Interesting Cases - May, 2011

Unfenced backyard deemed "curtilage" because D's home was located in a wooded area and there were no neighbors within several hundred yards. *Cooksey v. State*, 2011 WL 1796141 (Tex.App.-San Antonio May 11, 2011) (NO. 04-10-00424-CR) In addition, there was an absence of "no trespassing" signs posted on property, the home was not visible from the main road, and D's backyard and back steps were not visible from the driveway or from any neighboring properties. Lastly, the back steps on which officer observed potted marijuana plants were physically attached to the home.

D's written consent to search his property, which was given AFTER officers made an illegal entry into his backyard and observed marijuana plants on back steps, was not voluntary, even though there was no flagrant police misconduct; D gave consent to search less than five minutes of officer's entry into backyard, D did not volunteer his consent but was asked for it, D was not told he could decline consent, and officer testified that D was not free to leave. *Cooksey v. State*, 2011 WL 1796141 (Tex.App.-San Antonio May 11, 2011) (NO. 04-10-00424-CR) In addition, the officers failed to reveal to D that they were not legally authorized to be in the backyard. The court deemed the consent involuntary even though several factors favored the state, to-wit: "[T]he third factor favors the State because there is no evidence of flagrant police misconduct in this case….Because we construe the record in the light most favorable to the trial court's ruling, we presume [officers] only entered the backyard out of concern for officer safety, rather than with intent to surprise or alarm [D] or to discover illegal activity. Also, the sixth factor favors the State because, construing the record in the light most favorable to the trial court's ruling, we accept [officer's] testimony that he did not enter the backyard for the purpose of obtaining consent to search."

Officer's prolonging of stop, while awaiting drug dog, up to five minutes after he received confirmation that driver's license was invalid was not impermissible, where officer had sufficient information to corroborate tip concerning alleged drug house that D had been seen driving away from. *Mitchell v. State*, 2011 WL 2135368 (Tex.App.-Amarillo May 31, 2011) (NO. 07-09-00173-CR) "[Officer] testified he had previously made 'numerous stops from that house ... in reference to narcotics.'….[D] told the officer she lived at the residence….[D] also told the officer she had 'used about [every drug she] could' and had previously been arrested in a nearby town for 'cocaine.' But she considered herself 'in recovery right now.'….The officer told the trial court that as [D] spoke with him, she was agitated, shaking, and very nervous. Our review of the video supports the trial court's implicit findings of these observations. The officer can be heard on the video recording telling his fellow officer that [D] 'keeps moving around.'"

Falling asleep during voir dire deemed race-neutral reason for State to exercise peremptory challenge against African-American. *McGee v. State*, 2011 WL 1988522 (Tex.App.-Amarillo May 23, 2011) (NO. 07-10-0374-CR)

Judge of statutory county court, acting as a magistrate, did not have authority to issue a search warrant for the drawing of blood in a different county. *Sanchez v. State*, 2011 WL 1936064 (Tex.App.-Hous. (1 Dist.) May 19, 2011) (NO. 01-10-00433-CR) "[U]nlike district judges, who may act for one another, with no geographical restrictions, [cites Texas Constitution], no such grant of authority exists for statutory county court judges…. We conclude the Legislature has limited a statutory county court judge's authority to acting within the county of the court. Accordingly, we hold that the trial court erred by denying [D's] motion to suppress the evidence obtained as a result of the search warrant issued by a judge of a statutory county court of Montgomery County to be executed in Harris County."

RS shown as to investigatory stop of vehicle parked next to a fast food drive through window after the restaurant was closed. *In re A.O.,* 2011 WL 1878640 (Tex.App.-Amarillo May 17, 2011) (NO. 07-10-0194-CV) "In [Klare v. State], the court determined that the lateness of the hour, the fact a car was parked behind a closed shopping center, and prior burglaries in the area alone were not sufficient to provide reasonable suspicion for detention. However, here we have additional factors for the officer's consideration….only two days previously at a nearby location, a fast food restaurant was burglarized via entry through the drive-up window. Moreover, the lights of the business were extinguished at the time. There was also a rash of burglaries occurring that night involving pry bars and breaking windows. Also, the vehicle pulled away when the officer drove up, suggesting that [D] and his colleagues had the car's motor running."

Prosecutor's comment that D "has never taken responsibility for any of his actions" during punishment stage was not impermissible comment on D's failure to testify. *Kirvin v. State*, 2011 WL 1818420 (Tex.App.-Dallas May 13, 2011) (NO. 05-09-00734-CR) "[W]e conclude the State's argument was invited by, and made in response to, [D's] argument." D had argued essentially that he sympathized with both victims.

RS shown where officer's in-car computer terminal indicated that the insurance policy covering D's vehicle had lapsed, despite the undisputed fact that Texas law allows alternate methods (other than insurance) to satisfy the financial responsibility requirement. *Crawford v. State*, 2011 WL 1835270 (Tex.App.-Hous. (1 Dist.) May 12, 2011) (NO. 01-10-00559-CR) "[D] contends that [officer] could not reasonably rely on the insurance database currently used by enforcement to stop him for a lack of liability insurance. First, [D] correctly points out that Texas law does not specifically

require a person to purchase liability insurance. A person may establish the financial responsibility required to drive a vehicle by other methods, including filing a surety bond, making a deposit of cash or securities with the comptroller, or qualifying for and obtaining a certificate of self-insurance from the Department of Public Safety…. But, the mere fact that alternate methods exist to satisfy the Transportation Code's financial responsibility requirement does not render the stop unreasonable…. [Officer] could reasonably suspect from the fact that the vehicle previously had liability insurance coverage—by far the most common means of satisfying the financial responsibility requirement—that the policy's lapse meant that it no longer complied with the law…. [D] relies on [Gonzalez–Gilando v. State] for the proposition that the MDT insurance database cannot support a finding of reasonable suspicion. [However, the Gonzalez case] hinged on the fact that the computer database search result stated that the insurance information was 'not available' or the status was 'undocumented.'"

D's admission, during police interview, to being present during a robbery and murder did not, by itself, render interview custodial. *Hodson v. State*, 2011 WL 1796088 (Tex.App.-San Antonio May 11, 2011) (NO. 04-10-00060-CR) "Even though a suspect may implicate himself in an offense, unless the circumstances are unique, as in Dowthitt, 'this alone does not trigger custody.'…. Here, [officer] testified [that D] admitted to being present during the robbery and murder. Other than this admission, there were no other circumstances present to lead a reasonable person to believe he was under arrest….We hold the trial court correctly concluded [D] was not in custody when he made the statements in question."

D voluntarily consented to search of his car, even though officer asked him for consent repeatedly -- six times -- before D finally consented. *Meekins v. State*, 340 S.W.3d 454 (Tex.Crim.App. May 04, 2011) (NO. PD-0261-10) Repeatedly asking for consent to search does not result in coercion, particularly when the person refuses to answer or is otherwise evasive in his response. Here, D "stalled and evaded" the question, concluded the court.

D's climbing out of a police station window during police interview did not render D in custody for Miranda purposes because no guard was stationed outside the interview room, D had voluntarily gone to police station, interview began promptly and lasted about an hour, and D waited 26 minutes before he fled. *Hodson v. State*, 2011 WL 1796088 (Tex.App.-San Antonio May 11, 2011) (NO. 04-10-00060-CR) "While [officer] was interviewing [another suspect], [second officer] heard the commotion as well, and when he looked in the interview room, he saw [D] half-way outside the window. [second officer] testified [D's] father was hanging onto Hodson's legs while trying to fall backwards. Sergeant Boysen was outside the Annex and saw [D] drop from a window and run away. [Second officer] pursued [D] on foot….While [D] was on the run, [second officer] used [other suspect's] statement that she had seen [D] stab [victim] to secure an arrest warrant for [D]. [D] was eventually arrested."

Summaries authored by Chris Cheatham of:
Cheatham Firm
Legal Research, Motions & Briefs
http://www.researchlawfirm.com/
Dallas, Texas

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