

A Peace Officer's Guide  
to Texas Law ---- 2011 Edition

by

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## **TEXAS POLICE ASSOCIATION**

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This is the Fourteenth 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](http://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*.

A handwritten signature in black ink, appearing to read "Erwin Ballarta". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

**Erwin Ballarta  
Executive Director**

## ACKNOWLEDGMENTS

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I especially thank my wife, Kay, for her support and understanding. She has shared my time and attention with this publication for the past two-and-a-half decades, and it exists only because of her patience.

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, 2009, and July, 2011. The summaries of cases from that period have been taken from the *Police Legal Digest*, a regular 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 fourteenth in a continuing series of books reporting significant changes in law for Texas peace officers. Reference to the preceding editions (1985 - 2009), along with this edition, will provide the reader an overview of the legal changes instituted over the last twenty-five-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 that 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.”

*Kjohede v. State* is a case decided using this reasonable expectation of privacy analysis. The Dallas court held that it was not reasonable for a person who presented a suitcase for a security check

at the airport to expect its content to remain private. Consequently, that person lacked standing to complain about the search of the bag.

In *Miller v. State*, the defendant was a police officer who left his personal “thumb drive” in a computer shared by other officers in the patrol room. When pornography was found on the drive, leading to a search of the officer’s laptop and home computers where child pornography was discovered, he moved to have the evidence suppressed. The Austin court rejected his claim, finding that the officer lacked a reasonable expectation of privacy in the thumb drive he left in a place that was publicly accessible.

### **SEARCH AND SEIZURE - OWNER LACKS STANDING TO CONTEST RANDOM SEARCH OF CHECKED SUITCASE AT AIRPORT.**

#### ***Kjohlhede v. State*, 333 S.W.3d 631 (Tex. App. - Dallas 2009)**

The defendant checked his suitcase at an airport’s curbside check-in desk for a flight to Hawaii. It was selected at random to be searched for dangerous items. Prior to opening the bag, there were no magnetometer checks or swabbing the suitcase for nitrates. A TSA officer found a Dopp kit inside the bag when it was opened. He looked in that zippered kit and discovered a vial containing white powder.

After a TSA supervisor looked at the vial, airport police were summoned and the defendant was paged to come to the baggage check-in area. When he was confronted with the bag and the vial, the defendant admitted that they belonged to him. When asked what was inside the vial, the defendant replied that it was cocaine, which later testing confirmed. The defendant was arrested for possession.

Following an unsuccessful pretrial suppression hearing, the defendant pled guilty and appealed the trial court’s ruling. He argued that the trial court was incorrect in holding that he lacked standing to complain about the search of his bag, and that the evidence found as a result of the search should have been ruled inadmissible.

**Holding:** “A defendant possesses standing to challenge a search only when that defendant has a legally protected right to the expectation of privacy.” A two-pronged analysis is used to determine whether a reasonable expectation of privacy existed. First, it must be determined whether the defendant had a subjective expectation of privacy. If so, then that expectation must be determined to be one that society would recognize as reasonable under the circumstances.

Several factors are useful in deciding whether a privacy expectation is objectively reasonable. These include (1) whether the defendant had a property or possessory interest in the object; (2) whether he had complete dominion over the item and the right to exclude others; (3) whether he legitimately possessed the thing; (4) whether he took normal precautions usually taken by persons trying to preserve privacy; (5) whether he put the item to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy. The defendant in this case had a possessory interest in his luggage, but he had surrendered it to TSA for screening. Multiple signs at the airport warned passengers that they must be available to unlock any locked luggage with which they wished to travel.

Airport screening is conducted for two primary purposes: to prevent passengers from carrying weapons or explosives onto an aircraft, and to deter passengers from attempting to do so. Screening is widely recognized as being an effective way to realize these goals. Federal legislation authorizing the TSA “provides some indication that society recognizes that all passengers boarding aircraft in the United States are subject to a search of themselves and all property that they attempt to bring aboard the aircraft.” Random full searches of luggage help deter and prevent acts of terrorism with minimal embarrassment of passengers or intrusion.

“Any subjective belief a person might have that his baggage checked for transport aboard a passenger aircraft may not be searched ‘makes little sense in a post-9/11 world.’” The defendant’s claimed subjective expectation of privacy could not be recognized as one that society would view as reasonable. Because he lacked a reasonable expectation of privacy in his checked bag, the defendant had no standing to challenge the full search of that suitcase and its contents. The trial court’s denial of the defendant’s suppression motion was justified.

**SEARCH AND SEIZURE – SUSPECT HAD NO EXPECTATION OF PRIVACY IN THUMB DRIVE LEFT IN AREA ACCESSIBLE TO OTHERS, AND ITS SEARCH DID NOT VIOLATE COMPUTER SECURITY LAW.**

***Miller v. State*, 335 S.W.3d 847 (Tex. App. – Austin 2011)**

A police officer who wanted to use a computer in the department’s patrol room to print his daily activity report from the officer’s personal thumb drive, found another thumb drive already in the computer. Since it wasn’t marked with any identifying information and the room was accessible to other officers, employees of the department, animal-control personnel, law enforcement officers from other counties, and the media, the officer opened the files in the drive to determine who it belonged to.

Noticing pictures in a folder on the drive, the officer opened that folder and discovered a photograph of a naked adult woman. He thought this was pornographic and offensive, so the officer turned over the thumb drive to his lieutenant. The lieutenant, in turn, gave it to an assistant chief who searched the drive and discovered child pornography.

An investigator with the attorney general’s office learned that members of the department suspected the drive belonged to the defendant. In an interview with the investigator, the defendant gave consent for a “full forensics search” of the thumb drive and permission to search both his laptop and desktop computer at defendant’s home. During this stage of the investigation, the defendant was told he wasn’t under arrest; that he could leave at any time; did not have to talk with the investigators; and that he wasn’t under indictment. In a subsequent search, child pornography was found on the defendant’s thumb drive and his laptop computer.

In the view of the investigator following the interview, the defendant had a “pretty solid understanding of how computers work” and he used them at an “advanced level.” He also discovered that the defendant had left his thumb drive in the patrol room computer on three prior occasions. It usually was found by someone and placed in his inbox within a day or two, and the defendant agreed to let his lieutenant put the drive in his inbox if it was found.

Following his arrest, the defendant moved to suppress the evidence found on the thumb drive. At the suppression hearing, he testified that he had an expectation of privacy in the contents of the drive and considered the patrol room to be a private area.

The officer considered the drive to be his private property and had not given anyone permission to look through it. During the interview with the investigators, the defendant said, he “somewhat felt like” he was in custody because his weapon was taken from him prior to the interview and one of the interviewers became “very antagonistic and accusatory.” Consequently, he did not consider his consent to have been “truly free and voluntary.”

During cross-examination, the officer admitted that he had not been handcuffed during the interview or told that he was under arrest. He was not prevented from leaving, and he was not arrested until two or three months later. He conceded that the thumb drive was not kept in a locked case and was not password protected.

After acknowledging that he had read the department’s policy regarding computers, the defendant agreed that he knew he did not have a reasonable expectation of privacy in the department’s computer. At the conclusion of the suppression hearing, the trial judge held that the defendant lacked standing to complain about the search of his thumb drive, and denied the motion. After pleading guilty, the defendant appealed.

**Holding:** “An accused has standing to challenge the admission of evidence obtained by a governmental intrusion only if he had a ‘legitimate expectation of privacy’ in the place subject to intrusion by the government.” It is the defendant’s burden to prove that he had a legitimate expectation of privacy. By his conduct, the defendant did not exhibit an actual subjective expectation of privacy in his thumb drive. On three prior occasions, he had left it in the patrol room computer, an area accessible to many people.

No external markings identified the drive as belonging to the defendant. While he had somewhat advanced knowledge of computers, he did nothing to protect the contents of his thumb drive. Telling his lieutenant that he could return the drive to his inbox if it was found indicated that the defendant expected his co-workers to determine whether the drive belonged to him, presumably by opening it.

Even if the accused had a subjective expectation of privacy, it was not one that society would recognize as reasonable. Other than by having a property interest in the thumb drive, the defendant did not establish a privacy interest in the drive. He didn’t maintain control over the drive, or mark it as his, or attempt to password-protect it. He did leave it in the patrol room computer where it was accessible to others.

As to defendant’s consent to search his drive and home computers, that consent was voluntary and freely given. While some factors would support the defendant’s claim that he was in custody during the interview, no coercion, duress, or physical force was used or threatened during the interview. The defendant was not handcuffed, and he was told he could leave at any time. During the interview, he was allowed to go to his car and retrieve his reading glasses so he could sign the consent to search form. With 22 years of law enforcement experience and training, it was reasonable for the trial judge to find that the officer knew the legal consequences of consenting.

Finally, defendant contended that seizure of the evidence on his thumb drive violated Section 33.02(a) of the Texas Penal Code, which provides that it is a crime to access a computer without the

effective consent of the owner. This argument also failed because defendant effectively consented to others accessing his drive by leaving it in a publicly available computer.

### 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

A great deal of information can be gleaned from a person’s waste. Investigators in *Gabriel v. State* found evidence that the defendant was engaged in a fraudulent scheme by searching through the trash he had placed outside his residence for collection. It was unreasonable for him to expect privacy in what he had discarded, as it was unreasonable for him to think the contents of his UPS mail box would be private. The letters within the envelopes might be private, but the exterior of those envelopes was not.

It is well established that a “dog sniff” does not constitute a search because odors emanating from one’s vehicle are not private. The Eastland court of appeals confirmed that this 4<sup>th</sup> Amendment standard also applies to the Texas Constitution’s privacy guarantee.

**SEARCH AND SEIZURE - SEARCHING DEFENDANT'S GARBAGE AND PRIVATE MAIL BOX WITHOUT A WARRANT WAS NOT UNLAWFUL.**

***Gabriel v. State*, 290 S.W.3d 426 (Tex. App. - Houston 2009)**

The defendant participated in an elaborate scheme for defrauding a lender by filing multiple credit card applications with false names and social security numbers. He used various addresses, including postal boxes on these applications. Once he received the credit cards, the defendant would use them to make transactions with other false accounts, rarely paying the balances on the cards. When he did pay an account, he did so with a bad check. In all, the bank lost more than \$300,000 from these fraudulent accounts.

Analysts at the bank discovered this pattern of fraud involving forty suspect accounts, all linked by some common factors. All of them were associated with various addresses in Katy, Bedford, Dallas, and Fort Worth. Thirty of the accounts were linked to a single telephone number that had been used for balance inquiries. One of the accounts connected with the phone number was the defendant's, and his home address was obtained as a result. The principal investigator at the bank turned over this information to an investigator at the sheriff's office in one of the affected counties.

The detective, along with a U.S. Postal Inspector, went to a local UPS Store where two postal boxes involved in the accounts were located. One was registered to the defendant, and the other was registered to his wife. While there, the detective obtained the store manager's permission to make copies of the outside of the mail in the defendant's mail box. The addressees were the same ones listed on the fraudulent bank accounts. No mail was opened and, after it was copied, it was returned to the box.

Using information from the applications filed for the postal boxes, the investigator identified a local address of the defendant's residence. Surveillance was established at the residence for a month and the trash was picked up and inspected. In the trash, detectives found three shredded credit cards, including one that was connected with the fraud scheme. They also discovered numerous pre-approved credit card offers, letters of correspondence from credit card companies, and credit card statements sent to the names on the fraudulent accounts.

Following the trash pickup, the investigator prepared an affidavit for a search warrant for the residence and vehicles. Inside the house, they found identifying documents, checkbooks, credit cards, and notebooks with information about accounts, pin numbers, names, and social security numbers.

The defendant was charged with aggregated theft of \$200,000 or more. He moved to suppress on the grounds that the warrantless searches of his garbage and postal boxes violated his Fourth Amendment rights, and that the search warrant was not supported by probable cause. The trial court denied the defendant's motion and he was convicted. He appealed.

**Holding:** In order to challenge a search of a place or thing, a person must establish that he or she has a reasonable expectation of privacy that was allegedly violated by the search. In order to do this, he must show that he had an actual subjective expectation of privacy, and that his expectation was one that society would recognize as objectively reasonable. Individuals cannot reasonably claim a privacy expectation in garbage left for collection. Placing garbage on the curb

“for the express purpose of conveying it to a third party, the trash collector,” evidences that a person does not retain any privacy expectation in that trash.

Anyone could sort through a person’s garbage once it is set out for collection. The defendant did not take any special measures to ensure the privacy of his trash, and any expectation he might have had that the trash would remain private was not one that society would recognize as reasonable.

Regarding the postal boxes, it was conceded that there is no expectation of privacy in the exterior of an envelope while it is “in the stream of commerce.” The defendant argued, however, that, once it was placed in his postal box, he had a privacy expectation in the outside of his mail.

The defendant’s postal boxes could be opened from the outside only by the defendant or his wife by the use of a key. The back remained open to employees of The UPS Store, and the manager agreed to allow the officer to copy the envelopes in the defendant’s boxes. The rental form signed by the defendant at the time he rented the boxes designated the commercial mail receiving center as his authorized agent for the delivery of mail. As his agent, the mailing center had authority to consent to a search of the boxes of its customers, including that of the defendant.

Defendant’s principal argument regarding the lack of probable cause to issue the search warrant was that photographs of him taken by ATM cameras during fraudulent transactions were of such poor quality that the magistrate could not have identified him by that means. The other evidence obtained in the course of the investigation, and set forth in detail in the affidavit for the warrant, would have been enough without reliance on the photos, to establish probable cause.

The trial court’s denial of the defendant’s suppression motion was warranted. The defendant lacked any expectation of privacy in his trash. His duly authorized agent consented to the inspection of the contents of the defendant’s mailbox, and the warrant to search his residence was supported by probable cause.

## **SEARCH AND SEIZURE - DOG SNIFF FOR DRUGS DURING TRAFFIC STOP DOES NOT VIOLATE TEXAS CONSTITUTION.**

### ***Johnson v. State*, 323 S.W.3d 561 (Tex. App. - Eastland 2010)**

The defendant’s vehicle was stopped for failing to stop at a stop sign. An officer with a drug detection dog overheard the stop on the radio and drove to the scene. When he arrived, the officer who had made the traffic stop was running a check on the defendant’s driver’s license, so he had his dog sniff around the defendant’s vehicle. The dog alerted on the driver’s side door.

In a search of the vehicle, the officer found an open alcohol container, a rock of crack cocaine, and a spoon that tested positive for cocaine. The defendant moved to suppress all of this evidence, claiming that Article I, Section 9 of the Texas Constitution was violated by the dog sniff. The trial court denied the defendant’s suppression motion. Following his conviction by a jury, the defendant appealed the ruling on his motion.

**Holding:** The Supreme Court of the United States held in *Illinois v. Caballes*, 543 U.S. 405, that “[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth

Amendment.” The Texas Constitution contains in Article I, Section language similar to that in the Fourth Amendment.

The defendant argued that the Texas Constitution provides greater protection than the Fourth Amendment, a position that the Texas Court of Criminal Appeals previously has taken in some respects. That court later held that, while the Texas Constitution *can* afford greater protections, it is not necessarily the case that it does so.

A dog sniff during a valid traffic stop is unlike other kinds of search in that the procedure “discloses only the presence or absence of narcotics.” This limited reach of the sniff, therefore, does not violate the Fourth Amendment. Because the plain language of the Fourth Amendment and Article I, Section 9 is substantively the same, “a canine sniff during a valid traffic stop violates neither the Fourth Amendment nor Article I, Section 9 of the Texas Constitution.” It was not error for the trial court to deny the defendant’s suppression motion.

**COMMENT:** The holding of this case is relatively narrow and unremarkable. It should not be read, however, as a blanket approval of dog sniffs. While the procedure itself may not present a constitutional issue, the circumstances surrounding the sniff can result in the “search” being unreasonable and the evidence ruled inadmissible. The most common way this happens is that the stop itself is unlawful from its initiation, or that it becomes unlawful due to it being unduly prolonged. If there are insufficient grounds to believe an offense is being committed, or if the observed facts simply don’t meet the requirements for probable cause or reasonable suspicion to stop the driver, anything that follows - including a dog sniff and its fruits - arguably will be tainted by the unlawful stop. Even a valid traffic stop can last only for as long as required to achieve its purposes. That usually doesn’t include conducting a dog sniff. Once the necessary checks have been made and a citation has been written, holding the motorist in order to conduct a sniff search is likely to convert what began as a valid stop into an unlawful one.

## 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, but if it is not, the encounter is a “seizure” that usually requires one of the two levels of suspicion.

All of the circumstances known to an officer may be considered in establishing reasonable suspicion. In *Townes v. State*, a statement made by a probationer that a handgun was in a backpack in a room he controlled was sufficient to establish reasonable suspicion. The fact that the suspect was a probationer was a circumstance that provided support for the search of his locked bedroom.

A violation of an ordinance or a state law also can provide the requisite suspicion to support a seizure. The defendant in *State v. Patterson* was stopped because he was seen walking on the wrong side of a highway, while driving on the shoulder of a roadway justified the stop in *State v. \$5,500 in U.S. Currency*. In *Kelly v. State*, the traffic stop was supported by the defendant driving without a front license plate.

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. Such a tip supported the detention of a suspect who was said to be a gang member heading toward a school to shoot people in *Morgan v. State*. A citizen-informant's 911 call reporting a suspected drunk driver was sufficient to establish reasonable suspicion in *Bresee v. State*.

Otherwise innocent behavior can create reasonable suspicion if all of the circumstances known to the officer suggest criminal conduct. In *State v. Pina*, the suspect's nervousness and prison gang tattoo caused the officers to believe the man seen buying a gun at a gun show was actually a felon in possession of a firearm. The situation in *State v. Castleberry* began as a consensual encounter between the officers and men found behind a building late at night, but escalated into a detention when one of the men reached for his waistband. A driver in *Alleman v. State* was stopped for a traffic offense and would have been free to leave but for his pretending to talk on a cell phone and providing a suspicious story to the officer about the purpose of his travel. These observations provided reasonable suspicion that supported continued detention.

Even a brief detention is unlawful without the necessary reasonable suspicion. While seeing an offense can justify a detention, if the officer is mistaken about whether the law prohibits the suspect's actions, what otherwise would have been a lawful stop is actually unlawful and unreasonable. The officer in *Texas D.P.S. v. Axt* detained a drunken driver for criminal trespass when he pulled his car into the police department's restricted parking lot. Because the gate arms at the entrance of the lot were not lowered as usual, the court concluded the officer's detention for criminal trespass lacked reasonable suspicion.

The driver in *State v. Rothrock* accelerated rapidly out of a bar parking lot late at night in view of an officer. The ensuing traffic stop was not based on reasonable suspicion to believe the defendant was committing any offense. Similarly, in *State v. Ruelas* the traffic stop was held to be unlawful because what the officer believed to be an unlawful left turn was not actually an unlawful movement by the driver.

## **SEARCH AND SEIZURE - SEARCH OF PROBATIONER'S LOCKED BEDROOM SUPPORTED BY REASONABLE SUSPICION.**

### ***Townes v. State*, 293 S.W.3d 227 (Tex. App. - San Antonio 2009)**

A probation officer was told by a police detective that he had received information that the defendant, who was on misdemeanor probation, might have illegal drugs and weapons at his house. The terms of the defendant's probation prohibited him from possessing contraband and weapons, and included a condition that he would consent to a search of his person, residence or vehicle without prior notice or warrant.

The defendant was not at home when the probation officer and the detective went to his residence. Instead, the officers found the owner of the residence and told her that the defendant was on probation, and they requested permission to search for drugs, contraband, or weapons. She agreed. One bedroom, which the defendant used, was locked and only the defendant had a key. While they were at the residence, the officers received information that other officers had found the defendant and he was brought to the scene of the search.

While waiting with officers in the carport of the residence, the defendant was asked by the detective if he had a key to the room. One of the officers with the defendant brought the key to the detective after the defendant told the officers that there was a weapon inside a backpack in the bedroom. During this time, the defendant was not handcuffed, but he was not free to leave.

In the defendant's bedroom, the probation officer found a disassembled machine gun in a backpack. Another officer found a revolver underneath a television stand. The defendant admitted both weapons were his, and that the room was his bedroom.

The defendant was indicted for possession of a machine gun. He moved to suppress the evidence on the grounds that the warrantless search that uncovered the weapon was unlawful. The State responded that the search was justified by consent or, alternatively, that it was supported by reasonable suspicion. The trial court denied the defendant's motion; he pled guilty; and he was granted permission to appeal the ruling.

**Holding:** The defendant argued on appeal that he had not consented to the search of his room merely by accepting the conditions of probation. Previously, the Texas Court of Criminal Appeals held that a probation condition requiring the probationer to submit to a search at any time is "not freely and voluntarily given." Subsequent to that decision, however, the U.S. Supreme Court held in *U.S. v. Knights*, 534 U.S. 112, that the Fourth Amendment is not violated by searching a probationer's residence without a warrant when such a search is "reasonable." Because the defendant relied on the Fourth Amendment rather than the Texas Constitution, *Knights* is controlling on the issue.

Although the U.S. Supreme Court did not decide whether a probation condition regarding consent to search like the one that applied to the defendant constituted a waiver of Fourth Amendment rights, it upheld a similar search even without a finding of consent. The Court in *Knights* concluded that reasonable suspicion and the probation condition rendered the search of the probationer's home reasonable.

In this case, the defendant argued that the information the detective and probation officer had was not of proven reliability and could not supply reasonable suspicion. Despite any concerns about reliability, the statement the defendant made to officers while waiting in the carport about having a machine gun in his backpack was sufficient to establish reasonable suspicion.

Although the defendant contended that the probation condition was overbroad because it did not advance the goal of rehabilitation, rehabilitation is not the only purpose of probation. Probation also is designed to protect society. Because probationers are "more likely than the ordinary citizen to violate the law," restrictions may be imposed on them that do not apply to other citizens. The condition in this case is a reasonable one and does not violate the Fourth Amendment.

This search was for the purpose of determining whether the defendant had any illegal drugs or weapons, items the defendant was not allowed by his terms of probation to possess. The search was not undermined by having a law enforcement objective or being initiated by a police detective

rather than a probation officer. Reasonable suspicion justified the search of the defendant's residence, as did the terms of his probation. The evidence found in that search was properly admitted against him.

### **SEARCH AND SEIZURE - WALKING ON "HIGHWAY" WITH BACK TO TRAFFIC PROVIDES REASONABLE SUSPICION FOR DETENTION.**

#### ***State v. Patterson*, 291 S.W.3d 121 (Tex. App. - Amarillo 2009)**

A police officer saw the defendant walking on a roadway that had no sidewalks. The man was not facing on-coming traffic as he walked, but was walking with his back to the traffic in the lane closest to him. The officer stopped the man because he believed it was a violation of a municipal ordinance to walk with the traffic instead of against it. When asked if he had identification, the defendant could not produce any.

Because the officer was going to hold the defendant while he tried to determine his identity, and because he was going to place him in the back of his squad car, he patted down the man's clothing. The defendant also consented to a search of his pockets. Inside a pocket, the officer discovered marijuana.

The defendant moved to suppress the drugs found during the search. He claimed that the initial detention was unlawful because the officer lacked reasonable suspicion or probable cause to stop him for walking on the street. Specifically, he argued that the ordinance that was the basis for the stop did not apply to his conduct. The trial court agreed with the defendant that the ordinance was inapplicable, and it granted his suppression motion. The State appealed.

**Holding:** The ordinance in question provides that: "Where sidewalks are not provided any pedestrian walking along and upon a highway shall when possible walk only on the left side of the roadway or its shoulder facing approaching traffic." "Highway" is defined in the ordinance as "A highway divided into two (2) roadways by leaving an intervening space, or by a physical barrier, or by a clearly indicated dividing section between the two roadways." The roadway on which the defendant was walking had no such intervening space, physical barrier, or clearly indicated divider. Consequently, the trial court held that the ordinance did not apply to the defendant and the officer had no grounds for detaining him.

A Texas statute, however, makes it illegal to walk on a highway's surface with one's back to traffic when no sidewalk is available. Under state law, "highway" is defined as "the width between the boundary lines of a publicly maintained way any part of which is open to the public for vehicular travel." No mention is made in the state statute about intervening spaces, physical barriers, or clearly indicated dividers. While the defendant may not have violated the city's ordinance, the officer had reasonable suspicion or probable cause to believe he violated the Texas Transportation Code provision.

Traffic offenses can be the basis for a lawful stop. The subjective intent of the officer who makes such a stop is irrelevant. If there are legal grounds for the detention, it is objectively reasonable. "In other words, the subjective reasons uttered by the officer to legitimize the stop have no bearing on the outcome if the totality of the circumstances nonetheless would lead a police officer

to reasonably suspect that crime is afoot.” In this case, the trial judge expressly found that the defendant was walking on the right side of the roadway facing away from approaching traffic, and there were “no sidewalks, lane markings, or curbs on [the] portion” of the street. Sections 552.006(a)-(b) of the Transportation Code prohibit a pedestrian walking on a highway without a sidewalk from walking in the direction of traffic if it is possible to walk facing traffic.

A municipal ordinance may not conflict with a provision of state law unless the state statute expressly authorizes it. Since the city’s law in this case directly conflicts with the definition of “highway” in Section 541.302(5), the ordinance must give way to the state statute. Because the evidence established that the officer had reasonable suspicion or probable cause to believe the defendant was violating the Transportation Code when the man was seen walking on the wrong side of the roadway, the detention was lawful. The trial court should not have granted the defendant’s motion to suppress.

### **SEARCH AND SEIZURE - REASONABLE SUSPICION THAT SUSPECT DROVE ON SHOULDER OF HIGHWAY SUPPORTS INVESTIGATIVE DETENTION.**

#### ***State v. \$5,500 in U.S. Currency, 296 S.W.3d 696 (Tex. App. - El Paso 2009)***

A narcotics investigator learned from information received by a DEA agent that the defendant was suspected of trafficking in methamphetamine which he kept in a storage unit and sold from a tool box in the bed of his truck. The investigator watched the storage units and saw the suspect locking the door on one of them. He appeared “overly cautious” when he left.

A few days later, the officer saw the suspect at the storage unit again and followed him in an unmarked car. After the suspect committed two traffic offenses, including failure to maintain a single lane for driving on the shoulder of an exit, the investigator directed a marked unit to stop the suspect. When the officers determined that the suspect had an outstanding parole violation warrant, they arrested him and impounded the truck he had been driving. At the police station, the narcotics investigator inventoried the vehicle’s contents and found methamphetamine in the tool box, along with paraphernalia and scales and the keys to the storage units. A drug dog alerted on the storage units later that evening.

The investigator prepared an affidavit for a search warrant which included an “affidavit of qualifications” from the dog handler which was signed but not notarized. Despite this, a search warrant issued for the storage spaces. Stolen property, methamphetamine, marijuana, and \$5500 in cash were found inside.

The State petitioned to forfeit the money and some other items seized during the search. The defendant responded that there was no sufficient cause for the stop of the truck, that the impoundment was unlawful, and that the warrant affidavit was insufficient because the information about the drug dog handler’s qualifications was not sworn. After the trial court excluded parts of the warrant affidavit and found that the stop and inventory were unlawful, it denied the State’s petition for forfeiture. The State appealed the denial.

**Holding:** The burden in a forfeiture proceeding is on the State to prove by a preponderance of the evidence that the property is subject to seizure under the law. That includes showing probable

cause for the seizure, which requires proof of a “substantial connection” between the property and illegal activity. In this case, that burden is met if “the State proves that it is more reasonably probable than not that the seized currency was either intended for use in, or derived from, a violation of the offenses listed in the forfeiture statute.”

Regarding the traffic stop, a “reasonable basis” for believing a person has committed a traffic offense must exist. In this case, the investigator saw the defendant drive on the shoulder of the road and fail to maintain a single lane. Failure to maintain a single lane is a violation only when it is unsafe to move from one lane to another. Because the State offered no evidence that the defendant’s movement was unsafe, no violation of Transportation Code Section 545.060 was established. Section 545.058 of that code permits driving on a shoulder only under certain circumstances. There was no evidence that when the defendant drove on the shoulder while exiting, any of those circumstances existed. Consequently, it was reasonable for the officer to believe that the defendant violated the statute, and the traffic stop was lawful.

An inventory search may not be a “ruse for a general rummaging in order to discover incriminating evidence.” It must proceed from a lawful impoundment, and must be conducted pursuant to a standardized procedure. A standardized policy was in effect at the time of the impoundment of the defendant’s truck. Contrary to the trial court’s finding, there was no evidence that the truck was lawfully parked where it was stopped or that the defendant lived in the apartment complex where the parking lot was located. In the absence of such evidence, the impoundment could not be found to be unlawful.

The warrant affidavit was not insufficient, even with the disputed allegations removed. Although the investigator falsely stated that he had attached the dog handler’s affidavit to his own, his affidavit contained sufficient information from the tip about the suspect and its corroboration to support probable cause. Defendant’s connection to the storage units was confirmed by surveillance and papers found in the search of his truck. Even without the evidence of the dog sniff, there was reason to believe contraband would be found in the storage units when the warrant was executed. The trial court should not have denied forfeiture of the \$5500 on these grounds.

**SEARCH AND SEIZURE - DRIVING WITHOUT FRONT LICENSE PLATE  
PROVIDED REASONABLE SUSPICION FOR TRAFFIC STOP AND CONSENSUAL  
SEARCH THAT FOLLOWED.**

***Kelly v. State*, 331 S.W.3d 541 (Tex. App. - Houston 2011)**

Deputies were watching the defendant because they believed he was in possession of methamphetamine. When one of them saw a vehicle matching the description of defendant’s truck, and observed that the truck had no front license plate and the occupant was not wearing a seat belt, he radioed another deputy with the information. The second deputy spotted the truck and noticed the same violations. He stopped the vehicle at a service station. After the stop, the deputy noticed the driver reaching around inside the truck, and he suspected the defendant was trying to hide or retrieve something.

When the officer asked the driver for his license, he noticed the man was unusually nervous. A check revealed the suspect had a criminal history involving drugs, but no warrants were outstanding. After denying that he possessed drugs or other contraband, the driver asked for consent to search the vehicle. The defendant replied, "Sure. I don't have anything in there." During the search the suspect sat in the back of the patrol car with the windows down. He was not handcuffed or under arrest.

Several plastic bags were found in the truck containing methamphetamine and a cutting agent. When confronted with this information, the defendant admitted the drugs belonged to him. He then directed the deputies to additional methamphetamine hidden in the truck. Until all of the drugs were found, the defendant was not handcuffed or told he was under arrest.

In a hearing held on the defendant's suppression motion, he testified that he had been wearing a seat belt at the time of the stop but his truck did not have a front license plate. He also said he asked the deputy whether he had a choice when he was asked to consent to the search. The deputy replied, "Not really." According to the defendant, he then said, "Well, you know, I can't stop you, you know." The defendant also testified that he did not tell the deputies to stop searching. During the search, he said he was handcuffed and placed in the back of the patrol car. He did not believe he was free to leave.

Following the hearing, the trial judge denied defendant's suppression motion. She found that the defendant had consented to the search, but that he was in custody when asked about the additional methamphetamine found after the defendant was questioned. The defendant pled guilty. After being sentenced, he appealed the court's ruling on his suppression motion.

**Holding:** Consent is an exception to the requirement that a warrant be obtained prior to searching. In Texas, the State bears the burden of proving by clear and convincing evidence that the consent was voluntarily given. "A showing that a suspect has been warned that he does not have to consent to the search and has a right to refuse is of evidentiary value in determining whether a valid consent was given. But the absence of such information does not automatically render an accused's consent involuntary."

In this case, the officer testified that the defendant said he didn't have anything in the vehicle and the officer could search. Nothing in the circumstances of the stop suggest that his consent was coerced or given under duress. At the time of this incident, the defendant was fifty-six years old and had been in the penitentiary four times for dealing in methamphetamine. While the defendant argued that this was evidence he would not have allowed a search if he had been given a choice, the trial judge was free to believe the officers' testimony and disbelieve the defendant.

The defendant also contended that other factors, including the fact that the deputy had consent forms in his possession but did not use them, as reasons why the purported consent was not positive and unequivocal. While the trial court could have considered these, there was sufficient evidence of the defendant's voluntary consent to support the search.

It also was claimed that the officers were not justified in stopping and detaining the defendant. In particular, the defendant argued that the stop was a "pretext" and a "sham." In support of this position, he noted that the purpose of the stop for traffic offenses was abandoned immediately in order for the officers to conduct a drug investigation. Operating a motor vehicle on a public highway without a front license plate is an offense under Texas Transportation Code Section

502.404(a). Since the deputy observed the defendant driving on a highway without a front plate, he had reasonable suspicion to stop the defendant.

A traffic stop may last no longer than necessary to carry out its purpose. During the stop, officers may request information regarding the driver's license and registration, and may conduct a computer check of that information. "After the computer check is completed, and the officer learns that the driver has a valid license and no outstanding warrants and that the vehicle is not stolen, the traffic stop investigation is fully resolved."

Traffic stops may not be used to conduct a fishing expedition for evidence of a crime. The deputy in this case had received information about the defendant's possible involvement in drug offenses prior to the stop. He noted the defendant's furtive movements once he was stopped, as well as his nervousness. The officer's questions about drug possession were reasonably related to the reason for the stop, especially in light of his information about the defendant's suspected possession and the determination that he had a criminal history of drug offenses.

There was no undue prolongation of the traffic stop in order to obtain the defendant's consent. Once he did so, no further justification for the detention was needed as long as the consensual search continued. While no citation was issued and the officer did not ask for proof of insurance, the trial judge was free to consider or disregard these circumstances in determining reasonable suspicion.

Although the interrogation about whether additional drugs were in the truck was conducted in violation of *Miranda*, the trial court did not rely on the defendant's statement in deciding that the search was valid. Because the traffic stop was justified by the front license violation and the search was supported by defendant's voluntary consent, denial of the suppression motion was not error.

**SEARCH AND SEIZURE - 911 CALL REPORTING SUSPECTED DRUNK DRIVER  
WAS SUFFICIENT TO ESTABLISH REASONABLE SUSPICION FOR DETENTION,  
EVEN WITHOUT OFFICER'S OWN OBSERVATION.**

***Bresee v. State*, 2010 WL 3030970 (Tex. App. - San Antonio)**

A DPS trooper on patrol heard a dispatch report that a citizen had reported a person driving while intoxicated. The citizen had called 911 to report a public disturbance in a bar, that the person causing the disturbance was intoxicated and had left the bar driving a blue Saturn vehicle with a given license plate number. The caller also specified the road on which the suspect was driving and the direction of his travel.

The trooper spotted the vehicle matching the description given by the informant. He verified with the dispatcher that the citizen had left his name and address before turning on his lights and stopping the vehicle. When he approached the driver, the trooper smelled alcohol, an odor he described as moderate to strong. The defendant's eyes appeared glassy and he fumbled through his wallet looking for his license. This indicated to the officer that the driver was intoxicated.

The defendant tried to explain to the officer what had happened at the bar, and did not deny that he had been there. When the officer asked to look in his eyes, the man said he would not take any tests, but would provide a blood sample. He also refused a portable breath test.

After being arrested and charged with driving while intoxicated, the driver moved to suppress the evidence obtained during and after his stop. He argued that the officer lacked reasonable suspicion for the traffic stop because he had not observed the defendant violate any law. Based on the testimony he heard at the hearing, the trial judge denied the defendant's motion on the grounds that the caller's tip provided sufficient reasonable suspicion to support the detention. The defendant appealed.

**Holding:** "The factual basis for stopping a vehicle need not arise from the officer's personal observation but may be supplied by information acquired from another person." A stop may be based on information provided by a citizen-eyewitness if it is adequately corroborated by the officer. "Corroboration" "refers to whether the police officer, in light of the circumstances, confirms enough facts to reasonably conclude that the information given to him is reliable and a temporary detention is thus justified." A detailed description by the informant, for example, together with a statement that the event was witnessed firsthand, and when the informant is in a position to be held accountable for the truthfulness of his statement, is usually sufficiently reliable.

The officer in this case received the report of a drunk driver through the dispatcher. The citizen's report was that an intoxicated man had caused a disturbance at a bar and left the bar, driving a car that was described by color, make, and license number, heading south on a described highway. About eleven miles from the town where the incident occurred, the trooper saw the described vehicle driving on that highway. When he checked with the dispatcher, he was told that the citizen-informant had left his name and address.

Although the officer did not personally see any traffic violation committed by the defendant, the unsolicited information given by the 911 caller was sufficiently corroborated by the officers' observations. Moreover, the caller had identified himself to the dispatcher, thereby placing himself in a position to be held accountable for his information. Given this corroboration of the tip, the officer had reasonable suspicion to detain the defendant to determine whether he was driving while intoxicated.

The defendant also argued that, because the officer did not recall whether he smelled the odor of alcohol while the driver was inside the vehicle or outside, "it was unreasonable to force [the defendant] from his vehicle to perform a standardized field sobriety test" because an investigative detention must last no longer than necessary. At the suppression hearing, the trooper testified that he smelled alcohol after approaching the defendant's vehicle and explaining the reason for the stop. He noticed that the defendant was fumbling with his wallet, looking for his license, which he could not find even though it was right in front of him. The officer also noticed the glassy appearance of the defendant's eyes. Although the trooper could not "state exactly when" he had smelled alcohol, he said it was "during the initial conversation." Based on this testimony, the officer's detention of the driver was not unreasonable.

Considering the same factors that gave rise to reasonable suspicion, the trooper also had probable cause to arrest the defendant for driving while intoxicated. The suppression motion was properly denied.

**SEARCH AND SEIZURE - TIP THAT GANG MEMBERS WERE GOING TO A SCHOOL TO SHOOT PEOPLE JUSTIFIED INVESTIGATIVE DETENTION OF SUSPECT WHO WAS BELIEVED TO BE INVOLVED.**

***Morgan v. State*, 304 S.W.3d 861 (Tex. App. - Amarillo 2010)**

A police officer serving as a high school's liaison officer received information that the defendant, who was a former student at the school, and another person had been involved in a fight in the parking lot of the school's activity center. During this period, the high school was experiencing gang-related problems.

Shortly after this report, the officer was told by students that a second fight was going to occur off campus, and that the defendant would be fighting again. On one of the days the students said a fight would take place, two students were assaulted and one of them was injured seriously. The victims of this violence were uncooperative for fear of gang retaliation, but the officers heard rumors that a big gang-related fight would take place the next day after school. He was told that the defendant would be one of the people participating.

The day after the officer received this information he was told by students that gang members were coming to the school to shoot people, and that he would be shot if he tried to interfere. After verifying these reports with students, gang members, and administrators he considered to be credible, the officer met with school administrators and other police officers to tell them what he had learned and that weapons might be involved.

Various police units positioned themselves around the high school perimeter and the streets adjacent to the school. An assistant principal saw the defendant's SUV driving on a street next to the school and reported it to the school officer. Based on the timing of the defendant's appearance, his alleged involvement in the campus fight and subsequent assault, and the frequency with which he was mentioned as a participant in school violence, the officer radioed patrol officers and asked them to stop the defendant, identify him, and find out why he was in the area.

A local police officer parked on the perimeter saw the defendant's SUV and tried to stop it. The defendant did not stop immediately and was making furtive hand movements as he drove, as if he was trying to hide something or reach a weapon. When the SUV finally came to a stop, the officer removed the defendant from it and handcuffed and frisked him. The officer later said he did not arrest the suspect but merely detained him for investigation. He then searched the driver's side of the SUV for weapons and discovered a clear plastic baggie tucked between the driver's seat and the console. A marijuana cigarette was in the vehicle's door handle.

Prior to trial, the defendant moved to suppress the marijuana found in his SUV. When that motion was denied, he pled guilty and appealed the ruling.

**Holding:** The defendant's contention was that the officer stopped him improperly because he lacked reasonable suspicion. Although the defendant was handcuffed, that fact did not automatically convert the detention to an arrest, but a detention would not be valid unless reasonable suspicion existed. Before detaining a suspect, an officer must have reasonable suspicion to believe that the person is involved in criminal activity. Whether that detention is reasonable depends on the totality of circumstances and what facts were known to the officer that would warrant a belief that the suspect was engaged in some criminal activity, or had been, or soon will be.

A tip may provide the required suspicion if it is sufficiently reliable. “Corroborating information that can give rise to reasonable suspicion includes details that accurately predict the subject’s future behavior, link the subject to the alleged criminal activity, or give a particularized and objective reason to suspect the subject.” Citizen’s tips with detailed, firsthand information are considered more reliable, as are those in which a citizen puts himself in a position to be held accountable, is not connected with law enforcement or a paid informant, or the informant’s past relationship with law enforcement demonstrates his reliability.

In this case, the officer had information from students he considered reliable due to information they had provided in the past. These students identified the defendant as a participant in a fight in the school’s parking lot. They also told the officer about an upcoming fight in which the defendant would be involved, and on that day two students were assaulted. These same sources verified the rumors the officer had heard and the reports he had received from other students that gang members were coming to school to shoot people, including the officer if he got in the way. This information provided a credible threat of violence at the school involving weapons and the defendant.

The appearance of the defendant near the school at the time these predicted shootings might occur, together with the other information the officer had, gave him reasonable suspicion to request that the suspect be stopped and questioned. The defendant’s presence on the school’s perimeter on the day of the predicted violence justified a stop, even though he had not “crossed the line” onto school premises at the time. Since that detention was reasonable, and because the marijuana was found in plain view during the stop, the trial court properly denied the defendant’s suppression motion.

**SEARCH AND SEIZURE - NERVOUSNESS OF BUYER AT A GUN SHOW, ALONG WITH TATTOO SHOWING AFFILIATION WITH A PRISON GANG, PROVIDED REASONABLE SUSPICION THAT BUYER WAS FELON IN POSSESSION OF FIREARM.**

***State v. Pina*, 2010 WL 4946140 (Tex. App. - Dallas 2010)**

An ICE agent was working a gun show with other officers, looking for people illegally purchasing weapons. Officers notified the agent by radio that three persons were “acting in suspicious manners ... [with] tattoos indicative of gang affiliations ... purchasing weapons and ammunition.” The defendant, who was one of the three men, had a star tattoo on his neck, which was associated with the Tango Blast Gang. The agent knew that this gang was a prison gang, and that members had to have a conviction and have been to prison.

Two other officers and the agent approached the defendant as he was leaving the building. After identifying themselves and asking for defendant’s identification, they frisked him. The other two suspects either gave a false name and date of birth or said they did not have identification. When stopped, the defendant had a pistol case. It was determined that he previously had been convicted of a felony.

The defendant was arrested and charged with being in illegal possession of a firearm. He moved to suppress the evidence found when the officers stopped him, arguing that the initial detention was not based on reasonable suspicion or probable cause. After hearing the evidence, the trial court granted the defendant's suppression motion and ordered the evidence suppressed. The State appealed.

**Holding:** On appeal, the State contended that the trial court should not have suppressed the evidence against the defendant because the officers had objectively reasonable suspicion to believe the defendant was a felon in possession of a firearm at the time they detained him. Reasonable suspicion is determined from the totality of circumstances known to the officer at the moment of detention. When more than one officer is involved in the detention, the collective information known to them at the time of the stop or arrest is considered in determining the validity of the seizure.

During the course of a lawful detention, law enforcement officers may conduct a limited search of the suspect's outer clothing for weapons if they reasonably believe that the suspect is armed and dangerous to the officer or others. Although the trial judge in this case found the officers' testimony to be credible, the judge nevertheless held it was insufficient as a matter of law to establish reasonable suspicion.

The ICE agent testified that he knew that people who are not allowed to have guns often buy them at gun shows. An officer inside the show notified the agent and others of what he had seen. Because this information came from a "fellow law enforcement" officer, it was not from an anonymous informant. This information was that the defendant and two other men were buying guns and ammunition. They were acting suspiciously and seemed nervous. One of the men, the defendant, had a star tattoo, indicating affiliation with the Tango Blast Gang, which the agent took to mean that the defendant had been to prison for a prior conviction.

As the three men exited the show, two of them were seen carrying weapons; the defendant had a pistol case. Because the defendant was carrying that case, and because he had a star tattoo clearly visible on his neck, the officers gained reasonable suspicion to believe that the defendant was a felon in possession of a firearm. Given the facts and circumstances known to the officers at the time of the detention, it was not unreasonable for them to suspect the defendant was engaged in criminal conduct. Detaining him for further investigation was lawful and his suppression motion should have been denied.

**SEARCH AND SEIZURE – OFFICER'S ENCOUNTER WITH MEN FOUND BEHIND BUILDINGS IN A HIGH-CRIME AREA WAS CONSENSUAL, BUT REASONABLE SUSPICION DEVELOPED WHEN SUSPECT REACHED FOR HIS WAISTBAND.**

*State v. Castleberry*, 332 S.W.3d 460 (Tex. Crim. App. 2011)

A police officer on routine patrol in an area that had been experiencing a number of burglaries saw two men walking behind a closed business at around 3:00 a.m. The officer and his partner approached the men from opposite directions. Once contact was made, the officer asked the suspects for identification, which caused one of the men to reach for his waistband. Fearing that the

suspect was reaching for a weapon, the officer ordered him to put his hands above his head. Instead of complying with the order, the man again reached for his waistband. After the officer told the suspect to put his hands behind his back so he could be frisked, the man reached for his waistband a third time and threw a baggie containing cocaine.

When the officers first saw the men walking behind the building, neither one was carrying any burglary tools, and nothing about their appearance was out of the ordinary. It was determined after the baggie of cocaine was thrown down that the suspect was not carrying a weapon. The area where the stop occurred was lit by ambient light.

At the suppression hearing, the defendant testified that he was walking from a bar to his apartment, located about a block from where the stop was made. He described the area as “well lit enough where you could ... see what’s going on.” According to the defendant, the area was not dangerous at all, and that he was carrying a compact disc in his waistband. He also testified that there was quite a bit of foot traffic in the area at that time of day.

The trial judge granted the defendant’s motion to suppress the cocaine. He concluded that the defendant was detained when the officer ordered him to put his hands in the air, and that the officer had no reason to believe at that time the man was a threat to anyone. The State appealed from this ruling. The court of appeals agreed that, at the time of the stop, the defendant was simply walking in a public area and the officers had no information that would cause them to believe the men were a threat. This affirmance was appealed to the court of criminal appeals.

**Holding:** Consensual encounters require no objective justification. Investigatory detentions must be supported by reasonable suspicion, and arrests are based on probable cause. “When a police-citizen encounter is consensual, the Fourth Amendment and its protections are not implicated. An officer is just as free as anyone to stop and question a fellow citizen.” The citizen, of course, is also free to terminate a consensual encounter at any time and walk away from the officer. An officer may request identification from a citizen, but the citizen may ignore the request and refuse to provide identification or information. If the citizen does comply, that fact does not necessarily negate the consensual nature of the encounter.

Restraint of a citizen’s liberty transforms the consensual encounter into a seizure requiring an objective level of suspicion. “There is no bright-line rule to determine when an encounter becomes a seizure.” All of the circumstances surrounding the interaction must be taken into account, “but the officer’s conduct is the most important factor in determining whether a police-citizen interaction is a consensual encounter or a Fourth Amendment seizure.”

During an investigative detention, a limited pat down of the outer clothing of the detainee is allowed, but only if the officer reasonably suspects the person is armed. Reasonable inferences may be drawn by the officer in deciding whether reasonable suspicion exists. In this case, the initial contact between the officer and defendant was consensual. Even if the officer had, or believed he had, reasonable suspicion, a reasonable person in the defendant’s position would have felt free to decline the officer’s request for identification and information.

While most people would feel freer to ignore a request and walk away from an officer in the middle of the day in a public place where others are nearby, the defendant was only a block from his apartment when this encounter occurred. The area was lighted well enough that a person would not need a flashlight to “see what’s going on.” The defendant also testified that there was quite a bit of

foot traffic in the area, even at 3:00 a.m. Considering all of these circumstances, a reasonable person would have felt able to terminate the conversation and continue on his way.

Even if the waistband is a common place for carrying identification, and even if the defendant's actions were innocent, the officer was free to suspect from that conduct that the defendant was carrying a weapon. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."

When the officer first found the defendant behind a closed business in a high crime area, he did not see any weapons and had no reason to believe the man was a threat. It was reasonable for him to conclude, however, that the suspect was reaching for a weapon when he moved toward his waistband. The officer's initial approach was not based on reasonable suspicion, but it was consensual. No suspicion was required. By repeatedly reaching for his waistband in response to the officer's request for identification, the suspect created a reasonable belief that he was armed. That belief justified the officer's detention and frisk of the defendant. The trial court should have denied the suppression motion.

**SEARCH AND SEIZURE - DRIVER'S PRETENDING TO USE CELL PHONE DURING TRAFFIC STOP, ALONG WITH SMELL OF MARIJUANA AND UNSUPPORTED CLAIM OF BEING ON A BUSINESS TRIP JUSTIFIED CONTINUED DETENTION AND INVESTIGATION.**

***Alleman v. State*, 2011 WL 193496 (Tex. App. - Beaumont 2011)**

An officer saw the defendant's car being driven without a license plate displayed in the rear bracket. After stopping the car, he noticed a temporary tag was displayed in the back window which the officer could not read. He explained to the driver that in Texas a license plate must be properly displayed.

As soon as the defendant's car was stopped, he stepped out of the vehicle. The officer directed him to the rear of his vehicle and asked for his driver's license. While looking in the console, the driver opened a cell phone and held it to his ear, even though the officer did not hear the phone ring and noticed that the driver was not talking into the phone. The driver told the officer he was on a two-day business trip, but he had no luggage, paperwork, briefcase, or anything else to support his story. Further, he said he was wearing the same clothes for the entire trip.

As the driver was getting his insurance papers from the car, the officer smelled marijuana and saw what looked like marijuana residue on the floorboard. Due to these observations and the peculiar behavior of the driver and his story about the business trip, the officer asked for a consent to search the vehicle, which the defendant gave. When the officer did not find anything in the passenger compartment, he believed it likely he would find marijuana in the trunk. As he opened the trunk, the officer smelled the "overwhelming" odor of marijuana and arrested the driver. In a subsequent search of the trunk, the officer found a bag which he opened, finding two bags of marijuana and a pipe.

The defendant moved to suppress the evidence found in his vehicle on the grounds that the stop was pretextual and illegal, and that the search of the trunk exceeded any consent that he may have given. After his motion was denied, the defendant pled guilty and appealed the ruling.

**Holding:** The defendant's argument that the stop was illegal was based on a claimed lack of reasonable suspicion of a law violation, as well as the dissipation of any suspicion that existed initially once the officer saw that a temporary tag actually was displayed. Traffic stops amount to seizures under the Fourth Amendment. To be reasonable, the stop must be based on at least reasonable suspicion that the suspect is involved in criminal activity, including a traffic offense.

The Texas Transportation Code requires the display of two license plates, one at the front and one at the rear of the vehicle. Temporary tags must be legible. When the officer stopped the vehicle, it was because he did not see a tag on the rear. Once he made the stop and approached the car, he saw that a temporary tag was in the back window, but it was not legible, a violation of state law.

Based on his observations, the officer had probable cause to believe a traffic offense had been committed. During the stop, he saw several things that made him think another offense was occurring. These included the driver stepping out of his car almost immediately when he was stopped, pretending to be talking on the cell phone, and claiming to be on a business trip with no clothing or possessions to corroborate the claim. Additionally, the officer smelled marijuana and saw what appeared to be marijuana residue by the driver's side door. At the time all these observations were made, the officer was still engaged in the investigation of the traffic offense for which he had stopped the defendant.

The odor of marijuana gave the officer probable cause to search the vehicle. In a warrantless search of a vehicle based on probable cause, an officer may search every place a magistrate could authorize pursuant to a search warrant based on the facts known to the officer. In this case, the defendant also consented to the search and placed no limitation on the scope of that search. Failing to find marijuana in the passenger compartment, the officer believed it must be in the trunk. He had been told by the driver that a pipe was in the vehicle.

Once the trunk was opened, the officer smelled marijuana, opened a bag and found the contraband. It was reasonable under the circumstances for the officer to believe that the defendant's consent permitted him to open the bag in the trunk. Because the stop in this case was justified by an observed traffic violation, it was lawful. The subsequent search was based on probable cause developed during the stop, and on the defendant's voluntary consent.

## **SEARCH AND SEIZURE - REASONABLE SUSPICION LACKING TO SUPPORT STOP OF MOTORIST FOR SUSPECTED CRIME OF CRIMINAL TRESPASS.**

***Texas D.P.S. v. Axt*, 292 S.W.3d 736 (Tex. App. - Fort Worth 2009)**

The defendant was driving home from a bar in the early hours of the morning when he entered a parking lot for a police department. Access to the lot was controlled and usually restricted by yellow gate arms that blocked the entry and exit, but on that night the arms were raised. Two officers were standing near the department's sally port when the defendant drove past the sign indicating restricted access to the lot and through the raised gate. When they noticed that the

defendant appeared to be lost and had difficulty reversing and turning his car, the officers stepped in front of the vehicle and signaled for it to stop.

One of the officers smelled a strong odor of alcohol coming from the vehicle and the defendant admitted that he had just left a bar down the street. Another officer was summoned to conduct field sobriety tests of the defendant. When it was determined that the defendant was intoxicated, he was arrested and told the consequences of refusing a breath test. Nevertheless, the defendant refused the test and his license was suspended.

At an administrative hearing on the suspension, the administrative law judge found that reasonable suspicion existed to stop the vehicle, and that the defendant was operating a motor vehicle in a public place while intoxicated. The defendant appealed this ruling to a trial court, which reversed the decision, finding that there was no reasonable suspicion to justify the defendant's detention. DPS appealed.

**Holding:** “At a driver’s license suspension hearing, the Department bears the burden of proving 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 asked to submit to a breath or blood test; and (4) the person refused to submit ... the breath or blood specimen.” The Department argued that the trial court had reasonable suspicion to stop the defendant for the offense of criminal trespass because he entered the police department’s parking lot. It was necessary for the Department to prove, not that the crime was committed, but that the officer reasonably believed the crime was in progress.

Criminal trespass includes entry onto the property of another without the effective consent of the owner, and with notice that the entry was forbidden. To violate the statute, it must be shown that the actor intentionally, knowingly, or recklessly entered the property. Notice is required as a part of the offense to ensure that innocent trespass on another’s property does not make a person criminally responsible. This kind of notice is provided by “fencing or other enclosure obviously designed to exclude intruders” and “signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.” Without notice, there is no criminal trespass.

At the time the defendant drove into the police parking lot, access was not restricted. In order to have reasonable suspicion of criminal trespass, the officer who stopped the vehicle would have had to reasonably believe that the defendant was excluded from the lot, and that he had notice of that fact. At the administrative hearing, the officer who stopped the defendant testified that on the night in question, the arms to the entry and exit gates were up, “allowing public access to the parking lot.” He also testified that it appeared the defendant was turning his car around to leave, rather than trying to park in the lot.

The officer “could not have had a reasonable basis to believe that [the defendant] was committing criminal trespass in light of his testimony and his police report indicating that the parking lot’s open gates allowed public access on the night in question.” In the absence of other evidence that could produce such a belief, the officer’s stop of the defendant’s car was not justified. The administrative judge’s finding was not supported by the evidence, and the trial court’s reversal of that finding was correct.

**SEARCH AND SEIZURE - REASONABLE SUSPICION OF INTOXICATION NOT  
CREATED BY RAPIDLY PULLING OUT OF BAR PARKING LOT LATE AT NIGHT.**

***State v. Rothrock, 2010 WL 3064303 (Tex. App. - Austin)***

A DPS trooper saw the defendant's car pull out of the parking lot of a bar at 2:30 a.m. in a large cloud of dust. The officer made a U-turn and followed the defendant, observing him weave within his lane and briefly cross over the left fog line onto the shoulder. Because he suspected the defendant was intoxicated, and because he believed the driver had committed a traffic offense, the trooper signaled for him to stop. After being charged with DWI, the defendant moved to suppress any evidence on the grounds that no reasonable suspicion existed to justify the traffic stop. The trial judge granted the defendant's suppression motion. The State appealed.

**Holding:** When the trooper saw the defendant's car raising a large cloud of dust as it left the parking lot of a bar in the early morning hours, that fact suggested to the officer that something unusual, perhaps a fight, had occurred. By the time the officer turned around to follow and caught up with the defendant, about five minutes had passed. The officer then saw the truck weaving in its lane. In similar cases, courts have held that reasonable suspicion was not created by an officer observing a vehicle spinning its tires in a downtown location at night. "Lurching" a vehicle in similar circumstances also did not create reasonable suspicion.

"The only evidence - beyond unsubstantiated suspicions - the [the defendant] was intoxicated was his pulling out of a bar parking lot quickly and late at night." The trooper also testified to seeing the defendant's vehicle weaving in its lane, but the trial judge apparently did not credit this testimony as sufficient to create reasonable suspicion. The trial court was the sole judge of the credibility and demeanor of the officer. Since the court did not find the officer's testimony sufficient to establish the requisite suspicion that the driver was intoxicated, the State could not establish that the court abused its discretion in this finding.

The State also argued that the traffic stop was based on a violation observed by the trooper. "An officer may legally initiate a detention if he has a reasonable basis for suspecting that a person has committed a traffic offense," even if no traffic offense actually was committed. There was no dispute in this case that driving on an improved shoulder, in the absence of an approved purpose, is a traffic offense. The officer testified that the driver crossed over the left fog line and drive on the improved shoulder for several seconds.

Although a video purporting to show this violation was viewed by the court, it was impossible to determine whether the wheels of the defendant's car actually crossed the left fog line on the on-ramp to the highway or not. Without conclusive evidence to the contrary, the trial court was free to decide, as it did, that no traffic violation occurred. Unless a traffic violation was committed by the defendant, the stop of his vehicle was justified solely by whatever suspicion was generated from his rapid departure from the bar's parking area late at night. By itself, this observation was insufficient to justify a detention and the evidence obtained during the traffic stop was properly suppressed.

## SEARCH AND SEIZURE - EVIDENCE OF UNLAWFUL LEFT TURN DID NOT CREATE REASONABLE SUSPICION FOR TRAFFIC STOP.

### *State v. Ruelas, 327 S.W.3d 321 (Tex. App. - El Paso 2010)*

An officer on patrol saw a vehicle turn left at an intersection. He stopped the vehicle for failure to signal his intent to change lanes before changing lanes two times. As the officer approached the vehicle, he smelled alcohol coming from inside. The defendant had “glassy blood shot eyes and a dazed look on his face,” and he slurred his speech and mumbled.

When the driver admitted he had consumed three or four drinks, the officer asked him to get out of the vehicle. The odor of alcohol on the driver’s breath and person was strong. Field sobriety tests were conducted, which the defendant failed. He was arrested and charged with DWI.

Defendant’s suppression motion was based on the initial traffic stop. The defendant claimed the evidence showed that he had signaled his turn and, consequently, that the stop was not based on reasonable suspicion. The trial court found that the defendant had, in fact, signaled his left turn properly. The officer observed the defendant enter into the left lane before moving to the right lane without signaling, then move back to the left lane without signaling. This was contradicted by the defendant who testified that he turned through the center lane into the right lane.

The trial judge found the defendant’s testimony to be credible. Although the State argued that the defendant violated traffic laws by turning directly into the right lane, the court found that the officer failed to testify to that violation. As a result, the trial court granted the defendant’s suppression motion. The State appealed.

**Holding:** The trial judge is the sole trier of facts and judge of witnesses’ credibility at a suppression hearing. Once a defendant establishes that a search or seizure is constitutionally unreasonable, and once he establishes that the search or seizure was conducted without a warrant, the burden falls on the State to prove that it was reasonable despite the absence of a warrant.

At the suppression hearing, the officer testified that the defendant initially turned into the left lane, but moved into the far right lane without signaling. According to his testimony, the defendant then moved to the left lane, also without signaling. The officer said these lane changes both violated the transportation code.

Defendant’s testimony was that he made a left turn at the intersection after signaling. He “went into the right lane with his left turn signal on instead of staying in the left lane.” The defendant later explained that he “passed through” the left lane on his way to the right lane, using his left turn signal, but not his right signal. He also claimed he used his signals “a hundred percent of the time.”

In the trial judge’s findings of fact, he construed the defendant’s testimony as being “that he simply turned into the curb [right] lane on [the street] and never again changed lanes.” In effect, this testimony contradicted the officer’s because he denied making an improper lane change. When a witness testifies at a suppression hearing, the judge who has an opportunity to observe the demeanor of the witness and judge his credibility decides whether the testimony is truthful or not. In this case, the court resolved the credibility dispute between the officer and the defendant in favor of the defendant.

The State contended that the defendant nevertheless admitted to making an improper left turn by turning directly into the right lane rather than the inside lane. It was only after the defendant's testimony that he turned directly into the right lane that the officer testified such conduct violated state traffic laws.

The stop of the defendant's vehicle could not have been based on such a violation because the officer previously had testified that he stopped the defendant for changing lanes without signaling. At the time of the stop, he lacked reasonable suspicion that the defendant had committed a violation by turning directly into the right lane. The evidence supported the judge's suppression of the evidence on the grounds of an unlawful stop.

### 3. Probable Cause

As noted in subsection (2), a "seizure" within the meaning of the Fourth Amendment requires either reasonable suspicion or probable cause. Probable cause is the "gold standard" of suspicion; it is specifically mentioned within the Constitution, although it is not defined, and it supports a custodial arrest, a much more serious and prolonged kind of seizure than the temporary investigative detention that requires only reasonable suspicion.

In many respects, probable cause and reasonable suspicion are similar. Both are levels of suspicion, so this similarity makes sense. One of the ways in which the two are alike is in the fact that a tip from an informant may generate the suspicion necessary, but only if the tip and the person providing it are shown to be reliable. For example, in both *State v. Hoffman* and *Pace v. State*, the tip was held to be insufficient to establish probable cause because the informant was of unknown reliability. On the other hand, the court in *Perez v. State* allowed the evidence found during a search based on information from a known and proven informant.

Like reasonable suspicion, probable cause is evaluated by considering all of the circumstances known to the officer at the time of the arrest or search. Using that standard, the court in *Triana v. State* found that the facts did not support probable cause to enter a motel room simply because the defendant was believed to be a drug dealer and he and his girlfriend were staying in the room. There was insufficient evidence to believe drugs would be found in the room.

### **SEARCH AND SEIZURE - TIP FROM THIRD PARTY OF UNKNOWN RELIABILITY DOES NOT ESTABLISH PROBABLE CAUSE TO BELIEVE SUSPECT'S GIRLFRIEND WAS INVOLVED IN DRUG POSSESSION.**

#### ***State v. Hoffman*, 293 S.W.3d 633 (Tex. App. - San Antonio 2009)**

An officer learned from an informant that a person was selling drugs from a room in the rear of a certain motel. That information came, not from the informant's personal knowledge, but from a third party of unknown reliability.

While the suspect was in jail for possession of marijuana and DWLS, two investigators visited the motel room where he was living with his girlfriend. The room in which she was living

was provided to her because she worked at the motel. Acting without a warrant, the officers met with the motel manager and asked her to assist them. As they approached the room, the defendant came out of her room and appeared to speak with someone on the floor below over a railing outside the room.

When she saw the trio approaching, the woman stopped talking and rushed back into the room, leaving the door open. As the detectives rushed to the door, they heard the toilet flush inside the apartment. Despite having no information that the defendant possessed drugs, the officers entered the room and, when one of them saw the woman standing over the toilet, he pulled her away and removed a bag of crack cocaine in the toilet bowl. Marijuana also was found in the room, as was information identifying the boyfriend as a possible occupant.

The defendant was charged with possession of a controlled substance and tampering with evidence. She moved to suppress the evidence discovered in the officers' warrantless search of her room. Defendant's suppression motion was granted. The State appealed, arguing that the investigators had probable cause to search and that exigent circumstances excused obtaining a warrant.

**Holding:** Warrantless searches of residences are presumptively invalid, but exceptions to the warrant requirement exist. These include probable cause and exigent circumstances, voluntary consent, and search incident to lawful arrest. A "two-step" process is necessary when a warrantless search is based on probable cause and exigency. First, probable cause must exist to support the entry or search of a specific location. Secondly, "an exigency that requires an immediate entry to a particular place without a warrant must exist." Both of these requirements must be met in order to justify entry without a warrant. In this case, the State contended that the tip received by the officers produced probable cause, and that the defendant's quick entry into her apartment after making eye contact with the officers, coupled with the flushing sound, established exigent circumstances.

As to probable cause, the State argued that the officers knew the suspect lived at the motel, that he was a known drug dealer and/or user, and that the defendant was his girlfriend or common-law wife. The officers' training and experience, according to the State, led them to believe that the defendant's actions provided both probable cause and exigency. One officer testified, however, that they did not have probable cause to search when they went to the motel and hoped to gather information on which a warrant might issue. They knew the suspect was in jail at the time, and they had no information about the defendant possessing drugs.

Particularized probable cause was lacking in this case. Without probable cause to search the room or believe that the defendant possessed drugs, exigency was irrelevant. Intrusion into a private residence "is entitled to far greater Fourth Amendment protection" than a public place like a parking lot or nightclub. The information the officers had in this case came from an unidentified third party of unknown reliability regarding alleged criminal activity by the man in jail two days before.

Other than knowing that the defendant was dating their suspect, the investigators had no information concerning the defendant. Given the lack of support for probable cause, the entry and search of the defendant's residence was unlawful and the trial court acted within its discretion in granting the motion to suppress.

## SEARCH AND SEIZURE - TIP REGARDING PERSON SMOKING MARIJUANA AT RESIDENCE DOES NOT CREATE PROBABLE CAUSE TO ENTER RESIDENCE.

### *Pace v. State*, 318 S.W.3d 526 (Tex. App. - Beaumont)

An officer was dispatched to a residence for a welfare check because there were “children in the home possibly in danger.” The officer had been informed that the defendant had used marijuana at the location on other occasions, although none had been found there, and a three-month-old child was visiting at the house for the weekend.

The defendant answered the door, and the officer determined that the child would be returning soon with the defendant’s mother, the person who was leasing the residence. Instead of asking the defendant for permission to search the house, the officer called defendant’s mother directly and explained that he was there to conduct a welfare check. When he asked for permission to enter the house, she said, “sure.”

After the officer told the defendant that his mother had consented to a check of the house, the man said he wanted to put on a pair of boxers (he already was wearing shorts) and he tried to slam the door. Because the officer’s foot was in the door, it did not shut, and the officer saw the defendant running in the direction of his bedroom. The officer later testified that he followed the defendant for the officer’s safety and saw him go into his bedroom. When the officer entered the room, he saw the defendant attempting to dispose of marijuana.

At the hearing on defendant’s suppression motion, defendant’s mother testified that the officer had asked her if he could enter the house to check on its cleanliness and suitability for the baby. She denied giving consent for the officer to enter the defendant’s room, and said there was a lock on his bedroom door, and that she normally knocked when entering the room.

The defendant’s version of the events was that he had explained to the officer that the house was not his and he could not search it. The defendant said he walked to his room to put on boxers underneath his baggy shorts, and did not give permission for the officer to enter the room. The room had a lock and his mother knocked before entering. The defendant also testified that his mother did not allow any kind of smoking in the house. He kept marijuana behind a picture on his entertainment center and smoked marijuana pipes outside the house.

When the trial court denied the defendant’s suppression motion, which was based on the officer’s unlawful entry into the house, he pled guilty. The defendant then appealed the denial of his motion.

**Holding:** “Ordinarily an officer must have probable cause to enter the home without a warrant, and exigent circumstances must exist that justify an immediate need to enter.” Exigency is determined by examining the “degree of urgency and the amount of time necessary to obtain a warrant,” whether it is reasonable to believe evidence will be destroyed or removed, any danger to officers in securing the site, whether the suspect knows of the police presence, and “the ready destruction of the contraband.”

Although the officer was dispatched because someone had informed the police that a person was smoking marijuana in the presence of a child at the residence, the tip was anonymous. There was no indication of the source of the information, when the observation had been made, or whether the informant had been present when the incident occurred. No drugs had been found in the house

when the police previously had responded to calls at the residence, and they had no information about weapons in the home. Based on the totality of circumstances, probable cause did not exist to enter the residence. Further, the officer knew that the child was with the defendant's mother at the time of his entry. The fact that the defendant "retreated" into the residence "was legally insufficient to establish probable cause that the instrumentality of a crime or evidence of a crime would be found in the residence."

Voluntary consent would have allowed the entry in the absence of probable cause or a warrant. A third-party may give such consent if that person possesses common authority over the premises. The Supreme Court held in *Georgia v. Randolph*, however, that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." The defendant was present and had authority over his bedroom. Also, he told the officer he could not search the house. When the officer entered, it was with the consent of defendant's mother. She had told the officer, though, that defendant's bedroom had a lock and she knocked before entering, so her consent did not extend to that room.

Officer safety might justify a cursory inspection or protective sweep of the premises, but only when reasonable suspicion exists that a person is on the premises who poses a danger. Such sweeps are allowed only of areas where persons may hide. Although the officer did not have consent to enter the defendant's room, "the quickly evolving facts indicated to the officer that [the defendant] presented a potential danger." The trial court was the sole judge of the officer's testimony and, while it might have found otherwise, it determined that it was reasonable for the officer to feel he was in danger. Once the officer followed the defendant into his bedroom to conduct a cursory inspection for his safety, he was lawfully in position to see the marijuana in plain view. The trial court's denial of the suppression motion was not improper.

**SEARCH AND SEIZURE - INFORMATION RECEIVED FROM RELIABLE  
INFORMANT PRODUCES PROBABLE CAUSE TO SEARCH VEHICLE WITHOUT A  
WARRANT.**

***Perez v. State*, 295 S.W.3d 681 (Tex. App. - Amarillo 2009)**

A confidential informant gave a deputy sheriff information that the defendant and another woman would be driving from Hobbs, New Mexico to Denver City, Texas. According to the tip, the two would be driving a maroon Ford Explorer belonging to the defendant and they would have an ounce to an ounce-and-a-half of cocaine. The deputy, who was not on duty, contacted a DPS trooper and asked him to stop the vehicle. As the trooper was waiting at the county line, the described vehicle passed him. He recognized one of women in the vehicle as a person named in the tip, and they were coming from the direction of Hobbs.

After the trooper stopped the vehicle, the deputy arrived on the scene. Both women were already outside the Explorer. Defendant's companion gave consent to search the vehicle, but no contraband was found until the deputy opened a black purse in the front of the car. Inside the purse, the deputy found identification belonging to the defendant, \$1,350 in cash, and about an ounce of

cocaine. The defendant was charged with possession of cocaine. She filed a suppression motion, arguing that there was no probable cause or a warrant and the evidence should be excluded. The trial judge denied her motion and a jury convicted her of the offense. She appealed.

**Holding:** One of the exceptions to the warrant requirement is the “vehicle exception.” A warrantless search of a vehicle under this exception must be based on probable cause to believe the vehicle contains contraband or evidence of crime. The totality of circumstances is reviewed to determine whether probable cause exists. “Probable cause exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” These “facts and circumstances” include what is known personally to law enforcement and what is known from a “reasonably trustworthy” source.

The deputy had known the informant for a year and a half when he received the tip that she had just left Hobbs, New Mexico. The informant who provided the information had provided other reliable information on five previous occasions. By observation, the trooper and deputy were able to confirm that the defendant was headed toward Denver City; she was traveling with the woman named by the informant; the defendant was in a maroon Ford Explorer belonging to the other woman; and the defendant was traveling from Hobbs.

The defendant complained on appeal that the source of the defendant’s information was not known to the officers. “When the informant has shown to be reliable in the past, the quality of the information, then the details of how the informant came to acquire the information about drugs, the quantity of the information, need not be as detailed.” This informant had been reliable in the past, gave detailed information, and the details were verified. The tip was delivered just moments after the defendant had left Hobbs. The totality of circumstances established probable cause to believe evidence of a crime would be found in the vehicle.

While the defendant also argued that consent given to search the vehicle did not permit a search of the purse found inside it, that issue has been decided against the defendant’s position in other cases. This case, however, did not turn on consent. Rather, the warrantless search was supported by the vehicle exception based on probable cause.

**SEARCH AND SEIZURE - PROBABLE CAUSE DID NOT SUPPORT WARRANTLESS ENTRY INTO MOTEL ROOM WHERE OCCUPANT WHO SAW OFFICERS APPROACHING STOPPED A CONVERSATION, ENTERED THE ROOM, AND FLUSHED THE TOILET.**

*Triana v. State*, 293 S.W.3d 224 (Tex. App. - San Antonio 2009)

The defendant, who was believed to be selling drugs from his hotel room, was arrested for driving with a suspended license and possession of marijuana. While he was still in jail, two investigators went to his hotel room where he had been living with his girlfriend. As the officers approached the room, they saw the defendant’s girlfriend standing outside the room talking with someone. When she saw the officers, she abruptly stopped her conversation and went inside the room, leaving the door open.

The officers heard the toilet flushing inside the room as they neared the door, and they entered immediately and pulled a bag of crack cocaine from the toilet. Marijuana also was found in the room, as was material that identified the defendant as an occupant.

The defendant was indicted for possession of cocaine. He moved to suppress the evidence seized in the warrantless entry and search of his room. After a hearing, the trial court granted the motion and ruled the evidence inadmissible. The State appealed.

**Holding:** A search of a residence without a warrant is presumptively invalid. Some circumstances, however, justify a warrantless search. These include cases in which probable cause exists and exigent circumstances prevent police from obtaining a warrant. When exigent circumstances are argued to dispense with the need for a warrant, courts engage in a two-step review process. First, probable cause must exist to enter or search a specific location. Probable cause for this purpose exists “when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality ... or evidence of a crime will be found.” The second inquiry is whether “an exigency that requires an immediate entry to a particular place without a warrant” exists. Both of these requirements must be met; if either is lacking, the warrantless entry and search is unreasonable.

In this case, the State argued that the investigators had probable cause based on information received from a confidential informant, reinforced by the woman’s quick entrance into the room when she saw the officers, and the sound of a flushing toilet which followed her entry. In addition to these facts, the State contended that the awareness of the officers that the defendant lived at the hotel room, that he was known to use and/or traffic in drugs, and that the woman was his girlfriend, provided the necessary exigent circumstances. Training and experience also led the officers to believe that they needed to act quickly. One of the investigators testified, however, that they did not have probable cause to search the room when they arrived at the hotel. Instead, they were hoping to gather information that would allow them to apply for a search warrant.

It was the defendant, not his girlfriend, who was suspected of dealing in drugs. No specific information known to the officers suggested that the woman possessed drugs, and they knew the defendant already was in jail at the time they went to the hotel. In the absence of information that created probable cause to believe drugs were present in the room, or that the girlfriend possessed drugs, the exception to the warrant requirement could not be established. Without probable cause, it was irrelevant whether exigent circumstances existed. The trial court’s ruling on the defendant’s suppression motion was supported by the evidence presented at the hearing. Exclusion of the evidence seized from the room was justified.

**COMMENT:** This opinion is unremarkable, but it serves as a reminder that “exigency” is not enough by itself to support a search or entry without a warrant. While some exceptions to the warrant requirement do not require probable cause, the exigency exception does. If the officers could not get a warrant for the hotel room before arriving on the scene, they could not enter without a warrant just because some exigency might present itself, unless additional information was gathered prior to the entry that would establish probable cause. If they had known, for example, that the girlfriend was in possession of drugs, or that she was a party to drug dealing that was occurring at the location, then exigency might have excused a warrant. But in the absence of probable cause to believe she was committing a crime in the room, their warrantless entry was insupportable.

[**Author’s note:** The case against the girlfriend was decided in a similar fashion by the San Antonio court of appeals in *State v. Hoffman*, described above in this subsection.]

#### 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 *Wisembaker v. State*, a case in which an officer approached the suspect’s front door, then followed a sign directing visitors to the “other door” around back. Once in the back yard, he could see the resident holding a marijuana pipe, and he could smell burnt marijuana. It was immediately apparent that the officer had evidence of a crime before him.

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 - PLAIN VIEW CREATES PROBABLE CAUSE AND EXIGENCY PERMITS WARRANTLESS ENTRY INTO HOUSE TO ARREST FOR POSSESSION OF MARIJUANA.**

##### ***Wisembaker v. State*, 311 S.W.3d 57 (Tex. App. - San Antonio 2010)**

A police officer was dispatched to a residence because a neighbor had called the police to report that the defendant and friends were smoking marijuana in the defendant’s house. When he arrived, the officer was told by the informant that the defendant and his friends were “always” smoking marijuana, and that the officer could see them if he looked through a hole in the privacy fence in the backyard. When the officer looked through the fence, he saw the defendant inside the

house holding a “marijuana pipe.” Although he did not smell any marijuana odor and did not see the defendant actually use the pipe, the officer decided to “knock and talk” to the defendant.

On the front door of the defendant’s house, the officer found a sign that read, “Go around, use the other door.” The officer, accompanied by other police officers, walked around the side of the house to the patio door. This was the same door through which the officer earlier had seen the defendant with the marijuana pipe.

As the officer looked into the house, he saw the defendant on the couch with the pipe in his hand and a “thick” cloud of smoke hanging in the room. He also smelled the odor of burnt marijuana coming from inside. When the officer made eye contact with the defendant, the suspect looked startled and appeared to be trying either to hide the pipe or get up from the couch. At that point, the officer opened the patio door and stepped inside where he found a bag of marijuana, pipes, and other paraphernalia on a coffee table.

The defendant moved to suppress the evidence seized during the officer’s entry, but that motion was denied. After pleading guilty, the defendant appealed the trial court’s ruling on the suppression motion, claiming that the warrantless entry was not justified by exigent circumstances. He did not contend that the officer lacked probable cause.

**Holding:** In this case, the tip came from a citizen who identified himself and spoke with the officer at the scene. His information was corroborated by the officer’s personal observations when he looked through the hole in the fence and saw the defendant holding a marijuana pipe. Taken together, this information produced probable cause to believe the defendant was in possession of drug paraphernalia.

The officers were free to use the sidewalk leading up to the front door of the defendant’s house in an effort to contact him. When they found the sign directing them to use the “other door,” it was reasonable to follow the sidewalk around the side of the house to the patio door in back. Once the officer was standing outside the patio door, he could see the defendant holding a marijuana pipe, smell burnt marijuana, and see a cloud of smoke inside the house. These observations created probable cause to believe the occupant was in possession of a controlled substance, and that he was smoking it.

The officer also could believe from his observations that the evidence was being destroyed by being smoked. The exigency created by the situation, combined with probable cause to search, made the entry into the defendant’s residence without a warrant reasonable. Once inside, the officers saw in plain view on the table additional evidence of the crime. The suppression motion was properly denied.

**COMMENT:** This case nicely illustrates an important distinction between plain view and the right to enter without a warrant. If the officer in this case had seen marijuana or paraphernalia in plain view inside the house but no one had been inside to see the officer, there would have been no circumstance permitting entry without a warrant. It was only because the officer saw the defendant, and vice versa, and because the contraband (evidence of the crime) was being destroyed by smoking, that the officer had the right to make a warrantless entry without consent. There was no real question about whether probable cause existed, even before the officer walked around the house to the patio door. But probable cause gained by plain view does not, by itself, justify entering the residence without a warrant.

## 2. 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. The defendant in *Ferguson v. State*, received such warnings and signed a written consent form. His consent to search his vehicle was found to be voluntary in spite of it being impounded at the time.

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.

*Lemons v. State* is illustrative of “unlimited consent” and the scope allowed by such consent. The officers in *Valtierra v. State*, however, misconstrued the scope of consent to enter a residence. While they were authorized to enter, that consent did not permit any further exploration of the premises.

Consent may be implied from a person’s statements or actions. In *Thomas v. State*, the words and body movement of a suspect reasonably could have been interpreted by the officer as an invitation to search. Consequently, the court found the scope of the search was supported by his voluntary consent.

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.” *Valdez v. State* is an example of apparent authority supporting the consent.

An issue that has arisen with increasing frequency in recent years relates to the voluntariness of consent obtained during a traffic stop after the purpose of the stop has been achieved. The

argument being made is that requesting consent after the necessary steps have been taken to conclude the detention unduly prolongs the stop and transforms a detention based on reasonable suspicion or probable cause into an unlawful detention. That unlawful detention, in turn, taints any consent that is obtained subsequently and renders it involuntary. In principle, this argument is sound, but whether the detention is unduly prolonged without justification depends on whether the motorist reasonably feels free to leave once the traffic stop has concluded. The court in *Glenn v. State* dealt with this issue and determined that, under the facts of that case, the stop was not impermissibly prolonged.

### **SEARCH AND SEIZURE - CONSENT TO SEARCH VEHICLE ALREADY IMPOUNDED NOT INVOLUNTARY.**

#### ***Ferguson v. State*, 2010 WL 4013737 (Tex. App. - Houston 2010)**

The defendant and another man got into an argument over money that resulted in the defendant shooting and killing the victim. A short time later, the defendant was seen at the same apartments where the shooting occurred by a worker who previously had issued him multiple trespass warnings. Once police arrived, the defendant was arrested for trespassing. The officer asked if the man had a vehicle parked at the complex that should be towed. Because he had previously hidden the murder weapon in the vehicle, the defendant told the officer his vehicle was in the shop and lied about the make of his vehicle. Eventually, the officer found the defendant's vehicle parked at some apartments across the street from the ones where the defendant was arrested. The vehicle was impounded.

The next day, a homicide investigator interviewed the defendant about the shooting. After the defendant confessed to killing the victim, he gave written consent to search his car, and told the officer where to find the weapon in the vehicle. A nine-millimeter pistol was found in defendant's car where he said it would be.

The defendant moved to suppress the weapon on the grounds that the vehicle was searched unlawfully because the officer had only a "hunch" that the car contained evidence of the homicide. He argued that the impoundment of the vehicle was illegal, and that his consent was not voluntary because it was obtained after the impoundment, essentially leaving him no choice but to consent. The trial court denied defendant's motion. He was convicted by a jury, and he appealed.

**Holding:** The defendant's first argument was that his car was impounded unlawfully because it was legally parked in a private parking lot across the street from where he was arrested for trespassing. At the time of the impoundment, the police officers involved said they believed they had no probable cause to seize the car. The defendant argued that the officers had no more than a suspicion that the vehicle might contain criminal evidence, so the seizure was unlawful. In response, the State contended that the testimony of the officers about probable cause did not settle the issue because their subjective beliefs were immaterial. Instead, the State asserted, the facts known to the police about the crime that had occurred, and that the defendant had lied about the location and make of his car, produced probable cause to believe it contained evidence.

Whether probable cause existed or not, the defendant gave consent for the search. Voluntary consent sufficiently attenuated any taint from the seizure of the vehicle, even if it was illegal. The

defendant suggested that his consent was involuntary because the unlawful impoundment “left him with no real option other than giving consent to a search of his car.” No other evidence of threats or coercion was introduced.

When the consent form was signed, the defendant already had admitted to shooting the deceased and had told the investigator where the gun was located. He had sufficient maturity and education to make such a decision, and he had been properly warned of his rights, and had waived them. Given the testimony of the officer about the circumstances under which the defendant was questioned, the trial judge reasonably could have concluded that consent was given freely and voluntarily. Contrary to the defendant’s later assertion, the impoundment of his car appears not to have played any part in the decision to consent.

No mention was made during the recorded statement that the car had been impounded. Although the consent form indicated that the car was located at the police impound lot, there was no evidence that the defendant knew the vehicle had been taken there until he signed the consent form, after he orally had consented to the search.

The pistol was not obtained from an unlawful seizure of the defendant’s car, or from exploitation of that seizure. Instead, it was discovered in a lawful search based on voluntary consent given by the defendant after he had confessed. Denial of the suppression motion was justified by the evidence.

### **SEARCH AND SEIZURE - HANDING OVER CELL PHONE IN RESPONSE TO OFFICER’S REQUEST TO EXAMINE IT AMOUNTS TO CONSENT TO VIEW PHOTOS STORED ON PHONE.**

#### ***Lemons v. State, 298 S.W.3d (Tex. App. - Tyler 2009)***

The father of a fourteen-year-old girl called the police after being told that his daughter was seen lying in the defendant’s bed. Officers interviewed the defendant at his work place. While questioning him, one of the officers asked whether he had been calling the girl. The officer then asked if he could see the defendant’s cell phone.

Defendant’s response to this request was to hand over the telephone. The officer looked at the calling information on the phone, then pressed the “camera” button. He saw several photos stored on the phone, including a nude picture of the girl which the defendant admitted he had taken at a local hotel.

The defendant was arrested and charged with indecency with a child and possession of child pornography. He moved to suppress the photos on his cell phone, claiming that the officers exceeded the scope of any consent he had given when they looked at the pictures stored in the phone’s memory. The trial court denied the defendant’s suppression motion. The photos were admitted in evidence at his trial, and the defendant was convicted on both charges. He appealed.

**Holding:** In order to be valid, consent to search must be “positive and unequivocal and must not be the product of duress or coercion, either express or implied.” The State must prove the voluntariness of any consent to search by clear and convincing evidence.

The scope of any search conducted pursuant to consent is limited by the terms of that consent. “The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of objective reasonableness, i.e., what the typical reasonable person would have understood from the exchange between the officer and the suspect.” An open-ended consent does not limit the scope of the search. “Thus, for example, when an officer specifically asks a suspect if he can search a vehicle for illegal contraband, and the suspect answers affirmatively, a reasonable person would construe the consent to extend to any area of the vehicle in which such objects could be concealed.”

A person has an expectation of privacy in the information contained on a cell phone. When the officer asked to examine the defendant’s phone, the defendant handed over his telephone. There was no indication that the defendant wished to limit the examination of the phone. “Instead, it is reasonable to conclude that [the defendant’s] surrender ... of his cellular telephone in response to [the officer’s] open ended request implied [the defendant’s] grant of equally unbridled consent ... to examine the phone and the information contained therein.” Moreover, the defendant did not object when the officer continued to search.

The defendant’s response to the officer’s request amounted to an “unlimited consent.” It was not an abuse of discretion for the trial court to find that the State had proven by clear and convincing evidence that consent had been given, and that the search that revealed the photos in question was within the scope of that consent.

**COMMENT:** It can be difficult to determine the scope of consent from ambiguous statements made by citizens and law enforcement officers. Clear requests about what is to be searched, and clear responses, avoid many of the challenges that might otherwise result.

### **SEARCH AND SEIZURE - CONSENT TO ENTER APARTMENT DID NOT PERMIT OFFICER TO FOLLOW OCCUPANT DOWN HALL TOWARD BATHROOM.**

*Valtierra v. State*, 293 S.W.3d 697 (Tex. App. - San Antonio 2009), *rev’d and remanded*, 310 S.W.3d 442 (Tex. Crim. App. 2010)

Officers received information that a thirteen-year-old runaway was living in a certain apartment. One of them recalled seeing a young girl at the apartment when he had contacted two men at the apartment during the prior week. The two officers decided to go to the apartment for a “knock and talk.” When they arrived, a man opened the door. An officer asked if he could come inside and speak with the girl, and the man consented. Both officers later testified that they did not enter until they received permission.

Once inside, another man walked out of a bedroom on the left side of the hallway and into the living room where the first man and the officers were standing. One of the officers asked the man who had answered the door where the girl was, and whether he could speak to her. According to the officer, the man said she was in the shower and the officer could talk to her. However, a recording of the conversation reflected that the man replied, “Ah, yes. She’ll come out in a minute. Erica, they’re calling you.”

As the officer walked down the hallway toward the bathroom, he passed the bedroom and saw two men inside the room throw some items under the bed. After ordering the men out of the

room, the officers conducted what they called a “protective sweep” of the room and found drug paraphernalia. The evidence they recovered was used to obtain a search warrant that eventually led to the discovery of drugs, paraphernalia, and a stolen firearm. The man who had admitted the officers to the house was indicted for possession of cocaine, and he moved to suppress the evidence, claiming it was the product of a warrantless, non-consensual search of the residence.

The trial court conducted a hearing on the motion and denied it. Subsequently, the defendant pled guilty and appealed the trial court’s ruling on his suppression motion.

**Holding:** A warrantless entry by the police into an individual’s home is presumed to be unreasonable. Voluntary consent to enter, however, is an exception to this general rule. When the State contends that consent existed, it bears the burden of proving by clear and convincing evidence that the consent existed, and that it was voluntary.

The totality of circumstances determine whether consent was voluntary. Such factors as the age of the accused, his or her level of education and intelligence, whether warnings were given, the length of any detention, repetitiveness of questioning, and whether any physical measures were used, are important in determining voluntariness.

According to the defendant in this case, the officer who knocked on the door entered the apartment by sticking his head about four inches inside the apartment doorway and calling out of the girl before asking for permission to enter. He also claimed the officer walked down the hallway toward the bathroom while calling for the girl, after being told that she was taking a shower.

The officer testified, and the transcript of the recording made through a body microphone the officer was wearing, reflected, that the officer asked for permission to enter and the defendant agreed. The officer also testified that he did not break the plane of the doorway until he had received permission. These pieces of evidence supported the trial court’s finding that the officer entered the apartment with consent. “An accused’s consent to admit a police officer into his residence, however, does not infer (sic) an accused’s consent to allow that officer to further proceed into the residence or consent to search the residence.” The trial judge did not make an express finding that the officer had consent to walk down the hallway or go further into the apartment.

In this instance, the record of testimony did not support an implied finding that the State proved by clear and convincing evidence that the defendant consented to the officer proceeding down the hallway. Although the officer testified that he had consent from the defendant to go down the hall to talk with the girl, the transcript from the audio recording reflected that the officer never asked for consent to walk down the hallway. The defendant said, “She’ll come out in a minute,” a statement that indicated the officers should wait for her to come out of the bathroom. Testimony from the officer alone cannot support the trial judge’s implied finding of consent when the recording contradicted that evidence.

The State also contended that the officer was entitled to conduct a protective sweep of the premises. A protective sweep is quick and limited to a “cursory visual inspection of those places in which a person might be hiding” and present a threat to an officer. Reasonable suspicion must exist to believe a person may be present in the place that the officer looks.

Nothing in the officer’s testimony suggested any reason for conducting a protective sweep down the hallway of the apartment. Rather, he said he walked further into the apartment to contact the possible runaway, and not for his safety. The other officer repeatedly testified that he did not feel his safety was in jeopardy, nor that he was in danger.

Exigency also was suggested by the State as a justification for the warrantless entry, but to support this theory, the State was required to show that probable cause existed and the immediate need to act to protect or preserve life or prevent serious injury made it impractical to obtain a warrant. No warrant was obtained before the officers went to the apartment; therefore, any exigency would have to have arisen after the officers entered the residence. Nothing happened or was learned by the officers in the short time they were inside the apartment to support a reasonable belief that an exigency existed.

In the absence of valid consent to intrude further into the apartment, and without evidence to support a protective sweep or exigency circumstances, there was no justification for the officer to walk down the hallway. Since he had no reason for being in a position to see the two men putting items under the bed in the bedroom, the defendant's suppression motion should have been granted. **COMMENT:** This opinion restates the "scope" limitation on consent. Courts tend to construe consent in a somewhat limited fashion. If the words or actions used to convey consent would not reasonable be interpreted to extend to certain areas, searching beyond the limits of reasonable interpretation is not permitted without a warrant. This is especially true in residences. As in this case, when a person agrees to let the police enter, that agreement does not necessarily carry with it permission to enter into any and all parts of the home. If there is any ambiguity about the scope of the consent, officers should clarify the permission before relying on it.

**[Author's note: This decision was reversed by the Texas Court of Criminal Appeals and remanded to the San Antonio court of appeals.]**

#### **SEARCH AND SEIZURE - IMPLIED, BUT NOT EXPRESS, CONSENT SUPPORTS SEARCH OF SUSPECT'S POCKET.**

***Thomas v. State*, 297 S.W.3d 458 (Tex. App. - Houston 2009)**

Several men robbed at gunpoint a group of people who were leaving a restaurant. An officer dispatched to the scene received a description of the men indicating that they were black or Hispanic, wearing dark or black clothing, and one of them wore bright red shoes. About an hour after receiving the dispatch, the officer saw two black men walking about a block from the scene of the robbery. One of them was wearing bright red shoes, the other had on black pants and shoes and a white shirt.

The men were detained and frisked, but the officer did not find any weapons. They told the officer they were going to the store to buy chips, but one of the men had no wallet. When asked how he would buy chips without money, the other man - the one wearing the black pants and shoes - turned to show the officer his pocket and said, "Look, I've got money." Based on his body movement and invitation to "look," the officer thought he was consenting to a search of his pocket, and she checked inside, finding several hundred-dollar bills. Since cash had been stolen from the robbery victims, the officer questioned the man about the money. He claimed to have gotten it from his girlfriend.

While waiting for a K-9 unit to arrive on the scene, the officer allowed the suspect to sit in her patrol car because he said he was cold. He was not handcuffed or under arrest, but also was not free to leave.

Based on scent samples taken from the money and the victims, and on the reaction of the trained dogs brought to the scene, the officers believed the money had been taken from the victims. The suspect was arrested and given *Miranda* warnings by a detective who was called to the scene. He later gave a statement that was offered at trial over objection. In the defendant's statement he admitted driving the others to the place of the robbery in his girlfriend's car. A search of the car uncovered black jackets, gloves, and a cap, as well as the defendant's social security card and two wallets belonging to the robbery victims.

The defendant moved to suppress his statement and all of the evidence obtained at a result of his stop and frisk because he was detained, searched, and arrested without probable cause. The trial court denied his suppression motion and he was convicted. He appealed.

**Holding:** The defendant claimed that information about "five to seven black or Hispanic males wearing all dark clothing with one wearing red shoes" was insufficient to justify a detention and arrest. He argued that the only things tying him to the description were his race and being in proximity to the robbery scene an hour after the crime. Even his shirt was a different color than reported. When he was seen, the defendant was not committing a crime, and did not have a weapon. No additional identifiers, like height, weight, or other characteristics, were given, and the victims seemed unsure of the race of the robbers.

The defendant and his companion did fit the description the officer had. They were black or Hispanic men wearing dark clothing, and one of them had bright red shoes. They also were close to the scene of the crime only an hour after it occurred. The victims noted that the men wore large, bulky clothing. It was cold when the defendant was stopped, but he was wearing a white undershirt. The officer reasonably could have believed he had removed his jacket earlier to prevent being identified.

Because the crime was committed with weapons, the officers were justified in patting down the two suspects. Based on what was known by the officers, the detention and frisk were reasonable. As to the defendant's contention that he did not consent to a search of his pocket, his actions implied that the officer could look inside the pocket. It was undisputed that the officer did not expressly ask for permission to search the defendant's pocket. Instead, she believed he was inviting her to do so by raising his hand, "put[ting] his hip towards [her]," and inviting her to "look."

It "may have been preferable for [the officer] to expressly request permission to search," but the trial court was exercising proper discretion in finding that the actions constituted voluntary consent. Since the detention and frisk of the defendant were supported by reasonable suspicion, and because he then impliedly consented to the search of his pocket that revealed money stolen in the robbery, the denial of defendant's suppression motion was warranted.

**COMMENT:** Two important points are made in this opinion. First, reasonable suspicion or probable cause based on a physical description depends on proximity in time and distance from the crime, and characteristics that would exclude most people. This case seems to be a close call in these respects because the officer had relatively little information to go on. Perhaps if the defendant had not been walking with someone wearing red shoes, this case would have been decided differently. Secondly, it always is risky to depend on implied consent rather than actual, express

consent. If the officer in this case had simply asked, “You want me to look?,” the issue might have been resolved without question.

**SEARCH AND SEIZURE - DEFENDANT’S COMMON-LAW SPOUSE LACKED  
APPARENT AUTHORITY TO CONSENT TO SEARCH OF LOCK BOX, BUT  
DEFENDANT’S MOTHER HAD SUCH AUTHORITY.**

***Valdez v. State*, 336 S.W.3d 330 (Tex. App. - San Antonio 2010)**

A woman called police from her mother’s house to report her common law husband for sexually abusing his daughter. When an officer arrived at the couple’s home, the defendant answered the door and told the officer that the little girl had run into his bedroom and jumped on his bed after he got undressed.

The man, his common law wife and the girl were taken to the police station for questioning. An investigator interviewed the child who first told him that nothing happened and she was not abused by her father. She seemed scared, though, and asked to have her step-mother in the room with her. When the woman came in, the girl said bad things had happened to her. She then described acts of sexual abuse, and said that he also made her watch nasty movies which he kept locked in a box in his bedroom.

The detective asked the common law wife to sign a consent form for the defendant’s house, and she did so. He asked another officer to go to the house and secure the premises until he arrived. When that officer arrived, he found the defendant’s mother, whom he believed to be the owner of the house.

Defendant’s mother did not live at the house with the couple, but the officer told her he was there to collect some adult videos as evidence. She invited the officer in and took him directly to the master bedroom. She then went to the closet and retrieved a safe. Using a key, she opened the safe and took out the DVDs and put them on the bed.

The mother later testified that she did not give the officer permission to enter the house; that the officer told her the common law wife had given consent, and she needed to come with him to the bedroom. According to her testimony, the detective took the lock box from the closet and ordered her to unlock it. She said she had some difficulty finding the correct key on the key ring. The detective became impatient, grabbed the keys and unlocked the box himself. She claimed the officer threatened to arrest her if she did not cooperate.

Following a trial in which the pornography evidence was admitted and the child testified to sexual abuse, the jury found the defendant guilty. The defendant appealed, claiming his motion to suppress should have been granted because the evidence was seized without a warrant and his common law wife lacked both actual and apparent authority to consent to the search that produced it.

**Holding:** While searches conducted without a warrant generally are unreasonable, those conducted with consent are not. “A third party may consent to the search if he possesses equal control over and authority to use the premises being searched.” Where a person does not have actual authority to consent to a search, the search nevertheless may be valid if the consenting party has

apparent authority. “This does not mean, however, that officers may rely upon consent given in ambiguous circumstances or that clearly appears unreasonable.” If ambiguous circumstances are present, officers may not proceed without inquiring into the question of authority; they may not accept at face value an apparent claim of authority. The State bears the burden of proving that a warrantless search was reasonable.

In this case, the defendant argued that his common law wife did not have actual or apparent authority to consent to the search of the lock box. “A protected expectation of privacy may exist where a defendant has taken some special steps to protect his personal effects from the scrutiny of others.” By locking his box and not sharing access with his wife, the defendant took those special steps to protect his privacy expectation. Although his wife could consent to a search of the common areas of the house they shared, she had no apparent authority to consent to the search of the box because she told the police she did not know where the box was located, and did not possess a key. Later, she testified that she did not know about the box.

It was unreasonable for an officer to believe in these circumstances that the common law wife had actual or apparent authority to consent to a search of the box. Defendant’s mother, on the other hand, did have apparent authority. She invited the officer into the house and took him directly to the master bedroom. She retrieved the lock box from the closet, unlocked it, and put the DVDs on the bed. The officer reasonably could have believed that the woman had actual authority to open the lock box.

“Even though [defendant’s mother] was not the actual owner of the box and did not have authority to unlock it absent permission from her son, [the officer’s] good faith mistake does not invalidate the search because he reasonably believed that she had common authority over the lock box.” There was not sufficient ambiguity in the situation to require him to inquire further before relying on that consent. Reliance on the apparent authority of defendant’s mother to consent was reasonable under the circumstances. Consequently, the search of the box was reasonable and the suppression motion was properly denied.

**SEARCH AND SEIZURE - INVITATION TO “LOOK INSIDE” AND TO OPEN TRUNK FOR OFFICER PROVIDED VOLUNTARY CONSENT FOR SEARCH AND DID NOT UNDULY PROLONG TRAFFIC STOP.**

***Glenn v. State, 2011 WL 322451 (Tex. App. - Eastland 2011)***

An officer stopped the defendant’s car for speeding. He issued a written warning for the offense before asking the driver for permission to search the car. According to the officer, the defendant agreed. In a search of the vehicle, the officer found various pills, a glass pipe containing residue, and two small baggies containing a crystal-like substance. The defendant was arrested.

He moved to suppress the drugs and paraphernalia seized from his vehicle during the traffic stop. At a hearing on the motion it was determined that just after issuing the warning citation, the officer asked the defendant if there was anything in the vehicle. The officer then asked either, “Do you mind if I look for my own self and let you go about your way?” or “Do you mind if I look for

my own self before I let you go on your way?” The defendant replied, “You want to have a look inside?” He then asked the officer if he wanted the defendant to open the trunk.

The trial court determined that this exchange constituted voluntary consent for the search by the defendant, and that the traffic stop was not unnecessarily prolonged by the officer’s request for consent to search and the subsequent search he conducted. At the trial, a jury convicted the defendant and he appealed the denial of his suppression motion.

**Holding:** The defendant contended that once the purpose of the traffic stop was achieved by issuing him a warning citation, continuing to detain him while requesting consent and searching was unlawful and unsupported by reasonable suspicion or probable cause. Unlike other cases in which a detention is continued to allow the officer to conduct a “fishing expedition,” this case involved a consensual search.

“After the purpose of a traffic stop has been accomplished, a police officer may ask for consent to search a vehicle; however, if consent is refused, the officer may not detain the occupants or vehicle further unless reasonable suspicion of some criminal activity exists.” In this case, the officer requested consent to search, which the defendant did not refuse. It was not unreasonable for him to continue to detain the defendant as long as that consent was in effect.

The defendant also argued that his consent was not given voluntarily. The voluntariness of any purported consent to search must be proven by the State by clear and convincing evidence. Voluntariness is determined from the totality of circumstances. At the hearing, the arresting officer testified that the defendant gave him permission to search. Nothing in the record suggested that the defendant did not consent, or that he was not free to leave at the time he was asked for consent. It was not shown that he acted under duress or coercion, or that he was being detained illegally.

It was within the discretion of the trial court to find the defendant’s consent to be voluntary since there was no evidence presented to the contrary. Given that the traffic stop was not unnecessarily prolonged, and that the defendant freely and voluntarily consented to the search of his vehicle, the denial of his suppression motion was proper.

### 3. 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. In *Bowman v. State*, the court applied the holding of *Gant* to find the vehicle search was outside the scope of a search incident to arrest.

**SEARCH AND SEIZURE - SEARCH OF ARRESTEE'S VEHICLE WAS OUTSIDE  
SCOPE OF SEARCH INCIDENT TO ARREST AND NOT SHOWN TO BE WITHIN  
VEHICLE EXCEPTION.**

***State v. Bowman*, 2010 WL 2813504 (Tex. App. - Fort Worth)**

A detective received a tip that the defendant was a methamphetamine dealer and would be at an Albertson's parking lot near a local mall, driving a maroon Cadillac, meeting with his supplier, and would be in possession of the drug. Together with a narcotics dog handler and a patrol officer, the detective went to the anticipated meeting at the parking lot. As she watched, the detective saw the defendant drive into the lot, get out of his vehicle, go inside the Albertson's, and return about fifteen minutes later. He waited in his car until the vehicle with his supplier arrived, then walked to that vehicle and returned carrying a black plastic bag.

At the instruction of the detective, the patrol officer stopped the defendant's car after he drove away from the parking lot. According to the officer, the detective had told him that she saw the defendant driving without a seatbelt. The patrol officer also saw the defendant turn left without signaling. Those traffic offenses, the officer later said, were the sole reasons for the stop.

Because the defendant had an arrest warrant outstanding, the patrol officer arrested the defendant, handcuffed him, and placed him in the back of the patrol car while he searched the defendant's car incident to his arrest. Inside, he found a black plastic bag in the front passenger seat containing methamphetamine.

The defendant was indicted for possession of a controlled substance. He moved to suppress the evidence found in the search of his vehicle and, after conducting a hearing on the motion, the trial judge granted the motion and ruled the evidence inadmissible. The State appealed on the grounds that, although the search was not a valid search incident to arrest, it was nevertheless permitted under the vehicle exception.

**Holding:** The automobile exception to the search warrant requirement provides that "a warrantless search of a vehicle is reasonable if law enforcement officials have probable cause to believe that the vehicle contains contraband." Search incident to arrest is also an exception to the warrant requirement. In order to have a valid search of a vehicle incident to an arrest, the arrestee must be "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." In this case, the State correctly conceded that the search of defendant's vehicle was not justified as an incident to his arrest.

The defendant had been handcuffed and was sitting in the patrol car when the officer searched his vehicle. The passenger compartment was outside his reaching distance, so the exception no longer applied. The State contended that, although the search was not incident to arrest, it was based on probable cause to believe contraband would be found in the vehicle and therefore was valid under the vehicle exception. Only the investigating and arresting officers

testified at the suppression, however, and their testimony was not necessarily found to be credible by the trial judge.

The court questioned whether the defendant actually committed the traffic offenses for which he was stopped, and questioned whether probable cause existed to search the defendant's car. The detective's initial report did not mention a confidential informant, and was written as if the only reason for the search was as an incident of the defendant's arrest.

If the trial judge doubted the detective's testimony concerning the existence of the informant or the corroboration of the informant's tip, the only remaining evidence supporting probable cause would have been the officers seeing the defendant obtain a plastic bag from another person in the parking lot. In light of the judge's statements expressing his doubt, an appellate court is not free to find that the trial court erred in granting the suppression motion. Because the vehicle exception was not clearly established, and the search was not one incident to arrest, the trial court's ruling stands.

**COMMENT:** The court's rejection of search incident to arrest in this case was mandated by the holding of the Supreme Court in *Arizona v. Gant*, 129 S.Ct. 1710. Prior to *Gant*, courts and law enforcement personnel interpreted the holding in *New York v. Belton* to mean that all containers within the passenger compartment of a vehicle from which a person had been arrested could be searched incident to that arrest. The Court clarified its position in *Gant* to expressly prohibit a search of a vehicle incident to the driver's arrest when the arrestee has been removed from the reaching area of his vehicle, unless there is reason to believe the vehicle contains evidence of the crime for which the arrestee has been arrested. Although this point was not explored in the case digested, the exception to *Gant* would have been inapplicable because the driver was arrested for a seatbelt violation, a signal violation, and an outstanding warrant. None of these offenses appears to have any evidence that might be inside the vehicle, and the arrestee clearly was outside the area of control of his passenger compartment once he was handcuffed and placed in the patrol car.

#### 4. 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 *Scardino v. State* held that community caretaking did not justify the stop of a vehicle because the detention was motivated primarily by the officer's observation of suspicious driving. 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 *Kuykendall v. State* approved a stop on community caretaking grounds. The defendant's vehicle was parked "wrong" on the highway shoulder with the parking lights on. For the court, the circumstances supported caretaking as the primary motivation for the contact.

### **SEARCH AND SEIZURE - STOP OF MOTORIST FOR WEAVING WITHIN LANE NOT A VALID COMMUNITY CARETAKING FUNCTION STOP.**

#### ***Scardino v. State*, 294 S.W.3d 401 (Tex. App. - Corpus Christi 2009)**

A DPS trooper traveling on a highway at night noticed that the pickup truck in front of him was weaving within its own lane of travel. The vehicle crossed the fog line one time and the driver steered back toward the center stripe, then erratically steered away to keep from crossing it. Based on his observation, the officer stopped the defendant. He later explained that he thought the driver might be ill, but did not say that he suspected the driver was intoxicated.

After stopping the truck, the trooper noticed that the defendant's eyes were glassy and bloodshot, and his speech was slurred. When asked if he had been drinking, the defendant replied that he had consumed four beers. Following field sobriety tests, the defendant took an intoxilyzer exam which indicated his blood alcohol level was above the legal limit. He was arrested for DWI.

At the hearing on defendant's suppression motion, the trooper testified that the defendant did not do anything unsafe, but that his driving was "a jerky kind of sporadic driving." He also confirmed that the defendant drove entirely within his lane except for crossing the fog line one time. The State argued that the trooper was entitled to stop the defendant for violating Section 545.058 of the Transportation Code which prohibits driving on an improved shoulder of a roadway unless it can be done safely, and then, only in a limited number of circumstances. The State also contended that the trooper was exercising a community caretaking function by stopping the defendant.

The trial court denied the defendant's motion and, following a jury trial, he was convicted of DWI. On appeal, he argued that the State had not established either that he violated Section 545.058, or that the community caretaking function exception applied to his case.

**Holding:** A temporary detention must be supported by reasonable suspicion determined from the totality of circumstances. The State contended that the trooper's stop of the defendant was based on a violation of Section 545.058 of the Transportation Code, although the officer himself never testified that he believed a traffic violation had occurred.

The evidence at the suppression hearing did not establish a violation of Section 545.058. There was no testimony that the defendant "drove" on the shoulder as required by that statute; the trial court did not find that he drove on the shoulder; and the video from the dash-mounted camera

did not show that the defendant drove on the shoulder. Since Section 545.058 deals only with situations in which a driver may, or may not, drive on an improved shoulder of a roadway, no violation of that statute was supported by the evidence.

As to the contention that the stop was based on community caretaking, “the court of criminal appeals has stated that a police officer may not properly invoke his community caretaking function if he is primarily motivated by a non-community caretaking purpose.” In this case, there was no sufficient “level of distress” described in the officer’s testimony that would “lead a reasonably prudent person to perceive that [the defendant] was distressed.

The driver was detained in the vicinity of several convenience stores where he could have sought assistance if he had been ill. And there was no indication from the video of the incident that the defendant presented a danger to himself or others. Based on the officer’s testimony, his focus was more on the defendant’s suspicious driving than on his health and welfare. He did not ask the defendant about his health after the stop, but instead told the driver he was weaving within his lane and conducted field sobriety tests. In the absence of any evidence that a traffic violation occurred, or that the officer was conducting a valid community caretaking function stop, the defendant’s motion should have been granted. The evidence gathered during and after the traffic stop was inadmissible.

#### **SEARCH AND SEIZURE – VEHICLE IMPROPERLY PARKED ON SHOULDER OF HIGHWAY IN A DARK RESIDENTIAL AREA WITH PARKING LIGHTS ON JUSTIFIED COMMUNITY CARETAKING FUNCTION STOP.**

##### ***Kuykendall v. State*, 335 S.W.3d 429 (Tex. App. – Beaumont 2011)**

Two sheriff’s deputies saw the defendant sitting in his truck late at night, parked on the side of the highway with the parking lights on. They decided to approach defendant’s truck to “make sure he was okay.” The officers found the defendant sitting in the truck wearing only a blue tank top and his underwear. He said he was okay, but the deputies saw an open alcohol container in the vehicle and a twelve-pack of beer on the floorboard. When asked for identification and insurance, the defendant produced only an expired identification card and a pizza coupon.

After he was removed from the vehicle and told to sit on the tailgate of the truck, the defendant claimed he was an undercover agent for the Texas Rangers, and his credentials were inside the vehicle. He gave the deputies permission to retrieve these credentials. Inside the cab, one of the officers saw a large knife on the floorboard, but no credentials were found. The defendant was arrested for impersonating a public servant and possessing an unlawful weapon.

In an inventory of the contents of the truck, officers moved a pair of trousers on the seat and a baggie of marijuana fell out. A charge of possession of a controlled substance was added to the other charges against the man. After pleading guilty to possessing the controlled substance and a prohibited weapon, the defendant appealed. He argued that his suppression motion should have been granted because his detention was illegal.

**Holding:** “If a reasonable person would feel free to disregard the officer, an officer may ask if someone requires assistance without implicating the Fourth Amendment. Even if a person is

seized within the meaning of the Fourth Amendment, a community caretaking exception allows police officers, as part of their duty to ‘serve and protect,’ to stop or temporarily detain an individual whom a reasonable person would believe is in need of help, given the totality of the circumstances.”

Two steps are requiring in evaluating the validity of a community caretaking function stop. First, the court must consider whether the officer’s primary motivation was community caretaking. If it was, then the court determines whether the officer’s believe was reasonable by analyzing four factors. The factors used to decide the reasonableness of such a stop are: (1) the nature and level of distress exhibited by the citizen; (2) where the person was located; (3) whether the person could obtain other assistance; and (4) the degree to which the person presented a danger to himself or others.

One of the deputies testified that when they saw the defendant’s truck, it was parked “wrong” on the shoulder of the highway, in a dark, non-residential area, and only had its parking lights on. The defendant appeared to be alone with no apparent assistance available. The other deputy testified that it was an “extremely dark area” and no residences or street were within a close distance. The vehicle seemed to be parked “out of the ordinary,” and both officers said they approached it to make sure there were not problems, and to offer assistance.

Based on this testimony, it was reasonable for the trial judge to conclude that the deputies were motivated primarily by community caretaking concerns, and that those concerns were reasonable. Once the officers were standing beside the vehicle, they saw at least one open container of alcohol in the truck. Defendant’s false representation and consent to search justified further investigation and his arrest. The inventory of the vehicle following defendant’s arrest was reasonable.

The circumstances surrounding the contact with the defendant supported the deputies’ view that community caretaking was appropriate. Admission of the evidence that was discovered after that contact was made was not error.

## 5. 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.

Concern that law enforcement officers might be creating an exigency in order to circumvent the Fourth Amendment's warrant requirement prompted the U.S. Supreme Court to decide the case of *Kentucky v. King*. The defendant in that case argued that the police banged on his door and identified themselves as the police. Those actions, the defendant claimed, were calculated to cause a reaction inside the apartment that would make the officers think drug evidence was being destroyed. The Court rejected the police-created-exigency argument in principle, but reserved its possible application for situations in which "the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment." If the officers had demanded entry, for example, the Court might have reached a different result.

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 without the occupant's consent in *Michigan v. Fisher* because they saw recent damage and blood on a truck parked in the driveway, and broken glass from the home's windows laying in the yard. The defendant was seen through a window, screaming and throwing things, and he would not let the officers enter. The Supreme Court upheld the entry as being a reasonable response to the situation.

**SEARCH AND SEIZURE – "POLICE-CREATED EXIGENCY" DOES NOT  
INVALIDATE WARRANTLESS ENTRY AND SEARCH UNLESS POLICE ENGAGE  
IN OR THREATEN CONDUCT THAT WOULD VIOLATE THE FOURTH  
AMENDMENT.**

***Kentucky v. King*, 131 S.Ct. 1849 (2011)**

Police officers set up a controlled buy of crack cocaine outside an apartment complex. After the sale, the seller moved away quickly, walking through a breezeway and into the complex. Fearing the suspect would get away, officers hurried try to intercept him before he entered an apartment, but as they entered the breezeway, they heard a door shut and smelled the strong odor of burnt marijuana. They saw two apartments, but didn't know which one the suspect had entered.

Believing the marijuana smell was coming from the apartment on the left, the officers banged on the door "as loud as [they] could and announced, 'This is the police' or 'Police, police, police.'" In response to the banging, the officers heard people moving around inside the apartment, causing them to believe that the occupants were about to destroy drug evidence. After announcing their intention to enter the apartment, the officers kicked in the door and went inside. They found the defendant, his girlfriend, and a guest who was smoking marijuana, all in the front room.

During a protective sweep, the officers discovered marijuana and powder cocaine in plain view. In a subsequent search, they found crack cocaine, cash, and drug paraphernalia. It was later discovered that the drug dealer actually lived in the other apartment, on the right.

The defendant was charged with drug trafficking. He moved to suppress the evidence, but the motion was denied. The trial court found that the odor of marijuana produced probable cause,

and that the warrantless entry was justified by exigent circumstances, the likely destruction of evidence.

The defendant appealed the denial of his suppression motion, arguing that the police created the exigent circumstances by banging on the apartment door, knowing that it probably would cause the inhabitants to try to destroy evidence. One state appeals court affirmed the conviction, but the state supreme court reversed, holding that police cannot “deliberately create the exigent circumstances with the bad faith intent to avoid the warrant requirement.” The state supreme court also observed that if “it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances,” that exigency could not be the basis for a warrantless entry and search. The prosecution petitioned the U.S. Supreme Court for certiorari, which was granted.

**Held:** “Although the Fourth Amendment does not specify when a search warrant must be obtained, [the Supreme Court] has inferred that a warrant must generally be secured.” “Searches and seizures inside a home without a warrant are presumptively unreasonable.” One of the established exceptions to the warrant requirement is for exigent circumstances that make a warrantless search objectively reasonable. The need for “emergency aid” can provide exigency, as can the need to prevent the destruction of evidence.

Lower courts have developed an exception to the exigency rule for “police-created exigency.” Officers who wish to rely on an exigency cannot manufacture one in order to avoid compliance with the warrant requirement.

The central test of the Fourth Amendment is whether the action of the police is reasonable. This approach permits seizure of evidence found in plain view, but only if law enforcement officers have arrived at the spot from which the observation is made in a lawful manner. Similarly, officers may seek consent to search if they are lawfully in the place where the consensual encounter occurs. If they are, “it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent.”

Some lower courts have prohibited police from relying on an exigency they created if they acted with the “bad faith” intent to avoid the warrant requirement. The Supreme Court has rejected a subjective approach in other contexts, so this “bad faith” approach is inconsistent with the view that objective standards best serve the goal of “evenhanded law enforcement.” Even if the police foresee that their conduct may cause a reaction, like the destruction of evidence, it would be difficult to “quantify the degree of predictability” needed to determine that they had created the exigency. Prohibiting the police from knocking on a door if they reasonably could foresee a reaction from the occupants would “create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field.” Although police officers may have probable cause and could obtain a warrant instead of knocking on a door without one, they are not required to seek a warrant. They may have “entirely proper reasons” not to obtain a warrant as soon as they have probable cause.

The defendant in this case argued that officers create an exigency when they act in a way that would cause a reasonable person to believe that entry will be imminent and inevitable. Banging on the door and speaking forcefully or yelling should be considered, according to the defendant. Such a test would make it difficult for the police to know how loudly to announce themselves, or how forcefully to knock on a door. Courts reviewing their actions would face the same problem.

Instead of following any of these approaches, “the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.” Like any other person, an officer may knock on a door, and the occupant has no obligation to open the door or to speak.

In this case, the officers did not violate the Fourth Amendment or threaten to do so before entering the apartment. Banging on the door and yelling, “Police, police, police” or “This is the police” “was entirely consistent with the Fourth Amendment. There was no evidence that the police “demanded” entry to the apartment. It was only after the exigency arose that the officers explained to the occupants that they were going to enter. Therefore, the announced intent to enter could not have created the exigency.

Given that the conduct of the officers in this case did not violate the Fourth Amendment or threaten to do so, they were entitled to rely on the exigency that existed when they believed evidence was being destroyed in the apartment. The evidence found in the apartment should not have been suppressed.

**SEARCH AND SEIZURE - “EMERGENCY AID EXCEPTION” ALLOWS  
WARRANTLESS ENTRY INTO HOME TO INVESTIGATE WHETHER OCCUPANT  
NEEDED MEDICAL ASSISTANCE.**

***Michigan v. Fisher*, 130 S.Ct. 546 (2009)**

When two police officers responded to a disturbance call at a residence, they were told by a couple in the vicinity that a man inside was “going crazy.” Outside the home, the officers observed evidence of a chaotic situation. A pickup truck parked in the driveway had its front smashed; there were damaged fenceposts along the side of the property; and glass from three of the home’s broken windows was on the ground outside the house. The officers saw blood on the truck’s hood, as well as on clothes inside the truck and one of the doors to the home.

Looking through a window, the officers saw the defendant inside the house, screaming and throwing things. The front door was blocked by a couch that had been placed in front of it, and the back door was locked. When the officers knocked, the defendant refused to answer the door. He also ignored their question about whether he needed medical attention when they saw a cut on his hand. Swearing, the defendant demanded that the officers leave to get a search warrant.

One of the officers pushed the front door partly open and entered the house, but when he saw the defendant point a rifle at him, he left. The defendant eventually was charged with assault with a dangerous weapon and possession of a firearm during commission of a felony.

Defendant’s motion to suppress evidence was granted by the trial court on the grounds that the officer’s warrantless entry violated the Fourth Amendment. The State appealed, but the state’s court of appeals affirmed the trial court’s decision. The State then applied to the United States Supreme Court for review.

**Holding:** “Searches and seizures inside a home without a warrant are presumptively unreasonable,” but exigent circumstances may overcome the presumption. In *Brigham City v. Stuart*, 547 U.S. 398, the Supreme Court identified one of those circumstances as “the need to assist

persons who are seriously injured or threatened with such injury.” If a person inside a home needs emergency medical assistance or is in danger of imminent injury, it is reasonable for law enforcement officers to enter without a warrant. The subjective motivation of the officers or the seriousness of any crime being investigated do not control the application of the “emergency aid exception.” If it is objectively reasonable for the officer to believe that “a person within [the house] is in need of immediate aid,” the warrantless entry may be made.

The officers in this case, much like those in *Brigham City*, were responding to a disturbance call. Upon their arrival at the scene, they observed signs of a recent injury, perhaps from a car accident, and they could see violent behavior inside the house. The defendant was screaming and throwing things. While the officers could not see anyone else, it was reasonable to believe that the defendant was throwing the objects at another person, or that he would hurt himself because of his rage.

The state appellate court found that seeing “mere drops of blood” was insufficient to suggest a serious, life-threatening injury. Further, the defendant was standing and apparently able to care for himself. Officers do not need “ironclad proof” of a serious injury, however, in order to invoke the “emergency aid exception.” Although the officers did not call for medical aid, the defendant might have been endangering someone else in the house. In any event, it was not the subjective belief of the officers that controlled in this case, but whether their belief that they needed to enter was objectively reasonable.

It was reasonable for the officer to believe that the defendant had hurt himself and needed treatment, or that he was about to hurt someone else or already had done so. Because the actions of the officer were objectively reasonable, the defendant’s suppression motion should not have been granted.

## 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 was established by information contained in the affidavit in *Wise v. State*. The warrant that issued to search for pornographic images was not invalidated by the fact that other persons had access to the defendant’s computer and might have placed the images there. As courts often point out, probable cause is a matter of probabilities, not certainties.

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. No facts in the affidavit established the reliability of informants in *State v. Hill*. Because there was no corroboration of the tip by independent investigation, and since the tip was not trustworthy, the warrant that had issued was held to be invalid.

Information that might establish probable cause while “fresh,” may fail to provide probable cause when it grows “stale.” For example, if an informant sees drugs in a house one day, and a search warrant based on his information is sought within a few days after the observation, it is likely the contraband is still present in the house. On the other hand, if it has been six months since the drugs were seen, there is a good chance the evidence is no longer there and the probable cause that once existed is also gone. The defendant in *State v. Dugas* argued that the failure to state the time of the offense in the affidavit for a warrant made it impossible to determine whether the information was stale, but the appeals court upheld the validity of the warrant because it was determined through testimony that the observation occurred on the same day the warrant issued.

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, one that is deliberately false or made with reckless disregard for whether it is true, will invalidate any warrant that is issued.

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. The officer in *Rogers v. State* had personal knowledge of the premises, permitting the court, contrary to the holding of other Texas appellate courts, to find that the information was sufficiently specific to uphold the search.

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.

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.

**SEARCH AND SEIZURE – AFFIDAVIT FOR SEARCH OF HOME COMPUTER WAS SUFFICIENT TO JUSTIFY ISSUANCE OF WARRANT, AND EVIDENCE FOUND WAS SUFFICIENT TO ESTABLISH POSSESSION, EVEN IF PORNOGRAPHIC IMAGES MAY HAVE BEEN PLACED ON COMPUTER BY ANOTHER.**

*Wise v. State*, 340 S.W.3d 818 (Tex. App. – Fort Worth 2011)

The defendant, who was a manager of a fast-food restaurant, began having a sexual relationship with a 16-year-old girl who worked there. She took digital photos of herself naked and gave them to the defendant. When their relationship was discovered by the girl’s parents and reported, she allowed the police to record a phone conversation she had with the defendant in which they discussed some details of their sexual acts.

A police detective obtained an arrest warrant and a search warrant for the man’s house. When the search warrant was executed, officers seized a digital camera, pornographic DVDs, a laptop computer, a desktop computer tower, phone cards, condoms, and a blindfold the defendant had used in one of his encounters with the girl.

The defendant was arrested after the police arrived at his house to search it. He was taken to the police station and confessed to his part in the offense. A forensic analysis of defendant’s computers uncovered images that were given to the detective. After he was indicted for multiple counts of sexual assault, possession of child pornography, and indecency with a child, the defendant moved to suppress the evidence found at his house. He argued that the warrant was not supported by probable cause, and that the affidavit was deficient. Following denial of his motion, the defendant was tried by a jury and convicted on all but one of the counts. He appealed.

**Holding:** A search warrant must be supported by an affidavit that establishes probable cause within the four corners of the affidavit. “The affidavit must set forth facts established that (1) a specific offense has been committed, (2) the item to be seized constitutes evidence of the offense or evidence that a particular person committed the offense, and (3) the item is located at or on the person, place, or thing to be searched.” When a court reviews a warrant’s affidavit for sufficiency, “the issue is not whether there are other facts that could have, or even should have, been included in the affidavit.” Rather, the reviewing court focuses on the “combined logical force of facts that are in the affidavit, not those that are omitted from the affidavit.”

In this affidavit, the affiant stated that the girl admitted that the defendant on several occasions asked her to provide him with pictures of herself unclothed. She said she took two photos of herself in the restroom at work with the defendant's cell phone camera. When the defendant brought a digital camera, the victim took additional photos of herself naked at her home and gave the camera back to the defendant. He told her later that he had saved the pictures on a memory card, but she did not know whether he saved them on his desktop computer. She knew he had a laptop, but he told her it was not working.

The affidavit alleged that the defendant had sexually assaulted the girl and had digital pictures of her on two devices. It further alleged that he had saved some images on a memory card; that he had a desktop computer in his house; and that he threatened to post the photos of the girl on the internet, suggesting that the pictures would be stored or transferred to a computer for that purpose. Based on these allegations, the magistrate reasonably could conclude that the photographs of the girl would be found on the defendant's computers. Since the affidavit established sufficient facts to allow a finding of probable cause, the trial court was entitled to deny defendant's suppression motion.

The defendant also contended that the evidence in the case against him was insufficient to prove that he was in possession of the admittedly pornographic images found on his desktop computer. Specifically, he complained that he had bought the computer second-hand; that the pictures were found in a space on the computer where deleted items are stored; and that the viruses on the computer could have allowed the images to be stored without the defendant's knowledge.

The State's computer forensics examiner confirmed that ten images were found in the "free space" of the computer where deleted items are stored, and that it was impossible to say where they had come from, or how they were placed on the computer. The photos might have been viewed intentionally, or they may have popped up while a user was looking at another website. Because the computer contained various viruses, it was possible that pornography could have been stored on the computer, which had been purchased at a flea market, without the user's knowledge. The examiner could not determine when the files were viewed.

In order to be convicted of possessing something, it must be proven beyond a reasonable doubt that the accused intentionally or knowingly exercised care, custody, or control over the object. A rational jury could not find that the defendant possessed child pornography images found in the free space of his computer. While the search warrant used to obtain the evidence in this case was based on an affidavit sufficient to establish probable cause, the defendant should not have been convicted of possessing the images found on his desktop computer. His convictions for the offenses of sexual assault and indecency with a child were supported by the evidence.

**SEARCH AND SEIZURE - SEARCH WARRANT AFFIDAVIT FAILS TO SHOW SUFFICIENT CORROBORATION OF TIP TO PRODUCE PROBABLE CAUSE.**

*State v. Hill*, 299 S.W.3d 240 (Tex. App. - Texarkana 2009)

A search warrant issued to search a residence for methamphetamine. The affidavit used to procure the warrant referred to informants, but did not establish their reliability through past

performance. Instead, the affidavit alleged in conclusory fashion that the drug might be found at the residence. Following the search and arrest of the defendant, a suppression motion was filed on the grounds that the warrant lacked probable cause. The trial judge granted the defendant's motion and suppressed the evidence. The State appealed the ruling.

**Holding:** "Search warrants should not be invalidated by interpreting affidavits in a 'hypertechnical' manner." "A search-warrant affidavit must be read in a common-sense and realistic manner." An affidavit for a warrant must establish probable cause "(1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched."

Magistrates may draw reasonable inferences from allegations in affidavits. Everything within the "four corners" of the affidavit, but nothing outside it, is considered in determining whether probable cause exists.

All of the incriminating evidence in this affidavit was provided by unnamed confidential informants. Such information may be shown to be reliable and credible by past performance, but none was recited in this affidavit. Prior reliability is not required to establish probable cause in a warrant if information from a tip is corroborated sufficiently and described in the affidavit. In this case, the affidavit contained mere allegations that drugs were located at the defendant's residence, and cited "several sources" for those claims.

Although the affidavit states that "three separate parties" reported to the affiant that they had been to the residence and had bought methamphetamine, there was no clear allegation that the purchase of drugs occurred at the residence. No date, time, or details concerning the purchases were provided. Surveillance during a three-hour period was described. Allegedly, some twenty vehicles came and went from the residence, each staying only a few minutes. The affiant stated that such activity was "typically involved in narcotic activity." "Although the fact that known narcotics users frequent a place for brief stretches of time may suffice to corroborate an informant's tip, thus combining to establish probable cause, it does not by itself provide more than a reasonable suspicion that contraband may be found there."

There was one allegation in the affidavit that "came closest" to establishing probable cause. An unnamed informant allegedly said he had bought methamphetamine at the residence the "weekend before." This admission is one "against penal interest," which is a factor indicating reliability, and at least an approximate time was given for the purchase. The allegation does not contain, though, "detail and minute particularity" of the kind required for corroboration of information from unnamed informants. It related only a general time-frame; did not describe the person from whom the drugs were purchased; and failed to include any indication that the person who supposedly sold the drugs was the defendant.

The identity of the resident(s) of the place also were not identified in the affidavit. The informant said he bought the drug from a named person, but nothing tied that person to the residence to be searched.

"Corroboration by independent police investigation means that 'in light of the circumstances, the officer confirms enough facts to reasonably conclude that the information provided in reliable and a detention is justified.' Corroboration of only innocent details is usually insufficient." The only

corroboration provided in this affidavit was the three-hour period of observation in which approximately twenty cars came to and left the residence. Nothing else suggested narcotics activity, and it was not confirmed that any of the persons visiting the residence bought methamphetamine.

The affiant's statement that this activity is typical of narcotics activity was simply conclusory. In the absence of sufficient corroboration, the mere allegations of several unnamed persons of unknown credibility did not produce probable cause. The trial court's ruling was justified.

### **SEARCH AND SEIZURE - FAILURE TO STATE TIME OF OFFENSE IN AFFIDAVIT FOR SEARCH WARRANT DOES NOT RENDER THE INFORMATION "STALE."**

#### ***State v. Dugas*, 296 S.W.3d 112 (Tex. App. - Houston 2009)**

An officer saw the vehicle the defendant was driving weave outside its lane of travel and fail to signal a lane change. During the following traffic stop, the officer smelled alcohol on the defendant and noticed that he was slurring his speech and was unsteady on his feet. After the driver admitted that he had consumed four beers, the officer administered field sobriety tests. Based on the defendant's performance on those tests, the officer concluded that he was intoxicated.

The defendant was arrested for DWI and asked to submit a blood or breath sample for testing. He refused. Consequently, the arresting officer prepared an affidavit requesting a search warrant for the defendant's blood. The affidavit was presented to a magistrate who issued the requested blood search warrant. Following a hearing on the defendant's suppression motion, the trial court agreed that the facts contained in the warrant affidavit were stale because the time of the alleged offense was not included. The blood alcohol evidence obtained through execution of the search warrant was ordered suppressed. The State appealed.

**Holding:** "Generally, taking a blood sample is a search and seizure within the meaning of the Fourth Amendment to the United States Constitution." Texas law permits a warrant to issue for items of evidence, and blood is such an "item."

Probable cause must be shown by affidavit in order for a magistrate to issue a search warrant for blood. "The test for determining probable cause is whether the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing." If facts included within the affidavit have become "stale" when the warrant is sought, probable cause does not exist to believe that the evidence will be found in the place to be searched. "Probable cause ceases to exist when, at the time the search warrant is issued, it would be unreasonable to presume the items remain at the suspected place."

In this case, the State argued that the affidavit established for the magistrate that blood evidence of intoxication existed at the time the warrant was issued. The trial court found, however, that because the affidavit did not include the time of the offense, the magistrate could not conclude that the allegations in the affidavit were not stale.

While the affidavit did not state the time the stop occurred, it was undisputed that it happened the same day the warrant was issued. At most, only a bit over six hours could have elapsed from the time of the stop until the warrant was signed. The warrant affidavit contained factual assertions of the defendant's driving pattern, the grounds for the stop, officer's observations of signs of

intoxication, and the defendant's admissions and performance on field sobriety tests. Considering the maximum amount of time that could have passed from the alleged offense, and the evidence of intoxication contained in the affidavit, it was not unreasonable for the magistrate to find it likely that some evidence of blood alcohol concentration would remain in the defendant's sample. The trial court should not have granted the suppression motion.

**COMMENT:** This is the first case of its kind in Texas to consider whether failure to state the time of the defendant's driving could render an evidentiary search warrant for blood stale. The issue is likely to be considered by the Texas Court of Criminal Appeals, which may have a different view than the court of appeals. At the heart of this question is the effect that the passage of time has on whether evidence will be found in a certain place when the warrant is executed. Some evidence, by its nature, is evanescent. That is, it will diminish, change in strength or character, or vanish over time. Blood alcohol evidence is of that kind. If an intoxicated driver has a high level of alcohol in his blood when he is stopped, even a short time later he may have more, less, or the same amount. If enough time passes, he will have none. At some point, a magistrate no longer could say that it is likely a search of the blood will produce evidence. In other words, probable cause could disappear along with the alcohol level. Without knowing the time of the stop, the magistrate is unable to make any calculation as to the likelihood of blood evidence remaining.

#### **SEARCH AND SEIZURE - OFFICER'S PERSONAL KNOWLEDGE OF PREMISES CAN AUGMENT SEARCH WARRANT'S DESCRIPTION TO MEET THE PARTICULARITY REQUIREMENT.**

*Rogers v. State*, 291 S.W.3d 148 (Tex. App. - Texarkana 2009)

The defendant's motel room was placed under surveillance by officers who were investigating drug trafficking. While they were watching, officers saw a vehicle drive away after the driver left the room. The driver of the vehicle consented to a search of his vehicle which uncovered crack cocaine. Officers then used information from this "confidential informant" to obtain a search warrant for the motel room.

During the execution of the warrant, officers found crack cocaine on the defendant's person. His girlfriend, who was present during the search, was in possession of powder cocaine and marijuana. A pistol and a large amount of cash also were found in the room.

Defendant's motion to suppress was based on his contention that the "affidavit did not properly describe the person relaying the information," and failed to particularly describe the location to be searched. After the motion was denied, a jury convicted the defendant of possession with intent to deliver, enhanced by a prior felony conviction. He appealed the denial of his suppression motion.

**Holding:** The defendant's first argument, that the warrant did not specifically identify his girlfriend, was not presented to the trial court for consideration. Consequently, he failed to preserve that alleged point of error for review by the appeals court.

In his second argument, the defendant complained that the location to be search was not sufficiently described in the search warrant because it did not specify the motel room to be searched.

The location and description of the motel itself was not challenged. Generally, “a search warrant must specify which unit of a multi-unit complex is subject to the search.” “[W]here the warrant describes a multi-unit dwelling, the description must contain sufficient guidance to apprise the officers of the particular unit to be searched.”

In this case, the motel room was described as being “on the bottom floor of the east side of the main motel building. The room has a white door with blue trim. There are two windows on the left hand side of the door. There is no visible number to the room.” It is not required that a description of a room in a multi-unit residence include the room number.

In order to be sufficient, a warrant must “describe sufficient distinguishing characteristics to distinguish the particular unit to be searched from the other units in the multi-unit-dwelling.” Here, the description could apply to every room in the motel. This description did not specify whether other rooms have a white door and blue trim, or have two windows on the left-hand side of the door, or have a visible number. Except for locating the room on the east side of the building, there was no indication of the room’s position in relation to other rooms of the motel.

This lack of descriptive information within the “four corners” of the affidavit presents a “substantial danger of misidentification.” The question is whether a reviewing court is limited to what is contained within those “four corners” or is permitted to take into account facts known to the officer which are not contained within the affidavit. A determination of probable cause is limited to allegations contained within the affidavit. “The probable cause affidavit cannot normally be supplemented with additional information not contained in the affidavit.”

Some appellate courts have limited their review of particularity to the face of the affidavit, but others had allowed the use of information known to the officer but not included in the affidavit when considering the sufficiency of the property description. “These cases conclude that when the same police officer conducts the investigation, swears to the affidavit for the warrant, and executes the search warrant, that officer’s knowledge of the exact premises may cure description deficiencies in the warrant or affidavit. An officer’s knowledge of the premises cannot suffice by itself. The warrant should contain a complete and adequate description of the place to be searched. However, the executing officer’s knowledge of the premises to be searched also can be considered as supplementing the description in the affidavit.

In this case, an investigator with the sheriff’s office testified that he had been familiar with the motel for many years. He admitted there were many rooms in the main building and did not know how many rooms had white doors or windows on one side of the door. The investigator testified, though, that the room had been under surveillance before the search, and a suspect had been seen entering and exiting the room before being stopped. That suspect was the confidential informant whose statement was used to obtain the warrant.

This investigator, who had the room under surveillance and seen the informant come and go, signed the affidavit and was present at the execution of the warrant. The description in the affidavit, combined with the affiant’s personal knowledge of the premises was sufficient to ensure that the search was conducted in the correct room

Taken with the affiant’s knowledge, the description in the warrant was particular enough to withstand challenge. It was not error for the trial court to deny the defendant’s suppression motion.

**COMMENT:** It is especially easy for an investigator who is preparing an affidavit to short-change the description of the place to be searched. When a single-family dwelling is involved, it can be easy

enough to describe, but if the search is to be of a multi-family, multi-unit property, the difficulty increases. While the description in the affidavit and warrant may seem unimportant to an investigator who is familiar with the place to be searched, the test is whether an officer unfamiliar with the place to be searched could determine exactly where the search should be conducted. In this case, the court of appeals joins those taking the position that the officer's personal knowledge can be considered, but another group of appeals courts disagrees. The safer course of action is to ensure that the description is adequate under any standard.

## 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. A search or arrest may be found to be unreasonable, and therefore to violate the Fourth Amendment, even if probable cause and a warrant exist. Because the Constitution prohibits "unreasonable" searches and seizures, the way in which a search or arrest is carried out can render it unlawful, as was the case in *Hereford v. State*. Repeatedly tasing an uncooperative arrestee, officers forcibly removed controlled substances from his mouth.

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.

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.

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.

**SEARCH AND SEIZURE - FORCEFUL REMOVAL OF OBJECT FROM MOUTH OF ARRESTEE WAS UNREASONABLE AND VIOLATED FOURTH AMENDMENT.**

***Hereford v. State*, 302 S.W.3d 903 (Tex. App. - Amarillo 2009)**

Officers arrested the defendant pursuant to arrest warrants for drug offenses. Because he had placed something in his mouth believed by the officers to be evidence, and because he would not open his mouth when ordered to do so, he was taken to a hospital for medical assistance in removing the object. Prior to being taken to the hospital, but after the arrest, an officer tased the defendant twice in order to force the defendant to open his mouth, but with no success. At the hospital another officer tased the defendant for twenty seconds while he was handcuffed and being held down in the emergency room.

The defendant had not attacked anyone and was not seen as a threat, but he would not open his mouth to allow officers to remove whatever he had put there. When the initial tasing to the defendant's inner thigh or groin area did not produce results, the officer repeated the tasing. In all, the defendant was shocked as much as eleven times within about an hour.

Evidence eventually was retrieved that was used against the defendant in a prosecution for possession of a controlled substance with intent to deliver. The defendant moved to suppress the evidence on the grounds that the method used to obtain it was unreasonable and excessive. The trial judge denied the defendant's motion and he was convicted. He appealed the ruling on his suppression motion.

**Holding:** Due process of law requires "public servants to comply with particular standards of conduct and consciousness when performing their duties." Police officers are required to use reasonable methods to gather evidence. Whether a search or seizure is reasonable is determined by evaluating the facts on a case-by-case basis.

In this instance, the defendant was not being violent or physically aggressive towards anyone. No one felt threatened by him. He clenched his teeth, shook his head, and began screaming and moaning after officers tried to physically remove him from the patrol car, applied a throat hold, pushed him against the trunk of the car, tased him in the back and leg, and pulled him to the ground. After deciding that the defendant was "noncompliant;" i.e., he would not spit out of the object in his mouth, the officers returned him to the patrol car and discussed what to do. They believed he was just continuing to hold the object in his mouth, and that he had not swallowed it. Since it was thought to be crack cocaine, the officers thought it would not dissolve in his mouth, so there was no particular urgency to their actions.

Despite the lack of success the officers had with tasing the defendant at the arrest scene, they tried it again at the hospital. This time, the officer applied the taser to the "upper, inner thigh," an area another officer described as the "groin area." The tasing method used was the "drive stun," which was described by the officers as being less violent than being punched, kneed or hit with an asp. There may be situations, however, where "being tased is as egregious as being struck with a baton depending on the location of the blow." In their testimony, the officers conceded that the use of a taser presents "a risk of death" and is a "pain compliance" method. Hospital staff testified that the defendant screamed when tased and seemed to be in pain. The weapon can burn flesh, but was readily and repeatedly being used only because the defendant was "noncompliant."

While police officers have a right to search persons who have been arrested, and the State has an interest in securing and preserving evidence of a crime, the conduct of officers must be reasonable. At the time of the tasing, the defendant already was subject to prosecution for crimes and there was no evidence offered that the loss of evidence in the defendant's mouth was "imminent or even probable." There also was no evidence of the officers' training in the use of a taser, or evidence of departmental policies regarding its use. While the use of a choke hold and a taser might be reasonable where a suspect is being aggressive and is destroying evidence, that was not the case here. Moreover, one officer had tased the defendant in the field and determined it was ineffective before he was taken to the hospital to try another method. At the hospital, the tasing was repeated even though there was no reason to think it necessary.

Given the circumstances of this case, the repeated, prolonged, and continuous use of a taser on the defendant was unreasonable. Introduction of the evidence obtained as a result of the tasing was harmful, and it should not have been admitted over the defendant's objection.

## 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.

### 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 that is determined by looking at the totality of circumstances surrounding the questioning. *Johnson v. State*, *State v. Vasquez*, and *Campbell v. State* deal with whether the suspect was in “custody” when questioned. In *Johnson*, the suspect voluntarily came to the police station

and answered questions despite being told he was free to leave. But in *Vasquez*, *Miranda* warnings were required because the suspect was told he “had to go” to the station. Nonverbal acts, like taking the keys from the suspect’s ignition to prevent him driving away, constituted “custody” in *Campbell*.

**CONFESSION. *MIRANDA* WARNINGS NOT REQUIRED WHERE SUSPECT VOLUNTARILY CAME TO POLICE STATION AND WAS TOLD HE WOULD BE FREE TO LEAVE AFTER INTERVIEW.**

***Johnson v. State*, 299 S.W.3d 491 (Tex. App. - Tyler 2009)**

A man was asked to leave a house late one night and one of the residents threatened him if he didn’t “move along.” Upset with his treatment, the man returned early the next morning and shot four people, taking money from one of them before getting in a car driven by the defendant and leaving the scene. Two of the victims died; the other two were seriously injured.

Later that day, the defendant and the shooter bought eleven dollars worth of crack cocaine, paying with money that had blood on it. Suspecting that the defendant had played a part in the shootings, the police talked to the defendant, who admitted being in the neighborhood but denied his involvement.

When the police invited him to come to the station to be interviewed, the defendant agreed. During a four-hour interview, the defendant admitted that he knew the shooter and had driven to and from the house, and that he saw one of the shootings on the front porch. The defendant was indicted for capital murder and pled not guilty. He was convicted after a witness testified that she saw the defendant’s vehicle at the scene, heard his voice, and saw the vehicle drive away after the shooting. The defendant appealed, claiming that his statement at the police station should not have been admitted because it was obtained while he was in custody and he had not been advised of his rights.

**Holding:** In addition to requiring *Miranda* warnings prior to custodial interrogation, Texas law requires an additional warning that the suspect may terminate the interview at any time. In Texas, oral statements generally are inadmissible unless recorded, or unless one of a limited number of exceptions to the prohibition is present. “A person is in custody only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest.... An individual’s freedom of movement may be restricted by a law enforcement officer telling a suspect he cannot leave or by the officer creating a situation that would lead a reasonable person to believe that his freedom of movement has been restricted, including when there is probable cause to arrest the suspect and the law enforcement officers do not tell the suspect he is free to leave.”

When the defendant went to the police station, he was not under arrest. He drove himself and, after the interrogation, he was allowed to leave the station. Throughout, he was told that he was free to leave and that he would be leaving at the end of the interview. Sometimes, he was left alone during the interview. When he asked for breaks or water, he was given them. His freedom of movement was not restricted.

According to the defendant, he was in custody from the beginning, and even if he was not, custody began when he admitted to being at the scene and the driving the shooter. When a person

makes a crucial admission during an interview, he reasonably may believe that he is no longer free to go, that he is in “custody.”

This interview lasted for four hours, and the defendant made two important incriminating statements. The first of these was that he knew what the shooter was going to do at the house. But he did not say at that time that he had played any role in the shooting. It was only later that he admitted he drove the shooter to and from the residence. Together, the two statements established that the defendant provided aid and support in the crime. Following the second statement, the defendant did not make any significant admission about his involvement.

Since the first important admission the defendant made did not make him criminally responsible, it was not until the second admission that a reasonable person possibly would have felt that he could not leave because he had admitted committing a crime. Prior to that time, the defendant was not in custody because he came to the interview voluntarily, was not prevented from leaving, was told repeatedly that he could leave, was left alone for periods, and his requests were granted. Although the interrogation was very long and held at the police station, and although the defendant was told that the shooter had implicated him in the crime, a reasonable person would not have believed he was not free to go.

Because the defendant was not in custody at the time he was questioned, it was not necessary to give him *Miranda* warnings. The failure to do so did not render his statements involuntary, and they were properly admitted against him.

**CONFESSION. DEPUTIES’ TELLING SUSPECT HE “HAD TO GO” TO STATION TO BE QUESTIONED CONSTITUTED “CUSTODY” AND REQUIRED WARNINGS.**

***State v. Vasquez*, 305 S.W.3d 289 (Tex. App. - Corpus Christi 2009)**

Following a homicide, the defendant gave a written statement to deputies investigating the death. He then retained a law firm to represent him, and the firm notified the district attorney’s investigator that future communications with the defendant should be through her. Nothing further happened regarding the defendant for four years. Four years later, deputies who were unaware that the defendant was represented by an attorney contacted him and obtained a second statement without the defendant’s lawyer being present, although the defendant repeatedly requested her presence. Two years after that, the defendant was indicted and pled not guilty.

Defendant’s pretrial motion to suppress alleged that it was obtained in violation of the U.S. and Texas constitutions. At the hearing on this motion, one of the investigators testified that he was assigned the “cold case” and noticed several discrepancies in the statements of the defendant and another suspect. Accompanied by another deputy, the officer went to defendant’s house and asked him to go with them to the sheriff’s department to talk about his 2001 statements. He claimed the defendant cooperated, was warned, and waived his rights.

The officer recalled that his supervisor conducted most of the interview and told the defendant that he was free to leave if he didn’t want to talk to the officers. He also said the file did not indicate whether the defendant was represented by counsel.

According to the defendant, he was asked by the deputies to go with them to the sheriff's department for questioning but they did not say what the subject of the questioning was to be. They also did not tell him he could refuse to go. When he told the senior deputy that he was represented by the attorney, the deputy replied that he didn't have a lawyer any more. Only after the statement was given was he told that he was free to leave.

Following this hearing, the trial judge granted the defendant's suppression motion and ruled the statement inadmissible. The State appealed the trial court's ruling.

**Holding:** The State claimed that the defendant was not in custody when he was questioned in 2005, and that *Miranda* warnings were not required. The defendant "voluntarily participated in a 'friendly non-custodial interview,'" according to the State. Contrary to this position, the defendant argued that he was subjected to a custodial interrogation because he did not feel free to leave until after he had given his second statement. "A person is in custody if, under the totality of the circumstances, a reasonable person would believe his freedom of movement was restrained to the degree associated with a formal arrest."

If someone voluntarily accompanies an officer to an interview and knows that the officer suspects he may be involved in the crime being investigated, he is not restrained in the way that would cause him to be "in custody." During questioning, however, circumstances may change and an interview may escalate to custodial interrogation.

The defendant testified that he was told he "had to go" to the sheriff's department for questioning. Once there, he was given *Miranda* warnings, a factor that might lead a reasonable person to believe he was not free to go. While the defendant agreed that one of the officers had told him he was free to go if he wished, he said that statement was made only after he had been questioned and given his statement. When he asked to speak with his lawyer, he was told that he didn't "have a lawyer any more" and the interview continued. Under these circumstances, a reasonable person would have believed he was in custody. Further, he was "effectively deprived" of "his 'freedom' to contact his retained counsel."

Because the defendant requested counsel during the second interrogation, *Miranda* was violated. Once a person being subjected to custodial interrogation asks for a lawyer, "the interrogation must cease until an attorney is present." Since the defendant was questioned while in "custody" and requested the help of counsel, which was not honored, the trial court's suppression of his statement was justified.

**DWI. TAKING CAR KEYS FROM SUSPECT'S IGNITION CONSTITUTED  
"CUSTODY" REQUIRING *MIRANDA* WARNINGS PRIOR TO QUESTIONING.**

***Campbell v. State*, 325 S.W.3d 223 (Tex. App. - Fort Worth 2010)**

At around 1:15 a.m., a police sergeant received information about a driver who was possibly intoxicated. He spotted the vehicle and followed it, noticing that the car was weaving across the center line, then back off of the shoulder on the right side. The sergeant followed the car into a residential neighborhood, parked behind it, and waited for another officer to arrive. The driver did not exit the vehicle during this time. When the other officer arrived at the scene, he found the

defendant sleeping or passed out behind the wheel. He smelled of alcohol. When he woke up, he reached for the ignition, but the officer told him to hand over the keys and step out of the car.

The officer observed that the defendant slurred his words, and he felt he was a danger to himself or others, so he handcuffed the man and placed him in the back seat of his patrol car. When the officer asked if the man had anything to drink that night, the defendant replied that he had been drinking with some friends. According to the officer, he decided when he handcuffed the man that he would be charged with at least a public intoxication or minor in consumption violation.

An HGN test was administered and the officer noted six clues of intoxication. He placed the defendant under arrest for DWI. No *Miranda* warnings were given the defendant during the questioning at the scene of the arrest. The defendant moved to suppress the statements he made on the ground that he was not given proper warnings prior to being questioned, even though he was in custody. His motion was denied and the defendant was found guilty of DWI.

**Holding:** The evidence in this case supports the trial judge's conclusion that reasonable suspicion existed for the defendant's detention and further investigation. During that investigation, the officer developed probable cause to believe the defendant was committing the offense of public intoxication. At the time the officer arrived at the defendant's parked car, he found the man sleeping or passed out in the vehicle. He smelled of alcohol and slurred his speech, and the defendant reached for his keys that were still in the ignition when he woke up. Following an HGN test, and after talking with his sergeant about what he had observed, the officer had probable cause to arrest the defendant for DWI.

Since the defendant admitted several times during the encounter that he had been drinking, it was necessary to determine the precise point at which he was taken into custody in order to decide whether warnings had been administered prior to the incriminating statements. *Miranda* warnings are required prior to "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. A person held for an investigative detention is not in custody."

Various factors may be considered in determining whether a person has been taken into custody, but "the standard for distinguishing between an investigative detention and an arrest is not always clear - both constitute seizures." Only one unpublished opinion has discussed whether taking someone's car keys constitutes an arrest. In that case, the court concluded that the defendant was detained, but not in custody.

In this case, the defendant's car was parked with the driver sleeping or passed out inside. The officer never explained why he took the keys from the car, but he retained them during the investigation. After the officer took the keys, and before he placed the defendant in handcuffs, he asked him how old he was, whether he had identification, whether he had been drinking that night, and whether it was a couple of beers. All of these actions were part of a continuing investigation prior to arresting the defendant.

Since the defendant's responses that he was nineteen, did not have identification with him, and had consumed a couple of beers, were made during a period of investigative detention, *Miranda* warnings were not required. Other questions were asked after the officer placed the defendant in handcuffs.

During the suppression hearing, the officer did not say that he handcuffed the defendant for safety purposes, to continue the investigation, or to maintain the status quo, which might have suggested that the detention was continuing. Instead, he gave contradictory testimony, admitting that he continued to question the defendant “even though he was arresting him based on public intoxication” but also saying that the defendant was “detained” to investigate. Handcuffing does not always transform a detention into an arrest, but it did in this case. The defendant was deprived of his freedom in a significant way. The trial court should have suppressed the man’s statements following his arrest (handcuffing) for public intoxication because no *Miranda* warnings were given.

## 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.

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. There was no such difficulty in *Nguyen v. State*, a case in which the defendant clearly had invoked his counsel right. Instead of questioning him, the arresting officer placed him in the patrol car with the passenger who had been riding with the suspect, and recorded their conversation without the knowledge of either man. The Texas Court of Criminal Appeals held that surreptitious recording violated the counsel right that the defendant had invoked.

*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.

Custodial interrogation requires a waiver of both rights. In *Hughen v. State*, it was held that waiver of Fifth Amendment rights also effectively waives the Sixth Amendment right to counsel. While the right to silence ordinarily is not waived simply by the suspect remaining silent, the U.S. Supreme Court decided in *Berghuis v. Thompkins* that in some circumstances a very extended silence after warnings are given does not necessarily preclude an inference that the suspect was waiving his right when he finally began answering questions.

Once invoked, the right to counsel is more difficult to waive than the right to silence. This is because invocation of the counsel right effectively means that the suspect does not want to speak with police directly, but only through an intermediary, if at all. The defendant in *Flores v. State* was a Mexican national who had been appointed counsel in that country. The court nevertheless held that his waiver of the right to counsel in the United States could be valid because he expressly waived the right when given *Miranda* warnings and did not ask to confer with his Mexican counsel.

Law enforcement officers may not initiate contact with a suspect who has invoked his right to counsel. If the suspect contacts officers, though, as in *Hall v. State*, he may waive his right. The Supreme Court also approved, for the first time, a waiver that occurred after police contacted a defendant who earlier had invoked his right to counsel. The invocation in that case, however, had occurred years before. In its opinion, the Court established a presumptive rule that contact may be initiated 14 days or longer after the invocation of the right to counsel, although the suspect is free to renew his request for counsel and stop the interrogation.

A defendant who received appointed counsel at an arraignment, but did not request his lawyer, also was held in *Montejo v. Louisiana* to be subject to police-initiated contact. The Supreme Court refused to presume that his waiver was involuntary because he had not requested a lawyer during the hearing at which one was appointed to represent him.

**CONFESSION. ORAL STATEMENTS SURREPTITIOUSLY RECORDED WHILE PERSON IS ARRESTED, AND AFTER RIGHT TO COUNSEL HAS BEEN INVOKED, ARE INADMISSIBLE IN HINDERING APPREHENSION CASE.**

***Nguyen v. State*, 292 S.W.3d 671 (Tex. Crim. App. 2009)**

The defendant was stopped for traffic violations. After he and his passenger gave the officer conflicting stories about where they had been, the officer requested consent to search the car, which the passenger, who owned the car, gave. When methamphetamine was discovered in the passenger’s bag, the officer arrested him. Following the passenger’s statement that the drugs belonged to the defendant, another officer arrested the defendant, presumably for the traffic violations.

After the defendant was advised of his *Miranda* rights, he requested an attorney. The officer told him he was not going to question him, and he had him placed in the back of his patrol car with

the passenger who had been arrested. The conversation between the two men while they were in the patrol car was recorded. It began with the passenger begging the defendant to take responsibility for the drugs, which he eventually agreed to do.

After they got the attention of the arresting officer, the passenger told him that the methamphetamine belonged to the defendant. The officer responded that he was not going to question the defendant about the drugs, which prompted a comment from the passenger that he was not “going down” for the defendant’s drugs. The defendant said he wanted to go home. A conversation between the defendant and the officer ensued in which the officer explained that he was not asking the defendant anything, but that he was going to jail, not for the drugs, but for the traffic violations.

When the officer closed the door and left the men alone in the car again, the passenger continued to beg the defendant to take responsibility for the drugs, which he did, confirming the passenger’s statement to the officer that the drugs did not belong to the passenger. The passenger was taken out of the car but not released, and was told he would not be charged with possession. A few minutes later, though, an ecstasy tablet was found near or in an item belonging to the passenger and he was placed back inside the patrol car. Again, he begged the defendant to say the tablet was his, and he agreed that it was when the passenger told this story to the officer. Both men were transported to the police station. The passenger was charged with possession of the drugs, and the defendant was charged with hindering apprehension.

Prior to trial he moved to suppress his false confession to possessing the methamphetamine, arguing that he had been subjected to custodial interrogation without being warned of his right to terminate the interview, and that the oral statements were inadmissible under Article 38.22 of the Texas Code of Criminal Procedure. The trial judge denied the motion and found him guilty. He appealed.

**Holding:** Oral statements generally are inadmissible against a defendant, but the prohibition is subject to several exceptions. One of these is that the statement was recorded electronically after the defendant was given the warnings required by Article 38.22 and the defendant waived his rights. Section 3(a) of Article 38.22 sets out additional requirements for statements that have been recorded, and strict compliance is required. Article 38.22 is a procedural rule that operates independently from the exclusionary rule in Article 38.23. The State’s argument that the “evidence” to be excluded in this case must have been of a crime committed before the questioning, and not a crime - like hindering apprehension - committed after it, is not supported by the language of Article 38.22.

The State also contended that the statement was admissible because the defendant was not “in custody” for hindering apprehension when it was made; he had been arrested for traffic violations. “Custody” occurs either when a person is formally arrested, or when someone’s freedom of movement has been restrained to the degree associated with formal arrest. “A formal arrest ... always constitutes ‘custody’ for purposes of Article 38.22, regardless of the offense that prompted the arrest.” The defendant already was under arrest when he said the methamphetamine belonged to him.

Finally, the State argued that Article 38.22 applies only to “confessional” statements and is not applicable when the defendant does not implicate himself in the offense that is prosecuted. The plain language of Article 38.22, Section 3, is to the contrary. That statutory language does not include the exception that the State argued for. It states that “no oral or sign language statement of

an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless” certain conditions are met. Exceptions are set forth in Section 3(a) and Section 5 of that article. None of these exceptions applies to statements that are not confessional in nature, do not implicate the accused for the offense charged, or constitute a crime. The defendant’s oral statements made while he was in custody should not have been admitted in evidence against him on the charge of hindering apprehension.

**CONFESSION. WAIVER OF FIFTH AMENDMENT *MIRANDA* RIGHTS ALSO CONSTITUTES WAIVER OF SIXTH AMENDMENT RIGHT TO COUNSEL.**

***Hughen v. State*, 297 S.W.3d 330 (Tex. Crim. App. 2009)**

The defendant was arrested for participating in a violent altercation. When he was taken before a magistrate, he was advised that he was charged with attempted murder, and that he had the right to remain silent; that any statements he made could be used against him; that he had the right to consult counsel; and that an attorney would be appointed to represent him if he couldn’t afford one. Defendant asked that counsel be appointed to represent him. Three hours later, and before counsel was appointed, two officers took the defendant from his jail cell to an interrogation room, turned on a DVD recorder, and advised him of his *Miranda* rights.

After acknowledging that he understood his rights, the defendant said he “guessed” that he didn’t need to have a lawyer present before questioning “right now,” and he agreed to talk with the investigator. His responses were recorded on a fill-in-the-blank waiver form which he initialed and signed, but only after asking, “This ain’t waiving my right for an attorney, is it?” The detective replied, “No, sir. This is just talking with us about what happened and what was going on and all that good stuff.” The defendant then answered questions.

Prior to trial, the defendant moved to suppress “any conversations between [him] and law enforcement officers.” He contended that he had been deprived his right to counsel under the Fifth and Sixth Amendments because he had been approached by the officers before he conferred with counsel, and because the detective had inaccurately assured him that he was not waiving his right to counsel. The State responded that the defendant was aware of his rights, including the right to counsel, at the time he spoke to the officers. When he asked if he was waiving his right to counsel, the prosecution argued, that was reasonably interpreted to be an inquiry into whether he was waiving counsel rights for the whole trial process, and not for the purpose of answering questions.

The trial court denied the defendant’s suppression motion. At trial, the DVD was played for the jury and he was convicted. He appealed the denial of his motion.

**Holding:** Defendant’s argument was that his Sixth Amendment right to counsel was violated by the police-initiated interrogation that followed the attachment of the right. He contended that once the right to counsel attached and was asserted, it could be waived only if (1) he initiated contact with the police or (2) his lawyer agreed to the waiver. Neither of these happened in this case.

“Once the adversarial judicial process has been initiated, the Sixth Amendment right to counsel guarantees an accused the right to have counsel present at all ‘critical’ stages of the criminal proceeding.” Interrogation is a “critical stage” once the “adversarial judicial process” has begun.

An accused may waive the right to counsel, even after charges have been brought, if that waiver is voluntary, knowing, and intelligent. Waiver of rights following the warnings required by *Miranda* usually will suffice to waive the Sixth Amendment right to counsel also.

When the defendant was taken before a magistrate following his arrest, adversarial judicial proceedings were initiated against him, and his Sixth Amendment rights attached. He was entitled to have his lawyer present during questioning by the investigator. While he had the right to a lawyer, the defendant waived that right when the investigator read *Miranda* warnings to him before questioning and the defendant declined to have counsel present. The Supreme Court recently held in *Montejo v. Louisiana*, 129 S.Ct. 2079, that the Sixth Amendment does not prohibit police-initiated “interrogation of a suspect who has previously asserted his right to counsel.” The Fifth Amendment, on the other hand, bars police-initiated custodial interrogation of suspects who previously asserted their right to counsel, unless the suspect’s lawyer is actually present. Because the defendant did not assert on appeal any violation of his Fifth Amendment rights, this question was not before the court. **COMMENT:** *Montejo* is a very recent decision by the U.S. Supreme Court, and it changes the prevalent thinking about whether police may question someone whose Sixth Amendment right has attached, once that person has previously requested a lawyer. The defendant in this case did not rely on the Fifth Amendment rule of *Edwards*, deciding instead to argue only a Sixth Amendment violation. Under *Edwards*, a defendant who asks for a lawyer after being given *Miranda* warnings cannot thereafter be approached by the police and interrogated unless his lawyer is present. This rule is designed to “prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.”

**CONFESSION. EXTENDED SILENCE FOLLOWING WARNINGS DOES NOT PRECLUDE INFERENCE OF WAIVER OF RIGHT TO REMAIN SILENT.**

***Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010)**

A suspect in a shooting was arrested about a year after the crime. Two officers arrived at the place where he was arrested to interrogate him. One of the officers presented the defendant a form with *Miranda* warnings, including one which read, “You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.” The detective had the defendant read this warning out loud to ensure he could read and understand English. When asked to sign the form, however, the defendant refused. The officers proceeded with the interrogation. At no point did the defendant say he wanted to remain silent or that he wanted a lawyer, but he was “largely” silent during the interrogation, which lasted about three hours.

During this time, the defendant gave “a few limited verbal responses, such as ‘yeah,’ ‘no,’ or ‘I don’t know.’” Sometimes he nodded his head. After about two-and-three-quarters hours of this, one of the officers asked, “Do you believe in God?” With tears in his eyes, the defendant responded, “Yes.” The officer then asked, “Do you pray to God to forgive you for shooting that boy down?” Again, the defendant answered, “Yes.” He refused to make a written statement, and the interrogation was terminated a short time later.

These verbal responses were offered by the prosecution at the defendant's murder trial over the defendant's objection. He was convicted and sentenced to life without parole.

On appeal, the defendant argued that his suppression motion should have been granted because his statement had been obtained in violation of *Miranda*. A federal appeals court reversed his conviction, finding that the defendant's "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: [the defendant] did not wish to waive his rights." This ruling was appealed to the Supreme Court.

**Holding:** There was no argument by the parties as to whether the warnings given the defendant complied with the requirements of *Miranda*. The legal question in this case focused entirely on the defendant's reaction to the warnings.

A suspect's ambiguous or equivocal mention of counsel has been held insufficient to invoke the right, and there is no reason to treat the right to silence differently. If the police are required to "guess" whether a suspect wants to remain silent, society's interest in prosecuting criminal activity may be harmed. The defendant "did not say that he wanted to remain silent or that he did not want to talk with the police." If he had done either, his silence right would have been invoked unequivocally. Apart from whether the defendant invoked his right to silence, there is a question whether his silence could constitute a waiver of that right. Without a voluntary waiver of his right, the statement was inadmissible.

According to *Miranda*, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." This burden does not require, however, that the waiver be express. An "implicit waiver" is sufficient. While it is not enough for the State to show only that warnings were given and the defendant made an uncoerced statement, waiver may be inferred from a showing that the defendant understood his rights.

"Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." If someone has a full understanding of the right to remain silent, acting in a way that is inconsistent with the exercise of that right shows a deliberate choice not to remain silent.

In this case, the defendant waived his right to silence. There was no evidence that he did not understand the rights. By speaking, he gave up his right not to speak. The defendant received a copy of the warnings and showed that he could read and understand English by reading aloud the warning that he could decide at any time to use his right to remain silent. This warning demonstrated his knowledge that the right did not expire after a certain time had passed, and that the police would honor his right whenever he exercised it.

If the defendant had wanted to invoke his right, he could have simply remained silent, or he could have said he wished to invoke his rights. Instead, he made a statement after nearly three hours of questioning following warnings. In the absence of any evidence that the defendant's statement was coerced, it was admissible. The interrogation took place in a standard-sized room during the afternoon. While lengthy, the interrogation was not so long as to make it coercive. The suspect was not deprived of sleep or food, or threatened.

The defendant also argued that he should not have been questioned until the police obtained a waiver. Instead, the questioning began and continued without any waiver until the suspect

responded to the officer's question. The Court already has held, however, that waiver can be inferred "from the actions and words of the person interrogated." This is inconsistent with a rule that requires waiver prior to questioning.

Being questioned before deciding to waive provides the suspect with additional information that may help the suspect make that decision. Once the warnings have been given, police may proceed with questioning unless the suspect invokes one of his rights. A suspect who has received proper warnings and understood them, and who has not invoked his rights, may be questioned. If he subsequently makes an uncoerced statement without asserting a right, that statement will be admissible.

**CONFESSION. MEXICAN NATIONAL WHO HAD BEEN GIVEN APPOINTED  
COUNSEL IN MEXICO COULD STILL VALIDLY WAIVE RIGHT TO COUNSEL IN  
U.S.**

***Flores v. State*, 299 S.W.3d 843 (Tex. App. - El Paso 2009)**

On the defendant's birthday, he and friends were celebrating at the house belonging to his mother. At that time, the defendant and his girlfriend with whom he had three children were separated. She and a friend were at a dance club when the defendant, who had been drinking and previously had threatened to kill her, called her repeatedly, asking her to come by his birthday party. She refused and he became very upset.

Later that evening, after leaving the dance club, the woman decided to drop by the birthday party and her friend took her there and let her out. The next morning, the mother became concerned when she returned to her house and discovered her son was not there, and was not where he was supposed to be. She called the police. The responding officer told the woman, through a translator, that if she became upset with her son's drinking and wanted him out of her house, she only had to put his things outside. She agreed, and as she and a niece started gathering his things, they found the body of his girlfriend wrapped in a sheet and garbage bags in her son's bedroom closet. The victim's ankles and arm had been wrapped in duct tape. Fingerprints belonging to the defendant were found on a garbage bag containing some of her effects and left with the body.

After the killing, the defendant fled to Mexico. He was extradited to the U.S. following his indictment for murder. In a statement he gave to a detective, the defendant said he had used large amounts of beer and drugs on the night of the party. He planned for his friends to hide when the victim came into the house, then jump out, tie her up and "slap her around to cause her to fear a severe beating so that she would not 'do stupid things' to him anymore." The men jumped her, taped her, and eventually agreed to kill her when one of them told the defendant she had been unfaithful to him. One man tried to suffocate the victim with a plastic bag, but when it didn't work, the defendant and one of the friends tied an extension cord around her neck and pulled until she died.

The defendant argued on appeal that his Sixth Amendment rights were violated because he was approached by detectives while he was represented by an attorney who had been appointed in Mexico. He claimed that the waiver of rights he gave when he confessed was invalid due to the prior representation on the extradition matter.

**Holding:** The Sixth Amendment right to counsel attaches after the initiation of adversarial judicial proceedings against the accused. At any “critical stage” following that point, the defendant is entitled to the advice of an attorney. A general request for appointed counsel at an arraignment does not prevent law enforcement officers from later approaching the defendant and seeking his waiver of rights for interrogation purposes. On the other hand, if a defendant does not wish to answer questions without advice of counsel, he can assert that right at any time. “At that point, not only must the immediate contact end, but ‘badgering’ by later requests is prohibited.”

In this case the defendant waived his right to counsel when he was approached and given *Miranda* warnings. The attorney appointed to represent him in Mexico was never identified, and the defendant never claimed the attorney’s representation was connected with the murder charge. The defendant did not request to confer with the Mexican lawyer. He was not tricked, coerced, or badgered into waiving his right to counsel. Consequently, his recorded statement was admissible.

The defendant also claimed that the trial court should not have admitted his video-recorded statement, which was in Spanish, without providing a contemporaneous translation to the jury. Instead, the jury received a transcript of a translation. His argument was that the English-speaking jurors would be reading the translation while the recording was played, and would not be able to “correlate the English translation with [the defendant’s] statements and the context in which they were made.”

No challenge was made to the accuracy or quality of the translation. The jury had the translation and videotape available to view during deliberations if it wished, and jurors were able to observe the defendant’s demeanor by watching the recording. Because the interpreter was qualified and subject to cross-examination, the translation was adequate for the jury to use in its deliberations. The defendant’s guilt was established by overwhelming evidence. While the Spanish statement given by the defendant should not have been heard by jurors because it might have been used by Spanish-speakers to contradict the official version provided by the translator, there was no evidence this happened and defendant was not harmed by playing the recording at trial.

**CONFESSION. DEFENDANT WAIVED HIS RIGHT TO COUNSEL WHEN HE INITIATED CONTACT WITH OFFICER.**

***Hall v. State*, 303 S.W.3d 336 (Tex. App. - Amarillo 2009)**

While on bond pending trial for possession of cocaine, the defendant came to a DEA office of his free will to see if he could “cut a deal” to avoid prison time. In exchange for this benefit, he offered to provide a local police officer with information about drug deals in his area. The officer told the defendant he could not promise anything and that he would have to contact the district attorney’s office.

Without first receiving *Miranda* warnings, the defendant was questioned. He admitted, among other things, that he obtained the crack cocaine that had been found in his car from a local drug dealer. This led the officer to conclude that the defendant knew about the local drug trade and probably was a drug dealer.

Following his conviction, the defendant appealed on the ground that his Sixth Amendment right to counsel had been violated by the officer and his inculpatory statements should not have been admitted at trial. The State responded that the defendant waived his objection by not raising it during trial, and that he waived his right to counsel when he initiated contact with the law enforcement officer.

**Holding:** Unless a defendant objects to an error at trial, he waives his complaint unless the requirement allegedly violated is “an absolute or systemic” one or he was denied a “waivable-only right that he did not waive.” The issue in this case is the application of the Sixth Amendment guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” When the adversarial criminal judicial process begins, the defendant has the right to counsel at all “critical” stages of the prosecution. Interrogation after charges have been filed is a “critical stage.” Although the defendant may have a right to have a lawyer present during questioning after he has been indicted, he may waive that right if the waiver is voluntary, knowing, and intelligent. Therefore, the right to counsel is not absolute or systemic.

Once a defendant is represented by counsel and has been indicted, he may waive his right to have the attorney present if he initiates contact with the police. “Initiation is an inquiry representing a desire on the part of the accused to open up a more generalized discussion relating directly or indirectly to the officer’s investigation.”

While the Texas Court of Criminal Appeals has not decided directly whether a defendant’s Sixth Amendment right to counsel during post-indictment interrogation is a “waivable-only” right, it has disallowed appeal in a case in which right to counsel was an issue and the defendant failed to object. Even if the right to the presence of an attorney during questioning at a “critical stage” is a “waivable-only” right, the defendant did not give up his right by doing nothing, which is the standard for determining whether that right is “waivable-only.” Instead, he affirmatively demonstrated his waiver of his counsel right by seeking communication with the officer in a manner that was voluntary, knowing, and intelligent.

It was the defendant, and not the officer, who requested the meeting and said he wanted to negotiate a deal. That action indicated that he wanted to “go it alone” rather than have the assistance of his lawyer, and that he was willing to have a “more generalized discussion” related to the officer’s investigation. Further, the officer in this case did not “deliberately elicit” incriminating statements from the defendant. He did not coerce, threaten, or intimidate him, and he did not promise anything in exchange for the defendant’s information.

While the defendant did not receive *Miranda* warnings, he was free on bail and could have left the DEA office at any time he wished. Given all of the circumstances, the defendant waived his Sixth Amendment right to counsel by initiating contact with the officer and volunteering incriminating information.

**CONFESSION. POLICE MAY INITIATE CONTACT WITH SUSPECT WHO HAS INVOKED RIGHT TO COUNSEL IF “BREAK IN CUSTODY” OF AT LEAST 14 DAYS HAS OCCURRED.**

***Maryland v. Shatzer*, 130 S.Ct. 1213 (2010)**

After receiving information that the defendant has sexually abused his three-year-old son, a detective went to the prison where the man was serving a sentence for an unrelated child sex abuse conviction. He gave the defendant *Miranda* warnings and obtained a waiver of rights before explaining why he was there. The defendant had mistakenly thought the investigator was an attorney who wanted to discuss the crime for which he was in prison. When he found out the real purpose of the visit, he refused to answer questions without an attorney. After the defendant invoked his rights, the interview terminated and he was released back into the general prison population. The investigation was closed a short time later.

Two-and-a-half years later, the social worker who had reported the alleged child abuse provided the police with additional information about the incident and the defendant’s role. A different detective from the same division interviewed the victim before going to the prison to which the defendant had been transferred. The detective explained that a new investigation had been opened, and administered *Miranda* warnings. This time, the defendant waived his rights and answered questions about the incident without requesting a lawyer. In a subsequent interrogation following a failed polygraph exam, the defendant incriminated himself by saying, “I didn’t force him.” He then requested an attorney and there were no more questions.

After he was charged with child sex abuse, he moved to suppress the most recent statements he had made, arguing that *Edwards v. Arizona*, 451 U.S. 477, prohibited law enforcement officers from approaching him again after he had initially invoked his right to an attorney. When his motion was denied, he was found guilty and appealed.

**Holding:** *Edwards* held that, “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 suspect who asks for a lawyer cannot be approached by the police until he has an attorney unless he “himself initiates further communication, exchanges, or conversations with the police.” This rule protects suspects from “the mounting coercive pressures of ‘prolonged police custody.’” It is designed to prevent the police from repeatedly trying to question a suspect who has asked for a lawyer until he is “badgered into submission.”

The rule of *Edwards* is not constitutionally required, but is a rule intended to protect suspects in custody from coercion. Since it is not mandated by the Constitution, it applies only where the benefits of the rule outweigh its costs.

Where a suspect has been released from custody and “has returned to his normal life for some time before the later attempted interrogation,” it is unlikely that a waiver of rights has been coerced by a police-dominated atmosphere. The suspect could have sought advice from a lawyer or others and he knows that he can stop any attempted interrogation merely by saying he wants counsel. “[The suspect’s] change of heart is less likely attributable to ‘badgering’ than it is to the fact that further

deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest.”

The defendant in this case was not approached for two-and-a-half years after he invoked his right to counsel. During that time, he was returned to the general prison population, and situation that constituted a “normal life” for him. He could have talked with friends and a lawyer during that period, and it is unlikely he was feeling any “residual coercive effects of his prior custody” when he eventually agreed to answer questions.

The time necessary to recover from the effects of custody is 14 days. After that period of “break in custody,” law enforcement officers again may approach a suspect who previously has requested counsel, give him warnings, and question him if he waives his rights. In the defendant’s case, he had such a “break in custody” despite being in prison the entire time because he had been returned to his accustomed surroundings and daily routine. Because an extensive period - much longer than 14 days - separated the time the defendant requested counsel from the time he was approached about the same matter, and because he was not under the potentially coercive control of the officer who first approached him during that time, his later statements were admissible.

**COMMENT:** This case departs significantly from the rule of *Edwards* as it generally has been understood. Notice, however, what the case does not allow. While a suspect who previously asked for a lawyer may be approached again after 14 days, he still must be given warnings, must waive his rights, and must agree to answer questions. If he indicates that he wants to remain silent or talk with a lawyer, there cannot be any questioning. Also, continuous custody during the 14 days on the same charge where the suspect has not been sentenced and is still under the “control” of his interrogators, prevents an officer from “trying again.” There must be a “break in custody” for 14 days, unless the suspect is in the peculiar situation of the defendant in this case, and happens to be living in a prison situation.

**CONFESSION. POLICE MAY INITIATE CONTACT WITH DEFENDANT AFTER  
ARRAIGNMENT AT WHICH COURT ORDERS APPOINTMENT OF COUNSEL BUT  
DEFENDANT DOES NOT REQUEST A LAWYER.**

***Montejo v. Louisiana*, 129 S.Ct. 2079 (2009)**

The defendant was a known associate of a suspect in a murder and robbery case. When questioned by the police, the defendant repeatedly changed his story and eventually admitted that he had shot and killed the victim while committing a burglary.

Following his arrest, the defendant was brought before a magistrate for a “72-hour hearing” at which no bail was set and the public defender’s office was ordered to be appointed to represent the accused. Later that day, investigators asked the defendant to accompany them to locate the murder weapon. After receiving his *Miranda* warnings again, the defendant agreed to go along.. During this excursion, the defendant wrote a letter of apology to the victim’s widow in which he admitted his part in the crime.

When the defendant met with his court-appointed lawyer, the attorney was upset that the investigators had interrogated his client without notice to him and without his presence. Although

the attorney objected to the introduction of the letter into evidence at trial, it was admitted and the defendant was convicted and sentenced to death.

On appeal to the state supreme court, the defendant argued that the rule of *Jackson v. Michigan*, 475 U.S. 625, prohibited police-initiated contact and interrogation. In *Jackson*, the Supreme Court held that, “if police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant’s right to counsel for that police-initiated interrogation is invalid.” The appellate court affirmed the conviction and sentence because it reasoned that *Jackson* applies only where the defendant actually requests a lawyer. The defendant did not ask for counsel at his 72-hour hearing. Defendant appealed to the Supreme Court of the U.S., which granted review.

**Holding:** “Once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings. Interrogation by the State is such a stage.” A defendant may waive that right to counsel if the waiver is voluntary, knowing, and intelligent, even if the defendant is already represented by counsel. “The only question raised by this case, and the only one addressed by the *Jackson* rule, is whether courts must *presume* that such a waiver is invalid under certain circumstances.”

In order to prevent police from badgering a suspect into waiving rights he previously has asserted, counsel must be made available prior to further interrogation once the suspect has requested counsel. Asking for a lawyer at arraignment also is treated as an invocation of the Sixth Amendment right, even if there is doubt that the defendant intended to apply that request to interrogation. However, “when a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary.” The defendant has not elected to exercise that right, and no reason exists to protect him from a later waiver.

This defendant did nothing at all to express his intentions about Sixth Amendment rights, or to indicate that he would not be open to speaking to the police without having a lawyer present. A defendant who has not made up his mind about whether to seek the advice of counsel cannot be “badgered” into changing his mind. To adopt the defendant’s position would mean that in states in which counsel is appointed without a request by the defendant, the police could never initiate interrogation because the Sixth Amendment right attached automatically. Under *Miranda*, a defendant always can assert his right to counsel after being informed or reminded of that right, and if he does so, later requests by police for a waiver are prohibited.

Although *Miranda* applies only to situations in which a suspect is interrogated while in custody, a person who is not in custody is less likely to be coerced into speaking without counsel. Therefore, the *Miranda* rule provides the essential protection from “badgering” that the defendant argued was necessary in this case, even though it would not apply to non-custodial questioning. The state supreme court’s ruling regarding *Jackson v. Michigan* reached the correct result. As long as the defendant did not request counsel, the letter was properly admitted.

**COMMENT:** This opinion fundamentally changes the rule of *Jackson*. It places the burden on the defendant to assert his or her Sixth Amendment right to counsel in order to preclude police-initiated contact for interrogation. The rule now essentially is replaced by *Arizona v. Edwards* and *Miranda*. Law enforcement officers must exercise great care when approaching a defendant whose Sixth

Amendment rights have attached at the initiation of adversarial judicial proceedings. The holding in this case removes the automatic prohibition on initiating contact with such persons, but it leaves in place the rules regarding the effect of a request for counsel by the defendant

### 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.

The court in *Lugo v. State* rejected the defendant's unexplained claim that his statement was involuntary because his interrogator told the defendant that he would use whatever evidence he could find to try to prove the truth of the defendant's statements. An involuntariness claim also failed in *Butler v. State*, a case in which the defendant's statement was recorded without his knowledge.

#### **CONFESSION. INVESTIGATOR'S STATEMENTS MADE TO SUSPECT DURING INTERROGATION THAT HE WOULD TRY TO PROVE THE TRUTH OF SUSPECT'S STORY DID NOT RENDER CONFESSION INVOLUNTARY.**

##### ***Lugo v. State*, 299 S.W.3d 445 (Tex. App. - Fort Worth 2009)**

A police officer who was sent to investigate a homicide found the victim lying face down in a motel room with a bullet wound in his back. The room was searched pursuant to a warrant, and additional evidence was found that the death was a homicide. A detective who arrived on the scene also searched the room. He discovered pay stubs with the defendant's name on them, and he obtained an arrest warrant for the man.

One witness was located who said that she had seen the defendant and the victim arguing in the motel room over a drug sale. She was afraid that she would be caught with drugs if she stayed, so she left. As she did so, she heard a gunshot, turned around, and saw the victim falling face forward as the defendant was holding a gun.

The defendant could not be found for five years, but he eventually was apprehended and detained in Ohio. At first, he denied being present at the time of the killing, but later admitted that he had been in the motel room when it happened, along with other admissions.

After being indicted for murder, the defendant moved to suppress his statement to the detective who had gone to Ohio to interview him. The trial court denied the motion, and the detective testified at trial about what he was told by the defendant. The witness also testified. Following his conviction, the defendant appealed.

**Holding:** On appeal, the defendant argued that the detective to whom he made his statement had “stepped over the line” and coerced the statement. It was the remarks the detective made during the interrogation process, according to the defendant, that caused his statement to be involuntary. Voluntariness is determined from an examination of the totality of circumstances. If the defendant’s will was “overborne” by police conduct, any statement that is produced will be considered involuntary and inadmissible. “A defendant’s statement must not have been obtained by the influence of hope or fear. Even trickery or deception does not make a statement involuntary unless the method was calculated to produce an untruthful confession or was offensive to due process.”

In this case, the defendant complains of two remarks made by the detective during interrogation. In the first, the officer asked the defendant, “[W]hy don’t you just tell me ... the truth about what happened and see if we can prove what you say?” In the other, he said, “I swear to you that I will do whatever I can with the evidence, with witnesses, or whatever, with the laboratory, whatever to prove what you told me is the truth.” The defendant did not explain how these statements produced an untrue confession, violated due process, or caused his will to be “overborne.” “If anything, [the detective’s] remarks conveyed a sense that the veracity of [the defendant’s] statement would eventually be discovered.”

The trial judge was entitled to find that the defendant’s statement was voluntary and not coerced, and to deny his suppression motion. All other issues the defendant raised on appeal also were denied and his conviction affirmed.

**COMMENT:** The defendant in this case failed to demonstrate, or even explain, to the appellate court how the statements made to him by the detective might have rendered his confession involuntary. Consequently, his appeal failed on this and other grounds. He might have argued, however, that what the detective said amounted to a promise to help him. A promise or threat made by someone in authority that may induce a person to speak untruthfully renders any resulting statement involuntary. It also has long been the law in Texas that a warning, not that a statement can be used *against* a suspect, but that it can be used *for and against* him, taints any statement that is produced and makes it involuntary. Although the statement is literally true, the warnings are designed to remind the suspect that the aim of the interrogation is to elicit incriminating statements, not to assist him in “telling his story.”

**CONFESSION. FAILURE TO ADVISE SUSPECT HE WAS BEING RECORDED DID NOT RENDER STATEMENT INVOLUNTARY.**

***Butler v. State*, 300 S.W.3d 474 (Tex. App. - Texarkana 2009)**

As a restaurant owner and one of his employees was closing for the night, two men in ski masks and gloves forced their way through the back door and shot the employee. The owner was ordered to open the safe, and the men took cash and a pistol from inside, as well as the owner’s briefcase with checkbook and credit cards. About three weeks later, an officer saw a car matching the description of the one seen on the night of the robbery and stopped it for a traffic offense. The defendant was arrested for driving without a license and the car was impounded and inventoried, revealing the pistol taken from the restaurant’s safe.

Additional evidence was found during a consent search of an apartment where the defendant sometimes stayed. Late that night, and following the search, the officers returned to the jail and conducted an interview with the defendant. It was unclear whether the defendant was asleep when the officers approached him, but he agreed to talk with them. He was advised of his rights and interviewed. This conversation was digitally recorded, although the defendant was not advised that a recording was being made.

During the interrogation, the defendant admitted robbing the restaurant's owner with his brother. He also confessed that he had held the gun during the robbery, but said that the shooting was accidental. The defendant later moved to suppress this statement, claiming that the failure to advise him of the recording and waking him at 2:00 a.m. to be interviewed violated his constitutional rights. The trial court denied the motion and the defendant was convicted. He appealed.

**Holding:** In an interview on the afternoon of the day the defendant was arrested, he told investigators that he had let the robbers borrow his car. Late that night, he agreed to the second interview in which he admitted his role in the robbery and shooting. On the recording of the second interview, the officers could be heard offering the defendant a soda and a piece of pie. There was no indication that he was roused from sleep in order to disorient him, or that any coercive interview tactics were used. The defendant could be heard sobbing during parts of the confession, but only after he initially denied involvement. When he provided details of his part in multiple robberies, he was composed and there was no indication of coercion.

Article 38.22 of the Texas Code of Criminal Procedure no longer requires a suspect to be informed that his statement is being recorded. "Criminal defendants ... are constitutionally protected only from *compulsory* self-incrimination." Physical and mental compulsion can render a confession involuntary and a suspect must voluntarily waive his rights. The waiver cannot be the product of intimidation, coercion or deception.

Defendant's unawareness of the recording device could not have *compelled* him to incriminate himself. In the absence of any evidence that the police forced his statement or his waiver of rights, the trial court's denial of the defendant's suppression motion was proper.

#### 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.

The defendant in *Nguyen v. State* argued that his rights under Article 38.22 of the Texas Code of Criminal Procedure had been violated. In a novel response, the State contended, among other things, that Art. 38.22 was inapplicable because the defendant's statements were offered as evidence of a crime that hadn't been committed at the time they were made. The defendant clearly was in custody at the time, and he was questioned over his request for an attorney. The appeals court

rejected the State's claim that 38.22 applies only to statements that are "confessional" in nature, and held the defendant's statements to be inadmissible.

**CONFESSION. ARTICLE 38.22 ALSO APPLIES TO STATEMENTS THAT ARE NOT  
"CONFESSIONAL" IN NATURE.**

***Nguyen v. State*, 292 S.W.3d 671 (Tex. Crim. App. 2009)**

An officer on patrol stopped the defendant's car for several traffic violations. After he questioned the defendant, who was driving the vehicle, and the passenger, who owned the vehicle, the officer requested consent to search the car. The owner agreed to a search, which uncovered methamphetamine in the owner's bag. After his arrest, the vehicle owner claimed that the drugs belonged to the defendant, who also was taken into custody for the traffic offenses by another officer who had been called to the scene.

After being advised of his rights under *Miranda*, the defendant asked for an attorney. The arresting officer explained that he would be entitled to an attorney only if the officer was going to ask him questions about the offense.

Both men were placed in the back of a patrol car where their conversation was recorded. The owner of the car pleaded with the defendant to take responsibility for the drugs, which he agreed to do. But when they got the officer's attention, the defendant said only that he wanted to go home. The officer said he would not ask the defendant about the drugs, but he informed the defendant that the other man was facing charges for him, and that the defendant would be going to jail for the traffic offenses. He then left the two men alone in the car again, where the defendant eventually agreed to claim the drugs were his.

When the officer was summoned to the car, the defendant told him the drugs did not belong to the other man. After the officer advised the defendant to tell him if the drugs belonged to him, the defendant said, "Honestly, I don't want to, but it's mine. Okay?" The search of the vehicle was resumed and a tablet of ecstasy was found near or in an item belonging to the owner. Again, the defendant agreed with the man's statement that it was not his, but the officer transported both men to the station after telling the vehicle owner that the defendant had not taken responsibility for the ecstasy.

The defendant was charged with hindering apprehension for falsely confessing that he possessed the methamphetamine. Prior to trial, the defendant moved to suppress his recorded statement on the grounds that he was subjected to custodial interrogation and his right to counsel was violated. The motion was denied and the defendant found guilty. He appealed.

On appeal, the court of appeals found that the defendant had been subjected to custodial interrogation by the officer's statements that he knew or should have known would elicit incriminating responses. After the trial court's ruling on the motion was reversed, the State petitioned the Texas Court of Criminal Appeals for discretionary review.

**Holding:** Article 38.22, Sec. 3(a), requires that five conditions be met in order for a recorded statement to be admissible. This article is a procedural evidentiary rule, and is unlike Article 38.23, the Texas exclusionary rule that "mandates exclusion of evidence when it has been obtained in

contravention of legal or constitutional rights.” The State contended that the illegality, if any, involved in obtaining the defendant’s statement occurred before he committed the offense of hindering apprehension. Consequently, any illegality “did not occur in the process of obtaining evidence for the crime that [the defendant] was charged with committing” and did not require suppression.

“There is no statutory exception in Article 38.22 for statements that constitute a crime committed after law enforcement officials violated that provision in attempting to obtain evidence of a previously committed crime.” The State’s argument is not supported by the plain language of Article 38.22.

The State also contended that the defendant was not in “custody” when he made the statement. He had been arrested for traffic violations, and not for hindering apprehension. “Custody” is established when a person is “formally arrested” or when his “freedom of movement has been restrained to the degree associated with a formal arrest.” Because the defendant was under formal arrest for traffic offenses at the time he took responsibility for the methamphetamine, he clearly was in “custody.”

Finally, the State argued that the statement was not offered to prove its truth, but only to show that the defendant made such a statement. It should not have been excluded, therefore, even if a violation of Article 38.22 occurred, according to the State.

The plain language of Article 38.22, Section 3, “does not include the exception” urged by the State. It simply says that an oral statement is inadmissible unless the five conditions are met, or other exceptions apply. No exception exists for “statements that are not confessional in nature, do not implicate the accused for the offense prosecuted, or constitute an offense.” The defendant’s oral statement did not fall within any stated exception, and therefore should not have been admitted. **[Editor’s note:** The opinion from the court of appeals in this case was reported in the November, 2009 Digest.]

## 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.

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. *Parks v. State* and *Crain v. State* illustrate how tone of voice, environment, gestures, and other nonverbal cues might convince a reasonable person that he is not free to leave, changing a consensual encounter into a seizure. In both cases, an officer “spotlighted” the suspect and spoke to him in an authoritative or commanding voice. These actions transformed the encounter into one requiring at least reasonable 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). Even if the seizure is characterized as an investigative detention, reasonable suspicion must support it. In *Sieffert v. State*, the officer was unable to develop reasonable suspicion to continue detaining a motorist after the reason for the traffic stop was satisfied. In the absence of reasonable suspicion that another offense was being committed, the detention became unlawful and evidence found during that detention was inadmissible.

**SEARCH AND SEIZURE - SHINING SPOTLIGHT ON MEN AND USING  
AUTHORITATIVE TONE CONSTITUTED A “SEIZURE” REQUIRING  
REASONABLE SUSPICION; GANG MEMBERSHIP DOES NOT PROVIDE SUCH  
SUSPICION.**

***Parks v. State*, 330 S.W.3d 675 (Tex. App. - San Antonio 2010)**

Two officers on routine patrol at night saw the defendant and three other people walking behind some stores in a strip mall. Although they were near some back doors to the stores, the men did not approach the doors or attempt to open them. One of the officers used the patrol car’s spotlight to illuminate the men and he noticed that they had blue rags hanging from their pockets. Based on his experience, the officer associated the blue rags with gang membership.

The officers drove near the men and one of them told the men to place their hands on the car. The officer used an authoritative tone and, he later testified, would have stopped them if they had not responded. The defendant took a step back before complying with the officer’s command, which he repeated. Because the officer thought the defendant “might have something illegal on him” because of his reaction, he frisked the suspect and found a gun in the defendant’s pocket. None of the group made any furtive gestures or threats; none was smoking or passing anything; and none were seen engaging in any criminal activity.

The officer testified that he “wanted to find out who they were and what they were doing behind a business.” He had no information that any of the men was a gang member and, although they were all dressed similarly, their clothing was not indicative of gang membership. After hearing his testimony, the trial judge denied the defendant’s motion to suppress the pistol on the basis that the officers lacked reasonable suspicion to detain or frisk him. Following a plea of no contest, the defendant appealed the denial of his motion.

**Holding:** “An encounter takes place when an officer approaches a citizen in a public place to ask questions, and the citizen is willing to listen and voluntarily answers.” A consensual encounter does not require any level of suspicion, and is not governed by the Fourth Amendment. An investigative detention, on the other hand, is a “seizure” which is subject to the Fourth Amendment. It requires reasonable suspicion, and permits an officer to interfere with a person’s freedom to leave. Whether an interaction between an officer and a citizen is a consensual encounter or an investigative detention depends on “whether a reasonable person in the citizen’s position would have felt free to decline the officer’s requests or otherwise terminate the encounter.”

Several factors may be helpful in determining whether a person has been detained. These include the threatening presence of several officers; display of a weapon by an officer; physical

touching by the police; and the “use of language or tone of voice indicating compliance with the officer’s request might be compelled.” In this case, the initial encounter between the officer and the defendant was a detention. The use of a spotlight, while not always determinative, is a factor in deciding whether a person was seized. The officer here “authoritatively” requested or commanded the men to walk over to the patrol car and place their hands on it. Further, the officer testified that the suspects were not free to disregard the order. Two officers were present, both in uniform and armed. The defendant, while hesitant, did not refuse to comply with the order; he acquiesced to the officer’s show of authority. Under these circumstances, a reasonable person would not have felt free to leave.

Since this encounter was not consensual, the officer was required to have at least reasonable suspicion of criminal activity to justify the seizure. Except for the blue rags, the officer did not testify to any other activity related to crime. The men were merely walking past the back doors of businesses, not “checking them out” or trying to open them, and no furtive gestures or gang signs were seen. None of the men was known to be involved in a gang, or to have a criminal record.

In the absence of additional evidence of criminal activity, no reasonable suspicion existed in this case. The officer’s testimony that the blue rags were a sign that the men were gang members did “not rise above mere surmise or hunch.” Evidence that a person is a gang member “may be a factor in determining reasonable suspicion, but gang membership, alone, does not provide reasonable suspicion.”

There was no testimony from the officer that any particular gang identified itself with blue rags, or that such a gang operated in the area. He did not explain why he thought the rags were associated with gangs, or how his experience supported his belief that gang members usually carry weapons. Without such evidence and additional circumstances supporting the officer’s conclusion that the defendant and his companions were gang members and were engaged in some criminal activity, the investigative detention was not justified by reasonable suspicion, as required. The trial judge should have granted the defendant’s motion to suppress.

**COMMENT:** The central point of this opinion is that a request/command/order issued in an authoritative tone of voice by uniformed officers to a suspect who is being spotlighted, constitutes a “seizure” of that person for Fourth Amendment purposes. In this case, that seizure was unlawful because the officer had no reason other than the blue rags to suspect the men were engaged in criminal activity. While the rags might lead the officer to think the men were gang members, the court holds that gang membership, by itself, is not sufficient to create reasonable suspicion. There must be independent reason to suspect criminal activity.

### **SEARCH AND SEIZURE - SPOTLIGHTING SUSPECT AND SAYING “COME OVER HERE AND TALK TO ME” CONSTITUTED DETENTION WITHOUT REASONABLE SUSPICION.**

*Crain v. State*, 315 S.W.3d 43 (Tex. Crim. App. 2010)

Around 12:30 a.m. a police officer on his way to a theft call saw the defendant walking in a residential area. As the officer drove past, the man “grabbed at his waist.” After finishing at the

theft call, the officer returned to where he had seen the man and found him walking across a yard. The officer called out to the defendant, "Come over here and talk to me." He then shined his spotlight on the man. Later, the officer testified that if the man had refused to talk with him, he would have let him go because he had not seen him do anything that was "criminal activity."

As the man approached the patrol car, the officer exited. In response to the man's question about what he was doing wrong, the officer replied that he wanted to talk to him. During this conversation, the officer smelled the odor of recently smoked marijuana coming from the man's clothing and breath.

The officer decided to detain the man for possibly possessing marijuana. He held the man's hands behind his back as he walked him toward the patrol car. After another officer arrived, the defendant was frisked. Seeing a bulge under the man's shirt, one of the officers determined it was a pistol, which he removed from the defendant. A search incident to arrest was conducted then, but no additional contraband was found.

The officer testified that the defendant was never threatening and did not resist. He never had to be told to stop or not to run. A witness contradicted this testimony, saying that he heard the officer say "stop and don't you run," then "something about a thousand volts or something." She characterized the officer's statement as "an order" or "command."

At the conclusion of the suppression hearing held by the trial court, the judge found that the officer had not made a show of authority until after he smelled marijuana. The contact, according to the court, was a mere encounter not requiring any particular level of suspicion. Using the spotlight was "a matter of practical necessity due to the time of night" and the court determined that the officer's version of what was said at the scene was credible, rather than the testimony of the witness. This decision was appealed to the court of appeals which held over the dissent of one justice that the trial court was correct. The defendant petitioned for discretionary review by the Texas Court of Criminal Appeals.

**Holding:** A consensual encounter between a citizen and the police does not trigger Fourth Amendment protection. "An encounter takes place when an officer approaches a citizen in a public place to ask questions, and the citizen is willing to listen and voluntarily answers." If the citizen yields to an officer's show of authority and reasonably feels he is not free to leave, he has been detained for investigation. In deciding whether someone was detained, the court will consider "whether the officer conveyed a message that compliance with the officer's request was required."

The use of a spotlight, unlike the use of emergency lights, does not necessarily convert an encounter into an investigative detention, but each case must be decided on its own facts. Use of a spotlight may not be enough by itself, but it is a factor to be considered in determining whether a citizen has been detained.

The officer in this case testified that he called to the defendant through his rolled-down window, "Come over here and talk to me." After the defendant stopped and turned toward the officer, the officer got out of his patrol car and approached the defendant to speak with him. There was no option presented by the words the officer used when he called to the suspect. He left the defendant no choice. The words were mandatory. In this case, the words were spoken by a police officer in a marked car shining his spotlight on the defendant in the middle of the night.

Given the circumstances, a reasonable person in the defendant's shoes would not have felt that he was free to walk away. The encounter was a detention which required reasonable suspicion

to believe the defendant was engaged in criminal activity. Reasonable suspicion requires articulable facts that would lead an officer to believe someone has been, is, or will be engaged in criminal activity. “Articulable facts” must be “more than a mere inarticulate hunch, suspicion, or good faith suspicion that a crime was in progress.”

The officer explained that he suspected the defendant because he was walking late at night through a residential area, and he “grabbed at his waist” when the officer passed. There was no evidence that the officer believed the defendant was involved in a crime; no burglaries had been reported for that area, and the officer did not know whether the defendant was a resident of the neighborhood.

“Neither time of day nor level of criminal activity in an area are suspicious in and of themselves; the two are merely factors to be considered in making a determination of reasonable suspicion.” Prior to smelling marijuana on the defendant, the officer had no reason to suspect the man was engaged in criminal activity. The defendant was detained by the officer when he was ordered to talk with him. Since no reasonable suspicion existed at that time, the detention was unlawful. The evidence found as a result of the detention should have been suppressed.

**CONFESSION. TRAFFIC STOP WAS UNDULY PROLONGED WHERE  
REASONABLE SUSPICION DID NOT DEVELOP FOR CONTINUED DETENTION.**

***Sieffert v. State*, 290 S.W.3d 478 (Tex. App. - Amarillo 2009)**

A police officer on routine patrol in a high crime area shortly after midnight saw a white SUV with four occupants driving slowly. He followed the vehicle until he was able to pace it driving at 5 m.p.h. over the speed limit. Having already determined the investigation would “go to something further” than speeding, the officer approached the SUV. He found the driver already had his license and proof of insurance ready, which concerned the officer. The driver also appeared “real nervous” to the officer, so he asked him to get out of the SUV, frisked him, and put him in the back of his patrol car.

The driver said there was nothing the officer “needed to know” about inside the SUV, but he refused to consent to a search. This caused the officer to believe “something was out of the ordinary.” He decided to call a K-9 unit to the scene to search for drugs.

While the defendant, who was a passenger in the SUV, had not given the officer any cause for suspicion, he also had her get out of the vehicle and questioned her about her activities, identity, and the SUV’s contents. Twice the defendant gave the officer incorrect information about her identity.

Although the drug dog was unable to detect anything in the SUV, the officer searched the vehicle and found the defendant’s identification. Because she had three outstanding warrants, she was arrested. The driver was not given a citation or warning for speeding, but the defendant was charged with Failure to Identify.

After the defendant’s suppression motion was denied, a jury trial was held. She was convicted of the offense and sentenced to one year in jail. The defendant appealed the ruling on her motion to suppress, contending that the statements she made to the officer about her identity should

not have been admitted because they were the product of an unlawful detention that was unduly prolonged.

**Holding:** During a traffic stop, the driver and passengers are “seized” for purposes of the Fourth Amendment and they have standing to contest the legality of the stop and the length of their detention. If the traffic stop was based on reasonable suspicion and took no longer than necessary to fulfill the purpose of the stop, it was reasonable.

In the course of a traffic stop, an officer may request identification, proof of insurance and vehicle registration; check for outstanding warrants; confirm the registration; and ask about the purpose of the trip and intended destination. While officers may question passengers about these things, they may do so only if the questioning is consensual, unless they have reasonable suspicion to believe the passengers are involved in criminal activity. A traffic stop is temporary and “may last no longer than necessary to effectuate its purpose. Once its purpose has been satisfied, the stop may not be used as a ‘fishing expedition for unrelated criminal activity.’”

If, during a traffic stop, an officer is refused consent to search the vehicle, the occupants may not be detained unless reasonable suspicion exists to believe they are engaged in some crime. Refusing to consent does not create reasonable suspicion to prolong the stop.

The fact that this stop occurred late at night in a high crime area, and that the vehicle was being driven slowly, was not suspicious without more. When the stop was made, the officer already had decided that it would evolve into “something more,” but he did not see anything indicating the occupants of the vehicle might have engaged in illegal activity. Although the driver was nervous, that fact is “of minimal probative value, given that many, if not most, individuals can become nervous or agitated when detained by police officers.” The officer admitted that he did not know whether the SUV’s occupants had been involved in any criminal activity when he called for the drug dog. Nevertheless, “he proceeded to engage in a fishing expedition to determine whether there were drugs in the SUV” and questioned the occupants about their identities and activities.

The officer’s suspicion was no more than a hunch. He had even less reason to suspect the defendant than the driver. Detaining her and questioning her while waiting for the arrival of the dog went beyond the scope of the stop and unnecessarily prolonged the detention.

While the officer had reason for the traffic stop, he had no sufficient reason to continue to detain the SUV or its occupants. Driving slowly through a high crime area at night, even with signs of nervousness, did not produce the required objective suspicion. When the driver refused consent to search, the officer should have written a citation or released him. The statements that resulted from the unreasonably prolonged stop should not have been admitted against the defendant.

### 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. *Abraham v. State* and *Garcia v. State* involve this issue. In *Abraham*, an officer outside his jurisdiction was found not to have “stopped” (seized) the DWI defendant because the motorist was stopped already when the officer approached him. There was a traffic stop by an officer outside his jurisdiction in *Garcia*, but the court found reasonable suspicion to support it.

**ARREST. OFFICER WHO WAS OUTSIDE HIS JURISDICTION DID NOT “STOP”  
DEFENDANT FOR DWI INVESTIGATION BECAUSE DRIVER WAS STOPPED  
WHEN OFFICER APPROACHED.**

*Abraham v. State*, 330 S.W.3d 326 (Tex. App. - Dallas 2009)

A police sergeant on routine patrol was sitting in his car when he was approached by a driver at 3:00 a.m. The driver reported that a vehicle was stopped in the middle of the road a short distance away and its occupant appeared to be passed out. The officer located the vehicle, which was sitting in the center lane of an intersection just outside the sergeant’s jurisdiction. When he approached the car, the sergeant found the car in gear with the engine running. After beating on the window for several minutes, the defendant woke up and rolled down his window. As soon as he did that, the sergeant smelled the odor of alcohol. He reached into the car, turned off the vehicle, and set the keys on the top of the defendant’s car.

There was no conversation between the two men. The officer just called his dispatcher to have the neighboring city’s police department notified to come and take care of the situation. Three or four minutes later, a police officer arrived on the scene. The sergeant told him what he had found and, after another back-up officer arrived, the sergeant left and returned to his own city.

The officer who remained with the defendant asked him if he had been drinking, and the man replied that he had. After he failed three field sobriety tests, the defendant was arrested for DWI.

Prior to trial, the defendant moved to suppress the evidence of his intoxication. He contended that the police sergeant who had discovered him did not have jurisdiction to stop him in the neighboring town. The arresting officer testified to what he did and what he had been told by the sergeant. Following the trial court’s denial of his suppression motion, the defendant was convicted of DWI by jury. He appealed the suppression ruling.

**Holding:** The defendant argued that the sergeant who found him stopped him for a traffic offense. That argument was not supported by the testimony or the trial judge’s findings. “There was no evidence [the sergeant] ‘stopped’ [the defendant] at all.” The defendant’s car had been stopped for some time before the officer arrived on the scene. Nothing was said by the sergeant about a traffic violation. His initial contact with the defendant was a consensual encounter, and not a “stop.”

“Police officers are as free as any other citizen to knock on someone’s door and ask to talk to them, to approach citizens on the street or in their cars and to ask for information or their cooperation. Police officers may be as aggressive as the pushy Fuller-brush man at the front door, the insistent panhandler on the street, or the grimacing street-corner car-window squeegee man. All of these social interactions may involve embarrassment and inconvenience, but they do not involve official coercion.”

A private citizen told the sergeant about the defendant and where to find him. When he located the car stopped in the middle of the roadway, the sergeant approached and tried to wake up the driver. Anyone might have done those things out of a concern for the safety of the driver. It was only after the sergeant smelled alcohol on the defendant’s breath that he turned off the engine and removed the keys. The version of Article 14.03(g) of the Code of Criminal Procedure in effect at the time allowed an officer outside his jurisdiction to detain a driver who had been DWI.

The sergeant's actions, while outside his own territorial jurisdiction, did not violate Article 14.03(g). The trial court properly overruled the defendant's suppression motion and admitted the evidence of his intoxication.

**ARREST. REASONABLE SUSPICION OF DWI SUPPORTS STOP OF DRIVER BY OFFICER ACTING OUTSIDE HIS HOME JURISDICTION.**

***Garcia v. State*, 296 S.W.3d 180 (Tex. App. - Houston 2009)**

An officer heard a dispatch regarding a tip from a driver that a described vehicle was continuously striking the curb. The officer located the suspect vehicle and followed it. As the officer was following the vehicle, it swerved between lanes. Although by this time the vehicle was outside the officer's jurisdiction, he stopped it for failure to maintain a single lane.

After the defendant failed field sobriety tests, the officer placed him under arrest for DWI. Prior to trial, the defendant moved to suppress any evidence resulting from his detention and arrest on the grounds that the traffic stop was unlawful because the officer was outside his geographical arrest jurisdiction. The trial court denied the suppression motion, and the defendant pled guilty to DWI. He was sentenced and appealed his conviction, claiming that the court's should have granted his suppression motion.

**Holding:** There was no dispute in this case that the defendant was outside of his employing municipality when he detained the defendant. "Generally, 'a peace officer is a peace officer only while in his jurisdiction and when the officer leaves that jurisdiction, he cannot perform the functions of his office.'" Article 14.03(d) of the Texas Code of Criminal Procedure provides, however, that "A peace officer who is outside his jurisdiction may arrest, without warrant, a person who commits an offense within the officer's present or view, if the offense is a felony, a violation of Chapter 42 or 49, Penal Code, or a breach of the peace."

DWI is a violation of Chapter 49 of the Penal Code. Although the statute applies to "arrests," it is not limited to "formal custodial arrest(s)." The exception to the general rule applies also to investigative detentions based on reasonable suspicion. If an officer has reasonable suspicion that a driver is violating the DWI statute, because it is within Chapter 49, the officer may temporarily detain the driver to investigate further. And the officer may do this even if he is outside his own city limits.

"Reasonable suspicion 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." The suspicion must be "particularized and objective," and the officer must be able to point to facts that would lead a reasonable person to believe the suspect was engaged in criminal conduct. A "mere hunch" is insufficient.

Officers need not personally observe circumstances that give rise to the reasonable suspicion. They also may consider information supplied by another person, as long as that information is reliable. Reliability of a tip may be shown by the way the informant acquired the information, and is enhanced by a detailed description of the wrongdoing, especially if it is observed firsthand. When an informant is known and can be held accountable for the accuracy of their tip, the information

deserves to be given greater weight. “Unsolicited information regarding a crime in progress, provided by a citizen who has no relationship with the police, provides detailed information, and makes himself accountable by providing contact information is sufficiently reliable to warrant an officer to reasonably conclude that a temporary detention is justified.”

In this case, the officer was acting on a tip provided by a citizen-informant who saw the defendant’s vehicle hitting the outside curb of the street. The informant followed the defendant’s vehicle and provided detailed information about its location and direction of travel, as well as a description of the vehicle and license plate number.

Acting on this tip, the officer located the vehicle and personally observed it swerving between lanes. Taken with the information provided by the informant, the officer had reasonable suspicion to believe the driver was operating the vehicle while intoxicated. Defendant’s initial detention was lawful because it was based on reasonable suspicion to believe a Chapter 49 offense was being committed in the presence or view of the officer. Since Article 14.03(d) permits officers who are outside their jurisdiction to “arrest” offenders in these circumstances, the suppression motion was properly denied.

## 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.

Increasingly, law enforcement officers rely on the assistance of devices to detect violations. Although the technology for measuring the speed of a moving object has changed over the years, anything that enhances an officer’s senses and produces evidence of a violation must be shown to be reliable. While the officer need not understand the scientific principles behind the device, she or he must know how to use it, and the State must be able to prove to the court that the evidence the device produces is trustworthy. This usually is done through the testimony of an expert, and not the officer. The device in question in *Hall v. State* was a LIDAR speed measuring unit. Only the evidence from the device was offered by the State to justify the stop for speeding that led to a DWI arrest, but no evidence of the trustworthiness of the device was introduced. In the absence of such evidence or other reason to justify the stop, the State failed to carry its burden of showing the stop was lawful.

Lane movements have caused considerable difficulty as the basis for traffic stops. The driver in *Mahaffrey v. State* failed to signal before moving from a traffic lane that ended, and merging into

an adjacent lane. The court decided that the Transportation Code does not require a signal for that particular lane movement, but only where the driver turns right or left from the “direct course” of the road.

Display of license plates is an issue that also has been the basis for challenge in the recent past. The latest iteration of this issue was in *Spence v. State*, a case in which the officer stopped a driver who placed his license plate behind the front windshield. That placement was held not to satisfy the requirement for displaying a plate “at the front” of the vehicle.

As noted in other sections of the *Guide*, unduly prolonging a traffic stop can transform a lawful detention into an unlawful one. Once the purpose of the stop has been accomplished, the motorist must be allowed to leave unless reasonable suspicion or probable cause develops during the stop to justify further detention. No such suspicion supported the prolonged detention in *State v. Wilson*.

### **DWI. LIDAR EVIDENCE ADMISSIBLE WITHOUT RELIABILITY HEARING, BUT LIDAR NOT SHOWN TO BE BASIS FOR STOPPING THE DEFENDANT FOR SPEEDING.**

*Hall v. State*, 297 S.W.3d 294 (Tex. Crim. App. 2009)

Based on readings from a Light Detection and Ranging (LIDAR) device, a police officer stopped the defendant for speeding eleven miles-per-hour over the limit. During his contact with the driver, the officer noticed the odor of alcohol on the man’s breath.

Due to his performance on field sobriety tests, the defendant was arrested for DWI. He moved to suppress any evidence resulting from the traffic stop. At the hearing on his motion, the defendant contended that before the results of the LIDAR device could be admitted, it must be shown by a scientific expert that the equipment is “scientifically correct and reliable.” In the absence of such testimony, the defendant argued the court should grant his motion.

The officer testified that on the night of the arrest, he had turned on the device and it had initiated a self-test and indicated that it was functioning correctly. He also testified as to the operation of the LIDAR, and admitted that he was not certified to operate the equipment and was unsure whether anyone maintained it to assure its reliability and accuracy. The LIDAR reading was the officer’s sole reason for stopping the defendant.

Defendant’s motion was denied by the trial judge. Following his conviction by a jury, the defendant appealed the suppression ruling.

**Holding:** The court’s interpretation of Rule 702 of the Texas Rules of Evidence requires a trial judge to determine the reliability of an expert’s testimony as to any scientific evidence about which the expert testifies. That rule, like most other rules of evidence, does not apply to a suppression hearing. Therefore, the judge in this case was not required to conduct a reliability hearing on LIDAR technology before hearing testimony.

The officer testified that his decision to stop the defendant for speeding was made solely on the basis of the LIDAR reading. No evidence was offered that the officer used any other independent means, including the officer’s personal observation. There also was nothing in the record regarding

whether LIDAR produces reasonably trustworthy information. The judge might have taken judicial notice of the reliability of the device, but that, too, was not reflected in the court's record.

To support the stop, the State was required to show the existence of probable cause to believe the defendant was committing the offense of speeding. The only evidence supporting the officer's belief that the defendant was speeding was the reading he obtained from LIDAR. In the absence of a finding that LIDAR is reasonably trustworthy or that the officer had some other reason for his belief, no probable cause was shown. The trial court should have granted the defendant's suppression motion.

**DWI. MOVING FROM TRAFFIC LANE THAT ENDS IN RESPONSE TO "MERGE LEFT" SIGN IS NOT A MOVEMENT THAT REQUIRES SIGNAL FOR LANE CHANGE.**

***Mahaffrey v. State*, 316 S.W.3d 633 (Tex. Crim. App. 2010)**

The defendant was driving in the far right lane of a highway. As he approached a bridge, the lane ended after a sign that read "Lane Ends - Merge Left." Because the defendant moved left to merge without signaling his lane change, a police officer following him stopped the defendant. When the officer approached defendant's car, he noticed that the driver's speech was slurred and "a strong odor of alcohol" was coming from inside the car.

The driver was arrested for DWI. He filed a suppression motion, claiming that the officer stopped him without reason, and that the evidence obtained following the stop should not have been admitted. At the hearing, the officer testified that the defendant's car never crossed any lane dividers or markers, and he did exactly what the sign directed him to do. According to the officer, "Where he decided to switch over at was when he noticed he no longer was going to have a lane.... I interpret when he leaves from that right-hand lane, he's moving to the left lane regardless of how they merge together."

The trial judge denied the suppression motion, finding that "the defendant did not cross over lane markings but rather failed to use a turn signal after the lane markings ended as the two lanes merged into one." This, according to the court, was a violation of Section 545.104(a) of the Transportation Code which requires a signal prior to a turn or lane change. The defendant pleaded guilty and appealed.

**Holding:** The question in this case is whether a "merge" is a "turn" within the meaning of the Transportation Code. Although the trial court discussed the matter as a "lane change" rather than a "turn," the State argued that "a movement right or left on a roadway is a turn" requiring a signal.

In interpreting statutes, courts look to the literal text of the statute in question and give the words their plain meaning. Other factors may be considered only where the language of the statute is ambiguous. The Transportation Code does not define the word "turn." Contrary to the State's argument and the holding of the court of appeals, "turn" does not include a "movement right or left on a roadway." The statutory language of Section 545.103 is plain and unambiguous. It provides no definition of "turn."

In the context of driving, “turn” is understood to mean to change directions, to turn the vehicle from a direct course of the roadway. “Thus, if the road itself makes sharp switchback turns going up the mountain, the driver need not signal these ‘turns’ because he is simply following the ‘direct course’ of the road and of the traffic on that winding road.” A driver must signal only when he turns right or left from the “direct course” of the road. Therefore, a driver exiting a freeway is not changing lanes, but turns at corners or into driveways would require a signal.

To view the defendant’s movement as a “turn” would require signaling any movement that “is not a perfectly straight trajectory.” A signal is needed to merge only when “entering a freeway,” but not in other merge situations. While all left or right movements on the road must be made safely, only turns, lane changes and starts from a parked position require a signal. Since the State did not argue that this case involves a “lane change,” the stop for failure to signal a “turn” was unlawful and the evidence obtained following the stop of defendant’s car should have been suppressed.

**COMMENT:** The court does not reach the question of whether this stop could have been justified for failure to signal a lane change because it was not decided on those grounds in the lower court and the issue was not before it. The question might have been closer had the stop been seen as based on failure to signal a lane change, although the result may have been the same. It is not clear that merging in response to a lane ending constitutes a “change” of lane.

### **SEARCH AND SEIZURE - LICENSE PLATE PLACED BEHIND WINDSHIELD DOES NOT MEET REQUIREMENT FOR DISPLAYING PLATE “AT THE FRONT” OF THE VEHICLE.**

#### ***Spence v. State*, 296 S.W.3d 315 (Tex. App. - Amarillo 2009)**

A police officer watching a known crack house saw a car parked in the driveway. When it left and drove past the officer, he noticed there was no front license plate on the vehicle. The officer stopped the car for not having a front plate, something the driver said he knew because he previously had been cited. After determining that the defendant did not have a driver’s license, the officer frisked him and found drugs and \$1400 on his person.

While escorting the defendant to the patrol car, the officer noticed the passenger in the defendant’s car discard a baggie with crack cocaine. At trial, the officer testified that he stopped the defendant for driving without a front license plate, but admitted that he saw a plate laying on the dashboard when he approached the vehicle.

The defendant testified that the plate was quite visible from outside the car and was “all the way up in front of the front windshield.” He contended that, when the officer saw the license plate, he had no reason to detain him any longer. At the close of the evidence, the defendant requested the judge to instruct the jury to disregard any evidence obtained during the stop if it found that there was no reason for the detention other than the license violation. The trial court denied the request to give the instruction and the defendant was convicted. He appealed.

**Holding:** The evidence at trial was conflicting as to whether the license plate could be seen readily, but it was undisputed that the plate was on the dashboard behind the windshield. Section 502.404(a) of the Transportation Code requires that plates be attached to the “front” and “rear” of

the vehicle. Although one court has held that the word “front” is ambiguous and could include displaying the plate on the dashboard if it could be seen from the front of the car, the word “connotes the idea of something preceding something else, or of the beginning of an object.” There is no evidence that the Texas Legislature used the word “front” in any other way with a special meaning.

The apparent purpose of Section 502.404 is to “facilitate the identification of a motor vehicle.” Being able to focus attention on the part of the vehicle where the officer would expect to find the license plate aids quick identification, especially when trying to identify a plate number of a moving vehicle. It also is not sufficient that the plate merely be “facing” the front; the statute requires that it be placed “at” the front. A plate placed someplace other than the front bumper might be seen from the front, or might be facing the front, but would not be “at” the front. Had the legislature wished to do so, it could have written the statute to require only that the plate had “to be seen” by someone passing by. The words it actually used have a different meaning.

Section 502.404(a) is satisfied by placing the license plate in the area “where the car begins,” the foremost part of the car. Placing it behind the windshield is not sufficient. Since the defendant’s car did not have a license plate displayed as it was required to have, the officer had a valid reason for making the traffic stop. The trial court was not obliged to instruct the jury on whether some other justification for the stop existed.

#### **SEARCH AND SEIZURE - PROLONGED TRAFFIC STOP NOT BASED ON REASONABLE SUSPICION.**

##### ***State v. Wilson, 295 S.W.3d 759 (Tex. App. - Eastland 2009)***

The defendant was stopped for speeding on an interstate highway. When the officer began following him for driving 81 miles per hour, the defendant accelerated to 90 miles per hour. After five miles, the officer activated his lights and the defendant pulled over immediately. When the officer asked for his license and proof of insurance, the defendant said he was on parole for a drug offense. He produced his license, but could not find his proof of insurance. The officer returned to his patrol car to run a license check, which he had to repeat when he received no response from dispatch to his first request. During the stop, the defendant located his proof of insurance and left his vehicle to give it to the officer. He was instructed by the officer to remain in a certain place on the side of the road but instead, he “fidgeted” and moved around.

While waiting for a return on the license check, the officer asked the defendant for consent to search his vehicle. The defendant became “tongue-tied” and began to stutter. After giving reasons for not wanting the officer to check the vehicle, the defendant refused to consent to a search.

The officer frisked the defendant and had him stand beside the road while a drug dog sniffed his vehicle. On the second time around the car, the dog alerted on the front door, and methamphetamine was found inside. Thirteen minutes passed between the time the stop was made and the dog sniff began. Following a hearing on the defendant’s motion to suppress evidence found in the search of his vehicle, the trial court granted the motion. The State appealed that order to the court of appeals.

**Holding:** “A traffic stop is a detention and must be reasonable under the United States and Texas Constitutions. To be reasonable, a traffic stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” An officer conducting a traffic stop may conduct a check for outstanding warrants, and may obtain a driver’s license and proof of insurance from the driver. It does not violate the Fourth Amendment to question the driver about matters unrelated to the traffic offense during the time the officer is waiting for the warrant check if that questioning does not unduly extend the duration of the valid stop.

Once the reason for the traffic stop has been satisfied, “the stop may not be used as a ‘fishing expedition for unrelated criminal activity.’” Only if reasonable suspicion of another offense develops during the stop, is the officer allowed to continue to detain the motorist after the conclusion of the investigation for the violation for which the stop was made initially. “After the purpose of a traffic stop has been accomplished, a police officer may ask for consent to search a vehicle; however, if consent is refused, the officer may not detain the occupants or vehicle further unless reasonable suspicion of some criminal activity exists.” In this case, the officer frisked the defendant and conducted a dog sniff of the vehicle after the purpose of the traffic stop had been achieved.

At the suppression hearing, the officer testified that the only reasons for prolonging the stop were the refusal of the defendant to consent to a search and his apparent nervousness. While nervousness may be considered in establishing reasonable suspicion, it is not enough by itself to create that suspicion. Given that no other facts were produced that might have allowed the officer to continue to detain the defendant, the trial court’s finding that the detention was unduly prolonged was supported by the record. In the absence of reasonable suspicion to believe the defendant was committing an offense other than the one for which he was stopped, the officer should have permitted the defendant to continue on his way.

### 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. For an example of a case in which the officer’s belief was based on observation that was found to be insufficient to produce reasonable suspicion, see *Foster v. State*. 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.

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. The driver in *Texas D.P.S. v. Gilfeather* refused to participate in field sobriety tests, a fact that the court of appeals held could be considered in determining whether probable cause existed that the driver was intoxicated.

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. See *State v. Dugas* in Chapter I, subsection (E) (“Search Warrants”).

What is important in a DWI prosecution is the blood alcohol level *at the time the defendant was operating the vehicle*. Breath and blood evidence provides an indication of the level *after arrest*. To determine the alcohol level while the defendant was driving, a process called “retrograde extrapolation” must be undertaken by a scientific expert. No extrapolation is possible, however, unless the expert has considerable information about the characteristics of the driver, including things like, height, weight, and time since last eating. The expert in *Burns v. State* lacked that information; consequently, his testimony about the blood alcohol level of the defendant while operating the vehicle was held to be inadmissible.

Occasionally a case turns on the substantive law of DWI rather than a procedural rule. *Roane 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. Although the arresting officer did not see him operate the vehicle, circumstantial evidence, including finding keys to the ignition in the man’s pocket, provided sufficient evidence to support a DWI conviction.

A more esoteric argument was made in *Brown v. State*, an argument based in fundamental criminal law theory. The driver claimed that he was involuntarily intoxicated, a defense that has been recognized in Texas cases. He contended that the accident in which he was involved was caused by his accidental ingestion of Ambien after he had been drinking. This, according to the defendant, rendered him incapable of forming the requisite culpable mental state necessary for DWI. The appeals court held, however, that since DWI is a strict liability offense (one that does not require culpability), involuntary intoxication cannot be a defense to DWI even if it is proven.

**DWI. EVIDENCE OF INTOXICATION INADMISSIBLE BECAUSE STOP OF  
VEHICLE NOT SUPPORTED BY REASONABLE SUSPICION TO BELIEVE DRIVER  
WAS INTOXICATED.**

***Foster v. State*, 297 S.W.3d 386 (Tex. App. - Austin 2009), reversed, 326 S.W.3d 609 (Tex.  
Crim. App. 2010)**

In the early morning hours, the defendant, driving a pickup truck, pulled up very close behind the unmarked car of an officer who was stopped at a red light. The officer heard a revving sound and noticed the truck lurch forward twice, as if trying to move into the empty lane to the left. Just

after this happened, a police sergeant driving a marked police car pulled up alongside the two vehicles, effectively blocking the defendant from moving his truck. The sergeant and the detective approached the defendant and smelled the odor of alcohol. A DWI enforcement officer who was called to the scene conducted field sobriety tests, which resulted in the defendant's arrest for DWI. Prior to his trial, the defendant moved to suppress any evidence obtained as a result of his detention, arguing that the stop was not supported by reasonable suspicion. The trial court denied the defendant's motion, finding that the testimony of the detective was credible. The judge based his finding of reasonable suspicion on the time of night, the location near a bar district, and the defendant's erratic driving (the two lurching movements). The defendant pleaded no contest and appealed denial of his suppression motion.

**Holding:** Reasonable suspicion is required to justify an investigative detention. "A reasonable suspicion means more than a mere hunch or non-specific suspicion of criminal activity."

The State's position was that the encounter was consensual until the officers detected the odor of alcohol. Consensual encounters, unlike investigative detentions, do not require any particular degree of suspicion. "A detention occurs when a person yields to an officer's show of authority or when a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter." The defendant was stopped behind the detective's car on a two-lane, one-way street. His vehicle was barricaded by vehicles on his front and side, one of which was a marked police car. "Under such circumstances, a reasonable person would not only feel that he was not free to leave, but would be physically prevented from doing so, absent an attempt to exit the vehicle and flee on foot."

Since the defendant had been detained by the placement of the police cars around his truck, it was necessary for the officers to have at least reasonable suspicion to support the seizure. The State contended that two traffic offenses had been committed: unsafe start from a stop position, and reckless driving.

The detective testified that the defendant drove up very close to the rear of his vehicle before stopping, although he did not hear any tires screeching during the stop. Then, the defendant tried to change lanes but was too close to do so. Although he revved his engine and tried to move to the other lane, he did not hit the officer's car. These movements appeared unsafe to the detective, and he suspected the driver might be intoxicated because of the time of night and the nearness of the local bar district.

"Poor or even rude driving habits do not necessarily translate into traffic violations." There was no evidence that the defendant was not in control of his vehicle or that he had been driving recklessly. He did not leave his lane of traffic, although he obviously wanted to. He may have realized that, while he hoped to change lanes while waiting at the light, his proximity to the car in front of him would not permit that. No traffic offense was committed by this driving behavior and the officer lacked reasonable suspicion to detain the defendant in order to investigate.

Although the trial judge believed the defendant's lurching movements were indicative of intoxication when combined with the lateness of the hour and the location where they occurred, these factors did not provide sufficient reason for the officer reasonably to suspect that the driver was drunk. To allow such an inference would be to permit officers to detain any driver found at a downtown intersection late at night if that person made lurching movements. Reasonable suspicion did not exist to believe either that the defendant had committed a traffic offense, or that he was

intoxicated. His detention was unlawful and any evidence produced from it should have been suppressed.

**[Editor's note: This decision was later reversed by the Texas Court of Criminal Appeals.]**

**DWI. REFUSAL TO SUBMIT TO SOBRIETY TESTS CONSIDERED IN  
DETERMINING THAT PROBABLE CAUSE EXISTED TO BELIEVE DRIVER WAS  
INTOXICATED.**

*Texas D.P.S. v. Gilfeather*, 293 S.W.3d 875 (Tex. App. - Ft. Worth 2009)

A DPS trooper stopped the defendant for speeding and issued him a warning. About five minutes later a different trooper stopped the defendant for driving thirteen miles an hour over the limit.

When the officer approached the defendant and requested his license and proof of insurance, the defendant instead handed him the warning the other trooper had given him. During their conversation, the officer noticed the smell of alcohol coming from the vehicle. He also observed that the defendant's eyes were red, bloodshot, and glassy. Although the man did not stagger as he exited his car, he swayed as he stood on the roadside. After the defendant refused to take field sobriety tests, the officer arrested him.

Before the defendant refused a breath test, he signed a form acknowledging that refusal would result in a suspension of his license for not less than 180 days. Following the suspension, the defendant requested an administrative hearing. The administrative law judge (ALJ) upheld the license suspension after hearing testimony from the trooper and the defendant. The defendant appealed this decision to the county court at law which reversed the ALJ's decision. That appeal was heard by the court of appeals.

**Holding:** In order to uphold an ALJ's decision, the court of appeals must find, not that the decision was correct, but that some reasonable basis existed for the decision. DPS asserted that substantial evidence supported each of the findings the ALJ was required to make.

When a person is arrested for DWI, specimens of breath or blood may be taken. Refusal to submit a sample for testing results in the suspension of the driver's license for 180 days, subject to a hearing if requested by the driver. At the hearing DPS must prove that reasonable suspicion or probable existed to stop or arrest the defendant; that there was probable cause to believe the person was operating a motor vehicle in a public place while intoxicated; that the arresting officer requested a specimen; and that the arrestee refused to submit the specimen. In this case, it was undisputed that the trooper arrested the defendant and requested a specimen, which the defendant refused to provide.

The only issues contested here were whether some justification existed for the stop, and whether there was probable cause that the defendant was intoxicated while driving. The trooper testified that the defendant was driving 68 m.p.h. in a 55 m.p.h. zone, as measured by radar, which was sufficient to establish grounds for the traffic stop.

As to probable cause to believe he was intoxicated, several factors contributed to the officer's conclusion that the defendant was committing the offense. "Speeding can indicate impaired mental

judgment” and is a circumstance that may be considered. “Bloodshot eyes, an odor of alcohol on a person’s breath, and unsteady balance are all classic symptoms of intoxication.” The refusal to participate in field sobriety tests also is a factor in determining intoxication.

The defendant had received a warning about speeding only five minutes before he was stopped by a second officer for the same violation. His eyes were red, bloodshot, and glassy, and he swayed on his feet. Also, the officer smelled the odor of alcohol on the defendant’s breath. Taking into account all of these circumstances, as well as the fact that the defendant refused field sobriety tests, a substantial basis existed for the ALJ’s finding that the trooper had probable cause to arrest the defendant for DWI. Both of the contested issues the DPS was required to prove were supported by the evidence, and this “reasonable basis” for the decision should have resulted in the affirmance of the suspension.

**COMMENT:** One of the Justices participating in this case dissented from the holding that refusal to participate in field sobriety tests could provide any support for a finding of intoxication. The Justice noted that, just as a refusal to give a statement or interview cannot be viewed as evidence of guilt, the decision not to perform tests requested by officers cannot logically be taken into account in determining whether the driver is intoxicated. Unlike the implied consent law that establishes a presumption that driver’s agree to submit a specimen, the Legislature has not established any implied consent to take part in a field sobriety test.

**DWI. EXPERT WITNESS’S LACK OF INFORMATION ABOUT DRIVER’S CHARACTERISTICS RENDERS RETROGRADE EXTRAPOLATION TESTIMONY INADMISSIBLE.**

***Burns v. State*, 298 S.W.3d 697 (Tex. App. - San Antonio 2009)**

A deputy who was dispatched to look for a possibly intoxicated driver on a certain highway saw a pickup truck driving on the improved shoulder of the road, but the truck did not match the description he had been given. When the officer failed to see any other vehicle, he again observed the pickup and saw the driver make an illegal wide turn onto a road. The deputy stopped the truck and contacted the driver. When he did so, he smelled the strong odor of alcohol coming from the vehicle. The driver and the passenger, who owned the truck, admitted they had been drinking, and the driver’s speech was “very slurred.”

After the driver performed poorly on field sobriety tests, he was arrested for DWI. About 75 minutes later, he consented to a breath test which indicated a blood alcohol content of .116 and .113.

A breath test technical supervisor testified about the scientific theory on which the equipment operates, and on the effect a blood alcohol level of .116 or .113 would have on a driver. He then explained about retrograde extrapolation and testified that, in his expert opinion, a person tested 75 minutes after driving would have a ten percent chance that his BAC was rising, and a ninety percent chance that his “he’s coming down.” In additional testimony, the expert said he could not form an opinion about the defendant’s BAC when driving because he knew nothing about his individual

characteristics. It could have been higher, lower, or the same as the concentration when the driver was tested.

The jury convicted the defendant of DWI. He appealed his conviction on the ground that the State's expert should not have been allowed to testify about retrograde extrapolation, and that he had been harmed by the trial court permitting that testimony.

**Holding:** The Texas Court of Criminal Appeals has held that retrograde extrapolation testimony cannot be reliable in the absence of evidence that several individual characteristics of the driver were considered in assessing his or her blood alcohol level. These include weight, gender, typical drinking patterns, tolerance for alcohol, the quantity and type of alcohol consumed, the time period when it was consumed, the time of the last drink, and whether the driver ate before, during, or after drinking.

It was the State's position that the Court of Criminal Appeals' holding did not apply in this case because its expert did not testify to a specific alcohol concentration range. Instead, he testified only about two studies indicating that ninety percent of intoxicated drivers are in the elimination phase.

When the expert was asked to provide a range of "alcohol levels" based on the facts of this case, however, he said that there was a ten percent chance that "he's rising at the time that he's tested, and there's a ninety percent chance that he's coming down." This testimony conveyed to the jury that the defendant probably was in the elimination phase and, even if he was in the absorption phase, his BAC was rising slowly enough that he was intoxicated while he was actually driving. By allowing this testimony, the trial judge failed to apply the Court of Criminal Appeals' holding in *Mata v. State*, 46 S.W.3d 902. Despite this, the State's expert did testify that he did not know the individual characteristics of the defendant when he took the test and could not express an opinion as to a range of alcohol concentrations he might have had while driving. Instead, the expert said the BAC could have been higher, lower, or the same, that he did not know if the defendant was in the absorption phase or elimination phase. Given this admitted lack of information, the trial judge should not have admitted the expert's retrograde extrapolation testimony.

**COMMENT:** While the trial court erred in admitting the breath test supervisor's testimony, after review the evidence of intoxication produced at trial the court of appeals concluded that the error was harmless. The defendant's conviction was affirmed because there was sufficient admissible evidence to support the verdict.

## **DWI. EVIDENCE THAT DWI SUSPECT OPERATED THE VEHICLE WAS SUPPLIED BY FINDING KEYS IN HIS POCKET.**

***Roane v. State*, 2010 WL 3399036 (Tex. App. - Dallas)**

A police officer was dispatched to the scene of a major accident. When he arrived, he found the defendant standing outside a Ford Bronco with no top, and a woman was inside the vehicle. The defendant told the officer that he and the woman were four-wheeling in some fields in "a friend's Bronco" when the woman was thrown from the vehicle. Because she was unable to drive, he drove to the alley where the officer had been dispatched and telephoned 911. After smelling alcohol and

observing the defendant's poor balance, red, watery eyes, and slightly slurred speech, the officer had the man perform several field sobriety tests. He failed each of them.

The defendant eventually was convicted of DWI. He appealed that conviction on the grounds that the evidence was factually and legally insufficient to support the verdict. At trial, the arresting officer admitted that he had not seen the defendant drive, and he knew nothing about where and when he drove. Everything the officer knew about the incident came from the defendant's statements and the 911 call.

According to the officer, the defendant admitted drinking at a party. The officer conceded that he did not know what defendant's normal speech was like. He also testified that the dispatcher had told him that the caller said he had lost control of the vehicle while driving and the accident had occurred somewhere else.

**Holding:** The offense of DWI requires proof that the defendant operated a motor vehicle while intoxicated. In this case, the defendant contended that the State had not proven how recently he drove the vehicle, or that he was intoxicated at the time he operated it. There was evidence, however, that would support the conclusion that the defendant was intoxicated. The officer did not find evidence of alcohol consumption in the vehicle, which would permit the finding that the defendant did not drink from the time he left the party until the officer arrived at the scene.

When he was first contacted by the officer, the defendant was standing beside the driver's door of the Bronco and had the vehicle's keys in his pocket. He admitted to drinking, and his companion was incapable of driving. This evidence would permit a judge or jury to conclude that he had driven the vehicle. The circumstantial evidence supported a finding that the defendant drove the Bronco from the scene of the injury to the place where the officer found him. Videotape recorded at the scene was reviewed by the trial judge and, while the defendant contended that it demonstrated his good performance on the field sobriety tests, it was up to the judge to decide whether he appeared intoxicated or not.

Since the alley where the defendant was found could not be reached except by driving on public streets, the evidence sufficiently supported a finding that the defendant had operated a vehicle on a public roadway while intoxicated. The conviction was affirmed.

### **DWI. INVOLUNTARY INTOXICATION NOT A DEFENSE TO DWI BECAUSE NO CULPABLE MENTAL STATE REQUIRED FOR THE OFFENSE.**

#### ***Brown v. State*, 290 S.W.3d 247 (Tex. App. - Fort Worth 2009)**

A driver saw the defendant's car approaching from the opposite direction as he was driving down a residential street. Because the defendant was driving unsafely, the other driver pulled to the curb in order to avoid an accident, but the defendant hit the other driver's car, clipped a tree, and "crashed into a ditch." When the police arrived at the accident scene, the defendant admitted he had been drinking after performing field sobriety tests. He was taken to a hospital where his blood was drawn, and the alcohol content was .09. The defendant was charged with DWI.

The defendant testified during trial that he had drunk two tumblers of whiskey on the night of his arrest before going to bed. When he awoke to take his blood pressure medicine, he

inadvertently took Ambien. The defendant claimed to have no memory of anything that happened from the time he returned to bed until he was having his blood drawn at the hospital. He also testified that the Ambien was a different shape and size from his blood pressure medicine, and that his doctor had not told him not to take Ambien with alcohol.

At the end of his trial, the defendant asked the court to instruct the jury to acquit him if it found he was involuntarily intoxicated at the time of the offense. The court refused, the defendant was convicted, and he appealed.

**Holding:** DWI is committed by operating a motor vehicle in a public place while intoxicated. Intoxication occurs when the person does not have “the normal use of mental or physical faculties by reason of the introduction of alcohol ... or any other substance into the body.” Proof of a culpable mental state is not required for DWI. Voluntary intoxication, on the other hand, is required.

Involuntary intoxication has been recognized by the Texas Court of Criminal Appeals as a defense to criminal culpability when the defendant “exercised no independent judgment or volition in taking the intoxicant” and “as a result of his intoxication, the accused did not know that his conduct was wrong or was incapable of conforming his conduct to the requirement of the law he allegedly violated.” The defense, however, should not be extended to DWI.

The crime of DWI does not require proof of a culpable mental state. Section 49.11 of the Penal Code expressly removes that requirement for intoxication and alcoholic beverage offenses. Moreover, no culpability for DWI is implied, according to the court of criminal appeals. Since a culpable mental state is not required for DWI, a defense that is available for those persons whose involuntary intoxication renders them incapable of forming culpability, does not apply to DWI.

The defendant was not entitled to a jury instruction on the defense of involuntary intoxication. Because “involuntary intoxication cannot be a defense to DWI,” the trial court was under no obligation to instruct the jury on that defense.

**COMMENT:** This case deals with a point of substantive criminal law that is rarely discussed in opinions from appellate courts. The common law view was that the act of becoming intoxicated displayed a sufficient degree of culpability (recklessness) that the actor was responsible for whatever he or she did while intoxicated. Texas law reflects this by expressly providing that voluntary intoxication is never a defense. Thirty years ago, the court of criminal appeals, following the lead of a Minnesota court, recognized that “involuntary” intoxication should be treated differently because the actor had not culpably become intoxicated. Rather, the intoxication was due to mistake, coercion, or ignorance about the effect that the intoxicant might have. While involuntary intoxication may be a defense, it serves to exonerate the defendant only when he or she essentially suffers from temporary insanity as a result, a legal test that is very difficult to meet. As the concurring Justice in this case correctly notes, while involuntary intoxication may not be a defense to a crime like DWI that does not require a culpable mental state, it might sometimes be a defense because the intoxication renders the defendant incapable of acting “voluntary.” A voluntary act is required for all offenses, regardless of whether the crime includes a culpability level or is strict liability. While that Justice did not think the defendant in this case sufficiently established that he acted involuntarily as a result of his intoxication (i.e., that he experienced what is known as “automatism”), in an appropriate case, evidence of that state of intoxication should require a jury instruction on the defense, not because the actor lacked culpability, but because he was not acting voluntarily.

## 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).

## 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.

In the first of two other examples of unsuccessful arguments about the interpretation of statutes, the defendant in *Quinones v. State* argued that his detention for consumption of an alcoholic beverage in a public place in violation of a city ordinance was unlawful because the after-hours club where he was arrested was not a “public place” as required by the ordinance. This contention was rejected by the court despite the fact that admission was charged to the club and patrons were subject to search and could be refused admission to the club.

The second case involved a challenge to the constitutionality of the “racing on highway” statute. While the court rejected the defendant’s claim on a procedural ground, it helpfully described in some detail the method used for analyzing challenges to constitutionality.

Four cases involved procedural, rather than substantive law. All of them focused on identification issues. One of the ways in which a witness’s identification of a defendant may be attacked is by claiming that an out-of-court procedure was used that was unnecessarily suggestive. The argument is that the suggestive line-up, one-on-one identification, or photo spread planted an unshakable but incorrect belief in the witness that the defendant was involved in the offense. The witness in *Hamilton v. State* saw the defendant in the courtroom, sitting at the defense table. More than two years had passed since the crime, and the witness had been unable to identify him from a photo array earlier. Nevertheless, the court held that the courtroom identification testimony was admissible because of factors that made it more likely the testimony was not tainted by the suggestive confrontation. The same factors were used in two other cases, *Lesso v. State* and *Booker v. State*. In both, the defendants complained that the photo spreads used for identification were unnecessarily suggestive. In neither case did the court find that any suggestiveness outweighed the likelihood that the in-court identification was reliable.

The last of the identification cases considered a “scent lineup.” Evidence of a scent identification was admitted, but the jailhouse confession of the defendant was more hotly contested. It also was admitted, and the defendant was convicted of murder. The Texas Court of Criminal Appeals later reversed the holding of the court of appeals, ruling that “scent discrimination” evidence cannot be used as the sole or primary evidence supporting a conviction.

**SEARCH AND SEIZURE - AFTER-HOURS CLUB WAS “PUBLIC PLACE” EVEN  
THOUGH ADMISSION WAS CHARGED AND PATRONS WERE SUBJECT TO  
SEARCH AND EXCLUSION.**

***Quinones v. State*, 325 S.W.3d 801 (Tex. App. - Amarillo 2010)**

An officer dispatched to investigate a possible fight in an after-hours club did not find any evidence of a fight, but saw the defendant inside the club holding a styrofoam cup. Because the officer believed that people often drink alcoholic beverages from such cups, and because city ordinance prohibited consumption of alcohol in a public place at that time of night, he approached the man and looked in the cup. The officer saw that the defendant was drinking beer, and he arrested him for “consumption after hours.” In a search incident to arrest, the officer discovered a plastic baggie containing cocaine.

In his suppression motion, the defendant claimed that the club was not a “public place” as required by the ordinance. In support of this contention, he argued that the club charged an admission fee and subjected patrons to search and exclusion by the club’s security personnel. After the trial court denied the defendant’s motion, he pled guilty. Appeal was taken from the conviction on the grounds that the trial judge should have ruled the contraband inadmissible as the product of an unlawful arrest.

**Holding:** “If an officer could reasonably believe that the elements comprising a crime existed, given the totality of circumstances before him, he has probable cause to arrest the actor irrespective of whether the State can prove at trial that a crime actually, *i.e.* factually, occurred.” A public place is “any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.” Addressing this definition, some courts have held that “any access” is sufficient to make place public, while others rely “on the extent of actual access and not on the formalities by which access is gained.”

The arresting officer testified that he was familiar with the club in which the defendant was arrested. He asserted that anyone paying the cover charge could go inside the club, and that the club advertised in other “bars.” Based on these circumstances, it was reasonable for the officer to believe that the club was open to the public. He had probable cause to arrest the defendant for drinking beer in a public place during prohibited hours, and the suppression motion was properly denied.

**“RACING ON HIGHWAY” STATUTE NOT UNCONSTITUTIONALLY VAGUE AS  
APPLIED.**

***Urdiales v. State*, No. 04-08-00546 (Tex. App. - San Antonio, 7-1-09)**

The defendant was arrested and charged with racing on a highway. In the information filed against him, the State alleged, pursuant to Section 545.420(a)(1), (b)(2)(A) of the Texas Transportation Code, that the defendant did “intentionally and knowingly participate as the driver

and operator of a motor vehicle in a race, namely: the use of one or more vehicles in an attempt to outgain and outdistance another vehicle.”

Prior to trial the defendant moved to set aside the information, contending that “both the information and the statute on which it is based are unconstitutionally vague under both the Texas and United States Constitutions.” When the trial court denied the motion, the defendant pled no contest and appealed the ruling.

**Holding:** The crux of the defendant’s argument was that the statute fails to give an ordinary citizen adequate notice of the conduct that is prohibited, and that it does not afford law enforcement officers sufficient guidance to prevent arbitrary or discriminatory enforcement. The State’s response to this argument was that the statute, when read as a whole, “provides ordinary persons a reasonable opportunity to know what conduct is prohibited, and establishes determinate guidelines for law enforcement.”

Statutes are presumed to be valid. When appeals courts interpret them, they do so in accordance with the plain meaning of the statute’s language unless that language is ambiguous or the plain meaning would lead to an absurd result. In order to determine whether a criminal statute is impermissibly vague, a court makes a “two-pronged inquiry.” First, the court considers whether the statute gives an ordinary citizen enough information to know what conduct is prohibited. The statute will be considered unconstitutionally vague only when “no core of prohibited activity is defined.” Next, the court analyzes whether the statute provides law enforcement with enough notice of the forbidden conduct to prevent arbitrary or discriminatory enforcement. The language of the statute must be so specific that enforcement is not left to the subjective judgment of an officer.

The defendant did not explain how the statute was vague with respect to his own conduct. In fact, he did not disclose to the court what his conduct was. Because he failed to specify the way in which the statute was too vague, as applied to his own actions, the defendant did not meet his burden of first establishing that the statute was unconstitutional “as applied.” Without that preliminary showing, the appeals court need not consider whether the statute is unconstitutionally vague “on its face.”

The defendant also contended that the information filed against him was insufficient to give him adequate notice and allow him to prepare a defense because the language of the information tracked the allegedly vague wording of the statute. Generally, however, an indictment or information is sufficient if it tracks the language of a statute. Despite his contention, the defendant failed to show how he was prevented from investigating the offense and preparing a defense. He merely stated that the statute is too vague. Since he failed to establish the vagueness of the statute, and the information tracked that statute, the information was sufficient.

**COMMENT:** One of the Justices hearing this appeal wrote a separate concurring opinion to urge the Legislature to amend this statute’s definition of “race” because she felt it “may render the statute impermissibly vague.” The Justice noted that the statutory definition of “race” relied on in this case (the use of a vehicle to “outgain and outdistance” another vehicle) would make every ordinary driver guilty of “racing” simply by lawfully passing another vehicle.

## **IDENTIFICATION. SEEING DEFENDANT IN COURTROOM AFTER FAILING TO IDENTIFY PHOTOGRAPH DOES NOT PREVENT COURTROOM IDENTIFICATION.**

### ***Hamilton v. State*, 300 S.W.3d 14 (Tex. App. - San Antonio 2009)**

The defendant came into a sales trailer in a subdivision that was being developed and talked with the realtor who was working there alone. After about an hour, she told him she had to leave. When the woman went into an office in the trailer, he followed and sexually assaulted her. According to the victim, her attacker had reddish-blond hair and green eyes. She was shown a photographic lineup a few days after the assault, but was unable to identify the defendant as the man who attacked her.

More than two years later, the victim was called as a witness against the defendant. When she entered the courtroom, she saw the man sitting at the defense table and recognized him as her attacker.

The defendant moved to suppress her identification testimony, and a hearing was held outside the presence of the jury. At that hearing, the witness said “she always knew she would recognize her attacker when she actually saw him.” She was certain that the defendant was the man who assaulted her, and testified that she could identify him because of his hair color and body shape. The witness explained that her inability to pick out the defendant from the photo array was due to his “kind of blond, lighter reddish hair,” which none of the men in the photos seemed to have, the “clean and professional” appearance she remembered the attacker having, and the “bad” quality of the photograph.

Following the suppression hearing, the trial court denied the defendant’s motion. He appealed on the grounds that the unduly suggestive encounter in the courtroom likely led the defendant to misidentify him.

**Holding:** “An in-court identification is inadmissible when it has been tainted by an impermissibly suggestive pretrial identification.” Where the suggestive pretrial identification gives rise to a “very substantial likelihood of irreparable misidentification,” the witness is not allowed to identify the actor during trial. Several factors are used to determine whether an in-court identification is reliable, or whether it is tainted by what happened before trial. These include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the degree of attention the witness gave to the actor; (3) how accurate the witness’s prior description was; (4) the degree of certainty with which the identification was made; and (5) how much time passed between the crime and the identification.

In this case, the defendant had an “extensive opportunity” to view the defendant at the crime scene. She spent an hour with him in the sales trailer discussing floor plans and construction matters. During this time, her attention was focused on him because of the setting and the fact that she was trying to sell him a house.

The initial description the witness gave was fairly accurate, including his hair and eye color. Her explanation for her inability to identify his photo when it was first shown to her was plausible. The witness was very certain of her identification in the courtroom. She testified that she “always knew she would be able to identify [the defendant] when she saw him.”

Two years and two months had passed between the assault and time of the identification at trial. While that was a rather long time, under the totality of circumstances there was no substantial likelihood of misidentification. The fact that she saw the defendant briefly in the courtroom before the trial started did not impair the reliability of her identification.

**COMMENT:** The most common cause for wrongful convictions is inaccurate eyewitness identification. Because it is notoriously unreliable, partly because suggestive pretrial procedures can convince a witness of the accuracy of an incorrect identification, courts consider the effects of such procedures on the later in-court identification testimony. Perhaps the most troubling aspect of this case, as the court acknowledges, is the fact that the victim could not identify the defendant's photo shortly after the crime occurred. This inability illustrates how limited the photograph can be as a way to identify a person. While a live lineup is considered much better, convenience and procedural issues often lead officers to prefer the photographic array.

**IDENTIFICATION. PHOTO SPREAD SHOWN TO COMPLAINANT NOT IMPERMISSIBLY SUGGESTIVE SO AS TO PRODUCE LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.**

*Lesso v. State*, 295 S.W.3d 16 (Tex. App. - Houston 2009)

The defendant and others in his party were turned away from an after-hours club by security staff, including a commissioned security officer and the club manager. When they refused him admittance, the defendant threatened the security officer and the manager, and told them they had made a mistake.

At about 3:00 a.m., the complainant, who worked as a bouncer at the club and looked like the club manager, arrived in the parking lot for his shift. He changed into his required security clothes in his girlfriend's car and began to walk toward the nightclub. As he was walking toward the club, the complainant heard gunshots and started telling club patrons in the parking lot to get away. While directing people out of the lot, he saw the defendant holding a black pistol.

The club's security officer heard the shots and went outside, where he saw the defendant shooting at the complainant, who was trying to find cover behind some cars. After exchanging gunfire with the security officer, the defendant and his party drove out of the parking lot.

In the shooting, the complainant was hit three times in the legs. He was taken to the hospital where emergency surgery was performed. After five months, he was released from the hospital without having physical therapy because he had no insurance.

A homicide investigator assigned to the case watched videotape from a club security camera and obtained two license plate numbers provided by security guards at the club on the night of the shooting. Using this information and towing information and police records, the investigator assembled a photo spread of "persons with similar characteristics, physical characteristics, race, facial characteristics,[and] facial hair" which he took to the complainant five days after the shooting. The detective told the complainant he was "not under any obligation to pick" anyone in the photo spread. The complainant looked at each photo in the array and picked out the picture of the

defendant. When asked by the investigator if he was sure, the complainant replied, “That’s the guy that shot me.”

About three weeks after the shooting, the investigator returned to the hospital to get a second identification from the complainant. Again, he picked the photo of the defendant. A week later, the investigator took the same photo spread to the club’s security officer and told him not “to pick anybody if you don’t see them, but if you see them, point them out.” The same photo of the defendant was identified as the man who had done the shooting, and the security officer could not identify anyone else in other photo arrays he was shown by the officer. Based on these identifications, the defendant was charged with aggravated assault and was arrested. About a week before trial, the complainant saw the defendant at another nightclub and had a brief conversation with him.

Defendant’s lawyer did not move to suppress the identification before trial, and he did not object to the witnesses’ identification testimony during the trial. When the defendant was convicted, he moved for a new trial, arguing that he had been deprived of his due process rights by his attorney’s failure to object to the identification. The motion was denied on the grounds that the photo spread procedure was not unduly suggestive and, even if it was suggestive, it was unlikely to have made the in-court identification unreliable. The defendant appealed.

**Holding:** The defendant contended on appeal that the photo array was impermissibly suggestive because the same investigator who prepared the spread showed it to the witnesses. He also complained that the detective was likely to give clues to the defendant’s photo when it was shown because he knew which photo was that of the defendant. According to the defendant, multiple uses of the photo spread also made it impermissibly suggestive. And since the complainant saw the defendant in a nightclub a week before trial, his in-court identification was unreliable and should have been inadmissible.

“A pretrial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law.” If the identification procedure gives rise to a “very substantial likelihood of irreparable misidentification,” its use at trial deprives a defendant of due process of law. Factors are used to determine whether an in-court identification is independent, or is the result of a suggestive out-of-court identification process. These include, (1) the opportunity of the witness to observe the person; (2) the witness’s degree of attention during the crime; (3) the accuracy of any prior description the witness has given; (4) the witness’s level of certainty when the identification is made; and (5) the length of time between the crime and the identification.

The officer in this case prepared the photo spread after viewing the security camera footage and using license plate information, towing information, and police records to find the defendant’s photograph. He used photos of persons with similar features in the arrays, which he showed to the complainant and the security officer separately and admonishing them that they did not need to pick anyone. Both men picked the same photo.

No cases support the defendant’s contention that it is impermissible for the officer who prepared the photo array to also display it to witnesses. Nor is there any support for the argument that other “filler” photos must come from a witness’s description rather than from watching a videotape identifying a suspect from his license plate number, nor for disqualifying an officer who knows the identity of the suspect from showing the array. Showing a suspect’s photo multiple times

may be suggestive if it is done in a way that leads to later misidentification. The complainant did not hesitate, however, to identify the defendant either time he viewed the photos, and the other witness also identified the defendant without hesitation.

The identification procedure used before trial was not impermissibly suggestive, but even if it was, there was no substantial risk of misidentification. Both witnesses had a good opportunity to view the defendant, who was standing under a direct light. The security officer had seen him just minutes before when he tried to enter the club.

The complainant was highly attentive as he tried to take cover to avoid the gunshots, and the security officer was aiming at the defendant as he fired at him. Although neither man gave a description of the defendant prior to seeing the photo spread, both of them identified the photo quickly and with a high level of certainty. It was just five days after the shooting that the complainant identified the photo for the first time. About three weeks later, he identified it for a second time, and the other witness did so a week after that. Not much time elapsed between the crime and the first positive identification.

Both witnesses testified in court that they were identifying the defendant from their independent recollection, and not because of the photo array. They were certain and definite. Defendant's contention that he was denied due process because his attorney failed to object to the identification procedure before trial and during trial was not supported by the evidence.

#### **IDENTIFICATION. SUGGESTIVE PHOTO IDENTIFICATION OUTWEIGHED BY OTHER FACTORS OF RELIABILITY.**

##### ***Booker v. State*, 291 S.W.3d 100 (Tex. App. - Eastland 2009)**

A woman working as a carhop at a Sonic drive-in received an order from the walk-up order window. When she went outside to deliver the order, the man asked if she had change for a \$20 bill, and she said she did. The man then pulled a gun from his pocket, grabbed the woman's left arm, and told her to "give him all the money." A man inside saw what was happening and told another female employee. That woman ran to the window and saw the man who was robbing her co-worker.

Both the victim and the witness told police that the suspect had acne on his face and braids in his hair. The victim also noticed that he had red beads at the bottom of the braids.

When police arrived on the scene, the victim and witness told them about the robber's acne and scruffy face. He was described as, "light-skinned black male with acne, 5' 9" to 6' 1", 30, 35 years of age, wearing a black, long-sleeve shirt, black pants, black tennis shoes."

A week about the robbery, the victim was shown a photographic lineup containing six photos, including one of the defendant. The same lineup was shown to the witness a few days later. Both of them identified the defendant.

Following the defendant's arrest, his attorney filed a motion to suppress the photographic identifications, claiming that the lineup was impermissibly suggestive and that it led to a substantial likelihood of misidentification at trial. The defendant's claim that the lineup was suggestive was based on the fact that his was the only photo in the lineup that depicted a person with facial

blemishes or acne marks on this face. The trial court denied the defendant's motion and both the victim and the witness identified the man at trial. Following conviction by a jury, he appealed.

**Holding:** A pretrial identification procedure may be so suggestive that it taints a witness's identification testimony at trial and denies a defendant due process. Whether a procedure tainted in-court testimony is determined by using the totality of circumstances to evaluate whether it would give rise to a very substantial likelihood of irreparable misidentification. Five factors are used to assess the impact of a suggestive pre-trial procedure on in-trial identification: (1) the opportunity of the witness to view the actor during the commission of the offense; (2) the witness's degree of attention; (3) how accurate the witness's description was at the time of the offense; (4) the degree of certainty the witness showed in making the identification; and (5) how long it was between the crime and the identification.

In this case, the defendant's photograph was the only one in the lineup to show a man with "acne marks" or a "scruffy face." This procedure was suggestive, but not necessarily so impermissibly suggestive that it likely led to irreparable misidentification.

Both witnesses had clear opportunities to view the robber. They testified that they had a clear look at his face. The victim was standing face-to-face with the man in a well-lighted area, and nothing obstructed her view. The witnesses focused on the robber's face, and both were confident in their identification during trial. The victim had "no doubt" it was the defendant, and the witness was "positive." Both testified that they would have been able to identify the defendant as the robber if they had never seen the photographic lineup.

From the testimony offered by the witnesses, it appeared that their identification was based on memory from the night of the robber. While the photo lineup was suggestive, the evidence did not establish that it gave rise to a very substantial likelihood of misidentification by the witnesses. Their in-court testimony was properly admitted.

**COMMENT:** Photo lineups are used widely. Their use can avoid problems with live lineups, but in either case, great care must be taken to avoid showing the witness something that suggests the "correct" suspect. With photographs, the photo of the suspect must match in finish, size, and appearance, the others that are used. In this case, having only one photo of a man with acne, especially when the witnesses both mentioned that as a distinguishing feature of the robber, was highly suggestive.

#### **MURDER. "SCENT LINEUP" AND JAILHOUSE CONFESSION PROVIDE SUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR MURDER.**

***Winfrey v. State*, 291 S.W.3d 68 (Tex. App. - Eastland 2009), reversed, 323 S.W.3d 875 (Tex. Crim. App. 2010)**

A woman dropped off her grandchildren to visit her brother, who was retirement age and lived alone in a trailer. The children later told her the man would not answer the door. The next day, the woman and other family members went to the trailer to check on the man. When he did not answer their knock, the sister used her key to open the trailer door. Inside, they saw a bloody "drag mark" on the floor and found the brother dead in the bedroom. He had been severely beaten and

stabbed multiple times. The only thing found to be missing was a Bible that had been on the entertainment center.

The local sheriff was called to the scene and notified the Texas Rangers and a DPS crime scene unit. The officer who arrived to investigate found no evidence of forced entry. From blood spatter evidence, it appeared the victim had been beaten in the living room and bedroom. No identifiable fingerprints were found.

Forensic personnel took evidence from the crime scene for DNA testing. The medical examiner determined that the many wounds on the victim were consistent with those inflicted by a knife with a sharp edge and a blunt edge. She ruled the death a homicide.

The sheriff received information that led him to suspect the defendant's teenaged children were possibly involved in the crime. They lived within two miles of the victim. When the defendant was interviewed by a Ranger, he was not a suspect, and was questioned about his children. He denied involvement in the murder, saying that he had not seen the victim for four or five years, and had never been in his home. The children also denied involvement but said they had been to the victim's house several times. DNA evidence was obtained from them.

The Ranger contacted a deputy sheriff who was a canine handler about performing a scent lineup. The deputy claimed to have been trained in bloodhound tracking and had worked with various law enforcement agencies. At the instruction of the deputy, the Ranger obtained scent samples from the clothing that the victim was wearing at the time of the murder by touching gauze pads to the clothes and sealing the pads in Ziplock bags.

Scent lineups were conducted in a vacant lot near the sheriff's office. In three lineups, two dogs alerted on the sealed scent pads of the defendant's son and daughter. None of the DNA evidence obtained at the crime scene linked the defendant or his children to the murder victim.

The break in the case came when a jail inmate who had been in the same cell with the defendant in another county. According to the informant, the defendant described a murder at the victim's home and how it had occurred. He did not say he had been involved, but he said that a door had been unlocked in the rear to allow access, and that "some kind of a gun and some knife collection" had been taken. Until that time, no one was aware that guns had been taken from the victim's trailer. A follow-up investigation revealed that the victim had owned a rifle and shotgun, but none were found on the crime scene. The defendant became a focus of the investigation and he and his two children were arrested.

Another scent lineup was then conducted using a scent sample from the defendant and the sample from the victim's clothing. Three dogs were used, and all three alerted on the can containing the scent sample from the defendant. Evidence of the scent lineup was introduced at trial, as was the testimony of the defendant's cell mate about his description of the crime. The defendant was convicted of capital murder. He appealed on the ground that the evidence was insufficient to sustain his conviction.

**Holding:** When questioned by the Ranger, the defendant claimed that he had not seen the victim for four or five years and had never been in his home. The results of the scent lineup, however, indicated that his scent was on the clothes the victim was wearing when he was murdered. The deputy's testimony about the scent evidence placed the defendant in close contact with the victim's clothing. He also testified about the reliability of the bloodhounds used to conduct the scent lineup and his training as a handler. The jury watched a videotape of the lineup procedure.

Based on this evidence, the jury could have found that the defendant was in close contact with the victim and inside the victim's house at the time of the murder. Although there was no DNA evidence linking him with the crime, the jury was not required to find from that fact that the defendant did not commit the offense.

Defendant's statement to his cell mate that "some kind of a gun and some knife collection" had been taken from the victim's house was evidence that the jury could use to determine that he had committed the offense. That information was unknown to the police before the defendant told the other inmate, and the jury might have concluded that only the murderer would know such a thing. Further, during the preliminary interview of the defendant, he told the Ranger that he was the "number one suspect," even though he was not considered a suspect by Ranger at that time. All of this evidence taken together was sufficient to permit the jury to find the defendant guilty of murder. **[Author's note: This decision from the court of appeals was reversed by the Texas Court of Criminal Appeals, which held that scent discrimination evidence used as the sole evidence or as primary evidence connecting the defendant to an offense is insufficient to support a conviction.]**

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