

Interesting Cases - March, 2010

Necessity instruction was proper because D admitted that he bit officer to get officer off his back. *Juarez v. State*, 2010 WL 1222680 (Tex.Crim.App. Mar 31, 2010) (NO. PD-0666-09)

Necessity instruction to aggravated assault on police officer was proper, despite D's denial that he bit police officer's finger intentionally, knowingly, or recklessly. "This case is distinguishable from our previous decisions holding that a defendant's denial of an element of the prohibited conduct constitutes a challenge to the elements of the charged offense (or conduct) and therefore does not require a necessity defense instruction. Though [D] denied biting Officer Burge intentionally, knowingly, or recklessly he had also admitted that he bit Officer Burge to get Officer Burge off of him because Officer Burge was causing him to suffocate."

Evidence that driver vomited, ran red light and changed lanes twice without signaling was not factually insufficient as to DWI simply because of D's "bad sushi" alternative hypothesis. *Williams v. State*, 2010 WL 745785 (Tex.App.-Fort Worth Mar 04, 2010) (NO. 2-08-336-CR)

"Specifically, [D] contends that 'the State enjoyed a lower standard when attempting to prove the [impairment] definition of intoxication because the jury was allowed to consider convicting on insufficient evidence'...Here, because the jury could convict [D] if it found that he was driving while intoxicated under either the impairment or per se definition of 'intoxicated' and because the jury entered a general verdict of 'guilty,' factually sufficient evidence of either theory will support the jury's finding....Williams testified at trial and offered another explanation for some of his actions that night. He explained that he had eaten some sushi at a party, had felt sick, and had run the red light on purpose so that he could get home to throw up. He also explained that he had changed lanes without using a blinker because he saw Officer Brown's car, thought the officer was in a hurry, and wanted to get out of his way. Although the jury could have found Williams's testimony to be true, the mere existence of a reasonable alternative hypothesis for his running a red light, changing lanes without signaling, and throwing up does not render the evidence factually insufficient."

No mistrial as to court's comment "behavioral abnormality based upon homosexuality" during voir dire.

In re Commitment of Hill, 2009 WL 6084698 (Tex.App.-Beaumont Mar 25, 2010) (NO. 09-08-00482-CV) "As phrased, the trial court's statement in voir dire appears directed at getting [D's] attorney to rephrase a question; it does not appear intended or capable of being interpreted as an instruction to the jury on the proper legal definition of the term 'behavioral abnormality.' [Also]...the trial court's charge included the correct statutory definition for the meaning of 'behavioral abnormality.'"

D asleep in parked vehicle with keys in ignition and motor running considered "operating" vehicle as to DWI, in part due to "activated radio." *Molina v. State*, 2010 WL 1068090 (Tex.App.-Amarillo Mar 18, 2010)

(NO. 07-09-00022-CR) "[T]he jury could have determine that the running vehicle, the flickering brake lights, and the activated radio were indications that appellant had taken actions that affected the functioning of the vehicle and, thus, was operating the vehicle prior to falling asleep....[S]ince any person intending to drive would first have to turn the key to start the car, we conclude that the fact that the key was turned and the engine was running could be interpreted by the jury as operating the vehicle."

Theft by deception conviction upheld where D allegedly had sexual affairs, after which D's husband drafted legal petitions for pretrial depositions of the men amounting to an alleged "shake down" for "hush money." *Roberts v. State*, 2010 WL 956129 (Tex.App.-San Antonio Mar 17, 2010) (NO. 04-09-00017-CR)

Defendant had sexual relations with complainants, she typed revisions to some of the petitions for pretrial depositions to investigate claims given to complainants that were drafted by husband, each complainant received such a petition, defendant set up meetings between husband and some of the complainants and complainants paid \$115,000 to husband, to husband and defendant, or to an alleged children's "charity." Complainants were

told that money they were to pay would, in part, make husband “whole,” but complainants all paid for some of the same “expenses,” and despite statements in petitions about divorce, relationship between defendant and her husband became more “lovey-dovey.” “Appellant testified she was familiar with Rule 202 and believed it was a legitimate vehicle to investigate claims prior to filing suit. In support of this argument, appellant offered the testimony of an expert who testified a lawyer does not have to decide whether he or she actually has a claim before serving a Rule 202 petition, and such a petition is a valid legal mechanism to investigate a claim. Although there was no dispute at trial that Rule 202 petitions are legitimate mechanisms to investigate a claim, the jury was free to accept the State's argument that [husband] and [D's] use of the petitions under the circumstances presented here amounted to a ‘shake down’ for ‘hush money’; thereby rejecting [D's] argument that she believed her and husband's] use of the petitions was legal.”

Statements that D's minor son made to 911 operator deemed nontestimonial and present sense

impressions. *Reyes v. State, 2010 WL 956140 (Tex.App.-San Antonio Mar 17, 2010) (NO. 04-09-00210-CR)* The statements were not testimonial, and thus not violative of the Confrontation Clause, because the 911 operator's questions were designed to evaluate the situation in order to determine if an emergency existed. As to hearsay, statements were present sense impressions because the 911 recording included statements by son that his mother was “limping” and that she “needs” and ambulance, indicating that son was describing events as they were happening, and to extent that son's statement on recording that D had beaten his mother appeared to be a description of a past event, “[D] objected to the entire recording and he did not request specific portions to be excluded.”

Illegal immigrant status deemed inadmissible to impeach driver's testimony. *TXI Transp. Co. v. Hughes, 2010 WL 852159, 53 Tex. Sup. Ct. J. 431 (Tex. Mar 12, 2010) (NO. 07-0541)* This is a civil case, but the court's holding relies, in part, on a CCA decision stating that parties may not impeach on collateral or immaterial matters.

Defense counsel was effective, despite D's claim that counsel uttered misrepresentations to him about the availability of deferred adjudication. *Galan v. State, 2010 WL 840811 (Tex.App.-Amarillo Mar 11, 2010) (NO. 07-09-0224-CR)* Said claim was uncorroborated and D's credibility was deemed doubtful on the ground that D originally swore that his plea was voluntary only to recant after being sentenced to prison.

Inmate's suit for guard's alleged spilling of coffee on inmate's legal documents deemed not frivolous. *Hamilton v. Pechacek, 2010 WL 851410 (Tex.App.-Fort Worth Mar 11, 2010) (NO. 2-09-115-CV)* “[Inmate] seeks damages based upon [guard's] alleged destruction of ‘\$166 worth of legal documents generated from a pending suit against Asst. Warden Tommy Norwood.’ In his original petition, [inmate] specifically alleges that [guard] intentionally caused coffee to be spilled and knew or should have known that the documents would be destroyed as a result....[W]e hold that the trial court could not have properly concluded that [inmate's] common law property claims lack an arguable basis in law.”

Reasonable suspicion to stop D for DWI based, in part, on time of day and area of city that D had been coming from. *Reed v. State, 2010 WL 851424 (Tex.App.-Fort Worth Mar 11, 2010) (NO. 2-09-126-CR)* “Here...[officer] not only testified that he had stopped [D] because of her driving violations, but also because he had suspected that she might be intoxicated based on the time of day, the area of the city that she had been coming from, and his experience with intoxicated drivers exhibiting similar characteristics of driving....[T]he totality of the circumstances surrounding the stop, support a reasonable suspicion that Reed was driving while intoxicated.”

Statute for causing the death of a person by participating in a drag race is not unconstitutionally vague.

Kfoury v. State, 2010 WL 771046 (Tex.App.-Hous. (14 Dist.) Mar 09, 2010) (NO. 14-08-00984-CR) The following arguments of D failed to convince the appellate court: the statute is unclear because it could apply to “mere spectators;” “whether the application [of the statute] is restricted to motor vehicles or to any type of vehicle;” and (3) the statute is unclear because “it could apply to all ‘traffic areas’ including sidewalks, alleys, and shoulders.”; (4) the statute “does not establish a standard for law enforcement personnel to employ when determining whether two cars are in a ‘competitive attempt to outdistance each other.’”

Requiring student to leave backpack inside classroom subject to police dog sniff was not

unconstitutional seizure. *In re D.H.*, 2010 WL 744117 (Tex.App.-Austin Mar 05, 2010) (NO. 03-07-00426-CV) “[D] does not contend that the dog’s inspection of her bag was a search for Fourth Amendment purposes. Instead, she argues that requiring her to leave her backpack in the classroom while she left the room was an unconstitutional seizure of her property and that she otherwise would have carried it on her person, where the dog would not have been permitted to sniff it....The students themselves were not sniffed and they were not in the room while the dog sniffed their belongings....Given the method employed in conducting the canine inspection and the minimally intrusive nature of the inspection, we hold that the invasion of [D’s] privacy was not significant.”

Because D was not adequately represented during the 30 day period for filing a motion for new trial, appellate court abated proceedings and restarted the appellate timetable.

Bearman v. State, 2010 WL 724516 (Tex.App.-Hous. (1 Dist.) Mar 04, 2010) (NO. 01-08-00787-CR) While trial counsel might have made D aware of his right to file a motion for new trial, D did not have the assistance of counsel in doing so, and because of the gap in D’s representation during the 30-day period after sentencing, D was denied counsel during a critical stage of the criminal process.

Police officer’s fabrication of fingerprint document in order to compel D in murder investigation to confess violated penal statute governing evidence tampering, rendering confession inadmissible.

Wilson v. State, 2010 WL 715253 (Tex.Crim.App. Mar 03, 2010) (NO. PD-0307-09) The State unsuccessfully argued that, “[s]ince detectives are allowed to deceive suspects during interrogations, [officer] was reasonable in believing his act in presenting the ‘dummy’ lab report to [D] was lawful.”

Seizure of safe not improper, even though police seized two safes and warrant described only one.

State v. Powell, 2010 WL 715266 (Tex.Crim.App. Mar 03, 2010) (NO. PD-1205-08) “The safe that Lowery bought at a Home Depot with a forged check was ‘property described in the affidavit.’ The police, therefore, could have seized the two safes they found in the home because they could have reasonably believed that one of the safes was the one that Lowery bought at a Home Depot with a forged check and that Lowery said was in the home. This decision on this question of law as to what items the search warrant authorized to be seized does not have the effect of converting the search in this case into a general search and it does not have the effect of authorizing the seizure of one thing under a warrant describing another.”

Petitioner not entitled to expunction as to sexual assault of child arrest, even State had declined to prosecute and the trial court found that the victim had lied.

In re S.S.A., 2010 WL 703229 (Tex.App.-El Paso Mar 02, 2010) (NO. 08-08-00293-CV) The court called on the legislature to amend the statute: “We understand that the Legislature wants to prohibit expunction when there is no limitations period...But in a case where the State has declined to prosecute the case and the trial court has found that the child victim lied about her age, there is very little chance the State will change its mind and prosecute. We believe this is an unfair application of the statute in this case. Perhaps the Legislature should amend the statute so that a defendant in these circumstances can also get his arrest record expunged when the State has declined the case and the trial court finds that the defendant was arrested because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the arrest.”

Evidence for aggravated assault on a public servant was sufficient, despite witness testimony that D was using the knife to cut his own throat at the time as the officers tried to subdue him. *Gokey v. State*, 2010 WL 723769 (Tex.App.-San Antonio Mar 03, 2010) (NO. 04-08-00214-CR, 0408-00215-CR) “[D] argues he was attempting suicide when the officers ‘got in the way’ and he ‘involuntarily’ cut them. Although several witnesses testified [D] used the knife to cut his neck as the officers tried to subdue him, [D] has not identified any evidence that suggests his actions were the result of some reflex, convulsion, unconsciousness, hypnosis, or other nonvolitional impetus. Rather, his argument is that the result of his actions-the cutting of each officer-was unintended. This argument is akin to the ‘accident’ defense no longer available under Texas law.”