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TAKING A CLOSER LOOK: DISPOSITION OF STOLEN PROPERTY HEARINGS

By Thea Whalen
Program Attorney

Picture this: You are John Q. Public and you get a call from local law enforcement. They've found the person who broke into your garage two weeks ago and made off with your trusty Dewalt 15-Amp Industrial Rotary Hammer. That beauty cost about $1,700 retail. You tell them, "Great! You can drop it by after 5:00 pm today!" But it's not that simple. So now what – how do you get it back? In the Code of Criminal Procedure Chapter 47, there is a process that must be followed.

The first thing to note is that until a hearing is held to determine who has the right to possession of the property, the officer who seized the property shall retain custody of it subject to an order of the proper court. *Art. 47.01(b) C.C.P.*

So what is the "proper court"? For Justice Court purposes, jurisdiction is within the county in where the property is held. *Art. 47.01a(a) C.C.P.* If a criminal case involving the property is filed – even after a request for a stolen property hearing is filed in Justice Court, the criminal court with jurisdiction (the one trying the case) determines who the property belongs to. If this happens, an interested party may make a motion to dismiss. The Court should dismiss the re so that the case may be filed with the proper court. Venue is also proper in any Justice Court within the county in which the property was seized and can be transferred to another county upon motion of any interested party. *Art. 47.01a(d) C.C.P.* Jurisdiction under this section is based solely on jurisdiction as a criminal magistrate and not jurisdiction as a civil court. Even if the thief took a whole garage of $50,000.00 worth of Dewalt tools, a justice of the peace in the county where the seizure occurred would still have jurisdiction.

Now that we know where our property hearing may be held, how do we get the court to hear our case? An interested party needs to petition the court for a hearing to determine possession. The code is silent as to what specifics must be included in the petition. Art. 47.01a (a) C.C.P.

Notice

It's not clear by reading the Code of Criminal Procedure who has to notify the interested parties:

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INSIDE THIS ISSUE

Update from the General Counsel

By Bronson Tucker

Welcome to the first newsletter of the 2014-15 Academic Year, one which promises to be among the busiest in Training Center history! In addition to our standard menu of five 20 hour Justice of the Peace seminars, six 16 hour Court Personnel seminars and four Civil Process seminars, we are going to be offering four 10 hour workshops for judges and clerks, twenty-two 2 hour webinars, 80 hours for a new judge class of over 150 new judges, and seven Legislative Update seminars.

In addition to developing all those materials, and that travel schedule, we also are of course hard at work on our new Deskbooks and Form Manuals, plus answering your Legal Questions through our Legal Question board at tjctc.org and over the phone as well.

We think we have an outstanding lineup of courses and instructors for you all in 2014-15, and we hope that you agree that the track our instruction on is one that is ever improving, and as always, we welcome your suggestions on how we can improve it.

You should have recently received some information from Rob Daniel regarding the Bond Condition Schematic program, and we strongly encourage counties to participate in this program. It allows magistrates and trial courts to work together to ensure defendants appear in court, and also to protect the community from repeat DWI offenders.

To those of you who are new to the bench, welcome! Please feel free to call the office with legal questions that are pressing, and post others on our Legal Question Q&A board at tjctc.org, for written responses. Also, reading those Q&A is an excellent way to brush up on issues that may not have hit your court yet. A sampling of some recent Q&A is included on P. 8 of this newsletter.

Until next time,

Bronson

STOLEN PROPERTY HEARINGS (CONT. FROM P. 1)

the court or the law enforcement agency holding the property. Something else that happened when an officer seizes property alleged to have been stolen is that he shall immediately file a 'schedule' of the property and its value with the court having jurisdiction of the case, certifying that the property has been seized by him and why. In that 'schedule,' the officer shall notify the court of the names and addresses of each party known to the officer who has a claim to possession of the seized property *Art. 47.03 C.C.P.*

We believe it is best practice for the court to go ahead and send notice. It is the court that has jurisdiction of the seizure case and through the 'schedule', the court is informed of the identities of the interested parties. Like any notice of hearing, the notice should be in writing and let the interested parties know the time, date, and place of the hearing. It should state what property was seized, and when and where it was seized. It should attach a copy of the inventory filed by law enforcement. The notice should include a statement that the interested party is being given an opportunity to assert a claim to possession of the property and should appear at the proceeding with evidence showing that the property was not acquired by theft or another offense. *Art. 47.01a(c) C.C.P.* The notice should also include a statement that, failure to appear will leave the Court to believe that the party does not have a valid claim to possession, has abandoned a claim to possession or do not wish to assert a claim and that the court may award possession of the property to the law enforcement agency holding the property if no interested party has proved a superior right to possess the property.

Hearing

Once a petition is filed and the notice of hearing sent, there is one main question we need to know: is there a criminal trial pending regarding our property?

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STOLEN PROPERTY HEARINGS (CONT. FROM PAGE 2)

If the answer is "No," then the justice of the peace may hold a hearing to determine the right to possession of the property. Any interested person may present evidence showing that the property was not acquired by theft or another offense or that the person is entitled to possess the property. At the hearing, hearsay evidence is admissible. *Art. 47.01a(c) C.C.P.* In that hearing, the judge shall ordered the property be handled in one of three ways:

1. Order the property delivered to whoever has the superior right to possession, without conditions;
2. On the filing of a written motion before trial by an attorney representing the state, order the property delivered to whoever has the superior right to possession, subject to the condition that the property be made available to the prosecuting authority should it be needed in future prosecutions;
3. Order the property awarded to the custody of the peace officer, pending resolution of criminal investigations regarding the property. *Art. 47.01a(a).*

Unlike in our scenario -- where we are the rightful owner of the Dewalt Hammer, there may be times when the court cannot determine who the rightful owner is due to the fact that the property was taken by theft (or by some other way that is a crime). In that situation, the court shall order the peace officer to do one of three things:

1. Deliver the property to a government agency for official purposes;
2. Deliver the property to a person authorized by Article 18.17 of this code to receive and dispose of the property; or
3. Destroy the property. *Art. 47.01a(b) (1)-(3).*

Let's say in our scenario we had contacted the police when the Dewalt Hammer went missing and there was a police report created stating the same. This case might result in a criminal trial. If so, our case might not be heard by a justice of the peace. Criminal jurisdiction of a theft in that amount ($1,700) would be outside of the fine only theft a Justice Court could hear. In that case, our seizure case would be heard by the court with criminal jurisdiction. *Art. 47.02(a) C.C.P.* However, on written consent of the prosecuting attorney, any magistrate having jurisdiction in the county in which a criminal action for theft (or any other offense involving the illegal acquisition of property is pending) may hold a hearing to determine the right to possession of the property. Therefore, it could be heard by a justice of the peace in our county – acting as a magistrate - if the state agrees in writing. If it is proved to the satisfaction of the magistrate that any person is a true owner of the property alleged to have been stolen, and the property is under the control of a peace officer, the magistrate may, by written order, direct the property to be restored to that person. *Art. 47.02(b) C.C.P.*

Regardless if a criminal trial is pending or not, if the court has any doubt as to the ownership of the property, the court may require a bond of the person claiming ownership in case it is later determined that they are not the true owner. Or, the court may have the sheriff hold the property until further orders are made regarding possession. The bond must have sufficient sureties and be equal to the value of the property at issue. It shall be payable to and approved by the county judge of the county in which the property is in custody. *Art. 47.05 C.C.P.* What if none of the interested parties appear at the hearing, except for the officer who has now discovered another interested party since the scheduling of the hearing? The court should instruct the officer to file an amended inventory of property seized and to include the name and mailing address of the newly-discovered interested party on the amended form. Then, the court should reset the case and notify the interested parties of the hearing.

Order

Any order awarding possession should contain the basic information: that a hearing was held on a given date in the Justice Court of the appropriate county. The order should also state the name of the seizing law enforcement agency, described property, and name the officer who has possession and control of the item. The order should state that all interested parties were notified of the hearing and those who desired to assert their claim did appear in court. The court, after hearing all the evidence and testimony, determined a specific named interested party is entitled to possession of the property. The order should direct the possession of the property be immediately transferred to the awarded party (either without conditions or subjected to the condition that the property be made available to the State to be used for

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STOLEN PROPERTY HEARINGS (CONT. FROM PAGE 3)

evidentiary purposes should it be needed). The order also needs to instruct the successful claimant that they are required to pay all reasonable charges for the safekeeping of the property while in possession and control of the law enforcement agency pending the hearing. This must be paid before delivery of the property. The order should also state the name of the officer directed to make the return. The order should provide an officer's return showing that the property has, in fact, been transferred to the awarded party on a given date. *Art. 47.01a(a) C.C.P.*

The court's order must have an affidavit attached verifying the storage charges incurred against the property. It must say what storage charges are being sought for holding the property and what storage facility is to be paid. It must also say that these costs are determined by disclosing the daily storage fee and the period of storage and that the charges were fair and reasonable and were necessary because the law enforcement agency did not have adequate facilities available. *Art. 47.09 C.C.P.*

What if the storage costs are not paid by the party awarded possession of the property? The property must be sold by the storage facility by execution (sale of the property). The storage facility can take their expenses for keeping the property from the proceeds and court costs could be taken from the same. Any remaining proceeds of a sale must be paid to the owner of the property. *Art. 47.09 & 47.10 C.C.P.*

Appeal

To appeal the outcome of a stolen property hearing, an oral notice has to be given at the end of the hearing. The party then has until the next business day to post a bond. The bond amount is determined by the court based on what it believes is appropriate, but it cannot be more than twice the value of the property. Like other bonds, it should be made payable to the party awarded possession at the hearing, with sufficient sureties. Appeal from a hearing held in a justice court will be heard by a county court or a statutory county court just as the procedure for appeals in civil cases from justice court to county court. *Art. 47.12 (a) & (b) C.C.P.*

For other issues, such as The Pawn Shop Act, the Certificate of Title Act or Disposition of Seized Weapons, see our most recent Deskbook, Criminal Volume 2012, on pages 629, 630, and 642, respectively.

Also, there are many helpful forms available on our website located under the 'resources' tab:

Form 106 – "Order Awarding Possession of Seized Property (One Award")
Form 106A – "Officer's Return"
Form 107 – "Order Awarding Possession of Seized Property (Multiple Awards)"
Form 107A – "Officer's Return"
Form 108 - "Affidavit Verifying Storage Charges"
Form 104 – "Notice of Examining Trial on Seized Property"
Form 105 – "Amended Schedule of Seized Property"
Form 103 – "Order for Possession of Seized Property"

Please contact our office if you have trouble locating these topics or forms.

DUTIES OF A MAGISTRATE: RELEASE BY CITATION

We know that many Texas justices of the peace secretly dream that Willie Nelson will be busted for marijuana possession in their county, giving them the opportunity to read the Red-Headed Stranger his Article 15.17 warnings at the county jail. However, if a Burnet County Sheriff's Office deputy pulls Willie's tour bus over for speeding, smells the odor of burnt marijuana emitting from an open window, and conducts a search which yields one half-burnt marijuana cigarette, it's possible that Mr. Nelson may not be booked into the county jail following his arrest. Why?

This possibility is not based on unauthorized leniency by adoring peace officers, even though it is a fact that all Texans, including Burnet County sheriff's deputies, love Mr. Nelson's 1974 album Phases & Stages. Rather, it is based on an often-forgotten legislative amendment to Article 14.06 of the Code of Criminal Procedure. In 2007, the Texas Legislature passed House Bill 2391, which tacked subsections (c) and (d) on to the end of Article 14.06. These subsections provide that individuals who are arrested in the county where they reside for certain Class A or B misdemeanors may be released by citation and instructed to appear before a magistrate at a specific time and place. As many of you know, Mr. Nelson's residence in Spicewood is located in Burnet County, and possession of less than two ounces of marijuana is one of the offenses listed in Article 14.06(d). Therefore, Willie would be eligible for release by citation in the hypothetical scenario described above.

If Willie is released by citation and ordered to appear before a justice of the peace, what happens when he shows up at the justice court on the date listed on the citation? Article 14.06(c) states that Willie must "appear before a magistrate of this state *as described by subsection (a)*." Subsection (a) of Article 14.06 states that once an officer brings a person he has arrested before a magistrate, "the magistrate shall immediately perform the duties described in Article 15.17 of this Code." Therefore, a justice of the peace must conduct a full Article 15.17 hearing when Willie—or anyone else released by citation following arrest for a Class A or B misdemeanor offense—appears in court.

Conducting a full Article 15.17 hearing following release by citation includes several steps. First, the magistrate who conducts the hearing must read the oral admonishments listed in Article 15.17(a). Second, the magistrate must set bail in order to ensure that the accused will appear for future court settings. The magistrate may also set any bond conditions necessary to ensure community safety and/or protect a victim of the offense (if any). Third, the magistrate must provide assistance in filling out forms for requesting appointment of counsel. The magistrate must also promptly transmit such forms to the appropriate court. Fourth, the magistrate must notify the appropriate consulate if the individual is a citizen of a foreign country requiring automatic notification. If the accused is a citizen of a foreign country but automatic notification is not required, the magistrate must ask the accused if consular notification is desired. If the accused requests consular notification, his or her consulate must be notified.

What happens if Willie is released by citation but fails to appear as instructed? If a person who has been released by citation following an arrest for a Class A or Class B misdemeanor fails to appear at the time and place specified in the citation, he or she commits the offense of Failure to Appear (see Article 38.10, Penal Code). Because the offense for which the person was released by citation was punishable by confinement, the offense is a Class A misdemeanor. *Id*. TJCTC recommends promptly reporting such criminal behavior to a peace officer or a prosecutor.

If your county's law enforcement agencies have adopted a policy of releasing some individuals arrested for Class A and Class B misdemeanors by citation, there are several other offenses to which Article 14.06(c) and (d) potentially apply. These offenses include possession of a controlled substance in Penalty Group 2-A (any amount under 4 ounces), Class B criminal mischief, Class B graffiti, Class B theft, Class B theft of service, Class B contraband in a correctional facility, and driving while license invalid (DWLI).

What if a person is arrested for a Class C misdemeanor and released by citation? It's a common misconception that when a peace officer arrests a person for disorderly conduct or Class C assault and releases the person by issuing a citation, he charges the person with an offense in the court of the magistrate named in the citation. However, a justice court gains personal jurisdiction over a defendant only when a charging instrument (in justice court, a sworn complaint or a duplicate copy of the citation) is filed with the court, not when a citation is written by a peace officer. *Trejo v. State*, 280 S.W.3d 258 (Tex. Crim. App. 2009) (Keller, P.J., concurring). When a peace officer writes a citation, he is (cont. on P. 5)

RELEASE BY CITATION (CONT. FROM P. 4)

ordering the defendant to appear before a magistrate, not appear before a trial court in order to answer to criminal charges. Theoretically, a peace officer could write a citation requiring an individual accused of disorderly conduct to appear before a district judge (serving in his or her capacity as a magistrate), even though criminal charges cannot be filed in a district court. A duplicate copy of that citation, filed in a justice court, would serve as a valid charging instrument.

Why does a citation issued following a Class C misdemeanor arrest order the accused to appear before a magistrate? What should the magistrate do when the accused appears as instructed by the citation? Article 14.06(b) contains some clues. That subsection states that the peace officer may issue a citation after he makes a Class C misdemeanor arrest "instead of taking the person before a magistrate." Although this language lacks clarity and specificity, it is the Training Center's opinion that this language suggests that the magistrate identified in the citation must conduct an Article 15.17 hearing at the time the individual appears before him or her.

Conducting an Article 15.17 hearing following release by citation when an individual is accused of a Class C misdemeanor includes: 1) reading the oral admonishments listed in Article 15.17(a); 2) setting bail and bond conditions; and 3) consular notification if the individual is a citizen of a foreign country and automatic notification is required by treaty or notification is requested by the individual.

If a charging instrument accusing the defendant of a Class C misdemeanor has been filed in a justice court before the accused appears to receive his or her Article 15.17 warnings, the justice of the peace may accept a plea from the defendant after conducting the Article 15.17 hearing. If a sworn complaint or a duplicate copy of the citation has not been filed with the justice court at the time the individual appears, the court has no jurisdiction and may not accept a plea.

Why did the Texas Legislature grant peace officers the authority to release some people accused of crimes by citation rather than booking them into the county jail? The bill analysis for HB 2391 contains a statement of intent indicating that the bill was filed because "Texas county jails are under significant capacity pressures." Releasing some non-violent defendants who are statistically unlikely to go on the lam has helped to relieve overcrowding in counties where jail space is limited or has failed to keep up with population growth.

News coverage at the time the bill was passed also indicates that the time peace officers were spending to book individuals into the county jail for low-level offenses was a concern. Some police departments and sheriff's offices with limited resources were having a hard time keeping enough officers on patrol, and booking in a defendant for a DWLI offense can take an officer off the street for hours.

If your county is experiencing either of these issues, you may wish to point out the existence of this often-overlooked statute to your local law enforcement agencies. Increased use of release by citation may save your county—and municipalities located within your county—money in the long run.

TRANSPORTATION NETWORK COMPANIES: A DWI SOLUTION?

By Rob Daniel, Program Attorney

Texas Justices of the Peace, particularly those who live in large metropolitan areas, may have heard the term "Transportation Network Company," or "TNC," in the news lately. What is a TNC? Wikipedia defines the term as "a company that uses an online-enabled platform to connect passengers with drivers using their personal, non -commercial, vehicles." In other words, TNCs such as Uber, Lyft, and Sidecar enable individuals who wish to earn money by ferrying passengers from Point A to Point B in an automobile to do so without acquiring a taxicab license or affiliating with a taxi company. Instead, drivers who register with these services may use their personal automobiles as taxicabs. Individuals looking to hitch a ride must contact drivers by using a cell phone application to indicate when and where they would like to be picked up. Once a driver and passenger have been matched using the app and the ride has been completed, payment is made automatically using credit card information stored by the application. As you might have guessed, the services are very popular with Americans under 30 years of age, who are less likely to own a car and are more likely to own smartphones.

TNCs contend that they improve traffic safety and reduce the incidence of drunk driving. They maintain that because there aren't enough taxicabs in Austin, Houston, Dallas, and other Texas cities to whisk intoxicated bar patrons safely home at 2:00 AM, some revelers end up foolishly driving home as a result. TNCs claim that by providing additional safe transportation alternatives to those affected by overconsumption the number of DWIs will fall.

However, others argue that TNCs do not offer safe or reliable service. In Texas, municipalities have historically regulated the ride-for-hire business rather strictly. This allowed cities to create rules which discouraged discrimination. For example, taxicab companies in Austin are prohibited from refusing to pick up people with disabilities. TNCs claim that they do not discriminate, but a New York Times magazine article recently reported that Uber drivers have the ability to rate passengers on a 5 star scale. The article quotes an Uber driver, who states that "I usually don't pick people up if they're a 4 or less." It's not difficult to see how societal biases could result in a low Uber rating for a passenger, who would be effectively excommunicated from riding with Uber drivers. Additionally, some have voiced concerns that TNC operators may not be carrying appropriate automobile insurance or may not have been subjected to satisfactory background checks. However, even TNC critics seem to agree that increasing the number of vehicles-for-hire available to safely convey late night partygoers to their homes would reduce the number of drunk drivers on the road.

A major question is whether TNCs will submit to regulation by local and state governments. Many companies have claimed that they desire to "disrupt" the traditional taxicab business by operating free of traditional regulations, and have insisted on continuing to do business in Austin despite the fact that the current city code prohibits their operation. (However, Austin has proposed an ordinance which would allow TNCs to operate legally with some restrictions.) TNCs recently won approval to operate in the city of Houston. Dallas is also considering regulations which would allow TNCs to do business within the city limits. In Colorado, the state legislature has passed a law which regulates TNCs throughout the state. The Colorado statute sets minimum standards for insurance coverage and requires TNC drivers to inform their insurance companies that they use their vehicles to chauffeur passengers.

Another question is whether TNCs will expand to serve rural areas of Texas that are currently not served by taxi companies. If the Texas Legislature considers regulating TNCs across the state during the 2015 legislative session, will it propose regulations that would require TNCs to operate in Mentone as well as Midland? If TNCs refuse to add drivers in rural areas, are they truly helping to solve the DWI problem in Texas? DWI remains common in several rural areas of the state. For example, 16 DWI fatalities occurred in Jones County (population 19,973) in 2013, a rate of 8 fatalities per 10,000 residents. By contrast, Harris County (population 4.25 million) registered 2,938 DWI fatalities, a rate of 6.9 fatalities per 10,000 residents, in 2013. Unless drunk drivers traveling from the bars in Abilene to their homes in Anson are able to (and choose to) use services like Lyft and Sidecar, TNCs may not have a substantial impact on DWI rates in rural Texas communities that could certainly benefit from more transportation options.

What do you think about this issue? Can TNCs have a meaningful impact on the Texas DWI rate? Should municipalities ban TNCs? Or allow them to operate with regulations? Should the Texas legislature weigh in on this topic by proposing statewide regulations? Let us know what you think, on social media (@TJCTC on Twitter, www.facebook.com/TJCTC)or at TJCTC seminars.

LEGAL Q&A REVIEW

Q: Where do I find the law on bankruptcy and traffic violations. I have a notice sent to this court to have a fine removed, but I think the bankruptcy does not include traffic violations?

A: Filing or being in bankruptcy does NOT stay any criminal proceeding:

11 U.S. Code § 362
(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—
(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

You may deny the defendant's request.

Q: The Judge granted a occupational license to a defendant and the defendant failed to send in the fee in a timely manner and he stated DPS told him that it would take 21 business to process once the fee is received and that would go beyond the 30 days the order is good for; which the order granting the occupational license would expires and he is asking for an extension on that order. Can the Judge grant him an extension on that order?

A: No. The order is still good. What has expired is the time that the order serves as a DL, which is set by statute, and can't be extended by the judge.

Q: When a civil case is filed and a court date is set; we send out notice letters and the defendants do not normally know that they need to file a answer. Can we tell them they need to file one or give them a generate form to fill out?

A: Why doesn't the defendant know that he or she is required to file an answer? The citation generated by the justice court must state the following:

"You have been sued. You may employ an attorney to help you in defending against this lawsuit. But you are not required to employ an attorney. **You or your attorney must file an answer with the court. Your answer is due by the end of the 14th day after the day you were served with these papers. If the 14th day is a Saturday, Sunday, or legal holiday, your answer is due by the end of the first day following the 14th day that is not a Saturday, Sunday, or legal holiday. Do not ignore these papers. If you do not file an answer by the due date, a default judgment may be taken against you.** For further information, consult Part V of the Texas Rules of Civil Procedure, which is available online and also at the court listed on this citation." (See Rule 501.1, Texas Rules of Civil Procedure.)

If the court is not creating a citation which contains this statement every time a civil lawsuit is filed, the court needs to start doing so immediately.

Additionally, a civil case should not be set for trial until the defendant files an answer. (See Rule 503.3(a), Texas Rules of Civil Procedure.)

Q: We have old cases that have judgments and money owed to the State. These are getting real old and we know a judgment cannot be dismissed. What do we do with these that have been chased up one side and down the other and are not collectable?

A: Options for the court include:

1) Referring the defendants to a collections agency pursuant to Article 103.0031, Code of Criminal Procedure;

2) Reporting the defendant's failure to satisfy the judgment to DPS via OMNI pursuant to Chapter 706 of the Transportation Code; or

3) Issuing a capias pro fine for the defendant's arrest pursuant to Article 45.045, Code of Criminal Procedure.

We recommend reviewing the statutes cited above. If you have additional questions after reviewing the applicable statutes, we would be happy to answer them. We also have a webinar available in our archive on this topic, which may be helpful to review. Finally, if you plan to attend a 20 hour seminar this year, we recommend signing up for the "Noncompliant Criminal Defendants" course.

DWI BOND CONDITION SCHEMATIC PROGRAM

The Texas Justice Court Training Center's bond schematic program assists Texas counties in creating consistent conditions of bond in all DWI cases. TJCTC works with all stakeholders (including all criminal magistrates, prosecutors, and probation departments) in participating counties to establish a system for setting, monitoring, and enforcing appropriate conditions of bond. If you are interested in having your county participate in this program, please contact Rob Daniel at 512-347-9927.

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Our Mission Statement

"The mission of the Texas Justice Court Training Center is to provide quality education opportunities for justices of the peace, constables and court personnel, insuring the credibility of, and confidence in, the justice courts enabling them to better serve the people of The State of Texas."