

Interesting Cases - April, 2011

D, by cutting victim's vehicle off in traffic and then slamming on his brakes, placed victim in imminent danger of serious bodily injury, supporting conviction for deadly conduct. *Zuliani v. State*, 2011 WL 1347034 (Tex.App.-Austin Apr 08, 2011) (NO. 03-10-00041-CR, 03-10-00042-CR) "With respect to the element of imminent danger of serious bodily injury, the jury heard testimony that [victim's] vehicle spun out of control across multiple lanes of traffic, striking both a guardrail and [D's] vehicle before coming to rest perpendicular to oncoming traffic. [Witness] also testified that after witnessing the accident, he 'was convinced' that serious bodily injury had resulted."

D lacked reasonable expectation of privacy in lockbox after he gave key to victim, even though he asked victim to promise to destroy it if something happened to him, because victim was a minor and, thus, could freely disaffirm her promise. *Castleberry v. State*, 2011 WL 1598841 (Tex.App.-Hous. (1 Dist.) Apr 28, 2011) (NO. 01-10-00158-CR, 01-10-00159-CR, 01-10-00248-CR, 01-10-00249-CR) In addition, "the relevant question is not whether an effective bailment existed, but whether [victim] had mutual access to and control over the lockbox....[D] thus made no effort to secure the privacy of the lockbox's contents as against [victim], giving [victim] mutual, if not superior, access to and control over them." The court cited to case law holding that "manager of private mailbox facility had authority to consent to search of defendant's mailbox where front of box was locked but back was open to access by employees sorting and arranging mail."

Inventory search of vehicle was conducted properly, such that dope found inside purse was admissible, even though officer did not itemize contents of vehicle. Also, no reasonable alternative to impoundment was demonstrated, even though D told officer that "her boyfriend could come retrieve the vehicle." *St. Clair v. State*, 2011 WL 1432190 (Tex.App.-Amarillo Apr 14, 2011) (NO. 07-10-0251-CR) "Though [D] did mention to [officer] that her boyfriend could come retrieve the vehicle, nothing within the record illustrates that [the boyfriend] was available at the time, that he would agree to retrieve the vehicle, or that he had a driver's license. Also missing was evidence that she owned the vehicle and, therefore, had the authority to approve of the manner of its disposition....As for [D's] effort to question the legitimacy of the inventory search because the officer did not itemize the contents of the vehicle, we note that [officer] testified to searching the vehicle in accordance with departmental policy, that the only items of value found were the purse and the [money] contained in it, and that those items were included in his report. He also described the reasons for conducting the search (i.e. to protect the possessions of the person that owns or controls the vehicle and to avoid liability issues). Furthermore, the policy in question was admitted into evidence. And, [D] did not attack the legitimacy of that particular policy at trial. That was enough evidence to establish that the officer conducted a proper inventory search."

In juvenile delinquency proceeding, the presence of armed police detective during judge's entire warning and interview process did not violate procedural requirements governing the admissibility of a child's statement; the juvenile gave a recorded statement, not a written statement, emphasized the court. *In re M.A.C.*, 2011 WL 1519351 (Tex.App.-Eastland Apr 14, 2011) (NO. 11-09-00172-CV) M.A.C. contends that the provisions of Section 51.095(a)(1)(B)(i) were violated because "[Detective] was present during the entire warning and interview process and was armed during this process with his firearm visible at all times. Given [judge's] testimony that he requested the presence of [detective], we focus our attention to the presence of [the detective's] weapon during the interview process. The critical inquiry is whether or not the weapon prohibition applied to the taking of [D's] recorded statement....The State asserted at trial that the weapon prohibition of Section 51.095(a)(1)(B)(i) did not apply because M.A.C.'s statement was not the result of a custodial interrogation....Thus, by its express terms, the weapon prohibition applies when the juvenile executes a written statement in the presence of a magistrate...."

Police officer's promise during interrogation to "call the district attorney and say...what really happened" did not render confession involuntary. Nor did officer's reference to "mercy" during the interrogation (see quote from officer below) do so. Such statements would be unlikely to induce an innocent person to confess to murder, concluded court. *Wilson v. State*, 2011 WL 1364972 (Tex.App.-Hous. (14 Dist.) Apr 12, 2011) (NO. 14-09-01040-CR) Although officer told D he would "appeal to the District Attorney," the officer "never promised any deal for the defendant," observed court. During the interrogation, the officer told D: "You got to explain something ... It's the right ... thing to do ... then I can call the district attorney and say hey this is what really happened this guy didn't mean

for this stuff to go on. Do you understand, there's consequences regardless for your actions ... but its either you're gonna be looked at with the eyes of justice, this guy deserves the worst ... or the eyes of mercy ... [D] is not that evil monster that he is painted to be."

Police officer's statements during interrogation about how D's mother would "lose everything" if she used her money to assist in D's defense did not render confession involuntary. *Wilson v. State*, 2011 WL 1364972 (Tex.App.-Hous. (14 Dist.) Apr 12, 2011) (NO. 14-09-01040-CR) "Police officers are permitted to suggest that suspects decline legal counsel to 'save himself or his family the expense' despite the constitutional requirement that suspects be informed that they have a right to appointed counsel. Thus, we cannot say as a matter of law that all discussion about the expense of legal representation is so contrary to the right to appointed counsel that it creates involuntary confessions. Nonetheless, police discussion of economic hardship might form enough pressure to overcome some defendants' will and create involuntary confessions. Consequently, the inquiry into whether such statements by the police overcame the will of the defendant requires a factual determination."

Officer who arrested D for DWI was motivated primarily by his community caretaking duties, even though officer was, at the time, assigned to DWI task force and even though officer activated the emergency lights of his police car, because officer became concerned when he observed a vehicle pull over to the side of a lightly traveled highway around 1:00 a.m. *Gonzales v. State*, 2011 WL 1320526 (Tex.App.-Eastland Apr 07, 2011) (NO. 11-09-00306-CR) "[Officer] stated that he activated his lights to alert other drivers on the road and to let the driver of the vehicle know that he was not 'some bad guy.' In this case, [D] had pulled over to the side of the road and stopped a little before 1:00 in the morning. The location where [D] was stopped was inside the city limits, but traffic was minimal in that area at that time of night. There were no houses nearby and only a few businesses in the area. If [D] had needed assistance, he would have had difficulty finding anyone other than [officer] to help him at that time in that location."

Written confession signed by D while at store was not obtained as a result of "custodial interrogation," despite D's argument that it is has become a common practice for retailers to obtain written confession from shoplifters without providing Miranda warnings and also a common practice for prosecutors to make use of those statements as evidence in theft prosecutions. *Elizondo v. State*, 2011 WL 1330596 (Tex.App.-Amarillo Apr 07, 2011) (NO. 07-10-00213-CR) "[D] attempts to distinguish Orijji, and argues that here, police and the district attorney were aware of the practices of Old Navy and other retailers to obtain written admissions from shoplifters without providing Miranda warnings and that prosecutors repeatedly made use of them as evidence in theft prosecutions....We cannot agree the general awareness of police or prosecutors that retailers take non- Mirandized statements from shoplifters, even if accompanied by a common practice to obtain and introduce the statements at trial, renders the store employees the agents of law enforcement when they take the statements."

D tries, unsuccessfully, to invalidate a warrant by arguing that the affidavit did not accompany the warrant at the time of the search. *Ramirez v. State*, 2011 WL 1304895 (Tex.App.-San Antonio Apr 06, 2011) (NO. 04-10-00679-CR) "Texas law does not require that the affidavit be attached to the warrant at the time of the search."

Strong order of ammonia did not give rise to exigent circumstances to justify warrantless entry into residence, even though ammonia is used in the production of methamphetamine, and despite the propensity for explosion associated therewith. *Burton v. State*, 2011 WL 1258710 (Tex.App.-Texarkana Apr 05, 2011) (NO. 06-10-00199-CR) "As pertains to safety of the officers, [officer's] concern was for some possible 'fires or explosions, things like that.' But we find the record insufficient to justify his warrantless entry under the facts of this case."

Officers' repeated use of stun guns on D's groin and inner thigh in order to compel D to remove narcotics from his mouth deemed unreasonable, resulting in suppression thereof. *Hereford v. State*, 2011 WL 1266550 (Tex.Crim.App. Apr 06, 2011) (NO. PD-0144-10), rehearing denied (May 25, 2011) "[Officer's] testimony that the Taser is less violent than being struck by his asp, fist, or knees, does little to counter the finding that the Taser does threaten a suspect's health or safety.... None of the testifying officers was able to verify that the repeated use of the Taser to collect evidence followed acceptable police procedure, and the court of appeals was understandably concerned that the officers seemed unconcerned by the potential dangers of excessive tasing and appeared to believe that

repeated Taser use is an acceptable practice. Perhaps even more worrisome to the court of appeals was Officer Arp's testimony that he would use the same force again if confronted with a similar situation."This encroachment into [D's] privacy rights was exacerbated by the manner in which the officers used their weapons—as a pain-infliction device for those deemed non-compliant—as well as the cavalier attitude exhibited in their testimony.... A considerable amount of time passed between Officer Williams's initial observation of [D] and the force used by [officer], yet [D] had still not swallowed the substance....We emphasize that neither this opinion, nor that of the court of appeals, should be construed to imply that the use of a Taser is per se unreasonable....Officer Arp deliberately chose to administer numerous electrical shocks to an area of appellant's body chosen by him because of its exceptional sensitivity, long after the initial arrest was made, when there admittedly was no ongoing attempt by [D] to destroy the evidence, little concern about a drug overdose, and while [D] was restrained in handcuffs behind his back."