# A Peace Officer's Guide to Texas Law ---- 2009 Edition

by

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# TEXAS POLICE ASSOCIATION

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This is the Thirteenth Edition of **A Peace Officer's Guide to Texas Law,** and is being provided to members of the Texas Police Association as a benefit of membership. The *Police Legal Digest*, contained in each issue of the *Texas Police Journal*, and the **Guide** are intended to serve as vital sources of up-to-date information for Texas Peace Officers.

Many departments provide all their officers with membership in TPA so that each officer will receive a copy of the **Guide***,* a monthly edition of the *Police Legal Digest*, and other timely articles. This is a wise expenditure of training funds in these times of shrinking budgets. Any department interested in signing up their officers should contact the Texas Police Association office for additional information. For individual membership, an application can be found on our web site at www.TexasPoliceAssociation.com, in the *Texas Police Journal*, or in the **Guide**.

The Texas Police Association deeply appreciates Gerald S. Reamey, Professor of Law, St. Mary's University School of Law, for his tireless efforts in preparing the *Police Legal Digest* each month and the monumental task of writing and assembling this edition of **A Peace Officer's Guide to Texas Law**.

E. C. “Joey” Sherman
Executive Director

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Gerald S. Reamey
San Antonio, Texas
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# PREFACE

This work is intended to highlight and describe the more significant legal decisions during the period between the end of July, 2007, and July, 2009. The summaries of cases from that period have been taken from the *Police Legal Digest*, a monthly feature of the *Texas Police Journal* that reports on important opinions from the various Texas and federal courts that establish law for Texas.

This book is the thirteenth in a continuing series of books reporting significant changes in law for Texas peace officers. Reference to the preceding editions (1985 - 2007), along with this edition, will provide the reader an overview of the legal changes instituted over the last twenty-plus years.

To provide an overview of the trends in law during the latest reporting period, the case summaries have been organized in chapters according to subject area. A Table of Cases is included for ready reference when the reader knows the case name. The overall structure of the book may be seen in the Table of Contents, which provides the easiest access to topics. This edition is published in searchable, digital form, making possible "key word" searches of the entire text, allowing the reader to search for and find topics of interest in a much more efficient and effective way than the headnote index that previously was a part of "hard copy" editions of this book.

Some cases decided early in the reporting period already have been overruled, vacated, or modified by subsequent decisions. Some of these cases have been retained despite the fact that they may not represent the current state of the law because they illustrate the trends in Texas or constitutional law. When a reported case has been modified, but is nevertheless included in this book, the case changing the result also will be reported in the same subchapter in which the earlier opinion summary appears. If a case has been overruled or vacated, or reversed on other grounds than those reported, a notation of that fact appears with the summary.

To further aid the reader, each topic begins with an introduction describing the more significant cases collected in that chapter. These introductory remarks are designed to place the summaries in context so that their impact on Texas law may be seen more easily and accurately. Cases selected for digesting which were intended merely to reinforce known and settled rules or procedures may not be accompanied by additional comment in the introduction. The knowledgeable reader may gain some appreciation for the development of Texas law over the last two years by reading only the topic introductions. More detailed information is available by study of the case summaries to which the text refers.

Where possible, citation is to the National Reporter System because most readers have access to decisions reported within that system. Some cases were decided so recently that only slip opinions were available at the date of publication. In such instances, the slip opinion number or Westlaw citation, issuing court and date have been noted to assist the reader in finding the full opinion. Readers are cautioned, however, that slip opinions may be withdrawn by the issuing court prior to their publication and they may not become law in some instances.

Several additional cautionary notes included with the first *Police Legal Digest* bear repeating here. The cases selected for digesting do not purport to represent the whole of Texas or federal constitutional law, or even the whole of a narrow portion of those bodies of law. Instead, they were selected because they either established new law or changed existing law, or because they restated important principles of law relevant to law enforcement.

All of the cases appearing in this book and in the *Police Legal Digest* concern some facet of law enforcement. They should not be considered a comprehensive treatment of recent legal precedent in criminal law or criminal procedure generally. For example, many important cases relating to criminal trial procedure intentionally have been omitted. Such cases would be of importance to criminal trial lawyers but do not concern directly the investigative stages of prosecution in which peace officers work. Similarly, selected civil cases have been included, but they represent only those areas most important to law enforcement agencies and personnel. Cases involving federal civil rights suits, for instance, might be reported because of their obvious relevance, but other tort causes of action usually would not be included unless they involve police civil liability.

Cases involving traffic offenses and DWI previously had been arranged according to whether the issue treated in the decision was one of search, arrest, confession, or some other matter than occurred in the course of a traffic stop, rather than by segregating them. So many opinions now involve traffic stops that these cases, including DWI, have been collected in a separate chapter. Some cases in which the traffic offense was merely incidental to the primary legal issue have been assigned to the chapters dealing with other issues. Readers wishing to review the development of case law involving DWI and traffic offenses should turn first to that chapter, but should not overlook the opinions relating in some way to those topics that may be reported elsewhere.

The cases reported come from many different federal and state courts. They are, however, all cases dealing with the law in Texas. Federal constitutional issues decided by the United States Supreme Court, federal circuit courts of appeal, or federal district courts may be included because those decisions form part of the law applied by and to Texas peace officers. Opinions by the Texas Court of Criminal Appeals, Texas courts of appeal, or the Texas Supreme Court also are included, of course, because they are binding precedent for Texas citizens. Persons from other jurisdictions should use this guide with particular care since it is written expressly for the Texas officer.

Perhaps the most important cautionary note is that this book has been named a "guide" because it is not intended to have a broader purpose. The case summaries which follow have the virtue of being relatively short renditions of opinions and they are, hopefully, easily read and understood. Unfortunately, in the summarizing process the risk is always present that important facts will have been omitted or that the editor's interpretation of the case is subject to dispute. For this reason, the reader is cautioned not to rely on these summaries and generalizations in making legal decisions. As noted in the introduction to the first *Police Legal Digest*, "The only safe course is to obtain the full opinion and decide whether it applies to your situation."

Despite the necessity for caution in using these summaries, it is hoped that they will serve as a valuable guide in finding relevant recent precedent and in providing the reader an overview so difficult to obtain from close study of numerous lengthy opinions. Taken in this spirit, this guide may prove useful to those engaged in law enforcement, both as an aid in training and as a legal resource for the men and women who police our state. Readers' comments are of great interest and suggestions for improvement consistent with the purpose of this guide are most welcome.

# CHAPTER 1 - SEARCH AND SEIZURE

## A. INTRODUCTION

As noted in the 1985 edition of this book, "the law of search and seizure is the most volatile with which the peace officer must contend." This point remains true and is amply illustrated again by the number and scope of the cases decided related to search and seizure during the past two years.

Despite the title of this chapter, "seizure" of persons is addressed only as it involves standards of probable cause or limited searches based on reasonable suspicion. Cases related more directly to the execution of arrests are collected in Chapter 3. The limited focus of this chapter on "searches" has not resulted, however, in a limited number or variety of opinions to be considered. Indeed, the number of cases reported in this chapter greatly exceeds the number of cases in any other chapter, as it has in every edition of this book.

In an effort to order these cases in a logical and practical way, they have been categorized and organized in the way in which search questions usually are approached. That is, they are arranged by first considering "threshold" issues such as standing and expectation of privacy. Then follow cases that relate to varying levels of suspicion because it is by reference to those levels that peace officers must decide whether and how extensively they may search.

The largest subchapter deals with exceptions to the warrant requirement, an illustration of the prominent part these cases play in the law of search and seizure, particularly insofar as they often reflect interpretations of the United States Constitution or Texas Constitution. Also included in this chapter are cases involving the exclusionary rule, whether in its federal or Texas version, and cases deciding the reasonableness of searches in which a warrant was executed.

Many searches occur during a traffic stop. This chapter contains cases in which the primary point of the opinion is one of search law. Cases considering the stop itself, or the statute authorizing the stop, can be found in Chapter 4, "Traffic Stops and DWI."

## B. STANDING

A primary concern for persons wishing to contest a search, usually through application of the exclusionary rule to suppress evidence, is whether they have "standing" to complain about the search that led to the evidence. Without standing to complain, the defendant may not invoke the exclusionary rule because his personal constitutional rights have not been violated. Standing turns on whether the defendant had a "legitimate expectation of privacy" or "reasonable expectation of privacy" in the area or item searched. It no longer depends upon whether the defendant had a possessory or other property interest that was violated, although that fact might bear on whether a privacy expectation is "legitimate" or "reasonable."

Although a vehicle passenger may lack standing to contest the search of the car in which he or she is riding because the passenger lacks a reasonable expectation of privacy in the vehicle, the passenger does have standing to complain about the basis for the stop. This is because, when the car

is stopped, everyone inside the vehicle necessarily is "seized." In *Brendlin v. California*, the Supreme Court made this rule clear, resolving any lingering doubt about the standing of the passenger to seek suppression because the stop of the car in which he was riding was unlawful. For cases deciding whether a traffic stop was lawful, see Chapter 4.

## SEARCH AND SEIZURE - PASSENGER RIDING IN A VEHICLE STOPPED FOR A TRAFFIC OFFENSE WAS "SEIZED" FOR FOURTH AMENDMENT PURPOSES.

### *Brendlin v. California*, 127 S.Ct. 2400 (2007)

A deputy and his partner saw a parked vehicle in the early morning hours with expired registration tags. According to the dispatcher, the vehicle's registration was being processed. Later, the officers spotted the car on the road with a temporary operating license that indicated the vehicle could be operated legally until the end of the month a few days away. Although the permit was not unusual and was displayed in a normal fashion, the officers stopped the car to verify that the permit matched the vehicle.

As the deputy asked the driver for her license, he recognized the passenger as one of two brothers. He knew that one or the other brother had dropped out of parole supervision and asked the passenger for identification. After calling for backup, the deputy confirmed that an arrest warrant was outstanding for the passenger for parole violation. Before other officers arrived, the deputy saw the defendant briefly open and then close the passenger door of the car.

After backup officers arrived, the deputy ordered the defendant out of the car and placed him under arrest. In a search incident to arrest, an orange syringe cap was found on the man. The driver of the car was frisked and syringes and a plastic bag of a green leafy substance were found. Following the driver's arrest, the car was searched. Tubing, a scale, and other items used in the production of methamphetamine were discovered.

The passenger was charged with possession and manufacture of methamphetamine. He moved to suppress, arguing that the officers lacked probable cause or reasonable suspicion to stop the car. He did not claim a violation of his personal Fourth Amendment rights by the search of the vehicle, but contended instead that his rights were violated by the seizure of his person. The trial court denied the motion. The judge found the stop to be lawful, and that the defendant had not been seized until he was ordered out of the car and formally arrested. The defendant pleaded guilty and appealed.

An intermediate state appeals court reversed, but the state supreme court upheld the denial of the defendant's motion, holding that a passenger is not seized unless he or she is "the subject of the peace officer's investigation or show of authority." Since the driver, and not the defendant, was the "exclusive target" of the traffic stop, he was not seized. A passenger in that situation, the court reasoned, would feel free to leave once the vehicle was stopped.

The defendant petitioned the U.S. Supreme Court for review of the decision. The Court granted review to consider whether a traffic stop constitutes a seizure of both a vehicle's driver and any passengers.

**Holding:** A person is "seized" when his or her freedom of movement is restrained or

terminated "by means of physical force or show of authority." Even an "'unintended person ... [may be] the object of detention' so long as the detention is "willful" and not merely the consequence of 'an unknowing act.'"

Physical force is not required to make a seizure; it may be made by a person's actual submission to an officer's show of authority. When that submission occurs through passive acquiescence, however, the evidence must show that "a reasonable person would have believed that he was not free to leave." If a reasonable person would feel free to "decline the officers' requests or otherwise terminate the encounter," there has not been the kind of submission required for a seizure. A traffic stop clearly entails a seizure of the driver, despite the fact that the stop is brief and its purpose is limited. There is no distinction in this regard between the driver and the passengers.

There was no justification in this case for stopping the car in which the defendant was riding, a point that the State conceded. Whether he was seized is determined by asking whether a reasonable person in the defendant's position when the vehicle was stopped would have felt free to "terminate the encounter." "Any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." A passenger's travel is curtailed during a traffic stop just as much as the driver's.

If a car is stopped, people would not ordinarily expect a police officer to allow people to come and go freely from the scene. And if the driver is suspected of criminal activity, a passenger would feel that his association with the driver would cast suspicion on him as well, and subject him to some scrutiny.

Officer safety permits ordering a passenger out of a car as a precautionary measure, even without reasonable suspicion that the passenger is dangerous. Because of the risk of harm, officers "routinely exercise unquestioned command of the situation." This level of control during a traffic stop is at odds with any idea that a passenger would feel free to leave without the officer's permission.

While an officer might intend only to detain and investigate the driver when he stops a vehicle, his subjective intent is irrelevant to whether the passenger reasonably would feel free to leave. It is the "intent that is conveyed to the person confronted" that matters, and not whether that person actually is the target of the investigation.

Because the defendant reasonably felt that his freedom of movement was restricted when the car in which he was riding was stopped, he was "seized" for purposes of the Fourth Amendment. That seizure was not supported by reasonable suspicion or probable cause and was unlawful. Consequently, his suppression motion should not have been denied on the ground that he was not seized.

**COMMENT:** The holding in this case is hardly surprising given the Court's treatment of the issue in other cases. Nevertheless, the Court had not previously stated clearly that passengers are seized to the same extent as the driver during a traffic stop. This decision is an important one because it gives passengers standing to complain about the legality of the stop, even if they do not always have standing to complain about a search of the vehicle in which they are riding.

## C. EXPECTATION OF PRIVACY

Reasonable expectation of privacy serves a purpose other than determining standing. It also guides courts in deciding whether a "search" has occurred at all. If a person has no expectation of privacy in the area or thing searched, or if his expectation is unreasonable, the Supreme Court considers the governmental activity that led to the discovery of the item not to have been a search. Since it is not a search, the Fourth Amendment is inapplicable, as is the exclusionary rule.

An example of this analysis is in the "plain view" cases which are discussed in more detail further on in this chapter. If, for instance, a person takes out and lights up a marijuana cigarette in the presence of a police officer, has the officer discovered the marijuana by "searching" for it? The Supreme Court would say "no" because the defendant voluntarily gave up any reasonable expectation of privacy he had in the contents of his pocket or in the marijuana itself when he exposed it to the view of any interested passerby.

The difficulty in using this analysis is that courts may disagree as to whether an expectation of privacy is "reasonable" or not. The circumstances surrounding the discovery of evidence usually determine reasonableness, with the court weighing the person's privacy interests against society's interest in effective law enforcement. Ordinarily, courts defer to a person's privacy expectations in a residence, but that deference does not extend to common or public areas.

1. Generally

Expectation of privacy was at the heart of the court's decision in *Murray v. State*. The defendant argued that the federal HIPAA law was violated by permitting a Texas grand jury subpoena to order release of the defendant's medical records for investigation of DWI. Although the federal law creates an expectation of privacy in personal medical information, that law does not preempt the state from ordering disclosure of the same information for investigative purposes. Whether such disclosure is reasonable in a given case is determined by balancing the patient's privacy rights against the state's interest in effective law enforcement.

**SEARCH AND SEIZURE - GRAND JURY SUBPOENA FOR HOSPITAL'S RECORDS NOT PREEMPTED BY FEDERAL PRIVACY LAW PROTECTING PATIENT'S MEDICAL INFORMATION.**

***Murray v. State*, 245 S.W.3d 37 (Tex. App. - Austin 2007)**

The defendant was involved in a single-car accident in which he was injured. At the scene, he was placed under arrest for DWI by the investigating officer before being taken to a hospital for treatment. Hospital staff took a blood sample for treatment purposes which indicated a blood-alcohol level of .252. A police officer also requested a specimen of the defendant's blood at the hospital, but the defendant refused.

The State obtained the results of the lab work done at the hospital by grand jury subpoena. Prior to trial, the defendant moved to suppress the blood test results that were subpoenaed, arguing that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) created an expectation

of privacy in medical records which preempted contrary state law.

While the trial court agreed that the defendant enjoyed an expectation of privacy in his medical information, it denied the motion to suppress. The court held that the grand jury subpoena fell within an exception created by HIPAA. Following this ruling, the defendant pled guilty pursuant to a plea agreement and preserved his right to appeal. He appealed the trial court's holding to the court of appeals.

**Holding:** Pursuant to HIPAA, privacy standards were created for patients' medical information. The privacy rule applies to health plans, health care clearinghouses, and health care providers, and is designed to protect consumers and enhance their rights of access to their own health information.

In *State v. Hardy*, 963 S.W.2d 516, the Court of Criminal Appeals considered whether drivers have an expectation of privacy in blood-alcohol test results obtained after an accident for medical purposes, and concluded that they did not. *Hardy* was decided prior to the enactment of HIPAA, however.

HIPAA does not create an absolute protection from non-consensual disclosure of medical information. It recognizes that a patient's right to privacy must be balanced against society's needs. Federal regulation expressly authorizes the disclosure of health information without a patient's consent in numerous situations, including "for law enforcement purposes pursuant to a grand jury subpoena." In light of this exception, it cannot be said that HIPAA preempted the holding in *Hardy*.

It also was not the case here that the blood test was performed at the request of law enforcement personnel for their own purposes. The sample was obtained for medical treatment and the staff members were not acting as agents of law enforcement. Consequently, it was not a violation of the defendant's reasonable expectation of privacy in his medical information for the State to obtain a grand jury subpoena for his test results. Denial of the suppression motion was not improper.

2. Reasonable Suspicion/*Terry* Detentions (other than traffic stops)

Searches or seizures must be "reasonable." That is, there must exist a sufficient level of suspicion of criminal activity to justify restraining a person's liberty even briefly. For arrests, that level of suspicion is probable cause, but for lesser seizures - "investigative detentions" or *Terry* stops - the level also is less: "reasonable suspicion." Sometimes, reasonable suspicion and probable cause simply are not required because an encounter is consensual, as the Court of Appeals originally held in *State v. Garcia-Cantu.* But the Court of Criminal Appeals saw the situation differently when *Garcia-Cantu* reached that court, holding that shining a spotlight on the suspect's car while it was prevented from moving by the position of the police officer's vehicle constituted a "seizure" of the suspect.

All of the circumstances known to an officer may be considered in establishing reasonable suspicion. In *Tanner v. State*, the time of day and location of the suspect were legitimate factors that could create reasonable suspicion, but in *Newbrough v. State*, those same factors were insufficient to justify a detention. These cases illustrate that, while such considerations are appropriate, the cumulative effect of what the officer knows still must reach the level of reasonable suspicion.

This suspicion may come from close association with suspected persons, as in *Gipson v. State*

and *Gomez v. State*. In *Gipson*, proximity in time and distance to the scene of a robbery added to the officer's suspicion, and the nature of the crime contributed to his reasonable belief that the suspect might be armed and dangerous.

Reasonable suspicion, like probable cause, can be established by an officer's personal observations or by reliable information provided by a citizen informant. Where a citizen reports criminal or suspicious behavior to an officer, that report might provide reasonable suspicion, or even probable cause, but only if it suffices in quantity and quality to warrant a seizure. Courts generally regard tips from known informants as more reliable because the informant can be found, questioned, and held accountable for any false information he or she might have provided. This was the case in *McNickles v. State* and *State v. Nelson*. The tip in *State v. Griffey*, on the other hand, came from a known and reliable informant, but the information received, even when combined with the officer's observations, was insufficient to create reasonable suspicion that the suspect was involved in criminal activity.

## SEARCH AND SEIZURE - REASONABLE SUSPICION NOT REQUIRED TO APPROACH PARKED VEHICLE AND CONVERSE WITH OCCUPANT.

### *State v. Garcia-Cantu*, 225 S.W.3d 820 (Tex. App. - Beaumont 2007)

A police officer on routine patrol in the early morning hours spotted an unfamiliar truck parked at the end of a dead-end street. He checked the truck's registration and determined it was not parked at the address of the owner. The officer noticed two people moving around inside the truck with the interior light on. Directing his spotlight at the truck, the officer pulled up behind it and approached the vehicle. As he did, the two occupants got out, although the officer had not turned on his emergency lights, drawn his weapon, or ordered them out.

While the officer was talking to the defendant, another officer who had heard the radio report of a suspicious vehicle arrived on the scene. He later verified that the officer who initially made contact with the defendant was not using emergency lights, and did not have his weapon drawn, although his spotlight was turned on the truck. Both officers considered the area to be one known for drug trafficking and prostitution. Although the officer did not see the defendant engage in any criminal conduct, he suspected that the pair might be involved in drug activity.

The defendant testified during the suppression hearing that, while no emergency lights were used, no weapons were drawn, and despite leaving the truck voluntarily, he felt he was not able to leave the scene because of the spotlight. He argued that he was detained at that time, prior to the discovery of the marijuana for which he was arrested and charged, without reasonable suspicion or probable cause. The trial court granted the defendant's suppression motion on the grounds that he was unlawfully detained. The State appealed that ruling.

**Holding:** "Both federal and state law provide that a police officer may approach a citizen in a public place or knock on a door to ask questions or seek consent to search. The officer need not have reasonable suspicion to do so as long as the officer does not indicate that compliance is required." These encounters are "consensual" and are not subject to Fourth Amendment requirements. A citizen may terminate a consensual encounter at any time.

In this case, the officer was free to approach the defendant who was parked on a public street without having reasonable suspicion. The use of a spotlight does not transform the encounter into a detention.

An officer is not required to choose between approaching a vehicle in the dark in order to have a consensual encounter or illuminating the vehicle for his safety and converting the encounter into a seizure. If the use of a spotlight *per se* created a detention, officers would be discouraged from using lights when necessary for the officers' safety.

The officer engaged in a consensual encounter with the defendant. That encounter was not transformed into a seizure by the use of the spotlight. Because the encounter did not require reasonable suspicion, the trial court should not have required the State to show its existence. The suppression motion was improperly granted. **[Editor's note: See the following opinion in this case from the Texas Court of Criminal Appeals reaching the opposite conclusion.]**

## SEARCH AND SEIZURE - SHINING PATROL CAR'S SPOTLIGHT ON SUSPECT'S VEHICLE AND BLOCKING IT FROM MOVING IS A DETENTION.

### *State v. Garcia-Cantu*, 253 S.W.3d 236 (Tex. Crim. App. 2008)

An officer on routine patrol at around 4:00 a.m. saw a pickup truck parked at the end of a dead-end street. He later characterized the neighborhood as a "high-crime" area known for drugs and prostitution, although there had been only two drug arrests and no prostitution arrests in the area in the prior six months. Inside the truck were two people sitting with the dome light on. While the officer admitted he saw nothing suspicious, he decided to investigate.

As he pulled his patrol car behind the parked truck, the officer turned on his spotlight, "to make sure that they weren't doing harm" to him. He explained, "If I had wanted them to know it was a police officer I would have turned my overhead lights on, to indicate I was detaining them. But I just wanted to see what they were doing in there."

The officer stopped about ten feet behind the truck and turned on his dash-mounted camera. After seeing movement on the driver's side of the truck, he approached the truck, holding a long flashlight in both hands at shoulder level. As the light shined on the driver's side of the vehicle, the defendant got out on that side and met the officer in the road. In an ensuing search, which both sides conceded would have given the trial judge grounds for suppressing evidence, marijuana and a weapon were found.

The defendant moved to suppress, and the trial court granted the motion. The State's appeal focused on whether the officer "detained" the defendant or whether, instead, there was merely an "encounter" between the officer and the defendant. If the defendant was "detained," then there was sufficient evidence to uphold the judge's determination that the suppression motion should have been granted. But if the officer was having only a consensual "encounter" with the defendant, then the discovery of the contraband was not unlawful under any theory and it should have been admitted.

**Holding:** The U.S. Supreme Court has observed that, "encounters between citizens and police officers are incredibly rich in diversity." They include everything from "wholly friendly exchanges of pleasantries" to "hostile confrontations of armed men, involving arrests, injuries, or

loss of life." An encounter between a police officer and a citizen becomes a "seizure" for Fourth Amendment purposes, and subject to probable cause or reasonable suspicion requirements only when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." As long as the encounter remains consensual, it is not subject to the Fourth Amendment. But when it loses this nature, the Fourth Amendment comes into play.

"It is the display of official authority and the implication that this authority cannot be ignored, avoided, or terminated, that results in a Fourth Amendment seizure." Merely approaching and questioning persons in parked cars may be permissible, but an order or command that cannot be ignored, avoided, or terminated transforms the encounter into a detention. Because of the variety of encounters, each must be evaluated under the totality of the circumstances. "There are no *per se* rules." "The officer's conduct is the primary focus, but time, place, and attendant circumstances matter as well. 'A court must step into the shoes of the defendant and determine from a common, objective perspective whether the defendant would have felt free to leave.'"

An officer's use of a spotlight does not necessarily turn an encounter into a detention; each case depends on its own facts. In this instance, the officer approached the defendant's truck and "used an authoritative, commanding voice and demeanor that brooked no disagreement into his official investigation." The encounter was in the early morning hours of Christmas night. As he approached, the officer turned on his spotlight to light up the truck and activated his dashboard camera.

During the suppression hearing, the trial judge asked the officer, "[A]nd you got your spotlight on and you want me to believe that with a spotlight on, they could drive away?" The officer replied, "Yes," but agreed that he had "[n]ever had anybody who has had his spotlight turned on them drive away."

When the officer stopped his patrol car, he was parked about ten feet behind the defendant's truck, effectively "boxing in" the vehicle and preventing it from leaving. In response to the trial judge's questioning about whether the defendant was blocked from moving, the officer said "They could have backed up." He then admitted that to get out of the area where they were parked, the officer would have had to move his vehicle.

The trial judge summarized the testimony by asking, "And what we have here is, you're telling me that if this person would have simply backed up, even though your overhead or your spotlight was on, or whatever was on, and you're pulled up within ten feet of this other vehicle, they were free to leave? That's what you want me to believe?" The officer replied, "Yes, sir."

When the officer approached the truck, he held his flashlight in both hands at shoulder-height. After the defendant got out of his vehicle and started toward the officer, the officer immediately asked, "What are you doing here?" He also shined his flashlight on the passenger as she was getting out, and then "played his flashlight into and across" the defendant's eyes as if he were looking for signs of intoxication. After asking for identification and learning that it was in the truck, the officer looked inside the truck before telling the defendant to get it from the vehicle.

Under the totality of circumstances in this case, the trial court could have found that a reasonable person in defendant's place would not have felt free to leave. The officer's use of a spotlight was only one of the facts that converted the encounter into a detention; all of the facts taken together did support the trial judge's finding.

**COMMENT:** This opinion reiterates the distinction Texas courts have drawn between "encounters"

and "seizures," which include "investigative detentions" and "arrests." The distinction is a very important one because seizures, but not consensual encounters, are subject to Fourth Amendment protections. In this case, for example, if the court believed that the defendant was free to leave, what the officer might have seen in plain view would have been admissible, and any consent the defendant had given would have been voluntary. While the officer's actions might have been prudent as a matter of police work - encountering strangers in early-morning hours while alone - they created, as they undoubtedly were intended to do, the impression that the officer was in command from the moment he arrived on the scene and nothing could be done without his approval. This may have made him safer, but it also triggered the protections of the Fourth Amendment.

## SEARCH AND SEIZURE - INVESTIGATIVE DETENTION BASED ON TIME OF DAY AND TYPE OF VEHICLE SUSPECT WAS DRIVING LACKED REASONABLE SUSPICION.

### *Newbrough v. State*, 225 S.W.3d 863 (Tex. App. - El Paso 2007)

In the very early hours of the morning, a deputy patrolling a rural area saw a sport utility vehicle pass him on the highway where the deputy's patrol vehicle was parked. The deputy followed the SUV for about a mile, observing nothing unusual. When the SUV came to an intersection, the driver turned through a cattle guard and onto a dirt road. At that point the deputy signaled the vehicle to pull over and he contacted the driver. During the course of the stop, the deputy determined that the driver was intoxicated and arrested him for DWI.

The defendant moved to suppress any evidence obtained as a result of the stop, arguing that the deputy lacked sufficient suspicion to justify a detention. A suppression hearing was held in which the deputy explained why he had stopped the vehicle. According to the officer, the property the defendant entered was a private oil field road used primarily by oil field workers or ranch hands. Pickup trucks, water trucks, or "gang-unit type trucks" were the kinds usually seen on the road, not SUVs like the defendant was driving.

The deputy also testified that he was concerned about oil field thefts and underage drinking, and that he had seen young people doing "doughnuts" on the property and had found beer cans in the area previously. It was not considered a high-crime area, though. About eight months before this incident, the deputy had spoken with a man the deputy believed kept cattle on the land. He had asked the deputy to tell people found on the property to leave, but there was no indication that the defendant posed any danger to anyone or needed the deputy's assistance.

It was the time of day and type of vehicle the defendant was driving that made the deputy suspicious. He explained that he intended to detain the defendant when he stopped him, although he had not seen any crime committed and had no information that made him suspect the SUV had been involved in a crime. Defendant's suppression motion was denied and he pled guilty to DWI. Following his conviction, the defendant appealed.

**Holding:** "Under the Fourth Amendment, a temporary detention is justified when the detaining officer has specific articulable facts which, together with rational inferences from those facts in light of the officer's experience and general knowledge, would lead a reasonable officer to

conclude that the person detained is, has been, or soon will be engaged in criminal activity." An officer may not detain someone, however, on a mere "hunch." Specific facts which the officer can articulate must exist to support the stop. The reasonableness of a detention is measured by whether a reasonable officer under the same circumstances would conclude that the suspect is involved in criminal activity.

Stopping a vehicle also is a "detention" or "seizure" under the Fourth Amendment and requires at least reasonable suspicion. "A lawful temporary detention must be based upon more than the suspicious location of a vehicle or the time of day." Although those factors are relevant, they focus only on the suspect's surroundings, and not on the behavior of the suspect himself.

The deputy was unable to point to any specific action of the defendant that caused him to believe the driver was involved in a crime, or about to be. There was no reason to believe the defendant was trespassing on the property and, although criminal activity might have occurred there previously, it was unconnected to anything the defendant was doing.

Lacking any reasonable suspicion that the defendant was engaged in a crime, the stop of the SUV was unlawful and any evidence obtained as a result of that stop should have been suppressed. If the admission of evidence obtained from the stop had been harmless beyond a reasonable doubt, the conviction could have been affirmed, but it could not be said in this case that its admission was harmless.

## SEARCH AND SEIZURE - TIME OF DAY AND LOCATION MAY SUFFICE TO ESTABLISH REASONABLE SUSPICION.

### *Tanner v. State*, 228 S.W.3d 852 (Tex. App. - Austin 2007)

A deputy on routine patrol at around 3:00 a.m. saw a man and a young woman pushing bicycles out from a dark area behind a bar that was closed for the night. He did not see them commit any traffic offenses or other kind of crime. Based on his concern that they "might need assistance" and his suspicion due to the bar having closed by 2:00 a.m., he decided to stop the pair and investigate. The officer later admitted he did not know the bar's employees or how long it might take to clean the bar after closing, and he did not claim that the area had a history of criminal activity.

When the deputy flashed his patrol car's lights to signal for the couple to stop, the woman stopped but her companion kept walking even after the deputy called out to him. The officer saw two large knives clipped to the inside of the man's pants pockets, but when he inspected them he determined they were of legal length, as was a small knife found during a frisk.

In response to the deputy's question whether the suspect had any contraband, especially drugs, the man replied, "I don't know; you can check." Asked if the officer could search the suspect's pockets, he responded, "Go ahead and take the stuff out." Inside the man's left front pants pocket, the deputy found a closed pocketknife sheath with clear plastic sticking out from the inside. The sheath contained a small clear plastic bag holding ten smaller bags of methamphetamine.

Following the defendant's arrest for possession with intent to deliver methamphetamine, he moved to suppress the drugs on the grounds that the officer's initial detention was not supported by reasonable suspicion. The trial court denied the motion, calling it a "close call." The defendant

appealed the ruling after pleading guilty.

**Holding:** Reasonable suspicion will support a brief investigative detention. Whether reasonable suspicion exists is determined in light of the totality of the circumstances existing when the detention occurred, and whether specific facts known to the officer at that time would lead the officer reasonably to conclude that a certain person is engaged in criminal activity, or soon would be. "Reasonable suspicion must be based on more than a non-specific suspicion or mere "hunch" of criminal activity. The State has the burden to show that the officer had an objective basis for the stop, and the officer's subjective intent is irrelevant to the determination of reasonable suspicion."

An investigative detention clearly occurred when the defendant stopped walking in response to the deputy's demand. The State was obliged to show that, at that moment, reasonable suspicion existed.

The State relied on the officer's testimony that he stopped the couple because they were walking from a dark area behind a bar that "had been well closed by that time" at 3:00 a.m. The deputy also stated that his suspicion was further aroused when the defendant continued walking after his companion stopped in response to the officer's signal.

"The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" It is "not possible" to define reasonable suspicion precisely.

In this case, the deputy saw someone walk from behind a darkened, closed business in the middle of the night, in a quiet area with little ambient light. The officer could consider those facts, along with reasonable inferences he might draw from the facts, in order to decide whether a detention was warranted.

It would be improper to consider the circumstances of the stop piecemeal. While each of these, taken separately, might be insufficient to generate suspicion, when taken as a whole they would suffice. The time of day viewed together with the location in a commonsense fashion supported the finding of reasonable suspicion.

## SEARCH AND SEIZURE - STOP OF VEHICLE LEAVING SCENE OF ROBBERY AND FRISK OF PASSENGER JUSTIFIED BY SERIOUSNESS OF CRIME AND MINIMAL INTERFERENCE WITH LIBERTY.

### *Gipson v. State*, 268 S.W.3d 185 (Tex. App. - Corpus Christi 2008)

Police officers were dispatched to a Wal-Mart where a robbery had just occurred. They were told that the suspect was a tall, slender young man with tattoos who was last seen running through a wooded area in front of the store. One of the officers arrived just minutes after the dispatch in the store's parking lot near where the suspect was seen running. As he entered, the officer saw a blue Toyota preparing to leave the lot. Because it was the only car about to exit, the officer blocked its path because he considered the occupants "potential suspects or witnesses to a crime."

One woman and several men were in the Toyota. The driver immediately said that "some guy was robbed" that the driver "had helped chase the suspect." A passenger in the car matched the description of the suspect and appeared nervous, avoiding eye contact with the officer.

All of the passengers denied knowing anything about the robbery, but some of them later

changed their stories and claimed to be witnesses to the crime. Another officer arrived on the scene and kept an eye on the occupants. He noticed that the man matching the description moved around a lot and appeared "very nervous" and "fidgety."

The occupants were ordered to get out of the vehicle, and the officer frisked all of them. Before frisking the nervous, slender man, the officer noticed a "big bulk" in the suspect's back pocket. These objects in the back pocket were about the size of credit cards. Because the officer thought that the object could be a knife of that shape and size, he removed the objects and determined they were credit cards belonging to the victim of the robbery.

The defendant moved to suppress this evidence, claiming that it was the product of an unlawful detention and search. He contended that the initial stop of the Toyota was not supported by reasonable suspicion, and that, if it was, there was no reason to believe that he was armed and dangerous and that a frisk was justified. The trial court denied the defendant's suppression motion and he was convicted of aggravated robbery. He appealed the ruling on his motion.

**Holding:** The officer who first arrived on the scene and stopped the Toyota in which the defendant was riding testified that he did so because the occupants "were potential suspects or witnesses to a crime." A temporary detention is justified when an officer has specific, articulable facts that lead him to conclude a person is, has been, or is about to be involved in criminal activity.

When an officer detains a person who may be a witness to a crime, that detention is not supported by reasonable suspicion to believe the detainee was involved, but rather, to discover information about a third person's involvement in a crime. The U.S. Supreme Court has approved the use of a checkpoint in some limited circumstances to identify and gather information from potential witnesses. Whether a checkpoint or other brief detention is reasonable for this purpose is determined by considering "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

In this case, the officer who detained the Toyota was investigating a serious offense, robbery. Detaining the vehicle advanced the public's interest to a significant degree because it was done in the vicinity of the crime at the time it happened, and the people who were stopped were possibly witnesses to the offense.

The area in which the officer stopped the car was nearby the Wal-Mart where the robbery occurred, and was very close to the area of the parking lot where the suspect had last been seen. In itself, the brief detention of the vehicle's occupants was minimally intrusive, especially because the officer only blocked their car. As he began walking toward it, the driver volunteered that he had seen the robbery.

It was reasonable for the officer to detain the defendant briefly for investigation, but a frisk was justified only if the facts known to the officer would have led a reasonably cautious person to believe that the officer's safety or the safety of others was in danger. Several people were in the car, but the defendant was the only one who was tall, slender, and had tattoos. He seemed nervous and "fidgety." While he denied having any identification, the officer saw that the man had something in his pockets, and appeared to have something in the waistband of his pants.

Adding to the officer's suspicion was the fact that the occupants of the vehicle initially denied seeing a robbery, but later said they had been witnesses to the crime. In light of everything known to the officer, it was reasonable for him to believe that his safety was in jeopardy from the

suspect. Frisking the suspect revealed objects in the defendant's pockets that were the size and shape of credit cards. The officer testified that he had encountered knives of a similar shape, so he removed the objects to determine what they were.

The initial detention of the Toyota was reasonable under all of the circumstances. Patting down the defendant's clothing also was justified by the evidence gathered by the officer during the stop.

**COMMENT:** One of the most common mistakes made by law enforcement officers regarding law stems from the incorrect assumption that justification for a detention includes justification for a frisk. The two actions are separate and distinct parts of the Fourth Amendment, and each requires its own kind of reasonable suspicion. Reasonable suspicion of criminal activity supports a detention; reasonable suspicion that a suspect is armed and dangerous supports a frisk. The frisk does not follow automatically from the detention.

## SEARCH AND SEIZURE - STOP OF VEHICLE JUSTIFIED BY OUTSTANDING WARRANT FOR WOMAN ASSOCIATED WITH VEHICLE, ALTHOUGH DRIVER WAS MALE.

### *Gomez v. State*, 234 S.W.3d 696 (Tex. App. - Amarillo 2007)

The defendant was a suspect in a homicide investigation, but had not been arrested for the offense. A police officer stopped the vehicle in which the defendant was riding because, when he pulled alongside the car and noticed that the driver, a man, seemed nervous and the passenger in the front seat bent down and was engaged in "a lot of furtive movement." This behavior aroused the officer's suspicion and he checked the vehicle's registration for warrants before making the stop. A young woman was the registered owner of the car, and an arrest warrant had been issued for her.

After the officer pulled beside the car at a traffic light and determined that one of the passengers was female, he signaled the driver to pull over. During the stop, the defendant was asked to identify himself. He gave a fictitious name, which was discovered by the officer, and he was arrested for failure to identify.

The female passenger also was arrested, and the officer inventoried the vehicle. Items found in the car were introduced in defendant's trial for murder, along with incriminating statements he made after the stop.

The defendant moved to suppress his statements and the evidence seized from the vehicle, claiming that the stop was unlawful. He argued that, as the officer admitted during the suppression hearing, the initial stop of the car was based on a guess that the only female passenger was the owner and the person for whom the warrant had issued. The trial court denied the suppression motion and the defendant was convicted of murder. He appealed the court's decision.

**Holding:** To determine whether reasonable suspicion existed for the stop, the appeals court was required to evaluate whether the officer articulated specific facts which, taken with rational inferences from those facts, provided sufficient suspicion. In this case the officer relied on several facts: the nervous appearance of the driver when he saw the police car; the passenger ducking below eye level and making furtive gestures; and the existence of an outstanding arrest warrant for the

female owner of the car. The stop occurred only after the officer also had determined that one of the passengers in the car was a woman.

The defendant argued on appeal that the officer's admission that he was "guessing" that the female passenger was actually the owner was the only basis for the stop, and was insufficient to establish reasonable suspicion. It is the totality of circumstances, however, rather than any single bit of testimony at the suppression hearing that determines whether a stop was authorized.

Based on all of the circumstances known to the officer in this case, and inferences he might have drawn from those circumstances, the stop was supported by reasonable suspicion. The officer's articulated information and observations, taken together, justified the trial court's denial of the defendant's motion to suppress.

## SEARCH AND SEIZURE - TIP FROM INFORMANT PROVIDES REASONABLE SUSPICION FOR INVESTIGATIVE DETENTION.

### *McNickles v. State*, 230 S.W.3d 816 (Tex. App. - Houston 2007)

A confidential informant arranged a drug buy for an undercover narcotics officer he had worked with in the past. The officer, posing as the informant's cousin, was to meet the seller of 50 ecstasy pills at a gas station According to the informant, the seller was a "skinny black male with braids, driving an older model green Grand Am." When the officer arrived at the station to meet the seller, he spotted him parked in a green Grand Am.

Because there were not enough officers at the scene to conduct surveillance of the sale, the undercover officer asked nearby patrol units to detain the suspect. Two units pulled into the service station, blocking the suspect's vehicle. One of the responding officers saw the suspect bending down, apparently reaching under the seat or the floorboard. Since he did not know whether the man was reaching for a weapon, the officer approached and drew his weapon, pointing it at the suspect.

The suspect was taken out of the car, but not handcuffed. An officer reached inside the vehicle and retrieved a knife the suspect had been sitting on. In a search for weapons underneath the same seat, the officer found a plastic bag full of pink pills.

The defendant was charged with possession of a controlled substance. He moved to suppress the pills, claiming that the officers had insufficient grounds to detain or search him. Specifically, the defendant claimed that the information given to the police by the informant was uncorroborated and of unproven reliability. The trial court denied the defendant's motion. Following the defendant's conviction, he appealed the ruling.

**Holding:** "An officer may conduct a warrantless search of a motor vehicle if the officer has probable cause to believe the vehicle contains evidence of a crime." Probable cause is established from a totality of the circumstances. The facts that an officer may use to establish probable cause "include those personally known to the officer or those derived from a reasonably trustworthy source."

"An informant's veracity, reliability, and basis of knowledge are all highly relevant in determining the value of a tip." Information from an unnamed informant, by itself, does not establish probable cause, but that information can be considered along with facts developed through

independent police investigation. The undercover officer testified that he had worked with this informant at least five times and had received reliable and correct information from him in the past. When the officer arrived at the gas station, what he saw matched the tip he had been given.

The suspect looked the way he had been described; he was driving a green Grand Am just as predicted; and he was at the place at the time the informant had said the transaction was to take place. Although there was no evidence that the informant's prior information had resulted in any arrest or conviction, that is not required in order to show the reliability of an informant or his tip.

Defendant also pointed out that the undercover officer did not see him engage in any criminal activity before the patrol units were contacted and had not been informed by the owner of the station that the defendant was involved in a crime. It is not necessary, however, for an officer to verify that a suspect actually is in possession of a controlled substance before detaining him.

Finally, the defendant argued that the patrol officer's observation of a furtive gesture after pulling his patrol car near the suspect's would not establish probable cause in the absence of corroborating evidence. The detention was based on corroboration of the informant's tip, though, and not on the furtive gesture alone.

Probable cause existed to believe the defendant possessed ecstasy pills. The officers' independent corroboration of the defendant's physical description, the description of his car, and the location and time of the meeting were sufficient, along with the informant's proven reliability, to establish that the suspect possessed the controlled substance the officer had come to buy.

## SEARCH AND SEIZURE - TRAFFIC STOP JUSTIFIED BY MOTORIST'S TIP BUT DWI ARREST NOT SUPPORTED BY OFFICER'S OBSERVATIONS.

### *State v. Nelson*, 228 S.W.3d 899 (Tex. App. - Austin 2007)

A driver noticed the car ahead of her was being driven erratically. At one point it almost entered the oncoming traffic lane, and later she saw the vehicle "going like from the grass on the right side over to [the] grass on the left side, back-and-forth." The driver called 911 and reported what she had seen. She could not see the license number or describe the vehicle in detail because it would alternately speed up to ninety miles-per-hour, then the driver would "slam on the brakes."

For about twenty minutes the motorist followed the car, describing to the dispatcher what she was seeing. After the vehicle was stopped, she stopped at the scene and gave a statement to a deputy.

The deputy who was dispatched to intercept the suspect's vehicle was told that the car was "all over the road." He located the two vehicles, got between them, and followed the suspect for about a minute before stopping it. During that time, the deputy testified, "this vehicle was within its lane weaving back-and-forth, and then a couple of times or two occasions it crossed a solid white line leading into the improved shoulder, and drove on the improved shoulder for some way."

A videotape of the incident showed the vehicle drifting toward the broken center line three times, touching the line with its left tires. It also drifted right, twice crossing the solid fog line, but only by a few inches. There was no other traffic and the deputy did not see the vehicle move unsafely.

After the stop, the deputy conducted an HGN test and two other field sobriety tests. Although there was no evidence that the driver had been drinking, the officer concluded that she was intoxicated by some other substance because of her performance on the sobriety tests, and he arrested her. A search uncovered diazepam and the defendant was charged with its possession. She moved to suppress the evidence, claiming that the deputy had insufficient grounds for the traffic stop because the tip did not establish reasonable suspicion and that her arrest had not been supported by probable cause.

The trial court granted the suppression motion, finding that both the initial stop and the subsequent arrest were unlawful. The State appealed, contending that the motorist's tip and the officer's observations provided a basis for the stop, and that the officer developed probable cause to arrest during the detention.

**Holding:** A warrantless traffic stop is like a temporary detention for investigation. It must be supported by reasonable suspicion gathered from the totality of circumstances. The stop does not need to be justified by the officer's personal observations alone. Facts supplied by a citizen-witness, if corroborated, can provide the basis for a detention. In order to establish the reliability of the information from the citizen, the officer need only corroborate enough facts to reasonably conclude that what he has been provided is reliable.

The deputy knew that a citizen informer had reported a possible drunk driver weaving "all over the road." The caller remained on the line with the dispatcher and the deputy reasonably could believe that she had identified herself. When the deputy saw the defendant's vehicle weaving within its lane, that observation combined with the inference of reliability that arises from a named citizen-informant's tip created sufficient reasonable suspicion to validate the traffic stop.

When the deputy told the defendant that a motorist had seen her weaving, she admitted it, claiming that it was because she had been looking for a snuff can. The deputy saw a snuff can in a pocket in the driver's door panel. He did not smell any alcohol on the driver, but he thought her pupils were "constricted," which he took as a sign of possible drug use. He admitted, though, that it could have been caused by the brightness of his emergency lights.

After the driver passed the HGN test, she was given a walk-and-turn and one-leg stand test. The deputy saw two clues on the walk-and-turn, but did not know how many possible clues existed for the test. He testified that he thought there were four clues in the one-leg stand and the driver displayed one. It was clear from the videotape of the testing that it occurred on the unimproved edge of the highway shoulder. The deputy admitted it should have been conducted on the improved, flat surface, and he admitted he had not given the driver all of the instructions listed in the testing manual.

A charge of driving while intoxicated by drugs was dropped because the defendant was never evaluated by a certified drug recognition expert. While a peace officer may arrest a person without a warrant for offenses committed in the presence or view of the officer, probable cause must exist to believe the person has committed a crime.

The defendant offered an "innocent, if somewhat dubious, explanation" for weaving. Although the deputy noted that the driver's pupils were constricted, he acknowledged that he was not trained in drug recognition and her eyes might have been affected by the bright lights. The officer wasn't sure whether the HGN test that the driver passed was relevant for drug use. His conclusion that she had failed two other sobriety tests was undermined by his inability to remember how many

clues exist for these tests. There was no evidence that two clues on one test and one clue on another would indicate intoxication.

Further, the deputy admitted that the field tests were not conducted in accordance with prescribed procedures. The trial court apparently concluded from this evidence that the officer failed to properly administer the tests and was not qualified to recognize drug intoxication. Its decision to suppress evidence obtained during the arrest was supported by the absence of probable cause.

## SEARCH AND SEIZURE - NO REASONABLE SUSPICION FROM REPORT THAT DRIVER WAS PASSED OUT BEHIND THE WHEEL OF A VEHICLE.

### *State v. Griffey*, 241 S.W.3d 700 (Tex. App. - Austin 2007)

Around 3:00 a.m., an officer was dispatched to a fast-food restaurant to investigate a report from the manager that a person was "passed out behind the wheel in the drive-through." The officer was not given any other information at the time. When he arrived, a restaurant employee pointed to the defendant's car. The defendant was awake when the officer arrived and her vehicle was sitting next to the drive-through window. The officer pulled his vehicle in front of the suspect's car to block her forward movement, and she was blocked from the rear by other vehicles in the drive-through lane. At the officer's request, the defendant turned off her engine and stepped out of her vehicle.

After detaining the suspect, the officer smelled the odor of alcohol coming from her. Another officer who arrived at the scene a few minutes later administered field sobriety tests and arrested the defendant for DWI.

Before trial, the defendant moved to suppress any evidence obtained as a result of her detention. She argued that the only evidence known to the officer at the time she was detained was the manager's report that someone was passed out in the drive-through lane of the restaurant. The trial court held that the initial detention of the defendant was unreasonable and not authorized by law. All evidence was ordered suppressed. The State appealed.

**Holding:** The State argued on appeal that the officer's actions were reasonable in light of the information he had from the manager's call, and that his detention of the suspect was justified without further investigation. A brief investigative detention must be based on at least reasonable suspicion to believe someone is involved in criminal activity. Reasonable suspicion must be grounded on more that a mere hunch or non-specific suspicion. Whether the detention is reasonable is judged from the totality of circumstances, and depends on the specific articulable facts known to the officer that reasonably would lead him to suspect that a person has engaged in, or soon would be engaging in criminal activity.

"Reasonable suspicion may be established based on information given to police officers by citizen informants, provided the facts are adequately corroborated by the officer." A tip by an unnamed informant rarely will justify an investigative detention; "there must be some further indicia of reliability, some additional facts from which a police officer may reasonably conclude that the tip is reliable and a detention is justified."

The most reliable form of citizen-informant tip is one given face-to-face by a person who has no contact with the police other than witnessing a criminal act. The restaurant manager was not

completely anonymous because he identified himself as the manager. He also was not a face-to-face informant, and did not witness any criminal activity in what he reported to the police. He simply reported that a person was passed out in the drive-through lane, which is not criminal by itself.

The manager did not claim that the suspect was intoxicated or showed signs of intoxication, and did not report that the driver was obstructing a passageway, as the State argued. When the officer arrived, the defendant was awake in her vehicle at the drive-through window. What the officer observed did not corroborate the tip. Instead, it contradicted the manager's report. The officer could have initiated a consensual encounter to determine whether the manager's tip could be corroborated, but he initiated an investigative detention without any additional information.

Because there was no corroboration of the manager's tip, and because the officer's observations at the scene prior to the detention actually contradicted what the manager had reported, the tip was insufficient to establish reasonable suspicion that the defendant was intoxicated or engaging in any other criminal activity. All evidence resulting from her unlawful detention was properly suppressed.

## D. EXCEPTIONS TO THE WARRANT REQUIREMENT

### 1. Plain View, Plain Smell, Plain Touch

Since the abolition of the "inadvertence" requirement for plain view in *Horton v. California*, the only remaining requisites for plain view are that the officer be authorized to be in the place from which the "view" was made, and that it be "immediately apparent" that the object viewed is evidence of a crime. Each of these "prongs" must be established independently in order to justify a search or seizure based on plain view.

The first of these requirements is illustrated by *Russo v. State*, a case in which an officer saw a website referred to on a suspect's computer while that officer was searching for other evidence. Since the officer was justified in looking at material on the computer, the website reference was in plain view.

In *Keehn v. State*, the Court of Appeals thought the officer's view of a propane bottle inside a van fell within the exception because the officer, like anyone else, had a right to walk up the drive where the van was parked in order to knock on the defendant's door. The Court of Criminal Appeals did not disagree that the deputy could approach the house and view the propane tank, but it held that what the officer saw in the van did not, by itself, give him a legal right to open the van without a warrant and inspect and remove the tank. On the other hand, the view did create probable cause to believe contraband was inside the van and, because the tank was inside a readily mobile vehicle, the "automobile exception" (or "vehicle exception") allowed entry and search of the van without a warrant.

A "plain smell" exception also may be said to exist, requiring the same elements as plain view. Because persons have no reasonable expectation of privacy in the odors emanating from themselves and their personal effects, a dog sniff or an officer smelling burnt marijuana or other odors is not considered a search and does not require any level of suspicion. As is true with the plain view exception, however, the officer or dog must be lawfully in the place where the odor is detected,

and it must be immediately apparent that the odor emanates from contraband or criminal evidence.

The same rules that govern plain view and plain smell control "plain feel." If an officer touches something, and if touching in the way the officer does is permitted, the officer may develop probable cause from the feel of the object. In this context "immediately apparent" does not mean that the officer is "certain" from the feel of the item exactly what it is, but rather that the feel conveys enough information to gain probable cause.

## SEARCH AND SEIZURE - WEBSITE REFERENCE SEEN DURING SEARCH OF COMPUTER FOR OTHER EVIDENCE PROPERLY USED AS BASIS FOR FURTHER INVESTIGATION.

### *Russo v. State*, 228 S.W.3d 779 (Tex. App. - Austin 2007)

A woman who was a supervisor for IBM and worked from her home was found strangled to death in the house where she lived alone. Her last telephone conversation took place at 3:30 p.m. on the day of her death, and her computer was shut down at 3:59 p.m. on the same day.

The victim's body was discovered when police officers who had been contacted by the woman's coworkers because she missed a scheduled meeting, went to her house to investigate on the morning after her death. There was no evidence of a sexual assault on the victim's body, which was found face-down in an upstairs guest bedroom, but her neck showed signs of a ligature and her wrists had been tied. An expensive engagement ring was missing, as was a jewelry box containing a substantial amount of jewelry. One of the victim's coworkers in California reported speaking to the woman by phone about 12:30 p.m. on the day of the crime, and that she had said she had just shown her house, which was for sale, to a potential buyer.

One of the neighbors saw a gold or brown van parked in front of her house at around 5:00 p.m., and he assumed the van belonged to a potential home buyer. During the investigation, officers discovered that other residents in the subdivision who had "for sale" signs in their yards had been approached by a man who claimed to be interested in their homes. The would-be home buyer gave different names to some of the homeowners. A composite sketch of the man was created from descriptions given by one of these homeowners and it was publicized.

A homeowner from a neighboring subdivision called the police after seeing the drawing in the newspaper. She reported that a man had come to her home, too, and that she had written down his license plate number. Investigators used the number to identify the defendant.

The defendant worked as a worship leader and music director at a church. He spoke with police officers on the day they executed a search warrant for his home, and he told them he had gone to a radio station on the day of the crime, although a station employee testified that the man had not been at the station when he claimed. Following questioning, the defendant went to the home of his pastor and told him he expected to be arrested for killing a lady, and that some jewelry had been taken from her. The police had not told the defendant that any jewelry was missing from the home.

Numerous witnesses gave statements to the police regarding a man most identified as the defendant who came to their for-sale houses, usually while a woman was alone in the house, and said he wanted to buy a house for cash. This evidence, along with DNA evidence found at the scene of

the crime, led investigators to obtain a search warrant for the defendant's home which resulted in his computer being seized.

The computer was found to have been used to access an "asphyxiation-type pornographic" website. The web pages viewed by the defendant, some as recently as two days before the crime, included photographs of manual and ligature strangulation. About 1,200 images were recovered from the computer.

After the defendant was charged with capital murder, he moved to suppress evidence seized from his computer. He claimed, not that all of the evidence seized from the computer should be suppressed, but that the search of the file related to the website containing the strangulation images was beyond the scope of the warrant. The trial court denied the motion.

**Holding:** Two warrants were issued in this case, one on June 18 and one on November 18. The first of these authorized a search for real estate files and documents, while the second expressly authorized the search of the file related to the asphyxiation website. The defendant's contention on appeal was that information obtained during the execution of the first warrant included "private information" that was used for the second warrant. The computer forensic investigator testified that in order to determine what was related to real estate, it was necessary to recover the entire internet history on the machine and review each piece.

While the website's name had no meaning to the detective investigating the homicide, he used another computer to access the site and view the nature of its content. Further investigation with the website owner uncovered the fact that a subscription to the site had been paid with a credit card belonging to the defendant.

In the course of reviewing the internet history of the computer pursuant to the June 18 warrant to determine whether any real estate searches had been conducted, investigators observed references to a website with a name that attracted their attention. The file itself was not opened or seized; rather, the detective independently investigated its nature and, ultimately, the defendant's connection with the site.

The exhibits that were offered at trial were not obtained from the defendant's computer, but from an independent source. They were not tainted by any illegality and were admissible. The search of the computer was confined to those files and documents authorized by the June 18 search warrant. During the course of that search, a suggestive website name was discovered. The initial, authorized search was not abandoned at that time, and no search of the hard drive was conducted to uncover pornographic material. Consequently, the search pursuant to the first warrant did not exceed its proper scope and the evidence obtained independently was properly used to develop probable cause for a subsequent warrant. That independent evidence was admissible.

## SEARCH AND SEIZURE - PLAIN VIEW OBSERVATION BY OFFICER WALKING DOWN DRIVE TO "KNOCK AND TALK" DOES NOT VIOLATE FOURTH AMENDMENT.

### *Keehn v. State*, 223 S.W.3d 53 (Tex. App. - Fort Worth 2007)

An eyewitness to a theft told investigators that she saw the suspects enter the back door of

the defendant's house, and later leave in a van. A deputy who went to the house to conduct a follow-up interview saw the van the witness had described parked in the driveway in front of the house. After calling the lead investigator in the case to meet him at the house, the deputy walked back up the driveway toward the front door. He stopped at the van and looked inside.

In the van, the officer saw a propane bottle with bluish-green discoloration or corrosion visible around the neck. Because he thought the coloring indicated that the bottle contained anhydrous ammonia, which is used in the manufacture of methamphetamine, the officer called the drug task force to investigate. A member of the regional drug task force came to the scene, looked inside the van, and saw the discoloration on the propane tank. He believed that the tank had been used to store anhydrous ammonia, used to make methamphetamine, and the officer knew that propane tanks of that kind were not approved containers for anhydrous ammonia.

The task force officer seized the tank and tested it, determining that it contained anhydrous ammonia. He arrested the defendant for possession of anhydrous ammonia with intent to unlawfully manufacture a controlled substance.

The defendant moved to suppress the evidence seized from the van. Specifically, he argued that the plain view doctrine did not apply to the seizure of the propane tank because it was not immediately apparent that the tank contained anhydrous ammonia, and that the officers had no right to enter the driveway or the van. After the trial court denied the motion, the defendant pled guilty and appealed the suppression ruling. On appeal, he again contended that the plain view seizure of the tank was unlawful.

**Holding:** Once a defendant has established that a search or seizure was made without a warrant, the State bears the burden of showing that its conduct was reasonable. Reasonableness is determined from the totality of circumstances. Warrantless searches are per se unreasonable, unless they fall within one of the exceptions to the warrant requirement. One of these is the "plain view" doctrine.

Although it often is classified as a warrant exception, the plain view doctrine is not a true "exception." "If an article is in plain view, neither its observation nor its seizure would involve any invasion of privacy." The doctrine requires two things: 1) that the officer be lawfully in the place from which the view is made, and 2) that it be immediately apparent that the item seized constitutes evidence. "Immediately apparent" means that there is probable cause to believe the item is associated with criminal activity.

The defendant claimed that the van was within the "curtilage" of his home and therefore protected by the Fourth Amendment. "Curtilage" is "the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." Even if the driveway in which the van was parked was within the curtilage of the defendant's residence, a law enforcement officer is not prohibited from entering that area by walking the "normal course used to reach the front door." The officers in this case took the "normal course" to the defendant's door.

There were no "no trespassing" signs on the defendant's property or other indicators that the defendant did not want people to enter the property. These officers had a right to walk up the front driveway to approach the door. The propane tank was first seen as a deputy approached the front door to conduct a follow-up interview with the defendant. It was not unlawful for the officer to do this.

It is not enough, however, that the officer had a right to be in the place where he made the

view. It also must have been immediately apparent that the tank was evidence of a crime. Although it is not illegal to possess anhydrous ammonia, it is unlawful to possess or transport it with intent to manufacture a controlled substance. That intent is presumed when the substance is stored in a container not designed or made for that purpose, like the propane tank in this case.

Because the task force officer believed the tank in the defendant's van was not designed for the transport or storage of anhydrous ammonia, probable cause existed to believe the tank was associated with criminal activity. The bluish-green discoloration on the tank led the officer to conclude it contained anhydrous ammonia.

The requirements of the plain view doctrine were met in this case. Observation of the tank occurred while the deputy was lawfully approaching the defendant's home, and what the officers saw made it immediately apparent that they had criminal evidence before them. Seizure of the tank was reasonable. **[Author's note: See the opinion below for the decision of the Texas Court of Criminal Appeals in the same case.]**

## SEARCH AND SEIZURE - TANK OF ANHYDROUS AMMONIA SEEN IN VAN WAS NOT IN "PLAIN VIEW" BUT SUBJECT TO WARRANTLESS SEARCH UNDER THE VEHICLE EXCEPTION.

### *Keehn v. State*, 279 S.W.3d 330 (Tex. Crim. App. 2009)

A theft was reported in the vicinity of the defendant's house. The complainant reported seeing a man and woman running to the back of the defendant's house shortly after the theft and a minivan left the house a few minutes later. The deputy who was investigating the theft returned to the defendant's residence several times over the next few days, looking for the minivan but never seeing it. Finally, he spotted the vehicle parked in the driveway and decided to talk with the residents.

As the deputy approached the house, he looked through the tinted windows of the van and saw a five-gallon propane tank inside. Because there was a bluish-greenish discoloration around the "cutting of the tank," the deputy believed in contained anhydrous ammonia, a component used in the manufacture of methamphetamine.

After the deputy knocked on the front door of the residence, he heard rustling and moving around inside the house but no one answered the door in spite of the deputy's repeated knocking. He called for assistance, including help from a local drug task force. Upon the arrival of other officers, the deputy again knocked on the door and it was answered by the defendant. The deputy said he was investigating the theft and entered the house to question the defendant.

A drug task force officer arrived on the scene shortly after the other officers had entered, and he also looked in the van through the windows. He noticed that the valve appeared discolored and looked like someone had tampered with it. This officer, who was trained in the manufacture of methamphetamine, agreed that the tank contained anhydrous ammonia. The task force officer entered the van and seized the propane tank. He tested its contents and determined that it did indeed contain the suspected chemical.

The defendant was arrested for possession. He later testified that the van did not belong to

him, that it belonged to a friend who had parked it at his house, and that he had not driven the van in the past month. He moved to suppress the evidence seized from the van, claiming that the warrantless search was unlawful. A suppression hearing was held, and the trial judge denied the defendant's motion.

After pleading guilty, the defendant appealed the denial of his request for suppression of the evidence. Specifically, the defendant argued on appeal that the officer had not been lawfully in the driveway at the time he saw the propane tank; that it was not immediately apparent to him that it was evidence of a crime; and that the entry into the van was unlawful under the plain view exception.

The court of appeals upheld the trial court's ruling, holding that the officers were lawfully in a position to view the tank and that it was immediately apparent to the task force officer that it was evidence of criminal activity. The defendant asked for review by the Texas Court of Criminal Appeals.

**Holding:** "A seizure of an object is lawful under the plain view exception if three requirements are met. First, law enforcement officials must lawfully be where the object can be 'plainly viewed.' Second, the 'incriminating character' of the object in plain view must be 'immediately apparent' to the officials. And third, the officials must have the right to access the object." The defendant focused on the third of these, that the officers did not have a right to enter the van without a warrant. In that, he was correct. "Plain view, in the absence of exigent circumstances, can never justify a search and seizure without a warrant when law enforcement officials have no lawful right to access an object."

The vehicle exception to the warrant requirement, on the other hand, permits the warrantless entry and search of a vehicle because its "ready mobility" creates an exigency that allows action without prior judicial approval. This exception did not apply, the defendant contended, because the van was parked in his driveway.

There was no indication that this van was being used as a residence or that it otherwise lacked the essential character of a mobile vehicle that might remove it from the application of the automobile exception. The task force officer had the right to enter the van and seize the propane tank without a warrant because the vehicle was readily mobile, and the officer had probable cause from his observation to believe the tank contained anhydrous ammonia.

**COMMENT:** The court makes a point in its opinion that is sometimes overlooked or misunderstood. Seeing an object in plain view does not, in itself, constitute grounds to seize that object without a warrant. If, for example, an officer sees contraband through the open window of a residence, he or she cannot enter the residence without a warrant simply because the object was in "plain view." Lacking consent or exigency, the officer would be required to obtain a search warrant in order to enter and seize the contraband. That principle is at work in this case, which actually involves a combination of two doctrines: plain view and exigency. The officers were lawfully in position to view the propane tank by looking through the windows of the van parked in an area where they had a right to be under the circumstances. When they looked in the van, it was "immediately apparent" to them from the appearance of the tank that it contained, or probably contained, anhydrous ammonia. That "plain view" gave the officers probable cause to believe the vehicle contained evidence of a crime. Because the vehicle is inherently mobile and the expectation of privacy in its contents is less than in some other protected spaces, no warrant is required. This authorization to enter the van without a warrant comes from the vehicle exception - which is just a

kind of exigency exception - rather than the plain view doctrine.

2. Vehicle Searches

Vehicles may be searched validly in a large variety of ways. The owner or operator may consent to a search; the vehicle may be searched at a border; it may be searched incident to a lawful arrest, or during an impoundment inventory; or it may be searched because probable cause exists to believe it contains evidence of a crime.

The last of these usually is called the "automobile" or "vehicle" exception. In *United States v. Ross*, the Supreme Court held that where probable cause exists to believe a car contains criminal evidence, a warrantless search may be conducted of that car to the same extent that a search could be authorized by a magistrate. The most important change in this exception during the past several years is in the scope of the search permitted. Until its decision in *California v. Acevedo* in 1991, the Supreme Court permitted a thorough warrantless search of the vehicle to find what was suspected to be inside, but refused to allow police to use the exception as a way to inspect without a warrant what they *knew* was in the car. For example, if officers watched a drug transaction and waited until the defendant placed a suitcase containing the drugs inside the car, they could search the car without a warrant to retrieve the suitcase but could not open it without a warrant. On the other hand, if they had reliable information that the defendant's car contained drugs, they could search the entire car without a warrant to find the drugs, opening containers like the suitcase without a warrant as they searched. The rationale for this was to prevent the use of the exception as a subterfuge to avoid the warrant requirement in cases in which one could and should have been obtained. In *Acevedo*, however, a majority of the Court abandoned its previous limitation. The Court held that because the vehicle is mobile, vehicle searches are exigency searches and justified without a warrant to uncover contraband or criminal evidence. It no longer matters, the Court decided, that police may know, as in *Acevedo*, that the marijuana is in a brown bag in the car's trunk before they begin to search. They may search the trunk without a warrant for that bag, and they may open it and inspect the contents, also without a warrant, when they find it.

The application of this exception may be seen in the last case of the preceding section, *Keehn v. State*, as well as *Green v. State* and *Curry v. State*. In *Green*, the stop of a vehicle for a suspected traffic offense led to additional observations which, combined with the officer's training and experience, amounted to probable cause to believe contraband was in the vehicle. *Curry* also involved a car search for drugs, but one in which the suspect had left his car to make a drug sale in a motel room. Believing that drugs would still be in the car, the court found that probable cause supported the warrantless search of the vehicle.

**SEARCH AND SEIZURE - SEARCH OF VEHICLE BASED ON PROBABLE CAUSE FROM DRIVER'S ACTIONS AND STOP AT KNOWN DRUG HOUSE.**

***Green v. State*, 256 S.W.3d 456 (Tex. App. - Waco 2008)**

A police warrant officer saw a truck being driven in the on-coming lane without a license plate on the front. After it passed, the officer looked for a license in the rear and saw that the truck did not have one. The officer circled the block in order to stop the truck. When he did so, he noticed the truck was stopped in front of a house, and that a man was turning and walking away from the truck in the direction of the house.

Based on prior experience and information from other officers, the warrant officer believed the house to be a "drug house." In fact, the officer previously had stopped a vehicle leaving the same house and discovered crack cocaine in the driver's possession. Because of what he had seen and what he knew about the location, the officer signaled the defendant to stop. As soon as the defendant pulled over, and before the officer could get out of his car, he opened his door and began walking toward the officer.

Since the man was looking nervously at the officer and advancing toward him, the officer remained behind his patrol car's door and ordered the driver back inside his truck. He had to repeat this command several times before the defendant complied. The man's nervousness and behavior led the officer to believe he had something illegal in his vehicle. Later, the officer testified that he was concerned that the defendant might be dangerous, but that he ordered him back inside his truck - where he might have gained access to a weapon - because he felt less exposed with the man in the vehicle.

As he approached the truck, the officer noticed a paper dealer's tag in the rear window. He explained the reason for the stop and obtained the driver's license and proof of insurance from the suspect, but did not see or smell any contraband in the vehicle.

When the officer then ordered the defendant out of the truck so they could talk, the suspect asked why. The officer explained that the defendant was being detained for investigation because he was nervous and had been seen in front of a drug house, leading the officer to believe he was trying to hide something. In response to the officer's question about whether he had anything illegal in the truck, the defendant said, "No, why?" The officer then asked if he could search the vehicle, and the driver again replied, "No, why?" After telling the suspect that, because of his behavior, he was going to search the truck anyway but was asking again for consent, the officer finally obtained the agreement of the defendant to search. In the search, a cigarette box was found stuffed next to the seat that contained crack cocaine.

The defendant moved to suppress the drugs found in his truck, arguing that, after the officer determined that there was no traffic violation, he should have ended the stop and let the defendant leave. He also argued that his consent was invalid because it was obtained by coercion. The trial court denied the suppression motion, and the defendant pled guilty to possession of a controlled substance. He then appealed the suppression ruling.

**Holding:** The defendant did not challenge the initial traffic stop. Traffic stops are like investigative detentions, both of which must be supported by reasonable suspicion and must be reasonable. "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." It cannot be used as a "fishing expedition for unrelated criminal activity." "Nervousness alone does not warrant reasonable suspicion." It can be considered, however, in evaluating the totality of the circumstances.

In this case, the defendant stopped in front of a known drug house, and the officer saw someone walking away from his truck and back to the house. When he was pulled over, the

defendant got out of his truck immediately and walked toward the officer's car, initially ignoring an order to return to his vehicle. During all of this encounter, the defendant acted nervous and kept glancing nervously at his own vehicle. All of these circumstances justified continuing the investigative detention after the original purpose for the traffic stop no longer existed.

The search of the defendant's truck was not the product of a valid consent, however. The officer told the defendant that he did not need his consent because he was going to search his truck anyway. That statement implied that the suspect had no right to resist the search, and it rendered involuntary any purported consent that he gave. While the search was not based on valid consent, the State argued that it was reasonable either to assure the officer's safety, or because probable cause existed.

A "vehicle frisk" is not automatically authorized during a traffic stop. "The search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief ... that the suspect is dangerous and the suspect may gain immediate control of weapons."

The defendant in this case immediately got out of his truck and walked toward the officer who had stopped him. He was nervous and failed to comply with the officer's instructions. However, the officer ordered the defendant back into his vehicle, even though that would have given the suspect access to a weapon, the very basis for the officer's purported concern for his safety. Under these circumstances the officer did not possess a reasonable belief that the suspect was dangerous and might gain access to a weapon in the truck that could be used against the officer.

While the facts known to the officer and his actions did not warrant a frisk of the defendant's vehicle, they did amount to probable cause to believe the vehicle contained contraband. Stopping in front of a known drug house and apparently having contact with someone from the house; getting out and away from his truck when stopped; walking toward the officer's car; not complying with an order to get back into the car; and acting nervous throughout the encounter contributed to the officer's suspicion that contraband was in the truck.

Combined with the officer's training, experience, and knowledge, including a prior arrest of someone visiting the same drug house, sufficient evidence existed to permit the trial judge reasonably to conclude that the officer had probable cause under the totality of circumstances. It was not improper for the court to deny the defendant's suppression motion.

**COMMENT:** In its opinion, the court includes two findings that serve as important reminders for law enforcement officers. First, it observes the long-standing rule that mere acquiescence to a request for consent to search is not effective. The defendant in this case finally agreed to the search of his truck, but only after being told by the officer that it really made no difference if he consented because the search was going to be made in any event. After essentially telling the suspect that he had no right to refuse, the officer could not rely on any agreement to search that might follow. Secondly, the court rejected the State's argument that the search of the vehicle was justified as a frisk because of the officer's reasonable belief the suspect was armed and dangerous. While his nervousness and general behavior might have produced a legitimate concern for safety, the officer effectively demonstrated that he did not really believe the man to be dangerous when he ordered him back into his vehicle. Putting a "dangerous" suspect back in the very place the officer wanted to search on the theory that it could contain a weapon convinced the court that the officer had no actual, reasonable concern for his safety.

**SEARCH AND SEIZURE - OFFICERS OBSERVING DRUG BUY IN MOTEL ROOM HAD PROBABLE CAUSE TO SEARCH SUSPECT'S CAR IN PARKING LOT WITHOUT A WARRANT.**

***Curry v. State*, 228 S.W.3d 292 (Tex. App. - Waco 2007)**

A man who had been arrested by police agreed to cooperate with drug task force officers by arranging a buy of crack cocaine at a motel. A detective and other officers positioned themselves in the adjoining motel room and maintained video surveillance of the room next door. Another officer in a room across the parking lot watched vehicle traffic. In the evening, the defendant drove up in a green car and got out but left the engine running and the lights on. He entered the room under surveillance and, as the officers watched, he and the buyer exchanged what appeared to be crack cocaine and money.

The officers entered the room and arrested the defendant. Their undercover buyer gave the officers 1.1 grams of crack cocaine. He had been searched prior to the transaction and had not had any drugs on his person. Two cell phones and about $1600 were found in a search of the defendant, including the money the task force officers had supplied to make the buy. A warrantless search of the defendant's car produced crack cocaine found in various places and weighing a total of about 65 grams.

The defendant moved to suppress to cocaine found in his car, contending that the police had no search warrant or probable cause. Because he was arrested in the motel room rather than near his vehicle, he argued the officers lacked probable cause for the car. Prior to trial, the defendant's suppression motion was denied. Following conviction and sentencing enhanced by prior convictions, he appealed the ruling on his suppression motion.

**Holding:** "Under both state and federal law, a police officer may conduct a warrantless search of an automobile if he or she has probable cause to believe a crime has been committed and there is contraband located somewhere inside the vehicle." This "vehicle exception" or "automobile exception" is based on the inherent mobility and relatively low expectation of privacy of vehicles.

"Probable cause exists when the facts and circumstances within the officer's knowledge and about which he has reasonable trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that a crime has been committed." All of the information known to cooperating officers at the time of the search may be considered in determining whether probable cause existed.

In this case the officers knew that the defendant had arrived in the green car and that he had sold crack cocaine to the buyer. A detective testified that he recognized the defendant from previous drug investigations and that, based on his experience, drug dealers usually do not carry all of their "stash" with them, but keep it nearby.

Based on the circumstances, the officers had probable cause to believe that the car and its contents were associated with the drug transaction they witnessed. Because probable cause extended to the defendant's vehicle, no warrant was required to search it. The defendant's suppression motion was properly overruled.

3. Inventory

A vehicle "inventory" is not considered by the Supreme Court to be a "search." It is an administrative procedure to "take stock" of the belongings of the owner for purposes of safekeeping. Because it is viewed in this way, no probable cause or warrant is required. It is essential, however, that the vehicle be impounded lawfully before any inventory can be taken.

Inventory of the contents of a vehicle usually involves one or more of four legal issues: (1) lawfulness of the impoundment, (2) absence of an investigative motive for the inventory and impoundment, existence of, and adherence to, a standardized procedure for conducting inventories, and (4) confinement of the "search" to the areas properly within the scope of an inventory. An inventory does not always involve a vehicle. For the same reasons that justify a vehicle inventory, personal effects may be seized and inventoried for safekeeping when the owner has been arrested and is being placed in jail or is otherwise unable to care for his or her property.

*State v. Stauder* illustrates the need, not only to have prescribed criteria and procedures for the inventory, but also the need to follow those rules. No inventory list was prepared in *Stauder*, even though one was required by the department's internal inventory policy. This omission invalidated the inventory and the State was left trying, unsuccessfully, to justify the search of the vehicle in other ways.

**SEARCH AND SEIZURE - VEHICLE INVENTORY NOT PERFORMED IN ACCORDANCE WITH DEPARTMENT'S "STANDARDIZED PROCEDURES" HELD INVALID.**

***State v. Stauder*, 264 S.W.3d 360 (Tex. App. - Eastland 2008)**

An officer stopped the defendant for driving while not wearing a seatbelt. During the traffic stop, the officer noticed that the registration sticker had been altered, making it "fictitious." The defendant was arrested for this offense and his pickup truck was impounded. Prior to the towing and impoundment, the officer and others, including a canine unit, searched the vehicle. They later referred to this search as an "inventory." During the search, a handgun and illegal drugs and paraphernalia were found in an unlocked container in the truck's bed. Police department policy required that an inventory form be completed, but the officer failed to make an inventory list of the items found in the pickup.

The defendant moved to suppress the evidence prior to his trial for unlawful possession of a firearm by a felon and possession of methamphetamine. In the hearing on the motion, the Chief of Police testified that his officer failed to follow departmental inventory policy because he did not complete an inventory sheet.

The trial court granted the defendant's motion, finding that the failure to comply with written standardized procedures for a vehicle inventory rendered the warrantless search of the truck unlawful. Since no other probable cause or exception to the requirements of the Fourth Amendment or the Texas Constitution existed, the evidence was not admitted. The State appealed.

**Holding:** "Under the inventory doctrine, police are permitted to search impounded vehicles

to make an inventory of items in the car in order to protect the owner's property, to protect the police from claims for lost property, and to protect the police from dangerous contents." An inventory may not be used to search a vehicle for incriminating evidence. Only those conducted pursuant to standard police procedures are considered reasonable under the Fourth Amendment.

"The Texas Court of Criminal Appeals has long held that, to be constitutional, an inventory search must not deviate from police department policy and that the State may satisfy its burden by showing (1) an inventory policy existed and (2) the policy was followed." In this case, the State admitted that the written, standardized inventory policies of the department were not followed because no inventory list was completed. The State therefore failed to meet its burden of showing compliance with established procedures. Consequently, the trial judge was correct in holding that the inventory search that revealed the contraband was invalid, any would have been justified in believing that the "inventory" was merely a "ruse" to search the defendant's truck without a warrant.

Alternatively, the State argued that the container was searched incident to the defendant's arrest. "When the person arrested is a recent occupant of a vehicle, the passenger compartment of that vehicle may be searched incident to the person's arrest." The State contended that this rule extends to the bed of the pickup, but it failed to meet its burden on this issue. According to the testimony of the officers, the evidence was found in an "inventory," and not during a search incident to arrest.

*New York v. Belton*, 453 U.S. 454, authorized the search of a passenger compartment of a vehicle, not the bed of a pickup truck. There was no evidence that the items within the bed of the truck were within reach of the defendant or within the area of his "immediate control" in order to bring them within the search incident to arrest exception.

**COMMENT:** Since the adoption by the U.S. Supreme Court of vehicle inventory as a legitimate "taking stock" of the contents of a car or truck, the validity of the procedure has depended on the existence of standardized operating procedures that govern the inventory, and compliance with those procedures. Because, unlike most searches, the inventory is not justified by probable cause or even reasonable suspicion, courts have been concerned that police officers exercising unlimited discretion could use the procedure as a way to search when they could not do so by following the usual requirements of the Fourth Amendment. The necessity of having and following standardized procedures is intended to provide some guidance for officers and limitation on the availability of the inventory.

4. Consent

Consent to search cases usually turn on the voluntariness of the consent given or the authority of the person to give consent. Consent that is truly voluntary eliminates the need for either suspicion or a warrant. Voluntariness is a fact question for the judge or jury, and findings supported by the evidence usually are not disturbed on appeal. Courts often hold that, in order to be voluntary, consent must be "clear and unequivocal" and not merely "acquiescence to authority."

Officers sometimes request written consent or administer a kind of *Miranda*-warning to persons being asked to consent, all in an effort to demonstrate the voluntariness of any consent that is given. No prescribed warning is necessary to establish that consent is voluntary. It is only

necessary that the consent be voluntary within the totality of circumstances.

Because voluntariness is determined from an assessment of all the circumstances operating on the suspect when he or she consented, every detail of the encounter is potentially significant. Written evidence of consent is very helpful to the State if the existence or voluntariness of consent becomes an issue. But written permission to search is not required by Texas or federal constitutional law, and verbal consent is no less valid than written consent.

In all search cases, the scope of the search must conform to its purpose, and in the case of consent, the scope of a search must conform with the limits placed on the consent that is given, or to the limits inherent in the consent as it reasonably would be understood. For example, if a person is asked for consent to search his car, and he replies, "Sure, go ahead. But don't open the trunk," the consent does not include the trunk area and probable cause is not created by the fact that the driver withheld consent for the trunk. Or, if a driver is asked for permission to search her car's trunk and she agrees, that consent does not permit a search of the passenger compartment too.

Consent may be implied from a person's statements or actions. In *Johnson v. State*, a woman called 9-1-1 to report that she had just killed her husband. She repeatedly urged the dispatcher to send the police to her house, thereby effectively consenting to their entry, where they saw evidence later used against her. *Banargent v. State* presents the same legal issue set in a very different context. Banargent was an inmate who made admissions of guilt during a call he placed from the jail. Since inmates were warned that calls might be recorded and monitored, the court held that the defendant effectively had consented to his call being overheard.

Authority to consent is another issue often involved in consent cases. Where control over premises is shared, as it is between roommates or spouses living together, the consent of one may suffice even if the other would have objected. This may be because the person giving consent "actually" has common authority - or control - over the premises, but it also may suffice that the person giving consent has "apparent authority" even if he or she has no actual authority. If a reasonable person would believe from all appearances that the person consenting had authority, an officer may rely on that "apparent authority." *Hubert v. State* is a case in which the co-occupant of a suspect's house gave permission to officers to search the suspect's bedroom, but the circumstances observed by the officers should have alerted them that the co-occupant lacked even apparent authority to consent.

## SEARCH AND SEIZURE - CO-OCCUPANT LACKED APPARENT AUTHORITY TO CONSENT TO SEARCH OF OTHER TENANT'S BEDROOM THAT HAD CLOSED DOOR.

***Hubert v. State*, No. 13-08-00093 (Tex. App. - Corpus Christi, 1-15-09).**

The defendant had been convicted of a felony, served part of his sentence, and was released on parole. His grandfather, who shared the house where the defendant lived, reported to the defendant's parole officer that his grandson had violated several conditions of parole.

An arrest warrant was obtained for the defendant. When deputy constables went to the house to arrest the defendant, his grandfather gave them consent to search the entire house where the two

men lived, including the defendant's bedroom. In that room, the officers found guns for which the defendant was charged with possession by a felon.

During the search of the house, the deputies came to the defendant's bedroom. The door was closed, but his grandfather opened the door and allowed the officers to enter and conduct a search. The guns were found on top of an entertainment center and inside a closet. Ammunition was found inside a dresser.

A detective who assisted in the arrest and search later testified that he believed the grandfather owned the home. He also testified that the man had told him he did not sleep in the defendant's bedroom At the suppression hearing, the defendant's girlfriend testified that she slept in his bedroom, and that the defendant and his grandfather owned the house jointly, an assertion that was repeated by the defendant in his own testimony.

Following the suppression hearing, the trial court denied the defendant's motion to exclude the guns. The defendant pled guilty pursuant to a plea agreement and appealed on the grounds that his motion had been wrongfully denied.

**Holding:** Consent to search is a well-recognized exception to the warrant requirement. "Consent to search must come from a person who has authority over the property." Whether a person is the owner of the property is not determinative of the authority of such a person to consent to a search. A person who has "common authority" may properly consent "when the party has equal control over and equal use of the premises being searched."

The officers testified that the defendant's grandfather gave them consent to search. One of them believed the man was the owner of the house, and he opened the defendant's bedroom door for the officers. That door had been closed, and the defendant was sitting, handcuffed, in a patrol car just outside the house.

None of the testimony of the officers was evidence that the person who gave them consent had actual control over the bedroom. In the absence of proof that the grandfather had actual authority to consent, the search could be justified only if he reasonably appeared to have such authority. "Under federal constitutional principles, a third party's apparent authority to consent to search will suffice when the facts available to the officer would lead a person of reasonable caution to believe that the third party had authority to consent to the search." Where it is unclear whether a person has authority, officers may not rely on his or her consent to conduct a search.

The apparent authority doctrine does not allow law enforcement officers "to proceed without inquiry into ambiguous circumstances or to always accept at face value the consenting party's apparent assumption or claim of authority to allow the contemplated search." In this case, the door to the defendant's bedroom was closed and they heard his grandfather say that he did not sleep in that bedroom. It was the grandfather, though, who opened the door and allowed the officers to enter.

At best, the authority of the defendant's grandfather to consent to the search was ambiguous. A reasonable person would have inquired further. Because the officers did not do this, they were not entitled to rely on the third party's consent. In the absence of consent, they lacked authority to enter and conduct a search of the bedroom without a search warrant, which they did not have. The search was unreasonable and the guns found inside should have been suppressed.

**SEARCH AND SEIZURE - CALL BY A WOMAN TO 9-1-1 ASKING OFFICERS TO BE**

**SENT TO HER RESIDENCE WHERE SHE HAD JUST SHOT HER HUSBAND AMOUNTED TO CONSENT FOR OFFICERS TO ENTER AND SEARCH HOUSE.**

***Johnson v. State*, 226 S.W.3d 439 (Tex. Crim. App. 2007)**

A woman who was hysterical called 911 just after midnight and told the dispatcher, "Come, come. I killed him." After giving the dispatcher directions to her house, the woman explained that she had shot her husband "through the heart" because he had beaten her. Throughout the conversation, the woman repeatedly asked the dispatcher to "bring someone out here to me" and "come on." At the dispatcher's direction, the woman went to the front door without the gun and continued to talk with the dispatcher until an officer arrived.

For his safety, the officer handcuffed the suspect and put her in his patrol car before entering the house to find the woman's dead husband on the living room floor. In a brief protective sweep of the house, he discovered a .380 handgun on the kitchen counter that had been used in the shooting.

Paramedics arrived shortly thereafter, followed about fifteen minutes later by sheriff's investigators who took custody of the suspect and went inside the home to begin a preliminary investigation. During this period, the suspect continued to explain why she had shot her husband and asked if she could show or tell the officers anything. She did not ask them to stop the investigation or leave her house.

A suppression hearing was held during the trial in which the defendant argued that the officers entered the home unlawfully, either at first or during one of the re-entries. The trial judge denied the motion, ruling that the suspect had consented to the search and that, in any event, most of the evidence was found in plain view during the first protective sweep of the area.

The jury rejected the defendant's self-defense claim and convicted her of murder, and she appealed. The court of appeals affirmed on the grounds that the first two entries were justified by the "emergency aid" and protective sweep doctrines, and anything seen in plain view during those entries was admissible. Evidence found in a later entry was inadmissible, the court held, but its admission at trial was harmless error. The defendant petitioned for discretionary review by the Texas Court of Criminal Appeals.

**Holding:** Entering a person's home without a warrant is presumptively unreasonable under the Fourth Amendment unless one of the exceptions to the warrant requirement exists. Voluntary consent is one of these. Because any claimed consent must have been voluntary, courts review the totality of circumstances to determine voluntariness. Voluntary consent must be established by clear and convincing evidence. Its scope is measured by what an ordinary reasonable person would have understood under the same circumstances.

In previous Texas cases, as well as those from other states, courts have found implied consent to enter a home from the fact that a homeowner called 911 to report a crime on the premises. "When a homeowner makes a 911 call and requests immediate assistance because of an emergency, he is indicating his consent to (1) the arrival and entry of the responding officers to resolve that emergency and, (2) absent any evidence of the revocation of that consent, an objectively reasonable limited investigation by the responding officers into the emergency that the homeowner reported." This case is somewhat different from many other similar cases, however, because the defendant did not claim the murder had been committed by a third party. Rather, she admitted from the beginning that she

had shot her husband.

The defendant claimed self-defense initially in her conversation with the dispatcher, and repeated that assertion later during the investigation at the scene. In this case, though, her alleged self-defense made no difference in whether consent to enter the house and investigate was voluntary. After the defendant begged for the police to come to her home, and after she provided them directions, they did exactly as she asked. She remained on the scene as the officers entered, but never revoked her consent or asked the officers to leave. In fact, she offered to go back into the house to assist the officers.

The "initial investigation" that was conducted on the basis of implied consent did not end simply because the officers came and went from the house several times shortly after the initial entry. It is not the number of times officers enter and leave that determines the reasonableness of their conduct, but whether officers return for "later distinct 'visits' to the home" after the initial investigation is complete.

These officers limited the scope of their search in this case to what was objectively reasonable under the circumstances. They "did not rummage through closets, open drawers, paw through purses, or otherwise invade [the defendant's] privacy interests in her home." Instead, they came when summoned, found the body, took photographs, and collected the gun and a shell casing. Except for the shell casing, everything was in plain view during the first, cursory investigation.

Under the circumstances, the officers' entry in the home was reasonable in scope and based on implied consent from the defendant's 911 call. The suppression motion was properly denied. **COMMENT:** The holding of the court that a 911 call under these circumstances carries with it the implied consent to enter the house where the emergency exists is not remarkable in itself. It should not be taken to mean more than the court says, though. For example, the court did not hold that a 911 call from a third party outside the home would also justify permission to enter under an implied consent theory. It might be justified by the emergency doctrine or otherwise, but only persons with authority to consent can do so. Further, the court is careful to note that a homeowner who calls 911 does not impliedly consent to an entry and search that is more extensive than necessary to deal immediately with the circumstances. The court concedes that a person calling 911 to report a shooting and asking for immediate assistance does not necessarily "consent to the responding police searching through his bedroom belongings." Once the immediate steps necessary to deal with the purpose of the 911 call have been taken, officers cannot continue to search or explore the house for evidence of the crime that may have occurred there without obtaining a warrant.

## SEARCH AND SEIZURE - RECORDING INMATE'S PHONE CALL FROM JAIL DOES NOT VIOLATE TEXAS WIRETAP STATUTE.

### *Banargent v. State*, 228 S.W.3d 393 (Tex. App. - Houston 2007)

The defendant and his girlfriend had lived together for about a year-and-a-half, but the relationship was ending at the time he walked into the living room and said something to her. She replied that she "didn't want to hear it" that morning. The woman felt something hit her back and neck, which she first thought was a fist. She realized it was a knife when the defendant stabbed her

in the side of her neck.

After leaving the house for a short time, the defendant returned and stabbed the woman behind her ear, on the back of her neck, on her back, and on her arm, telling her that he wanted her to die. A paramedic called to treat the victim at the scene was told by the defendant that someone had broken into the home and attacked her.

When a police officer arrived to investigate, the defendant told a similar story, but the physical evidence did not support his version of events. Eventually, the defendant was arrested and charged with aggravated assault. While he was in jail awaiting trial, the defendant made a telephone call in which he admitted stabbing the victim, but claimed it was done in self-defense. The call was recorded on a digital telephone recording system operated at the jail. Each inmate was identified for recording purposes by a number. Calls were stored on compact discs according to the inmate's number and retained for use by law enforcement.

All of this was described in detail during the defendant's trial when the State offered the recording in evidence to rebut the defendant's claim that a former boyfriend of the victim had stabbed her. The defendant objected to the introduction of the recording, arguing that it was obtained in violation of Section 16.02 of the Texas Penal Code which prohibits electronic eavesdropping.

The recording was admitted over the defendant's objection and he requested that the jury be instructed to disregard the evidence if it found that the recording had been obtained illegally. The defendant was convicted and he appealed.

**Holding:** Article 38.23(a) of the Texas Code of Criminal Procedure, the state exclusionary rule, provides in part that if the evidence raises an issue about whether some of the evidence was obtained in violation of the constitution or laws of the State of Texas or the United States, the jury shall be instructed to disregard that evidence if it finds that such a violation occurred. The defendant's argument was that the jury should have been instructed under Article 38.23(a) because listening to and recording his telephone call violated Section 16.02 of the Penal Code prohibiting the intentional interception of a wire, oral, or electronic communication.

Section 16.02(c)(3)(A) provides an affirmative defense for intentional interception if one of the parties to the communication has given prior consent. Since notices are posted that telephone calls may be monitored or recorded, and since the recording itself contained a recorded voice prompt at the beginning of the defendant's call reminding the parties that the call was subject to being recorded, the State argued that the defendant had effectively consented to the interception.

Defendant's response to this was that the prompts and notices only tell inmates that their calls "may" be recorded, not that they "shall" be recorded and monitored. Further, inmates were not asked whether they consented to the recording, and did not consent in writing.

Although Texas has not previously dealt precisely with this point, a Wisconsin case decided the matter by holding that an inmate gives implied consent when he is on notice that the call may be recorded or monitored but nevertheless continues with the call. The defendant's telephone conversations contained a prompt indicating that calls were subject to monitoring. Postings throughout the jail also informed inmates that their telephone calls were not private and could be recorded or monitored. The defendant impliedly consented to the recording when he continued with his call despite these warnings.

There was no violation of Section 16.02. The trial court's refusal of the defendant's requested jury instruction therefore was not erroneous.

5. Search Incident to Arrest

Search incident to arrest justifies a warrantless search of the area in the "immediate control" of the arrestee where the arrest is lawful. Reviewing courts therefore are most likely to confront questions about the scope of the search; that is, whether the area searched was within the control of the person being detained. But equally important is the determination of whether the arrest or stop was legal. If it was not, the search, even if within the area of immediate control, cannot be justified by reliance on the search incident to arrest rationale.

The Supreme Court's decision in *Arizona v. Gant* is easily the most significant development in the law of search incident to arrest since that court decided *New York v. Belton*, the 1981 case in which search of closed containers within a vehicle's passenger compartment was approved. Following the decision in *Belton*, many commentators, judges, and scholars believed that a warrantless search of the passenger compartment incident to arrest was valid even if that area no longer was within the reach and control of an arrestee. The Court made clear in *Gant* that this reading of *Belton* was incorrect. If the arrestee cannot access the passenger compartment, it cannot be searched under this rationale unless it is reasonable to believe the vehicle contains evidence of the crime for which the person has been arrested.

**SEARCH AND SEIZURE. POLICE MAY NOT SEARCH INTERIOR OF VEHICLE INCIDENT TO ARREST IF THAT AREA IS INACCESSIBLE TO ARRESTEE.**

***Arizona v. Gant*, 129 S.Ct. 1710 (2009)**

Officers received a tip that drugs were being sold at a residence. When they knocked on the door to investigate, the defendant answered and told them that he expected the owner to return later. A records search later revealed that the defendant's license was suspended and that there was a warrant for his arrest for driving with a suspended license.

When the officer returned to the residence later, they found a man and woman outside. Both of them were arrested, handcuffed, and placed in patrol cars. The defendant's car pulled into the driveway while the officers were on the premises. After he got out of his car and closed the door, one of the officers called to the defendant and stopped him about 10 to 12 feet from the suspect's car. He was arrested and handcuffed immediately.

Once backup officers arrived, the defendant was placed in the back of a patrol car while two officers searched his vehicle. One of the officers found a gun while the other discovered a bag of cocaine in the pocket of defendant's jacket, which was laying on the backseat.

The defendant was charged with possession of a drug for sale and possession of drug paraphernalia. He moved to suppress both of these items, claiming that the warrantless search of his car's interior was not permitted incident to arrest because he was not a threat to the officers while handcuffed in the backseat of a patrol car, and because there was no evidence of the crime of driving with a suspended license that the officers could have expected to find in the vehicle.

The trial court denied the motion, holding that the search was permissible as being incident

to the defendant's arrest. He was convicted by a jury on both counts and appealed to the state supreme court.

After the Arizona Supreme Court decided that the search of the defendant's car was unreasonable, the case was accepted for review by the Supreme Court of the United States. The issue on appeal was whether *New York v. Belton*, 453 U.S. 454, permits the warrantless search of a car's passenger compartment when the arrestee has been removed from the vehicle and secured, and when there is no reason to believe that evidence will be found in the car.

**Holding:** In *Chimel v. California*, 395 U.S. 752, the Court held that a search incident to arrest may include only the arrestee's person and the area "within his immediate control." That area is one "from within which he might gain possession of a weapon or destructible evidence."

The officer in *Belton* stopped a car in which four men were riding. When the officer discovered evidence of a possible drug offense in the car, he did not handcuff the men, but he had them get out of the car and he separated the suspects while he searched the passenger compartment of the car. In the pocket of a jacket on the backseat, the officer found cocaine. Because articles within the passenger compartment of an automobile were considered generally to be within the area "into which an arrestee might reach," the Court allowed the warrantless search. "When an officer lawfully arrests 'the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile.'"

*Belton* has been "widely understood" to permit an arresting officer to search the passenger compartment of a vehicle, including any closed containers in it, whenever a recent occupant of that vehicle is arrested. And this understanding has not depended on whether the arrestee could reach and gain control of an item within that area. Reading *Belton* in this way, however, is inconsistent with the reasons the Court announced in *Chimel* for allowing a search incident to arrest. "The *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."

It also is reasonable to search the passenger compartment incident to an arrest if it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Where there is no reason to think evidence of the violation could be found in the vehicle, as, for example, in the offense of driving with a suspended license, then no search is permitted.

In this case, the defendant was handcuffed and in the back of a patrol car at the time of the search. There were five officers on the scene, and only three arrestees, all of whom had been secured away from the car. The defendant was not within reaching distance of his car, and there was no relevant evidence associated with his offense that was likely to be found in the vehicle. Had he been arrested for a drug offense, a search of the passenger compartment for evidence of that crime might have been appropriate, but the officers could not have expected to find evidence that the defendant was driving with a suspended license.

While it is true that expectations of privacy are lessened in a vehicle, the privacy interests remain important. "A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals." The rule of *Belton* also has not proven to provide great clarity in determining whether a search is reasonable. Courts have interpreted the rule differently when the suspect has

been removed from the scene prior to the search, or when the issue is one of whether the search is "contemporaneous" with the arrest.

Law enforcement officers will not be better protected by allowing a search when the arrestee is secured and poses no realistic threat to officer safety. Evidence in the vehicle also cannot be destroyed in those situations, and if reason exists to believe evidence is in the car, officers may search. "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies."

**COMMENT:** This significant opinion reshapes the usual understanding of what is allowed when an officer arrests the occupant of a vehicle. It is well understood that a search of the person who has been arrested - as well as the area within his or her "immediate control" - is allowed without a warrant or probable cause in order to protect the safety of the officer and prevent the destruction of evidence the arrested person may have. Since *Belton*, vehicle searches have been treated very differently, but without explanation of why they are unlike other searches incident to arrest. While *Belton* was intended to be a "bright-line" rule that was easy to apply, it has not always been so clear. Could a search include a locked glove compartment or console? If the arrestee had been taken to jail, could a search still be conducted? These questions could not be answered by applying the twin reasons from *Chimel* because the *Belton* "rule" seemed to ignore that rationale. This case now provides officers a guiding principle to apply: Is the arrestee able to reach into the passenger compartment to obtain access to a weapon or evidence? If so, that area may be searched incident to arrest, but if not, some other rationale must be found (Inventory? Consent? The vehicle exception?) if the search is to be conducted without a warrant. The Court also announces a peculiar standard for searching when it is "reasonable to believe the vehicle contains evidence of the offense of arrest." It is unclear whether "reasonable" means a level of suspicion akin to reasonable suspicion, or is more like probable cause. It is clear, however, that this standard is likely to be subject to more interpretations from courts trying to apply the rule.

6. Administrative Search and Community Caretaking

Over the past several years, the Supreme Court has approved a variety of "administrative searches," always without requiring a warrant and often on the basis of reasonable suspicion rather than probable cause. These "searches" are evaluated on reasonableness grounds and are not considered to be searches for criminal evidence although they often uncover such evidence. The Supreme Court has approved warrantless searches of school children, probationers, auto salvage operators, governmental employees, and U.S. Customs agents. The Court looks for the presence of some "special need" other than the usual needs of law enforcement in approving administrative searches.

Roadblocks, conducted for a variety of purposes, also can be characterized as "special needs" searches. In Texas, though, courts have been very reluctant to approve roadblocks in the absence of a well-established and clearly defined statutory or regulatory procedure for their

implementation. An effort to establish such a procedure died in the Texas Legislature in 2009.

Another kind of administrative search, the "community caretaking" stop, has been recognized by the Court of Criminal Appeals and considered by several lower courts. Four factors have been employed widely to test the validity of these encounters: (1) the nature and level of distress exhibited, (2) the location of the person, (3) whether the person was alone or had access to assistance, and (4) the extent to which the person in distress was a danger to himself or others. Using these factors, the court of appeals in *Gibson v. State* held that community caretaking did not justify the stop of a vehicle in an effort to find a juvenile girl who was late returning home. The "most important" factor - the nature and level of distress - did not support the stop under the circumstances.

Using the same factors, the appeals court in *Doiron v. State* approved a stop on community caretaking grounds. Although the officer did not see the defendant commit a traffic offense, he did observe the driver driving slowly with his emergency flashers on before pulling to the side, opening his door, and vomiting. Since he was alone in the car, the officer stopped to see if he could assist, and discovered that the defendant was intoxicated.

## SEARCH AND SEIZURE - STOP OF VEHICLE IN ORDER TO LOCATE MINOR WHO WAS LATE RETURNING HOME WAS NOT JUSTIFIED AS "COMMUNITY CARETAKING" FUNCTION.

### *Gibson v. State*, 253 S.W.3d 709 (Tex. App. - Amarillo 2007)

Around 11:15 p.m., the mother of a juvenile girl called the police to report that her fifteen-year-old daughter had not returned from a high school football game as expected. She told the officer who responded to the call that her daughter might be in a 1989 blue vehicle with a certain license plate number. About a half hour later, the officer saw a vehicle matching the description and, although he could not see or identify the occupants, the officer pulled over the car and told the driver he had been stopped "for the juvenile." While another officer removed the girl from the vehicle, the officer who had made the stop asked the driver for his license and proof of insurance. The driver did not have a license and he was placed under arrest. In a search incident to arrest, cocaine and marijuana were found in or near the car and the driver was charged with possession.

The defendant moved to suppress the drugs. At the suppression hearing the officer testified that he knew the driver did not have a license because of a past encounter with him, but that he was not stopped for that reason. Instead, the officer said, he stopped the vehicle because it matched the description of the vehicle he had been given by the missing girl's mother when she asked him to find her daughter.

The daughter testified that she and the defendant left the football game before it ended, and the defendant went to a house briefly while she waited in the car. When they returned to the game, it was over and the girl's ride could not be found so she agreed to let the defendant take her to her house. On the way to the girl's home, they were stopped by the officer. As they were being stopped, the defendant pulled drugs from his pocket and gave them to the girl, asking her to "chunk them out the window." Since another officer approached on the passenger side of the car, the girl laid the drugs beside the seat.

The trial court denied the defendant's suppression motion and, at trial, refused to instruct the

jury to disregard the evidence if it found the stop to be unlawful. Following his conviction, the defendant appealed.

**Holding:** The State argued on appeal that the stop of the defendant was based on the community caretaking function of the officers. "As part of a police officer's duty to 'serve and protect,' an officer 'may stop and assist an individual whom a reasonable person, given the totality of the circumstances, would believe is in need of help.'" The community caretaking function is "totally divorced" from the detection, investigation, or acquisition of criminal evidence. Its primary purpose is for the welfare of the person who is in need of assistance.

Four factors are used to evaluate whether an officer's belief that assistance was needed was reasonable. These are: (1) the nature and level of distress exhibited by the person; (2) the person's location; (3) whether assistance other than that of the officer was available; and (4) to what extent the person was a danger to himself or others. The officer in this case had no reasonable suspicion or probable cause. He was unaware of any reason to think the defendant was involved in criminal activity when the stop was made, but none was required if the stop was a community caretaking function.

All the officer knew from the mother's report was that she was "concerned" about her daughter not returning home when expected, and that she did not want her daughter in a car with the defendant. The mother did not say why she did not want the girl with the defendant, and she was no more than an hour and a half late when the stop was made. Based on these facts, the first factor - the nature and level of distress - was insufficient to justify a stop of the defendant for community caretaking. While this factor is the most important, the other factors, in a given situation, might justify a stop.

The location of the stop also did not support a stop, though, because it was made just a couple of houses before the defendant reached the girl's home. It was reasonable to conclude that the defendant was taking her home, so location did not contribute to the girl's distress.

At the time of the stop, the officer testified he could not see how many people were in the car and could not identify them. It was impossible, therefore, to determine whether the girl he sought was alone or with others who might offer assistance.

There was no evidence that the girl was in danger by getting a ride home from the defendant. It does not appear that he was driving erratically or in a way that would endanger anyone, or that he posed a threat to the girl. The only evidence was that her mother did not want her with the defendant.

Based on all of these factors, "the evidence failed to establish that the stop of [defendant's] vehicle was an objectively reasonable exercise of the community caretaking function." In the absence of at least reasonable suspicion, there was no justification for the stop and the drugs found incident to that stop should have been suppressed.

## DWI. STOP JUSTIFIED BY COMMUNITY CARETAKING FUNCTION RATHER THAN TRAFFIC OFFENSE.

### *Doiron v. State*, 283 S.W.3d 71 (Tex. App. - Beaumont 2009)

At about 1:00 a.m. an officer saw the defendant's car being driven slowly on the side of the street with the brake lights blinking intermittently. The door was open and the driver's head was leaning out. He was alone in the car. The officer turned on his emergency lights and stopped the defendant. According to the officer, the defendant's breath and vehicle smelled strongly of alcohol.

When the driver was outside the car, he was unsteady on his feet, his eyes were bloodshot and glassy, his clothes were untidy, and he had a stamp on his hand, which made the officer think he had come from a bar. The officer also noticed that the defendant had vomited on the ground outside his car. After showing signs of intoxication on field sobriety tests, the defendant was arrested by the officer for DWI. He refused to submit to a breath test.

The defendant moved to suppress any evidence resulting from the stop, arguing that the officer lacked reasonable suspicion to justify a detention. Following denial of his suppression motion, the defendant was tried before a jury. At trial, the officer testified that he did not cite the defendant for any traffic offense and did not see him commit one. Instead, he stopped the defendant for "community caretaking." The defendant was convicted of DWI and appealed on the ground that the officer's stop was unlawful.

**Holding:** "A police officer's job involves more than enforcing the law, conducting investigations, or gathering evidence for criminal proceedings. An officer also investigates accidents that involve no criminal liability claim, directs traffic, and performs other duties that are best described as 'community caretaking functions.'" For these functions, the officer's "primary motive must be concern for the individual's well-being." Based on the facts of this case, that concern might have been the primary motive for the officer's stop of the defendant.

Whether an officer's belief that someone needs assistance is reasonable depends on several factors. These include: (1) the nature and level of distress exhibited by the individual; (2) the location of the person; (3) whether the person was alone or had assistance from others; and (4) the extent to which the person was a danger to himself or others.The first of these factors is entitled to the greatest weight, but all four weigh in favor of the officer's stop of the defendant in this case. His distress was evident; the driver's door was open and the defendant was vomiting while leaning out the door.

When the officer first saw the defendant, his car was stopped in the road, then pulled slowly to the side with the motor running and the brake lights flashing intermittently. He was alone in the car and only the officer was present to assist him. Because the driver was by himself, it was reasonable for the officer to stop and see whether he was in danger. Community caretaking cases depend heavily on the facts and circumstances known to the officer. In this case, those circumstances supported the officer's stop and inquiry.

7. Exigency

Where officers have probable cause but are unable to obtain a warrant due to a reasonable fear that evidence will be destroyed or a suspect will escape, courts have permitted a warrantless search or arrest. Entries into residences, however, receive especially close scrutiny by courts. The Fourth Amendment is explicit in its coverage of "houses," which perhaps explains in part why all manner of "homes" or living places get special deference. When these two concepts - a need to act

quickly and special protection for residences - combine, courts face an added challenge in balancing the competing interests.

Several Texas cases have dealt with officers smelling the odor of burning marijuana, and acting on that evidence without a warrant. Clearly, if marijuana is burning, evidence is being destroyed and quick action is required. At the same time, entering a residence without a warrant from which the odor of burning marijuana is emanating involves an intrusion on the most sacred territory. While odors alone do not authorize a search without a warrant, an odor might combine with other circumstances to establish probable cause or the exigency necessary to conduct a warrantless search. Officers in *Gutierrez v. State* smelled marijuana and saw that a suspect's eyes were bloodshot as they stood talking with him on his front porch about a stolen computer in his home. While probable cause existed to believe the stolen property was inside, and that marijuana had been used and would be found in the house, the officers were not confronted with the kind of exigency that would permit a warrantless entry and search of the entire house.

The "emergency doctrine" is related to, and something of a mix of, exigency and the "community caretaking" doctrine. It is based on the need to act quickly in order to save life or property, and is not limited by the probable cause and warrant requirements that accompany searches for criminal evidence. In such searches, there must be an objective reason to believe immediate action is required. Officers entered a house in *Rothstein v. State* because they believed a burglary might be in progress at the residence. Inside, they found evidence of drug trafficking and secured the premises while they obtained a warrant. The court of appeals determined that no "search" of the house occurred beyond that justified by the exigency of the situation.

No building or residence search was involved in *Ontiveros v. State*. Rather, the search was a non-consensual DNA swab of the penis of a man suspected of sexual assault. The court of appeals agreed that an exigency existed, citing the possibility that fragile DNA evidence could have been destroyed if the search had been delayed until a warrant could be procured.

## SEARCH AND SEIZURE - EXIGENCY SUPPORTS NON-CONSENSUAL DNA SWAB OF SUSPECT'S PENIS.

### *Ontiveros v. State*, 240 S.W.3d 369 (Tex. App. - Austin 2007)

A teenaged woman awoke in the early morning hours to find the defendant in her bed. She knew him because he had lived with her aunt and was the father of her aunt's children. The man overcame her resistance and penetrated her vagina with his penis. Following the assault the young woman showered, ran from her family's apartment, and called her boyfriend. Since her attacker had left, she returned to the apartment and woke her parents to tell them what had happened.

The police were called. While waiting for them to arrive, the girl's stepfather noticed that the air conditioning unit had been removed from the window and blood was found on the curtain next to the window. DNA tests confirmed that the blood was the defendant's.

A detective who spoke with the victim and learned the identity of her attacker learned that the suspect had been found by the woman's family. There were outstanding warrants for the man's arrest, so the detective ordered officers at the scene to arrest and book the man, holding him for the

sexual assault. He also told them to "ask [the defendant] for a voluntary specimen from his penis or penis swab" but said if the man did not consent, he "wanted it anyway under exigent circumstances." The investigator later testified that he did not know if a magistrate would be available on a Sunday morning to issue a search warrant, and that it could have taken four or five hours to get a warrant. He believed the DNA could have been damaged or destroyed by the defendant in that time.

The officer who transported the suspect to the jail took him to a private room and asked him to submit to a penile swab. After the man refused, an evidence technician took the swab without resistance by the suspect. The complainant's DNA was found on the swab, along with sperm cell fractions containing the suspect's DNA.

The defendant moved to suppress the DNA evidence obtained by the swab on the grounds that it was obtained without a warrant and was presumptively unreasonable. His objection was overruled and he was convicted. The defendant appealed.

**Holding:** The defendant had been lawfully arrested on outstanding warrants and the police had probable cause to believe he had committed a sexual assault only a few hours before his arrest. There was reason to believe DNA evidence would still be found on the man's penis. A DNA search in this case could be conducted simply by rubbing a swab across the defendant's penis. To spare the man embarrassment, this sample was taken in a private room with only the evidence technician and the arresting officer present, and no force was used.

The defendant argued that he could have been prevented from destroying the evidence by just handcuffing him and not allowing him to use the restroom while a warrant was obtained. Fragile DNA evidence might have been damaged, however, by the man urinating in his pants, even if he was handcuffed and restrained. Given the potential for loss of evidence of this offense if a warrant was sought, it was not unreasonable to conduct a non-consensual penile swab. The Texas Constitution, like the U.S. Constitution, does not require a different result.

This sort of search may not be routinely conducted whenever a suspect is arrested, even for sexual assault. "The nature of the sexual assault, the strength of the probable cause, the relatively short amount of time between the assault and the search, the showing of a need to act before the DNA evidence could be damaged or destroyed, and the manner in which the search was conducted in a private room by a trained technician" were factors in this case that justified the search.

## SEARCH AND SEIZURE - WARRANTLESS ENTRY INTO HOME NOT REQUIRED TO PREVENT DESTRUCTION OF CONTRABAND OR STOLEN PROPERTY WHERE SUSPECT IS OUTSIDE RESIDENCE WITH OFFICERS.

### *Gutierrez v. State*, 221 S.W.3d 680 (Tex. Crim. App. 2007)

A detective was informed by an investigator in another police department that a computer stolen from that other city was believed to have been used recently from a local address. The computer, which contained an anti-theft program showing the location from which it was last used to access the internet, had been traced to an address in the detective's city.

The detective and another investigator went to the address where the defendant lived. He had

been smoking marijuana when the officers arrived, but saw them park and approach the house, so he put out the cigarette and met them on the front porch. After initially denying that the computer was in the house, he admitted it was there. During this conversation, one of the officers smelled marijuana and noticed that the defendant had bloodshot eyes and was nervous.

The defendant offered to go into the house to bring out the computer, but the officers would not allow him to enter the house alone. One of the detectives filled out a consent to search form and explained it to the defendant, asking if he could search the house. After the defendant agreed, but before he signed the form, the officers entered the home. Once they were inside the residence, the defendant signed the consent form.

The detectives noticed the odor of burnt marijuana and a marijuana cigarette in plain view on a living room table after the defendant had retrieved the computer and given it to the officers. In a "cursory visual search" the investigators found cash, a police scanner, and several plastic baggies. Narcotics officers were summoned to the scene and a thorough warrantless search of the house produced cocaine, cash, a pistol and ammunition, digital scales, and other drug paraphernalia. The defendant was arrested and indicted for possession of cocaine with intent to deliver.

In his suppression motion, the defendant argued that any consent was not freely and voluntarily given. The trial judge denied the motion. Appeal of the denial was opposed by the State which argued that in addition to consent, probable cause and exigent circumstances supported the warrantless search. The court of appeals agreed with the State's position that exigent circumstances existed, and did not reach the question of whether defendant's consent was voluntary. Review was granted by the Texas Court of Criminal Appeals.

**Holding:** "The search of a residence without a judicially authorized warrant is presumptively unreasonable." However, police officers may search even a home without a warrant if probable cause exists and exigent circumstances prevent a warrant from being obtained, or if voluntary consent to search has been given.

A warrantless search based on exigency requires (1) probable cause to enter or search a particular location and (2) "an exigency that requires immediate entry into a particular place without a warrant." Entries justified by "exigency" include providing aid or assistance to persons; protecting police officers from persons believed to be armed and dangerous; and preventing the destruction of evidence or contraband. Both probable cause and exigency are required to validate an entry made without a warrant. If the State cannot establish that both existed, the warrantless entry was unlawful.

The court of appeals found probable cause existed when the officers confronted the defendant on his front porch. They knew that he had a stolen computer and marijuana, and he initially had lied to them about possessing the laptop. In order to prevent the defendant from entering the house and destroying evidence, a "measured police response to maintain the status quo" was appropriate. The officers were not authorized, however, to conduct a full-blown search of the defendant's home. Searching the entire residence "far exceeded the exigent circumstance they faced." Reasonable steps to secure the situation were justified, but not just any course of action was allowed.

Although exigent circumstances did not support the search of the residence, voluntary consent also would have permitted a warrantless search. In consent cases, the State bears the burden of proving that consent was not the result of duress or coercion.

Testimony in this case showed that after he lied to the officers initially, the defendant was cooperative. One of the detectives explained to the suspect that he could not reenter his home alone,

and then the officer filled out a consent form and explained it to the defendant. While it is true that the form was not signed until after the detectives already had entered the home, they testified that they had received verbal consent from the defendant before entering. The defendant disagreed with this testimony, but the trial judge resolved the contradiction in favor of the officers.

The written consent allowed a search of the whole house. While the defendant claimed he signed the form because the officers threatened to arrest his wife and have his daughter taken by Child Protective Services, the trial judge believed the officers' account. The exchange between the officers and the defendant was not confrontational or provocative. He agreed to allow the officers to enter to retrieve the computer. The defendant's free will was not overborne by threats, and consent was given freely.

Exigent circumstances did not support a warrantless search of the defendant's entire house. His voluntary consent, on the other hand, justified the search without a warrant. The evidence discovered in that search was properly admitted against the defendant at trial.

## SEARCH AND SEIZURE - DEPUTIES DID NOT IMPROPERLY SEARCH RESIDENCE AFTER EXIGENT CIRCUMSTANCES ENDED.

### *Rothstein v. State*, 267 S.W.3d 366 (Tex. App. - Houston 2008)

Following a call from an unknown person that a burglary was in progress at a residence, a deputy was dispatched to investigate. He met another deputy at the scene, and the two of them discovered that the back door of the house had been kicked in. Other officers arrived before the deputies entered the house to search for any burglars who might be inside.. Once they entered, they found parts of the house in disarray. Marijuana was seen in several locations, along with a small scale, plastic baggies, and grinders to process marijuana.

After determining that no one was in the house, the deputies left, although the deputy in charge of the scene testified he reentered one time to view the marijuana and paraphernalia, but did not search further. He then left to obtain a search warrant, and no other officers entered. While the warrant was being sought, the defendant arrived at the residence. An assistant district attorney who was helping obtain the warrant instructed the officers to take the man into custody.

Once the warrant was issued, the house was searched thoroughly. The search uncovered marijuana and paraphernalia, cash, mushroom-type substances, and LSD for which the defendant was charged.

A hidden surveillance camera recorded what had occurred in the house. It revealed that, contrary to the deputy's testimony, he had entered the house several times before leaving to obtain a search warrant.

The defendant moved to suppress all evidence found inside the home. He contended that the senior deputy's entry was not justified by the exigent circumstances exception; that there was insufficient information known to the deputies to justify a search of the curtilage; that the search continued after any exigent circumstance had ended; and the scope of the search expanded after there was no longer any exigency. The trial court denied the defendant's motion and he pled guilty to possession of controlled substances. Following his conviction, the defendant appealed the ruling on

his motion.

**Holding:** "The search of a residence without a judicially authorized warrant is presumptively unreasonable." While some exceptions to the warrant requirement are recognized, it is not lightly set aside. One of the exceptions that will excuse a warrant is the existence of probable cause and exigent circumstances making it impractical to obtain a warrant. An "exigency" requires "immediate entry to a particular place without a warrant." There are three categories of exigency that excuse a warrant: (1) providing aid or assistance to persons whom law enforcement officers reasonably believe are in need of assistance; (2) protecting police officers from persons whom they reasonably believe are present, armed, and dangerous; and (3) preventing the destruction of evidence or contraband.

"Absent express orders from a person in possession of property not to trespass, anyone, including a law enforcement officer, has the right to approach the front door of a residence and knock on that door. In addition, it is permissible for police officers to approach the back door of a house to contact the residents after they have first tried the front door and received no answer."

In this case, the officers did not unlawfully search the curtilage, or area immediately surrounding and associated with the home, because they initially tried to contact the residents at the front door. Only when that effort failed, did they go around to the back door.

When the officers saw that the back door had been kicked in, that observation, combined with the report of a burglary in progress, provided probable cause and the exigent circumstances necessary to enter without a warrant. The entry was needed to determine whether burglars remained in the home, or if victims inside needed assistance.

Regarding the argument that a complete search of the house was conducted after any exigency had ended, the deputy who first entered the house testified that he searched for suspects only briefly and only in areas where a person could hide. After showing the senior deputy the marijuana, he left the house and did not re-enter or see any other deputy do so.

The senior deputy testified that he entered the house when asked to do so by the first deputies inside. While he saw the marijuana and paraphernalia, he denied conducting a search in the house until the warrant was executed. He did admit that he had re-entered the house and paced back and forth through the back door while talking to his supervisor on his cell phone. It is not the number of times that an officer enters a house that determines whether the entry was no longer supported by exigency. In this case, the testimony was that entry was only for the purpose of securing the premises and finding any suspects on the scene.

Having viewed the video recording of scene from a surveillance camera and heard the officers' testimony about their movements and actions at the residence, the trial court concluded that no search was undertaken after the exigent circumstances ended that justified the initial entry. In this finding, the trial court did not abuse its discretion and the suppression motion was properly denied.

8. Frisks

The phrase "stop and frisk" may have led some officers to conclude that a "frisk" (limited search for weapons) always accompanies a "stop" (brief, investigative detention). Courts repeatedly

have distinguished the two activities and explained that each must be supported by independent reasonable suspicion. A "stop" is based on reasonable suspicion to believe that criminal activity is afoot, while a "frisk" requires reasonable suspicion that the suspect is "armed and dangerous." Because a frisk is *only* for the purpose of discovering weapons that could be used to harm the officer or others, the permissible scope of a frisk is limited to places where the officer reasonably believes a weapon might be found.

This point is illustrated by *Baldwin v. State*. There, the officer reached into the pocket of a suspect's pants to retrieve his wallet and look for identification because the man was reluctant to identify himself to the officer. Inside the wallet, the officer found a small container of cocaine. This frisk was held to exceed the scope of a lawful search for weapons. Reasonable suspicion to believe a suspect is armed and dangerous is not established by an officer being "in fear for his safety." There must be some objective reason to believe the person has a weapon, and the frisk cannot extend beyond the area in which a weapon could be found.

It is important to understand that a "stop" may be conducted without any "frisk," but a frisk depends upon there being a valid stop. If probable cause exists to believe a person is committing a crime, then the "stop" is based on probable cause and can be treated as an arrest. Where only reasonable suspicion exists, however, the detention and any frisk are limited, but they are "seizures" under the Fourth Amendment despite their limited nature. In *Arizona v. Gant*, the Supreme Court approved a frisk of a vehicle's passenger, even though the stop was for an unrelated traffic offense. Factors related to gang activity were noted during the traffic stop and eventually the officer developed reason to believe the suspect passenger was armed and dangerous.

## SEARCH AND SEIZURE - REACHING INTO SUSPECT'S POCKET TO RETRIEVE HIS WALLET DURING A DETENTION EXCEEDS SCOPE ALLOWED FOR FRISK.

### *Baldwin v. State*, 278 S.W.3d 367 (Tex. Crim. App. 2009)

A deputy patrolling an area at night was flagged down by a woman the deputy had seen previously in the neighborhood. She mistakenly thought he had been dispatched after she called the police. The woman told the officer she had seen a white man "dressed all in black walking around looking into houses." She did not recognize him from the neighborhood, but the woman knew there had been several burglaries in the area and told the officer she didn't know if the man "was a part of it or not, but he may have been."

Although the deputy wasn't sure whether the woman meant by "looking into houses" that the suspect was viewing them from the sidewalk or walking up to the windows to look inside, he began looking for the suspect and encountered the defendant a few blocks away. The defendant was dressed in black and walking down the sidewalk.

When he saw the deputy, the suspect "began a very fast walking pace away from" the officer. The deputy stopped and approached the man. He told him about the woman's report, asked where the man lived, and asked for his identification. Without telling the officer where he lived, the man asked why he wanted to see his identification and looked "nervous." The deputy interpreted the suspect's behavior as meaning that he was "going to fight or ... going to run."

Based on this reaction, the officer later said he was "in fear of [his] life." He handcuffed the suspect for "officer safety" and asked where his identification was located. The defendant said it was in his right pants pocket. Taking that statement as permission to reach into the man's pocket, the officer retrieved a small wallet. Inside the wallet was a driver's license, which the deputy removed to examine. When he did so, he saw a small baggie with white powder behind the license. As he removed the baggie, the suspect said, "That dope is not mine. I found it." The powder was field-tested, and it was positive for cocaine.

The defendant filed a motion to suppress the cocaine, which was denied. He then pled guilty and appealed the trial court's ruling on his suppression motion.

**Holding:** "There was no valid basis for an arrest, and assuming ... that there was a valid basis for an investigative detention, there was no valid basis for reaching into [the defendant's] pocket to procure his wallet." Had there been probable cause to believe that the defendant had committed, or was committing, an offense, the officer could have searched the defendant's pocket incident to that arrest. While probable cause is a "fluid concept," it involves "a reasonable ground for belief of guilt" that is "particularized with respect to the person to be searched or seized." Probable cause requires a great degree of information that is of higher quality and more reliable than that needed for reasonable suspicion. While it falls short of the preponderance of the evidence standard, probable cause remains a "relatively high level of suspicion."

The deputy knew certain things when he decided to reach into the suspect's pocket to retrieve his identification. He knew that a woman known to him by sight had called the police to report an unknown man walking the neighborhood. The defendant fit the general description given by the woman; he was dressed all in black. The officer knew that the suspect was looking into houses, although he didn't know from what vantage point. There had been burglaries in the neighborhood and it was considered a "medium crime neighborhood." This occurred at 10:30 p.m., and when the suspect saw the officer he began walking away quickly. He was nervous, and refused to make eye contact with the deputy. The suspect also asked why he needed to show identification.

"These circumstances did not give rise to the relatively high level of suspicion that would constitute probable cause to arrest." Therefore, reaching into the man's pocket could not have been a search incident to a lawful arrest. A pat-down or frisk may be conducted under some circumstances by an officer during an investigative detention. If, in the course of that pat-down, the officer feels something "whose contour or mass makes its identity immediately apparent" as contraband, the officer may seize that object.

The officer lacked probable cause to search for non-weapon contraband or other evidence for the same reason that he lacked probable cause to arrest the defendant. "Though an officer may ask a defendant to identify himself during a valid investigative detention, that does not automatically mean that the officer can search a defendant's person to obtain or confirm his identity."

Only consent to search was a plausible exception to the probable cause requirement in this case. The deputy believed that the defendant's answer to his question regarding the location of his identification implied consent to reach into the pocket and retrieve it. Such a belief was unreasonable. The defendant's reply was just an answer to the question; it was not consent to search. Because the officer lacked consent and the removal of the defendant's wallet from his pocket exceeded the scope of an investigative detention, the search was unlawful. The trial court should have granted the defendant's motion to suppress.

**COMMENT:** Although this opinion does not break new ground regarding the scope of an investigative detention and the pat-down that might occur during one, it serves as an important reminder that reaching into a detainee's pocket is permitted only under very limited circumstances. Some of the judges disagreed about whether handcuffing the suspect transformed this stop into a custodial arrest. None disagreed, however, with the holding that there was no valid consent to search based on the suspect's answer to the question, "Where's your identification?" Neither did any of the judges disagree with the following statement in the court's opinion: *"Though an officer may ask a defendant to identify himself during a valid investigative detention, that does not automatically mean that the officer can search a defendant's person to obtain or confirm his identity."* The pat-down or frisk is *only* for the purpose of discovering whether the suspect is armed, and may be conducted only if reason exists to believe the suspect *is* "armed and dangerous." A frisk is not justified by an officer's "fear for his safety" unless that fear is based on facts that would make a reasonable officer think the suspect has a weapon. If a frisk is conducted, only items that feel like weapons can be removed.

## SEARCH AND SEIZURE - FRISK OF VEHICLE PASSENGER BELIEVED TO BE ARMED VALID EVEN THOUGH PASSENGER'S DETENTION WAS MERELY INCIDENT TO TRAFFIC STOP FOR DIFFERENT REASON.

### *Arizona v. Johnson*, 129 S.Ct. 781 (2009)

Officers assigned to a gang task force patrolling near a neighborhood associated with the Crips gang stopped a vehicle at around 9:00 p.m. because a license plate check revealed that the registration had been suspended for an insurance-related violation. That violation was a "citation-only" offense. There were three occupants in the car: the driver, a front-seat passenger, and a rear-seat passenger. No one in the car was suspected of criminal activity.

All of the occupants denied that there were any weapons in the car. The driver was ordered out of the vehicle; the front-seat passenger was questioned by another officer; and a third officer dealt with the defendant, who had been sitting in the back seat. This officer noticed that the defendant kept looking back and kept his eyes on the officers, and he was wearing a blue bandana that the officer thought was consistent with Crips membership. She also noticed that he had a scanner in his jacket pocket, something she thought most people would not do unless "they're going to be involved in some kind of criminal activity or [are] going to try to evade the police by listening to the scanner."

The defendant gave his name and address but had no identification. He said he was from a town that the officer knew was home to a Crips gang. The defendant told the officer he had served time for burglary, and had been out for about a year. Based on these answers, all given to the officer while the defendant was sitting in the car, the officer ordered him out of the car and suspected that "he might have a weapon on him." When the defendant got out, the officer frisked him and felt the butt of a gun near his waist.

The defendant was handcuffed after he began to struggle, and was charged with possession of a weapon by a prohibited possessor. He moved to suppress the pistol as the fruit of an unlawful

search. The trial judge denied the defendant's motion, holding that the stop was lawful and the officer had reason to suspect that the defendant was armed and dangerous. Following his conviction, the defendant appealed.

**Holding:** Law enforcement officers are permitted to detain persons suspected of criminal activity on less than probable cause. If there also is reason to believe that the detained person is armed and dangerous, an officer may pat down the suspect's outer clothing.

Traffic stops resemble brief investigative detentions, and are dangerous for police officers. Consequently, officers may order the driver and passengers out of the vehicle during a traffic stop. A passenger has already been "stopped" because he or she was riding in the vehicle at the time the officer had reason to detain the driver for a traffic offense. While a passenger has been "seized" by a traffic stop, the passenger may not be frisked unless there is reason to believe that person is armed and dangerous. In this case, the defendant was lawfully detained because the officers had a legitimate reason to stop the car in which he was riding.

"A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." During the stop, an officer is permitted to inquire into matters other than the reason for the stop. This inquiry does not convert the stop into an unlawful seizure, "so long as those inquiries do not measurably extend the duration of the stop."

The defendant would not have felt free to leave the scene following the stop, and the traffic stop had not ended before the defendant was frisked. The state appeals court assumed that reasonable suspicion existed to believe the defendant was armed and dangerous, but found that the detention of the defendant was unlawful. That finding was erroneous.

**COMMENT:** This case expands upon the Court's prior decisions regarding the effect of a traffic stop on the liberty interests of a passenger. It is clear that, when a vehicle is stopped for a traffic violation, everyone in the vehicle has been "seized" for Fourth Amendment purposes. The Court reiterates that this seizure is not unreasonable. Once the reason for the stop has been resolved, everyone - driver and passengers - must be allowed to leave unless there is independent reasonable suspicion or probable cause to support a continued detention. During this time, neither the driver nor the passengers may be frisked unless there is reasonable suspicion to believe that they may be armed and dangerous. There is no general approval for a frisk simply "for an officer's safety." There must be suspicion, and that suspicion must focus on the individual who is frisked.

## E. SEARCH WARRANTS

As may be inferred from the existence of exceptions to the search warrant "requirement," searches ordinarily should be conducted pursuant to a warrant. It often is said by courts that a search made without a warrant is "*per se* unreasonable," although the State may attempt to prove that the search fell within one of the "clearly defined exceptions" to the warrant requirement in order to establish its reasonableness in the absence of a warrant. Of course the practice differs. Warrantless searches are routine, and their number surely must be far greater than those conducted with a

warrant. Notwithstanding this fact of law enforcement life, the warrant preference - which may better describe the law than the word "requirement" - remains a kind of benchmark against which all searches are measured and, as such, it is very important.

The Texas and U.S. constitutions require probable cause based on "oath or affirmation" for the issuance of a search warrant. Further, they require that any warrant describe "as nearly as may be" the place to be searched or the thing to be seized. Taken together, these few words demand: (1) an affidavit setting forth sufficient facts to persuade the magistrate of the existence of probable cause, (2) probable cause itself, and (3) "particularity." The last of these is intended to prevent the abuses that were part of the colonial practice of issuing "general warrants" permitting government officials to search at will for whatever might turn up.

The neutral, detached magistrate who is charged with the responsibility of determining probable cause reviews the affidavit - a sworn, written statement - to decide (1) whether sufficient facts exist that lead logically to the "probability" that criminal evidence will be found at a certain place, and (2) whether those sworn facts are sufficiently reliable to support the issuance of a warrant. In other words, the allegations in the affidavit must be sufficient both in quantity and in quality to meet the constitutional requirements. "Probable cause" is not an exact standard. Reasonable minds might differ as to whether certain facts generate enough confidence that evidence will be found.

Probable cause often is gained through information from a third party, and not directly from observations of the affiant. When this is done, the informant and his or her information must be shown to be reliable and worthy of belief, something that is judged from the totality of circumstances.

False or inaccurate statements contained in a warrant affidavit effectively cancel the beneficial effects of review by a neutral, detached magistrate. While an inadvertently incorrect assertion will not undermine the validity of the warrant (see *Herring v. U.S.* in the follow section, "Exclusionary Rule"), one that is deliberately false or made with reckless disregard for whether it is true, will invalidate any warrant that is issued. This point is illustrated in *Blocker v. State*.

The "particularity requirement," which also exists for arrest warrants, essentially is aimed at ensuring that an officer who knows nothing about the case will be able to execute the warrant without mistaking the place to be searched or the items for which the warrant issued. Inaccurate descriptions in an affidavit can be especially troubling if they do not match the descriptions in the warrant itself. Usually, affidavit descriptions control over those contained in the warrant, presumably because the affiant is the one who better knows the location, and because the magistrate must determine the true location from the affidavit.

Even when a warrant has been issued properly and meets the particularity requirement, the ensuing search may be rendered illegal by faulty execution of the warrant. The Texas Code of Criminal Procedure and the Fourth Amendment to the U.S. Constitution, require that officers knock and announce their presence and purpose when executing a warrant. In an exigency or emergency situation, a "no-knock" entry may be made, but the State bears the burden of showing why the known facts justified circumvention of the usual requirement. Increasingly, courts are reviewing whether specific facts justified an unannounced entry or an entry following an announcement by only seconds.

Reversing its position on knock-and-announce, the U.S. Supreme Court held in *Hudson v. Michigan* that, while failure to comply with the requirement violates the Fourth Amendment, it does

not require the suppression of evidence found after the entry has been made. The Court's reasoning was that the constitutional violation did not directly cause evidence to be found because entry still would have occurred if the officers had announced their entry. It remains to be seen whether Texas courts will follow the Supreme Court's lead in construing the Texas Constitution and Code of Criminal Procedure.

The timeliness of execution is important with search warrants, but not with arrest warrants. As long as probable cause remains, the arrest warrant can remain valid almost indefinitely. Items believed to be on premises, however, may be moved or consumed or destroyed. Consequently, Texas law requires that a search warrant be executed within three days, exclusive of the day of issuance and the day of execution. The issue in *State v. Rico* was whether a "day" is a whole 24-hour period, which would effectively allow five such periods in which to execute the warrant. The court of appeals held that this is not what "day" means, and held the warrant to be "stale" and of no official force and effect.

Sometimes, as in *Hedspeth v. State*, the question for execution of the search warrant is whether certain items are included within the area to be searched. For example, if certain "premises" may be searched (e.g., a motel room), does that permission extend to a vehicle parked in the motel's lot? In *Hedspeth*, the court ruled that it did, but only because the warrant affidavit established probable cause to believe drugs would be found in that vehicle.

## SEARCH AND SEIZURE - FALSE STATEMENT IN SEARCH WARRANT AFFIDAVIT NOT MADE DELIBERATELY OR WITH RECKLESS DISREGARD FOR THE TRUTH.

### *Blocker v. State*, 264 S.W.3d 356 (Tex. App. - Waco 2008)

Three officers went to a trailer park to execute an arrest warrant for a man who lived there. One of the officers entered the trailer through an unlocked window after hearing a noise inside but receiving no response to his knocking. He heard noises on the east side of the residence and noticed a paused video game in the living room. The officer announced himself again and entered a bedroom where he found the man he was looking for in bed with a woman and an infant.

After the man told the officer he did not know whether anyone else was on the premises, the officer took him outside and placed him under arrest. He then returned to the trailer and performed a protective sweep. Kicking open the locked door to the master bedroom, the officer saw the defendant standing next to an open bathroom doorway. In the bathroom, the officer saw what he believed was a "meth-cook" in progress, and he arrested the defendant.

A task force narcotics officer summoned to the scene entered the trailer and saw various kinds of drug paraphernalia throughout the residence. He provided this information to the arresting officer who prepared a search warrant affidavit for the trailer.

The defendant moved to suppress all evidence found as a result of the execution of the search warrant, claiming that the underlying affidavit contained misrepresentations. If the false statements were removed from the affidavit, according to the defendant, it would fail to establish probable cause for the warrant. Following a hearing to determine whether the false statements in the affidavit were

made deliberately or with reckless disregard for the truth, the trial court denied the defendant's motion, and he was convicted. He appealed.

**Holding:** Although a search warrant's affidavit is presumed to be valid, if a defendant establishes that the affiant deliberately made statements in the affidavit that were false, or were made in reckless disregard for the truth, and the affidavit cannot establish probable cause if those false statements are removed, then the warrant fails. Facts recited in the affidavit that are determined not to be accurate are not necessarily "untruthful." If the statement was believed to be true by the affiant, and there was no good reason to doubt it, then that statement was "truthful."

The defendant claimed that this affidavit contained several false statements, including the following: (1) that he was "in charge of and controlled" the premises; (2) that the officer found several subjects in the trailer "attempting to hide and possibly destroy evidence;" (3) that the officer found a small vial that was "field-tested" for amphetamine; (4) that the officer found the person for whom he had the arrest warrant in the master bathroom; and (5) that the officer saw a flask and other items associated with manufacturing methamphetamine while he was in the bathroom with the person he had a warrant to arrest. The defendant contended that the record did not reflect that he was in control of the residence, that the subjects were trying to hide or destroy evidence, that the officer field-tested the contents of a small glass vial, that he found the arrest suspect in the bathroom (it was the defendant, instead), or that he saw paraphernalia while in the bathroom with the arrest suspect (again, it was the defendant). While the State conceded that the affidavit contained inaccuracies, it argued that no intentional misrepresentations were made by the affiant.

At the suppression hearing, the officer testified that he had been told that the arrest suspect lived in the trailer. Even if he was only a houseguest, he still had apparent authority over the premises, and it was not false to state that the defendant and/or the arrest suspect controlled the suspected place.

When the officer knocked, according to his testimony, he heard noises of movement from inside. He found several persons in the residence attempting to hide and possibly destroy evidence, and it was not false to state this in the affidavit. The officer also testified that neither he nor his fellow DPS officers who had come to execute the arrest warrant performed any field test, but he did not know whether the task force officers had done so. This statement and others later found to be inaccurate, including those in which the names were switched, were made by the affiant based on information provided by the narcotics officer.

That information proved to be mistaken, but the affiant did not deliberately falsify the affidavit or make statements in reckless disregard for the truth. The trial court was free to believe or disbelieve any evidence presented at the suppression hearing, and it was not error to find that the inaccuracies contained in the affidavit were not the product of deliberate deceit.

**COMMENT:** The hearing held in this case is called a *Franks v. Delaware* challenge, based on the name of the Supreme Court case requiring inquiry into allegations of deliberate falsehood in the content of an affidavit. All officers who prepare affidavits must take special care to ensure that the statements that will be considered by the magistrate are as accurate as the officer can make them. Exaggeration or turning a blind eye to the source and reliability of statements contained in the affidavit can undermine the entire probable cause determination which, in turn, can cause the warrant to be invalid. Although the court does not discuss the point in its opinion, there also is a question in cases such as this about whether a protective sweep is justified. In the absence of reason

(reasonable suspicion) to believe that persons may be present in the residence who will endanger the officer's safety, a protective sweep may not be conducted. Sweeping premises after the person the officers sought had been found and removed seems unlikely to have been supported by such concerns.

## SEARCH AND SEIZURE - EXECUTION OF SEARCH WARRANT NOT WITHIN TIME REQUIRED BY LAW.

### *State v. Rico,* 241 S.W.3d 648 (Tex. App. - Amarillo 2007)

A search warrant was issued on August 19, 2005, at 2:10 p.m. and executed on August 24, 2005, at 9:10 a.m. Methamphetamine was found in the search, which led to the defendant's arrest and indictment for possession of a controlled substance. The defendant moved to suppress the methamphetamine on the grounds that articles 18.06(a) and 18.07 of the Texas Code of Criminal Procedure were violated. Specifically, he argued that the execution of the warrant was not timely.

The trial court agreed with the defendant's contention and ordered the evidence suppressed. The State appealed, claiming that the execution of the warrant did not violate these provisions and that the evidence should have been admitted.

**Holding:** "The maximum life span of a search warrant is determined by article 18.06(a) which provides that it 'must be executed within three days from the time of its issuance.'" Computation of the time for execution of the warrant is determined by Article 18.07, which allows "three whole days, exclusive of the day of its issuance and of the day of its execution." If a search warrant is not executed within the time allotted by these statutes, it has no official force or effect. A search based solely on a defunct warrant is unauthorized.

The State contended that the common-law method for computation of time and the Code Construction Act provision on this point are inconsistent with the language of Article 18.07. Because Article 18.07 was amended more recently, the State argued that it should control. Under the State's argument, time is computed from the time the warrant is issued, giving "day" the ordinary meaning of a twenty-four hour period. According to this argument, the "day" of its issuance and "day" of its execution would be excluded, and an additional 120 hours (three twenty-four hour periods) would be available for execution of the warrant.

There is no authority for this interpretation of Article 18.07. In accordance with the holding in a court of appeals case on this issue, the State in this instance had until midnight on the fourth day after the search warrant was issued in which to execute it.

The warrant issued on August 19 and was executed on August 24. Excluding the date of issuance (August 19), and the last day for legal execution (August 23), the State had three whole days (August 20, 21, and 22) to execute the warrant. Because the warrant was not executed until August 24, it had grown stale and of no official force and effect. Any search conducted pursuant to that warrant was invalid, and the trial court's granting of the defendant's suppression motion was proper.

## SEARCH AND SEIZURE - SEARCH WARRANT FOR MOTEL ROOM AUTHORIZING SEARCH OF VEHICLES "ON THE PREMISES" EXTENDS TO VEHICLE PARKED IN MOTEL PARKING LOT.

***Hedspeth v. State*, 249 S.W.3d 732 (Tex. App. - Austin 2008)**

Officers with a narcotics task force received information that the defendant and a woman were selling crack cocaine from a motel room. After an undercover officer bought drugs from the defendant at that location, a search warrant was obtained. The warrant authorized the search of room 217 of the motel and "any and all vehicles owned and or controlled by the person(s), which are located on the property named in this warrant." In the affidavit, one of the officers included a statement that persons dealing in illegal drugs commonly hide contraband and other evidence in their motor vehicles "for ready access and to conceal such items."

When the warrant was executed, car keys were found on a table in the motel room. One of the officers asked the defendant if they were for his car, and he replied that he was renting the car, which he identified as a white, four-door sedan parked outside in the parking lot. Using the keys to unlock the door, officers searched the car and discovered sixteen grams of crack cocaine under the driver's seat. The defendant later gave officers a voluntary statement in which he admitted that the cocaine was his.

The defendant moved to suppress the drug evidence found in the vehicle, contending that there was no probable cause for the car and that officers exceeded the scope of the search warrant by searching it. He argued that it was not possible to know which car, among those in the common parking area, was his.

After the trial court denied the defendant's suppression motion, he pled guilty and appealed the court's ruling. The issue on appeal was whether the warrant's authorization to search "any and all vehicles owned and or controlled by" the defendant "which are located on the property named" particularly described the place to be searched.

**Holding:** Where probable cause exists to believe that evidence of a crime will be found in a residence or somewhere on the premises, courts generally have allowed an automobile found on the premises to be searched, although a search warrant authorized only a search of the residence or the premises generally. Cases allowing vehicles to be searched in these cases "necessarily imply that the probable cause showing with respect to the premises in general was sufficient to establish probable cause for the search of the vehicles."

The affidavit in this case specifically referred to vehicles "owned or controlled" by the defendant, which were located on the property described in the warrant. Keys for defendant's car were found in the motel room that was searched pursuant to the warrant. Defendant's vehicle did not arrive on the premises during the search; it had been parked there in a common parking lot when the search began. The defendant had control of the vehicle and the keys that were found in his motel room.

During the execution of the search warrant, officers did not find contraband in the room. Given the evidence they possessed, which was reflected in the affidavit for the warrant, it was reasonable to infer that the drugs would be found in the vehicle instead. In *Bower v. State*, 769 S.W.2d 887, the Texas Court of Criminal Appeals held that the statute governing execution of search

warrants "merely requires that there be probable cause to believe that the items would be located in the general location, i.e., somewhere within [the defendant's] residence, which included the automobiles parked inside his garage and on the premises."

The evidence reflected by the affidavit in this case established a substantial basis for probable cause to search the defendant's vehicle. That vehicle was sufficiently described to avoid searching the wrong car. Because there was a substantial basis for the magistrate to issue the warrant including the defendant's vehicle, and because that vehicle was adequately described, the search of the vehicle parked in the adjoining common lot was reasonable and within the scope of the warrant.

## F. EXCLUSIONARY RULE

The law contains many kinds of exclusionary rules, but the one requiring suppression of evidence seized pursuant to an unlawful search or seizure is perhaps the most controversial. Its purpose is to deter violations by withholding the very fruits of those violations. Although the exclusionary rule announced in *Weeks v. U.S.*, and applied to the states in *Mapp v. Ohio*, is better-known, Texas also has an exclusionary rule. In fact, the statutory rule in Texas law has existed for well over a hundred years, far longer than its Fourth Amendment counterpart.

Differences exist between these two exclusionary rules, both of which are applicable in Texas. For example, the federal version requires the unlawful action of a "state actor;" conduct by private citizens that would violate the Fourth Amendment if done by a law enforcement officer does not require suppression. Texas law, on the other hand, sometimes requires suppression of evidence obtained by the acts of private persons as well as state officers.

*Miles v. State* dealt with this kind of private party search. The Texas Court of Criminal Appeals held in that case that a private citizen would be justified in doing no more than what a peace officer would be allowed to do. Because an officer could have violated certain traffic rules under the circumstances confronting the citizen in *Miles*, the citizen also was justified in doing so.

The federal exclusionary rule differs from the Texas rule in another way, too. Evidence seized by officers who act in objectively good faith reliance on a warrant need not be suppressed, even though the search that uncovered it was not supported by probable cause, or the warrant contained defects. Texas also has adopted a statutory version of the "good-faith exception," but it is much narrower than the federal rule. If a search warrant is not supported by probable cause in Texas, no amount of good faith will save the evidence that is found in the execution of that warrant.

In *Herring v. U.S.*, the Supreme Court considered whether an arrest that was mistakenly believed to have been authorized by a warrant issued in a neighboring jurisdiction was unlawful. Because the mistake was the result of negligence, and not a deliberate or reckless act, the Court decided that suppression of evidence found during the execution of the warrant that had been recalled was not required.

A somewhat different situation presented itself in *Bryant v. State*. There, the court of appeals ruled that, even if the initial detention of the suspect was unlawful, suppression of evidence obtained during the arrest was not required because the defendant actually violated the law *while* he was arrested by tampering with evidence that had been seized from his person. Similarly, in *State v. Iduarte*, the defendant assaulted officers who had entered his apartment unlawfully. Evidence of that

assault, unlike evidence produced directly from the unlawful entry, was admissible because the assault was an independent offense.

Texas law effectively gives a defendant two "bites at the apple" where exclusion is concerned. As usually happens, the defendant can object to the introduction of the evidence at his trial either by moving to suppress that evidence or objecting to it when it is offered at trial, or both. Additionally, the defendant may request that the jury be instructed to disregard certain evidence if it believes that the evidence was the product of an unlawful search or seizure. That is what the defendant did in *Rodriguez v. State.* Because he believed the arresting officer's testimony did not establish sufficient reason for the arrest, the defendant requested a jury instruction allowing the jurors to ignore the evidence found in an inventory while he was detained. Because the trial judge denied the defendant's request for such an instruction, the appellate court reversed his conviction.

An unlawful act does not necessarily taint all evidence that is obtained after it, as is illustrated by *Monge v. State* (see also *State v. Iduarte*, above). Monge moved to suppress incriminating statements he made following an unlawful arrest. Certain factors adopted by the U.S. Supreme Court in an earlier case are used to determine whether the confession is the product of the arrest, or whether it is sufficiently detached from that act to be admissible. In *Monge*, the court found the taint to be attenuated.

## SEARCH AND SEIZURE - EVIDENCE OBTAINED AFTER TOW TRUCK DRIVER VIOLATED TRAFFIC LAWS TO MAKE CITIZEN'S ARREST FOR DWI WAS NOT SUBJECT TO TEXAS EXCLUSIONARY RULE FOR PRIVATE PARTY SEARCHES AND SEIZURES.

### *Miles v. State*, 241 S.W.3d 28 (Tex. Crim. App. 2007)

A limousine driver stopped at a stop light in the early hours of the morning saw a Corvette hit the car waiting behind the limo driver, veer toward the curb and lurch back to the left, hitting the limousine. The driver and some of his passengers, who were professional football players, got out of the limousine to inspect the damage. The passengers said the driver of the Corvette was drunk. As the limo driver requested the defendant's license and proof of insurance, he noticed alcohol on the man's breath, and that his speech was slurred, his eyes were red, his balance was unsteady, and he was propping himself up on his car.

After obtaining the defendant's driver's license information, but not his insurance documents, the limo driver asked the defendant to wait at the scene until the police arrived. The defendant became nervous, said he would "have to go," and drove away at a high rate of speed, running a red light at the intersection.

Several tow truck drivers had arrived at the scene. One of them had noticed the cars were not so badly damaged they could not be driven, and concluded that the accident did not require police assistance. When the defendant left the scene, the tow truck driver decided "based on public safety and [the defendant's] mannerisms that something needed to be done in an effort to try to stop him from harming anyone else or himself." The driver and about five other wrecker drivers followed the defendant, trying to stop him.

After a pursuit driving the wrong way on a one-way street, the wrecker driver and others "corralled" the defendant in a parking lot. When he tried to take the keys from the man's ignition, the defendant pulled a handgun and pointed it at the wrecker driver's head. The police arrived a few minutes later and took the defendant into custody for DWI and unlawfully carrying a weapon. The defendant moved to suppress all of the evidence obtained following his arrest, arguing that Article 38.23 of the Code of Criminal Procedure required suppression of evidence obtained by the wrecker driver because that driver violated various traffic laws in the course of making the arrest.

The trial court denied the defendant's motion. He pled guilty and appealed. On appeal, the court of appeals held that Article 38.23 does not require suppression of evidence obtained by private persons who violate the law in the course of retrieving that evidence unless the "law which is violated in obtaining evidence [exists] for the purpose of regulating the acquisition of evidence to be used in a criminal case." Because the traffic laws the tow truck driver violated do not exist "for the purpose of regulating the acquisition" of criminal evidence, the appellate court concluded that the trial court's denial of the motion was justified. The defendant appealed to the Texas Court of Criminal Appeals.

**Holding:** "Article 38.23(a), unlike the Fourth Amendment, applies to certain actions by private individuals as well as those by government officers." When it was enacted, the Texas exclusionary rule was broader than its federal counterpart because of the "widespread problem of vigilante-type private citizens [acting] in concert with the police conducting illegal searches for whiskey." The language and history of Article 38.23(a) leads to the conclusion that "if an officer violates a person's privacy rights by his illegal conduct making the fruits of his search or seizure inadmissible in a criminal proceeding ... that same illegal conduct undertaken by an 'other person' is also subject to the Texas exclusionary rule."

The holdings in each of the cases deciding whether suppression was required under Article 38.23(a) because a private citizen violated the law could have been explained by understanding that "a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do." This understanding also is consistent with the purpose and history of the Texas exclusionary rule.

Citizens are permitted in some circumstances to arrest persons without obtaining a warrant. One of these situations, under Article 14.01(a) of the criminal procedure code, occurs when an felony offense or one "against the public peace" is committed in the presence or view of the citizen. Although there is no precise definition for what constitutes a crime "against the public peace," public drunkenness and DWI have been cited as offenses that are offenses against the public peace. The right of a private citizen to arrest for such crimes "is limited to the time the offense is committed or while there is continuing danger of its renewal, and does not include the right to pursue and arrest for the purpose of insuring the apprehension or future trial of the offender."

Therefore, a citizen may arrest an offender without a warrant even for a misdemeanor if it is committed within the citizen's presence or view if the offender's conduct "poses a threat of continuing violence or harm to himself or the public. It is the exigency of the situation, not the title of the offense, that gives both officer and citizen statutory authorization to protect the public from an ongoing threat of violence, harm, or danger by making a warrantless arrest."

In this case, the wrecker driver had probable cause to believe that the defendant was intoxicated when he sped away from the scene of the accident. His speed, coupled with running a

red light, posed a danger to pedestrians and other motorists. There was traffic on the street where the defendant was driving; he "whipped" in and out of a parking lot at high speed, almost sideswiping another car; and drove the wrong way down a one-way street. Because the defendant's conduct posed a continuing threat to himself and others, the tow truck driver was authorized to arrest him for an offense against he public peace without a warrant.

Although the wrecker driver did violate traffic laws while pursuing the defendant, the issue is whether a peace officer or private citizen in pursuit of a fleeing suspect may violate such laws in order to follow or stop the offender. A police officer in this situation would have been justified in violating traffic laws to make the stop and the defendant also was justified to do so.

"Of course, there might be situations in which the conduct of the police officer or citizen in making an arrest is constitutionally unreasonable under the circumstances." Here, the tow truck driver did not increase the risk to public safety but instead used his flashing lights to warn approaching motorists of the danger while he was in pursuit. The manner in which he pursued the defendant was reasonable. He had probable cause to arrest the defendant for DWI, and his violations of traffic laws did not require suppression of any evidence that arrest produced.

**COMMENT:** This case deals with a variety of legal issues, including the primary one: whether a private citizen's violations of law in these circumstances require that evidence obtained be excluded from trial. The Texas exclusionary rule long has applied by its terms to "any person," and not just to peace officers. Only relatively recently have Texas courts applied the rule to searches and seizures by private citizens. This application of the rule inevitably raised the question whether the citizen would be treated as standing in the shoes of the peace officer. To some extent this case answers that question by holding that the citizen, like the peace officer, must have legal justification for what he or she does in order to avoid suppression. The warrantless arrest by citizens provision in Article 14.01(a) applies to felonies and misdemeanors that "breach the public peace," a term that also has not been precisely defined by Texas law despite its inclusion in the statute for many years. The court decides that DWI and perhaps public intoxication are such offenses, but adds a limitation: warrantless arrest is permitted only where the offender poses a threat to himself or others. Paradoxically, the court treats the wrecker driver as a private citizen for the citizens' arrest statute but as a person subject to the justification accorded a peace officer when his authorization to violate traffic laws while in pursuit is considered.

## SEARCH AND SEIZURE - EVIDENCE SEIZED INCIDENT TO ARREST BASED ON WARRANT LATER FOUND TO HAVE BEEN RECALLED NOT SUBJECT TO SUPPRESSION.

### *Herring v. U.S.*, 129 S.Ct. 695 (2009)

The defendant was known to law enforcement officers, and when he drove to a sheriff's department to get something from his impounded truck, an investigator ran a warrant check on him. None turned up initially, but the officer asked the warrant clerk to check with a neighboring county. The clerk in that county reported an active arrest warrant for the defendant, which she faxed to the requesting office. As the defendant left the impound lot, the investigator and a deputy stopped him

and arrested him. In a search incident to the defendant's arrest, the officers found methamphetamine in his pocket and a pistol in his vehicle. The defendant was a convicted felon.

It later was determined that the arrest warrant had been recalled some five months earlier. Information about the recall did not appear in that county's database. When the warrant clerk discovered the error, she immediately called the requesting agency and the information was relayed to the investigator quickly, but not before he had arrested the defendant and discovered the contraband.

The defendant was indicted for illegal possession of the gun and drugs. He moved to suppress on the grounds that his arrest was unlawful because it was not based on a valid warrant. The court denied the motion because the judge concluded the suppression of evidence found in the officers' exercise of the good-faith belief that the warrant was valid would not be an effective deterrent to future mistakes. The defendant was convicted and appealed.

**Holding:** In determining whether the exclusionary rule should be applied, the "actions of all the police officers involved" must be considered. The officers who arrested the defendant did nothing improper. Someone in the neighboring county, however, should have updated the database to reflect that the warrant for the defendant had been recalled. This error was negligent, but it was not deliberate or reckless.

A violation of the Fourth Amendment does not necessarily mean that the exclusionary rule applies. Only where the rule "results in appreciable deterrence," should it be used. The focus is on whether the application of the rule will deter future Fourth Amendment violations. In cases in which the police act in reasonable, good-faith reliance on a warrant, exclusion of evidence is not required if it later is determined that probable cause for that warrant was lacking. This rule has been applied in the past to a good-faith, but mistaken, belief that a warrant existed because of an error in a court's database.

Whether the same principle should apply where law enforcement personnel, rather than court personnel, are responsible for the error in reporting a warrant later found to be invalid, is the question in this case. The answer depends on the culpability of the law enforcement personnel in the mistake. The abuses that led to the exclusionary rule involved intentional conduct that was obviously unconstitutional. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."

As in cases involving the negligent use of false information to obtain a warrant, the error in this case was not sufficiently culpable to require exclusion of the evidence. While some record keeping errors might result in suppression, the conduct here was not of that kind. "If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified." "In a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system."

There was no evidence in this case that the county providing the warrant information routinely made such errors. The investigator testified that he had never had reason to question a warrant from that county, and the clerks in both counties testified that they could not remember any similar mis-communication.

Police negligence of the sort demonstrated in this case does not require suppression of

evidence obtained in a search incident to an arrest based on erroneous information. The deterrence value of the exclusionary rule in cases not involving "systemic error or reckless disregard of constitutional requirements" is not sufficient to outweigh its cost. The mistake made in this case was not sufficiently culpable to justify use of the exclusionary rule. Consequently, the trial court's denial of the defendant's suppression motion was not erroneous.

**COMMENT:** This opinion is potentially very significant. The good-faith exception to the exclusionary rule always has been limited to situations in which an officer's mistaken belief about the validity of a warrant was "objectively reasonable." Essentially, that has meant that no law enforcement personnel played a part in creating the error or would have recognized it as one. This case extends beyond that limitation, however, because the Court distinguishes between a careless or "negligent" mistake on the part of the police and one that is more "serious." It remains to be seen whether the Court's approach will be adopted in future cases in which officers negligently violate the Fourth Amendment.

## SEARCH AND SEIZURE - LEGALITY OF DETENTION DOES NOT REQUIRE SUPPRESSION OF EVIDENCE NOT EXISTING PRIOR TO THE DETENTION.

### *Bryant v. State*, 253 S.W.3d 810 (Tex. App. - Amarillo 2008)

Near midnight, police officers were dispatched to the scene of a fight in and outside a motel room. When they arrived, they saw a vehicle backing out of a parking space in front of the room. An officer stopped the vehicle and talked with the two occupants, the defendant and a female passenger. Neither was able to produce identification, so the officer removed the couple from their vehicle and handcuffed the defendant.

During a frisk of the defendant, the officer discovered a glass pipe of the sort used to smoke methamphetamine. He took the pipe and placed it on the trunk of the patrol car. Despite being handcuffed, the defendant "brought [his hands] up to one of his sides, grabbed the pipe, the drug paraphernalia, the glass pipe, grabbed it and he threw it on the ground shattering it to a thousand different pieces." Because of this action, the defendant was indicted for tampering with evidence.

He filed a motion to suppress the evidence, claiming that his initial detention was unlawful. The trial judge denied the motion and the defendant was convicted. He appealed the denial of his motion and also contended that the evidence was insufficient to prove that he had "destroyed" the evidentiary value of the glass pipe.

**Holding:** "A person who is stopped or detained illegally is not immunized from prosecution for crimes committed during his detention period." Evidence of the defendant's destruction of the glass pipe was admissible regardless of whether his detention was unlawful.

Article 38.23 of the Code of Criminal Procedure requires the suppression of evidence obtained in violation of the law. That statute, however, contemplates that a crime already has been committed and that officers violated the law while attempting to obtain evidence of that offense. Evidence that the defendant broke the glass pipe did not exist prior to his detention. Article 38.23 addresses the admissibility of evidence "obtained in violation of the law." This evidence was not obtained as a result of any law being violated.

The defendant also argued that the evidence was insufficient to convict him of tampering with evidence. He asserted that the evidentiary value of the pipe was not destroyed by his breaking it. Pieces of the glass could have been tested for controlled substances, and the pieces could have been used to prosecute him for possession of drug paraphernalia.

Section 37.09(a)(1) of the Penal Code makes it a crime to alter, destroy, or conceal anything "with intent to impair its verity, legibility, or availability as evidence" in an investigation or trial. "The 'thousand pieces' of glass that might have been recovered from the motel parking lot would have less evidentiary value than the intact tube for the purpose of showing a jury that, when intact, it was an object used or intended to be used to inhale a controlled substance."

The evidence was sufficient to support the jury's finding that the defendant "destroyed" the evidence of the pipe. Further, that evidence was admissible without regard to whether the defendant was unlawfully detained.

## EXCLUSIONARY RULE. POLICE ENTRY INTO APARTMENT, EVEN IF UNLAWFUL, DID NOT REQUIRE SUPPRESSION OF EVIDENCE OF INDEPENDENT CRIME OF ASSAULT COMMITTED AFTER THE ENTRY.

### *State v. Iduarte*, 268 S.W.3d 544 (Tex. Crim. App. 2008)

Officers responding to a report that shots were fired and that a man and woman were arguing, found two men and a woman at the scene. One of the men was the husband of the woman, and he appeared angry and agitated. His wife was crying and screaming, but the other man was calm. One of the officers drew his weapon while the other frisked the two men. Although the husband was uncooperative, neither man had a weapon. The woman had red marks around her neck and chest, and said she had been assaulted but did not want to talk about it.

The woman asked to have the keys to a truck parked at the apartment complex so she could leave. Her husband said the keys might be upstairs in his apartment. At the suggestion of one officer, the man agreed to go upstairs with the officer to get the keys, although he told the officer there was no electricity in the apartment. As they climbed the stairs, the defendant started to run, and the officer pursued him because of the earlier report of shots being fired. The defendant was inside the apartment with his back to the door when the officer entered.

After failing to find the keys on a key board in the apartment, the defendant and the officer went back outside. As they did so, the officer noticed an empty holster and gun case on the stairway landing. The defendant denied having a gun and attempted to open the case, but the officer opened the case and found it was empty. On the stairway landing, the officer told the defendant he was under arrest for public intoxication and questioned him again about having a gun.

During the questioning, the defendant started clenching his fists and was becoming agitated. He shouted at the officer, "You want the gun? I will show you the gun." He then turned and ran into the apartment, followed by the officer. As the officer shone his flashlight on the defendant, he saw the man reach over a chair and retrieve a revolver, heard the hammer cock, and saw the defendant turn toward him with the gun pointed at the officer's face. The officer dropped to one knee and shot the defendant twice in the abdomen.

Another officer later testified that the defendant cocked the pistol while pointing it at his own head and threatened to shoot himself. After the shooting, that officer tried to restrain the defendant, although the man struggled and continuously said, "I'm sorry, I forgive you."

Prior to his trial for aggravated assault on a peace officer, the defendant moved to suppress all evidence of the offense, arguing that the officers had violated his federal and state constitutional rights because they entered his apartment without probable cause. The trial court agreed, holding that the defendant did not consent to the entry and the officer's entry when the shooting occurred was not justified by exigency or a community caretaking function. The State appealed.

**Holding:** The issue in this case is not whether, as the trial court found, an unlawful search and seizure occurred. Instead, it is whether suppression of the evidence is required because that evidence was tainted by a prior unlawful act, or whether it was uncovered by means sufficiently independent from any improper conduct to purge that taint.

"The 'fruit of the poisonous tree' doctrine ... serves to exclude as evidence not only the direct products of Fourth Amendment violations, but also the indirect products." The defendant in this case was charged with a crime that took place after the allegedly illegal entry into his apartment by the officer. An illegal entry by police officers does not justify a subsequent assault on those officers. "If [the defendant] did point the gun at [the officer], that act constituted an independent criminal offense committed after the complained-of entry, and the acquisition of evidence of the independent offense was not causally connected to the officer's allegedly illegal entry."

Evidence of the assault did not exist when the officer entered the apartment. Instead, evidence of the assault was a "subsequent independent criminal act" that was not caused by the unlawful entry. The exclusionary rule does not apply in this case.

While the officer's credibility might be seen as suspect on whether the gun was pointed at him, a grand jury found the evidence sufficient to indict the defendant. Whether the officer's testimony is credible or sufficient in this case should be resolved at the trial on the merits, and not, as the defendant suggested, at the suppression hearing.

## SEARCH AND SEIZURE - DISPUTED EVIDENCE OF KIDNAPPING REQUIRES SUBMISSION OF JURY INSTRUCTION TO DISREGARD CONTRABAND FOUND DURING SEARCH INCIDENT TO ARREST.

### *Rodriguez v. State*, 239 S.W.3d 277 (Tex. App. - Amarillo 2007)

A man estranged from his wife called the police to report that his wife had possibly been abducted from a Big Lots parking lot. When an officer arrived at the scene, the caller spoke with him and identified the defendant's car in the parking lot. The officer and several others went to the defendant's home address in order to locate the suspect and the woman he was thought to have abducted. As they approached, he saw the defendant struggling with the woman in the front yard and holding her arm.

The defendant was handcuffed and placed in a patrol car. According to the officer, the suspect was in "protective custody" pending further investigation, but was not under arrest. After talking with other people at the scene, the officer told the defendant he was under arrest and took him

to a holding facility.

During an inventory of the defendant's person, cash, two digital scales, and a brown felt pouch containing methamphetamine were discovered. The defendant moved to suppress the evidence before trial, but the trial judge denied the motion. After the evidence had been presented at trial, the defendant requested the judge to instruct the jurors to disregard anything found in the search following his arrest if they believed that his warrantless arrest had not been supported by probable cause. The judge also denied this request and the jury found the defendant guilty. He appealed both rulings.

**Holding:** Article 38.23(a) requires an instruction to the jury to disregard any evidence obtained in violation of the constitution or laws of Texas or the United States. This instruction is required only when some factual dispute exists in the evidence that raises the issue of whether a seizure was legal. "A fact issue concerning whether the evidence was legally obtained may be raised from any source and it does not matter whether the evidence is 'strong, weak, contradicted, unimpeached, or unbelievable.'" Such a fact issue was raised by the evidence in this case and the trial judge was obliged to give the requested instruction.

The officer testified that he would not have arrested the defendant if the kidnapping allegations had proven to be wrong. He considered "the initial information received, the uninvolved witness information, and the victim's information," but he did not specify what it was about any of that information that led him to conclude that probable cause existed. According to the officer's testimony, the sole basis for the arrest was the reference to a possible abduction in the initial report and the fact that he saw the defendant holding the woman by the arm and "struggling" with her in front of his residence.

The supposed victim of the kidnapping testified that she had decided to stop seeing the defendant and return to her husband. The defendant approached her outside Big Lots and pleaded with her not to leave him. During this exchange, the defendant called on her cell phone and asked if he should call the police. She replied, "Yes, whatever it takes." Eventually, she agreed to follow the defendant home, but she drove him home in her car when he agreed to get her a "20" of methamphetamine. The woman refused to go inside the defendant's house and they were discussing this when the police and her estranged husband arrived.

There was no struggle, and the defendant was not holding her arm, according to the woman's testimony. As the officers approached, she told them, "It's okay. It's okay." She found it "shocking" that the defendant was handcuffed and placed in the patrol car and was upset and confused about why he was being arrested. The woman remembered telling officers about the argument at Big Lots but also said she told them she did not believe she had been kidnapped. Her estranged husband squeezed her arm and told her to "shut up" when she told the officers everything was okay.

If the woman's testimony was believed by the jury, it would have undermined the facts the officer said he relied on to conclude that probable cause existed. An instruction to the jury to disregard the evidence discovered following the defendant's arrest if his arrest was unlawful should have been given, and it was harmful to him to refuse that instruction.

## EXCLUSIONARY RULE. CONFESSION OBTAINED AFTER UNLAWFUL ARREST

**WAS ADMISSIBLE BECAUSE TAINT WAS ATTENUATED.**

***Monge v. State*, 276 S.W.3d 180 (Tex. App. - Houston 2009)**

The defendant's cell phone was found in the back yard of a murder victim who had been shot twice in the back. On the day of the murder, the defendant had placed calls to, and received calls from, the victim, as well as a third person. Initially, the defendant claimed his cell phone had been stolen, but he voluntarily accompanied an investigator to the sheriff's department for questioning. He denied involvement in the murder, consented to a search of his vehicle and residence, submitted to a polygraph examination, and gave a DNA sample while he was at the station.

Although the defendant was told he could go, he fell asleep in the small interrogation room where he had been questioned. In a different room, detectives were questioning the third person who had been involved in phone conversations with the victim and defendant. That man admitted that he and the defendant were involved in the murder, and he named the defendant as the shooter. A detective told the defendant, who was still at the sheriff's department, that he was under arrest. He was handcuffed, given *Miranda* warnings, and questioned again. After being told that the other man had implicated him in the shooting, the defendant confessed. His confession was videotaped and recorded.

Prior to his trial for capital murder, the defendant moved to suppress his confession. He argued that it was tainted by his unlawful, warrantless arrest. The trial judge found that the defendant was free to leave the department at all times until he was actually placed under arrest, but that the detectives improperly failed to obtain an arrest warrant. Since no exception to the warrant requirement excused that omission, the court held that the arrest was unlawful.

Despite the unlawfulness of the arrest, the trial judge denied the defendant's suppression motion, ruling that the taint of the arrest was attenuated at the time the defendant confessed. The defendant pled guilty, but appealed the court's ruling on his suppression motion.

**Holding:** "The 'fruit of the poisonous tree' doctrine generally precludes the use of evidence, both direct and indirect, obtained following an illegal arrest." If the taint is sufficiently attenuated, however, the evidence produced following such an arrest may be admitted. Four factors are used to determine whether a confession obtained after an unlawful arrest is admissible due to attenuation of the taint. These are: (1) whether *Miranda* warnings were given; (2) the temporal proximity of the arrest and the confession; (3) any intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. It is not enough that *Miranda* warnings were given. They are an important factor in determining whether the taint was dissipated, but not the only one.

When the recorded interview with the defendant began, he was given *Miranda* warnings, which he said he understood. The defendant waived his rights and answered the questions put to him by the investigators. Although he was given only one set of warnings, multiple warnings are not required.

Temporal proximity is given the least weight of the factors. "Generally, longer time periods tend to favor a finding of attenuation," while shorter periods between the unlawful arrest and the confession make it more likely that the taint has not been attenuated. This factor favors the defendant. He was told of his arrest about two-and-a-quarter hours before the interrogation that produced his confession. Not every factor needs to be resolved in favor of the defendant, however.

There is no clear definition for "intervening circumstances." Appearance before a magistrate, termination of the illegal custody, consultation with an attorney, or making a volunteered statement may indicate that the confession was not the product of the arrest. None of these things happened in this case. Other jurisdictions have held, though, that confronting the accused with "untainted information of his guilt," like the confession of an accomplice, may qualify as an intervening circumstance.

The defendant denied involvement in the murder until he learned that his accomplice had implicated him in the crime. He was told by the investigators of the details of his accomplice's statement, and that it had been corroborated by another witness. Only then did the defendant confess. That confession was not the result of his arrest, but instead, his voluntary decision to do so after learning of his accomplice's statement.

"Purpose and flagrancy of official misconduct" is a factor that also weighed in favor of attenuation. "When official misconduct is the most flagrantly abusive, the standard for the State to prove attenuation is elevated to require the "clearest indications of attenuation."

Although the defendant was kept in a small, windowless room for twenty-two hours and had eaten only one meal in that time, he did not claim that his confession was involuntary. His movement within the building was restricted, but the defendant was free to leave during at least part of this time. He voluntarily remained at the sheriff's department until he was arrested.

Probable cause existed for the arrest. Although it was made without a warrant, the detective failed to procure one because he believed he did not need one. This seemed to have been based on the officer's misunderstanding of the scope of Article 14.03(a)(6) of the Texas Code of Criminal Procedure. The trial judge concluded that the officers in this case did not violate the law purposely and flagrantly. Given that intervening circumstances existed, the defendant's confession was not tainted by his having been arrested unlawfully. The taint of that arrest was sufficiently attenuated that it did not produce the confession, and the confession was properly admitted.

# CHAPTER 2 - CONFESSIONS

## A. INTRODUCTION

Texas confession law is complicated by its basic prohibition of oral confessions. While efforts have been made repeatedly in the legislature to permit oral confessions in cases in which federal requirements are met, Texas law to date consists of a confusing and overlapping variety of exceptions to the general rule disallowing all but written confessions.

In at least one other respect Texas confession law also is more restrictive than the interpretations of the federal constitution. While both bodies of law require that confessions be given voluntarily, Texas courts have construed more strictly - in practice if not in principle - the rule that a statement may not be the product of any inducement, whether promise or threat, made by a person in authority.

Added to these areas of particular concern in Texas are the numerous issues arising in interpreting the limits of the Fifth and Sixth Amendments to the United States Constitution. The cases deciding these issues generally relate either to the time at which the rights attach, or to whether they have been invoked or waived by the person giving a confession.

Sometimes, as in *Sierra v. State* and *Corley v. U.S.*, an argument will be made that violation of some rule, and perhaps not one closely related to confessions, requires the suppression of a statement. The rule violated in *Sierra* was the requirement in the Vienna Convention that the consulate of a foreign national be contacted if he is arrested in the United States, and that the arrestee be notified of his right to contact his own consulate. The Texas Court of Criminal Appeals, following a decision of the U.S. Supreme Court, held that the treaty did not create a "law" as contemplated by the Texas exclusionary rule, and that violation of that treaty provision did not require suppression of a subsequently obtained confession.

The federal *McNabb-Mallory* rule requiring prompt presentment to a magistrate following arrest was at issue in *Corley*. There, the Supreme Court rejected the government's argument that the rule had been supplanted by Congress's earlier attempt to avoid the *Miranda* requirements and return to a limited voluntariness test for admissibility of confessions. The Court held that in federal cases, failure to take a prisoner before a magistrate within six hours presumptively requires suppression of any confession obtained thereafter.

### CONFESSION. FAILURE TO ADVISE FOREIGN NATIONAL OF RIGHT TO CONTACT CONSULATE DOES NOT REQUIRE SUPPRESSION OF STATEMENT.

***Sierra v. State*, 218 S.W.3d 85 (Tex. Crim. App. 2007)**

The defendant was arrested because he was believed to have been involved in an aggravated robbery and murder. At the police station, the defendant received *Miranda* warnings and gave a written confession. Although the police knew that the defendant was a Mexican national, the Mexican consulate was not contacted and the suspect was not told that he had the right under Article

36 of the Vienna Convention to contact his consulate.

The defendant moved to suppress his confession based on the violation of his rights under the Vienna Convention. The trial court denied the motion and admitted the defendant's confession at trial. He was convicted of capital murder and appealed.

**Holding:** Article 36 of the Vienna Convention governs relations between consulates and their nationals. It "grants a foreign national who has been arrested, imprisoned or taken into custody a right to contact his consulate and requires the arresting government authorities to inform the individual of the right 'with delay.'" The defendant's argument was that his rights under Article 36 were privately enforceable, and that violation of those rights requires the exclusion of confessions obtained as a result of that violation.

While this appeal was pending, the U.S. Supreme Court decided two cases involving the issue raised by the defendant. The Court assumed, without deciding, that Article 36 does not grant rights that an individual may enforce, and held that the federal exclusionary rule cannot be used as a remedy for a violation.

In *Rocha v. State*, 16 S.W.3d 1, the Texas Court of Criminal Appeals held that the exclusionary remedy in Article 38.23 of the Texas Code of Criminal Procedure does not apply to treaty violations. The court in *Rocha* concluded that a treaty is not a "law" for purposes of Article 38.23.

The defendant in this case was not entitled to have his suppression motion granted under either federal or state law. A defendant might challenge the voluntariness of a confession where Article 36 rights were not observed, and a trial judge might "make the appropriate accommodations to ensure the defendant secures, to the extent possible, the benefits of consular assistance." Vienna Convention rights are enforced primarily through diplomatic means. Suppression of evidence is not the appropriate remedy for those violations.

## CONFESSION. DELAY IN TAKING PRISONER BEFORE A MAGISTRATE AFTER ARREST TAINTS CONFESSION AND RENDERS IT INADMISSIBLE.

### *Corley v. United States*, 129 S.Ct. 1558 (2009)

The defendant was arrested on a state warrant, but was suspected of also robbing a bank. When officers tried to arrest the defendant, he nearly ran over an officer, jumped out of his car, pushed the officer down, and ran. He was caught and charged with assaulting a federal officer.

It was around 8:00 a.m. when the defendant was arrested. He was held at a local police station while residents of the area where he was captured were questioned. Around 11:45 a.m., officers took the defendant to a hospital for treatment of a minor wound he received in the chase, then to the FBI office where he was told he was suspected of robbing a bank. During this time, he had not been taken before a magistrate even though a magistrate's office was in the same building where the defendant was questioned.

Eventually, at 5:27 p.m., the defendant began an oral confession to the bank robbery. Instead of committing his statement to writing that evening, he asked to take a break and the agents held him overnight. The interrogation resumed at 10:30 a.m. the next day. After the defendant signed his

written confession, he was taken before a magistrate for the first time. Twenty-nine-and-a-half hours had elapsed since he was arrested.

The defendant was charged with armed bank robbery and other federal charges. He moved to suppress his oral and written confessions, arguing that his right to be taken before a magistrate "without unnecessary delay" after arrest had been violated. The trial court denied the defense motion, finding that the delay was caused by medical treatment, which should be excluded from the six-hour "window" allowed by the federal statute. The court also excluded the break the defendant requested after he already had begun his statement.

On appeal, the circuit court of appeals affirmed, but on different grounds. That court held that 18 U.S.C. 3501 completely overruled the *McNabb-Mallory* rule requiring prompt presentment, and substituted in its place a requirement only for voluntariness of the confession. The defendant appealed to the Supreme Court.

**Holding:** The government argued, as the circuit court held, that Sec. 3501 overruled *McNabb-Mallory* and replaced it with a strict voluntariness test. The defendant claimed that the whole purpose of Congress in enacting Sec. 3501 was to replace the *Miranda* rule, and not to change *McNabb-Mallory* except to require the presentment within six hours of arrest.

The government's reading of Sec. 3501 would make the "six-hour" limitation "nonsensical and superfluous." If Congress intended to have all confessions judged on the basis of voluntariness, without regard for the delay in bringing the arrestee before a magistrate, there would be no reason to then require presentment within six hours.

Subsection "c" of Sec. 3501 creates two exceptions to the rule mandating that an arrested person be taken promptly before a magistrate. One of these is that the confession be "made voluntarily," and the other is that it be given "within six hours" of the time of arrest. If those criteria are met, the confession will be admissible, but if the delay exceeds six hours and is unreasonable, then even voluntary confessions are inadmissible.

Legislative history also supports the defendant's interpretation of Sec. 3501. In the debates on this bill, it was made clear that the first subsection dealt with *Miranda*, while subsection "c" was intended to define and limit the *McNabb-Mallory* rule. The rule requiring a prisoner be taken before a magistrate promptly "stretches back to the common law, when it was 'one of the most important' protections 'against unlawful arrest.'" It is this point at which the judge informs the accused of charges against him, of his right to remain silent, his right to counsel, right to a preliminary hearing, and to decide on bail. Otherwise, "federal agents would be free to question suspects for extended periods before bringing them out in the open." To avoid the pressures of custodial interrogation and the possibility of false confession, the rule brings the process "out in[to] the open."

To avoid the potential for coerced statements, the court reviewing a claim of unreasonable delay must determine whether the defendant confessed within six hours of his arrest, or whether a longer delay was reasonable because of the unavailability of a magistrate. If the confession was within the allowed time, it is admissible if it was given voluntarily. Should the confession have been given more than six hours after arrest, however, and the defendant had not been taken before a magistrate, the court must decide whether the delay was unreasonable or unnecessary. If it was, the confession must be suppressed.

In this case, the circuit court did not properly apply this rule and did not determine whether the defendant's confession was made within six hours of arrest. Assuming it was not, the court did

not consider whether additional delay was justified.

**COMMENT:** Texas law enforcement officers will recognize the local rule that is reflected in *McNabb-Mallory*'s requirement that prisoners be taken without unnecessary delay before a magistrate. This is codified in Article 15.17(a) of the Texas Code of Criminal Procedure. While Texas does not have the specific requirement of 18 USC 3501 that effectively places a six-hour "clock" on the presentment rule, in some cases a delay longer than that might be considered "unnecessary" by a Texas court. The federal rules also are important to Texas law enforcement officers because arrests made by state officers may result in federal prosecution. In fact, in this case both federal and state agents were involved in the execution of the arrest warrant for the defendant. Generally speaking, attempting to obtain a confession from a prisoner before taking him or her before a magistrate carries a risk that the confession will be tainted.

## B. FIFTH AND SIXTH AMENDMENT REQUIREMENTS

### 1. Custodial Interrogation Definitions

*Miranda v. Arizona* applies to interrogation by state actors, law enforcement officers and their agents, and not to questioning by private citizens. The decision in *Miranda* made clear that the "warnings" to be given to ensure a knowing and intelligent waiver of Fifth and Sixth Amendment rights are required only when the suspect is in "custody" and "interrogated." Similarly, Article 38.22 of the Texas Code of Criminal Procedure provides that oral statements are admissible despite the usual prohibition if those statements are not the product of custodial interrogation. Texas and federal cases continue to explore the meaning of these terms in deciding whether warnings are necessary, and whether an oral statement is admissible.

Sometimes, a law enforcement officer will make a comment or remark that is not punctuated by a question mark, and a person in custody will respond with an incriminating statement. If the comment did not constitute "interrogation," no warning was required. Interrogation does not always have to take the form of a question, though. Any comment or conduct that is reasonably likely to elicit an incriminating response may be the equivalent of "interrogation."

When an incriminating statement has been made without the benefit of warnings, the issue often is whether the person making the statement was in "custody" at the time. In the absence of custody, an unwarned oral statement is admissible, so the question of "custody" is an especially important one.

Although the defendant in *Herrera v. State* certainly was in custody - he was an inmate - the court of criminal appeals nevertheless held that no *Miranda* warnings were required because the questioning related to a different offense than the one for which the defendant was in jail. According to the court, the defendant might be able to establish that the circumstances of the interrogation were coercive or that he felt pressured by the interrogator to answer questions. If he could do that, he would be considered to be in "custody" and warnings would be required.

**CONFESSION. JAIL INMATE NOT NECESSARILY IN "CUSTODY" FOR *MIRANDA***

**IF HELD ON DIFFERENT CHARGES.**

***Herrera v. State*, 241 S.W.3d 520 (Tex. Crim. App. 2007)**

A fight took place outside a bar in which several persons were stabbed. A police sergeant who arrived at the scene shortly after the fight ended was asked by another officer to stop a red car that was leaving. The sergeant stopped the car and found three persons inside: the defendant, who was sitting alone in the back seat, and his parents. While the occupants were being questioned, an officer searched the car and found a lock-blade knife on the floorboard near where the defendant had been sitting.

The defendant was arrested on an outstanding warrant and taken to the county jail. An investigator visited the defendant the next morning and questioned him about the events of the prior evening. The investigator did not advise the defendant of his rights under *Miranda* and no recording was made of the conversation.

In the course of the interrogation, the defendant admitted that "he had a knife in his pocket" and that, when the car in which he was riding was stopped, "he took the knife out of his pocket and dropped it on the floorboard." He also explained that during the fight he had seen his brother fighting with some men and saw another man hit his father. The defendant was kicked and hit while trying to get the knife from his pocket. The defendant was charged with aggravated assault with a deadly weapon. He moved to suppress the statements he had made to the investigator while he was in jail.

In response to questions from the defense counsel, the investigator testified that the sergeant who had stopped the defendant's car had not told him that the defendant or his family had stabbed anyone, but only that they were somehow "involved" in the fight. He also testified that he did not consider them to be "suspects" at the time of the questioning. The officer admitted he had not given *Miranda* warnings to the defendant prior to interviewing him. He said when he met with the defendant he did not have a clear picture of what had happened the previous night. The trial judge admitted the defendant's statements and he was convicted.

On appeal, the court of appeals held that the defendant was not "in custody" for purposes of *Miranda* when he was questioned, despite having been incarcerated at the time. Compulsion was not used, according to the court, and the statement was properly admitted because it was not the product of custodial interrogation. The defendant petitioned for review by the Texas Court of Criminal Appeals.

**Holding:** "The warnings set out by the United States Supreme Court in *Miranda v. Arizona* were established to safeguard an uncounseled individual's constitutional privilege against self-incrimination during custodial interrogation." "Custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." The question of custody is determined by whether a reasonable person in the same situation would have believed that his freedom was restrained in the way a formal arrest would allow.

The U.S. Supreme Court has not held that every inmate is in custody for purposes of *Miranda*. It is not useful in such cases to consider only whether the inmate would "feel free to leave" in determining the issue of custody. Rather, it is necessary where an inmate is being

interrogated to consider such factors as the language used to summon the inmate, the physical surroundings of the interrogation, the extent to which the inmate is confronted with evidence of his guilt, and any additional pressure exerted to detain him.

If all inmates were considered to be "in custody," warnings would be required in every instance in which questioning occurred. "Even though an inmate is not at liberty to leave a detention facility, the deprivation of freedom is not absolute. Inmates, in varied degrees, retain some level of freedom and autonomy while incarcerated."

In situations in which an inmate would feel free to terminate an interview and leave the interrogation setting, and where other circumstances did not create a coercive environment, warnings may not be required. Here, the defendant failed to established that any factors related to "custody" existed at the time he was questioned, other than the fact that he was an inmate. Since the defendant did not produce evidence showing that he was subjected to "custodial interrogation," it was not error for the trial judge to overrule the defendant's objection to admitting his statement.

**COMMENT:** In this opinion, a divided court concludes that not every inmate is in "custody" for purposes of *Miranda*. Because the defendant failed to introduce any evidence showing that he nevertheless was questioned in a coercive manner or setting, the court did not discuss the particulars of this situation. Law enforcement officers, therefore, get little guidance from this opinion on the weight the "factors" relating to custody in this circumstance will be given or what the court will consider more or less important. Of course, the best approach in almost all cases will be to treat all inmates as persons in custody for all purposes and provide them fresh warnings prior to any questioning, thereby avoiding the problem raised in this case. If, for some reason, warnings are not given to an inmate, it should be made clear at a minimum that there is no compulsion to answer questions, and that there will be no repercussions of any kind for refusal to cooperate. It also probably is important - perhaps even critical - to limit questioning to topics and offenses unrelated to the reason the inmate is incarcerated.

2. Invocation and Waiver of Rights

The right to counsel attaches in two distinct ways. One is by the defendant invoking it during or before custodial interrogation. This is sometimes referred to as the "Fifth Amendment" right to counsel. But the right to counsel also may attach automatically because a suspect has become an "accused," and "adversarial criminal judicial proceedings" have been initiated against him. When this happens, the defendant need not say or do anything to invoke the right; indeed, he may not even know that he has such a right. The right to counsel in this situation is termed a "Sixth Amendment" right, and law enforcement officers must be especially careful not to be so focused on *Miranda* that they forget that another right to counsel exists.

This "automatic" protection by the Sixth Amendment is well illustrated in *Pecina v. State*, a case in which the defendant said at his arraignment that he wanted a court-appointed lawyer. He was then immediately asked if he wanted to talk to detectives investigating the homicide for which he was arrested. When the defendant answered, "yes," he was given warnings and questioned, leading to incriminating statements. The court of criminal appeals ruled that this process amounted to an invocation of the right to counsel, followed by questioning that was not initiated by the

accused. Consequently, his "waiver" of the right to counsel was invalid.

Sixth Amendment counsel rights also were at issue in *Arabzadegan v. State*. The defendant was warned and waived his rights, including his right to counsel, before giving an incriminating statement. He complained later, though, that because he had spoken with an attorney prior to his arrest, he had effectively invoked his right before the investigator asked if he would waive it. The court of appeals concluded that speaking with an attorney is not the same as establishing an attorney-client relationship, and the waiver was valid.

In its interpretation of the Fifth Amendment, *Miranda* requires that all questioning cease upon demand of the suspect for either assistance of counsel or the right to remain silent. While this rule is clear and unambiguous, it often is difficult to determine precisely when one of these rights has been invoked or waived.

The suspects in *Dalton v. State* and *State v. Gobert* mentioned lawyers, but did not unequivocally request them. Dalton asked the arresting officer to tell his friends to get him a lawyer, but he later waived his right. The court did not consider his prior statement to be the equivalent of asking for an attorney.

Gobert actually told his interrogator, "I don't want to give up any right, though, if I don't got no lawyer." This statement, which was followed by more ambiguous comments about whether the suspect wanted to talk to the officers, initially was held to be an invocation of the right to counsel, but after reconsidering the matter, the court of appeals eventually reversed its position and held that it was not sufficient to require the presence of an attorney.

*Miranda* established that invocation of either the right to silence or right to counsel requires the immediate cessation of questioning. Failure to do this, or failure to warn prior to asking any questions, renders inadmissible any statements made by a suspect in response to subsequent interrogation. The U.S. Supreme Court considered in a case called *Oregon v. Elstad* whether a failure to warn that produced an admission could be "un-done" by later giving proper warnings, obtaining a voluntary waiver, and getting the suspect to repeat his incriminating statement. It ruled that the taint from the initial illegality (custodial questioning without warnings) would not necessarily prevent the introduction of a subsequent statement that *did* comply with *Miranda*. This prospect encouraged some law enforcement agencies and officers to deliberately violate *Miranda* in order to get admissions, then to warn the suspect and essentially have him or her repeat the confession. While this procedure may have seemed like a clever way to avoid *Miranda*, courts - including the Supreme Court - have not been slow to exclude the second, warned confession where it appeared that the "two-step" process was just a ploy to evade a constitutional requirement.

*Carter v. State* and *Martinez v. State* are examples of courts rejecting arguments that a second, unwarned confession was not tainted by a prior *Miranda* violation. In these cases, the courts found it significant that the interrogation process was "continuous" and no "curative" steps were taken to lessen the effect of questioning without warnings.

A somewhat different, but similar, situation developed in *Hallmark v. State*. In that case, the defendant invoked his right to remain silent rather than his counsel right. The invocation was "scrupulously honored" and questioning ceased. After about four hours, a different officer contacted the defendant and obtained a waiver and, eventually, a confession. The court of appeals decided that the statement could be used against the defendant because of the time that had lapsed, the change in interrogators, repeating the warnings, and obtaining what seemed to be a voluntary waiver of

rights.

## CONFESSION. RIGHT TO COUNSEL ATTACHED AT ARRAIGNMENT AND WAS NOT VALIDLY WAIVED PRIOR TO QUESTIONING.

### *Pecina v. State*, 268 S.W.3d 564 (Tex. Crim. App. 2008)

The defendant and his wife lived with her father and sister. When the sister came home one evening, she found the defendant and his wife lying on the floor of their bedroom, bleeding from stab wounds. As the woman tried to call 911, the defendant got up and moved toward her, causing her to leave the apartment and go to a neighbor's where a call was made for assistance. Police officers and paramedics found the defendant had been stabbed and was lying on the floor. His wife was pronounced dead at the scene from more than fifty stab wounds.

An arrest warrant was obtained for the defendant because detectives believed he had killed his wife and attempted to commit suicide. The defendant was arraigned in the hospital. When the magistrate entered the defendant's hospital room, she when to his bedside, pointed to the officers, and said, "They are here. They want to speak to you." The magistrate later testified that the defendant nodded yes or somehow acknowledged her statement.

After reading the defendant his rights, the magistrate asked if he wanted a court-appointed attorney, and he said he did. When she then asked if he wanted to speak to the detectives, he said, "Yes." An "Adult Warning Form" was signed by the defendant, advising him of his right to counsel and right to remain silent. One of the officers present noted on the form that the defendant asked for a lawyer but also wanted to speak with the officers.

Following two sets of *Miranda* warnings, the defendant was questioned. During the interview, he admitted that he and his wife had argued and that he had cut her. The defendant signed a written confession to that effect.

In his motion to suppress the oral and written statements he had made to the police, the defendant argued that his 4th, 5th, 6th, and 14th Amendment rights had been violated. After a hearing on the motion at which the magistrate testified, the trial court denied the defendant's motion, concluding that he had been fully informed of his rights and that although he had "indicated that ... he did want a lawyer," he nevertheless "wished to also talk with the detectives ... meaning that he basically was waiving his rights at that time." The court found that this waiver was voluntary, and the statement was admissible.

The defendant was tried for murder and sentenced to life in prison. He appealed on several grounds, including that his statement was obtained in violation of his right to counsel.

**Holding:** "When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." A person in custody who indicates that he wants to communicate with police officers only through an attorney is not subject to further questioning until he has an opportunity to confer with counsel and waives his rights voluntarily, unless the person "himself initiates further communication, exchanges, or conversations with the police."

These principles apply equally to situations in which the 6th Amendment right to counsel has attached. This right does not apply only to representation in "formal legal proceedings." It applies also to questioning once "adverse judicial proceedings" have begun against the accused.

The U.S. Supreme Court recently held that a defendant's initial appearance before a magistrate "where he learns the charge against him and his liberty is subject to restriction" is the beginning of adversarial judicial proceedings. At that point, the 6th Amendment right to counsel applies.

In this case, the defendant requested a court-appointed lawyer when the magistrate visited him in the hospital, and informed him of the charges against him and his rights. If he did not "initiate" contact with the police and then validly waive his right to counsel after that, he should not have been questioned without consultation with an attorney.

The defendant did not initiate contact with the detectives; they came to the hospital with an arrest warrant and with the magistrate who arraigned him. After performing the magistrate's duties, she asked him whether he wanted to speak with detectives and he said, "Yes." This contact was not at the defendant's instigation, and the magistrate testified to this at the suppression hearing. She said that before asking the defendant if he wanted to speak with the detectives, "He never said to me that he wanted to talk to them." His statement came only in response to police-initiated questioning.

Saying "yes" when asked by the magistrate if he wanted a court appointed attorney was sufficient to invoke the 6th Amendment right to counsel. Saying "yes" when asked after the invocation if he wanted to speak to detectives was not sufficient to show that *he initiated* the contact. Because the detectives questioned the defendant after he had asked for a lawyer, and without being contacted by the defendant, his subsequent statements were obtained in violation of the 6th Amendment. They should have been suppressed.

**COMMENT:** This case makes several points important in conducting an interrogation. The first of these is the timing of the attachment of 6th Amendment counsel rights. While officers usually are sensitive to the need for *Miranda* warnings before "custodial interrogation," the 6th Amendment right to counsel, which differs from the 5th Amendment right to counsel protected by *Miranda*, may attach without notice. As the court states in this opinion, once a defendant is taken before a magistrate for the prescribed warnings and is informed of the charges against him, he has a right to have counsel present before any questions are asked. This is true regardless of whether the defendant is in custody or out on bail. Even if the defendant does not indicate that he wants a lawyer, and many will requested appointed counsel as this defendant did, special care must be taken to ensure that an effective waiver of the counsel right occurs before any questioning. If, as here, the defendant does ask for a lawyer, no agent of law enforcement can approach the defendant about answering questions. He or she may contact a law enforcement officer and waive the right, but in the absence of that contact, officers cannot even inquire whether the defendant has had a change of heart. The defendant in this case apparently was quite willing to talk with the police, but his rights nevertheless were violated because *he* did not initiate this contact.

## CONFESSION. RIGHT TO COUNSEL NOT VIOLATED BY UNILATERAL WAIVER OF SUSPECT WHERE NO ATTORNEY-CLIENT RELATIONSHIP EXISTS.

***Arabzadegan v. State*, 240 S.W.3d 44 (Tex. App. - Austin 2007)**

The defendant was arrested with a warrant and charged with capital murder in the death of a victim found in his home who had been blindfolded, gagged with socks, sprayed with pepper spray, and shocked several times with a stun gun. Following his arrest, the defendant was taken to a booking facility and placed in an interrogation room before being booked. After receiving *Miranda* rights warnings, which he waived, he answered questions while being videotaped in an interview that lasted an hour and ten minutes. The defendant specifically waived the right to consult an attorney.

Before trial, the defendant moved to suppress the incriminating statements he made in that videotaped interrogation session, citing violation of his right to counsel. At the suppression hearing, it was ascertained that, prior to the defendant's arrest but after he had become a suspect, an investigator received a call from a criminal defense attorney. In that conversation, the attorney told the detective that either he or his firm "would probably be the attorneys of record" and "would be working on the case." An attorney from the firm was sent to meet with the defendant after he was arrested, but the deputies working at the front desk told the attorney that they did not have the defendant in their computer system.

After the lawyer demanded that the defendant be located, the deputies provided him with the phone numbers for the investigator and head of the Major Crimes Unit. The attorney called both of these officers and left messages. One of them returned the call shortly thereafter and confirmed that the defendant was in custody. The attorney met with the defendant, but the videotaped interrogation already had been concluded.

The trial judge denied defendant's suppression motion, which was based on violation of his right to counsel. According to the defendant, his waiver of the right to counsel at the beginning of the interrogation session was invalid because his Sixth Amendment right to counsel had attached, he was represented by counsel, and he signed the waiver without benefit of counsel. After pleading guilty to murder, the defendant appealed.

**Holding:** "The Sixth Amendment right to counsel attaches at the initiation of adversarial judicial proceedings whether by way of formal charge, preliminary hearing, indictment, information or arraignment." After the Sixth Amendment right comes into play, a defendant is entitled to have an attorney act as a "medium" between him and the State. This counsel right attaches when a suspect becomes the "accused" and the government had committed itself to prosecute. It is then that the defendant "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."

Once a felony complaint is filed and a warrant issued, adversarial judicial proceedings are deemed to have commenced in Texas. These actions had been taken in the defendant's case, so the Sixth Amendment right to counsel had attached when he was questioned, and he was entitled to an attorney's assistance unless he validly waived that right.

The officers complied with *Miranda* and the defendant clearly waived his Fifth Amendment rights to silence and counsel, both orally and in writing. This does not settle, however, whether he waived his Sixth Amendment right to counsel. An "established attorney-client relationship" cannot be waived without the involvement of counsel. If a defendant is represented and his Sixth Amendment right has attached - whether retained or appointed - "the police may initiate interrogation only through notice to defense counsel, and a defendant's unilateral waiver of his Sixth

Amendment right to assistance of counsel is invalid."

The defendant argued that such an attorney-client relationship existed with the firm of the lawyer who called the police prior to the filing of the felony complaint and the issuance of a warrant. Such a relationship is contractual in nature and "results from the mutual agreement and understanding of the parties concerned." It is common for family member or friends to help an accused retain the services of a lawyer, but an agreement between such persons and the attorney does not, by itself, create an attorney-client relationship. The accused is always free in such cases to reject the attorney selected by others, just as the lawyer is free to reject the relationship or agree to it.

The defendant was not even aware of the existence of the firm or the lawyer who attempted to see him until after his confession. He therefore could not have formed an attorney-client relationship with this firm until his statement already had been made. It was the defendant's family that contacted the attorney and asked him to represent the defendant when he was arrested. Based on his actions, the attorney appears to have been willing to undertake the representation but there was no evidence that the accused ever agreed to this relationship.

The State is obliged to establish that a waiver was made knowingly, voluntarily, and intelligently by the accused. It is not obliged, however, to show that no attorney-client relationship existed at the time. That burden falls on the accused who claims a violation of the right to counsel.

In the absence of an attorney-client relationship between the defendant and a lawyer, he was free to unilaterally waive his right to counsel without notice or the involvement of an attorney. Lacking evidence that such a relationship existed, the trial court was not required to suppress the defendant's confession for violation of his Sixth Amendment right to counsel.

**COMMENT:** The Sixth Amendment right to counsel is not the same as the Fifth Amendment right to counsel referred to in the *Miranda* warnings. As this opinion notes, the right attaches automatically under the Sixth Amendment once "adversarial judicial proceedings" have been initiated. Essentially, this means that after some act of "formal" charging, the accused is entitled to counsel unless he specifically waives that right. Where, as here, there is a question about whether an attorney has been appointed or retained by the defendant, a good rule of thumb is that the lawyer should be physically present when the defendant waives his right to counsel, if he does. Allowing a defendant to speak with an attorney by phone, or even in person, is not necessarily sufficient to satisfy the Sixth Amendment counsel right and produce a valid waiver, although it is not impossible for a defendant to waive his right unilaterally. Because this is a complex question, no interrogation should occur once a defendant's Sixth Amendment right attaches unless any lawyer involved in the representation is present and there is a *very clear* waiver of the right by the accused.

## CONFESSION. REQUEST FOR OFFICER TO TELL SUSPECT'S FRIENDS TO GET HIM A LAWYER WAS NOT AN INVOCATION OF RIGHT TO COUNSEL.

### *Dalton v. State*, No. 03-06-00589 (Tex. App. - Austin, 2-1-08)

Police officers were summoned to a house to assist EMS personnel who found a dead woman in the house. The defendant, who was outside when an officer arrived, matched the description of the possible suspect. The officer handcuffed the defendant and frisked him, then identified the

women with the man as friends of his. The suspect asked the officer to give the women his keys, which were in his pocket.

After agreeing, the officer placed the suspect in the back of his patrol car and turned on the car's video camera. He advised the suspect of his rights, which the suspect said he understood. The defendant then asked the officer, "When you give my friends the keys, could you tell them to get me a lawyer?" After assuring the suspect that he would "probably do that in a little bit," the officer asked for the names of the women. The suspect requested the officer to get his medications from his house, to notify his father, and take care of the dogs. These requests were repeated by the officer to other officers, including the request that they ask the man's friends to get him a lawyer.

A homicide detective who arrived on the scene obtained the suspect's consent to enter the house, then told him that he would be taken to the police station where he would be interviewed. The defendant asked whether he could get a lawyer then and was told that if he wanted a lawyer, he could have one. At the station, a second detective again advised the defendant of his rights, which the defendant said he understood. When asked if he wanted to talk about what happened, the suspect replied, "Well, should I get a lawyer first?" The investigator told the defendant that was a decision he would have to make, but that he had a right to a lawyer. In a long conversation that followed, the officer explained that some people obtained lawyers and some did not, and he answered questions about the process of obtaining a lawyer.

Eventually, the defendant acknowledged in writing that he understood the warnings and wanted to waive his rights. He answered questions, describing the history of his relationship with his wife and a fight they had the night before. Then, the defendant said, "I guess I should get a lawyer before I really get into what happened." Following some further conversation about the process of getting an attorney, the detective tried to determine whether the suspect wanted to talk or was invoking his right to counsel. The defendant replied, "I should get one, probably. I guess so. I mean, I guess I should do it. I suppose I should get a lawyer. Oh, yeah, I want one." When asked whether he wanted a lawyer, the defendant said, "Yes, sir." The interview ended and the defendant was taken to jail. Before trial, he filed a motion to suppress all statements he made after invoking his right to counsel.

After hearing the evidence, the trial court determined that any statements made after the defendant said he wanted a lawyer were inadmissible, but everything he said before that was admissible. Specifically, the defendant's claim that his request to "tell my friends to get me a lawyer" amounted to an invocation of the counsel right was rejected. The defendant appealed.

**Holding:** Ambiguous statements regarding counsel to not require the cessation of questioning, but any clear request for the assistance of an attorney must result in an immediate termination of interrogation. The trial judge in this case concluded that the defendant's statement was not an unequivocal invocation, but instead was "an indirect request for counsel transmitted to a third party, who was his friend." During the interview, the defendant sometimes talked about getting a lawyer and whether he needed one, but the trial judge found he had not made an unequivocal request.

The defendant's "statement to the officer to ask or tell his friends to get him a lawyer was not an invocation of his right to an attorney. It was not the type of direct, unequivocal assertion required to halt any further questioning by the officers." That statement might have been an equivocal statement that he might want the services of an attorney in the future, but it was not clear. Even

though the officer reported the request to other officers, it was not transformed into an invocation.

Any desire the defendant had to obtain a lawyer was not articulated with sufficient clarity to lead a reasonable police officer to conclude that the suspect was invoking his right to counsel. Given the ambiguity of the request, suppression of the defendant's subsequent statements was not required.

## CONFESSION. SUSPECT'S STATEMENT REGARDING CONSULTING AN ATTORNEY WAS NOT AN INVOCATION OF THE RIGHT TO COUNSEL.

### *State v. Gobert*, 244 S.W.3d 861 (Tex. App. - Austin 2008)

The defendant was arrested for a parole violation and for assault. A suspect in a murder, he was warned of his rights by detectives prior to questioning. When asked whether he understood his rights, the suspect replied, "I don't want to give up any right, though, if I don't got no lawyer." The investigators immediately asked the defendant if he didn't want to talk, and he answered, "I mean, I'll talk to y'all. I mean, I know, you know, what she had said about it, you know. I'll speak with y'all, but ___, man. I mean I'll speak with y'all, you know."

The defendant acknowledged that he understood his rights and questioning began. One of the detectives interrupted after a few questions and asked again if the defendant wanted to talk, and the defendant said, "Yeah." Following a lengthy interrogation, the defendant confessed to the murder. He later moved to suppress the confession, claiming that he had invoked his right to counsel by saying he didn't want to give up any right unless he had a lawyer.

The suppression motion was granted by the trial court, and the State appealed. On original submission, the court of appeals first held that the defendant's statement was a clear and unequivocal invocation of the right to counsel. The court then reconsidered the question.

**Holding:** If a suspect who is being subjected to custodial interrogation requests the assistance of a lawyer, all questioning must cease until counsel is provided or the suspect initiates contact with a law enforcement officer and waives his right. "The suspect's request for counsel must be unambiguous, that is, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Merely mentioning the words "attorney" or "lawyer" are not sufficient to invoke the right. The suspect must express his desire for assistance by counsel. No "magic words" are required to invoke the right, but the suspect must communicate a wish to consult with an attorney. Ambiguous statements will not suffice.

"Although it may be good police practice for interviewing officers to clarify a suspect's ambiguous statement regarding counsel, both to protect the rights of the suspect and to minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement, clarifying questions are not required, and the officers have no obligation to stop questioning." It was not clear that the defendant's statement was an attempt to communicate that he wanted to speak with an attorney. It "may have clearly conveyed the idea that he did not have a present intent to 'give up any right,' but it was not a request for counsel so as to halt further interrogation by the officers."

The defendant's reply may have indicated that he "might" want to invoke his right to counsel

in the future, but it was not a clear invocation to do so at the time. Immediately thereafter, he told the police three times that he was willing to talk. The detective asked again, shortly after the interview began, whether the suspect was willing to answer questions, and the defendant said he was.

The suppression motion should not have been granted. Defendant's equivocal statement was insufficient to invoke his right to counsel.

**COMMENT:** The Austin court of appeals originally held that this statement was a clear and unambiguous invocation of the right to counsel (reported in the *Texas Police Digest* in July, 2007). This opinion withdraws its previous opinion and substitutes this holding that the statement was not an invocation of the right. What remains clear from this changing decision is that reasonable minds might differ as to whether the defendant was asking for an attorney, or not.

## CONFESSION. "TWO-STEP INTERROGATION" PRODUCING AN UNWARNED ADMISSION FOLLOWED BY WARNINGS AND CONTINUED QUESTIONING TAINTS SECOND CONFESSION.

### *Carter v. State*, No. 07-07-0157 (Tex. App. - Amarillo, 4-1-09)

A DPS trooper patrolling an interstate highway saw the defendant's vehicle in the opposite lane of traffic, next to the median. The trooper made eye contact with the driver who then crossed over to the right lane and exited without signaling. Having seen the driver fail to signal a lane change, the officer cut across the median and turned on his overhead lights. As he watched, he saw the driver run a stop sign and turn onto a farm-to-market road.

Once the car was stopped, the trooper asked the driver for his license and registration. The driver did not have a driver's license, but the defendant, who was a passenger in the front seat, produced a rental contract showing that he had leased the vehicle.

The driver told the officer that they were coming from Tucson, Arizona, where his little brother played basketball. Later, the defendant said they had come from Phoenix, where they had been on vacation. When the trooper asked about weapons or drugs in the car, the defendant replied, "Not that I know of, but it is a rental car, you never know." In response to the officer's request, the defendant consented to a search of the car.

Laundry detergent was strewn over the floor of the car's trunk, and there was a high concentration of detergent in the crease where the back seat met the floor of the trunk. Because laundry detergent is used to mask the odor of drugs, the trooper lifted the back seat and found two packages of cocaine. Both men were arrested. The defendant was handcuffed and placed in the back of the trooper's patrol car. After a short time, the officer began driving the defendant to a nearby police station. While doing this, he questioned the defendant.

Prior to be given *Miranda* warnings, the trooper asked the defendant if the packages found in his car contained cocaine or crack cocaine. The defendant answered, "cocaine." Following the defendant's admission, the officer gave the defendant warnings and asked questions about the weight of the cocaine, where the men had purchased it, and whether they had any cash with them. This exchange was recorded on the patrol car's on-board equipment.

The defendant moved to suppress all of these statements, claiming that the first admissions

had been obtained in violation of *Miranda*, and that everything that followed was fruit of the poisonous tree. The trial court eventually sustained the objection to the unwarned statements, but allowed the jury to consider everything the defendant said after he received his warnings.

The defendant was convicted of possession of a controlled substance with intent to deliver. He appealed on several grounds, including the court's admission of his incriminating statements.

**Holding:** In limited circumstances, the Supreme Court has ruled that a voluntary statement made after receiving proper warnings is admissible even if law enforcement officers previously had elicited the same admissions from the suspect in violation of *Miranda*. However, the Court has expressly condemned the use of a deliberate "two-step" process in which an officer intentionally violates *Miranda* in order to obtain a confession, then gives warnings and asks the defendant questions designed to produce the same incriminating responses.

The Texas Court of Criminal Appeals identified several factors to use in determining whether *Miranda* warnings would be effective if delivered "mid-stream." These include: (1) the completeness and detail of the questions and answers in the first round of interrogation, (2) the overlapping content of the two statements, (3) the timing and setting of the first and second statements, (4) the continuity of law enforcement personnel, and (5) the degree to which the interrogator's questions treated the second round as a continuation of the first round.

In this case, the defendant "was ... subjected to a conscious, two-step interrogation without any curative measures being applied." The officer was highly experienced and, within a few minutes of the defendant's arrest, began interrogating him without warnings. Within just seconds, the trooper had elicited an incriminating statement from the defendant, asking the same question again knowing that the answers were being recorded. Immediately after the confession, the officer gave *Miranda* warnings and resumed his questioning.

It was clear that the defendant was entitled to warnings before the first questions were asked, and the conversation was not casual. With the trooper's experience, he "certainly did not need [the defendant] to assist him in differentiating cocaine from crack cocaine." When an officer deliberately undermines *Miranda*, "curative" measures must be taken to ensure that any statement obtained is voluntary and the defendant's rights are protected. That did not happen in this case.

The warned and unwarned statements the trooper elicited were overlapping in content; both related to the defendant's knowledge of and connection to the cocaine. They were made to the same officer within seconds of each other. The interrogation was one uninterrupted event. No effort was made to explain to the defendant when he was given warnings how the admissibility of his statements might differ.

The trooper maintained that warnings were unnecessary when he asked the defendant to identify the drugs, but the defendant was under arrest while being questioned. The questions were not merely "rhetorical" as contended by the State. At the time the question was asked, the defendant was sitting in the back of a patrol car with his hands handcuffed behind his back, at the crime scene, watching law enforcement officers searching his car. The trooper was not asking a question that was "open-ended" or "contemporaneous with the discovery of the contraband." The questions were pointed and direct, after the officer knew what he had found.

Because this interrogation was an uninterrupted and continuous process and no curative measures were taken to lessen the damage of the unwarned questioning, it "had the likely effect of undermining both [defendant's] ability to assert his right to remain silent and his ability to

knowingly, voluntarily, or intelligently waive that right." The trial judge should have suppressed the defendant's statements.

## CONFESSION. FAILURE TO GIVE WARNINGS BEFORE QUESTIONING NOT CURED BY WARNINGS GIVEN BEFORE SECOND INTERROGATION SESSION.

### *Martinez v. State*, 272 S.W.3d 615 (Tex. Crim. App. 2008)

Three men were "socializing" at an apartment complex in the early morning hours when they were approached by two men carrying a rifle and a pistol. The shorter of the two men pressed the rifle into the abdomen of one of the three men and demanded money. His accomplice pointed the pistol at the other two and also demanded money. When one of the three gave his wallet to the taller man, he was shot in the groin. Another man was shot in the stomach by the same gunman when he handed over his wallet. The third man was pushed to the ground and his wallet was taken. After shooting him in the neck, the two men fled. Police were summoned and all three men were taken to the hospital. One was treated and released; another was hospitalized and eventually underwent multiple surgeries; and the man who had been shot in the groin died a few hours after the shooting.

A Crime Stoppers tip identified the defendant and another man as the primary suspects. They matched the descriptions the police had been given by the victims, and one of the victims identified both men in a photo array. The other surviving victim was able to identify only the defendant.

A warrant was obtained for the defendant, but the other suspect had died by the time of the identification. The defendant was arrested in a convenience store parking lot while driving a car that had been used in the robbery. When he was arrested, the defendant was not given *Miranda* warnings. He was questioned at police headquarters by two investigators but denied knowing anything about the incident.

Following a polygraph test, which took three to four hours to complete, the investigators again spoke with the defendant and told him he had failed the exam. It was not usual for a suspect to be told he "failed" a test, but only that "deception was indicated on some of the test questions." The defendant then was taken before a magistrate who administered *Miranda* warnings for the first time. When he was returned to the central holding station, the defendant was questioned again by the investigators who repeated the warnings.

The defendant gave a videotaped statement. At the beginning, he said he had learned some facts about the case from the polygraph examiner, although he previously had said he was unaware of the incident. He also denied being one of the robbers, and said he had been a "lookout." Eventually, the defendant said there had been four people involved, and that one of them, the man carrying the rifle, resembled him and could have been mistaken for the defendant. Following his indictment for capital murder, the defendant moved to suppress his statement.

In his suppression motion, the defendant argued that he had not received *Miranda* warnings before being arrested or polygraphed. Following the testimony of one of the investigators, the trial judge ruled that the defendant had waived his right to remain silent and overruled the defendant's suppression motion.

**Holding:** In *Missouri v. Seibert*, 542 U.S. 600 (2004), the defendant confessed to a murder

without being given *Miranda* warnings. Twenty minutes later, the detective returned to the defendant, gave her required warnings, obtained a signed waiver, and a second confession. The Supreme Court held that, when a suspect is questioned without warnings and then given *Miranda* warnings and questioned again in order to obtain a second, admissible statement, that confession may be rejected by the trial court in some circumstances.

The factors controlling whether a statement is admissible if *Miranda* warnings have been "delivered midstream," include: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first."

In this case, the defendant was in custody for capital murder and was not warned by the investigator at the time of his arrest or before being questioned about the crime. He did not receive any warnings before being taken for a polygraph examination by an examiner who never was identified to the court. Only after the first round of questioning and the polygraph examination was the defendant warned by a magistrate. From these facts, it appeared that the failure to warn the defendant prior to any questioning was deliberate and done in a "calculated way to undermine the *Miranda* warning."

When a *Miranda* violation occurs, the State bears the burden of proving admissibility of any statement obtained. The defendant's rights were violated at the station when he was questioned without receiving the warnings. The State failed to provide the polygrapher's name, the questions asked during the polygraph examination, or what was said during the first interrogation of the defendant. While there are some cases in which an officer may not realize that warnings are required because it is unclear that the suspect is in custody, a case involving a "midstream warning" must be examined more closely.

A deliberate violation of *Miranda* in an effort to obtain an admission may render it immaterial whether an incriminating statement actually was made by the suspect. The defendant clearly was in custody; he had been arrested pursuant to an arrest warrant, and was questioned at a police station. Failure to give warnings was not an innocent mistake, but a "conscious choice." Further, the questioning did not involve a substantial break between the first interrogation and the statement that was obtained eventually. Only about seven hours transpired between the unwarned questioning and the time the magistrate gave the suspect warnings. The statement was given very shortly after the warnings.

The defendant was with police officers or police department personnel throughout the day of his arrest. They questioned him both times, and were always with him except for the period of the polygraph exam, which was administered by a police officer.

The videotaped interrogation was treated as a continuation of the first, unwarned interrogation, and one of the officers referred to that first questioning in the second session. It was reasonable for the defendant to assume that the second interrogation was just a continuation of the first. While the suspect was informed of his rights the second time, he was not told that any statement he had made previously, either during questioning or in the polygraph exam, could not be used against him. He was not told he could refuse the polygraph, but was told he had "failed" the test. Not telling the defendant that nothing that went before could be used, and referring to the first interrogation after the warning were given, "likely created the belief in [the defendant's] mind that

he was compelled to again discuss the matters raised in the first interview during the second interview."

No "curative measures" were used by the officers prior to questioning the defendant a second time. He would not reasonably have been able to distinguish between the first interrogation and the second, and "appreciate that the interrogation has taken a new turn."

The videotaped statement was tainted by the deliberate questioning of the defendant without warning him, and the lack of any measures that would have "cured" the impression that the entire interrogation was one continuous event. Consequently, the defendant's statement was inadmissible.
**COMMENT:** This significant opinion makes clear that the Texas Court of Criminal Appeals will strictly scrutinize statements made by a person in custody following interrogation that violates *Miranda*. While some "second" statements obtained after a violation may be "cured" of the taint of a failure to warn earlier, it seems from the Court's opinion that those will be admissible only in circumstances evidencing a substantial break in the first interrogation and the second one, and where the suspect likely would have known that his prior, unwarned statement could not be used against him. The lessons to be taken from this opinion are: (1) that deliberately violating *Miranda* in the hope of eventually getting an admissible statement is likely not to produce the desired result; and (2) that in cases of an inadvertent or innocent violation, the suspect should be interrogated further only after "curative measures" have been taken.

## CONFESSION. RIGHT TO SILENCE NOT VIOLATED BY DIFFERENT OFFICER ASKING SUSPECT LATER IF HE WANTED TO ANSWER QUESTIONS.

### *Hallmark v. State*, 287 S.W.3d 223 (Tex. App. - Eastland 2009)

A deputy was called to the scene of a shooting. While en route, he received information that the suspect in the shooting had gone to a residence. The deputy found the suspect there and read him *Miranda* warnings. The defendant asked the deputy if he could remain silent. He was told that he could if he wanted to, but that the deputy did not think it would help, and did not think anything could help the defendant.

Several hours later, a Texas Ranger went to the sheriff's department to talk with the defendant. After determining that the man did not need medical attention, he asked if the defendant wished to speak with him. The defendant said he did. The investigator read the defendant *Miranda* warnings, which the defendant said he understood. Although the officer did not read the "waiver of rights" portion of his *Miranda* card to the defendant, and did not know whether the defendant had read it, he told the defendant, "You need to sign here." The defendant signed the card.

At no time did the defendant tell the investigator that he did not want to talk, and he never hesitated or stopped the interrogation. The defendant made an oral statement that later was offered as evidence against him at trial.

Prior to trial the defendant moved to suppress the oral statement, claiming that he had invoked his right to silence, but that his right had been violated by the investigator initiating contact after the invocation. The trial court denied the defendant's motion, finding that the audiotaped statement had been given voluntarily, knowingly, and intelligently. Following his murder

conviction, the defendant appealed.

**Holding:** An invocation of the right to silence must be "scrupulously honored." Whether a subsequently obtained statement is admissible depends on several factors. A reviewing court will consider (1) whether the suspect was warned of his or her right before the first questioning; (2) whether the suspect was warned of the right to silence before the second questioning; (3) the amount of time between the first and second questioning; (4) whether the second attempted interrogation involved a different crime than the initial questioning; and (5) whether the suspect's first invocation of the right to remain silent was honored.

The defendant in this case was informed of his right to remain silent by the deputy who first took him into custody, and later by the Texas Ranger prior to questioning about the crime. Approximately four hours passed after the first questioning by the deputy before the subsequent contact was made by the investigator. When the defendant told the deputy that he wanted to remain silent, that request was honored. Both sessions of questioning focused on the same offense.

The investigator asked the defendant if he wished to speak with him, and did not question the suspect until he indicated that he wanted to answer questions. During the interrogation, the defendant never indicated to the Ranger in any way that he wanted to invoke his right to counsel, or that he did not want to talk.

The defendant's initial invocation of his silence right was honored by the deputy and several hours passed before he was asked again by a different officer if he wanted to answer questions. Considering all of the factors, the defendant's initial invocation of the right to remain silent was scrupulously honored, and the trial judge did not abuse his discretion by admitting the defendant's oral statement.

**COMMENT:** The Supreme Court dealt with this issue in *Michigan v. Mosley*, 423 U.S. 96 (1975). In that case, the Court made clear that once a suspect has invoked the right to remain silent, any subsequent statement must be reviewed to determine whether it is the product of the suspect's voluntary waiver of the right, or whether it was obtained by ignoring the suspect's invocation. As this court notes, several factors are important in this determination. In *Mosley*, a significant period of time passed before different officers approached the suspect about a *different* offense. While the Supreme Court held that the confession was not obtained in violation of the defendant's previously invoked right to silence, its opinion relied heavily on the facts that different officers were questioning the suspect about a different crime, and that they were doing so after a considerable "break." Situations that suggest to a suspect that he or she will be asked repeatedly to waive the right to silence until the suspect "gets it right," will almost certainly not produce an admissible statement.

## C. VOLUNTARINESS

In order for a confession to be admissible, it must be given voluntarily. Generally, this means that it cannot be the result of threats or promises made by any person in authority which might induce a suspect to testify falsely. Of course, other factors also may affect the voluntariness of a confession. These include physical mistreatment, deception, undue psychological pressure, and so forth.

Circumstances short of physical coercion can render a confession involuntary, but even some measure of coercion will not necessarily do so. The totality of circumstances is evaluated by courts

in deciding whether a confession was the product of free will.

## D. TEXAS STATUTORY REQUIREMENTS

Texas criminal procedure statutes also control the admissibility of confessions, sometimes in ways that exceed constitutional limitations. As noted previously, one of these is the general prohibition on oral statements. The code of criminal procedure also prescribes the form that written confessions must take, including a warning not required by *Miranda*.

In addition to the statutory requirements contained in the Texas Code of Criminal Procedure, rules related to confessions by juveniles exist within the Texas Family Code. Among these is a requirement to notify parents promptly when a child is taken into custody. Violation of this rule may cause a statement by the child to be inadmissible, but in *Cortez v. State* the juvenile's parents were not present while he was being held. The court of appeals noted that the boy's mother and father were contacted shortly after he was detained; his father did not ask to speak with him or be present; and testimony conflicted about whether the mother was denied permission to be with her son. No violation was found, but the court observed that the statements obtained were not especially incriminating in any event, and their introduction was harmless.

**CONFESSION. JUVENILE'S STATEMENTS NOT THE PRODUCT OF FAILURE TO CONTACT PARENTS.**

***Cortez v. State*, 240 S.W.3d 372 (Tex. App. - Austin 2007)**

A Honda Accord with six persons inside pulled to the curb beside a group of high school students who had just gotten off a school bus. After a brief exchange between the front-seat passenger and one of the students, shots were fired from the car and two students were wounded. One of them died from his wound. It was determined by investigators that the occupants of the car were three members of the same family, the defendant, and two others. When officers went to the family's house the day after the shooting, they spoke with two brothers, one of whom had been driving the car, and the defendant. All of the young men agreed to come to the station to answer questions.

The defendant, who was sixteen years old was not a suspect in the shooting when he went to the station, and he was not under arrest or restrained. He waited in the hall while the brothers, and eventually their sister, were questioned and then he walked to a nearby convenience store and called for a ride.

During the questioning of the family members, investigators developed reason to believe the defendant fired the shots from the car. They found him at the convenience store and arrested him, returned him to the station and placed him in an interview room designated as a juvenile processing office. At the defendant's request, the investigator attempted to call the juvenile's mother, but got no answer. He did reach the juvenile's father and told him the defendant was about to be transferred to a juvenile detention facility.

While waiting to be transferred, the defendant asked the officer how long he thought he was going to have to remain in jail. The investigator replied that the juvenile "was getting ahead of himself" and "needed to wait and see." Another detective had seen the juvenile's mother in the lobby of the police station and had a brief conversation with her, telling her he would be back after going upstairs to where the interviews were taking place. When he returned, the woman was gone. The juvenile's mother later testified she had been told by the detective that she could not see her son and she returned home. Later, she was told he was being taken to the juvenile facility.

That evening, when the defendant arrived at the juvenile detention facility, the intake officer called his family and spoke with them, informing them of visiting hours at the facility. They could not see the juvenile that night because the intake process did not conclude until after visiting hours had ended.

The next morning, one of the detectives and another officer took the defendant to a magistrate to be advised of his rights. On the way, the juvenile asked the officer if the police "wanted the gun" or wanted to know "where the gun was." The officer testified that he and the detective responded that they would "talk about that later."

After appearing before the magistrate, the defendant was returned to the juvenile facility, refused to speak with officers, and asked to talk with his parents. There was no telephone in the room, so the detective dialed the number on his cell phone, handed it to the defendant, and stepped outside. Through a microphone in the room, the detective heard the defendant tell his mother he had fired two shots but not hit anyone, and that the driver had fired the fatal shots. This statement and the other two he made (his questions to the officer in the car and his question regarding how long he was going to have to remain in jail) were admitted in evidence against the juvenile over his objection during his trial.

On appeal, the defendant argued that none of these statements should have been admitted. The first two, he claimed, were the product of violations of the Texas Family Code. Specifically, he contended the officers who took him into custody failed to notify his parents promptly and that he was not allowed to have his parents with him in the juvenile processing office. The defendant's contention regarding the third statement was that it also was the product of these violations of the code.

**Holding:** "The failure to comply with the section 52.01(b)(1) notice requirement will render inadmissible any subsequent statement by the child that is obtained as a result of the statutory violation." This provision does not define, however, what is meant by "prompt" notification of parents. Among the factors used to determine whether notification was prompt are the length of time the juvenile was held before notice was given, whether it was given before or after a statement was obtained, the ease with which the police were able to contact an appropriate adult, and what occurred during the delay.

In this case, only a short time passed between the defendant being taken into custody and the notification of his parents. An officer testified that it was only minutes after the juvenile was placed in the juvenile processing office before he contacted the boy's father.

The detective who spoke with the juvenile's mother at the station told her of her son's status shortly after he was taken into custody. Later that day, a police officer called her at home. The defendant was not questioned before his parents were notified, and all of the contested statements were made following parental notification.

"A child being held in a juvenile processing office may not be left unattended and is entitled to be accompanied by his parent. The statute does not require that a parent be present, however." The defendant was monitored the entire time he was held in the juvenile processing office and never asked to have his parents with him. There was no evidence that the boy's father asked to speak with him or be with him while he was detained in the processing office. Although the mother testified that she was refused permission to be with her son at the station, the detective's testimony contradicted hers. Where testimony conflicts, the trial court determines which version to accept, and it reasonably could have concluded in this case that neither parent asked to be with the defendant while he was in the processing office.

Even if the juvenile's parents had not been notified promptly, there was no causal connection established between that failure and the statements he made. The first two statements might have been made even if his parents had been present and counseled against saying anything to the police. In any event, the statements were not especially incriminating and their introduction at trial, in light of all the other evidence, was harmless.

The statement the defendant made to his mother by phone was not obtained in violation of the Fourth Amendment as he claimed. A defendant may challenge evidence gained by intrusion into a place where he had a reasonable expectation of privacy. In this case, the defendant subjectively believed his conversation with his mother would be private. It was not the product of a "search", though, unless that belief was objectively reasonable.

The juvenile processing office in which the phone call was made was not a place in which the defendant had a property or possessory interest or one from which he could exercise control and exclude others. Although he was using the office for a private purpose, there was no evidence he took any steps to ensure his privacy. Nothing the detective did was an attempt to deliberately mislead or deceive the defendant about whether his conversation would be private. He gave the suspect no assurances that his comments to his mother would not be heard by others. While juveniles have rights and protections not afforded adults, it was not reasonable under the circumstances for the defendant to believe that his conversation would be private.

No violation of the family code was shown and no evidence was produced that, even if there had been a violation, a failure to notify the parents would have led to the statements admitted against the juvenile. As to his telephone conversation, it was not the result of a "search" that violated the Fourth Amendment or the Texas prohibition on interception of communications. Therefore, the introduction to all three of the defendant's statements was proper.

# CHAPTER 3 - ARREST

## A. INTRODUCTION

The lawfulness of an arrest is usually an issue in a criminal prosecution only because a violation of a statutory or constitutional provision may "taint" evidence found pursuant to that arrest and render it inadmissible. While arrest cases could be characterized in several ways, the most obvious distinction is whether the arrest was made with a warrant or not.

Arrests by warrant involve legal issues not associated with warrantless arrests. For example, Texas law requires certain formalities in the obtaining, execution, and return of arrest warrants, and these statutory duties are often the bases for claims that the arrest was unlawful.

Warrantless arrests, on the other hand, involve an entirely different and distinct set of issues. Texas law permits warrantless arrests only in circumstances which fall within one of the statutory exceptions to the warrant requirement. These exceptions generally are covered by Articles 14.01, 14.02, 14.03, 14.04, or 18.16 of the Code of Criminal Procedure. Failure to justify the absence of a warrant to arrest is a common ground for challenge. Of course, all arrests share some features, including the need for probable cause.

## B. "SEIZURE" OF PERSONS

As described in Chapter 1 dealing with search and seizure, the "seizure" provisions of the Fourth Amendment and Article I, Section 9 include more than the seizure of property. They also make those constitutional guarantees applicable to the "seizure" of persons. Constitutional seizures include full custodial arrests, and investigative detentions. They do not include purely consensual encounters between the police and citizens. Therefore, the question of whether a "seizure" occurred is an important one. If there was no "seizure" - in the constitutional sense - then there was no governmental action regulated by the constitution, and no suppression of evidence for a constitutional violation. *See Brendlin v. California* in Chapter 1.

Officers are free to approach citizens and ask for identifying information or generally inquire into their activities, as long as the encounter is "consensual." It is only when the circumstances of the encounter reasonably convey to the citizen that he or she is not free to leave that the contact becomes a "seizure" requiring some level of suspicion.

Just as it is important to distinguish between consensual encounters and "seizures," it also is important to distinguish between the two kinds of seizures: arrests and investigative detentions. The former requires probable cause while the latter needs only reasonable suspicion. Because the higher standard can be difficult to prove, the characterization of a seizure as an "arrest" instead of a detention can result in evidence being suppressed if probable cause is not established. For cases defining and describing reasonable suspicion, see Chapter 1, Section C(2).

## C. ARREST WITH AND WITHOUT WARRANT

For many years, Texas courts have taken the view that the Texas Constitution, like the U.S. Constitution, requires a warrant unless some exception to the warrant requirement exists. Courts usually have begun their analysis of warrantless searches and arrests by noting that in the absence of a warrant, the arrest or search is *per se* unreasonable. Of course, warrantless arrests and searches are commonplace, but only because courts have recognized a fairly large number of rather broad exceptions to the warrant requirement.

In 1998, the Texas Court of Criminal Appeals contradicted all of this conventional understanding of the warrant requirement in *Hulit v. State*. There, the court held that Article I, Section 9 of the Texas Constitution, which is virtually identical to the Fourth Amendment, does not require a warrant at all. If the arrest or search is reasonable under the circumstances, it meets the constitutional standard without regard for whether a warrant was obtained. This position is difficult to square with the statutory exceptions to an arrest warrant found in Texas law. Indeed, it has long been the practice in Texas to measure warrantless arrests against *only* the statutory exceptions, rather than against judge-made exceptions, as in the federal system. Since the U.S. Constitution follows the traditional analysis requiring a warrant unless some exception exists, and since statutory warrant exceptions remain a part of Texas law, *Hulit* may prove to be of little real significance. In the cases decided by Texas courts since *Hulit* was decided, virtually no attention has been paid to the opinion, and it appears that the traditional warrant/exception requirement remains intact.

The constitutional requirements for an arrest warrant essentially are the same as those for a search warrant, and they are described briefly in the introduction to the subsection dealing with that kind of warrant. *See* Chapter 1, Section (E). The way in which an arrest warrant is executed is as important as the way in which it is obtained, or the grounds for its issuance. Deficiencies in the issuance or execution of an arrest warrant may result in the exclusion of evidence obtained as a result of the arrest.

Warrantless arrests and searches generally are permitted in cases in which some exigent circumstance exists. The exigency exception recognizes that the need for quick action sometimes precludes the usual judicial preapproval process. In arrest cases, the fear that a person may escape arrest altogether, or that the arrest may be postponed and result in harm to persons or property, is the usual basis for dispensing with a warrant.

Probably the most commonly used exception to the arrest warrant requirement is for offenses which occur within the "presence or view" of the arresting officer. Exceptions also exist for persons found in "suspicious places," for certain assault and domestic violence cases, for fleeing felons, and for persons believed to have committed theft offenses. Examples of these exceptions may be found in the cases collected in Chapter 1 - Search and Seizure, as well as in Chapter 4 - Traffic Stops and DWI.

## D. JURISDICTION OF POLICE OFFICERS

Certainly one of the most confusing areas in the law of arrest has been the question of the territorial limits on an officer's authority. Courts considering this issue consistently have held that territorial jurisdiction is determined in the first instance by statute. Provisions regarding arrest jurisdiction are found in Article 14.03 of the Texas Code of Criminal Procedure, but the limitations

of a governmental entity's authority and that of the officers it employs, are situated within the Texas Government Code and the Texas Local Government Code.

# CHAPTER 4 - TRAFFIC STOPS AND DWI

## A. INTRODUCTION

The traffic stop is perhaps the single most common way in which citizens will encounter a law enforcement officer. Because of the nature and sheer numbers of these encounters, the stop often develops into much more than a brief, "routine" contact. For this reason, what begins as a traffic stop may eventually involve questions of search and seizure law, the law of confessions, issues related to possession of contraband, or other points of procedure or substantive law covered elsewhere in the *Guide*. Cases dealing primarily with these issues, but which just happen to arise in the course of a traffic stop, are collected in other chapters. Those concerning the interpretation of traffic laws, or in which the traffic stop is the focus of decision, can be found in this chapter.

The chapter is organized very broadly into two primary categories: traffic stops and the laws involving them, and DWI. Even this basic division is problematic. Some traffic stops for minor violations produce evidence of DWI. Are these primarily DWI cases or traffic stop cases? DWI cases may have little to do with the law or procedure of DWI, but everything to do with the lawfulness of a stop. Readers interested in learning more about any one of these topics therefore neglect the others at their own peril, a reflection of the simple fact that traffic stops cut across many lines of legal doctrine and often defy categorization.

## B. TRAFFIC OFFENSES AND STOPS

Traffic stops begin, not with procedure, but with the fundamental question: Has a traffic offense occurred? The answer to this question is critical for two reasons. First, of course, is the officer's need to determine whether a citation or arrest will lead to conviction of an offense. But the lawfulness of the stop also is critical because it affects whether evidence obtained during that stop will be admissible.

Not surprisingly, one of the most common reasons cited for stopping a motorist is that he or she was "weaving" or "failing to maintain a single lane." The Texas Transportation Code specifies that, for an offense, the motorist must do more than "weave" outside a lane of traffic. That movement must be unsafe. Following a spate of cases in which appeals courts have held that the evidence of weaving was insufficient to establish unsafe movement, decisions dealing with the issue recently have found other justifications for a stop. For example, in *Bracken v. State* and *Doyle v. State*, the courts of appeals upheld the stop on the grounds that the defendant "failed to drive on the right" in violation of Section 545.051(a) of the transportation code. One of those courts held in *Dunkelberg v. State* that even weaving within a single lane could justify a stop if it provided reasonable suspicion of DWI. And in *Curtis v. State*, the Texas Court of Criminal Appeals noted that such a stop - based on reasonable suspicion of intoxication - is not invalidated merely by the existence of a possible innocent explanation for the weaving.

*Texas D.P.S. v. Gonzales*, a license suspension case, dealt with a different reason for the stop. The driver was driving under the speed limit, but the court of appeals found this insufficient to

justify a stop, given that the weather was bad at the time and there was no evidence that the reduced speed was impeding traffic.

As explained in Chapter 1, two of the closely-related threshold questions that must be satisfied before a person may contest a search or a seizure are whether the defendant had a personal right that was violated by the action, i.e., "standing" to complain, and whether the defendant had a reasonable expectation of privacy in the place searched or thing seized. A vehicle's passenger may not have "standing" to complain about a search of the vehicle in which he or she is riding, but the passenger does have the right to complain about the grounds for the stop of the vehicle that preceded the search, as is explained in *Brendlin v. California,*, a case that is described in Chapter 1(B).

In a decision unrelated to a traffic stop, the appellate court held in *Alonzo v. State* that the statutory authority for an officer to investigate a vehicle accident involving injury death or damage of $1000 or more does not implicitly prohibit the investigation of accidents with less serious consequences. Nor does the transportation code prevent investigation by an officer who simply is unaware of whether death, injury, or property damage resulted.

## DWI. WEAVING ACROSS CENTER LINE AND "FOG LINE" PROVIDE REASONABLE SUSPICION FOR DETENTION.

### *Bracken v. State*, 282 S.W.3d 94 (Tex. App. - Fort Worth 2009)

A deputy noticed the defendant's car traveling on a two-lane rural road that was undergoing construction work about 1:30 a.m. The deputy began following the defendant after he saw approximately half of the vehicle cross the yellow center line. As he followed, the deputy watched the defendant weave from one side of the lane to the other, "crossing or driving on the white and yellow lines and lane bumps several times." According to his testimony later, the defendant's driving was dangerous because there was no shoulder on the road due to the construction and concrete barriers and traffic barrels located on the sides of the roads.

While the officer admitted that it could be safer to drive closer to the center line because of these obstructions, he testified that it should be done only if there was no oncoming traffic. The video recording made during the incident corroborated the deputy's testimony that the defendant's vehicle repeatedly was weaving across the lane markers. In the defendant's testimony during the suppression hearing, he claimed that he never crossed the center line, that his tires touched the bumps on the line once or twice but that he moved back into the center of his lane as soon as he felt the bumps.

Following a traffic stop to investigate whether the defendant was driving while intoxicated, the deputy placed the driver under arrest. He was charged with DWI, enhanced by a prior DWI conviction.

The defendant moved to suppress any evidence obtained as a result of the stop. He contended that the officer lacked reasonable suspicion to justify the traffic stop. After the trial judge denied the motion, the defendant was convicted in a jury trial and he appealed.

**Holding:** "Reasonable suspicion exists when, based on the totality of the circumstances, the officer has specific, articulable facts that when combined with rational inferences from those facts,

would lead the officer to reasonably conclude that a particular person is, has been, or soon will be engaged in criminal activity. This is an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists." In this case, the deputy pointed to three characteristics of the defendant's driving that gave rise to reasonable suspicion. These characteristics that caused the deputy to suspect the defendant was intoxicated were: "[the defendant's] crossing over the center line by half a vehicle's width; crossing or driving on the fog line; and weaving back and forth within his lane over the course of several miles."

According to the deputy, the defendant violated Transportation Code Sec. 545.051(a) by crossing the center line. He "failed to drive on the right" and none of the exceptions to this rule applied.

The defendant argued that this case was controlled by *Ehrhart v. State*, 9 S.W.3d 929, a case in which it was held that touching the fog line two or three times does not justify a stop. But that case was distinguishable from the defendant's situation because it dealt with a section of the Transportation Code requiring a driver to stay as nearly as practical within a single lane unless movement to another lane can be made safely. The defendant's failure to stay on the right side of the road as required by Section 545.051(a) gave the deputy sufficient reasonable suspicion that the defendant had violated the law to justify a traffic stop. It was not necessary under that section to determine whether the driver could move safely across the line.

Because the stop was based on a statute plainly violated by the defendant's driving, it was valid. The trial court properly denied the defendant's suppression motion.

## DWI. TRAFFIC STOP JUSTIFIED BY DEFENDANT'S FAILURE TO DRIVE ON THE RIGHT HALF OF THE ROADWAY.

### *Doyle v. State*, 265 S.W.3d 28 (Tex. App. - Houston 2008)

Around midnight an officer on patrol saw the defendant's vehicle weave from the right-hand lane into the lane of on-coming traffic and back. Traffic was heavy at the time the officer had to stop his patrol vehicle to avoid a head-on collision with the defendant. When the officer made contact with the driver, he smelled alcohol and noticed that the defendant's eyes were glassy, red, and bloodshot, and that his speech was slurred. The defendant told the officer that he was a wine distributer and that he had drunk two glasses of wine at a friend's house that night.

Four field sobriety tests indicated the defendant was intoxicated. After his arrest, the defendant was taken to the police station where he again failed several field sobriety tests. His blood alcohol level registered 0.19 on the intoxilyzer. The defendant later testified that he had not been intoxicated that evening, that he had been nervous and tired, and had consumed only two glasses of wine. He admitted weaving, but said he did so to avoid parked cars on the narrow street and did not come close to hitting the officer's car. Both the defendant and the officer agreed that there were no lanes marked on the street where the incident occurred.

On the day of trial, the defendant moved to suppress any evidence obtained during the stop. He alleged that the officer did not have reasonable suspicion to support the stop. The State argued

that the officer witnessed the defendant commit a traffic violation, justifying the stop. The suppression motion was denied and the defendant was found guilty. He appealed the ruling on the motion.

**Holding:** "A temporary detention is justified when the detaining officer has specific articulable facts which, taken together with rational inferences from those facts, lead the officer to conclude that the person detained is, has been, or soon will be engaged in criminal activity." Where an officer has reasonable suspicion that a motorist has committed a traffic offense, a stop is justified. In this case, the officer testified that he stopped the defendant because he strayed into the opposing lane of traffic.

The trial judge concluded that the defendant's action constituted a violation of Section 545.060 of the Texas Transportation Code. That section provides that an operator "on a roadway divided into two or more clearly marked lanes for traffic shall drive an nearly as practical entirely within a single lane; and may not move from the lane unless that movement can be made safely." Because the officer testified that the street on which the defendant was driving did not have clearly marked lanes, that provision of the transportation code could not be said to have been violated. Section 545.051, however, does address the defendant's situation.

Section 545.051 prohibits driving on the left half of a roadway of sufficient width unless passing another vehicle or avoiding an obstruction. A driver moving into the oncoming traffic lane to avoid an obstruction must yield the right of way to a vehicle moving in the proper lane direction.

The trial court found that the officer's vehicle was moving toward the defendant's car and in its proper lane. In order to avoid a head-on collision, the officer had to stop his vehicle. Based on these facts, the officer had reasonable suspicion to believe that the defendant violated Section 545.051, and not Section 545.060. Reasonable suspicion supported the stop, and the trial judge ruled correctly in denying the motion to suppress.

## DWI. WEAVING WITHIN LANE PRODUCED REASONABLE SUSPICION AND GROUNDS FOR STOP.

### *Dunkelberg v. State*, 276 S.W.3d 503 (Tex. App. - Fort Worth 2008)

An officer saw a vehicle "having a little bit of difficulty maintaining its lane" at about 1:30 a.m. The vehicle was weaving within its lane, crossed the lane line, and struck several lines back and forth. After the officer signaled the driver to stop, the car jumped the curb and stopped with a tire on the curb. Subsequently, the driver was arrested for DWI.

The defendant moved to suppress evidence resulting from the stop, claiming that the stop was not based on probable cause or reasonable suspicion, and that there was no evidence that his weaving was unsafe. Following a suppression hearing, the trial judge found that the officer had seen the defendant's car weaving within its lane; that it crossed over the dividing line into another lane; that the vehicle did not stop immediately but continued for four or five blocks; and then ran up over a curb in stopping.

The trial court denied the defendant's motion to suppress. Following his conviction by a jury, the defendant appealed the denial of his suppression motion.

**Holding:** "A detention, as opposed to an arrest, may be justified on less than probable cause if a person is reasonably suspected of criminal activity based on specific, articulable facts." When an officer has such facts that, taken with rational inferences from them, lead him or her reasonably to conclude that a particular person is, has been, or soon will be engaged in criminal activity, reasonable suspicion exists and a temporary investigative detention is warranted.

The defendant argued that he did not violate Section 545.060 of the Texas Transportation Code because there was no evidence that his weaving was unsafe. Several Texas cases have held that in the absence of such testimony, a stop for that offense is unlawful. The arresting officer in this case, however, testified that he believed the defendant was driving while intoxicated. He based this conclusion on his training and experience, the manner in which the vehicle was being driven, and the time of night.

The officer also noted that weaving is included as one of "sixteen clues" in the NHTSA manual indicating a possibly intoxicated driver. The dashboard video that was introduced supported the officer's testimony that the defendant was weaving from one set of reflectors to the other, and that he crossed the lane divider at least once. The video also showed the defendant's slow reaction to the officer's signal to stop. In his testimony, the officer said intoxicated drivers often are encountered at that time of night and weaving was an indication of intoxication.

All of this evidence supported the trial court's finding that the officer had reasonable suspicion to believe that the defendant was driving while intoxicated. It was not improper for the court to deny the suppression motion.

## DWI. EXISTENCE OF POSSIBLE INNOCENT EXPLANATIONS FOR WEAVING DOES NOT PRECLUDE STOP BASED ON REASONABLE SUSPICION OF INTOXICATION.

### *Curtis v. State*, 238 S.W.3d 376 (Tex. Crim. App. 2007)

Two troopers saw the defendant's car weaving in and out of his lane over a short distance in the middle of the night. They stopped him and, based on field sobriety tests, arrested him for DWI. The court of appeals considered whether there was sufficient justification for stopping the defendant's vehicle. Responding to the defendant's suppression motion, the State had argued before trial that the stop was legal because he had committed a traffic offense, and because reasonable suspicion existed for the stop.

Both of the State's arguments were rejected by the court of appeals. Based on an opinion from the Texas Court of Criminal Appeals, it held that many reasons other than intoxication might exist for a vehicle to exceed a single lane, including "diabetic coma, fatigue, switching the radio channel, or dropping a sandwich onto the floorboard." Since a number of "non-intoxication-related" reasons might explain the defendant's weaving, the appellate court concluded that insufficient suspicion existed to support the stop. It is not appropriate, however, to require the State to prove that intoxication was the most likely explanation for a driver's weaving.

Even if a possible innocent explanation exists, a law enforcement officer may entertain reasonable suspicion of criminal conduct. Although a stop must be based on reasonable suspicion

of criminal activity, the possibility of non-criminal activity does not preclude a stop.

Although the court of appeals noted that neither of the arresting officers testified that anything other than defendant's weaving raised suspicion of intoxication, it failed to take into account other testimony by the officers. The officers testified that it was approximately one o'clock in the morning when the stop occurred; one of the officers had been trained in detecting DWI; that part of that training was that weaving was a possible indication of intoxication; and that the defendant wove out of his lane at least three times in a few hundred yards.

One of the officers was relatively new, but the other was an experienced field-training officer with many years in law enforcement, who had been certified in the detection of intoxicated drivers. That officer also was trained to consider weaving to be a sign of intoxication, and he testified that the driver's vehicle was "doing a considerable amount of weaving" before the stop.

"The reasonableness of a temporary detention must be examined in terms of the totality of the circumstances and will be justified when the detaining officer has specific articulable facts, which taken together with rational inferences from those facts, lead him to conclude that the person detained actually is, has been, or soon will be engaged in criminal activity." In reaching its decision, the court of appeals failed to consider the lateness of the hour or the experience of the field-training officer in detecting intoxicated drivers. From these facts and their observation of the defendant weaving in and out of his lane several times over a short distance, the officers reasonably could have inferred that the defendant was intoxicated.

The facts they articulated in their testimony could have led them to the reasonable conclusion that sufficient suspicion of intoxication existed to justify at least an investigation. Reversal of the defendant's conviction in the trial court on these facts was not warranted.

## DWI. REASONABLE SUSPICION DID NOT EXIST TO BELIEVE DRIVER TRAVELING UNDER SPEED LIMIT ON FOGGY, DRIZZLY DAY WAS IMPEDING TRAFFIC.

### *Texas D.P.S. v. Gonzales*, 276 S.W.3d 88 (Tex. App. - San Antonio 2008)

A police officer who saw the defendant's car being driven at 45 miles per hour in a 65 miles per hour zone, stopped the defendant. When he saw signs of intoxication, the officer asked the defendant to perform field sobriety tests, which the driver failed. After arresting the defendant for DWI, the officer requested that he submit a breath sample, which the defendant refused to do. His license was suspended by DPS and he requested an administrative hearing on the suspension.

When the administrative law judge upheld the suspension, the defendant appealed the ruling to the county court at law. He claimed that the evidence showed the stop occurred on January 21, while the administrative law judge's order stated that the offense occurred on January 1.

The county court reversed the suspension and DPS appealed. It contended that the administrative judge's clerical error did not affect the defendant's substantial rights, and that reasonable suspicion supported the traffic stop.

**Holding:** Both parties agreed that the defendant's actions and arrest occurred on January 21 rather than January 1. The clerical error of the administrative law judge did not affect the

defendant's substantial rights and therefore did not invalidate that judge's order.

While the clerical error did not undermine the suspension, substantial evidence must have existed supporting all of the elements DPS was required to prove. These are that: (1) reasonable suspicion or probable cause existed to stop or arrest the person; (2) probable cause existed to believe that the person was operating a motor vehicle in a public place while intoxicated; (3) the person was placed under arrest by the officer and subsequently requested to submit to a breath or blood test; and (4) the person refused to submit to the breath or blood test. Substantial evidence supported the last three of these elements. The issue in this case was whether the first of the elements was proven by DPS.

A lawful stop depends upon the existence of at least reasonable suspicion to believe a person is violating the law. Reasonable suspicion exists only if the officer has specific, articulable facts leading reasonably to the conclusion that a particular person has been, is, or soon will be engaged in criminal activity. The totality of circumstances determine whether reasonable suspicion existed.

Here, the officer testified that he stopped the defendant because he was driving 45 miles per hour in a 65 miles per hour zone. The officer considered this "impeding traffic." On the day in question, however, the officer testified that it was "foggy and drizzly; it was wet asphalt." He agreed that the conditions were "not the safest" and that a prudent driver would adjust his speed under those conditions. Since the officer could not recall the amount of traffic on the roadway when he stopped the defendant, he was unable to recall whether any traffic actually was impeded. The officer could not recall any other basis for the stop, although his report stated that he had observed the defendant drifting within his lane of travel.

Driving slowly is not a traffic offense in itself. An offense is committed only if the slow speed impedes traffic flow. "There was no evidence that the normal and reasonable movement of traffic was impeded by [the defendant's] driving." A conclusory statement by an officer that the law has been violated is insufficient to establish reasonable suspicion. The officer was obliged to provide "specific, articulable facts" supporting his suspicion.

Even if the defendant was seen "drifting within his lane," that would not justify a stop unless it was done in an erratic or unsafe manner, or would indicate intoxication. Similarly, there was no indication that the defendant's driving was unsafe merely because it was slower than the limit.

While the city in which this stop was made has an ordinance prohibiting driving ten miles per hour less than the "maximum reasonable, safe and prudent speed limit," that ordinance would not justify a stop merely because a driver was traveling ten miles per hour slower than the posted limit. The ordinance focuses on the speed that is reasonable, safe, and prudent, rather than what is posted. As there was no testimony regarding what a reasonable speed would have been under the conditions, the officer did not justify stopping the defendant's vehicle on the morning in question.

Since there was no objectively reasonable suspicion that the defendant was committing or about to commit a traffic violation, he should not have been stopped. In the absence of grounds sufficient for the stop, DPS did not meet its burden of proving all the elements required to uphold the license suspension.

**DWI. OFFICER MAY INVESTIGATE ACCIDENT EVEN IF UNAWARE BEFORE ARRIVING AT SCENE THAT THE ACCIDENT RESULTED IN DEATH, INJURY, OR**

**PROPERTY DAMAGE.**

***Alonzo v. State*, 251 S.W.3d 203 (Tex. App. - Austin 2008)**

The defendant was involved in a single-car accident on a frontage road of the interstate highway. A DPS trooper was dispatched to the scene to investigate. When the officer arrived, he determined that the defendant's car had left the roadway, sideswiped a road sign, and hit a light pole. A firefighter, who already was at the scene, told the officer that the defendant was the driver and there were no passengers. He also reported that he had seen the defendant punch a hole in the rear passenger window of his vehicle, and that EMS had been called.

In response to a question about whether he was okay, the defendant told the trooper his name. When asked what had happened, he replied, "Uh, don't worry about that." He then said he was so mad he had hit the window. The defendant admitted he had been driving, but couldn't say whether he was hurt because it "takes time to feel effects from the wreck." After claiming to be on medication, the defendant couldn't say what it was or why he was taking it.

During this exchange, the trooper noticed the defendant was unsteady, swaying, and slurring his speech; his eyes were glassy and he had a moderate odor of alcohol on his breath. At first, he denied having anything to drink, blaming the odor on "cough drops," but eventually admitted drinking one and a half beers. When the officer attempted to administer field sobriety tests, the defendant refused to cooperate, and would not answer some of the trooper's questions. At that point, the defendant was placed under arrest for DWI.

Before trial, the defendant moved to suppress any evidence obtained as a result of the investigation. He contended that the officer lacked reasonable suspicion or probable cause. After the trial court denied his motion, the defendant pleaded no contest to DWI and appealed the suppression ruling.

**Holding:** The defendant argued that the trooper lacked authority to detain him for three reasons. The first of these was that he did not have authority to investigate the accident because Section 550.041(a) of the Transportation Code permits accident investigation only where injury or death or property damage of at least $1000 has occurred. Section 550.041(a) provides that a peace officer "who is notified of a motor vehicle accident" involving injury, death, or damage of $1000 or more "may investigate the accident and file justifiable charges relating to the accident ...." Contrary to the argument of the defendant, this section actually expands the powers of investigation and arrest rather than limiting them.

Part of the language of Section 550.041(a) extends authority to accidents occurring on property other than highways and public places. The statute, therefore, allows an officer to investigate certain accidents even if they do not take place on the property usually covered by the Transportation Code.

In fact, an officer dispatched to an accident scene has a duty to determine whether it involved death, injury, or the requisite amount of damage, and, if so, to file an accident report "not later than the 10th day after the date of the accident." The trooper in this case arrived on the accident scene and saw damage that he estimated to be more than $1000. EMS had been called, indicating that someone had been injured.

The defendant also claimed that no specific, articulable facts existed leading to a reasonable

belief that he had been engaged in criminal activity. To the contrary, the trooper noticed the defendant's glassy eyes, slurred speech, unsteadiness, agitation, difficulty with simple questions, and a moderate odor of alcohol on the defendant's breath. The defendant admitted drinking and taking medications, all of which contributed to the officer's reasonable belief that the man was intoxicated. Based on the totality of circumstances, the officer was justified in detaining the driver and investigating him.

Finally, the defendant contended that a warrantless arrest was not justified because the officer lacked probable cause to believe he had been driving while intoxicated and, in any event, no offense occurred in the presence or view of the officer. "As a general rule, an officer may not make a warrantless arrest for DWI unless probable cause exists and the DWI is committed in the presence or view of an officer."

In this instance, the officer did have probable cause to believe the defendant was intoxicated in a public place. For this arrest to be valid, the defendant must have been intoxicated to such an extent that he posed a danger to himself or others. All of the indicators led the officer to conclude that the man was intoxicated. He appeared unable to answer questions or follow simple directions, did not know what medication he was taking or for what purpose, and did not know why he had taken that particular exit off the interstate highway.

Defendant's admission that he was driving when his vehicle sideswiped a sign and hit a light pole, along with the fact that he had hit and broken his own car window with his fist, contributed to the officer's reasonable conclusion that the suspect was a danger to himself because of his intoxication. Probable cause existed to believe the defendant was committing the offense of public intoxication in the presence of the officer, and his warrantless arrest was valid.

## C. DWI

A variety of issues arise around DWI, including the grounds for the stop of a suspect's vehicle, what steps may be taken during that stop to confirm or dispel the suspicion that the driver is intoxicated, and how long those steps may take. Use of breath or blood samples to test for alcohol levels also involves a host of questions. Were proper testing methods used? Was the operator of the intoxilyzer qualified? Was consent properly obtained, and was it voluntary? Are the results of the test admissible as a form of scientific evidence? Because these diverse and numerous legal issues are raised routinely in DWI cases, the body of law addressing them is large and growing.

The stop of a vehicle that precedes a DWI arrest usually is based either on the officer's belief that a traffic law has been violated, or because what the officer observes or learns from a reliable source leads to the reasonable belief that the driver is intoxicated. If a perceived traffic infraction is the basis for the stop, the lawfulness of the stop obviously depends on whether there actually was a violation of a traffic law.

Once a vehicle has been stopped and the driver shows signs of intoxication, a question always exists as to the sufficiency of the evidence to create probable cause for DWI. The driver in *Amador v. State* was stopped for speeding, a reasonable ground for the traffic stop. Although the officer had no reason to believe from the defendant's driving that he was intoxicated, she smelled alcohol and placed him under arrest for DWI. The court of appeals held the evidence insufficient to establish

probable cause for the arrest.

Similarly, in *Cantrell v. State* an officer received a tip that the defendant and another man had been drinking alcohol at a drive-in restaurant, and then drove off in a car the informant described. When the officer located the vehicle and began following it, the driver slowed to below the speed limit. Neither of the men in the vehicle would look at the officer when he pulled alongside. Following the stop, evidence of intoxication was found and the defendant was charged with DWI. Although the appeals court upheld the stop as reasonable, it rejected the finding by the jury that during the offense the defendant had "used or exhibited a deadly weapon (the car)." The court concluded that the evidence did not show the vehicle had placed people in actual danger.

Field sobriety tests are useful tools for establishing preliminarily whether a driver is intoxicated, but they may be administered only when reasonable suspicion of intoxication exists. The person conducting the test must be versed in the clues required to indicate intoxication, and must know how to administer the test properly. In *State v. Rudd*, the court of appeals was not persuaded by the evidence that the officer conducting an HGN test had administered it properly.

Breath and blood evidence of blood alcohol levels is so damaging to defendants in a DWI prosecution that challenges often are made to have it suppressed. Taking a blood sample from a DWI suspect is a "search" and the usual rules regarding probable cause and warrants control these cases. A search without a warrant is possible only where some exception to the warrant requirement exists, and DWI law has additional statutory rules that either require or prohibit taking blood samples involuntarily. When a search warrant is obtained for blood, that kind of warrant is an "evidentiary" warrant and may not be issued by a magistrate who is not a licensed attorney and judge of a court of record. This requirement was in issue in *Muniz v. State*. There, the court upheld the admission of a blood sample obtained by search warrant issued by a lay judge, relying on the exception within the rule for counties in which the only attorney-judges are district court judges with jurisdiction over more than one county. Where the consent of the suspect is relied on rather than a warrant, that consent must, of course, be voluntary. See *Washburn v. State*.

If a blood sample is taken pursuant to Section 724.012 of the Texas Transportation Code, the statutory language does not clearly specify the number of specimens that may be collected. The Texas Court of Criminal Appeals decided in *Neesley v. State* that only one specimen is permitted by the statute.

Not uncommonly, a blood specimen is taken by medical personnel following an accident, for reasons related to medical care instead of intoxication testing. The defendant in *Kennemur v. State* made the novel argument that blood evidence obtained during medical treatment was subject to privacy rules under federal law (HIPAA). Because the information had been obtained properly by subpoena, the court of appeals ruled that its admission did not violate the defendant's rights.

Occasionally a case turns on the substantive law of DWI rather than a procedural rule. *Dornbusch v. State* contains that kind of substantive analysis. The issue was whether the defendant was "operating" his vehicle while intoxicated, as required by the DWI statute. This was in question because he was found asleep in the car with the engine running and the car in gear. The appeals court concluded that this was sufficient to constitute "operation" of the vehicle."

**DWI. STOP FOR SUSPECTED DWI REASONABLE BUT ARREST NOT SUPPORTED**

**BY PROBABLE CAUSE.**

***Amador v. State*, 242 S.W.3d 95 (Tex. App. - Beaumont 2007)**

A DPS trooper stopped the defendant for speeding. She observed that the driver's speech was "mumbled," that he was "extremely slow to respond" and "fumbled through and passed over his driver's license on more than one occasion." When the defendant got out of his car, the officer testified he exited more slowly than normal, but did not stumble, stagger, or lean on the car for support. As the officer issued the driver a warning citation, she noticed alcohol on his breath.

He denied drinking any alcohol but because of his speech, his slowness in getting his license, and the smell of alcohol, the officer decided to administer field sobriety tests. Based on the defendant's performance, the officer arrested him for DWI.

The defendant moved to suppress all evidence because the stop of his car was unduly prolonged and no probable cause existed to arrest him for DWI. After the trial court's denial of his motion, the defendant pled guilty and appealed the ruling.

**Holding:** The defendant's argument that the officer should have let him go without further investigation as soon as she completed the warning citation ignores several facts. The officer had noticed that the defendant had trouble complying with her simple requests for license and insurance information and was very slow to get out of his vehicle.

A videotape of the stop indicated that the officer smelled alcohol on the defendant's breath after she issued the warning and asked the defendant how much he had drunk. His assertion that he had nothing to drink was inconsistent with her observations.

There were no unnecessary delays in this stop. The facts known to the officer justified further investigation of the defendant's sobriety. Field sobriety tests were administered only after the officer perceived that he had been drinking.

In assessing probable cause, a court considers not only the testimonial evidence, but also videotape evidence of the events, including any audio recording made at the scene. The trial court in this case heard the testimony of the officer and viewed a portion of the videotape of the stop, which did not show the field sobriety tests. The officer testified that when she was writing the warning citation, she had no intention of arresting the defendant. There was nothing in the way in which he stopped his car or the way he was driving that indicated he was intoxicated. She agreed that the odor of alcohol on someone's breath is not indicative of intoxication. No facts concerning the defendant's performance on the field sobriety tests were elicited at the suppression hearing.

After the prosecutor asked the officer what sobriety tests she had the defendant perform, and the tests were named, the prosecutor asked the officer what she decided to do. The officer merely replied, "I placed him under arrest for driving while intoxicated." Following this testimony, the prosecutor told the court she had "nothing further," and no additional evidence was offered. The officer never testified that the defendant failed the sobriety tests, and that inference cannot be made without speculation that clues showing intoxication were present.

Based on the testimony at the suppression hearing, probable cause was not established. There was no statement from the trooper that, in her opinion, the defendant failed the sobriety tests, nor were there any facts produced demonstrating how the officer might have concluded that the defendant failed. In the absence of evidence establishing that the defendant was intoxicated, an

appellate court cannot conclude that probable cause existed to support an arrest for DWI. Without a showing of probable cause, this arrest was illegal and any evidence obtain as a result of it should have been suppressed.

## DWI. FINDING THAT DRIVER WAS USING A "DEADLY WEAPON" BY DRIVING HIS VEHICLE WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE, BUT TRAFFIC STOP WAS JUSTIFIED BY REASONABLE SUSPICION.

### *Cantrell v. State*, 280 S.W.3d 408 (Tex. App. - Amarillo 2008)

A waitress who identified herself, saw the defendant and another man drinking from a paper covered bottle at a drive-in restaurant. She told the sheriff's dispatcher that the bottle contained alcohol, she described the vehicle and its occupants, and told the dispatcher that the vehicle had left the restaurant heading south on the highway.

A deputy who received this report from the dispatcher drove in the direction of the town where this occurred and met a car occupied by two white males, and matching the description given by the witness. Both the driver and the passenger looked directly at the deputy as they passed him. After the deputy turned his vehicle around and began following the defendant's car, the car immediately slowed to below the speed limit. When the deputy pulled alongside the suspects' car, neither man would look in the direction of the deputy, and they both appeared nervous.

The deputy stopped the defendant and, when he approached the man's car, he smelled the odor of alcohol. This odor was on the defendant's breath when he talked with the officer, and the deputy noticed empty beer bottles, including one in a brown paper bag. The defendant also was slurring his words, which contributed to the deputy's conclusion that the man was intoxicated.

A DPS trooper was summoned to the scene to assist with field sobriety tests. The trooper concurred that the defendant was intoxicated, and the driver was asked to submit a breath specimen. He refused. Following the refusal, the trooper applied for a search warrant to take a blood sample from the defendant, which was issued. Subsequent analysis of the blood sample revealed a blood alcohol level in excess of the legal limit.

The defendant moved to suppress the evidence against him, claiming that the initial stop of his vehicle was without reasonable suspicion. The trial court denied the motion. At trial, the defendant contested the validity of the search warrant, and that challenge also was overruled. The defendant was convicted of DWI and the jury found that he had used or exhibited a deadly weapon during the commission of the offense by driving a motor vehicle. He appealed.

**Holding:** On appeal, the defendant claimed that the trial judge should not have admitted the results of the blood test; that there was no reasonable suspicion to support the stop; and that the evidence was insufficient to support a deadly weapon finding. Texas law provides that a blood specimen may not be taken from a person who refuses to consent unless one of several exceptions applies. Those exceptions did not apply to the defendant's case.

The implied consent law does not prevent the State from obtaining a search warrant for a blood sample. Despite the defendant's refusal to submit a breath sample, and the absence of any exception in law that would allow a blood sample, the trial court was not incorrect in admitting the

results of a blood test taken pursuant to a search warrant.

The validity of the stop of the defendant's car depended on whether at least reasonable suspicion existed to support the detention. In this case, the officer was directed by the witness's description to the defendant's vehicle. A vehicle matching that description, with two white male occupants, was seen traveling in the direction and on the highway described by the witness. The witness also identified herself and told the dispatcher how she had obtained her information.

Once the deputy turned around to follow the defendant's car, that car slowed to a speed well below the speed limit. Neither man in the car would look at the officer when he pulled alongside them; they stared straight ahead and appeared nervous. These circumstances, taken together, provided the deputy with reasonable suspicion to believe that the defendant was engaged in criminal activity by driving. It was not an abuse of discretion for the trial court to deny the defendant's suppression motion.

"To sustain a deadly weapon finding, the evidence must show that the object in question meets the requirement of a deadly weapon; the deadly weapon was used during the transaction from which the conviction was obtained; and that other people were put in actual danger." If a motor vehicle is used in a manner capable of causing death or serious bodily injury, it may become a "deadly weapon."

The deputy testified that there was "moderate traffic" on the highway where he saw the defendant. He also agreed that the high was "pretty frequented." But the deputy testified that he did not see any dangerous maneuvers or actions by the defendant while he was driving. Both the deputy and the DPS trooper testified that driving while intoxicated exposed the public to some sort of risk. There was no testimony, however, of any other vehicle on the road with the defendant. There was only testimony that generally traffic at that time of day on that highway was moderate.

The defendant did not violate any traffic laws, and no witness other than the deputy saw the defendant driving. While the evidence presented a "hypothetical risk" to the driving public, it was not sufficient to show that people were put in actual danger. Although the stop of the defendant's car was valid, and the blood evidence showing his intoxication was admissible, the evidence was insufficient to show that the vehicle was a being used as a "deadly weapon." The conviction was sustained, but the deadly weapon finding was overturned.

## DWI. OFFICER MUST HAVE REASONABLE SUSPICION OF INTOXICATION OFFENSE BEFORE REQUESTING FIELD SOBRIETY TEST.

### *State v. Rudd*, 255 S.W.3d 293 (Tex. App. – Waco 2008)

A trooper arrived at the scene of a single-vehicle accident around 12:30 a.m. to discover the injured driver of the vehicle who had driven off the road into some woods, the driver of a pickup, and the driver of another car who had been the first to discover the accident. The pickup driver rode in an ambulance with the injured driver to the site where a helicopter landed to take him to a hospital.

The woman who discovered the accident told the trooper she had been driving from the pickup driver's home when she came upon the scene. She called 9-1-1 and the pickup driver at the

injured man's request.

After being told by his partner that the pickup driver had an odor of alcohol, the trooper asked the man to perform three field sobriety tests: a horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg-stand test. The trooper was certified to perform the three tests and did so in accordance with his training. Four of six clues were observed in the HGN test; three of eight during the walk-and-turn; and none on the one-leg-stand test. The man told the trooper he had drunk about five or six alcoholic drinks during the day.

The pickup driver did not appear to have slurred speech or bloodshot eyes, and he provided seemingly accurate information about the injured driver. Two of the sobriety tests were videotaped, but the HGN test was not because, according to the trooper, the flashing lights could have interfered with the test.

The defendant was arrested for DWI and moved to suppress the evidence, which was granted by the trial court because the trooper did not have reasonable suspicion to conduct the field sobriety tests and the State did not establish the admissibility of the HGN test and the opinions related to it. The State appealed.

**Holding:** Encounters between police officers and citizens fall into three categories: consensual encounters, investigative detentions, and arrests. Approaching a citizen in public and asking questions usually is a consensual encounter for which no level of suspicion is required. A detention or an arrest requires the requisite level of objective suspicion. Probable cause is needed for arrest; reasonable suspicion is the basis for a detention.

When an officer questions a witness at an accident scene, the encounter usually is consensual. Answers given to the officer's questions may be used to establish reasonable suspicion that a crime has occurred. If reasonable suspicion is provided by responses and observations made during a consensual encounter, an officer may conduct field sobriety tests and the results of those tests may lead to probable cause for an arrest.

The trooper in this case did not need to have reasonable suspicion to talk with the defendant at the scene of the accident and question him. He could not be required, however, to undergo field sobriety tests without first establishing reasonable suspicion.

The trial judge found that reasonable suspicion was lacking because there was "no clear evidence" regarding if or when the defendant drove the pickup; the trooper did not observe any signs of intoxication before his partner mentioned smelling alcohol on the defendant; there was no evidence regarding the defendant's behavior while he accompanied the injured driver to the helicopter landing site; and there was no evidence that the defendant tried to drive his pickup after the trooper was on the scene. When the trooper arrived at the accident site about fifteen minutes after the 9-1-1 call had been placed, he found three people and three vehicles. He "believed" that the defendant had told him at the scene that he had "responded" in his pickup when he was notified about the accident.

The injured driver requested that the woman call the defendant, and it would not be reasonable to assume that the defendant's pickup truck would have been parked at the scene fortuitously, rather than having been driven there by the defendant. While the officer did not see the defendant driving, it was reasonable for him to conclude that from the circumstances. In addition, the officer was aware that the defendant smelled of alcohol, and that he said he had consumed several drinks during the day. Taken together, all of these facts gave the officer reasonable suspicion

to believe that the defendant may have been driving while intoxicated.

HGN and other scientific evidence is considered reliable only if the underlying scientific theory is valid, the technique used to gather the evidence is valid, and the person employing the technique did so properly on the occasion in question. Neither the defendant nor the trial court questioned the reliability of HGN theory or the technique used. The trooper testified that he administered the test in the recommended way, but the trial court did not believe this testimony because the test was not performed on video, but was done off-camera.

The trial court acted within its discretion in finding that the State did not prove that the trooper properly administered the HGN test. While the finding that the officer lacked reasonable suspicion to administer the field sobriety tests was incorrect, the trial judge was free to disbelieve the officer's testimony regarding the way in which the test was performed.

## DWI. EVIDENTIARY SEARCH WARRANT FOR BLOOD SAMPLE NOT SIGNED BY ATTORNEY-JUDGE WAS SUBJECT TO STATUTORY EXCEPTION.

### *Muniz v. State*, 264 S.W.3d 392 (Tex. App. - Houston 2008)

In the early morning hours, a deputy saw a truck parked in the middle of a county road. The truck drove away as the deputy approached, and the officer followed and stopped it. The driver of the truck got out and began walking toward the deputy until he was ordered to stop by the officer. In an ensuing conversation, the driver told the deputy that he had been drinking, had just come from a festival, and was looking for a party.

A passenger in the truck had a strong smell of alcohol on his breath, and the deputy noticed two beer cans in the center console. When asked how much he had to drink, the driver said he could not remember, but he smelled strongly of alcohol and slurred his speech. Although the defendant would not submit to a field sobriety test, he was off-balance when he walked. The deputy placed him under arrest. At the jail, the defendant refused to take a breath or blood test.

The deputy prepared a blood search warrant affidavit and presented it to a justice of the peace, who signed the warrant. About two-and-a-half hours after the first contact between the deputy and the defendant, a blood sample was drawn at a local hospital, which revealed a blood alcohol level of 0.14. In a pretrial suppression motion, the defendant argued, among other things, that the justice of the peace was not authorized to issue the warrant. The trial court denied defendant's motion, and he appealed.

**Holding:** Taking a blood sample is a "search" within the meaning of the Fourth Amendment and the Texas Constitution. When a police officer has reasonable grounds to believe that a person who has been arrested for driving in a public place while intoxicated, the officer may request a sample of the arrestee's blood.

The defendant refused to consent to a blood test in this case, so the officer was required to obtain a search warrant. In accordance with Article 18.02(10) of the Texas Code of Criminal Procedure, search warrants may issue for "property or items ... constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense." Blood is one of these "items."

An affidavit submitted in support of such a warrant must show probable cause and, generally, must be presented to a "judge of a municipal court of record or county court who is an attorney licensed by the State of Texas" or to the judge of a statutory county court, district court, the Court of Criminal Appeals, or the Supreme Court. [This kind of warrant is often referred to as an "evidentiary" warrant. - ed.] There is an exception to the "attorney-judge" requirement, however. "In a county ... in which the only judges serving the county who are licensed attorneys are two or more district judges each of whose districts includes more than one county, any magistrate may issue a search warrant under [article 18.02(10)]."

In the county in which the search warrant issued, there are two district court judges, both of whom are licensed attorneys. They have concurrent jurisdiction over four counties. Consequently, these judges are "two or more district judges each of whose districts includes more than one county," and they are licensed to practice law. The defendant argued that two other judges serving in the county also were licensed attorneys. Although it was true that other licensed attorney-judges served in the county, neither of them was permitted to sign an evidentiary warrant because the municipal courts over which they presided were not courts of record as required by Article 18.01.

"When the district judges of a county are serving more than one county and peace officers are forced to travel and spend considerable time to find the judge cross multiple counties, there is a risk of loss or destruction of evidence. The plain purpose of the exception is to facilitate the timely issuance of a warrant to prevent the loss or destruction of evidence by allowing a peace officer to seek the warrant from any magistrate."

It is logical in this case to read the language of the statutory exception as allowing "any magistrate" to sign an evidentiary warrant as long as the only licensed judges serving a county, and other counties, are themselves authorized to issue such warrants. Applying this interpretation, the justice of the peace who signed the blood search warrant was permitted to do so and the evidence obtained by its execution was properly admitted.

**COMMENT:** This case serves as a reminder of the limitation on "evidentiary" warrants. These warrants, which permit the seizure of items of "mere evidence," as opposed to contraband or fruits or instrumentalities of crime, can allow especially intrusive searches. Perhaps for this reason, they generally may be issued only by magistrates who are licensed attorneys, and who preside in higher-level courts, or those courts where a record of the proceedings must be made. In less populous counties, though, it may not be possible to find such judges in the short time necessary to secure an evidentiary warrant. That possibility led to the creation of the exception that is discussed in this opinion. Any officer seeking a search warrant always should consider (1) whether the warrant is for "mere evidence," and (2) if so, whether the magistrate who is being asked to issue the warrant has authority to do so.

## DWI. CONSENT TO BLOOD TEST FOLLOWING ARREST WAS VOLUNTARY.

### *Washburn v. State*, 235 S.W.3d 346 (Tex. App. - Texarkana 2007)

An officer dispatched to the scene of a one-car accident found the defendant sitting on the tailgate of a truck. He was injured and admitted to the officer that he had been drinking. The officer

could smell alcohol on the defendant. After being taken to the hospital, the defendant was warned by the officer prior to being asked to submit a blood specimen. The warnings were those required by statute for a person who has been arrested. The defendant consented to provide the sample after being given the warnings on form DIC-24, which begins with the words, "You are under arrest for an offense...."

The defendant later moved to suppress the results of that blood test, arguing that his consent was the product of coercion and duress. He claimed that the warnings he received incorrectly advised him that his driver's license would be suspended if he refused to provide a blood specimen, but that he was not under arrest at the time, so his license could not be suspended. After his motion was denied, the defendant pled no contest and was found guilty of the offense of DWI. Appeal was based on denial of the suppression motion.

**Holding:** "The taking of a blood specimen is considered a search and seizure within the meaning of the Fourth Amendment." A violation of law that causes a person to submit a specimen renders the results of a test of that specimen subject to suppression in accordance with the Texas exclusionary rule. The Texas Transportation Code provides that drivers impliedly consent to the taking of breath or blood samples to determine blood alcohol content. A person retains the right, though, to refuse such a test. Any consent to a request for a specimen is involuntary if it results from an officer's misstatement of the consequences of refusal.

Warnings are required when a person has been arrested, but not otherwise. Therefore, if the defendant was not arrested at the time he was informed that his driver's license could be suspended if he did not submit a blood specimen, that warning misstated the law. The defendant claimed he was not under arrest when the warnings were read by the officer.

"An individual is arrested when he or she has been actually placed under restraint or taken into custody." If a reasonable person would believe that his freedom of movement was restricted in a way consistent with arrest, then he or she has been "arrested." Actual physical restraint establishes arrest, but so does being told by an officer that a person cannot leave. It also is an "arrest" if an officer creates a situation that would lead a reasonable person to the conclusion that his or her freedom of movement has been significantly restricted, or if there is probable cause to arrest but officers do not tell a suspect that he or she is free to leave.

In this case, the officer had probable cause to arrest the defendant and did not tell him he was free to leave. The defendant collided with a tree after skidding on a dry road. The skid began while the defendant was driving in the lane designated for oncoming traffic. He admitted he had been drinking, had slurred speech, and smelled of alcohol. At the time of the accident, the defendant was under the age of twenty-one, so he could have been arrested for driving "while having any detectable amount of alcohol" in his system.

These facts established probable cause to arrest the defendant. A reasonable person in his position would have believed he was under arrest, in part because he was read warnings in form DIC-24 which stated that he was under arrest. Whether the officer subjectively intended to place the defendant under arrest prior to these warnings is irrelevant; a reasonable person would have believed that he had been arrested.

The defendant also argued that his consent was involuntary because the warnings were incorrect and he was afraid he would lose his license. At the time he gave consent, the defendant was under arrest and warned appropriately. He was not misinformed about the consequences of a

refusal. "To be valid, a consent to search must be positive and unequivocal and must 'not be coerced, by explicit or implicit means, by implied threat or covert force.'" The defendant read the DIC-24 form and admitted he had given consent for a blood sample. There was no evidence that this consent was not voluntary, and the trial judge ruled correctly on defendant's suppression motion.

## DWI. ONLY ONE BLOOD "SPECIMEN" MAY BE TAKEN FROM ARRESTEE IN ORDER TO DETERMINE BLOOD ALCOHOL LEVEL.

### *Neesley v. State*, 239 S.W.3d 780 (Tex. Crim. App. 2007)

The defendant was involved in a head-on collision when he veered into the lane of on-coming traffic. A witness who was driving in the same direction as the defendant saw the resulting collision in his rear-view mirror. An officer investigating the accident spoke with the defendant and detected a "moderate" odor of alcohol. Since she was injured in the accident, the defendant was taken to a hospital for treatment.

The driver of the vehicle that was hit was critically injured and trapped behind the steering wheel of her car when the defendant was transported to the hospital. Before she could be freed from the wreckage, the driver went into cardiac arrest and died at the scene. The officer at the scene notified two other deputies that the defendant's blood would have to be analyzed at the hospital to determine if he was intoxicated. One of these deputies spoke with the defendant and also smelled the odor of alcohol. Following a field sobriety test, both deputies concluded that the defendant probably was intoxicated.

After the statutory warning form had been read to the defendant by one of the deputies, the defendant refused to provide a sample. A blood specimen was taken from the defendant, but at the time she had a intravenous saline line running which contaminated the sample. A second specimen was drawn about an hour later. The defendant moved to suppress the results of that sample, arguing that Section 724.012 of the Texas Transportation Code permits only one "specimen" of blood or breath to be taken from a DWI suspect, regardless of whether the specimen is usable or not.

The trial judge granted the suppression motion. The State appealed.

**Holding:** Section 724.012 provides that a peace officer "shall require the taking of a specimen" of a person's blood in certain circumstances. Although this language makes clear that at least one specimen is to be taken, it does not specify clearly how many specimens may be taken. The language of the statute permits several interpretations. One of these is that only one specimen may be taken, although it also might be read to mean that an unlimited number of specimens may be taken or that more than one specimen may be taken in order to obtain a "usable" sample.

Under the implied consent portion of the statute, "one or more" specimens may be taken, but under subsection (b) at least one specimen must be taken in certain circumstances if the suspect refuses to submit. Reading these provisions together leads to the conclusion that Section 724.012(b) does not allow more than one specimen to be taken if the suspect refuses to submit. The question remains, however, whether the "specimen" that must be taken under subsection (b) is a single "usable" specimen, or whether the statutory permission is limited to a single specimen regardless of whether it is usable or not. "Specimen" is not defined within the statute.

This statute was intended to require a specimen in cases involved death or serious bodily injury. It was passed because of the high percentage of deaths and injuries resulting from accidents in which alcohol was involved. Given this purpose, "specimen" should be interpreted to mean a "usable" sample. An unusable sample would provide no clear indication of whether a driver involved in a collision was intoxicated, and would not advance the legislative purpose.

A peace officer is required to take a specimen of blood or breath in the circumstances established by Section 724.012(b), and may take no more than one such "specimen." "Specimen" means a usable sample.

**COMMENT:** Because the language of Section 724.012 is ambiguous, the Court is obliged to interpret the term "specimen" as well as to decide whether more than one specimen may be taken in a given case. Although only one specimen may be taken, there might be several attempts to obtain a usable sample, as in this case. The first effort failed to produce anything usable because the saline line contaminated the sample, resulting in no "specimen." The second try produced a usable quantity of blood, so it was legally considered to be the first and only "specimen" obtained.

## INTOXICATION MANSLAUGHTER. BLOOD EVIDENCE DISCLOSED BY MEDICAL PERSONNEL DID NOT VIOLATE FEDERAL LAW AND WAS SUFFICIENT TO SHOW DRIVER'S INTOXICATION AT TIME OF ACCIDENT.

### *Kennemur v. State*, 280 S.W.3d 305 (Tex. App. - Amarillo 2008)

The defendant and his girlfriend had been drinking when they arrived at a bar about forty minutes before closing time. While at the bar, the two argued and drank, and the defendant got into disputes with the bartender. Loud and belligerent, the defendant left the bar with his girlfriend after paying his tab. The bartender pleaded with the defendant to let her take the woman home, rather than having her ride with the defendant, but defendant's girlfriend eventually got into his car and the two sped away after having backed into a ditch in front of the bar.

When the defendant left the ditch, his car fish-tailed across the parking lot, ran a stop sign, entered the highway the wrong way, and narrowly avoided hitting an oncoming truck. The following morning at 5:45 a.m., the defendant woke a man at his home and told him he had been involved in an accident after leaving the bar, and had been walking dirt roads for some time looking for help.

The house where the defendant sought help was about thirteen miles from the bar, and not the closest to the scene of the accident. An EMT called to the scene of the accident found the defendant's girlfriend dead. The EMT then went to the house where defendant was and drew three tubes of blood from him at approximately 6:30 a.m. He later testified that the defendant smelled of alcohol, was very agitated, distraught, and crying. The defendant seemed to the EMT to be in an "altered level of consciousness."

At the emergency room where the defendant was taken, a doctor ordered blood tests to determine blood alcohol content, and noted that the defendant smelled as if he was probably drunk. The blood drawn by the EMT was tested and found to have a serum BAC of 114, or a whole BAC of .098, about the legal limit.

A DPS trooper took a voluntary statement from the defendant in which he said his girlfriend

had been driving, but when confronted with the bartender's statement that he had been driving when he left the bar, he said they had switched seats later. Based on his reconstruction of the accident scene, including damage to the car, the trooper later testified that he believed the victim was in the passenger's seat when the car left the road at 113 m.p.h. and hit a utility pole on that side of the car, throwing the woman from the vehicle. A second expert certified in accident reconstruction agreed with that analysis, as did a forensic pathologist.

The defendant was charged with intoxication manslaughter. He moved to suppress evidence of his subpoenaed blood test results, claiming that he had a privacy expectation in those medical records which were protected by federal law (HIPAA). That motion was denied by the trial court. Following his conviction, the defendant appealed on the grounds that his suppression motion should have been granted. He also argued that the evidence was both legally and factually insufficient to establish that he had been intoxicated at the time of the accident.

**Holding:** Federal law prohibits the disclosure of a patient's medical information without his or her consent unless disclosure is permitted by one of the limited exceptions in the law. There is, however, "no Fourth Amendment reasonable expectation of privacy protecting blood alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident." Further, according to federal law, a hospital may disclose medical information for law enforcement purposes if the disclosure is "[p]ursuant to process" and is as "required by law." In this case, the district attorney's office obtained a subpoena *duces tecum* requiring the custodian of medical records to appear with the documents before the district court for law enforcement purposes. Suppression of the blood test results was not required.

Intoxication manslaughter is committed by a person operating a motor vehicle in a public place while intoxicated and, by reason of that intoxication, causing a death by accident or mistake. "Intoxication" can be shown either because the driver does not have the normal use of his or her mental or physical faculties by reason of alcohol, or by an alcohol concentration of 0.08 or more. The trial evidence established that the defendant had been drinking before the accident and was behaving in an irrational and threatening way when he drove away from the bar in a reckless manner. He was driving more than 113 m.p.h. when he lost control of his car on a straight road. Seven hours after the accident, the defendant's blood still contained sufficient alcohol to be over the legal limit. He smelled of alcohol, was agitated, distraught, and crying. In the emergency room of the hospital, the treating physician noted that he smelled as if he were drunk.

Based on all of the evidence before the jury, they reasonably could have found that the defendant operated his vehicle on a public road while intoxicated, causing the death of his passenger when she was thrown from the car. His appearance and blood alcohol level hours after the accident supported this inference. There was no evidence that the defendant consumed alcohol after leaving the bar or after the accident occurred. Therefore there was no reason for the jury to believe that his blood alcohol content at the time the defendant was tested by the EMT was not the result of drinking prior to leaving the bar.

The defendant argued that his blood alcohol test result was unreliable because the blood sample was obtained seven hours after the incident, and that the bartender testified he was not intoxicated when he drove away from the bar. He also claimed that the use of alcohol to clean his arm prior to drawing a blood sample contaminated that sample.

No "retrograde extrapolation" was possible in this case because insufficient information was

available. The test results were nevertheless relevant in determining whether the defendant was impaired at the time of the accident.

The State's expert testified that, while a precise level at the time of the accident could not be determined, he believed that the defendant's alcohol level would have been higher at the time of the accident than it was at the time the sample was drawn. The defendant did not offer any evidence to rebut this opinion. The expert also testified that the defendant could not have been in the "absorptive stage" when the blood was drawn. Too many hours had passed, in his opinion, for that to be the case. The testimony of the bartender, or the defendant's good performance on the "Glasgow Coma" test when his blood sample was taken, do not cast sufficient doubt on the evidence to render it insufficient. It is the job of the jury to decide whether to give that evidence any weight and, if so, how much.

Use of alcohol to clean the test site is only a factor to be considered by the jury. There was testimony that the alcohol would have evaporated before the needle was inserted, and the State's expert concurred that the alcohol swab would not have altered the test result.

The verdict of the jury was supported by sufficient evidence. Jurors could have found that the defendant's faculties were impaired at the time he was driving the car, and that his intoxication led to the accident causing the woman's death.

## DWI. EVIDENCE THAT DRIVER WAS ASLEEP IN VEHICLE WHILE CAR WAS NOT IN "PARK" SUFFICIENT TO PROVE HE WAS "OPERATING" IT.

### *Dornbusch v. State*, 262 S.W.3d 432 (Tex. App. - Fort Worth 2008)

A police sergeant checking on businesses around midnight saw the defendant's vehicle stopped in the parking lot of a restaurant. The vehicle attracted her attention because the headlights were on, and it was in the back of the lot, "parked oddly." About forty-five minutes after the officer first saw the car, she saw it again in the same spot with the lights still on. After calling for backup, the sergeant and another officer approached the vehicle and noticed that the engine was running. She could not see that the brake lights were activated, but both officers heard loud music coming from the car.

The driver was hunched over the steering wheel. After considerable effort, they aroused the man. His vehicle smelled of alcohol and, after first denying it, the man admitted he had been drinking. The driver's eyes were bloodshot, his speech was slurred, and he seemed disoriented. When the driver attempted field sobriety tests, he was unable to complete two of them, but several clues of intoxication were observed in those he did complete.

When the officer tried to turn off the defendant's vehicle, she was unable to remove the keys from the ignition. The defendant told her the car had to be in park to take out the keys. According to the officer's testimony, the vehicle was in drive. It was not moving because the wheels were up against the curb. Although the officer was unsure whether the car had been in drive or neutral, she was certain it had not been in park.

After arresting the defendant, the officer searched his vehicle and found a bottle of vodka that had not been opened. She also found "to-go" drink containers containing a "dark liquid" that

smelled of alcohol.

The defendant's testimony at trial was that he had consumed "a few drinks" while waiting to meet his girlfriend at the restaurant. Because he had "a couple too many," he said he decided to sit in the car until he felt he could drive home safely. The defendant said he was running the vehicle for warmth, and the lights were on because the car automatically turned them on in the dark. He denied having the music loud.

Based on the fact that the vehicle was running without moving, the trial court found the defendant guilty of "operating" a motor vehicle while intoxicated. The defendant appealed, contending that the evidence was insufficient to show that he operated the car.

**Holding:** Section 49.04 of the Texas Penal Code defines DWI as a person operating a motor vehicle in a public place while intoxicated. The defendant did not contest the finding that he was intoxicated. Rather, he claimed that his conviction was not supported by proof that he operated the vehicle.

There is not statutory definition of "operate." The Court of Criminal Appeals has held, however, that "the totality of circumstances must demonstrate that the defendant took action to affect the functioning of his vehicle that would enable the vehicle's use." A driver need not cause the automobile to move or not move through any effort of the driver's. All of the circumstances are examined to determine whether a defendant exerted personal effort on his vehicle. "Because 'operating a motor vehicle' is defined so broadly, any action that is more than mere preparation toward operating the vehicle would necessarily be an 'action to affect the functioning of [a] vehicle in a manner that would enable the vehicle's use.'"

Several cases in which the defendant was found asleep concluded that the person was "operating" the vehicle when it was found running and in gear. The defendant in this case argued that he was being punished for his decision not to drive, but to sleep off his intoxication. While it is better to sleep off intoxication rather than drive, the fact question of whether the defendant was "operating" his car was for the trial court to resolve. Based on the evidence, it found that he had been operating it, and not merely sleeping. The headlights were on, the vehicle's engine was running, the radio was playing loudly, and the defendant was found in the driver's seat either sleeping or passed out. The officer testified that the car was not in park, and was not moving only because of the curb.

The proof in this case was "not so obviously weak as to undermine confidence in the verdict and [was] not greatly outweighed by contrary proof." The evidence was sufficient to support the conviction.

# CHAPTER 5 - CIVIL ACTIONS

## A. INTRODUCTION

Police work is most closely identified with criminal law, but law enforcement activities touch on virtually every kind of law: tort law, contract law, property law, public or municipal law, and employment or labor law, to mention only some. Within the field of tort law, the most common kind of action in which a peace officer is involved alleges the commission of a "constitutional tort." These suits may be brought in state or federal court, but usually are based on federal law, specifically on 42 U.S.C. Sec. 1983. Such actions are known as federal civil rights suits, and officers may be sued in their official capacities for alleged deprivations of a "right, privilege, or immunity" brought about "under color of state law." The successful plaintiff may recover money damages and attorney's fees. Federal civil rights suits often involve claimed violations of the Fourth Amendment (false arrest or excessive use of force), Fifth Amendment (compelling a confession), Eighth Amendment (inflicting cruel or unusual punishment, e.g., by failing to provide medical care for, or otherwise mistreating prisoners), or the Fourteenth Amendment due process guarantee (including property deprivations).

*Los Angeles County v. Rettele* is just such a federal civil rights case involving an alleged Fourth Amendment violation. Officers ordered a naked couple out of bed during execution of a search warrant, even though the couple was of a different race than the suspects the officers expected to find in the house. The actual suspects had moved three months earlier. Holding that the actions of the officers, while mistaken, were reasonable, the U.S. Supreme Court found no violation of constitutional rights.

The duty status of a peace officer working as a store security guard was the issue in *Brown v. Dillard's*. Holding that the officer essentially became an on-duty officer when he saw and responded to what he believed was a crime, the court rejected the plaintiff's claim that the store was civilly liable for the actions of its employee.

*Stanford v. City of Lubbock* is a different kind of civil action. A fire fighter who had been charged but not convicted of DWI, had his driver's license revoked. When he was bypassed for promotion despite have the highest ranking on the promotion eligibility list, the fire fighter sued to be promoted. The court of appeals upheld the fire chief's decision, ruling that the pending charges constituted a valid reason to bypass the plaintiff.

### CIVIL RIGHTS ACTION. ORDERING NAKED RESIDENTS OUT OF BED AND HOLDING THEM AT GUNPOINT DURING EXECUTION OF SEARCH WARRANT WAS NOT UNREASONABLE.

***Los Angeles County v. Rettele*, 127 S.Ct. 1989 (2007)**

A deputy investigating a fraud and identity-theft ring identified four suspects, all of whom were African-American. Based on the evidence he had gathered, the deputy obtained a search warrant for two residences without knowing that the persons he suspected had moved from the home

three months earlier. During the execution of the warrant, the officers found a couple sleeping in the bedroom. Although the residents were unclothed, they were ordered to stand for a few minutes before being permitted to dress. This couple was of a different race than the suspects the officers expected to find in the house.

After they realized their mistake, the officers apologized to the couple and left. In the second house the deputies found three of the suspects they had been seeking, and they arrested them. The couple the deputies had mistakenly ordered from their bed at gunpoint sued the deputies and others under 42 U.S.C. 1983 for violating their Fourth Amendment rights. They alleged that the warrant was obtained recklessly and that the detention and search were unreasonable.

Following dismissal of the suit by the federal district court on grounds of the officers' qualified immunity, the circuit court of appeals reversed. That court reasoned that the officers were not entitled to immunity because no African-Americans lived in the home; the plaintiffs had bought the home months earlier and the officers failed to inquire into who owned the residence at the time of the search; no emergency search was necessary; and a jury might have found the detention of the couple to be "unnecessarily painful, degrading, or prolonged."

The officers petitioned for review by the U.S. Supreme Court. The Court accepted the case to determine whether the search and seizure were so clearly unreasonable as to deprive the officers qualified immunity.

**Holding:** When the deputies in this case ordered the plaintiffs to get out of bed, they had no way of knowing whether the African-American suspects they sought were in the house. Finding a white couple did not eliminate the possibility that their suspects also lived at the residence. One of the suspects was believed to be armed. The officers were authorized to secure the premises and determine whether the couple they had found were alone in the house, or whether the suspects they thought lived there were also present.

When a warrant exists to search a residence for contraband, the occupants may be detained while the search is being conducted. Detention is a relatively small intrusion on the freedom of occupants which is outweighed by the risk of harm to the officers and the possibility that persons in the house will flee if evidence is found. While it is reasonable for officers to secure premises prior to a search, excessive force or restraints that "cause unnecessary pain or are imposed for a prolonged and unnecessary period of time" are unreasonable. The deputies' actions in this situation were reasonable.

Since blankets and bedding can hide weapons, and one of the suspects was known to own a firearm, the officers were justified in securing the bedroom to ensure their safety. They were not required to turn their backs to allow the couple to cover themselves or retrieve their clothes. It would not have been reasonable, however, to require the occupants to remain standing undressed for longer than necessary. In this case, the officers left in less than fifteen minutes and the couple was prevented from dressing for only a couple of minutes. Once an immediate threat was ruled out, the deputies urged the couple to hurry up and put on clothes.

Warrants are based on probable cause, "a standard well short of absolute certainty." Sometimes, mistakes will be made and valid warrants will allow innocent people to be searched. When officers act reasonably to protect themselves, though, the Fourth Amendment is not violated. The deputies actions in this case were reasonable. Consequently, the plaintiffs' Fourth Amendment rights were not violated.

**CIVIL LIABILITY. OFF-DUTY OFFICER WORKING AS SECURITY GUARD IS "ON-DUTY" OFFICER ACTING IN PUBLIC CAPACITY WHEN HE IS ENFORCING LAWS OR MAKING AN ARREST.**

***Brown v. Dillard's*, No. 11-08-00062 (Tex. App. - Eastland 2009)**

The plaintiff and his sons stopped at a mall to exchange cars with his wife who worked at Dillard's. One of the sons stayed with the car while the plaintiff and his other sons went inside the store. The trunk of the car was open and the young man was sitting on the bumper. His father moved his mother's car near where they had parked and opened the trunk of that car. His son unloaded a duffle bag and a blanket from the father's car and placed them into the trunk of his mother's car. Two Dillard's bags from inside the car also were moved to the trunk.

Some Dillard's managers returning from lunch at this time saw the young man next to a car with an open trunk when another car pulled up and several bags, including Dillard's bags, were transferred from one car to another. Because the store had recently experienced "grab-and-runs," the managers suspected a theft was in progress.

An off-duty police officer working part-time for Dillard's as a security officer was contacted, and he asked for assistance from another off-duty officer who was working security for the mall. The two officers got into a car with the managers and followed the "suspicious" vehicle.

As the plaintiff was about to exit the mall parking lot, the mall security officer blocked his way with a pickup truck, and the store officer and managers stopped behind the plaintiff's car. The mall officer was in uniform with a badge, and he was armed. The officer banged on the plaintiff's window, told him to open his trunk, and said he had been accused of stealing pants. While the other officer, who also was armed and in uniform, stood by the trunk as the plaintiff objected, the managers ripped open the two Dillard's bags. Inside, they found a receipt, dropped the bags, got back in their vehicle, and left.

The plaintiff sued Dillard's on several grounds. The store moved for summary judgment before trial and the trial court granted the motion without specifying the grounds for its ruling. The plaintiff appealed.

**Holding:** Dillard's liability depends in part on whether its security officer was acting in his capacity as an employee, or was acting in his public capacity as a city police officer. At the time, the officer was off-duty, wearing his city uniform and badge, working part-time for Dillard's, and acting solely on the basis of information provided by the managers.

"Every peace officer has a duty to preserve the peace. If an off-duty officer observes and responds to a crime, he becomes an on-duty officer." Although the officer knew only what the store managers had told him, that did not "automatically make him a private security officer." Generally, a peace officer engaged in the enforcement of laws does not create liability for his actions in his private or temporary employer, even if the employer has directed him to perform that task. An officer engaged in the protection of the employer's property or enforcing the employer's policies, however, may be acting as an agent of the employer rather than as a public official.

The officer in this case acted on information from the Dillard's managers that the plaintiff was stealing property from a car in the mall parking lot. Although that property included Dillard's

bags, the officer was not in the process of protecting Dillard's property.

All of these events occurred in a public area, and not in the store. "The act of stopping a vehicle driving in a public area and forcing the owner to allow a search of his trunk based upon allegations of theft is the act of a peace officer enforcing a general law." Because the store security officer was acting in his capacity as a peace officer, Dillard's was not liable for his conduct. At the time of the stop and search, the officer, despite being an employee of Dillard's, was enforcing the general laws and was acting in his public capacity.

## PENDING CRIMINAL CHARGE CONSTITUTES "VALID REASON" FOR REFUSING TO PROMOTE OTHERWISE QUALIFIED CIVIL SERVICE EMPLOYEE.

### *Stanford v. City of Lubbock*, 279 S.W.3d 795 (Tex. App. - Amarillo 2007)

A fire fighter who was ranked highest on the promotion eligibility list was arrested and charged with DWI and unlawfully carrying a weapon. The fire fighter refused a breath test, causing his driver's license to be revoked. When a fire department lieutenant's retirement created a vacancy, the fire chief met with the employee who had criminal charges pending and told him he was being bypassed for promotion. A memorandum from the chief explained that there was a "valid reason" for not promoting the employee.

The fire fighter appealed the chief's decision to the civil service commission. The fire chief testified before the commission that he denied the promotion because a fire lieutenant is a first-line supervisor responsible for knowing and abiding by rules, and that he feared the fire fighter could not effectively fulfill those duties because of the criminal charges that were pending. The chief also explained that the employee's driver's license had been suspended due to his refusal to submit a breath sample at the time of his arrest. This resulted in the employee not being able to drive and operate a fire truck during his license suspension.

Although the employee's license had been suspended, no disciplinary action was taken against him and his salary was unaffected. He was not suspended from work or demoted because of the charges or his license suspension. While he would not consider disciplinary action until the pending charges were resolved, the chief testified, he also was not comfortable promoting a person in that situation. The reasons for passing over the employee had been discussed with him as required by the applicable statute.

The commission upheld the fire chief's decision not to promote his employee for the reasons he stated. Following this decision, the fire fighter filed suit against the city, claiming that the evidence did not support the commission's holding and that several procedural errors were made in taking this action. The defendants moved for summary judgment and it was granted by the trial court in their favor and against the plaintiff fire fighter. He appealed.

**Holding:** The plaintiff argued that failure to promote him amounted to a disciplinary action. Although Section 143.057(a) of the Civil Service Act does address "promotional passover," it also requires a "letter of disciplinary action."

The fire chief testified that no disciplinary action was taken against the plaintiff and his salary remained unaffected. Written reasons were provided to the plaintiff and the commission. A

promotional passover is not necessarily disciplinary in nature. When the action is not disciplinary, the employee is not entitled to notice of a right to appeal to an independent hearing examiner or written notice of appeal rights to the civil service commission.

No civil service violations were charged against the plaintiff, either. He therefore was not entitled to have the commissioner's hearing postponed as he had requested. If he had been suspended from his duties as a fire fighter, the plaintiff would have had rights he did not have in this case because no disciplinary actions were taken against him.

The plaintiff questioned whether criminal charges, rather than a criminal conviction, constitute a "valid reason" for bypassing him for promotion. The phrase "valid reason" is not defined by the civil service statute, so it was given its plain meaning. As he explained to the commission, the fire chief refused to promote the plaintiff because of the pending criminal charges. This resulted in the plaintiff being unable to set an appropriate example to subordinates, unable to command the respect and discipline of those he would supervise, and unqualified to operate fire equipment he would be required to operate. Moreover, the plaintiff refused to submit a breath sample as required by state law. As a lieutenant, the plaintiff would be obliged to know, follow, and enforce state law and regulations.

These reasons for not promoting the plaintiff were sufficiently "valid." The defendants were entitled to summary judgment based on this substantial evidence that the fire chief complied with the requirements of the civil service statute.

# CHAPTER 6 - STATUTORY INTERPRETATION AND MISCELLANEOUS CASES

## A. INTRODUCTION

Courts often are called upon to determine the scope of a penal law, or to decide the proper interpretation of terms used within the law. This activity does not necessarily indicate a legislative failure in drafting the statute, since it is impossible at the time of its enactment to foresee every possible application of a law. Because Texas does not recognize "common law crimes" - those created by courts rather than by the legislature - courts applying penal statutes look to the clear meaning of the text, to legislative history, and to other sources in order to clear up ambiguities in the statutory language.

A body of cases relate to drug offenses. Like DWI, these crimes raise a wide variety of legal issues. Many are therefore described within the chapter dealing with search and seizure; others may be within the arrest chapter. The ones collected in this chapter focus not on procedure, but on the substantive crime of drug possession, manufacture, or delivery.

Possession is the prohibited "act" required for some offenses. It requires an intent and knowledge, as well as exercise of care, custody, dominion, and control over the contraband possessed. The decision in *Ly v. State* considers whether cocaine found inside a truck was in "possession" of the driver when others had access to the truck.

Use of force against a peace officer was the issue in *Dobbins v. State* and *Pumphrey v. State*. A vehicle was used in *Dobbins* to hit an off-duty officer investigating a car alarm. The court of appeals found that the vehicle was a deadly weapon, and that the circumstances established the defendant's intent. In a somewhat surprising holding, the court in *Pumphrey* determined that "pulling away" from an officer who was trying to arrest the defendant was sufficient for resisting arrest. Because that offense requires use of force against the officer, cases in which the arrestee is merely uncooperative tend not to support a conviction.

A peace officer was charged with sexual contact with a woman in his custody in *Pastrano v. State*. On appeal from his conviction, he claimed that the State failed to prove that the victim was either an "adult offender" or a "juvenile offender," rather than an "individual." Construing Section 39.04 of the Penal Code, the appellate court rejected this contention as one that would lead to an "absurd" result.

In the first of two other examples of unsuccessful arguments about the interpretation of statutes, the defendant in *Gaston, et al v. State* proposed that penal code section 42.04 requires an officer to warn a person to move before he can be said to be obstructing a street. In the other case, *Adams v. State,* a car thief objected to the police using a "bait" car to catch him, claiming that to do so violated the officers' duty to prevent or suppress crime.

Some of the cases described above were appealed on what is called "sufficiency of the evidence" grounds. That is, the defendant claimed that even if the evidence is viewed in the light most favorable to the State's case, it nevertheless failed *as a matter of law* to support the conviction. *Glockzin v. State* is one of those cases. The defendant contended in an aggravated sexual assault of

a child case that, because contradictory evidence was introduced at trial, his conviction had not been established beyond a reasonable doubt. But contradictory evidence does not necessarily undermine a conviction because the jury is free to give credit to some testimony and not to other testimony. *Mikkelson v. State* is a somewhat different kind of sufficiency claim. The accused argued in a possession of firearms by felon case that the evidence did not establish his pistol was a "firearm" as defined by the statute. The court of appeals rejected this claim based on the statutory definition found in Section 46.01 of the Penal Code, and on the testimony of an officer and crime lab employee.

Sometimes these arguments that the evidence does not fit the legal definition are successful, as in *State v. Ortiz*. There, the defendant was found in possession of a "tire buddy" and charged with unlawfully carrying a weapon. Based on the definition of "club" found in Section 46.02 of the Penal Code, the appeals court determined that the State had not shown the tire buddy was "specially designed, made, or adapted" to be used as a club, and it upheld the trial court's rejection of the tool in evidence.

*Mendiola v. State* is a procedural case, rather than one of substantive law. The court considered whether a photographic array used for identification purposes was unnecessarily suggestive because the photo of the defendant was larger and darker than the other photos shown to the witness. It concluded that, while the array was suggestive, it did not lead to "irreparable misidentification" because the witness had a good opportunity to view the defendant on more than one occasion and was certain that he identified the person who robbed him.

Instead of arguing against an interpretation of a statute's words or phrases, or that the evidence did not support the conviction, some defendants challenge the constitutionality of the statute under which they are prosecuted. The defendant in *Karenev v. State* successfully challenged the constitutionality of the harassment statute (Section 42.07) on the grounds that the words "alarm" and "annoy" applied to harassment by sending electronic communications are impermissibly vague. This case is only the latest in a line of cases holding various provisions within the harassment statute unconstitutional for exactly the same reason. [Note: The decision in *Karenev* was later reversed, but only on procedural grounds having nothing to do with its substance.]

A recent and controversial addition to the capital murder statute was attacked by a defendant in *Flores v. State*. That statute was amended to make the intentional killing of a fetus capital murder in some circumstances. The accused, who had tried to help his girlfriend abort her fetus by stepping on her abdomen as she requested, claimed that the statute violated the Equal Protection Clause of the U.S. Constitution by punishing him but exempting the pregnant woman. The Texas Court of Criminal Appeals rejected his claim, as well as the argument that the statute essentially establishes a religious viewpoint in violation of the First Amendment.

Texas Penal Code Section 37.152(a)(3) makes it a crime for a person to prevent "hazing." The defendant in *State v. Zascavage* objected to this requirement on the grounds that the statute fails to identify the persons who have this legal duty and, thereby, seeks to impose the duty on "every living person in the universe." The court agreed and declared the provision unconstitutional.

**POSSESSION. DRUGS FOUND IN TRUCK DEFENDANT WAS DRIVING WERE SUFFICIENTLY LINKED TO HIM TO PROVE POSSESSION.**

***Ly v. State*, 273 S.W.3d 778 (Tex. App. - Houston 2008)**

A DPS trooper stopped a pickup truck for speeding and following too closely. When the officer signaled for the truck to stop, the driver moved into the right lane but continued a short distance before stopping. The driver, who was alone in the truck, did not smell of alcohol or drugs, but his eyes were red and he seemed very nervous. When the trooper asked if the driver had any alcohol, drugs, or weapons in the vehicle, the defendant denied having any.

A half-full bottle of vodka was seen in the passenger compartment by the officer, but the defendant passed field sobriety tests. The trooper planned to issue the defendant a citation for violating the open container law, but then a deputy sheriff and another DPS trooper arrived on the scene.

The officers searched the defendant and his truck. An empty clear plastic sandwich bag was found in the man's front pants pocket. Although the driver said he had eaten a sandwich earlier that day, the bag did not appear to contain crumbs or other evidence that it had held a sandwich.

As the truck was being searched, the defendant told one of the officers that there was a gun inside. It was found between the driver's seat and the center console. After the defendant again denied that any drugs or weapons were in the truck, the officers found a bag appearing to contain cocaine in the cup holders of the center console, along with something wrapped in a paper towel that appeared to be crack cocaine.

A jury convicted the defendant of possession of cocaine. He appealed on the grounds that the evidence was legally and factually insufficient to prove that he knowingly possessed the drugs. His wife testified at trial that she believed the cocaine may have belonged to a known drug user employed by the defendant who often drove the vehicle. The defendant argued that "mere presence" in the truck was not enough to support a conviction for possession.

**Holding:** Unlawful possession requires proof that the defendant: (1) exercised care, management, or control over the substance; and (2) knew the substance possessed was contraband. It is not enough that the defendant's connection with the contraband is mere fortuitous. When more than one person has possession of the place where contraband is found, the State must show "affirmative links" between the accused and the contraband. A number of factors may affirmatively link someone to contraband.

The defendant was in control of the pickup, and he was the only one in the vehicle when it was stopped. He and his wife owned the truck and used it for business. He also was present during the search; the cocaine was in a place accessible to him from the driver's seat; he appeared to the officers to be under the influence of drugs; and he had a clear plastic bag in his pocket, which the officers said was often used to carry drugs. The defendant took longer than usual to stop his truck after the officer signaled for him to do so. The center console where the drugs were found was an enclosed space, and the defendant's nervous behavior and lies about having a gun and alcohol, "demonstrated a consciousness of guilt." Based on all these facts, it was reasonable for the jury to conclude that the defendant knowingly exercised possession and control over the contraband.

The defendant also argued that the absence of other "affirmative links" undermined the strength of the evidence against him. He was not arrested in a place known for drug activity and did not have any paraphernalia, a large amount of cash, or a cell phone or beeper, as he might be expected to have if he was in possession with intent to deliver. There was no odor of drug use on

the man's clothing, and he did not try to evade the officer or make any "furtive moves" when he was stopped. No incriminating statements were made, and the cocaine was not packaged in the normal way for sale.

Although the defendant did not exhibit every one of the possible "affirmative link" factors, that was not required. One of the officers testified that the defendant appeared to be under the influence of drugs, but that no odor could be detected because of the rain that was falling. The driver's nervousness and lying about the presence of a gun and alcohol might have led the jury to conclude that he was also lying about having drugs in his truck. There was sufficient evidence to convict the defendant of knowingly possessing cocaine.

As to whether he possessed it with intent to deliver, one of the officers testified that the amount in the man's possession indicated an intent to deliver, although the defendant argued that the amount was too small. He also claimed that the jury should not have found an intent to deliver because the cocaine was all in one bag rather than being divided into smaller bags to sell.

These arguments were made to the jury, and it was up to the jurors to decide what weight to give them. The jury's finding of intent to deliver was not clearly wrong and unjust. The conviction was supported by sufficient evidence to sustain the conviction.

## ASSAULT ON PUBLIC SERVANT. HITTING OFF-DUTY DEPUTY WITH VEHICLE SUFFICIENTLY ESTABLISHED INTENT TO ASSAULT WITH DEADLY WEAPON.

### *Dobbins v. State*, 228 S.W.3d 761 (Tex. App. - Houston 2007)

A deputy constable was working security off-duty in uniform at a restaurant. In the early afternoon, he was in the restaurant's parking lot when he saw a green Buick drive around to the rear of the building, an area usually used only by employees. As the deputy got out of his vehicle, he heard a car alarm and went to the area where the Buick had driven to investigate. He saw the defendant quickly disappear behind a Suburban that was parked beside the green Buick. Then, the defendant drove the Buick from its parking place toward the officer. Another man also was in the front seat of the car.

When the officer held up his hand to signal the vehicle to stop, it stopped about one or one-and-a-half car lengths from him. As the officer went "around to the driver's side," the Buick moved forward, hitting him and lifting him onto the hood. The officer later testified that the driver clearly had seen him, and that the Buick was going between five and ten miles per hour when it hit him. He also testified that there was plenty of room for the defendant to have gone around him, instead of hitting him.

After the officer was thrown onto the hood, the defendant kept moving as the officer gripped the edge of hood near the windshield. Face-to-face with the driver, the officer pulled his pistol and repeatedly yelled for the defendant to stop. The passenger, who said he "didn't want anything to do with it," reached across the seat and put the car in park, causing it to stop. The officer ordered the passenger out of the car and onto the ground.

When he then ordered the defendant out of the vehicle, the man ignored him, backed into a parking space, then drove out of the parking lot. The defendant was identified subsequently by the

license plate number and his license photo. According to the officer's testimony, he felt his life was in danger during the incident, and that the car had been used as a deadly weapon. He was unsure how long he had been on top of the hood.

The defendant was charged with aggravated assault on a public servant. Following his conviction, he appealed, contending that the evidence was insufficient to establish that he acted intentionally or knowingly, that he threatened the officer, or that he used a deadly weapon.

**Holding:** Whether a person acted intentionally or knowingly is a question to be determined from the totality of circumstances. As the defendant pointed out, no threatening words or gestures were made in this case, but these are not required to prove a defendant's knowledge or intent. A jury may infer mental state from an actor's words or conduct. While the defendant argued that there was no evidence that he "raced the engine" or accelerated rapidly toward the officer, or that he saw the officer in front of the vehicle, there was evidence from which the jury could infer these elements.

The deputy constable testified that the defendant drove out of the parking space and stopped only after the officer put up his hand, evidence that the defendant did see the officer in front of the vehicle. As the officer approached the car, it moved forward and hit him, lifting him onto the hood before he reached the driver's side. These facts supported the inferences that the defendant both saw the officer in front of the car, and that he intentionally or knowingly drove the vehicle into him.

The defendant claimed that the evidence demonstrated only that he was reckless or negligent about whether the officer was present because he was walking toward the driver's side of the car, and might not have been seen by the defendant. There was no evidence to support that theory, though. It was the grill of the car that hit the deputy constable, not a glancing blow as one might expect if the officer was no longer in front of the vehicle. Further, the defendant was driving and the officer was walking from directly in front to the driver's side, placing him squarely in front of the defendant when he was hit.

Following the collision, the driver did not stop immediately, but continued to drive with the officer on the hood. This could not have been only for the brief time necessary to brake because the officer had time to pull his pistol, yell for the driver to stop, and call for assistance on his radio. After the passenger stopped the car, the defendant fled the scene. All of this evidence supports the jury's finding that the defendant acted intentionally or knowingly.

As to whether the officer was threatened by the defendant, a threat may be communicated in various, nonverbal ways. The officer testified that he felt threatened when the car drove at him. This happened sequentially, and not all at once. The car drove toward him, stopped, then drove forward again. That conduct "communicated a threat" which the officer perceived as a threat before he was actually hit.

The defendant also argued that the evidence was insufficient to show that a deadly weapon had been used. Section 1.07(a)(17) defines "deadly weapon" to include instruments whose "manner of use" is capable of causing death or serious bodily injury. A motor vehicle is such an instrument.

Despite defendant's contention to the contrary, he drove his car directly at the officer at a speed between five and ten miles-per-hour. It was more than merely reckless driving; it was intentional or knowing conduct that endangered the life of the officer. Driving a car fast enough to lift a person onto its hood is capable of inflicting death or serious bodily injury. It is common knowledge that automobiles cause "countless deaths and serious injuries." The severity of the injuries sustained by pedestrians struck by vehicles varies according to many factors, but such use

of the vehicle "is capable" of causing death or serious bodily injury.

This evidence was sufficient to support the jury's finding that the defendant used a deadly weapon in order to threaten the officer. It also was sufficient to allow a finding that the defendant engaged in this conduct intentionally or knowingly.

## RESISTING ARREST. FORCEFULLY PULLING AWAY FROM OFFICER IS SUFFICIENT PROOF OF RESISTING ARREST.

### *Pumphrey v. State*, 245 S.W.3d 85 (Tex. App. - Texarkana 2008)

A university police officer grabbed the wrist of a young woman outside the entrance to a dance event being held on campus, intending to arrest her for disorderly conduct. She "immediately started pulling away and jerking." This confrontation began when the woman made some obscene remarks when she was told by a security guard that she could not take her camera into the dance. The obscenities were directed to her boyfriend because he would not take the camera back to the car for her, despite it being cold outside. The police officer overheard the remarks and told her to watch her language, which prompted the woman to make additional obscene remarks to the officer, causing him to attempt to arrest her. For various reasons, he did not "take her to the ground" despite her "twisting and squirming."

Eventually, the woman was arrested and charged with resisting arrest. Following her conviction for the offense, she appealed on the grounds that the evidence was factually and legally insufficient to support the conviction. Specifically, she argued that she was unaware that an officer was attempting to arrest her, and that her actions were merely non-cooperation rather than active resistance of the sort required for the offense.

**Holding:** The arresting officer testified that the woman knew he was a police officer because of their verbal interaction. Before he grabbed her wrist, the officer said he told her she was under arrest and she began turning in circles and pulling away from him. Another officer on the scene testified, however, that he did not hear the arresting officer say the woman was under arrest. Rather, the arresting officer was attempting to handcuff the defendant when the second officer arrived.

The defendant's boyfriend testified that the arresting officer grabbed the defendant's wrist, that she "kind of pulled away," and that the officer said she was resisting arrest. A friend of the defendant's did not recall any obscenities directed at the officers, and said the arresting officer came up behind the defendant and grabbed her wrist. She did not try to get away.

In the defendant's own testimony, she said she had cursed at her boyfriend. The next thing she knew, her wrist was being twisted and she tried to pull away and began screaming. When she could see who it was who had her wrist, she asked the officer what was going on and was told that she was under arrest for resisting. The defendant said she was thrown onto the hood of the officer's car, splitting her lip. When she complained of the pain in her wrist, she was taken to a hospital and told she had a severe sprain.

Although the defendant testified that she was unaware an officer was trying to arrest her at first, the evidence was conflicting on that point. The officers testified that she knew who he was; her testimony that her back was turned could have meant that she was unaware of his presence, or

that she was trying to ignore or avoid the officer. Because the evidence conflicted, and because there was sufficient evidence to support a finding that the defendant did know an officer was trying to arrest her, the conviction could not be reversed on that argument alone. The defendant also contended, however, that simply pulling away from an officer trying to physically control her was insufficient to show the kind of resistance required for the offense.

Section 38.03 of the Texas Penal Code requires the use of "force against" a known officer who is trying to effect an arrest. The defendant argued that this phrase requires force be directed "toward" an officer in order for the offense to be committed. The evidence in this case was that the defendant "pulled" and "jerked" against the officer's efforts to hold her wrist, squirming and turning her body to keep the officer from getting both of her arms pulled behind her. There was no other evidence that the defendant directed any aggressive force toward the officer or struck him.

A number of Texas cases "explicitly hold that only a force directed 'toward' an officer can support a conviction" for resisting arrest. Other courts have criticized these opinions and held that Section 38.03 does not require action directed toward an officer, but only force exerted in opposition to the arrest. "The ordinary meaning of 'resist' does not require that the resistance be directed toward the person or force being resisted. To 'resist' is to 'exert oneself so as to counteract or defeat.'" Since there is no statutory definition for the term, "force against" does not require force directed "at or toward" an officer, "but also is met with any force exerted 'in opposition to,' but away from, the officer, such as a simple pulling away."

The defendant forcefully pulled away from the officer's hold on her wrist, but she also "jerked, squirmed, twisted, turned, and struggled" against the officer's efforts. Her actions were sufficient to constitute "force against" and to sustain her conviction for resisting arrest.

**COMMENT:** This opinion presents one view of the "force against" phrase in Section 38.03, but as the court admits, there are other opinions taking the opposite position. Which view prevails in any given place in Texas depends on whether the court of appeals with jurisdiction has spoken on the question and, if so, what its view of the matter was. In the face of this uncertainty, and in light of the potential consequences of a "false arrest" lawsuit brought against an officer who misunderstands the law in his or her jurisdiction, a great deal of caution is prudent before a resisting arrest charge is brought. In an earlier time in law enforcement, officers seem to have believed that a resisting arrest charge virtually always was appropriate when an officer got into a physical altercation with a citizen. For several very important reasons, officers often cause many more problems by adding a resisting charge than they avoid, unless the evidence is clear and plainly constitutes force directed toward the officer.

## SEXUAL CONTACT WITH PERSON IN CUSTODY. OFFENSE DOES NOT REQUIRE PROOF THAT VICTIM WAS "ADULT OFFENDER" OR "JUVENILE OFFENDER."

### *Pastrano v. State*, 250 S.W.3d 128 (Tex. App. - Austin 2008)

The defendant, a peace officer, was indicted for engaging in sexual conduct with a woman he had detained by touching her breast. No witnesses testified at the officer's trial. Instead, the defendant and the State stipulated to certain facts. It was stipulated that the defendant was a deputy

sheriff at the time of the incident, and that he detained the victim on a traffic stop. Both parties also agreed that the evidence would show the defendant had touched the breast of the woman with intent to arouse or gratify his sexual desire, and that the woman was not arrested, confined, or convicted of any offense on the date of the incident.

Following his conviction for engaging in improper sexual activity with a person in custody, the defendant appealed on the ground that the evidence in the case was legally insufficient to sustain the conviction. Specifically, he argued that the State was required to prove that the complainant was an "adult offender" or a "juvenile offender," and not just an "individual" or "person."

**Holding:** Penal Code Section 39.04, at the time of the offense, provided that it was an offense for a peace officer to intentionally "engage in sexual contact, sexual intercourse, or deviate sexual intercourse with an individual in custody." The defendant agreed that he was a peace officer and had touched the complainant's breast with intent to arouse or gratify his sexual desire. On appeal, he questioned the sufficiency of the evidence to establish that he had committed this act "with an individual in custody."

An "individual" is a living human being, and "custody" is "the detention, arrest, or confinement of an adult offender or the detention or the commitment of a juvenile offender to a facility operated by or under a contract with the Texas Youth Commission or a facility operated by or under a contract with a juvenile board." To be "detained" means that a reasonable person in the situation would not believe herself free to leave. The complainant clearly was an "individual" and the defendant admitted that she was detained (in "custody"). Defendant's argument, though, was that in 1999 when the legislature changed the definition of custody to replace "person" with "adult offender" or "juvenile offender," the statute was narrowed.

Essentially, defendant's contention was that it was insufficient to prove that the complainant was an "individual." The State, he claimed, was required to prove that she was an adult or juvenile "offender" because only those kinds of persons could be in "custody" for purposes of the statute. The complainant's age was not shown at trial. Further, it was agreed that she had not been arrested, confined, or convicted.

While the clear language of a statute's text usually controls, courts must interpret it if the language is ambiguous, as it is in this case. Factors outside the text might be considered in such instances, and the words should not be interpreted in a way that would "lead to an absurd result." The defendant's interpretation of the statutory language would mean that only those convicted or actually guilty of an offense could be in "custody" for purposes of this statute, because only they would be "offenders." "That would mean that the legislature intended to prohibit peace officers from engaging in sexual activity with individuals who are guilty of the offense for which they are in custody, but did not intend to prohibit sexual activity with individuals who are in custody but innocent."

The legislature could not reasonably have intended that result. The history of the statutory provision also argues against the defendant's position. In 1999 the legislature amended section 39.04 to define "correctional facility" in a way that includes both adult and juvenile facilities. In light of this change, the modification of the definition of "custody" reflects a broader application of the statute rather than a narrower one.

Both adults and juveniles who are detained are deemed to be in custody under Section 39.04. The State is not required to prove the age of the detainee or "offender," or to show that she was

actually guilty of the traffic offense for which she was stopped. In this case, the evidence was sufficient to support the defendant's conviction.

## OBSTRUCTION OF STREET. OFFENSE DOES NOT REQUIRE PROOF THAT POLICE WARNED DEFENDANTS TO MOVE BEFORE ARRESTING THEM.

***Gaston, et al v. State*, 276 S.W.3d 507 (Tex. App. - Houston 2008)**

A police lieutenant met with representatives of a union that was planning a demonstration. He rejected the union's request that the police department take a "hands-off approach" to the protestors, and told them that they would be arrested if they blocked streets or intersections.

On the day of the protest, a group was handcuffed together around a tower surrounded by garbage bags that had been erected in an intersection. Another group was handcuffed in a line next to two cars that had been parked in the intersection. An officer responding to the demonstration saw the defendant handcuffing people together in the intersection. He told them on his p.a. system to move because they were violating the law.

Following four such announcements, mounted officers moved into the intersection. As they rode their horses forward slowly in a line, they told the protestors to get out of the street. Instead, many of the demonstrators sat down or pushed against the horses. Officers on foot pulled people from the street, and began arresting them. Protestors in the street refused to get up and move, so they were lifted from the street. Others who had been handcuffed around the cars were separated, warned to move, and arrested when they refused. All of this happened during rush hour, causing traffic to back up for blocks. Some of the officers had trouble getting to the scene because of the congestion.

The defendant and others were arrested for their part in the demonstrations and charged with obstruction of a street under Texas Penal Code Section 42.03. They argued that the State's proof was insufficient because it did not show that they had been warned to move out of the street before they were arrested, and that the warning was required under Section 42.04. The State responded that Section 42.04 is a defense, not an element of the offense, and that the State had no burden of proof on whether a warning was given. The appeal raised the issue of whether the evidence was legally sufficient to support the conviction of the defendants.

**Holding:** Section 42.03 makes it an offense for a person to obstruct a street, regardless of the means of the obstruction, if it is done intentionally, knowingly, or recklessly, and is without legal privilege or authority. Section 42.04 provides that if the conduct is speech or "gathering with others to picket or otherwise express in a nonviolent manner a position on social, economic, political, or religious questions," the actor "must be ordered to move ... if he has not yet intentionally harmed the interests of others ...."

Section 42.04 creates a defense to prosecution if the circumstances were such that an order was required but not given. The defendants contended that Section 42.04 creates an offense in subsection (a), and a defense to that offense in subsection (c). They claimed that the evidence was legally insufficient to show either an offense under Sec. 42.04(a) or a that there was no defense under Sec. 42.04(c).

Section 42.04 is entitled, "Defense When Conduct Consists of Speech or Other Expression."

That title suggests that the section creates a defense, not additional elements of the crime defined in Sec. 42.03. As required by the Penal Code for defenses, Sec. 42.04(c) begins with the phrase, "It is a defense to prosecution ...." Subsection (a) does not contain language that would be used if it contained elements of an offense. "There is no forbidden conduct, no required culpability, no required result, and no exception to the offense." Consequently, Section 42.04 includes a defense to prosecution for the offense of obstructing a street. In order to establish a defense, the defendant - and not the State - must produce "some evidence" to support the defense.

If the defendant bears that burden successfully, the State has the burden of persuasion to disprove the defense that was raised by the evidence. To raise the defense in Sec. 42.04, the defendants were required to present some evidence that "circumstances required an order, and no order was given." The defendants produced two witnesses who testified that they did not hear officers give any warnings. Therefore, the defendants produced some evidence that there was no order.

They were also required, however, to introduce some evidence that an order was required by the circumstances. In other words, they had to show that the defendants' conduct consisted of speech, assembly, or communication in order to express views on a protected issue, if the defendant had not yet intentionally harmed the interests of others that the statute was designed to protect.

In this case, the conduct of the defendants was "intended as speech on a social or economic issue." They were protesting low wages and lack of benefits. When they were arrested, though, there was no evidence that they had not yet harmed the interests of others that the statute was intended to protect. By the time the defendants were arrested, they already had harmed the interests of others because traffic was backed up for blocks. The police lieutenant testified that he had to park his patrol car and walk part of the way to the scene because he could not get through. Other officers were able to drive to the scene only by driving the wrong way on one-way streets.

This protest occurred just before the evening rush hour. While it is an offense to obstruct a street even if no one is actually impeded, in such a case an order to disperse would be required. "However, by choosing to block the intersection during rush hour traffic, [the defendants] created not only an obstruction that violated section 42.03, but immediately 'harmed the interests of others' the statute was designed to protect, thus negating application of the 42.04 defense."

The State was not required to show that someone in authority ordered the defendants to move, disperse, or cease obstructing the street. Even if that burden had been on the State, a rational jury could have found from the evidence that an order to disperse had been given. One officer warned the protestors that they were blocking the intersection and needed "to move now." The Lieutenant testified that he issued verbal commands to the group to "get out of the street." Nothing requires that an officer give each individual protestor an order to move.

The law requires an order to disperse only in certain circumstances which were not present in this case. If such an order had been necessary, there nevertheless was evidence to support a jury finding that the defendants were warned appropriately. The evidence was legally sufficient to support the defendants' convictions.

## THEFT OF VEHICLE. USING "BAIT" CAR DOES NOT VIOLATE POLICE DUTY TO PREVENT OR SUPPRESS CRIME.

### *Adams v. State*, 270 S.W.3d 657 (Tex. App. - Fort Worth 2008)

A police unit targeting vehicle theft deployed a "bait" vehicle in an area in which thefts were prevalent. The vehicle was an SUV equipped with a computer monitoring system that alerted the police if anyone entered or moved it. The SUV's movement could be monitored remotely by GPS, and its door locks could be operated remotely, as could an engine kill switch. Devices built into the vehicle made a video and audio recording of the interior.

This SUV was parked on a city street with its doors unlocked, the windows down, and the keys sitting in plain sight on the console. In the early morning hours, the system reported that the door had been opened and there was movement inside the vehicle. Using directions received from the dispatcher, officers spotted the SUV and signaled for it to stop. Instead of stopping, the driver sped away, leading officers on a chase that ended when the SUV crashed into a parked vehicle. After a foot chase, the defendant was arrested and charged with theft of a vehicle and evading arrest.

The defendant moved to suppress any evidence produced by using the bait vehicle. He contended that by leaving the SUV's doors unlocked and its windows down and the keys on the console, the police had violated Article 2.13 of the Texas Code of Criminal Procedure. Article 2.13 provides, among other things, that peace officers have a duty to suppress and prevent crime. According to the defendant, the use of a bait car is inconsistent with this duty. The trial court denied the defendant's motion and he was convicted. He appealed.

**Holding:** If the language of a statute is clear and unambiguous, courts apply the plain meaning of those words. "But if the plain language leads to an absurd result that the legislature could not have possibly intended, or if the language is ambiguous, [a court] may consider extra-textual factors to determine the statute's meaning."

In an effort to enforce a particular law, the police in this case were affording an opportunity for persons to commit a crime. "Bait car programs do not conflict with article 2.13 because the use of bait cars allows police to catch criminals that have already decided to steal vehicles, regardless of whether the vehicle is a bait car." Interpreting the language of Article 2.13 in this fashion does not lead to an "absurd result." Instead, it promotes the public policy of crime deterrence and allows the police to fulfill their duty to suppress crime.

While the legislature has not expressly authorized the use of bait cars to control auto theft, it also has not prohibited their use. The public policy of preventing auto thefts outweighs any competing concern about the police operating such a program.

The defendant did not assert an entrapment defense in this case, but that defense is not available when police officers merely afford a person the opportunity to commit a crime. A bait car program violates neither public policy nor the legal duty of law enforcement officers to prevent and suppress crime, and it was not erroneous for the trial court to deny the defendant's suppression motion.

## AGGRAVATED SEXUAL ASSAULT OF A CHILD CONVICTION SUPPORTED BY VICTIM'S TESTIMONY DESPITE CONTRADICTORY EVIDENCE.

### *Glockzin v. State*, 220 S.W.3d 140 (Tex. App. - Waco 2007)

The defendant's daughter and her niece spent the night with him. During that visit, the defendant followed his daughter to the bedroom, got in bed with her, and penetrated her vagina with his finger. The complainant testified that the defendant had been drinking.

According to the niece, who was in the living room during the incident, the complainant ran out of the bedroom when the defendant entered and only returned after he left. None of this was reported until after the complainant's bloody underwear was discovered hidden in a closet by her sister, and she revealed what had happened.

The defendant was indicted and convicted of aggravated sexual assault and indecency with a child. Following his conviction, he appealed on the ground that the evidence was factually insufficient to support the verdict, largely because of the existence of other evidence in the record that contradicted the complainant's story or suggested that the defendant's conduct did not satisfy the requirements of the crimes with which he was charged.

**Holding:** The defendant challenged the sufficiency of the evidence in four regards. The first of these was that the trial evidence established the complainant had contracted genital warts, most likely resulting from genital-to-genital contact. The defendant claimed not to have genital warts, and there was no evidence that he did have. He had submitted to a visual inspection by the investigator in the case, and argued that he should have been tested for HPV (Human Papilloma Virus) in order to definitively determine whether he could have transmitted it to the complainant. A medical expert testified that the testing was not available in the county and that it was not "very accurate" or "very sensitive." While the defendant may have lacked the disease that the complainant contracted, that fact did "not make the evidence supporting the judgment so weak as to be manifestly unjust and clearly wrong."

The complainant insisted that the defendant had assaulted her only on this one occasion. A physician who examined her believed that she may have been assaulted previously, and may have been hiding something in order to protect herself or her family. The defendant claimed that evidence of her prior abuse is contrary to proof of his guilt. "While it is possible that the complainant was abused in the past, whether by the defendant or someone else, the fact remains that the complainant described an instance of abuse by the defendant." The child victim's testimony alone is sufficient to support this conviction.

A third argument made by the defendant was that the complainant's mother may have coached her. The evidence, however, lacked any motive for falsely accusing the defendant. He provided generous financial assistance to the complainant's mother. His daughter enjoyed spending time with the defendant's parents, and she had a good relationship with her father. After hearing all of this, the jury was in the best position to decide whether the complainant's testimony was true or false.

Finally, the defendant noted that he never had been accused of similar offenses. The complainant's sister testified that he had treated her kindly during his marriage to her mother. No semen or DNA evidence linked the defendant to this offense, and he adamantly denied it. These denials "do not render the evidence factually insufficient." A jury can consider the absence of forensic evidence and other evidence casting doubt on the defendant's commission of the offense, but in the end, the complainant's testimony is sufficient to convict if the jury chooses to accept it.

While there was some contradictory evidence in this case, it was not "so strong" or the proof of guilt "so weak" as to render the verdict "clearly wrong and manifestly unjust." The conviction

was affirmed.

**POSSESSION OF FIREARM BY FELON. EVIDENCE SUFFICIENT TO PROVE PISTOL IS A "FIREARM."**

***Mikkelson v. State*, 266 S.W.3d 578 (Tex. App. - Fort Worth 2008)**

Two officers on patrol in an unmarked car at night saw a vehicle at a gas station. Three men were "mulling around" the car. While the officers were stopped at an intersection from which they could observe the gas station, they saw one of the men make a movement that looked like he was putting something in his waistband. That man and another walked to the store's entrance and, while one of them waited outside with his back to the door, the other entered the store. In a short time, the man came out of the store and both of them walked quickly to the car.

One of the men opened the passenger-side door, started "digging around in the floorboard," then sat down in the passenger's seat. When the officers cleared the intersection, they pulled into the gas station and approached the men they had been watching. As they did so, they saw the man who had gone inside the store, and who was now standing beside the driver's door, reach into his pocket, remove an object, and place it on the dashboard. One of the officers recognized the item as a marijuana cigarette.

After the driver had been arrested for possession of marijuana, the officers searched the vehicle prior to having it towed. They saw a gun sticking out from under the passenger seat.

The passenger was handcuffed and appeared agitated, pacing back and forth. After one of the officers removed the gun from the car, the defendant repeatedly claimed that it was his. He was arrested and charged with unlawful possession of a firearm by a felon. On appeal following his conviction by a jury, the defendant claimed that the evidence was insufficient to show that he actually possessed a gun that was a firearm.

**Holding:** Section 46.01 of the Texas Penal Code defines a "handgun" as "any firearm that is designed, made, or adapted to be fired with one hand." "Firearm" is defined by the same section as "any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use."

According to the testimony at trial, the defendant rummaged around on the floorboard where the pistol was found later. When he was handcuffed, he admitted that the pistol was his.

One of the officers testified that the gun was a "firearm." She explained to the court what a firearm is: "It's a weapon that can be charged – that can be actually discharged. It kind of looks like, you know, fire. You know, the hammer gets cocked back, striking pin will strike the back of a bullet; which, on the back of a bullet there's a spot that will ignite some gunpowder, which is inside the bullet, and then you shoot the actual bullet part off the end, like a little tiny explosion or fire." When questioned, the officer agreed that the .22 caliber gun was, in fact, a firearm. A crime lab employee also testified that his job was to fire handguns when they came into the police department before they were placed in the property room. He had fired the pistol in question and it worked properly.

Given this testimony, the evidence was legally and factually sufficient to support the jury's

verdict. The defendant's points of error on appeal were overruled and his conviction affirmed.

## SEARCH AND SEIZURE - STATE FAILS TO SHOW THAT "TIRE BUDDY" FOUND IN CAR WAS A "CLUB" JUSTIFYING ARREST AND SEARCH INCIDENT TO ARREST FOR UNLAWFUL CARRYING OF A WEAPON.

### *State v. Ortiz*, 286 S.W.3d 514 (Tex. App. - Corpus Christi 2009)

The defendant's vehicle was stopped for having an expired registration sticker. When the officer approached the car, the defendant opened the driver's door and the officer saw a wooden club between the door and the driver's seat. The officer mistakenly arrested the defendant for possession of a prohibited weapon, but the State later contended that he meant to arrest him for unlawful carrying of a weapon. During a search incident to this arrest, the officer found a "little baggy" of cocaine.

Backup officers were called to the scene. In a subsequent search of the defendant's vehicle, officers found marijuana, a baggy containing what they believed was crack cocaine, two crack pipes, a scale, and a handgun. Prior to trial, the defendant moved to suppress all of the evidence found following the stop of his vehicle. He claimed that the arrest for possession of a prohibited weapon or UCW was unlawful because, as the officer testified in the suppression hearing, the "tire buddy" had not been modified in any way. The officer also conceded that the search was based on the defendant's arrest.

The "tire buddy" found in the car, according to the defendant, could not have met the definition of a "club" in the UCW statute because it was not modified. Section 46.01 of the Penal Code defines a club as "an instrument that is specially designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with the instrument."

In response, the State argued that the tool was not stored in the trunk of the car with other tools, but was by the defendant's side where it could be used as a weapon. In the absence of any authority for this argument, the trial court granted the defendant's suppression motion. The State appealed.

**Holding:** On appeal, the State contended that the arrest in this case was lawful because an officer is permitted to arrest any offender for most transportation code offenses. Because that argument was not made to the trial judge, the State waived it. The State also argued that even though the officer thought the tire buddy was a prohibited weapon, he had sufficient evidence to believe the tool was a club carried in violation of Section 46.02 of the Penal Code.

Detaining the defendant for driving with an expired registration sticker was lawful. Arresting him for UCW depended on the development of probable cause.

The State contended that the tire buddy was a "club" within the penal code definition because of its proximity to the driver. The statute requires, however, that the instrument be one that has been "specially designed, made, or adapted" for such use. No evidence was produced by the State that the tire buddy in the defendant's car was "specially designed, made, or adapted" to be used to strike a person. When the arresting officer was asked whether the "club" had been modified, he replied, "It hasn't been modified."

In the absence of testimony that would lead a reasonable and prudent person to believe the tire buddy fit the definition of a "club," no probable cause was shown to support the arrest for UCW. The trial court was justified in granting the defendant's suppression motion.

## IDENTIFICATION. SUGGESTIVE PHOTO ARRAY CALLED ATTENTION TO SUSPECT'S PHOTO BUT DID NOT MAKE MISIDENTIFICATION LIKELY.

### *Mendiola v. State*, 269 S.W.3d 144 (Tex. App. - Fort Worth 2008)

The owner of a construction company went to an apartment complex to talk with a man he knew from a Bible study group about remodeling an apartment. He spoke with the man and another man at length, then returned to his pickup to get his briefcase. After he got out of his pickup truck, the man who was with the one he was supposed to meet put a knife to his throat.

The victim was stabbed below his right ear, causing only a superficial wound. The attacker, along with the man the victim had come to see about the remodeling job, forced the victim to get in his truck and drive from one ATM to another, taking money out of his account. Both of the men held the victim at knifepoint. When all of the money in the account had been obtained, the men forced the victim to drive them back to the apartment complex, then to a parking lot in a warehouse district. The man the victim had initially come to see about remodeling told his accomplice, the defendant, to "finish the job."

The defendant stabbed the victim in the neck and the two men struggled. After the victim had sustained cuts on his hands and arms, and a punctured lung, the defendant ran to the truck where the other man was waiting, and they drove away. The victim tried to stop the bleeding as much as possible, then drove himself from the scene, eventually crashing his truck into the sidewalk of a car dealership. One of the salesmen who had EMT training, saw that the victim appeared to have a serious injury to a major neck artery and other wounds to his chest.

On the day after the robbery, while the victim was hospitalized, a detective talked with him and obtained descriptions of the two robbers. A week later, the victim was shown two photo spreads. He identified the defendant from one of the spreads and the other man from the second.

The defendant moved to suppress the victim's in-court identification testimony of him because he claimed it was tainted by an improperly suggestive identification procedure. The trial court denied the suppression motion and allowed the testimony. The defendant was convicted of aggravated robbery and appealed the suppression ruling.

**Holding:** In order to challenge an identification, a defendant must first prove that the out-of-court identification was impermissibly suggestive. Then, the reviewing court determines whether that suggestiveness created a very substantial likelihood of irreparable misidentification. If it did, the in-court identification is inadmissible.

In this case, the photo spread from which the defendant was identified was examined. The photograph of the defendant was larger and darker than the other photos, and it filled more of the space provided for the photos than the others. A person who knew nothing about the case would be drawn immediately to the defendant's photograph because it was "so distinctive in relation to the remaining photographs." Due to this distinctive quality, the out-of-court identification procedure

was impermissibly suggestive.

Having decided that the out-of-court procedure improperly suggested identification of the defendant, it was necessary to decide whether that procedure led to a "very substantial likelihood of irreparable misidentification." The victim in the case met with the defendant twice. Their first meeting, approximately a week before the stabbing, lasted an hour or a little less. Although the victim did not remember the defendant's name from that first meeting, he testified that he remembered the face. He also testified that he was not sure he wanted the defendant involved on the job because he looked like he was on drugs.

On the day of the stabbing, the victim saw the defendant for the second time. He spent a little over two hours with the two men he met at the apartment. The victim described the defendant as "the one that did the stabbing," and testified that he was 100% sure that the person he saw in the courtroom was the person who stabbed him.

Given the opportunity the victim had to observe the defendant on two separate days, it could not be said that the suggestive photo spread created a substantial likelihood of irreparable misidentification. The victim not only had ample opportunity to observe the defendant, he was unequivocal in this identification at trial. Since the suggestive nature of the photo spread was not likely in this case to taint the later in-court identification, the decision of the trial court to deny the defendant's suppression motion was not erroneous.

**COMMENT:** The court employs the usual two-prong approach to questions regarding identification witness testimony. Either an out-of-court identification, like a photo spread or line-up, might be suggestive, or an in-court identification might be suggestive. When a witness relies in his or her testimony primarily on the identification made out-of-court, the reliability of that witness's in-court identification is suspect. Once a witness decides "that's the one," it can be difficult to obtain an objective and accurate identification later if the first identification was mistaken. Indeed, misidentification by eyewitnesses is almost certainly the leading cause of wrongful convictions of persons who are innocent. Once the suggestive photo spread was used in this case, the idea that the defendant stabbed him was planted in the mind of the victim. But this case also contains a classic example of "independent source." That is, when the victim testified in court, he wasn't relying on his earlier decision about the perpetrator made from viewing the photo spread. He was relying on his independent recollection of the man's features, gained from prolonged exposure to him on two separate occasions. His opportunity to observe and his degree of certainty weighed heavily against the in-court identification being tainted by the prior out-of-court identification. Needless to say, this case also highlights the importance of assembling the photo spread carefully, ensuring that there is nothing about its composition or presentation that suggests who the investigators think the "right" person is.

## HARASSMENT STATUTE HELD TO BE UNCONSTITUTIONALLY VAGUE.

### *Karenev v. State*, No. 2-05-425 (Tex. App. – Fort Worth, 4-3-08)

During the pendency of their divorce, a woman's husband sent her email messages and made telephone calls which she claimed were harassing. Based on an investigation of the email messages,

the police arrested the defendant and charged him with harassment. The prosecution was based on five emails, all written in Bulgarian and translated by a woman who was an acquaintance of the wife's. The defendant disagreed with some of these translations and offered the testimony of a translator to support his version of their contents.

The second email included language telling the wife that there was no purpose in changing her passwords. The defendant's testimony was that his wife had called and asked him if she needed to change her password, and that he had set up the computer system she was using and was its administrator. There was disagreement over a line in the email that could have been translated as "rest in peace" or "remain in good health."

In the remaining emails, some of the language appears angry. The defendant predicted that he would raise their child, that his wife's mother would be paralyzed, and that she would be in either a mental hospital or prison. He called her "a pathological liar, a dirty whore, a filthy thief, a rotten user, a sick nymphomaniac, a mental case, and a devil's work," and said it was about time for her to pay for her "filthy deeds."

The defendant explained this language by testifying that while in Bulgaria, he had run into fortunetellers his wife had relied on who asked him to relay the message regarding her future. After his conviction on one count of harassment, the defendant appealed on the ground that the Texas harassment statute is unconstitutionally vague.

**Holding:** The defendant's vagueness argument included a free speech component which the State argued was not part of this case because harassment is not protected First Amendment speech. Unless the statute is constitutional, however, there cannot be "harassment" that would not be protected by the First Amendment. "It is axiomatic that vague laws offend the Federal Constitution by allowing arbitrary and discriminatory enforcement, by failing to provide fair warning, and by inhibiting the exercise of First Amendment freedoms." Persons of ordinary intelligence must have a reasonable opportunity to know from a statute what is prohibited. Further, the law must establish determinate guidelines for law enforcement, and it must be sufficiently definite to avoid chilling protected expression.

Without guidelines governing law enforcement, a statute may allow a "standardless sweep" that permits law enforcement officers, prosecutors, and juries to follow their own personal desires and motives.

Section 42.07(a)(7) of the Texas Penal Code provides that a person commits the offense if, "with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." Prior to 1983, the statute was held unconstitutionally vague for relying on the words "annoy" and "alarm." The same language was included in the 1993 stalking statute, but the term "reasonably likely" was included, which was argued to create a reasonable person standard to use in judging whether the sensibilities would be offended. By itself, a reasonable person standard was held not to save the statute from a constitutional challenge for vagueness, and would cause the statute to be overbroad even if it were construed to solve the vagueness problem.

"The First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed. Many legitimate political protests … contain both of these elements."

Much of the language that made the prior harassment statute and the stalking statute vague

was changed to cure the problem by focusing on specific acts rather than whether they were committed to annoy or alarm, or were reasonably likely to do so. Section 42.07(a)(7), however, repeated the same problems as the prior law when it was added to address the issue of harassment by electronic communications.

Those portions of the harassment statute which make it a crime to send electronic communications that annoy or alarm are unconstitutionally vague. "Additionally, because the statute still does not establish a clear standard for whose sensibilities must be offended, it is unconstitutionally vague in that the standard of conduct it specifies is dependent on each complainant's sensitivity."

Adding an intent to harass, annoy, or alarm does not limit this vagueness simply because terms other than annoy and alarm are now included. The statute also prohibits "repeated" communications, but does not define the word "repeated." It is not specified whether three times is enough, or more is required, and does not indicate the time period during which the conduct must occur. The unconstitutional vagueness of Section 42.07(a)(7) renders it void. The defendant's conviction cannot stand because it was based entirely on a void law. **[Author's Note: On review by the Texas Court of Criminal Appeals, this decision was reversed for procedural reasons having to do with when a facial challenge of constitutionality must be raised. The substance of this decision was not considered. See 281 S.W.3d 428 (Tex. Crim. App. 2009).]**

## CAPITAL MURDER STATUTE PUNISHING KILLING OF FETUSES HELD CONSTITUTIONAL.

### *Flores v. State*, 245 S.W.3d 432 (Tex. Crim. App. 2008)

The defendant, who was 18-years-old, learned that his 16-year-old girlfriend was pregnant with twins. At one point in her pregnancy, the girl told her doctor that she was considering an abortion. Her doctor explained that, due to the late stage of her pregnancy, he could not perform the procedure safely.

In order to terminate her pregnancy, the girl asked her boyfriend to step on her abdomen. She asked him repeatedly to do this, and he agreed, using a "slow, steady press" twice within two weeks of her premature delivery. The woman also tried to terminate her pregnancy by hitting herself in the abdomen more than ten times. During the last week before her delivery, she struck herself every day. She also disobeyed her doctor's instructions and jogged and walked in order to endanger her pregnancy.

At approximately 20 to 22 weeks, the girl prematurely deliver stillborn twins at home. The physician who examined the fetuses concluded that they had died as a result of some kind of "blunt force trauma." Experts later testified that the pregnancy could have been terminated either by the woman hitting herself or by someone stepping on her abdomen. There was no agreement as to whether one of these actions or a genetic abnormality caused the deaths.

Her doctor and others noticed around the time of her delivery that the woman had bruises across her abdomen and one on her face. After the defendant was charged with capital murder for causing the deaths of the fetuses, the woman testified that he hit her in the face once the day before

the delivery and that she had been bruised on her arms when she and the defendant had engaged in "consensual, playful roughhousing."

One expert thought the bruise on the woman's abdomen was more consistent with her hitting herself than with a foot being pressed down on the abdomen, and the woman testified that she had caused the bruising, rather than the defendant. The State's theory of the case was that the woman wanted to have her children and was being abused by the defendant. An expert witness testified in support of that theory that an abuse victim will commonly defend the abuser.

The defendant was convicted of capital murder and sentenced to life in prison. He appealed on the grounds that the statute unconstitutionally violated due process, equal protection, and the Establishment Clause.

**Holding:** The defendant's due process claim was based on the argument that the statute punished the killing of an "unborn child" in violation of *Roe v. Wade*. The Texas Court of Criminal Appeals rejected the same claim in *Lawrence v. State*, a 2007 case.

His equal protection argument was that the defendant was treated differently under law than the mother of the fetuses, who was cooperating in his attempts to kill them. Although both were trying to cause the deaths, only the defendant could be prosecuted because a pregnant woman is not subject to prosecution for harming her own fetus. There was evidence, however, that the defendant's girlfriend did not consent to his stepping on her abdomen. She was bruised from his abuse, and he admitted to hitting her in the face. While he claimed that he was innocent of causing the other bruises, the jury could have believed instead that all of the bruises were the result of his abuse, a finding consistent with the State's expert witness's explanation of abusive relationships and testimony from a witness who said the woman seemed to be looking forward to carrying the twins to term.

Unless stepping on the pregnant woman's abdomen was a consensual act, the defendant and his girlfriend were not similarly situated, and could be treated differently under the law. The jury was free to disbelieve his testimony that his actions were consensual.

The defendant also contended that the Establishment Clause of the First Amendment is violated by the Texas capital murder statute because including "unborn child" within the definition of "individual" adopts a particular religious view over a secular view. Whether a statute violates the Establishment Clause is determined by determining whether the statute had a secular legislative purpose; whether its principal or primary effect is one that neither advances nor inhibits religion; and whether the statute fosters excessive government entanglement with religion.

The fact that a statute is consistent with religious tenets does not, by itself, make it unconstitutional. If it did, laws against such crimes as theft and murder would not be constitutional because they are consistent with religious principles. It is not only religious views that might motivate the legislature to protect a fetus. "While some may indeed view a fetus as a human being out of religious convictions, others may reach the same conclusion through secular reasoning or moral intuition unconnected to religion."

The defendant failed to show that the statute advances religion. Moreover, it does not "entangle government" with religion merely because it reflects a respect for fetal life. The defendant did not demonstrate that the statute violates the Establishment Clause, due process or equal protection guarantees, and his conviction was affirmed.

## HAZING STATUTE UNCONSTITUTIONALLY VAGUE FOR REQUIRING ALL PERSONS TO PREVENT HAZING.

### *State v. Zascavage*, 216 S.W.3d 495 (Tex. App. - Fort Worth 2007)

The defendant was indicted for recklessly permitting hazing by failing in his role as an educator to supervise students. This case arose from what occurred at a party sponsored by a high school wrestling team booster club. Fliers were distributed at the high school to notify student wrestlers about the party, but the school administration did not authorize or support the event. It occurred on a Saturday evening at the home of a member of the club.

The party was attended by the defendant, booster club members, parents of student wrestlers, and the family at whose home the party was held. About seventy percent of the members of the team attended the party, including about sixty percent of the freshman members.

During the party, student wrestlers slapped or hit other student wrestlers "to initiate them into the wrestling team." It was unclear whether the defendant or any other adult at the party witnessed the hazing.

The trial court dismissed the indictment against the accused on the grounds that Section 37.152(a)(3) of the Education Code was unconstitutional. The State appealed.

**Holding:** Section 37.152(a)(3) of the Education Code prohibits recklessly permitting hazing to occur. "Hazing is any intentional or reckless act occurring on or off the campus of an educational institution, by one person acting alone or acting with others, directed against a student, that endangers the mental or physical health or safety of a student for the purpose of pledging or being initiated into an organization."

"Generally, the clarity or vagueness of a criminal statute depends on whether the statute provides sufficient notice of a particular charge to a particular defendant." Criminal statutes must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." The failure to perform an act is not the basis for criminal punishment unless a statute makes omission of an act a crime or provides that a person has a duty to act. Common law duties, as opposed to duties created by statute, historically could not form the basis for crimes in Texas. This limitation was modified by the legislature, but a person must have notification that a duty to act exists. A statute that imposes a duty on "every living person in the universe" fails to inform those who are obliged to act in certain ways in order to avoid prosecution.

Section 37.152(a)(3) fails to identify any person or class of persons who have a duty to prevent hazing. Instead, it imposes a duty on all persons to prevent hazing. Because such notice is insufficient to withstand a vagueness challenge, the provision is constitutionally invalid.

The State claimed that, as an educator, the defendant had a duty toward the student athletes to prevent hazing. There is not a general duty, however, that requires educators to supervise students at all times and under all circumstances. While educators may stand *in loco parentis* to a student, and thereby enjoy civil liability immunity, the statutes and cases establishing this relationship do not apply in this case. These scattered references in law simply would not "give persons of ordinary intelligence a reasonable opportunity to know that they have a duty to supervise students." Additionally, it is unclear whether the defendant, as a wrestling coach, is an "educator." Even if the defendant is an educator and had a duty to prevent hazing, it is not clear that he had a duty to act in

these circumstances.

The party was held at a private residence and attended by students, parents, and members of the booster club. It was not sponsored by the high school or school district, and attendance by the students was not required. Even as an educator, the defendant did not assume care or custody of the students at this party. Their parents were allowed to attend, and the student wrestlers were not obliged to be there. The defendant had no duty to prevent hazing, regardless of whether Section 37.152(a)(3) applied to him.

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