WHAT'S GOING ON WITH TRAFFIC DETENTIONS?

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WHAT'S GOING ON WITH TRAFFIC DETENTIONS?

I.
HOW THE COURTS HAVE INTERPRETED PROLONGED DETENTION UNDER *RODRIGUEZ* IN THE LAST TWO YEARS.

The appellate review of a motion to suppress is under the bifurcated standard. Furby v State, 291 S.W.3d 872, 877 (Tex. Crim. App. 2016) At a motion to suppress hearing, the judge is the sole finder of fact and judge of the credibility of the witnesses and the weight to be given to their testimony. A reviewing court, therefore, is bound by the determination of historical facts from the trial court as long as they are supported by the record. Carmouche v State, 10 S.W.3d 323 (Tex. Crim. App. 2000) However, the appeals court reviews "de novo" whether the facts are sufficient to give rise to a reasonable suspicion. When the trial court makes findings of fact, the appellate court takes those facts as true as long as they are supported by the record. When the trial court does not make findings of facts, the appeals court reviews the evidence in the light most favorable to whatever the trial court finds and assumes that the trial court made implicit findings of fact if supported by the record. Ford v State, 158 S.W.3d 488 (Tex. Crim. App.2005) The appeals court will sustain the ruling of the trial court if it is correct under any applicable theory of law, even if not addressed by the court or parties. Arguellez v State, 409 S.W.3d 657 (Tex. Crim. App. 2013)

In 2015, the Supreme Court handed down Rodriguez v United States, 135 S.Ct. 1609 (2015). The Supreme Court ruled again, as it had in Johnson, 29 S.Ct. 721 and Cabalas, 125 S.Ct. 831 that a traffic stop must be legal at it's inception and can last no longer than it takes to effectuate the purposes of the stop and conduct the "mission" of the traffic investigation. Law enforcement may not unduly prolong traffic stops without reasonable suspicion of other criminal activities taking place. When a seizure is justified only by police observed traffic violations and it is prolonged beyond the time reasonably required to complete the mission of issuing the ticket,

then it is a violation. Cabalas, 125 S.Ct. 831 What is most important is that Rodriguez did away with the 'de minimus' rule stating that any extension or prolonging of the traffic stop under the de minimus rule still violated the Fourth Amendment. Although Texas had long ago establish that the stop could last no longer than the mission of the traffic violation, the federal 'de minimus' rule had prevented Fourth Amendments violations for extensions beyond the time it took effectuate the traffic stop. The importance of Rodriguez was to establish the basic fact that the traffic stop could last no longer than the purposes of the initial detention and the completion of the mission. The mission of the traffic stop, in addition to determining whether to issue a ticket, allows police officers to investigate the ordinary inquiries incident to traffic stops such as checking driver's license, determining whether or not there are outstanding warrants against the driver or passengers, inspecting the vehicle's registration and proof of insurance. During this time, as long as the police officers diligently pursue the mission of the traffic stop, (no particular order is required) they may ask whatever questions they desire of the driver or passengers as long as it does not extend the time of the stop. Considering the traffic stops are often a danger to police officers, the Rodriguez court held that an officer may require the driver and/or passengers to exit the vehicle during a traffic stop. (No problem separating people to compare stories.)

I would like to discuss several post Rodriguez cases in both the Fifth Circuit and in the Texas courts that determine how Rodriguez is being interpreted in the current case law. As usual, it appears that the "reasonable suspicion" merry-go-round is still alive and well.

The definition of reasonable suspicion is when an officer has specific, articulable facts that, when combined with rational inferences from those facts and the officers training and experience, will lead the officer to reasonably conclude that the person detained is, has been or will soon be engaged in criminal activity. The standard looks at the totality of the circumstances. The standard is objective and the subjective intent of the officer is irrelevant. U.S. v Arvizu, 122

S.Ct. 744 (2002) However, the case law on what constitutes reasonable suspicion and what does not is inconsistent at best. Even under the standard of "almost total difference" to a trial's court findings of fact, the legal 'reasonable suspicion' often makes no sense.

I.
FIFTH CIRCUIT CASES THAT HAVE FOUND REASONABLE SUSPICION TO CONTINUE A TRAFFIC STOP IN THE LAST TWO YEARS.

1. U.S. v Johnson, 655 F.d. Appx. 247 (5th Cir. 7/19/2016)

   Narcotic officers in Tarrant County received information that defendant sold methamphetamine from his home. In February, 2014, the officers made two controlled buys using a confidential informant. On February 13, 2014, the officers proceeded to execute a search warrant of Johnson's home. Before the warrant could be executed, Johnson left as a passenger in a pick up truck. Of course, the officers followed and observed two traffic violations and had a uniform officer stop the pick up truck. The officer got both people out and the officer ran a computer check for outstanding warrants. None existed, but the search revealed that each had prior felony convictions. While the computer check was going on the narcotics officer asked for permission to search the truck which was denied. The detaining officer had a K-9 which he got out and the dog alerted to the truck. Methamphetamine and a gun were found. Johnson moved to suppress the drugs during the traffic stop arguing that the dog sniff unconstitutionally extended the stop and his detention. The trial court denied the motion to suppress finding that reasonable suspicions supported the dog sniff. As required, the Fifth Circuit used the two step analysis.

a. Whether the initial stop was justified by reasonable suspicion, and if yes,

b. that the officer's subsequent actions during the stop were reasonably related to the mission of the stop.

The Fifth Circuit found that there was a dual reason for the stop. Of course the traffic violations, but secondarily to the reasonable suspicion of drug activity based on the issued search warrant. The court found that this was enough to satisfy the much lower standard of reasonable suspicion for a traffic stop. The court found that the information about the drug dealing used to obtain the search warrant was indicative of drug activity and was developed before the traffic stop. The court ruled that that information can be used as an additional justification for the reasonable suspicion to extend the traffic stop into the K-9 search. U.S. v Henton, 600 Fed. Appx. 263 (5th Cir. 2015)

2. U.S. v Hipolito-Ramirez, 657 Fed. Appx. 271 (August 9, 2016)

This case was a immigration check point and not a traffic stop. However, the same analysis still applies to the purposes of the immigration detention and that the detention can last no longer than is necessary to briefly investigate the defendant's citizenship status. In April, 2014, defendant and passenger approached immigration check point in Laredo. An 11 years experienced border patrol veteran stopped him for a routine immigration inspection. Defendant handed over immigration documents including B-1, B-2 Visas and I-94 Permits. These documents are processed by computer in the booth and the procedure is brief. The agent asked where the Defendant was going and the immigration officer believed that he lied. The defendant said he was going to San Marcos to buy

shirts for resale in Mexico. He was "speaking a little loud" and seemed "nervous". Because it was after 5 p.m., the agent asked him if he would be spending the night. The defendant replied, no. This struck the agent as strange since the outlets closed at 9 p.m., the defendant would encounter rush hour traffic in San Antonio and it left no time to shop before the stores closed. The agent thought that 'a person traveling to the outlet mall' at that hour would necessarly have to spend the night'. Three minutes into the stop, the agent observed two large suitcases in the rear cargo area of the SUV. The defendant volunteered that the suitcases were to store the shirts he was going to buy. The agent testified 'he didn't know what was going on. He knew the story was off.' This conversation took about one minute. The agent asked for a dog, which arrived in one minute. The dog did not alert. The agent requested consent to search the suitcases, which was granted. They appeared to be empty. The agent then asked to search the car and consent was granted. The vehicle was moved to the secondary inspection area. Subsequently, the dog alerted to the two suitcases and the agents found 11 kilograms of methamphetamine in the lining. The defendant filed a motion to suppress alleging that the detention lasted longer than was necessary to effectuate the purposes of the immigration check point. The magistrate judge denied the motion to suppress and the district judge affirmed. The defendant challenges the approximate one minute between the time that the immigration check was completed and the consent to search as given. The Fifth Circuit stated "inconsistent stories, especially combined with other facts, can give rise to reasonable suspicion. We conclude that the agent developed reasonable suspicion of illegal activity by the time the K-9 arrived based upon the combination of the

implausible story, the defendant's nervousness, the defendant's presence in a drug trafficking corridor. Accordingly, the agent was justified in extending the stop when the K-9 search was performed and the subsequent consent was valid.

3. U.S. v Berry, 664 Fed. Appx. 413 (5th Cir. Dec. 1, 2016)

Berry had a wiretap on his phone and a GPS on his car. DEA agents were investigating and knew that he had traveled to Houston at least three times to meet with co-conspirators and had been observed in an apartment that they later discovered was a stash location. They had made trash runs and found packaging material for heroin. When Berry left Louisiana, agents in Houston were alerted and surveillance was requested on Berry. DEA agents, as a result of their prior investigation, suspected that he would be traveling back to New Orleans from Houston with heroin. DEA agents alerted Louisiana State Troopers and briefed them on all of Berry's suspected involvement with narcotics trafficking. Troopers set up surveillance along Interstate 10 and Berry was pulled over for a traffic violation. The trooper testified that Berry gave him a story that he was going to Louisiana to do construction work for his aunt, but that he had not called her prior to traveling such a long distance. Further, Berry was not wearing clothes "suitable" for construction work. He was also nervous, shaking and wouldn't make eye contact. The court found that this factual basis coupled with the information about narcotics trafficking conveyed to the trooper was sufficient for reasonable suspicion to extend the traffic stop for a dog sniff which resulted in heroin seizure.

These three cases seem to indicate that "not much" is required for reasonable suspicion in the Fifth Circuit to extend the traffic stop.

II.
FIFTH CIRCUIT CASE THAT DID NOT FIND REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP.

1. U.S. v Spears, 636 Fed. Appx. 893 (January 21, 2016. 5th Cir.)

Spears arrived at a known drug house that was under surveillance for ongoing drug activity. He went down the driveway and was there approximately 10 or 20 minutes, but the surveillance officers could not see whether or not he even exited his vehicle or went into the house. When he left the location he was followed and ultimately detained for failure to signal a lane change. He was asked for identification and insurance which he provided. After speaking with Spears for one minute, the officer returned to his patrol car. After four and half minutes, the officer exited his patrol car and began to speak with Spears again. The officer testified that Spears appeared nervous, was not giving straight answers, was evasive in responding to questions, was very non-compliant. When he asked Spears where he was coming from, Spears said he was visiting a relative, which the officer knew to be an untrue statement because he was at a dope house. Spears said he did not have any weapons and did not consent to a search. He was then ordered out of the truck, which he ultimately complied with after backup arrived. He was patted down and no weapons were found. He was then placed in the back of the patrol car to wait for a drug dog. When he was placed in the back of the patrol car 16 minutes had elapsed since the initial detention. The officers attempted to get a drug dog but were unable to locate one. After they found that they could not obtain a dog, they decided there was probable cause to search the truck where they found $60,000 in empty laundry bags smelling of marijuana,

counterfeit money detector and Spears was arrested. His cell phone was seized and ultimately a warrant indicated drug trafficking on the phone.

The Court found the initial detention was lawful for the traffic violation. The Government also argued that the initial detention was justified by reasonable suspicion that he had committed or was about to commit a drug crime. Based on visiting a known drug location, backed his truck in the driveway that obstructed the view, had out-of-state license plates and that multiple vehicles had arrived and departed from the drug house near the time that arrived and departed from the drug house. He only stayed at the house for 10 to 20 minutes.

The court found that visiting a drug house is analogous to being in a high crime area. But finding it "relevant in the contextual consideration", standing alone it is not enough to support a reasonable suspicion. The court found that there was not reasonable suspicion to stop Spears for drug activity. Therefore, the court's decision turned on whether the traffic detention was unjustly prolonged after finding there was no reasonable suspicion for drug investigation. The court found significant that neither Spears or his vehicle was known to the officers before he arrived at the drug house. The court found that the out-of-state plates were meaningless. The court also found insignificant that other vehicles arrived and left the locations after short periods of time. The court found that 40 minutes had lapsed between the initial detention and the beginning of the search. The officers began to search after hearing that another vehicle that had left the location was searched and money was found. However, after the stop the traffic mission was completed, but Spears was further detained and this was well before the other information was received. The additional 23 minutes waiting for the dog was not

part of the mission in issuing the traffic ticket. Dog sniffs are not part of traffic investigations. The Government argued that the defendant lied about where he was coming from, appeared nervous, he was evasive, non-compliant and argumentative and there was a backpack inside the vehicle in plain view. The Government argues that this was all reasonable suspicion to continue the traffic stop investigation. The court held that minor, insignificant or illusionary or reconcilable inconsistencies in the defendant's story are not indicative of criminal activity. (Davis v U.S., 620 Fed. Appx. 295 and Pack v U.S., 612 F.3d 359) The officers could not say that the drug location did not contained a relative of the defendant. The court further found that although the officer testified that the defendant was nervous, he did not explain why he thought the defendant was nervous and described no physical symptoms. The court held that the evasiveness, noncompliance and argumentativeness of the defendant, is not necessarily indicative of criminal wrong doing and that the defendant eventually complied with all the instructions. The court found that such behavior is not necessarily indicative of criminal wrong doing and that the defendant eventually complied with all the instructions. Also reviewing the video, the court found that the evasiveness, noncompliance and argumentative did not rise to such a level that it created a reasonable suspicion. Further, the court found that the backpack, which was testified as being "one of the most common items" used to store money or drugs was unreliable. The court found this unpersuasiveness as the police never saw Spears remove the backpack from the vehicle while he was at the drug house. For all of these reasons, the court found under the totality of the circumstances the facts did not create reasonable suspicion to extend the traffic

stop beyond what was necessary to investigate the traffic violation.

It certainly appears that Spears had a great deal more reasonable suspicion than was found in either Hipolito-Ramirez or U.S. v Berry, Supra. It certainly looked like the court in Spears picked apart the reasonable suspicion one by one rather than using the totality as was done in the other two cases. The court may have determined that the 11 kilos of methamphetamine and 2.5 pounds of heroin found on Hipolito-Ramirez and Berry make a difference in the finding of reasonable suspicion since Spears was only found with cash and no dope. Of course, it may be just different views of different justices. I will never claim to understand reasonable suspicion.

III.
TEXAS CASES THAT HAVE FOUND REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP

1. Smith v State, 2017 Tex. App. Lex. 3039, (2nd District 4/6/2017)

   Defendant stopped for speeding 79 in a 75 (awful). The (high way) was a 'drug corridor', there was evidence that there was "hard travel" (food wrappers, blankets, pillows in car which is indicative of drug couriers) origin of travel was Northern California (marijuana grows), defendant was nervous, carotid artery pulsing, attempts to distract officer investigation with diversionary conversation. The court found all of this justifies prolonging the detention for K-9.

2. Valentine v State, 2017 Tex. App. Lex. 42249 (4th District,5/10/2017)

   Traffic stop for speeding, valid. Finding there was reasonable suspicion to extend which was based on the following:

   1. experienced trooper
   2. drug corridor
   3. no identification
   4. rent car

5. nervous

6. furtive gestures

7. different stories about travels from defendant and passenger

Held, under the totality of the circumstances reasonable suspicion found to extend the traffic stop for K-9 sniff.

3. Pulver v State, 216 Tex. App. Lex. 12412 (7th District, 11/17/2016)

31 minute detention while waiting for a drug dog was justified because:

1. nervous

2. shallow rapid breathing

3. avoiding eye contact

4. lied about two prior drug possessions

5. said attending a concert by a musician who was not playing.

6. 78 miles an hour in a 75 mile an hour zone (more awful).

This was true even though the passenger had confirmed the 'travel information'. (Very interesting that 8.5 pounds of heroin were found. Maybe that contributed to reasonable suspicion?)

4. Ramirez-Tamayo v State, 537 S.W.3 29 (CCA, 9/20/2017)

Trial court denied motion to suppress. Court of Appeals reversed, granted motion to suppress. PDR granted. Court of Criminal Appeals reversed Court of Appeals and reinstated ruling of the trial court denying motion to suppress. Defendant stopped at I-40 near Amarillo. Again, 78 in a 75 mph zone (popular speed). Trooper went to passenger side and instead of rolling down the window the defendant opened the door. Motor vehicle is rent car and trooper believed the window should have worked. The trooper had prior experience that drugs were

concealed in door panels making the windows inoperable. Strong smell of cologne in the vehicle. Chain smoking in a rent car which did not allow smoking. The usual 'nervous and excited'. Constantly shifting. Warning issued. Detention continued based on reasonable suspicion of drug trafficking. Dog had arrived by the time the warning ticket was issued. 20 pounds of marijuana found in the car.

5. Oden v State, 217 Tex. App. Lex 9344 (3rd District Austin, 10/5/2017)

Defendant was detained for license plate light. The officer observed defendant leaving a hotel in a high crime area known for narcotics use, defendant stated she had been previously arrested and became nervous when asked about narcotics in her possession. Defendant indicated that she had been arrested for possession of stolen property but omitted that she had prior arrests for multiple narcotic offenses. The court found that under the totality of the circumstances that there was reasonable suspicion to continue the detention past the time needed to effectuate the traffic violation.

6. Roma v State, 2018 Tex. Crim. App. Lex. 48 (CCA, January 24, 2018)

The trial court denied the motion to suppress. The Court of Appeals reversed the trial court. The Court of Criminal Appeals reversed the Court of Appeals and reinstated the denial of the motion to suppress by the trial court.

Defendant was stopped as a passenger in a motor vehicle that failed to stop at the line of a red light and also failed to signal a turn within 100 feet. The defendant did not have any identification although the driver did have driver's license and insurance. The defendant passenger kept acting nervous and making movements that caused the officer to believe he may have a weapon. He asked the passenger, while he was so nervous and asked him out to make a proper

identification since he had no identification. The defendant was slow to exit the car. The officer said he was going to pat down the defendant when the defendant handed over a pocket knife. Defendant seemed to be guarding his pockets. The officer felt what he thought were cigars and a baggie of some sort but did not retrieve these items. The officer thought the cigars were weed. Officer was alone, so he did not confront the defendant and found no further weapons. Ten minutes after the stop, backup arrived. The defendant gave a fake name that did not match a computer check. He then search the defendant and found synthetic marijuana. Defendant then ran on foot. The court found that the officer was still in the course of diligently pursuing the purpose of the traffic stop and that the officers are permitted to ask drivers and passengers about matters unrelated to the stop so long as the question does not measurably extend the duration of the stop. The court found that the stop was not completed and the officer was diligent in pursuing the stop up until the time the defendant fled on foot.

7. Tello v State, 218 Tex. App. Lexis 1538 (11th District, February 28, 2018)

Defendant was convicted of possession of a controlled substance, a State Jail felony. He was detained for failure to signal a turn. The in-car computer did not confirm insurance. The defendant provided a driver's license and proof of insurance. The driver had no warrants on a warrant check and no information could be found about the passenger. The officer believed the passenger was lying. The officer got the passenger out of vehicle so they could attempt to identify her. She stated that she was from out of state. The officer asked dispatch to run her out of state and no information could be located. By this time backup had arrived and the officer was told by the driver that the passenger had given a fake name.

The passenger was placed in the patrol car and the defendant was asked to exit the vehicle. The officer believed something 'weird' was occurring. The passenger was found to have warrants for possession, they had just left a high narcotics area, the passenger lied about her name. The officer had already called for a K-9 unit. Defendant got out of his vehicle, but failed to close the door. Defendant was searched for weapons and was asked to sit on the curb. He kept standing up and not complying with directions. Eventually the K-9 arrived and jumped in the open door and located narcotics in the console.

The court found that once the passenger was arrested for an outstanding narcotics warrant, coupled with the high narcotics area, coupled with the after midnight time frame, coupled with the defendant having a previous history for narcotics, his denial of consent to search and the passenger lying about her name, constituted to reasonable suspicion to continue the detention. Because it was improper for the dog to jump in the vehicle, the court ruled that it was an inadvertent invasion of the Fourth Amendment and not intentional. Therefore, even though the dog entered the vehicle before it alerted and without probable cause because it was inadvertent and not a Fourth Amendment violation. (I guess it's ok to "accidentally" let the dog jump in the car. The defendant should have closed the door!)

IV.
TEXAS CASES WHERE REASONABLE SUSPICION TO CONTINUE THE DETENTION WAS NOT FOUND

1. State v Robinson, 216 Tex. App. Lex. 12266 (9th District, 9/15/2016), State's appeal.

Defendant was stopped on Highway 59 in Liberty County (testified as

known corner for drugs). Thought the car was speeding, but followed because it had out of state plates and felt that the car was 'overly clean'. Paced the car and detained it for five miles over the posted speed limit. Officer smelled air freshener upon approaching the vehicle. One minute into the stop he stated it would be a warning, but nevertheless asked Robinson to accompany him to his vehicle to do the warning ticket. In the vehicle, the trooper questioned defendant about the purpose for her trip, and he did not believe her. He indicated that she was nervous which continued even after she had been told she would be receiving a warning ticket. Computer check showed no warrants. The car was not stolen. Seven minutes into the stop the trooper asked for consent to search to which she agreed. The court found the stop was valid, however, the court found that the evidence the trooper gathered did not reasonably justify the detention beyond the period required to issue the warning which had expired by the time the officer had asked for permission to search. The detention was unduly prolonged and the consent was not valid. The appeals court's ruling was notably based on the highly differential standard and the abuse of discretion standard granted to the trial court in granting a motion to suppress.

2. State v Taylor, 216 Tex. App. Lex. 11473 (5th District, 10/21/16)

Rockwall County Sheriff's Deputy observed an Infinity that he believed did not have a license plate lamp. Before the detention, the Infinity pulled into a truck stop and met with another vehicle. Both the vehicles had Tennessee plates. Deputy ran the registration of both vehicles and they were both registered to the defendant. Both vehicles left the truck stop together and traveled together on I-30. At that time, the deputy called another deputy further down on I-30 and asked

him to stop the Infinity while he stopped the pick up truck. He stopped the pick up truck for following to closely to the Infinity. There were three Hispanic males. The driver did not speak English. The driver did not have a driver's license, but there were no outstanding warrants on any of the occupants. Further up the highway, the Infinity was detained for a partially lite license plate light. The defendant told this deputy that he owned both vehicles, they were returning from bidding on an apartment building in a construction job in Lewisville. The two deputies talked to each other over the radio. The deputy with the pick up truck asked the driver about his boss and the pick up truck driver told the deputy that his boss was in Nashville. (The deputy believed that his boss was in the Infinity.) One deputy received consent to search the pick up truck, but no drugs were found. Consent to search the Infinity was declined. The Infinity officer then asked for a K-9 unit. The K-9 was contacted, but did not arrive for 45 minutes. The K-9 alerted on the pick up truck, which was search again, but no drugs were found. The pick up truck was released. No ticket or warning was issued for following to closely. Further, the driver of the pick up was allowed to leave even though he had no valid license. The K-9 and first deputy then traveled to the Infinity. The pick up had not stopped at the Infinity but kept going after being released. Dog alerted on the Infinity. 100 pounds of marijuana were found. The court found that the initial detention was lawful, that the purpose of the detention was concluded 35 minutes into the stop, that the additional one hour of detention of the Infinity while waiting for the K-9 was illegal. The trial court suppressed the evidence.

Using a collective knowledge doctrine, the state alleged the following reasonable suspicion:

1. The two cars were together, but neither got gas.
2. The individuals at the gas station dispersed when seeing the police officer but joined together to travel down the highway.
3. The pick up truck followed the Infinity too closely.
4. The driver of the pick up lied about his boss.
5. Two cars was registered to the same individual which is indicative of narcotics trafficking.
6. The pick up truck did not stop after being let go to join the Infinity, but continued on even though they had previously been together.
7. It is very common for narcotics traffickers to travel in pairs with one car containing the drugs and the other car to be used as a diversion.

The trial court found that the defendant was relaxed, made appropriate eye contact, answered all questions promptly and without hesitation, and that no one showed signs of nervousness. Also, neither deputy smelled marijuana. 17 minutes into the stop, the officers received confirmation that neither the defendant or his passenger has any warrants. Consent was refused. The Infinity officer testified he continued the detention of the Infinity only because the pick up truck officer has informed him that a K-9 unit had been requested. The detaining officer of the Infinity admitted that after the warrant and registration check had been completed, all traffic stop related issues were completed and he was just waiting on the K-9. There was a continued detention for one hour after the stop

had been completed. The appeals court found that the trial court was justified in determining the continued detention was unreasonable.

It's interesting to note that in the Texas cases that the cases that found reasonable suspicion were all defendant's appeals. The cases that found that there was not reasonable suspicion to continue the traffic violation were all State's appeals. The highly differential standard to the determination of the trial court and the almost total difference of the factual finding indicates that in all likelihood the Court of Appeals will uphold the trial court. In both instances where the Court of Appeals reversed the trial court's denial of the motion to suppress, the Court of Criminal Appeals reinstated the trial courts ruling.

I think it is very important for the judges to understand that if there is a close question on continuing detention based on reasonable suspicion and, the trial court really wishes to get an analysis by the Court of Appeals it is better for the State to appeal than to deny the motion to suppress and ask the defendant to appeal.

V.
HOW THE COURTS HAVE BEEN DETERMINING REASONABLE SUSPICION BASED ON COMPUTER INFORMATION REGARDING INSURANCE & WARRANTS

In 2008, the legislature made changes to the Transportation Code regarding the legal requirement of automobile insurance. This was called the financial responsibility verification program (it's short name is TexasSure). The TexasSure went online in June of 2008 with an automated system containing registered vehicle information that was matched with insurance policy information. Multiple 'implementing agencies" share in the role for TexasSure. These include the Texas Department of Insurance, The Department of Transportation, the Department of Public Safety and the Department of Information & Resources. TEX SURE has processes and

controls in place to allegedly accurately retrieve vehicle registration data and personal vehicle insurance policy information. However, TEX SURE does not contain complete information on commercial vehicle insurance policies because the implementing agencies have not required insurance companies to report that information. Additionally, TexasSure in no way controls for providing insurance to people who elect to be self insured under the law of Texas. Even so, by 2009 over 100,000 commercial vehicles had reported to TexasSure that approximately 83,000 self insured vehicles were under TexasSure. Unfortunately, the auditors can not obtain reliable information as to the total number of commercial vehicles or self-insured vehicles in the State of Texas. The Texas Department of Insurance (TDI) which is the lead agency for implementing the TexasSure program, entered into a $15.5 million dollar contract with HDI Solutions Inc. to develop and manage technology for TexasSure. TexasSure has implemented procedures to exchange information with the Texas Law Enforcement Tele-Communication System (TLETS) which is a system designed for warrant checks. In effect, this is an all in one program now that will do a registration check, insurance check, and check for warrants associated with the license plate number through the integration of these systems. The warrant system would have to be run individually for names. The license plate check is only the beginning and if a hit is obtained related to the motor vehicle, then the individual warrant would have to be confirmed through the TLETS warrant information system.

I.
VALIDITY OF THE WARRANTS DATABASE (TLETS)

It appears that the courts have assumed that the warrant databases are accurate. An attack on the validity of the warrant system will arise when the system shows a hit on a warrant that is either withdrawn, already executed or mistakenly entered under the wrong name or identifying information. The ability to suppress any of these issues is determined by whether or not there is a

systemic problem with the database system and the burden seems to be on the defendant to prove this matter. The most recent Supreme Court case is Herring v U.S., 555 U.S. 135 (Jan. 14, 2009). Herring complained he was arrested and searched pursuant to a warrant that had been recalled. It appears that the traffic municipality recalled the warrant, but the recall was never placed in the system so the system showed that the warrant was still accurate. The court ruled that the exclusionary rule did not apply as the error that occurred arose from non-recurring and attenuated negligence. It was further removed from the core concerns that lead to the exclusionary rule in the first place. To trigger the exclusionary rule, police conduct had to be sufficiently deliberate such that the exclusion could meaningfully deter it and sufficiently culpable that such deterrent was worth the price paid by the judicial system for the implementation of the exclusionary rule. In Herring, the miscommunications were not routine nor widespread, nor were they sufficiently culpable to require suppression. It appears that only if the police had been shown to be reckless in maintaining or knowingly made false entries into the system that the exclusionary rule would apply. It gets even more complicated if the mistake was made by an agency other than the arresting agency of the defendant in the particular case. It would be hard to impute the negligence or misfeasance of the agency causing the problem to the arresting officer who is merely relying on the computer database. An attack on the database would require a showing that there is a pattern in practice of mistakes in the system that would show the system is unreliable or that there is a pattern of false entries that would show malicious intent or gross negligence.

II.
THE RULES APPEAR TO BE DIFFERENT WITH THE TexasSure SYSTEM

The case law seems to indicate that the burden is on the State to prove up the reliability of the TexasSure system when the detention is caused by an indication on the system that vehicle is

uninsured. There is case law that has found that the system is reliable and there is case law that has found that the system is not reliable. It appears that the difference depends upon the level of proof offered by the prosecution as to the validity of the system and also as to the court's determination of the facts as to whether or not the system is reliable or unreliable.

It is interesting that the Texas Administrative Code (28 T.A.C. §5.605) places the burden for data correction errors on the insurance company. However, the only source of wrongful data for the insurance company to correct comes from TexasSure. It looks like the TexasSure system is self policing.

III.
CASES WHICH HAVE UPHELD THE RELIABILITY OF THE INSURANCE DATABASE

There are four cases which upheld tell the reliability of the TexasSure database in the last two and half years. I will do them from oldest to newest:

1. Oliva-Arita v State, 2015 Tex. App. Lex. 11925 (1st District, Nov. 19, 2015)

> The officer's testimony provided the trial court with an explanation of the meaning of the terms confirmed and unconfirmed when it came to vehicle insurance. The testimony indicated why information might be unconfirmed and the actual reliability of the database was established based on the officer's experience and only his testimony. In this particular case, the court found that the arresting officer uses the database on almost every stop. He testified that when he gets unconfirmed that means that the vehicle is not insured and when it's confirmed that means that the vehicle is insured. He testified the majority of the stops on unconfirmed have no insurance. The officer estimated the accuracy of the system at 75%, based on his training and experience. The officer further testified that based on his experience the information received from the computer

database was reliable. The court ruled that this testimony from the officer provided the trial court with an explanation of the meaning of the terms and the accuracy and reliability of the database based on his experience.

2. Swadley v State, 216 Tex. App. Lex. 13308 (2nd Dist., Dec. 15, 2016)

The database in this particular case indicated that the insurance status was "unconfirmed" with the additional notation "vehicle last matched not within 45 days". The officer testified based on his experience these notes meant that the driver's insurance had lapsed or had been cancelled, although the database also showed an insurance expiration date two months later than that of the stop. It turns out that the driver was in fact insured. However, the court ruled that at the time of the stop, the objective fact was that the database showed he was not insured and that provided reasonable suspicion to stop him. The court reasoned that the traffic stop based on database searches fall into two categories. In the first category, the courts have held that the officer did not have reasonable suspicion when the evidence was not developed to determine the ambiguous answers meaning or reliability. In the second category, the courts have held that reasonable suspicion existed when the officer's perception, through training and experience, gave additional information about what the ambiguous answer from the database meant and some idea regarding the data's reliability. The court found that in this particular case that the officer's testimony placed the defendant into the second category and found reasonable suspicion to uphold the detention. Case relied on standard States argument that reasonable mistakes about the facts may still legitimately justify an officer's conclusion that reasonable suspicion existed to detain. Mistakes about the facts, if reasonable, will not visiate an

officer's actions so long as his actions were lawful under facts as he reasonably, although mistakenly, perceive them to be. See Robinson v State, 377 S.W.3 712 (Tex. Crim. App. 2012)

3. U.S. v Broca-Martinez, 8555 F.d3 675 5th Cir. (April 28, 2017)

For federal purposes, the 5th Circuit has ruled that an officer has reasonable suspicion to stop the defendant's vehicle based on the insurance database reporting as unconfirmed on the insurance. The 5th Circuit ruled that the officer's testimony provided sufficient support for the reliability of the database because he described the process for using it, how records in the database are kept, and his extensive experience with the accuracy of the results. The 5th Circuit went through the other circuits which have found in different ways regarding insurance databases. However, the 5th Circuit agreed with the other circuits that have confronted the question and stated that the State computer database indication of insurance status may establish reasonable suspicion as long as the officer is familiar with the database and the system itself is reliable. In this particular case the officer explained the process for imputing the information, described how the databases records are kept, and noted that he was familiar with these records. He explained that "with the knowledge and experience of working the system" he knows the vehicle is uninsured when an unconfirmed status appears because the computer system will either return insurance confirmed or unconfirmed. The officer testified that for the for the most part the computer system is accurate. The court ruled that even if the officer was not completely positive of the non-insurance status, the use of the computer in his testimony about it's reliability cleared the bar for the low standard of reasonable suspicion.

4. Ellis v State, 535 S.W.3 (2nd Dist. Nov. 22, 2017)

In another 'unconfirmed' report the court held that based on the officer's experience he knew that unconfirmed return from the database meant that the vehicle was not currently insured. The trial court made specific findings of fact that the officer's knowledge was sufficient to establish the database's reliability for the purposes of establishing reasonable suspicion. The officer's testimony that less than 2% of the overall returns of the insurance database were in errors to satisfy the accuracy requirement found in the Administration Code (Supra). The officer had testified that he used the database "tens of thousands of times", and that the database was very accurate based on his experience. He indicated that he had received an unconfirmed insurance about 20% of the time and that the system is almost always accurate about the unconfirmed status. He indicated that someone has insurance after a reporting of unconfirmed a handful of times, very seldom and less than 10% of the time. The court found that this was sufficient to establish reasonable suspicion.

IV.
CASES WHICH HAVE NOT FOUND REASONABLE SUSPICION BASED ON THE UNRELIABILITY OF THE INSURANCE DATABASE SYSTEM

1. The most relied upon case for unreliability is Gonzalez-Galindez v State, 306 S.W.3 893 (7th Dist. Feb. 10, 2010)

The distinguishing factor case is that the report on the database was that the insurance issue on the insurance vehicle was "unavailable" rather than unconfirmed. This is a different report back and indicates that the database does not know whether or not the vehicle is insured or not. That usually makes this

case distinguishable from the ones above where the court found that the system is reliable. Troopers who found this information decided they could not stop the car based on this information. However, they called a local deputy sherif to intercede. The deputy ran the license plates and also determined the vehicle's insurance status was "not available". None the less, the deputy decided to conduct a traffic stop anyway. Basically, the court ruled that a detention based on "unavailable" information from the system rather than "unconfirmed" information from the system was insufficient to justify reasonable suspicion. The court further found the remaining background facts were insufficient to establish reasonable suspicion for the detention.

2. U.S. v Esquiviel-Rios, 725 F.3d 1231 (10th Cir., 2013)

In this federal case the court ruled that the computer database system was not reliable. What distinguishes this case was the dispatcher's comment regarding the confirmation in the database. The dispatcher told the trooper that he was not getting a return probably because it was an out of state temporary tag. Because the dispatcher did say "no return" on the tag the trooper pulled over the defendant anyway. Unfortunately for the Government, the dispatcher also told the trooper that "Colorado temporary tags usually don't return". The court found that this information told the trooper that there was basically no information on the tag and it could not be reasonable suspicion to detain the vehicle. The court found the case of temporary out of state tags that the database was gravely unreliable. The court also found there was no qualifying information about the reliability of the database from the trooper or any other source.

3. State v Daniel, 446 S.W.3 809 (4th Dist. 8/29/2014)

In this particular case, based on the Bandera County Sheriff's Office dispatch, Sgt. Johnson understood the vehicle been driven by the defendant was operated without insurance. He then got a uniformed officer to initiate the traffic stop of the vehicle which resulted in the possession charge. Unfortunately for the State, the State stipulated that the printout from the insurance database was accurate. The information stipulated to was that the information on the database regarding insurance was "unavailable". Unconfirmed would be no insurance, unavailable would be unknown and would not justify reasonable suspicion. Because of the stipulation, the court did not have to reach the reasonable belief of Sgt. Johnson that the vehicle was uninsured.

4. The most recent case, and probably the most interesting one is State v Binkley, 02-16-00318-CR Tex. App. Ft.W 2/8/18.

It is important to note that in this particular case it is a State's appeal and the trial court granted a motion to suppress. The court goes to great length to set out the bifurcated standard and the total difference issue with regards to the facts.

The deputy noticed the vehicle driving a little slow. He ran the database on insurance and found that the insurance was 'unconfirmed'. The stop was made to verify the insurance situation. The officer testified that the database was working correctly, but he did not get any error messages, that he had no reason to think that the database was any less reliable on this stop or on the other. The printout of the TexasSure database matched this information.

The deputy testified through his training and experience regarding the database and that he used it 30 to 40 times per hour. He testified that he would often verify manually based on the information from the database, that he did not

know who input the data, that he did not know the rates of error, that he did not know the accuracy of the insurance company information. He further testified that he did not know how to correct data was in error. He did not know the name of the program that allowed the information to be in his patrol car. He had no idea if there were any safeguards nor how self-insured people were handled. He did know that DPS administered the program and four to five times per week he would pull over an unconfirmed database hit and find that the driver had insurance. He testified that he made three traffic stops a week for unconfirmed insurance and that 1/3 of the time the person would actually have insurance.

Additionally, Ms. Burkhardt the Coordinator of the TexasSure program testified about how the program worked, the full possible responses of confirmed, unconfirmed, not found and multiple. That the Department of Insurances does not keep record regarding rates of errors in the system and that in her opinion the database is reliable in spite of the 33% error rate testified to by the deputy.

The trial court found that the error rate was unacceptable and the Appeals Court said they must uphold the trial's court ruling because the record supported it. The court went on to discuss the Swadley, Ellis, Gonzalez-Galindo, Daniel, and found that the trial court's reasoning was correct. Based on the totality of the circumstances and the factual determinations of the trial court, the appeals court could not say that the trial court committed error and upheld the suppression.

V.
CONCLUSION

In both the prolonged detention and the 'no insurance' stops, the great difference on fact findings and upholding the trial court, if at all possible, seem to control the outcomes. The exact same facts to have been upheld where there was a State's appeal or defendant's appeal and the 'prosecutor, and defense lawyers' should all understand that it is highly unusual for the trial court to not be affirmed.