

Interesting Cases - April, 2010

Police officer had RS to stop D for suspicion of DWI, even though the swerving of D's vehicle took place entirely within her lane and even though officer's testimony did not reveal any suspicion of DWI at the time of the stop. *State v. Alderete*, 2010 WL 1634580 (Tex.App.-El Paso Apr 21, 2010) (NO. 08-09-00066-CR) Majority: "[T]here is no requirement that a traffic regulation must be violated in order for an officer to have sufficient reasonable suspicion to justify a stop of a vehicle." Dissent: "On numerous occasions, the officers do indicate that they stopped [D] solely for swerving within her lane. On one occasion, an officer states he stopped [D] for swerving in her lane and nothing else. On another occasion, an officer testified he stopped [D] for her safety. Never does either officer testify he stopped [D] for suspicion of driving while intoxicated....Neither did either officer indicate that the swerving within the lane at night had any special 'police significance' due to their training or experience from which they reasonably inferred that [D] was driving while intoxicated."

Officers had PC to conduct search of suitcase found in D's vehicle due, in part, to intense odor of fabric softener arising from suitcase. *Palacios v. State*, 2010 WL 1486496 (Tex.App.-San Antonio Apr 14, 2010) (NO. 04-09-00315-CR) Fabric softener is a "'known cover odor to mask odors of illegal drugs.'"

Police officer had RS to stop D, even though officer erroneously believed that he was stopping D for an exhibition of acceleration violation. *State v. Clark*, 2010 WL 1384082 (Tex.App.-Eastland Apr 08, 2010) (NO. 11-09-00042-CR) Police officer's subjective belief that he was stopping D for an exhibition of acceleration violation, which was false because D was not racing anyone, was irrelevant in determining whether stop was supported by reasonable suspicion; only an objectively reasonable basis was required for the stop. Here, the objective basis was an apparent violation of an Abilene Municipal Code provision pertaining to disturbances by a motor vehicle.

The circumstances of D's detention did not render his videotaped statement involuntary, despite claim that he was kept in a cold cell for ten hours without a blanket, food or water. *Miller v. State*, 2010 WL 1509728 (Tex.App.-Fort Worth Apr 15, 2010) (NO. 2-08-458-CR, 2-08-459-CR, 2-08-460-CR, 2-08-461-CR) "[Investigator] testified that he did not recall [D] complaining on the day of the interview about the conditions of the jail or saying that he was cold or hungry....[court cites Fort Worth COA case] (holding eight hours of questioning while in handcuffs and leg shackles did not render confession involuntary where appellant never indicated he did not want to answer any more questions or wanted to speak to attorney and never requested food, water, or bathroom breaks)."

Dog sniffs of D's garage door and backyard fence by police canine were not "searches." *Romo v. State*, 2010 WL 1427272 (Tex.App.-Fort Worth Apr 08, 2010) (NO. 2-09-153-CR, 2-09-154-CR, 2-09-155-CR) "[The dog] sniffed areas that were not protected from observation by passersby and because [D] had no reasonable expectation of privacy in the odor of marijuana coming from his backyard."

Affidavit in support of search warrant did not give rise to PC to issue warrant because affidavit failed to specify what time the confidential informant acquired the information. *State v. McLain*, 2010 WL 1340831 (Tex.App.-Amarillo Apr 06, 2010) (NO. 07-09-00234-CR) "The only mention of time within the four corners of the affidavit is the following statement: 'In the past 72 hours, a confidential informant advised the Affiant that Chris was seen in possession of a large amount of methamphetamine at his residence and business.' The State urges that we view this statement as implying that the observation of the methamphetamine occurred within the 72 hours before the execution of the affidavit. However....[a]ll we can determine from the four corners of the affidavit is when the affiant spoke to the confidential informant...[T]he affidavit fails to provide probable cause..."

Community caretaking was not officer's primary motivation when he made the decision to ask D, who was walking along the highway, whether he had been driving a wrecked vehicle that an anonymous caller had described. *State v. Woodard*, 2010 WL 1268035 (Tex.App.-Fort Worth Apr 01, 2010) (NO. 2-09-052-CR) "Here, the record reflects that at the time he approached [D] [officer] (1) was

unsure if a wreck existed at the alleged location, (2) possessed no personal knowledge that [D] had operated the vehicle, (3) admitted the [caller's] description was extremely vague, and (4) was not concerned for [D's] safety. Moreover, the record reflects [officer] did not initially observe that [D] was endangering himself or others."

Ineffective assistance was shown where counsel had advised D, who faced 3 counts of sexual assault of child and 2 counts of indecency, that he was eligible to receive community supervision.

Hart v. State, 2010 WL 1728385 (Tex.App.-Texarkana Apr 30, 2010) (NO. 06-09-00049-CR) Statute prohibited community supervision for defendants convicted of sexual assault or indecency with a child. D received a cumulative sentence of 100 years imprisonment.

Trial court's revocation of D's community supervision was not justified, even though D had failed to complete the treatment program to which he had been transferred; the government official who initiated the transfer lacked the authorization to do so.

Witkovsky v. State, 2010 WL 1633434 (Tex.App.-Fort Worth Apr 22, 2010) (NO. 2-09-259-CR), rehearing overruled (May 06, 2010) Supervisor with county community supervision and corrections department was not authorized to modify condition of D's community supervision by transferring him from one sex offender treatment program to another, absent the trial court's authorization to make such a transfer or modification, and, thus, trial court's revocation of D's community supervision based on D's failure to successfully complete said program was not justified.

Former grand jurors unsuccessfully sued DA seeking declaration that they had both the right and the privilege to assert evidence showing that they were not a "runaway grand jury."

Ryan v. Rosenthal, 2010 WL 1555382 (Tex.App.-Hous. (14 Dist.) Apr 20, 2010) (NO. 14-08-00382-CV) District court lacked jurisdiction to issue a declaratory judgment construing the criminal statute requiring secrecy in grand jury proceedings; grand jurors did not challenge the constitutionality of statute or allege that immediate irreparable harm to persons or vested property rights was likely to occur.

Theft conviction of home repair contractor upheld, even though the loss sustained by the homeowner-victim sounded in civil contract.

Lopez v. State, 2010 WL 1491844 (Tex.App.-Eastland Apr 15, 2010) (NO. 11-08-00133-CR) Evidence was sufficient to support home repair contractor's conviction for theft over \$100,000; D collected money from victims for bogus permit fees and he charged them for unnecessary repairs and twenty-five percent of work D agreed to complete remained unfinished; also, testimony of D's other customers revealed a pattern of conduct.

Trial court could not revoke D's community supervision based merely on results of polygraph.

Leonard v. State, 2010 WL 1491863 (Tex.App.-Eastland Apr 15, 2010) (NO. 11-09-00032-CR) "The State also argues that, because a polygraph exam can be a condition of community supervision, it is only logical to require a defendant to show no deception during a test and that, otherwise, polygraph exams will lose much of their benefit...Finally, the State argues that community supervision was not revoked for failing a polygraph but that he was revoked because [expert] did not believe he was telling the truth and, therefore, was putting other children at risk..." Said arguments were unsuccessful.

Witness' wife's testimony about what witness told her shortly after murder deemed excited utterance.

Wells v. State, 2010 WL 1486642 (Tex.App.-San Antonio Apr 14, 2010) (NO. 04-08-00668-CR) "We first note several distinguishing factors between *First Southwest* and the case at hand....[T]he *First Southwest* eyewitness was purely an eyewitness without any other meaningful involvement. [The witness in the instant case], on the other hand, was present during the murder, was restrained by the suspects, and still had duct tape across his ankles and zip ties on his wrists at the time he made the statements to his wife...."

Requiring D to show tattoo on his leg to jury did not violate his right against self-incrimination, even though the tattoo depicted D's name.

Sauceda v. State, 2010 WL 1286472 (Tex.App.-Amarillo Apr 05, 2010) (NO. 07-09-0208-CR) "Because [D's] defense was an attempt to show that the victims were mistaken as to his identity, the evidence was relevant to that issue. And, that the tattoo may have been of his name matters little. It is no less an identifying marker than the color of a person's eyes, the sound of his voice, or the color of his hair."

Trial court's failure to include order for restitution in oral pronouncement of sentence precluded restitution. *Sauceda v. State*, 2010 WL 1286472 (Tex.App.-Amarillo Apr 05, 2010) (NO. 07-09-0208-CR) [R]estitution has been deemed to be an aspect of punishment by our Court of Criminal Appeals...So, we see no legitimate basis to exclude it from the requirement that sentence be orally pronounced in open court."

D's appellate brief, which exceeded maximum page limit by more than 200 pages, was stricken for failure to comply with appellate rules. *Meyer v. State*, 2010 WL 1235577 (Tex.App.-Texarkana Apr 01, 2010) (NO. 06-09-00166-CR) "[B]eginning with the statement of facts and ending at the prayer, is 253 pages long."

Mistrial not granted, even though a docket sheet was posted on a door at the courthouse which indicated that D had been convicted of a prior DWI, because there was no evidence that jurors read the docket sheet. *Payne v. State*, 2010 WL 1730857 (Tex.App.-Fort Worth Apr 29, 2010) (NO. 2-09-100-CR) "Payne argued that the trial court should grant a mistrial because the docket sheet informed the jury that he had a prior conviction for DWI even though the State had agreed to Payne's motion in limine regarding the introduction of evidence relating to the prior conviction....there is nothing in the record demonstrating that any of the jurors had information that Payne had a prior conviction for DWI. Payne concedes this, stating that 'it is impossible to know for certain which jurors or whether all of the jurors were exposed to the information.'"

Prison officials did not violate inmate's rights when they seized his wooden radio and replaced it was a transparent one. *Morales v. Carranza*, 2010 WL 1619067 (Tex.App.-Corpus Christi Apr 22, 2010) (NO. 13-08-00314-CV) The prisoner had purchased the radio years earlier at a commissary and was told that he would be allowed to keep the item even if he was transferred. Yet, upon later transfer to a new facility, the wooden radio was confiscated. Officials allowed prisoner to mail the wooden radio to his home, although prisoner pointed out that "it would take 15 stamps" to do so.

Even though officer observed that D's turn signal was not activated while D sat in a turn-only lane, officer lacked RS to stop D for failure to signal. *State v. Elias*, 2010 WL 1478909 (Tex.App.-El Paso Apr 14, 2010) (NO. 08-08-00085-CR) "As [officer] approached...he saw a white van stopped at a stop sign at the intersection...The van did not have a turn signal on...A map presented at trial showed that the van could not have gone straight and would have had to make either a right or left turn...After [officer] passed the van, the van turned right onto Zaragosa, heading south. [Officer] then made a U-turn and conducted a traffic stop because the van 'failed to signal a right turn from that stop.'...[D] agreed that he had not signaled his intent to turn right.... [Officer] passed [D's] van at approximately fifty miles per hour and drove thirty yards north on Zaragosa before he turned around and conducted the traffic stop. In his affidavit and summary, [officer] stated that the ticketable offense [D] had committed was a failure to signal intent to make a right turn. However, at trial, [officer] testified that [D] was stopped and stationary at the intersection when he passed [D]. [Officer] further testified that he did not see [D] fail to use his turn signal from his vantage point, nor did he see [D] commit any ticketable offense. [Officer] stated that the required distance for a driver to signal their intent to turn right or left by law is 100 feet, and he did not see any turn signals on [D's] van as he passed the vehicle....Because [officer] did not see [D] commit any traffic violations, he failed to show sufficient specific articulable facts coupled with his experience, knowledge, and logical inferences to justify the initial stop with or without probable cause."