



**A**  
**Peace Officer's Guide**  
**to Texas Law**

**2013 Edition**

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to Texas Law  
2013 Edition**

**by**

**Joe C. Tooley, Legal Digest Editor  
Joe C. Tooley, Attorneys & Counselors, Rockwall, Texas**

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## TEXAS POLICE ASSOCIATION

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(512) 458-3140

Fax (512) 458-1799

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This is the Fifteenth 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 website at [www.TexasPoliceAssociation.com](http://www.TexasPoliceAssociation.com), in the *Texas Police Journal*, or in the **Guide**.

The Texas Police Association deeply appreciates Joe C. Tooley, TPA General Counsel, for his tireless efforts in preparing the *Police Legal Digest* each bi-month and the monumental task of writing and assembling this edition of **A Peace Officer's Guide to Texas Law**.

A handwritten signature in blue ink, which appears to read 'Erwin Ballarta'. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Erwin Ballarta  
Executive Director

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## **PREFACE**

This 2013 Peace Officer Guide is a continuation of a semi-annual series published by the Texas Police Association for many years as a service to its members. The Guide is a compendium of reports from the Legal Digests of the Texas Police Association from July, 2011, to July, 2013. The editor has attempted to select those court decisions which are of significance to the working law enforcement officer and, within those selections, has attempted to identify and present the information pertinent to the daily work of police officers in Texas. This Guide is dedicated to the men and women of Texas law enforcement and especially to those officers wounded or killed in the line of duty and to their families.



# Fourth Amendment Overview and Other Constitutional Rights

## CIVIL IMMUNITY OF PROSECUTION INVESTIGATORS FROM CLAIMS ARISING FROM GRAND JURY TESTIMONY

The chief investigator for a district attorney's office, testified at grand jury proceedings that resulted in indictments. After the indictments were dismissed, the defendant brought a civil rights action against the investigator under 42 U. S. C. §1983, alleging that respondent had conspired to present and did present false testimony to the grand jury. The Federal District Court denied the investigator's motion to dismiss on immunity grounds, but the Eleventh Circuit reversed, holding that the investigator had absolute immunity from a §1983 claim based on his grand jury testimony.

*Held:* A witness in a grand jury proceeding is entitled to the same absolute immunity from suit under §1983 as a witness who testifies at trial.

*Rehberg v. Paulk*, No. 10-788, U.S. Supreme Court, Decided April 2, 2012.

## Search & Seizure Arrests and Detentions

### REASONABLE SUSPICION REQUIRED FOR TRAFFIC STOP LEADING TO ARREST – STANDARD

After observing a suspicious vehicle, an officer made a stop for a traffic violation resulting in the arrest of the suspect for weapons and drug charges. A motion to suppress evidence was granted by the County Court at Law in Ellis County based upon a finding that there was no reasonable suspicion to support the original traffic stop. The State appealed and the Waco Court of Appeals affirmed with the following relevant language. (citations are omitted) (ed. note: The defendant/suspect's name is "Police" which is not used in the following passages to avoid confusion).

The facts that led to the officer's traffic stop of (the suspect) are as follows: at around midnight, an officer observed a vehicle he did not recognize driving through his patrol area which he had patrolled for several years. He followed the vehicle and got directly behind it so he could run a license check. (The suspect) was the driver of the vehicle. (The suspect) almost immediately turned right in front of the officer into a neighborhood known for burglaries and narcotics transactions. The officer did not observe any traffic violations in this turn. The street onto which (the suspect) turned was in essence a horseshoe shape. The officer did not follow (the suspect) onto that street, but waited for him to come out, which (The suspect) did in less than a minute and a half. (The suspect) approached the intersection which had a stop sign, but no crosswalk or stop line. (The suspect)'s vehicle came to a complete stop at a point past the stop sign but did not enter the intersection.

The officer believed that (The suspect) had committed a traffic violation by stopping at a point past the stop sign, citing section 544.010 of the Transportation Code. Because of this, the officer initiated a traffic stop which ultimately resulted in the discovery of a weapon, marijuana, and some other controlled substance, and (The suspect) was arrested for those offenses. Additionally, in the suppression hearing the officer indicated that his reasons for the stop were also because he did not recognize the vehicle, the lateness of the hour, the fact that (The suspect) turned right almost immediately after the officer got behind him, the reputation of the neighborhood into which (The suspect) turned for burglaries and narcotics, and the short time that (The suspect) was in the neighborhood. However, the officer testified that he did not feel that he could initiate a traffic stop until the alleged traffic violation occurred.

An officer conducts a lawful temporary detention when he has reasonable suspicion to believe that an individual is violating the law. Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular

person actually is, has been, or soon will be engaged in criminal activity. Otherwise stated, those specific, articulable facts must show unusual activity, some evidence that connects the detained individual to the unusual activity, and some indication that the unusual activity is related to crime. This is an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists. A reasonable suspicion determination is made by considering the totality of the circumstances.

A traffic stop is justified when the officer has reasonable suspicion to believe that a traffic violation has occurred. We must ask whether a person of reasonable caution, looking at the facts available to the officer at the moment of the investigation, would believe that a traffic violation occurred. The fact that the officer made the stop for a reason other than the occurrence of the traffic violation is irrelevant as long as a traffic violation that would have objectively justified the stop occurred. An officer's mistaken, though honest, misunderstanding of the traffic law, however, will not justify a stop.

Section 544.010(c) of the Transportation Code provides three different stop sign requirements: (1) if a crosswalk exists, the driver shall stop before entering the crosswalk; (2) if no crosswalk exists, the driver shall stop at a clearly marked stop line; and (3) if no stop line exists, the driver shall stop "at the place nearest the intersecting roadway where the operator has a view of approaching traffic on the intersecting roadway." TEX. TRANSP. CODE ANN. § 544.010(c) (Vernon 1999). The plain language of the statute does not refer to a stop sign as an indicator of anything other than a signal that a stop is required prior to entering the intersection.

We find that the plain language of the statute indicates that a stop must be made exactly where it states, which may or may not be behind a stop sign. The trial court determined that (the suspect) came to a complete stop at a point past the stop sign but not in the intersection, which the trial court determined as a matter of law did not constitute a traffic violation of section 544.010.

The trial court's finding of fact that (the suspect) stopped his vehicle at the place nearest the roadway where he had a view of approaching traffic is supported by the evidence. Therefore, there was no traffic violation. The officer's honest, but mistaken belief about the law does not justify the stop. Because there was no traffic violation, we must determine whether reasonable suspicion otherwise existed to justify the traffic stop.

The facts before the officer were: (1) it was around midnight; (2) Police's car was unfamiliar to him; (3) when he pulled behind (the suspect)'s vehicle to run a license check, Police almost immediately turned right onto a street that curved in a horseshoe shape; (4) rather than follow (the suspect), the officer waited for (the suspect) to exit the neighborhood; (5) the officer did not believe that (the suspect) resided in that neighborhood, having patrolled that area for approximately four years; (6) the neighborhood had a reputation for burglaries and narcotics transactions; (7) (the suspect) emerged on the other end of the street in less than ninety seconds; (8) (the suspect) pulled up past the stop sign at that intersection but not in the intersecting roadway; (9) (the suspect) turned onto the original roadway and the officer initiated the traffic stop. The trial court's findings of fact also included that "\*t+he officer did not observe any traffic violations, irregularities, dangerous, hazardous or reckless behavior of the Defendant before, during or immediately after turning right" at the first turn. Further, the findings stated that "\*t+he officer did not observe any illegal, hazardous or reckless driving behaviors as the vehicle traveled on the roadway back to the original roadway." These findings are supported by the record.

With these facts, (the suspect)'s behavior was not bizarre and nothing suggests a pattern or repetition of unusual behavior as was found in *Derichsweiler*. The noncriminal, not terribly unusual, non-repetitive behavior observed in this case was insufficient to objectively support a belief that criminal activity was or soon would be afoot. The only behavior of (the suspect)'s that could be construed as suspicious was his making the first turn, although the trial court's fact finding was that it was not irregular, dangerous, hazardous, or reckless is supported by the record.

There was no evidence that (the suspect) made any furtive or otherwise suspicious gestures nor was he

known to the officer as having any criminal background or association with known criminals or drug users; he simply made a legal turn in front of an officer into a neighborhood where criminal activity occurred previously. The circumstances known to the officer at the time of the stop were not sufficient to establish reasonable suspicion to justify the traffic stop.

*State v. Police*, No. 10-11-00108, 10-11-00109, 10-11-00110 (Tex. App. – Waco, Jan. 4<sup>th</sup> 2012)

(*Ed. note: This is a good example of the adage “Remember the basics.” Officers should always remember to note and document reasonable suspicion anytime a person is detained or frisked*)

## **REASONABLE SUSPICION TO STOP – TRAFFIC – IMPEDING TRAFFIC**

The defendant was stopped for impeding traffic after an officer observed him traveling 52 mph in a 65 mph zone. Based upon probable cause developed during the stop, the officer searched the vehicle, found drugs and charged defendant with possession of marijuana. Defendant’s motion to suppress claiming the initial stop lacked reasonable suspicion was denied by the trial court and an appeal was filed. The court of appeals found the stopped lacked reasonable suspicion and reversed.

As to the reasonable suspicion for the initial traffic stop, The relevant portion of the offense report states that:

“I observed a traffic congestion in the inside westbound lane [on Interstate 10 in Waller County]. Traffic volume was moderate. I inspected further and observed a grey Chevrolet 4 door sedan ... traveling below the prima facie limit of 65 miles per hour and Impeding Traffic. I paced the vehicle, which was traveling at approximately 52 miles per hour... I initiated a traffic stop of the vehicle.”

Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that an individual is, has been, or is about to be engaged in criminal activity. There is a difference between specific, articulable facts on the one hand and conclusory statements or opinions on the other. *Castro v. State*, 227 S.W.3d 737, 742 (Tex.Crim.App.2007). Mere conclusory statements are not an effective substitute for specific, articulable facts when the nature of the offense requires an officer to make a subjective determination. *Id.* (noting that whether driver changed lanes without signaling was an objective determination, unlike following too closely, speeding, or being intoxicated, which are subjective determinations).

\*3 Under Texas law, a vehicle “may not drive so slowly as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law.” Tex. Transp. Code § 545.363(a). “Slow driving, in and of itself, is not a violation of the statute; a violation only occurs when the normal and reasonable movement of traffic is impeded.” *Tex. Dep’t of Pub. Safety v. Gonzales*, 276 S.W.3d 88, 93 (Tex.App.-San Antonio 2008, no pet.).

The only facts stated in the officer’s report relevant to the existence of reasonable suspicion are that (1) he observed traffic congestion in the inside westbound lane of I-10, (2) traffic volume was moderate, and (3) he paced appellant’s car traveling 52 miles per hour in a 65 mile-per-hour zone. The report perhaps implies, but does not state, that appellant’s vehicle was traveling in the inside westbound lane. The report also includes the conclusory statement that appellant’s vehicle was impeding traffic.

Here, the officer’s offense report merely stated that the traffic volume was moderate, that there was congestion in the left lane, and that appellant’s vehicle was traveling 13 miles per hour below the speed limit while the officer was following it. There was no evidence that the normal and reasonable movement of traffic

was impeded by appellant's driving. Specifically, there was no evidence presented that appellant's car was the cause of the congestion, that the moderate traffic volume was unusual for the time of day, whether cars were forced to pass appellant, how long the officer observed the traffic congestion behind appellant, or that traveling 13 miles below the speed limit was unreasonable given the traffic and weather conditions at the time. The officer's opinion that appellant was "impeding traffic," without specific, articulable facts to substantiate it, is insufficient to support the existence of reasonable suspicion.

We conclude that the record does not justify a reasonable suspicion that appellant was impeding traffic, and therefore the trial court erred in denying appellant's motion to suppress evidence.

*Delafuente v. State*, No. 14-11-00500-CR, Court of Appeals of Texas, Houston (14th Dist.) April 3, 2012.

## **REASONABLE SUSPICION – PRETEXT DRUG STOP**

Intelligence information indicated a vehicle was loaded with several hundred kilos of cocaine and millions of dollars in drug proceeds was to be driven from the Texas border area to Chicago. In order to avoid compromising an ongoing investigation, the vehicle was allowed to leave Texas and was stopped by Illinois officers for a traffic violation as it approached Chicago.

Several Illinois State officers were stationed along I-55 to observe the vehicle and conduct a traffic stop. Officer Brody observed that the trailer's taillights were "flicker[ing]" as if there was a mechanical issue" and that the trailer was swaying back and forth within its lane. Brody initiated a traffic stop based on improper lane usage and improper lighting.

Brody approached Andres, who was driving the truck, and requested his driver's license, registration, and insurance. Brody returned to his car and ran a check on Andres' license. Brody determined that Andres had a valid license, a clean driving record, and no outstanding warrants, and decided to issue a written warning for the traffic offenses. Brody wrote a warning ticket and returned to the truck to speak with Andres. Brody asked Andres to get out of the truck so that he could talk to Andres about the taillight problem. Andres inspected the electrical connection between the truck and the trailer. Brody told Andres that he would give him a warning ticket and handed him a clipboard to sign the ticket.

While Andres was signing the ticket, Brody asked him where he was coming from. Andres replied that he was coming from Joliet, where he had dropped off a car. However, Brody knew that Simington had spotted the truck south of Joliet, and that Andres would not have had time to stop in Joliet. Brody also observed at this point that Andres began to fidget and move his feet and arms around, which Brody interpreted as nervousness. Brody asked Andres who was in the truck with him. Andres responded that it was his stepdaughter, but he did not know her last name. Brody then patted down Andres, checked inside his jacket for weapons, and went to talk to the passenger, Noemi Gutierrez ("Gutierrez"). She stated that she and Andres had come from Joliet, where they had dropped off a van on Ruby Street.

Brody returned to speak to Andres and asked him if he had any drugs in the truck. Andres denied that he did, and said "go ahead and check." Brody asked permission to search for drugs with his dog, and Andres consented. The dog alerted to the presence of drugs within about thirty seconds. Officers ultimately found over twenty kilograms of cocaine in a hidden compartment in the truck.

Andres moved to suppress the drug evidence, arguing that Brody did not initially have probable cause to stop the truck and that the duration and scope of the stop were not justified by the alleged traffic offenses. The district court denied this motion in an oral ruling following the suppression hearing. Andres then waived his right to jury trial and consented to a bench trial based on stipulated facts in order to preserve his right to appeal the

suppression issue. The district court found Andres guilty of conspiracy to possess with intent to distribute more than five kilograms of cocaine.

Andres argues that the drug evidence should be suppressed because it was obtained through an unreasonable search that violated the Fourth Amendment. He argues that the initial traffic stop by Brody was not justified because it was “based on pretext rather than any actual offense.” He further argues that even if the stop was initially justified, Brody’s continued questioning and dog search were not reasonably related to the circumstances warranting the stop.

If the initial stop was justified, we determine “whether the officer’s subsequent actions were reasonably related in scope to the circumstances that justified the stop of the vehicle in the first place.” (citation omitted)

The stop was justified at its inception based on observed traffic violations.

A traffic stop “must be temporary and last no longer than is necessary to effectuate the purpose of the stop, unless further reasonable suspicion, supported by articulable facts, emerges.” *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004) (en banc). “If the officer develops reasonable suspicion of additional criminal activity during his investigation of the circumstances that originally caused the stop, he may further detain [the] occupants [of the vehicle] for a reasonable time while appropriately attempting to dispel this reasonable suspicion.” *United States v. Pack*, 612 F.3d 341, 350 (5th Cir. 2010).

Andres argues that his “detention impermissibly exceeded its original scope when Sergeant Brody detained him longer than necessary to issue a written warning and then questioned him about matters wholly unrelated to the purpose of a routine traffic stop.” This court has emphasized that police questioning, even about matters unrelated to a traffic stop, does not violate the Fourth Amendment absent some nonconsensual restraint on one’s liberty. *Brigham*, 382 F.3d at 508. Accordingly, the question is only whether Andres was detained for longer than necessary to deal with the initial traffic violations, and if so, whether additional reasonable suspicion of wrongdoing developed during the time that Brody was legitimately addressing the traffic violations. The government understandably does not contend that the entire stop, including the continued interrogation of Andres and his passenger and the dog search, was justified by the initial traffic violations. Rather, the government argues that Andres’ untruthful answers and nervousness, the anonymous tip stating that the truck was carrying drugs, and other factors created additional reasonable suspicion justifying the continued detention.

Andres contends that after Brody checked his driving and criminal records and wrote a warning ticket, Brody should have immediately obtained his signature on the ticket and let him go. Instead, Brody asked Andres to walk to the back of the trailer to look at the lights that were previously flickering and the wiring that might have been loose. After briefly discussing the lights and wiring, Brody handed Andres the warning ticket to sign and immediately asked him where he was coming from. Andres responded that he had come from Joliet. However, Brody knew that Simington had spotted Andres coming from south of Joliet, and that given the amount of time that had passed since Simington spotted Andres, Andres would not have had time to make a stop in Joliet. The government argues that this initial question, which revealed to Brody that Andres was lying and thereby created further suspicion, took place while Andres was signing the warning ticket and did not extend the duration of the stop. The district court found that the initial question and answer occurred “as the legitimate stop [was] still in progress,” and that Andres’ further responses and nervousness created additional suspicion. The district court concluded that these facts provided Brody with a legitimate basis to continue the stop.

We do not find it unreasonable that an officer who has stopped a driver based on code violations and safety concerns involving a trailer would ask the driver to exit the vehicle to look at the trailer and discuss the problems. Furthermore, we agree that Brody’s question asking where Andres was driving from occurred before Brody had finished dealing with the traffic offenses and did not extend the scope or duration of the stop. Andres’

untruthful answer created further suspicion justifying continued detention, and his subsequent answers created even further suspicion. Based on this reasonable suspicion, Brody continued to investigate, ultimately requesting and receiving permission to search the truck. Because Brody's continued search and seizure beyond the scope of the initial traffic stop were justified by additional reasonable suspicion, the district court did not err in concluding that the scope of the stop was reasonable.

Andres argues that the warrantless placement and use of the GPS device to monitor the truck he was driving violated the Fourth Amendment. Andres further argues that because this illegal GPS search directly led to the discovery of the drugs in his truck, the drugs must be suppressed under the "fruit of the poisonous tree" doctrine. Even assuming that a Fourth Amendment violation occurred and that suppression would otherwise be appropriate, the evidence should not be suppressed in this case because the officers acted in reasonable reliance on circuit precedent.

"[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011). In December 2009, it was objectively reasonable for agents operating within the Fifth Circuit to believe that warrantless GPS tracking was permissible under circuit precedent. The conviction was affirmed.

*U.S. V. ANDRES*, No. 11-40783, 5<sup>th</sup> Cir. Jan. 3, 2013.

## **REASONABLE SUSPICION – TRAFFIC STOP – DWI ARREST**

In a motion to suppress evidence, Stacie Kerwick asserted that the officer who detained her lacked reasonable suspicion to conduct the investigatory detention which led to her arrest for driving while intoxicated. The trial judge granted Kerwick's motion and the court of appeals affirmed the ruling. We hold that Kerwick's detention was supported by reasonable suspicion and reverse the court of appeals's judgment.

1. At approximately 12:19 a.m. on the morning of August 14, 2009, Officer Bradford was dispatched to 2411 North Main (PR's Bar) in response to a fight.
2. According to the dispatch, several people were fighting in front of the bar.
3. Upon arrival, Officer Bradford observed several people standing outside the bar.
4. Officer Bradford made contact with an unidentified person who Officer Bradford believed was the individual who called the police.
5. Officer Bradford testified as having the name of the unidentified person written down, however, it was never offered as testimony.
6. The unidentified person that Officer Bradford spoke to was the owner of a damaged vehicle.
7. Officer Bradford's testimony did not reveal the cause of the damage to the vehicle nor where the damaged vehicle was located.
8. The unidentified person pointed at a vehicle that was parked across the street and said "there they are right there. There they are, there they are."
9. According to Officer Bradford, the vehicle that the unidentified person pointed to was parked across the street from the bar.
10. Officer Bradford then proceeded on foot across the street toward the vehicle.
11. The vehicle began to move, and Officer Bradford ordered the driver to stop the vehicle because he believed the occupants of the vehicle were involved in either an assault, criminal mischief, or both.
12. Prior to making the stop Officer Bradford did not know how many people there might be in the vehicle nor how many people in the vehicle might have been involved in an assault or criminal mischief.
13. Officer Bradford made contact with the driver, Ms. Kerwick.

14. Officer Bradford smelled a strong odor of alcohol coming from inside the car.
15. Officer Bradford observed the driver's bloodshot and watery eyes.
16. Officer Bradford has been employed by the Forth Worth Police Department since 2000.

The trial judge concluded that Officer Bradford improperly stopped Kerwick's vehicle because the only information Officer Bradford possessed was the information from dispatch that several people were fighting and the "there they are" statement, which was vague and made by an unidentified person. In the trial judge's opinion, Officer Bradford did not possess specific, articulable facts establishing reasonable suspicion that some activity out of the ordinary was occurring or had occurred, and that Kerwick had a connection with criminal activity. The State's appeal followed. The court of appeals affirmed the trial judge's ruling.

The Fourth Amendment to the United States Constitution permits a warrantless detention of a person, short of a full-blown custodial arrest, if the detention is justified by reasonable suspicion. "[A] law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further." Reasonable suspicion to detain a person exists if an officer has specific, articulable facts that, combined with rational inferences from those facts, would lead him to reasonably conclude that the person detained is, has been, or soon will be engaged in criminal activity. These facts must show unusual activity, some evidence that connects the detainee to the unusual activity, and some indication that the unusual activity is related to crime. "Although an officer's reliance on a mere 'hunch' is insufficient to justify an investigatory stop, . . . the likelihood of criminal activity need not rise to the level required for probable cause." The test for reasonable suspicion is an objective one that focuses solely on whether an objective basis exists for the detention and disregards the officer's subjective intent. A reasonable-suspicion determination requires looking at the totality of the circumstances and reasonable suspicion may exist even if those circumstances standing alone may be just as consistent with innocent activity as with criminal activity.

While the specific, articulable facts introduced through Officer Bradford's testimony were neither ideally inclusive nor entirely descriptive, the facts found by the trial judge were sufficient to evaluate the reasonableness of Kerwick's detention.

We begin our *de novo* review by identifying the relevant historical facts the trial judge found Officer Bradford knew at the time he initiated the investigative detention: (1) shortly after midnight, someone called the police to report several people fighting in front of PR's Bar; (2) upon arrival at PR's Bar, Officer Bradford saw several people standing outside; (3) Officer Bradford spoke to someone who was the owner of a damaged vehicle which was at the location; (4) this person, who identified him or herself to Officer Bradford, pointed at a vehicle parked on the roadway directly across the street from the bar and stated, "There they are right there. There they are, there they are;" and (5) as Officer Bradford approached Kerwick's vehicle, it began to move and he ordered Kerwick to stop.

While each fact in isolation may be insufficient to establish reasonable suspicion, based on the totality of the circumstances, we find that Kerwick's detention was supported by reasonable suspicion. The damage to the vehicle observed by Officer Bradford and the report of several people fighting is indicative that unusual activity occurred and that this unusual activity was some indication that a crime may have occurred. The evidence further supports a reasonable basis to believe that either Kerwick or the car's other occupants may have been connected to this unusual activity.

In light of the damaged vehicle and the presence of several people outside of the bar after a report of several people fighting, and the clear identification of Kerwick's vehicle, the statement provided a rational basis for Officer Bradford to infer that the person whose vehicle was damaged was a potential crime victim and was identifying the person or persons responsible for the damage. As the court of appeals seems to suggest, it is conceivable that this person who identified the occupants in Kerwick's car could have been

pointing them out to Officer Bradford for a reason wholly distinct from any involvement in an assault or criminal mischief, or that the vehicle was actually damaged in an unrelated incident. But Officer Bradford was entitled to interpret these facts with common sense and infer that criminal activity may have recently occurred. Officer Bradford's belief that Kerwick or a passenger in her car was involved in criminal activity and that he needed to investigate was further supported by Kerwick's attempt to drive away as he approached. It was reasonable for Officer Bradford to infer that Kerwick was evading Officer Bradford either because Kerwick did not want to speak to him or because Kerwick and her passengers had been identified by a witness or potential crime victim at the scene. "[Flight] is not necessarily indicative of wrongdoing, but it is certainly suggestive of such"<sup>28</sup> and may be considered among the totality of the circumstances in a reasonable-suspicion analysis.<sup>29</sup> The Fourth Amendment does not require an officer "to simply shrug his shoulders and allow . . . a criminal to escape.

Officer Bradford's investigatory stop was reasonable in <sup>30</sup> order to determine Kerwick's and her passenger's identities and "maintain the status quo momentarily to obtain more information" concerning the possible criminal activity. When police receive a call about an offense and, on arrival at the scene, someone shouts "There they are," it would be unreasonable for an officer not to investigate further. Amounting to more than a mere hunch, the specific, articulable facts, and the rational inferences flowing from those facts, warranted Officer Bradford's investigative detention of Kerwick.

Based on the totality of the circumstances, we conclude Officer Bradford was justified in suspecting that Kerwick was involved in criminal activity and detaining Kerwick to investigate further.

*State v. Kerwick*, No. PD-1837-11, Court of Crim. App. Feb. 27<sup>th</sup>, 2013.

## **ARREST – REASONABLE SUSPICION FOR INVESTIGATIVE DETENTION – DWI**

At 2:45 a.m. on July 5, 2008, the police received a concerned-citizen call about a white Ford Ranger that had been parked beside the road, with its lights on, for more than an hour. When Officer C.A. Bain arrived at the scene, he observed the white Ford Ranger on the shoulder. Officer Bain testified that he believed this was a dangerous situation because it was unusual for a vehicle to be parked in that location at that time of night and because there had been several vehicle burglaries in the area. Officer Bain approached the vehicle and noticed that the vehicle's engine was running, that its lights were on, and that the driver's side window was partially rolled down. He also discovered Huddleston asleep in the driver's seat with two beer cans within reach. Officer Bain examined the surrounding area to determine the presence of any weapons and turned the vehicle off in case Huddleston startled when waking. After waking Huddleston, Officer Bain smelled alcohol on Huddleston's breath and observed that Huddleston had bloodshot, watery eyes. Huddleston explained his location by stating that he had been called into work and was waiting for the gates to open.

Officer Bain asked Huddleston if he had been drinking, and Huddleston said that he drank two 24-ounce beers around 6:00 p.m. the previous day. Officer Bain testified that Huddleston appeared disoriented and confused about a beeping sound from his vehicle. Officer Bain then requested that Huddleston step out of the vehicle, and Huddleston stumbled when exiting. Officer Bain requested that Huddleston perform several field sobriety tests (FST), and Huddleston illustrated multiple signs of intoxication before he refused to continue the test: three clues on the HGN and five clues on the —walk and turn|| and the —one-leg stand.|| Prior to the FSTs, Huddleston informed Officer Bain of a prior back injury.

Upon completion of the FSTs, Officer Bain detained Huddleston and subsequently spoke to his mother over the phone about possible medical conditions. Huddleston's mother confirmed the back injury but informed the officer that Huddleston had no current medical conditions that would affect an FST. Officer Bain arrested Huddleston for driving while intoxicated.



After securing a search warrant from a magistrate, Officer Bain extracted a blood sample from Huddleston and charged him with DWI.

Huddleston filed motion to suppress the evidence based upon the argument that the detention was not supported by probable cause. The motion was denied by the District Court and the Court of Appeals affirmed.

The Texas Court of Criminal Appeals has recognized three categories of interactions between police officers and citizens: encounters, investigative detentions, and arrests. Unlike investigative detentions and arrests, which are seizures for Fourth Amendment purposes, an encounter is a consensual interaction that the citizen is free to terminate at any time. The dispositive question is whether the totality of the circumstances shows that the police conduct at issue would have caused a reasonable person to believe that he was free to decline the officer's requests or otherwise terminate the encounter. If a reasonable person would feel free to terminate the encounter, the police-citizen contact is merely a consensual encounter and does not implicate the Fourth Amendment. Circumstances that may indicate that a police-citizen interaction is a seizure, rather than a consensual encounter, include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or use of language or tone of voice indicating that compliance with the officer's requests might be compelled.

No bright-line rule governs when a consensual encounter becomes a seizure. Generally, however, when an officer through force or a showing of authority restrains a citizen's liberty, the encounter is no longer consensual. Generally, however, when an officer through force or a showing of authority restrains a citizen's liberty, the encounter is no longer consensual. (ed. note: citations omitted from the above passages).

*Reasonable suspicion exists when an officer has specific articulable facts that, when combined with rational inferences from those facts, would lead him reasonably to conclude that a particular person is, has been, or soon will be engaged in criminal activity. (ed. note: This is a good reminder for officers preparing reports involving detentions or any other actions based upon the reasonable suspicion standard!!)*

The Court went on to hold in this case that Bain was justified in approaching Huddleston's vehicle and inspecting the situation. A citizen reported at 2:45 a.m. on July 5, 2008, that a white Ford Ranger had been parked on the side of the road with its 8 lights on for more than an hour. Officer Bain was dispatched to the reported location and observed the described vehicle. Officer Bain did not know whether someone in the vehicle was in distress, but the circumstances warranted further investigation. Bain was justified in approaching Huddleston's vehicle and inspecting the situation. A citizen reported at 2:45 a.m. on July 5, 2008, that a white Ford Ranger had been parked on the side of the road with its lights on for more than an hour. Officer Bain was dispatched to the reported location and observed the described vehicle. Officer Bain did not know whether someone in the vehicle was in distress, but the circumstances warranted further investigation. We conclude ... that Officer Bain's initial interaction with Huddleston was a consensual police-citizen encounter that did not implicate the Fourth Amendment.

Officer Bain could not temporarily detain Huddleston beyond the initial encounter, however, without reasonable suspicion. In the early morning hours following the July Fourth holiday, Officer Bain arrived at the scene to see a vehicle parked on the side of a busy roadway, with its lights on, its engine running, and Huddleston sleeping inside with two beer cans within reach. Immediately after waking Huddleston, Officer Bain noticed Huddleston's disorientation, his bloodshot and watery eyes, the odor of alcohol on his breath, and his instability when he exited the vehicle. Based on a totality of the circumstances, Officer Bain had sufficient articulable facts supporting a reasonable suspicion that Huddleston had been engaged in criminal activity. He was therefore justified in temporarily detaining Huddleston to conduct further investigation.

We hold that Officer Bain's initial approach and contact with Huddleston did not violate the Fourth

Amendment because it was a consensual police-citizen encounter and that the initial encounter escalated into an investigative detention supported by reasonable suspicion.

*Huddleston v. State*, No. 02-09-00406-CR (Tex. App. – 2<sup>nd</sup> Ft. Worth, August 4, 2011).

**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.**

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 brightline 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.

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

#### **SEARCH AND SEIZURE – REASONABLE SUSPICION WAS NOT SUPPLIED BY ANONYMOUS TIP CORROBORATED ONLY BY INNOCENT ACTIVITY AND DID NOT SUPPORT DETENTION.**

An officer who received an anonymous tip regarding drug activity spotted a gold, Chevy Blazer of the kind the informant said would contain two females carrying about four ounces of methamphetamine. He followed the vehicle through town for about five minutes without seeing any traffic violation or other sign of criminal activity. As the vehicle pulled into a driveway of a residence and parked, the officer turned on his lights. When the driver got out of the vehicle and tried to walk to the house, the officer told her to stop and come back to the vehicle. While this was happening, the officer noticed the passenger “was reaching down – she turned away from the patrol – from us and our view, the front of her body was facing away, and she was digging down in her pants like this like she was either stuffing, reaching, or scratching something.” Suspecting she might have a weapon, the officer told her to get her hands out of her pants.

As the passenger turned around, he saw “a cylindrical shaped object on the side of her leg.” Before she was frisked, the passenger voluntarily removed methamphetamine from her pants and was arrested. Prior to trial, the defendant moved to suppress the drug evidence found during this stop. She claimed that the officer had seized her without probable cause, reasonable suspicion, or a warrant. The trial judge granted the motion, and the State appealed.

Holding: There are three categories of interactions between the police and citizens: arrests, investigative detentions, and encounters. According to the State, the interaction between the officer and the defendant was a consensual encounter that did not require probable cause or reasonable suspicion. “So long as the citizen remains free to disregard the officer’s questions and go about his or her business, the encounter is consensual and merits no further constitutional analysis.” Court must consider all of the circumstances surrounding a police-citizen contact in order to determine whether the officers’ conduct “would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” In this case, the encounter was not consensual. The officer had been following the car in which the defendant was riding for about five minutes before he followed it into the driveway of a private residence. The officer turned on his patrol

car lights as the vehicle stopped. When the driver got out and began walking toward the house, the officer told her to stop and come back to the vehicle. A command, given by a uniformed officer while his patrol lights were operating, would be understood by reasonable persons to mean that they were not free to leave or refuse the officer's order.

Since the encounter was not consensual, the defendant was entitled to Fourth Amendment protections. A brief investigatory stop of a vehicle is prohibited unless it is based on reasonable suspicion. It is not necessary for an officer to rely on personal observation in order to make a stop. An informant's tip may provide reasonable suspicion or probable cause if it contains sufficient "indicia of reliability." By itself, an anonymous telephone call rarely will provide sufficient suspicion because it cannot be determined how the informant came by the information or whether the informant is truthful. Although there was some conflict in the testimony at the suppression hearing about the point, it was determined that, at the time the tip was received, the informant's identity was unknown to police. Reasonable suspicion might be established in spite of a tip being anonymous if it is "suitably corroborated or otherwise exhibit[s] sufficient indicia of reliability." Generally, "corroboration of mere innocent details is insufficient to corroborate an anonymous tip." The color, make, and model of the vehicle was corroborated, as was the road on which it was travelling and the approximate time it would be in that location. The officer also determined, as the informant said, that two women were riding in the Blazer. However, corroboration of innocent details that could be obtained easily when the tip was provided "will not lend support to the tip."

None of these facts, even if verified, indicated that the women were engaged in criminal activity. The State argued that other details were found to be true, and that corroboration of those facts supplied the necessary indicia of reliability. None of those facts were known at the time of the seizure, though. Facts not known to be true at the time the officer detained the citizen cannot corroborate a tip.

The encounter between the officer and the two suspects was not consensual and at least reasonable suspicion was required to support it. Because the anonymous tip on which the officer acted was not shown to be reliable, by corroboration or otherwise, and because no independent reason existed to suspect criminal activity, the detention was unlawful and the suppression motion was properly granted.

*State v. Wilson*, 2011 WL 923954 (Tex. App. – Texarkana).

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

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 twelvepack 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 required in valuating 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 belief 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 streets 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.

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

## **PRETEXT STOP – DWI ARREST**

After receiving information from the suspect’s husband that the suspect was driving while intoxicated, an officer located and stopped the suspect after witnessing a turn signal violation. The suspect was charged with, and convicted for, felony DWI and appealed claiming the detention and arrest was not reasonable and a pretext. When, as here, an officer makes a valid traffic stop, the existence of another motive for the stop is irrelevant because the prohibition against pretextual stops has been abandoned in Texas. *Citation omitted*. A stop is justified if the officer has specific articulable facts that, when combined with rational inferences from those facts, would give the officer a reasonable suspicion that the driver has engaged in criminal activity. *Citation omitted*. This standard is an objective one; so long as there is an objective basis for the stop, the subjective intent of the officer conducting the stop is irrelevant. *Citation omitted*. The reasonable suspicion determination is made by considering the totality of the circumstances. *Citation omitted*. The conviction was upheld as the initial stop was valid and based upon probable cause.

*Graves v. State*, No. 05-10-01151-CR, 5th Ct. App.—Dallas, August 25, 2011. Unpublished.

*(Note: Federal Constitutional cases are consistent with the notion that pretext stops are valid where the*

*underlying motivation is either unknown or a motivation based upon a valid purpose (drug enforcement, DWI prevention). However, if there is evidence that the underlying motivation is improper, (such as profiling or retaliation) the stop will then be rendered unreasonable and in violation of the Fourth Amendment.)*

## **Searches during arrests or detentions**

### **JAILS AND DETENTIONS – STRIP SEARCH OF INCOMING DETAINEES**

Petitioner was arrested during a traffic stop by a New Jersey state trooper who checked a statewide computer database and found a bench warrant issued for petitioner's arrest after he failed to appear at a hearing to enforce a fine. He was initially detained in the Burlington County Detention Center and later in the Essex County Correctional Facility, but was released once it was determined that the fine had been paid. At the first jail, petitioner, like every incoming detainee, had to shower with a delousing agent and was checked for scars, marks, gang tattoos, and contraband as he disrobed. Petitioner claims that he also had to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. At the second jail, petitioner, like other arriving detainees, had to remove his clothing while an officer looked for body markings, wounds, and contraband; had an officer look at his ears, nose, mouth, hair, scalp, fingers, hands, armpits, and other body openings; had a mandatory shower; and had his clothes examined. Petitioner claims that he was also required to lift his genitals, turn around, and cough while squatting.

Contrary to the holding of several Circuit Courts, including the 5<sup>th</sup> Circuit, the Supreme Court held that strip searching incoming inmates without reasonable suspicion did not violate the Fourth Amendment where the inmate was to be placed in the general jail population. The court held that the need for jail security outweighed the privacy interest of the individual. This was a five – four decision and the concurring opinions indicate the holding would go the other way if the inmate is not to be placed in the general jail population.

*Florence v. Burlington County*, U.S. Supreme Court, No. No. 10–945. Decided April 2, 2012.

### **SEARCH & SEIZURE – DRUG ARREST OF PASSENGER IN VEHICLE – DOG HIT**

Rodriguez and Izquierdo were arrested at a Border Patrol checkpoint outside of Falfurrias, Texas, after the cab of the tractor-trailer in which they were stopped by Border Patrol agents was found to contain over 45 kilograms of marijuana in a concealed compartment. The stop was prompted in part by a Border Patrol dog, who alerted while being walked around the truck. On appeal, Rodriguez contends that the district court erred in denying his motion to suppress because (1) his warrantless arrest was made without probable cause and therefore violated the Fourth Amendment, and (2) the warrantless search of the contents of his cell phone constituted an unlawful search incident to his arrest.

The Supreme Court, however, has previously allowed the warrantless arrest of all the passengers in a car in which drugs were found when none of them would claim ownership of the drugs in question. *Maryland v. Pringle*, 540 U.S. 366, 372 (2003). Similarly, in this case, after the discovery of the marijuana, neither Rodriguez nor Izquierdo acknowledged ownership of it, and it was therefore “an entirely reasonable inference . . . that any or [both] of the [truck’s] occupants had knowledge of, and exercised dominion and control over, the [marijuana]” that was found. *Id.* Rodriguez’s warrantless arrest was thus amply supported by probable cause.

Rodriguez argues, though, that, even if the cell phone was found on his person, the warrantless search of its contents exceeded the permissible scope of a search incident to arrest under *Gant*. We disagree. In *United States v. Finley*, we held that a search incident to arrest of the contents of a cell phone found on an arrestee’s

person for evidence of the arrestee's crime was allowable, analogizing it to a search of a container found on an arrestee's person.

*U.S. V. RODRIGUEZ*, No. 11-41020, 5<sup>th</sup> Cir. Dec. 7<sup>th</sup>, 2012.

## INVENTORY SEARCH OF VEHICLE

After a traffic stop for an expired inspection sticker, the driver (McKinnon) was arrested when he failed to produce a valid drivers license. The vehicle was impounded and the arresting officer conducted an inventory search required by department procedure. During the inventory, a loaded handgun was found under the driver's seat. The suspect was subsequently indicted on Federal charges for being a felon in possession of a firearm and ammunition, in violation of 8 U.S.C. §§ 922(g)(1) and 924 (a)(2). The suspect pleaded guilty to being a felon in possession of a firearm and ammunition, but reserved his right to appeal the district court's denial of his motion to suppress with respect to the firearm and ammunition. He was convicted and appealed to the Fifth Circuit. Based on the testimony, McKinnon argued that Zia's inventory search violated his Fourth Amendment rights because (1) the inventory search was merely a pretext for searching for evidence related to the burglaries that had recently taken place in the neighborhood where McKinnon was stopped; and (2) the inventory search was conducted pursuant to a policy that provided HPD officers with impermissible discretion in deciding when to tow a vehicle. The district court, unpersuaded by McKinnon's argument, denied his motion to suppress the revolver and ammunition.

McKinnon argues that the HPD's towing policy affords officers unconstitutional discretion in deciding when to tow a vehicle as a nonconsent tow. McKinnon further claims that Zia's inventory search of the vehicle was unconstitutional because it was a purposeful and general means of discovering evidence, in violation of the Fourth Amendment. In sum, McKinnon maintains that Zia had complete discretion in deciding whether to tow, leave the vehicle parked, or permit another to leave with it. Those options, he argues, afforded Zia unconstitutional discretion in deciding whether to inventory.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Warrantless searches and seizures are 'per se unreasonable unless they fall within a few narrowly defined exceptions.'" One such exception that courts have recognized is the "community caretaking" exception. The origin of the community caretaking exception is found in the United States Supreme Court's decision in *South Dakota v. Opperman*, 428 U.S. 364 (1976). In *Opperman*, the Court noted that impoundments by the police may be in furtherance of "public safety" or "community caretaking functions," such as removing "disabled or damaged vehicles," and "automobiles which violate parking ordinances, and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic." The Court further noted that the "authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." Approximately ten years after *Opperman*, the Court again touched on the subject of a police officer's decision to impound a vehicle in *Colorado v. Bertine*, 479 U.S. 367 (1987). Interpreting *Opperman*, the Court stated:

[n]othing in *Opperman* [ ] prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it.

*Bertine*, 479 U.S. at 375.

Since *Opperman* and *Bertine*, we have focused our inquiry on the reasonableness of the vehicle impoundment

for a community caretaking purpose without reference to any standardized criteria. In considering whether this exception applies, our constitutional analysis hinges upon the reasonableness of the “community caretaker” impound viewed in the context of the facts and circumstances encountered by the officer.

The Government contends that the decision to impound was reasonable under the Fourth Amendment because: (1) it reduced Zia’s exposure to liability for lost or stolen items; (2) leaving the vehicle locked and parked presented a risk of theft or vandalism; and (3) the vehicle could not lawfully be driven away from the scene. Because nothing in *Opperman* suggests that limiting an officer’s liability is in any way related to purposes of the community caretaking exception, this consideration is irrelevant. We have recognized, however, that an appreciable risk of theft or vandalism may support an officer’s decision to impound a vehicle.

In this case, Zia’s decision to impound the car was reasonable under the Fourth Amendment. It is undisputed that the neighborhood in which the stop occurred had experienced a series of burglaries. Although these were house burglaries, there is nothing to suggest that the vehicle would not have been stolen or vandalized if left parked and locked at the scene. By impounding the vehicle, Zia ensured that the vehicle was not left on a public street where it could have become a nuisance, and where it could have been stolen or damaged. Thus, Zia’s conduct falls within the community caretaking function.

McKinnon further contends that Zia should have released the vehicle to Momoh (the passenger) because he had a valid driver’s license. Nevertheless, when viewed in the light most favorable to the Government, the evidence does not compel such a conclusion. Although Momoh possessed a valid driver’s license there is no evidence that he had valid insurance coverage for the vehicle that would allow Momoh to legally drive the vehicle from the scene. In addition, the vehicle’s registration sticker was expired. Pursuant to Texas Transportation Code § 502.472, “a person commits an offense if the person operates a motor vehicle that has not been registered . . . .” Thus, the vehicle operated by McKinnon could not lawfully be driven away from the scene.

According to McKinnon’s second point of contention, he argues that Zia’s inventory search of the vehicle was unconstitutional under the Fourth Amendment because it was a purposeful and general means of discovering evidence. Indeed, “an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.” “Thus, an inventory search of a seized vehicle is reasonable and not violative of the Fourth Amendment if it is conducted pursuant to standardized regulations and procedures that are consistent with (1) protecting the property of the vehicle’s owner, (2) protecting the police against claims or disputes over lost or stolen property, and (3) protecting the police from danger.” These standardized regulations and procedures must “sufficiently limit the discretion of law enforcement officers to prevent inventory searches from becoming evidentiary searches.”

Pursuant to the HPD towing policy,

Whenever an officer authorizes a nonconsent tow of a prisoner's vehicle, the officer will personally conduct an inventory of items in the vehicle including any and all containers not secured by a lock, and will complete a wrecker slip. A detailed inventory list will be written on the wrecker slip. Officers must be specific in identifying inventoried items. General terms such as "miscellaneous property" will not be used.

The policy is constitutionally adequate. By its clear terms, the policy is consistent with preserving the property of the vehicle's owner, ensuring that the police protect themselves against claims or disputes over lost or stolen property, and protecting the police from danger. Moreover, its limitation on the types of containers that can be searched helps prevent an inventory search from becoming an evidentiary search. Though a slight constraint on the exercise of an officer's discretion, a limitation on the types of containers that can be searched during an inventory search deprives officers of the "uncanalized discretion" that the Supreme Court has found constitutionally deficient. Because the inventory search in this case was conducted pursuant to this constitutionally adequate policy, it was reasonable and thus does not violate the Fourth Amendment.

*U.S. v. McKinnon*, No. 11-20163 (5<sup>th</sup> Cir. Apr. 18<sup>th</sup>, 2012)



## SEARCH AND SEIZURE. CONSENT. COERCED?

Trial court denied Defendant's motion to suppress based upon an alleged coerced consent to search. Court of Appeals affirmed. The Court of Criminal Appeals found the trial court did not view all the evidence and reversed and remanded.

Officers received an anonymous tip that Appellant was selling marijuana from his house. The following day, an officer began surveillance of Appellant's residence in an effort to corroborate the anonymous report. After about an hour and a half of surveillance, the officer saw Appellant leave his home in a white van. The officer followed Appellant in an unmarked car and observed him fail to use a turn signal when making a right-hand turn. In response, she directed Officer Byron Griffin, who was positioned on the highway in a marked unit, to stop Appellant for the traffic violation. Testimony at the suppression hearing indicated that the officers hoped they would "gain some kind of probable cause" from the traffic stop that would allow them to search Appellant's residence.

The stop was recorded by an on-board camera in Officer Griffin's car. When Griffin pulled Appellant over, another officer, Deputy Johnson, arrived at the scene to assist him. Griffin testified that Appellant could not drive away unless both police cars were moved. Griffin instructed Appellant to exit the van, and Appellant acquiesced, leaving the vehicle running. When Appellant exited the van, he informed Griffin that his son was inside. Griffin stated that it was his usual practice to get everyone out of a vehicle during a traffic stop. However, he told Appellant to leave his son in the car and stated, "This is only going to take a second."

Appellant produced his driver's license and informed the officer that his insurance information was in the glove box. Griffin testified that Appellant appeared nervous, his face was trembling, and he placed his hands in his pockets. Griffin patted Appellant down and found nothing. Appellant then asked the officers if he could remove his son from the van because it was a hot day, and the van did not have air conditioning. The officers answered that the stop would not take long, and told Appellant that his son could remain in the vehicle. Griffin wrote Appellant a warning citation for the turn-signal violation and returned Appellant's driver's license to him. The citation was issued approximately seven minutes after the initial stop. Griffin then asked Appellant if the vehicle contained any contraband. Appellant responded that it did not. Griffin asked to search the vehicle, and Appellant consented.

Deputy Johnson conducted a search, and, according to Griffin, immediately noticed "shake," or small pieces of marijuana, on the passenger's side floorboard. Appellant was handcuffed and informed that he was being detained for possession of marijuana. Griffin patted down Appellant a second time, but found nothing. Griffin informed Appellant that if he was taken to jail with "anything on him," he could be charged with a felony. Griffin then asked Appellant if he had any marijuana in the crotch of his pants, and Appellant responded no. Griffin asked Appellant whether he had any marijuana in his shoes, and Appellant admitted that there was marijuana in his shoe. Griffin directed Appellant to remove his shoes, and recovered a small plastic bag containing 10.21 grams of marijuana. The officers searched, but found nothing further on Appellant's person or in his vehicle. Appellant testified that he requested that his son be removed from the van several times, but that the officers left him in the vehicle for the entire stop, approximately thirty-six minutes.

After discovering and seizing the marijuana from Appellant's shoe, Griffin informed Appellant that they had information that he was selling marijuana from his residence. Griffin asked Appellant for consent to search his residence. Appellant asked Griffin to contact his wife to pick up their son from the scene. Griffin denied Appellant's request and responded that they "needed to accomplish one thing at a time," and he "didn't want more people showing up on the scene because it becomes an officer safety issue." Griffin again asked for consent to search Appellant's home, and according to Griffin's testimony, Appellant said he would consent if Griffin would take his son back to his residence. Officers searched Appellant's residence and discovered an additional

misdemeanor quantity of marijuana.

Appellant sought to have the marijuana that was seized from his vehicle and home suppressed for lack of voluntary consent to search. Griffin and Appellant both testified at the hearing and the State entered into evidence the video recording of the stop. The trial judge stated several times that he would not watch the video but admitted it for the record. The trial court denied the motions to suppress.

At the Fourth Court of Appeals, Appellant complained that his consent to the search of his vehicle, and his later consent to the search of his residence, were "fruits" of an unlawful and prolonged detention. Appellant also complained that both instances of consent were coerced, given under duress, and involuntary.

The trial court was faced with the conflicting testimony of Tucker's assertion that the officers used his son "as a pawn" to obtain consent to search the residence, and Officer Griffin's adamant denial of such allegations. Because an appellate court affords the trial court almost complete deference in its determination of historical facts, especially those based on an assessment of credibility and demeanor, we conclude there is sufficient evidence in the record to support the trial court's implied finding that Tucker knowingly, intelligently, and voluntarily consented to the search of his residence.

*(However.....)*

Had the trial court viewed the video, it would have learned that Mr. Tucker repeatedly asked to have his son removed from a hot vehicle, to no avail. The court would have seen that the State could not prove by clear and convincing evidence that Mr. Tucker's consents to the searches of his van and home were free of the taints of police officer coercion and duress. *The court's decision not to view the video was its own. The court reversibly erred in denying Mr. Tucker's motion to suppress.*

In determining whether a defendant's will was overborne in a particular case, the trial court must assess the *totality of the circumstances* from the point of view of an objectively reasonable person, including words, actions, or circumstantial evidence. Consent coerced by any explicit or implicit means is "no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."

Factors to be considered in evaluating whether consent was voluntary include: whether the accused was advised of his constitutional rights,- the length of the detention, whether the questioning was repetitive or prolonged, whether the accused was aware that he could decline to answer the questions, and what kind of psychological impact the questioning had on the accused. If, after considering the totality of the circumstances, the trial court determines that the consent was involuntary, i.e., that it was coerced by threat or force, given under duress, or given only in submission to a claim of lawful authority, then the consent was invalid, and the search was unreasonable.

In the case before us, there was conflicting testimony regarding some of these factors, and an evaluation of the totality of the circumstances should include a viewing of the video to determine whether the trial court's ruling is supported by the evidence.

Because the court of appeals erred in upholding the trial court's implicit finding that Appellant's consent was voluntary without evaluating all of the evidence that was admitted into the record by the trial court, we reverse the judgment of the court of appeals and remand the case for further proceedings consistent with this opinion.

*Tucker v. State*, NO. PD-0486-10 (Tex. Crim. App. June 20, 2012).

## SEARCH & SEIZURE – CONSENT SEARCH

McCulley appeals his conviction for murder and claims he was in custody at the time he made incriminating statements and had sought to terminate the questioning before making the statements.

From a murder scene, police took McCulley to the hospital (where his wife, the victim, died). While there, McCulley was photographed and then taken to the police station where the police questioned him for almost four and one-half hours. McCulley eventually implicated himself in his wife's death.

After McCulley consented to the search of his house, Brunson said that he asked McCulley to go to the police station so that he could interview him. Brunson testified that McCulley obliged and that another officer brought McCulley to the police station. He also said that McCulley was not a suspect at this time and that the interview was intended to —gather leads and any intelligence he might have to try to find out what happened.|| Brunson said that the videotaped interview began shortly before 1:00 a.m. on May 21.

Brunson said that as he interviewed McCulley, he had McCulley verify to him that he was there of his own free will, and Brunson said that McCulley freely answered his questions. Brunson testified, as the video of the interview played for the trial court, that after asking McCulley, —is there anything that you haven't talked about that might help me out on this case, anything at all that might help me, — McCulley responded, —I just want to see her,|| and —I just want to go to the hospital.|| After telling McCulley that his wife —was still at the hospital,|| Brunson told McCulley that he could see her —as soon as we finish here.

Brunson said that during the interview, he reminded McCulley that he was still free to leave. Brunson asked several times to go home. He was told again that it was not a good idea. Brunson said that what the detective meant when she said that the police would be at McCulley's home for a while was that the police would be processing crime-scene evidence and no one would be allowed in the home. Brunson said that even after these requests, McCulley was not a suspect at this time and that he was still free to leave the interview. Brunson said that just before 5:00 a.m., he and McCulley read McCulley's *Miranda* rights and his article 38.22 rights together. Brunson averred that McCulley acknowledged that he understood his rights. When asked whether he was still willing to talk to Brunson, McCulley responded, —Can I just go to sleep?|| Brunson responded, —We need to talk. We need to get things worked out.|| He told McCulley, —You can go to sleep when we're done.|| But Brunson also said, —If you want to invoke your rights, that's your right also." The video of the interview reflects many of the statements Brunson testified to. In the video, as the interview begins, Brunson tells McCulley that he is not under arrest and is not being charged with anything. Brunson also has McCulley verify that he knows he is there of his own free will.

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). Additionally, article 38.22 of the code of criminal procedure precludes the use of statements that result from custodial interrogation without compliance with its procedural safeguards. *See* Tex. Code Crim. Proc. Ann. art. 38.22. 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. *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. If an investigation is not at an accusatorial or custodial stage, a person's Fifth Amendment rights have not yet come into play, and the voluntariness in waiving those rights is not implicated. Four factors are relevant to determining whether a person is in custody: (1) probable cause to arrest, (2) subjective intent of the police, (3) focus of the investigation, and (4) subjective belief of the defendant. As a general rule, when a person voluntarily accompanies law enforcement to a certain location, even though he knows or should know that law enforcement suspects that he may have committed or may be implicated in committing a crime, that person is not restrained or —in custody.|| More specifically, so long as the circumstances show that a person is acting only

upon the invitation, request, or even urging of law enforcement, and there are no threats, either express or implied, that he will be taken forcibly, the accompaniment is voluntary, and such person is not in custody.

Here, according to Brunson, McCulley voluntarily rode with an officer to the police station from the hospital. McCulley, however, was not wearing shoes and had blood on his clothing. At the suppression hearing, Brunson testified that in order for McCulley to return home or to the hospital, the police would have needed to transport him. When asked whether McCulley was dependent upon the police for transportation, Brunson answered, —It would have been up to me.|| Brunson also averred that leaving the interrogation room would have been difficult, requiring knowledge of a —sneaky way out,|| so much so that Brunson said more than once 12 that he would have been required to escort McCulley out of the building. When taken as a whole, we conclude that McCulley was physically deprived of his freedom in a significant way. Police finally read McCulley his rights almost four hours after they brought him to the interrogation room.

Here, police should have given McCulley his *Miranda* and article 38.22 warnings at the moment his interview turned from an investigation to an interrogation. Therefore, we must determine whether the police deliberately employed a two-step question-first strategy in an effort to thwart McCulley’s understanding of his rights. Because the —question of whether the interrogating officer deliberately withheld *Miranda* warnings will invariably turn on the credibility of the officer’s testimony in light of the totality of the circumstances surrounding the interrogation,|| a factual finding regarding the officer’s credibility is entitled to deference on appeal and is reviewed only for clear error. *Citation omitted.*

Here, the trial court made the specific finding of fact at the suppression hearing that Brunson was a credible witness. Brunson testified that he did not believe that McCulley was in custody at any time during the interview. Because the question of whether Brunson deliberately withheld warnings turns on his credibility and because the trial court determined he was in fact credible, we defer to the trial court’s determination. Based on the trial court’s credibility determination, the record does not show a deliberate tactic to employ a two-step interrogation technique. We hold that the record fails to show that the police deliberately used a two-step, —question first, warn later|| strategy.

When the two-step questioning tactic is not deliberately employed, —the admissibility of any subsequent statement should turn . . . solely on whether it is knowingly and voluntarily made. In this case, the trial judge made specific findings that McCulley’s post-*Miranda* statement to police was voluntarily made.

*McCulley v. State*, NO. 02-09-00222-CR, 2<sup>nd</sup> Ct. App. – TEX. Fort Worth, August 18, 2011.

## **SEARCH AND SEIZURE – PROTECTIVE SWEEP**

A jury found Cecil Walter Max-George guilty of possession of marijuana in an amount of more than four ounces and less than five pounds. The conviction was affirmed by the Court of Appeals. The Defendant contended that the entry into the premises by the officers was unlawful and that the evidence discovered should be suppressed.

On December 26, 2009, at around 2:30 a.m., Deputy S. Brown, of the Harris County Sheriff’s Office, was sitting in a parking lot in his patrol car writing reports when he observed a man looking into a vehicle with a flashlight. The vehicle was parked in front of a closed business that was part of a strip mall. As Deputy Brown approached to investigate, he was met by appellant, who had come from inside the building. Deputy Brown identified himself and asked appellant what he was doing, and appellant told Deputy Brown that he was looking inside his friend’s car. Deputy Brown also smelled burnt marijuana coming from appellant’s person. Deputy

Brown asked appellant for his identification, but appellant told him that it was inside the business and that he would go get it. Appellant entered the building and Deputy Brown followed. Appellant gave Deputy Brown his identification, and Brown noticed a “very strong odor of unburnt marijuana” inside the building. Deputy Brown also observed a small amount of marijuana in plain view on a bookshelf to the left of the door.

At that time, Deputy Brown asked appellant and another man who was present in the front room of the building to step outside while he checked for outstanding warrants. As the men complied, other officers began to arrive. The officers asked appellant if any other people remained inside the building. Appellant told them that there were others inside the building, so Deputy Brown and Deputy B. Frazur once again entered the building to find its other occupants. Deputy Brown testified that they did so because “if there is anything illegal in there or we also need to check to make sure, I mean, there’s nobody else in there. It’s an officer safety issue to see what’s inside.” He testified that they did not search for any illegal items or materials at that time—they performed a “protective sweep” in which they looked only for people. Deputies Brown and Frazur found two other people hiding in a restroom, checked them for concealed weapons, and escorted them outside the business. In the course of checking the premises for other people, Deputy Brown notice several potted marijuana plants, but he testified that he did not count them at that time because he was focused on looking for people.

The officers exited the premises and summoned narcotics officers who sought a search warrant based on Deputy Brown’s observation in the course of his encounter with appellant and the three other men. Once they had the search warrant, the officers returned to the building and searched the premises for illegal narcotics and weapons. The officers discovered fifty-nine marijuana plants, heat lamps and other marijuana growing paraphernalia, two semiautomatic handguns, and a shotgun.

The Fourth Amendment will tolerate a warrantless search if the police (1) have probable cause coupled with exigent circumstances; (2) have obtained voluntary consent; or (3) conduct a search incident to a lawful arrest. Here, it is undisputed that Deputy Brown did not make his initial entry into the building incident to an arrest, but appellant’s consent would be immaterial if Brown had probable cause coupled with exigent circumstances.

Deputy Brown testified that he observed a man using a flashlight to look into a car parked in front of a closed business at 2:30 in the morning the day after Christmas, and that this was suspicious behavior. He also testified that, as appellant approached him, he noticed that appellant smelled strongly of burnt marijuana. This testimony was sufficient to establish probable cause.

At the suppression hearing, Deputy Brown also testified that he followed appellant into the building’s office because he had a suspicion that the business might not actually belong to appellant or that appellant could have been breaking into the vehicle or the business, and because it was the middle of the night and appellant was using a flashlight to look around, which was also suspicious. When appellant asked him, “What gave you the right to go into the office?”, Deputy Brown testified, “It’s an officer safety issue. I don’t know what’s inside.” At trial, Deputy Brown testified that when he saw someone outside the closed business, he was not sure what to think because “there’s graffiti in the area. Possibly could be breaking into a building, could be breaking into the vehicle.” Deputy Frazur, who arrived while Deputy Brown was inside the office with appellant, testified that for reasons of officer safety, he wanted to be able to clearly see appellant and the other officers at all times.

Based on this testimony, the trial court reasonably could have found that Deputy Brown’s warrantless entry was justified by the need to protect himself from a suspicious person who might have been going inside the building to retrieve a weapon, to prevent appellant from escaping following a theft of a vehicle or business, or to prevent appellant from destroying evidence of a potential theft or drug related crime.

We hold that, based on Deputy Brown’s uncontroverted testimony on these issues, the trial court could have properly concluded that the initial entry into the building was permissible because the State established both probable cause and exigent circumstances. Therefore, the trial court did not err in concluding that the question of appellant’s consent was immaterial in determining whether the initial entry was lawful.

*Max-George v. State*, No. 01-10-00497-CR (Ct. App – Hou. [1<sup>st</sup>. Dist] July 28<sup>th</sup>, 2011).

## **SEARCH & SEIZURE: USE OF SUSPECT’S CAR KEY FOB, AFFIRMATIVE LINKS.**

Houston PD Officers A. Robles and K. Wagner went to a part of Houston known for narcotics activity to serve felony warrants. It was approximately 10:45 p.m., and it was dark. The officers saw a person leaning into the open window of a parked vehicle. The man put his hand into the vehicle through the window and then removed it. Robles believed he had witnessed a drug transaction, and he pursued the suspect on foot. Wagner followed them in the patrol car.

During the foot-chase, Robles saw the suspect throw something to the ground, and he saw another man, appellant Wiley, walk towards it. After a chase of approximately 200 yards, Robles apprehended the original suspect, and Wagner took custody of him. Robles walked back toward the spot where he saw an object thrown to the ground, and he saw Wiley “looking like he was bending down to pick something up.” Robles testified, “I saw the defendant [Wiley]—looked like he had picked something up. And he looked back and saw me and then went and turned away from me like he was attempting to conceal or hide something he had just picked up.” Robles then detained Wiley on the suspicion that he had picked up narcotics or tampered with evidence.

Robles asked Wiley if he lived nearby. Wiley responded that he did not, and he also stated that he had gotten a ride from a friend. In response to Robles’s inquiry, Wiley said he did not have a car. After Wiley provided his name, birthdate, and address, Robles determined that there was a warrant for his arrest, and he placed him under arrest. He then found that Wiley had a set of car keys and a wad of money, more than \$2,000, mostly in \$20 bills.

As they drove away in the patrol car, Robles pushed the car alarm button on Wiley’s keys. Less than a block from where the arrest took place, a car alarm went off. The car was legally parked on a public street. The officers stopped beside the car, checked the license plate, and determined that it was registered in Wiley’s name. They approached the car and used their flashlights to look through the windows. They saw what they believed to be crack cocaine and cocaine in plain view on the rear seat side of the car. They opened the car door, retrieved the suspected narcotics, and conducted a field test, which was positive for cocaine. Then they had the car towed.

The trial court convicted Wiley after denying his motion to exclude evidence of the drugs in the car based upon the claim that the search of the car was unconstitutional.

Wiley first claimed his initial detention lacked reasonable suspicion.

A police officer may temporarily detain an individual for investigative purposes if he reasonably suspects that the individual is involved in criminal activity. *Foster v. State*, 326 S.W.3d 609, 613 (Tex. Crim. App. 2010) (citing *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968)). “Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity.” *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). It requires more than an “inchoate and unparticularized suspicion or ‘hunch.’” *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. “A reasonable-suspicion determination is made by considering the totality of the circumstances.” *Ford*, 158 S.W.3d at 492–93.

The trial court did not file written findings of fact, but it did state its reasons for denying the motion to suppress on the record in open court. The trial court reasoned that the officers were in an area known for narcotics activity, that DeVaughn threw a marijuana cigarette to the ground while Robles chased him on foot, that Robles saw Wiley go the area where DeVaughn threw the cigarette, and that Wiley went behind a truck when Robles approached him. To the extent they were found by the trial judge, these facts are supported by the record.

Further, these facts gave rise to reasonable suspicion sufficient to justify Robles's detention of Wiley. An officer's training or experience, combined with permissible deductions based on objective facts, may provide reasonable suspicion to justify a detention. *See Ford*, 158 S.W.3d at 494 (citing *U.S. v. Cortez*, 449 U.S. 411, 419, 101 S. Ct. 690, 695–96 (1981)). Robles saw what he believed, based on his training and experience, to be a hand-to-hand drug transaction, and he watched the suspect throw something from his hand to the ground. He also saw Wiley move toward the object, just after it was thrown. In addition, when Robles approached Wiley, he moved behind a nearby truck and tried to walk away. These facts give rise to reasonable suspicion. *See also LeBlanc v. State*, 138 S.W.3d 603, 608 n.5 & n.6 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (noting that furtive gestures and nervousness are factors that may give rise to reasonable suspicion). We hold that the trial court did not err by denying the motion to suppress as to the initial detention...

Wiley argues that the use of the alarm button to locate his car was not justified as part of a search incident to arrest because he was not within reaching distance of the passenger compartment at the time of his arrest or at the time the officer activated the alarm, and because it was not reasonable to believe the car contained evidence of the offense for which he was arrested. Wiley's argument presupposes that the officer's use of the car alarm button was a search under the Fourth Amendment and then concludes that the search was unlawful because it was warrantless and did not fall within the "search incident to arrest" exception to the warrant requirement. The State contends that the use of the alarm button was not unlawful because it was not a search at all.

Wiley was lawfully arrested pursuant to an outstanding warrant for his arrest. On appeal he does not challenge the lawfulness of the officer's search of his person incident to that arrest or the officer's seizure of his car keys. Rather, he argues only that the officer's subsequent use of the alarm button was itself an unlawful search and that the court therefore should have suppressed the evidence found in his car.

Wiley's vehicle was parked on a public street. He had no reasonable expectation of privacy in the identity of his car. *See Cowan*, 674 F.3d at 955. Pressing the alarm button on his car key and activating the car's alarm revealed only that the keys found on Wiley matched the car parked nearby. *See id.* As in *Cowan*, Wiley has not shown how the use of the car alarm button violated a reasonable expectation of privacy in the encrypted code, which the officers did not attempt to discover. *See id.* Thus, we conclude that the use of the alarm button to locate Wiley's car did not violate the Fourth Amendment under the *Katz* reasonable-expectation-of-privacy test because Wiley did not show that he had a reasonable expectation of privacy that was invaded by the officer's actions. *See*

*Wiley v. State*, No. 01-11-00147-CR, Ct. App. – Houston [1<sup>st</sup> Dist.] Aug. 30, 2012.

## **SEARCH & SEIZURE – CONSENT SEARCH**

Four officers came to Mr. Weaver's welding shop looking for a person wanted in another county. Mr. Weaver gave the officers consent to search for that person. The officers, over Mr. Weaver's objection, ended up searching a van on his property and finding drugs in it. The trial judge granted Mr. Weaver's motion to suppress because he found that the search of the van exceeded the scope of Mr. Weaver's consent and excluded the evidence found in the van. The Court of Appeals and Court of Criminal Appeals affirmed the ruling.

Weaver owned a welding shop in Polk County. There was a front office and a workshop in the rear. At the back on one side of the workshop was an open bay door with a van backed into it. Also parked in the back yard were several "broken down" vehicles, a boat, and "some other items." Four narcotics officers came to the shop looking for a suspect named "Bear" who was wanted in another jurisdiction for organized crime charges. When the officers arrived, they saw Bear's car parked out in front of the shop. The officers asked Mr. Weaver if they "could look around for the guy," and he gave them "consent to look for him."

The officers looked around for about ten minutes, but Bear was not at the shop nor inside the van that was backed up in the workshop bay door. Nonetheless, because the narcotics officers had received information "that there was also methamphetamine being used and distributed from the business," they lingered in the shop. When Sgt. Smith asked if he could search the van, Mr. Weaver refused consent. A drug dog then "hit" on the van which was searched, and a tin box that contained glass pipes and some methamphetamine was found on the floorboard between the door and the passenger's seat. Mr. Weaver was arrested and charged with possession of methamphetamine. In this case, the evidence shows that when the officers' search for "Bear" ended, they had not observed anything suspicious. Because the trial judge could have determined that Weaver's consent to search for "Bear" had ended, the trial court could reasonably find that the officers, without establishing probable cause, were not entitled to search for other purposes unrelated to that of their initial search.

The scope of a search is usually defined by its expressed object. A person is free to limit the scope of the consent that he gives. If police rely on consent as the basis for a warrantless search, "they have no more authority than they have apparently been given by the consent." It is therefore "important to take account of any express or implied limitations or qualifications attending that consent which establish the permissible scope of the search in terms of such matters as time, duration, area, or intensity." On the other hand, a person's silence in the face of an officer's further actions may imply consent to that further action. The "standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?"- Therefore, a court reviewing the totality of the circumstances of a particular police-citizen interaction does so without regard for the subjective thoughts or intents of either the officer or the citizen. Still, in Texas, the "clear and convincing" burden "requires the prosecution to show the consent given was positive and unequivocal and there must not be duress or coercion, actual or implied."

Viewing the evidence in the light most favorable to the trial judge's ruling, this area (the van) Federal and state courts alike have upheld dog sniffs in the public parking lots of gas stations, hotels, restaurants, and high schools. But police cannot prolong a traffic stop beyond the time reasonably required to accomplish its purpose simply to give them time to bring in a drug dog. As our courts of appeals have recognized, officers initiating a dog sniff must have the right to be where they are at the time they initiate a dog sniff. The van was not part of the "public" area of the welding shop. Therefore, the officers needed permission to be where they were when they initiated the dog sniff, but they did not have it.

But the trial court did not find that the van was parked in a public parking lot. Rather, it found the van "was located beside the defendant's shop on property owned by the defendant." The prevailing party is afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. The facts here support the trial court's implicit finding that the van was not parked on any part of the business premises open to the public or in a public "parking lot." From the evidence in this record, the trial judge could have found otherwise, but he did not do so. We are obliged to give almost total deference to his implied factual findings. Therefore, unless the officers had Mr. Weaver's consent to be standing beside the van at the loading dock, they were no longer entitled to be in the non-public portion of the welding workshop at the time they conducted the dog sniff.

*State v. Weaver*, NO. PD-1635-10 (Tex. Crim. App. September 28, 2011).



*This opinion illustrates that consent can be limited by conduct or words of the person giving the consent. Also, while use of a drug dog requires no warrant, the dog and officers must be legally in position at the time the dog hits on a vehicle or closed premises. Again, these circumstances should be addressed in post-arrest reports.*

## **SEARCH & SEIZURE -- SEARCH OF CELL PHONE AFTER ARREST FOR DISTURBANCE.**

Granville was arrested after causing a disturbance at his school. Another officer, who was not involved in the arrest or response to the disturbance, searched the cell phone in Granville's possession because he had been told that Granville took a picture of a student urinating in a urinal at school the day before. This act was purportedly a crime which stimulated the officer to begin his search for evidence of it. So, without a search warrant, he ventured down to the jail, took Granville's cell phone from the property room, turned it on, and began scrolling through it for the picture in question. It was eventually discovered on the device, and that led to Granville's indictment for "Improper Photography or Visual Recording."

Furthermore, a search conducted without a warrant is presumptively unreasonable, *United States v. Karo*, 468 U.S. 705, 717, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) and, when it is initially shown that a warrantless search occurred, the State has the burden of legitimizing it in some manner. *Roth v. State*, 917 S.W.2d 292, 299 (Tex. App.—Austin 1995, no pet.). We now address whether the State carried its burden.

May an officer conduct a warrantless search of the contents or stored data in a cell phone when its owner was required to relinquish possession of the phone as part of the booking or jailing process? Again, we do not address situations involving the presence of exigent circumstances or other recognized exceptions to the warrant requirement. Instead, our review is limited to the grounds urged by the State during the suppression hearing, those grounds being the presence of probable cause to believe a crime was committed and the supposed lack of any reasonable expectation of privacy in the device.

We know of no authority that allows the State to search property merely because its officers have probable cause to believe that a crime occurred and evidence of that crime can be found on the property to be searched. Those two indicia simply provide a basis to secure a warrant. They alone do not allow a search. Without such a warrant, the search is presumptively unreasonable.

As for the second and final ground, the State contends that the "search of that inmate's phone was an allowable search [because] . . . [i]t was jail property and therefore Granville had no expectation of privacy." It is true that prisoners have no reasonable expectation of privacy in their *cells*. Yet, the prosecutor is simply wrong in saying that no expectation of privacy in a jail setting has been recognized. arrestees still retain some level of privacy interest in personal effects or belongings taken from them after arrest. *Id.* at 108. Instead of having none, their expectations of privacy are "diminished."

Next, we address the extent, if any, to which an arrestee has an expectation of privacy in the electronically stored data in his cell phone that was taken from him upon booking into jail. Forty years ago the average person could only dream of having a device that allowed individuals to walk about talking with whomever they chose. Interestingly, though, while phones shrank in size, they expanded in versatility and technology. In addition to seeking out information deemed important to its owner, cell phones have the capability of memorializing personal thoughts, plans, and financial data, facilitating leisure activities, pursuing personal relationships, and the like. Due to the abundance of programs or "apps" available, users also have the ability to personalize their phone; it is not farfetched to conclude that a stranger can learn much about the owner, his thought processes, family affairs, friends, religious and political beliefs, and financial matters by simply perusing through it. That such matters are intrinsically private cannot be reasonably doubted. The importance and private nature of such

information has also led to the development of passwords, encrypted programs, and like security measures to prevent its disclosure. Given this, we cannot but hold that a person (whose category encompasses Granville) has a general, reasonable expectation of privacy in the data contained in or accessible by his cell, now “smart,” phone.

We must next assess the effect, if any, of Granville’s incarceration upon his expectation of privacy. As previously mentioned, being jailed tends to diminish, though not necessarily vitiate, such expectations. The extent to which they survive in property lawfully seized as part of the jailing process depends, in large part, upon the owner’s exhibition of subjective expectations of privacy, whether they are reasonable, and society’s recognition of the same. Furthermore, the amount of control retained by the owner over the item is also of importance because it influences whether the detainee’s expectation can truly be said to be reasonable.

We are looking at a privacy interest in data hidden within electrical components contained in the device as well as potential information not in the phone but accessible through its manipulation, that is, data saved on the internet. The cell phone had to be activated, or turned on, by the officer, and he had to pull up or scroll through the information imprinted on electronic chips to uncover the photo. It was not exposed to anyone happening to touch the item, which differentiates it from the miscellaneous things accessible on a prisoner’s pants. Evidence of the phone being off has other import, as well. That evinces some precautionary measure being taken to secure the data from curious eyes. The power button can be likened to the front door of a house.

Now we turn to the subject of society recognizing (or not) an arrestee’s privacy interest in a cell phone impounded during the booking process.<sup>1</sup> It must be remembered that Granville was simply a pretrial detainee. This is of import since detainees, in some ways, are accorded greater constitutional protection than a convicted individual.

So too is the potential for exceptional intrusion in one’s private matters worth reiteration. Should the State’s contention be accepted, it would be free to look for whatever it cared to just because it could. Exposing a detainee to having his private thoughts, relationships, finances, and the like to arbitrary intrusion seems antithetical to the societal and civil norm mandating the presumption of innocence until proven guilty. A detainee, like Granville, who is jailed for a class C misdemeanor is not even the type of prisoner that society thought should be placed in extended governmental control. Indeed, those convicted of such a misdemeanor are not susceptible to imprisonment upon conviction.

Due to the potential invasiveness of the search, Granville’s status as a pretrial detainee, the fact that his stay in jail for a class C misdemeanor would be of short duration, the utter lack of any nexus between the cell phone and the crime for which appellant was jailed, and the lack of evidence suggesting that the phone and its contents posed any risk to the jail’s penological interests, we conclude that society would recognize his continued, and reasonable, privacy interest in the instrument despite his temporary detention. Indeed, holding that the mere impoundment of property does not vitiate all reasonable expectation of privacy in the item confiscated is nothing new. Law enforcement officials have long been barred from searching impounded vehicles in any manner that they may care to. *See South Dakota v. Opperman*, 428 U.S. 364, 372-73, 96 S.Ct. 3092, 3098-99, 49 L.Ed.2d 1000 (1976) (prescribing the way in which an inventory search of an impounded vehicle must occur for it to pass Fourth Amendment restrictions). Thus, the simple act of a governmental body taking custody over personal property of another “does not put an end to all expectations of privacy.” *State v. Hill, supra*. Nor should it.

As we cautioned early on, we deal not with a warrantless search incident to arrest or one undertaken due to exigent circumstances. Nor do we deal with property found in a jail cell. Rather, we consider a warrantless search, by a stranger to an arrest, of a cell phone taken as part of an inventory-conducted incident to jailing for

evidence of a crime distinct from that underlying the owner's arrest. Nothing in those circumstances or the others mentioned herein nullify Granville's reasonable expectation of privacy in the phone searched. Nothing in them allowed the officer to act without a warrant.

Exclusion of evidence found on the cell phone was affirmed by the Court.

*(Author note: This case illustrates the degree of privacy interest the courts are recognizing in electronic data and information stored on cell phones. As this opinion indicates, it's best to consider cell phone data as private and secure a search warrant based upon probable cause unless exigent circumstances truly exist. The fact that the phone is in jail property does not change this.)*

*State v. Granville*, NO. 07-11-0415-CR, (Ct. App. – Amarillo, July 11, 2012).

### **SEARCH & SEIZURE – VEHICLE SEARCH – CONSENT, OBJECTION TO CONSENT BY PASSENGER (driver's common law spouse).**

A patrol officer set up to watch a house where neighbors complained of suspicious activity (people frequently coming and going). The officer stopped a vehicle which was present at the premises for a short time after observing a traffic violation. The driver consented to a search of the vehicle, but the passenger, who had a different last name, objected to the search. Both the driver and passenger stated that they were common law husband and wife. The vehicle was registered to the driver. The officer searched the vehicle finding drugs and the occupants were prosecuted.

The passenger moved to suppress the evidence based on an invalid search. It was the State's burden to show that the couple did not meet the elements of a common law marriage. The three elements of a common-law marriage: (1) an agreement to be husband and wife; (2) living together as husband and wife; and (3) a holding out to the public that the couple are husband and wife. *See Hightower v. State*, 629 S.W.2d 920, 924 (Tex. Crim. App. 1981). Since the officer could not disprove the common law marriage relationship and the State could not disprove the relationship at the suppression hearing, the relationship was presumed; thus, the passenger had standing to object to, and negate, the consent to search of the driver due to her community property interest in the vehicle under *Georgia v. Randolph*.

Texas courts do extend the *Georgia v. Randolph* holding to vehicles.

The District Court suppressed the evidence finding the consent was ineffective due to the common law wife's objection. The Court of Appeals affirmed this ruling.

*State v. Copeland*, No. 13-11-00701-CR, (Ct. App. – Corpus Christi, Aug. 09, 2012.)

### **DETENTION – AUTOMOBILE SEARCH**

After stopping a vehicle for seatbelt violations, the officer noted the driver seemed quite nervous. After questioning the driver and passenger about general matters, including where they were going and past criminal activity, the officer issued citations and continued questioning the driver. The district court found that the Trooper handed the driver the citations together with his driver's license, and simultaneously asked the driver if he would answer more questions. The district court did not make a finding in its order as to when the trooper handed the passenger's identification card back to the driver, though it found that the Trooper asked for permission to search after handing back the driver's license, the citations, and the passenger's identification card.

The trooper frisked the driver and directed him to stand by a sign further down the roadside, within shouting distance, and to face away from the truck. He then questioned the passenger further, including about her own drug use, before ordering her out of the truck. After emptying her pockets and pulling up her pants to expose her ankles, the passenger was directed to stand down the roadside, about halfway between the truck and the driver, and to face away from the driver and toward the truck. Approximately seventeen minutes after he began the search of the truck, and forty-seven minutes after initiating the stop, the Trooper found an unloaded firearm and ammunition in a closed bag belonging to the driver. Drug paraphernalia belonging to the passenger was also found, but she was not charged. The driver was arrested approximately one hour and thirty-nine minutes after the Trooper initiated the stop.

A grand jury in the Western District of Texas indicted Macias for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). In sum, the district court determined that Trooper Barragan's questions to Macias and Zillioux before issuing the citations were proper; that Trooper Barragan did not detain Macias, despite his nervous behavior and the discrepancy about his criminal record, and instead chose to issue the citations; that after receiving the citations and his driver's license, Macias was free to leave, and thus his subsequent interaction with Trooper Barragan was a consensual encounter that did not illegally extend the traffic stop; and that Trooper Barragan asked for consent to search after handing Macias the citations, his driver's license, and Zillioux's identification card. Finding no improper detention, the district court denied the motion to suppress. The driver entered a conditional guilty plea and the case was appealed to the Fifth Circuit.

On appeal, the question presented is whether Trooper Barragan's subsequent actions after he legitimately stopped the truck were reasonably related to the circumstances that justified the stop, or to dispelling any reasonable suspicion developed during the stop. Did these unrelated questions impermissibly extended the duration of the stop? Approximately two minutes passed between the time Trooper Barragan initiated the stop and initially questioned Macias and Zillioux while they sat in the truck. It was not until Macias followed Trooper Barragan to the area in front of the patrol vehicle that Trooper Barragan began to ask questions unrelated to the purpose and itinerary of the stop. Nearly eight minutes elapsed from that point until Trooper Barragan ran the computer checks. Though we recognize that during this time Trooper Barragan also asked Macias and Zillioux questions related to the purpose and itinerary of the trip, Trooper Barragan extensively questioned them both on unrelated topics. These questions therefore extended the stop by some length of time.

Both the scope and length of the officer's detention must be reasonable in the light of the facts articulated as having created the reasonable suspicion of criminal activity. *Pack*, 612 F.3d at 357. For the scope of an officer's detention to be reasonable in the light of the facts having created the reasonable suspicion, "each crime he investigates should, if established, be reasonably likely to explain those facts." *Id.* Nervousness, standing alone, generally is not sufficient to support reasonable suspicion.

Even if Macias and Zillioux's answers are considered inconsistent, inconsistent stories between a driver and passenger do not necessarily constitute articulable facts of reasonable suspicion. Trooper Barragan asked numerous questions unrelated to the purpose and itinerary of the stop before he *may* have obtained reasonable suspicion by learning that Macias was not only nervous, but may have misrepresented his criminal past. Law enforcement must possess reasonable suspicion *before* extending a stop by asking unrelated questions.

Though "[t]here is . . . no constitutional stopwatch on traffic stops," the questions asked by Trooper Barragan were unrelated to the purpose and itinerary of the trip, and do not demonstrate that he "diligently pursued a means of investigation that was likely to confirm or dispel [his suspicion] quickly." *Brigham*, 382 F.3d at 511 (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985)). Accordingly, we must conclude that Trooper Barragan's actions subsequent to the initial stop of the truck were not reasonably related in scope to the circumstances that justified the stop of the truck, and Trooper Barragan's extended detention of Macias violated his Fourth Amendment rights.

*Tip: Try to limit questioning during a traffic stop to matters related to the circumstances of the stop and carefully establish (and document!) reasonable suspicion to extend the stop when necessary. The courts will focus upon the point in time during the detention at which reasonable suspicion arises so officer reports must take this into account.*

## **DWI CONVICTION – INVOLUNTARY BLOOD DRAW**

Moseley was a driver of a vehicle involved in a fatality accident with a motorcycle. Trooper Campos testified that during his on-scene interaction with Mosely, Mosely exhibited a “noticeable, probably moderate” smell of alcohol and bloodshot eyes but did not appear to have trouble speaking or maintaining his balance. Campos testified that Mosely told him he had had “a couple of drinks,” though Mosely later testified and denied Campos’s allegation. Campos testified that while on the scene he believed Mosely as “possibly” intoxicated but did not form a definite opinion on the matter. Campos did not ask Mosely to perform any field sobriety tests. Campos testified that based on the circumstances of the accident, he believed that Mosely was subject to a mandatory blood draw to test his BAC. He testified that he explained to [Mosely] what the law was and that he had two choices, one, that he comply voluntarily to go . . . to the nearest medical facility for a blood draw, or that he would be placed in custody and transported against his will and . . . a blood draw would have been taken based on the law at that time. Campos clarified: “I didn’t order him [to have his blood drawn] or anything. I asked him.” Campos testified that after he explained his understanding of the law, Mosely “consented” to a blood draw. Subsequently, Mosely got in the patrol car of state trooper Ha and rode with Ha to a nearby emergency room. At no point did Campos or Ha handcuff Mosely or tell him he was under arrest. Trooper Ha testified that Mosely rode in the front seat of his patrol car on the way to the emergency room. The trip took somewhere between twelve and fifteen minutes, during which time Ha smelled alcohol on Mosely but noticed no other signs of intoxication. Mosely testified that he and Ha entered the emergency room together, and Ha approached a nurse about needing to have Mosely’s blood drawn. Mosely testified that the nurse responded by asking whether Ha had Mosely’s consent to the blood draw, and Ha initially did not respond. Mosely testified that the nurse followed up by saying, “[w]ithout the patient’s consent, we can’t do a blood alcohol profile unless he’s under arrest. Is he under arrest?” Mosely testified that Ha “hesitated for a moment and kind of shrugged and said, Yes, he’s under arrest.”

Ha testified that he did not recall this exchange and that he believed Mosely gave blood voluntarily. He also testified that he believed Mosely was not under arrest, that he would have lacked probable cause to place Mosely under arrest, and that he never filled out the paperwork that is required when a suspect’s blood is drawn involuntarily pursuant to an arrest. The State argues that Mosely was constitutionally and statutorily subject to an involuntary blood draw, so his purported failure to consent was irrelevant. Alternatively, the State argues that Mosely “volunteered” to give blood and was “uncoerced” because he gave blood after Campos gave him “a true statement of the law and circumstances regarding a mandatory blood draw.” a warrantless seizure of a blood sample can be constitutionally permissible if officers have probable cause to arrest a suspect, exigent circumstances exist, and a reasonable method of extraction is available. (*citation omitted*) It argues, in other words, that

Trooper Campos had probable cause to arrest Mosely for DWI, that exigent circumstances existed (namely, Mosely’s BAC would decline over time and therefore needed to be tested quickly), and that a reasonable method of extraction (blood draw by an emergency-room nurse) was available. Mosely argues, in contrast, that not all of the constitutional criteria for an involuntary blood draw were met because Campos lacked probable cause to arrest him for DWI. The question we must answer is whether this record so thoroughly satisfies the State’s burden of establishing that Campos had probable cause to arrest Mosely for DWI that the trial court’s

ruling to the contrary was an abuse of discretion. *Citation omitted*. We hold that it does not. Intoxication is defined as “not having the normal use of mental or physical faculties.” See Tex. Penal Code Ann. § 49.01(2)(A).

Thus, to establish that Campos had probable cause to arrest Mosely for DWI, the State needed to present evidence that Mosely lacked the normal use of his mental or physical faculties. *Citation omitted*. It did not do so. Neither Campos nor Ha performed field sobriety tests on Mosely, and Campos testified that he did not observe Mosely slur his speech, have trouble maintaining his balance, or do anything else to suggest that he was physically or mentally impaired. Indeed, both troopers testified that they did not form an opinion as to whether Mosely was intoxicated. While the facts that Mosely was involved in an accident, smelled of alcohol, had bloodshot eyes, and admitted to drinking are certainly consistent with intoxication, they do not establish that Mosely had lost the normal use of his faculties.

Because the State failed to establish that Mosely had lost the normal use of his faculties, it failed to carry its burden of establishing that the troopers had probable cause to arrest Mosely. Thus, the troopers could not constitutionally draw Mosely’s blood without Mosely’s consent. The State argues that Mosely was not “coerced” into giving blood because he gave blood after Trooper Campos correctly explained to him the law regarding blood draws. As the trial court found, Campos “explained to Mosely that he could voluntarily submit to a /blood draw or that he would be taken into custody and have a mandatory blood draw taken.” On the record before us, this explanation of the law was incorrect; as detailed above, the State failed to establish that Campos had probable cause to arrest Mosely at the time he made this statement. Thus, the State failed to establish that Campos could legally “take[] [Mosely] into custody” for a mandatory blood draw. It follows that Campos’s explanation of the law could not yield voluntary consent.

The trial court did not abuse its discretion by ruling that Mosely’s blood was obtained unlawfully. Evidence supported the court’s determination that Mosely did not voluntarily consent to a blood draw. Furthermore, because the State failed to carry its burden of establishing that Trooper Campos or Ha had probable cause to arrest Mosely, the State failed to carry its burden of establishing that an involuntary blood draw was constitutionally or statutorily permissible.

*State v. Mosely*, # 03-09-00721-CR, 3rd Ct. App.-TEX July 28, 2011.

## **DWI BREATH TEST CONSENT, VOLUNTARY?**

Appellant, Casey Ray Fienen, was arrested for driving while intoxicated (DWI). When the trial court denied his pre-trial motion to suppress, Appellant pled guilty and was convicted of DWI. The Sixth Court of Appeals held that Appellant acted voluntarily when he submitted a breath specimen and thus affirmed the trial court’s decision to admit the evidence. The Court of Criminal Appeals affirmed.

On January 31, 2010, George Robinson of the Fannin County Sheriff’s Office stopped Appellant’s vehicle when he witnessed it cross the center line and drive on the improved shoulder. He contacted Texas Department of Public Safety (DPS) Officer Carmen Barker to assist with the field sobriety tests. Upon Barker’s arrival and throughout the encounter, Appellant conversed comfortably and familiarly with Barker. For example, Appellant asked Barker if she was from a particular area, and when she responded affirmatively, Appellant informed her that he had been there and it was very nice. Appellant also told Barker that one of his friends had previously been stopped by her and that he had spoken highly of the trooper. In addition, Appellant informed Barker that he had dentures and four titanium plates on the left side of his face due to a fight that occurred less than a year before. And when a vehicle drove by the scene, Appellant shared with Barker that he had gone with the driver of that vehicle to Red Lobster the night before.

After administering the field sobriety tests and a portable breathalyzer test, Barker believed that Appellant showed signs of intoxication and arrested him for DWI. Upon arrest, Appellant was placed in the trooper's patrol vehicle. Appellant asked Barker if everything had been recorded, and when she answered affirmatively, he exclaimed, "Alright. That's awesome." He also apologized if he "was being disrespectful in any way."

Barker provided Appellant with a copy of the DWI statutory warning form and read the warnings to him. Barker then asked Appellant if he would be willing to provide a breath or blood specimen, and Appellant refused.

While Appellant was seated in the patrol vehicle, Barker contacted dispatch with a request to contact the county judge so that he could meet them at the hospital to sign and execute a blood search warrant. Overhearing the conversation, Appellant asked Barker, "You take my blood from my arm or I blow again?" Barker responded, "No sir." When she tried to elaborate, she was interrupted by Appellant who stated, "If I give you a breathalyzer, I am not getting the needle stuck in me." Barker then continued explaining that, because Appellant had refused to provide a breath or blood specimen, "we contact [the county judge], he meets us at the hospital, he signs the blood search warrant, and we take your blood." Appellant inquired if blood would be taken "even though it is against my religion?" Barker responded, "Yes." Appellant stated, "I'll give you my breath. You ain't taking my blood, that's crazy. I hate needles. . . . I'm just deathly terrified of needles." Barker then inquired if Appellant would prefer to give a breath sample.

Appellant consented.

Barker called dispatch to cancel the request for the judge. However, seconds later Appellant withdrew consent and reiterated, "It's against my religion to have my blood drawn." Consequently, Barker contacted dispatch and asked them to call the judge again. When Barker asked Appellant to sign a form indicating his refusal to give a specimen, Appellant asked, "If we go to the hospital, you're really going to hold me down and take my blood?" Barker responded, "Yes, sir." Appellant replied, "Or I blow in the machine." The trooper responded, "Correct." Appellant then asked about the results of his earlier breath test, and Barker informed him that she could not share that information. To clarify Appellant's intentions, Barker asked, "Do you want to give a specimen of your breath or do you want to go to the hospital and give a specimen of your blood?" Appellant commented, "If I try to refuse giving a specimen of blood, it's probably going to be like assault or something of that nature, right?" Barker repeated her previous question. Appellant replied, "I don't want a needle in me, but this is awful." After Appellant made an unrelated inquiry about whether Barker knew a certain individual, he consented to the breathalyzer test, stating, "Go get the blower. I'm not getting a needle in me." Appellant also apologized to Barker for changing his mind so many times. The breath-test results indicated that Appellant was intoxicated.

Appellant filed a pre-trial motion to suppress evidence. At the hearing on the motion to suppress, Appellant argued that the results of the breathalyzer test should be suppressed because Barker gave extra-statutory warnings, and such warnings resulted in psychological pressure that amounted to coercion.

Any person who is arrested for DWI is deemed to have given consent to submit to providing a specimen for a breath or blood test for the purpose of determining alcohol concentration or the presence of a controlled substance, drug, dangerous drug, or other substance. TEX. TRANSP. CODE § 724.011(a). However, a person retains an absolute right (subject to certain exceptions not relevant here) to refuse a test. *Id.* § 724.013. That refusal must be strictly honored.

We have explained this apparent inconsistency: "[C]onsent being implied by law, a driver may not legally refuse. A driver, however, can physically refuse to submit, and the implied consent law, recognizing that practical reality, forbids the use of physical force to compel submission."

A driver's consent to a blood or breath test must be free and voluntary, and it must not be the result of physical *or* psychological pressures brought to bear by law enforcement.

The ultimate question is whether the person's "will has been overborne and his capacity for self-determination critically impaired" such that his consent to search must have been involuntary. We "review the totality of the circumstances of a particular police-citizen interaction from the point of view of the objectively reasonable person." Critical to a consent analysis is that the fact finder must consider the *totality of the circumstances* in order to determine whether consent was given voluntarily.

*(The Court criticized at length the prior line of cases under Erdman v. State, 861 S.W.2d 890 (Tex. Crim. App. 1993.) which appears to hold that any warnings or statements beyond the statutory warnings of consequences for refusing a breath or blood test will negate the consent.*

No statement—whether it refers to the consequences of refusing a breath test, the consequences of passing or failing a breath test, or otherwise—should be analyzed in isolation because its impact can only be understood when the surrounding circumstances are accounted for. In other words, allowing any statement by itself to control a voluntariness analysis contradicts the basic rule that voluntariness is to be determined based upon a case-specific consideration of all of the evidence. Hence, non-statutory language does not automatically amount to coercion or create an inference thereof.

The comments at issue occurred when Barker responded to Appellant's own questions, and the trooper did not provide any information that was untrue as Appellant could have been taken to the hospital and a blood search warrant obtained. Although Barker conveyed what would happen in more definite terms than suggested by the (present) statute, she provided only the most basic information and did not linger or prolong the exchange by explaining in detail the intricacies of obtaining the search warrant (*e.g.*, that the blood search warrant must be approved by a neutral and impartial magistrate and that the judge may sign the search warrant only if he believes that it is supported by probable cause). Furthermore, this language was not coercive when the surrounding circumstances are considered.

Appellant was informed that he could refuse the breathalyzer test, and in fact, he had done so at least two times before his ultimate consent. Upon Appellant's initial refusal, Barker simply continued following standard protocol by contacting dispatch and preparing to go to the hospital and obtain a search warrant. She did so despite continued interruptions by Appellant. Appellant heard Barker call in the request for the judge and the mention of a blood search warrant, so he was aware of the general process to occur. It was only when Appellant began questioning Barker that the trooper responded with the comments at issue. After Appellant's interruptions and expressed intent to avoid the blood draw (and take the breathalyzer), Barker repeated her question to clarify whether Appellant wanted to give a breath or blood specimen. Barker was not going out of her way to prolong the exchange or exert psychological pressure. Barker did not use threats, deception, or physical touching, or a demanding tone of voice or language. The video recording supports that Barker's demeanor was consistently professional and accommodating, and nothing about Barker's comments or demeanor put undue psychological pressure on Appellant. Further, Appellant's expressed fear of needles does not change the fact that Barker was entitled to seek a search warrant for his blood draw.

Therefore, under the totality of circumstances, there is clear and convincing evidence that Appellant made a conscious and voluntary decision to consent to the breathalyzer test. Barker's actions were not coercive, and if anything, Appellant had greater information on which to base his decision.

*Fiene v. State*, NO. PD-0119-12, Tex. Ct. Crim. App. Nov. 21, 2012.



# Warrants

## SIGNIFICANT DECISION – FOURTH AMENDMENT – SEARCH – PLACING A GPS TRACKING DEVICE ON A VEHICLE AND GATHERING DATA IS A SEARCH WHICH REQUIRES A WARRANT – U.S. SUPREME COURT

The Government obtained a search warrant permitting it to install a Global-Positioning-System (GPS) tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D. C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

*Held:* The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment.

*The court was unanimous in reaching this holding; however, it was split on the underlying reasoning. The Majority relied upon the physical intrusion as a primary basis for finding that the placement of the device required a warrant. Four justices concurred in the result; but would have found a Fourth Amendment violation based solely upon the "expectation of privacy" without regard to the physical intrusion. Justice Sotomayor, also concurring, appears to strike a middle ground which would still allow a physical trespass to trigger Fourth Amendment protections; but which would give greater deference to a person's expectation of confidential "information" in an increasingly technological world.*

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. *United States v. Chadwick*, 433 U. S. 1, 12 (1977). We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search."

The Court found that physically placing the GPS device on the vehicle constituted an intrusion on an "effect" for purposes of obtaining information and, therefore, was an invasion of privacy protected by the Fourth Amendment.

*The following excerpts from the opinion illustrate the basis of the Court's holding and, perhaps, provide a hint as to the direction of future Fourth Amendment search cases:*

The Court relied, in part, upon the following quote from a 1765 case from Old England:

"[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."

Our later cases, of course, have deviated from that exclusively property-based approach. In *Katz v. United States*, citation omitted, we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy,"

But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.

*United States v. Karo* does not suggest a different conclusion. There we addressed the question left open by *Knotts*, whether the installation of a beeper in a container amounted to a search or seizure. As in *Knotts*, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later. Thus, the specific question we considered was whether the installation “*with the consent of the original owner* constitute[d] a search or seizure . . . when the container is delivered to a buyer having no knowledge of the presence of the beeper.” We held not. The Government, we said, came into physical contact with the container only before it belonged to the defendant Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo’s privacy. That conclusion is perfectly consistent with the one we reach here. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper’s presence, even though it was used to monitor the container’s location. . . . Jones, who possessed the Jeep at the time the Government (in a trespassing manner) inserted the information-gathering device, is on much different footing. The Government also points to our exposition in *New York v. Class* that “[t]he exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a ‘search.’” That statement is of marginal relevance here since, as the Government acknowledges, “the officers in this case did *more* than conduct a visual inspection of respondent’s vehicle,” By attaching the device to the Jeep, officers encroached on a protected area.

The concurrence begins by accusing us of applying “18th-century tort law.” That is a distortion. What we apply is an 18th-century guarantee against un-reasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply *exclusively* *Katz*’s reasonable-expectation of-privacy test, even when that eliminates rights that previously existed. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

In fact, it is the concurrence’s insistence on the exclusivity of the *Katz* test that needlessly leads us into “particularly vexing problems” in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. We accordingly held in *Knotts* that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” Thus, even assuming that the concurrence is correct to say that “[t]raditional surveillance” of Jones for a 4-week period “would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,” our cases suggest that such visual observation is constitutionally permissible. *It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.* (emphasis by ed. Here the Court leaves open the possibility that a Fourth Amendment violation might occur without a physical intrusion).

What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these “vexing problems” in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

(ed. note: the above portions are from the majority opinion. Four justices joined in a concurring opinion which would have reached the same result, but with a different rationale as illustrated below.)

Concurrence:

The concurring opinion would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

[I]f long term monitoring can be accomplished without committing a technical trespass—suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car—the (majority opinion) would provide no protection.

If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.

In the present case, the Fourth Amendment applies, the Court (Majority opinion) concludes, because the officers installed the GPS device after respondent's wife, to whom the car was registered, turned it over to respondent for his exclusive use. But if the GPS had been attached prior to that time, the Court's theory would lead to a different result.

[S]uppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property.

The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties.

In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.

On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping.

Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements.

The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

*(Ed. note: This is a significant statement from four of the Supreme Court's nine justices indicating their view that "reasonable expectation of privacy" is in a state of flux and subject to change depending upon technological developments. The Court specifically mentions video cameras monitoring public areas, smart phone GPS locating functions and vehicle toll records.)*

Justice Sotomayor stated: The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection.

With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smart phones. In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance. But "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." (the reasonable expectation of privacy test, regardless of physical intrusion upon a person's property or "effects".)

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society."

Justice Sotomayor also stated: I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. (leaving open the possibility that duplicating traditional surveillance "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy"). I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent "a too permeating police surveillance,"

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice Alito notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

*(ed. note: Like many areas of Fourth Amendment law which continue to develop, the safest course, when in doubt, is to get a warrant.)*

*U.S. v. Jones*, No. 10–1259. (U.S. Supreme Court, January 23, 2012)

## **MEDICAL ANAL SEARCH PURSUANT TO WARRANT – SEARCH VIOLATED FOURTH AMENDMENT – EXCLUSIONARY RULE NOT APPLIED UNDER GOOD FAITH EXCEPTION.**

[I]n our view, this is a case where “resolution” of the substantive challenge “is necessary to guide future action by law enforcement officers and magistrates...” *citation omitted*.

Appellant Rondrick Gray was forced to undergo a proctoscopic examination under sedation pursuant to a warrant obtained on the police’s belief that he was concealing crack cocaine in his rectum. The District Court admitted the evidence in the underlying criminal trial. Weighing the competing interests, the Fifth Circuit held that the search was unreasonable but that the evidence should not be suppressed because the police acted in good-faith reliance on a valid search warrant.

Having information from an informant that Gray was possessing crack cocaine, officers stopped his vehicle and arrested him on outstanding warrants. A passenger told officers that Gray had a baggie of crack cocaine at the time of the stop which she refused to hide for him at his request. Although a K-9 hit on the interior of the vehicle, no drugs were found. Gray was uncooperative and evasive during multiple strip searches at the jail. Still no drugs were discovered.

Officers advised Gray that he could undergo a third strip search, he could be placed in a cell with a waterless toilet, or he could consent to a rectal x-ray examination. Gray did not consent to any of these options. Based on all of these events and his education, training, and experience, Officer Hethcock believed that the “only place” Gray could be concealing the crack cocaine that the police suspected him of possessing was in his rectum. Hethcock informed Gray that the police would seek a search warrant to try to uncover the drugs. By 10:15 p.m., Gray posted a bond on his traffic warrants and was released. SAPD, however, detained Gray for thirty minutes while waiting to secure the search warrant. At about 10:45 p.m., over seven hours after Gray’s initial arrest, a state judge signed the search warrant, and Gray was taken to the hospital for the search.

The state judge found probable cause for a search based on Hethcock’s affidavit. The judge ordered Gray to be presented to a “qualified medical technician to examine [Gray] for the concealment of controlled substances and to remove said controlled substances from his body in accordance with recognized accepted medical procedure as described in [Hethcock’s] affidavit.” Hethcock’s affidavit, while it did state that the police suspected Gray of concealing crack cocaine in his “anal cavity,” did not describe the medical procedure to be performed at all. The only limitation on the procedure was the same as in the warrant itself—“in accordance with recognized medical procedures.”

At the hospital, the first procedure performed was an x-ray using a portable x-ray machine. Gray was, according to Hethcock, uncooperative with the x-ray technician and as a result, the technician was unable to “get a good picture with the portable x-ray.” The next procedure attempted was another x-ray but this time using a stationary machine. At first, Gray was asked to do a standing x-ray, but Gray “refused to stay where he was told.” The medical staff then tried to x-ray Gray while he was lying down, but Gray would not lie still. Eventually, the x-ray technician obtained a useable picture. From his review, he noticed something that he thought could either be a gas pocket or a foreign object but could not decide which. Hethcock took the x-ray to Dr. Roland Heidenhofer, a staff physician at the hospital, who also could not discern whether the anomaly was a gas pocket or a foreign object. Heidenhofer then went to Gray’s room and informed Gray that he was going to perform a digital rectal examination on him. Though Hethcock described Gray as “evasive and uncooperative” during the digital exam, Heidenhofer was able to perform the digital exam to some extent. From that examination, however, he was unable to determine if there was an object in Gray’s rectum.

After failing to determine anything from either the x-rays or the digital exam, Heidenhofer consulted with Dr. Emmette Flynn, the hospital’s Trauma Medical Director. Flynn believed that the best next step was to

perform a proctoscopic examination of Gray’s rectum. In such an examination, the proctoscope, essentially an illuminated tube, is inserted across the anal canal and into the rectum. The rectum is then filled with air, or insufflated, so that the interior can be examined. When the rectum is insufflated, the walls are distended, which permits a more thorough evaluation of the wall of the rectum and objects within the rectal vault. Flynn stated that he did not ask for Gray’s consent for the proctoscopic exam and that at the time he made the decision, he had not reviewed the search warrant or Gray’s medical history. For Gray’s proctoscopic exam, two sedatives (Versed and Etomidate) were administered to Gray intravenously. Though the doctors later testified at the suppression hearing that the risks associated with the sedatives were low, Gray was placed on a number of monitors to measure Gray’s cardiovascular status during the examination. The sedatives carry with them a risk of respiratory depression or arrest. Proctoscopy also has associated risks, including pain and potential anal bleeding or perforation. Flynn admitted that proctoscopic exams are usually not conducted on uncooperative patients. At the time that the doctors decided to perform the proctoscopic exam, there were other less intrusive means available to try to recover the suspected drugs, including a cathartic or an enema—neither of which would have involved sedation.

During the proctoscopy, Flynn was unable to completely visualize the rectal vault due to a “substantial amount of fecal debris.” He did, however, intermittently see and feel something different from the other contents of the rectum. Flynn removed the scope and performed a second digital rectal examination, during which Flynn removed a plastic bag from Gray’s rectal cavity. Flynn placed the plastic bag into a biohazard bag provided by the emergency department, and handed the bag to an SAPD officer. Subsequent testing revealed the contents of the bag recovered from Gray’s rectum to be 9.62 grams of cocaine base.

The exclusionary rule prevents admission of illegally obtained evidence unless the officers seizing the evidence acted in good faith. “[T]he exclusionary rule is “a judicially created remedy,” *citation omitted*, designed to deter police misconduct, *citation omitted*. Therefore, where a police officer “acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope,” *citation omitted*, “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” *citation omitted*. We have held that “[t]he good faith exception applies unless one of the four exceptions to it is present.” *citation omitted*.

Those exceptions are: “(1) If the issuing magistrate/judge was misled by information in an affidavit that the affiant knew was false or would have known except for reckless disregard of the truth; (2) where the issuing magistrate/judge wholly abandoned his or her judicial role; (3) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid.” *citation omitted*.

In deciding on the applicability of the good faith exception, the “evidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’” *Citation omitted*.

Gray argues that the proctoscopy violated his right to “personal privacy and dignity,” as delineated in *Winston v. Lee*, *citation omitted*. There, the Supreme Court dealt with an appeal of a permanent injunction issued by the district court enjoining the enforcement of a state court search warrant that authorized surgery under general anesthesia to retrieve a bullet that lodged in a suspect’s chest during a robbery. *citation omitted*. The Court affirmed the injunction because it found the ordering of the surgery to be unreasonable under the Fourth Amendment. *citation omitted*. In so doing, it stated that “[t]he reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual’s interests in privacy and security are weighed

against society's interests in conducting the procedure.”

Applying the *Winston* factors to the present case, the magnitude/danger of the proctoscopy appears to be slight. Though the testimony reveals that there was some risk of respiratory depression or arrest associated with the sedatives administered and risk of anal bleeding or perforation associated with the use of the proctoscope, these risks were low in the hospital setting where the proctoscopy occurred. The risks here are obviously greater than the blood draw found permissible in *Schmerber*, *citation omitted*, but they do not seem to rise to the level of the risks associated with the surgery found unreasonable in *Winston*, *citation omitted*.

On the extent of the intrusion factor, Gray argues that “[s]hy of full-on exploratory surgery [like in *Winston*], it is hard to imagine a more demeaning and intrusive invasion of Gray’s interests” in personal privacy and bodily integrity. This is an understatement: the proctoscopy here was a greater affront to Gray’s dignitary interest than full-on exploratory surgery. Though sedated, Gray was conscious throughout the entire procedure. Moreover, the procedure targeted an area of the body that is highly personal and private. In our society, the thought of medical technicians, under the direction of police officers, involuntarily sedating and anally probing a conscious person is jarring. Such a procedure is degrading to the person being probed—both from his perspective and society’s. This type of search resembles the physical vaginal cavity search that the First Circuit encountered in *Rodrigues v. Furtado*, *citation omitted*. There, the First Circuit said,

[t]he invasion here was extreme, constituting a drastic and total intrusion of the personal privacy and security values shielded by the fourth amendment [sic] from unreasonable searches. Searches of this nature instinctively give us cause for concern as they implicate and threaten the highest degree of dignity that we are entrusted to protect.

In taking both of the individual interests into account, the magnitude of the intrusion from the proctoscopy was minimal, but the extent of intrusion from the proctoscopy was great.

Society’s interest here, like in *Winston*, is “of great importance.” The interest is even greater than in *Winston*, where there was other evidence of guilt, *id.*, because the crack cocaine that Hethcock believed Gray was concealing in his anal cavity was the only direct evidence of Gray’s possession. Unlike in *Schmerber* or *Winston*, however, there were other available avenues for obtaining this evidence, such as a cathartic or an enema. Such alternatives militate against society’s great interest “in conducting *the procedure*” used in this case—proctoscopy. *citation omitted*.

When balancing these interests and comparing them to our benchmarks of the permissible *Schmerber* blood draw and the impermissible *Winston* surgery, the medical danger here is slightly greater than in the former but nowhere near the danger of the latter. As to the dignitary interest, this is one of the greatest dignitary intrusions that could flow from a medical procedure—involuntary sedation for an anal probe where the person remains conscious. The last consideration is society’s interests, which are not as great as in *Schmerber* but greater than in *Winston*. *On balance, we find the proctoscopic search unreasonable due to the exceeding affront to Gray’s dignitary interest and society’s diminished interest in that specific procedure in light of other less invasive means.*

*(This case illustrates that a Fourth Amendment violation in conducting a search does not always result in exclusion of evidence in a criminal trial where the officers proceed in good faith. However, violation of Fourth Amendment restrictions may still expose officers to civil liability. In any case where invasive search procedures are contemplated, a warrant detailing the specific procedures should be secured and highly intrusive procedures must be thoroughly justified.)*

*U.S. v. Gray*, No. 10-11150 (5<sup>TH</sup> Cir. Feb. 01<sup>st</sup>, 2012).

## WARRANT APPLICATION BY REMOTE ELECTRONIC MEANS: AFFDAVIT MAY BE SWORN BY TELEPHONIC MEANS.

Defendant was stopped for speeding and arrested for DWI. The Defendant refused to take a breath test, so DPS Trooper Ortega filled out an affidavit for a search warrant to obtain a specimen of her blood. Ortega then called Hill County Court at Law Judge A. Lee Harris on the telephone. Ortega and Harris “each recognized the other’s voice[,]” and in the course of the telephone conversation, Ortega “swore to and signed” the search warrant affidavit. It is specifically stipulated that Ortega did not sign the warrant affidavit “in the physical presence of Judge Harris” and that “Judge Harris did not physically witness” Ortega sign the warrant affidavit. Ortega faxed the warrant affidavit to Judge Harris, who signed and dated the *jurat*. Judge Harris then signed a search warrant authorizing the blood draw and faxed it back to Ortega, who had the defendant’s blood drawn accordingly.

The appellant pled guilty. The trial court certified her right to appeal. On appeal, the appellant argued that the search warrant was invalid because the affidavit in support of the warrant was not sworn to in the physical presence of the magistrate, as she contends is required by Article 18.01 of the Code of Criminal Procedure. The Tenth Court of Appeals disagreed, holding that “a face-to-face meeting between the trooper and the judge was not required and the making of the oath over the telephone did not invalidate the search warrant.” At least one other court of appeals has reached the opposite result on comparable facts, albeit in an unpublished opinion.

By statute, an evidentiary search warrant may issue in Texas for the extraction of blood for forensic testing. The issuance of such a search warrant is governed by, *inter alia*, Article 18.01(b) of the Code of Criminal Procedure, which provides:

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. Except as provided by [another Article not pertinent here], the affidavit is public information if executed, and the magistrate’s clerk shall make a copy of the affidavit available for public inspection in the clerk’s office during normal business hours.

Whether an investigating officer may apply for a search warrant by swearing out a supporting affidavit over the telephone is not specifically addressed in Article 18.01(b), or in any other provision of the Code of Criminal Procedure.

In *Smith v. State*, the question before us was whether either the Fourth Amendment to the United States Constitution or Article 18.01(b) requires that an affidavit in support of a search warrant include the signature of the affiant. With respect to Article 18.01(b), we observed that the purpose of the signature on an affidavit is to memorialize the fact that the affiant took an oath. While an oath is both constitutionally and statutorily indispensable, we held, a signature memorializing that the affiant swore out the affidavit is not, and the affidavit may still suffice to support the issuance of a search warrant if the record indicates that “the affidavit was solemnized by other means.” We expressly held “that the failure to sign the warrant affidavit does not invalidate the warrant if other evidence proves that the affiant personally swore to the truth of the facts in the affidavit before the issuing magistrate.” We went on to observe, Although the affiant’s signature on an affidavit serves as an important memorialization of the officer’s act of swearing before the magistrate, it is that act of swearing, not the signature itself, that is essential. It is important, too, that the law retain some flexibility in the face of technological advances. For example, the federal courts and some state courts, now permit telephonic search warrants, and one can foresee the day in which search warrants might be obtained via e-mail or a recorded video conference with a magistrate located many miles away. In a state as large as Texas, such innovations should not be foreclosed by the requirement of a signed affidavit if the officer’s oath can be memorialized by other, equally



satisfactory, means. We leave those potential future changes to the Texas Legislature, but we should not stand in the way of the future by declaring that all affidavits, which are properly sworn to but unsigned, are necessarily invalid.

We agree with the appellant that whether telephonic search warrants are permissible in Texas depends upon the parameters of the statute as it currently reads. Our job is to faithfully construe statutory language, never to enlarge upon it. We cannot, simply for the sake of keeping pace with the technology, stretch the meaning of the statute beyond the bounds of what its language will tolerate. Article 18.01(b) requires a “sworn affidavit.” In *Smith*, we held that a “sworn affidavit” need not contain the affiant’s signature before it may support a search warrant, so long as there is other evidence to show “that the affiant *personally* swore to the truth of the facts in the affidavit *before* the issuing magistrate.”

And indeed, this Court has held for the better part of a hundred years that, before a written statement in support of a search warrant will constitute a “sworn affidavit,” the necessary oath must be administered “before” a magistrate or other qualified officer. In the name of flexibility, can it reasonably be said that an oath administered over the telephone satisfies the requirement that, to be a “sworn affidavit” for purposes of Article 18.01(b), a writing must be sworn to “personally . . . before the issuing magistrate” or other qualified oath-giver? As presently written, does Article 18.01(b) allow for the granting of a search warrant based upon an affidavit that is sworn to over the telephone, inasmuch as the one thing we held in *Smith* to be “essential,” namely, the oath, is not administered in the corporal presence of the magistrate or other official authorized to administer it?

The statutory requirement of a “sworn affidavit” serves two important functions: to solemnize and to memorialize. That the affidavit must be sworn to fulfills the constitutional requirement that it be executed under oath or affirmation so as “to impress upon the swearing individual an appropriate sense of obligation to tell the truth.”

Ortega drafted a written affidavit and faxed it to Judge Harris, so that the issuing magistrate had a document to be “filed” as required. On the particular facts of this case, then, the only remaining question is whether Ortega’s written affidavit was properly “sworn” to, in contemplation of Article 18.01(b), when Judge Harris administered the oath to Ortega over the telephone rather than face to face.

There is apparently no Fourth Amendment impediment to administering the oath or affirmation telephonically. The Federal Rules of Criminal Procedure have authorized telephonic applications for a search warrant since 1977, and the federal courts long ago rejected the specific argument “that for constitutional purposes an oath or affirmation is invalid merely because it is taken over the telephone[.]” elaborating that “[t]he moral, religious and legal significance of the undertaking remains the same whether the oath taker and the witness communicate face-to-face or over the telephone.” Following the federal lead, many states now provide for telephonic search warrant applications by statute or rule, and many of those provisions expressly permit the obligatory oath to be administered over the telephone.

Because Ortega and Judge Harris recognized one another’s voices on the telephone at the time Ortega swore out his warrant affidavit, it was properly solemnized. And because Ortega reduced the affidavit to writing and faxed it to Judge Harris for filing, the basis for probable cause was properly memorialized. Under these circumstances, we hold that Article 18.01(b)’s requirement of a “sworn affidavit” was satisfied. Accordingly, we affirm the judgment of the court of appeals.

*Clay v. State*, No. PD-0579-12, Tex. Court of Crim. Appeals, Jan. 9, 2013).

## SEARCH WARRANT – NO KNOCK ENTRY

Based upon information from an informant, an investigator secured a search warrant for a residence where it was suspected methamphetamine was being cooked and/or sold. Before executing the search warrant, the officer conducted an investigation of the residence. He determined that: women, not the person named by the informant, paid the taxes and utility bills for the house; the car parked in the driveway was registered to another person; and there was no history of criminal activity associated with the property or its known residents. The officer also surveilled the premises and observed that someone appeared to be at home, but he was not able to determine the identity of anyone inside.

Although the reasons are disputed, it was decided to execute the warrant without knocking and announcing. The no-knock decision was approved by the officer's supervising sergeant. Seven plain-clothes detectives and one uniformed officer forcibly entered the house using a battering ram to knock in the front door. The occupants were handcuffed and questioned. When the officers' initial search failed to uncover any evidence of drugs, a narcotic detection dog was brought in to search the home, but it too found no evidence of drugs. The occupants were cooperative throughout the search. The officers eventually un-cuffed the occupants and departed. The raid lasted a total of approximately an hour and 45 minutes. The occupants were not the subject of any further investigation.

Suit was filed by the occupants/Appellants in Federal court alleging that they were subjected to excessive force, false arrest, and an unreasonable search. The district court dismissed all of Appellants' claims against the individual defendants and all but the unreasonable search claim against the City. The district court concluded that the no-knock entry was reasonable under the Fourth Amendment and granted summary judgment in favor of defendants.

The Fifth Circuit stated, "The specific question before this court is whether exigent circumstances justified [the officer's] decision, which was approved by his immediate superior, to enter Appellants' home without knocking and announcing his team's identity and purpose. Because [the officer] has relied almost exclusively on generalizations that are legally inadequate to create exigent circumstances, we conclude that the no-knock entry was unreasonable under the Fourth Amendment." The Court found that the officer's justification for the no-knock entry was based upon general considerations of the dangers involved in dealing with meth suspects rather than upon a particularized concern regarding the occupants of the residence to be entered. "The Supreme Court has rejected the contention that the execution of all drug-related search warrants inherently pose a substantial risk of evidence destruction."

The Court did, however, re-affirm that establishing an exigent circumstance need only meet the reasonable suspicion standard rather than the higher probable cause standard necessary for issuance of the warrant itself.

"Reading *Washington* together with *Richards* and its progeny, the law in this circuit is that, as stated in *Linbrugger*, a police officer does not have to "demonstrate 'particularized knowledge' that a suspect is armed in order to justify a no-knock entry," 363 F.3d at 542, but that does not negate the requirement that "reasonable suspicion" must be derived from specific facts and circumstance surrounding a search. Because "reasonable suspicion of danger" is a lower threshold than "particularized knowledge" that a suspect possesses a weapon, an officer must be able to point to specific facts to explain his safety concerns but need not demonstrate that he specifically knew a certain suspect was armed. Thus, contrary to Arcuri's suggestion, *Washington* and *Linbrugger* are entirely consistent with the requirement that he point to something beyond the general dangers associated with drug crimes to justify his entry into Appellants' home. Obviously neither *Linbrugger* nor *Washington* could or did eliminate the requirement announced in *Richards* that, to justify a no-knock entry on grounds of officer safety, an officer must have "a reasonable suspicion" based on "the particular circumstances" that knocking-and-

announcing would be dangerous. 520 U.S. at 394. Because Arcuri admits that he had no such particularized suspicion of danger, he unwittingly concedes that his team’s no-knock entry was not justified by safety concerns.”

*Bishop v. Arcuri*, 5<sup>th</sup> Cir. No. 11-50010, March 9, 2012.

## SEARCH WARRANT, RELIANCE ON UNCORROBORATED INFORMANT.

The State of Texas appeals an order granting James Allen Huddleston’s motion to suppress. A “cooperating individual” provided Officer Greg Hill, a police officer with the Athens Police Department and assigned to the Henderson County Sheriff’s Office, with a tip that Huddleston possessed anhydrous ammonia in an unapproved container in violation of Section 481.124 of the Texas Health and Safety Code. Officer Hill obtained a search warrant for Huddleston’s residence and discovered a propane tank with bluing on the valve and a small bag containing a trace of methamphetamine. Huddleston filed a motion to suppress alleging the probable cause affidavit failed to provide a substantial basis to determine probable cause existed. After a hearing, the trial court granted Huddleston’s motion to suppress. The State appealed.

An application for a search warrant must be supported by an affidavit setting forth facts establishing probable cause. TEX. CODE CRIM. PROC. ANN. art. 1.06 (West 2005), art. 18.01(b) (West Supp. 2012). To justify the issuance of a search warrant, the supporting affidavit must set forth facts sufficient to 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. TEX. CODE CRIM. PROC. ANN. art. 18.01(c) (West Supp. 2012).

The facts contained in the probable cause affidavit must be sufficient to justify a conclusion that the object of the search is probably on the premises at the time the warrant is issued. The determination of the sufficiency of an arrest or search warrant is limited to the four corners of the affidavit. The warrant must contain “sufficient information” to allow the issuing magistrate to determine probable cause because the magistrate’s action “cannot be a mere ratification of the bare conclusions of others.”

Because of the potential unreliability of statements given by anonymous informants, the United States Supreme Court developed the *Aguilar-Spinelli* analysis, which required a two-pronged test: (1) the informant obtained the relevant information in a reliable manner; and (2) the informant was reliable.

In response to “hypertechnical” interpretations of the *Aguilar-Spinelli* analysis, the United States Supreme Court subsequently relaxed the rigid standards of the *Aguilar-Spinelli* analysis to allow consideration of the totality of the circumstances. Because the focus of inquiry is whether the statements are sufficiently reliable for a finding of probable cause, a deficiency in one of the two factors of reliability of the informant may not be fatal if the totality of the circumstances indicate reliability. However, “an informant’s ‘veracity,’ ‘reliability’ and ‘basis of knowledge’ are all highly relevant in determining the value of his report.” *Gates* merely held that a deficiency could be “compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. . . .”

The affidavit in this case fails to provide any facts upon which the magistrate could conclude that the anonymous caller was reliable. The probable cause affidavit provides as follows, in pertinent part:

Affiant Greg Hill is employed with the Athens Police Department and assigned to the Henderson County Sheriff's Office as a Narcotics Investigator. Affiant has conducted numerous narcotics investigations. On 07/21/2011 a cooperating individual advised Affiant that James Huddleston lives at the said suspected place. The cooperating individual advised Affiant that the cooperating individual did personally observe James Huddleston, W/M, in possession of Anhydrous Ammonia in an unapproved container inside the said suspected place within the last forty-eight (48) hours. The cooperating individual is familiar with Anhydrous Ammonia. The cooperating individual advised affiant that the Anhydrous Ammonia is being stored in a 25 gallon propane tank. Based on Affiant's training and experience, affiant knows that a propane tank is rated at 240 psi and Anhydrous Ammonia requires a 480 psi rating. The cooperating individual has provided Affiant with an audio taped statement in regards to this information and is willing to testify. Affiant has records which show that James Huddleston has been arrested for Possession of Controlled Substance charges in Henderson County in the past.

The affidavit does not mention any independent corroboration or other indicia of reliability. Although, as argued by the State, the issuing magistrate could have reasonably inferred that the informant's name was known to the police, that fact is insufficient, by itself, to establish reliability.

A named informant, whose only contact with the police is a result of having witnessed a criminal act committed by another, is considered inherently reliable. The Texas Court of Criminal Appeals has recently confirmed that confidential informants are not considered citizen informants. 2012 Tex. Crim. App. LEXIS 1180, \*16. The court observed:

The citizen-informer is presumed to speak with the voice of honesty and accuracy. The criminal snitch who is making a *quid pro quo* trade does not enjoy any such presumption; his motive is entirely self-serving.

Citizen informants are considered inherently reliable; confidential informants are not.

The State argues we should presume an unnamed individual qualifies as a citizen informant unless the probable cause affidavit provides otherwise. The law does not authorize such a presumption. Other than use of the term "cooperating individual," the warrant does not contain any facts that support such a conclusion. The term itself does not establish that the informant is a private citizen without prior contact with the police. In fact, the term "cooperating" could reasonably refer to a criminal making a *quid pro quo* trade.

*(Ed. note: here the Court provides a good practice tip for narcotics officers preparing warrants based upon citizen information.)* Whether an informant is a citizen informant must be established by the facts contained in the four corners of the affidavit—including whether the source had prior contact with the police. Because the affidavit fails to specify that the informant has not had prior contact with the police, it fails to support a conclusion that the informant was a citizen informant.

The affidavit does not contain any corroboration<sup>6</sup> of the informant's information or other indicia of reliability. As noted by Huddleston, the declarations were not against the informant's own penal interest. It also does not specify that the informant has given reliable credible information in the past. *Gates* suggests that a deficiency in one of the factors may not be fatal if the totality of the circumstances indicate reliability. *Gates*, though, does not remove the requirement of reliability.

We further note that the veracity and basis of knowledge of the informant's tip is deficient. As argued by Huddleston, the affidavit does not specify how the informant knew the propane tank contained anhydrous ammonia. Was the container leaking and the informant recognized the odor of ammonia? Even so, how did the informant know it was anhydrous ammonia rather than just ammonia? Did the informant take a sample back to his private chemistry laboratory to conduct a chemical analysis? Or did Huddleston admit that the tank contained anhydrous ammonia? Although the informant claimed personal knowledge, the informant fails to explain how he learned what was contained in the propane container. The probable cause affidavit fails to establish the veracity

or basis of knowledge of the informant's conclusion that the tank contained anhydrous ammonia.

The affidavit contained insufficient particularized facts to allow the magistrate to determine that probable cause existed. The four corners of the affidavit fail to contain sufficient facts for the magistrate to conclude that the "cooperating individual" was a citizen informer without prior police contact. Similar to *Duarte*, the probable cause affidavit in this case fails to establish either the reliability or the veracity of the unnamed "cooperating individual."

No effort was made to compensate for these deficiencies, i.e., the affidavit does not contain any other indicia of reliability, such as corroboration or prior reliable information. Although *Gates* permits consideration of other indicia of reliability, *Gates* still requires a substantial basis to conclude probable cause exists. *Gates* merely held that a deficiency could be "compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. . . ."

The trial court correctly granted Huddleston's motion to suppress.

*State v. Huddleston*, No. 06-12-00116-CR, Tex. Ct. App. – Texarkana, Nov. 21, 2012.

## **SEARCH – CURTILAGE, CONSENT**

*(ed. note: this is a good discussion of the curtilage principle for reference in future cases.)*

Cooke pleaded guilty of being a felon in possession of stolen firearms and body armor in violation of 18 U.S.C. §§ 922(g) and 931(a)(2), respectively. His plea was subject to an appeal of the denial of his motion to suppress evidence, namely, the guns and armor discovered during a search of his house. Cooke alleges that the police unlawfully entered the curtilage while attempting to conduct a "knock and talk" in violation of the Fourth Amendment and that his mother's consent to enter the premises was vitiated by his prior express refusal under *Georgia v. Randolph*, 547 U.S. 103 (2006), even though his mother, but not Cooke, was at the house. The 5<sup>th</sup> Circuit affirmed the conviction and rejected Cooke's claims that the evidence should be suppressed.

Cooke was arrested in Polk County after suspicious activity was reported at a motel. While searching his truck and motel room, officers found two weapons, a digital camera with memory cards, ammunition, and a trace of methamphetamine. The camera had pictures showing Cooke holding firearms other than those found. Two Secret Service agents, suspecting Cooke was counterfeiting money, asked to search his residence in Tomball, Texas (Harris County). He refused.

A week after Cooke's arrest and while he was still in jail, Secret Service, ATF, and local law enforcement agents visited the residence to conduct a "knock and talk." The residence is unique, located at the corner of two residential streets, with a fence separating the property from neighbors, but no fence along the two street-sides. Aside from the residence, the property has several trees and a large driveway separating the residence from the street by about fifty feet. The exterior is windowless and resembles a barn or warehouse. The front and back each have two, large sliding exterior barn doors, with a security camera above the front doors. Inside the structure is a large area with a dirt floor, save for a paved sidewalk path that leads to a stoop and another set of doors. Inside the second set of interior doors are living quarters where Cooke, his wife, and his mother resided.

When agents approached, they noticed that one of the exterior barn doors had been damaged by a hurricane, leaving an opening through which one could walk directly into the residence. The agents also claim that the second barn door was "wide open" such that they could see through the entire residence, similar to a "carport," because the rear barn doors were also open. Cooke claims that the intact front barn door was closed. Believing that knocking on the exterior barn doors would be futile, the agents walked through the open barn door and knocked on the interior set of doors. After about a minute of knocking and announcing, Ima Cooke ("Ima"),

Cooke's 78-year old mother, came to the door, asked the officers what they wanted, and after a brief conversation explaining that they wanted to enter the residence and ask questions, allowed them into the living quarters.

While speaking with Ima, one agent saw a shotgun shell and gun safe lying in plain view and, based on that information, the officers eventually secured a search warrant. In the safe they found numerous firearms, ammunition, and a bulletproof vest which resulted in Cooke's prosecution and eventual conviction.

Cooke appealed contending that agents unlawfully entered the curtilage and that his refusal to consent to a search a week previously trumps his mother's consent to enter the premises.

The curtilage issue: The parties agreed that the touchstone case for determining what part of a residence is "curtilage" is *United States v. Dunn*, 480 U.S. 294 (1987), which laid out a four-factor test: (1) the proximity of the area claimed to be curtilage to the house, (2) whether the area is included within an enclosure surrounding the house, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by.

The first *Dunn* factor weighs in favor of Cooke, as the government concedes, because the area in question was physically attached to, and shared the same roof as, the residence. The second factor also supports Cooke: The area that he claims to be curtilage was surrounded by the walls of the structure, which completely surround the residence. Although no fence completely surrounds the structure (the only fence on the property was on two sides), the walls and barn doors around the area in question practically functioned as a fence: One is required to pass through the barn doors and into the area in question to reach the front door of the living quarters.

The third factor supports the government's position: The area had a dirt floor, had a paved pathway leading to the interior doors, and seems to have been used as storage. Finally, the fourth factor also tends to support the government: Although the barn doors could be closed, completely obstructing the public's view, at least one barn door was broken, and government agents testified that both the front and rear doors were "wide open." The district court seemed to credit the government's account, describing the area as "akin to a covered porch" into which "any member of the public would have gone to knock at the defendant's front door."

Given the peculiarities of the residence, it is not surprising that the four *Dunn* factors do not provide dispositive guidance as to whether the area immediately inside the barn doors is curtilage. But the central aim of *Dunn* is determining whether the area in question "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life" such that the area is "so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection."

Because Cooke's residence is so idiosyncratic and this court's caselaw on curtilage so sparse, no case from this circuit is on point or closely analogous. But *Thomas (United States v. Thomas*, 120 F.3d 564 (5th Cir. 1997)) provides guidance. There, the police, who suspected marijuana in an apartment, walked past an open gate of a privacy fence that surrounded the apartment to knock on the door and obtain consent to search. *Id.* at 586. The defendants argued that the area enclosed by the fence was part of the curtilage, so their Fourth Amendment rights were violated when the police entered it without a warrant. *Id.* at 571. As here, the court in *Thomas* determined that the first two *Dunn* factors weighed in favor of the defendants, the latter two in favor of the government. *Id.* the Fifth Circuit ruled in favor of the government based on the district court's finding that, because the gate had no bell or knocker, "it was certainly reasonable for the officers to believe the front door was readily accessible to the general public; and it was the principal means of access to the dwelling." *Id.* at 571-72 (internal quotation marks omitted).

Similarly, the outside barn doors of Cooke's residence had no bell or knocker. Although a security camera monitored the outside of the building, the officers, even if they had seen the camera, had no reason to believe that

someone inside the residence was constantly watching the video feed such that they would be aware of the officers' desire to speak and enter. In congruence with these facts, the district court described the area as a "covered porch," a finding that, based on the evidence, is not clearly erroneous.

Accordingly, as in *Thomas*, members of the public would reasonably believe they had to enter the first threshold of the building to knock on the interior set of doors to obtain the attention of the residents and access the dwelling. The space entered by the police without consent or a warrant was thus not one that "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life."

The Fifth Circuit concluded that the area inside the first set of barn doors but outside the interior doors was not part of the curtilage, so the police did not violate Cooke's Fourth Amendment rights by entering the area without consent or a warrant.

The consent issue: In *Georgia v. Randolph*, the Supreme Court held that, although co-tenants generally have the ability to consent to search, "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Id.* at 122-23. Cooke sought to have the Fifth Circuit extend *Randolph* to his situation, where a physically *absent* tenant refuses to give consent while a physically *present* cotenant grants consent.

In contrast to the defendant in *Randolph*, Cooke was not a "present and objecting" cotenant but rather was many miles away from his home in jail when he objected to the search. Neither the Supreme Court nor this court has directly addressed the situation of whether an absent defendant's objection vitiates the consent of a physically present cotenant. Several sister circuits, however, have spoken: The Seventh and Eighth Circuits have permitted searches under similar circumstances; the Ninth Circuit has invalidated such searches.

The Fifth Circuit agreed with the Seventh and Eighth Circuits that the objection of an absent cotenant does not vitiate the consent of a physically present cotenant under *Randolph*. In sum, *Randolph* applies only to searches conducted in the face of a present and objecting cotenant.

*U.S. v. Cooke*, No. 10-20422, 5<sup>th</sup> Cir., March 13, 2012.

## **SEARCH AND SEIZURE. WARRANTS. COMPUTER SEARCHES.**

Triplett pled guilty under a plea agreement to possession of child pornography. His plea was conditioned on retaining the right to challenge the denial of his motion to suppress on appeal. Triplett claims the search warrant that led officers to the pornography violated the Fourth Amendment's particularity and probable cause requirements. His conviction is affirmed.

The evidence supporting Triplett's conviction resulted from what began as a state missing-person's investigation. Triplett reported to the Lowndes County Sheriff's Department that his stepdaughter Kaila Morris was missing. The report was made on September 18, 2009, after his wife Bonnie (who is Kaila Morris's mother) asked him to call. Morris was a student at Mississippi State University. The night before the sheriff was contacted, she had been visiting her parents' home in Columbus, Mississippi. At 3:44 p.m., Morris last used her cellular phone and Triplett reports that she left home at 8 p.m. in a dark colored vehicle he did not recognize. Supposedly she left to visit a friend in Alabama. Morris has not been heard from since.

Authorities obtained a search warrant from a Lowndes County Justice Court judge on September 23, 2009. It authorized the seizure at Triplett's house of "[a]ny and all articles of clothing of Kaila Morris, bed sheets, electronic devices, electronic memory devices, cell phones, DNA, hand digging and cutting tools, vehicles, and

utility vehicles.” The warrant declared the “public interest to locate Kaila Morris” as its purpose, and incorporated an affidavit setting forth a factual basis titled “Underlying Facts and Circumstances.”

In addition to the information already discussed, this factual basis included other important information. Triplett was thought to have been convicted of rape in Louisiana and to be serving non-adjudicated probation in Mississippi for attempted sexual battery. He reported inappropriately touching Morris. Recently he had washed her bed sheets. Also included were details of a trip by Triplett to property in Pickens County, Alabama. He told the FBI that the day before her disappearance, Morris had asked him “to check some of her property” in Pickens County. Triplett said he traveled there with an ax and shovel, and that for two hours his four-wheel vehicle had been stuck. Because the property in Pickens County was on the route to Morris’s friend’s home, Triplett suggested that authorities might check there for her.

An additional fact was a statement from Triplett’s wife that her husband “had recently changed the hard drive in his computer.” The affiant, Lowndes County Sheriff Investigator Ryan Rickert, also orally swore to the Justice Court judge that during the earlier investigation of the attempted sexual battery, a search of Triplett’s computer had uncovered pornography that, while lawful to possess, depicted scenes of bondage. Among the items seized from the home were pill bottles, external computer storage drives, three laptops, a desktop computer, a Magellan GPS device, a Sony camcorder, a digital camera, three hard drives, a cellular phone, pieces of mattress, blankets and pillows, two shoes retrieved from vehicles, and axes. A forensic investigator at Triplett’s residence copied the hard drive of one of the laptops, a Hewlett-Packard Pavilion DV 9000. During a preliminary examination on scene, several images thought to be child pornography were discovered. The computer search was discontinued at that point.

The good-faith exception requires answering the question of “whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate’s authorization.” *United States v. Leon*, 468 U.S. 897, at 922 n.23. (1984). We have held there is no good faith if one of four circumstances exists:

- (1) If the issuing magistrate/judge was misled by information in an affidavit that the affiant knew was false or would have known except for reckless disregard of the truth;
- (2) where the issuing magistrate/judge wholly abandoned his or her judicial role;
- (3) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and
- (4) where the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid.

*United States v. Payne*, 341 F.3d 393, 399-400 (5th Cir. 2003).

Triplett initially challenged the search warrant on the basis that Investigator Rickert had made false statements in his sworn affidavit. The district court agreed there were inaccuracies but found none of those statements were made “with reckless disregard or intentional falsity.” Such a finding will not be set aside unless clearly erroneous. Because there were no intentionally or recklessly false statements by law enforcement, we “consider the entire affidavit – without any excision – under the good-faith exception to the exclusionary rule.”

The Fourth Amendment requires that warrants “particularly describ[e] the place to be searched, and the persons or things to be seized.” Some interpretation is unavoidable. Officers are “not obliged to interpret [the warrant] narrowly.” Reasonable specificity is required, not “elaborate detail.”

Triplett’s challenge is that the terms “electronic devices,” and “electronic memory devices” in the warrant were too open-ended to limit officers’ discretion to only those objects lawfully seized. Triplett lists some of the wide variety of devices with electronic memories. He argues that the warrant description was overbroad. We



find limiting guidance for the officers in the warrant. It stated that the objects were relevant “to locate Kaila Morris,” informing the officers that the proper electronic memory devices were those on which information on her location could be preserved. The list was of evidence likely in Triplett’s possession and relevant to his interactions with Kaila Morris, who had just been reported missing. The law permits an affidavit incorporated by reference to amplify particularity, notwithstanding that, by its terms, the Fourth Amendment “requires particularity in the warrant, not in the supporting documents.” When viewed alongside the affidavit, the warrant’s list of items to be seized is reasonably focused. Based on this nexus between the facts and circumstances and the items to be seized, we conclude that a reasonably well-trained officer could have concluded that the warrant satisfied Fourth Amendment particularity.

“[A] computer search may be as extensive as reasonably required to locate the items described in the warrant based on probable cause.” Here, the object of the first warrant was to locate evidence concerning Morris’s disappearance. The forensic investigator followed a reasonable protocol toward that end; first a mirror image of the hard drive was made so original files would not be disturbed. He then testified to starting with documents and other text files, before proceeding on to images.

During a systematic review of the images, he discovered suspected child pornography. The investigation changed. As the investigator explained at the suppression hearing:

I immediately shut the case down. I flagged the images that I’d already seen to show to investigators. I shut the case down; I picked up the phone; and I called the sheriff’s department and advised them per our policies and procedures, they are to get another search warrant before I continued.

Although officers should limit exposure to innocent files, for a computer search, “in the end, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders.” Without expressing a view on the need for the second warrant, that protocol illustrates a desirable form of minimization.

Courts will not suppress evidence even when the affidavit fails to establish probable cause, unless “it is obvious that no reasonably competent officer would have concluded that the warrant should issue.” Probable cause is a practical assessment that all the circumstances generate a “fair probability that contraband or evidence of a crime will be found in a particular place.” Triplett was the last person to see Morris. His alleged trip to inspect property in Alabama with an ax and shovel raised suspicion as to his guilt. An officer might have also assigned weight to Triplett’s past possession of bondage pornography. The wife’s statement that he had recently changed a computer hard drive raised other bases justifying a search. Viewed from the perspective of law enforcement, we hold that these and other stated facts could have reasonably been seen as sufficient.

(However,) in its order denying suppression, the district court concluded that Investigator Rickert’s suppression testimony that “Morris had used at least one computer in the Morris-Triplett home on the night before her disappearance” created the nexus for probable cause between the Pavilion computer that was searched and the case being investigated. Though proffered at the suppression hearing on the child pornography charge, this information was not included in Rickert’s affidavit, nor was the state magistrate orally advised of it. Therefore, Triplett is correct that this particular piece of evidence is irrelevant to probable cause. (*Ed. note: This confirms the notion that if information is not in the affidavit or material submitted to the magistrate, it will not be considered in determining whether probable cause existed.*)

*U.S. V. Triplett*, No. 11-60277 (5<sup>th</sup> Cir. June 12, 2012 ).

## SEARCH AND SEIZURE – TECHNICAL DEFECTS IN WARRANTS – GOOD FAITH EXCEPTION.

A jury found Cecil Walter Max-George guilty of possession of marijuana in an amount of more than four ounces and less than five pounds. The conviction was affirmed by the Court of Appeals. The Defendant contended that the entry into the premises by the officers was unlawful and that the evidence discovered should be suppressed.

On December 26, 2009, at around 2:30 a.m., Deputy S. Brown, of the Harris County Sheriff's Office, was sitting in a parking lot in his patrol car writing reports when he observed a man looking into a vehicle with a flashlight. The vehicle was parked in front of a closed business that was part of a strip mall. As Deputy Brown approached to investigate, he was met by appellant, who had come from inside the building. Deputy Brown identified himself and asked appellant what he was doing, and appellant told Deputy Brown that he was looking inside his friend's car. Deputy Brown also smelled burnt marijuana coming from appellant's person. Deputy Brown asked appellant for his identification, but appellant told him that it was inside the business and that he would go get it. Appellant entered the building and Deputy Brown followed. Appellant gave Deputy Brown his identification, and Brown noticed a "very strong odor of unburnt marijuana" inside the building. Deputy Brown also observed a small amount of marijuana in plain view on a bookshelf to the left of the door.

At that time, Deputy Brown asked appellant and another man who was present in the front room of the building to step outside while he checked for outstanding warrants. As the men complied, other officers began to arrive. The officers asked appellant if any other people remained inside the building. Appellant told them that there were others inside the building, so Deputy Brown and Deputy B. Frazur once again entered the building to find its other occupants. Deputy Brown testified that they did so because "if there is anything illegal in there or we also need to check to make sure, I mean, there's nobody else in there. It's an officer safety issue to see what's inside." He testified that they did not search for any illegal items or materials at that time—they performed a "protective sweep" in which they looked only for people. Deputies Brown and Frazur found two other people hiding in a restroom, checked them for concealed weapons, and escorted them outside the business. In the course of checking the premises for other people, Deputy Brown notice several potted marijuana plants, but he testified that he did not count them at that time because he was focused on looking for people.

The officers exited the premises and summoned narcotics officers who sought a search warrant based on Deputy Brown's observation in the course of his encounter with appellant and the three other men. Once they had the search warrant, the officers returned to the building and searched the premises for illegal narcotics and weapons. The officers discovered fifty-nine marijuana plants, heat lamps and other marijuana growing paraphernalia, two semiautomatic handguns, and a shotgun.

The Fourth Amendment will tolerate a warrantless search if the police (1) have probable cause coupled with exigent circumstances; (2) have obtained voluntary consent; or (3) conduct a search incident to a lawful arrest. Here, it is undisputed that Deputy Brown did not make his initial entry into the building incident to an arrest, but appellant's consent would be immaterial if Brown had probable cause coupled with exigent circumstances.

Deputy Brown testified that he observed a man using a flashlight to look into a car parked in front of a closed business at 2:30 in the morning the day after Christmas, and that this was suspicious behavior. He also testified that, as appellant approached him, he noticed that appellant smelled strongly of burnt marijuana. This testimony was sufficient to establish probable cause.

At the suppression hearing, Deputy Brown also testified that he followed appellant into the building's office because he had a suspicion that the business might not actually belong to appellant or that appellant could have been breaking into the vehicle or the business, and because it was the middle of the night and appellant was

using a flashlight to look around, which was also suspicious. When appellant asked him, “What gave you the right to go into the office?”, Deputy Brown testified, “It’s an officer safety issue. I don’t know what’s inside.” At trial, Deputy Brown testified that when he saw someone outside the closed business, he was not sure what to think because “there’s graffiti in the area. Possibly could be breaking into a building, could be breaking into the vehicle.” Deputy Frazur, who arrived while Deputy Brown was inside the office with appellant, testified that for reasons of officer safety, he wanted to be able to clearly see appellant and the other officers at all times. Based on this testimony, the trial court reasonably could have found that Deputy Brown’s warrantless entry was justified by the need to protect himself from a suspicious person who might have been going inside the building to retrieve a weapon, to prevent appellant from escaping following a theft of a vehicle or business, or to prevent appellant from destroying evidence of a potential theft or drug related crime.

We hold that, based on Deputy Brown’s uncontroverted testimony on these issues, the trial court could have properly concluded that the initial entry into the building was permissible because the State established both probable cause and exigent circumstances. Therefore, the trial court did not err in concluding that the question of appellant’s consent was immaterial in determining whether the initial entry was lawful.

*Max-George v. State*, No. 01-10-00497-CR (Ct. App – Hou. [1<sup>st</sup>. Dist] July 28<sup>th</sup>, 2011).

## **SEARCH WARRANTS – INFORMANTS**

Defendant who was charged with possession of cocaine filed motion to dismiss evidence seized from his residence during execution of search warrant, alleging the warrant affidavit did not establish probable cause. The District Court granted the motion and dismissed the charge. The Court of Appeals reversed. The Court of Criminal Appeals again reversed holding that warrant affidavit did not establish probable cause necessary for issuance of warrant to search defendant’s residence.

The search warrant affidavit was based almost entirely on hearsay information supplied by a first-time confidential informant who was not identified. “Standard” language regarding the informant’s reliability was in the affidavit and included: he has pending charges; he is hoping for a dismissal or favorable plea bargain; he knows he will not benefit unless the information provided is valid; and he knows the criminal consequences for giving false information. . . the informant demonstrated a knowledge about drugs that was consistent with affiant’s knowledge about drugs. That is, the informant knows cocaine when he sees it.

However, the Court of Criminal Appeals recognized that information about the credibility of the informant was lacking with the following comments: But tips from anonymous or first-time confidential informants of unknown reliability must be coupled with facts from which an inference may be drawn that the informant is credible or that his information is reliable.

We agree with appellee that there was no substantial basis for crediting the first-time informant’s hearsay statement. Officers failed to corroborate the informant’s tip except to confirm appellee’s address. The tip was not a statement against interest, nor repeated by other informants. There was no accurate prediction of future behavior. This tip was a first-hand observation, but it contained no particular level of detail regarding appellee’s premises or his criminal activity. Police failed to corroborate the tip except to confirm Mr. Duarte’s address.

The Court of Criminal Appeals concluded its ruling in favor of the defendant with the comments: We agree with the State that “an affiant’s basis for finding the informant reliable need not be of any certain nature.” But, whatever its nature, it must be demonstrated within the four corners of the affidavit. Here, the affiant-officer believed that the confidential informant was credible largely because he was a “confidential informant”—a “snitch” with pending criminal charges who wanted to trade a tip for leniency. We decline to equate the reliability

of a first-time, unnamed informant with that of a named citizen-informant.

The trial judge correctly identified the problem with this boilerplate affidavit: it contained insufficient particularized facts about appellee's alleged possession to allow the magistrate to determine probable cause to issue a search warrant. The trial judge did not err in granting Mr. Duarte's motion to suppress.

*State v. Duarte*, 2012 WL 3965824, Court of Criminal Appeals.

## **SEARCH – WARRANT FOR CODE VIOLATIONS; INDUCED CONSENT; KNOCK-AND-TALK.**

The suspect Orosco pleaded guilty to possession of drugs after his motion to suppress was denied. He appeals the denial of the motion to suppress. In Houston, a narcotics officer informed a city code enforcement officer of code violations at a residence. After observing the code violations (tall grass, etc.), the code officer secured a search warrant to investigate the code violations. The code officer testified that he felt the warrant permitted entry into the cartilage, but not into the interior of the house. The code officer and at least five other officers arrived at the residence about 7am with the warrant.

The officers approached the front door to knock and announce their presence, while the other officers formed a perimeter around the house to prevent anyone inside from "jumping out the back window" and running off and to make sure "that no one walks up on us while we're conducting an investigation."

The officers "knocked and knocked and knocked and knocked," but no one came to the door. The officers around the perimeter of the house looked in the windows and saw a bong on a coffee table and also noted that there were keys inside the front lock indicating that someone was home. While surrounding the house, the police saw additional municipal violations including stacked tires on the side of the house and exposed electrical wiring. The police also noticed that the house had "the kind of low quality security cameras that [are usually found] at drug dealers' houses." From one partially opened window, the officers detected the odor of marijuana.

The officers continued knocking on the door and windows intermittently for 20 to 30 minutes with no response from anyone inside. Watson testified that everyone within the house was being detained from the moment he and the other officers approached the house, and that no one was free to leave the residence until he had talked with them about the municipal code violations. After about 30 minutes of knocking, one of the officers discharged a shotgun at a threatening dog in the area. Immediately thereafter, appellant came out of the front door. He told one of the officers, "You know, y'all were laughing about [shooting at] the dog. I was afraid of what you'd do to me if I didn't come out." The officers heard the deadbolt lock on the door after appellant stepped outside. Watson, while surrounded by three or four other officers, placed appellant in handcuffs and then asked him whether anyone else was inside the house. Appellant initially denied that there was anyone in the house, but when questioned further by Watson, appellant replied, "Yeah, yeah, you're right. My girlfriend's in the house." Watson then told appellant, "Well, you need to have her come out because I don't know how many people are in there. You've already lied to me once about there being someone else in the house. You need to have her come outside right now." Appellant talked to his girlfriend through the door and she then came out on the porch. The officers had her sit in a chair on the porch because she was several months pregnant.

When appellant's girlfriend came out of the house, the officers noticed the smell of fresh marijuana and that appellant had several gang tattoos. Appellant told Watson that "he didn't want people knowing his business and he didn't want to talk around his girlfriend . . . [s]o [they] went inside to his kitchen right immediately inside the front door."

Before going inside with appellant, several of the officers did a "protective sweep" of the house. Watson did not ask permission to do the sweep, and he testified that he felt it was necessary because the officers smelled

marihuana, “believed there’s a high probability that someone else could be in there,” saw appellant’s gang tattoos, and appellant had lied once about there being no one in the house. During the protective sweep, the officers found two loaded firearms, smelled fresh marihuana, saw drug paraphernalia, and discovered a “hydroponic” marihuana growth set-up in one of the rooms.

Officer Schuster testified that appellant was told that if he signed the consent, his girlfriend would not be prosecuted or arrested. However, on cross-examination Schuster clarified that appellant first brought up the issue of letting his girlfriend go, and that there was no promise of anything in exchange for signing the consent. Watson also testified that he told appellant that in return for signing the consent, he would not charge appellant’s girlfriend. Watson then read appellant the consent form, explained it to him, and informed appellant that he had the right to refuse to consent. Appellant signed the form.

The police discovered a large quantity of marihuana during their subsequent search of the house.

### Analysis

The validity of a consensual search is a question of fact, and the State bears the burden to prove by clear and convincing evidence that consent was obtained voluntarily. This burden includes proving that consent was not the result of duress or coercion. Consent is not established by showing no more than acquiescence to a lawful authority. To determine whether the State met its burden, we look at the totality of the circumstances. Whether it is reasonable under the Fourth Amendment for an officer to rely on consent is a question which we determine by examining the totality of the circumstances. If police obtain evidence as the result of a consensual search during an illegal seizure, a defendant may have the evidence suppressed unless the State proves that the causal relationship between the police misconduct and the defendant’s consent is attenuated—that is, the illegal seizure did not taint the otherwise voluntary consent.

Thus, before we determine whether appellant’s consent was voluntary, we must first address his allegations of police misconduct. The Defendant contends that (1) the warrant was invalid, thus the officers had no right to encroach on his property any further than the front door, and (2) even if the warrant was valid and the officers had the right to detain him, they could not enter his home to do so without a warrant, nor could they coercively induce him to exit the property so as to effectuate a warrantless arrest outside the home.

Appellant ( the defendant) contends that he was illegally seized within his home when six to seven armed police officers surrounded his house before daylight, knocked repeatedly on doors and windows for 20 to 30 minutes, and then discharged a shotgun nearby. Appellant argues that his decision to exit the house was not voluntary, thus his seizure was a warrantless arrest inside a home absent exigent circumstances even if probable cause for such an arrest exists. Appellant further contends that the “protective sweep” and his consent to search were tainted by this initial illegal seizure.

Essentially, the State argues that because the officers had reasonable suspicion to detain appellant for the municipal code violations, he was required to open the door to them. This is clearly not the law. A defendant is entitled to remain in his home, and police officers cannot enter to effectuate an arrest without exigent circumstances, even if they have probable cause to do so.

The more difficult question we address for the first time today is whether police conduct can, in the face of a defendant’s refusal to exit his home, be considered an illegal arrest if the officers create circumstances indicating to the defendant that he must exit the home. In such a case, the police have not breached the threshold of the home, but their conduct has nonetheless coerced the defendant to exit the home where he is then subject to warrantless detention or arrest. (The court recognized there seem to be no State cases on this question, but discusses several Federal cases which seemed to be on point.)

### Holding:

Police cannot use an unreasonable show of force during a “knock and talk” to compel a defendant to open his door to police. When a person in his home declines to speak to police, the officers should retreat cautiously, seek a search warrant, or conduct further surveillance.

Thus, we must decide whether in this case an unreasonable show of force compelled appellant to exit his home. Here, seven police officers entered appellant’s property before daylight on a Saturday morning to execute a search warrant for municipal code violations. After noting several municipal violations, the police did not leave, but maintained their perimeter around appellant’s home while they attempted to make contact with appellant about the municipal code violations. Two officers approached the front door, while the others remained in their positions around the house. Officer Watson testified that the perimeter was necessary because “we’ve had it happen before that you go to knock on somebody’s front door regarding high weeds and they’re jumping out the back window running because of something else they’ve done.” Watson also testified that, based on where the officers were positioned, no one was able to leave the residence. Watson knocked on the front door intermittently for 20 to 30 minutes. While he was at the front door knocking, some other officers were knocking on windows. During this 20 to 30 minute period, no one came to the door, although officers believed that appellant was inside. Officers Watson and Schuster also testified that at no time was appellant free to leave.

“Opening the door to one’s home is not voluntary if ordered to do so under color of authority.” “If an individual’s decision to open the door to his home to the police is not made voluntarily, the individual is seized inside his home.” *Id.* “A reasonable person faced with several police officers consistently knocking and yelling at their door for twenty minutes in the early morning hours would not feel free to ignore the officers’ implicit command to open the door.”

Under these circumstances, it cannot be said that appellant voluntarily exposed himself to a warrantless arrest by leaving the confines of his home. After searching the property before daylight, seven officers surrounded the home, knocked on doors and windows for 20 to 30 minutes, and discharged a weapon before appellant exited the house. As the officers themselves testified, they were not leaving the premises, nor allowing anyone else to enter or leave the premises, until appellant answered the door and responded to their questioning. In effect, 20 appellant’s home was under siege when he finally consented to come outside. Because he answered the door in response to an unreasonable show of authority by the officers, he was unconstitutionally seized at that time.

Thus, we turn to the issue of whether appellant’s subsequent consent to search was sufficiently attenuated from his unconstitutional seizure.

To establish the validity of consent after an illegal search or seizure, the State must prove by clear and convincing evidence that the taint inherent in the illegality had dissipated by the time consent was given. In that respect, we consider (1) the temporal proximity between the unlawful seizure and the given consent; (2) whether the warrantless seizure brought about police observation of the particular object for which consent was sought; (3) whether the seizure resulted from flagrant police misconduct; (4) whether the consent was volunteered or requested; (5) whether appellant was made fully aware of the right to refuse consent; and (6) whether the police purpose underlying the illegality was to obtain the consent. The record shows that appellant gave his consent to search immediately after he was illegally seized. “The close temporal and spatial proximity of the consent to the illegal conduct makes the first factor favorable to appellant.” But for appellant’s warrantless seizure, police would not have conducted the protective sweep, which led to the discovery of the items for which the police ultimately sought consent to search. The second factor favors appellant. According to the officers’ testimony, their purpose did not change to seeking consent to search until after they performed a protective sweep of the house. However, it is also probable that their conduct was “calculated to cause surprise, fright, and confusion.” Multiple officers approached appellant’s home before daylight and began knocking on doors and windows before

finally firing a shotgun. We conclude that factor three is neutral. The police requested consent to search. This fourth factor favors appellant.

Appellant was made fully aware, both orally and in writing, of his right to decline consent. This fifth factor favors the State. The sixth factor requires us to consider whether the police purpose underlying the illegality was to obtain the consent to search. As stated in our discussion of the third factor, the police testified that their purpose in forcing appellant to leave his home was to discuss the municipal code violations they had seen, as well as the drug paraphernalia and the odor of marijuana. The police testified that they did not form an intent to seek consent to search the house until the protective sweep of the house. The sixth factor favors the State. Only two of the six factors favor the State, thus we conclude that the State has not met its burden of showing that the taint of appellant's illegal seizure was sufficiently attenuated from his subsequent consent to search. Thus, the trial court erred in denying appellant's motion to suppress.

*Orosco v. State*, No. 01-11-00559-CR (Ct. App. – Houston [1<sup>st</sup> Dist] July 12, 2012).

## **SEARCH AND SEIZURE. WARRANTS. COMPUTER SEARCHES.**

The defendant, who was a manager of a fastfood 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 establishing 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.

*Wise v. State*, 2011 WL 754415 (Tex. App. – Fort Worth).

## **SEARCH AND SEIZURE – “POLICE-CREATED EXIGENCY”**

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 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 an 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.

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

## **SEARCH AND SEIZURE – NO EXPECTATION OF PRIVACY IN THUMB DRIVE ACCESSIBLE TO OTHERS.**

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.

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

#### **CONSENT SEARCH: CONSENT BY MINOR.**

A minor teenager, with her relatives, reported to police a long and continuous series of sexual assaults by her biological father (Green) with whom she lived. The teen was escorted to the apartment she shared with the father to gather her things and, while there, she showed the officer evidence which would contain DNA samples as evidence of the past assaults. The father was not present at the time. The father moved to suppress the evidence claiming the minor had no capacity to consent to the entry and search of the apartment by the officer. The motion was denied and a conviction was followed by an appeal.

The Court of Appeals recognized these principles: Consent to enter and search property can be given either by the individual whose property is searched or by a third party who possesses common authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797 (1990); *Patrick v. State*, 906 S.W.2d 481, 490 (Tex. Crim. App. 1995), cert. denied, 517 U.S. 1106 (1996). The third party may, in her own right, give valid consent when she and the absent, non-consenting person share common authority over the premises or property. *Citation omitted*. Common authority derives from the mutual use of the property, not the ownership or lack thereof. *Citation omitted*. The validity of an alleged consent to search is a question to be determined from all the circumstances. *Citation omitted*.

The apartment had two bedrooms, one of which had a king-sized bed in it and the other had a baby bed in it.<sup>3</sup> The room with the king-sized bed, which was the room from which Officer Newman took the towels and sheet, was both H.G.'s and Green's bedroom; according to Green, it was H.G.'s room when Green was out of town during the week, and it was his room when he was at home on the weekends. Thus, based on the record from the suppression hearing, the trial court could have found that H.G. had authority to consent to the removal of these items from the bedroom because, at a minimum, she shared common authority over the bedroom. *Citation omitted*. Thus, the question becomes whether the fact that H.G. was a minor prevented her from being able to consent to the removal of items from the bedroom that she shared with her father. The court of criminal appeals recently rejected a per se rule that children may, or may not, consent to entry into a residence. *Citation*

*omitted*. The court explained, –Under given circumstances, and taking into account widely shared social expectations‘ and –commonly held understanding,‘ it may be reasonable or unreasonable to believe that a child has authority to consent to a particular intrusion. *Citation omitted*. Here, sixteen-year-old H.G. had been living in the apartment by herself five days out of the week, with no adult supervision; she had been driving herself to her job at a fast-food restaurant; and she had a five-month-old baby. *Citation omitted*. Moreover, Officer Newman was not there to search the apartment for evidence of a crime; he had accompanied H.G. there so that she could move her things out of the house, and while there, she directed him to the sheet and towels. Viewing the totality of the circumstances surrounding H.G.‘s consent, we hold that the fact that she was a minor did not prevent her from freely and voluntarily consenting to Officer Newman seizing the towels and bed sheet that she directed him to in the bedroom that she shared with her father. *Citation omitted*. Consequently, we hold that the trial court did not err by denying Green‘ s motion to suppress.

*Green v. State*, NO. 02-10-00082-CR, 2d Ct. App. – TEX, Fort Worth, August 4, 2011.

## Use of Force

### USE OF FORCE – DEADLY FORCE -- REASONABLENESS QUESTION TURNS UPON FACTS AT TIME FORCE WAS USED.

A 911 call came from residential disturbance involving a 17 year old with a knife. Officer Green, who was on patrol nearby, received a dispatch that a man had stabbed himself and needed medical attention. The dispatcher mistakenly informed Green that Ruddy had already stabbed himself and the knife was still lodged in his abdomen. On this information, Green went to the house to clear and secure the scene for the paramedics. When he arrived at the house, Alicia directed Green to Ruddy’s room, where he found Ruddy unhurt and still holding the knife to his stomach. Green drew his weapon, backed out of Ruddy’s room, and repeatedly ordered him to put down the knife. Ruddy refused to comply. He tried to close the door on Green, but Green did not let him. Several times, Ruddy cursed at Green and yelled, “F----- shoot me.” Green told Ruddy that he did not want to shoot him, but that he would be forced to if Ruddy came any closer. Despite Green’s warning, Ruddy moved closer to Green and raised the knife in a threatening motion. Green fired his gun three times, hitting Ruddy in the chest, shoulder and abdomen. Green immediately called in the paramedics, who had been waiting outside, but Ruddy died from his wounds.

Turning to the merits of the appeal, the only issue before us is whether, viewing the evidence in the light most favorable to the Elizondos, Green used excessive force against Ruddy. Excessive force claims are analyzed under the reasonableness standard of the Fourth Amendment.

To establish the use of excessive force in violation of the Constitution, a plaintiff must prove: “(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable.” *Citation omitted*. The use of deadly force is constitutional when the suspect poses a threat of serious physical harm to the officer or others. *Citation omitted*. In analyzing the reasonableness of the specific use of force, courts must consider the totality of the circumstances surrounding the officer’s decision. *Citation omitted*.

We agree with the district court’s conclusion that Green’s use of deadly force was not clearly unreasonable. Ruddy ignored repeated instructions to put down the knife he was holding and seemed intent on provoking Green. At the time Green discharged his weapon, Ruddy was hostile, armed with a knife, in close proximity to Green, and moving closer. Considering the totality of the circumstances in which Green found himself, it was reasonable for him to conclude that Ruddy posed a threat of serious harm. Finally, in the absence of a constitutional violation, there can be no municipal liability for the City.

*(Judge DeMoss concurred in the judgment but commented in a separate opinion expressing his concern of the officer's actions leading up to the incident and referring to a prior case (Rockwell v. Brown) from the same agency in which he expressed a similar concern. This illustrates that, for now, when analyzing a use of force claim, the Fifth Circuit focuses upon a "snapshot" of the facts confronting the officer (including information known to him) at the time the force was applied without consideration of whether the officer(s)' actions leading up to the need for the use of force. This is not the case in many other Circuits which do analyze and consider the issue of whether an officer's conduct causes the situation in which force is necessary. It appears that Judge DeMoss, and possible others, would consider such preliminary conduct in the right case.)*  
*Elizondo v. Green*, No. 10-11177 (5<sup>th</sup> Cir. Feb. 13<sup>th</sup>, 2012).

## **Evidentiary issues and *Miranda* cases**

### **U.S. SUPREME COURT – BRADY VIOLATION – CONVICTION BASED UPON SINGLE EYEWITNESS**

Smith was convicted of first-degree murder based on the testimony of a single eyewitness. During state post-conviction relief proceedings, Smith obtained police files containing statements by the eyewitness contradicting his testimony. Smith argued that the prosecution's failure to disclose those statements violated *Brady v. Maryland*. *Brady* held that due process bars a State from withholding evidence that is favorable to the defense and material to the defendant's guilt or punishment. See *id.*, at 87. The state trial court rejected Smith's *Brady* claim, and the Louisiana Court of Appeal and Louisiana Supreme Court denied review.

Held: *Brady* requires that Smith's conviction be reversed. The State does not dispute that the eyewitness's statements were favorable to Smith and that those statements were not disclosed to Smith. Under *Brady*, evidence is material if there is a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Citation omitted*. A "reasonable probability" means that the likelihood of a different result is great enough to "undermine[ ] confidence in the outcome of the trial." *Citation omitted*. Evidence impeaching an eyewitness's testimony may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. *Citation omitted*. Here, however, the eyewitness's testimony was the only evidence linking Smith to the crime, and the eyewitness's undisclosed statements contradicted his testimony. The eyewitness's statements were plainly material, and the State's failure to disclose those statements to the defense thus violated *Brady*.

We have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. *Citation omitted*. That is not the case here. Boatner's (the eyewitness) testimony was the only evidence linking Smith to the crime. And Boatner's undisclosed statements directly contradict his testimony: Boatner told the jury that he had "[n]o doubt" that Smith was the gunman he stood "face to face" with on the night of the crime, but Ronquillo's notes show Boatner saying that he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." Boatner's undisclosed statements were plainly material.

The decision was 8 – 1 with only Justice Thomas dissenting who would have found that the withheld evidence would not have changed the underlying verdict for conviction.

*(ed. note: In any investigation, **all** evidence and statements should be provided to the prosecutor who is in the best position to determine what should be produced as *Brady* material.)*

*SMITH v. CAIN, WARDEN*, No. 10–8145 (U. S. Supreme Court. January 10, 2012).

## MIRANDA, STATEMENT DURING TRAFFIC STOP

During the course of a traffic stop, the appellee made incriminating statements. The trial court suppressed the statements, finding that the appellee was in custody when the statements were made and that he had not been properly Mirandized. The Court of Appeals and the Court of Criminal Appeals affirmed.

Officer Johnson made a nighttime traffic stop of appellee (Ortiz) for speeding. After asking for the appellee's license and insurance information, Johnson asked the appellee to step out of the car and move to Johnson's patrol car, which was parked directly behind the appellee's car. There, Johnson began to question the appellee. The appellee revealed that he was going, with his wife to Spearman, Texas. Additionally, the appellee stated that he was on probation in Spearman "for drugs," specifically "one-eighth" of cocaine. After questioning the appellee, Johnson approached the appellee's car to question Mrs. Ortiz, who was sitting in the front passenger seat. Among other things, Mrs. Ortiz explained that they were traveling to Gruver, Texas. Because this explanation conflicted with the appellee's account, Johnson called for backup officers. While waiting for backup to arrive, Johnson returned to the appellee, and asked him "point blank," "How much drugs are in the car?" The appellee responded "No. No. No. No." The appellee then consented to a search of his person and his car. While Johnson searched the appellee, backup officers, Deputy Pierpoint and Officer Vargas, arrived. Vargas approached the appellee's car, in which Mrs. Ortiz remained seated. Mrs. Ortiz stepped out of the vehicle, apparently at Vargas's direction, and Vargas began to pat her down. When Mrs. Ortiz apparently made movements to avert the patdown, Vargas started to handcuff her, and Pierpoint came to Vargas's aid.

Shortly after handcuffing Mrs. Ortiz, Pierpoint and Vargas signaled back to Johnson, indicating that they had apparently discovered something during the patdown of Mrs. Ortiz. Johnson then turned to the appellee and said, "Yep. Turn around. Put your hands behind your back." Johnson then handcuffed the appellee. About this time, Pierpoint walked back to Johnson's patrol car and informed Johnson that Vargas had found "something" under Mrs. Ortiz's skirt. Johnson then turned to the appellee and asked him in Spanish, "What kind of drugs does your wife have?" After prompting Johnson to repeat the question, which Johnson did, the appellee responded, "coca." Johnson began to repeat the question, again in Spanish, "What kind of drugs . . .?" Before Johnson could finish, the appellee cut him off, answering, "cocaina."

The appellee was not given *Miranda* warnings before making the cocaine statements. It is the admissibility of the cocaine statements that is now the subject of our review.

Based on Johnson's testimony and the video recording of the traffic stop, the trial court found that, by the time he was placed in handcuffs, the appellee was arrested and in custody for *Miranda* purposes. Because Johnson failed to advise the appellee of his *Miranda* rights before asking him the series of questions that elicited the cocaine statements, the trial court expressly ruled that those statements were inadmissible and must be suppressed.

The court of appeals affirmed the trial court's ruling. In *Berkemer v. McCarty*, the United States Supreme Court announced the general rule that a traffic stop ordinarily amounts only to a temporary detention, and the occupants of the detained vehicle are not subjected to custody for *Miranda* purposes. If, during the course of the 16 detention, however, an occupant's freedom is constrained to the "degree associated with formal arrest," then Fifth Amendment protections are triggered and a suspect is entitled to *Miranda* warnings.

Generally, a routine traffic stop does not place a person in custody for *Miranda* purposes. But a traffic stop may escalate from a non-custodial detention into a custodial detention when formal arrest ensues or a detainee's freedom of movement is restrained "to the degree associated with a formal arrest." We evaluate whether a person has been detained to the degree associated with arrest on an *ad hoc*, or case-by-case, basis. In making the custody determination, the primary question is whether a reasonable person would perceive the

detention to be a restraint on his movement “comparable to . . . formal arrest,” given all the objective circumstances.

In evaluating whether a reasonable person would believe his freedom has been restrained to the degree of formal arrest, this Court looks only to the objective factors surrounding the detention. The subjective beliefs of the detaining officer are not included in the calculation of whether a suspect is in custody. But if the officer manifests his belief to the detainee that he is a suspect, then that officer’s subjective belief becomes relevant to the determination of whether a reasonable person in the detainee’s position would believe he is in custody. Conversely, any undisclosed subjective belief of the suspect that he is guilty of an offense should not be taken into consideration—the reasonable person standard presupposes an “innocent person.”

Applying this standard, we agree with the court of appeals that, at the moment that Johnson elicited the cocaine statements from the appellee, a reasonable person in the appellee’s position would have believed, given the accretion of objective circumstances, that he was in custody. The objective facts show that, by that time: (1) Johnson had expressed his suspicion to the appellee “point blank” that he had drugs in his possession; (2) two additional law enforcement officers had arrived on the scene; (3) Mrs. Ortiz and the appellee had both been patted down and handcuffed; and (4) the officers had manifested their belief to the appellee that he was connected to some sort of (albeit, as-yet undisclosed) illegal or dangerous activity on Mrs. Ortiz’s part. These circumstances combine to lead a reasonable person to believe that his liberty was compromised to a degree associated with formal arrest.

A normal traffic stop is a non-custodial detention because it is brief and relatively non-coercive. In holding that a traffic stop is generally less coercive than a custodial detention, the *Berkemer* Court observed that, during a traffic stop, a detainee is typically “only confronted by one or at the most two policemen[,which] further mutes his sense of vulnerability.” By the time he made the cocaine statements in this case, however, the appellee’s detention had escalated into something inherently more coercive than a typical traffic stop. An ordinary traffic stop usually involves a single police car and one or two officers. The appellee was faced with at least two police cars and three officers by the time he made the cocaine statements. While this is hardly an overwhelming show of force, it adds at least marginally to the court of appeals’s conclusion that the appellee was in custody for *Miranda* purposes at that time.

The court of appeals did not err to affirm the trial court’s conclusion that a reasonable person in appellee’s position would have believed, given all the objective circumstances, that, at the moment he made the cocaine statements, he was in custody for Fifth Amendment purposes.

*State v. Ortiz*, NO. PD-1181-11, Tex. Ct. Crim. App. Oct. 31, 2012.

## **STATEMENTS TO STORE PERSONNEL DETAINING SHOPLIFTER**

Ms. Elizondo was detained by a loss prevention officer (Mora) at a department store for shoplifting. The store officer asked Appellant (Elizondo) to read and sign a document entitled “GAP INC. CIVIL DEMAND NOTICE,” a document that contained the statement, “I, Becky Abajo Elizondo, have admitted to the theft of merchandise/cash valued at \$65.00 from GAP INC., Store No. 6220, located at 6249 Slide Rd. I also hereby acknowledge that my detention on this date was reasonable.” Appellant signed the form, dated it, and completed the address information section. Mora also had Appellant sign a store receipt reflecting the value of the merchandise and took photographs of Appellant and the stolen items. After completing what Mora testified was typical protocol for theft at Old Navy, he called the Lubbock Police Department, and officers came to the store to arrest Appellant and her friend.

Appellant argued that Mora was required to give *Miranda* warnings when he obtained the civil demand notice because he was engaged in an agency relationship with law enforcement and that the failure to give the warnings should have resulted in the statement being excluded from evidence.

In *Miranda v. Arizona*, the United States Supreme Court held that, in order to ensure that criminal suspects in custody are aware of their rights under the United States Constitution, police must give formal warnings before suspects are interrogated. *Miranda* defined “custodial interrogation” as “questioning initiated by law enforcement officers after a person has been taken into custody.” Texas Code of Criminal Procedure Article 38.22 provides that a written statement made by an accused as a result of custodial interrogation is inadmissible if the accused did not receive *Miranda* warnings. The issue here is whether *Miranda* applies when questioning is initiated by someone other than law enforcement.

Non-law-enforcement state agents are required to give *Miranda* warnings only when acting in tandem with the police to gather evidence for a criminal prosecution. To determine if an agency relationship exists, the courts must examine the entire record and consider three factors: (1) the relationship between the police and the potential police agent, (2) the interviewer’s actions and perceptions, and (3) the defendant’s perceptions of the encounter. The test helps courts determine whether the interviewer was acting as an instrumentality or was “in cahoots” with the police or prosecution.

Mora stated that every time he apprehended shoplifters he asked them to fill out a civil demand notice for Old Navy’s records, and that 99% of the time the accused shoplifter signed the document. While officers may have been aware that Old Navy had a policy of obtaining a civil demand notice, there is no indication that this knowledge led to a calculated practice between the police and the store’s loss-prevention staff. The police had not even been contacted when Mora obtained Appellant’s confession, so they clearly did not instruct Mora to get specific information or give him questions to ask Appellant. The police were not using Mora to get information from Appellant that they could not lawfully obtain themselves, and neither the police nor the DA’s office asked Mora to obtain an admission of guilt to use in a criminal proceeding.

Here, Mora’s reason for obtaining the civil demand notice was to adhere to the policies in the Gap Inc. loss prevention manual. Although Gap Inc.’s policy manual says that theft incident reports serve to aid in criminal prosecutions and convictions, help maintain a good rapport with law enforcement, and prevent defense attorneys from discrediting the testimony of the loss-prevention staff, those are not the primary purposes of the report. The manual says reports, which should include a civil demand notice, are necessary to record and preserve observations, details, and information about the events surrounding the theft, and it says that the reports are for company use and records only. The civil demand notice states that the law permits merchants to recover civil monetary damages and that the civil penalties are not intended to compromise any criminal action the store may seek as a result of the shoplifting incident. While Mora did help build a case that led to Appellant’s arrest, and his testimony indicates that the purpose of obtaining a written confession goes beyond merely civil reasons, his primary duty was to document the incident for company records. The record indicates that Mora believed that he was following Old Navy policy and acting on the store’s behalf, not acting as a police agent.

Mora testified that he was not wearing a uniform when he approached Appellant and her friend outside the store. He informed them that he was a loss-prevention officer for Old Navy, escorted them to the store manager’s office, and asked them to fill out paperwork about the theft. A female Old Navy manager was present during the encounter, and the door to the manager’s office was left ajar. Mora printed out an Old Navy store receipt for the items found in Appellant’s purse and photographed Appellant and the stolen items. Under these circumstances, we cannot say that a reasonable person in Appellant’s position would believe that Mora was a law-enforcement agent.



The record supports the trial court's decision to deny Appellant's motion to suppress the written confession and the court of appeals did not err in affirming the trial court's denial of the motion to suppress.

*Elizondo v. State*, NO. PD-0882-11, Tex. Ct. Crim. App. Nov. 7<sup>th</sup>, 2012.

### **UNSWORN OFFICER REPORTS ARE ADMISSIBLE IN A DUI TRIAL**

In a DUI case, the officer did not swear to his report as required. However, the Court held that since the report was otherwise reliable and the suspect had an opportunity to confront and cross-examine the officer, the report would be admitted.

*D.P.S. v. Caruana* Tex. Supreme Court. No. 10-0321 : 03/30/12.

### **MIRANDA VIOLATION – CONSENT TO SEARCH – EXCLUSIONARY RULE.**

In violation of *Miranda v. Arizona*, a federal agent questioned Gonzalez regarding possible drug activity in a nearby house. Gonzalez confessed that he was guarding marijuana in the residence and requested an attorney. Agents then sought and obtained his consent to search the house, entered with his assistance, and discovered the marijuana. We consider whether the district court erred in denying Gonzalez's motion to suppress the drugs.

Federal agents suspected that criminal activity was afoot at a house in McAllen, Texas and began surveilling the residence. Agents later observed a black Mercedes-Benz drive away from the residence soon after a passenger "put[] . . . what appeared to be luggage" in the vehicle. Agents followed the Mercedes, which eventually pulled into a parking lot. Its driver made a brief phone call, drove out of the lot, and sped off—causing the agents to abandon their pursuit. Around the same time as the phone call, Gonzalez left the residence. He walked quickly away from the house, "looking back and forth . . . like he was nervous." ICE agent Ramirez approached Gonzalez and asked whether Gonzalez was in the country legally. Gonzalez admitted that he was not. Ramirez then handcuffed him, placed him in the front passenger seat of the truck, and drove toward the house.

During the drive, Ramirez began a "conversation" with Gonzalez. Ramirez asked if Gonzalez "was guarding drugs in [the] house;" Gonzalez responded, "yes." Ramirez asked, "[s]o to be clear, there are drugs in that house right now;" Gonzalez again responded, "yes." At that time, Gonzalez—sitting, in handcuffs, in a law-enforcement vehicle—had not received *Miranda* warnings. The government concedes that the district court properly suppressed these statements.

About the same time as Gonzalez's second "yes," Ramirez claims to have said "hold on" and reached for his *Miranda* rights card. Ramirez decided not to read Gonzalez his *Miranda* rights, however, because as he reached for his *Miranda* card, Gonzalez requested a lawyer. Soon after the request, case agent Michael Renaud approached Ramirez's car window.

Ramirez informed Renaud that Gonzalez desired counsel. Renaud then asked Ramirez to inquire whether Gonzalez would consent to a search of the house. According to Ramirez, the following transpired: Ramirez asked Gonzalez for consent. Gonzalez did not respond and "looked like he was thinking about it." Perhaps a minute later, Ramirez asked again. Gonzalez responded, asking, "Well, what can you do for me? What's in it for me?" After Ramirez said he might advise the prosecutor of Gonzalez's cooperation, Gonzalez "just kind of looked like he was deciding, you know, kind of a sigh here or there." Ramirez again sought consent; Gonzalez again asked, "What can you do for me?;" and Ramirez again mentioned advising the prosecutor of Gonzalez's cooperation. A few seconds later, Ramirez stepped out of the truck and Renaud entered. Minutes later Ramirez reentered the truck with "the understanding that [Gonzalez] was still thinking about it." Ramirez then asked, "Okay, we need

to know, Mr. Gonzalez, will you consent to search the house?” After Gonzalez responded, “yes,” he signed a consent form that Ramirez had read to him.

A search of the house revealed bundles of marijuana—about 2,043 kilograms, or roughly two-and-one-quarter tons, in all.

Gonzalez was charged in a two-count indictment with possession with intent to distribute a controlled substance and conspiracy to do the same. He pleaded not guilty to the conspiracy count and moved to suppress “[a]ny statements or admissions made by the Defendant at the time of his arrest or [the] search . . . and anything arising therefrom,” as well as all statements, testimony, and physical evidence discovered “as a direct result and exploitation of said arrest and search.”

The Supreme Court extended *Miranda* in *Edwards v. Arizona* which provides that “when an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available to him.” This “prophylactic” rule is designed to “prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights” and protects “a suspect’s voluntary choice not to speak outside his lawyer’s presence.” The rationale undergirding *Edwards* is that “once a suspect indicates that ‘he is not capable of undergoing [custodial] questioning without advice of counsel,’ ‘any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is . . . not the purely voluntary choice of the suspect.”

Consent to search need only be given voluntarily; unlike the knowing waiver of *Miranda* rights, voluntariness does not “require proof of knowledge of a right to refuse.”

The first question is whether the district court should have suppressed the seized marijuana as the fruit of an *Edwards* violation. We have suggested that a request for consent is not an “interrogation” capable of violating the *Edwards* rule.

The critical point here is that Gonzalez seeks only suppression of marijuana. A violation of the prophylactic *Miranda* rule does not require “suppression of the [nontestimonial] physical fruits of the suspect’s unwarned but voluntary statements.” Because the marijuana seized is physical, nontestimonial evidence, an *Edwards* violation itself would not justify suppression.

The final issue is whether the conceded *Miranda* violation renders involuntary Gonzalez’s subsequent consent to the search. Gonzalez appears to argue that the government used his unwarned confession to obtain his consent, making his consent involuntary. No one disputes that if his consent was involuntarily given, the marijuana must be suppressed.

Gonzalez appears to argue that consent is coerced *whenever* police use an unwarned statement to obtain consent. But a categorical rule is inconsistent with the multi-factor, holistic approach to assessing voluntariness that this Court and the Supreme Court have endorsed. Just as a confession following an unwarned confession may be voluntary, consent following an unwarned confession may be voluntary. Accordingly, this argument is without force.

The district court found that Gonzalez voluntarily consented to the search of a house containing marijuana. His consent was not automatically involuntary merely because his *Miranda* rights were violated. And even if government agents violated *Edwards* when they sought his consent, that *Edwards* violation would not suffice to justify suppression of the marijuana. We therefore AFFIRM the judgment of conviction that is based on the partial denial of Gonzalez’s motion to suppress.

*U.S. v. Gonzalez-Garcia*, No. 11-41365, 5<sup>th</sup> Cir., Feb. 15, 2013.

## EVIDENCE – LOGS OF DRUG SALES WERE ADMISSIBLE IN CONSPIRACY CASE.

In 2009, James Pieprzica, an officer with the Texas Department of Public Safety, discovered a conspiracy whereby individuals would visit multiple pharmacies to obtain large quantities of pseudoephedrine and use it to manufacture methamphetamine. With the help of cooperating witnesses and informants, Pieprzica compiled a list of alleged conspirators—including Towns—and began submitting requests to various pharmacies to obtain lists of their purchases of pseudoephedrine. Upon receipt of those lists, some of which were in electronic format sent through email and some of which were hard copies that were mailed, Pieprzica and an analyst combined the information into a spreadsheet. At trial, the Government offered pseudoephedrine purchase logs from various retailers (Walgreens, Wal-Mart, Target, and CVS) to highlight a pattern of movement and purchase implicating Towns in the conspiracy. The log spreadsheets were admitted through Pieprzica, who had received the records and their certifying affidavits from the records custodians of the companies that ran the pharmacies.

Towns was subsequently convicted by a jury. In his motion for a new trial, Towns reurged that the records were both improperly admitted as business records and violated his right to confront the witnesses against him. The motion was denied.

This appeal revolves around the business transaction logs obtained from the pharmacies. If this information is admissible and does not violate the Confrontation Clause, the conviction must be upheld. We hold that the pseudoephedrine purchase logs were business records for the purposes of Federal Rule of Evidence 803(6); admissible under the exception to the hearsay rule via the affidavits certifying their status; and nontestimonial records that do not violate the Sixth Amendment.

To begin, the undue focus on the law enforcement purpose of the records has little to do with whether they are business records under the Federal Rules of Evidence. What matters is that they were kept in the ordinary course of business. It is not uncommon for a business to perform certain tasks that it would not otherwise undertake in order to fulfill governmental regulations. This does not mean those records are not kept in the ordinary course of business. In *[a prior case]*, this court held that firearm records that gun shops were forced to maintain by law were business records since a company could lose corporate privileges for failing to maintain them properly. To hold otherwise here would violate precedent and move the inquiry beyond the rule's text. Fed. R. Evid. 803(6)(B) (exempting records “kept in the course of a regularly conducted activity of a business” from the rule against hearsay). The regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage.

Next, the purchase records were properly admitted as business records because of the qualifying affidavits offered to the court. For admission, a record of a regularly conducted business activity must be proven by “testimony of the custodian or another qualified witness, *or by a certification* that complies with Rule 902(11).” Fed. R. Evid. 803(6)(D) (emphasis added). According to Rule 902(11), records of regularly conducted business activity—even copies—are self-authenticating if certified as accurate by the custodian.

The conviction was affirmed.

*Author's note, practical application: when working up a drug case (or any case) in which an entity's business records are needed, the records themselves will usually be admissible, but investigators should always secure a records affidavit from the entity's records custodian. In all major cases, evidence acquisition of this nature should be done in close coordination with prosecution authorities.*

*U.S. v. Towns, Jr.*, No. 11-50948, (5<sup>th</sup> Cir. Apr. 30, 2013).

## **DISCOVERY OF CHILD PORNOGRAPHY ON SUSPECT'S COMPUTER BY GUEST. ADMISSIBLE.**

The Defendant hired Killian to stay at his home and care for his dog while he was away on vacation. During her stay, Killian used the appellant's computer in his master bedroom and found child pornography. At a pre-trial motion to suppress hearing, the appellant claimed that Killian's access to his bedroom and computer was illegal; therefore, the State could not use the evidence against him at his trial, under Article 38.23(a) of the Texas Code of Criminal Procedure. The trial court denied the motion to suppress, and the Tenth Court of Appeals affirmed. We granted the appellant's petition for discretionary review to examine this holding. We now affirm.

Whether Killian committed either trespass or breach of computer security depends upon whether she had the appellant's "effective consent."

The evidence supports a finding that the appellant gave Killian his apparent consent. The appellant invited Killian to help herself to "anything" and "everything," and this invitation was not limited to the refrigerator and pantry, but was repeated during the course of the tour of the house, which included his master bedroom. Whatever he may have intended, the appellant told Killian only that he required her to keep the bedroom door closed in order to keep the dog out. He did not expressly banish her from the bedroom, nor did he forbid her to use his computer. He showed her how to operate the television and stereo. He did not power the computer down or password-protect it, and he admitted that he allowed his roommate to use it regularly. Given this convergence of facts, the trial court was justified in concluding that Killian had the appellant's apparent consent--that is to say, it is clear and manifest to the understanding that she had his assent in fact--to enter his bedroom and use his computer.

*Baird v. State*, No. PD-0159-12, Tex. Court of Crim. Appeals, May 8<sup>th</sup>, 2013.

## **DWI ARREST, BLOOD DRAW. EMT-1 WAS NOT QUALIFIED TO MAKE BLOOD DRAW.**

After appellant was arrested for driving while intoxicated, his blood was drawn at a hospital by Rachel Lopez. Although Lopez's job title was "emergency medical technician" and she was licensed as an EMT-I, her primary duty at the hospital was to draw blood in non-emergency situations. The questions in this case are whether, under § 724.017 of the Transportation Code, Lopez was "emergency medical services personnel" and, if so, whether that fact renders her unable to be a "qualified technician" authorized to take blood specimens in driving-while-intoxicated cases. After reviewing Lopez's job duties, we hold that she was not "emergency medical services personnel" and that she was a "qualified technician" within the meaning of the statute. We reverse the judgment of the court of appeals.

Appellant moved to suppress the results of the blood test, arguing that Lopez was not a person authorized by § 724.017 of the Transportation Code to take a blood specimen. Specifically, appellant contended that Lopez was not a "qualified technician" within the meaning of the statute because she was part of the hospital's "emergency medical services personnel." Section 724.017(a) provides:

Only a physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse may take a blood specimen at the request or order of a peace officer under this chapter.

Section 724.017(c) says:

In this section, "qualified technician" does not include emergency medical services personnel.

Two courts of appeals have held that phlebotomists are "qualified technicians" within the meaning of § 724.017, provided that their qualifications are established on the record. In *Torres v. State*, the defendant was charged with driving while intoxicated and his blood was drawn by a phlebotomist on staff. Implicit in the court of appeals's decision is a conclusion that a phlebotomist is a technician within the meaning of the statute.

And in *State v. Bingham*, the defendant was arrested for driving while intoxicated and taken to a hospital where a phlebotomist drew his blood. A blood test showed he was over the legal blood-alcohol limit. The court of appeals concluded that the phlebotomist was a qualified technician within the meaning of the statute and stated, "The common-sense interpretation of the term 'qualified technician,' . . . must include a phlebotomist who a hospital or other medical facility has determined to be qualified in the technical job of . . . phlebotomy, i.e., the drawing of blood."

The record in this case shows that Lopez's primary duties were that of a phlebotomist and that she was qualified to be so. Lopez was trained to draw blood, and her primary duty at the hospital for the six years she was employed there was to draw blood. Lopez took anywhere between fifty to one-hundred blood draws per day, and she maintained her own office at the hospital to do exactly that. When asked if drawing blood was part of her "daily chore[s]" at the hospital, Lopez replied, "Yes, ma'am. It's all I do." Lopez also explained the procedure used to take blood specimens when directed to do so by police officers in driving-while-intoxicated cases, and she affirmed that she knew how to use the kit and equipment provided by the police officers to take such specimens. Lopez was qualified within the meaning of the statute.

The record also confirms that, functionally, Lopez was not emergency medical services personnel. It is true that Lopez had training in general emergency procedures. She also was licensed as an EMT-I and had that title at the hospital. But that training and her license and title had little to do with what she actually did at the hospital, which was almost exclusively drawing blood. Her new title of Patient Care Technician, Level 1, required no additional training or duties and is substantively indistinguishable from her previous position. From the perspective of the hospital, Lopez was not treated as an EMT-I or part of its emergency medical services personnel, but instead as a de facto phlebotomist. Because Lopez did not function as emergency services personnel, § 724.017(c) and its restrictions on emergency services personnel are not applicable in this case.

The court of appeals was mistaken to conclude, in spite of its misgivings, that Lopez was excluded from taking a blood specimen in this case. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

*Krause v. State*, No. PD-0819-12, Tex. Ct. of Crim. Appeals, May 8<sup>th</sup>, 2013.

#### **FIFTH AMENDMENT. MIRANDA. PRE-MIRANDA SILENCE ADMISSIBLE.**

Houston police officers discovered two homicide victims on the morning of December 18, 1992. An investigation led to the appellant, and he voluntarily accompanied officers to the police station for questioning. For approximately one hour, the appellant answered every question asked. Then, when asked whether shotgun shells found at the crime scene would match a shotgun found at his home, the appellant remained silent, and, according to the interrogating officer, demonstrated signs of deception. A ballistics analysis later matched the shotgun with the casings left at the murder scene. Subsequent investigation led police to a witness who stated that the appellant had admitted murdering the victims.

After evading arrest for nearly 15 years, the appellant was captured in 2007. His first trial ended in a mistrial. In the appellant's second trial, the State sought to introduce evidence of his silence when he was questioned about the shotgun shells in the 1992 interview. The appellant's trial counsel objected to the State's introduction of this evidence, arguing that the appellant could "invoke the Fifth Amendment privilege whether

he was in custody or not.” The trial court overruled the objection and allowed the evidence to be introduced. The jury found the appellant guilty of murder.

On appeal to the Fourteenth Court of Appeals, the appellant argued that the trial court erred in admitting evidence of his pre-arrest, pre-*Miranda* silence. The Court of Appeals and the Court of Criminal Appeals both affirmed the conviction holding that evidence of silence was admissible.

The Supreme Court has held that a defendant’s Fifth Amendment right against compelled self-incrimination is violated if the State is allowed to impeach the defendant’s testimony by using his post-arrest, post-*Miranda* silence.<sup>7</sup> The State does *not* violate a defendant’s Fifth Amendment rights, however, by cross-examining a defendant as to post-arrest, pre-*Miranda* silence when a defendant chooses to testify. Furthermore, the Supreme Court has held that prearrest, pre-*Miranda* silence can be used to impeach a defendant who testifies.

The plain language of the Fifth Amendment protects a defendant from *compelled* selfincrimination.

In pre-arrest, pre-*Miranda* circumstances, a suspect’s interaction with police officers is not compelled. Thus, the Fifth Amendment right against compulsory selfincrimination is “simply irrelevant to a citizen’s decision to remain silent when he is under no official compulsion to speak.”

We hold that pre-arrest, pre-*Miranda* silence is not protected by the Fifth Amendment right against compelled self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies.

*(Ed. note: The opinion in this case recognizes, in an extended discussion, that the courts across the country are split on this issue and the U.S. Supreme Court has yet to address it. The Court chose to apply the above rule in Texas which is subject to change. As a matter of procedure, it’s best to document all facts and circumstances surrounding the questioning of any potential suspect for possible later use in prosecution.)*

*Salinas v. State*, NO. PD-0570-11 (Tex. Ct. Crim. App. April 25<sup>th</sup>, 2012).

## **EVIDENCE – ADMISSION OF FACEBOOK MESSAGES.**

The defendant and his live-in girlfriend had a fight over messages she had received on her facebook page resulting in the suspect being convicted of aggravated assault with a deadly weapon. The defendant’s contention on appeal was that facebook messages from him to his girlfriend after the incident were not properly authenticated and not admissible. The only evidence authenticating the messages was the girlfriend’s testimony that she received them from the defendant’s account to which she had no access and that she did not send them to herself. The District Court allowed the evidence and this was affirmed by the Court of Appeals.

In so holding, the Court discussed the need and degree of authentication of email messages:

“In analyzing whether the evidence is sufficient to support the trial court’s ruling, we start by noting that the content of the messages themselves purport to be messages sent from a Facebook account bearing Campbell’s name to an account bearing Ana’s name. While this fact alone is insufficient to authenticate Campbell as the author, when combined with other circumstantial evidence, the record may support a finding by a rational jury that the messages were authored and sent by Campbell. *See id.* at 642; *see also Commonwealth v. Purdy*, 945 N.E.2d 372, 381 (Mass. 2011) (explaining that e-mail sent from Facebook account bearing defendant’s name not sufficiently authenticated without additional “confirming circumstances”). Accordingly, we examine whether the remaining evidence supports the trial court’s ruling.

Further, the undisputed testimony provides circumstantial evidence tending to connect Campbell to the messages. The undisputed testimony yields the following: (1) Campbell had a Facebook account; (2) only he and Ana ever had access to his Facebook account; and (3) Ana received the messages bearing Campbell’s name. This evidence suggests that only Campbell or Ana could have authored the messages received in Ana’s Facebook account. In addition, Ana told the jury that she could not access Campbell’s account, and therefore, she did not send the messages to herself. While this evidence certainly does not conclusively establish that Campbell authored the messages—in fact, Campbell insisted that he did not—the State was not required to “rule out all possibilities inconsistent with authenticity or prove beyond any doubt that the evidence is what it purports to be.” See *Manuel*, 357 S.W.3d at 74 (quoting *Chin*, 371 F.3d at 37). So long as the authenticity of the proffered evidence was at least “within the zone of reasonable disagreement,” the jury was entitled to weigh the credibility of these witnesses and decide who was telling the truth. See *Tienda*, 358 S.W.3d at 638, 645-46 (explaining that conceivably someone could have concocted appellant’s MySpace page “[b]ut that is an alternate scenario whose likelihood and weight the jury was entitled to assess once the State had produced a prima facie showing that it was appellant, and not some unidentified conspirators or fraud artists, who created and maintained these MySpace pages”).

*Campbell v. State*, No. 03-11-00834-CR, Ct. App. – Austin, Aug. 31, 2012.

## **DUI TRIAL – EVIDENCE OF ARRESTING OFFICER’S PRIOR SUSPENSION – BRADY MATERIAL?**

At a jury trial resulting in conviction of Baldez, the District Judge did not allow evidence of the arresting officer’s prior suspension for “for violating department rules at a crime scene by taking evidence and concealing such fact, and the evidence, from his superiors.” Baldez’ lawyer argued that the suspension and underlying circumstances went to the credibility of the officer and should have been admitted.

“The credibility of a witness may be attacked by opinion or reputation evidence, or by proof of a conviction for a felony or a crime of moral turpitude. Aside from proof of a conviction for a felony or a crime of moral turpitude, a witness’s general character for truthfulness may not be attacked by evidence of specific instances of conduct. Specific instances of conduct may, however, be admissible for the purpose of attacking a witness’s trustworthiness in a particular case because of bias or interest. The appellant has the burden of showing the relevance of particular evidence to the issue of bias or prejudice.

Here, Baldez sought to introduce the disciplinary report for the sole purpose of showing Rubio’s lack of credibility; Baldez never argued that Rubio was untrustworthy due to bias or interest against Baldez. Rule 608(b) expressly prohibits the introduction of specific instances of conduct to attack a witness’s credibility. [T]here is an important distinction between an attack on the general credibility of a witness and a more particular attack on credibility that reveals ‘possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities of the case at hand.’

Because Baldez sought to impeach Rubio’s credibility with proof of the disciplinary report, we conclude the trial court did not abuse its discretion in limiting cross-examination.

Baldez also argues that his right to due process was violated when the State failed to disclose Officer Rubio’s disciplinary suspension. Under *Brady v. Maryland*, prosecutors have an affirmative duty to disclose all material exculpatory evidence to the defense.

We disagree that a *Brady* violation exists in this case. To establish a *Brady* violation, the defendant must show that (1) the State suppressed evidence, (2) the suppressed evidence favors the defendant, and (3) “there is

a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.” Here, the record does not reflect that Rubio’s disciplinary report was withheld from Baldez. Although Baldez contends he did not receive Rubio’s records from the Commission of Law Enforcement Officer Standards and Education until the second day of trial, Baldez attempted to cross-examine Rubio concerning the report on the first day of trial, and then made a bill of exception during which the report was admitted for purposes of appeal on the second day of trial. Therefore, Baldez has not shown that the State suppressed the evidence. (*Brady* claim fails where evidence is turned over in time for defendant to use it in his defense); *see also Marchbanks v. State*, 341 S.W.3d 559, 563-64 (Tex. App.—Fort Worth 2011, no pet.) (no *Brady* violation where defendant became aware of withheld evidence during trial). In any event, as discussed above, evidence of Rubio’s prior disciplinary proceeding was not admissible as impeachment evidence under Rule 608(b); thus, the prosecution had no duty to turn over the report. (“[T]he prosecution has no duty to turn over evidence that would be inadmissible at trial.”).

Even assuming the disciplinary report was admissible, Baldez has not shown that there is a reasonable probability the outcome of the trial would have been different. This was not a case involving a “swearing match” between Baldez and Officer Rubio in which their versions of events varied. *See Lopez*, 18 S.W.3d at 225 (defendant had heightened need to impeach credibility of accuser where there was no corroborating evidence and trial amounted to a “swearing match” between the two). As previously discussed, Rubio had probable cause to stop Baldez for driving without illuminated headlights at night. Moreover, Rubio’s testimony that Baldez appeared intoxicated based on his bloodshot eyes, slurred speech, and the odor of alcohol emanating from his breath was corroborated by the results of the intoxilyzer test showing that Baldez’s blood alcohol concentration was more than twice the legal limit. Given the other uncontroverted evidence of his intoxication, Baldez cannot show how impeaching Rubio’s character for truthfulness would have most likely produced a different outcome at trial. Because Baldez cannot demonstrate that he meets the three-pronged *Brady* test, we conclude Baldez has no basis on which to demand a new trial.

(citations omitted)

*Baldez v. State*, No. 04-11-00615-CR, Ct. App. – San Antonio, July 11, 2012.

#### **ARREST – JUVENILES – *MIRANDA* WARNINGS – QUESTIONING OF A JUVENILE (13 Y.O.A.).**

J. D. B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed door conference room, and questioned by police for at least half an hour.

This was the second time that police questioned J. D. B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J. D. B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J. D. B.’s grandmother— his legal guardian—as well as his aunt. Police later learned that a digital camera matching the description of one of the stolen items had been found at J. D. B.’s middle school and seen in J. D. B.’s possession. A juvenile investigator with the local police department who had been assigned to the case, went to the school to question J. D. B. Upon arrival, the officer informed the school resource officer, the assistant principal, and an administrative intern that he was there to question J. D. B. about the break-ins. Although the investigating officer asked the school administrators to verify J. D. B.’s date of birth, address, and parent contact information from school records, neither the police officers nor the school administrators contacted J. D. B.’s grandmother.

The uniformed school resource officer interrupted J. D. B.’s afternoon social studies class, removed J. D. B. from the classroom, and escorted him to a closed door school conference room. There, J. D. B. was met by



the investigating officer, /the assistant principal, and the administrative intern.

With the two police officers and the two administrators present, J. D. B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J. D. B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room. Questioning began with small talk—discussion of sports and J. D. B.’s family life. The investigating officer asked, and J. D. B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J. D. B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J. D. B. for additional detail about his efforts to obtain work; asked J. D. B. to explain a prior incident, when one of the victims returned home to find J. D. B. behind her house; and confronted J. D. B. with the stolen camera. The assistant principal urged J. D. B. to “do the right thing,” warning J. D. B. that “the truth always comes out in the end.” App. 99a, 112a. Eventually, J. D. B. asked whether he would “still be in trouble” if he returned the “stuff.” In response, DiCostanzo explained that return of the stolen items would be helpful, but “this thing is going to court” regardless. Id., at 112a; *ibid.* (“[W]hat’s done is done[;] now you need to help yourself by making it right”); see also id., at 99a. DiCostanzo then warned that he may need to seek a secure custody order if he believed that J. D. B. would continue to break into other homes. When J. D. B. asked what a secure custody order was, DiCostanzo explained that “it’s where you get sent to juvenile detention before court.” Id., at 112a. After learning of the prospect of juvenile detention, J. D. B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J. D. B. that he could refuse to answer the investigator’s questions and that he was free to leave.<sup>2</sup> Asked whether he understood, J. D. B. nodded and provided further detail, including information about the location of the stolen items. Eventually J. D. B. wrote a statement, at DiCostanzo’s request. When the bell rang indicating the end of the schoolday, J. D. B. was allowed to leave to catch the bus home.

J.D.B. was charged with burglary and theft. The public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because of the lack of the *Miranda* warning and because his statements were involuntary under the totality of the circumstances test. The North Carolina trial court and an intermediate appeal court rejected this argument holding that J.D.B. was not in custody and, further, that the suspect’s age would not be considered in making a determination as to whether he was “in custody” for purpose of determining whether the *Miranda* warning was required. The North Carolina Supreme Court affirmed, with two dissents, and the case was appealed to the U.S. Supreme Court to address the question of whether a suspect’s age should be considered in determining whether a suspect is “in custody” thus requiring administration of the *Miranda* warning.

The Supreme Court re-affirmed that the in custody analysis turns upon an objective test and repeated the standard, “Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions.” Citation omitted. Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to ‘examine all of the circumstances surrounding the interrogation,’ including any circumstance that “would have affected how a reasonable person” in the suspect’s position “would perceive his or her freedom to leave.” On the other hand, the “subjective views harbored by either the interrogating officers or the person being questioned” are irrelevant. The test, in other words, involves no consideration of the “actual mindset” of the particular suspect subjected to police questioning. Citations omitted. Police must make in-the-moment judgments as to when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect’s position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person’s subjective state of mind. A reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. Children “generally are less mature and

responsible than adults,”; that they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,”; that they “are more vulnerable or susceptible to . . . outside pressures” than adults. Addressing the specific context of police interrogation, we have observed that events that “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” (“[N]o matter how sophisticated,” a juvenile subject of police interrogation “cannot be compared” to an adult subject). Describing no one child in particular, these observations restate what “any parent knows”—indeed, what any person knows—about children generally. (Citations omitted.)

*The opinion goes on at some length to discuss the many historical and legal examples of children receiving different or preferential treatment due solely to their age.*

We hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child’s age will be a determinative, or even a significant, factor in every case. . . . It is, however, a reality that courts cannot simply ignore. Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age. Indeed, they are competent to do so even though an interrogation room lacks the “reflective atmosphere of a [jury] deliberation room.” To hold, as the State requests, that a child’s age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults— would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.

The case was remanded to the State Court to consider the age of the detained suspect in determining the custody question.

*J. D.B., Petitioner v. North Carolina*, 131 S.Ct. 2394, 79 USLW 4504 (2011) U.S. Supreme Court.

## **VOLUNTARY CONFESSION –PROMISES BY INTERROGATING OFFICERS.**

On April 23, 2007, Hernandez used a large rock to break into Petra’s Boutique. He took several purses, shirts, and dresses (valued in excess of \$13,000) from the store. The next day, while conducting surveillance on a house, San Antonio Police Detectives Guy Durden and Tony Arcuri encountered Hernandez and found some of the items he had stolen in his girlfriend’s vehicle, which was parked in front of the house. Detectives Durden and Arcuri then handcuffed Hernandez in front of the girlfriend’s three daughters. Hernandez admitted to the officers that he had stolen all of the items in the vehicle and asked that nothing happen to his girlfriend or her children. Detectives Durden and Arcuri took Hernandez to the police station where Hernandez admitted during a video-recorded interview with Detective Durden that he had broken into Petra’s Boutique and had stolen several purses and articles of clothing. He also told Detective Durden where many of the other items taken from Petra’s Boutique could be found. Many of these items were returned to Petra Williams, the owner of Petra’s Boutique. The State charged Hernandez with burglary and theft.

A statement is involuntary if it is obtained by a positive promise of some benefit to the accused that is “made or sanctioned by someone in authority, and [is] of such an influential nature that it would likely cause a defendant to speak untruthfully.” (*Citation omitted*) After reviewing all of the evidence at Hernandez’s suppression hearing, the trial court found that the totality of the circumstances indicated that Hernandez voluntarily gave his statement. The court also found that Detective Durden made no improper promise that likely led Hernandez to implicate himself falsely and that Hernandez’s statement was not obtained by compulsion or persuasion.

After reviewing all of the evidence at Hernandez’s suppression hearing, the trial court found that the totality of the circumstances indicated that Hernandez voluntarily gave his statement. The court also found that Detective Durden made no improper promise that likely led Hernandez to implicate himself falsely and that Hernandez’s statement was not obtained by compulsion or persuasion.

Hernandez argues that these findings are erroneous because he testified at the suppression hearing that when he was arrested, Detective Durden made three threats or promises that resulted in his involuntary confession. Hernandez testified that he was told that if he “manned up” to the crime, then: (1) the State would charge him only with theft and not burglary; (2) the State would not charge his girlfriend; and (3) the Department of Family and Protective Services would not be called to take his girlfriend’s children into custody. Conversely, Detectives Durden and Arcuri both testified that they never made any such promises or threats. Detective Durden testified that when Hernandez was arrested, he initially accepted responsibility for stealing the clothes and other items and asked that nothing happen to his girlfriend or her three children. Durden further testified that he offered nothing to Hernandez in exchange for a confession. Detective Durden stated that it was his “perspective that [Hernandez] was accepting responsibility for what he did. If he truly was the person that this property belonged to and it wasn’t her, again, that he was manning up to it, he didn’t want her to get in trouble for it, so that’s all.” Detective Arcuri testified that Hernandez on his own initiative wanted to cooperate because he did not want his girlfriend to go to jail or her children to go to a shelter. Detective Arcuri testified that he told Hernandez that if Hernandez “manned up” and told him everything, he would not place his girlfriend under arrest that evening. He explained that he decided not to arrest Hernandez’s girlfriend because he was not obligated by law to place her under arrest, her kids were present at the scene, and Hernandez offered to go to the police station and give a statement admitting what had happened. Furthermore, Hernandez’s video-recorded statement does not show that Detective Durden made any statement positively promising Hernandez anything in exchange for his testimony. During the interview, Detective Durden alluded to his prior conversation with Hernandez about what was in the best interest of his girlfriend’s children. Detective Durden also told Hernandez that he was booking him only for possession of stolen property and not for burglary, but said that “whatever this adds up to is what you are going to jail for.” Hernandez next argues that the admission of his confession was improper because Detective Durden failed to inform him of his right to terminate the interview.

For a defendant’s oral statement to be admissible, article 38.22 of the Code of Criminal Procedure requires, inter alia, that the defendant be warned of his “right to terminate the interview at any time.” See TEX. CODE CRIM. PROC. ANN. art. 38.22, §§ 2(a)(5), 3(a)(2) *Citation omitted*. However, this requirement does not apply “to any statement which contains assertions of facts or circumstances that are found to be true and . . . establish the guilt of the accused, such as the finding of secreted or stolen property.” TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(c); *Citation omitted*.

Detective Durden did not warn Hernandez during the video-recorded interview that he had the right to terminate the interview at any time. However, the trial court found that during the interview, “[Hernandez] provided . . . detail as to how and why the crime was committed. Stolen property was recovered as a direct result of the defendant’s statement.” The video-recorded statement reflects that Hernandez revealed to Detective Durden the identity of the person to whom he had sold several of the stolen items.

According to Detective Durden’s testimony, several items were retrieved from that person and returned to Petra Williams. Hernandez’s statement contained facts regarding the location of stolen property that were found to be true and led to the finding of the stolen items. Thus, under article 38.22, a warning that Hernandez had the right to terminate the interview was not a prerequisite to the admissibility of Hernandez’s statement.

*Hernandez v. State*, No. 04-10-00396-CR, 4th Ct. App. – TEX. San Antonio, August 24, 2011, unpublished.

## INTERROGATION – VOLUNTARY STATEMENT

After a jury verdict convicted him of murder, the defendant, McKnight, appealed claiming, among other things, that his statement was not voluntary. Officer Bergen received notice that a resident in Galveston had reported seeing an intoxicated person at the end of her street. When Officer Bergen arrived on the scene around 5:45 a.m., he found McKnight rolling around on the ground next to a Jeep wearing only boxer shorts. McKnight's shoes were scattered on the ground and a pair of pants was hanging from one ankle. Officer Bergen recognized the Jeep as the one he had seen driving through the neighborhood earlier that same morning. McKnight was possibly intoxicated, unresponsive, and had to be helped to his feet. When questioned, McKnight told Officer Bergen his name, but was unable to tell him the date or where he was. Officer Bergen read McKnight his rights and arrested him for public intoxication and driving while intoxicated.

Sergeant Shannon arrived around 5:50 a.m. after Officer Bergen called for assistance. While conducting an inventory of the Jeep, Sergeant Shannon leaned his head through the open front driver's side window and found the Jeep "smelled like a person had been dead for a long time." Sergeant Shannon removed a sheet on the back floorboard and found Ubaldo's body. McKnight's fingerprints were found in various places in and on the Jeep, including on the driver's side door handle, the steering wheel, and the driver's side window. Officers placed McKnight in a patrol car around 6:00 a.m. They then transported him to the police station around 7:45 a.m. McKnight was placed in a holding cell until he was removed for sobriety testing around 1:00 p.m. The officer who administered the tests determined that McKnight did not appear intoxicated, but did not include a breathalyzer or blood test. Sergeant Echols and Sergeant Putnam began interviewing McKnight at around 3:40 p.m., approximately nine hours after his arrest, and the interview lasted about four and a half hours. The officers again read McKnight his rights before beginning the interview, and McKnight signed a written waiver of those rights. McKnight was relatively quiet during the first hour and a half of the interview. He cooperated with the officers to the extent that he answered questions, though Sergeant Putnam characterized his responses as evasive. He occasionally rubbed his arms up and down, which Sergeant Echols believed was a reaction to drugs. At one point, Sergeant Echols acted frustrated with McKnight's responses and walked out of the interview room as part of an interrogation technique. After this, McKnight became more talkative. McKnight was still in his boxers at the start of the interview and for about 90 minutes before he was given clothing. Sergeant Echols later testified that he believed McKnight was wearing a swimsuit, which he stated was not uncommon for people arrested in the Galveston area. When McKnight asked for clothes, Sergeants Echols and Putnam sent for clothing from the jail because no clothes were immediately available at the interview location. The officers also provided McKnight with food and breaks during the interview to use the restroom and smoke.

McKnight eventually informed Sergeant Echols that he had held Ubaldo at gunpoint, put tape over his mouth, and that it "could have been" him who hit Ubaldo and broke his nose. McKnight stated that he and his alleged accomplice purchased the duct tape. McKnight also admitted that he purchased the heroin that was injected into Ubaldo. McKnight also said that it "could have been" him who assisted in the planning and that he participated in the "jacking," or robbing, of Ubaldo.

McKnight never asked for an attorney, though he asked for his mother and stated that he wanted to talk to "somebody" several times. Sergeant Echols or Sergeant Putnam never promised anything in exchange for cooperating. Finally, McKnight did not ask the officers to stop the interview at any point. At one point in the interview, Sergeant Echols asked, "Is this interview about to be over?" McKnight responded, "No."

Officer Bergen testified that when he encountered McKnight on the morning of his arrest, he appeared to be intoxicated. McKnight, however, passed a sobriety test administered about seven hours after his arrest, before the custodial interview began. McKnight appeared to have the normal use of his mental and physical faculties at that time. Sergeant Echols testified that when he interviewed McKnight nine hours after his arrest, he was "very responsive," was able to carry on a conversation, and appeared to have "his mental faculties about him." Both

Sergeant Echols and Sergeant Putnam testified that they believed it was inappropriate to conduct the interview while McKnight was in his underwear and that they obtained clothing as soon as possible from the jail. McKnight testified that he did not tell the officers everything he knew because he “didn’t want to get in trouble.” McKnight never claimed that he was embarrassed or uncomfortable due to his lack of outer garments or the conditions of the interview.

A defendant’s recorded custodial statement may be used as evidence against him if the defendant made it freely, voluntarily, and without impermissible compulsion or persuasion. See Tex. Code Crim. Proc. Ann. art. 38.21. A custodial statement is involuntary “if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker.” *Citation omitted*. In other words, the ultimate question is whether the defendant’s will was “overborne.” *Citation omitted*. We examine the totality of circumstances surrounding the confession to determine whether a confession is voluntary. *Citation omitted*.

McKnight first asserts that law enforcement officers deprived him of sleep and clothes, making his statement involuntary. He maintains was not given a chance to sleep in the nine hours between his arrest and his questioning, the majority of which appears to have been spent in a holding cell, and that a short nap in a patrol car was insufficient. Generally, sleep deprivation must be deliberate and severe in order to rise to the level of coercion. *Citation omitted*. While there was no evidence of whether McKnight slept for an extended time between his arrest at 6:00 a.m. and his interrogation at 3:40 p.m., his alleged sleep deprivation was not as a result of the deliberate efforts by law enforcement or of such duration as to make his statement involuntary. Further, the interviewing officers provided McKnight with necessities like clothing, food, access to the restroom, and a cigarette break. While about 90 minutes passed before McKnight was provided with clothing, both interrogating officers testified that they did not have immediate access to clothing at the interview location. Sergeant Echols also testified that he believed McKnight was wearing a swimsuit, which was common for people arrested in the Galveston area. A delay in providing a defendant with clothing, beyond underwear, does not necessarily constitute coercive conduct. Second, McKnight asserts that Sergeant Putnam’s comment that telling the truth would “look good to the Judge and the DA” was extremely misleading and constituted coercion.

A defendant’s statement may be found involuntary due to improper inducement or coercion if it is improperly induced by a promise that was “(1) positive, (2) made or sanctioned by someone in authority, and (3) of such an influential nature that it would cause a defendant to speak untruthfully.” (*citation omitted*). These general comments that McKnight tell the truth are not sufficient to constitute police coercion. McKnight also never expressly invoked his right to remain silent or requested that the interview stop, and the trial court concluded that McKnight “never unequivocally and unambiguously invoked his right to remain silent.” Both the United States Supreme Court and the Court of Criminal Appeals have determined that a defendant must unambiguously invoke his right to remain silent. Finally, McKnight asserts that he was intoxicated and incoherent at the time of his arrest and that he was incapable of giving a voluntary statement when questioned later that same day. While relevant, evidence of intoxication or the influence of drugs does not necessarily render a statement involuntary.

The record demonstrates that officers informed McKnight of his rights at his arrest and again nine hours later, before the start of his interrogation, and that he signed a written waiver of those rights. Law enforcement officers did not deprive him of basic necessities for an extended period of time or promise him anything beyond that the State generally favored someone who cooperated and told the truth. The trial court heard testimony that McKnight was coherent and responsive by the time he made his statements. Finally, McKnight made no attempt to terminate the interview, continued to talk to the officers, and made no attempt to ask for a lawyer or otherwise assert his rights. Based on the totality of the circumstances, we conclude that the trial court did not err in denying McKnight’s motion to suppress and finding McKnight made his statement voluntarily.

*McKnight v. State*, NO. 01-09-00852-CR, 1st Ct. App – Tex., Houston. 2011. Unpublished.

## SEARCH & SEIZURE, EMERGENCY ENTRANCE, EVIDENCE ADMISSIBILITY.

Shortly after midnight, deputies responded to a residential disturbance call. There were reports of yelling, screaming, and the sounds of objects being thrown in the apartment. When knocking at the door, officers heard sounds of a violent disturbance and people yelling as if intoxicated. The officers made entry based upon initial consent and upon the emergency doctrine. “Under the emergency doctrine, an officer may enter a residence if he has an immediate, reasonable belief that he must act to protect or preserve life or avoid serious injury. If the emergency doctrine applies, an officer may seize any evidence that is in the plain view during the course of his legitimate emergency activities.”

While inside, officers could not confirm that any assault had taken place and the boyfriend was not present – only Ms. Miller and her children. Once inside, the occupant (Ms. Miller) repeatedly asked the officers to leave; however, they remained to await results of warrant checks (according to the facts determined by the court). During this time, officers recognized drug paraphernalia in the apartment and conducted a search which revealed drugs resulting in Ms. Miller’s being charged for possession. The record reflects that, when he first arrived at appellant’s door, Deputy Yarborough was approaching the situation as a domestic assault, already seemingly having decided, before any contact with appellant, that the third-party report of yelling, screaming, and the sounds of objects being thrown in appellant’s apartment were the sounds of domestic assault, a not unreasonable conclusion. But somewhat contradictorily, he also appears to have assumed that the perpetrator had left and that appellant might think that the perpetrator had returned.

His assumptions colored his behavior throughout his interactions with Miller who repeatedly said that she was upset because her boyfriend was cheating on her, but there is nothing in the record that reveals how or when she found that out—in person from him or by the grapevine, e-mail, or telephone. She also told the officers that the boyfriend was not there and that she did not know where he was. The officers clearly believed her as to the boyfriend’s absence, as they made no attempt to search the apartment for him or anyone else. Yet, long after it had become clear that no domestic violence had occurred that evening, the responding officer continued to treat the situation as a domestic assault, pressing appellant for her boyfriend’s name and whereabouts, even after several denials of physical contact or knowledge of the boyfriend’s location and with no evidence of physical harm.

While officers are clearly entitled to complete their investigation of a situation that may involve domestic violence, and the record here supports a conclusion that such an investigation was appropriate, the record does not support a conclusion that the noises that the officers heard before making contact with appellant, the “disarray” in her apartment, or her intoxication in her own home justified the officers’ continuing presence once their investigation of possible domestic violence had been completed.

The recordings reveal, however, that the officers recognized upon entry that appellant was the only adult present. They accepted her assurances that the only other persons in the apartment were her “babies” and made no attempt to search the apartment for her boyfriend or her children, thereby making clear that they perceived no emergency that would require remaining in appellant’s apartment in order “to protect or preserve life or avoid serious injury,” and Deputy Mitchell testified that no other emergency situation, such as destruction of evidence, existed at any of the four times at which appellant told the officers to leave her home. Based on the record before us, the court of appeals erred when it found that the officers’ presence was justified under the emergency doctrine.

The court sustained appellant’s (Miller) first ground for appeal and consider whether the officers’ continued presence is justified under another theory of law.

It is undisputed that appellant consented to the initial entry by the officers, but it is also undisputed that such consent may be limited or revoked. “If an officer is invited or permitted to come into a house for a particular

purpose (such as to look for a particular person or object), the scope of the consent to enter normally includes consent to search those areas in which the person or object would reasonably be found. But the person who consents to the entry may specifically limit or revoke his consent.

The trial court's fact findings and conclusions of law state that the officers' presence in the apartment at the time they found the illegal substance was permissible as part of their investigation for domestic violence. But the Court of Criminal Appeals found that the record did not support this. Although it is undisputed that the officers' initial entry into the apartment was part of their investigation for domestic violence, it is also undisputed that they found no evidence of domestic abuse, appellant told them to leave four times, and the only reason that they did not leave was because they were waiting for a return on the warrant check on appellant. The officers' explanation for refusing to leave before they received the warrant check was, essentially, "But we always do it that way." This is insufficient justification for their continued presence, as is the state's argument that remaining in appellant's apartment was appropriate because the entire encounter was very short—under six minutes.

The Court of Criminal Appeals concluded that the trial court's factual finding that the police presence in the appellant's apartment was part of a reasonable domestic-violence investigation is accurate with respect to the officers' initial entry, but it does not support a legal conclusion that the officers were still completing their investigation of domestic violence at the time they remained in appellant's apartment while waiting for a return on the warrant check and at the time that the illegal substance was found. At that point, the appellant had told them four times to leave, and the officers, by their own admission, were planning to leave the apartment after the results of the warrant check came back because their domestic-violence investigation had been completed.

The Court held that appellant had revoked her consent to enter, the officers had no probable cause to arrest her until after the fourth iteration of her revocation of consent, and that, by remaining in her apartment, the officers were not at a vantage point where they had the right to be.

*State v. Miller*; No. PD-0705-11, Texas Court of Crim. App. Nov. 21, 2012.

## Traffic

### TRAFFIC. DRIVING ON SHOULDER OF ROADWAY.

The appellant was driving west on Highway 114 in Boyd. At a railroad crossing, the car in front of him slowed down, and the appellant used an improved shoulder to pass the slowing car as they crossed the tracks. Officer Estel was driving east on Highway 114. Estel observed the appellant's driving and stopped him for illegally driving on an improved shoulder.

For reasons not contained in the record, the appellant was arrested for driving while intoxicated.

Prior to his DWI trial, the appellant moved to suppress all evidence obtained as a result of the traffic stop on the basis that Estel's traffic stop was improper because Estel did not have reasonable suspicion that the appellant had committed a criminal offense.

The appellant argued that his driving was legal under Transportation Code section 545.058(a):

- (a) An operator may drive on an improved shoulder to the right of the main traveled portion of a roadway if that operation is necessary and may be done safely, but only:
- (1) to stop, stand, or park;
  - (2) to accelerate before entering the main traveled lane of traffic;
  - (3) to decelerate before making a right turn;

- (4) to pass another vehicle that is slowing or stopped on the main traveled portion of the highway, disabled, or preparing to make a left turn;
- (5) to allow another vehicle traveling faster to pass;
- (6) as permitted or required by an official traffic-control device; or
- (7) to avoid a collision.

The appellant argued that he was “pass[ing] another vehicle that [was] slowing ... on the main traveled portion of the highway ...” The trial court denied the motion to suppress and the appellant pled guilty to DWI.

The Second Court of Appeals affirmed the conviction. It held that driving on an improved shoulder, regardless of circumstance, is *prima facie* evidence of an offense, and that Section 545.058(a) merely establishes defenses that a defendant may raise at trial.<sup>2</sup> The Court of Appeals analogized the “defenses” it read in Section 545.058(a) to the defense of self-defense, and determined that the same burdens of proof applied: the State must produce evidence only of the basic offense, and it is the defendant’s burden to produce evidence of each element of the defense. In this case, the Court of Appeals determined that the “defenses” in Section 545.058(a) consist of three elements: the defendant must show “that driving on the shoulder was done (1) safely, (2) out of necessity, and (3) to effectuate one of the seven defenses enumerated in the statute.” After then determining that the appellant had not produced evidence that his passing on the shoulder was done safely and of necessity,<sup>4</sup> the Court of Appeals determined that he had not carried his burden of production and that Estel had reasonable suspicion for the traffic stop.

We disagree with the Court of Appeals’s statutory analysis. First, we do not read the statute such that “necessary” is a free-standing requirement. When discussing whether a particular action is “necessary,” the relevant inquiry is always: Necessary to what end? By treating necessity as a free-standing requirement, without context, the Court of Appeals ignored that inquiry. If the question were, “When is driving on an improved shoulder *absolutely* necessary?” we would agree with the Court of Appeals that it is hard to imagine a scenario in which it is.

But the legislature gave us a statute that lists several situations in which driving on the shoulder may be permitted, most of which would never be *absolutely* necessary. For instance, subsection (a)(4) allows a driver to use an improved shoulder to pass a vehicle preparing to make a left turn, but such an action would never be absolutely necessary – the driver could simply come to a stop behind the left-turning vehicle and wait for it to turn. However, since the statute plainly envisions drivers legally using improved shoulders in order to pass left-turning vehicles, interpreting “necessary” to mean *absolutely necessary* would thwart the legislative intent.

This does not set up a shifting-burden, self-defense-style framework, as the Court of Appeals believed. Rather, it shows that the offense of illegally driving on an improved shoulder can be proved in one of two ways: either driving on the improved shoulder was not a necessary part of achieving one of the seven approved purposes, or driving on the improved shoulder could not have been done safely. Merely driving on an improved shoulder is not *prima facie* evidence of an offense. Thus if an officer sees a driver driving on an improved shoulder, and it appears that driving on the improved shoulder was necessary to achieving one of the seven approved purposes, and *it is done safely*, that officer does not have reasonable suspicion that an offense occurred.

*(Ed. note: would reasonable suspicion of a violation have arisen had the officer documented in his report how driving on the shoulder was unsafe under the circumstances?)*

While there may be circumstances in which arguably legal behavior might produce reasonable suspicion of an offense, here the legislature *explicitly* made certain behavior legal. It would violate legislative intent to allow that behavior to serve as the basis of a traffic stop or arrest.



Applying this interpretation to the facts of this case, we hold that Estel did not have reasonable suspicion that the appellant was illegally driving on an improved shoulder. Estel testified that the car in front of the appellant slowed down noticeably, and that the appellant then used the improved shoulder to pass the slowed car, as authorized by Section 545.058(a)(4). Estel did not testify that using the improved shoulder car was unnecessary to pass the slowing vehicle (*i.e.*, the appellant could have safely passed in the lane used by oncoming traffic), and the fact that Estel himself was driving toward the appellant strongly implies that the lane used by oncoming traffic was unavailable for passing. Estel did not testify that using the shoulder to pass was unsafe. Thus there was no evidence that Estel saw the appellant driving in a manner inconsistent with Section 545.0548(a)(4).

Lothrop v. State, No. PD-1489-11 (Tex. Ct. Crim. App. May 9<sup>th</sup>, 2012).

## **GOLF CARTS ON A PUBLIC ROADWAY**

Texas Attorney General Opinion.

Under what circumstances may golf carts be operated in accordance with the Transportation Code?

Transportation Code §551.403 provides for operation of golf carts in master-planned communities, on public or private beaches, and on public highways with certain speed and distance requirements. No Texas statute or rule defines the term “master-planned community” whatever that may be. A golf cart may be operated on a public highway only if it is operated during the day, not more than two miles from the location where it is usually parked, and only for the purpose of transportation to or from a golf course.

*Our thanks to the Texas District and County Attorneys Association for this information.*

Texas A.G. Opinion # GA-0966. Sept. 12, 2012.

## **Misc offenses**

### **THEFT OF COMPUTERS – VALUE OF SOFTWARE INCLUDED IN DETERMINING LEVEL OF OFFENSE.**

A Jury convicted the suspect of felony level theft. The jury charge did not specifically define the term “computer”.

A person commits theft if he unlawfully appropriates property with intent to deprive the owner of property. Tex. Penal Code Ann. § 31.03(a) (Vernon 2011). The offense is —a felony of the third degree if the value of the property stolen is \$20,000 or more but less than \$100,000.|| *Id.* § 31.03(e)(5).

Chapter 33 of the penal code, entitled Computer Crimes, provides different definitions for the terms computer, computer network, computer program, computer services, computer system, and computer software. *See* Tex. Penal Code Ann. §§ 33.01(4)-(9) (Vernon 2011). Computer is defined in Chapter 33 as an electronic, magnetic, optical, electrochemical, or other high-speed data processing device that performs logical, arithmetic, or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, or communication facilities that are connected or related to the device. *Id.* § 33.01(4).

Based on the Chapter 33 definition, the convicted suspect argued that the value of the two stolen computers must be measured without considering the value of software installed on them. The Court of Appeals rejected this argument.

Section 31.08 defines value in theft prosecutions as (1) the fair market value of the property or service at the time and place of the offense; or (2) if the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the theft. Tex. Penal Code Ann. § 31.08(a) (Vernon 2011). Fair market value, though not statutorily defined, is defined by caselaw as the amount the property would sell for in cash given a reasonable time for selling it. *Citations omitted*. Put another way, fair market value for purposes of a theft prosecution may be expressed as —the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying. *Citation omitted*. An owner may testify either in terms of purchase price or replacement cost, and is presumed to be testifying to an estimation of fair market value. *Citation omitted*. Highly specialized host, command, and mobile software had been installed on the two stolen Toughbook computers; this software was part of the computers —at the time and place of the offense|| for purposes of calculating the computers’ fair market value under Chapter 31.

*(ed. note: When calculating the value of a stolen computer, try to include the value of the software loaded on the computer in order to define the level of offense. When taking initial reports, the value may be unknown, but the officer should attempt to include in the report, to the extent possible, all software programs which are loaded on the stolen computer.)*

*Uyamadu v. State*, NO. 14-10-00393-CR (Tex. Court of Appeals – Houston [14<sup>th</sup> Dist] December 29, 2011)

## **CONSPIRACY ELEMENTS – DRUG TRAFFICKING – ENTRAPMENT ELEMENTS.**

Appellants Mark Anthony Milan, Cristobal Cervantes, and Luis Eduardo Alvarez were convicted on charges stemming from a sting operation conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Appellants, along with a fourth defendant who did not appeal, worked with an undercover agent to plan an armed home invasion with the aim of stealing a large quantity of drugs. The home invasion was a sham. Appellants were arrested on the day the invasion was set to happen and subsequently indicted on six counts. After a jury trial, Appellants were convicted on all six counts. They now appeal their convictions and sentences on a number of grounds. As explained below, the district court’s only error occurred when it applied a sentencing enhancement that should not have been applied. Appellants’ other arguments lack merit. Therefore, we AFFIRM the convictions of Cervantes, Alvarez, and Milan; VACATE the sentences of Cervantes and Alvarez; and REMAND for resentencing.

Alvarez contends here that there was insufficient evidence to convict him of conspiracy to possess a controlled substance with intent to distribute and aiding and abetting the possession of a firearm in furtherance of a drug trafficking crime. He argues that there was no evidence that he knew about the drugs involved in the armed home invasion, and he claims that the government did not prove that he shared his co-conspirators’ criminal intent for the aiding and abetting charge since the undercover agent initially only met with Milan and Cervantes to plan the home invasion. As explained below, these arguments are unpersuasive. The government presented sufficient evidence, viewed in the light most favorable to the verdict, showing that Alvarez conspired to possess a controlled substance with intent to distribute and that he aided and abetted the possession of a firearm in furtherance of a drug trafficking crime.

The elements of Alvarez’s drug conspiracy charge are (1) an agreement with another person; (2) knowledge of the agreement; and (3) voluntary participation in the conspiracy. *United States v. Percel*, 553 F.3d 903, 910 (5th Cir. 2008). “Absent direct evidence of an agreement, the jury can infer the existence of an agreement from circumstantial evidence.” *Id.* Viewed in the light most favorable to the verdict, the government presented sufficient evidence to justify Alvarez’s conspiracy conviction. The government presented uncontradicted testimony identifying Alvarez at the site of the arrest and as the individual, prior to arrest, who

stated that he was “going in first” and that the armed men were “not rookies.” These statements were recorded and presented at trial. Further, after verifying that Alvarez spoke English, the agent explained the nature of the invasion in detail to the four defendants. Specifically, the agent reiterated that the house would be guarded by at least two individuals, one of whom had a firearm, and that there would be at least twenty-five kilograms of cocaine for the men to steal. The circumstances surrounding the arrest show that the four defendants were clearly engaged in a joint criminal enterprise, and the jury was entitled to credit the evidence and testimony presented. The jury thus had more than sufficient evidence to conclude that the elements of a drug conspiracy were met.

To be convicted of aiding and abetting possession of a firearm in furtherance of a drug trafficking crime, the government must show (1) that the offense occurred and (2) that Alvarez associated with the venture, participated in it as something he wished to bring about, and sought to make it succeed. *Percel*, 553 F.3d at 911. Alvarez must also have shared the group’s criminal intent. *Id.* In his brief, Alvarez contends that there was insufficient proof that he shared his partners’ criminal intent or that he knew the crime involved drugs. Here again, the government presented sufficient evidence, viewed in the light most favorable to the verdict, to convict Alvarez.

As explained above, Alvarez clearly knew that the group’s plan involved drugs. The undercover agent asked Alvarez if he spoke English and then reiterated that they were to rob a drug stash house containing at least twenty-five kilograms of cocaine. Alvarez contends that he was present for an insufficient amount of time for a proper criminal scheme to form, but the test does not include a temporal element. At no time did Alvarez express disagreement with the plan or attempt to disassociate himself. Likewise, Alvarez shared his partners’ criminal intent. Alvarez told the undercover agent that he would go in first and specifically reiterated that the group did not consist of rookies. He knew that the group was armed, he was prepared to participate, and he wanted the invasion to succeed. Given this evidence, a rational jury could certainly have found Alvarez guilty beyond a reasonable doubt. Therefore, we affirm.

The entrapment defense operates using a burden-shifting regime. *United States v. Theagene*, 565 F.3d 911, 918 (5th Cir. 2009). If a defendant makes a prima facie showing of entrapment,<sup>1</sup> then the government must prove beyond a reasonable doubt that the defendant was already predisposed to commit the alleged offense when the government approached him. *Id.* There is no formulaic way to prove predisposition. See *United States v. Chavez*, 119 F.3d 342, 346 (5th Cir. 1997) (per curiam) (“Many factors may indicate a defendant’s predisposition . . .”). In fact, “a defendant’s ready and willing participation in government-solicited criminal activity, standing alone, is sufficient to prove predisposition.” *United States v. Reyes*, 239 F.3d 722, 739 (5th Cir. 2001). Other possible factors include “desire for profit; demonstrated knowledge or experience with the criminal activity under investigation; the character of the defendant, including past criminal history; whether the government first suggested criminal activity; and the nature of the inducement offered by the government.” *Id.*

Here, the government presented sufficient evidence, viewed in a light most favorable to the verdict, to support the jury’s rejection of Appellants’ entrapment defenses. Cervantes demonstrated his eagerness to participate in the ATF’s proposed home invasion on a number of occasions. He met with the undercover agent three separate times and, on the day of his arrest, showed the agent the pistol he intended to use as he tucked it in his waistband. Likewise, Alvarez volunteered to the agent that he would “go in first,” a clear indication of eagerness. The two men also clearly had a profit motive since the cocaine they were going to steal was worth nearly half a million dollars. On no occasion did either Cervantes or Alvarez express hesitation or doubt concerning the group’s plan. There was thus sufficient evidence to demonstrate that Cervantes and Alvarez were predisposed to commit this crime. Therefore, we affirm.

*U.S. V. Cervantes*, No. 11-41385, 11-41407 (5<sup>th</sup> Cir. Jan. 30, 2013).

## DRUG CONSPIRACY

Perez was charged with possession with intent to distribute fifty grams or more of methamphetamine and conspiracy to do the same. He pleaded not guilty and requested a jury trial. Following his conviction on both counts, the district court sentenced him to 292 months of imprisonment. The Fifth Circuit affirmed the judgment of sentence and conviction.

This case arises out of a drug transaction conducted on May 23, 2011. On May 10, undercover agent Jose Lopez was introduced to Rene Martinez. Lopez told Martinez that he sought to purchase four pounds of methamphetamine. Around May 20, at The Golden Corral restaurant in Laredo, Texas, Martinez provided Lopez with several methamphetamine samples supplied by Martinez's "cousin." Martinez informed Lopez that the four pounds of methamphetamine were in Mexico, but that they would be smuggled into the United States and, on May 23, delivered to Lopez. The delivery was to take place in a parking lot near The Golden Corral, for a price of \$13,000 per pound.

On May 23, Martinez arrived at the parking lot in a black truck. He informed Lopez that a friend had the methamphetamine in a white van and instructed that person to drive over to them. Lopez saw the van and directed it into a parking spot across from where Martinez was stopped. Martinez and Lopez walked over to the van. Lopez then met the driver—appellant Israel Perez-Solis—whom Lopez had not previously seen or suspected of involvement.

Lopez secretly recorded his conversation with Perez and Martinez. At trial, Lopez testified that the conversation went as follows: Lopez asked Perez whether he had "it," referring to the methamphetamine. Perez said "we need[] to go somewhere else to take it out" because it was in "a compartment." After Lopez asked where "it" was, Perez stepped out of the van and walked to its trunk. Perez opened the van's back doors to reveal a blue ice chest, and, according to Lopez, "pointed to the drugs being in the ice chest." Martinez asked whether the transaction could be completed in Lopez's nearby hotel room, a question Lopez ignored. When Lopez asked Perez "where exactly it was," Perez told Lopez that the lining of the ice chest needed to be removed and helped him to remove it. Perez did not look surprised when he removed the lining from the cooler. After doing so, Lopez further testified, Perez took out two packages of methamphetamine, told Lopez that the remaining two packages were on the other side of the liner, and handed a package to Lopez. At Lopez's signal, Drug Enforcement Administration (DEA) agents arrested both Perez and Martinez.

An audio recording of the conversation was also admitted in evidence. The prosecution played the recording for the jury (in Spanish), accompanied by a written translation. According to the transcript, Perez told Lopez, "I have it hidden. Where can we take to open it?" And when Lopez later asked, "Will you take [it] out[?]" . . . [C]an I see all four (4)?," Perez told him, "[i]t's all here. There's one . . . [a]nd the other one is over here." Lopez acknowledged on cross-examination that—as the transcript indicates—he "never told [Perez] you have the methamphetamine" and "never asked him do you have the drugs," instead using only the word "it." Lopez further acknowledged that Perez used the word "it" rather than "methamphetamine" or drugs; that Perez never said the phrase "in the lining;" and that although Perez said "it" was hidden, he did not say "hidden compartment"—Perez "could have [meant] that the cooler itself was hidden in the truck."

DEA agent Patrick Curran testified next. He explained that on May 23, Martinez's black truck drove in and out of a parking lot several times, as though the driver were attempting to determine whether he was being observed. At some point Perez's white van appeared to be "traveling in tandem with the [truck]. I mean, the van was very close to his rear bumper. They followed the same route through the parking lot before the truck had left." Curran does not appear to have testified, however, that the white van drove in and out of the lot several times. He also acknowledged on cross-examination that although he observed the transaction between Lopez and Martinez on May 20, he did not see Perez on that day.

DEA group supervisor Gilberto Hinojosa followed Curran on the stand. Hinojosa interviewed Perez on May 23. Perez claimed that a neighbor-acquaintance, whom he had known for many years but could not name, asked him to come from Mexico to Texas, pick up a cooler, and deliver that cooler to someone in exchange for \$300. Perez said he received a series of phone numbers, which he called for further instruction. Hinojosa felt Perez had “pretended” to be unable to remember the name of the street from which he received the cooler. And he described Perez’s story as coming “in layers. [I]nitially he denied knowing anything about it. Then when I brought it to his attention how ridiculous a story that was, then he would add a little bit more and add a bit. Ultimately, the story was – because I asked him.” Finally, Perez disclosed that the methamphetamine likely belonged to Hector Alaniz.

Cross examination focused almost entirely on two facts. First, although Hinojosa supervised the investigation, he was unaware of Perez’s involvement until the day of the bust. Second, Perez did not admit to knowledge of the drugs prior to the bust, or to participation in other drug activity. Redirect established that total surveillance between May 10 and 23 lasted only about four to eight hours, and that Perez could have met Martinez without Hinojosa’s knowledge.

After Perez moved unsuccessfully for a directed verdict, he took the stand. Perez testified that he owned an electronics-related business in each of Nuevo Laredo, Mexico, and Laredo, Texas. The conversation turned to Hector Alaniz. Perez testified that he had known Alaniz for roughly seven months. Initially, Alaniz was simply a patron of Perez’s business. At one point, he brought to Perez’s store a “compadre” of his who lived near Perez’s father’s home. (Alaniz’s “compadre” was Perez’s father’s “neighbor.”)

Perez’s relationship with Alaniz turned friendlier. They occasionally had lunch together, for which Alaniz would offer to pay. Once Alaniz realized that Perez was living in Laredo, Perez testified, “he started asking me a lot of favors.” The favors were essentially errands: purchasing a computer from Best Buy (for which he was reimbursed and paid sixty or seventy dollars); a “Super Chip” from Pep Boys; a toolbox for Perez’s truck, etc. Each purchase was made at a well-known establishment, always with Perez’s credit card. Alaniz compensated Perez for his efforts, reimbursing him for expenses and adding “whatever [Alaniz] thought was fair.”

The final favor that Perez did for Alaniz before the bust involved retrieving some documents from Roma, Texas. Perez retrieved the documents on May 9, but was not compensated at that time. Including reimbursement, Perez expected to receive \$200–\$250 for the errand. On May 23, the day of the bust, the “neighbor” came to his shop and informed him that Alaniz would pay him in Laredo, Texas, for the Roma favor.

Later that day, while driving to Laredo, Perez called the “neighbor” to ask where he should go to be paid. The “neighbor” told Perez that he had given Perez’s number to someone, who would call him. A person named Demetrio called and said that his “cousin” would pay Perez at a warehouse near Mines Road. That “cousin”—whom Perez later learned was Rene Martinez—gave Perez another phone number, which apparently belonged to a “Night Watch[man].” At some point Perez spoke with Alaniz to inquire about who would be paying him. Alaniz informed Perez that he should give the night watchman fifty dollars for an item to be delivered to Martinez. Perez paid the watchman fifty dollars for an “ice chest” and called Martinez, who instructed him to go to The Golden Corral.

Perez testified that he arrived at the Corral before Martinez and did not follow Martinez’s vehicle. A man wearing a blue shirt signaled to Perez and indicated where Perez should park. When the man—evidently Lopez—asked Perez whether he had anything for Lopez, Perez informed him that the ice chest was in the back of Perez’s van. Perez testified that he did not open the cooler and implied that he did not remove the methamphetamine from the cooler. He was surprised, he added, to see the hidden contents of the cooler.

Perez first argues that insufficient evidence supports each of his convictions.

Perez’s conspiracy conviction required proof, beyond a reasonable doubt, of the existence of an agreement to possess fifty grams or more of methamphetamine with the intent to distribute it, as well as Perez’s knowledge of and voluntary participation in that agreement. A “jury may infer a conspiracy agreement from circumstantial evidence, and may rely upon presence and association, along with other evidence, in finding that a conspiracy existed.”

Perez’s argument focuses on whether evidence demonstrates that he had knowledge of *Martinez’s* agreement with others. It centers on two propositions. First, the government was unaware of Perez’s involvement with Martinez until the day of their arrest. Second, Perez was not aware he was transporting methamphetamine.

The record provides a simple explanation for why the government was unaware of Perez’s involvement: surveillance was limited. DEA group supervisor Hinojosa testified that surveillance prior to May 23 lasted only about four to eight hours, and that Perez could have communicated with Martinez without Hinojosa’s knowledge. Moreover, agent Curran testified that Perez’s white van appeared to be “traveling in tandem with [Martinez’s black truck].” This suggests collaboration and cooperation. Moreover, Perez admitted that he spoke to Martinez on the phone on May 23, though he contended that their conversation was innocuous. And as agent Lopez testified, Perez waited at the ready for Martinez to summon him to The Golden Corral.

The second proposition also lacks force. Perez suggests that agent Lopez misunderstood the word “it,” interpreting it to refer to methamphetamine rather than the cooler or the drinks contained therein. We are not convinced. First, the transcript makes clear that Perez said “and the other one is over here.” If Perez was discussing beverages plainly visible inside the cooler, there would be no need to say “and the other one is over here.” Instead, the phrase suggests that Perez was referring to methamphetamine hidden in another portion of the cooler’s lining, even if he never said the word “liner.” Second, Perez’s question, transcribed as “[w]here can we take to open it[?],” suggests that he knew he was not talking merely about a cooler containing legal beverages. The idea that the cooler could not be opened in a parking lot suggests a fear that its illegal contents would be observed. Third and finally, even if the audio recording is ambiguous, translation of the *audio* recording has no bearing on Lopez’s testimony about what he *saw*. Lopez testified that Perez did not look surprised when the lining of the cooler was removed, and testified that Perez showed him how to access the drugs. Even putting aside whether Perez’s testimony is so implausible as to itself be incriminating, in the light most favorable to the verdict, this evidence establishes far more than Perez’s mere “association with the conspirators, and his presence at the time of the transactions.” There is no error here, plain or otherwise.

Perez’s possession conviction required proof, beyond a reasonable doubt, that he knowingly possessed fifty grams or more of methamphetamine and intended to distribute it. Perez argues that there was insufficient evidence to establish that he knew he was delivering drugs, but a reasonable jury could have concluded otherwise. The government presented evidence that Perez indicated that “it” was in the cooler. Perez suggested that they open the cooler elsewhere, indicating that he wanted to keep its contents secret. He showed no surprise when drugs were removed from the lining of the cooler. These facts and others provide sufficient evidence from which a reasonable jury could infer knowledge.

*U.S. V. PEREZ-SOLIS*, No. 12-40056, 5<sup>th</sup> Cir., Feb. 20<sup>th</sup>, 2013.

## **CHILD ENDANGERMENT . ELEMENTS.**

Garcia’s conviction for endangering a child was reversed by the Court of Appeals on the basis of insufficient evidence. The court of Criminal Appeals held that the court of appeals properly determined that the evidence was insufficient to establish that appellant placed her child in imminent danger of bodily injury or physical impairment and, therefore, affirmed.

At 1:51 a.m. on October 28, 2009, Elyse Haynes heard a loud knock and calls for help at her apartment door. When she looked out the window, she observed appellant crying as she held a child that appeared to be one to two years of age. Wearing only a diaper, the child was shivering and had blue lips and a lot of mucus on her face. Haynes was "real concerned" about the child, but did not allow appellant into her home because she did not know her. Haynes did not know how long appellant had been standing outside before she knocked on the door. After Haynes refused them entry, appellant and her child entered Haynes's unlocked car, which was parked nearby.

Haynes called the police, and two police officers arrived about six minutes later. They saw appellant inside Haynes's car with the doors shut and the windows up. When Officer Chesworth saw her in the car, appellant was holding the child loosely on her lap. At around that same time, Officer Bullard saw appellant in the car "holding the baby up against her." The officers opened the car door and smelled alcohol coming from appellant. They also smelled vomit but could not tell if it was coming from appellant or her child. Appellant had slurred speech and appeared disoriented. She refused the officers' assistance; she was belligerent and uncooperative; and she cursed at the officers. Appellant refused to give the names of any family member that could come to care for the child.

The officers noticed that the child's body was cold to the touch and that her lips were blue. Officer Bullard said that he knew that the child "was cold, so [he] knew that we needed to get the child in somewhere." Officer Bullard testified that he was "very much" concerned that the child was cold, "needed help," and needed to be in a "warm environment." Officer Bullard decided to arrest appellant for endangering a child because due to the weather and the wind and me being cold, the fact that the child was cold [], and it was 2:00 o'clock in the morning . . . . The child appeared to be unkempt . . . [with] snot and everything all over [her] nose. The fact that it was – she was in no state to take care of a child at that point due to her intoxication. I felt that the child was more – more in danger than had she, you know, been not intoxicated.

The officers also decided to arrest appellant for public intoxication.

Officer Chesworth asked appellant to hand him the child, but she refused. The officers took the child from appellant for the child's safety so that she would not be injured while the officers took appellant into custody. The officers then handed the child to Haynes. When taken from appellant, the child started crying because she was "very scared."

The officers commanded appellant to get out of the car. Because appellant refused to leave the car, the officers forcefully removed her, placed her in handcuffs, and escorted her into the back of the police car, which took "at least two minutes." While in the back of the police car, appellant attempted to kick out the window. She also slipped out of the handcuffs and lunged through the window at one of the police officers. The officers forcibly controlled her movement by handcuffing her wrists and restraining her feet.

When the police officer handed her the child, Haynes noticed she was "shivering very, very bad." Haynes said she was concerned about the baby that night because "[s]he was cold." Haynes wrapped her own robe around the child until her boyfriend brought her one of her children's jackets, which she placed on the child. Later, one of the officers placed his police jacket around the child. Haynes took the child to her vehicle, where she sat with her for almost 30 minutes in front of the car heater before the child stopped shivering.

Paramedics were never called to attend to the child and no medical attention was required.

When the child ultimately left with a worker with the Texas Department of Family and Protective Services, the officer gave the worker his sweater for the child.

At the time Haynes called the police, the temperature was cool. It was 58 degrees with 69 percent humidity, and there was a breeze between 14 and 21 miles per hour. The adults were dressed for the cool weather. Appellant wore a light jacket with her skirt, and the police officers wore thermal long-sleeve shirts and pants underneath their uniform. The child, however, wore only a diaper that was described by an officer as "huge, wet, and . . . very cold to the touch."

The Texas Penal Code states that a person commits an offense if he "intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment." Tex. Penal Code § 22.041(c).

A jury convicted appellant, and the trial court sentenced her to two years in state jail, suspended for five years of community supervision.

On direct appeal, the court of appeals determined that the evidence was insufficient:

While the evidence presented in this case showed that the child was quite cold and one could infer that, if the child had remained outside with the same clothing the child might have been in imminent danger of bodily injury or physical or mental impairment, we conclude that one could not reasonably determine from the evidence that Garcia's conduct placed the child in imminent danger of bodily injury or physical or mental impairment.

The appeal presented two questions: First, the State asks, "Has a child sustained bodily injury from being too cold as contemplated by the Texas Penal [Code's definition for 'bodily injury']?" *See* Tex. Penal Code § 1.07(a)(8). Second, the State asks, "By failing to properly clothe a child one to two years of age in a manner necessary for the cold weather and surroundings has appellant engaged in conduct which placed the child in imminent danger of death, bodily injury, and physical and mental impairment as contemplated by the [endangering-a-child statute]?"

The Texas Penal Code broadly defines "bodily injury" as "physical pain, illness, or any impairment of physical condition." *Id.* § 1.07(a)(8). The Penal Code does not define "physical impairment," but Texas courts have interpreted "impairment" to include the diminished function of a bodily organ. Viewing the evidence in a light most favorable to the jury's verdict, we conclude that no rational fact finder could have determined that appellant's child had sustained bodily injury or physical impairment. Although there is evidence that the child was shivering, had blue lips, and wore only a wet diaper, no evidence shows that she was experiencing physical pain or impaired organ function from being exposed to the 58-degree weather while wearing only a wet diaper. Haynes testified that the child did not cry until she was taken from her mother's arms and that, at that point, the child was "very scared." At most, the record shows that the child was shivering and had blue lips, which would signify that she was very cold, but she was not crying or otherwise exhibiting any signs of pain or impairment. Although we recognize that a child could sustain bodily injury or physical impairment from exposure to extreme temperatures for a short time or from exposure to more moderate temperatures outdoors for an extended time, the record does not establish that either of those situations occurred here.

No evidence shows that physical pain or impairment was "ready to take place." Evidence that Haynes and the police officers desired to move the child to a warmer place suggests that the child would have been more comfortable elsewhere, but it does not establish that physical pain or impairment was imminent.

Officer Bullard testified that he did not believe the child needed medical attention, but that he "knew if something wasn't done at the point that we were at, that it could turn for the worse and the infant would need to seek medical attention." He never testified, however, that he believed the child was in imminent danger of physical pain or impairment. *See* Tex. Penal Code § 22.041(c). At most, he said it "could" have turned for the worse, suggesting a possibility of an occurrence rather than an imminent danger of it.



The question is not whether the child would have been more comfortable if she was warmer, but whether the child was placed in danger of imminent bodily injury or physical impairment due to the cold and the lack of clothing.

*(Ed. note: This opinion provides a good discussion of the type of evidence to be documented by officers when contemplating a charge on this offense.)*

*Garcia v. State*, No. PD-1516-11 (Tex. Ct. Crim. App. June 6<sup>th</sup>, 2012).

## **PUBLIC INFORMATION ACT – TEXAS SUPREME COURT RECOGNIZES A “PHYSICAL HARM” EXCEPTION TO THE PUBLIC INFORMATION ACT**

In separate requests, two reporters representing three newspapers asked the Department of Public Safety for travel vouchers from Governor Rick Perry’s security detail. One request was limited to the Governor’s out-of-state trips in 2001 and 2007; the other was not confined to a specific period of travel. Believing all of the documents to be excepted from disclosure under the Public Information Act (specifically Government Code section 552.101), DPS sought a ruling from the Attorney General’s office.

Based solely on DPS’s letter and inspection of a subset of the responsive documents, the Attorney General determined that release of the information would place the governor in imminent threat of physical danger. Accordingly, the Attorney General concluded that the information fell within a “special circumstances” aspect of common law privacy that required DPS to withhold the submitted information in its entirety under Government Code section 552.101. The media filed suit in District Court which ruled the information should be released. This was affirmed by a Court of Appeals. The Supreme Court took the appeal and reversed the lower courts holding that there is a common law right to physical safety which creates an exception to the Public Information Act and also that Government Code section 418.176 applies as an exception to the type of records requested. The case was remanded for a factual determination as to whether the specific records fall within the newly created exception.

*Texas D.P.S. v. Cox Texas Newspapers L.P., et. al.*, 343 S.W.3d 112 (Tex. 2011) Decided July 1, 2011.

## **FIREARMS – SECOND AMENDMENT DOES NOT PROVIDE RIGHT TO BEAR ARMS TO ILLEGAL ALIENS.**

Responding to a motor vehicle disturbance, a Dimmit officer arrested a suspect operating a four wheeler after discovering a .22 caliber handgun in the center console. The suspect said the handgun was for killing coyotes on his ranch hand job. The suspect was also found to possess a controlled substance after a white powder wrapped in a dollar bill was also found in his possession. He was arrested for unlawfully carrying a weapon and possession of a controlled substance. His pre-sentence report established that the suspect was an illegal alien from Mexico who originally entered the country in 2005; returned to Mexico; and re-entered the country in 2009 – about 18 months before his arrest. At the time of his arrest, he had been employed as a ranch hand at a nearby dairy for about six months.

The suspect was indicted under 18 U.S.C. § 922(g)(5) for possession of a firearm by an illegal alien. He admitted he was a citizen of Mexico, present illegally in the U.S. and in possession of a firearm. After his motion to dismiss was denied, the suspect entered a conditional guilty plea so as to allow an appeal of his ten month sentence to be followed by three years supervised release. On appeal, the suspect argued that his conviction violated the Second Amendment right of “the people” to bear arms.

The Fifth Circuit Court of Appeals rejected the appeal holding that the Second Amendment right of “the people” did not include aliens who were in the country illegally.

*USA v. Portillo*, 643 F.3d 437 (5th Cir. 2011).

## **PUBLIC AUTHORITY DEFENSE FOR DRUG SMUGGLER, LIMITS**

Sariles was stopped at the Paso Del Norte Port of Entry in El Paso, Texas, driving a van loaded with 97.3 kilograms of marijuana. The Government charged him in a two-count indictment with importation of fifty kilograms or more of marijuana and with possession with intent to distribute fifty kilograms or more of marijuana. At the time of his arrest, Sariles contended that he had been acting in cooperation with Deputy Kevin Roberts of the Reeves County Sheriff’s Department. Prior to the arrest at the border, Deputy Roberts had stopped Sariles on two separate occasions and discovered evidence of narcotics trafficking. Sariles and Roberts entered into an oral agreement for Sariles to avoid charges in Reeves County by providing Roberts with information about load vehicles of marijuana crossing the border from Mexico. According to Deputy Roberts, Sariles was told that he was not to transport any further loads of marijuana into the United States and that if he did so he would be “on his own.” Sariles contended, however, that he could not obtain information about the smuggling operation without running a load of marijuana and that he believed Deputy Roberts wanted him to deliver the load as part of their agreement.

Based on this belief, Sariles filed the requisite notice of a public authority defense pursuant to Federal Rule of Criminal Procedure 12.3. The Government moved to exclude the defense on the grounds that Sariles was not acting at the behest of Deputy Roberts and that, even if he were, the defense was inapplicable because Roberts, as a state official, lacked the actual authority to authorize Sariles to violate federal drug laws.

The district court conducted a hearing and agreed with the Government that Sariles could not present evidence of a public authority defense. The district court reasoned that apparent authority is insufficient and a defendant cannot rely on the defense unless the law enforcement officer has the actual authority to sanction the otherwise illegal conduct. Although Sariles’s subjective belief about his agreement with Deputy Roberts was disputed, it was undisputed that Roberts lacked actual authority to permit importation and possession with intent to distribute marijuana in the United States. Accordingly, the district court concluded that the defense was not viable. Rule 12.3 provides in relevant part that “[i]f a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing . . . .” FED. R. CRIM. P. 12.3(a)(1). We have recognized that this defense “is available when the defendant is engaged by a government official to participate or assist in covert activity.” (*citation omitted*) Although other circuits have ruled that the officer must have actual authority to permit the activity, the Fifth Circuit has not, before this case, considered the question. Here, the Fifth Circuit holds that the public authority defense requires the defendant reasonably to rely on the actual, not apparent, authority of the government official or law enforcement officer to engage the defendant in covert activity. Because it is undisputed here that Deputy Roberts lacked actual authority to authorize Sariles’s violation of the federal drug laws, the district court correctly held that the public authority defense was unavailable.

*US v. Sariles*, No. 10-50577, June 23, 2011, 5<sup>th</sup> Cir.