

Interesting Cases - June, 2011

D's use of cell phone at the time of auto accident not sufficient to support conviction of criminally negligent homicide. *Montgomery v. State*, 2011 WL 2150230 (Tex.App.-Hous. (14 Dist.) June 02, 2011) (NO. 14-09-00887-CR) "One of the State's [expert witnesses] testified that he believed cell phone usage was a factor in a growing number of accidents and could have been a factor here, but he cited no data or studies in support of these bare conclusions....In addition to failing to present any evidence of an increased risk of death, the State also failed to present any evidence that such greater risk was generally known and disapproved of in the community....Supported by additional scientific research and increased public awareness, Texans may one day determine that cell phone usage while operating a vehicle is morally blameworthy conduct that justifies criminal sanctions; however, the State failed to establish that such was the case in March 2008, at the time of this accident."

Video footage of inside of home taken by officer prior to obtaining a search warrant deemed admissible, even though the exigencies that justified the initial search of the house (i.e., observing dead victim through window) had dissipated by the time the video was taken. *Carmen v. State*, 2011 WL 2637489 (Tex.App.-Hous. (1 Dist.) June 30, 2011) (NO. 01-10-00124-CR) "Because the subsequent search merely documented what had already been observed in plain view during the initial, reasonable search, we conclude that trial court properly overruled [D's] objections."

State's argument on punishment that "if [D] kills again, that is on you" deemed permissible, despite D's argument that it interjects new facts not on the record relating to D's propensity to commit a future murder. *Carmen v. State*, 2011 WL 2637489 (Tex.App.-Hous. (1 Dist.) June 30, 2011) (NO. 01-10-00124-CR) "The State's argument does not indicate the likelihood of such a future occurrence. It merely poses the hypothetical possibility that a person who has murdered once could do so again. The evidence at trial supports the State's theory that [D] prepared for the murder by practicing firing the pistol, that [D] lay in wait in order to ambush his father when he arrived home after work, and that [D] showed no emotion or remorse after killing his father."

D's act of crossing the center stripe, resulting in fatal vehicle collision, was an act in furtherance of the offense of felony DWI, as would support conviction for felony murder. *Adams v. State*, 2011 WL 2242607 (Tex.App.-Waco June 08, 2011) (NO. 10-10-00358-CR) D unsuccessfully argued that "the evidence was insufficient in that the 'act clearly dangerous to human life,' which was driving across the center stripe of a roadway into the opposing lane of traffic, was not 'in furtherance of' the commission of the offense of felony DWI."

Officer had RS to believe that D was committing public intoxication, even though officer did not smell alcohol or observe any other typical signs of intoxication, because D was sitting in a vehicle, asleep, with the lights on and the engine running, and parked on a sidewalk in front of a gas station during the early morning hours. Officer also had RS that D was committing burglary, as explained below. *York v. State*, 2011 WL 2555688 (Tex.Crim.App. June 29, 2011) (NO. PD-0088-10) "Although [officer] did not smell alcohol as he approached the car, that fact did not cause reasonable suspicion to dissipate, in part because [D] could still have been intoxicated by drugs.... Even before [officer] parked behind [D's] car, there was reasonable suspicion to believe that a burglary was occurring. [Officer] knew that the Exxon station was closed, that the station had been burglarized before, that it was about 3:00 a.m., that the headlights of [D's] car were shining into the store, and that [D] was parked too close to the store door (on the sidewalk). These facts were sufficient for [officer] to reasonably suspect that a burglary might be occurring and to justify an investigation. When the officer approached the car on foot, he learned that the engine was running, which would be consistent with it being a getaway car."

Fourteen-year-old boy who opened the front door at 2:00 a.m. in response to officer's knock had apparent authority to consent to officer's warrantless entry into residence to search. *Limon v. State*, 340 S.W.3d 753 (Tex.Crim.App. June 15, 2011) (NO. PD-1320-10) "[Boy] opened the door by himself in response to [officer's] knock. The trial court could have believed that his act suggests a greater

level of authority to permit entry than, for example, if he had answered 'What do you want?' from behind the door, or if he had answered the door with an adult in view behind him. Second...the trial court reasonably could have inferred from [officer's] testimony that [boy] appeared to be at least a teenager of significant maturity, if not a young adult. Third, [boy] consented to mere entry through the front door, as opposed to entry or search of less public areas of the house....Fourth, the officer's announced purpose was to conduct an emergency public-safety function. We think it an even more widely shared social expectation that a teenager would have authority to permit entry for an emergency public-safety function than, for example, entry for a salesperson to make a sales pitch. Finally we consider the time of the entry: 2:00 a.m. The Court of Appeals found that the hour weighed against believing that [boy] had authority because he may have been awakened from sleep and not thinking clearly. On the other hand, the trial court could have found it reasonable for [officer] to believe that an individual opening the door at 2:00 a.m. was a resident rather than a guest."

Portion of prosecutor's closing argument in which he asked D if he still heard murder victim's girlfriend screaming was an improper comment on D's failure to testify. *Archie v. State*, 340 S.W.3d 734 (Tex.Crim.App. June 08, 2011) (NO. PD-0189-10) "These questions go more immediately to [D's] present state of mind as he sat in the courtroom, seeming to ask whether he presently harbors a guilty conscience for what transpired on the night of the murder. These questions could be answered only by [D], and the asking of these questions, coupled with the prosecutor's act of turning from the jury to face the defense counsel table, pointing, and taking a step or two towards [D], directly highlighted the fact that [D] did not personally take the stand to testify. We think the jury could only have construed this as an invitation to go beyond the inference deriving from the kite to consider [D's] failure to testify, perhaps to express remorse, from the witness stand. Thus, we agree with the court of appeals to the extent that we hold that at least that part of the prosecutor's argument was improper."

Blood search warrant deemed valid, even though affidavit was silent regarding the time at which D was stopped for suspected DWI, and despite D's argument that the four hours that passed since the arrest rendered the blood test inaccurate. *State v. Jordan*, 2011 WL 2555708 (Tex.Crim.App. June 29, 2011) (NO. PD-1156-10) "[T]he affiant's introductory statement that the offense occurred on June 6, 2008, provided the magistrate with a substantial basis to infer that the driving and intoxication elements then described in the affidavit were observed on that same date....We also find that the magistrate had a substantial basis for determining probable cause despite the failure of the affiant to specify the time of the stop. Because the warrant was issued on June 6th at 3:54 a.m., less than four hours could have elapsed between the observation of the offense, the stop, and the issuance of the warrant....[D] argues, 'When the length of time from the point of arrest stretches into hours, the less accurate the test of the sample will be on its face, and the testimony of the expert, if such evidence is even available, becomes even more speculative....While we have recognized that 'testing nearer in time to the time of the alleged offense increases the ability to determine the subject's offense-time BAC,' retrograde extrapolation to a specific blood-alcohol concentration was not necessary for the [D's] blood to be evidence of a crime. Evidence of any amount of alcohol, or any other substance or combination falling within the definition of 'intoxicated' in Section 49.01(2) of the Penal Code, could be probative of intoxication because it would provide evidence that the [D] had introduced such a substance into his body. Given the symptoms of intoxication described in the affidavit, we hold that the magistrate had a substantial basis to determine that evidence of intoxication would probably be found in the [D's] blood within four hours of the stop."

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