SEARCH & SEIZURE – DWI MOTIONS TO SUPPRESS

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I. SCOPE OF ARTICLE

A defendant charged with driving while intoxicated ("DWI") may file, like any criminal defendant, a pretrial motion to suppress in order to challenge the legality of the seizure of evidence that the state proposes to use against him at trial. The determination of a motion to suppress in the defendant's favor may narrow the evidence that the state offers at trial and may even result in the dismissal of the case filed against the defendant. The purpose of this paper is to outline the procedural requirements surrounding motions to suppress evidence in DWI cases, the advantages and disadvantages of filing such a motion, and some recent DWI search and seizure issues considered by the courts.

II. PROCEDURAL RULES FOR MOTIONS TO SUPPRESS

A trial court may set a case for a pretrial hearing to decide a motion to suppress before it is set for trial on the merits. TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1. The presence of the defendant is generally required for such a hearing. *Riggall v. State*, 590 S. W.2d 460, 461 (Tex. Crim. App. 1979); *Warren v. State*, 804 S.W.2d 597, 598 (Tex. App.—Houston [1st Dist.] 1991, no pet.). *But see Adanandus v. State*, 866 S.W.2d 210, 219 (Tex. Crim. App. 1993) (defendant need not be present if attorney is present and attorney's presence bears a reasonably substantial relationship to defendant's opportunity to defend). When a case is set for a pretrial hearing, any preliminary matter not raised or filed seven days before the hearing will not thereafter be allowed to be raised or filed, except by permission of the court for good cause shown; provided that the defendant shall have not less than ten days notice of such hearing in order to give the defendant adequate time to file motions. TEX. CODE CRIM. PROC. ANN. art. 28.01 § 2. It is best that the written motion to suppress contain every objection to the admission of the evidence that is the subject of the motion. *See, Buchanan v. State*, 207 S.W.3d 772 (Tex. Crim. App. 2006)(argument under Chapter 14 of the Code of Criminal Procedure waived by not raising it in written motion or orally at suppression hearing).

Even if the trial court sets a pretrial hearing, the court retains discretion to hold an evidentiary hearing on the defendant's motion to suppress or postpone the determination of the motion until the issue arises at trial. *Cantu v. State*, 546 S.W.2d 621, 621 (Tex. Crim. App. 1977); *Bell v. State*, 442 S.W.2d 716, 719 (Tex. Crim. App. 1969); *Calloway v. State*, 743 S.W.2d 645, 649 (Tex. Crim. App. 1988) (article 28.01 is not a mandatory statute but is directed at court's discretion). In other words, the trial court may carry the motion to suppress with the trial of the case. *See Garza v. State*, 126 S.W.3d 79, 84-85 (Tex. Crim. App. 2004) (the trial court may direct parties to present all testimony at trial before ruling on motion to suppress). Alternatively, the trial court may decide the merits of the motion based simply on a review of the motion without any type of live pretrial or during-trial evidentiary hearing. TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1(6); *State v. Brunner*, 917 S.W.2d 103, 105 (Tex. App.—San Antonio 1996, pet. ref'd).

In DWI cases, the Defendant may move to suppress evidence that is seized when the investigating officer lacks "reasonable suspicion" to stop the driver's car and initiate an investigative detention. *See Fowler v. State*, 266 S.W.3d 498, 502 (Tex. App.—Fort Worth 2008, pet. ref'd); *Alonzo v. State*, 251 S.W.3d 203, 207 (Tex. App.—Austin 2008, pet. ref'd) (for the purposes of constitutional analysis, a police stop and investigative detention for DWI constitute a "seizure"). Reasonable suspicion is an objective standard that exists when, considering the totality of the circumstances, an officer has "specific, articulable facts that when combined with rational inferences from those facts, would lead the officer to reasonably conclude that a particular person is, has been, or soon will be engaged in criminal activity." *Fowler*, 266 S.W.3d at 502. A wide variety of situations can give rise to a reasonable search and seizure in DWI cases. *See, e.g., Alonzo*, 251 S.W.3d at 209 (reasonable suspicion found to investigate an accident scene even though death, injury, or property damage in excess of $1,000 had not occurred); *State v. Cullen*, 227 S.W.3d 278, 283 (Tex. App.—San Antonio 2007, pet. ref'd) (reasonable suspicion for investigation was found where officers observed defendant take a turn at a high rate of speed and crash his vehicle); *Mitchell v. State*, 821 S.W.2d 420, 424-25 (Tex.App.—Austin 1991, pet. ref'd) (reasonable suspicion found where investigating officer learned from another officer that DWI suspect had been in a car accident).

The "reasonable suspicion" that is required to justify investigative detentions is a lower standard than the "probable cause" that is required to justify arrests. *See Fowler*, 266 S.W.3d at 501 (citing *Klare v. State*, 76 S.W.3d 68, 75 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd)). "Probable cause" questions often become quite significant in DWI cases because, as the U.S. Supreme Court has noted, DWI arrests generally arise out of situations in which the arresting police officer does not have a warrant. *See Schmerber v. California*, 384 U.S. 757, 768 (1966). Probable cause is similar to reasonable suspicion in that it is analyzed by considering the totality of the circumstances and it must be based upon articulable facts. *See Amador v. State*, 221 S.W.3d 666, 672 (Tex. Crim App. 2007); *Ford v. State*, 158 S.W.3d 488, 493-94 (Tex. Crim.

App. 2005). Much like "reasonable suspicion," many situations can give rise to the "probable cause" that is necessary make an arrest for DWI. S*ee, e.g., Pesina v. State*, 676 S.W.2d 122, 127 (Tex. Crim. App. 1984) (probable cause to arrest defendant found where the defendant was in an accident and the officer smelled alcohol on the defendant's breath); *Knisley v. State*, 81 S.W.3d 478, 483-84 (Tex. App.—Dallas 2002, pet. ref'd) (probable cause to arrest found where defendant was involved in a traffic accident, smelled of alcohol, and could not answer basic question from the officer).

Upon request of the losing party, the trial court is required to enter findings of fact and conclusions of law explaining its ruling on a motion to suppress. *State v. Cullen*, 195 S.W.3d 696, 698 (Tex. Crim. App. 2006). When the trial court makes no findings, the appellate court presumes implicit findings that support the decision on the motion to suppress. *Id.* at 697-98.

III. RULES OF EVIDENCE FOR MOTIONS TO SUPPRESS

The mere filing of a pretrial motion to suppress does not preserve error in the admission of evidence. *Maynard v. State*, 685 S.W.2d 60, 64 (Tex. Crim. App. 1985); *Burrow v. State*, 668 S.W.2d 441, 442 (Tex. App—El Paso 1984, no pet.) (filing of a motion in limine, standing alone, did not preserve error in DWI prosecution). A hearing and ruling outside the presence of the jury, however, will preserve error without the need to object again in the presence of the jury. *See* TEX. R. EVID. 103(a)(1); *Geuder v. State*, 115 S.W.3d 11, 14-16 (Tex. Crim. App. 2003); *Ethington v. State*, 819 S.W.2d 854, 859 (Tex. Crim. App. 1991). If the defendant says "no objection" when the evidence is offered in the presence of the jury, any error preserved by the hearing and ruling on the pretrial motion to suppress will be waived. *See James v. State*, 772 S.W.2d 84, 97 (Tex. Crim. App. 1989), *vacated on other grounds*, 493 U.S. 885 (1989).

The defendant may also waive any error in the overruling of a pretrial motion to suppress by introducing the same evidence before the jury as the objected to evidence. *Burrow*, 668 S.W.2d at 442 (error not preserved when DWI defendant, after filing a motion in limine to restrict the introduction of certain evidence from the traffic stop, introduced the officer's report which contained the evidence which had been the subject of the motion in limine). The exceptions to this principle are where the defendant is impelled to testify to overcome illegally admitted evidence and where the defendant offers the evidence to meet or destroy illegally admitted evidence. *See Leday v. State*, 983 S.W.2d 713, 719 (Tex. Crim. App. 1998).

The rules of evidence, with the exception of the rules governing privileges, do not apply at the hearing on a motion to suppress evidence. *See* TEX. R. EVID. 101(d)(1)(A), 104(a); *Granados v. State*, 85 S.W.3d 217, 227 (Tex. Crim. App. 2002) (because suppression hearings involve the determination of preliminary questions concerning admissibility of evidence, rules of evidence, except privileges, do not apply to suppression hearings); *Belcher v. State*, 244 S.W.3d 531, 542 (Tex. App.—Fort Worth 2007, no pet.) (DWI defendant was not permitted to challenge the competency to testify of the arresting officer during a motion to suppress hearing because the rules of evidence did not apply in the hearing). Also, in accordance with U.S. Supreme Court precedent, the rules of evidence specifically allow a defendant to testify on a preliminary matter out of the hearing of the jury, such as at a hearing on a motion to suppress, without being cross-examined on matters not covered by his direct testimony. *See* TEX. R. EVID. 104(d); *Simmons v. United States*, 390 U.S. 377, 384 (1968). If the defendant does testify at the motion to suppress hearing, and he later testifies at trial in a manner that is inconsistent with his pretrial motion to suppress hearing testimony, the state may use the pretrial testimony to impeach the defendant. *Franklin v. State*, 606 S.W.2d 818, 848 (Tex. Crim. App. 1978).

Finally, it is not necessary that a defendant file a pretrial motion to suppress evidence in order to object to the admissibility of evidence at his trial. The defendant may raise the issue by making a timely, specific objection at the time the evidence is offered during the defendant's trial. *See Roberts v. State*, 545 S.W.2d 157, 158 (Tex. Crim. App. 1977).

IV. TO FILE OR NOT TO FILE

The primary purpose of a motion to suppress is to keep the state from using incriminating evidence against the defendant at trial. *McCray v. Illinois*, 386 U.S. 300, 307 (1967). A motion to suppress, however, may also be used as a device to discover evidence in the possession of the state. A successful motion to suppress may shape the course of the trial or may even result in the case being dismissed if the suppressed evidence is essential to the state's case. It should be kept in mind, though, that the state has the right to appeal the granting of a motion to suppress. TEX. CODE CRIM. PROC. ANN. art. 44.01(5). Under some circumstances, therefore, it may be wise to wait until the time of trial and object to the admission of the illegally obtained evidence when it is offered by the state in order to keep the state from appealing the decision to exclude the evidence from the trial. *See id.* (state may not appeal granting of motion to suppress if jeopardy has attached). There is no requirement that an objection to illegally seized evidence be made pretrial by way of a motion to suppress. A defense attorney may always object when the evidence is offered during the trial. *See Cantu*, 546 S.W.2d at 621.

V. BURDENS OF PROOF AND PERSUASION

In order for a defendant to successfully invoke the Texas or federal exclusionary rule he must negotiate several legal hurdles. First, the defendant must show that he has standing to complain about the illegality that is the subject of his motion to suppress. This means that the defendant must demonstrate that he had a reasonable expectation of privacy in the thing seized or in the area searched at the time of the search. *Arizona v. Gant*, 129 S.Ct. 1710, 1720 (2009); *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004) (applying the "reasonable expectation of privacy standard" in a DWI context). The burden of establishing standing falls on the defendant when he challenges a search as violative of his Fourth Amendment rights. *Amador*, 221 S.W.3d at 672. Once this burden is met, the burden shifts to the state, which must prove that the search was reasonable given the totality of the circumstances. *Id.* at 672-73.

For example, a DWI defendant has no Fourth Amendment reasonable expectation of privacy protecting his blood alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident. *Kennemur v. State*, 280 S.W.3d 305, 311-12 (Tex. App.—Amarillo 2008, pet ref'd); *Murray v. State*, 245 S.W.3d 37, 41-42 (Tex. App.—Austin 2007, pet. ref'd). This further means that a DWI defendant lacks standing to complain that the state obtained his medical records in violation of the Health Insurance Portability and Accountability Act ("HIPAA"). *Id.* at 311.

Next, the defendant must show that the government conduct infringed on some subjective expectation of privacy that society is prepared to recognize as reasonable. *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (government's search of an individual's home by remaining outside the home and using heat-detecting infrared technology to find marijuana violates a reasonable expectation of privacy); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986).

In order to invoke the protections of the federal exclusionary rule the defendant must establish that the search in question involved "state action." *See Walter v. United States*, 447 U.S. 649, 656 (1980). The state exclusionary rule, however, is not so restrictive. Evidence seized by a private person in violation of the constitution or laws of the United States or Texas may be suppressed. *See* TEX CODE CRIM. PROC. ANN. art. 38.23(a); *Miles v. States*, 241 S.W.3d 28, 35 (Tex. Crim. App. 2007); *State v. Johnson*, 939 S.W.2d 586, 588 (Tex. Crim. App. 1996). It is important to note, however, that the exclusionary rule, does not apply to impeachment evidence. *See Manns v. State* 122 S.W.3d 171, 192 (Tex. Crim. App. 2003) (evidence obtained in violation of Fourth Amendment may be used to impeach defendant's trial testimony).

The defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct. *State v. Kelly*, 204 S.W.3d 808, 820 (Tex. Crim. App. 2006); *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986). A defendant satisfies this burden by proving that a search or seizure occurred without a warrant. *See Alonzo*, 251 S.W.3d at 207 (citing *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002)). If the defendant establishes a warrantless search or seizure the burden of proof shifts to the state to show that the search or seizure was conducted pursuant to a warrant or was reasonable. *Id.* If the state relies on a warrant to justify the search or seizure, the state bears the burden of exhibiting the warrant and supporting affidavit to the trial judge. *See Cannady v. State*, 582 S.W.2d 467, 469 (Tex. Crim. App. 1979); *Miller v. State* 736 S.W.2d 643, 648 (Tex. Crim. App. 1987). The state, however, has no obligation to exhibit the warrant to the trial judge unless the defendant first establishes his standing to challenge the legality of the search. *See Handy v. State*, 189 S.W.3d 296, 299 (Tex. Crim. App. 2006). If there was no warrant, or the state cannot produce one, the state must establish by a preponderance of the evidence that the search or seizure was reasonable and supported by probable cause. *Russell*, 717 S.W.2d at 10. If the state claims the search is justified by consent, it must show by clear and convincing evidence that the consent was freely and voluntarily given. *Gutierrez*, 221 S.W.2d 680, 686 (Tex. Crim. App. 2007).

VI. THE RIGHT TO ARGUE QUESTIONS OF FACT TO A JURY

A defendant has the right to submit jury instructions about questions of fact that surround evidence which he believes was seized in violation of his constitutional rights and which the trial court did not suppress. *Pierce v. State*, 32 S.W.3d 247, 251 (Tex. Crim. App. 2000). This right is limited to disputed fact issues that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible. *Madden v. State*, 242 S.W.3d 504, 509-10 (Tex. Crim. App. 2007). Specifically, the criminal code provides that, "[w]here the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." TEX. CODE CRIM. PROC. ANN. art 38.23(a). The Court of Criminal Appeals has helpfully reduced this statute to three distinct elements: "(1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) that contested

factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence." *See Madden*, 242 S.W.3d at 510 (citing 40 George E. Dix & Robert O. Dawson, CRIMINAL PRACTICE AND PROCEDURE § 4.194 (2d ed. 2001)).

VII. RECENT SEARCH AND SEIZURE DECISIONS

Herring v. United States, 129 S.Ct. 1692 (2009)

Issue: When a negligent clerical error – rather than systemic error or reckless disregard of constitutional requirements – results in an unlawful search by a police officer, does the exclusionary rule still apply or does a good-faith exception exist?

Facts: Herring was arrested and had his vehicle searched in Coffee County, Alabama because the police were informed by the warrant clerk in neighboring Dale County that there was an outstanding warrant for Herring. Acting in good-faith reliance on the warrant clerk's information, the officers searched Herring's vehicle and discovered firearms and drugs. Fifteen minutes later, however, the officers were alerted by the Dale County warrant clerk that there had been a clerical error, and in fact there was no outstanding warrant for Herring. Herring moved to suppress the evidence uncovered on the grounds that his constitutional rights had been violated by a warrantless search. The State argued that the police officer's conduct constituted a "good faith exception" to the exclusionary rule. Herring was convicted, and his conviction was affirmed by the Eleventh Circuit.

Held: The Court held that when unconstitutional searches by officers are the result of isolated negligence rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply because a good faith exception exists. Citing a quotation from Justice Cordozo, the Court stated that, "the criminal should not 'go free because the constable has blundered.'" The opinion inspired a strongly-worded dissent and significant academic commentary about whether the Court was seeking to erode the exclusionary rule through a series of recent rulings. It is regarded as one of the most significant cases on the exclusionary rule to be issued in recent memory.

Fischer v. State, 252 S.W.3d 375 (Tex. Crim. App. 2008)

Issue: Whether a police officer's factual observations of a DWI suspect, contemporaneously dictated to his patrol-car videotape, are admissible as a present sense impression exception to hearsay?

Facts: A police officer stopped a driver for not wearing a safety belt. Before approaching the driver, the officer announced his actions to the dash board camera. As he questioned the driver, he smelled alcohol and observed the suspect's "glassy, bloodshot eyes," and "slurred speech." The suspect stated that he had consumed "three wines," and the officer noticed a wine opener in the vehicle. All of these observations were recorded by the officer, as he repeatedly walked back and forth between the police car (where he recorded these observations) and the suspect's car. The DWI Defendant objected to the recorded statements as hearsay.

Held: An officer's factual observations are not admissible as a present sense impression exception to hearsay. The Court held that the exception was designed to allow "unreflective, instinctive" comments from a speaker who was not concerned with the legal consequences of his statements. In this situation, however, the unreflective character was missing because the officer's observations were clearly adversarial and recorded for the benefit of future prosecution. The Court of Criminal Appeals agreed with the court of appeals' observation that the comments were "the functional equivalent of a police offense report."

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

Issue: Whether evidence obtained as a result of a warrantless arrest by a private citizen under Article 14.01(a) must be suppressed because the citizen violated traffic laws in the process of affecting the arrest?

Facts: The defendant crashed his vehicle into a private citizen at a stop light at 1:45 a.m. While speaking with the defendant, the citizen and the tow-truck drivers noticed the smell of alcohol, slurred speech and red eyes; they all concluded that the defendant was intoxicated. The defendant became nervous, got back in his car and sped off, running a red light. Several tow-truck drivers followed the defendant, acting entirely as private citizens. They followed the defendant while he violated many different traffic laws including driving into oncoming traffic and speeding. Eventually, the tow-truck drivers were able to corner the defendant until the police arrived. The police arrested the defendant for DWI and also charged him with unlawfully carrying a weapon found inside the car during a search incident to arrest. The defendant moved to suppress the evidence stating that

the search was illegal as the tow-truck drivers had obtained the evidence while violating traffic laws. The trial court denied the defendant's motion.

Held: The Court of Criminal Appeals began by acknowledging that Article 38.23(a) applies to both government officers as well as private citizens. Article 14.01(a) specifically allows a police officer "or any other person" to make a warrantless arrest of another citizen "when the offense is committed in his presence or within his view, if the offense is…against the public peace". TEX. CODE CRIM. PROC. ANN. art 14.01(a). Whether a defendant's specific acts are a breach of the peace depends on the specific facts and circumstances of each case. *Woods v. State*, 213 S.W.2d 685, 687 (Tex. Crim. 1948). The Court reasoned that this DWI was an ongoing breach of the peace and therefore the citizen was legally allowed to arrest the defendant. The Court next concluded that since a police officer would have been justified in violating traffic laws to arrest the defendant, the private citizen was also justified, without triggering Article 38.23(a) exclusion. The Court recognized that there are situations in which the conduct of the citizen or officer may be unreasonable under the circumstances and therefore violate the Fourth Amendment's protection against unreasonable searches and seizures. This situation was not unreasonable and the tow-truck drivers' traffic violations in effecting the arrest did not implicate Article 38.23(a).

Torres v. State, 182 S.W.3d 899 (Tex. Crim. App. 2005)

Issue: Whether the opinion of a police officer that a person at an accident scene is intoxicated –without any articulable facts supporting the officer's opinion – is sufficient to establish probable cause for a DWI arrest?

Facts: DWI Defendant drove his car approximately 150 feet off a road and hit the porch of a nearby house. The investigating trooper did not smell alcohol, did not ask the defendant if he had been drinking, did not issue any field sobriety tests, and did not observe slurred speech or poor balance. The officer merely asked the defendant how the accident had occurred, and the defendant replied that he was unfamiliar with the road and took a wrong turn. Sheriff's deputies who were at the scene expressed their opinion that the defendant was intoxicated.

Held: The Court held that a DWI arrest must be based upon "articulable facts," not merely opinions of the police officers, and the arrest in this case was not based upon any articulable facts – such as an admission that the defendant had been drinking, the smell of alcohol, results from field sobriety tests, poor balance, or slurred speech. The Court also rejected the argument that the opinions of police officers are "inherently reliable,"and stated that opinions cannot be transformed into facts without supporting evidence.

Brother v. State, 166 S.W.3d 255 (Tex. Crim. App. 2005)

Issue: Must the articulable facts that are necessary to justify an investigative detention in a DWI stop be facts that are personally observed by the officer, or may the facts have been observed by a private citizen and then related to the officer?

Facts: A private citizen who was not involved in law enforcement observed the DWI Defendant's erratic driving—speeding, tailgating, and weaving across several lanes of traffic—and called "911" on her cellular phone to report the driver. The citizen caller followed the DWI Defendant and stayed in phone contact with the 911 dispatcher until an officer arrived to investigate. The officer knew which car to pull over because the dispatcher had given him the license plate number relayed by the caller and because the caller had activated her hazard lights as a signal to the police officer. The caller remained on the scene during and after the traffic stop, and she provided her contact information to the police officer. The DWI Defendant filed a motion to suppress, arguing that because the officer did not "personally observe" any of the erratic driving, the state failed to demonstrate a reasonable basis for the stop.

Held: The Court found held that the factual basis for stopping a vehicle may be supplied by a third-party citizen informant and need not come directly from the police officer's personal observations. A citizen informant is not per se reliable, but the information given must be granted "serious attention and great weight." As long as the facts provided by the citizen informant are corroborated by the investigating officer – as they were in this case – the traffic stop is not violative of Fourth Amendment rights.

Alonzo v. State, 251 S.W.3d 203, (Tex. App.—Austin 2008, pet. ref'd)

Issue: Whether an officer has probable cause to investigate an accident scene where death, injury, or property damage in excess of $1,000 has not occurred.

Facts: DWI defendant filed a motion to suppress all statements, video recordings, and other incriminating evidence that resulted from his detention because, he argued, the investigating officer lacked probable cause.

The defendant, who had driven his car into a tree on the side of the highway, argued that (1) the officer was only permitted under the transportation code to investigate accident sites where death, injury, or property damages in excess of $1,000 occurred; and (2) there were no specific, articulable facts that could have lead the officer to reasonably suspect DWI.

Held: The Court of Appeals rejected both arguments. With respect to the first argument, the Court held that officers have not only the authority, but the duty under the transportation code, to investigate whether death, injury, or property damage in excess of $1,000 has occurred at an accident scene, and then to file a report. With respect to Alonzo's second argument, the court found that probable cause for investigative detention existed because Alonzo "had glassy eyes, was swaying and seemed unsteady, was slurring his speech, had a difficult time answering simple questions, appeared agitated, and had a moderate odor of an alcoholic beverage coming from his breath. In addition, Alonzo admitted to drinking beer and to taking medications without knowing what he was taking or for what reason."

Kennemur v. State, 280 S.W.3d 305 (Tex. App.—Amarillo 2008, pet. ref'd)

Issue: Whether there is a Fourth Amendment reasonable expectation of privacy protecting blood alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident?

Facts: After becoming intoxicated at a bar late one night, the intoxication manslaughter defendant was involved in a car accident that killed his passenger. The defendant, who was injured in the crash, was taken to a nearby hospital, where samples of his blood were taken. The hospital took the samples because they smelled alcohol on the breath of the defendant and noticed his bloodshot eyes, and hospital procedures required the physicians to keep patients detained in the hospital if their blood-alcohol content exceeded a certain level. The investigating prosecutors issued a subpoena duces tecum to the hospital's custodian of records to obtain the blood-alcohol level test results from the night of the accident. The defendant filed a motion to suppress, arguing that the state's acquisition of his medical tests was a violation of HIPAA's privacy rules because the subpoena was not issued by a grand jury or a judicial officer.

Held: The Court held that DWI defendants have no Fourth Amendment reasonable expectation of privacy protecting blood alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident; and therefore Defendants may not argue that the retrieval of the test results are in violation of HIPPA.

State v. Kelly, 204 S.W.3d 808 (Tex. Crim App. 2006)

Issue: Whether the defendant consented to her blood being drawn for medical purposes when she "acquiesced" to the blood draw by sticking out her arm.

Facts: While driving, the defendant was involved in a car accident and taken to an emergency room for medical treatment. For medical purposes, a phlebotomist drew the defendant's blood and hospital testing revealed that the defendant's blood-alcohol concentration was above the legal limit. Police officers came to the emergency room and asked the defendant for a blood specimen; she refused. Several days later, the state obtained her hospital blood test results through a grand jury subpoena. The defendant moved to suppress the blood test results, asserting that the phlebotomist assaulted her in the emergency room and drew her blood without her consent. During the hearing on the motion to suppress, the phlebotomist testified that when he informed the defendant that he was going to draw her blood, she did not affirmatively refuse, and the phlebotomist interpreted the lack of refusal to be consent. No one testified that the defendant expressly refused permission for the blood draw. The trial court granted the motion to suppress. The state appealed and the court of appeals reversed.

Held: The Court of Criminal Appeals held that by sticking out her arm and acquiescing in response to the phlebotomist's statement that "I'm here to draw your blood," the defendant did not "refuse" the blood draw. The Court went on to hold that an express or implied finding of "mere acquiescence" to the blood draw constitutes a finding of "consent" to the blood draw. Therefore the trial court's finding that the defendant refused consent to the blood draw was not supported by the record. The court of appeals decision overturning the granting of the motion to suppress was affirmed.

Ford v. State, 158 S.W.3d 488, (Tex. Crim. App. 2005)

Issue: Whether an officer's testimony that the defendant was "following too close" was sufficient to establish that the officer had reasonable suspicion to stop the defendant for a violation of Section 545.062(2) of the Texas Transportation Code.

Facts: A state trooper pulled the defendant's vehicle over for following another car too close on Highway 290 outside of Houston. The trooper did not describe the distance between the defendant's vehicle and the other vehicle nor did he testify about the speed of the vehicles, the traffic conditions, or anything else other than he stopped the defendant for "following too close." After the stop, the trooper approached the vehicle and when the defendant lowered his window the trooper smelled a strong odor of marihuana. Further investigation led to the defendant's arrest for possession of marihuana and possession of codeine. The trial judge overruled the defendant's motion to suppress concluding that the stop was supported by reasonable suspicion. The court of appeals affirmed.

Held: The Court of Criminal Appeals reversed the decision of the court of appeals. The Court held that the trooper's testimony was conclusory in nature and did not contain any specific, articulable facts upon which to base a determination that the trooper had reasonable suspicion to stop the defendant. The Court explained that "[a]llowing a police officer's opinion to suffice in specific facts' stead eviscerates *Terry's* reasonable suspicion protection." Any other holding, according to the Court, "would be removing the 'reasonable' from reasonable suspicion."