This information is brought to you by:

Eddie Craig

Co-host on Rule of Law Radio (www.ruleoflawradio.com & www.logosradionetwork.com)

Eddie Craig will soon be launching a brand new site geared toward publicizing and organizing the efforts of the patriot community groups and organizations. The site will be called www.taooflaw.com. Go on Facebook to learn more. Search for "Tao Law" and make a friend request. You can also go directly to the site launch info page by searching for "Tao of Law" and reading up on what the site will provide as tools, resources, and features to its members and users. Be aware that this information is always evolving out of necessity. Watch the version number in the upper right-hand corner to see which one you are using. Always try to use the latest version.

Cross-examination Practice Script ("Transportation" Cases)

If and when you appear in court to fight a "transportation" citation, these terms are to be objected to at all times and for all purposes. They represent the "legal" meaning of these terms and phrases, which have NOT been introduced as evidence in the trial. Without a proper definition and understanding of the legal implications and semantics of that definition, it is nothing more than a legal conclusion made by an unqualified individual incapable of making that conclusion, i.e. the prosecutor and/or the officer. The goal is to get the judge to either:

a) ignore our legally valid objection and simply overrule us, or
b) to actually make a legal conclusion for the record as to the proper meaning and application of the term or phrase, which is something the judge will almost NEVER do.

==========
The Seven Deadly Sins
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1. This State
2. Police Officer
3. Transportation
4. Motor Vehicle
5. Vehicle
6. Drive, and any grammatical variation thereof (driver, driving, driven, etc.)
7. Operate, and any grammatical variation thereof (operator, operating, operated, etc.)

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The objection to be made:
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The objection comes in three parts:

1. ***(OBJECTION to the use of the [term(s)] …,)*** begin the objection by clearly stating the specific legal term(s) (*any of the seven deadly sins*) that were used and to which you are objecting, and
2. ***(the use of such term(s) assumes facts not in evidence and nothing in relation to these legally defined terms has been previously agreed to, and …)*** that the legal meaning of these terms is being assumed, as is their applicability to the accused and his/her actions, and the terms have NOT been properly defined, nor are they currently before the court as facts to be considered, and
3. ***(furthermore, their use requires a legal conclusion [by the fact witness].)*** that the use of those terms by anyone is an inappropriate and premature legal conclusion based entirely on the aforementioned assumption.

Remember, your objection must be timely, within 2-3 seconds maximum, or the judge will overrule you for timeliness.

Also remember, until all terms (the seven deadly sins) have been specifically defined as to their actual legal meaning and applicability to the actions of the accused, and in accordance with the properly applicable statutory definition relevant to the current case and its implied context, you ***must*** object to their use. Their proper use and application *requires* the prosecution to prove that the accused was engaged in a regulable activity to which those terms apply as defined within that statute, if any definition exists. If the terms are not being defined at the evidentiary phase of trial, then everything about their meaning is merely being assumed, and you CANNOT let presumptions/assumptions stand unrebutted in such cases or you WILL lose.

You cannot violate a law that never applied to you in the first place, and the burden of proof is on the accuser, not the defendant. In these cases the prosecutor has to prove that the accused was actually engaged in the regulable activity at issue, BUT THEY VIRTUALLY NEVER DO! Why? Because you weren't!! You *MUST* have been actively engaged in a regulable activity, such as "transportation," *BEFORE* the rules and regulations governing the regulable activity can possibly apply and be violated. And every such regulable activity *ALWAYS* requires a commercial capacity of some kind. To understand this better, ask yourself this one simple question:

Can you name a single government license or permit that is issued for any purpose other than engaging in some commercial activity for compensation or

hire, and that does NOT directly impact the health and/or welfare of the general public? I am willing to bet that you cannot.

The Objection:

Objection to the use of the term(s) ??? ! They assume facts not in evidence, not previously agreed to, and require a legal conclusion [by the fact witness].

Be aware that the "[*by the fact witness*]" portion is added ONLY if the term(s) were used by the person on the witness stand. Leave these four words out of the objection if the person using the terms is either the prosecutor or magistrate/judge.

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Cross-examination Practice Script:
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Officer, are you the primary fact witness for the State of Texas in this matter?

~~ (Witness) Yes

Officer, you testified that you work for the City of Austin Police Dept., is that correct?

~~ (Witness) Yes

Do you get paid to work for the City of Austin Police Dept., or are you strictly a volunteer?

~~ (Witness) Yes, I get paid

And is writing "transportation" citations part of what you get paid to do?

~~ (Witness) Yes

So part of what you get paid to do in your job is accuse people of violating the "transportation" code, is that correct?

~~ (Witness) Yes / No, I get paid to enforce the law.

Which means that you should know what laws are applicable to what people in a particular case, correct?

If the cop plays dumb then use an example such as the laws related to a licensed electrician's activity are not applicable to someone installing wiring in their own house, even though it is actually similar activity to that requiring the license.

You also get paid to write those accusations into "transportation" citations like the one that you wrote against the accused, correct?

~~ (Witness) Yes

Officer, I see that you are in your uniform, are you getting paid to appear here today?

~~ (Witness) Yes

Would you please tell the court exactly who is paying you to appear here today?

~~ (Witness) The City of Austin Police Department

Which would be the same police department that pays you to write "transportation" citations, correct?

~~ (Witness) Yes

When you stopped the accused, did you ever inform him/her that s/he was under arrest and not free to leave?

~~ (Witness) No

And you are being paid to appear and testify against the accused today, is that correct?

~~ (Witness) Yes

Did the accused ever ask you if s/he was under arrest?

~~ (Witness) No

This <u>should</u> be a lie if you did everything that is in the "transportation" script.

~~ (Witness) Yes

And what did you tell the accused in response to that question?

~~ (Witness) No, you're in an investigative detention.

Officer, you <u>are</u> aware that in Texas a "transportation" stop constitutes a custodial arrest under Chapter 543, "Transportation" Code, aren't you?

~~ (Witness) No

Are you at all familiar with Chapter 543, Texas Transportation Code?

~~ (Witness) No

So you have no clue what laws allegedly provide you with the authority you presume to exercise and act under regarding "transportation?"

We don't really care what the officer says, s/he has already admitted knowing absolutely nothing about the law or the limits of their authority.

~~ (Witness) Yes

Then you know that Chapter 543 makes it very clear that performing a "transportation" stop constitutes a custodial arrest, correct?

~~ (Witness) No

~~ (This applies to either answer) Move for judicial notice by the court of Chapter 543 and Azeez v. State of Texas. Point out the language of the opinion that says it's a custodial arrest as well as the statutory language regarding "arresting officer," "person arrested," "release the person arrested from custody."

~~ (Witness) Yes

Officer, during this custodial arrest, did the accused invoke his/her fundamentally protected rights, including the right to remain silent and the right to assistance of counsel?

~~ (Witness) No

This should be a lie if you did everything that is in the "transportation" script.

~~ (Witness) Yes

And did you attempt in any way to get the accused to waive those rights?

Officer, during this custodial arrest, did you demand that the accused surrender certain information and potential evidence to you?

~~ (Witness) No

So, you never asked the accused to produce a driver's license or proof of financial responsibility?

~~ (Witness) No

Then why are we here?

~~ (Witness) Yes

Could any of the information or documents that you demanded potentially be used against the accused in a court of law or to incriminate him/her in any way?

~~ (Witness) No

Ask questions about expiration dates on licenses and insurance cards, having the wrong insurance card in the wrong car, etc.

Really? If the accused handed you an insurance card that was out of date or for a different car, could you choose to charge them with a criminal offense based upon the information contained in that card?

Really? If the license that they gave you had an old address on it and they had not yet had the chance or thought to have it changed, could you choose to charge them with a criminal offense?

~~ (Witness) Yes

"Anything you say can and will be used against you." This includes anything that you provide to the officer as well (license, registration, financial responsibility).

Officer, did you at any time during the custodial arrest and alleged investigation, ever read the accused his/her rights?

~~ (Witness) No

But you testified that you knew, or should have known, that this was a custodial arrest, correct?

~~ (Witness) Yes

And even though you had not read the accused his/her rights, you still demanded that s/he produce information and documents that could potentially be used against him/her in court or to incriminate him/her in other ways?

~~ (Witness) Yes

Could you please explain for the record and benefit of the jury just how failing or refusing to inform someone that s/he is under arrest while intentionally failing to read him/her their rights is not a violation of the accused's right of due process?

We don't really care what the officer says or if the prosecutor objects and gets sustained, it IS a violation and the court and prosecution both know it, now the jury and the witnesses (and hopefully an official court record) should know it too.

Officer, when the accused refused to waive his/her rights in order to comply with your demands for production, did you tell the accused that state law requires production of the information and documents you demanded?

~~ (Witness) Yes

And do you believe that a law can rightfully require the accused to waive fundamentally protected rights against his/her will in order to comply with that law and your demands?

~~ (Witness) Yes/No

Did you become frustrated or angry with the accused when s/he refused to waive his/her rights in order to comply with your demands?

~~ (Witness) Yes/No

Did you become visibly upset or angry with the accused?

Did you become visibly hostile toward the accused?

Did you start to yell or curse at the accused?

Will the video and audio recording from your police cruiser show that you are telling the truth or will it show that you have just lied under oath and committed aggravated perjury?

Officer, did you threaten the accused with prolonged detention and incarceration in jail if they refused to produce the information and documents that you demanded?

~~ (Witness) Yes

Did you threaten to do anything else to detain or harm the accused if they would not "voluntarily" waive their fundamentally protected rights and comply?

~~ (Witness) No

Didn't you threaten to break the car window?

Didn't you threaten to tazer the accused?

Didn't you threaten to keep the accused in custody on the side of the road and prevent them from going on their way?

Could any of these threats potentially harm or injure the accused if you carried them out?

Officer, were you openly displaying that deadly weapon on your hip at the time you were threatening the accused?

Did you levy additional criminal charges against the accused because s/he would not waive his/her rights in order to comply with your demands?

~~ (Witness) No

~~ (Witness) Yes

And when the accused refused to waive his/her fundamentally protected rights in order to comply with your demands and that alleged law, what additional criminal charges did you levy against the accused?

*We don't really care what the officer says, he is admitting to making these charges **only** because the accused would not waive their fundamentally protected rights in order to comply with the law and his demands.*

Officer, at any time during your alleged investigation did you discover, obtain, or otherwise receive from me a bill of lading?

~~ (Witness) No

Did you attempt at any time to determine if I was transporting goods or property for compensation or hire?

~~ (Witness) No

Officer Davis, at any time during your alleged investigation did you discover, obtain, or otherwise receive from me a passenger manifest?

~~ (Witness) No

Did you attempt at any time to determine if I was transporting passengers for compensation or hire?

~~ (Witness) No

Officer Davis, at any time during your alleged investigation did you discover, obtain, or otherwise receive from me a driver's log book?

~~ (Witness) No

Officer Davis, when you stopped me did you attempt at any time to determine if I was actually engaging in business as a private, common or commercial carrier or "driver" that was "operating " a "motor vehicle" for compensation or hire?

~~ (Witness) No

Officer Davis, did you at any time whatsoever have any reasonable suspicion or facts leading you to believe that I was engaged in any kind of commercial business use of the highway for compensation or hire?

~~ (Witness) No

Officer Davis, is it correct then to summarize your testimony by saying that you never conducted any actual investigation whatsoever intended to discover facts or evidence that would prove that I was engaged in any regulable commercial activity relating to "transportation?"

~~ (Witness) Yes

~=~

~=~

Officer Davis, are you qualified and competent to make binding legal conclusions and determinations relating to matters of law and the facts of this case?

~~ (Witness) Yes

~~ Judge, at this time I would like to move the court to enter a ruling on this issue, is Officer Davis qualified and competent to make binding legal conclusions and determinations as to matters of law and the facts of this case?

~~ (Judge) Yes

~~ Judge, for my own clarification please, are you now making the legal determination that the witness, who is not a proper judicial officer by any stretch of the imagination, IS absolutely qualified and competent to make binding legal conclusions and determinations relating to the law and facts of this alleged case?

~~ (Judge) Yes

~~ Thank you judge.

~~

Officer Davis, what are all the legal elements required to be proven during the evidentiary phase of a criminal trial where the accused is charged with allegedly "Speeding?"

~~

No matter how the witness answers ask the next two questions preceded by EXACTLY THESE WORDS:

<u>Let's try an easier one then</u>, what are the two different sets of legal elements required to be proven during the evidentiary phase of a criminal trial where the accused is charged with allegedly "Failing/Failure to ID?"

<u>Still can't get one right? Let's try an even easier one then</u>, what are all the legal elements required to be proven during the evidentiary phase of a criminal trial where the accused is charged with allegedly "Public Intoxication?"

~~

AVOID any questions that can or do lead to dealing with MERITS!

~~

~~ Judge, for my own clarification, are you making the legal determination that the witness is absolutely unqualified and incompetent for the purpose of making any sort of binding legal conclusion or determination relating to the facts of this alleged case?

~~ (Judge) Yes

~~ Thank you judge.

~~ Judge, the court has ruled that the witness is unqualified and incompetent for the purpose of making any sort of binding legal conclusion in this matter, and yet, that is precisely what the witness had to do in order to come to the legal conclusion and determination that I had violated any or all of the necessary elements relating to the alleged statutory offenses at issue in this matter.

Therefore, in light of the court's ruling as to the competency of STATE's witness to make those legal conclusions and determinations, I move that the court declare the witness incompetent to testify as to any facts relating to this alleged case.

And if the court so declares, and the prosecution has no other witness to call, I further move that this matter be dismissed with prejudice for lack of evidence and a corroborating fact witness.

~~ (Witness) No

~~ Officer Davis, I just want to be very clear in my understanding of your testimony, are you testifying that you are absolutely certain that you are not competent and qualified to make binding legal conclusions or determinations about matters of law and the facts of this alleged case?

~~ (Witness) Yes

~~ Officer Davis, could you please identify the signature on this document, is it your signature?

~~ (Witness) Yes

~~ Officer Davis, could you please identify the document you have that has your signature?

~~ (Witness) Yes, it's the criminal complaint that I signed.

~~ Thank you. So you were the affiant on that particular criminal complaint, correct?

~~ (Witness) Yes

~~ And it's the same criminal complaint that was filed in this case, correct?

~~ (Witness) Yes

~~ And criminal complaints must be signed and verified under penalty of perjury, isn't that correct?

~~ (Witness) Yes

Now Officer Davis, you previously testified that you conducted no investigation whatsoever to determine if I was engaged in the business of "transportation" for the purpose of using the highways for compensation or hire. So, could you please explain what probable cause you had to stop and accost me?

NOTE: The ONLY thing the witness can go to is STILL some alleged "Transportation/Motor Vehicle Code" violation, which s/he just testified could NOT possible apply here because they never investigated into it, because they never believed that it was applicable. If it DID apply then he would know that he had to obtain evidence that proved you were engaged in "transportation." He just testified that he did NOT make ANY effort whatsoever to do that, and that he had no reason to believe that you were doing so, therefore, he KNOWS that "transportation" is NOT applicable at all! He can't have it both ways. The BIGGEST problem for them now is that this makes the CITATION and COMPLAINT against you malicious and a knowing, willful and intentional falsification of the record, as well as aggravated perjury by the officer if s/he was the actual affiant on the complaint.

Officer Davis, are you now testifying that at the time you initiated the "transportation stop" that you DID make a legal conclusion and determination that I was engaged in a regulable business activity involving "transportation" for compensation or hire?.

~~ (Witness) Yes

Officer Davis, I am now thoroughly confused about your testimony. First you claim to have stopped me for some alleged offense under the "Transportation" Code, then you testified that you never suspected or believed that I was engaging in any form of commercial use of the roads, i.e. "transportation," and that you intentionally failed to investigate that possibility at the time, is that correct?

~~ (Witness) Yes

But the part that is confusing me the most right now is that complaint in your hand. You testified that you are aware that such complaints have to be signed under penalty of perjury, and you also testified that said complaint bears YOUR signature as the affiant, is that correct?

~~ (Witness) Yes

Officer Davis, is it your understanding that the complaint in your hand makes a legal allegation against me that I am factually guilty of violating one or more sections of the "Transportation" Code?

~~ (Witness) Yes

Then I must tell you Officer Davis, that I am more confused than ever, was it your intention to confess to the crime of aggravated perjury in this court today?

~~ (Witness) No, I didn't/haven't commit(ed) perjury!

~~ (Prosecution) Objection! The defendant is making irrelevant allegations and trying to muddy the waters of this case!

~~ (You) Judge, the witness testified before this court that s/he never conducted an investigation into any commercial use of the highways, i.e. transportation, at the time of the stop, and the witness further testified that s/he never believed or had probable cause to believe that I was engaged in any commercial use of the highways.

Meanwhile, the witness holds a criminal complaint in his/her hand, and has testified that it bears his/her signature subscribed under penalty of perjury that s/he DOES HAVE REASON TO BELIEVE AND DOES BELIEVE that I committed the commercial "transportation" offense alleged therein. So which is the jury to believe, the witnesses' testimony offered under penalty of perjury that s/he NEVER HAD PROBABLE CAUSE OR REASON TO BELIEVE that I was engaged in any form of commercial use of the highways involving "transportation," or the criminal complaint signed under penalty of perjury that they DID HAVE PROBABLE CAUSE AND DO BELIEVE same?

So which is it? If the witness has lied under oath at any time, then the witness is guilty of perjury, correct? And if that perjury was committed with the intent of maliciously inflicting harm upon me then the witness is guilty of aggravated perjury, correct? Therefore, wouldn't my being forced to appear and stand before this court to answer knowingly and intentionally false and malicious allegations constitute an actionable tort for harm?

(This is what is known in chess as CHECKMATE!)

~~

Therefore, I move that the witness be disqualified for incompetence, for the crime of aggravated perjury, and for perpetrating fraud upon the court in collusion with the prosecution.

I also move the court to charge and arrest the witness for the crime of aggravated perjury and contempt of court.

Furthermore, I move the court to charge and arrest the prosecution for failure to properly inquire into the facts of the case and conspiring with the witness in order to perpetrate this malicious prosecution, contempt, and perpetrating fraud upon the court, as well as any appropriate sanctions.

~~

If the prosecutor objects to the line of questioning as being irrelevant by arguing (his/her erroneous legal conclusion) that such cases have nothing to do with commercial use and/or that "transportation" does not legally relate only to those engaging in commercial activities upon the highway, then, you need to object to that:

~~ (Prosecutor) Objection! Relevancy/This line of questioning is irrelevant! This case has nothing to do with commercial activity and no one has accused (Mr./Mrs. You) of any commercial activity!

Judge, I have a multi-part rebuttal to the prosecutions objection.

First, the prosecutor has just used their objection to make their own legal conclusion and determination and inject it illegally into the record in a blatant attempt to give false and misleading testimony relating to three different factual issues before the court:

1) *that this line of questioning is irrelevant because there is nothing commercial at issue here, and*
2) *that this case has nothing to do with commercial activity or commercial use of the highways, and*
3) *that no one has made a charge against me stating that I was engaged in some form of commercial activity, which given the existence of the criminal complaint in the court record is a knowingly and willfully made and patently false statement.*

Second, the prosecution has introduced no evidence into the record supporting his/her personal legal conclusion and determination that this matter DOES NOT have anything to do with commercial activity for the purpose of using the highways to engage in the business of "transportation."

Third, These questions go to the heart of my legal theory and defense, which is that all activities relating to "transportation," and all the rules and regulations codified in the "Transportation" Code which governs those activities, are entirely commercial in nature and apply only to those that are actually engaging in a commercial use of the highways at the time of the alleged offense. Which defense has stated and maintained at all times that s/he was not.

Lastly, is the prosecutor seriously asking the court to act on STATE's behalf for the purpose and intent of denying me in my right of due process by prohibiting me from putting up of a vigorous and legally valid defense in this matter?

Therefore, I move that prosecution's objection be stricken from the record and the jury be instructed to ignore his/her outburst, or in the interest of justice, that this matter be declared

a mistrial because of the prosecutor's blatant misconduct by attempting to offer false and misleading testimony in this matter.

~~

Try to stick to these questions. We do not want to wander into areas that will put our case at risk by tangling with arguments or facts dealing with the merits of the allegation(s). We stick STRICTLY to denial of engaging in the regulable activity known as "Transportation."

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This script is a Work in progress. It is always evolving as new facts and information become available. Please keep watch at www.TaoOfLaw.com for updates. The site has not yet launched but will be up and running soon.

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TRANSPORTATION CODE
TITLE 7. VEHICLES AND TRAFFIC
SUBTITLE C. RULES OF THE ROAD

CHAPTER 543. ***ARREST*** AND PROSECUTION OF VIOLATORS

SUBCHAPTER A. ***ARREST*** AND CHARGING PROCEDURES; NOTICES AND PROMISES TO APPEAR

Sec. 543.001. *ARREST* WITHOUT WARRANT AUTHORIZED. Any peace officer may ***arrest* without warrant** a person found committing a violation of this subtitle.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 543.002. *PERSON ARRESTED* TO BE TAKEN BEFORE MAGISTRATE.

(a) A ***person arrested*** for a violation of this subtitle punishable as a misdemeanor **shall be immediately taken before a magistrate if**:

(1) the person is ***arrested*** on a charge of failure to stop in the event of an accident causing damage to property; or

(2) the person demands an immediate appearance before a magistrate or refuses to make a written promise to appear in court as provided by this subchapter.

(b) The person must be taken before a magistrate who:

(1) has jurisdiction of the offense;

(2) is in the county in which the offense charged is alleged to have been committed; and

(3) is nearest or most accessible to the **place of *arrest***.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 543.003. NOTICE TO APPEAR REQUIRED: PERSON NOT TAKEN BEFORE MAGISTRATE. An officer who ***arrests*** a person for a violation of this subtitle punishable as a misdemeanor and who does not take the person before a magistrate shall issue a written notice to appear in court showing the time and place the person is to appear, the offense charged, the name and address of the person charged, and, if applicable, the license number of the person's vehicle.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 701, Sec. 3, eff. Aug. 30, 1999.

Sec. 543.004. NOTICE TO APPEAR REQUIRED: CERTAIN OFFENSES.

(a) An officer shall issue a written notice to appear if:

(1) the offense charged is speeding or a violation of the open container law, Section 49.03, Penal Code; and

(2) the person makes a written promise to appear in court as provided by Section 543.005.

(b) If the person is a resident of or is operating a vehicle licensed in a state or country other than this state, Subsection (a) applies only as provided by Chapter 703.

(c) The offenses specified by Subsection (a) are the only offenses for which issuance of a written notice to appear is mandatory.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 62, Sec. 17.07, eff. Sept. 1, 1999.

Sec. 543.005. PROMISE TO APPEAR; RELEASE. **To secure *release***, the **person *arrested*** must make a written promise to appear in court by signing the written notice prepared by the ***arresting* officer**. The signature may be obtained on a duplicate form or on an electronic device capable of creating a copy of the signed notice. The ***arresting* officer** shall retain the paper or electronic original of the notice and deliver the copy of the notice to the **person *arrested***. The officer shall then promptly ***release* the person from *custody***.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 701, Sec. 4, eff. Aug. 30, 1999.

Sec. 543.006. TIME AND PLACE OF APPEARANCE.

(a) The time specified in the notice to appear must be at least 10 days after the **date of *arrest*** unless the **person *arrested*** demands an earlier hearing.

(b) The place specified in the notice to appear must be before a magistrate having jurisdiction of the offense who is in the municipality or county in which the offense is alleged to have been committed.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 543.007. NOTICE TO APPEAR: COMMERCIAL VEHICLE OR LICENSE. A notice to appear issued to the operator of a commercial motor vehicle or holder of a commercial driver's license or commercial driver learner's permit, for the violation of a law regulating the operation of vehicles on highways, must contain the information required by department rule, to comply with Chapter 522 and the federal Commercial Motor Vehicle Safety Act of 1986 (Title 49, U.S.C. Section 2701 et seq.).

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 701, Sec. 5, eff. Aug. 30, 1999.

Sec. 543.008. VIOLATION BY OFFICER. A violation by an officer of a provision of Sections 543.003-543.007 is misconduct in office and the officer is subject to removal from the officer's position.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 543.009. COMPLIANCE WITH OR VIOLATION OF PROMISE TO APPEAR.

(a) A person may comply with a written promise to appear in court by an appearance by counsel.

(b) A person who wilfully violates a written promise to appear in court, given as provided by this subchapter, commits a misdemeanor regardless of the disposition of the charge on which **the person was *arrested***.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Sec. 543.010. SPECIFICATIONS OF SPEEDING CHARGE. The complaint and the summons or notice to appear on a charge of speeding under this subtitle must specify:

(1) the maximum or minimum speed limit applicable in the district or at the location; and

(2) the speed at which the defendant is alleged to have driven.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

LEXSEE 248 S.W.3D 182

SHERIFF K. AZEEZ, Appellant v. THE STATE OF TEXAS

NO. PD-010-07

COURT OF CRIMINAL APPEALS OF TEXAS

248 S.W.3d 182*; *2008 Tex. Crim. App. LEXIS 329

March 5, 2008, Delivered

NOTICE: PUBLISH

PRIOR HISTORY: [**1]

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY.

Azeez v. State, 203 S.W.3d 456, 2006 Tex. App. LEXIS 7821 (Tex. App. Houston 14th Dist., 2006)

COUNSEL: For APPELLANT: Alexander B. Wathen, Houston, TX.

For STATE: Kim R. Trujillo, ASSISTANT CITY ATTORNEY, Houston, TX; Jeffrey L. Van Horn, STATE'S ATTORNEY, Austin, TX.

JUDGES: PRICE, J., delivered the opinion of the Court in which KELLER, P.J., and WOMACK, JOHNSON, KEASLER, HERVEY, HOLCOMB and COCHRAN, JJ., joined. MEYERS, J., did not participate.

OPINION BY: PRICE

OPINION

[*184] Although the charging instrument in this case alleged a misdemeanor offense in the express terms of *Section 38.10 of the Texas Penal Code*, [1] the Fourteenth Court of Appeals declared that the appellant was actually prosecuted and convicted under *Section 543.009 of the Texas Transportation Code*. [2] However, the jury assessed a punishment that, while it was comfortably within the maximum fine permitted under the Penal Code provision, far exceeded the permissible maximum fine under the Transportation Code provision. We granted the appellant's petition for discretionary [*185] review in order to sort out this anomaly. [3] We will reverse the judgment of the court of appeals. [4]

1 *TEX. PENAL CODE § 38.10(a)* ("A person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release."). An [**2] offense under this provision is a Class C misdemeanor where, as here, the offense for which the person was required to appear (speeding) is punishable by fine only. *Id., § 38.10(e).* Therefore, punishment could not exceed a fine of $ 500. *See TEX. PENAL CODE § 12.23*.

2 *TEX. TRANSP. CODE § 543.009(b)* ("A person who wilfully violates a written promise to appear in court, given as provided by this subchapter, commits a misdemeanor regardless of the disposition of the charge on which the person was arrested."). An officer who pulls a speeder over is required to issue him a citation and release him, so long as he promises to appear. *TEX. TRANSP. CODE §§ 543.004(a)(1)* & *543.005*. The misdemeanor offense of failure to appear as promised as per the conditions of the speeding citation is specifically spelled out in the Transportation Code as a fine of no less than $ 1 and no more than $ 200. *See TEX. TRANSP. CODE § 542.401*. Thus, the maximum fine for this offense is considerably lower than the maximum fine for the penal code violation.

3 *See TEX. R. APP. P. 66.3(f).*

4 *Azeez v. State, 203 S.W.3d 456, 460* (Tex. App.--Houston [14th] 2006).

FACTS AND PROCEDURAL POSTURE

On June 19, 2003, the appellant was [**3] pulled over by a Houston police officer and issued a speeding citation. By signing the citation, the appellant promised to appear in Municipal Court No. 15 on July 21, 2003. He failed to appear, and was charged by complaint with "unlawfully and knowingly fail[ing] to appear . . . in accordance with the terms of his release after having been lawfully released from custody on condition that he subsequently appear in said court." [5] The appellant was tried a year later for this offense in Houston Municipal Court No. 8, and was convicted by a jury and fined $ 400. He

appealed his conviction to the County Criminal Court at Law No. 12 of Harris County, which affirmed his conviction. He next appealed his conviction to the Fourteenth Court of Appeals, which likewise affirmed his conviction, albeit "for different reasons" than those given by the County Criminal Court at Law. [6]

5 This language expressly tracks the language of *Section 38.10(a) of the Penal Code*.

6 *Id. at 460*.

On the first day of his trial in municipal court, before jury selection commenced, the appellant orally moved to quash the complaint, arguing that, whereas it charged him with an offense in the express terms of the Penal Code [**4] provision, he should instead have been charged under the Transportation Code provision, which he contended is "the more specific" provision. The city prosecutor responded that the complaint had not charged the appellant under *either* of these provisions, but had instead charged him with a violation of City of Houston Ordinance 16-47. [7] The appellant answered that he could not be charged under the ordinance because the city "cannot legislate in areas there is a controlling State law, so that's void -- even if he is under that ordinance." Alternatively, he argued (as we understand him) that, in view of the city ordinance, he should not have been charged by a complaint that seemed to be couched in terms of a Penal Code provision. Either way, he maintained, he should not have been charged with an offense under *Section 38.10(a) of the Penal Code*, as the complaint apparently had done. The trial court denied his motion to quash.

7 HOUSTON, TEX. ORDINANCES § 16-47 ("It shall be unlawful for any person knowingly to fail to appear for the trial of any charge against the person pending in the municipal courts of the city."). This offense is punishable by "a fine not exceeding $ 500.00; provided, [**5] however, that no penalty shall be greater or less than the penalty provided for the same or a similar offense under the laws of the state." HOUSTON, TEX. ORDINANCES § 1-6(a).

Events at trial seemed to bear out the appellant's claim that he had been charged under the Penal Code offense. During voir dire, in testing the qualification of prospective jurors, the appellant inquired whether they could all consider assessing punishment within the range of a fine between $ 1 and $ 500--a range that is consistent with the Penal Code and city ordinance offenses, but inconsistent with the range of punishment for the Transportation Code offense. At the close of the evidence, the appellant again complained, this time in the context of a motion for directed verdict, that "it's not clear in the Complaint which offense the Defendant is charged with." It was apparently clear [*186] enough to the trial judge, however, when he came to issue his written charge to the jury. There, without objection from either party, the trial court expressly set out the offense with which the appellant had been charged in terms of *Section 38.10(a) of the Penal Code*, and authorized a fine of up to $ 500. [8]

8 The charge instructed [**6] the jury that "[o]ur statute provides that a person lawfully released from custody with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release. Any person who violates the statute shall upon conviction be fined not more than Five Hundred Dollars ($ 500.00)." The application paragraph then instructed the jury, in the same terms as had been set out in the complaint and which tracked the statutory language, to convict the appellant should it find he committed the offense.

During her final summation to the jury, the prosecutor read out loud to the jury part of the speeding citation that the appellant had signed, containing a warning that in the event he should fail to appear as promised, a warrant would issue for his arrest and he would be subject to an "ADDITIONAL CHARGE FOR FAILURE TO APPEAR WITH A FINE OF $ 200." She then urged the jury to "[a]ssess what fine you deem appropriate." The jury quickly found the appellant guilty and assessed a fine of $ 400. The appellant filed a motion for new trial in which he argued, *inter alia*, that the trial court had erred in failing to [**7] grant his motion to quash the complaint on the basis that it had charged him with the broad Penal Code offense rather than the more specific offense under the Transportation Code. The trial court denied the motion. The appellant reiterated this argument in his appeal to the County Criminal Court at Law, which ruled in a one-page opinion that he had "waived" this and all of his other challenges to the complaint because he had "made his objections after the start of voir dire."

The court of appeals likewise affirmed the appellant's conviction, but eschewed the County Criminal Court at Law's procedural-default rationale in favor of a ruling on the merits of the appellant's claim. [9] The court of appeals held that the complaint *did* charge the appellant with the Transportation Code offense, [10] and did *not* charge him under either the city ordinance or the Penal Code provision. [11] We believe that in so holding, however, the court of appeals erred in two significant respects. First, in holding that the appellant was actually charged with the Transportation Code offense, the court of appeals ignored 1) the express language of the complaint

itself, 2) the fact that the court's charge instructed [**8] the jury to convict the appellant (if at all) under the express language of the Penal Code provision, and 3) the fact that the jury was authorized to, and did in fact, assess a fine in excess of that which is permitted for the Transportation Code offense. Second, in the process of holding that the Transportation Code provision and the Penal Code provision are not *in pari materia*, the court of appeals misconstrued the scope of *Section 38.10(a) of the Penal Code*. We hold that the two provisions should, in fact, be construed *in pari materia*, and that the trial court erred to allow the appellant to be prosecuted and punished under the Penal Code provision instead of the Transportation Code provision.

9 *Azeez v. State, supra, at 464-65*.
10 *Id. at 462-64*.
11 *Id. at 464-65*.

ANALYSIS

Penal Code or Transportation Code?

The court of appeals held that the complaint was sufficient to allege every [*187] element of the Transportation Code offense. [12] While we do not take issue with this proposition, it does not necessarily follow that it was in fact the Transportation Code offense that appellant was charged with, to the exclusion of either the city ordinance or the Penal Code provision. With respect to the former, [**9] the court of appeals concluded that **the complaint did not allege an offense under Section 16-47 of the Houston City Ordinances because it alleged elements not necessary to state an offense under that provision, and did not conclude with the phrase, "Contrary to said ordinance,"** as is permissible in complaints that charge only city ordinance violations. [13] We would add to these observations that the complaint also did not allege that the appellant failed to appear for the "trial" of a charge pending in municipal court--only that he failed to appear in municipal court according to the terms upon which he had been released (without specifying what those terms were or setting out the citation *in haec verba*). [14] We therefore agree with the court of appeals that, notwithstanding the State's persistent assertions during trial and in its various appellate briefs, the complaint did not give the appellant sufficient notice of (and may not even have been adequate to allege) a violation of the city ordinance.

12 *Id. at 462-64*.
13 *Id. at 464. See TEX. CODE CRIM. PROC. art. 45.019(a)(7)* ("if the offense charged is an offense only under a municipal ordinance, [the complaint] may also conclude with the [**10] words 'Contrary to the ordinance'.").

14 *See* note 7, *ante*.

But we reject the court of appeals's conclusion that the complaint clearly charged the appellant with the Transportation Code offense to the exclusion of the Penal Code offense. If anything, the opposite is more accurate. The language of the complaint tracked *Section 38.10(a) of the Penal Code* word for word, whereas it merely paraphrased the elements necessary to charge an offense under the Transportation Code. Moreover, the complaint was not so clear in charging the Transportation Code offense that it sufficed to alert the trial court that it should instruct the jury that it could convict, and, more critically, punish the appellant under *that* offense, rather than *Section 38.10(a) of the Penal Code*. Indeed, were it truly the case, as the court of appeals concluded, that the appellant was actually tried for and convicted of the Transportation Code offense, then the $ 400 fine the jury assessed and the trial court imposed would be patently illegal, because it was in excess of the maximum ($ 200) authorized by law. **The appellant could complain of such an illegality in his sentencing at any stage of appellate and post-conviction proceedings**. [**11] [15]

15 *Mizell v. State, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003)*.

Still, the court of appeals believed that the appellant could *not*, in fact, have been charged with the offense of failing to appear under *Section 38.10(a) of the Penal Code*. [16] This perception is based upon a misreading of a portion of the relevant statute. The court of appeals opined:

> *Section 38.10 of the Penal Code* applies to persons who are in custody pursuant to a court order. * * * All of the elements of *section 38.10* are included in the [appellant's] complaint, but **the definition of custody in [Chapter 38 of the Penal Code] specifically limits *section 38.10* to those situations when a person is under arrest pursuant to a court order of this state or another state or when a person is under restraint by an agent or employee of a facility, such as a jail or [*188] prison**. *See TEX. PENAL CODE ANN. § 38.01(1)* (Vernon 2003). [17]

The court of appeals went on to conclude that, because the appellant was arrested for speeding rather than pursuant to a court order, *Section 38.10(a)* could not apply to make his failure to appear unlawful. Because the Penal Code provision was not available to charge the appellant,

the court of appeals seems [**12] to have reasoned, he must have been charged under the Transportation Code provision instead. We reject this reasoning.

16 *Azeez v. State, supra, at 464-65.*
17 *Id.*

The court of appeals's logic proceeds upon the premise that only an arrest that is based upon a court order can lead to the kind of "custody" that is contemplated in *Section 38.10(a) of the Penal Code*. The court of appeals derived this premise from the definition of custody found in *Section 38.01(1)(A) of the Penal Code*, which reads as follows:

> In this chapter:
>
> (1) "Custody" means:
>
> (A) under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court of this state or another state of the United States[.]

The court of appeals construed this definition to mean that, before it can constitute "custody" for purposes of Chapter 38 of the Penal Code, a peace officer's arrest of an individual must occur "pursuant to an order of a court . . . ." But this construction is correct only if it can be said that this prepositional phrase modifies both phrases that precede it, namely, "under arrest by a peace officer" *and* "under restraint by a public servant." Because of a lack of punctuation, it is unclear from [**13] the face of the statute whether it does or not.

We have encountered just this kind of ambiguity before, in *Ludwig v. State.* [18] There we observed that "[g]enerally the presence of a comma separating a modifying clause in a statute from the clause immediately preceding is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one." [19] Consistent with this convention of punctuation (and assuming, as we did in *Ludwig*, that it applies equally to phrases as clauses), if the court of appeals's construction of the statute is correct, we would expect the definition of custody to be punctuated as follows:

> under arrest by a peace officer or under restraint by a public servant, pursuant to an order of a court of this state or another state of the United States;

On the other hand, in *Ludwig* we also identified another punctuation convention, that "[g]enerally, a comma should precede a conjunction connecting two coordinate clauses or phrases in a statute in order to prevent the following qualifying phrases from modifying the clause preceding the conjunction." [20] Following this convention, if the court of appeals's construction of the [**14] definition of custody is *not* the one the Legislature intended, we would expect it to be punctuated as follows:

> under arrest by a peace officer, or under restraint by a public servant pursuant to an order of a court of this state or another state of the United States.

Unfortunately, the statutory language is not punctuated in either of these ways, and we cannot tell from the plain language of the statute which meaning was intended. [*189] As in *Ludwig*, we must go beyond the language of the statute.

18 *931 S.W.2d 239 (Tex. Crim. App. 1996).*
19 *Id. at 241.* For this proposition we cited 82 C.J.S. Statutes § 334 (1953), at 672.
20 *Id. at 242*, also citing 82 C.J.S., *supra.*

In construing the Penal Code, we are authorized to consider, *inter alia*, both the object sought to be obtained and the consequences of a particular construction. [21] We do not think that the court of appeals's limited construction of the definition of custody comports with the intent of the legislators who enacted Chapter 38 of the Penal Code. **When the definition of custody was first enacted in *Section 38.01* with the advent of the present Penal Code in 1973, the Practice Commentary observed: "'Custody' is defined as restraint by a public [**15] servant pursuant to court order or arrest by a peace officer."** [22] As thus paraphrased, the definition is unambiguous, and **does not require that arrest by a peace officer be authorized by a court order to constitute custody for purposes of Chapter 38**.

21 *TEX. GOV'T CODE §§ 311.023(1) & (5)* (Code Construction Act).
22 *See TEX. PENAL CODE § 38.07* cmt. (Vernons 1974).

This definition is consistent with the Legislature's use of the term in, *e.g.*, current *Section 38.06(a) of the Penal Code*, which makes it an offense to escape from "custody":

> (A) A person commits an offense if he escapes from custody when he is:
>
> (1) under arrest for, charged with, or convicted of an offense; or

(2) in custody pursuant to a lawful order of a court.

If the court of appeals's construction of "custody" were correct, then subsections *(a)(1)* and *(a)(2)* would be redundant, at least insofar as a person might "escape from custody when he is . . . under arrest." For if "custody . . . under arrest" meant, by definition, "arrest . . . pursuant to a lawful court order," as the court of appeals believed, then every escape while "under arrest" would *also* be covered by *Section 38.06(a)(2)*, because every arrest would have to be (in [**16] order to constitute "custody" under *Section 38.01*) pursuant to a court order. It is clear to us that the Legislature intended no such redundancy, but instead, intended that it should be an offense for a person to escape from a peace officer who has placed him under arrest, regardless of whether that officer had a warrant or other court order. [23] For these reasons we hold that the court of appeals erred to conclude that, in order to be "under arrest" for purposes of the definition of "custody" under Chapter 38 of the Penal Code, a suspect would have to be arrested pursuant to a court order, and therefore the appellant must have been charged with the Transportation Code offense.

23 In 1997, Subsections *9.01*(a) and (b) of the Penal Code were amended to adopt the same definition of "custody" as that contained in *Section 38.01(1)*. *See* Acts 1997, 75th Leg., ch. 293, §2, pp. 1308-09, eff. Sept. 1, 1997. *Section 9.52 of the Penal Code* makes justifiable the use of force "to prevent the escape of an arrested person from custody . . . when the force could have been employed to effect the arrest under which the person is in custody[.]" *TEX. PENAL CODE § 9.52*. We doubt that the Legislature intended [**17] that this defensive issue should be available only to peace officers who effectuated the arrest "pursuant to an order of a court."

The Penal Code Offense

Section 543.001 of the Transportation Code provides that "[a]ny peace officer may arrest without warrant a person found committing a violation of this subtitle." [24] A peace officer may, and in the [*190] case of a speeding violation, must, offer that person the option of signing a written notice and promise to appear in court in lieu of an immediate appearance before a magistrate. [25] If the person signs the promise to appear, then he is immediately released from detention. [26] If the person refuses to sign a promise to appear, he shall be immediately taken before a magistrate. [27] Under these provisions, is a person "under arrest" for purposes of *Section 38.01(1)(A) of the Penal Code*, up to the point that he signs the promise to appear and is released, such that he can be prosecuted for failure to appear under *Section 38.10(a) of the Penal Code*? **We have never addressed this precise question, and our precedents are ambiguous with respect to the exact nature and scope of the detention that occurs when a motorist is pulled over for a traffic violation [**18] and agrees to sign a citation and promise to appear to answer for the offense.**

24 *TEX. TRANSP. CODE § 543.001*. *See Boyett v. State, 487 S.W.2d 357, 359 (Tex. Crim. App. 1972)*; *Nite v. State, 882 S.W.2d 587, 591-92* (Tex. App.--Houston [1st] 1994, no pet.).

25 *TEX. TRANSP. CODE §§ 543.003, 543.004(a)(1)* & *543.005*.

26 *Id. § 543.005*.

27 *Id. § 543.002(a)(2)*.

Courts have often declared, under predecessor provisions to the Transportation Code, that a peace officer may "arrest" anyone he witnesses committing any traffic offense "[e]xcept for the offense of speeding." [28] But, strictly speaking, it is not true that the Transportation Code does not authorize the "arrest" of speeders. **It just does not permit speeders to be "arrested" for any longer than it takes for the arresting officer to issue a citation (assuming the motorist is willing to sign the promise to appear).** [29] The seminal case construing the earliest incarnation of these Transportation Code provisions clearly contemplated that a motorist who was detained along the roadside for a speeding violation, and who agreed to sign a promise to appear in lieu of being taken immediately before a magistrate, was nevertheless initially "arrested" and [**19] then released from "custody" once he signed the citation. [30] Later cases established that such an arrest does not amount to a "full custodial arrest," such that it would authorize the arresting officer to conduct a search-incident-to-arrest without first obtaining a search warrant. [31] But **the Transportation [*191] Code scheme clearly regards it as some form, degree, or gradation of "arrest," however fleeting**. We said as much in *State v. Kurtz*, [32] where we concluded that "[t]he [Transportation] Code makes it clear that its use of the term 'arrest' is not limited to custodial arrest." [33]

28 *See Tores v. State, 518 S.W.2d 378, 380 (Tex. Crim. App. 1975)*; *Christian v. State, 592 S.W.2d 625, 628-29 (Tex. Crim. App. 1980)*; *Vicknair v. State, 751 S.W.2d 180, 189 n.3 (Tex. Crim. App. 1988)* (Opinion on Appellant's motion for rehearing); *Coleman v. State, 45 S.W.3d 175, 179 n.2* (Tex. App.--Houston [1st] 2001, pet. ref'd); *Unit-*

ed States v. Castro, 166 F.3d 728, 732 n.6 (5th Cir. 1999).

29 *TEX. TRANSP. CODE §§ 543.004 & 543.005.*

30 *Montgomery v. State, 145 Tex. Cr. R. 606, 609-10, 170 S.W.2d 750, 752 (1943). See also Spencer v. Southland Life Insurance Company, 340 S.W.2d 335, 337 (Civ. App.--Ft. Worth 1960, writ ref'd);* [**20] *Borner v. State, 521 S.W.2d 852, 854 (Tex. Crim. App. 1975).* The enactment of the Transportation Code in 1995 was not intended to make substantive changes to earlier statutory provisions, but merely to recodify them. *See* Acts 1995, 74th Leg., ch. 165, p. 1871, eff. Sept. 1, 1995. And indeed, *Section 543.005 of the Transportation Code* still speaks in terms of "releasing" a motorist from "custody" once he signs the citation promising to appear. *TEX. TRANSP. CODE § 543.005*. The Third Edition of Texas Jurisprudence has apparently construed the recodified provisions of the Transportation Code pertaining to traffic violations accordingly, to authorize the "arrest" of violators, including speeders, subject to "release . . . from custody" if and when the violator signs the promise to appear on the citation. 22 Tex. Jur. 3d § 2277 (2001), at pp. 294-95.

31 *E.g., Thomas v. State, 572 S.W.2d 507, 509 (Tex. Crim. App. 1976)* (opinion on original submission); *Christian v. State, supra; Linnett v. State, 647 S.W.2d 672, 675 (Tex. Crim. App. 1983)*; *Williams v. State, 726 S.W.2d 99, 101 n.1 (Tex. Crim. App. 1986). See also* George E. Dix & Robert O. Dawson, 40 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 10.14 [**21] (2d ed. 2001), at 579 ("If fealty to the statutory language [of the Transportation Code] requires that the detention involved [in a "traffic stop"] be labeled an 'arrest,' it is not the sort of 'custodial arrest' that subjects the person to the incidental searches allowed by *Fourth Amendment* law.").

32 *152 S.W.3d 72 (Tex. Crim. App. 2004).*

33 *Id. at 79.*

But **does the "arrest" associated with a traffic stop equate with being "under arrest" for purposes of the definition of "custody" in *Section 38.01(1)(A) of the Penal Code*, such that a motorist who is released from "custody" under the provisions of the Transportation Code but then fails to appear as promised in the citation has committed an offense under *Section 38.10(a) of the Penal Code*? We believe so**. The Penal Code itself contains no definition of "arrest" to compare to the apparent scope of "arrest" as used in the Transportation Code. But the Code of Criminal Procedure provides that "[a] person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant." [34] **We have construed this provision to mean that, [**22] at least as a matter of state law, a restriction upon personal liberty that amounts to less than "full custodial arrest" may nevertheless constitute an "arrest."** [35] And at least one court of appeals has construed a Transportation Code "arrest" to be of the type to justify prosecution for resisting arrest under another offense in Chapter 38 of the Penal Code. [36] **We conclude that the failure to appear to answer to a traffic offense citation, including a speeding citation, *does* constitute a failure to appear under the terms of a lawful release from "custody" for purposes of *Sections 38.01(1)(A) and 38.10(a)* of the Penal Code, and is therefore an offense under the latter provision.**

34 *TEX. CODE CRIM. PROC. art. 15.22.*

35 *Torres v. State, 868 S.W.2d 798, 801 (Tex. Crim. App. 1993)*; *Hoag v. State, 728 S.W.2d 375, 379 (Tex. Crim. App. 1987)*; *Brewster v. State, 606 S.W.2d 325, 327 n.6 (Tex. Crim. App. 1980)*; *White v. State, 601 S.W.2d 364, 365-66 (Tex. Crim. App. 1980)*; *Maldonado v. State, 528 S.W.2d 234, 237 (Tex. Crim. App. 1975)*; *Hardinge v. State, 500 S.W.2d 870, 873 (Tex. Crim. App. 1973)*; *Woods v. State, 466 S.W.2d 741, 743 (Tex. Crim. App. 1971).*

36 *See Bruno v. State, 922 S.W.2d 292, 295 (Tex. App.--Amarillo 1996, no pet.)* [**23] (in prosecution for resisting arrest, where appellant was detained for a Transportation Code offense, "until appellant was cited and allowed to leave, he was undergoing an arrest"). *See TEX. PENAL CODE § 38.03(a)* ("a person commits an offense if he intentionally or knowingly obstructs . . . a peace officer . . . from effecting an arrest . . . by using force against the peace officer[.]").

Are the Statutes *In Pari Materia?*

We have described the doctrine of *in pari materia* in this way:

> It is a settled rule of statutory interpretation that statutes that deal with the same general subject, have the same general purpose, or relate to the same person or thing or class of persons or things, are considered to be in pari materia though they contain no reference to one another, and though they were passed at different times or at different sessions of the legislature.

> In order to arrive at a proper construction of a statute, and determine the [*192] exact legislative intent, all acts and parts of acts in pari materia will, therefore, be taken, read, and construed together, each enactment in reference to the other, as though they were parts of one and the same law. Any conflict between their provisions [**24] will be harmonized, if possible, and effect will be given to all the provisions of each act if they can be made to stand together and have concurrent efficacy.
>
> The purpose of the in pari materia rule of construction is to carry out the full legislative intent, by giving effect to all laws and provisions bearing on the same subject. The rule proceeds on the same supposition that several statutes relating to one subject are governed by one spirit and policy, and are intended to be consistent and harmonious in their several parts and provisions. Thus, it applies where one statute deals with a subject in comprehensive terms and another deals with a portion of the same subject in a more definite way. But where a general statute and a more detailed enactment are in conflict, the latter will prevail, regardless of whether it was passed prior to or subsequently to the general statute, unless it appears that the legislature intended to make the general act controlling. [37]

The doctrine has been codified in *Section 311.026 of the Government Code*:

> (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.
>
> (b) [**25] If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail. [38]

With respect to how the doctrine applies to penal provisions, we have observed:

> In construing penal provisions this Court has on a number of occasions found two statutes to be in pari materia, where one provision has broadly defined an offense, and a second has more narrowly hewn another offense, complete within itself, to proscribe conduct that would otherwise meet every element of, and hence be punishable under, the broader provision. In the case in which the special statute provides for a lesser range of punishment than the general, obviously an "irreconcilable conflict" exists, and due process and due course of law dictate that an accused be prosecuted under the special provision, in keeping with presumed legislative intent. Accordingly, where range of punishment under what is perceived to be the more specifically defined offense is less than that for the broader, . . . this Court has [**26] not hesitated to reverse convictions obtained under the broader provision. [39]

Or, as we stated more succinctly in a recent opinion, "a defendant has a due process right to be prosecuted under a 'special' statute that is *in pari materia* with a broader statute when these statutes irreconcilably conflict." [40]

37 *Cheney v. State, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988), citing* 53 Tex.Jur.2d, *Statutes* § 186 (1964), at 280.
38 *TEX. GOV'T CODE § 311.026.*
39 *Mills v. State, 722 S.W.2d 411, 414 (Tex. Crim. App. 1986).*
40 *Ex parte Smith, 185 S.W.3d 887, 893 (Tex. Crim. App. 2006).*

Section 38.10(a) of the Penal Code has "broadly defined" the offense of failure to appear when conditionally released [*193] from custody, regardless of the basis for that custody. Because a motorist who has been pulled over for the issuance of a speeding citation *is* "under arrest" in contemplation of *Section 38.01(1)(A)*'s definition of "custody," then a person in the appellant's position, who signed a promise to appear to answer for a speeding offense but then failed to appear as promised, is subject to prosecution under this broad provision. But *Section 543.009(b) of the Transportation Code* has more narrowly hewn an offense, [**27] complete in itself, to specifically proscribe the failure to appear in court pursuant to a written promise upon being arrested for an offense under Title 7, Subtitle C of the Transportation Code-an offense which would otherwise meet every element of, and hence be punishable under, the Penal Code provision. It is,

therefore, a "special" provision in contemplation of *Section 311.026* of the Code Construction Act and our case law construing the doctrine of *in pari materia*. Moreover, because violation of *Section 543.009(b) of the Transportation Code* carries a lesser range of punishment than the broader *Section 38.10(a) of the Penal Code*, the statutes are in irreconcilable conflict. In that event, due process and due course of law require that any defendant who fails to appear after promising to do so under the provisions of the Transportation Code, upon arrest for an offense defined in Title 7, Subtitle C therein, be prosecuted for the Transportation Code offense, not the broader Penal Code offense. The Legislature has clearly manifested a policy that a failure to appear in court to answer for a traffic infraction should carry a less severe punishment than other failures to appear. Because [**28] the appellant was prosecuted under the Penal Code, and assessed a fine in excess of what was allowable for the Transportation Code offense, he suffered a violation of due process.

Procedural Default

Because it affirmed the appellant's conviction on the merits, the court of appeals did not address whether he may have procedurally defaulted his specific claim that he should have been charged under the Transportation Code instead of the Penal Code. The County Court at Law held, however, that the appellant "waived" this and other contentions on appeal because he did not begin to voice them until jury selection had begun. The County Criminal Court at Law cited no authority for this proposition. We note, however, that the Code of Criminal Procedure requires that, in order to preserve error in a complaint, either formal or substantive, a defendant must object "before the date on which the trial on the merits commences[.]" [41] We agree with the County Court at Law that, to the extent the appellant claimed on appeal that, e.g., he did not have sufficient notice from the complaint of the particular offense with which he was charged, that alleged error was not preserved. But we disagree that the [**29] appellant's renewed claim that the evidence showed that he was being prosecuted and punished under the wrong statute came too late for appellate review.

41 *TEX. CODE CRIM. PROC. art. 45.019(f).*

In *Ex parte Smith*, [42] we held that a pre-trial *in pari materia* claim, brought first in a motion to quash and then in a pre-trial application for writ of habeas corpus, was "premature," since the State had not "had an opportunity to develop a complete record during a trial." [43] The evidence at trial could conceivably have shown that [*194] Smith was not, in fact, guilty of the special provision, and was therefore appropriately charged and tried under the broader provision. Here the appellant made his *in pari materia* argument known to the trial court at the outset of the trial, albeit prematurely, in a motion to quash. But he also reiterated his argument once the State's evidence was complete in his motion for directed verdict, and again in a motion for new trial after the verdict, both of which were denied.

42 *185 S.W.3d 887 (Tex. Crim. App. 2006).*
43 *Id., at 893.*

On its face, the complaint itself was unobjectionable. It alleged a failure to appear *apparently* under the terms of the Penal Code provision, but [**30] did not allege the particular circumstances of the terms of his release or why he was in custody in the first place. It was only after the State's evidence disclosed that the case involved the failure to appear under the terms of a speeding citation that a basis for the appellant's *in pari materia* challenge became manifest. When he reiterated that challenge in his motions for directed verdict and new trial, the trial court was effectively put on notice that the appellant was being prosecuted under the wrong statutory provision. The appellant thereby presented his objection to the trial court clearly enough, and at a time when the trial court could have remedied the problem. *See Lankston v. State, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992).* The trial court should have taken steps to assure that the appellant was not being prosecuted, and more critically, *punished*, under the wrong statutory provision.

CONCLUSION

The trial court erred to allow the appellant to be prosecuted under the Penal Code. The court of appeals erred in allowing the appellant to be punished more severely than he could have been under the Transportation Code-a defect in the judgment that can be raised at any time, including [**31] for the first time on appeal. [44] The County Court at Law erred to hold that the appellant's objections to prosecution under the Penal Code were untimely and therefore "waived." We therefore reverse the judgment of the court of appeals, and remand the cause to the trial court for further proceedings not inconsistent with this opinion. [45]

44 *See* note 15, *ante.*
45 The appellant does not contend that the evidence was insufficient to support a conviction under the Transportation Code provision.

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