



Criminal Justice Section

State Bar of Texas

March 4, 2011

Interesting Cases - December, 2010

The nervousness with which gun show patron purchased a gun, along with what appeared to officer to be a prison-gang tattoo on patron's neck, provided RS that patron was a felon in possession of firearm. *State v. Pina*, 2010 WL 4946140 (Tex.App.-Dallas Dec. 07, 2010) (NO. 05-10-00026-CR) "[Officer in parking lot] was notified that officers inside the complex had seen three individuals 'acting in suspicious manners ... [with] tattoos indicative of gang affiliations ... purchasing weapons and ammunition.' One of those individuals, later identified as [D], had a star tattoo on his neck that allegedly was 'indicative of an affiliation to the Tango Blast gang.' Although [officer] did not specialize in gang affiliation, he did have some knowledge of the Tango Blast Gang. He knew that Tango Blast was a prison gang and, to be a member, the person had to have had a conviction and been to prison." The appellate court, in finding that RS existed, reversed the trial court's granting of D's motion to suppress.

Even though D admitted that he failed to signal lane change 100 feet in advance of turn, the trial court granted motion to suppress based on conclusion that strict enforcement of the 100-foot requirement was "a violation of one's right to be free from unreasonable seizures." The appellate court, in reversing the trial court, observed that a driver's unfamiliarity with the neighborhood and indecisiveness about which direction to turn simply does not excuse his turn-signal violation. *State v. Kidd*, 2010 WL 5463893 (Tex.App.-Austin Dec. 30, 2010) (NO. 03-09-00620-CR) "Although the trial court concluded that enforcement of the 100-foot rule 'leads to unreasonable, perhaps unforeseen, circumstances,' we cannot say that the statute's mandatory requirement that a driver intending to turn must 'signal continuously for not less than the last 100 feet' leads to absurd results."

Purported common-law spouse of D did not have actual or apparent authority to consent to officer's warrantless search of D's lock box stored in bedroom of home, given that she did not know where box was located and that she reportedly knew nothing about box. *Valdez v. State*, 2010 WL 5269818 (Tex.App.-San Antonio Dec. 15, 2010) (NO. 04-09-00420-CR) Although purported common-law wife had the authority to consent to a search of the common areas of the house, she did not have such authority with respect to the box.

In the same case as above, D's mother had apparent authority to consent to search of the lock box, even though she was not owner of box and did not have authority to unlock it, where she appeared to officer to be owner of home (even though she did not own it), she invited officer directly to bedroom upon officer's request to collect adult videos for evidence, she retrieved box from closet, unlocked box with key, and placed adult videos on bed. *Valdez v. State*, 2010 WL 5269818 (Tex.App.-San Antonio Dec. 15, 2010) (NO. 04-09-00420-CR) "[Mother's] recollection of the event, however, was very different. She stated that she did not give [officer] permission to enter the house. She explained [officer] told her [D] had given consent to search, and that she needed to accompany him to the bedroom. She stated that [officer] took the lock box from the closet, and ordered her to unlock it. She had a key ring in her pocket, and after unsuccessfully trying several keys, [officer] got mad, grabbed the keys from her, and opened the box himself. [Mother] claimed the police threatened to arrest her if she did not cooperate." However, the appellate court, in viewing the evidence in the light most favorable to the trial court's ruling, adopted the officer's account, to wit: "[Officer] testified that he believed that [mother] was the owner of the home because she was the person in control. It appeared to [officer] that [mother] had common authority over the lock box because she knew exactly where it was located and had the key."

Mere fact that innocent explanations may have existed for why D's vehicle partook in lurching movements inching toward the rear of a police car did not nullify officer's reasonable basis for suspecting that D was intoxicated; thus, resulting temporary detention was not improper. *Foster v. State*, 326 S.W.3d 609 (Tex.Crim.App. Dec. 08, 2010) (NO. PD-0001-10) The court observed that the erroneous view that there could have been a number of "non-intoxicated-related reasons" for a driver's conduct is a manifestation of the rejected "as

consistent with innocent activity as with criminal activity” standard.

“[W]e believe that location near a bar district where police have made numerous DWI arrests is a relevant factor in determining reasonable suspicion.” *Foster v. State*, 326 S.W.3d 609 (Tex.Crim.App. Dec. 08, 2010) (NO. PD-0001-10)

A defendant's age, and whether or not he engages in argument with investigators, deemed relevant factors in determining whether a non-custodial or post-Miranda statement is made voluntarily. *Woodruff v. State*, 2010 WL 4909597 (Tex.App.-Texarkana Dec. 03, 2010) (NO. 06-09-00086-CR) Here, the Defendant “was a nineteen-year-old college student and did not appear to be unduly intimidated during the interview. In fact, [D] argued with the investigators on a number of occasions.”

Prosecutors, by instructing sheriff's office to record D's telephone communications with his attorneys and provide prosecutors with copies of recordings, did not prejudice D in manner as to require dismissal of indictment; recordings supposedly did not provide State with useful information and district attorney's office recused itself, letting State's Attorney General's Office prosecute. *Woodruff v. State*, 2010 WL 4909597 (Tex.App.-Texarkana Dec. 03, 2010) (NO. 06-09-00086-CR) “The State does not challenge the trial court's conclusion that [D's] Sixth Amendment right to counsel was violated.... In our review of the record, we have reviewed the telephone calls recorded by the Hunt County Sheriff's Office at the request of the Hunt County District Attorney's Office....Approximately fifty-four of the calls were made to [D's] defense counsel or his office staff....Our review failed to discover any privileged information of even the most marginal value to the State. Although not for lack of trying, the Hunt County District Attorney's Office failed to discover anything of value when it violated [D's] constitutional rights.”

“[A] traffic stop made for the purpose of issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Overshown v. State*, 329 S.W.3d 201 (Tex.App.-Hous. (14 Dist.) Dec. 02, 2010) (NO. 14-09-00490-CR)

Even though D sustained lacerations to his head as a result of vehicular accident, D's post-accident behavior (e.g., unsteady gait) was nevertheless attributed to intoxication so as to provide sufficient evidence that D was intoxicated at the time of the accident. *Flores v. State*, 2010 WL 4901408 (Tex.App.-Corpus Christi Dec. 02, 2010) (NO. 13-09-00413-CR) “Each officer testified that he believed [D] was intoxicated. Each based his opinion on one or more of the following: (1) the smell of alcohol on [D's] breath; (2) the smell of alcohol emanating from his vehicle; (3) [D's] non-compliance, his red, bloodshot eyes, his slurred, loud speech, and his unsteady gait and balance; (4) the results of his field sobriety tests; and (5) the results of the portable breath test....When [officer] and [D] arrived at the Cameron County Jail, the medic advised [officer] that, because of the lacerations, the bleeding, and the dried blood, the jail personnel would not accept [D] until he received a medical clearance. According to Trooper Rodriguez, this decision had nothing to do with a head injury.”

Although D was in custody at the time that officer held up a flash-drive and asked D what it was and if it belonged to D, the question was deemed an administrative booking question rather than a custodial interrogation. *Alford v. State*, 2010 WL 4924991 (Tex.App.-Fort Worth Dec. 02, 2010) (NO. 02-09-00246-CR) The court likened the flash-drive inquiry to cases holding that officer's asking arrestee for his name, address, name of spouse, and like information, deemed “routine booking questions.”

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