

DWI Law

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DWI LAW

I. STOP, ARREST AND PRE-STATIONHOUSE STATEMENTS.

A. HEARING ON MOTIONS ALONE WITHOUT EVIDENCE

In State v. Brunner, 917 S.W.2d 103 (Tex.App.-San Antonio 1996) the defense answered ready for pre-trial suppression hearing.

The court denied the state's second motion for continuance and granted the defense motion to suppress the blood test without taking evidence.

The opinion observed that the literal text of Article 28.01 § 1(6)C.C.P. allows a decision on the motions themselves without evidence, citing Rodriguez v. State, 844 S.W.2d 744 (Tex.Cr.App. 1992). Because the state offered nothing in the record except the motion for continuance, all the judge had was the defense motion alleging an improper arrest and seizure of blood. The defense "fulfilled his burden by announcing ready on his filed motion. The burden then shifted to the state." The state having failed to meet its burden, motion to suppress was properly granted.

B. DWI STOP - REQUIRES REASONABLE SUSPICION ONLY

The standard of proof required for an officer to make a vehicle stop for suspicion of DWI is that required for a temporary investigative detention, to wit:

"a reasonable suspicion based upon articulable facts that

(a) Some activity out of the ordinary is or has occurred,

(b) Some suggestion to connect the detainee with the unusual activity, and

(c) Some indication that the activity is related to crime."

Stone v. State, 703 S.W.2d 652 (Tex.Cr.App. 1986).

Probable cause is not required for the stop. Pringle v. State 732 S.W.2d 363 (Tex.App.-Dallas 1987, pet. ref'd). A DWI case involving the question of the correct burden for jury submission on the issue of the right to stop the vehicle. However, probable cause is required for the arrest itself. Pringle v. State, supra.

C. STOP FOR TRAFFIC VIOLATION ONLY

1. *Requires Probable Cause - U.S. Supreme Court*

According to the United States Supreme Court if the stop is based on a traffic violation or violations the correct standard is probable cause. Whren v. United States, ___ U.S. ___, 116 S.Ct. 1769, 1776-77 (1996).

Citing Whren the San Antonio Court of Appeals recently addressed this issue in a different but analogous context in State v. Rivenburgh, 933 S.W.2d 698 (Tex.App.-San Antonio 1996). There, defendant was arrested for driving while intoxicated after being stopped for disorderly conduct (making "a vulgar gesture with her middle finger" to traffic honking behind her). The court granted defendant's motion to suppress and the state appealed. The prosecution argued that the question was whether the officer had reasonable suspicion to stop appellant and investigate. The Appellate Court responded as follows:

The State argues that the instant case presented the issue of whether the officer had reasonable suspicion to stop Rivenburgh to investigate. We disagree. Officer Morales testified that he stopped Rivenburgh for the offense of disorderly conduct. At the time she was stopped, there was no further investigation to be undertaken. Either Rivenburgh had committed the offense prior to being stopped by the officer, or she had not. Therefore, the issue confronted by the trial court was whether Officer Morales had probable cause to arrest Rivenburgh without a warrant. See Whren v. United States, ___ U.S. ___, 116 S.Ct. 1769, 1776-77 (1996) (issue where stop followed observed traffic violation was whether probable cause existed).

The Court upheld suppression by concluding that "the trial court could have found the gesture, at the time and place given, did not tend to incite a breach of the peace..."

NOTE: In order to show probable cause to make an arrest without a warrant based on an ordinance or code violation, the officer's testimony regarding the ordinance is sufficient, without the need for the prosecution to introduce a copy or for the court to judicially notice it. DeDonato v. State, 819 S.W.2d 164, 166 (Tex.Cr.App. 1991) followed in Howard v. State, 932 S.W.2d 216 (Tex.App.-Texarkana 1996, pet. ref'd).

2. *Insufficient Evidence of Violation*

If there is insufficient evidence of a traffic violation, all evidence obtained thereafter is suppressible. Willett v. State, 454 S.W.2d 398 (Tex.Cr.App. 1970), Hall v. State, 488 S.W.2d 788 (Tex.Cr.App. 1973), Pruitt v. State, 389 S.W.2d 475 (Tex.Cr.App. 1965), all cited with approval in Vicknair v. State, 751 S.W.2d 180 (Tex.Cr.App. 1986). See also Whren v. United States, ___ U.S. ___ 116 S.Ct. 1769, 1776-77 (1996), Hernandez v. State, 13 S.W.2d 492 (Amarillo 2000) (holding "driving with lights on bright" without more, to be insufficient) and State v. Rivenburgh, 933 S.W.2d 698 (Tex.App.-San Antonio No. 04-96-00246-CR, October 9, 1996 [Opinion Service 10-16-96]).

3. *Insufficiency Re Weaving*

"Weaving" is not a violation nor is "Failure to drive in a single lane." The pertinent statute, Section 545.060 of the Transportation Code states: An operator on a roadway divided into two or more clearly marked lanes for traffic:

(1) shall drive as nearly as practical entirely within a single lane and shall not move from the lane unless that movement can be made safely..." [emphasis ours]

Thus, moving into another lane is illegal only where "such movement is not made safely." Hernandez v. State, 983 S.W.2d 867 (Tex.App.-Austin 1998, pet. ref'd) insufficiency where the vehicle drifted partially across a lane marker a single time without signaling.

Also see State v. Tarvin, 972 S.W.2d 910 (Tex.App.-Waco 1998, pet. ref'd) (concluding that three occasions of drifting across the right line of a two lane road was insufficient for a traffic stop - no concern expressed by officer re DWI) and State v. Arriaga, 5 S.W.3d 804 (Tex.App.-San Antonio 1999) where crossing lane of traffic in same direction between two and

seven times in over one and a half miles without more...amounted to an unreasonable search and seizure" and United States v. Smith, 799 F.2d 204 (11th Cir. 1986), where the Florida single lane statute, identical to that of Texas', was held not have been violated where there was "one 6-inch deviation from the road and slight 'weaving' within a single lane." at 709.

However where the driving raises a reasonable suspicion of driving while intoxicated, then the stop is valid though falling short of requirements for a traffic violation.

[Weaving across three lanes in a bar area at 2 AM Townsend v. State, 813 S.W.2d 181 (Tex.App.-Houston [14th Dist.] 1991, pet. ref'd).

Weaving in his lane at unspecified "high rate of speed" Rafaelli v. State, 881 S.W.2d 714 (Tex.App.-Texarkana 1994), crossing double line of traffic two or three times and the broken line once. Gajewski v. State, 944 S.W.2d 450 (Tex.App.-Houston [14th Dist.] 1997)

Accord: LeCard v. State, 1999 WL 1018162 (Tex.App.-Houston [1st Dist.] November 10, 1999) where the opinion categorized crossing the lane two times in four blocks as "erratic" driving and Martinez v. State, 29 S.W.3d 609, 611 (Tex.App. Houston [1st Dist.] 2000).

4. *Exiting the freeway does not require turn signal absent lane change or 90-degree turn. A "turn", the opinion states, contemplates a 90-degree turn. Trahan v. State, 16 S.W. 3d 146 (Tex. App. - Beaumont 2000). But where freeway exit necessitates a 90-degree turn, signal is required. State v. Zeno, 2001 WL 497749 (Tex.App.-Beaumont May 9, 2001).*

D. CITIZEN'S STOP - REQUIRES PROBABLE CAUSE

United States v. Garcia, infra, interprets Texas law to the effect that a peace officer acting outside of the scope of his authority is nonetheless authorized to make a private citizens arrest under C.C.P art. 14.01a, supra. The "private citizen" status would, according to Garner v. State, 779 S.W.2d 498 (Tex.App.-Fort Worth 1989, pet. ref'd), defeat the right to make a temporary detention stop and would require, instead, the higher burden of probable cause for the pullover or detention.

NOTE: A private citizen may not see an offense and then later pursue the guilty party in order to

apprehend him for the police. Young v. State, 10 S.W.2d 705 (Tex.App.-Texarkana 1997).

E. APPLICABILITY OF HEARSAY RULE TO SUPPRESSION HEARING

McVickers v. State, 874 S.W.2d 662 (Tex.Cr.App. 1993), holds that "in the context of Tex. R. Crim. Evid. 1101(d)(4) the rules of evidence regarding hearsay apply to suppression hearings."

The controlling statute is 1101(d)(4) which provides in pertinent part:

In the following proceedings, these rules apply to the extent matters of evidence are not provided for in the statutes which govern procedure therein or in another court rule prescribed by statutory authority:

(4) Motions to suppress confessions, or to suppress illegally obtained evidence under Texas Code of Criminal Procedure Article 38.23.

They interpret C.C.P. art. 28.01, § 1(6) authorizing the court to render its decision in a motion to suppress hearing "on the motions themselves, or upon opposing affidavits or upon oral testimony" to only grant the trial judge "discretion in choosing the format in which the evidence is presented." "The court" they continue "is not given discretion to admit hearsay testimony which is inadmissible under the rules of evidence." TEX. R. CRIM. EVID. 104(a), which states:

Preliminary questions concerning the admissibility of evidence shall be determined by the court . . . In making its determination, it is not bound by the rules of evidence except those with respect to privilege is interpreted to be a general rule "to which 1101(d)(4) provides specific application for hearings or motions to suppress evidence."

F. STOP - TESTIFYING TO FELLOW OFFICER'S DECISION

McVickers above implications: Of strategic significance are the diametrically

different admissibility results between the following situations:

1. The detaining/arresting officer's testimony as to statements he heard that constituted his reason for detaining or arresting, versus
2. A second officer's testimony as to statements the stopping/detaining officer made to him regarding his reason for stopping/detaining.

According to the McVickers analysis, the first quoted statement, testified to by the detaining/arresting officer as to why he acted, would be admissible since the officer does not offer it for the truth of the facts asserted by the statement but rather for the fact that he heard and relied upon it. By contrast the second officer's testimony is offered for the truth as to why the quoted officer made the stop decision and thus became inadmissible hearsay. This scenario was the identical fact situation that was held to be inadmissible hearsay in McVickers.

G. STOP - FELLOW OFFICER'S DIRECT COMMUNICATION

1. Credibility

If the informant is a named officer, no further proof of credibility is needed. Gish v. State, 606 S.W.2d 883 (Tex.Cr.App. 1980); U.S. v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

2. Conclusory

The information from a named officer is also subject to the infirmity of being conclusory. In Miller v. State, 736 S.W.2d 643 (Tex.Cr.App. 1987), the arrest warrant affidavit provided only the affiant-officer's statement that he believed the defendant committed the offense. This was merely conclusory, defeating probable cause.

H. STOP - BROADCAST THRU DISPATCHER FROM OFFICER

A parallel situation is presented by Colston v. State, 511 S.W.2d 10 (Tex.Cr.App. 1974) differing only in that it involved a teletype dispatch from a fellow officer rather than dispatch by radio.

The teletype, from federal narcotics in San Antonio, gave a vehicle description including the license number and the names of two subjects inside it believed to be carrying narcotics. Seeing the vehicle make and matching

plates in Waco, officers conducted a stop and frisk, leading to contraband.

The court reversed, holding that "where the record fails to reflect that the issuing officer had [probable cause to investigate], the investigative stop is not insulated from challenge..."

I. STOP - UNNAMED INFORMANT'S COMPLAINT THRU DISPATCHER

1. U.S. Supreme Court

Reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in details that would identify a particular person. *Florida v. J.L.* ___ U.S. ___ No. 98-1993, March 28, 2000. See *Stewart v. State*, 22 SW3d 646 (Tex.App. Austin 2000) applying *Stewart* to a DWI tip and reversing due to lack of corroboration.

2. Insufficient Corroboration

In *Glass v. State*, 681 S.W.2d 599 (Tex.Cr.App. 1984), a caller, who did not identify himself, reported to dispatcher that occupants of two vehicles--one a brown over beige El Camino--were shooting at each other at or near the intersection of Parker and Oltorf Streets in Austin. In response, officers immediately went to that intersection but observed no unusual activity. In three or four minutes, a brown over beige El Camino was observed traveling south on Parker Lane. The officers stopped the vehicle and after noticing that the passenger was nervous when asked for identification, searched the car finding two pistols and methamphetamine. PDR was granted on the question of whether sufficient facts were established to authorize an investigatory stop short of a warrantless arrest. The Court declared the controlling law to be as follows:

"Probable cause to investigate" exists only where the circumstances reasonably indicate that the particular person either has committed or is preparing to commit a crime. However, the inarticulate hunch, suspicion, or good faith of the investigating officer is never sufficient to justify a police officer to order a subject to stop his motor vehicle or to order a subject from his

automobile. Otherwise, "[i]f subjective [belief] alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be `secure in their persons, houses, places, and effects,' only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97, 85 S.Ct. 223, 229, 13 L.Ed.2d 142 (1964); *Brown*, supra.

Applying the law to the facts, the court observed that there was no evidence as to "when the alleged incident occurred or when the anonymous report was received, and therefore does not show any proximity of time of the stop to the events held by the court of appeals to justify the stop of the vehicle appellant had been driving."

Given the absence of the proximity in time, the match of color and make of the car were held insufficient to justify the vehicle stop.

In *Davis v. State*, 989 S.W.2d 859 (Tex.App.-Austin 1999) the dispatch indicated:

having received information from a caller on a "cell phone" about a full-sized black Chevy Blazer with dealer's tags 5D1180 in the area of mile post 259 on I-25 driving in a northbound direction; that the vehicle was occupied by three white males; that the vehicle was being driven recklessly - "that the vehicle has passed the caller on the shoulder of the roadway back in Round Rock;" and that the occupants were "possibly smoking marijuana."

3. The dispatch "referred only to a female caller. No name, age or location of the caller was given.

The vehicle was initially observed by the first officer near mile post 260 within one or two minutes after receiving the dispatch. The stop officer who observed the vehicle between mile posts 261 and 262 on I-35 [made the] stop of the vehicle at mile post 263 on I-35.

4. The Appellate Court in reversing for insufficient indicia of reliability observed as follows:

Giving the anonymous tip a common sense reading and considering it in the most favorable light, we do not find any corroboration of details linking appellant and his companions to the criminal activity alleged. Officer Stengle stated that his stop of the Blazer and its occupants was based solely upon the anonymous tip. At the time of the stop, he observed no traffic offense being committed nor any violation of law. There was nothing to link the occupants to the criminal activity reported.

An inadequate anonymous tip may be supported by the officer's prior knowledge and experience. Officer Stengle was an experienced officer, but he did not state that he was familiar with appellant, his companions, or the vehicle. Stengle did not testify that he was aware of any criminal records, concerning the occupants of the Blazer, or that the location was a high crime area, or where narcotics users are frequently found, or where drivers usually engaged in reckless driving. Nothing in Officer Stengle's or Officer Pitcher's experience and knowledge aided the corroboration of the anonymous tip.

In State v. Simmang, 945 S.W.2d 219 (Tex.App.-San Antonio 1997) the officer received an anonymous tip that a white male was masturbating in a gold colored four-door car located in a parking lot on a specific intersection. Proceeding immediately to the intersection he blocked the exit path of the only gold-colored car in the area. It was occupied by a white male. Approaching he noted that defendant's hands were not in view, but he was dressed and his clothing was intact. He smelled the odor of marijuana when frisking defendant. The San

Antonio Appellate Court held the facts were insufficient to justify blocking the car and detaining the defendant.

Accord: Garcia v. State, 3 S.W.3d 227, 234 (Tex.App.-Houston [14th Dist.] 1999).

5. Sufficient Corroboration

In State v. Adkins 829 S.W.2d 900 (Tex. App. Fort Worth 1992) an unnamed citizen pointed to a car telling the officer that the driver "appeared to be extremely intoxicated." Citing Alabama v. White, 496 US 325 (1990) for the proposition that "an anonymous tip corroborated by independent police work, exhibited sufficient indicia of reliability to make an investigatory stop" the Court found that the officer's observation that the vehicle was driving on a badly damaged flat tire "sufficiently corroborated the anonymous tip to furnish reasonable suspicion."

J. STOP - INFORMANT WHOSE IDENTITY IS OBTAINED OR AVAILABLE

1. *Where the informant offers identification and gives a precise description which is confirmed, corroboration may be sufficient.*

See Flores v. State, 895 S.W.2d 435 (Tex.App.-San Antonio 1995, no pet.) and Gaines v. State, 888 S.W.2d 504 (Tex.App.-El Paso 1994, no pet.) and Rodriguez v. State, 975 S.W.2d 667 (Tex.App.-Texarkana 1998), Hime v. State, 998 S.W.2d 893 (Tex.App.-Houston [14th Dist.] 1999).

2. *Informants Availability For Identification Strengthens Reliability*

In Glover v. State, 870 S.W.2d 198 (Tex.App.-Fort Worth 1994), the broadcast stated it was based on an EMS ambulance unit report of "weaving all over the road," giving the time of the EMS report, and shortly thereafter the officer saw the vehicle of that description with that license number being followed by an ambulance. Also see State v. Stolte, 991 S.W.2d 336 (Tex.App.-Fort Worth 1999) where, on instruction from the dispatcher, the informant pulled in behind the patrol car to be available for identification. In State v. Fudge, ___SW3d___ 2001 WL 193835 (Tex.App.-Austin February 28, 2001) a cab driver approached an officer, reported a white pick-up driving all over the road – and said he believed the driver was "drunk." He then pointed out the truck. Though the officer saw no driving problems and no violation

of any laws, he stopped the vehicle. Following the 9th Circuit holding that “a person not connected with the police or not a paid informant, who gives a police officer unsolicited information in a face-to-face manner is inherently reliable,” United States v. Sierra v. Hernandez, 581 F2d 760 (9th Cir. 1978) the court observed “[T]here is nothing in the suppression record that should have caused [the] officer to doubt the cab driver’s inherent reliability or good faith.” The opinion also observed that “the cab driver put himself in a position where he would have been held accountable...” and “[t]he information given by the cab driver was neither imprecise about the time of the criminal activity nor vague about the kind of criminal activity.” Also see State v. Salio, 910 SW2d 184,186 (Tex.App.-Fort Worth 1995 pet. ref’d.) cited in Fudge.

NOTE: Statements reported to dispatcher cannot come in for the truth of the matter as a business records exception where no person engaged in police activity has personal knowledge of the information reported by the citizen. Stapleton v. State, 868 S.W.2d 781 (Tex.Cr.App. 1993).

K. STOP - COMMUNITY CARETAKING FUNCTION ADOPTED

"As part of his duty to serve and protect a police officer may stop and assist an individual whom a reasonable person --given the totality of the circumstances--would believe is in need of help."

....

"The following factors [FN5] are relevant to said determination [whether officer acted reasonably]:

- (1) The nature and level of the distress exhibited by the individual;*
- (2) the location of the individual;*
- (3) whether or not the individual was alone and/or had access to assistance independent of that offered by the officer;*
- (4) to what extent the individual--if not assisted--*

presented a danger to himself or others."

FN5. "In certain instances, other factors may also be relevant in the determining whether the officer acted reasonably."

Wright v. State, 7 S.W.3d 148 (Tex.Cr.App. 1999).

No distinction is drawn between the welfare of passengers as opposed to drivers. (Here the stop was made because the officer observed a passenger leaning out of an open rear window vomiting.)

See also Lebron v. State, 35 SW3d 774 (Tex.App.-Texarkana 2001) which applies the above criteria and finds justification for seizure.

L. STOP - CHECKPOINTS/ROADBLOCKS

1. DWI Check Points - The United States Supreme Court

In Holt v. State, 887 S.W.2d 16 (Tex.Cr.App. 1994) the Court of Criminal Appeals rejected an Arlington DWI roadblock set up pursuant to written guidelines established in 1988 by a Committee of Arlington Police Supervisors. They interpreted Michigan v. State, 496 U.S. 444 to hold that for any DWI Checkpoint program to be constitutional it must at a minimum be authorized by a statewide policy emanating from a politically accountable governing body.

No such statewide authorization has yet been authorized in Texas.

2. Non DWI Checkpoints - Drivers License checkpoint

a. Authorized by TEX. REV. CIV. STAT. ANN. art. 6687(b), § 13.

b. In State v. Sanchez, 856 S.W.2d 166 (Tex.Cr.App. 1993), the court observed that license roadblock searches fall into the "suspicionless search" category for which Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) requires balancing the magnitude of the problem sought to be prevented against the intrusion on the motorist. They held that:

In the absence of evidence of authoritatively standardized procedures followed in operating the subject roadblock in order to serve its stated purpose and minimize the officers' discretion, and in the absence of

testimony or empirical evidence demonstrating the effectiveness of the roadblock, we hold the court of appeals erred in concluding that the roadblock was reasonable under the Fourth amendment.

c. Dictum in Murphy v. State, 864 S.W.2d 70 (Tex.App.-Tyler 1992, pet. ref'd) states "although the Supreme Court of the United States has not yet upheld the constitutionality of roadblock stops for the purpose of checking licenses and registrations, the dictum in State of Delaware v. Prouse, 440 U.S. 648, 663 (1979) suggests that such stops could be constitutionally structured. However, Webb, supra, appears to have survived King, supra, to prevent use of a drivers license checkpoint as a subterfuge for DWI purposes. See State v. Hubacek, 840 S.W.2d 751, (Tex.App.-Fort Worth 1992, pet. ref'd).

3. Multi-purpose checkpoint

To the extent that Meeks v. State, 692 S.W.2d 504 (Tex.Cr.App. 1985), has survived, it prohibits arrest for additional purposes other than drivers license check, because unauthorized by statute. See analysis in dictum of Murphy v. State, 864 S.W.2d 70 (Tex.App.-Tyler 1992, pet. ref'd). However, State v. Hubacek, supra, concludes that the license check can include inquiry regarding proof of insurance.

M. DETENTION - LIMITS ON LENGTH AND PURPOSE APPLY TO FST'S

1. Generally

The United States Supreme Court warns:

This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (citations omitted).

This concept was applied by the Austin Court in the ALR case of Texas Department of Public Safety v. Rodriguez, 953 S.W.2d 362 (Tex.App.-Austin 1997). There the affidavit simply reflected that Rodriguez was stopped for sixty-four m.p.h. in a fifty-five m.p.h. zone and that the officer subsequently had him perform the three standardized field sobriety tests. In addition to referencing Florida v. Royer, above, the opinion also quoted Texas law as follows:

To determine whether an officer was justified in making such an intrusion upon the freedom of the person detained, the court must find that the officer, in light of his experience and general knowledge, "had specific and articulable facts which taken together with rational inferences from those facts would reasonably warrant the intrusion on the freedom of the person stopped for further investigation."

Townsend v. State, 813 S.W.2d 181, 185 (Tex.App.-Houston [14th Dist.] 1991, pet. ref'd) (quoting Hernandez v. State, 523 S.W.2d 410, 411 (Tex.Cr.App. 1975)).

Applying the law, the court declared:

The evidence in the record is completely silent on any causal connection between the initial stop and the subsequent field sobriety tests. Thus, while the first stop was justified because Rodriguez was speeding, the second "stop" (detaining Rodriguez to perform the field sobriety tests) was not.

Once the officer's initial reason for the stop is accomplished, further detention can be justified only by additional reasonable suspicion. See, e.g., Commonwealth v. Parker, 619 A.2d 735 (Pa.Sup.Ct. 1993) (after ticket was written, extended detention to request permission to search exceeded the purpose of the traffic stop); Collier v. State, 843 S.W.2d 176 (Tex.App.-Houston [14th Dist.] 1992) (20-minute wait for female search officer made detention illegal);

Autry v. State, 2000 WL 675661 (Tex. App. - Houston [1st Dist] May 25, 2000) where continued detention for ten minutes to assist drug detection dog was unjustified. Johnson v. State, 658 S.W.2d 623 (Tex.Cr.App. 1983) (once initial suspicion of having stolen furniture in the pick-up bed was dispelled, continued detention for questioning was illegal).

2. Traffic Violation Plus Alcohol Odor.

In Shakespeare v. State, 2001 WL 421003 (Tex.App.-Austin April 26, 2001) the defendant, stopped at 2:30 a.m. for running a stop sign, exhibited a moderate smell of alcohol. No other driving improprieties were observed. Once stopped the defendant produced his drivers license and insurance "without incident." His speech was normal and while walking to the sidewalk his gait was normal. The defense urged that extension of the stop for investigation of DWI lacked requisite reasonable suspicion. The Court of Appeals cited two cases – Sanchez v. State, 582 SW2d 813,814-815 (Tex.Cr.App. 1979) and State v. Brabson, 899 SW2d 741,747 (Tex.App.—Dallas 1995) in support of the observation that "[i]n similar cases Texas courts have held that an odor of alcohol on motorists breath in conjunction with another violation constitutes reasonable suspicion for an investigation."

In Sanchez, they summarized, justification existed where defendant who had fled from police who were attempting a stop, smelled of alcohol. Brabson, they stated, honked his horn excessively and smelled of alcohol. Foregoing declaration of a general rule that a traffic violation plus odor of alcohol is sufficient, the court instead held that "the traffic violation, the time of night and the odor of alcohol" combined, created reasonable suspicion. In doing so they did recognize evidence of the absence of factors urged by the defense did constitute a part of the totality of the circumstances, though "only a part."

NOTE: The Sanchez opinion simply concluded, without analysis, that an arrest could be made for "public drunkenness." In Brabson the defendant had honked ten to fifteen times at a drive-in window at 2:50 a.m. and had a strong odor of alcohol on his breath.

PRACTICE COMMENT: Passage of time awaiting arrival of another officer (for example, a

S.T.E.P. officer) to conduct tests could become so long that the Collier holding would apply.

During a traffic stop, the officer is authorized to check for a driver's license and evidence of financial responsibility. Article 6687b-13 (driver's license) and Article 6701h (financial responsibility). Further, ordering the traffic-stop driver to get out of the car is permissible. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). Donald Lee McCalin v. State, 984 S.W.2d 700 (Tex.App.-Texarkana 1999). A period of three to five minutes of additional detention while checking for any arrest warrants has been held not to be unreasonable. Petty v. State, 696 S.W.2d 635 (Tex.App.-Fort Worth 1985).

NOTE: The Petty court, in declaring that an investigatory stop could last so long as to become unreasonable, cited People v. McGaughran, 25 Cal.3rd 577, 601 P.2d 207, 159 Cal.Rptr. 191 (1979), where extending a traffic stop ten minutes after issuing a citation, solely to allow a warrant check, constituted unreasonable detention.

N. DETENTION - NON-MOVING VIOLATION & ALCOHOL ODOR

Since it is not illegal to drive after drinking, that fact, coupled with a non-moving traffic violation that is not reflective of impairment, gives no indication of the third prong of the Stone test above--"some indication that the activity is related to crime."

Therefore, without additional facts, detention for field sobriety tests is likely illegal. See: Jackson v. State, 681 S.W.2d 910 (Tex.App.-Fort Worth 1984). There the officer's basis was that the driver was holding a beer bottle. Invoking the "as consistent with innocent behavior" test, the court held that "since Texas does not have an 'Open Container Law' [since changed by legislation], the act of drinking while driving is not an offense so long as the driver is not intoxicated. By presuming that appellant was intoxicated, the officer was acting on a hunch. The beer which appellant was drinking could have been his first beer or his sixth. The sole fact of holding a beer bottle was no less consistent with the former than with the latter." (bracketed comment added).

O. DETENTION - DRINKING WHILE DRIVING AS SOLE BASIS

See P. above.

P. DETENTION - SPEEDING AND ODOR OF ALCOHOL

TEX. REV. CIV. STAT. ANN. art. 6701d, § 148 states, in pertinent part that the offense of speeding and the offense defined in § 107E (consumption of alcoholic beverages while driving, a Class "C" offense) shall be the only offenses making mandatory the issuance of a written notice to appear in court, and only then if the arrested person gives his written promise to appear in court, by signing in duplicate the written notice prepared by the arresting officer; and provided further, that it shall not be mandatory for an officer to give a written notice to appear in court to any person arrested for the offense of speeding or the offense defined in § 107E when such person is operating a vehicle licensed in a state or country other than the State of Texas or who is a resident of a state or country other than the State of Texas, except as provided by the Nonresident Violator Compact of 1977.

Q. ARREST - WHAT CONSTITUTES UNDER TEXAS LAW

Current opinions distinguishing arrest from investigative detention lack consistency. This is partly because of a change in federal standards and in large part because our statute defining arrest speaks in terms of restraint - a status common to both arrest and detention.

1. Arrest Statute

Article 15.22 C.C.P., entitled "When a Person is Arrested" states: "A person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing an arrest or by an officer or person arresting without a warrant.

No clarification is in the immediate offing. Having granted petition for review from Nargi v. State, 895 S.W.2d 820 (Tex.App.-Houston [14th Dist.] 1995), the Court of Criminal Appeals, on May 15, 1996, dismissed as improvidently granted. In Nargi it was held that handcuffing defendant "to gain control" while investigating did not accelerate the detention to an arrest. Francis held that placing defendant in the patrol car and returning

him to the scene of a burglary fell short of an arrest.

A like case, Rhodes v. State, 913 S.W.2d 242 (Tex.App.-Fort Worth 1995) has petition pending. Similar to Nargi, it held that handcuffing a suspect and leading him to the patrol car did not constitute an arrest. The officer had explained "I was obtaining [sic] him to investigate what was going on."

See also Garcia v. State, 967 S.W.2d 902 (Tex.App.-Austin 1998) also holding, under its facts, that handcuffing did not constitute arrest.

But, see the Court of Criminal Appeals cases of Amores v. State, 816 S.W.2d 407 (Tex.Cr.App. 1991) and Burkes v. State, *830 S.W.2d 922 (Tex.Cr.App. 1991), both reversing lower court decisions and holding that handcuffing a defendant after he'd been placed face-down on the ground, constituted an arrest.

For now the only proposed standard from the Court of Criminal Appeals is Judge Baird's in his dissent to dismissal of PDR in Francis:

[To] distinguish between an investigative detention an arrest, the standard should be whether, given the totality of the circumstances, a reasonable person would believe the seizure was to be brief.

On page 6 of the Opinion Service report of Baird's dissent is his list of significant indicators which serves as a good compilation and review of recent decisions.

Burkes began with an anonymous report of the sighting, in an area of Longview known as "The Front," of a pit-bulldog with drugs taped to its belly. The opinion gives no indication that the pit-bull was ever subjected to pat down or that the contraband was ever seized.

R. ARREST - MISDEMEANOR LIMITATIONS

Where there is no warrant, C.C.P. Chapter 14 permits a peace officer within his jurisdiction to arrest only under the following circumstances:

1. When any offense is committed in his presence, or within his view, C.C.P. art. 14.01(b); or, if not
2. "persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten or are about to commit offenses against the laws; C.C.P. art. 14.03(a)(1); amended by Senate Bill 1067, effective September 1, 1994, to read "persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code [or] breach of the peace, or offense under Section 49.02, Penal Code, or threaten or are about to commit some offense against the laws; (49.02 covers public intoxication only, no longer a part of Title 9 as of September 1, 1994).

PRACTICE COMMENT: The fact that the DWI offenses [49.04-49.08] are not listed gives strength to the proposition that DWI is, by specific omission, excluded from by 14.03.

3. "Where it is shown by satisfactory proof to a peace officer upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant..." C.C.P. art. 14.04, or
4. When a felony or breach of the peace has been committed in the presence or within the view of a magistrate. NOTE: Additional arrest authorization exists under C.C.P. Chapter 14, but for specific non-DWI offenses.

S. DWI IMPLICATIONS OF ABOVE - DRIVING NOT OBSERVED BY OFFICER

Where the officer or a magistrate does not observe the defendant operating the vehicle, the offense is not committed in his presence or within his view. Barring its occurrence under circumstances that meet both the "suspicious places" and "circumstances" requirements of C.C.P. art. 14.03(a)(1) above, under Chapter 14, arrest for misdemeanor DWI is illegal. Collins v. State, 795 S.W.2d 777 (Tex.App.-Austin 1990), Warrick v. State, 634 S.W.2d 707 (Tex.Cr.App.-1982); Segura v. State, 826 S.W.2d 178 (Tex.App.-Dallas 1992), holding that an accident scene is not per se a "suspicious place." Lowery

v. State, 499 S.W.2d 160 (Tex.Cr.App. 1973) which under C.C.P. art. 14.03(a)(1) rejects an apartment building as a "suspicious place." See Cooper v. State, 961 S.W.2d 229 (Tex.App.-Houston [1st Dist.] 1997) where, in a "highly fact-specific" decision, the court ruled the trial court's finding that "a parking lot in front of a bar in the wee hours of the morning with intoxicated, bleeding people walking around wrecked cars constituted 'suspicious place,' could have been a reasonable deduction." (This assumes DWI is encompassed by 14.03 without discussion of the September 1, 1994 amendment.) Also see State v. Parson, 988 S.W.2d 264 (Tex.App.-San Antonio 1998). In Lopez v. State, 936 S.W.2d 332 (Tex.App.-San Antonio 1996) the court simply ignores the "suspicious places" requirement in order to affirm.

The arrest could yet be upheld if sufficient probable cause for a public intoxication charge exists, as was the case in Segura. Also see Reynolds v. State, 902 S.W.2d 558 (Tex.App.-Houston [1st Dist.] 1995), Peddicord v. State, 942 S.W.2d 100 (Tex.App.-Amarillo 1997) ("appellant, having already endangered both himself and others (a rear-end collision) could have, absent proof otherwise, attempted to drive the Honda from the scene in an intoxicated condition..."), Carrasco v. State, 712 S.W.2d 120 (Tex.Cr.App. 1986) (officers observed symptoms of intoxication in driver in one-car accident.)

NOTE: The officer in whose presence the offense occurred need not be the officer who arrests where the observing officer(s) who observed were an integral part of the arrest team. Henderson v. State, 864 S.W.2d 227 (Tex.App.-Waco 1993).

T. CONCLUSORY = INSUFFICIENT

1. Insufficient Underlying Data:

In State v. Hopper, 842 S.W.2d 817 (Tex.App.-El Paso 1992), at pre-trial the first officer testified to stopping defendant after observing a hazardous turn at a high rate of speed, speeding, and an illegal U-turn. The record showed only that this officer administered some unspecified sobriety tests and believed defendant was intoxicated, and that the back-up officer administered additional unspecified sobriety tests and arrested defendant for DWI.

The court of appeals affirmed the trial court's grant of motion to suppress, observing that "[o]ther than the implied conclusion that Appellee failed the tests, there is nothing specific in the record which provides any basis upon which the trial court could reasonably determine that the officers had probable cause to effect the arrest."

However where the conclusory statements are contained in a pre-trial stipulation of evidence authored by the defense, complaining on appeal that those statements are flawed because conclusory, an appellate court may labor to let the prosecution out of the trap which was stepped open-eyed into.

See for example the 1st Courts decisions in Mathieu v. State, 992 S.W.2d 725 (Tex.App.-Houston [1st Dist.] 1999), O'Keefe v. State, 981 S.W.2d 872 (Tex.App.-Houston [1st Dist.] 1998) and Rowland v. State, 983 S.W.2d 58 (Tex.App.-Houston [1st Dist.] 1998).

U. ARREST - OFFICER'S JURISDICTION EXCEEDED

1. Former Law

Peace Officer's authority to arrest used to be statewide. Hurley v. State, 243 S.W.2d 1006, (Tex.Cr.App. 1950). Specially commissioned police officers (example - campus police, airport police) also had statewide authority. Christopher v. State, 639 S.W.2d 932 (Tex.Cr.App. 1982).

2. Current Law

General statewide arrest jurisdiction for police as well as specially commissioned police has now been limited in Angel v. State, 740 S.W.2d 727 (Tex.Cr.App. 1987), and Preston v. State, 700 S.W.2d 227 (Tex.Cr.App. 1985), respectively. By Articles 998 and 999, cities, towns and villages (now repealed as of 1987 and appearing revised in the TEX. LOC. GOV'T CODE ANN. §§ 341.001 - 341.022), city police, city marshals, and sheriff's officers have arrest jurisdiction coextensive to sheriff's officers, to wit: the county in which they are employed, Angel v. State, supra. (NOTE: Judge Clinton recently dissented from a refusal of petition for discretionary review on a Dallas Criminal Appeals decision, Landrum v. State, 751 S.W.2d 530 (Tex.App.-Dallas 1988, pet. ref'd), that followed Angel. He based his dissent on the fact that the Angel decision was only a plurality

opinion. Landrum v. State, 795 S.W.2d 205 (Tex.Cr.App. 1990).

NOTE: An investigator for a district attorney - classified as a peace officer - has no jurisdiction beyond the district served by the District Attorney. Dominguez v. State, 924 S.W.2d 950 (Tex.App.-El Paso 1996).

3. Authority Extended by Art. 14.03(d) and new (g) C.C.P.

a. C.C.P. art. 14.03(d) specifically extends the authority of a peace officer who is outside his jurisdiction to make a warrantless arrest when...

1. the offense is committed within the officer's presence or view, and

2. the offense is a felony or a violation of Title 9, Chapter 42 Penal Code. ("Disorderly Conduct and Related Offenses," which includes obstructing a highway or other passageway) a breach of the peace, or an offense under Section 49.02 Penal Code (public intoxication).

b. Newly Expanded Authority - 14.03(g) C.C.P.

The newly added § (g) of Article 14.03 [effective May 28, 1995 - H.B. 2614 § 1] gives certain designated police: (1) sheriffs and their deputies, (2) constables and deputy constables, (3) marshals or police officers of an incorporated city, town or village, and (4) rangers and officers commissioned by the Public Safety Commission and by the Director of the Department of Public Safety, the right when outside their jurisdiction to arrest for any offense within their presence or view other than an "Article 6701d" traffic offense. However, those in category (4) above can, when outside their jurisdiction also arrest for "Article 6701d" traffic offenses. Both Article 14.03(d) and (g) contain the additional requirement that the arrestee be promptly transferred to an officer having jurisdiction.

PRACTICE COMMENT: When applicable on its face, Article 14.03(g) will require re-evaluation of situations which previously limited arrest jurisdiction. The text of the specific statutory creation and authorization of the particular peace officer entity should be examined to determine if it could make 14.03(g) inapplicable. Illegality may survive, for example, where the jurisdictional arrest limit is

imposed by the statute that grants jurisdictional authority.

NOTE: If another officer is present who does have territorial jurisdiction, the arrest is valid.

Lewis v. State, 2000 WL 263208 (Tex.App.-Texarkana, March 10, 2000).

V. ARREST - LIMITS BY CLASSIFICATION OF MUNICIPAL CHARTER

1. Class B

See Yeager v. State, 23 SW3d 566 (Tex.App.-Waco 2000) holding that an officer of a Class "B" municipality has no investigative – detention authority outside the limits of his/her municipality.

2. Class C

In Reichaert v. State, 830 S.W.2d 348 (Tex.App.-San Antonio 1992, pet. ref'd), it was held that the Texas Local Government Code "clearly distinguishes between the powers, rights and jurisdiction of a type "A" municipality officer and those of a type "C" municipality officer and under § 341.001, only the type "A" officer has the same power and jurisdiction as the county sheriff. And since "the governing body of a type "C" municipality has no authority to grant jurisdiction to its officers beyond their own jurisdictional boundaries (here Hill Country Village, Bexar County, Texas)" they could not make a warrantless arrest for a DWI that originated and ended outside the corporate limits of the city of their employ.

NOTE: The requisites of a type A municipality are found in TEX. LOC. GOV'T CODE ANN. § 6.001 and type B in § 7.001, a type C in § 8.001 and Home Rule, § 9.001. The regulations regarding their police officers are § 341.001, type A; TEX. LOC. GOV'T CODE ANN. § 341.002, type C and § 341.003 Home Rule.

W. ARREST - SPECIALLY COMMISSIONED POLICE AUTHORITY EXCEEDED

[Pre-14.03(g) C.C.P.]

The jurisdiction of specially commissioned police, is likewise limited by the scope granted in their respective vesting statutes.

1. Campus Police are authorized by TEX. EDUC. CODE ANN. § 51.203 which formerly limited their general jurisdiction to those times

while "on the property under the control and jurisdiction of the institution of higher education or otherwise in the performance of his duties." Thus under the former limit, the making of a traffic arrest off campus exceeded that jurisdiction. Preston v. State, supra. See State v. Carroll, 855 S.W.2d 128 (Tex.App.-Austin 1993) for recognition of amendment to 51.203 broadening campus police arrest authority. Likewise, by city ordinance, Houston Airport Police formerly were not authorized to make traffic arrest off the property controlled by the airport (Perkins v. State, 812 S.W.2d 326 (Tex.Cr.App. 1991) and are not now able to do so outside the city limits. Robinson v. State, 866 S.W.2d 649 (Tex.App.-Houston [14th Dist] 1993).

2. Metropolitan Transit Officers. In cases interpreting the Metropolitan Transit Authorities Act Tex.Rev.Civ.Stat. Art. 1118x. As amended as it applied to cities with a population of over 1.5 million (Houston) the officers had authority to enforce state laws throughout all areas where Metro provides services or collects taxes, not just on properly owned or controlled by Metro. State v. Elliot, 879 S.W.2d 381 (Tex.App.-Waco 1994, pet ref'd), State v. Norton, 899 S.W.2d 303 (Tex.App.-Houston [14th Dist.] 1995), Vickio v. State, 902 S.W.2d 523 (Tex.App.-Houston [1st Dist.] 1994, no pet.) Lundy v. State, 891 S.W.2d 727 (Tex.App.-Houston [1st Dist.] 1994, no pet.), holds that metropolitan authority not restricted to time when metro service runs. Note however that for cities populated with less than 1.5 million, jurisdiction is limited to "All real and personal property of every kind and nature whatsoever, owned, rented, leased under the control of or operated or situated on property of, or held at anytime by an authority for mass transit purposes. Tex.Rev.Stat. Art. 1118t§2(f).

Accord Kaufman v. State, No. 08-00391-(CR 1995) (Tex.App.-El Paso, April 27, 1995 [Opinion Service 5-10-95]).

3. DA's Investigator

An investigator appointed by a district attorney has geographical jurisdiction co-extensive with that of the district attorney unless provided otherwise by law. Dominguez v. State of Texas, 924 S.W.2d 950 (Tex.App.-El Paso 1996).

X. ARREST - OFFICERS FUNCTIONAL AUTHORITY EXCEEDED

[Pre-14.036 C.C.P.]

Where the statutory provisions creating peace officers limit their jurisdiction functionally, they have Chapter 14 "peace officer" arrest powers only when acting within those functional limits. United States v. Garcia, 676 F.2d 1086 (1982), vacated on other grounds and remanded, 462 U.S. 1127, 103 S.Ct. 3105, 77 L.Ed.2d 1360 (1983), interprets Texas Law to the effect that outside the territorial limits of state parks the Texas Parks and Wildlife Code limits game wardens arrest powers as peace officers under Article 14 of the Texas Code of Criminal Procedure to violations of the gaming laws only.

Thus a stop of a truck driving on a private road through a pasture with its lights off in an area where drug smuggling and vehicle theft had been reported was held to be illegal since it was in no way connected with actual or suspected gaming law violations.

Y. ARREST - IMPAIRMENT ARGUABLY DUE TO COLLISION INJURIES

In State v. Williams, 814 S.W.2d 256 (Tex.App.-Austin 1991), the only witness at the pretrial hearing was a trooper who testified that while investigating a one-car accident, he was told by a deputy that the driver of another car had stated that defendant had "passed him on a no-passing zone, lost control of his vehicle and hit a culvert." The trooper was also informed that defendant had been ambulated to a hospital. After more than an hour of on-scene investigation, the trooper went to the hospital emergency room where he encountered defendant "had on a hospital gown, covered by a sheet and lying on a hospital bed." He inquired whether Defendant had life-threatening injuries and recalled that they were not. The Trooper related that defendant had alcohol on his breath, red and bloodshot eyes, and slurred speech. He then administered a horizontal gaze nystagmus test which he said defendant failed. The trooper then read him the warning required for taking a specimen and the defendant then agreed to and gave a blood specimen. He testified that defendant was suspected of intoxication and that he would have arrested him if he had refused to take the blood test.

Under the circumstances, the trial court granted the Motion to Suppress, observing that "the record is devoid of any evidence relating to what influence, if any, injury or medication might have had on the results of the test." The appellate court upheld the decision; State v. Williams, 814 S.W.2d 256 (Tex.App.-Austin 1991) on PDR the Court of Criminal Appeals affirmed. 832 S.W.2d 52 (Tex.Cr.App. 1992).

See also Vasquez v. State, 311 S.W.2d 828 (Tex.Cr.App. 1958) (facts as consistent with injury as with intoxication constitute insufficient evidence.)

NOTE: In Nottingham v. State, 908 S.W.2d 585 (Tex.App.-Austin 1995) the same court held that the opposite decision in a fact situation similar to Williams was not outside the "zone of reasonable disagreement", noting that unlike the Williams case, the officer was shown to be trained and experienced in administering the HGN test.

Z. ARREST - RESIDENCE ENTRY LIMITATIONS

C.C.P. art. 14.05 forbids entering a residence to make a warrantless arrest absent consent or exigent circumstances regardless of territorial jurisdiction. Further in Welsh v. Wisconsin, 466 U.S. 740 (1984), the court held that neither preservation of evidence of alcohol concentration nor public safety (defendant had abandoned automobile) could justify the intrusion for a "minor offense" (here a DWI which, under Wisconsin law, was a nonjailable traffic offense). See also Honeycutt v. State, 499 S.W.2d 662 (Tex.Cr.App. 1973) indicating that proof that the person is about to escape is required for a warrantless residence arrest under C.C.P. art. 14.04. (In Honeycutt a citizen who had observed erratic driving and observed speech and appearance indicating intoxication led officers to the residence). But see Carter v. State, 824 S.W.2d 767 (Tex.App.-Waco, no. pet.) where arrest was upheld when DWI defendant left area of the temporary detention and was pursued into his garage and arrested while attempting to enter house. "By retreating to his garage, [a]ppellant never reached an area protected by the Fourth Amendment, since he apparently was still exposed to public view." See Winter v. State, 902 S.W.2d 571 (Tex.App.-Houston [1st Dist.] 1995) which distinguished itself from Welsh because (1) there was hot

pursuit (2) a jailable offense (evading) was not minor and, it too involved only the garage. They also found exigent circumstances because of (1) concern that if police left to obtain a warrant, driving might be resumed and (b) defendant's blood alcohol level would have dissipated. *Also see LaHoye v. State, 1 S.W.3d 149 (Tex.App.-Texarkana 1999) allowing residence entry due to the exigent circumstance of hot pursuit for the offense of evading arrest, held to be a serious enough crime to justify hot-pursuit entry.*

NOTE: Houston's 14th Court has held that an officer's uninvited entry onto defendant's property could constitute a 38.23 trespass for which, an officer unlike a firefighter or emergency medical personnel, has no immunity under Section 30.05(c) of the Texas Penal Code. Rue v. State, 958 S.W.2d 915 (Tex.App.-Houston [14th Dist.] 1997).

AA. "CUSTODIAL" ORAL STATEMENTS AT TIME OF INVESTIGATION

1. When is setting Custodial?

Clearly if formally arrested, questioning is custodial. Scott v. State, 571 S.W.2d 893 (Tex.Cr.App. 1978).

2. Texas Adopts New Federal Standard

In Dowthitt v. State, 931 S.W.2d 244 (Tex.Cr.App. 1996) the Court of Criminal Appeals applies the U.S. Supreme Court standard of Stansbury v. California, 511 U.S. ___, 114 S.Ct. 1526, 128 L.Ed. 293 (1994). Because Dowthitt makes detailed effort to clarify "custody" at a time when it has become badly muddled, an extensive quote is helpful.

A person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. Stansbury v. California, 511 U.S. ___, 128 L.Ed.2d 293, 298-299 (1994). The "reasonable person" standard presupposes an innocent person. Florida v. Bostick, 501 U.S. 429, 438 (1991) (emphasis in original). Moreover, the subjective intent of law enforcement officials to arrest is irrelevant unless that intent is somehow communicated or otherwise manifested to the suspect. Stansbury v. California, 128 L.Ed.2d at 300, U.S. v. Mendenhall, 446 U.S. 544, 554 n. 6 (1980) (opinion of Stewart, J.). See also Dancy v. State,

728 S.W.2d 722, 778 (Tex.Cr.App.), cert. denied, 484 U.S. 975 (1987).

.....

We have outlined at least four general situations which may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave. Shiflet, 732 S.W.2d at 629. Concerning the first through third situations, Stansbury indicates that the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. Concerning the fourth situation, Stansbury dictates that the officers' knowledge of probable cause be manifested to the suspect. Such manifestation could occur if information substantiating probable cause is related by the officers to the suspect or by the suspect to the officers. Moreover, given our emphasis on probable cause as a "factor" in other cases, situation four does not automatically establish custody; rather, custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest.

3. Application of New Standard to DWI Interrogation

The Fort Worth Court applied Dowthitt to a DWI setting in Jordy v. State, 969 S.W.2d 528 (Tex.App.-Fort Worth 1998). There an Officer Lynn saw defendant who matched a dispatched description of a suspect, walking near the scene of the accident.

...Lynn immediately saw that Appellant was unsteady on his feet, swaying from side to side when he walked. Upon approaching Appellant, Lynn noticed that he had a strong odor of alcohol on his breath and his eyes were red and glassy.

Appellant did not have a driver's license with him, but

verbally provided Lynn his name and date of birth. Lynn asked Appellant how much he had been drinking. Instead of answering the question, Appellant lay down on the ground and said he needed medical attention...Lynn again asked how much Appellant had been drinking, and Appellant answered, "A lot."...

Dowthitt analysis was conducted in the following manner:

As it applied to the facts of this case, the Dowthitt decisions provides that the new test will be satisfied, and custody established, when: (1) an officer has probable cause to arrest a suspect and does not tell him that he is free to leave; (2) the officer manifests this knowledge to the suspect; and (3) a reasonable person in the suspect's position would believe he is under restraint to the degree associated with an arrest. A police officer witnessing someone committing a criminal offense has probable cause to arrest. Having personally observed Appellant commit the offense of public intoxication, Lynn had probable cause to arrest him. Specifically, Lynn observed that Appellant was unsteady on his feet, had a strong odor of alcohol on his breath, and his eyes were red and glassy.

Moreover, Lynn believed that Appellant's intoxication made him a danger to himself or others. Lynn did not tell Appellant he was free to leave. Lynn manifested to Appellant knowledge of probable cause to arrest him by asking how much he had drunk and attempting to administer field sobriety tests.

A reasonable person in this position would most certainly believe he is under restraint to the degree associated with an arrest.

Consequently, we find that appellant was in custody at the time he responded to Lynn's question. It was, therefore, error for the trial court to have admitted Appellant's statement, "A lot."

Also see Alford v. State, 22 SW3d 669 (Tex. App. - Fort Worth April 20, 2000) holding that getting driver (stopped for multi-problematic erratic driving) out of vehicle and immediately putting him on ground and handcuffing him constituted custody. But see State v. Stevenson, 958 S.W.2d 824 (Tex.Cr.App. 1997), Hutto v. State, 977 S.W.2d 855 (Tex.App.-Houston [14th Dist.] 1998), Abernathy v. State, 963 S.W.2d 822 (Tex.App.-San Antonio 1998) and State v. Waldrop, 7 S.W.3d 836 (Tex.App.-Austin 1999) and State v. Waldrop, 7 S.W.3d 836 (Tex.App.-Austin 1998) where the conclusion that defendant was not yet in custody allowed the statement to come in.

BB. ARTICLE 38.23's - EXCLUSIONARY RULE INAPPLICABLE TO TREATIES

Positing that "Article 38.23 is not a suitable enforcement mechanism for international treaties," a majority of the Court of Criminal Appeals concludes that "treaties do not constitute 'laws' for Article 38.23 purposes." Thus, they hold, that the violation of the Vienna Convention Treaty right of an arrested foreign national to be informed that he has a right to contact his consulate without delay is unenforceable, thus has not effect on an otherwise admissible confession. Rocha v. State, 2000 WL 368923 (Tex.Cr.App. - April 12, 2000).

II. IMPLIED CONSENT RE SPECIMENS OF BREATH AND BLOOD

A. IMPLIED CONSENT LAW

As revised by the Transportation Code, at Sec. 724.011(a), the implied consent statute now reads as follows:

If a person is arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle in a public place, or a watercraft, while intoxicated, the person is deemed to have

consented, subject to this chapter, to submit to the taking of one or more specimens of the person's breath or blood for analysis to determine the alcohol concentration or the presence in the person's body of a controlled substance, drug, dangerous drug, or other substance.

B. PUBLIC INTOXICATION ARREST - DOES IMPLIED CONSENT APPLY?

Does the implied consent statute apply, where legal arrest could only be made for Public Intoxication, and not DWI? To apply, the arrest must be for an offense "arising out of acts alleged to have been committed while a person was operating a motor vehicle in a public place or a watercraft while intoxicated..." §724.011(a) Transportation Code (emphasis added). If the implied consent statute is not applicable the reasoning of Howard v. State, 744 S.W.2d 640 (Tex.App.-Houston [14th Dist.] 1987) dictates that the intoxilyzer or blood test is involuntary and thus the result inadmissible where defendant is erroneously told that the implied consent law consequences apply. The Austin Court has considered this issue in Elliott v. State, 908 S.W.2d 590 (Tex.App.-Austin 1995). There the court summarily declared "it is obvious that the implied consent law applies to a person arrested for any offense, not just driving while intoxicated, arising out of the operation of a motor vehicle while intoxicated." (at 593). See also the Austin Court's Porter v. State, 969 S.W.2d 60 (Tex.App.-Austin 1998). *Accord: Beard v. State*, 5 S.W.2d 883 (Tex.App.-Eastland 1999) and Arnold v. State, 971 S.W.2d 588, 590 (Tex.App.-Dallas 1998).

COMMENT: It appears more likely that the phase describing offenses arising out of acts alleged to have been committed while...driving...while intoxicated was meant to reference offenses that statutorily include DWI such as the former Involuntary Manslaughter and the present Intoxication Manslaughter and Intoxication Assault.

C. CONSENT REQUIREMENTS GENERALLY

1. Consent must be "voluntary" and voluntariness is a question of fact. Turpin v. State, 606 S.W.2d 907 (Tex.Cr.App. 1980).

2. Article 67011-5(2) [now §724.013, Transportation Code] "requires that a suspect's refusal to provide a breath sample be strictly honored." McCambridge v. State, 712 S.W.2d 499, 504 fn.16 (Tex.Cr.App. 1986).

3. The consent issue may be raised at a motion to suppress hearing, Luckett v. State, 586 S.W.2d 524 (Tex.Cr.App. 1979), and to a jury, see Turpin v. State, supra. There the trial court "instructed the jury that they were not to consider the results of the test unless they found appellant freely and voluntarily consented to participating in the test." Turpin at 913.

4. Defendant can take the stand at the motion to suppress hearing for the limited purpose of the voluntariness issue. Yeary v. State, 734 S.W.2d 766 (Tex.App.-Fort Worth 1987).

D. CIRCUMSTANCES PERMITTING TAKING WITHOUT ACTUAL CONSENT

In two circumstances the requirement of actual consent is waived. They are (1) incapability of refusal (§724.014(c) Transportation Code) and (2) the officer's belief that an accident has or will result in death. §724.012(a)(3) Transportation Code.

E. ERDMAN ERROR. ADDING CONSEQUENCES = INVOLUNTARY

1. Key Case

Warning should be limited to "the actual direct statutory consequences of refusal." Further, "a suspects decision to submit to a breath test must truly be her own, made freely and with a correct understanding of the actual statutory consequences of refusal." Erdman v. State, 861 S.W.2d 890 (Tex.Cr.App. 1993).

In Erdman, it was observed that only two specific consequences "will definitely and directly result from a refusal to submit to a breath test: the person's drivers license will be suspended for 90 days and evidence of her refusal will be admissible against her in court." The Court, reversing Houston's 14th, went on to hold that the trooper's inclusion in his warning of the additional consequences that DWI charges would be filed against him and he would be placed in jail that night defeated the State's

burden to show that defendant's consent was voluntary. (The Officer had also stated that "if he took the test and passed it, he would not be charged with DWI that night." The court did not discuss this part in arriving at its decision, however.)

2. Effect of Subsequent Correct Warning

In State v. Serrano, 894 S.W.2d 85 (Tex.App.- Houston [1st Dist.] 1995) just after arresting the defendant following the field sobriety tests, the officer asked if he would agree to take an intoxilyzer test. The officer then told him "if he `passed' the test he would be free to go but if he failed the test he'd be put in jail for DWI". Before the test another officer gave defendant the required statutorily based written and oral warnings. The court held as follows:

The nonstatutory information conveyed to appellant under the circumstances was of the type that would normally result in considerable psychological pressure upon a DWI suspect to consent to the taking of an intoxilyzer test. The passage of two hours between the coercive statement made by the officer at the scene and the administration of the proper statutory warnings by a different officer at the county jail did not remove the taint. The officers at the county jail did not stray from the statutory warnings, however, neither did they negate the prior nonstatutory information. The coercive statement led to appellee's subsequent consent, arrest, and trip to the county jail for the breath test. This initial taint was the inertia which started this chain of events. (emphasis added).

The record is absent any evidence showing that the nonstatutory information given to appellee had no bearing on his decision to consent.

3. Client Need Not Take Stand

If the warning adds to the statutory information consequences "of the type that normally result in considerable psychological pressure upon a DWI suspect to consent to the

taking of a breath sample" defendant need not take the stand and testify as to non voluntariness provided there is "an absence of any record evidence showing that the non-statutory information given to appellant had no bearing on his decision to consent." Erdman v. State, supra.

F. WARNING GIVEN THOUGH INAPPLICABLE: CONFLICTING VOLUNTARINESS DECISIONS

The Austin Court considered in a case where the implied consent warning was given to defendant though the officer had not yet formulated probable cause nor had he actually put defendant under arrest, though the warning informed defendant to the contrary.

Citing the Court of Criminal Appeals language that "it is not the presence of a coercive factor which makes conduct involuntary but rather that the consent was given as a result of the coercion." The court found that while "[t]he wording of the forms that Trooper White used was not appropriate for one not under arrest:

[a]ppellant's claim that psychological coercion resulting from the wording of the forms caused him to consent to give his blood for analysis is not supported by any of his conduct at the scene or at the medical center, and nothing in the record suggests hesitation, question, or protest on his part to do what the trooper asked him to do. His belated claim is overcome by the circumstances.

Combest v. State, 981 S.W.2d 958 (Tex.App.- Austin 1998).

Compare the following:

When the DWI jurisdiction was broadened to include any "public place", the implied consent statute (then Article 67011-5 § 1 V.T.C.S.) remained applicable only to the original confines of "upon the public highways or upon a public beach" and was therefore inapplicable to a parking lot. Thus, consent to taking the intoxilyzer results was involuntary where defendant, who was only seen on parking lot, was incorrectly told the penalty of the implied consent law applied. Howard v. State,

744 S.W.2d 640 (Tex.App.-Houston [14th Dist] 1987).

Howard appears consistent with Erdman [see E. above] while Combest does not.

In Bell v. State, 881 S.W.2d 794 (1994) Houston's 14th Court addresses this issue in the context of the denial of a "voluntariness" jury charge. There a trooper arrived to see defendant sitting behind the wheel of a car in a ditch, his face cut and bleeding. A witness had seen the car leave the road. Emergency medical personnel arrived and administered first aid and took him to the hospital. No police interview was done at the scene. In the emergency room in the course of asking preliminary questions, the trooper detected the odor of alcohol coming from defendant as he lay on the gurney. Foregoing any field sobriety tests he read the DWI statutory warnings, asked for a blood sample and read defendant the text of a consent form. He testified that defendant orally consented to the taking of the sample but could not sign because of injuries. The trooper wrote "could not sign" where the signature was to go. A nurse Crotchett testified that the defendant orally consented.

The trooper testified that even though the statutory warnings and consent form that he read to defendant said he was under arrest, he in fact wasn't, though he did not explain that to defendant.

Defendant testified that he had no memory of the accident itself but did recall refusing to sign "some papers" offered by the police and he didn't know what the papers were. He stated he didn't consent to the taking of a blood sample for police use. He allowed Nurse Crotchett to take the blood sample in the belief it was for medical purposes. He couldn't remember if he'd ever been told he was under arrest.

A jury instruction on consent was requested and denied.

The court began its analysis by recognizing that the implied consent form and the warning are all predicated on arrest for DWI, and that it would only be appropriate if he were under arrest for DWI. The reading of the warnings, they said, justified some evidence of being under arrest.

The prosecution argued that he was not under arrest and that if not under arrest there is no consent requirement. The opinion responded that "the states position seems to be that a law-

abiding citizen has less protection against the bodily intrusion of the taking of a blood sample than does a person under arrest for DWI. This cannot be the law." The court found the protection to vest in the 4th Amendment and Article 1, Section 9 of the U.S. Constitution which limits a warrantless taking without consent to the situation "where there was bona-fide danger of the alcohol dissipating from the blood before the evidence [would] be gathered and where the officer had probable cause to arrest the defendant [for an alcohol related offense] "quoting from Weaver v. State, 721 S.W.2d 495 (Tex. App. - Houston [1st Dist.] 1986 pet. ref'd).

The opinion cites State v. Williams, 814 S.W.2d 256 (Tex. App. - Austin 1991 aff'd on other grounds, 832 S.W.2d [1992]) for the proposition that if reasonable ground do not exist for the drivers arrest, consent is not implied by law and the State must prove that actual consent was positive and unequivocal and obtained without duress or coercion.

The opinion concludes that the jury instruction should have been given and the refusal to do so harmed defendant. Further, defendant's objection was sufficient to put the court on notice.

G. VOLUNTARINESS ABSENT DWI STATUTORY WARNING

The Tyler and Houston Courts of Appeals have held that where the appellant voluntarily consents to the breath test, proof of the statutory written warnings is not necessary for admission of the test results. [emphasis ours] Hogue v. State, 752 S.W.2d 585 (Tex.App.-Tyler 1987); Landgraaf v. State, 740 S.W.2d 577 (Tex.App.-Houston [1st Dist.] 1987).

NOTE: See Hawkins v. State, 865 S.W.2d 97 (Tex.App.-Corpus Christi 1993) for a case upholding a procedure on the theory of consent where the statutory warning was for a urine test but a breath test was given when the defendant was unable to produce.

H. FAILURE TO GRANT REQUEST FOR LEGAL COUNSEL - SUBSEQUENT CONSENT

In McCambridge v. State, 712 S.W.2d 499 (Tex.Cr.App. 1986), the Court addressed the question: Prior to consent to take the intoxilyzer,

does giving the Miranda right to an attorney warning (though not required) create a legitimate expectation of entitlement to an attorney so that, if counsel is requested in reliance thereon and denied, subsequent consent should be ruled invalid and the intoxilyzer results suppressed?

The *en banc* opinion stated that since the testing decision involved neither custodial interrogation nor the privilege against self incrimination, there is no Miranda or Edwards remedy available. Nor is there a remedy under Article 1, Section 10 or 19 of the Texas Constitution, or the 14th Amendment of the U.S. Constitution or C.C.P. arts. 1.05, 15.17 or 38.22. McCambridge v. State, 778 S.W.2d 70 (1989).

I. ADMISSIBILITY OF REFUSAL

1. Does not offend 5th Amendment since not coerced. South Dakota v. Neville, 459 U.S. 553 (1983).

2. Fact that defendant not warned that refusal would be admissible does not offend due process clause. South Dakota v. Neville, supra. (However see note 9 at page 559 stating that "Due process concerns could be involved if the police initiated physical violence while administering the test, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force". Quoted in McCambridge v. State, 712 S.W.2d 499 (Tex.Cr.App. 1986) 504, n. 16.

3. But must show that the DWI warning given. Nebes v. State, 743 S.W.2d 729 (Tex.App.-Houston [1st Dist.] 1988). Hogue v. State, 752 S.W.2d 585 (Tex.App.-Tyler 1987, pet. ref'd).

Before the decision, warning must be given in writing as well as orally. Schaum v. State, 833 S.W.2d 644 (Tex.App.-Dallas 1992). "Before requesting a person to submit to the taking of a [blood or breath] specimen, the officer shall inform the person orally and in writing that..." (emphasis added). Section 724.015 Transportation Code. See Janak v. State, 826 S.W.2d 803 (Tex.App.-Texarkana 1992, no pet.) holding admission of the refusal to be error where there was no evidence that the written warning was ever provided.

However, several appellate courts have held that failure to provide the writing until after defendant's decision would not, absent a showing

of harm, require reversal. See Jessup v. State, 935 S.W.2d 508 (Tex.App.-Houston [14th Dist.] 1996), observing that "[t]he trial court heard no evidence which would prove that appellant refused to take the test because he did not receive the written warnings before he refused to take the test instead of immediately after, and that he could have changed his mind when he was given the written warning," the court found no harm and affirmed the conviction. See also Lane v. State, 951 S.W.2d 242 (Tex.App.-Austin 1997, no pet.), Rowland v. State, 983 S.W.2d 58 (Tex.App.-Houston [1st Dist.] 1998) and O'Keefe v. State, 981 S.W.2d 872 (Tex.App.-Houston [1st Dist.] 1998).

4. Refusal Tied To Request for Attorney

When the refusal is so intertwined with wishing to contact one's lawyer that excising it would distort the stated reason for the refusal, relevancy problems are created under Rules 401, 402 and 403 Tex. R. Crim. Evid.

Note: The new Article 38.38 C.C.P. confirms the policy that seeking an attorney's advice is inadmissible.

5. However, where videotaped refusal to take the test is based entirely upon inability to obtain attorneys advice, the refusal to take the breath test is admissible. Jamail v. State, 787 S.W.2d 380 (Tex.Cr.App. 1990), Jamail does let stand, however, McCambridge v. State footnoted concern that a police officer could so mix the request for a breath test with questions that amounted to interrogation as to violate Miranda see McCambridge v. State, 712 S.W.2d 499, 506 n.17 (Tex.Cr.App. 1986). The Jamail opinion observed, however, that the officer specifically stressed that Miranda warnings applied only to custodial interrogation and thus did not lead Jamail to believe that he was entitled to consult with an attorney prior to the test decision.

6. The language of Art. 670115 § 3(g) and its successor, § 724.061 Transportation Code both state that the refusal "may be introduced into evidence," rather than shall.

Houston's 1st Court has observed:

[T]he word "may" gives the Court the discretion to consider the circumstances on a case-by-case basis in determining when a refusal should be allowed in as evidence. A refusal to take

the test, like any other evidence, can be admitted as relevant evidence, at the trial court's discretion, unless a defendant can overcome the presumption of admissibility by showing undue prejudice or the like.

Moore, 981 S.W.2d 701 (Tex.App.-Houston [1st Dist.] 1998).

NOTE: In South Dakota v. Neville, 459 U.S. 553, 561-62, and 103 S.Ct. 916, 921 (1983) the Supreme Court case dealing with refusal admissibility over federal constitutional objection, Neville gave a clearly relevant reason: "I'm too drunk, I won't pass the test."

7. Miranda Warnings

Not required because not interrogation, South Dakota v. Neville, supra. Dennis v. State, 725 S.W.2d 812 (Tex.App.-Amarillo 1987, pet. ref'd).

J. INABILITY IS NOT REFUSAL

1. If intoxilyzer test invalid due to asthma, it cannot be considered a refusal. Navarez v. State, 671 S.W.2d 90 (Tex.App.-El Paso 1984)

2. Where machine failed to print result because defendant, due to asthma, did not exhale sufficiently, officer's report of numbers observed on the machine was inadmissible hearsay. May v. State, 784 S.W.2d 494 (Tex.App.-Dallas 1990).

3. The same basic facts, asthmatic's insufficient exhaling to satisfy slope detector, caused the digital indicator reading to be inadmissible in the face of objection that the test was not done in accordance with rules of TEX. REV. CIV. STAT. ANN., Department of Public Safety, art. 67011-5, § 3(b), thus a valid result was not obtained. Boss v. State, 778 S.W.2d 594 (Tex.App.-Austin 1989).

4. After an asthmatically unsuccessful intoxilyzer test, a follow-up blood test given with defendant's consent is admissible against the argument that since defendant had voluntarily given his consent for the breath test, he had complied with art. 67011-5, the negative effect of not complying could not be imposed against him and therefore the consequence of a refusal of the blood test was incorrectly stated rendering the consent involuntary. State v. Gonzales, 850

S.W.2d 672 (Tex.App.-San Antonio 1993) on rehearing.

K. DEFENDANT'S RIGHT TO COUNSEL UNDER BOTH FEDERAL AND STATE LAW DOES NOT ATTACH IN A DWI PROSECUTION UNTIL THE COMPLAINT IS FILED

Forte v. State, 707 S.W.2d 89 (Tex.Cr.App. 1986), and 759 S.W.2d 128 (Tex.Cr.App. 1988). Erdman v. State, 796 S.W.2d 243, (Tex.App.-Houston [14th Dist], 1990) (holding that the earlier issuance of a citation for DWI does not initiate formal criminal proceedings). Reversed on PDR on other grounds. 861 S.W.2d 890.

III. RETROGRADE EXTRAPOLATION-FROM TIME OF SAMPLE TO TIME OF DRIVING

A. SUFFICIENCY OF EVIDENCE

1. Generally

"The jury must still be convinced beyond a reasonable doubt that an inference can be made from the results of the breath test that the defendant had a 0.10 alcohol concentration in his body at the time of the offense (emphasis added)." Forte v. State, 707 S.W.2d 89 (Tex.Cr.App. 1986).

Given the significant time lapse between operation of the vehicle and capture of the sample, what testimony is required to permit the inference, beyond a reasonable doubt, of alcohol level at the time of operation of the vehicle?

2. Insufficient

McCafferty v. State, 743 S.W.2d 489 (Tex.App.-Houston [1st Dist] 1988) turned on this issue. Operating occurred at 2:30 a.m. The officer arrived at 3:50 a.m. and the breath test was administered at 4:45 a.m. The breath test showed an alcohol concentration of .18. The officer testified that upon observing defendant, he detected a strong odor of alcohol and bloodshot eyes. A field sobriety test was administered which he concluded defendant failed. The defendant challenged sufficiency proof of the "while intoxicated" element. The court's analysis is as follows:

Officer Poff's testimony that appellant was intoxicated when he arrived at 3:50 a.m.,

together with the breath test showing that appellant was intoxicated at 4:45 a.m., are *alone* not sufficient to establish that appellant was intoxicated at 2:30 a.m. when driving. The State did not ask Staub [a witness at the scene] whether appellant had anything to drink while waiting for the wrecker, and thus did not exclude this hypothesis. Furthermore, the State's expert witness did not explain absorption and metabolization rates of intoxication, or in any way connect the breath tests results at 4:45 a.m. to appellant's condition when driving at 2:30 a.m. See Weaver, 721 S.W.2d at 499; Mullan v. State, 668 S.W.2d 427, 428 (Tex.App.-Texarkana 1984, no pet.).

We, therefore, conclude that the State failed to show that appellant was intoxicated while driving, and hold that the evidence is insufficient to support the conviction. (emphasis theirs).

3. Sufficient

In Daricek v. State, 875 S.W.2d 770 (Tex.App.-Austin 1994, pet. ref'd) the arrest was made at 6:30 p.m. The intoxilyzer reading was .128 at 7:32 p.m. and .112 at 7:36 p.m. Elmer Webber, the technical supervisor, testified that he did not know what defendant's alcohol level would have been at 6:30 p.m. He did say however that if a person had three beers his blood alcohol an hour and a half later would, because of metabolization, have been no more than .03. Rather than view *per se* intoxication separately the Austin Court said the expert testimony, combined with the officers impairment testimony "provide cumulative evidence sufficient to enable the jury to relate the results of the breath test to appellants alcohol concentration at the time he was stopped.

B. KELLY AND DAUBERT REQUIREMENTS

On PDR - Hartman v. State, 946 S.W.2d 60 (Tex.Cr.App. 1997) - the defense focused on objection to extrapolation testimony because it

"pertained to scientific techniques which were not shown to be reliable or relevant under Rule of Criminal Evidence 702." He also objected under Rule 401, 402, 403 and 705. On appeal the defense argument that the 702 showing for the admissibility of scientific expert testimony required in Daubert, Kelly and Emerson was not met. The Appellate Court had rejected the argument, holding that the Kelly standards apply exclusively to "novel" scientific evidence. The Court of Criminal appeals reversed, holding that the Kelly standard applies not just to "novel" but to all scientific evidence offered under Rule 702, remanding for reconsideration under Kelly.

NOTE: In Hartman The Court of Criminal Appeals initially granted two additional points of error as a part of the PDR:

Is an expert opinion, extrapolating intoxilyzer results to an earlier point in time in order to give the chemical concentration of alcohol in the blood and tissues of a particular person at the earlier point in time, a genre of "scientific evidence" within the meaning of Kelly v. State, 824 S.W.2d 568 (Tex.Cr.App. 1992)?

Where the State relies upon the per se definition of intoxication of .10 breath alcohol concentration at the time the individual was driving or in actual physical control of a motor vehicle, is the defendant entitled to a jury instruction which requires the State to properly prove their case by extrapolation to the point in time when the defendant was "driving or in actual physical control of a motor vehicle?"

Due to the decision on the first point of error, these points were dismissed without prejudice.

On remand the San Antonio Court held that though the technical supervisor (1) acknowledged he did not know how much the defendant weighed or his eating or drinking history that night, and that he could not know whether Hartman's blood alcohol content was

rising or falling, the technical supervisor's testimony was admissible regarding "a range of blood-alcohol concentration" that would, as he explained "take into account such variables as whether Hartman had eaten and his body's unique way of metabolizing alcohol" and that was a "ball park figure."

Accord: Mata v. State, 13 S.W.2d 12 (Tex.App.-San Antonio 1999), following Hartman.

PRACTICE GUIDE: Justice Carlos Cadena, retired Chief Justice, wrote a thirty-three page dissent exhaustively analyzing the scientific shortcomings of the opinion. It provides an excellent guide to the defense for cross of the technical supervisor regarding relation back to time of driving. See also the chronology of decisions in Mireles v. Texas Department of Public Safety, 993 S.W.2d 426 (Tex.App.-San Antonio 1999), the three judge dissent on motion for rehearing at 1999 WL 300638, and 9 S.W.3d 128 (Tex. 1999).

IV. BREATH SPECIMEN

A. THRESHOLD PREDICATE FOR INTOXILYZER RESULT

1. Proper use of a reference sample (modified from "the use of properly compounded chemicals" as required for the breathalyzer) explained in footnote 1 page 209 of Harrel v. State, 725 S.W.2d 208 (Tex.Cr.App. 1986).

2. The existence of periodic supervision over the machine and operation by one who understands scientific theory of the machine.

3. Proof of the result of the test by a witness or witnesses qualified to translate and interpret such results so as to eliminate hearsay plus compliance with the D.P.S. chemical breath test regulations. Harrell v. State, supra.

NOTE: In state's position that Harrell v. State sets out the only requirements for admissibility was rejected in Stevenson v. State, 895 S.W.2d 694 (Tex.Cr.App. 1995).

B. CHALLENGE RE KELLY STANDARD

The requirements of Kelly have been already been recognized by the legislature under § 724.016 of the Transportation Code. The Harrell predicate supplies the third element. Henderson v. State, 20000 WL 231338 (Tex.App.-Austin 2000). Also see Scherl v. State, 7 S.W.3d 650 (Tex.App.-Texarkana 1999),

holding that the legislature has statutorily established reliability.

NOTE: In Forte v. State, 707 S.W.2d 89 (Tex.Cr.App. 1986), note 10, p. 95 the court noted that "the jury...had sufficient evidence of the reliability of the intoxilyzer and overwhelming eyewitness testimony concerning appellant's demeanor to find appellant to have been intoxicated." Therefore, they said the conviction did not subject him to a unconstitutional mandatory conclusive presumption of intoxication. However, "A different question might be presented had the test result been the sum total of the state's case. See California v. Trombetta, 467 U.S. 479, at 489, n.10, 104 S.Ct. at 2534, n.10 (evidence might be insufficient if state's case based solely on unreliable intoxilyzer machine."

C. INTOXILYZER RESULT PRINTOUT - WHAT'S HEARSAY AND WHAT ISN'T

The intoxilyzer printout, containing the results of the test was admitted into evidence through the technical supervisor without testimony from the operator. The Supervisor then testified to the results from the printout. Defendant made timely objection that the test results were hearsay, not subject to the business records objection, relying on Cole v. State, 839 S.W.2d 798 (Tex.Cr.App. 1990). Without reaching the defense argument the Dallas Court of Appeals held that the results were admissible under Article 67011-5 § 3, declaring it to be a specific statute governing the admissibility of intoxilyzer test results. As such, they held, it sets out the necessary three-pronged predicate for admitting intoxilyzer results.

The defense argued that while the 67011-5 or "Harrel" predicate is a requisite of admissibility (proof of that predicate was not challenged), it does not dispense with the rules of evidence.

The Court of Criminal Appeals agreed that "Article 67011-5 § 3 does not provide for blanket admissibility of evidence of breath test results...regardless of the form in which the evidence is presented."

Observing that the court has long recognized that the rule against hearsay could render breath test testimony inadmissible, the Court of Appeals judgment was vacated and the

case remanded to them for consideration of the hearsay objection. Stevenson v. State, 895 S.W.2d 694 (Tex.Cr.App. 1995).

On remand, the Dallas Court of Appeals observed that while the information in the printout that is merely feedback of computer-stored data would be hearsay, the opposite would be true of information - here the results - reflected on the print-out as the result of the computer's internal operations. This is because since "the intoxilyzer is not a declarant, the data it generates is not a statement and cannot be hearsay...The fact that the same data is ultimately printed in hard copy does not convert it into hearsay." Stevenson v. State, 920 S.W.2d 342 (Tex.App.-Dallas 1996).

Prior to the Stevenson opinion, it has been held that a self-generated computer printout that does not represent the output of statements placed into the computer by out-of-court declarants is not hearsay. Murray v. State, 804 S.W.2d 279, 283 (Tex.App.-Fort Worth 1991, pet. ref'd), Smith v. State, 866 S.W.2d 731 (Tex.App.-Houston [14th Dist.] 1993) (explaining that a machine cannot be a declarant nor make statements) (electronic door lock recording device). Burleson v. State, 802 S.W.2d 429, 439 (Tex.App.-Fort Worth 1991, pet. ref'd) (computer generated display of records missing from payroll commission file). Tony Ly v. State, 908 S.W.2d 598 (Tex.App.-Houston [1st Dist.] 1995) (an electronic monitoring print-out).

NOTE: The Tony Ly case did not disapprove, but distinguished the decision in May v. State, 784 S.W.2d 494 (Tex.App.-Dallas 1990, pet. ref'd) where the appellate court held that testimony of an operator repeating numbers observed on the intoxilyzer constituted inadmissible hearsay. The distinction was that in Tony Ly, the print-out itself was introduced into evidence.

In Vanderbilt v. State, 629 S.W.2d 709 (Tex.Cr.App. 1981) the court held that information from a computer print-out received in response to officer's data input was objectionable hearsay.

PRACTICE COMMENT: The part of the computer print-out bearing the name of the subject of breath test is feedback of a computer

stored statement made by a declarant, thus hearsay. Without admissible identification of the defendant as subject, the print-out is irrelevant and obviously prejudicial.

D. COMPLIANCE WITH DPS RULES RE BREATH TEST

1. Generally

Sec. 721.016(a) Transportation Code (formerly Article 67011-5 § 3(b) V.T.C.S.) states that:

A breath specimen taken at the request or order of a peace officer must be taken and analyzed under rules of the department by an individual possessing a certificate issued by the department certifying that the individual is qualified to perform the analysis.

Rules of the Department appear in both the DPS Operators Manual and Texas Department of Public Safety regulations governing breath alcohol testing. The regulations, entitled "Texas Department of Public Safety Breath Alcohol Testing Regulations" are at 37 Texas Administrative Code, Chapter 19.

The Testing Regulations declare that "[a]nalyzes must be performed by certified individuals on certified instruments which are supervised by a certified technical supervisor in accordance with provisions stated in these regulations." 37 Administrative Code § 19.7(b). Failure to comply with a Testing Regulation constitutes grounds for suppressing the Intoxilyzer result. State v. Kost, 785 S.W.2d 936 (Tex.App.-San Antonio 1990, pet.ref'd). Having raised a fact issue concerning compliance with a Testing Regulation, defendant is entitled to a jury instruction that the Intoxilyzer result should be disregarded if a reasonable doubt exists concerning compliance. Atkinson v. State, 871 S.W.2d 252 (Tex.App.-Fort Worth 1994), affirmed on PDR, 923 S.W.2d 21 (Tex.Cr.App. 1996).

2. Burden of Proof

Proving compliance with the Testing Regulations is not a prerequisite to admitting the Intoxilyzer result unless the defendant raises a fact issue concerning compliance with a

regulation. If the defendant raises such a fact issue, "[b]efore the intoxilyzer results can be considered by the trier of fact, the State must prove [compliance with that Testing Regulation]." Gifford v. State, 793 S.W.2d 48 (Tex.App.-Dallas 1990), pet. dismiss'd, improvidently granted, 810 S.W.2d 225 (Tex.Crim.App. 1991).

3. Modification of Fifteen Minute Observation Requirement

The pertinent part of § 19(c)(1) has now been changed. The former text "continuous observation of the subject for a minimum period of time as set by the Scientific Director prior to collection of the breath specimen..." was changed in 1990 to read "a period during which the operator is required to remain in the presence of the subject" (set at 15 minutes by § 19.3(i)). Due to this amendment, "continuous or direct observation of the subject prior to the test is no longer required." State v. Reed, 888 S.W.2d 117, 123 (Tex.App.-San Antonio 1994, no.pet.).

4. Failure to testify to checking the seals or temperature of the reference sample as required by the Breath Alcohol Testing Regulations and Texas Breath Alcohol Testing Program Operator Manual. See Texas Department of Public Safety 37, TEX. ADMIN. CODE § 19.3(c)(4) (Sept. 8, 1986). These require the tester to run a reference sample after checking that the reference sample device is properly sealed and at the proper temperature. The court held without elaboration "although Trooper Campbell could not recall checking the seals or temperature of the reference sample, the evidence does not establish that Campbell failed to follow the regulations."

Erdman v. State, 796 S.W.2d 243 (Tex.App.-Houston [14th Dist] 1990, reversed on PDR on other grounds, 861 S.W.2d 890).

5. Jury Instruction - See Section XIII. Subsection V.

E. EXPERT TESTIMONY REQUIRED FOR BREATH TEST ADMISSIBILITY

Where the expert required to establish admissibility predicate is absent, it is error to attempt to introduce result through non-expert officer. Scruggs v. State, 782 S.W.2d 499 (Tex. App. - Houston [1st Dist.] 1989).

F. INSPECTION REPORTS - APPLICABILITY OF BUSINESS RECORDS EXCEPTION

Analyzing Cole v. State, 839 S.W.2d 798 (Tex.Cr.App. 1990) where the court held that D.P.S. chemists were "law enforcement personnel" hence lab reports reported by D.P.S. chemists were inadmissible, the Houston court distinguished these records because they were made "for the purpose of informing the police department whether the machine was working properly, for maintenance purposes and not for use in any specific litigation." Thus the custodian, to whose expertise the defense had stipulated was not precluded by 803(8)(b) supra, from giving an opinion based upon those records under rules 602, 702 and 703 TEX. R. CRIM. EVID. Ponce v. State, 828 S.W. 2d 50 (Tex. App. - Houston [1st Dist] 1991, pet. ref'd)

NOTE: The Ponce decision is strengthened by Garcia v. State, 868 S.W.2d 337 (Tex.Cr.App. 1993) holding that an autopsy is not within the "for use in...litigation" category.

G. DEFENDANT WAS NOT DENIED DUE PROCESS BY STATES REFUSAL TO ADMINISTER BREATH TEST TO DEFENDANT

Graham v. State, 665 S.W.2d 832 (Tex.App.-Dallas 1984), Grove v. State, 675 S.W.2d 564 (Tex.App.-Houston [14th Dist] 1984).

H. DEFENDANT'S RIGHT TO REQUEST ADDITIONAL TESTS, (SECTION 724.019 TRANSPORTATION CODE) - CONSEQUENCE OF FAILURE TO PROVIDE

1. Does not create basis for inadmissibility of officer requested test. Crawford v. State, 643 S.W.2d 178 (Tex.App.-Tyler 1982); Hewitt v. State, 734 S.W.2d 745 (Tex.App.-Fort Worth 1987, pet. ref'd). Nor does it require dismissal of DWI charge, Crawford v. State, 643 S.W.2d 178 (Tex.App.-Tyler 1982).

But see South Dakota v. Neville, 459 U.S. 553 (1983), at page 559, note 9, suggesting failure to provide could constitute a due process violation.

2. However, implied consent statute specifically makes failure to comply with request

admissible. TEX. REV. CIV. STAT. ANN. art. 67011-5, § 3(f).

NOTE: THE TEX. REV. CIV. STAT. ANN. art. 67011-5, § 3(d) DOES NOT PROVIDE FOR ALTERNATIVE TESTS, BUT PROVIDES FOR ADDITIONAL TESTS ONLY. McKinnon v. State, 709 S.W.2d 805 (Tex.App.-Fort Worth 1986). The type of specimen to be submitted is solely within the discretion of the arresting officer. Davis v. D.P.S., 741 S.W.2d 616 (Tex.App.-Dallas 1987).

I. PRESERVATION OF BREATH SAMPLE, CONSEQUENCE OF FAILURE

Failure to preserve has been held to go to weight and credibility only and suppression of breath test results are not required. Turpin v. State, 606 S.W.2d 907 (Tex.Cr.App. 1980).

J. PASSAGE OF TIME BEFORE BREATH TEST

So long as there is other evidence of intoxication, a jury finding will not be disturbed due to passage of time before the test. Annis v. State, 578 S.W.2d 406 (Tex.Cr.App. 1979) involving one hour and twenty minutes; Dorsch v. State, 514 S.W.2d 755 (Tex.Cr.App. 1974) two hours and fifteen minutes after the arrest. However, neither dealt with a situation whether the breath test was the only evidence.

K. ADMISSIBILITY OF RESULTS ABSENT "PER SE" ALLEGATION IN INFORMATION

"We hold the intoxilyzer results were relevant and thus admissible to prove appellant consumed alcohol, and that it made him intoxicated." Grady v. State, 962 SW2d 128 (Tex.App.-Houston [1st Dist.] pet. ref'd).

V. BLOOD SPECIMEN

A. CONSENT RE BLOOD

In two circumstances the requirement of actual consent is waived. They are (1) incapability of refusal (§724.014(c) Transportation Code) and (2) the officer's belief that an accident has or will result in death. §724.012(a)(3) Transportation Code.

B. WHO MAY WITHDRAW BLOOD

When a person gives a specimen of blood at the request or order "of a peace officer

under the provisions of this Act, only a physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse may withdraw a blood specimen." §724.017(a) Transportation Code.

NOTE: "Qualified technician" includes a phlebotomist only if determined by hospital or other medical facility to be a qualified technician, State v. Bingham, 921 S.W.2d 494 (Tex.App.-Waco 1996). If record is silent regarding whether the phlebotomist has been determined to be qualified the Corpus Christi court finds the evidence resulting from the talking of the blood sample to be inadmissible. Cavazos v. State, 969 S.W.2d 454 (Tex.App.-Corpus Christi 1998)

NOTE: The "under the supervision or direction of a licensed physician" requirement has been deleted. Bennett v. State, 723 S.W.2d 359 (Tex.App.-Fort Worth 1987).

C. WHERE MUST SAMPLE BE TAKEN?

"The sample must be taken in a sanitary place." §724.017 Transportation Code. The former language "and such place, if other than the office or place of business of a licensee of the Texas State Board of Medical Examiners, must be inspected on a periodic basis by an agency of the State or by the County in which the sample is taken" has been deleted effective August 26, 1992 (Senate Bill No. 420).

D. CONSEQUENCES FOR NON-COMPLIANCE

Under former statute requiring that samples be taken by a physician in a physician's office or a hospital, failure of proof of these resulted in harm and therefore reversal. Though the requirements have now changed, this case is authority for art. 67011-5, § 3(c), being a predicate requirement which the State must meet. Turner v. State, 734 S.W.2d 186 (Tex.App.-Dallas 1987, pet. ref'd). See also, State v. Denton, 772 S.W.2d 537 (Tex.App.-Houston [14th Dist.] 1989, pet. ref'd), for authority that inspection requirements are predicate to admissibility.

E. BLOOD TAKEN FOR MEDICAL PURPOSES – PRIVILEGE/PRIVACY BARRIERS REMOVED

1. Physician-Patient Privilege (Statute and Rules)

a. NO LONGER EXISTS. The statutory grant of the physician-patient privilege by TEX. REV. CIV. STAT. ANN. art. 4495b, relating to communications and reports has been declared inapplicable to criminal cases because:

(1) Specific section of the statute creates an exception to confidentiality or privilege "in any criminal prosecution where the patient is a victim, witness, or defendant..." art. 4495b, supra, § 508(g)(8).

(2) By order of the Texas Court of Criminal Appeals, effective September 1, 1986, art. 4495b, § 5.08, supra, was repealed "as it relates to criminal law cases and criminal law matters." The repeal was simultaneous with the Texas Rules of Criminal Evidence which gives no recognition to a physician-patient privilege.

(Rule 509) The inapplicability of the physician-patient privilege was specifically recognized by the Court of Criminal Appeals in Blunt v. State, 724 S.W.2d 79 (Tex.Cr.App. 1987).

The validity of the repeal was upheld in State v. Hardy (Tex.Cr.App. No. 1061-94, November 19, 1997).

2. Constitutional Right of Privacy for Medical Records

In a five to four decision the Court of Criminal Appeals held that "whatever interests society may have in safeguarding the privacy of medical records, they are not sufficiently strong to require protection of blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident." State v. Hardy, above.

A support for its decision the Court placed reliance on its conclusion that (1) the expectation of privacy in (a) the physical intrusion to draw blood and (b) the exercise of control over and the testing of the blood sample has already been frustrated by nongovernmental agencies (medical personnel) and (2) many legislatures have conferred upon law enforcement officers the ability to draw blood samples following traffic accidents in ways that "permit intrusions that are significantly greater than present here."

F. BUSINESS RECORDS – BLOOD TAKEN BY JAIL NURSE

See Johnston v. State, 959 S.W.2d 230 (Tex.App.-Dallas, 1997) holding that a jail nurse was not law enforcement personnel under 803(8)(B), T.R.Cr.E.

G. IDENTITY OF DONOR-DEFENDANT

Proof of identity was held insufficient, hence blood sample inadmissible, where the facts necessary for admission of records under the TEX. REV. CIV. STAT. ANN. art. 3737(e) were met by Director of Medical Records for a patient with the same name as defendant, but the physician-witness who ordered the blood sample drawn testified he did not know the nurse who drew it, nor did he observe it being labeled and that he didn't know if the blood sample drawn from defendant was the sample that was tested. Lynch v. State, 687 S.W.2d 76 (Tex.App.-Amarillo 1985, pet. ref'd).

H. HEARSAY TESTIMONY REGARDING RESULTS

Where tests are done by law enforcement personnel, supervising chemist cannot testify through "records" exception as to result of test run by absent chemist. TEX. R. EVID. rule 803(8) specifically excludes "matters observed by police officers and other law enforcement personnel" from "records" exception to hearsay rule. Cole v. State, 839 S.W.2d 798 (Tex.Cr.App. 1990). But see Johnston v. State, 959 S.W.2d 230 (Tex.App.-Dallas, 1997) holding that a jail nurse isn't "law enforcement personnel."

I. STATUTORY WARNING REQUIREMENT

Evidence of the statutory warning is a predicate for admission of refusal to take a blood test. Since the refusal is in the nature of an incriminating act or statement, it is not admissible unless warning given. Janak v. State, 826 S.W.2d 803 (Tex.App.-Texarkana 1992).

J. ADDITIONAL PREDICATES PARALLELING THOSE REQUIRED FOR BREATH TEST

In Beck v. State, 651 S.W.2d 827 (Tex.App.-Houston [1st Dist.] 1983) the Court

applied the predicates required of the intoxilyzer to the blood test to determine if...

1. The technician understood scientific theory of the machine and,
2. Whether it was checked for accuracy and,
3. Whether the chemicals used in the reagent were properly compounded.

Applying this analysis the Court found that criteria were sufficiently met. See also, Lopez v. State, 731 S.W.2d 682 (Tex.App.-Houston [1st Dist.] 1987, rev'd on other grounds 779 S.W.2d 411 Tex.Cr.App. 1989), for an example of a medical technologist's testimony that met Court's predicate criteria. (Note - in Lopez, a blood sample of known alcohol was first tested.)

K. CONTAMINATION OF SAMPLE THROUGH CLEANSING AGENT

The use of solution containing ethyl alcohol for cleansing purposes as a part of blood test went to the weight rather than the admissibility of the test. Kaufman v. State, 632 S.W.2d 685 (Tex.App.-Eastland 1982, pet. ref'd).

VI. URINE SPECIMEN

A. INAPPLICABILITY OF PARTS OF IMPLIED CONSENT LAW

Urine is not included under implied consent (section 724.011(a) and unlike breath and blood, no statutory authorization is given for evidentiary admission of a refusal. There is, however, a statutory authorization for admission of the result (rather than the refusal) in section 724.064. The right of a defendant to have an additional test also applies.

B. NON-CONSENSUAL SPECIMEN COLLECTED BY OFFICER

1. Before arrest - Texas law: Consent is not required. "Our statutory prohibition against admission of non-consensual chemical analysis for blood alcohol content other than by breath analysis has been held 'by its explicit' terms [to apply] only to persons who have been arrested." Darland v. State, 582 S.W.2d 452 (Tex.Cr.App. 1979), quoting Bennett v. State, 522 the officer accompanied him into the restroom and caught the specimen with cup as he began to urinate.)

2. Before arrest - Constitutional limit: Method could "shock the conscience." See Rochin v. People of California, 342 U.S. 165 (1952). In Rochin where officers upon illegally entering a home and seeing a defendant put capsules in his mouth, first jumped him, unsuccessfully attempting to retrieve the capsules, then took him to a hospital and emetically induced vomiting to recover the tablets. Contrast this with Briethaupt v. Abram, 352 U.S. 432 (1957) holding that attending hospital physicians extraction of unconscious defendant's blood sample at request of officer, did not violate due process.

3. After arrest: In McKenna v. State, 671 S.W.2d 138 (Tex.App.-Houston [1st Dist.] 1984, pet. ref'd), police brought the defendant to the station and had him handcuffed to a chair for one and a half hours until he asked to go to the bathroom. At the urinal, the officers took off his handcuffs and then they reached around and caught the specimen in a cup. The trial court observed that the sample was not voluntarily given but rather acquired by trick, but nonetheless admitted it over objections. The appellate court reversed because he "was under arrest and did not give his consent" and therefore his statutory rights under TEX. REV. CIV. STAT. ANN. art. 67011-5, § 2 [now §724.013, Transportation Code] were violated.

VII. SUFFICIENCY OF EVIDENCE

A. SUFFICIENCY NOT PRE-TRIAL ISSUE

Sufficiency of evidence to support a conviction cannot be raised in a pre-trial motion to suppress.

B. GUILTY PLEA REMOVES SUFFICIENCY ISSUE IN MISDEMEANOR

Guilty plea in a misdemeanor constitutes an admission of every element of the charged offense and is conclusive on the issue of guilt. Punishment for a misdemeanor can be assessed by the court with or without evidence, at its discretion. Avila v. State, 884 S.W.2d 896 (Tex.App.-San Antonio 1994).

C. AFFIRMED ON FACTUAL SUFFICIENCY

Reagan v. State, 968 S.W.2d 571 (Tex.App.-Texarkana 1998) and Evans v. State, 5 S.W.3d 821 (Tex.App.-San Antonio 1999).

D. VEHICLE AS DEADLY WEAPON

Evidence found sufficient in Walker v. State, 872 S.W.2d 34 (Tex.App.-Fort Worth 1994), Ray v. State, 880 S.W.2d 795 (Tex.App.-Houston [1st Dist.] 1994), Fleming v. State, 987 S.W.2d 912 (Tex.App.-Beaumont, 1999), Schielack v. State, 992 S.W.2d 639 (Tex.App.-Houston [14th Dist.] 1999).

Evidence found insufficient in Englis v. State, 929 S.W.2d 33 (Tex. App. - Tyler 1991, pet. ref'd.)

E. CONDUCT CONSTITUTING OPERATING

NOTE: "Operating" issues generally arise where the defendant is first discovered at, or close to, the controls of the vehicle and either asleep or unconscious.

Denton Definition

In a recent opinion the Court of Criminal Appeals adopted a definition of the term "operate." The charge was unauthorized use of a motor vehicle. Defendant started the engine and attempted to accelerate, but the truck never moved from its stationary position. The owner testified that it required a warm-up of several minutes before it could be driven. The defendant claimed he did not operate the truck because he never actually moved it.

The opinion adopted the definition formulated in Barton v. State, 882 S.W.2d 456 (Tex.App.-Dallas 1994): "[T]he totality of the circumstances must demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." Under this definition they found sufficient evidence of operation. Denton v. State, 911 S.W.2d 388 (Tex.Cr.App. 1995).

F. PUBLIC PLACE

1. Definition

Both Article 6701L-1 and Penal Code Chapter 49 adopt Penal Code § 1.07(a)(40)'s definition of "public place":

"Public place" means any place to which the public or a substantial group of the public has

access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

2. Public Place Holdings Re DWI

a. Qualifying:

The parking lot of a convenience store as well as the convenience store itself. Gonzales v. State, 664 S.W.2d 797 (Tex.App.-Corpus Christi 1984, pet. granted), affirmed after being remanded on other grounds, 683 S.W.2d 791 (Tex.App.-Corpus Christi 1984). The parking lot of a condominium complex is also a public place. Thibaut v. State, 782 S.W.2d 307 (Tex.App.-Eastland 1989). A motel parking lot open to the public 24 hours a day. State v. Nailor, 949 S.W.2d 357 (Tex.App.-San Antonio 1997).

b. Not Qualifying:

Unpaved driveway of rural residence, located ¼ mile from county road, though neither gated nor posted. Fowler v. State, 2001 WL 10234 (Tex.App.-Amarillo January 3, 2001).

Neither a private residence nor the yard or driveway of a private residence is a public place. Commander v. State, 748 S.W.2d 270 (Tex.App.-Houston [14th Dist.] 1988).

G. NO "OPERATING" WITNESSES, BUT DEFENDANT ADMITS DRIVING

The common law corpus delicti rule prohibits a criminal conviction resting upon a defendant's extra judicial confession absent corroboration by independent evidence tending to establish the corpus delicti. Gribble v. State, 808 S.W.2d 65 (Tex.Cr.App. 1990). "The corpus delicti of a crime--any crime--simply consists of the fact that the crime in question has been committed by someone." Fisher v. State, 851 S.W.2d 298 (Tex.Cr.App. 1993).

The corpus delicti of DWI "consists of the fact that someone operated a motor vehicle in a public place when intoxicated." Coleman v. State, 704 S.W.2d 511 (Tex.App.-Houston [1st Dist] 1986) and "the accused's confession [of driving] cannot, itself, establish such fact." Threet v. State, 250 S.W.2d 200 (Tex.Cr.App. 1952). For finding of insufficiency under the corpus delicti rule, see Coleman v. State, supra.

The independent evidence must relate to the corpus delicti. Emery v. State, 881 S.W.2d 702, 705 (Tex.Cr.App. 1994), Fisher v. State, 851 S.W.2d 298, 302-03 (Tex.Cr.App. 1993), Gribble v. State, 808 S.W.2d 65, 70 (Tex.Cr.App. 1990), all cited in Hough v. State, 929 SW2d 484 (Tex.Cr.App.-Texarkana 1996).

H. HELD SUFFICIENT

Where intoxication was proved, the following cases have held that the evidence was sufficient either to "wheel" the defendant or to show intoxication at the time he was driving, or both: Redmond v. State, 30 SW3d 692 (Tex.App.-Beaumont 2000) (here "steering wheel" injury marks contributed to sufficiency). Hernandez v. State, 13 S.W.3d 78 (Tex.App.-Texarkana 2000), Purvis v. State, 43 S.W.3d 118 (Tex.App.-Waco 1999), Youens v. State, 988 S.W.2d 404 (Tex.App.-Houston [1st Dist.], 1999 [Opinion Service 3-24-99]), Turner v. State, 877 S.W.2d 513 (Tex.App.-Fort Worth 1994), Nichols v. State, 877 S.W.2d 494 (Tex.App.-Fort Worth, 1994), Guerra v. State, 846 S.W.2d 124 (Tex.App.-Fort Worth, 1993), Ray v. State, 816 S.W.2d 97 (Tex.App.-Dallas 1991), Pope v. State, 802 S.W.2d 418 (Tex.App.-Austin 1991), Kennedy v. State, 797 S.W.2d 695 (Tex.App.-Houston [1st Dist.] 1990), Folk v. State, 797 S.W.2d 141 (Tex.App.-Austin 1990, pet. ref'd), Dewitt v. State, 763 S.W.2d 524 (Tex.App.-El Paso 1988, pet. ref'd), Reynolds v. State, 744 S.W.2d 156 (Tex.App.-Amarillo 1987, pet. ref'd), Douthit v. State, 739 S.W.2d 94 (Tex.App.-San Antonio 1987), Yeary v. State, 734 S.W.2d 766 (Tex. App.-Fort Worth 1987), Bucek v. State, 724 S.W.2d 129 (Tex.App.-Fort Worth 1987), Keenan v. State, 700 S.W.2d 12 (Tex.App.-Amarillo 1985),

Wilson v. State, 688 S.W.2d 212 (Tex.App.-Corpus Christi 1985), Perez v. State, 432 S.W.2d 954 (Tex.Cr.App. 1968), Sandoval v. State, 422 S.W.2d 458 (Tex.Cr.App. 1967), Mixon v. State, 367 S.W.2d 679 (Tex.Cr.App. 1963), Johnson v. State, 355 S.W.2d 191 (Tex.Cr.App. 1962), Holder v. State, 354 S.W.2d 153 (Tex.Cr.App. 1962), Harrison v. State, 350 S.W.2d 204 (Tex.Cr.App. 1961), Sanford v. State, 334 S.W.2d 184 (Tex.Cr.App. 1960), Fancher v. State, 319 S.W.2d 707 (Tex.Cr.App. 1958), Morgan v. State, 300 S.W.2d 82 (Tex.Cr.App. 1957), Thomas v. State,

283 S.W.2d 933 (Tex.Cr.App. 1955), Hughes v. State, 276 S.W.2d 813 (Tex.Cr.App. 1955).

I. HELD INSUFFICIENT

Where intoxication was proved, the following cases have held that the evidence was insufficient either to "wheel" the defendant or to show intoxication at the time he was driving, or both: Cavazos v. State, 969 S.W.2d 454 (Tex.App.-Corpus Christi 1998), Hanson v. State, 781 S.W.2d 445 (Tex.App.-Fort Worth 1989, pet. granted), Ballard v. State, 757 S.W.2d 389 (Tex.App.-Houston [1st Dist.] 1988), McCafferty v. State, 748 S.W.2d 489 (Tex.App.-Houston [1st Dist.] 1988), Reddie v. State, 736 S.W.2d 923 (Tex.App.-San Antonio 1987, pet. ref'd), Weaver v. State, 721 S.W.2d 495 (Tex.App.-Houston [1st Dist.] 1986, pet. ref'd), Coleman v. State, 704 S.W.2d 511 (Tex.App.-Houston [1st Dist.] 1986, pet. ref'd), Sinast v. State, 688 S.W.2d 631 (Tex.App.-Corpus Christi 1985, pet. ref'd), Shaw v. State, 622 S.W.2d 862 (Tex.Cr.App. 1981), Johnson v. State, 517 S.W.2d 536 (Tex.Cr.App. 1975),

Gamboa v. State, 481 S.W.2d 423 (Tex.Cr.App. 1972), Duran v. State, 352 S.W.2d 739 (Tex.Cr.App. 1962), Avants v. State, 340 S.W.2d 817 (Tex.Cr.App. 1960), Moore v. State, 254 S.W.2d 520 (Tex.Cr.App. 1953), Threet v. State, 250 S.W.2d 200 (Tex.Cr.App. 1952), Pena v. State, 224 S.W.2d 258 (Tex.Cr.App. 1949).

VIII. ADDITIONAL NOTEWORTHY CASES

1. *Reinstatement Fee - Case of First Impression: Non-payment does not cause driver's license to remain suspended beyond 90-day suspension period, thus DWLS conviction is reversed.* Allen v. State, 11 S.W.3d 474 (Tex.App.-Houston [1st Dist.] 2000).

2. *DUI and DWI are sufficiently different so that they are not in pari materia or in irreconcilable conflict. Therefore underage motorist can be prosecuted for DWI.* Findlay v. State, 9 S.W.3d 397 (Tex.App.-Houston [14th Dist.] 1999).

3. *Interlock Read-Out Supports Revocation Sans Identification of Operator*

Alcohol was detected by the Interlock installed on defendant's vehicle, though no evidence was offered as to who blew.

"In the absence of any other explanation, the trial judge could reasonably

believe that the high readings...resulted after [defendant] repeatedly blew into the device;" revoked and sentenced to four to do. Kaylor v. State, 9 S.W.3d 205, 207 (Tex.App.-San Antonio 1999).

4. Immigration and Naturalization:

Deportation for Third DWI: Fifth Circuit Panel – Reverses it's September 1999 "Crime of Violence" Holding.

On March 1st 2001 the 5th Circuit Court of Appeals rejected it's earlier "crime of violence" decision [Camacho-Marroquin v. INS, 188 F.3d 649 (5th Cir. 1999)] and held ...that Texas felony drunken driving convictions are not crimes of violence. USA v. Moises Chapa-Garza, et.al. (No. 99-5199), 3/1/01:

While the victim of a drunk driver may sustain physical injury from physical force being applied to his body as a result of collision with the drunk driver's errant automobile, it is clear that such force has not been intentionally "used" against the other person by the drunk driver at all, much less in order to perpetrate any crime, including the crime of felony DWI. The crime of Texas felony DWI is committed when the defendant, after two prior DWI convictions, begins operating a vehicle while intoxicated. Intentional force against another's person or property is virtually never employed to commit this offense. Accordingly, we hold that felony DWI is not a crime of violence...

5. Charge: Normal Use Should Not Be Defined

In Murphy v. State, (2001 WL 324758 (Tex.App.-Austin April 5, 2001) The charge included, over defense objection, a definition of "normal use" as follows: The term "normal use" means a normal non-intoxicated person. Whether or not the defendant had the normal use of his mental and physical faculties does not require proof of the defendant's normal abilities. Rather, it means that the faculties which must be tested belong to the defendant. You should consider if the defendant could use his faculties on the occasion in question in the manner in which the normal non-intoxicated person would be able to use his faculties."

Held: "The term 'normal use' found within the legislatively crafted definition of 'intoxicated' should be given its common and ordinary meaning within the definition. If the legislature meant otherwise, it could have so provided.

Neither the trial court nor an appellate court has the power to legislate and read into the statute something omitted therefrom by the legislature as by adding words not in the statute to a jury instruction.

6. *Statutory Authorization for Taking Specimen in Face of Refusal Due to Likelihood of Fatality. [Section 724.012(b) Transportation Code] Fact of accident and arrest for intoxication offense do not automatically establish the causation requirement. Instead the belief must be based upon specific and articulable facts of causation."* Badgett v. State, ___ SW3d ___ 2001 WL 356, 451 (Tex.Cr.App. April 11, 2001).

IX. LEGISLATIVE CHANGES
CAUTIONARY NOTE: THE SOURCE FOR THE FOUR BILLS SUMMARIZED UNDER A, B, C AND D BELOW IS THE WEBSITE "TEXAS (space) LEGISLATURE (space) ONLINE." AS OF JUNE 1, 2001 THESE WERE THE ONLY FOUR SUBSTANTIVE BILLS THAT RELATED TO ARTICLE 49 OR ALR VIOLATIONS. [ONE OTHER BILL, HOUSE BILL 2812, SIMPLY MAKES NON-SUBSTANTIVE "HOUSEKEEPING" AMENDMENTS.] HOWEVER THERE COULD BE OTHERS THAT WERE PASSED TOWARD THE END OF THE SESSION THAT WERE NOT YET ON THE WEBSITE. YOU MAY WANT TO DO YOUR OWN MONITORING OF THIS WEBSITE.

DWI and ALR Statutes – Pending Legislation

The following were Awaiting Action by Governor at time this paper submitted.

A. HOUSE BILL 63 –LICENSE SUSPENSION PERIOD AND PROCEDURE

The definition of Drivers License for both failure and refusal suspensions now includes commercial licenses and commercial license permits.

Section 524 and 724 are amended to add ALR consequences to watercraft empowered with engines having a manufacturers rating of 50 horsepower or above.

Section 524.011 and 724.032 are amended to allow arresting officer at time of giving notice of suspension to (1) contemporaneously seize defendant's license and (2) issue a temporary driving permit, expiring on

the 41st day of the issuance. If commercial, it does not become effective until 24 hours after arrest. Article 524.032 section 4(d) and 724.041 section 11(c) require DPS to send defendant documentation of extension of driving permit privileges pending hearing and 524.035 (c) creates the same documentation requirement for hearing continuances.

Return of License: Department is required to return license if the ALR judge does not find in the affirmative.

Increased Periods of Suspension:

Failure:

1. No prior enforcement contacts within 10 years (formerly 5), increased from 60 to 90 days.
2. One or more prior enforcement contacts within 10 years (formerly 5), increased from 180 days to one year.

Refusal:

1. No prior enforcement contacts within 10 years (formerly 5), Increased from 90 days to 180 days.
2. With one or more prior enforcement contacts past 10 years (formerly 5) increased from 180 days to two years.
Given the increase, the separate category for under 21 drivers is eliminated.

Reinstatement Fee:

Increased from \$100 to \$125 for both Failure and Refusal suspensions.

B. HB5 BROADENS OPEN CONTAINER OFFENSE AND CONSEQUENCES FOR ARTICLE 49 SUBSEQUENT OFFENDERS.

1. Open Container

Adds a new section 49.031 creating an offense as follows:

“A person commits an offense if the person knowingly possesses an open container [containing any amount of alcohol] in a passenger area of a motor vehicle that is located

on a public highway, regardless of whether the vehicle is being operated or is stopped or parked. Possession by a person of one or more open containers in a single criminal episode is a single offense.”

The passenger area specifically excludes a glove compartment or similar storage container that is locked, the trunk or if no trunk, the area behind the last upright seat.

It is an exception if the individual was a passenger in commercial transportation or in the living quarters of a camper, RV motorized house coach or motorized trailer.

No arrest is allowed where the defendant signs a promise to appear.

2. *Increased Punitive Measures Where Subsequent Committed Within Five Years [W5Y] Of Commission Of Most Recent Prior, or within 10 years of prior Intoxication Manslaughter.*

Subsequent DWI Offender:

a. Deep lung analysis device [new section 49.09(g)]– requires installation on each vehicle owned or operated by the W5Y defendant, and requires that for one year after the first anniversary of license suspension the defendant not operate any vehicle not so equipped. Failure to comply is punishable by contempt.

b. Occupational License Prohibition.

Section 521.251 entitled “effective date of occupational license” is ten years regarding Intoxication Manslaughter amended to include the following:

Notwithstanding any other provision in this section, if the person’s driver’s license has been suspended as a result of second subsequent conviction under Section 49.04 [DWI] 49.07 [Intoxication Assault] or 49.08 [Intoxication Manslaughter], committal within five years of the date on which the most recent preceding offense was committed, an order granting the person an occupational license may not take effect before the first anniversary of the effective date of the suspension.

c. Period of License Suspension when Convicted – amending §521.344, changing it’s title from “Suspension for Offenses Related to Use of Alcohol” to read “Suspension for Offenses Involving Intoxication.” Section 521.344(a)(2)(a)(b) and (d) are amended by adding the following underlined parts:

1) Not less than 90 days or more than one year if the person is punished under Section

49.04 [DWI] or 49.07 [Intoxication Assault] Penal Code, except that if the person's license is suspended for a second or subsequent offense under Section 49.07 [Intoxication Assault] committed within five years of the date on which the most recent preceding offense was committed, the suspension continues for a period of one year;

2) DWI SECOND AND THIRD: Not less than 180 days or more than two years if punished under Section 49.09(a) [DWI 2nd] or (b) [DWI 3rd], Penal Code, or not less than one year or more than two years, if the person is punished under Section 49.09(a) or (b), Penal Code, and is subject to Section 49.09(g) of that code. [49.09(g)=subsequent committed within 5 years of commission of most recent prior.]

INTOXICATION MANSLAUGHTER SUSPENSION PERIOD:

Continues for a period set by the court of not less than 180 days or more than 2 years except that if the person's license is suspended for a second or subsequent offense under Section 49.08 [Intoxication Manslaughter], Penal Code, committed within 10 years of date on which the most recent preceding offense was committed the suspension continues for a period set by the court of not less than one year or more than two years.

d. COMPLETION OF PROGRAM [521.344(d)(2)]

License revocation protection afforded by completion of program is eliminated for repeat offenders under 49.09(a) and (b) who are subject to 49.09(g) [49.09(g)=subsequent committed within 5 years of commission of most recent prior.]

e. DEEP LUNG ANALYSIS EXCEPTION [521.344(d)(2)]

Amendment effect: License revocation protection afforded probationer ordered to install deep-lung analysis device is eliminated for repeat offenders under 49.09(a) and (b) who are subject to 49.09(g).

f. REQUIREMENT OF EVALUATION UNDER ARTICLE 42.12 § 9(h) IS ADDED.

Section 9(h) article 42.12 CCP is amended to add a "within five year" repeat offender requirement that a 9(h) evaluation be done to determine alcohol or drug rehabilitation required.

g. ARTICLE 42.12, SECTION 13 IS AMENDED AS FOLLOWS:

Section (a) – W5Y repeat offender required to do not less than 5 days in county jail on DWI second.

Section (g) Jury may not recommend that license not be suspended where second or third DWI defendant is a W5Y repeat offender.

Section (k) Judicially ordered suspension is increased from range of 180 days to two years for second and third offender to range of one-to-two years for second or third affecting W5Y repeat offender.

The 49.03 offense of Consumption of Alcohol Beverage by operator is repealed.

C. HOUSE BILL 2250 –BROADENS THE IMPACT AND SCOPE OF PRIORS AVAILABLE FOR 49.09 ENHANCEMENT.

1. 49.09(a) and (b) are amended so that no matter how long ago committed, enhancement to third degree felony requires only one (versus the former two) prior intoxication manslaughter, or a substantially similar offense from another state.

2. 49.09(e) and (f) are amended to this effect:

(a) The "more than 10 years after" remoteness exception is narrowed so that commission of the current offense must have occurred more than 10 years after the latest of:

- (A) the date the judgment was entered for the previous conviction;
- (B) the date of discharge from the community supervision of the previous conviction
- (C) the date of successful completion of the parole of the previous conviction
- (D) the date of completion of the confinement or imprisonment for the previous conviction.

(b) A prior conviction for Intoxication Manslaughter may be used for enhancement no matter how remote

D. SENATE BILL 886 ELIMINATES OCCUPATIONAL LICENSES FOR ALL TEXAS COMMERCIAL DRIVER'S LICENSE SUSPENSIONS.

Section 521.242 of the Transportation Code entitled "Petition" [under Subchapter L.

entitled “Occupational License”] is amended so that under (b) stating who may apply references (1) to those suspended under Chapter 522 “Texas Commercial Driver’s License Act” is deleted and a new (f) is added stating:

(f) A court may not grant an occupational license for the operator of a Commercial Motor vehicle to which Chapter 522 “Texas Commercial Driver’s License Act” applies.

X. APPENDIX

A. Major Legal Battlegrounds

STUART KINARD
Austin, Texas
DWI

MAJOR LEGAL BATTLEGROUNDS
May 22, 2000

Chapter and Page of
Mini-briefs
Kinard's DWI Manual-2000

- | | | |
|----------|----|---|
| 4-2 | 1. | <p><u>Hearing on Motions Alone Without Evidence</u></p> <p><u>State v. Brunner</u>, 917 S.W. 103 (Tex. App.-San Antonio 1996)</p> |
| 12-1 | 2. | <p><u>Felony DWI Acquit – Misdemeanor Statute Tolled</u></p> <p><u>State v. Yount</u>, 820 S.W. 2d 252 (Tex. App.-Beaumont 1991, pet. ref'd)</p> |
| 4-3 | 3. | <p><u>Stop-Testifying to Fellow Officer's Reason for Stopping</u></p> <p><u>McVickers v. State</u>, 874 S.W. 2d 662 (Tex. Cr. App. 1993)</p> |
| 4-7 | 4. | <p><u>Stop-Non-Testifying Officer's Conclusory Instruction</u></p> <p><u>Ware v. State</u>, 724 S.W. 2d 738 (Tex. Cr. App. – 1986)</p> |
| 4-26 | 5. | <p><u>Stop – Conclusory Testimony = Insufficient</u></p> <p><u>State v. Hopper</u>, 842 S.W.2d 817 (El Paso 1992)</p> |
| 4-10, 11 | 6. | <p><u>Stop-Unnamed Informant's Complaint</u></p> <p><u>Rojas v. State</u>, 797 S.W.2d 41, 44 n.2 (Tex. Cr. App. 1990)</p> <p><u>State v. Simmang</u>, 945 S.W. 2d 219 (Tex. App.-San Antonio 1996)</p> |
| 4-14 | 7. | <p><u>Stop-Traffic Violation, Insufficient Proof-Generally</u></p> <p><u>Willett v. State</u>, 454 S.W. 398 (Tex. Cr. App. 1970)</p> <p><u>Vicknair v. State</u>, 751 S.W. 2d 180 (Tex. Cr. App. 1986)</p> <p><u>Hernandez v. State</u>, 13 S.W. 3d 492 (Tex. App.-Amarillo 2000)</p> <p>("driving with lights on bright", without more, insuff.)</p> |

- Trahan v. State, 16 S.W. 3d 146 (Tex. App.-Beaumont 2000)**
(needn't signal if turn less than 90 degrees)
- 4-14 8. **Stop for Observed Violation Requires Probable Cause**
State v. Rivenburgh, 933 S.W. 2d 698 (Tex. App.-San Antonio 1996),
Citing Whren v. United States, ____ U.X.____, 116 S. Ct. 1769, 1776-
77 (1996)
- 4-14, 15 9. **Insufficiency re: Weaving**
State v. Tarvin, 972 S.W. 2d 910 (Tex.App.-Waco 1998)
Hernandez v. State, 983 S.W. 2d 867 (Tex.App.-Austin 1998)
State v. Arriaga 5 S.W. 3d 804 (Tex.App.-San Antonio 1999)
- 4-8 10. **Stop-Driving Slowly**
Viveros v. State, 828 S.W. 2d 2 (Tex.Cr.App. 1992)
Shaffer v. State, 562 S.W. 2d 853 (Tex. Cr. App. 1978)
- 4-13 11. **Stop-Driver Involved in Disturbance Leaves Scene**
Gurrola v. State, 877 S.W. 2d 300 (Tex.Cr.App. 1994)
- 4-17 12. **Stop-DWI Checkpoints**
State v. Holt 887 S.W. 2d 16 (Tex.Cr.App. 1994)
- 4-17 13. **Stop-Non-DWI Checkpoints**
State v. Sanchez, 856 S.W. 2d 166 (Tex.Cr.App. 1993)
- 4-17 14. **Stop-Citizens Stop Requires Probable Cause**
Garner v. State, 779 S.W. 2d 498 (Tex.App.-Fort Worth 1989, pet.
ref'd)
- 4-5 15. **Detention – Detaining For FSTS May Require Additional Basis**
Texas Department of Public Safety v. Rodriguez, 953 S.W. 2d 362
(Tex.App.-Austin 1997), citing Florida v. Rover, below
- 4-5 16. **Detention-Non-Moving Violation and Alcohol Odor**

- Florida v. Royer, 460 U.S. 491, 103 S.Ct. 319 75 L.Ed. 299 (1983)**
- 4-5 17. **Detention-Drinking While Driving as SoleBasis**
Florida v. Royer, 460 U.S. 491, 103 S.Ct. 319 75 L.Ed. 299 (1983)
- 4-5 18. **Detention-Speeding and Odor of Alcohol**
Florida v. Royer, 460 U.S. 491, 103 S.Ct. 319 75 L.Ed. 299 (1983)
- 4-13 19. **Detention-Behavior Dispels Suspicion of Impairment, by Analogy**
Cortinas v. State, 571 S.W. 2d 932 (Tex.Cr.App. 1978)
- 4-6 20. **Detention-Unreasonably Long Wait for “DWI” Officer**
Collier v. State, 843 S.W. 2d 176 (Tex.App. – Houston [14th Dist.] 1992, no pet)
Florida v. Royer, 460 U.S. 491, 103 S.Ct. 319 75 L.Ed. 299 (1983)
Petty v. State, 696 S.W.2d 635 (Tex.App. – Fort Worth 1985)
People v. McGaughrin, 25 Cal 3rd 577, 601 P.2d 207, 159 Cal.Rptr. 191 (1979)
- 4-21,22 21. **Arrest-Driving Not Observed and Insufficient PI Proof**
Collins v. State, 795 S.W. 777 (Tex. App. Austin 1990)
Segura v. State, 826 S.W. 178 (Tex. App. – Dallas 1992, pet. ref’d)
Commander v. State, 748 S.W. 2d 270 (Tex. App. – Houston [14th Dist.] 1988)
- 4-22 22. **Arrest – Driving not Observed and Sufficient PI Proof**
“If arrested for any offense arising out of acts alleged to have been committed while a person was driving or in actual physical control of a motor vehicle or an aircraft while intoxicated.”
Art. 67011-5 §1 But see Elliot v. State, 908 S.W. 2d 590 (Tex.App. – Austin 1995)
- 4-26 23. **Arrest – Conclusory Statement = Insufficient**

[felony or offense against public peace].

PRACTICE REMINDER: “Citizen” must have probable cause for initial stop. See 14 above.

NOTE: 25, 26, 27 below all cite pre-14.03(g) decisions. Whether they will be affected will depend in part on breadth of the word “jurisdiction” in this context.

- 5-25 25. Arrest-Limits by “B” Classification of Municipal Charter [Post-14.03(g)]
Yeager v. State, 23 S.W. 3d 566 (Tex.App. –Waco 2000)
- 4-25 26. Arrest-Limits by “C” Classification of Municipal Charter [Pre-14.03(g)]
Reichart v. State, 830 S.W. 2d 348 (Tex.App. – San Antonio, 1992, pet. ref’d)
- 4-25 27. Arrest-Specially Commissioned Police Authority Exceeded [Pre-14.03(g)]
Robinson v. State, 866 S.W. 2d 649 (Tex.App. – Houston [14th Dist.] 1993)
- 4-25 28. Arrest-Officer’s Functional Authority Exceeded [Pre-14.03(g)]
United States v. Garcia, 676 F.2d 1086 (5th Cir. 1983)
- 4-17 29. Arrest-Impairment Arguably Due to Injuries
State v. Williams 832 S.W. 2d 52 (Tex.Cr.App. 1992)
- 4-28 30. Arrest-Officer Observing Crime is Not Arresting Officer: “Integral Part of Arrest Team” Standard
Henderson v. State, 864 S.W. 2d 227 (Tex.App. – Waco 1993 pet. ref’d).
Willis v. State, 669 S.W.2d 728, 730 (Tex.Cr.App. 1984)

- 4-23 31. **Arrest-Residence Entry Limitations**
Honeycutt v. State, 499 S.W. 2d 662 (Tex.Cr.App. 1993)
- 11-8,9 32. **Sufficiency-Operating “Asleep at the Wheel”**
Denton v. State, 911 S.W. 2d 388 (Tex.Cr.App. 1995)
- 11-12 33. **Sufficiency-Public Intoxication: Public Place in Residence Driveway**
Commander v. State, 748 S.W. 2d 270 (Tex.App. – Houston [14th
Dist.] 1998)
Fowler v. State, ____ S.W. 3d 2001 WL 10234 (Tex.App.-Amarillo
January 3, 2001)
- 11-12 34. **Sufficiency-Public Highway**
Ford v. State, 571 S.W. 2d 924 (Tex.Cr.App. 1978)
- 11-11 35. **Sufficiency-Not Behind Wheel – No Admission**
Chavzos v. State, 969 S.W. 2d 454 (Tex.App. – Corpus Christi 1998)
Spinks v. State, 243 S.W. 2d 173 (Tex.Cr.App. 1951)
Moore v. State, 254 S.W. 2d 520 (Tex.Cr.App. 1953)
Gamboa v. State, 481 S.W. 2d 423 (Tex.Cr.App. 1972)
- 11-10,11 36. **Sufficiency-Driving Admitted, Insufficient Additional Proof of**
Corpus Delicti
Hanson v. State, 781 S.W. 2d 445 (Tex.App. – Fort Worth 1989)
appeal abated by Appellant’s death, 790 S.W. 2d 646 (Tex.Cr.App.
1990)
Coleman v. State, 704 S.W. 2d 511 (Tex.App. – Houston [1st Dist.]
1986, pet.ref’d)
Threeth v. State, 250 S.W. 2d 200 (Tex.Cr.App. 1952)
Pena v. State, 224 S.W. 2d 258 (Tex.Cr.App. 1949)

- 11-6,7 37. **Sufficiency-“While” Shortfall – Retrograde Extrapolation**
McCafferty v. State, 748 S.W. 2d 489 (Houston [1st Dist.] 1988),
Also see **Annis v. State**, 578 S.W. 2d 406 (Tex.Cr.App. 1979),
Crawfort v. State, 643 S.W. 2d 178 (Tex.App. – Tyler 1982),
And **Daricek v. State**, 875 S.W. 2d 770 (Tex.App. – Austin 1994,
pet.ref’d)
Each recognizing the issue but allowing impairment evidence to
buttress the per se finding.
But see **Hartman v. State**, 2 S.W. 3d 490 (Tex.App. – San Antonio
1999) where, Though expert lacked knowledge re pertinent factors,
testimony re estimated “ballpark range” of concentration permitted.
- 11,8 38. **Sufficiency-“While” Shortfall – No Evidence of Time of Driving**
Weaver v. State, 721 S.W. 2d 495 (Tex.App. – Houston [1st Dist.]
1986, pet.ref’d)
- 6-3,4 39. **Per Se: Test Excluded-Unauthorized Coercive Warning**
Erdman v. State, 861 S.W. 2d 890 (Tex.Cr.App. 1993)
But see **Sandoval v. State**, 2000 WL 632580 (Tex.App. – Austin May
18, 2000),
Ruling that, absent a causal link, overruling the suppression motion
was within legitimate discretionary bounds.
- 6-14 40. **Per Se: Test Excluded-Technical Supervision Unavailable**
Scruggs v. State, 782 S.W. 2d 499 (Tex.App. – Houston [1st Dist.]
pet.ref’d)
- 6-15 41. **Per Se: Test Excluded-Operator Unavailable**
Vanderbilt v. State, 629 S.W. 2d 709 (Tex.Cr.App. 1981)
- 6-22 42. **Per Se: Test Excluded-Blood Test – Insufficient Donor Identity**

- Lynch v. State, 687 S.W. 2d 76 (Tex.App. – Amarillo, 1985, pet.ref'd)**
- 6-23 43. **Per Se: Test Excluded-Supervising D.P.S. Chemist Testifying in Testing Chemist’s Absence**
Cole v. State, 839 S.W. 2d 798 (Tex.Cr.App. 1990)
- 6-16, 17 44. **Per Se: Test Excluded—Failure to Comply with D.P.S. Rules**
Atkinson v. State, 871 S.W. 2d 252 (Tex.App. – Fort Worth 1994)
 “ 923 S.W. 2d 21 (Tex.Cr.App. 1996)
 “ 934 S.W. 2d 896 (Tex.App. – Fort Worth 1996)
45. **Field Sobriety Test Battery Excluded – Remaining Evidence Insufficient**
- 17-40.1.1 **Emerson v. State, 880 S.W. 2d 759 (Tex.Cr.App. 1994)**
- 6-9 **Hartman v. State, 946 S.W. 2d 60 (Tex.Cr.App. 1997)**
- 6-20 46. **Blood Sample Taken In Violation of Statute**
Cavazos v. State, 969 S.W. 2d 454 (Tex.App. – Corpus Christi, 1998)