

Interesting Cases - September, 2010

Officers who had received consent to search premises of welding shop for wanted man were not authorized to search van located on premises for which consent was specifically denied, even though drug dog alerted on van, because, by that time, officers had concluded their search for the wanted man. *State v. Weaver*, 2010 WL 3518743 (Tex.App.-Beaumont Sep 08, 2010) (NO. 09-10-00116-CR) From the dissent: "Although the owner refused consent to a search of the van, the canine sniff of the exterior of the van, made while officers were questioning [Defendant], was not a 'search' for Fourth Amendment purposes....The officers were not required to see the vehicle 'being operated' before the canine sniff of the exterior of the van. After the dog alerted to the drugs, a search of the interior of the van was justified under the circumstances."

Officer's illegal restraint of D while the officer performed a warrants check was cured by officer's discovery of an outstanding warrant. *Trigg v. State*, 2010 WL 3787820 (Tex.App.-Dallas Sep 30, 2010) (NO. 05-09-01531-CR) Discovery of warrant broke the connection between the primary taint and the subsequently discovered evidence; and, thus, cocaine that was found in D's pocket upon arrest deemed admissible.

Consent of co-tenant deemed a sufficient basis to search entire residence, even without obtaining the consent of the other co-tenant whom police did not discover was present in the residence until after first co-tenant's consent had already been given and they had entered residence. *Woolverton v. State*, 2010 WL 3549629 (Tex.App.-Texarkana Sep 14, 2010) (NO. 06-09-00221-CR) "[T]he question of whether [second co-tenant] refused to consent to the search is disputed in this case....[Officer] further testified that when [second co-tenant] was asked to vacate the residence, she complied without ever communicating to [officer] the fact that she lived in the residence. While [officer] did learn that [second co-tenant] resided at the residence after he arrived on the premises, he did not proactively seek her consent because [first co-tenant] had previously provided written consent to search."

Area outside D's residence became a "suspicious place" for purposes of arresting D without a warrant based on report that D had shot a firearm at his tenant in front of the residence, even though officer testified on cross that the area was not normally a place where criminal activity usually takes place. *Cardella v. State*, 2010 WL 3443221 (Tex.App.-San Antonio Sep 01, 2010) (NO. 04-09-00319-CR) "[D] argues that the area could not have been suspicious because [officer] testified that it was not. However, what [officer] specifically said during his testimony was that the area was not normally a place where criminal activity usually takes place. He did not say that he did not consider the area to be a suspicious place at the time he made the arrest."

D was not under “arrest,” even though he was asked by officer to remove his shoes and socks “so that [D] would have a harder time running if he tried to flee.” *Barriere v. State*, 2010 WL 3369858 (Tex.App.-Austin Aug 26, 2010) (NO. 03-09-00026-CR) “[Officer] asked [D] to remove his shoes and socks, both so that [Officer] could search them for additional evidence and so that [D] would have a harder time running if he tried to flee....The degree of intrusion was minimal...”

That officer towed D’s car and took her keys did not mean that D was in custody, where D consented to officers' actions. Nor did D’s disputed allegation that the officer dispossessed her of her cell phone provide a basis for reasonable belief that she was in custody. *Ervin v. State*, 2010 WL 3212095 (Tex.App.-Hous. (1 Dist.) Aug 11, 2010) (NO. 01-08-00121-CR) “[Officer] said [D] was free to call her mother if she wished and she did not ask to use the telephone. [Officer] acknowledged, however, that he did not offer [D] the use of a telephone.”

Prosecutor's statement during closing argument to the effect that "the only person who can tell the jury the truth is the person who would not cooperate" did not constitute an impermissible remark on D’s failure to testify. *Weems v. State*, 2010 WL 3788289 (Tex.App.-Eastland Sep 30, 2010) (NO. 11-09-00076-CR) “Viewed in context, the complained-of statement by the prosecutor relates to [D’s] lack of cooperation with the police rather than his failure to testify. As such, the statement did not constitute an impermissible comment on [D’s] failure to testify.”

D’s consent to a breath test was voluntarily, despite officer's failure to comply with the statutory requirement to orally recite warnings before obtaining consent. *State v. Klein*, 2010 WL 3611523 (Tex.App.-Waco Sep 15, 2010) (NO. 10-08-00344-CR) “The evidence establishes that [D] was provided the written warnings. [D] did not contend at the suppression hearing, nor does she contend on appeal, that she did not understand the written warnings. Furthermore, before [officer] gave any warnings to [D], [D] admitted that she had been drinking. For these reasons, [D] has shown no causal connection between her consent to the breath test and [officer’s] failure to orally inform her of paragraph (4) of section 724.015.”

Breath test results were admissible despite D’s argument that he was not provided with the software code for the breath test machine. *Contreras v. State*, 2010 WL 3505122 (Tex.App.-Eastland Sep 09, 2010) (NO. 11-09-00107-CR, 11-09-00109-CR) Even if D requested the software code and even if the State failed to provide it, “[D] cannot show with a reasonable probability that, had he been given access to the computer and computer program, the outcome of the trial would have been different.”

Evidence of D’s ingestion of medications, for which D had properly obtained prescriptions, supported D’s conviction for DWI. *Smarr v. State*, 2010 WL 3518746 (Tex.App.-Texarkana Sep 10, 2010) (NO. 06-10-00002-CR) “The fact that a defendant was entitled to use prescribed medication is not a defense to DWI.”