

Interesting Cases - June, 2010

Deemed an investigatory detention was officer's conduct in calling out to pedestrian, through rolled-down window of patrol car, "Come over here and talk to me" while shining the spotlight on him. *Crain v. State*, 2010 WL 2595077 (Tex.Crim.App. Jun 30, 2010) (NO. PD-1262-09) "[m]issing from the phrase 'come over here and talk to me' are words of contingency or option."

Merging into a lane from an ending lane was neither a turn nor a lane change that required the use of a turn signal. *Mahaffey v. State*, 2010 WL 2606487 (Tex.Crim.App. Jun 30, 2010) (NO. PD-1491-09)

D was not in custody for Miranda purposes, even though: the police transported him to the police station, abruptly cut off his telephone contact with his pastor who attempted to invoke D's right to counsel, accused D of murder, and subjected D to continued interrogation, after he requested to leave, that lasted five hours. *Estrada v. State*, 313 S.W.3d 274 (Tex.Crim.App. Jun 16, 2010) (NO. AP-75,634) The court emphasized that D was told several times by police that he could leave.

Court analyzes whether officer's act of removing D's key from the ignition constituted or contributed to an "arrest." *Campbell v. State*, 2010 WL 2432065 (Tex.App.-Fort Worth Jun 17, 2010) (NO. 2-08-262-CR) "[Officer] gave [D] no explanation for taking his car keys, and he retained the keys during their interaction. Nonetheless, [officer's] actions immediately after taking the keys and before placing [D] in handcuffs appear to be part of a continuing investigation-he asked [D] how old he was, whether he had any identification, and how much he had had to drink that night and whether it was a couple of beers. We conclude that [D] was not in custody when [officer] took his keys or asked him questions prior to placing him in handcuffs." [The court found only one other opinion, unpublished, that addresses whether a defendant is under arrest when an officer takes his car keys.]

Confession was voluntarily entered, despite D's argument that, at the time, he needed a cigarette, had used drugs and forewent sleep for multiple days, and had just received local anesthetics and anti-psychotic drugs. *Davis v. State*, 313 S.W.3d 317 (Tex.Crim.App. Jun 16, 2010) (NO. AP-75,796) "The detectives would not allow [D] to smoke in the interview room, but they never suggested [to D] that being allowed to smoke depended upon [D's] participation in the interrogation. Because [D] was under arrest, the officers were not required to let him smoke at all.... In *United States v. Kelley*, the Ninth Circuit held a statement to be voluntary even though the suspect was suffering from heroin withdrawal.... Whatever cravings [D] may have been having for cigarettes, they were not nearly as severe as the withdrawal symptoms exhibited by the suspect in *Kelley*."

Although D's lack of sleep prior to confession did not entitle him to an exclusionary rule instruction, such instruction was warranted based on officers' alleged threats to arrest D's wife if D did not confess. *Contreras v. State*, 312 S.W.3d 566 (Tex.Crim.App. Jun 09, 2010) (NO. PD-0490-09) "The State contends that [D's] description of the detectives' threats to arrest his wife if he did not confess appear more akin to mere trickery or deception about the state of the evidence as to the source and cause of [victim's] injuries rather than overt threats to arrest [D's] wife if he did not confess." To which the court responded: "Although some of [D's] testimony did conform to the State's characterization, [D's] testimony described at least one explicit threat to arrest his wife if he did not confess. Given that we must view the evidence at trial in the light most favorable to submitting a defensive instruction, we cannot agree with the State that [D's] testimony alleged mere deception by the police about the state of the evidence during the investigation."

Following D's refusal of consent to vehicle search, officer had RS to detain D pending dog sniff given officer's observation of two air fresheners and a can of Febreze and D's body language indicating, in officer's view, deception (described below). *Rogers v. State*, 2010 WL 2598978 (Tex.App.-Dallas Jun 30, 2010) (NO. 05-09-00862-CR) "When [officer] returned to where [D] was standing and asked for consent to search the vehicle, [D] turned and looked at his vehicle and turned back and 'kind of hesitated' before refusing consent to search. As [D] hesitated, [officer] saw [D's] face began to twitch, and after refusing consent, [D] shuffled his feet and walked back and forth with his arms crossed, indicating he was being deceptive." Also the court points out that D told officer that he "had been in trouble before in some other stuff" but did not elaborate and told officer he could "look it up" if he wanted.

Sufficient evidence supported PC to arrest D for public intoxication and, therefore, the trial court did not err in denying D's motion to suppress in prosecution for DWI. *Scharf v. State*, 2010 WL 2541830 (Tex.App.-Hous. (14 Dist.) Jun 24, 2010) (NO. 14-09-00281-CR) D argued that his arrest was without probable cause because there was insufficient evidence to show he was operating the motor vehicle. However, because there was probable cause to arrest D for public intoxication, the court did not decide whether there was probable cause to arrest him for driving while intoxicated. The court quotes a Houston [1st Dist.] case as follows: "Whenever an intoxicated person is in an officer's presence and there is probable cause to arrest him for public intoxication, the officer may do so without a warrant, even though a warrantless arrest of that person for the offense of driving while intoxicated would be unlawful."

Erroneous date of birth contained in the warrant is nothing more than a typographical mistake and, as such, does not vitiate the validity of the warrant. *State v. Lozano*, 2010 WL 2572807 (Tex.App.-Amarillo Jun 28, 2010) (NO. 07-09-00334-CR) "[W]hen we return to one of the basic principles behind the requirement of a warrant, minimizing the danger of searching the person of an innocent bystander, we find that the affidavit correctly describes the person to be searched."

D's cousin, a minor, deemed without authority to consent to officers' entry into D's home; officer admitted that he did not ask cousin if he lived at house, if he had possession or control of house, or how old he was. *Limon v. State*, 314 S.W.3d 694 (Tex.App.-Corpus Christi Jun 17, 2010) (NO. 13-08-00551-CR) "The dissent would conclude that because [cousin] opened the front door of the home at 2:00 a.m., [officer] reasonably concluded that [cousin] was a resident of the house. But this logic is flawed..."

Affidavit, which did not state the date and time when D was suspected of driving while intoxicated, deemed insufficient to support warrant authorizing taking of blood sample. *State v. Jordan*, 2010 WL 2428122 (Tex.App.-Austin Jun 17, 2010) (NO. 03-09-00530-CR) The State unsuccessfully argued that "because the warrant issued at 3:54 a.m. on June 6, the maximum amount of time that could have elapsed between the stop and the issuance of the warrant was three hours and fifty-four minutes" and that "it was therefore reasonable for the issuing magistrate to infer that [D's] blood would still contain some evidence of intoxication when the warrant issued."

State's introduction into evidence of D's poor grades in school, during punishment phase, deemed "questionable," but not reversible error. *Davis v. State*, 2010 WL 2572781 (Tex.App.-Hous. (14 Dist.) Jun 29, 2010) (NO. 14-09-00192-CR) "Although it is questionable that [D's] poor grades were relevant to determining an appropriate punishment for [D], any asserted error in admitting evidence of [D's] grades was not harmful."

Pre-trial identification procedure was not impermissibly suggestive, even though murder victim's widow was present and victim's brother acted as translator while witnesses viewed the photo array. *Proctor v. State*, 2010 WL 2545605 (Tex.App.-Hous. (1 Dist.) Jun 24, 2010) (NO. 01-08-01041-CR) "[E]ven if [D] had established that [officer's] using the complainant's brother as a translator and allowing the complainant's widow to be present at the showing of the photo array created an impermissibly suggestive procedure, he would still not have shown that the procedure gave rise to a substantial likelihood of irreparable misidentification."

D, who was indicted for murder 23 years after the alleged offense, failed to show that the delay violated due process, even though the State conceded that D's defense would be substantially prejudiced by the delay. *State v. Krizan-Wilson*, 2010 WL 2483784 (Tex.App.-Hous. (14 Dist.) Jun 22, 2010) (NO. 14-09-00475-CR) "[W]e agree with the State that there is no evidence in this case that the delay was intended to gain a tactical advantage over [D] or for another improper purpose. Instead, the only evidence regarding the prosecutorial gap indicated that the original prosecutor and police investigators did not believe the case to be winnable....Even though the delay was apparently not for investigative purposes, [D] failed to meet her burden of showing an intentional delay for tactical advantage or other bad faith purpose....There is no requirement in Texas that a continuous investigation take place."

13-year-old could not legally consent to sex and, thus, could not be adjudicated delinquent for offense of prostitution. *In re B.W.*, 313 S.W.3d 818, 53 Tex. Sup. Ct. J. 854 (Tex. Jun 18, 2010) (NO. 08-1044) "It is difficult to reconcile the Legislature's recognition of the special vulnerability of children, and its passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money, or to consider children quasi-criminal offenders guilty of an act that necessarily involves their own sexual exploitation. In the context of these laws, and given the blanket adoption of the Penal Code into the Family Code, it is far more likely that the Legislature intended to punish those who sexually exploit children rather than subject child victims under the age of fourteen to prosecution."

D had Fifth Amendment right not to answer proposed polygraph examination question about whether, since being on probation, he had sexual contact with minors; question asked about independent crimes rather than mere community supervision violations. *Ex parte Dangelo*, 2010 WL 2432017 (Tex.App.-Fort Worth Jun 17, 2010) (NO. 2-09-266-CR) Following are the polygraph questions asked of D: "(1) 'Since you have been on probation, have you had [sic] violated any of the conditions?'; (2) 'Since you have been on probation, have you had sexual contact with any persons younger than 17?'; (3) 'Since you have been on probation, have you tried to isolate any child for sexual purposes?'; and (4) 'Since you have been on probation, have you intentionally committed any sexual crimes?'" The court wrote: "The first question asks only about community supervision violations, not about independent criminal activity, and [D] therefore does not have a Fifth Amendment right to not answer the question....The State has conceded, and we conclude, that the second and fourth questions ask about independent crimes rather than mere community supervision violations and that under the authority cited above, [D] has a Fifth Amendment right to not answer those questions."

Allowing officer to testify that D neither admitted nor denied allegations against him was not Fifth Amendment rights violation. Also not improper was prosecutor's jury argument that D did not deny the allegations against him. *Steadman v. State*, 2010 WL 2308591 (Tex.App.-Eastland Jun 10, 2010) (NO. 11-08-00183-CR) "The law is somewhat unsettled in this area, but we do have some guidance. Although the case involved post-Miranda silence, the Texas Court of Criminal Appeals has stated that '[p]rearrest silence is a constitutionally permissible area of inquiry.' [citation omitted] In

another case, while the court found it unnecessary to address the question of the admissibility of pre-arrest silence, it did note that there were those federal courts of appeals that had held that pre-arrest silence is admissible. It also noted that there were other federal courts of appeals in which the opposite result was reached [citations omitted] (referring to courts in various jurisdictions and their approach to comments upon the silence of a defendant when exercised at various stages in an investigation)." As for the State's jury argument, the court wrote: "[w]hen examined in context, it is clear that the prosecutor's comment upon [D's] failure to deny the allegations to [officer] was not directed at [D's] failure to testify, but upon his failure to deny the allegations during the telephone conversation....The State's argument to the trial court that pre-arrest silence was admissible under *Waldo* also referred to [D's] pre-arrest/pre-Miranda silence. We have held such silence to be a subject of proper inquiry. Because the evidence was admissible, a summation of that evidence is proper. [citation omitted] Furthermore, the argument was a reasonable deduction from the evidence"

Placing the burden of proof on the State to prove that person who withdrew D's blood specimen was a qualified technician, the court held that said burden was not met here given lack of testimony of person who extracted the blood and given officer's testimony that he did not know the name of said person. *State v. Robinson, 2010 WL 2432019 (Tex.App.-Waco Jun 16, 2010) (NO. 10-08-00185-CR)*

Furthermore, the officer failed to remember what the person looked like; nor did officer write down the person's name, or remember details such as which arm the blood was drawn from. In addition, officer's testimony was inconsistent, to wit: "On re-direct examination, [officer] said that a 'nurse' in the emergency room took [D's] blood sample. But on re-cross-examination, [officer] then admitted that his report states that an 'emergency room technician' signed and sealed [D's] blood specimen. In response to whether that emergency room technician was the same person as the 'nurse' who took the blood or was just someone who witnessed it, [officer] said nonresponsively, 'The same guy that took the blood has to sign off and seal it and put it back in the vile [sic].'" The State unsuccessfully argued that: "the trial court erred in granting the motion to suppress because the testimony of the nurse who withdrew [D's] blood was not required" and the State cited cases holding that "the person who drew the blood need not testify and that the person's missing testimony goes to the weight of the evidence, but not to its admissibility." To which the appellate court responded: "[W]e disagree with the State that the motion to suppress was granted only because the alleged nurse did not testify. It instead appears that the trial court did not believe the State met its burden of proof because [officer's] testimony about who drew the blood was inconsistent, not credible, or both....[T]he State assumed the risk of nonpersuasion, we cannot say that the trial court erred or abused its discretion in granting the motion to suppress." From the dissent: "This may be the most important decision we make this year. It is almost certainly the most important decision in a criminal case this year...[T]he Court's holding could have significant adverse economic consequences on the efficient prosecution of any charge for driving-while-intoxicated in which the State is relying on blood-alcohol-content evidence....The Court errs, as did the trial court, in placing the burden of proof on the State to prove that the blood draw was taken in compliance with the relevant statute. It is solely this error, the placement of the burden of proof, that has resulted in the erroneous suppression of the blood evidence."