

Interesting Cases - October, 2010

CD containing child porn not suppressed, even though D was present in the residence and did not consent to search; no “search” occurred, concluded court, because the officer merely asked D’s wife to give officer the CD and she consensually did so. *Bollig v. State*, 2010 WL 3835771 (Tex.App.-Dallas Oct 04, 2010) (NO. 05-08-01038-CR) “[D] argues only that the search of his residence and the seizure of the CD containing images of child pornography was unconstitutional based on Randolph because the search was conducted after the police obtained his wife’s consent, he was present when she consented, and he did not consent.” At the suppression hearing, D’s wife stated that “[A police officer] talked to me and asked me to give him that CD,” “[I] was asked, do you have the CD in your possession,” and “I was asked for [the CD], and I gave it to them.” Yet, a detective testified that the wife was “adamant” that the police take the CD. “Here the record contains testimony showing [D’s] wife gave the police the CD and there was no police search that led to its seizure.”

Conviction for DWI upheld, even though officers were unable to locate D after the accident for up to 30 minutes at which point officers found D at his residence where he had partaken in post-accident drinking (3 glasses of wine) allegedly. *Gonzales v. State*, 2010 WL 4229114 (Tex.App.-San Antonio Oct 27, 2010) (NO. 04-09-00811-CR) “[D] testified that the cause of his intoxication was his consumption of three glasses of wine after arriving at his residence,” and also D alleged that the accident was due to a tire blowout and sleep deprivation. The Court nevertheless determined that various circumstantial evidence was sufficient to support the DWI conviction, e.g., only a one-vehicle accident (i.e., hit a fence), no skid marks, driver left scene of accident, and the officer’s testimony that “a person would not likely have reached the level of intoxication he observed in [D] unless the person drank continuously for twenty minutes, and he saw no evidence near [D] that indicated [D] had been drinking at his residence.”

Conviction for DWI upheld, despite testimony of three witnesses that someone other than D was driving D’s motorcycle at the time of the crash, along with the consistent testimony of an independent fourth witness. *Gunter v. State*, 2010 WL 4138721 (Tex.App.-Fort Worth Oct 21, 2010) (NO. 02-09-00315-CR) “[I]n contrast to the testimony given by the witnesses that [D] called, the State provided testimony from two officers who said that [D] told them that he had been driving the motorcycle home from the bar before he crashed it. [One of the officers] also said that [D’s] arm was injured and looked like it had a ‘road rash,’ which supports the State’s theory that [D] crashed the motorcycle.”

Interaction between D and officers was not a consensual encounter; one officer used a spotlight to illuminate D who, along with three other men, were walking behind stores in a strip mall, and the officers communicated in an authoritative tone to D that he walk to the patrol car and place his hands on the car. *Parks v. State*, 2010 WL 4229043 (Tex.App.-San Antonio Oct 27, 2010) (NO. 04-09-00650-CR) The Court also emphasized that two officers were present (fully uniformed and armed). “Although [D] did not immediately place his hands on the patrol car as instructed, he ‘yielded’ to Officer Hensley’s request/command by stopping his path of travel.”

State argued that after making a left turn the traffic code requires the driver to immediately enter the left-most lane; the court concluded that, even if a traffic violation occurred, because the officer was unaware of the violation at the time of the stop, it did not afford the officer RS to stop D’s vehicle. *State v. Ruelas*, 2010 WL 3896516 (Tex.App.-El Paso Oct 06, 2010) (NO. 08-09-00091-CR) “[The State] contends that [D] testified to making an improper left turn onto [a road] by directly entering into the right lane after making his left turn. The State argues that this particular act violates the traffic code, but the trial court disregarded [D’s] admission by concluding that the evidence should be suppressed because that was not the violation [officer] testified to. The State argues the fact that [officer] did not testify specifically that [D] entered into the right lane immediately after turning left is irrelevant because our court recognized previously that ‘an officer’s stated reason for the stop is not controlling if there is an objectively reasonable basis for the stop as shown by the evidence.... Similar to Swaffar, in the instant case, it was not until the suppression hearing when the State cross-examined [D] that the State

and [officer] learned of the facts suggesting [D] turned directly into the right lane after making a left turn and only used his left signal. Subsequent to this testimony by [D], [officer] testified that such conduct violates the traffic code. Because law enforcement action can only be supported by facts an officer was actually aware of at the time of that action, and [officer] did not testify to [D's] act of turning directly into the right lane after turning left onto [road], [officer] lacked reasonable suspicion to support the stop of [D].”

Officers were without RS, even though one officer noticed that D and three accompanying men had blue rags hanging from their pockets, and even though officer associated blue rags with gang members and believed that gang members often carry weapons to protect themselves or drugs.

Parks v. State, 2010 WL 4229043 (Tex.App.-San Antonio Oct 27, 2010) (NO. 04-09-00650-CR) “While the State correctly argues that gang membership may be a factor to be considered in determining if reasonable suspicion exists, it has not cited any authority holding that gang membership alone provides reasonable suspicion for an investigative detention or a Terry frisk.” Moreover, officer did not testify that any particular gang identified itself with similar blue rags or that such a gang was active in the area, and the officer did not explain how he acquired his knowledge about the weapon-carrying propensities of that particular gang. “Although the officer testified that he has come into ‘contact’ with ‘gang members’ at least once a day for the nine years he has worked as a police officer, he was never questioned about the basis for his testimony that he associated blue rags with gangs or how he acquired knowledge that ‘gang members’ carry weapons.”

Officer had PC to believe that club in which D was located was a “public place,” as required to support D’s arrest for drinking in a public place after hours, despite D’s contention that “patrons were charged an admission fee and subject to search and exclusion by security personnel.”

Quinones v. State, 2010 WL 4117451 (Tex.App.-Amarillo Oct 20, 2010) (NO. 07-09-0193-CR) While the club indeed had security personnel at the door monitoring ingress and egress, the officer testified that anybody could walk up to the club, pay the cover charge, and go inside. “[Officer] further disclosed that [the club] advertised its services in other ‘bars.’”

D had no reasonable expectation of privacy as to contents of plastic shopping bag, which was seized by police from co-defendant’s vehicle after D gave bag to co-defendant; “[D], [h]aving assumed the risk that [co-defendant] would betray the secrecy concerning the bag’s contents, relinquished his expectation of privacy.” *Pham v. State, 2010 WL 4013552 (Tex.App.-Hous. (14 Dist.) Oct 14, 2010) (NO. 14-09-00484-CR)*

“More importantly, the evidence unequivocally reflects that [D] had no intention of repossessing the bag: by giving the bag to [co-defendant], who in turn would give it to a third party, [D] permanently disavowed possession and ownership of the bag.”

Handgun retrieved from D’s automobile after it was impounded by the police was pursuant to [D’s] consent, despite [D’s] argument that his consent had been coerced since the car had already been impounded and he was, therefore, left with no choice but to consent to the search. *Ferguson v. State, 2010 WL 4013737 (Tex.App.-Hous. (14 Dist.) Oct 14, 2010) (NO. 14-09-00597-CR)*

“The written consent to search describes [D’s] vehicle as being located at the police impound lot; however, there is no evidence [D] knew the vehicle had been taken there until he reviewed and signed the written consent form, which was after he had already agreed to give a statement to [officer] and after he had already orally consented to the search of his vehicle.”

Prosecutor’s calling attention to D’s lack of witnesses did not constitute an improper comment on D’s failure to testify because, according to the court, D was not the only witness that could have been called to testify. *Tanner v. State, 2010 WL 4263822 (Tex.App.-Beaumont Oct 27, 2010) (NO. 09-09-00458-CR)* “A remark that calls attention to the absence of evidence which only the defendant could supply will result in reversal; however, if the language can reasonably be construed to refer to appellant’s failure to produce evidence other than his own testimony, the comment is not improper.”

D’s post-arrest interview was admissible even though he did not receive Miranda warnings because an employee of the county pretrial services agency conducted the interview, which constituted “administrative questioning.” *Smith v. State, 2010 WL 3928485 (Tex.App.-Hous. (1 Dist.)*

Oct 07, 2010) (NO. 01-09-00263-CR) “[D] argues that the interviewer’s questions adduced the primary basis for his conviction-information linking him to the address at which the car involved in the aggravated robbery was found, and establishing his relationship with the car’s owner-and, therefore, constituted custodial interrogation requiring Miranda warnings. Under both the federal and state constitutions, questioning attendant to an administrative ‘booking’ procedure does not generally require Miranda warnings.”

Motel room search proper, even though D did not consent, because D had no reasonable expectation of privacy as D failed to show that he was an overnight guest in the room and D’s girlfriend consented to search and she was the only person in whose name the room was rented.

Carter v. State, 2010 WL 3928492 (Tex.App.-Hous. (1 Dist.) Oct 07, 2010) (NO. 01-09-00349-CR) “The officers found female clothing and personal articles in the dresser, but no male clothing or personal items anywhere in the room....[D] contends that his expectation of privacy in [girlfriend’s] hotel room was objectively reasonable because he was legitimately in the room, he believed that he had to power to exclude others from the room as demonstrated by his attempt to refuse entrance to the police, he tried to ensure his privacy by closing the curtains and blinds, the room was not open to the public, and the ‘expectation of privacy of a boyfriend and girlfriend behind closed doors’ is consistent with historical notions of privacy....According to [officer], the gap in the curtains was wide enough that one could walk by the window and clearly see in ‘without having to actually look inside.’”