility may not impose a term of confinement in a county jail that, when added to the term in the CCF, exceeds 24 months.

## **C. Prison Time as a Condition of Community Supervision**

Article 42.12, Section 3g (b) of the Code of Criminal Procedure provides that in the trial of a felony of the second degree or higher that the deadly weapon used or exhibited was a firearm and the defendant is granted community supervision, the court may order the defendant confined in the Texas Department of Criminal Justice for not less than 60 and not more than 120 days. At any time after the defendant has served 60 days in the custody of the department, the sentencing judge, on his own motion or on motion of the defendant, may order the defendant released to community supervision.

The department shall released the defendant to community supervision from the penitentiary

after he has served 120 days.

Although not specified in this statute, I have taken the position that this is not a “shock” probation provision. Instead, it is my understanding that the court orders the defendant to serve not less than 60 days or more than 120 days as a condition of community supervision.

#### **D. Search Condition**

In McArthur v. State, 1 S. W. 3d 323 (Tex. App. – Fort Worth, 1999) the Fort Worth Court of Appeals approved the imposition of a search condition on a sex offender granted community supervision that required him “to permit your supervision officer to search your residence, vehicle and possessions for the presence of sexually explicit materials.”

See also, United States v. Knights, 534 U. S. 112 (2001).

See further, Samson v. California, \_\_\_ U. S. \_\_\_ (2006), No. 04-9728, delivered on June 16, 2006.

#### **E. Polygraphs**

A condition of community supervision requiring a sex offender to periodically submit to a polygraph examination has been upheld.

See Ex parte Renfro, 999 S. W. 2d 557 (Tex. App. - Houston [14th Dist.], 1999)

#### **F. DNA Samples**

In 2009 the Legislature mandated that the court order every probationer placed on regular community supervision for a felony offense to provide a DNA sample as a condition of community supervision. The only exception to this requirement is if a probationer has already submitted a sample to DPS. I interpret this new law to only apply to a felony probationer placed on regular community supervision on or after September 1, 2009. Moreover this law is not mandated for felony probationers placed on deferred adjudication community supervision. Finally this law is not retroactive.

#### **G. Gang Restrictions**

In 2009 the Legislature enacted H. B 2086. This bill adds a Section 13F to Article 42.12, Code of Criminal Procedure, to provide that a court granting community supervision to a defendant convicted of an organized crime offense, may impose as a condition of community supervision restrictions on the defendant’s operation of a motor vehicle, including specifying:

- (1) hours during which the defendant may not operate a motor vehicle; and
- (2) locations at or in which the defendant may not operate a motor vehicle.

Note: This bill does not reference whether the changes become applicable for offense committed on or after the effective date of the Act but I am assuming that for changes in the Penal Code, the changes are only applicable for offenses committed on or after September 1, 2009 and for changes in the Code of Criminal Procedure, the changes are applicable for persons placed on

community supervision on or after September 1, 2009 or for judgments entered on or after September 1, 2009.

## **H. Family Violence Center**

In 2009 the Legislature enacted S. B. 82. This bill mandates that a defendant placed on community supervision for a domestic violence offense be required to pay \$100 to a family violence center. This bill amends Article 42.12, Section 11 (h), Code of Criminal Procedure, to provide that if a judge grants community supervision to a person convicted of an offense under Title 5, Penal Code, that the court has determined involves family violence, the judge must require the person to pay \$100 to a family violence center that receives state or federal funds and that serves the county in which the court is located.

## **Special Conditions - Intoxication Offenses**

### **A. Confinement**

Article 42.12, Section 13 of the Code of Criminal Procedure provides that a person placed on probation for a DWI offense must be confined for the following periods in jail as a condition of community supervision:

- 1) not less than 72 hours of continuous confinement if it is shown that the person has been previously convicted one time for a DWI offense;
- 2) not less than five days of confinement in county jail if the defendant was punished for a second time intoxication offense and that offense was committed within five years of the date on which the most recent preceding offense was committed;
- 3) not less than 10 days if it is shown that the person has been previously convicted two or more times for a DWI offense; or
- 4) not less than 30 days if the defendant is convicted of intoxication assault.

Article 42.12, Section 13(b) of the Code of Criminal Procedure provides that if a defendant, convicted of intoxication manslaughter, is granted community supervision, the Court must require, as a condition of probation, that the defendant submit to a period of confinement of not less than 120 days. This confinement can be in either a county jail, a community corrections facility, or the state penitentiary.

### **B. DWI Educational Program**

Article 42.12, Section 13(h) of the Code of Criminal Procedure provides that if a person is convicted of a driving while intoxicated offense and is placed on community supervision, the judge shall require, as a condition of his community supervision, that the defendant attend and successfully complete before the 181<sup>st</sup> day after the day community supervision is granted an educational program designed to rehabilitate persons who have driven while intoxicated.

Upon showing of good cause in a written motion by the defendant, the judge may waive the educational program requirement or may grant an extension of time to successfully complete the program provided that the extension may not be for longer than one year after the beginning date of the person's community supervision. In determining good cause, the judge may consider but is not limited to the defendant's school and work schedule, the defendant's health, the distance that the defendant must travel to attend an educational program, and the fact that the defendant resides out of state, has no valid driver's license, or does not have access to transportation. A finding of good cause for the waiver must be set out in the judgment.

### **C. Repeat Offender DWI Education Program**

Article 42.12, Section 13(j) of the Code of Criminal Procedure provides that if a defendant is convicted of an enhanced DWI offense and is granted community supervision, the trial judge must order the defendant to participate in a repeat offender DWI education program as a condition of community supervision.

Moreover this provision further states that upon showing of good cause in a written motion by the defendant, the judge may waive the educational program requirement. In addition, a finding of good cause must be set out in the judgment. Good cause contains the same factors as those a court can consider in waiving an educational program under Section 13 (h). However, unlike Section 13 (h), Section 13(j) does not contain a provision that the repeat education program must be completed within a specified time.

### **D. Installation of Deep-Lung Breath Analysis Mechanism**

In 1993 the Legislature added a subsection (i) to Article 42.12, Section 13, Code of Criminal Procedure, dealing with the use of a deep lung breath analysis mechanism on a vehicle as a condition of community supervision. In its present form, this subsection authorizes a court to have a defendant convicted of certain intoxication offenses install on his vehicle, as a condition of community supervision, a device that uses a deep-lung breath analysis mechanism to make impractical the operation of the motor vehicle if ethyl alcohol is detected on the breath of the operator. This subsection (i) further provides that if the person is convicted of an enhanced DWI or a subsequent offense of intoxication manslaughter or intoxication assault the court must require as a condition of community supervision that the defendant have the device installed on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant and that not operate any vehicle unless the vehicle is equipped with such a device. Finally, in 2005 the Legislature enacted H. B. 51 to provide that if it is shown on the trial of an intoxication offense that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, then upon conviction, the defendant must install such a device.

This subsection (i) further specifies that the court must require the defendant to obtain the device before the 30<sup>th</sup> day after the date of conviction at his own cost unless the court finds that to do so would not be in the best interest of justice and enters its finding on the record.

Moreover, the court must require the defendant to provide evidence within the 30 day period that the device has been installed. The court must also order the device to remain installed on that vehicle for a period of not less than 50 percent of the supervision period. If the court determines that the offender is unable to pay for the device, the court may impose a reasonable payment schedule not to exceed twice the period of the court's order. (Presumably this period also cannot exceed the term of probation). Finally this subsection (i) provides that if a person is required to operate a motor vehicle in the course and scope of the person's employment and if the vehicle is owned by the employer, the person may operate that vehicle without installation of an approved ignition interlock device if the employer has been notified of that driving privilege restriction and if proof of that notification is with the vehicle. This employment exemption does not apply, however, if the business entity that owns the vehicle is owned or controlled by the person whose driving privilege has been restricted. See Acts 1993, Seventy-Third., Ch. 662, Section 1, p. 2459.

Note: Art. 17.441, Code of Criminal Procedure, also authorizes a magistrate to require a defendant, as a condition of bond, to install a deep lung breath analysis device on his motor vehicle. Subsection (a) of this provision states that except as provided by Subsection (b), a magistrate shall require on release that a defendant charged with a subsequent offense under Sections 49.04-49.06, Penal Code, or an offense under Section 49.07 or 49.08 of that code:

- (1) have installed on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant, a device that uses a deep-lung breath analysis mechanism to make impractical the operation of a motor vehicle if ethyl alcohol is detected in the breath of the operator; and
- (2) not operate any motor vehicle unless the vehicle is equipped with that device.

Subsection (b) of this provision also provides that the magistrate may not require the installation of the device if the magistrate finds that to require the device would not be in the best interest of justice. It has been my position that a magistrate could require a community supervision and corrections department to monitor this particular condition of bond.

## **Special Conditions - Sex Offenders**

### **A) Extensions**

Article 42.12, Section 22A, Code of Criminal Procedure, states that if a defendant is placed on community supervision after receiving a grant of deferred adjudication for or being convicted of an offense of indecency with a child, sexual assault, or aggravated sexual assault, the judge may extend the period of community supervision upon a determination that the defendant has not sufficiently demonstrated a commitment to avoid future criminal behavior and that the release of the defendant from supervision would endanger the public.

The judge may extend the period of supervision for a period not to exceed ten (10) additional years.

A judge may extend a period of community supervision under this section only once; however, the judge may extend a period of community supervision for a defendant under both Section 22 (c ) and this section, and the prohibition in Section 22 (c ) against a period of community supervision in a felony case exceeding 10 years does not apply to a defendant for whom community supervision is increased under this section or under both Section 22 (c ) and this section.

Note: If the Court does not extend the term of community supervision for the full ten years under Section 22A, the Court cannot later modify the term of community supervision to extend the term of community supervision for an additional period of time that equals ten years.

## **B) Registration**

Article 42.12, Section 11 (e), Code of Criminal Procedure, states that a judge granting community supervision to a defendant required to register as a sex offender shall require the registration as a condition of community supervision.

Note: Article 62.02 (a), Code of Criminal Procedure, states that a person who is required to register as a condition of community supervision shall register or, if the person is a person for whom registration is completed, verify registration with the local law enforcement authority in any municipality where the person resides or intends to reside for more than seven days.

## **C) DNA Samples**

During the Seventy-Seventh Legislative Session in 2001, the Legislature amended Article 42.12, Section 11 (e), Code of Criminal Procedure, to provide that if a judge grants community supervision to a defendant who is required to register as a sex offender, then the judge must require that defendant, as a condition of community supervision, to submit a blood sample or other specimen to the Texas Department of Public Safety for the purpose of creating a DNA record on the defendant, unless the defendant had already submitted the required specimen under other state law.

Note: Article 42.12, Section 11 (a) (22), Code of Criminal Procedure, states that the court may impose, as a condition of community supervision, a requirement that the defendant submit a blood sample or other specimen to the Department of Public Safety under Subchapter G. Chapter 411, Government Code, for the purpose of creating a DNA record. The authority to impose this particular condition is not limited to only those offenders placed on community supervision for a sex offense.

## **D) Notification**

During the Seventy-Sixth Legislative Session in 1999, the Legislature amended Article 42.12, Section 11 (a) (23), to provide that a judge may, as a condition of community supervision, require a defendant to provide public notice of the offense for which the defendant was placed on community supervision in the county in which the offense was committed.

## **E) Child Safety Zones**

Article 42.12, Section 13B, Code of Criminal Procedure, states that if a judge grants community supervision to a defendant convicted of certain prescribed sex offenses and the judge determines that a child was the victim of the offense, the judge must establish a child safety zone by requiring as a condition of community supervision that the defendant not:

- 1) supervise or participate in any program that includes as participants or recipients persons who are 17 years of age or younger and that regularly provides athletic, civic, or cultural activities; or
- 2) go in, on, or within 1,000 feet of a premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility; and
- 3) attend psychological counseling sessions for sex offenders with an individual or organization which provides sex offender treatment or counseling as specified by or approved by the judge or the supervision officer supervising the defendant.

Nevertheless this provision does not apply to a defendant while the defendant is in or going immediately to or from a:

- 1) community supervision and corrections department office;
- 2) premises at which a defendant is participating in a program or activity required as a condition of community supervision;
- 3) residential facility in which the defendant is required to reside as a condition of community supervision, if the facility was in operation as a residence for defendants on community supervision on June 1, 2003; or
- 4) private residence at which the defendant is required to reside as a condition of community supervision.

At any time after the imposition of this condition, the defendant can request the court to modify the child safety zone.

A supervision officer supervising a defendant may permit him on a case-by-case basis to enter into the child safety zone that the defendant is otherwise prohibited from entering under certain circumstances.

Note: Child for purposes of this measure is a person younger than 17.

Note further: In Opinion No. GA-0526, issued on March 6, 2007, the Attorney General stated that a home-rule municipality's authority to adopt ordinances restricting the residence of sex offenders did not violate Article I, Section 3 (the equal protection clause) of the Texas Constitution or Article I, Section 19 (the due course of law clause) of the Texas Constitution and that a home-rule municipality could adopt an ordinance that was more restrictive than that provided in Article 42.12, Section 13B, Code of Criminal Procedure.

## **F) Sex Offender Evaluations**

S. B. 1054, enacted in 2003, added a Section 9A to Article 42.12, Code of Criminal Procedure, to provide that if a defendant is a sex offender, the judge must direct a supervision officer approved by the community supervision and corrections department or the judge or a person, program, or other agency approved by the Council on Sex Offender Treatment to evaluate the appropriateness of, and a course of conduct necessary for, treatment, specialized supervision, or rehabilitation of the defendant and to report the results of the evaluation to the judge. This bill further allowed a judge to require the evaluation to use offense-specific standards of practice adopted by the Council on Sex Offender Treatment and require the report to reflect those standards. Furthermore, this bill mandates that the evaluation be made after conviction and before the entry of a final judgment or, if requested by the defendant, after arrest and before conviction.

### **G) Internet Restrictions**

In 2009 the Legislature enacted S. B. 689. This bill provides that if a court grants community supervision to a defendant who is required to register as a sex offender and:

- 1) is convicted of or receives a grant of deferred adjudication for the offenses of indecency with a child, sexual assault of a child, aggravated sexual assault of the child, online solicitation of a child or sexual performance of a child;
- 2) uses the Internet or any other type of electronic device used for Internet access to commit the offense or engage in the conduct for which the person is required to register as a sex offender; or
- 3) is assigned a numeric risk level of three,

the court as a condition of community supervision must prohibit the defendant from using the Internet to:

- 1) access material that is obscene;
- 2) access a commercial social networking site;
- 3) communicate with any individual concerning sexual relations with an individual who is younger than 17 years of age; or
- 4) communicate with another individual the defendant knows is younger than 17 years of age.

However under this measure the court may modify the condition of community supervision at any time if:

- 1) the condition interferes with the defendant's ability to attend school or become or remains employed and consequently constitutes an undue hardship for the defendant; or
- 2) the defendant is the parent or guardian of an individual who is younger than 17 years of age and the defendant is not otherwise prohibited from communicating with that individual.

Finally, This bill became effective on September 1, 2009.

### **Special Conditions - Substance Abuse**

Article 42.12, Section 14 (a), Code of Criminal Procedure, states that if a court places a

defendant on community supervision as an alternative to imprisonment, the judge may require as a condition of community supervision that the defendant serve a term of confinement and treatment in a substance abuse treatment facility operated by the Texas Department of Criminal Justice.

A term of confinement and treatment imposed under this section must be an indeterminate term of not more than one year or less than 90 days.

A judge may impose the condition of community supervision under this article if:

1) the judge places the defendant on community supervision;

2) the defendant is charged with or convicted of a felony other than indecency with a child, sexual assault, or aggravated sexual assault; and

3) the judge makes an affirmative finding that:

A) drug or alcohol abuse significantly contributed to the commission of the crime or violation of community supervision; and

B) the defendant is a suitable candidate for treatment, as determined by the suitability criteria established by the Texas Board of Criminal Justice.

### **Special Conditions - State Jail Felony Offender**

Previously a judge could only impose on a defendant granted community supervision for a state jail felony offense a condition that the defendant submit to a period of confinement in a county jail only if the term did not exceed 90 days. However in 2005 the passage of H. B. 1759 removed the restriction on the amount of jail time that could be imposed on a state jail felon as a condition of community supervision. This bill amended Article 42.12, Section 12 (a), Code of Criminal Procedure, to provide that the judge could require a state jail felon, as a condition of community supervision, to submit to confinement in a county jail for a period not to exceed 180 days. This change became applicable only to a defendant originally placed on community supervision on or after September 1, 2005.

A judge may impose as a condition of community supervision that a defendant submit at the beginning of the period of community supervision to a term of confinement in a state jail felony facility for a term of not less than 90 days or more than 180 days, or a term of not less than 90 days or more than one year if the defendant is convicted of a delivery of a controlled substance offense that is punishable as a state jail felony.

A judge may not require a defendant to submit, as a condition of community supervision, to both the term of confinement in a state jail felony facility and a county jail.

If a defendant violates a condition of community supervision imposed on a defendant granted community supervision for a state jail felony, the judge may require, as a modified condition of community supervision, that the defendant serve a period of confinement in a state jail felony facility, the minimum term of confinement being 90 days and the maximum term being 180 days.

Ordinarily no part of the time that the defendant is on community supervision shall be considered as any part of the time that he shall be sentenced to serve.  
See Article 42.12, Section 23 (b), Code of Criminal Procedure

However in 2007 the passage of H. B. 1678 provided credit for a defendant sentenced to a state jail felony facility. This bill amended Article 42.12, Section 15 (h) (2), Code of Criminal Procedure, to provide that a judge must credit against any time a defendant was required to serve in a state jail felony facility time served by the defendant in a substance abuse treatment facility operated by the Texas Department of Criminal Justice or other court-ordered residential program or facility as a condition of deferred adjudication community supervision but only if the defendant successfully completed the treatment program at the facility. Furthermore this bill amended Subdivision (3) of Subsection (h) of this section to provide that a judge must credit against any time a defendant was subsequently required to serve in a state jail felony facility after revocation of community supervision any time served after sentencing in a substance abuse treatment facility operated by the Texas Department of Criminal Justice or other court-ordered residential program or facility if the defendant successfully completed the treatment program in that facility. Lastly the changes in the law made to credit for time served apply only to those defendants initially placed on community supervision on or after September 1, 2007.

## **Other Conditions of Community Supervision**

### **A. Community Corrections Facilities**

Article 42.12, Section 18 of the Code of Criminal Procedure provides that as a condition of community supervision a defendant may be required to serve a term of not more than 24 months in a community corrections facility.

Note: Subsection (h) of Article 42.12, Section 18 further provides that a judge that requires as a condition of community supervision that the defendant serve a term in a community corrections facility may not impose a subsequent term in a community corrections facility or jail during the same supervision period that, when added to the terms previously imposed, exceeds 36 months.

Formerly a probationer granted probation under this section could not earn good conduct credit for the time spent in the center toward completion of a prison sentence if the probation were revoked. See Sabala v. State, 107 S. W. 3d 78 (Tex. App. – San Antonio, 2003)

However in 2007 with the passage of H. B. 1678 a court is now required to give credit on a revoked or imposed sentence if the person successfully completed a drug treatment program at a Substance Abuse Felony Punishment (SAFP) facility or other court-ordered residential program. This bill amended Article 42.03 (a) (2), Code of Criminal Procedure, in order to provide that the judge of the court in which the defendant is convicted must give the defendant credit on the person's sentence for the time that the defendant has spent in a substance abuse felony treatment facility operated by the Texas Department of Criminal Justice or other court-ordered residential program or facility as a condition of deferred adjudication community supervision if the defendant successfully completed the treatment program at that facility. In addition, this bill amended Article 42.12, Section 23 (b), Code of Criminal Procedure, to require a judge to credit on a revoked sentence any time served by the defendant, as a condition of community supervision, in a substance abuse

treatment facility operated by the Texas Department of Criminal Justice or another court-ordered residential program or facility but only if the defendant successfully completed the treatment program in that facility. Lastly the changes in the law made to credit for time served apply only to those defendants initially placed on community supervision on or after September 1, 2007.

## **B. Interpretation Fees**

H. B. 1601, which was signed into law by the Governor on June 18, 2005, amended Article 42.12, Section 11 (a), Code of Criminal Procedure, to provide that the judge may impose any reasonable condition [of community supervision] that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant, including:

- (24) reimburse the county in which the prosecution was instituted for compensation paid to any interpreter in the case.

This new provision became applicable only to a defendant placed on community supervision on or after September 1, 2005.

It seems apparent to me that ordering a foreign-language speaking defendant to reimburse the county for the costs of providing an interpreter is equivalent to ordering an indigent defendant to pay the costs of a court-appointed attorney and therefore such a requirement is constitutionally valid. In Opinion No. DM-245, issued on August 20, 1993, the Attorney General concluded that a court could not require a foreign-language speaking defendant to pay for the costs of an interpreter because there was not statutory authority to do so. In coming to the conclusion the Attorney General explicitly refrained from examining any constitutional barriers that would prohibit a foreign-language defendant from reimbursing the county for the costs of employing an interpreter. Thus H. B. 1601 provides the statutory authority that satisfies the objections that the Attorney General had in DM-245 regarding the propriety of ordering reimbursement of costs for a foreign-language interpreter.

Nevertheless the ordering of the reimbursement of costs for an interpreter for the deaf and hearing-impaired is much more problematic. In Tennessee v. Lane, 541 U. S. 509 (2004), delivered May 17, 2004, the United States Supreme Court held that Title II of the Americans with Disabilities Act (ADA) applied to States in suits involving a complaint of denial of access to courts. Moreover, Title 28 C.F.R. Section 35.130 (f), one of the regulations adopted pursuant to the ADA, provides that:

“[a] public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part [of the C.F.R.]”

Thus the Attorney General has opined that under the Supremacy Clause of the United States Constitution, “to the extent that interpreter services are required to make court mandated services available to deaf or hearing-impaired persons on a nondiscriminatory basis, the costs of such services

may not be imposed on those persons by taxing them as court costs.” See Attorney General Opinion No. DM-411, issued August 28, 1996. Following the reasoning of the Attorney General and in light of existing federal regulations and case law, there is some question concerning whether a court can order a deaf or hearing-impaired defendant, as a condition of community supervision, to reimburse the county for the costs of employing an interpreter in a criminal proceeding.

### **C. Community Service**

In 2007 H. B. 1678 made certain changes to the provision dealing with performing community service as a condition of community supervision. Under this bill no longer will a judge be required to order community service to be performed. Instead, the bill amends Article 42.12, Section 16 (a), Code of Criminal Procedure, to provide that a judge *may* (emphasis added) require as a condition of community supervision that a defendant work a specified number of hours at a community service project. Moreover, this bill states that a judge may not require that a defendant work at the community service project if the judge determines and notes on the order placing the defendant on community supervision that:

- (1) the defendant is physically or mentally incapable of participating in the project;
- (2) participating in the project will work a hardship on the defendant or the defendant’s dependents;
- (3) the defendant is to be confined in a substance abuse punishment facility as a condition of community supervision; or
- (4) there is other good cause.

Finally this bill also removed the floor that specified that the judge had to order a defendant to perform at least a certain minimum number of community service hours. Now Article 42.12, Section 16 (b) is amended to provide that the amount of community service work ordered by the judge:

- (1) may not exceed 1,000 hours for an offense classified as a first degree felony;
- (2) may not exceed 800 hours for an offense classified as a second degree felony;
- (3) may not exceed 600 hours for an offense classified as a third degree felony;
- (4) may not exceed 400 hours for an offense classified as a state jail felony;
- (5) may not:
  - (A) exceed 600 hours for an offense under Section 30.04, Penal Code, classified as a Class A misdemeanor; or
  - (B) exceed 200 hours for any other offense classified as a Class A misdemeanor or for any other misdemeanor for which the maximum permissible confinement, if any, exceeds six months or the maximum permissible fine, if any, exceeds \$4,000; and
- (6) may not exceed 100 hours for an offense classified as a Class B misdemeanor or for any other misdemeanor for which the maximum permissible confinement, if any, does not exceed six months and the maximum permissible fine, if any, does not exceed \$4,000.

Note: The changes in the law made to community service apply only to those defendants initially placed on community supervision on or after September 1, 2007.

Note also: In 2001, the Seventy-Seventh Legislature amended this section to provide that if the defendant is placed on community supervision for the offense of burglary of a vehicle, then the amount of community service ordered to be performed by the court may not exceed 600 hours or be less than 160 hours.

Note further: In 2007 the Legislature enacted H. B. 1887, which authorizes, under certain circumstances, the offense of burglary of a motor vehicle to be enhanced to a state jail felony offense. Thus if a person is placed on community supervision for a misdemeanor burglary of a motor vehicle offense and the judge orders the person to perform community service the maximum number of hours that a judge can order a defendant to perform will those hours listed in Article 42.12, Section (b) (5) (A); however, if the person is placed on community supervision for a felony burglary of a motor vehicle offense and the judge orders the person to perform community service the maximum number of hours that a judge can order a defendant to perform will those hours listed in Article 42.12, Section (b) (4).

Note finally: In 1993, the Legislature enacted Article 42.014, Code of Criminal Procedure, to provide that in the trial of an offense under the Penal Code if the court determines that the defendant intentionally selected the victim primarily because of the defendant's bias or prejudice against a person or a group, the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of that case.

This enactment also provided that if the court makes an affirmative finding under Article 42.014, Code of Criminal Procedure, the court can order the defendant to perform community service at a project designated by the court that primarily served the person or group who was the target of the defendant.

Moreover, if the court ordered community service under this subsection the court has to order the defendant to perform not less than:

- 1) 100 hours of service if the offense were a misdemeanor; or
- 2) 300 hours of service if the offense were a felony.

### **Community Service for the Offense of Graffiti**

In 2009 the Texas Legislature enacted H. B. 1633. The bill amends Article 42.12, Section 11, Code of Criminal Procedure, by adding a subsection (k) to provide that if a court grants community supervision to a defendant convicted of graffiti, the court must require as a condition of community supervision that the defendant perform:

- 1) at least fifteen hours of community service if the amount of pecuniary loss resulting from the graffiti offense is \$50 or more but less than \$500; or
- 2) at least thirty hours of community service if the amount of pecuniary loss resulting from the graffiti offense is \$500 or more.

In addition, this bill amends Article 42.037, Code of Criminal Procedure, by adding a section (s) provide, among other things, that if the court orders a defendant to make restitution for the offense of graffiti and the defendant is financially unable to make the restitution, the court may order the

defendant to perform a specific number of hours of community service to satisfy the restitution.

### **Community Service for the Offense of Failure to Avoid Injuring or Endangering a Visually Impaired Pedestrian**

In 2009 the Texas Legislature enacted H. B. 1633. The bill amends Section 552.010 of the Transportation Code by adding a subsection (c) to provide that if it is shown on the trial of the offense of failure to avoid injuring or endangering a visually impaired pedestrian crossing a roadway in a crosswalk that as a result of the commission of the offense a collision occurred causing serious bodily injury or death to the visually impaired person, the offense will be a misdemeanor punishable by:

- 1) a fine of not more than \$500; and
- 2) 30 hours of community service to an organization or agency that primarily served disabled or visually impaired persons, to be completed in not less than six months and not more than one year.

Moreover under this bill a portion of the community service required under this measure must include sensitivity training. Finally this bill becomes effective for offenses committed on or after September 1, 2009.

### **D. Fees, Fines and Costs**

Article 42.12, Section 11(b), Code of Criminal Procedure, provides that a court may not order a probationer to make any payments as a term or condition of probation, except for fines, court costs, restitution to the victim, and other terms or conditions related personally to the rehabilitation of the probationer or otherwise expressly authorized by law.

See Attorney General Opinion No. GA-0095, issued September 3, 2003

If a (court) cost or fee is not expressly authorized to be imposed as a condition of community supervision, then a trial judge may not order a probationer to pay such a fee or cost as a condition of community supervision.

See Busby v. State, 984 S. W. 2d 627 (Tex. Cr. App. – 1998)

However, see also, Tovar v. State, 777 S. W. 2d 481 (Tex. App. – Corpus Christi, 1989), in which the Corpus Christi Court of Appeals approved a trial judge’s requirement that the defendant pay for the costs of preparing a PSI report as a condition of community supervision.

Formerly in a proceeding to revoke community supervision where the grounds for revocation were the probationer’s failure to pay fees assessed as a condition of community supervision, the inability of the probationer to pay the enumerated fees was an affirmative defense. See Stanfield v. State, 718 S. W. 2d 734 (Tex. Cr. App. - 1986). Thus a probationer had to prove his inability to pay by a preponderance of the evidence and once the issue of inability to pay had been raised, the burden of proof shifted to the State to prove that the defendant’s failure to pay was intentional. See Greathouse v. State, 33 S. W. 3d 455 (Tex. App. - Houston, [1st. Dist.], 2000)

However, in 2007 H. B. 312 was enacted into law and amended Article 42.12, Section 21 (c), Code of Criminal Procedure, to provide that in a revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, or court costs, the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. The purpose of this change is to shift the burden of proof in revocation hearings from the defendant to the State where it is alleged that certain fees were not paid. This change became applicable only to a community supervision revocation hearing held on or after September 1, 2007.

Note: In State v. Crook, 248 S. W. 3d 172 (Tex. Cr. App. – 2008), the Texas Court of Criminal Appeals held that fines imposed in multiple convictions arising from the same criminal episode tried in one criminal action must “run” consecutively.

Note further: The Texas Court of Criminal Appeals, in *Ex parte McIver*, 586 S. W. 2d 851 (Tex. Cr. App. – 1979), had examined the statutory authority behind a jury verdict sentencing the defendant to both a term of confinement and a fine and had held that “the Legislature did not contemplate that fines would be probated.”

See also, Harris v. State, 185 S. W. 3d 524 (Tex. App. – Amarillo, 2006).

### **Pretrial Supervision Fees**

In 2009 the Legislature enacted S. B. 82. This bill amends Section 103.021(22), Code of Criminal Procedure to provide that fees for a pretrial intervention program shall consist of a supervision fee of \$60 per month plus expenses and a district attorney, criminal district attorney, or county attorney administrative fee not to exceed \$500.

Note: In 2005 the Legislature enacted S. B. 1006, which authorized a court that placed a defendant in a pre-trial diversion program to order the individual to pay a supervision fee in an amount not more than \$60 per month as a condition of participating in the program. Then during the last legislative session the Legislature enacted H. B. 2385 which authorized a district attorney, criminal district attorney, or county attorney to collect a fee in an amount not to exceed \$500 to be used to reimburse a county for expenses, including expenses of the district attorney’s, criminal district attorney’s, or county attorney’s office, related to a defendant’s participation in a pretrial intervention program offered in that county. This bill clarifies that a court can order the defendant to pay the \$500 pretrial intervention fee to the prosecutor’s office as a cost of court as well as the \$60 pretrial supervision fee to the CSCD. Finally this bill becomes effective on September 1, 2009.

### **Victim Notification**

Sec. 76.016 of the Government Code states that a department, using the name and address provided by the attorney representing the state under Article 56.08(d), Code of Criminal Procedure, shall immediately notify a victim of the defendant's crime or, if the victim has a guardian or is deceased, notify the guardian of the victim or close relative of the deceased victim of:

- (1) the fact that the defendant has been placed on community supervision;

- (2) the conditions of community supervision imposed on the defendant by the court; and
- (3) the date, time, and location of any hearing or proceeding at which the conditions of the defendant's community supervision may be modified or the defendant's placement on community supervision may be revoked or terminated.

Under this provision, a "close relative of a deceased victim," "guardian of a victim," and "victim" have the meanings assigned by Article 56.01, Code of Criminal Procedure.

In 2009 the Legislature enacted H. B. 1003. This bill requires community supervision and corrections departments to notify certain victims or witnesses whenever a probationer is no longer being monitored electronically. This bill amends Article 56.11, Code of Criminal Procedure, to provide that a community supervision and corrections department supervising a defendant must notify the victim or witness whenever the defendant, if subject to electronic monitoring as a condition of release, ceases to be electronically monitored. Nevertheless this measure only applies if the defendant is convicted of:

- 1) an offense under Title V of the Penal Code (Offenses against the Person) that was punishable as a felony;
- 2) Continuous sexual abuse of a young child or children;
- 3) Indecency with a child;
- 4) Sexual assault;
- 5) Aggravated sexual assault;
- 6) Incest;
- 7) Aggravated kidnapping if the defendant committed the offense with the intent to violate or abuse the victim sexually;
- 8) Burglary of a habitation if the defendant committed the offense with the intent to commit one of the above listed offenses; or
- 9) An offense involving family violence, stalking or a violation of a protective order or magistrate's order.

This bill became effective on September 1, 2009.

Note: A witness under this measure would be someone who testified against the defendant at trial for the offense, other than a witness who testified in the course and scope of the witness's official or professional duties.

Note further: Under this measure the CSCD has to give notice to the victim or witness not later than the 30<sup>th</sup> day before the date the defendant ceased to be electronically monitored as a condition of release.

### **Effect of Bankruptcy Proceeding**

Court-ordered fines, fees and costs have never been considered a debt dischargeable in a Chapter 7 bankruptcy proceeding.

See Kelly v. Robinson, 107 S. Ct. 353 (1986)

Moreover, if a Chapter 13 bankruptcy case is commenced on or after October 22, 1994, then court ordered fines, fees and costs are considered debts that cannot be discharged in a bankruptcy proceeding and a court can fully enforce its orders against a probationer.  
See 11 U.S.C. Section 1328 (a)

Even if a defendant first files bankruptcy and is subsequently found guilty of an offense a court can still order him to pay restitution for the same loss that had been discharged as a “debt.”  
See Cabla v. State, 974 S. W. 2d 927 (Tex. App. – Houston [14<sup>th</sup> Dist.], 1998)

## **Restitution**

There are three limits on a trial court’s authority to assess restitution.

First, the amount of restitution must be just, and it must have a factual basis within the loss of the victim.

See Cartwright v. State, 605 S. W. 2d 287 (Tex. Cr. App. - 1980)

Second, a trial court cannot order restitution for an offense for which the defendant is not criminally responsible.

See Gordon v. State, 707 S. W. 2d 626 (Tex. Cr. App. - 1986)

Finally, a trial court cannot order restitution to any but the victim or victims of the offense with which the offender was charged.

See Martin v. State, 874 S. W. 2d 674 (Tex. Cr. App. - 1994)

If the victim of the offense is deceased, the court can order the defendant to pay restitution to the estate of the deceased but not to individual heirs.

See Tyler v. State, 137 S. W. 3d 261 (Tex. App. – Houston [1<sup>st</sup> Dist.], 2004).

Note: H. B. 312, enacted in 2007 deleted all mention in Article 42.12, Section 21 (c), supra, of alleging failure to pay restitution and which party carried the burden of proving failure to pay or inability to pay. Now, while the procedure for conducting a revocation proceeding for the alleged failure to pay restitution fees will still be governed under Article 42.12, Section 21 (c), supra, the factors for determining whether the defendant should be legally held accountable for the failure to pay restitution will be established under Article 42.037, Code of Criminal Procedure.

Under Article 42.037, Section (h), supra, if a defendant is placed on community supervision, the court must order the payment of restitution as a condition of community supervision. In addition, this section states that a court may revoke the person’s community supervision if the defendant fails to comply with the order. Moreover this section provides that in determining whether to revoke community supervision, the court must consider:

- (1) the defendant’s employment status;
- (2) the defendant’s current and future earning ability;
- (3) the defendant’s current and future financial resources;

- (4) the willfulness of the defendant's failure to pay;
- (5) any other special circumstances that may affect the defendant's ability to pay; and
- (6) the victim's financial resources or ability to pay expenses incurred by the victim as a result of the offense.

While this section does not specify which party bears the burden of proof when it is alleged that the defendant failed to pay restitution and what that level of proof might be, it is assumed that the State carries the burden to establish or negate the above listed six factors by a preponderance of the evidence.

When a defendant is sentenced to prison, the judge can only make a finding of the amount of restitution that would make the victim whole; the judge cannot order the restitution to be paid as a condition of parole; see *Campbell v. State*, 5 S. W. 3d 693 (Tex. Cr. App. – 1999).

In 2009 the Legislature enacted H. B. 4464. This bill provides that in the event that the court orders restitution to be paid to the victim, a statement of the amount of restitution ordered must be included in the judgment as well as:

- 1) the name and address of a person or agency that will accept and forward restitution payments to the victim; or
- 2) if the court specifically elects to have payments made directly to the crime victim, the name and permanent address of the victim at the time of the judgment.

This bill became effective on September 1, 2009.

### **Revocation Proceedings**

Article 42.12, Section 21(a) of the Code of Criminal Procedure states that at any time during the period of community supervision the court may issue a warrant for violation of any of the conditions of the community supervision and cause the defendant to be arrested.

Any supervision officer, police officer or other officer with power of arrest may arrest such defendant with or without a warrant upon the order of the judge of such court to be noted on the docket of the court.

If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, extend, modify or revoke the community supervision.

The twenty day period only begins to run after the defendant has filed a motion for a hearing on the motion to revoke.

*Aquilar v State* 621 S.W. 2d 781 (Tex.Cr.App.-1981)

A defendant does not have to wait for the filing of the State's motion to revoke probation before he can file his motion for a speedy revocation hearing.

*Aquilar v State*, supra.

When confronted with a request for a speedy revocation hearing, the trial court must conduct a hearing within twenty days of the request or release the defendant.

If the trial court fails to comply with the statute's requirements, the defendant may attack the legality of his confinement by means of the writ of habeas corpus.

However, such a violation of confinement is not an error which would taint a revocation of his probation.

Aquilar v State, supra.

Ordinarily, the remedy for a violation of the 20 day speedy hearing requirement is dismissal of the motion without prejudice to refile it.

See Carney v. State, 573 S. W. 2d 24, (Tex. Cr. App. - 1978)

Probation revocation hearings are not criminal trials. They are administrative proceedings, supervised by the court, adversarial in nature, and a means of protecting society and rehabilitating law breakers. The result of such a hearing is not a conviction, but rather a finding upon which the trial court may exercise its discretion by revoking or continuing probation.

See Hill v State 480 S.W. 2d 200 (Tex.Cr.App.-1971)

Bowen v State 649 S.W. 2d 384 (Tex.App.-Fort Worth, 1983)

This is not to say, however, that all constitutional guarantees of due process fly out the window at a probation revocation hearing. A probationer is entitled to certain due process protections in the revocation proceedings.

Ruedas v State 586 S.W. 2d 520 (Tex.Cr.App.-1979)

In Gagnon v Scarpelli 93 S.Ct. 1756 (1973) the Supreme Court enunciated the "minimum requirements of due process" which must be observed in probation revocation hearings.

They include:

- 1) written notice of the claimed violations of community supervision;
- 2) disclosure to the probationer of the evidence against him;
- 3) the opportunity to be heard in person and to present witnesses;
- 4) the right to confront and cross-examine adverse witnesses;
- 5) a "neutral and detached" hearing body;
- 6) and a written statement by the fact finders as to the evidence relied on and the reasons for revoking probation.

See Bowen v State, supra.

The Texas Court of Criminal Appeals has held that the procedures under Texas law are sufficient to satisfy the due process requirements under Gagnon v. Scarpelli, supra, and Morrissey v. Brewer, 92 S. Ct. 2593 (1972) and therefore a probationer is not entitled to a preliminary hearing in a revocation proceeding. See Whisenant v. State, 557 S. W. 2d 102 (Tex. Cr. App. – 1977).

Under Gagnon v Scarpelli, supra, there is no absolute constitutional right to the appointment of counsel in a revocation hearing. However, the right to appointment of counsel in revocation hearings in Texas is required by statute.

Moreover, the Texas Court of Criminal Appeals has held that the right to an attorney in a revocation hearing in Texas is secured by the constitution.

See Ex parte Shivers, 501 S. W. 2d 898 (Tex. Cr. App. - 1973) and Parker v. State, 545 S. W. 2d 151 (Tex. Cr. App. - 1977)

See also Hatten v. State, 32 S. W. 3d 868 (Tex. App. - Texarkana, 2000)

The allegations in a motion to revoke do not have to be as specific as the allegations contained in an indictment.

Instead, what is required is that the motion to revoke fully and clearly set forth the basis on which the State seeks revocation so that a defendant and his counsel have notice.

The Rules of Evidence generally apply to revocation proceedings.

See Cobb v. State, 851 S. W. 2d 871 (Tex. Cr. App. – 1993)

See also, Stevens v. State, 900 S. W. 2d 348 (Tex. App. – Texarkana, 1995).

Note: There is no requirement that a motion to revoke be sworn.

See Johnson v. State, 410 S. W. 2d 785 (Tex. Cr. App. - 1967)

A variance between the charging instrument and the proof in a revocation proceeding is material only if it operates to the defendant's surprise or prejudices his rights.

See Moore v. State, 11 S. W. 3d 495 (Tex. App. - Houston, [14th Dist.], 2000)

Nevertheless, the authority of a trial court to revoke probation is limited by the allegations of which the probationer had due notice, i.e., those that are contained in the written motion to revoke probation.

See Champion v. State, 590 S. W. 2d 495 (Tex. Cr. App. - 1979).

Article 42.12, Section 21 (b), Code of Criminal Procedure, states that in a felony case, the state may amend the motion to revoke community supervision any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown.

In no event may the state amend the motion after the commencement of taking evidence at the hearing. The judge may continue the hearing for good cause shown by either the defendant or the state.

The defendant's counsel is entitled to ten days to prepare for a revocation proceeding but may waive the preparation time with the consent of the defendant in writing or on the record in open court.

This ten day requirement applies to the actual time of preparation, rather than the time from the formal appointment to the proceeding in question.

See Article 1.05 (e), Code of Criminal Procedure

See also, Salazar v. State, 5 S. W. 3d 814 (Tex. App. – San Antonio, 1999)

At a revocation hearing there are several potential issues to be resolved:

- (1) whether the allegations of the revocation motion are true, which the State must prove by a preponderance of the evidence; see Moreno v. State, 22 S. W. 3d 482 (Tex. Cr. App. – 1999); see also, Quisenberry v. State, 88 S. W. 3d 745 (Tex. App. – Waco, 2002);
- (2) whether the defendant failed to meet the financial obligations of his community supervision; the failure of which must be prove by the State by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. See Article 42.12, Section 21 (c), Code of Criminal Procedure;
- (3) if a violation is found, whether the community supervision should be continued, extended, modified, or revoked; See Article 42.12, Section 21 (b), Code of Criminal Procedure; and
- (4) if community supervision is revoked, whether the sentence should be reduced. See Article 42.12, Section 23 (a), Code of Criminal Procedure.

### **Evidentiary and Procedural Considerations.**

- 1) The standard of proof to sustain the State’s allegations is a preponderance of the evidence and not beyond a reasonable doubt;

Moreover the State always has the burden to sustain its allegations.

The greater weight of credible evidence before the court must create a reasonable belief that a condition of probation has been violated as alleged.

Jenkins v State 740 S.W. 2d 435 (Tex.Cr.App.-1987)

- 2) Accomplice testimony alone is sufficient to support a finding of a violation of a condition of probation.

See Howery v. State, 528 S. W. 2d 230 (Tex. Cr. App. - 1975)

See also, Benoit v. State, 561 S. W. 2d 810 (Tex. Cr. App. - 1977)

See further, Roberson v. State, 549 S. W. 2d 749 (Tex. Cr. App. - 1977)

- 3). A plea of true to any of the allegations is sufficient to sustain the State’s motion;  
See Benoit v. State, 561 S. W. 2d 810 (Tex. Cr. App. - 1997)

- 4) One ground for revocation is sufficient to revoke probation.

Jones v State 571 S.W. 2d 191 (Tex.Cr.App.-1978)

- 5) The identity of the defendant that he is the same person who was placed on probation in the same cause is always an element of the State’s proof.

Identity can be proven in several ways.

Testimony by a witness who was personally present when the defendant was originally placed on community supervision by the court can be had that the defendant in the revocation proceeding is the same person who was originally placed on community supervision.

In addition, evidence can be introduced showing that the fingerprint on the original judgment and sentence or original community supervision order is the same as the fingerprint of the defendant at the revocation proceeding.

See Batiste v. State, 530 S. W. 2d 588 (Tex. Crim. App. - 1975).

A supervision officer who was not present in court when the probationer was originally placed on community supervision can still testify that the defendant admitted or acknowledged that he was the person placed on community supervision in a specific cause number.

Finally, identification can be established through the trial judge asking the defendant whether or not he is the same person who was placed on community supervision.

See Batiste v. State, supra.

Nevertheless, unless the defendant makes his identity an issue at the revocation hearing, he cannot complain of this matter on appeal.

See Rivera v State 662 S.W. 2d 606 (Tex.Cr.App.-1984)

See also Gunter v State 806 S.W. 2d 235 (Tex.App.-Fort Worth, 1989) and

Adkins v. State 762 S.W. 2d 255 (Tex.App.-Beaumont, 1988).

While a trial judge can take judicial notice of the probationary records in his court, the judge cannot take judicial notice of the fact that the defendant is the same person who was placed on community supervision.

See McCowan v. State, 739 S. W. 2d 652 (Tex. App. - Beaumont, 1987).

6) One of the elements needed to sustain a motion to revoke is evidence of the terms and conditions of community supervision with which the probationer was required to comply.

Proof of this element can be shown in several ways.

The most obvious way is for the State to introduce into evidence a certified or attested copy of the judgment (or order) suspending the imposition of sentence along with a copy of the terms and conditions of community supervision to which the defendant was bound.

See Fleming v. State, 502 S. W. 2d 822 (Tex. Cr. App. - 1974)

The State can also introduce testimony from a supervision officer that the defendant knew and understood the conditions of his community supervision.

See Kent v. State, 809 S. W. 2d 664 (Tex. App. - Amarillo, 1991)

In addition, the State can ask the trial judge to take judicial notice of the records of his court under the particular cause number being heard.

The trial judge on his own can announce from the bench and on the record that he takes judicial notice of his court's records under a certain cause number.

See Holloway v. State, 666 S. W. 2d 104 (Tex. Cr. App. - 1984)

See also, Cobb v. State, 835 S. W. 2d 771 (Tex. App. - Texarkana, 1992)

Finally, if the defendant chooses to testify on his own behalf, the State may elicit testimony during cross-examination that the defendant understood that he was placed on community supervision by the trial court in a certain cause and knew that he was bound by the conditions alleged in the State's motion to revoke.

See Smith v. State, 422 S. W. 2d 440 (Tex. Cr. App. - 1968).

7) Unobjected hearsay is enough to sustain the State's burden;

See Forrest v State 769 S.W. 2d 298 (Tex. App. Houston [1st Dist.], 1985).

See also Chambers v State 711 S.W. 2d 240 (Tex.Cr.App.-1986).

8) An oral omission of a violation of probation terms, made by probationer to his probation officer is sufficient to revoke probation.

Barajas v State 682 S.W. 2d 588 (Tex. App.-Waco, 1984).

Testimony relating to an interview in a probation office between a supervising probation officer and the probationer is not barred because of failure to administer *Miranda* warnings.

Cunningham v State 488 S.W. 2d 117 (Tex.Cr.App.-1972).

Nevertheless, the Court has further held that if a motion to revoke has been filed and a warrant issued for the arrest of a probationer, then a community supervision officer is afterwards precluded from questioning the person about the crime that formed the basis for the revocation proceeding without first administering the *Miranda* warnings to the probationer. See Creeks v. State, 542 S. W. 2d 849 (Tex. Cr. App. – 1976).

9) Even if the State fails to prove the offense alleged in the motion to revoke, if the offense alleged includes a lesser offense and the evidence presented in the revocation proceeding, while insufficient to support the offense alleged, still proves a lesser included offense, then the trial court can revoke the individual's community supervision.

See Jones v. State, 787 S. W. 2d 96 (Tex. App. – Houston [14<sup>th</sup> Dist.], 1990).

10) Once the State files a motion and issues a capias, if the State amends the motion it does not have to re-issue a capias.

See Johnston v. State, 774 S. W. 2d 818 (Tex. App. - Dallas, 1989).

11) It is proper in a revocation proceeding to allow a probation officer to offer his/her opinion whether the defendant's probation should or should not be revoked.

Rationale: One important factor in determining whether the defendant's probation should be revoked, continued, or modified is whether the probation department is able to assist the

probationer's rehabilitation, a subject on which the probation officer will normally be an expert.  
See Hendley v. State, 783 S. W. 2d 750 (Tex. App. - Houston [1st Dist.], 1990)

12) Appellate review of an order revoking probation is limited to a determination of whether the trial court abused its discretion.

Jackson v State 645 S.W. 2d 303 (Tex.Cr.App.-1983)

13) A defendant on deferred adjudication is entitled to bail pending a proceeding to adjudicate guilt.

Ex parte Laday 594 S.W. 2d 102 (Tex.Cr.App.-1980).

A misdemeanor probationer is probably entitled to reasonable bail pending a motion to revoke probation.

Ex parte Smith 493 S.W. 2d 958 (Tex.Cr.App.-1973).

14) If a motion to revoke and capias is issued prior to the expiration of the probationary period, then the court retains limited jurisdiction to decide whether or not to revoke the defendant and have him incarcerated.

See Zillender v State 557 S.W. 2d 505 (Tex.Cr.App.-1977).

This applies equally to the situations in which a person is placed on deferred adjudication.

See Prior v State 795 S.W. 2d 179 (Tex.Cr.App.-1990).

15) The filing of an amended MTR after the probationary period has expired is void.

See Holtzman v. State, 866 S. W. 2d 728 (Tex. App, - Houston [14<sup>th</sup> Dist.], 1994).

See also Guillot v. State, 543 S. W. 2d 650 (Tex. Cr. App. – 1976).

Once the period of community supervision has expired, a court may still extend the term of community supervision if a motion for revocation is filed before the period of supervision ends, and the court hears the motion before the first anniversary of the date on which the period of supervision expires.

See Article 42.12, Section 22 (c), Code of Criminal Procedure

### **The Doctrine of Due Diligence - now has limited application.**

The Seventy-Eighth Legislature enacted H. B. 1634 to add a Section 24 to Article 42.12, Code of Criminal Procedure, in order to provide that it is an affirmative defense to revocation [or an adjudication of guilt] for an alleged failure to report to a supervision officer as directed or to remain within a specified place that a supervision officer, peace officer, or other officer with the power to arrest under a warrant issued by a judge for that alleged violation failed to contact or attempt to contact the defendant *in person* (emphasis added) at the defendant's last known residence address or last known employment address, as reflected in the files of the community supervision and corrections department serving the county in which the order of community supervision was entered.

In *Nurridin v. State*, 154 S. W. 3d 920 (Tex. App. – Dallas, 2005), the Dallas Court of Appeals noted that not only was the purpose of this change in the law to ensure the ability of the court to maintain jurisdiction over a person who absconded while on probation, but the appellate court also observed that the language in Section 24 to Article 42.12, supra, was clear and unambiguous, i.e., that Section 24 specifically limited the applicability of the affirmative defense of due diligence to two grounds: failure to report and failure to remain in a specified place.

Subsequent to the *Nurridian* decision, the Texarkana Court of Appeals also examined the effect of this statutory change to the doctrine of due diligence. In *Wheat v. State*, 165 S. W. 3d 802 (Tex. App. – Texarkana, 2005), a defendant had been arrested on a motion to revoke nearly ten years after the *capias* had been issued. Even though the defendant raised the defense of due diligence at his revocation hearing, the trial court nevertheless found that the state had exercised due diligence in apprehending him, revoked his community supervision, and sentenced him to ten years in prison.

The defendant appealed the ruling of the trial court to the Texarkana Court of Appeals. As with the Dallas Court of Appeals, the Texarkana Court noted that effective June 18, 2003 the Legislature had added a Section 24 to Article 42.12, Code of Criminal Procedure, to create an affirmative defense to the lack of due diligence applicable only to the grounds of revocation alleging failure to report or failure to remain in a specified location. In addition, the Court stated that while the defendant had successfully raised his affirmative defense of lack of due diligence to the allegation of failure to report, since that affirmative defense was no longer available for the other allegations contained in the motion to revoke, the Texarkana Court of Appeals held that the trial court had sufficient grounds to revoke his community supervision.

Now the Texas Court of Criminal Appeals has finally examined this statutory change to the doctrine of due diligence and has supported the holdings of the Dallas and Texarkana Courts of Appeals. In *Pena v. State*, 201 S. W. 3d 764 (Tex. Cr. App. – 2006), the defendant had been placed on three years' community supervision for the offense of possession of marijuana. The State subsequently filed a motion to revoke and a *capias* was issued for the arrest of the defendant. However, the defendant was not apprehended until five months after the term of his community supervision had expired.

After the trial court revoked his community supervision the defendant argued on appeal that the state had failed to exercise due diligence in executing the arrest warrant. The Corpus Christi Court of Appeals agreed with his contention and the State then filed an application for petition for discretionary review before the Texas Court of Criminal Appeals. In a very brief opinion the Court of Criminal Appeals reversed the holding of the Corpus Christi Court of Appeals and affirmed the ruling of the trial court by stating that the amendment to Article 42.12, Section 24, supra, became effective on June 18, 2003 and therefore it applied to this particular defendant's revocation hearing. As such the defendant could not raise the defense of due diligence in his revocation proceeding.

Note: This new measure is applicable to any hearing that commenced on or after the June 18, 2003, regardless of whether the defendant was placed on community supervision before, on, or after June 18, 2003.

- 16) There is no plea bargaining in a revocation proceeding.  
See Gutierrez v. State, 108 S. W. 3d 304 (Tex. Cr. App. – 2003)
- 17) When a trial judge finds that an accused has committed a violation as alleged by the State and adjudicates a previously deferred finding of guilt, the trial court must then conduct a second phase to determine punishment and allow the defendant to present any evidence that might mitigate the punishment the court is considering to impose.  
See Issa v. State, 826 S. W. 2d 159 (Tex. Cr. App. – 1992)  
See also, Foster v. State, 80 S. W. 3d 639 (Tex. App. – Houston [1<sup>st</sup> Dist.], 2002)  
See further, Cochran v. State, 78 S. W. 3d 20 (Tex. App. – Tyler, 2002)
- 18) Merely proving that the probationer was arrested or charged with a new offense is no proof that he violated the law.  
See Wester v. State, 542 S. W. 2d 403 (Tex. Cr. App. - 1976)
- 19) Venue is not an element that needs to be proved in a probation revocation proceeding.  
See Boiles v. State, 662 S. W. 2d 170 (Tex. Cr. App. - 1983)  
See also, Trcka v. State, 744 S. W. 2d 677 (Tex. Cr. App. - 1988)
- 20) When the same trial court presides over both the revocation hearing and the trial of the offense that is the basis for revocation, the trial court can take judicial notice of the evidence introduced in that prior proceeding.  
See Barrientez v. State, 500 S. W. 2d 474 (Tex. Cr. App. – 1973)  
Vaughn v. State, 608 S. W. 2d 237 (Tex. Cr. App. - 1980).
- 21) Although a jury may not have found a defendant guilty beyond a reasonable doubt in a prior trial, it is not constitutional error for the trial court to revoke community supervision based upon the same evidence presented in the prior trial because the standard of proof at a revocation hearing is proof by a preponderance, rather than proof beyond a reasonable doubt.  
See Bradley v. State, 608 S. W. 2d 652 (Tex. Cr. App. – 1980)  
Haile v. State, 556 S. W. 2d 818 (Tex. Cr. App. - 1977).
- 22) According to the San Antonio Court of Appeals the holding in Crawford v. Washington, 541 U. S. 36 (2004) does not apply to revocation proceedings. See Diaz v. State, No. 04-04-00611-CR, delivered July 20, 2005.
- 23) Probation files can be introduced into evidence in a revocation proceeding as a business record.  
See Canseco v. State, 199 S. W. 3d 437 (Tex. App. – Houston [1<sup>st</sup> Dist.], 2006)
- 24) A trial judge does not abuse his/her discretion in now allowing testimony as to the defendant's suitability for community supervision. See Ellison v. State, 201 s. W. 3d 714 (Tex. Cr. App. – 2006).

25) Evidence of the underlining offense is relevant in a revocation proceeding.  
See Davis v. State, 181 S. W. 3d 426 (Tex. App. – Waco, 2005) delivered November 2, 2005.

### **Double Jeopardy and Collateral Estoppel**

Since revocation proceedings are considered administrative in nature and not a true criminal proceeding, the Courts have deemed the Fifth Amendment right against double jeopardy to be inapplicable.

See Davenport v. State, 574 S. W. 2d 73 (Tex. Cr. App. - 1978)

See also, Ex parte Maldonado, 681 S. W. 2d 86 (Tex. App. - Amarillo, 1984).

Nevertheless the Courts have recognized the doctrine of collateral estoppel. This doctrine means that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuits.

There are three elements that are necessary to support collateral estoppel, to-wit:

- 1) there must be a “full hearing” at which the parties had an opportunity to thoroughly and fairly litigate the relevant fact issue;
- 2) the fact issue must be the same in both proceedings; and
- 3) the fact finder must have acted in a judicial capacity in each of the proceedings.

State v. Aguilar, 947 S. W. 2d 257 (Tex. Cr. App. - 1997)

See also, Wafer v. State, 58 S. W. 3d 138 (Tex. App. – Amarillo, 2001) in which the Amarillo Court of Appeals held that a revocation proceeding that was dismissed in one county because the trial judge stated that “he was not convinced by a preponderance of the evidence that the allegation was true” prevented the State from pursuing the charge that he delivered a controlled substance within 1,000 feet of a playground in another county.

Thus even though the double jeopardy provisions of the Texas and the United States constitutions are not offended when evidence used in a successful or unsuccessful attempt to revoke “regular” probation or deferred adjudication probation is later used to prosecute the defendant in a different case, the Texas Court of Criminal Appeals has still applied the doctrine of collateral estoppel in revocation proceedings and subsequent proceedings in a different case.

See Ex parte Tarver, 725 S. W. 2d 195 (Tex. Cr. App. - 1986).

Nevertheless it is only where the trial court makes a specific finding of fact that the allegation is “not true” that a fact has been established so as to bar relitigation of that same fact.

See Ex parte Tarver, supra.

Moreover in order to successfully assert the doctrine of collateral estoppel it must be apparent that the reason that the judge in one court dismissed an action was because the court made a finding of fact adverse to the State’s interest and that fact issue was essential to litigating a subsequent criminal matter.

See Guajardo v. State, 109 S. W. 3d 456 (Tex. Cr. App. – 2003)

Furthermore in order to fully demonstrate the reason for the court's dismissal, a complete trial transcript of the first hearing must be introduced into the record of the second hearing and be made available for appellate review.

See Guajardo v. State, supra.

The general rule is that once a probationer is allowed to remain on probation after a hearing on the motion to revoke, the probation may not be revoked without a determination by the trial court that the probationer has committed a violation of the conditions of probation since the prior hearing.

See Reeves v. State, 805 S. W. 2d 616 (Tex. App. - Beaumont, 1991)

See also, Rogers v. State, 640 S. W. 2d 248 (Tex. Cr. App. - 1982)

Nevertheless the Court of Criminal Appeals has held that the State may file a second motion to revoke, after unsuccessfully attempting to revoke the defendant's probation in a prior motion, which alleges the same violations as found in the first motion, provided that the second motion interjects new factual allegations not before the court in the first motion.

See Ex parte Bird, 752 S. W. 2d 559 (Tex. Cr. App. - 1988).

### **Judgment in Revocation Proceedings**

Only the court in which the defendant was tried may grant community supervision, impose conditions, revoke the community supervision, or discharge the defendant, unless the judge has transferred jurisdiction of the case to another court with the latter's consent.

See Article 42.12, Section 10 (a), Code of Criminal Procedure.

Moreover the judge who hears the revocation proceeding must be the one who signs the judgment. Nevertheless if a different judge signs the judgment, while error, is still subject to harmless error.

See Rojas v. State, 194 S. W. 3d 44 (Tex. App. – Tyler, 2006).

A defendant's sentence must be pronounced orally in his presence and contained in the judgment. When there is a conflict between the oral pronouncement of sentence and the sentence in the written judgment, the oral pronouncement controls. See Thompson v. State, 108 S. W. 3d 287 (Tex. Cr. App. – 2003).

In a regular probation case, when the defendant's probation is revoked and the judgment contains a fine even though the fine had not been re-pronounced at the revocation hearing the fine is still valid if it had been pronounced when punishment was assessed at the original trial proceeding.

See Coffey v. State, 979 S. W. 2d 326 (Tex. Cr. App. – 1998).

Nevertheless in a deferred adjudication case, if the fine is not pronounced at the time guilt is adjudicated and punishment assessed, even if a fine had been assessed at the time the defendant had originally been granted deferred adjudication, a fine cannot be reflected in a written judgment adjudicating the guilt of the individual.

See Taylor v. State, 131 S. W. 3d 497 (Tex. Cr. App. – 2004).

## Cumulation of Probated Sentences

Article 42.08 (a), Code of Criminal Procedure, states that in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases, and sentence and execution shall be accordingly; provided however, that the cumulative total of suspended sentences in felony cases shall not exceed 10 years, and the cumulative total of suspended sentences in misdemeanor cases shall not exceed the maximum period of confinement in jail, ... though in no event more than three years, . . . if none of the offenses are [intoxication offenses], or four years, . . . if any of the offenses are [intoxication offenses].

Nevertheless in Hurley v. State, 130 S. W. 3d 501 (Tex. App. – Dallas, 2004), the Dallas Court of Appeals disallowed the use of a term of deferred adjudication community supervision from being “stacked” on a “hard time” sentence. See also, Beedy v. State, 194 S. W. 3d 595 (Tex. App. Houston [1<sup>st</sup> Dist.], 2006).

In Beedy v. State, 250 S. W. 3d 107 (Tex. Cr. App. – 2008) the Texas Court of Criminal Appeals stated that because the trial judge did not have the authority to stack the defendant’s deferred adjudication community supervision term onto his prison sentence, the First Court of Appeals was correct when it deleted the cumulation order.

In Ex Parte Bailey, 842 S. W. 2d 694 (Tex. Cr. App. – 1992) the Texas Court of Criminal Appeals held that a cumulation order could not be entered, not only in cases where a defendant had begun to serve his sentence or in cases where shock probation had been revoked, but also in cases where a defendant was sentenced to a boot camp and was subsequently release on probation.

Nevertheless if a defendant fails to raise a complaint about the “stacking” of sentences on direct appeal, he forfeits his claim and cannot raise the matter through an application for writ of habeas corpus.

See Ex parte Townsend, 137 S. W. 2d 79 (Tex. Cr. App. – 2004).

## Appeals

In order for a court to act, it is a fundamental principle that it must first have jurisdiction to do so.

State v Klein 224 S.W. 2d 250 (1949)

Once the appeal is perfected, the trial court loses jurisdiction to grant the defendant a new trial.

Ex parte Drewery 677 S.W. 2d 533 (Tex.Cr.App.-1984)

The district court’s authority to take any action in the case remains suspended until it *receives* the mandate from the appellate court.

Yarbrough v State 677 S.W. 2d 588 (Tex.App.-1984)

When a conviction is reversed on appeal, only the receipt of the mandate restores general jurisdiction of the matter to the trial court.

Ex parte Johnson 652 S.W. 2d 401 (Tex.Cr.App.-1983)

Drew v State 765 S.W. 2d 533 (Tex.App.-Austin, 1989)

However, this rule only applies to an appeal to the original decision placing a defendant on community supervision. When a valid appeal is taken from a criminal conviction assessing a probated sentence, the terms of community supervision do not commence until the mandate from the appellate court effecting final disposition of the appeal is issued.

See Cuellar v. State, 985 S. W. 2d 656 (Tex. App. – Houston [1<sup>st</sup> Dist.], 1999)

If a defendant appeals a decision to revoke his community supervision, the defendant remains on community supervision until the mandate is returned to the clerk of the trial court.

See Ex parte Miller, 552 S. W. 164 (Tex. Crim. App. - 1977)

See also, Yates v. State, 679 S. W. 2d 538 (Tex. App. – Tyler, 1984)

However, prior to the filing of a motion for new trial, the trial court retains jurisdiction and has the power to exercise its authority to punish violations of its conditions of community supervision. See McConnell v. State, 34 S. W. 3d 27 (Tex. App. – Tyler, 2000)

Moreover, the conditions of community supervision can be modified during the pendency of an appeal of a revocation decision.

See Margoitta v. State, 10 S. W. 3d 416 (Tex. App. - Waco, 2000)

The general rule is that failing to appeal when placed on probation waives the right to review. Thus it has long been held that a defendant placed on “regular” community supervision can raise issues relating to the conviction, such as evidentiary sufficiency, only on appeals taken when community supervision has been originally imposed.

See Whetstone v. State, 786 S. W. 2d 361 (Tex. Cr. App. – 1990)

This rule applying to appeals in “regular” community supervision cases is equally applicable to deferred adjudication supervision cases.

See Manual v. State, 994 S. W. 2d 658 (Tex. Cr. App. – 1999)

While a defendant can still appeal a jurisdiction defect upon revocation of his community supervision, he can no longer appeal a matter subject to a collateral attack. Instead, if he wishes to collaterally attack a matter, he must file an application for writ of habeas corpus.

See Jordan v. State, 54 S. W. 3d 783, (Tex. Cr. App. - 2001) delivered June 27, 2001.

The failure to identify the probationer at the revocation hearing cannot be raised for the first time on appeal.

See Batiste v. State, 530 S. W. 2d 588 (Tex. Cr. App. - 1975)

See also, Pettit v. State, 662 S. W. 2d 427 (Tex. Cr. App. - 1983)

If a trial judge fails to include a finding of a violation in the revocation order, then evidence of that violation cannot be used by the State in an appeal.

See Gordon v. State, 4 S. W. 3d 32 (Tex. App. – El Paso, 1999)

In order to contest the imposition of an initial condition of community supervision on direct appeal, the defendant must object to the condition at the time of trial.

See Speth v. State, 6 S. W. 3d 530 (Tex. Cr. App. – 1999)

The holding of Clewis v. State, 922 S. W. 2d 126 (Tex. Cr. App. – 1996), which stated that an intermediate appellate court has the authority to review the factual sufficiency of the evidence to support the conviction, does not apply in the review of an appeal of a revocation of the terms of community supervision.

See: Davila v. State, 173 S. W. 3d 195 (Tex. App. – Corpus Christi, 2005), delivered August 31, 2005

Brooks v. State, 153 S. W. 3d 124, (Tex. App. – Beaumont, 2004)

Pierce v. State, 113 S. W. 3d 431, (Tex. App. – Texarkana, 2003)

Cochran v. State, 78 S. W. 3d 20, (Tex. App. – Tyler, 2002)

Becker v. State, 33 S. W. 3d 64, (Tex. App. – El Paso, 2000)

Allbright v. State, 13 S. W. 3d 817 (Tex. App. – Fort Worth, 2000)

Johnson v. State, 943 S. W. 2d 83, (Tex. App. – Houston [1<sup>st</sup> Dist.], 1997)

Brumbalow v. State, 933 S. W. 2d 298, (Tex. App. – Waco, 1996).

### **Appealing a Probated Sentence – When does the Term of Community Supervision Actually Begin?**

One of the more frequently asked questions posed to me over the past has been the question: after an appeal is finalized and has been resolved against the probationer, when does the term of community supervision actually begin. The fact scenario is generally the same. The defendant is found guilty of a criminal offense, he is assessed a term of jail or imprisonment, the sentence is probated and the defendant is then placed on community supervision. The defendant does not like the decision of the trial court so he files a notice of appeal. As with most appeals, it may take some time before the appellate court disposes of the matter. Eventually the appellate court will uphold the decision of the trial court and issue a mandate. The mandate reaches the clerk of the court. Now what? Has the defendant been on community supervision during the pendency of the appeal? Does his term of supervision begin now or has he already been serving part of it? Unfortunately, there is no statutory provision setting forth the procedure for what to do when a mandate is issued upholding the judgment of the trial court placing a defendant on community supervision.

In Goodson v. State, 221 S. W. 3d 303 (Tex. App. – Fort Worth, 2007), the Texas Court of Criminal Appeals stated that nothing in the rules of appellate procedure required the trial court or the trial court clerk to notify a defendant of the appellate mandate. The Court further stated that the record showed that after the defendant was placed on community supervision and before she filed notice of appeal, she had signed the conditions of community supervision imposed by the court.

Coupled with the fact that her attorney on appeal had been notified that the mandated had been issued and that the assistant director of the department had informed her that she needed to report for supervision, the Court concluded that she was not deprived of her due process rights under either the Texas or United States Constitutions by having her community supervision revoked.

This case actually makes it easier to “place” a defendant on community supervision than what had been my recommendation. While I had stated that a status hearing should be set with the sentencing court and the defendant notified to appear at the hearing in person, this decision indicates that all a supervision officer has to do is contact the defendant, notify the individual that the mandate had been issued and inform the person that s/he is now on community supervision. Nevertheless I still strongly believe that the judgment should be amended to reflect that the term of community supervision began on the day that the clerk received the issuance of the mandate.

#### **A. Appeal of a Restitution Order**

The Court has held that where restitution was a lawful condition of community supervision, but the specific amount imposed by the trial court was unsupported by the record, the proper remedy has been to abate the appeal, set aside the amount of restitution, and remand the cause for a hearing to determine a just amount of restitution.

See Cartwright v. State, 605 S. W. 2d 287 (Tex. Cr. App. – 1980)

#### **B. Appeals of Orders Modifying Conditions of Community Supervision**

A probationer cannot directly appeal an order altering or modifying a condition of community supervision. Instead, the probationer can only attack an order modifying a condition of community supervision by filing an application for writ of habeas corpus.

See Basaldua v. State, 558 S. W. 2d 2 (Tex. Cr. App. – 1977).

See also, Dodson v. State, 988 S. W. 2d 833 (Tex. App. – San Antonio, 1999).

See further Christopher v. State, 7 S. W. 3d 225 (Tex. App. – Austin, 1999).

H. B. 1713 in 2003 added an Article 11.072 to the Code of Criminal Procedure in order to establish the procedure for an application for a writ of habeas corpus in a felony or misdemeanor case in which the applicant seeks relief from an order or a judgment of conviction ordering community supervision.

This bill specifies that in order to file an application under this measure, the applicant must be, or have been, on community supervision, and the applicant must challenge the legal validity of:

- 1) the conviction for which or order in which community supervision was imposed; or
- 2) the conditions of community supervision.

Since the language in this bill specifically excludes the reliance on an application for writ of habeas corpus when the avenue of direct appeal is (or was) available, it would appear that the only two instances in which this measure could be utilized by a defendant are when the person is raising a jurisdictional or constitutional defect to the order or judgment placing the person on community

supervision or is attacking the constitutional validity of a modified condition of community supervision.

### **C. Appeal of Order Adjudicating Guilt**

There are three occasions when a defendant on deferred adjudication might attempt to appeal a ruling of the trial court: 1) pursuant to an order deferring adjudication; 2) upon a determination to proceed to an adjudication of guilt; and 3) after a judgment in a post-adjudication proceedings. Prior to 2007 a defendant could not appeal the court's decision to adjudicate him guilty.

Olowosuko v State 826 S.W. 2d 940 (Tex.Cr.App.-1992)

Dillehey v State 815 S.W. 2d 623 (Tex.Cr.App.-1991)

S. B. 909, which was signed into law by the Governor on June 15, 2007 amended Article 42.12, Section 5 (b), Code of Criminal Procedure, to provide that a determination by the court of whether it proceeds with an adjudication of guilt on the original charge is reviewable in the same manner as a revocation hearing in a case in which an adjudication of guilt had not been deferred. With this change, it appears that a defendant granted deferred adjudication community supervision will have two opportunities to raise a complaint on appeal. A defendant can appeal matters stemming from the decision to grant the person deferred adjudication community supervision within thirty days of the decision to do so. See *Manual v. State*, 994 S. W. 2d 658 (Tex. Cr. App. – 1999); see also, *Arreola v. State*, 207 S. W. 3d 387 (Tex. App. – Houston [1<sup>st</sup> Dist.], 2006. Moreover the defendant will now be able to appeal the decision to adjudicate guilt and an order imposing punishment pursuant to the adjudication of guilt in a single appeal. Finally, this change in the appellate law is applicable to all hearings on a motion to proceed with an adjudication of guilt conducted on or after June 15, 2007, regardless of when the adjudication of guilt was originally deferred or when the offense giving rise to the grant of deferred adjudication community supervision was committed.

Any evidentiary complaints stemming from the initial determination to place a defendant on deferred adjudication must be appealed within 30 days of the date that the court granted the defendant deferred adjudication.

See Manuel v. State, 994 S. W. 2d 658 (Tex. Cr. App. - 1999)

### **D. Dismissal of Appeal**

Texas Rules of Appellate Procedure Rule 42.4 provides that an appeal must be dismissed on the State's motion, supported by affidavit, showing that the appellant had escaped from custody pending the appeal and that to the affiant's knowledge, had not voluntarily returned to lawful custody with the State within ten days after escaping.

The unauthorized leaving a community corrections facility constitutes an escape necessitating the dismissal of an appeal.

See Luciano v. State, 906 S. W. 2d 523 (Tex. Cr. App. – 1995)

The unauthorized removal of an electronic monitoring device that a defendant was required to wear as a condition of appeal bond constitutes an escape necessitating the dismissal of the appeal. See Boyd v. State, 53 S. W. 3d 432 (Tex. App. – San Antonio, 2001).

### **Modification of Conditions of Community Supervision**

Article 42.12, Section 11(a), Code of Criminal Procedure, provides that a court may, at any time during the period of probation, alter or modify the conditions of community supervision. Hence, the trial judge is authorized by law to change any condition of community supervision that the Court originally imposed.

It appears that the trial court has a great deal of flexibility and discretion to modify a condition of community supervision.

Moreover, the trial court can even impose a modified condition that is punitive in nature without affording the defendant a hearing provided that the defendant is subsequently notified of the new condition. (see below).

In Sanchez v State, 603 S.W. 2d 869 (Tex.Cr.App.-1980) the Court held that where a trial court, *sua sponte*, modified a condition of probation requiring the defendant to report to a specific probation officer on the first and tenth of each month and subsequent to the Court's action, the defendant received notice of the modification, the defendant was not entitled to a hearing concerning the modification of his probation in order for the trial court to revoke his probation.

In Tyler v State, 644 S.W. 2d 865 (Tex. App.-Amarillo, 1982) the appellate court approved of the trial court's unilateral action to amend a condition requiring the probationer to avoid persons or places of disreputable and harmful character.

In Robinson v State, 686 S.W. 2d 326 (Tex. App-Houston, [14th Dist.], 1985) the appellate court held that provided that a probationer was supplied a copy of the amended conditions concerning reporting and paying monthly supervision fees, the court having jurisdiction of the case could alter or modify the conditions of probation at any time.

Although the Court of Criminal Appeals has never discussed the amount of due process to which a defendant is entitled in a proceeding short of a revocation hearing, several intermediate appellate courts have held that the amount of due process that must be afforded to the defendant is minimal.

However, the Court would probably also require that, if the trial court were to impose a punitive sanction on the probationer, then the trial court would need to make a finding of a violation of a condition of community supervision.

In Ex parte Harrington, 883 S. W. 2d 396 (Tex. App. - Fort Worth, 1994), the Fort Worth Court of Appeals held that while affording a probationer written notice and a formal hearing prior to an extension of community supervision may be considered the better practice, such procedures are not a constitutionally commanded right.

See also, Bailey v. State, 888 S. W. 2d 600 (Tex. App. - Beaumont, 1994)  
See further, Prevato v. State, 77 S. W. 3d 317 (Tex. App. – Houston [14<sup>th</sup> Dist.], 2002)

### **Delegation of Authority**

It is well established that a trial court cannot delegate its duty and responsibility for determining the conditions of probation to the probation officer or anyone else.

DeGay v State 741 S.W. 2d 445 (Tex.Cr.App-1987)

However, there is a clear distinction between rules imposed by a custodial treatment facility in furtherance of its rehabilitative function and the conditions of probation. Thus, in ordering a probationer to obey the rules and regulations of the community-based facility in which he is placed, a trial court does not thereby improperly delegate to the facility the authority to specify the terms of probation.

Sulmons v State 571 S.W. 2d 29 (Tex.Cr.App.-1978)

Nevertheless, the rules and regulations of a [community-based facility] cannot be utilized by the director of the [facility] or a probation officer to fix, alter or modify conditions of probation by either oral or written instructions.

DeGay v State, supra

Thus, absent an express statutory authorization, a supervision officer cannot modify a condition of community supervision.

See Pierce v. State, 67 S. W. 3d 374 (Tex. App. – Waco, 2001)

Article 42.12, Section 11 (a) (4), Code of Criminal Procedure, requires a probationer, as a condition of community supervision, to report to the supervision officer as directed by the judge or supervision officer and obey all rules and regulations of the community supervision and corrections department. In Pierce v. State, 67 S. W 3d 374 (Tex. App. - Waco, 2001), the defendant was placed on community supervision for the offense of sexual assault. The trial judge imposed a condition requiring the defendant to “report to the McLennan County Adult Probation Officer immediately and thereafter as he shall direct, but at least once each 30 days.” The McLennan County CSCD had a policy that required sex offenders to report at least twice a month to the department.

The State later filed a motion to revoke, alleging that the defendant on several occasions had failed to report semi-monthly. The trial court granted the motion and revoked the defendant’s probation. The defendant appealed his revocation to the Waco Court of Appeals, arguing that only the court, and not a community supervision officer, could order him to report. Since the court order only specified that he report at least once a month, the defendant contended that the community supervision officer had no authority to require him to report more often.

The Waco Court of Appeals noted that in 1979, the Legislature had amend former Section 6 (d) of Article 42.12, Code of Criminal Procedure, to provide that a trial court could require a defendant to “report to the probation officer as directed by the judge *or probation officer*.” (emphasis added) The appellate court further observed that over the years, the Texas Court of Criminal Appeals had never invalidated a condition requiring a probationer to report “as directed by his community supervision

officer.” Moreover, the Court observed that the Court of Criminal Appeals had also upheld conditions that left some discretion with the community supervision officer or others provided that the statute authorized the trial judge to delegate the discretion. See *DeGay v. State*, 741 S. W. 3d 445 (Tex. Cr. App. - 1987). As such the Court held that Article 42.12, Code of Criminal Procedure, permitted the trial judge to authorize the community supervision officer to require the probationer to report more often than expressly stated in the conditions of community supervision.

Article 42.12, Section 10 (d), Code of Criminal Procedure, states that a judge that places a defendant on community supervision may authorize the supervision officer supervising the defendant . . . to modify the conditions of community supervision for the limited purpose of transferring the defendant to different programs within the community supervision continuum of programs and sanctions.

### **Intermediate Sanctions**

Article 42.12, Section 22(a) of the Code of Criminal Procedure provides that if after a [revocation hearing] a court continues or modifies community supervision after determining that the probationer violated a condition of community supervision, the court may impose a sanction on the probationer.

These sanctions may be:

- 1) increase in the number of hours of community service that the defendant has previously been required to perform in an amount not to exceed double the number of hours permitted by Article 42.12, Section 16;
- 2) increase the fine - cannot exceed maximum fine allowable;
- 3) the placement of the defendant in a substance abuse felony punishment program operated by TDCJ if:
  - A) the defendant is convicted of a felony other than indecency with a child, sexual assault, or aggravated sexual assault or criminal attempt thereof; and the judge makes an affirmative finding that:
  - B) drug or alcohol abuse significantly contributed to the commission of the crime or violation of community supervision; and
  - C) the defendant is a suitable candidate for treatment, as determined by the suitability criteria established by the Texas Board of Criminal Justice; and
- 4) extend a period of community supervision as often as the judge determines is necessary, but the period of community supervision in a first, second, or third degree felony case may not exceed 10 years and, the period of community supervision in a misdemeanor case may not exceed three years.

However, the judge may extend the period of community supervision in a misdemeanor case for any period the judge determines is necessary, not to exceed an additional two years beyond the three year limit, if the defendant fails to pay a previously assess fine, costs, or restitution and the judge determines that extending the period of supervision increases the likelihood that the defendant will fully pay the fine, costs, or restitution.

Note: Article 42.12, Section 22 (d), Code of Criminal Procedure, provides that money received from an increase in a defendant's fine pursuant to a modification of the terms of the defendant's community supervision must be deposited in a special fund in the county treasury to be used by the community supervision and corrections department. An "increase in a defendant's fine" for purposes of this provision means an increase in the total original fine, including the probated and unprobated portions of the fine, assessed against the defendant when the defendant was sentenced and placed on community supervision. See Attorney General Opinion No. JC – 0173, issued February 2, 2000.

### **Maximum Terms of Community Supervision**

Several intermediate appellate courts over the years have ruled that various types of community supervision are separate for purposes of calculating the maximum term of community supervision that a defendant may be required to serve.

In Thomas v. State, 54 S. W. 3d 907 (Tex. App. – Corpus Christi, 2001) the Corpus Christi Court of Appeals concluded that a defendant who had served a term on deferred adjudication probation could be placed on adjudicated probation without regard to the length of time previously served on the deferred adjudication.

See also, Dunn v. State, 997 S. W. 2d 885 (Tex. App. – Waco, 1999) and Keeling v. State, 929 S. W. 2d 144 (Tex. App. – Amarillo, 1996) in which these courts of appeals stated that the number of years imposed on a deferred adjudication community supervision case did not limit the number of years that a trial court could require a probationer to serve whose guilt was adjudicated but whom the trial court placed on "regular" community supervision instead of sentencing to prison.

See further King v. State, 942 S. W. 2d 667 (Tex. App. – Eastland, 1997), in which the Eastland Court of Appeals stated that the term imposed on a probationer placed on "regular" community supervision but whose community supervision was later revoked did not limit the term that the court could impose upon granting "shock" probation to the individual.

### **Other Permissible Modifications Imposed as a Sanction**

#### **A. Electronic Monitoring as a Modified Condition of Community Supervision**

See Article 42.12, Section 11 (17), Code of Criminal Procedure

#### **B. Shock Probation – See, infra.**

#### **C. Community Corrections Facilities**

Article 42.12, Section 11 (a), Code of Criminal Procedure, provides that the judge of the court having jurisdiction of the case . . . may, at any time, during the period of community supervision alter or modify the conditions:

- (12) Remain under custodial supervision in a community corrections facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board.

Note: Subsection (h) of Article 42.12, Section 18 further provides that a judge that requires as a condition of community supervision that the defendant serve a term in a community corrections facility may not impose a subsequent term in a community corrections facility or jail during the same supervision period that, when added to the terms previously imposed, exceeds 36 months.

#### **D. State Jail Offenders**

Placement in a community corrections facility as a modified condition of community supervision  
See Article 42.12, Sections 11 (12) and 18, Code of Criminal Procedure

Placement in a state jail felony facility as a modified condition of community supervision for a minimum period of 90 days and a maximum period of 180 days - See Article 42.12, Section 15 (e), Code of Criminal Procedure

Placement in a substance abuse felony punishment facility as a modified condition of community supervision - See Article 42.12, Section 22 (a) (4), Code of Criminal Procedure  
See Ex parte Wilson, 171 S. W. 3d 925 (Tex. App. – Dallas, 2005)

#### **E. DWI Offenders**

Placement in a community corrections facility as a modified condition of community supervision -  
See Article 42.12, Sections 11 (12) and 18, Code of Criminal Procedure

Placement in a substance abuse felony punishment facility as a modified condition of community supervision - see Article 42.12, Section 22 (a) (4), Code of Criminal Procedure

#### **F. Substance Abuse Offenders**

Placement in a community corrections facility as a modified condition of community supervision -  
See Article 42.12, Sections 11 (12) and 18, Code of Criminal Procedure

Placement in a substance abuse felony punishment facility as a modified condition of community supervision - See Article 42.12, Section 22 (a) (4), Code of Criminal Procedure

If the offender is a state jail felon, placement in a state jail felony facility as a modified condition of community supervision for a minimum period of 90 days and a maximum period of 180 days.

See Article 42.12, Section 15 (e), Code of Criminal Procedure

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