

VICTORIA ADVOCATE

DA won't plea bargain DWI cases, causing courtroom jam

By [Jessica Priest](#)

April 25, 2015

A policy that forces every misdemeanor drunken driving case to go before a jury is creating a traffic jam in Victoria County courtrooms.

More than 100 are scheduled to go to jury trial by Dec. 7.

In 2014, there were only four.

At this rate, those arrested today on suspicion of driving while intoxicated won't get their day in court until 2016.

"We're going to have to make adjustments or something is going to crack," defense attorney Steven Kidder said.

Several cases last year triggered the policy, including one that involved Christopher Cordil-Cortinas. He fatally crashed into Cynthia Partida while intoxicated less than 24 hours after being released from jail.

He had been caught drinking while driving three times before. His third offense was a felony, for which he had received probation, and community members wondered why he wasn't incarcerated.

Victoria County Criminal District Attorney Stephen Tyler said he realized afterward the best way to get the community to take DWIs more seriously is by presenting more facts to them. A jury trial is his vehicle, he said.

But instead of focusing on felony DWI defendants, such as Cordil-Cortinas, who received probation in line with the state average, Tyler is going after misdemeanor offenders.

For at least the past three years, prosecutors were offering probation for misdemeanor DWI cases at a higher rate than the state average. They did this by offering plea bargains.

"The public doesn't go to an accident scene. They don't see anybody cut out of a car. They don't have to sit down with victims. They don't have to attend autopsies. That's all the grittier part of the crime, which makes it real," he said. "The closest they'll ever get to it is whatever evidence I put on, but that's infinitely closer than a plea bargain."

The change doesn't necessarily mean members of the community will be deciding DWI punishments more or even that more defendants will be incarcerated, however.

That's because defendants still have a constitutional right to request they be sentenced by a judge after they are found guilty by a jury.

And eight of the nine defendants found guilty by a jury so far this year have done just that.

Purpose of plea bargains

About 98 percent of criminal cases are resolved with a plea bargain, according to the State Bar of Texas.

Plea bargains avoid the time, cost and uncertainty of going to trial. They involve less people. Under a plea bargain, defendants usually either plead guilty to a lesser charge or plead guilty on the promise that the prosecution will recommend a more lenient sentence, according to the American Bar Association.

Some Victoria defense attorneys say plea bargains are ideal for misdemeanor DWI cases for those reasons.

Some even say their clients would plead guilty if it were not for the policy change.

"I wish we could change the policy, so my clients who feel they are guilty can accept their responsibility and pay their debt to society," defense attorney Alex Hernandez Jr. said.

Hernandez's client's case was dismissed after it had been on the docket for 10 months because prosecutors were not ready to go to trial. A witness was not available. They can re-file charges.

"She's possibly going to have this looming over her for another year, and she's going to have to pay to retain me again," he said.

Now, if defendants plead guilty outright, the state will ask a jury to decide their punishment, which Kidder explained is not ideal because a jury's sentence is less predictable than a judge's.

"Jury members may try one or two cases in their lifetime. Judges try cases constantly. ... I don't mind gambling with my own fortune, but I don't want to throw my clients out there," Kidder said.

Juries hearing DWI cases so far have made their decision on guilt and innocence in between five minutes to an hour.

In the case of Natividad Moreno late last month, some 30 potential jurors, who were asked questions designed to weed out those with biases, seemed to know how to answer before the attorneys had even finished speaking.

That's because the group had been through the process four times before. They were the last to be picked for a fifth DWI trial that week.

"I could probably pick one of you to try the case. How would you like that?" Assistant District Attorney Barbara Agbu asked, jokingly.

While some wore bored expressions on their faces, others took the proceedings seriously.

One man told Agbu he'd have to know when a breathalyzer was last calibrated to consider evidence law enforcement obtained from using it.

Howard Motal, 51, fell into the latter category.

"I'd rather be here in the air conditioning looking out this picture window than at work in the oil and the gas. I will say their coffee needs improvement, though," he said, jokingly.

Motal didn't know that all DWI cases must go to trial, but thought handling it that way was "over ambitious."

"I feel on the first offense you can be a little lax on enforcement," he said. "On the third one, you slam the door."

Police arrested Moreno, 41, after they noticed him parked on the wrong side of the road. He admitted to consuming 12 beers in two hours, and they found one open beer in his car, according to court documents.

A jury found him guilty after deliberating for less than 20 minutes.

Effect on the courts

How Tyler's office now handles misdemeanor DWI cases has touched every aspect of the courts.

The cost of trying every case before a jury, while hard to estimate this early into the change, is higher.

Moreno, for example, needed an interpreter all day because he didn't speak English. The only available one was from Houston.

With more jury trials, the county will pay prosecutors, clerks, bailiffs, court reporters and defense attorneys more for their time.

Kidder, for example, plans to bill the county for 11 hours he spent representing an indigent person charged with DWI.

Because that case went to trial, he is choosing to be paid by the hour rather than by the flat rate he would have received had he spent 45 minutes negotiating a plea bargain.

There are also only two court-at-law judges and a limited amount of space in which the cases can be heard.

Victoria County courts-at-law, where misdemeanor DWI cases are heard, have jury trials once every two weeks. Judges Travis Ernst and Daniel Gilliam, meanwhile, are doubling up on their other dockets, which also contain civil, probate and juvenile cases.

Jack Marr, judge of the 24th Judicial District Court, which deals with felonies, has heard at least one of the misdemeanor DWI cases so far. Former Court-at-Law No. 1 Judge Laura Weiser, who now lives near Austin, has volunteered to hear them, too. As a judicial resource liaison at the Texas Center for the Judiciary, which receives grants, she will not have to charge the county.

So far, DWI trials have been held in what are technically district courtrooms on the third and first floors and in the commissioners' courtroom on the second floor. They may even be heard in justices of the peace' courtrooms, although the sheriff's office may object to that because some of the rooms are not as secure, Gilliam said.

Before the policy announcement, county commissioners voted to re-purpose an old fire station next door for courthouse expansion, but in October, officials had not begun drawing up the plans.

"I'm going to try to do my best to get the cases to trial as expediently, economically and efficiently as possible," Gilliam said.

The Victoria County Sheriff's Office will continue to provide bailiffs regardless of how many misdemeanor DWI trials are scheduled, said Capt. Philip Dennis.

Dennis said only one bailiff is present during misdemeanor DWI trials because they don't anticipate any disruptions. In misdemeanor DWI trials, there aren't upset victims or victims' families in the audience. There are currently 18 deputies assigned to the court extradition unit.

Victoria County Clerk Heidi Easley also has not complained about the workload, Tyler said.

In fact, to critics who say jury trials should be reserved for more serious offenses, Tyler argues that courts-at-law have been historically underutilized.

Seventeen is the most misdemeanor jury trials that have occurred in a year since 2011, according to the Texas Office of Court Administration.

DWI and assault family violence cases are also the misdemeanor offenses with the most severe punishments, the most at stake, he said.

"DWIs are suitably egregious, and they weren't going to trial anyway," Tyler said.

Tim Lynch, director of the Cato Institute's projects on criminal justice, opposes plea bargaining and its prevalence.

The Cato Institute is a Washington, D.C.-based public policy research organization.

"If the argument is that we'll have more trials, well that's what the Constitution says," Lynch said. "This is something the government should spend money on. If we need to hire more judges to hear more trials, then that's what should happen."

Why not felonies?

Hernandez thinks the policy should apply to second- and third-time DWI offenders.

That's because unlike those who are pulled over on their way home from a bar and who haven't caused any damage, repeat offenders have already had a chance to learn from their mistakes, he said.

"Being in the jail overnight usually scares the you-know-what out of most of my clients. They're like, 'I'm never going to drink again,'" Hernandez said.

Tyler said he chose to focus on misdemeanor DWIs because they can escalate to a felony DWI almost by happenstance.

For example, John Florida, who was convicted of fatally crashing into Paula Nersesian after drinking at Tokyo Grill and Sushi Bar, did not have a prior DWI.

"The most dangerous drunk is a new drunk. It's the guy who would be a misdemeanor offender except he ran over someone. I want him to get in a cab," Tyler said.

If Tyler can't get people to take DWI more seriously, he'll be satisfied if he can change their behavior simply by making the experience as inconvenient as possible, he said.

The punishment for a felony or a third DWI, which is two to 10 years in prison and a possible fine of \$10,000, can also act as a deterrent.

And there are more tools on felony probation to rehabilitate someone, he said.

First, felony probation can last up to 10 years whereas misdemeanor probation can last up to two. Second, the court can sanction offenders to treatment facilities similar to incarceration and revoke probation, sending them to prison for the maximum time.

Tyler explained felony DWI cases are also not taken to jury trial as often as misdemeanor DWI.

That's because the Legislature has indicated other offenses, such as capital murder and continuous sexual abuse of children, are more serious.

Offering a plea bargain isn't synonymous with receiving probation, either.

In 2014, there were no felony DWI jury trials. Seventeen people were incarcerated while 19 were placed on probation for felony DWI then, too, according to the Texas Office of Court Administration.

The future

Matt Manning, an attorney who practices mostly in Corpus Christi, was the first to request a jury assess punishment for his client Robert Clifton Thomas, 61.

Thomas was pulled over in Victoria by a Texas Department of Public Safety trooper who had observed him swerving. He did not consent to a giving a breath or blood sample, according to his arrest report.

The only evidence the state had was a video that showed Thomas nervously admitting to the trooper, "OK, maybe I had one too many," Manning said.

"If it's a case where it is on a borderline, then a jury may be more inclined to assess less punishment or put themselves in that person's shoes," he said.

A jury sentenced Thomas to one year of probation and 40 hours of community service.

For the other eight DWI cases heard so far, the judges are resetting sentencing for about a month after DWI jury trials conclude, so they can order what's called a "pre-sentence investigation report." Prepared by the probation department, the report delves into the individual's socioeconomic and criminal background as well as recommends whether the defendant is suitable for probation.

Tyler has said these reports are not necessary in such open-and-shut cases and delaying sentencing may even be the judges' way of avoiding transparency. He would prefer that reports be ordered earlier in the process and worried the cases wouldn't be fresh on the judges' minds.

"If we can sentence a murderer the same week as they are finding guilt, I don't see why we can't in a DWI," Tyler said.

Gilliam said he takes notes throughout a trial that he can refer back to at sentencing.

He thinks pre-sentence investigation reports are valuable. Ordering one before a guilty verdict would be premature.

"I'm just trying to make the best use of our resources," said Gilliam, who like Ernst, declined to offer an opinion about the policy.

Tyler has said he's not necessarily looking for harsher punishments.

"I'm not saying it's necessarily a perfect tool," Tyler said, "This is the best I can do with what I have."

Deterrence seems to be a goal everyone thinks is worth achieving. It's how to achieve it that is still up for debate.

Manning thought under the current system, defendants are being stripped of their right to choose how their cases are handled.

"Their hands are bound," he said.

Victoria defense attorney Constance Filley-Johnson said one tragic case shouldn't dictate how to handle them all.

"There's not an easy solution here. There isn't. Some terrible things have happened. Lives have been lost. It's definitely a situation that needed to be assessed, but I don't know if the current policy is the smartest approach," she said.

Weiser, meanwhile, continues to champion programs in which misdemeanor DWI offenders are monitored closely on probation in her new role.

Participants in a similar program in Michigan were found to be 19 times less likely to re-offend, according to National Center for DWI Courts.

"My hope would be that everybody is doing their best to be efficient and effective and doing things for no other reason other than it's going to benefit the county and make the roads safer. That's what everybody should be working for," Weiser said.