

Interesting Cases - July, 2011

An individual's diet and cologne affect his human odor, which finding was properly used to exclude, as unreliable, evidence of scent-discrimination lineup procedure in which three bloodhounds purportedly identified D's scent to be present on items recovered from crime scene. Also deemed unreliable was dog handler's opinion due, in part, to lack of oversight and verification of his test results. *State v. Dominguez*, 2011 WL 3207766 (Tex.App.-Hous. (1 Dist.) Jul 28, 2011) (NO. 01-10-00428-CR) “[Dog handler] stated his task in interpreting the dogs' alerts is subjective in nature. [State's expert] stated it is up to the handler to decide whether the dog “alerted.” Neither [state's expert] nor [d's expert] could discern the dog signals identifying an alert in a video demonstration of [dog handler's] scent-discrimination lineup....Finding 13 states that, unlike a dog's alert to a bomb or to drugs, the matching of a scent in a lineup is not verifiable. Likewise, Finding 20 states that no laboratory analysis can verify the scent-discrimination lineup. The undisputed evidence at the hearing was that no analysis or instrument currently exists to verify the results of a scent-discrimination lineup, and that only the handler can verify that the dog has alerted to the correct scent.”

D raised inference of racial discrimination in jury selection, where State used its three strikes to remove two (of the 5) African-American members from the panel, and remove one (of 2) Asian venire members from panel. Also, state failed to rebut presumption of racial discrimination, despite the prosecutor's below-quoted testimony. *Hassan v. State*, 2011 WL 3196048 (Tex.App.-Hous. (14 Dist.) Jul 28, 2011) (NO. 14-10-00067-CR) “[T]he prosecutor testified that he exercised a strike on venire member 5, who is Asian, because she was a certified public accountant (CPA). The prosecutor stated that he never seats a person who works as a CPA on any jury. In his view, CPAs tend to overanalyze cases....Therefore, the prosecutor offered a race-neutral reason for striking one of the two Asian venire members....The prosecutor also testified at the Batson hearing that, in examining the 2005 trial record, he could not recall why he struck venire member 2 and venire member 8. The prosecutor explained that he could have exercised a strike against any venire members if he was not satisfied with the way they reacted to his voir-dire questions, humor, or joking, or if they did not maintain eye contact. On cross-examination, the prosecutor candidly stated that he could not recall whether venire member 2 or venire member 8, in particular, reacted in any specific way to his line of questioning. In response to cross-examination questions, the prosecutor likewise could not recall anything specific about these particular venire members, though he added, ‘I can tell you without a doubt that I never struck a [potential] juror for an improper reason including race or sex. While I cannot sit here and tell you today why they were struck, I can tell you with certainty they were not struck for any improper reason.’ A prosecutor may not rebut the presumption merely by denying that he had a discriminatory motive or by ‘affirming his good faith in individual selections.’”

Officer's testimony during murder prosecution regarding witness' identification of person, in photo array, as being the one present in the back of pickup truck involved in the shooting -- which testimony occurred after witness' testimony that he did not recall making such identification -- fell within the hearsay exclusion for identifications. *Delacerda v. State*, 2011 WL 2931189 (Tex.App.-Hous. (1 Dist.) Jul 21, 2011) (NO. 01-09-00972-CR) “We agree with the rationale of the Illinois Supreme Court and the District of Columbia Court of Appeals that limiting admissible testimony under the identification exclusion to the hearsay rule solely to the declarant's naming of the identified individual and not allowing testimony regarding what the declarant identified the individual as doing is unduly restrictive.”

Deemed proper was State's commitment question during voir dire to determine whether jurors could convict D in the absence of physical evidence if the state otherwise proved the elements of the offense beyond a reasonable doubt. *Delacerda v. State*, 2011 WL 2931189 (Tex.App.-Hous. (1 Dist.) Jul 21, 2011) (NO. 01-09-00972-CR) “The questions did not attempt to commit the prospective jurors to a specific set of facts prior to the presentation of evidence at trial. Rather, the only fact that the questions included was the absence of physical evidence, such as DNA or fingerprinting evidence, and this fact was necessary to test whether a prospective juror possessed a bias against a phase of the law upon which the State was entitled to rely, and was, therefore, challengeable for cause.”

Officer's question to D concerning what kind of drugs D's wife had on her person constituted a post-arrest interrogation of D within meaning of *Miranda*. *State v. Ortiz*, 2011 WL 2713984 (Tex.App.-Amarillo Jul 13, 2011) (NO. 07-11-00001-CR) "We conclude [officer's] question does not fall within the category of general or routine questions incident to an arrest. Rather, it specifically addressed the officers' discovery of the item strapped to the leg of [D's] wife as she was searched in the presence of [D] and [officer]. [Officer's] question to [D] asking the 'kind of drugs' his wife had was practically certain to elicit an incriminating response."

Summaries authored by Chris Cheatham of:

Cheatham Firm

Legal Research, Motions & Briefs

<http://www.researchlawfirm.com/>

Dallas, Texas

Copyright 2011 by Chris Cheatham. No reproduction or redistribution without author's written permission. The author makes no warranty as to the accuracy, reliability, or completeness of the summaries. Important information is omitted from each summary in the interest of brevity.