

## Interesting Cases - November, 2010

**Officers entered residence “voluntarily” where, after knocking, the officers heard one of the inhabitants yell “come in,” even if that particular inhabitant was a mere guest and had no actual authority over the premises.** *Colford v. State*, 2010 WL 4370952 (Tex.App.-Dallas Nov 05, 2010) (NO. 05-09-01360-CR) “[Officers] responded to a dispatch call regarding a citizen’s complaint that someone was selling drugs at a Dallas residence....When the officers arrived at the residence, they saw Akita dogs in the yard, but proceeded to the door. The officers could hear movement inside the house and knocked on the door. [Officer] testified that after a voice in the house said ‘come in’ in a ‘really agitated voice,’ he opened the door. He saw five or six people sitting on a couch in the living room. Two or three of the individuals had crack pipes in their hands....”[Officer] further stated that “[a]t the time someone said come in, [he] was under the belief that it was the person that was in charge of the house, saying come in....A third party’s consent is valid if the facts available to the officer at the time of the search would allow a person of reasonable caution to believe that the consenting party had authority over the premises....Thus, even if it was not [D] who said ‘come in,’ [officer] reasonably believed that someone with authority to consent to the officers’ entry provided consent.”

**Among officer’s articulated reasons in support of RS (which the court found to exist) are: D’s arteries were pulsating, D frequently scratched his face when responding to officer’s questions, D’s absence from work during the day, and D’s desire to drive a far distance despite the high price of gas per gallon.** *Vasquez v. State*, 324 S.W.3d 912 (Tex.App.-Hous. (14 Dist.) Nov 04, 2010) (NO. 14-09-00620-CR), rehearing en banc denied (Dec 09, 2010) The State argued successfully that the following gave rise to RS: “(1) the initial stop was out of the ordinary when [D] pulled to the left rather than to the right; (2) [D’s] distant travel plans to Greenspoint Mall when there were several major malls in between his home and Greenspoint Mall; (3) [Trooper’s] knowledge of the Greenspoint Mall being a ‘high-crime area’ and a ‘source location for the ultimate destination of drugs and narcotics[;]’ (4) [D’s] absence from work during the day; (5) [D’s] desire to travel so far when gas prices were almost \$4.00 a gallon; (6) [D’s] failure to identify the store or the type of dress he was looking for; (7) [Trooper’s] past training in identifying signs of someone involved in a crime; and (8) [D’s] frequent face scratching and the appearance of his very pronounced and pulsating carotid arteries.”

**Consent to search was “voluntary,” even though officer withheld D’s driver’s license while he asked D for consent, in large part because officer told D that “he could hit the switch in the patrol car if he wanted to stop the search” and D never “hit the switch” during the search.** *Vasquez v. State*, 324 S.W.3d 912 (Tex.App.-Hous. (14 Dist.) Nov 04, 2010) (NO. 14-09-00620-CR) Also, D was not placed in handcuffs during search.

**Police officer had RS that D violated turn-signal statute when changing lanes, even though officer admitted that D’s vehicle never crossed any marked line, because, when the right lane ended, D steered his automobile into left lane without using turn signal (albeit never crossing a marked line).** *Mahaffey v. State*, 2010 WL 4348347 (Tex.App.-Tyler Nov 03, 2010) (NO. 12-08-00430-CR) “It is clear that [D] would have been required to signal had he steered his vehicle across a lane dividing line....Yet, even though [D’s] vehicle did not cross a marked lane dividing line, the righthand lane in which [D] was traveling did end. When the righthand lane ended, [D] continued driving in the other southbound lane, previously the lane to his left, that had not ended. Thus, [D] changed lanes and did not signal his intent to do so.”

**Officer had RS to conduct investigatory stop, despite D’s argument that he drove a red vehicle and that police radio broadcast described car as “primer-old” color and referenced no license plate number.** *Peralta v. State*, 2010 WL 4851388 (Tex.App.-El Paso Nov 30, 2010) (NO. 08-09-00006-CR) In finding RS, the Court emphasized that the officer possessed additional information, to wit: “[Officer] knew the ... make, and model of the car; the approximate time [D] was last seen at the apartment complex; and the area in which [D] was likely to be located.”

**Officer's statement to D during traffic stop, to the effect that officer was going to take D's refusal to answer as a refusal to consent to breath test, did not render D's consent to breath test involuntary.** *Thomas v. State*, 2010 WL 4925846 (Tex.App.-Hous. (1 Dist.) Nov 30, 2010) (NO. 01-08-00902-CR) Officer, after repeatedly asking D whether he was willing to consent to a breath test and failing to get a clear answer, stated to D that he was going to take D's refusal to answer as a refusal to consent. Said statement did not impose the level of psychological pressure necessary to render D's consent involuntary, concluded Court.

**Results of EMIT (i.e., a screening test for drugs) were not reliable unless accompanied by a positive confirmation test; thus, the EMIT results deemed inadmissible.** *Somers v. State*, 2010 WL 4813681 (Tex.App.-Waco Nov 24, 2010) (NO. 10-09-00387-CR) "[T]he EMIT test was positive for cocaine, but the confirmation GC test was negative. EMIT test results are not reliable without a positive confirmation test. The trial court did not abuse its discretion in excluding the test results."

**The State did not withhold evidence by insisting upon two separate drug testing methods, even though "[t]he DPS scientists agreed with [toxicologist's] testimony that the failure to properly preserve the blood sample could have contributed to the [unfavorable result of one of the tests]."** *Somers v. State*, 2010 WL 4813681 (Tex.App.-Waco Nov 24, 2010) (NO. 10-09-00387-CR) In finding no Brady violation, Court emphasized that State satisfied its obligation to provide D with scientists' analysis prior to trial.

**Victim's statement of "whatever" in response to her employer's decision to fire her for failing a drug test was not an admission of drug use and, thus, did not constitute a statement against interest for purposes of hearsay exception.** *Somers v. State*, 2010 WL 4813681 (Tex.App.-Waco Nov 24, 2010) (NO. 10-09-00387-CR) "Three days prior to the accident, [victim of intoxication manslaughter] was given a drug test at her place of employment because she appeared 'high.' The drug test was positive for cocaine, amphetamines, and methamphetamines. [Victim] stated 'whatever' when told she was being terminated due to the positive drug test."

**State's closing argument during sentencing to the effect that D would serve merely a fraction of whatever sentence he received did not result in reversible error.** *Somers v. State*, 2010 WL 4813681 (Tex.App.-Waco Nov 24, 2010) (NO. 10-09-00387-CR) "[Earlier in the proceeding,] [t]he State noted [to the jury] that [D] might not receive parole...[However,] [t]he State later argued [to the jury] that: 'Now on these facts, with his history, you would certainly be within your rights to go back in this jury room and return the maximum sentence. That is a lot of time. He'll do ten years of that. He'll be a young man when he gets out.' [D] objected that it was unknown if he would receive parole at that time. The trial court overruled the objection."

**Blood-extraction search warrant affidavit sufficiently described D as person who was driving vehicle, even though affidavit never specifically stated that D was the person driving the vehicle.** *Hogan v. State*, 2010 WL 4676999 (Tex.App.-Fort Worth Nov 18, 2010) (NO. 02-09-00387-CR) "Although the affidavit never specifically stated that [D] was the person who was driving the 'IMP,' it explained that [officer] had good reason to believe that appellant had operated a motor vehicle, described how officers saw a car progress recklessly and illegally through the streets of Fort Worth, explained that officers stopped the car that they observed being driven recklessly and illegally, and then said that at the scene of the stop, [officer] made contact with [D]. The affidavit does not indicate that anyone other than [D] (and other police officers) was at the scene (and therefore does not create doubt that someone else could have driven the 'IMP'). Thus, we conclude that the magistrate could have reasonably inferred that [D] drove the vehicle described in the affidavit."

**Search warrant affidavit sufficiently described D's performance on field sobriety tests, even though the affidavit contained numerous technical acronyms which were undefined in the affidavit. The affidavit also withstood D's other challenges, including that the affidavit failed to explain the nature or significance of the tests and was silent regarding officer's experience in DWI cases.** *Hogan v. State*, 2010 WL 4676999 (Tex.App.-Fort Worth Nov 18, 2010) (NO. 02-09-00387-CR)

"[E]ven if we assume that the magistrate did not understand [officer's] acronyms or know about the tests, the affidavit still informed the magistrate in plain language that [D] showed fifteen combined clues of intoxication on the tests.... Finally, although the affidavit might have been more complete if it had detailed [officer's] experience in DWI cases, we hold that such information was not required to make the affidavit adequate."

**D's written consent to blood-alcohol test "trumped" D's allegation that he subsequently orally withdrew his consent.** *Colangelo v. State*, 2010 WL 4522432 (Tex.App.-Hous. (1 Dist.) Nov 10, 2010) (NO. 01-09-00720-CR) Evidence supported trial court's implied finding that D lacked credibility in his assertion in his affidavit that, by voicing his opposition to test, he withdrew his written consent to having his blood drawn. "[D] had a self-interest in [alleging that he withdrew his consent]," concluded Court.

**Evidence was sufficient to show that D was "operating" a motorcycle, even though no one saw the motorcycle's engine running; officer testified that D attempted to kick-start the motorcycle, thereby taking action in a manner that would enable the motorcycle's use, among other evidence.** *Kirsch v. State*, 2010 WL 4354033 (Tex.App.-Texarkana Nov 04, 2010) (NO. 06-10-00071-CR), rehearing overruled (Nov 30, 2010) "It is true that no witness saw the motorcycle running. Yet, [D] was found in the middle of the road at an intersection sitting on top of his motorcycle, which he was attempting to balance. He was wearing a helmet and had keys in hand. [Officer] testified that [D] attempted to kick-start the motorcycle. Using the broad definition of 'operate,' a jury could have determined [D] took action in a manner that would enable the motorcycle's use."

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