

## Interesting Cases - September, 2011

**Trooper had RS to continue detention while awaiting a canine based on D's nervousness and also officer's belief that D had misrepresented that she had never been arrested when, in fact, she had nine prior arrests.** *Hamal v. State*, 2011 WL 4414161 (Tex.App.-Fort Worth Sep 22, 2011) (NO. 02-09-00448-CR), rehearing overruled (Oct 27, 2011) However, because of the ambiguous wording of the officer's question to [D] (i.e., "Have you ever been in any trouble for anything?") it was questionable whether officer was reasonable in believing that [D] correctly heard his question and understood it as asking whether she had ever been arrested. For that reason, the court held that an exclusionary-rule instruction was warranted. Trial court's failure to include said instruction constituted egregious harm, resulting in reversal.

**Ordering a driver to perform field sobriety tests does not, without more, escalate a traffic stop into a custodial detention, despite officer's admission that driver was not free to leave.** *Berkemer*, 468 U.S. at 442; *Waldrop*, 7 S.W.3d at 839; *State v. Hutto*, 977 S.W.2d 855, 858 (Tex.App.-Houston [14th Dist.] 1998, no pet.). "The officer testified that [D] was not free to leave during this questioning, but he also testified that [D] was not restrained and was not told that he was under arrest....Based on the evidence that is in the record, we hold that the trial court abused its discretion by ruling that [D] was in custody after the HGN test....Apart from questioning and field sobriety tests...the record contains no evidence of objective circumstances that suggest [D] was in custody after the HGN test."

**Evidence was sufficient to show that D had been driving while intoxicated because of officer's testimony that the hood of D's truck was still warm, indicating to him that the truck had been recently driven, and also that the inside of the cab was warmer than the outside.** *Warren v. State*, 2011 WL 4036139 (Tex.App.-Hous. (1 Dist.) Sep 08, 2011) (NO. 01-10-00047-CR) "Even without knowing the time span between when the accident occurred and when [officer] arrived, [the above-described] evidence, viewed in the light most favorable to the verdict, is sufficient to support a finding by the jury that [D] was intoxicated while he was driving."

**D did not have standing to challenge search of vehicle, despite undisputed testimony that owner of vehicle had loaned D the vehicle for several months to drive around at D's will.** *Castaneda v. State*, 2011 WL 4490960 (Tex.App.-El Paso Sep 28, 2011) (NO. 08-10-00050-CR) "[D] testified that he had access to the vehicle and was allowed to drive it, with or without [the owner], for a period of about two or three months." The court concluded that [D] had no standing because, at the specific time that the vehicle was searched, [D] was not occupying it nor did he own it.

**Prosecutor's statement during closing argument that D did not have remorse for punching victim deemed an impermissible comment on D's failure to testify.** *Snowden v. State*, 2011 WL 4467280 (Tex.Crim.App. Sep 28, 2011) (NO. PD-1524-10) The statement highlighted to the jury [D's] failure to take the stand and claim remorse, and jury was not entitled to infer [D's] lack of remorse merely from his courtroom demeanor.

**D unsuccessfully argued that, because search warrant affidavit described an uncontrolled buy, it was insufficient to show that contraband would be found at specific address. Also unsuccessful was D's contention that presence of the unknowing participant described in the affidavit interposed a layer between the confidential source and the transaction that rendered reliance on said transaction misplaced.** *Bibbs v. State*, 2011 WL 4104878 (Tex.App.-Amarillo Sep 15, 2011) (NO. 07-11-00064-CR) "[D] contends that...within the drug trade, such elaborate subterfuge and misdirection may be reasonably expected due to paranoia regarding possible police investigations or fear of other rival drug dealers being able to locate where the dealer stores his or her drugs. While we agree with [D] that it is possible that a drug dealer might employ such elaborate precautions, it is more logical to infer that the unknowing participant in this case went to [specific address] to pick up the cocaine from that location. Thus, we conclude that the magistrate made a practical, common sense decision that, given the totality of the circumstances set forth in the affidavit, there was a fair probability that contraband or evidence of a crime would be found at [specific address]."

**D unsuccessfully argued that the inconsistent testimony of two officers (described below) rendered evidence insufficient that D was intoxicated while operating vehicle.** *Ruiz v. State*, 2011 WL 4088623 (Tex.App.-San Antonio Sep 14, 2011) (NO. 04-10-00722-CR) "[D] contends the evidence is legally insufficient to support the jury's verdict that [D] was intoxicated while operating a motor vehicle because there is a glaring inconsistency between [Officer 1's] testimony and [Officer 2's] testimony. [Officer 1] did not smell alcohol on [D] while [Officer 2] did. Additionally, [Officer 1] stated that [D] had a minor cut on his forehead, yet [Officer 2] observed no obvious indication of injury. [D] asserts that the inconsistent testimony of two trained law enforcement officers testifying on behalf of the State creates reasonable doubt. [D] maintains that the evidence of

intoxication was weak, and that his explanation for the accident—that he swerved to avoid a deer—was plausible. We disagree that the evidence is legally insufficient to support the jury's verdict.”

**The court, in rejecting D's contention that officer asked questions unrelated to the traffic violation on which the stop was based, concluded that officer's asking about driver's previous whereabouts “is standard procedure during [any] traffic stop.”** *Cantu v. State*, 2011 WL 4089575 (Tex.App.-San Antonio Sep 14, 2011) (NO. 04-10-00533-CR) “[D] contends [officer] did not promptly investigate the alleged traffic violations, but ‘milled about’ asking questions unrelated to the reasons he stopped [D] in the first place....[Officer] inquired about [D's] previous whereabouts, which is standard procedure during a traffic stop....Moreover, the overall duration of the traffic stop was relatively short; [officer] discovered the controlled substance less than five minutes after the stop was initiated. The record does not support the conclusion that [officer] strayed from the initial purpose of the stop or that [officer] unnecessarily delayed the detention.”

**Officer exceeded scope of consent to search of business' premises by conducting a dog sniff around exterior of D's vehicle against expressed wishes of D.** *State v. Weaver*, 2011 WL 4715178 (Tex.Crim.App. Sep 28, 2011) (NO. PD-1635-10) Officers had finished looking for the specific suspect for which they were searching and had achieved the ostensible purpose of their entry by the time that officers began their search of [D's] van, which was parked at the building's loading dock.

**The propriety of stopping a driver on suspicion of being intoxicated does not necessarily turn on whether the driver committed a traffic offense.** *Powell v. State*, 2011 WL 4357756 (Tex.App.-Austin Sep 14, 2011) (NO. 03-10-00728-CR) “[I]n the cases to which [D] cites in his brief, the officers testified that the reason they conducted the traffic stop was because of a particular traffic violation, and the record did not support a finding that such a traffic violation had occurred. In this case, in contrast, although [officer] testified that he believed [D] had committed the [various] traffic offenses, he also testified that he conducted the traffic stop because he believed, based on everything he had observed, that [D] was driving while intoxicated....The evidence of erratic driving, summarized above, along with the additional evidence that the driving was occurring on a Sunday morning at approximately 1:52 a.m. and that [officer] had observed ‘many’ intoxicated drivers in his years of experience as a peace officer, would support the trial court's finding that [officer] had reasonable suspicion to believe that [D] was driving while intoxicated. [Court then cites to case concluding that even though driver might not have committed traffic offense that did not mean that officer lacked RS to believe driver was intoxicated].”

**In the context of failure to stop and render aid, D had reason to know that the other driver needed medical attention, even though the other driver's car was merely “struck from the rear while traveling at a speed of approximately forty miles per hour” and even though it “did not roll or strike any other object before coming to rest.”** *Henry v. State*, 2011 WL 3890736 (Tex.App.-Texarkana Sep 06, 2011) (NO. 06-11-00010-CR) “Here, the record indicates the force of the impact caused [other driver's] car to spin out of control into the median....[Officer] described the damage to [victim's] car as severe, rendering the car inoperable. The incident report described the accident as ‘a major accident.’ The crash caused the air bag in [the] vehicle to deploy, and photographs depict significant damage to the front driver's side of the vehicle. Among the debris at the accident scene was the front license plate of [D's] vehicle. It was apparent to [officer] that [other driver] was in need of medical treatment at the accident scene, and she was taken by ambulance to the hospital, and was treated for her injuries.”

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