Interesting Cases - July, 2010

Officer had RS to stop D for speeding, despite officer's admission that he failed to calibrate his radar using a tuning fork. *Gutierrez v. State*, 2010 WL 2788249 (Tex.App.-San Antonio Jul 14, 2010) (NO. 04-09-00237-CR) "[D] challenges the State's reliance on the radar reading because on voir dire examination [first officer] stated he had been trained to use a tuning fork to determine the accuracy of a radar unit, and the officer admitted he did not use a tuning fork on the radar unit. However, [second officer], who testified he was familiar with the type of radar equipment used by [first officer], told the jury that using the 'self-test' function on the unit is the proper method to determine the radar equipment was operating properly. Moreover, the radar reading merely confirmed [first officer's] initial observation that [D] appeared to be traveling faster than the posted speed limit."

Officer had PC with respect to searching coffee can in D's automobile, such that officer could freely place his finger inside can to see whether marijuana was underneath coffee, notwithstanding D's argument that the destruction of his property (i.e., the coffee grounds) due to officer's dirty finger rendered the search unreasonable. *Garcia v. State*, 2010 WL 2677703 (Tex.App.-San Antonio Jul 07, 2010) (NO. 04-09-00446-CR) Essentially, D argued that the coffee grounds, which are "consumable property," were destroyed by virtue of the officer exposing the grounds to the officer's bare finger, thereby rendering the search unreasonable. To which the court responded: "[W]e note that while the destruction of property in carrying out a search is not favored, destroying property does not necessarily violate one's constitutional rights." Also in this case it was held that the alleged destruction of coffee did not amount to a "taking" in violation of the Takings Clause. D argued, unsuccessfully, takings, to wit: "[D] argues that '[b]y placing his bare hand in the coffee, the police officer destroyed consumable property' in violation of the Takings Clause of the Fifth Amendment to the Constitution. However, '[w]hen property has been seized pursuant to the criminal laws or subjected to in rem forfeiture proceedings, such deprivations are not 'takings' for which the owner is entitled to compensation.'"

D unsuccessfully argued that officers' refusal to remove D's son from hot van during traffic stop coerced him into giving consent to search the van. *Tucker v. State*, 2010 WL 2935788 (Tex.App.-San Antonio Jul 28, 2010) (NO. 04-09-00046-CR) The court emphasized that the evidence showed that D only made said request one time.

Initial interaction constituted a consensual encounter; officer merely approached an open "garage party" and asked partiers who had been driving a particular vehicle; after D identified himself, officer asked to speak with him. *Banda v. State*, 2010 WL 2899000 (Tex.App.-Hous. (14 Dist.) Jul 27, 2010) (NO. 14-09-00209-CR) "Nothing in the record indicates that [D] was

compelled to exit his garage due to the threatening presence of several officers, a display of a weapon or physical touching by [officer] a display of authority or control by the activation of a siren or patrol car overhead lights, or any indication through [officer's] words or tone of voice that [D] could not refuse [officer's] request to leave the garage and speak to him."

Area surrounding D's garage was a "suspicious place" such that officer could arrest D for DWI without a warrant. *Banda v. State*, 2010 WL 2899000 (Tex.App.-Hous. (14 Dist.) Jul 27, 2010) (NO. 14-09-00209-CR) It was necessary to take prompt action in order to ascertain D's blood-alcohol level, concluded court. And, "[t]he short amount of time between [D's] arrival at his home and [officer's] arrival at the scene -- approximately ten minutes -- also supports a conclusion that [D] was found in a suspicious place."

Officer's question to wit "You don't mind if I take a look, do you?" did not convey to D that search was mandated rather than requested, held court. *Tucker v. State*, 2010 WL 2935788 (Tex.App.-San Antonio Jul 28, 2010) (NO. 04-09-00046-CR) "Nothing in this statement indicates that compliance with the search was required. The tone of the officer's request did not convey that such a search was mandated rather than requested."

Where Miranda warnings were given by magistrate who, along with police, were visiting D bedside at the hospital, waiver of D's right to counsel was invalid; magistrate asked D if he wanted a court-appointed lawyer and he said he did, magistrate asked D if he still wanted to talk to the police officers and he said he did, but D did not initiate the questioning by the police after asserting his right to counsel. *Pecina v. State*, 2010 WL 2825663 (Tex.App.-Fort Worth Jul 15, 2010) (NO. 2-05-456-CR) "[I]f the dissent's arguments are correct, the police need only take a magistrate with them to conduct any custodial interrogation and 'cross their fingers' behind their backs while letting the magistrate first administer the Miranda warnings, and then they may ignore with impunity any attempt by the defendant to request appointment of counsel from the magistrate, making a mockery of Miranda."

DWI D's confrontation rights not violated, even though sponsoring witness for breath test results and maintenance logs, who was the technical supervisor of the machine, did not supervise the machine's use at time of D's particular intoxilyzer test. *Settlemire v. State*, 2010 WL 2720590 (Tex.App.-Fort Worth Jul 08, 2010) (NO. 2-09-214-CR) Testimony was not used to establish chain of custody, authenticity of sample, or accuracy of testing device.

Affidavit supporting search warrant deemed sufficient to seize computer from D's residence, even though complainant was wholly silent regarding any computers and even though complainant "saw him 'put the [child porn] pictures under his bed or in the closet in his bedroom.' " *Eubanks v. State*,

2010 WL 2723176 (Tex.App.-Hous. (1 Dist.) Jul 08, 2010) "Although neither complainant specifically mentioned the use of a digital camera or a computer, it was reasonable for the magistrate to infer from the information in the affidavit that the complainants were photographed and that a digital camera and computer could have been used in the process of taking inappropriate photographs of the girls and could probably be found on the premises to be searched."

Evidence not sufficient to support murder conviction, despite evidence that victim's blood was present in D's car trunk and that victim's body was wrapped in a blue tarp, the same blue material found in scratches on bumper of D's car. *Winningham v. State*, 2010 WL 2636175 (Tex.App.-Fort Worth Jul 01, 2010) (NO. 2-07-389-CR) In deeming the evidence factually insufficient, the court emphasized that there was no murder weapon linking D to the crime and no indication of blood level consistent with prosecution's theory that D placed victim's body in his trunk shortly after he murdered her. Furthermore, investigators did not find any evidence that person who had committed murder drove D's car shortly after murder, and there was no blue material inside D's trunk nor any evidence of blue tarp-like material found in victim's house or garage. Also, the investigators failed to gather fingerprint or DNA evidence from the murder scene.

Burglary not an inherently violent crime such that mere investigation thereof would justify officer's act of placing handcuffs on D. *State v. Klendworth*, 2010 WL 3003624 (Tex.App.-Tyler Jul 30, 2010) "[Officer] articulated no reason to suspect that [D] was carrying any type of weapon, burglary is not an inherently violent crime, and [officer] was not outnumbered."

Search of D's vehicle was not unreasonable, even though the traffic stop ended before the officer obtained consent to search. *Harpole v. State*, 2010 WL 3001171 (Tex.App.-Fort Worth Jul 29, 2010) (NO. 2-09-295-CR) After issuing D a traffic citation, officer never, explicitly, indicated to D that he was not free to leave. Officer did not take any action (e.g., holding D's license) to imply that D was not free to leave.

As to whether or not D was "in custody" at the time of the confession, the fact that the interrogating officer had already obtained a warrant for D's arrest was irrelevant. *State v. Roberts*, 2010 WL 2927481 (Tex.App.-Dallas Jul 28, 2010) (NO. 05-09-01328-CR) The officer did not, until after the confession, advise D of the existence of the warrant. "Moreover, the remaining facts noted by the trial court-[D] was in a private room with the door closed, a uniformed officer stood outside the door, and 'the interrogation commenced'-do not show that [D] was in custody at the time in question. The evidence shows that [D] went to the room at the request of his supervisor, not the officers, and the officers did not say anything prior to entering the room….The door to the room was closed but not

locked…[officer] never promised [D] anything in exchange for making a statement." The trial court's suppression of recorded confession reversed.

Knowledge of newspaper article was never "received" by the jury so as to require new trial, even though the article clearly came to the attention of the entire jury. *Alonzo v. State*, 2010 WL 2957252 (Tex.App.-Corpus Christi Jul 29, 2010) (NO. 13-09-00395-CR) The existence of a newspaper article indicating that D had been serving life sentence for a prior murder at time of prison altercation that led to the subject prosecution was communicated by one juror to the other jurors during deliberations. However, such information was not considered to be "received" by the jurors, according to the court, because the foreman "immediately" informed the trial court after which the trial court administered a curative instruction.

The below-described "missing links" in the chain of custody -- including failures to label and uncertainty as to which officer collected the evidence -- did not warrant exclusion. *Brown v. State*, 2010 WL 2772488 (Tex.App.-San Antonio Jul 14, 2010) (NO. 04-09-00372-CR) "[T]he drug evidence was not weighed, inventoried, or initialed at the scene, and the uncertainty as to whether it was [Officer 1] or [Officer 2] who collected each particular item of evidence…there was no time or date noted on the evidence card signed by [Officer 2] that he placed into the storage locker with the evidence…and no identifying number on the locker where the evidence was stored…Further, [Lieutenant] failed to initial the envelope of drugs when he removed it from the locker and mailed it to the DPS lab for testing. Finally, one of the baggies introduced in court had a hole in it, which [D] argues suggests the evidence was tampered with." The court observed: "Gaps or theoretical breaches in the chain of custody do not affect the admissibility of the evidence, absent affirmative evidence of tampering or commingling."

Letter sent by preacher purporting to be a default judgment gave rise to criminal conviction of preacher for "simulating legal process," even though the letter begins with the pronouncement that "[b]y the Authority and Power delegated to me solely by the Grace of God" issued by the "Kingdom of Heaven Ecclesiastic Court." *Runningwolf v. State*, 2010 WL 2730747 (Tex.App.-Amarillo Jul 12, 2010) (NO. 07-09-00182-CR) "Also on the front page is the 'Official Seal' bearing religious symbols and Latin phrases" and the letter states "I, an ordained Minister of His Gospel, ... issue this Non-Statutory Abatement.'"

D was not entitled to credit for time served on a conviction other than the one for which probation was imposed. *Collins v. State*, 2010 WL 2891769 (Tex.App.-Amarillo Jul 22, 2010) (NO. 07-10-0135-CR) Where D was simultaneously convicted of two distinct DWI offenses, one resulting in imprisonment ("Conviction A") and the other resulting in probation ("Conviction

B"), D was not entitled, upon revocation of the probation, to credit for time served in prison on Conviction A. "At most, the period contemplated should begin either at the time he began serving his Conviction A sentence or at the time he moved to revoke his probation…. According to the record before us, appellant was not jailed for the crime underlying Conviction B prior to the time the trial court revoked his probation. Indeed, his plea bargain excluded that since he was granted probation; that is, he was not supposed to go to jail for having committed that offense. Instead, his imprisonment arose from the sentence levied in response to Conviction A. Consequently, the circumstances at issue do not fit those contemplated by art. 42.03 § 2(a)(1)."

Drugs found in D's vehicle suppressed -- despite officers' observation of D receiving a black bag at location described by informant -- because traffic stop was performed by another officer who, according to court, found drugs pursuant to unlawful search incident to arrest. *State v. Bowman*, 2010 WL 2813504 (Tex.App.-Fort Worth Jul 15, 2010) (NO. 2-09-140-CR) "[D]espite the invalidity of the search as one incident to [D's] arrest, the State points to language in *Gant* that affirmed the viability of the automobile exception and contends that the officers on the scene had independent probable cause to search [D] car based on their collective knowledge and observations of the drug transaction in the Albertson's parking lot….The only witnesses at the suppression hearing were the investigating and arresting officers, and although their testimony clearly constitutes probable cause if believed, there are suggestions in the record that the trial court questioned whether [D] actually committed traffic violations and whether there was independent probable cause to search [D's] car. For example, the trial court stated at the suppression hearing that when the officers saw the bag being exchanged, they 'should have swooped in on [D] at that time and arrested him for that. Not to stop him on a traffic violation, you know, which could or could not have been trumped up."

Failure to identify in affidavit the particular STD and duration thereof was not fatal to warrant to draw blood. *Parker v. State*, 2010 WL 2784428 (Tex.App.-Hous. (14 Dist.) Jul 15, 2010) (NO. 14-09-00104-CR) "[A]lthough the better practice would have been to specify the particular type of STD and its duration (and facts supporting the affiant's knowledge of such things), because of the commonly-understood nature of STDs, the affiant's failure to so specify did not prevent the magistrate from concluding there was probable cause to believe [D's] blood constituted evidence of the offense."