Criminal Law—Defendant Has Burden of Proof To Exclude Evidence of Flight. *Hodge v. State,* 506 S.W.2d 870 (Tex. Crim. App. 1973), *rev'd on rehearing,* 506 S.W.2d 870 (Tex. Crim. App. 1974).

On August 22, 1969, Freddie J. Hodge was arrested and charged with two counts of robbery. Prior to his indictment he was transferred from the custody of the Dallas police to the custody of the police in Garland, Texas. While confined in the Garland jail, Hodge escaped from custody.[1] At the time of his escape the Garland police had not charged Hodge with an offense. They were investigating Hodge's involvement in a matter unrelated to the robberies with which the Dallas police had charged him.[2] At his trial for robbery the state introduced evidence of Hodge's escape from the Garland jail. The defense objected to the admissibility of this evidence on the ground that it was not relevant to the offenses for which Hodge was being tried.[3] The district court ruled that the evidence of the escape was admissible. Hodge was eventually convicted on both charges of robbery. The Texas Court of Criminal Appeals reversed.[4] The court held that for evidence of escape to be admissible, the state must present proof so connecting the escape with the offense for which the defendant is being tried that it is reasonable to infer that the escape was motivated by that offense rather than some unrelated offense.[5] On the state's motion for rehearing, the court set aside the reversal and affirmed the robbery convictions.[6] The court held that before the evidence of escape would be excluded, the defendant must affirmatively show that the escape and flight were directly connected to a transaction other than the offense for which he is being tried.[7]

The issue in *Hodge v. State*[8] involved the admissibility of evidence of flight from custody when it is questionable whether the offense under prosecution motivated the flight. In its original opinion the court relied on *Hicks v. State,*[9] which was recognized as the

1. Hodge v. State, 506 S.W.2d 870 (Tex. Crim. App. 1973), *rev'd on rehearing,* 506 S.W.2d 870 (Tex. Crim. App. 1974).
2. *Id.* at 873.
3. *Id.*
4. *Id.* at 872.
5. *Id.*
6. *Id.* at 874.
7. *Id.* at 873.
8. Hodge v. State, 506 S.W.2d 870 (Tex. Crim. App. 1973), *rev'd on rehearing,* 506 S.W.2d 870 (Tex. Crim. App. 1974).
9. 82 Tex. Crim. 254, 199 S.W. 487 (1917).

authoritative case on the issue. *Hicks* held that before evidence of flight can be introduced at trial, the flight must be so connected with the prosecuted offense that it shows a consciousness of guilt by the defendant for that offense.[10] The *Hicks* court made no specific mention of whether the state or the defendant had the burden of proof with respect to the relevance of evidence of flight.[11] The *Hodge* court, relying on *Hicks*, initially placed the burden on the state to show that the evidence of the defendant's flight was connected with the prosecuted offense.[12] On rehearing in *Hodge*, the court shifted the burden of proof to the defendant.[13] In reviewing its original opinion the court continued to support *Hicks* and held that the evidence of escape from custody must appear to have some legal relevance to the offense under prosecution; *i.e.*, it must tend to support an inference of a consciousness of guilt for the prosecuted offense.[14] The court, however, substantially modified *Hicks* by requiring the defendant who desires to have the evidence excluded to bear the burden of showing affirmatively that the offense under prosecution did not motivate the escape and flight from custody.[15]

During trial in the district court, the defendant challenged the admission of the evidence of the escape and flight as being irrelevant to the robbery offenses under prosecution. He contended that the flight occurred during custody for investigation of a matter unrelated to the robbery charges.[16] He further claimed that the state failed to show that the escape was motivated by the robbery offenses and not the second custody. Hence, the evidence of flight could not support an inference of a consciousness of guilt for the robbery offenses.[17] The majority on rehearing in *Hodge* emphasized that although the defendant was transferred to Garland, no formal charges were filed there against him. The custody relating to the charged offense was but a single continuing custody. Thus, an inference of a consciousness of guilt for the robbery offenses could be drawn fairly from the evidence of flight.[18]

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10. *Id.* at 254, 199 S.W. at 488.
11. *Id.*
12. Hodge v. State, 506 S.W.2d 870 (Tex. Crim. App. 1973), *rev'd on rehearing*, 506 S.W.2d 870 (Tex. Crim. App. 1974).
13. *Id.* at 873.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

The defendant also contended that the evidence of his transfer to the Garland police constituted evidence of an extraneous offense and, therefore, should have been excluded.[19] Admission of the evidence of transfer, the purpose of which was to further the investigation of an offense unrelated to the robbery offense, was a prerequisite to the admission of the evidence of flight because the flight occurred after the transfer. The court held, however, that the evidence of the transfer itself was not evidence of an extraneous offense, for there was no testimony before the jury concerning the reason for the transfer.[20]

Judge Roberts pointed out in his dissent that the defendant was under arrest in Dallas for the prosecuted offenses, but was transferred to Garland for investigation of a second unrelated offense.[21] The defendant was not formally charged with a second offense. Judge Roberts, however, emphasized that the presence or absence of formal charges resulting from the Garland investigation was unimportant, because flight need not be motivated by a formal charge to be a relevant circumstance.[22] The dissent concluded that the transfer pursuant to the Garland investigation effectively precluded a reasonable inference that the flight from custody was motivated solely by the prosecuted offense. This evidence was thus irrelevant.[23]

Evidence of flight has long been recognized as proof that tends to show a consciousness of guilt on the part of the accused.[24] At common law evidence of flight created so strong a presumption of guilt that in treason and felony cases the accused who fled forfeited his property, regardless of whether he was convicted or acquitted.[25] The modern view, however, is that evidence of flight only creates a presumption of a consciousness of guilt.[26] Mr. Justice White, writing for the United States Supreme Court in *Hickory v. United States*,[27] noted this change in the significance of flight from custody and that

19. *Id.* at 872.

20. *Id.*

21. *Id.* at 874-75 (Roberts and Onion, JJ., dissenting).

22. *Id.*

23. *Id.*

24. The theory that only the guilty flee existed early in history as is shown by the Biblical Proverb, "The wicked flee when no man pursueth: but the righteous are as bold as a lion." *Proverbs* 28:1 (King James). *See generally* 2 J. WIGMORE, EVIDENCE § 276 (3d ed. 1940).

25. Hickory v. United States, 160 U.S. 408, 420-22 (1896). The common law maxim *fetetur facinus qui fuget judicium* (he who flees his trial admits his misdeed) exhibits the importance of evidence of flight at common law.

26. *See* Hickory v. United States, 160 U.S. 408, 418 (1896).

27. *Id.*

it had been reduced from the common law presumption of guilt. The rationale for this change was based on the many reasons for flight, some as consistent with innocence as guilt.[28] Mr. Justice Brown, in *Allen v. United States,*[29] stated that it was error to instruct a jury that flight created a presumption of guilt or that unexplained flight was tantamount to a silent confession of guilt by a defendant.[30] He added, however, that flight of the accused was a proper factor to be considered by the jury in determining guilt.[31] The probative value of evidence of flight, however, depends upon all the facts in the case; the weight of this evidence is to be determined by the jury.[32]

In Texas evidence of flight is admissible, and this admissibility has been based on the rationale that "it is some evidence of guilt and amounts to a quasi-admission of guilt."[33] Although evidence of flight may be admissible to create a presumption of a consciousness of guilt, it alone is not sufficient to create a presumption of guilt.[34] The relevance of evidence of flight, and thus its admissibility, depends upon its relation to the particular offense for which the defendant is being tried.[35] In *Hicks v. State,*[36] the Texas Court of Criminal Appeals set forth the standard for admissibility of evidence of flight. The evidence must be "so connected with the [prosecuted] offense as to render it relevant as a circumstance bearing upon . . . [the accused's] guilt."[37]

In most jurisdictions, including Texas, the defendant can rebut the presumption of a consciousness of guilt created by evidence of flight by introducing evidence to explain his flight from custody.[38]

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28. The court in *Hickory* stated, "A person however conscious of innocence might not have the courage to stand trial, but might, although innocent, think it necessary to consult his safety by flight." *Id.* at 418. *See also* Allen v. United States, 164 U.S. 492 (1896); Alberty v. United States, 162 U.S. 499 (1896).

29. 164 U.S. 492 (1896).

30. *Id.* at 499.

31. *Id.*

32. People v. Yazum, 13 N.Y.2d 302, 196 N.E.2d 263, 246 N.Y.S.2d 626 (1963); State v. Fitzgerald, 12 Ore. App. 147, 505 P.2d 955 (1973); Martinez v. State, 140 Tex. Crim. 159, 140 S.W.2d 187 (1940).

33. Damron v. State, 58 Tex. Crim. 255, 255, 125 S.W. 396, 396-97 (1910).

34. Rossetti v. United States, 315 F.2d 86, 87 (9th Cir. 1963), *cert. denied,* 375 U.S. 814 (1963); Martinez v. State, 140 Tex. Crim. 159, 169, 140 S.W.2d 187, 193 (1940).

35. Torrence v. State, 85 Tex. Crim. 310, 212 S.W. 957 (1919); Roberts v. State, 83 Tex. Crim. 139, 201 S.W. 998 (1918); Hicks v. State, 82 Tex. Crim. 254, 199 S.W. 487 (1917).

36. 82 Tex. Crim. 254, 199 S.W. 487 (1917).

37. *Id.* at 256, 199 S.W. at 488.

38. United States v. Ayala, 307 F.2d 574, 576 (2d Cir. 1962); State v. Champ, 174 Kan. 60, ___, 254 P.2d 319, 321 (1953); Tubb v. State, 217 Miss. 741, ___, 64 So. 2d 911, 913

Generally, the defendant can offer any reasonable explanation to rebut the presumption created by evidence of flight and thereby attempt to minimize the effect of this evidence on the minds of the jurors.[39] A defendant may explain his flight by showing it was caused by threats or fear of violence[40] or that he thought it impossible to defend himself.[41] Defendants have been permitted to introduce evidence that they were induced to flee because they were told that crowds were searching for them and threatening to shoot them.[42] Thus, a defendant may explain his reason for flight although the explanation is frivolous; the reasonableness of the explanation is a question for the jury.[43]

A more complex problem arises, however, when the defendant is being held for two or more distinct offenses at the time flight occurs. Some jurisdictions require that under these circumstances evidence of flight should be excluded.[44] These courts note that when the defendant is charged with two offenses, it would be impossible to show which offense motivated the escape.[45] Thus, an inference of a consciousness of guilt for the prosecuted offense could not be fairly drawn, because either offense may have motivated the flight.[46] The majority of jurisdictions, however, will allow evidence of flight in cases in which the accused is being held for two or more unrelated offenses.[47] One basis for admitting this evidence was presented in *People v. Neiman.*[48] The court stated that it would be unfair to hold evidence of flight inadmissible against an accused who was awaiting

(1953); Alardin v. State, 491 S.W.2d 872, 875 (Tex. Crim. App. 1973); Chastain v. State, 97 Tex. Crim. 182, 184, 260 S.W. 172, 173 (1924).

39. Every explanation by a defendant may not be admissible as a valid explanation. A statement by a defendant that "he didn't have anything to straighten up with the Sheriff," made to an employer after an unexplained flight was not admissible. Orr v. State, 161 Tex. Crim. 529, 535, 278 S.W.2d 301, 304-05 (1955).

40. State v. McDevitt, 69 Iowa 549, 29 N.W. 459 (1886); State v. Hairston, 182 N.C. 851, 109 S.E. 45 (1921).

41. United States v. Greene, 146 F. 803 (S.D. Ga. 1906).

42. Green v. State, 258 Ala. 471, 64 So. 2d 84 (1953).

43. State v. Wilson, 38 Wash. 2d 593, 231 P.2d 288 (1951), *cert. denied,* 342 U.S. 855 (1951), *cert. denied,* 343 U.S. 950 (1952).

44. State v. Green, 236 S.W.2d 298 (Mo. 1951); State v. Crawford, 59 Utah 39, 201 P. 1030 (1921).

45. State v. Crawford, 59 Utah 39, 201 P. 1030 (1921).

46. *Id.* at ____, 201 P. at 1033.

47. *See, e.g.,* People v. Curtis, 7 Ill. App. 3d 520, 288 N.E.2d 35 (1972); People v. Yazum, 13 N.Y.2d 302, 196 N.E.2d 263, 246 N.Y.S.2d 626 (1963); Archie v. State, 488 P.2d 622 (Okla. Crim. App. 1971); State v. Fitzgerald, 12 Ore. App. 147, 505 P.2d 955 (1973).

48. 90 Ill. App. 2d 337, 232 N.E.2d 805 (1967).

trial on several charges and to admit the evidence against an accused who was charged with only one offense.[49] Such a procedure, in the court's view, would reward the professional criminal and punish the neophyte.[50] Other courts have reasoned that because evidence of flight is only a circumstance reflecting on the defendant's consciousness of guilt, any prejudicial result from the admission of the evidence could be corrected by the accused's explanation and a proper jury instruction.[51]

As a result of *Hodge,* Texas seems to have joined those jurisdictions that will admit evidence of flight notwithstanding the fact that the accused is charged with more than one offense.[52] Also by virtue of *Hodge,* this evidence will be admitted when it only "appears"[53] that the flight was connected with the offense for which the defendant is being tried. The result of these rules will be highly prejudicial to some defendants. The motive of the accused to flee may have been furnished wholly by his fear of prosecution for another crime, perhaps one totally unconnected to the prosetucuted offense. Thus, the act of flight may be entirely consistent with a consciousness of innocence concerning the offense for which the defendant is being tried. If that is the case, the evidence of flight would be irrelevant and yet have a decidedly prejudicial effect on the minds of the jurors. It would be unreasonable to require the defendant to divulge other charges against him or other offenses committed by him, as the introduction of these charges or offenses would be highly prejudicial or possibly even self-incriminating. If the defendant, however, failed to divulge those charges or offenses in fear of further prejudicing himself, the jury, even though unenlightened as to the true motive of the flight, would be required to base its verdict on inadequate information.[54]

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49. *Id.* at ___, 232 N.E.2d at 809.

50. *Id.*

51. *See, e.g.,* State v. Tyler, 306 S.W.2d 452, 460 (Mo. 1957); People v. Yazum, 13 N.Y.2d 302, 196 N.E.2d 263, 246 N.Y.S.2d 626 (1963); State v. Fitzgerald, 12 Ore. App. 147, ___, 505 P.2d 955, 956-57 (1973).

52. The *Hodge* court stated in dictum, "Such evidence of flight is admissible even though a defendant may be charged at the time with a number of offenses which are not related." Hodge v. State, 506 S.W.2d 870 (Tex. Crim. App. 1973), *rev'd on rehearing,* 506 S.W.2d 870, 873 (Tex. Crim. App. 1974).

53. *Id.*

54. For an example of this reasoning *see* People v. Yazum, 18 App. Div. 2d 407, 239 N.Y.S.2d 686 (1963), *rev'd,* People v. Yazum, 13 N.Y.2d 302, 196 N.E.2d 263, 246 N.Y.S.2d 626 (1963) (Fuld, Van Voorhis and Foster, JJ., dissenting); People v. McKeon, 64 Hun. 504, 505-06, 19 N.Y.S. 486, 487 (1892).

The *Hodge* court has placed the defendant who has fled from custody in a very onerous position by shifting to him the burden of exluding the evidence of flight.[55] To have this evidence excluded, the defendant must convince the court that his flight was motivated unequivocally by some reason other than the prosecuted offense.[56] Unless the defendant can show a totally innocent motive for his flight or that he is willing and able to introduce evidence of an unrelated offense as the motive for his flight, the court will admit the evidence. A specific jury instruction is required for the jury to weigh accurately this evidence and for the defendant to be protected properly from the prejudicial effect of the evidence. The jury must be instructed carefully that the evidence of flight is of no probative value unless the jury satisfies itself that the defendant's flight was motivated by the prosecuted offense.[57] The court in *Hodge*[58] did not speak to the necessity of this type of instruction, but only in this way can the slight probative value of this circumstantial evidence be balanced with its highly prejudicial effect.[59]

An argument can be made that the introduction of this evidence would have the desirable effect of working as a deterrent to escape by persons in custody. The state certainly has an interest in preventing escapes. This interest is furthered, however, by the statute which makes flight from custody a separate offense.[60] At the present time, the defendant who escapes from custody is not only criminally liable for the escape, but also the evidence of the escape may be used against him to show a consciousness of guilt for the offense under which he was being held. Escape from custody must be discouraged, but the appropriate means of discouragement is to recognize the escape as a separate offense, not to use it as an indica-

55. Hodge v. State, 506 S.W.2d 870 (Tex. Crim. App. 1973), *rev'd on rehearing*, 506 S.W.2d 870 (Tex. Crim. App. 1974).

56. The court in *Hodge* stated, "If the defendant offers evidence that the escape and flight may have sprung from some other cause, but its connection to the offense on trial remains a logical one, the evidence would still be admissible, the defensive evidence going only to the weight of the evidence." *Id.* at 873.

57. *See, e.g., People v. Yazum* where the court stated, "This court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of the crime charged." People v. Yazum, 13 N.Y.2d 302, ____, 196 N.E.2d 263, 264, 246 N.Y.S.2d 626, 628 (1963).

58. Hodge v. State, 506 S.W.2d 870 (Tex. Crim. App. 1973), *rev'd on rehearing*, 506 S.W.2d 870 (Tex. Crim. App. 1974).

59. *See, e.g.*, State v. Tyler, 306 S.W.2d 452 (Mo. 1957).

60. TEX. PENAL CODE ANN. art. 38.07 (1974).

tion of a guilty conscience for an offense that may not have motivated the escape.

The *Hodge* court, by excusing the state from having to present evidence connecting the flight with the prosecuted offense,[61] has indicated a disregard for the constitutional premise concerning the presumption of innocence in criminal trials. The basic tenet of our system of criminal justice is that a man is innocent until proven guilty; the state has the burden of proving his guilt.[62] Accordingly, the state also must have the burden of showing the relevance of all evidence it offers to prove the guilt of the defendant. Evidence of flight should not be admitted unless it can be shown that it is directly connected with the offense under prosecution. Only when a valid connection is established between evidence of flight and the particular offense under prosecution can an inference of a consciousness of guilt for that offense be drawn.[63] Thus, the state should shoulder the burden of proving the connection between the flight and the offense. In this way only, can the presumption of the defendant's innocence be fully preserved.

Stephen L. Baskind

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61. The *Hodge* court only required that the evidence of flight appear relevant to be admitted. "We hold that to support admission of evidence of escape from custody and flight it must *appear* that the escape and flight has some legal relevance to the offense under prosecution." Hodge v. State, 506 S.W.2d 870 (Tex. Crim. App. 1973), *rev'd on rehearing*, 506 S.W.2d 870, 873 (Tex. Crim. App. 1974) (emphasis added).

62. *In re* Winship, 397 U.S. 358, 361-64 (1970).

63. *See* Hodge v. State, 506 S.W.2d 870 (Tex. Crim. App. 1973), *rev'd on rehearing*, 506 S.W.2d 870, 875 (Tex. Crim. App. 1974) (Roberts and Onion, JJ., dissenting).