

# Environmental Enforcement and Crimes Committee Newsletter

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## ***Intentional Release Held "Use of a Deadly Weapon" -- State v. Lashley, No. F04-01663 (283rd Dist. Ct. Dallas County, Tex. January 4, 2005)***

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[In order to timely report this case, this synopsis was prepared from facts obtained from interviews of the Honorable Judge Vickers L. Cunningham, Sr., Judge, 283<sup>rd</sup> Criminal District Court, Jay Ethington, counsel for the defendant, and Robert P. Abbott, appellate counsel, without the benefit of the trial transcript.]

The State of Texas may have set a national precedent last month by successfully convincing a Dallas jury that an intentional release of sewage was "use of a deadly weapon" with the intent to cause harm. In addition to the ruling, the facts and trial of this case are loaded with enough "smoking guns" to cause some corporate and municipal officials to run for cover.

The defendant, an unemployed computer specialist, found work maintaining portable toilets. His job was to empty "porta-potties" after adding disinfectant to the human waste and, when his vacuum truck was full, to transport the material to a wastewater treatment plant for disposal. He had worked for less than four months when, during "Sweeps," a local television station broadcast a videotape showing the defendant releasing the contents of his truck into a ditch/creek on four separate occasions. The intermittent stream eventually led to the Trinity River, the longest river in Texas, whose water in the Dallas area is approximately 85% wastewater effluent from publicly owned treatment works.

Not surprisingly, the bill of indictment, addressing only the release in January 2004, charged the defendant with the intentional and knowing discharge of waste and pollutant, "to wit: sewage" into a water of the state without a permit in violation of Section 7.145 of the Texas Water Code. The penalty -- no more than 5 years imprisonment and/or a fine of \$1,000-\$100,000.

However, in a surprise tactic after the defendant would not accept the State's offer of a plea bargain requiring mandatory incarceration, the State reindicted the defendant a month before

trial to include the allegation that the defendant intentionally and knowingly used a deadly weapon, "to wit: sewage" in a manner that was capable of causing death and serious bodily injury in violation of Section 1.07(17) of the Texas Penal Code.

The "deadly weapon" offense is traditionally used when firearms are involved with a crime or sometimes when an automobile is driven so recklessly that it causes a death. However, the definition is broader. The Texas Penal Code at 1.07 (17) (B) defines "deadly weapon" to mean: "anything that is used or intended to be used with the intent to cause and is capable of causing death or serious bodily injury." So, theoretically, anything can be a deadly weapon depending upon the manner and means used so long as it is capable of causing a serious tort. In a strange way, it arguably supports the scientifically recognized principle that "the dose makes the poison."

In reality, the deadly weapon offense carries more punishment than meets the eye -- especially when compared to pollution cases. The rules governing the opportunity for parole/probation are different and more stringent. Most importantly, if a defendant is sentenced to prison, he is not eligible for parole until one-half of the sentence has been served. The appeal bond considerations are different and usually more stringent. And, prisoner privileges and work assignments are more restricted than for polluters.

At trial, the judge allowed the television station to film the proceedings. The original broadcast and additional footage was shown to the jurors -- including a scene where the television reporter waded in the waste to sample the water wearing minimal protective gear. The television producer offered testimony about the incidents. No mention was made of the timing of the disclosure or why the media taped four events (rather than one or two) before coming forward. There was no videotape of the state-approved clean up conducted by the defendant's employer.

The County Health officer testified that 500 gallons of sewage (the maximum that the vacuum truck could hold) was capable of causing serious bodily injury, particularly in children. The defense proffered a recent unprosecuted incident by way of comparison. In March of 2004, a sluice gate malfunctioned at the Trinity River Authority sewage treatment plant dumping millions of gallons of raw sewage "launching manhole covers into the air and sending geysers as high as 4 feet" before depositing the waste onto a golf course and into the Trinity River. The health official discounted the seriousness of the incident explaining that the TRA's raw sewage was diluted and would not likely cause harm because the spilled sewage contained both toilet waste and waste from domestic activities, such as washing, bathing and food preparation. A TRA spokesman, commenting on television about its incident, said the spill would not harm people although it could kill a few fish.

The defendant admitted that he released the material but denied that he intended to hurt anyone. He pointed out that the ditch was already contaminated with other refuse and the river in the area had previously been classified as "septic."

The jury was charged with determining not only whether the defendant had intentionally caused water pollution without a permit but also whether the defendant "used a deadly weapon, namely sewage, during the commission of the offense?" The jury charge defined

“deadly weapon” as: “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.”

The jury found the defendant guilty of the water pollution offense and made a deadly weapon finding. The jury assessed punishment at 5 years imprisonment with a \$10,000 fine and recommended probation. The judge, incensed by the crime, required 5 months of incarceration in the county jail, “one month for each month of employment” in addition to a 10 year term of probation and a \$10,000 fine. Before the defendant was led away in handcuffs to begin serving his sentence, the judge further chastised the defendant stating that the offense was, “Nasty.”

The case is being appealed by a court appointed lawyer who will likely argue that there was insufficient evidence to support the finding of use of a deadly weapon. However, until such time as an appellate decision is rendered, this case stands as Texas precedent. Terrorists, septic tank owners, businessmen and city employees beware – if you consciously release anything “nasty” into waters of the State of Texas – the release may trigger a finding and punishment more egregious than merely causing pollution. And, at least in Texas, a dose of sewage may be poison.

Perhaps another court on another day will determine whether the media has an immediate duty to report its observation of a crime when a deadly weapon is involved.