



Criminal Justice Section

State Bar of Texas

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Interesting Cases - August, 2011

D was in "custody" during interview, even though officer informed D that he was not a suspect and that he was free to leave; each time D indicated a desire to go to the hospital or his home, officer indicated that he could not go to those places until the police were "finished." *McCulley v. State*, 2011 WL 3672062 (Tex.App.-Fort Worth Aug 18, 2011) (NO. 02-09-00222-CR) In addition, "...[Officer] acknowledged that [D] was not wearing shoes....[Officer] maintained that for the majority of the nearly four and one-half hour interview, [D] was free to leave at any time but that to leave would have required [officer's] assistance because 'it's ... kind of a sneaky way out.' When asked directly how [D] would have left the police station, [officer] said, 'I would have to had shown him the way out.'"

However, in the same case as above, D's questions about whether he could go to the hospital or go home, and D's statements that he wanted to "go to sleep," were not sufficient to "terminate" the interview, and thus, his post-Miranda statements were admissible. *McCulley v. State*, 2011 WL 3672062 (Tex.App.-Fort Worth Aug 18, 2011) (NO. 02-09-00222-CR) "[N]one of these statements constitute an unambiguous and unequivocal invocation of the right to remain silent or otherwise terminate the interview....In fact, when [D] ultimately told [officer], 'I just want to go to sleep,' [officer] did not simply ignore the statement and continue questioning. Instead, [officer] sought to clarify [D]'s wishes before continuing the interview."

Employee of shopping mall management company did not have reasonable expectation of privacy in the premises of the mall. *State v. Bell*, 2011 WL 3570185 (Tex.App.-Hous. (14 Dist.) Aug 16, 2011) (NO. 14-10-00771-CR, 14-10-00772-CR) There was an absence of evidence of extent of management company's involvement in day-to-day operations of premises or responsibility for signage indicating that premises were private property. In addition, any right against unreasonable search or seizure would have been enjoyed solely by the management company itself and could not be vicariously asserted by an employee of the company such as [D] (even though [D] held the title of "Mall Manager.")

Search warrant affidavit deemed sufficient even though it lacked specific dates for certain facts. *Steele v. State*, 2011 WL 3523094 (Tex.App.-Hous. (1 Dist.) Aug 11, 2011) (NO. 01-10-00788-CR, 01-10-00789-CR) "[D] contends that a reader of the affidavit supporting the search warrant cannot discern when [witness] filed his initial report with the [police department], when [officer] was assigned to the case, when [officer] interviewed [witness], or when [officer] interviewed [witness]. Although the affidavit omits the specific dates of these events, it contains references to time," concluded court. For example, "[t]he affidavit establishes that both [witnesses] stated that [D] was currently living with an 18-year-old male, named K.A." Although [D] contended that the word "currently" is meaningless because the affidavit fails to specify when the witnesses made these statements to officer, the court nevertheless concluded that "The affidavit...establishes that K.A. was born in April 1990. Thus, [witnesses] must have made these statements during or after April 2008, when K.A. attained 18 years of age."

Blood draw affidavit deemed sufficient, even though it did not detail what police intended to do with sample after it was taken and even though it did not state specifically how the blood sample would constitute evidence of the DWI offense. *State v. Webre*, 2011 WL 3443455 (Tex.App.-Austin Aug 05, 2011) (NO. 03-11-00036-CR) The court refers to [D]'s arguments as "novel" and then states that: [D] cites no case, nor have we found any, holding that an affidavit in support of a warrant in this situation must specify what is to be done with the blood sample after it is taken, nor do we know of any authority instructing that the failure to include this sort of detail in an affidavit should invalidate a magistrate's determination of probable cause. Instead, the Court of Criminal Appeals has consistently held that reviewing courts are not to take such hypertechnical views of affidavits supporting warrants. The magistrate needed simply to determine the probability that evidence of an offense, i.e., a blood alcohol content exceeding the legal limit, would be found in [D]'s blood when the warrant issued....Even if the detail that [D] suggests were required to justify a warrant, the affidavit is sufficient if the magistrate could have reasonably inferred the

required information from the facts set forth in the affidavit.”

Passenger’s answering of officer’s question asking where driver was traveling from gave rise to RS (when coupled with other factors – see below) because the passenger answered officer’s question in great detail while the driver remained silent; even though officer was speaking through the passenger window. *Baxter v. State*, 2011 WL 3835664 (Tex.App.-Fort Worth Aug 31, 2011) (NO. 02-10-00364-CR) Also, driver had a scared look on his face, passenger had no identification and, in response to whether passenger used drugs, passenger first said “no” but then immediately revised her answer to not “in a long time.” And, “based on the manner in which the car initially swerved and accelerated.”

Emergency exception to warrant requirement deemed inapplicable, because, at the time of the search, the victim's body was located outside the home rather than inside, and D had been removed from scene by that time. Thus, after initial protective sweep of home, officers should have not re-entered. *Tollefson v. State*, 2011 WL 3847200 (Tex.App.-San Antonio Aug 31, 2011) (NO. 04-10-00286-CR) The court pointed out that, because [D] was no longer at the scene, “[D] was not in a position to deny consent.”

Automobile exception did not apply to travel trailer, concluded court, despite’s State’s argument that “trailer could be rendered mobile by simply hooking the trailer up to a truck and moving the two-by-fours.” *Tollefson v. State*, 2011 WL 3847200 (Tex.App.-San Antonio Aug 31, 2011) (NO. 04-10-00286-CR) “Even though [D]’s trailer was subject to government regulation, [court cites regulations applicable to travel trailers], we hold his trailer was not readily mobile. [D]’s trailer did not have an ignition switch, the only way it could become mobile would be to hitch it to another vehicle, and it was still attached to the utilities at the time of the search.”

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