

Interesting Cases - January, 2011

D's act of pretending to talk on his cell phone during the traffic stop was among the circumstances that provided officer RS to expand scope of stop. *Alleman v. State*, 2011 WL 193496 (Tex.App.-Beaumont Jan 19, 2011) (NO. 09-10-00173-CR) "While looking in the console, [D] opened his cellular telephone and held it to his ear. [Officer] did not hear the phone ring and he noticed that [D] was not speaking into the phone. [Officer] found this 'kind of odd.'....While conducting the traffic stop, [officer] observed several facts that led him to believe that another offense was occurring: (1) [D] stepped out of his vehicle almost immediately after being stopped, (2) [D] silently held his telephone to his ear, (3) [D] claimed to be on a business trip, but had no clothing or other items to corroborate this claim, (4) [officer] smelled marijuana when [D] retrieved his insurance papers, and (5) [officer] saw what appeared to be marijuana residue when he walked to the drivers side door of the vehicle."

Lack of specific dates in search warrant affidavit was not fatal to search warrant because affidavit contained words such as "recently." *Jones v. State*, 2011 WL 339213 (Tex.App.-Hous. (1 Dist.) Jan 31, 2011) (NO. 01-08-00828-CR, 01-08-01015-CR, 01-08-01016-CR) "The affidavit includes several direct and indirect references to the timing of the controlled buy. First, [officer] described his contact with the first confidential informant as having occurred 'recently.'....The investigation culminated in the controlled buy forming the basis for probable cause, which was described as occurring 'after' [officer] 'recently' met with the first confidential informant."

"Sunday at 4:50 a.m." deemed by court to be "a time at which more individuals drive intoxicated." *Arroyo v. State*, 2011 WL 286136 (Tex.App.-Hous. (1 Dist.) Jan 27, 2011) (NO. 01-10-00136-CR)

Although officer stopped D for no front license plate, officer's questioning of D about whether he possessed narcotics was reasonably related to the stop, because, in part, of officer's knowledge of D's background involving narcotics. *Kelly v. State*, 331 S.W.3d 541 (Tex.App.-Hous. (14 Dist.) Jan 27, 2011) (NO. 14-09-00992-CR) "Because [officer's] suspicions were aroused, in part, by [D's] furtive movements inside the vehicle and [D's] nervousness after being stopped, [officer's] questioning about whether [D] possessed narcotics was reasonably related to the traffic stop investigation....especially given the fact that [officer] learned of [D's] criminal background involving narcotics and asked [D] about this information..."

Driving below the speed limit weighed in favor of RS of DWI. *Arroyo v. State*, 2011 WL 286136 (Tex.App.-Hous. (1 Dist.) Jan 27, 2011) (NO. 01-10-00136-CR)

The following exchange was deemed sufficient to constitute D's consent to search. In response to officer's request for permission to search the vehicle, D asked the officer: "You want to have a look inside?" and then D asked the officer: "You want me to open the trunk?" *Glenn v. State*, 2011 WL 322451 (Tex.App.-Eastland Jan 27, 2011) (NO. 11-09-00099-CR)

In an issue of virtual first impression in Texas, court definitively held that the Fifth Amendment has no applicability to pre-arrest, pre-Miranda silence used as substantive evidence in cases in which D does not testify. *Salinas v. State*, 2011 WL 903984 (Tex.App.-Hous.(14 Dist.) Jan 17, 2011) (NO. 14-09-00395-CR) "There is little precedent from Texas courts to provide guidance.... A sister court of appeals has addressed the issue, but did not ultimately decide it.... The federal courts of appeals are split on the issue. The First, Sixth, Seventh, and Tenth Circuits have held that pre-arrest, pre- Miranda silence is not admissible as substantive evidence of guilt.... We agree with the Fifth, Ninth, and Eleventh Circuits....A plain reading of the [Fifth] amendment reveals that only government compulsion triggers its protections against self-incrimination."

D's erratic driving plus the presence of an empty pill bottle found in D's vehicle was not sufficient to support issuance of a blood-draw search warrant. *Farhat v. State*, 2011 WL 56056 (Tex.App.-Fort Worth Jan 06, 2011) (NO. 02-10-00030-CR) "[C]ontrary to the trial court's finding that the officer saw 'pills

in the console' of [D's] vehicle, the affidavit states only that the officer saw two pill bottles in the center console. The affidavit does not state that the bottles actually contained pills, and even if a reasonable inference could be drawn that the bottles did contain pills, the affidavit was silent as to the type of pill bottles, whether they were prescription or over-the-counter medicine bottles, whether [D] admitted to consuming pills from the bottles, or whether [D's] demeanor or appearance suggested that he had consumed them....The remaining facts contained in the affidavit show that [D] was driving ten miles below the speed limit shortly before 1:00 a.m., that he 'was weaving from sided [sic] to side,' that he turned on his right-turn signal before turning the opposite direction into the parking lot, and that he refused field sobriety tests. We do not know from the affidavit the extent of [D's] weaving or whether he was weaving outside of his lane or into oncoming traffic nor is it reasonable to infer such facts....[W]e hold that the magistrate did not have a substantial basis for concluding that there was a fair probability or substantial chance that [D] had committed the offense of DWI or that evidence of intoxication would be found in [D's] blood."

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