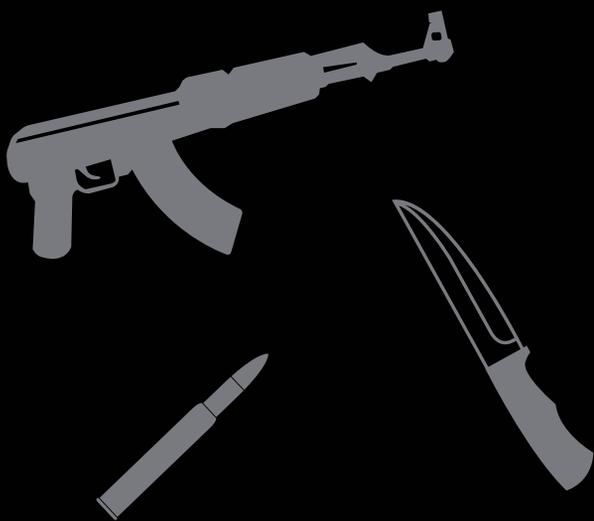


Deadly Weapons

Why attorneys and judges need to be aware of the serious consequences of the rendering of affirmative findings in appropriate cases.

BY JOHN B. STEVENS JR.



GENERALLY

In criminal cases, Texas trial courts are required to place affirmative findings in the courts' judgments whenever it is shown that a deadly weapon was knowingly used or exhibited by the defendant during the commission of a felony offense or during immediate flight therefrom.¹ This requirement resulted from the 1977 legislative amendment to Article 42.12 of the Texas Code of Criminal Procedure providing for an affirmative finding in criminal judgments of the use or exhibition of a deadly weapon when appropriate.² All felonies are theoretically susceptible to affirmative findings under Article 42.12, Section 3g.³

A "deadly weapon" is defined as "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury."⁴ It does not have to be a gun or knife.⁵

PAROLE

Affirmative findings are most important in determining when inmates are eligible for parole. Generally, inmates without affirmative finding judgments are eligible for release on parole when their actual time served, plus good conduct time, equals one-fourth of the sentence imposed or 15 years, whichever is less.⁶

An affirmative deadly weapon finding has a negative impact on a defendant's eligibility for community supervision, parole, and mandatory supervision.⁷ Inmates serving sentences for offenses in which judgments contain affirmative findings are not eligible for release on parole until such inmates' actual calendar time served, without consideration of good conduct time, equals one-half of the sentence imposed or 30 calendar years, whichever is less.⁸ However, in no event are inmates with affirmative finding judgments eligible for parole release in less than two calendar years' confinement.⁹

GUILT/INNOCENCE OR PUNISHMENT ISSUE?

Generally, upon case disposition, the trial judge will determine whether an affirmative finding is appropriate and cause it to be entered onto the face of the judgment. A deadly weapon finding is warranted in those cases where the defendant "used or exhibited" a "deadly weapon" during the commission of a felony offense.¹⁰

When the jury is the trier of fact of a deadly weapon determination in a trial, an affirmative finding may be properly entered in the judgment when: (1) the indictment alleges the use or exhibition of a deadly weapon; (2) the weapon used or exhibited is deadly per se; or (3) the jury affirmatively answers a special issue on the use or exhibition of a deadly weapon.¹¹ In such instances, the jury's affirmative deadly weapon finding is required to be supported by an "express," not an "implied," finding.¹²

Furthermore, the judgment should explicitly designate the deadly weapon as a “firearm” if it meets the legal definition.¹³

An affirmative finding can be, and in the past has been considered more suited to be, a punishment issue.¹⁴ However, the issue of a deadly weapon is not required to be resolved at the punishment phase.¹⁵ Under more recent Texas law, a deadly weapon finding submitted for determination during the punishment phase should be limited to situations when its “use or exhibition” is not alleged as an element of the charged offense.¹⁶

Where an indictment specifically alleges that a defendant used or exhibited a deadly weapon in the commission of the offense, and the jury finds the defendant “guilty as charged in the indictment,” the jury has necessarily made a *de facto* finding that the defendant used or exhibited a deadly weapon in the commission of the offense.¹⁷ The Texas Court of Criminal Appeals has also approved affirmative findings in cases where the jury finds the defendant guilty as charged in an indictment alleging the defendant caused death or serious bodily injury.¹⁸ As a side note, the court also highlighted certain potential dangers on appeal when the verdict form utilized by the jury upon finding the defendant “guilty” includes language other than the generally accepted “... as charged in the indictment.”¹⁹

When the trial court assesses punishment, it becomes the trier of fact at the punishment hearing.²⁰ As the trier of fact at the punishment hearing, the trial court has the authority to add the affirmative finding to the judgment if the facts warrant.²¹ This practice is entirely proper so long as the jury has not already decided the matter during the guilt/innocence phase.²²

EXHIBITED OR USED

It is important to note that the terms “exhibit” and/or “use” in this context are not synonymous.²³ The phrase “exhibited a deadly weapon” for affirmative finding purposes simply means that the defendant consciously displayed a deadly weapon during the commission of the required felony offense.²⁴ However, such deadly weapon exhibition must in some manner facilitate the associated felony.²⁵

The phrase “used ... a deadly weapon,” for affirmative finding purposes, is more complex. “Use” in this regard is commonly employed to describe conduct in which a deadly weapon is utilized to achieve a purpose.²⁶ It refers to the wielding of a deadly weapon with effect.²⁷ It extends to any employment of a deadly weapon, even its simple possession, if such possession facilitated the associated felony.²⁸

ILLEGAL POSSESSION OF FIREARMS

This issue becomes harder to distinguish in cases involving offenses in which the mere possession of a deadly weapon is criminalized.²⁹ A deadly weapon is not necessarily “used or exhibited” during the commission of such “mere possession” offenses simply because the instrument

or “thing” possessed is actually a deadly weapon.³⁰

It has been held, however, that an affirmative finding is not precluded in a “mere possession” offense when the underlying facts indicate the deadly weapon at issue was utilized in a particular manner which resulted in commission of a second felony, “separate and distinct” from the “mere possession” offense. Furthermore, one accused of a felon-in-possession-of-a-firearm offense could also brandish the firearm in question to prevent others from taking it, and such “use” of the weapon could result in a deadly weapon finding.³¹

MOTOR VEHICLES

Offenses Where Death or Serious Bodily Injury Is Alleged

Case law involving affirmative findings has evolved in an expansive fashion.³² This is evident in cases involving convictions for involuntary manslaughter by the reckless operation of a motor vehicle resulting in affirmative findings of use of a deadly weapon, namely, a motor vehicle.³³ The Court of Criminal Appeals has reflected on the issue of whether such an affirmative finding is ever appropriate when the underlying facts do not show the “deadly weapon” at issue was intentionally utilized by the defendant to commit an offense “separate and distinct” from “mere possession.”³⁴ The Texas Court of Criminal Appeals has reaffirmed its prior precedents that established “anything, including a motor vehicle, which is actually used to cause the death of a human being is a deadly weapon[,] ... because a thing which actually causes death is, by definition, ‘capable of causing death.’”³⁵ Where the evidence indicated the defendant “accidentally killed a man with his pickup truck because he [the defendant] was too drunk to control the vehicle, the court concluded that said evidence also established the pickup truck “was undoubtedly a deadly weapon.”³⁶

It should be noted that more recent cases have firmly established that proof of “specific intent” to use a motor vehicle—or any other “thing” or instrument alleged as a deadly weapon—is not required.³⁷

Offenses Where Neither Death nor Serious Bodily Injury Alleged

The Court of Criminal Appeals has also considered whether an affirmative finding is appropriate in felony driving-while-intoxicated cases. The overriding question concerns whether the manner in which a defendant used his vehicle when driving while intoxicated was capable of causing death or serious bodily injury.³⁸ Court review utilizes a two-prong procedure: First, it evaluates the manner in which the defendant used the motor vehicle during the felony; and second, it considers whether, during the commission of the felony, the motor vehicle was capable of causing death or serious bodily injury.³⁹

It has also been uniformly held that to sustain a deadly weapon affirmative finding in such cases, the record-evidence must demonstrate (1) the object or instrument meets the statutory definition of a deadly weapon;⁴⁰ (2) the “deadly

weapon” was used or exhibited “during the commission of a felony offense or during immediate flight therefrom;”⁴¹ and (3) that others were placed in actual danger, and not merely a hypothetical potential for danger if others had been present.⁴²

LAW OF PARTIES

During the 1991 legislative session, Article 42.12, §3g was amended to provide for an affirmative finding of a deadly weapon if “the defendant used or exhibited a deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited.”⁴³ This amendment has now essentially “superseded,” if not overruled, the associated holdings in earlier cases.⁴⁴ Thus, entry of an affirmative finding of a deadly weapon is authorized even against a defendant who never used or brandished a deadly weapon during commission of the offense so long as he (1) was a party to an offense where a deadly weapon was used or exhibited, or (2) knew such a weapon would be used or exhibited.⁴⁵

Since the 1991 amendment, appellate courts have additionally held that in cases where a defendant convicted as a party to an offense in which a deadly weapon was also alleged to have been used or exhibited during its commission, a jury verdict finding the defendant guilty “as charged [or “as alleged”] in the indictment,” necessarily makes the appropriate factual finding to support the entry of an affirmative finding of the use or exhibition of a deadly weapon upon the judgment.⁴⁶

PROPER NOTICE

Generally, due process requires that criminal defendants have proper notice of their charges so they can prepare to defend themselves at trial.⁴⁷ Defendants must also be afforded notice and due process at sentencing, although to a lesser degree than at the trial stage.⁴⁸

Texas criminal defendants are entitled to notice that an affirmative finding of the use or exhibition of a deadly weapon will be an issue at trial.⁴⁹ Notice to the defendant in “some form” is required to satisfy fundamental due process rights when considering an affirmative finding of a deadly weapon since it may have “an incrementally greater impact upon his liberty than a bare conviction.”⁵⁰

As an enhanced sentence must be supported by written allegations of prior convictions, an affirmative finding of a deadly weapon must also be supported in writing, although such is not required to be included in the indictment.⁵¹ Many, if not most, cases involving an affirmative finding of a deadly weapon include such allegations expressed in the indictment as an element of the offense. However, such allegations do not always have to be particularly alleged. Defense attorneys should be cautious of indictments involving allegations where a defendant committed a felony in a manner that would necessarily involve the use

of a deadly weapon.⁵² Such allegations may constitute adequate notice that there could be an issue regarding a deadly weapon finding.

Although the Texas Court of Criminal Appeals has never defined what constitutes “timely notice” in this regard, at least one judge has suggested that notice is adequate so long as it is provided prior to trial.⁵³ Receiving written notice of the state’s intent to seek an affirmative finding regarding a deadly weapon a few hours prior to the beginning of trial has been deemed timely notice.⁵⁴ At least one appellate court decided that a punishment enhancement issue can be litigated at trial with notice provided to the defense just before the beginning of the punishment hearing.⁵⁵

Nonetheless, failure to object at trial because of lack of notice of a deadly weapon finding does not require reversal where the record does not indicate the defendant was surprised at trial or hindered in his defense.⁵⁶ Furthermore, failure by the defense to request a continuance in an attempt to remedy any purported inadequate notice “defeats” an appellate claim of due process violation.⁵⁷

CONCLUSION

All involved parties should carefully deal with the issue of whether a deadly weapon finding may be rendered in criminal judgments. Whether an affirmative finding that a deadly weapon was used during the commission of the offense should be entered in a felony judgment depends, in large part, on the particular facts and circumstances of each case. Such findings should be made accurately and when lawful. Attorneys and judges must be aware of the serious consequences of the rendering of affirmative findings in appropriate cases. **TBJ**

NOTES

1. Tex. Code Crim. Proc. Ann. art. 42.12 3g(a)(2) (West Supp. 2012).
2. Act of May 30, 1977, 65th Leg. R.S. ch. 347, 1977 Tex. Gen. Laws 925, 926.
3. *Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1989); *Rodriguez v. State*, 31 S.W.3d 772, 777 (Tex. App.—Austin 2000), *aff’d*, 104 S.W.3d 87 (Tex. Crim. App. 2003).
4. Tex. Pen. Code Ann. §1.07(a)(17) (West Supp. 2012).
5. See *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005) (“Objects that are not usually considered dangerous weapons may become so, depending on the manner in which they are used during the commission of an offense.”).
6. Tex. Gov’t Code Ann. §508.145(f) (West 2012).
7. *Sierra v. State*, 280 S.W.3d 250, 254, 254 n. 13 (Tex. Crim. App. 2009) (citing Tex. Gov’t Code sections 508.145, 508.149, and 508.151 then in effect).
8. Tex. Gov’t Code Ann. §508.145(d)(1).
9. *Id.*
10. *Coleman v. State*, 145 S.W.3d 649, 652 (Tex. Crim. App. 2004).
11. *Ex parte Franklin*, 757 S.W.2d 778, 780 (Tex. Crim. App. 1988).
12. See *Polk v. State*, 693 S.W.2d 391, 396 (Tex. Crim. App. 1985).
13. See Tex. Code Crim. Proc. Ann. art. 42.12, §3g(a)(2).
14. *Fann v. State*, 702 S.W.2d 602, 604-05 (Tex. Crim. App. 1985).
15. *Luken v. State*, 780 S.W.2d 264, 268 (Tex. Crim. App. 1989).
16. See Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges—Criminal: Intoxication and Controlled Substances* PJC §A3.7 (2009) (“The Committee agrees that submission of the deadly weapon issue to the jury is better done at the guilt stage of the trial. This considerably simplifies the punishment stage instruction.”).
17. See *Polk v. State*, 693 S.W.2d at 393, 396.
18. *Crumpton v. State*, 301 S.W.3d 663, 664 (Tex. Crim. App. 2009).
19. *Id.* at 664-668.

20. *Mena v. State*, 749 S.W.2d 639, 641 (Tex. App.—San Antonio 1988, pet. ref'd).
21. *Flores v. State*, 690 S.W.2d 281, 283 (Tex. Crim. App. 1985) (*en banc*).
22. See *Fann v. State*, 702 S.W.2d 602, 604 (Tex. Crim. App. 1985) (op. on reh'g).
23. *Patterson v. State*, 769 S.W.2d at 940.
24. *Id.* at 941; see also *Garrett v. State*, 998 S.W.2d 307, 311 (Tex. App.—Texarkana 1999, pet. ref'd).
25. *Plummer v. State*, No. PD-1269-12, 2013 WL 5538883 (Tex. Crim. App. Oct. 9, 2013) (publication pending).
26. *Id.*
27. *Id.*
28. *Id.*
29. See *Narron v. State*, 835 S.W.2d 642, 644 (Tex. Crim. App. 1992) (defendant charged with Possession of a Prohibited Weapon); and *Ex Parte Petty*, 833 S.W.2d 145, 145-146 (Tex. Crim. App. 1992) (defendant charged with Felon in Possession of a Firearm), *abrogated on other grounds*, *Ex parte Nelson*, 137 S.W.3d 666, 668 (Tex. Crim. App. 2004).
30. See *Tyra v. State*, 897 S.W.2d 796, 798 (Tex. Crim. App. 1995) (expressly limiting *Narron* and *Petty*'s "affirmative finding" discussions).
31. See e.g. *Garner v. State*, 864 S.W.2d 92, 103 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).
32. *Tyra v. State*, 897 S.W.2d at 797.
33. *Id.*
34. *Id.* at 798.
35. *Id.* (citing Texas Penal Code § 1.07(a)(17)(B); *Ex parte McKithan*, 838 S.W.2d 560, 561 (Tex. Crim. App. 1992); *Ex parte Beck*, 769 S.W.2d 525, 526-527 (Tex. Crim. App. 1989)).
36. *Id.*
37. See *Drichas v. State*, 175 S.W.3d at 798; *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000); *Walker v. State*, 897 S.W.2d 812, 814 (Tex. Crim. App. 1995).
38. See *Sierra v. State*, 280 S.W.3d at 255.
39. *Id.* at 255.
40. Texas Penal Code § 1.07(a)(17)(A) or (B).
41. Texas Code of Criminal Procedure, Article 42.12, § 3g(a)(2).
42. See *Drichas v. State*, 175 S.W.3d at 798.
43. Act of May 25, 1991, 72nd Leg. R.S., ch. 541, 1991 Gen. Laws 1876.
44. See *LaFleur v. State*, 106 S.W.3d 91, 96 n. 33 (Tex. Crim. App. 2003).
45. *Bell v. State*, 169 S.W.3d 384, 398-399 (Tex. App.—Fort Worth 2005, pet. ref'd); *Sarmiento v. State*, 93 S.W.3d 566, 569 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).
46. See e.g., *Hurd v. State*, 322 S.W.3d 787, 792-703 (Tex. App.—Fort Worth 2010, no pet.); *Bell*, 169 S.W.3d at 398-399; *Sarmiento v. State*, 93 S.W.3d at 569-670; *Johnson v. State*, 6 S.W.3d 709, 714 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).
47. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).
48. *Ables v. Scott*, 73 F.3d 591, 593 (5th Cir.), *cert. denied*, 517 U.S. 1198 (1996); *U.S. v. Rochester*, 898 F.2d 971, 981 (5th Cir. 1990).
49. *Ex parte Patterson*, 740 S.W.2d 766, 775 (Tex. Crim. App. 1987) *overruled on other grounds*, *Ex parte Beck*, 769 S.W.2d 525, 528 (Tex. Crim. App. 1989); *Grettenberg v. State*, 790 S.W.2d 613, 614 (Tex. Crim. App. 1990).
50. *Id.* at 614; *Ex parte Patterson*, 740 S.W.2d at 774.
51. *Brooks v. State*, 847 S.W.2d 247, 248 (Tex. Crim. App. 1993).
52. See *Crumpton v. State*, 301 S.W.3d at 664. (indictment alleged aggravated assault which has to involve a deadly weapon).
53. See *Johnson v. State*, 815 S.W.2d 707, 715 (Tex. Crim. App. 1991) (Overstreet, J., concurring).
54. *Nolasco v. State*, 970 S.W.2d 194, 197 (Tex. App.—Dallas 1998, no pet.).
55. *Garza v. State*, 383 S.W.3d 673, 676-677 (Tex. App.—Houston [14th Dist.] 2012, no pet.).
56. *Wissinger v. State*, 702 S.W.2d 261, 265 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd).
57. See *Whaley v. State*, 946 S.W.2d 73, 75-76 (Tex. Crim. App. 1997).

Special thanks for the completion of this article go to Ed Tanner, general staff counsel for Jefferson County Criminal Courts, and Rene Mulholland, court reporter for the Criminal District Court.



JOHN B. STEVENS JR.

has served as the criminal district court judge for Jefferson County since 2006. He was an assistant U. S. attorney for the Eastern District of Texas, receiving the Justice Department's highest honor, the Attorney General's Award for Exceptional Service, as one of the prosecutors of the James Byrd dragging death cases.



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