

February, 2010

Vehicle stop not justified by vehicle's cleanliness or officer's belief that occupants belonged in a 'sportier car'. *Gonzalez-Gilando v. State*, 2010 WL 455503 (Tex.App.-Amarillo Feb 10, 2010) (NO. 07-09-0290-CR) The following circumstances did not justify an investigative stop of D's vehicle: the vehicle in which they rode was clean or lacked road grime; the young occupants did not fit the year and model of the vehicle (i.e., a 99 Lumina); the troopers thought the vehicles occupants should have been in a sportier car; both occupants simultaneously looked away from the officers as the vehicles met and passed; the occupants turned their hats around so they faced forward after passing the troopers; the car slowed and came to almost a complete stop at a blinking caution light adjacent to an intersection; and the driver drove within the speed limit. The court observed: "It is not a crime in this State to drive a clean car, look away from passing police officers, drive a vehicle of ones choice, obey traffic warnings, and abide by posted speed limits....[W]e are left to guess at why a young adult driving an older car insinuated that he was a criminal. Moreover, accepting such a proposition would be tantamount to concluding that only those young adults without sufficient means to acquire a newer car engage in criminal activity, and such is not the case."

Consent instruction to assault proper; victim's mood was aggressive and he called it "fighting." *Miller v. State*, 2010 WL 547035 (Tex.App.-Hous. (14 Dist.) Feb 18, 2010) (NO. 14-08-00763-CR) Jury instruction on "consent" to assault should have been given, where 18-year-old son (a football player) had an altercation with his father (the defendant); the son revealed that, at the time of the altercation, his own mood was "aggressive." "Furthermore, [son] described the altercation with phrases indicative of mutual combat, not assault. He testified that he 'was all jazzed up'...and that when [D] hit him, they were 'in the heat of combat' and 'still fighting.'"

Head nod by defendant deemed admissible as an admission of guilt while not in custody. *Lopez v. State*, 2010 WL 374391 (Tex.App.-San Antonio Feb 03, 2010) (NO. 04-08-00695-CR) Because D was not in custody when she nodded her head, her head nod -- which was allegedly in response to the question of whether she shot her husband -- was admissible. "[D] claims the head nod occurred while she was in custody and did not comply with the recording requirements of article 38.22...Although the question took place after [D] was read her Miranda rights, [police] testified [D] was still free to leave because her status did not change until after she nodded her head, admitting she shot her husband."

Court observed: "there is nothing inherently reckless about either exposing oneself or masturbating." *Smith v. State*, 2010 WL 625048 (Tex.Crim.App. Feb 24, 2010) (NO. PD-1805-08) Regarding charge of indecent exposure, information alleging that D exposed his penis and masturbated failed to comply with statutory requirement of alleging a particular act of recklessness about whether another person was present who would be offended and alarmed by the act.

Instruction revealing D's refusal of breath test was improper comment on the evidence.

Guess v. State, 2010 WL 681345 (Tex.App.-Tyler Feb 26, 2010) (NO. 12-08-00448-CR) Jury instruction permitting jury to consider D's purported refusal to submit to breath test constituted an improper comment on the evidence because D contested whether he refused the breath test.

Felony DWI was predicate for felony murder, even though unproven at the moment.

Sandoval v. State, 2010 WL 672162 (Tex.App.-El Paso Feb 26, 2010) (NO. 08-08-00189-CR) Felony DWI offense could be used as predicate for felony murder, contrary to D's argument that all DWI offenses are misdemeanors at the moment they are committed. The court indicated that the felony DWI was completed at the time D, having two previous convictions for DWI, drove while intoxicated, running a stop light and striking the two pedestrians. The fact that the prior convictions were not proven until the trial did not alter said analysis.

D not entitled to new trial, despite prosecutor's alleged knowledge of false evidence in PSI report.

Clarke v. State, 2010 WL 374513 (Tex.App.-Hous. (14 Dist.) Feb 04, 2010) (NO. 14-06-00390-CR) D, convicted of sexual assault of a child, was not entitled to new trial based on actions of prosecutor in allowing evidence concerning an extraneous offense to remain in PSI report, even though prosecutor allegedly knew that evidence was false. "[T]he statement in question is a single, unsworn statement in the PSI report. According to this statement, the complainant's mother said 'she had an intuition that perhaps the defendant's sister had a similar experience with her brother...'....Under the respective standards for materiality regarding the alleged Mooney violation and the alleged Brady violation, the trial court reasonably could have concluded that the testimony or evidence in question was not material..."

Double jeopardy not violated by punishing separately for vaginal and anal sex during single incident.

Gonzales v. State, 2010 WL 625056 (Tex.Crim.App. Feb 24, 2010) (NO. PD-0337-09) "The Legislature intended that penetration of a child's anus should be regarded as a distinct offense from penetration of her sexual organ even if they occur during the course of the same incident or transaction."