

## January, 2010

**Tip from unidentified informant yields reasonable suspicion to stop drunk driver.** *Arizpe v. State*, 2010 WL 26285 (Tex.App.-San Antonio Jan 06, 2010) (NO. 04-09-00131-CR) Generally, a tip by an unnamed informant of undisclosed reliability rarely will establish the requisite level of reasonable suspicion necessary to justify an investigative detention. However, in this case, the informant saw the suspect vehicle firsthand and specifically pointed it out to the officer, the informant was unconnected with police, and provided detailed description of drunk driving behavior.

**One hour of captivity in rear of patrol car deemed an investigative detention, not an arrest.** *Martinez v. State*, 2010 WL 198526 (Tex.App.-Amarillo Jan 21, 2010) (NO. 07-08-0296-CR) After obtaining conflicting responses to questions related to prior whereabouts and ownership of property, defendants were detained in patrol cars, and questioned, until burglary victim could be brought to scene; also part of the court's reasoning was the need for officer's safety. Also, the court deemed the duration of the stop reasonable.

**Arrest deemed valid, even though officer's subjective basis for the arrest was not.** *State v. Morales*, 2010 WL 188773 (Tex.App.-Dallas Jan 21, 2010) (NO. 05-09-00159-CR) Officer testified that the arrest was pursuant to existing arrest warrants; however, he did not bring the warrants to court. Nevertheless, the appellate court deemed that the arrest was justified based on D's failure to have insurance, even though the officer did not knowingly arrest D for that reason. The appellate court concluded "before [officer] searched [D's] car, he had probable cause to arrest him for failing to maintain financial responsibility; the fact that [officer] subjectively believed he was arresting [D] on outstanding warrants does not affect the legality of the arrest or the search incident to the arrest. Contrary to the trial court's concerns, whether the officer decided to issue the citation [for no insurance] before or after the search did not affect the validity of the search....'That the officer does not have the state of mind correlative to the reasons which provide legal justification for his conduct does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action.'"

**No evading arrest, despite D's admitted desire "to avoid contact" with police.** *Redwine v. State*, 2010 WL 307914 (Tex.App.-Hous. (14 Dist.) Jan 28, 2010) (NO. 14-08-00731-CR) Evidence was legally insufficient to prove that D, while operating his vehicle, knew peace officers were attempting to arrest or detain him because insufficient evidence showed that deputies activated their vehicles' overhead lights, despite State's contention that the jury could infer D's knowledge of police pursuit from D's written statement that he turned off the main road "to avoid contact" with the officers.

**Juvenile's written statement not suppressed, even though police failed to notify mother.**

*Grant v. State*, 2010 WL 311430 (Tex.App.-Waco Jan 27, 2010) (NO. 10-08-00393-CR) Juvenile's written statement not suppressed, even though police failed to notify his mother that he was taken into custody, in violation of Texas Family Code Section 52.02(b), and even though his mother was denied access to him before he gave his statement.

**The floor can be a deadly weapon. A hand can be a deadly weapon.** *McCallum v. State*, 2010 WL 305313 (Tex.App.-San Antonio Jan 27, 2010) (NO. 04-08-00844-CR) "[J]ury necessarily made affirmative finding that defendant used deadly weapon, namely, his hand, the use of which caused victim to fall and strike his head on the ground."

**Juror who reportedly "felt uncomfortable with the subject matter of the trial" not stricken.** *Strahan v. State*, 2010 WL 87964 (Tex.App.-Fort Worth Jan 07, 2010) (No. 2-08-384-CR, 2-08-385-CR) Juror's comment that she "felt uncomfortable with the subject matter of the trial" did not necessitate strike for cause.

**Working for postal service deemed race-neutral basis for striking black prospective jurors.**

*Leadon v. State*, 2010 WL 143467 (Tex.App.-Hous. (1 Dist.) Jan 14, 2010) (NO. 01-08-00839-CR, 01-08-00840-CR) Deemed a "race neutral" reason for striking two black females was state's explanation that the women were employed as postal workers; prosecutor pointed out that two non-black panel members who were also employed as postal workers were removed for cause and, thus, all persons on venire employed as postal workers were removed, either for cause or by prosecutor's use of peremptory strikes.

**Expert testimony of forensic video analyst deemed admissible.** *Stevenson v. State*, 2010 WL 144379 (Tex.App.-Fort Worth Jan 14, 2010) (NO. 2-08-131-CR) Expert testimony of forensic video analyst deemed admissible, even though jurors could see for themselves from videotape the sequence of events at convenience store, because video was in black-and-white and poor-quality particularly with regard to comparison of the heights of the persons depicted on the video.

**State's failure to file a pretrial motion to cumulate sentences did not invalidate order.**

*Strahan v. State*, 2010 WL 87964 (Tex.App.-Fort Worth Jan 07, 2010) (NO. 2-08-384-CR, 2-08-385-CR) State's failure to file a pretrial motion to cumulate sentences did not render the court's cumulation order void.

**Deferred adjudication rendered D ineligible for expunction.** *Texas Dept. of Public Safety v. Nail*, 2010 WL 45859 (Tex.App.-Austin Jan 08, 2010) (NO. 03-08-00435-CV) Deferred adjudication considered “court ordered community supervision,” rendering D ineligible for expunction of his arrest records. The dissent wrote: “[T]he majority considers the requirement in the underlying judgment that [D] pay an \$800 fine to be a ‘condition’ of community supervision and, therefore, determines that [D] was placed on community supervision within the meaning of article 42.12. Based on this reasoning, the majority concludes that [D] is ineligible for expunction. The majority’s analysis is inconsistent with the plain language of article 42.12.”

**Defendant used shirt as toilet paper during trial; court’s refusal to recess not prejudicial.** *Powell v. State*, 2009 WL 5449063 (Tex.App.-Beaumont Jan 20, 2010) (NO. 09-08-00243-CR) Trial court’s error in denying defense counsel’s request for recess to replace D’s shirt, which D had removed during break to use as toilet paper, did not prejudice D; overwhelming evidence of the crime dissipated any effect of error on jury’s function in determining facts.

**Omission from verdict form of “not guilty” option as to a lesser included is egregious.** *Jennings v. State*, 2010 WL 298071 (Tex.Crim.App. Jan 27, 2010) (NO. PD-0261-09) Complaint that verdict form did not include option of “not guilty” on a lesser included offense was not waived by failure to object.

**D should have been allowed to cross minor victim regarding prior false reports.** *Hammer v. State*, 2010 WL 305314 (Tex.App.-San Antonio Jan 27, 2010) (NO. 04-07-00072-CR) Conviction reversed because D was not permitted to cross-examine minor victim regarding the false reports that minor had previously made about various sexual encounters.

**D’s affiliation with Aryan Brotherhood deemed admissible to show motive.** *McCallum v. State*, 2010 WL 305313 (Tex.App.-San Antonio Jan 27, 2010) (NO. 04-08-00844-CR) “Without evidence of his membership in the Aryan Brotherhood, the jury would have been less able to understand [D’s] anger at [victim’s] alleged ‘false claiming’ with regard to [victim’s verbal bragging to have served] prison time and gang affiliation.”

**Deemed ineffective assistance was counsel's failure to object to multiple outcry**

**witnesses.** *Lopez v. State*, 2010 WL 337143 (Tex.App.-Hous. (1 Dist.) Jan 28, 2010) (NO. 01-08-00302-CR) Deemed ineffective assistance was counsel's failure to object to the State's use of multiple witnesses to provide outcry testimony. Court held as such despite recognizing that it had previously concluded that the failure to object to the outcry testimony of multiple witnesses can constitute plausible trial strategy.

**Defendant unsuccessfully argued for collateral estoppel.** *State v. Cotto*, 2010 WL 325932

(Tex.App.-El Paso Jan 29, 2010) (NO. 08-08-00056-CR) Defendant B unsuccessfully argued for collateral estoppel on the ground that Defendant A, the principal actor, was acquitted. Said argument was unsuccessful, even though B's trial would be based upon the same evidence and expert opinion surrounding the cause of death. "[C]ollateral estoppel would only bar such prosecution if [B] was a party to the litigation in [A's] prosecution."

**The below comments by the trial court regarding prostitution not fundamental error.**

*McLean v. State*, 2010 WL 335611 (Tex.App.-Hous. (1 Dist.) Jan 28, 2010) (NO. 01-08-00466-CR) Judge's comments to jury during voir dire: "Solicitation of prostitution, folks, like it or not, in this state, it's illegal under State law. We have some folks that believe that it should be legal and that's your right to believe that, but it's not legal in Texas to have a prostitution service. Bottom line. Simple question: If you cannot in good faith enforce that State law making prostitution illegal, I understand that. I just need to know right now that you can't do that job on this kind of case. So if you just can't do this job on this kind of case, let me know now by a show of hands. Anybody? All right. A lot of folks think that prostitution is a victimless crime. Let me give you a hint.... We have had about 7,000 alleged prostitutions in my court in 22 years [sic]. I will tell you from this viewpoint up here, prostitution is not a victimless offense. It affects families. It affects the people involved in the prostitution itself. It has the potential of possibly deadly STD's in your life. It is not a victimless crime. In Texas, prostitution is against the law period. Can we agree by a positive nod that you can enforce the law? Anybody that cannot do that? All right. Good to see."