

## Interesting Cases - May 2010

**Pills that fell from D's bra when officer requested that she pull her bra away from her body were suppressed. According to officer, "[b]ecause [D] was relatively well-endowed-'more than average'-[officer] was concerned she may have concealed the steak knife in her bra." Nevertheless, officer's concern did not allow officer to broaden scope of pat-down search.** *State v. Williams*, 2010 WL 1790809 (Tex.App.-Hous. (14 Dist.) May 06, 2010) (NO. 14-09-00353-CR, 14-09-00354-CR, 14-09-00355-CR) Male police officer's reluctance to perform pat-down on D, a female, provided insufficient justification for his requesting that D pull her bra away from her body, even though officer obtained information that D could be armed with steak knife and was concerned for his safety. The court emphasized that the officer was not told, specifically, that the steak knife was hidden in D's bra.

**Officer had RS to further detain driver and obtain sniff by a drug dog because officer noticed a strong aroma of cologne and air freshener in addition to signs of driver nervousness.** *Erskin v. State*, 2010 WL 2025754 (Tex.App.-Hous. (1 Dist.) May 20, 2010) (NO. 01-08-00866-CR) "[Officer] smelled a strong aroma, which he described as a 'cover odor,' a combination of freshly sprayed cologne and air freshener. [Officer] testified that the scent was 'overpowering enough to make you nauseous.'"

**D's grandfather, with whom D lived, had authority to consent to search of D's bedroom, despite testimony of D's girlfriend that grandfather was excluded from entering the room without D's express permission.** *Hubert v. State*, 2010 WL 2077166 (Tex.Crim.App. May 26, 2010) (NO. PD-0493-09) "[T]he determination of whether a person has authority to consent to a search of another person's bedroom cannot rest solely on...whether that third party sleeps in the other's bedroom. This fact alone, therefore, does not negate [grandfather's] authority to consent to a search of the [D's] bedroom....[D's] door was not shown to have been locked, and the trial court was entitled to disbelieve the testimony of the [D's] girlfriend that [grandfather] was 'excluded' from entering the bedroom without express permission....[D], lacking any proprietary interest in the house, or even any possessory right other than by the grace of his grandfather, assumed the risk that his grandfather might permit the search...at least in the absence of any agreement between the two that would expressly prohibit the grandfather from making such an intrusion...."

**Officer's initial interaction with DWI defendant was a voluntary encounter rather than a seizure, even though officer pointed his spotlight at D and communicated to D, who was eating a hamburger in her parked car with the engine running, that she needed to roll down her window.** *State v. Priddy*, 2010 WL 1999520 (Tex.App.-Fort Worth May 20, 2010) (NO. 2-09-132-CR) Officer did not activate his vehicle's overhead emergency lights or siren, nor did he block D's egress.

**Search warrant based, in part, on marijuana residue discovered on two different occasions in trash container outside D's residence was valid under "doctrine of chances," with dissent.** *Flores v. State*, 2010 WL 1979437 (Tex.Crim.App. May 19, 2010)

(NO. PD-1016-09) The "doctrine of chances" dictated that marijuana originated from D's residence and not from a neighbor or passer-by, because it was unlikely that a person or persons unconnected to the residence would have placed marijuana in said garbage can twice within a five-day period. From the dissent: "Finding marijuana stems, seeds, and residue in the trash does not provide probable cause to search the adjacent house for drugs. While remnants of drugs in the trash may indicate that someone possessed drugs in the past, it does not show current possession of drugs and certainly is not an indicator that there will be drugs in the house. Drug residue in the trash is equivalent to someone saying 'I used to do drugs,' which may show prior possession, but does not provide probable cause to arrest the person or search their home."

**Deemed irrelevant in prosecution for solicitation was minor's MySpace page, which showed picture of her and her boyfriend with the caption "omg how nasty i get it all the time."** *Hernandez v. State*, 2010 WL 2099220 (Tex.App.-San Antonio May 26, 2010) (NO. 04-09-00544-CR) Caption was ambiguous and, even if it did imply that victim was sexually active, such implication did not make it more likely that victim fabricated allegation of solicitation.

**Deemed a race-neutral basis for State's strike was potential juror's "looking around the room," not making eye contact, and unresponsiveness.** *In re Commitment of Wilson*, 2010 WL 2163827 (Tex.App.-Beaumont May 27, 2010) (NO. 09-09-00278-CV) Nor was said basis considered a pretext.

**Stalking conviction was supported by evidence that D stalked female runner on more than one occasion, even though the two episodes occurred within minutes of each other and along a stretch of street less than a mile in length.** *Hutton v. State*, 2010 WL 2089352 (Tex.App.-Amarillo May 25, 2010) (NO. 07-09-00119-CR, 07-09-00120-CR) D made a u-turn in his vehicle and followed runner as she ran in fear down middle of street, and after D was momentarily out of sight, runner next saw D's car in a parking lot, after which D drove behind her as she sprinted to a convenience store.

**D did not unambiguously invoke his right to terminate police interview, despite officer's admission that D specifically requested to cease interview, where D's reason for wanting to stop interview was that his "head was pounding."** *Gately v. State*, 2010 WL 1999684 (Tex.App.-Eastland May 20, 2010) (NO. 11-08-00157-CR) "At most, the recorded statement indicates that appellant wanted to stop the interview for the day because his head was pounding and then continue the interview the next day."

**Potential juror who divulged that she would automatically assume someone who was arrested for DWI was guilty was not required to be removed for cause.** *Bagheri v. State*, 2010 WL 1904265 (Tex.App.-San Antonio May 12, 2010) (NO. 04-08-00913-CR) She was rehabilitated when state explained there were different standards for arrest and conviction, whereupon she agreed that she would require state to meet a higher burden of proof to find D guilty.

**D was incompetent to proceed pro se, even though he was competent to stand trial, because D, among other conduct, cast a "curse" on the trial judge in open court, to wit: "May Yaweh curse you till the end and may I put an eternal**

**indictment on you and I will prosecute you to eternity."** *Chadwick v. State*, 309 S.W.3d 558 (Tex.Crim.App. May 05, 2010) (NO. PD-0250-09, PD-0251-09) The other conduct included: "During the course of the hearing, [D] interrupted his attorney several times. [D] objected several times, even as the judge granted the motions filed by his attorney....At the end of the pretrial hearing on August 28th, [D], apparently dissatisfied with the hearing, asked the judge, 'Would it be inappropriate to curse you with every Israeli curse there is?' [D's] counsel advised him that it would be. [D] ignored the advice....On September 10th, the day trial was to begin,...[D] engaged in a rambling monologue in which he launched personal attacks on the prosecutor, the judge, the bailiffs, judges from prior cases, and his attorney.'"