

Interesting Cases - March 2011

D's statements deemed voluntary even though D was under the influence of a "potent" dose of morphine and other drugs at the time, which drugs had been administered by the State (for the stated purpose of lessening D's heroin-withdrawal symptoms). *Paolilla v. State*, 2011 WL 723489 (Tex.App.-Hous. (14 Dist.) Mar 03, 2011) (NO. 14-08-00963-CR) "[D] argues that her statements should have been suppressed under the authority of [Townsend v. Sain]. In Townsend, a heroin addict confessed to murder after receiving treatment with a drug having the properties of a 'truth serum.' The drug was administered because the addict was entering opioid withdrawal....[Here,] Dr. Glass failed to explain how any of the medications [D] received acted in the nature of a 'truth serum.'....Although [D] received potent dosages of each drug, no one testified that either morphine or Methadone would render [D] incapable of understanding her rights. After receiving this treatment, [D] did not slur her words during the second interview. She did not pause inappropriately before answering a question, nor did she seem confused....Likewise, there was no testimony that the combined effect of morphine and Methadone had overcome [D's] free will, making her appear competent when, in fact, she was not....Before her third recorded interview in Houston, [D] received Librium to treat the anxiety associated with her heroin withdrawal. Dr. Glass testified that the amount of Librium administered was the equivalent of several shots of alcohol, and that it did nothing for the physical symptoms of withdrawal. Dr. Glass agreed with the officers, however, that [D] was not intoxicated when she offered her statements. Moreover, Dr. Glass never testified that Librium would prevent [D] from waiving her rights freely and knowingly."

Officer lacked RS, where, although officer received an anonymous tip that the vehicle contained drugs, the officer was only able to corroborate, at most, "innocent details" from the tip, such as the color and make of the vehicle and that two females were in vehicle. *State v. Wilson*, 2011 WL 923954 (Tex.App.-Texarkana Mar 18, 2011) (NO. 06-10-00188-CR) The tipster also informed the officer that D had just purchased a hamburger from Sonic. However, the officer did not observe D eating a hamburger until after he had stopped the vehicle and, thus, the hamburger could not be considered. Also, "[officer] claimed he found [tipster's] tip reliable because "he was [D's] boyfriend so I guess he had intimate knowledge of [D's] activities. He knew exactly what road she was on, knew what time frame,.... He knew there'd be two females in the vehicle. It was a gold Chevy Blazer, which are pretty rare.... This case is remarkably similar to the facts of [Smith v. State]. In Smith, police received a tip from Smith's girlfriend that Smith would have heroin in his vehicle northbound on Highway 6 between 6:00 and 8:00 p.m. She described the vehicle, license number, and explained Smith would have two passengers. Shortly after 6:00, Smith was in the vehicle and place as described with two passengers; he was stopped and heroin was found....The [Smith] court thought it was relevant that the informant had not explained the reason for turning in this information on her boyfriend or whether she could have an ulterior motive....[A]n innocent detail may corroborate an anonymous tip when the tip correctly predicts future movements of the suspect if the travel involves unusual itineraries. When the travel itinerary is more commonplace, knowledge of a suspect's travel plans may not be sufficient."

The 8 minutes it took for a narcotics-detection dog to arrive at the scene did not prolong initial traffic stop beyond the time reasonably required to complete the mission of the stop; importantly, the dog arrived the before officer finished conducting normal procedures for a traffic stop. *Branch v. State*, 2011 WL 1028958 (Tex.App.-Austin Mar 18, 2011) (NO. 03-09-00477-CR) "[Officer] testified that during the time after the initial stop and before [officer 2] arrived with the dog, [officer] was checking [D's] driver's license and insurance information and waiting for a police dispatcher to respond to him regarding whether [D] had any warrants. [Officer] testified that his actions were the "normal procedure" for a traffic stop and that he proceeded in a "normal fashion." He testified that waiting for [officer 2] to arrive with the dog did not delay the stop. [Officer] testified that [officer 2] arrived within approximately seven or eight minutes of the traffic stop. The video from [officer's] patrol car shows that the dog arrived within eight minutes of the traffic stop."

Deemed improper was prosecutor's comment relating to parole law and good-conduct time during closing argument of drug trial, to-wit: that D would "be done on life" in seven or eight years if he exhibited good conduct, that D would "never" serve as many as fifteen or twenty years if given a life sentence, and that D "would be out even quicker" if the jury gave him a thirty- or forty-year sentence. *Branch v. State*, 2011 WL 1028958 (Tex.App.-Austin Mar 18, 2011) (NO. 03-09-00477-CR) "The gravamen of the uncorrected statements was that the effective maximum period of imprisonment that the jury could impose was only seven or eight years and that the only way the jury could guarantee that [D] served that long was to impose a life sentence....We also note that a prosecutor acts under the authority of the State and brings a great deal of expertise to a criminal trial. The prosecutor here, speaking from such a place of authority, purported to explain the sentencing provisions in the jury charge when he made the inaccurate statements....It is also significant that the jury heard the inaccurate statements immediately before retiring to deliberate." Thus, defense attorneys' deficient performance in failing to object to the prosecutor's above-referenced statements prejudiced D, for purposes of claim of ineffective assistance; if defendant's attorneys had objected to the prosecutor's improper statements, the trial court could have corrected the misstatements and instructed the jury to disregard them.

Deemed insufficient was officer's affidavit for search warrant; although affidavit described weapons that were recovered from D's car on the night of the shooting, and that another witness had observed weapons in a "bunker" structure located on D's property, nothing in the affidavit indicated that any of the weapons were illegal. *Kennedy v. State*, 2011 WL 832122 (Tex.App.-Austin Mar 11, 2011) (NO. 03-07-00134-CR) Moreover, statements in affidavit by law-enforcement personnel that they believed that D was likely in possession of statutorily prohibited weapons were too conclusory to establish a basis for finding PC.

Deemed an "excited utterance" was out-of-court statement made by complainant one hour after D chased her down with his vehicle as she tried to run away, despite the one-hour time lapse, where officer described complainant as "very visibly shaken, very upset, scared, excited, and crying." *Dixon v. State*, 2011 WL 839689 (Tex.App.-Hous. (1 Dist.) Mar 10, 2011) (NO. 01-09-00340-CR) "[D] suggests that the passage of one hour between the event and the statement is too long for an excited utterance in light of evidence that in that time [complainant] left the scene of the offense, walked home, and made two 911 calls to the police....Based on [officer's] description of [complainant's] emotional state, the one hour time lapse does not make the statement inadmissible as an excited utterance."

D was without a reasonable expectation of privacy as to thumb drive (containing child porn) that he left in a computer at his place of employment (i.e., a police station) and thus lacked standing to challenge search of the thumb drive, because D had, previously, left the thumb drive in an area that was accessible to others, the drive did not contain any marks identifying D, and D did nothing to prevent others from accessing the drive (e.g., password) even though he possessed advanced computer knowledge. *Miller v. State*, 2011 WL 832126 (Tex.App.-Austin Mar 09, 2011) (NO. 03-09-00670-CR) "[D] testified that on three prior occasions, he had left his thumb drive in the patrol room, an area that was accessible to other law enforcement officers, animal control personnel, and citizens who were accompanied by officers. Although [D] testified that he considered the thumb drive to be his 'private possession,' he also testified that other than the initials 'ACCPD,' the thumb drive did not contain external identifying marks such as his name, badge number, address, or telephone number. Furthermore, the evidence tended to show that [D] possessed advanced computer knowledge. Yet by his own admission, [D] did nothing to prevent others from accessing the thumb drive, such as protecting it with a password, encrypting the data, or even placing the drive in a locked case. In fact, [fellow officer] testified that when he found the drive in the patrol room, it was already 'in' the computer-a computer which was the property of the Elgin Police Department....Because of the lack of identifying marks on the drive, the district court could have reasonably inferred that [D] was aware that his co-workers might attempt to identify to whom the drive belonged by opening it."

That D was observed to be the only occupant in a stationary vehicle justified (in part) officer's approach of D pursuant to officer's "community caretaking function," apparently under the assumption that when one is alone in their vehicle they're more likely to need a dose of community caretaking. *Kuykendall v. State*, 2011 WL 834060 (Tex.App.-Beaumont Mar 09, 2011) (NO. 09-10-00161-CR) "[Officers] testified that when [they] saw D's truck at ten o'clock at night, it was parked 'wrong' on the shoulder of the highway, and in a dark, non-residential area with just 'parking lamps on.' They noticed the occupant was alone and with no visible access to assistance. [Officers] testified they decided to stop and check on the welfare of the driver of the truck because the truck was parked on the side of the road with parking lights on, no residences or streets were within close distance, and it was an 'extremely dark area[.]' [Officer] explained that under those circumstances, 'we are going to turn around and check and make sure the driver is okay, make sure they are not having any kind of medical problems or something along those lines. If they are broke down, we will get them a tow truck or whatever we need to do to help them out.'....Nothing else suggested [D] was in distress or a danger to himself or others. Nevertheless, assuming a seizure occurred, the trial court could reasonably conclude that the officers were primarily motivated by community caretaking concerns, and that their belief was reasonable."

Evidence deemed insufficient that D knowingly possessed the child porn discovered on his computer because D bought the computer second-hand at a flea market, the computer contained viruses capable of covertly placing images on the computer, and it was impossible to determine when the images were placed on to, accessed, or deleted from, the computer. *Wise v. State*, 2011 WL 754415 (Tex.App.-Fort Worth Mar 03, 2011) (NO. 02-09-00267-CR) "We agree that Perry is factually distinct from the present case. In Perry, Perry affirmatively uploaded pornographic images of children onto the internet, his computer did not harbor any viruses that could covertly place images on Perry's computer, and there was no evidence that the computer was purchased second-hand, leaving little doubt that Perry accessed and then deleted the pornographic images of children found in his computer's free space." From the dissent: "Today, the majority holds that when defendants possess illegal pornographic images on their computers but delete them and send them to their hard drives' free space before the police discover them, the State cannot prove intentional or knowing possession of the images....The majority mischaracterizes the evidence about the viruses on [D's] computer. [The] State's digital forensic examiner, testified that the computer had several viruses and then said that some viruses, hypothetically, are capable of remotely accessing a computer and storing images on it. [The forensic examiner] did not say that the viruses found on [Ds] computer served such a purpose. She did explain, however, that the probability of a

malicious outsider using a virus to store child pornography in the free space of another computer is low....[A] lack of direct evidence and the existence of alternative hypotheses will be common features of many cases in which illegal images have been deleted and reside in a computer's free space. These features should not prevent a conviction where a rational jury may nonetheless rely on circumstantial evidence to find the elements of the crime beyond a reasonable doubt.”

Officer's initial approach of a pedestrian was a consensual encounter, even though it occurred at an unusual hour (3:00 a.m.), because it occurred in a well-lit area that had “quite a bit” of foot traffic for that time of the morning. *State v. Castleberry*, 332 S.W.3d 460 (Tex.Crim.App. Mar 02, 2011) (NO. PD-0354-10) “We have explained that a ‘reasonable person would feel freer to terminate or ignore a police encounter in the middle of the day in a public place where other people are nearby than he would when parked on a deserted, dead-end street at 4:00 a.m.’ [D] testified that he was walking from a bar to his apartment, which was located approximately one block from where he was arrested. He explained that the area was ‘well lit enough where you could, you know, see what's going on.’ Officer Barrett said that a person would not need a flashlight to walk there safely because it was lit by ‘ambient light from the surrounding ... area.’ [D] also explained that the area has ‘quite a bit’ of foot traffic at 3:00 a.m. Under these facts, we conclude that a reasonable person in [D's] shoes would have felt free to terminate the encounter, making it consensual.”

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