Contents

STATUTES:

Bond: CCP Art. 17.41
Offenses: Chapter 49 Texas Penal Code
Community Supervision: Code of Criminal Procedure 42.12 (13)
Specialty Courts: Health and Safety Code 469.001
Driver's License Suspensions: Trans. Code 524
Implied Consent: Trans. Code 724
Occupational Licenses: Trans. Code 521.246

BASIS FOR STOP AND ARREST

Stone v. State, 685 S.W.2d 791 (Tex. App.-Fort Worth 1985), aff'd 703 S.W.2d 652 (Tex. Crim. App. 1986) Officer needs reasonable suspicion to justify a stop of a vehicle.

Anonymous Tip

Navarette v. California, 134 S. Ct. 1683 (2014) the Supreme Court held that an anonymous tipster's claim that a driver had recently run her off the road with a specific description of the make, model, color and license plate of the vehicle gave police reasonable suspicion, under the totality of the circumstances, to stop that driver's vehicle because the driver may have been intoxicated.

State v. Garcia, No. 03-14-00048-CR, 2014 WL 4364623 (Tex. App.—Austin 2014) A call from a 911 caller who identified himself as "Eric" reported a possible intoxicated driver in a drive thru line at a nearby fast food restaurant whom he had seen swerving. He described the driver and the car. An officer pulled behind a car matching that description and approached the driver. The court found that the information conveyed was insufficient to justify a temporary detention. The Court found a lack of sufficient detail in the caller's report and characterized the statements made by the caller as conclusory.

Martinez v. State, 348 S.W.3d 919 (Tex. Crim. App. 2011) the officer lacked reasonable suspicion to support an investigatory stop of a pickup truck driven by defendant. Anonymous caller didn't give any identification information to officer or to dispatch, did not follow the suspect's vehicle, and was not present at the scene before the stop. The reliability of the caller was unknown and the officer had neither specific, articulable facts nor the necessary level of police corroboration that is required to produce reasonable suspicion so as to warrant an investigative detention.

Glover v. State, 870 S.W.2d 198 (Tex. App.—Fort Worth 1994, pet. ref'd.) An ambulance reported a DWI suspect driving a white corvette and gave the license plate to 911 dispatch. The Court found the broadcast was sufficient to validate an investigative Terry stop of Glover based upon a reasonable suspicion he was guilty of DWI. Even though Hall did not know the EMS technician's identity, his knowledge that the information broadcasted had come from an EMS unit was sufficient indicia of reliability. Because the officer could be confident of learning the identity of the technician, because the informant could reasonably anticipate his identity would be available to the police, and because the informant was trained in working with police and in emergency situations, we hold the information Hall received from the broadcast was reliable and, under the totality of the circumstances, established probable cause to detain Glover.

Identified Citizen Report

Hime v. State, 998 S.W.2d 893 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) A citizen called police after observing suspect swerving towards other cars as it passed. Citizen gave her name and noted that the suspect had stopped at her location too. The Court held that this was a sufficient basis for the stop noting than an identified citizen who calls in to report criminal acts is inherently credible and reliable.

Pospisil v. State, 2008 WL 4443092 (Tex. App—Texarkana 2008) Off duty firefighter called 911 to report a reckless driver. Based on that call, officer located and stopped the defendant's vehicle in a short period of time. The Court found three factors to be dispositive: 1. The report was not anonymous, the firefighter gave his name and occupation; 2. The caller was a firefighter making him one of the types of people that are generally trustworthy and reliable; and 3. The officer responded quickly allowing him to corroborate the vehicle's description.

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Information provided by police radio or computer

McDuff v. State, 2011 WL 1849540 (Tex. App.—El Paso 2011) Defendant was stopped based on information provided by the officer's on board computer that the vehicle registration had expired. Defendant argued that State failed to prove that he committed a traffic violation because it did not offer any evidence to substantiate the hearsay testimony. The Court found that the State is not reqired to prove that the defendant actually violated a particular statute in order to establish a reasonable suspicion or probable cause. The state must only elicit testimony that the officer knew sufficient fact to reasonably suspect that the defendant had violated a traffic law.

Information Provided to 911 Operator

Derichsweiler v. State, 348 S.W.3d 906 (Tex. Crim. App. 2011)

In assessing reasonable suspicion a reviewing court looks to the totality of objective information known *collectively* to the cooperating police officers, including the 911 dispatcher. Therefore, if information is reported to the 911 operator, that information will go to support reasonable suspicion to stop an individual even if that information is not communicated to the officer who performs the stop.

Bad Driving or Bad Conduct

Pillard v. State, No. 06-14-00015-CR, (Tex. App.—Texarkana 2014) Weaving within lane and traveling 20mph in a 40mph zone together with leaving an area populated by bars after closing time was sufficient to provide a legal basis for the stop that led to defendant's arrest.

Martinez v. State, 2010 WL 188734 (Tex. App.—Dallas 2010) Officer observed defendant hit the curb on a flat, straight, well-lit roadway and it was early Sunday morning shortly after the bars had closed, a "high DWI time". The Court found that the totality of the circumstances justified the stop.

Foster v. State, 326 S.W.3rd 609 (Tex. Crim. App. 2010) Court found reasonable suspicion justifying a temporary detention when at 1:30am a few blocks from the city's bar district (6th Street in Austin) defendant's truck came up close behind officer's vehicle at a red light and appeared to lurch forward. The officer then heard a revving sound and the truck lurched forward again. In light of the circumstances, the time of night and location, defendant's aggressive driving and the officer's training and experience, it was rational for the officer to have inferred that the defendant may have been driving while intoxicated.

Unconstitutional Investigatory Stop But Suspect Is Subject To A Valid Arrest Warrant

Utah v. Strieff No. 14-1373 (US SCT 6/20/16)

The Officer's discovery of a valid, pre-existing and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest.

Common Traffic Offenses

Offense	Transportation Code Section
Compliance with traffic control device	§544.004
Unsafe passing to the left	§545.053
Passing in a "no passing zone"	§545.055
Unsafe passing to the right	§545.057
Driving on improved shoulder	§545.058
Failure to drive within a single lane	§545.060
Following too closely	§545.062
Passing a school bus	§545.066
Improper turn at intersections	§545.101
Improper use or failure to use signal	§545.104
Failure to signal stop/sudden stop	§545.105
Improper stop/failure to stop at intersection	§545.151
Failure to Yield right of way at intersection	§545.153
Failure to/improper yield to emergency vehicle	§545.156
Improper stopping/parking	§545.302
Driving at unsafe speed	§545.351
Speed limits when not otherwise posted	§545.352
Reckless driving	§545.401
Leaving vehicle unattended	§545.404
Driving too slowly	§545.363

Transporting child w/o safety seat	§545.412
Failure to wear seat belt	§545.413
Child in bed of pick up truck	§545.414
Improper backing of vehicle	§545.415
Driving with operator's view obstructed	§545.417
Racing/rapid acceleration	§545.420
Driving through drive way-parking lot	§545.422
Unsafe lane change	§545.060
Driving w/o lights	§547.302
Absence of license plate light	§547.322(f)
Taillamp not emitting plainly visible red light	§547.322(d)
Overly tinted windows	§547.613
Operating a vehicle in a dangerous mechanical condition	§548.604
Striking an unattended vehicle	§550.024
Striking a fixture or highway landscaping	§550.025

Weaving in a Single Lane

Leming v. State of Texas PD-0072-15 (Texas Court of Criminal Appeals, April 13, 2016).

This case changes the way several courts of appeals have construed Section 545.060(a) of the Texas Transportation Code. See *Atkinson v. State*, 848 S.W.2d 813 (Tex. App.–Houston [14th Dist.] 1993 no pet.); *Hernandez v. State*, 983 S.W.2d 867 (Tex. App. – Austin 1998, pet. ref'd.); *State v. Houghton,* 384 S.W.3rd 441 (Tex. App.–Fort Worth 2012, no pet.); and *United States v. Raney*, 633 F.3rd 385 (5th Cir. 2011). These decisions held that a driver must both fail to maintain a single lane as far as is practical and change lanes without checking to assure the maneuver can be accomplished safely in order to violate Section 545.060(a) TTC.

Since statutory construction is a question of law, the Court of Criminal Appeals conducted a de novo review. The Court rejected *Atkinson's* formulation of the elements and relied on Section 22 of the same legislation that first enacted Section 545.060 that makes it an offense either "to do any act forbidden or fail to perform any act required by this Act" The Court held that statute to contain two separate, actionable offenses: (1) to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so and (2) to change marked lanes when it is unsafe to do so.

There was no factual assertion that the Appellant had changed marked lanes when it was unsafe to do so. The video established that the tires of Appellant's vehicle were on the divider stripes but did not clearly show that the vehicle entered into the next lane.

The Court then found it unnecessary to answer the question of whether the arresting officer had a reasonable suspicion that the Appellant failed to drive nearly as practical entirely within a single lane of traffic, holding that in order for a peace officer to stop a motorist to investigate a traffic infraction, proof of the actual commission of the offense is not a requisite.

The Court found that the peace officer's observation that Appellant had several times at least come very close to entering the adjacent lane coupled with a citizen's report of a vehicle matching the description of Appellant's vehicle "swerving from side to side" was sufficient information to justify a temporary detention to investigate whether Appellant had actually failed at some point to remain in his dedicated lane of traffic as far as it was practical to do so under the circumstances.

The Court also found that there was an objective basis by which the peace officer could have harbored a reasonable suspicion that Appellant was driving while intoxicated, and he could have detained the Appellant to investigate that offense as well.

Judge Yeary announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV in which Presiding Judge Keller and Judges Meyers, Alcala and Richardson joined, and an opinion with respect to Part II in which Presiding Judge Keller, and Judges Meyers and Richardson joined.
Judge Richardson filed a concurring opinion in which Judge Meyers joined.
Judge Keasler filed a dissenting opinion in which Judges Johnson and Hervey joined.
Judge Newell filed a dissenting opinion.

You may read the Court's opinion here; Judge Newell's dissenting opinion here; Judge Keasler's dissenting opinion here; and Judge Richardson's concurring opinion here.

State v. Bernard No. 14-15-00822-CR (14th COA 11/8/16)
The 14th Court of Appeals declined to apply the Court of Criminal Appeals' plurality decision in *Leming v. State* and instead applied the *Hernandez* analysis regarding TTC §545.060, holding that there is only a violation when the State can prove BOTH that the defendant failed to maintain a single lane and did so in an unsafe manner.

State v. Alderete, 2010 WL 1634580 (Tex. App.—El Paso 2010) Officers observed the defendant continuously weaving in her lane for half of a mile in the early morning hours. Both officers testified that they had received training in DWI detection and the weaving in a single lane was a common characteristic of an intoxicated driver. The Court held that the trial court's focus on the sole issue of weaving within the lane not giving rise to a reasonable suspicion that a traffic-code violation was committed, was error in that the court failed to consider whether the officers had reasonable suspicion, based on the totality of the circumstances, that Alderete was driving while intoxicated.
See the following cases also dealing with weaving in a single lane of traffic:

Rafaelli v. State, 881 S.W.2d 714 (Tex. App.—Texarkana 1994, pet. ref'd)
Dowler v. State, 44 S.W.3d 666 (Tex. App.—Austin 2001, pet. ref'd)
Fox v. State, 900 S.W.2d 345 (Tex. App.—Fort Worth 1995, (pet. dism'd, improv. Granted, 930 S.W.2d 607 [Tex. Crim. App. 1996])

Community Care-Taking

Gonzales v. State, 369 S.W.3d 851 (Tex. Crim. App. 2012) Officer was properly exercising his community-caretaking function because under the totality of the circumstances, it was reasonable to believe that the defendant was in need of help when he pulled over on the shoulder of the road at 1:00am with few businesses or houses nearby and light traffic. Analysis to determine whether exercise of community-caretaking function is reasonable is an objective one focusing on what the officer observed and whether the inference that the individual was in need of help was reasonable.

CHARGING INSTRUMENT/INFORMATION

Chapter 21 Texas Code of Criminal Procedure

INTOXICATION

State v. Barbernell, 257 SW3d 248 (Tex. Crim. App. 2009) the definitions of "intoxicated" in Section 49.01(2) are evidentiary and therefore do not need to be alleged in a charging instrument. Therefore, a trial court should not quash a DWI information charging a defendant with DWI due to the State's failure to allege the definition of "intoxicated" that it intends to prove at trial.

MENTAL OR PHYSICAL FACULTIES:

McGinty v. State, 740 S.W .2d 475 (Tex.App.-Houston [1st Dist.] 1987, pet. ref'd). The pleading of the type of intoxication is not required because it is essentially evidentiary, and does not concern the manner in which the offense of driving while intoxicated was committed. The State is not required to plead its evidence.
Sims v. State, 735 S.W.2d 913 (Tex.App.-Dallas 1987, pet. refd).
Nelson v. State No. 11-14-00276-CR (11th COA 9/8/16)
State is not required to prove that a defendant lost both mental and physical faculties to prove intoxication. If the State can prove loss of mental or physical faculties, a jury is entitled to find the defendant guilty of DWI.
State may plead loss of normal use and BAC above .08 in the conjunctive and charge in the disjunctive. The definitions for intoxication under TPC 49.01 set forth alternate means by which the State may prove intoxication rather than alternate means of committing the offense.

"PUBLIC PLACE" IS SPECIFIC ENOUGH

Rav v. State, 749 S.W.2d 939 (Tex.App.-San Antonio 1988, pet. ref'd).
Kinq v. State, 732 S.W .2d 796 (Tex.App.-Fort Worth 1987 , pet. refd).
Allegation of "public place" is a sufficiently specific description.

NO MENTAL STATE NECESSARY

Lewis v. State, 951 S.W.2d 235 (Tex.App.-Beaumont 1997, no pet.).
Reed v. State, 916 S.W.2d 591 (Tex.App.-Amarillo, 1996, pet. ref'd).
Chunn v. State, 923 S.W.2d728 (Tex.App.-Houston [1st Dist.] 1996, pet. ref'd).
Sanders v. State, 936 S.W.2d 436 (Tex.App.-Austin 1996, pet. ref'd).
State v. Sanchez, 925 S.W.2d 371(Tex.App.-Houston [1st Dist.]1996, pet. ref'd).
Burke v. State, 930 S.W.2d230 (Tex.App.-Houston [14th Dist.] 1996, pet. ref'd).
Aquirre v. State, 928 S.W.2d 759 (Tex.App.-Houston [14th Dist.] 1996, no pet.).

UNOBJECTED TO ERROR IN CHARGING INSTRUMENT

McCoy v. State, 877 5.W.2d844 (Tex.App.-Eastland 1994, no pet.).
Where charging instrument mistakenly alleged loss of "facilities" and no objection was made prior to trial, the judge could properly replace the term with "faculties" in the jury charging Instrument

READING DWI ENHANCEMENT AT WRONG TIME

Pratte v. State, 2008 WL 5423193 (Tex.App.-Austin 2008, no pet).
The court allowed the State to read the enhancement paragraph in front of the jury that alleged a prior DWI conviction over the defendant's objection. Article 36.01 of the Code of Criminal Procedure says that when prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment. In this particular case, the defendant stipulated to the prior listed in the enhancement after the information was read and before the State called its first witness so the Court holds that the error did not contribute to the defendant's conviction.

B.A.C. .15 OR GREATER

Navarro v. State, 469 S.W.3d687 (Tex. App.—Houston [14th Dist.]2014, pet. ref'd)
Penal Code 49.04(d) describes an element of DWI, not an enhancement. The effect of subsection d is to convert an offense from a Class B misdemeanor to a Class A misdemeanor whenever a person charged with DWI is shown to have an alcohol concentration level of 0.15 or more. Because this conversion represents a change in the degree of the offense, rather than just an enlargement of the punishment range for a Class B misdemeanor, a person's alcohol concentration level is not a basis for enhancement and is instead an element of a separate offense.

Castellanos v. State No. 13-14-00524-CR (13th COA 10/27/16)

49.04(d) describes an element of a Class A misdemeanor DWI, which the State has the burden to prove at the guilt/innocence stage of a defendant's trial. Because the jury never made a finding regarding Castellano's BAC level, the trial court erred in convicting and sentencing her for a Class A misdemeanor.

DOUBLE JEOPARDY

State v. Bara No. 11-15-00158-CR (11th COA 7/28/16)

Section 49.045 has, as the allowable unit of prosecution, one offense for each incident of driving or operating a vehicle. Therefore, charging the defendant with two violations of DWI with a child passenger because there were two child passengers is a violation of double jeopardy.

Gonzalez v. State No. 13-16-00134-CR (12/8/16 13th COA)

Convicting the defendant of three counts of DWI with a child passenger when they all arose out of the same traffic case was a violation of the prohibition against double jeopardy. The allowable unit of prosecution of Penal Code §49.045 is one offense for each incident of driving or operating a vehicle, not for each child in the vehicle.

ELEMENTS OF THE OFFENSE OF DWI

INTOXICATION

NORMAL USE OF MENTAL OR PHYSICAL FACULTIES

Allegation that defendant did not have the "normal use of his mental and physical faculties" does not require the State to prove what the defendant's normal faculties are. It simply means that the faculties to be tested must belong to the defendant.
Hernandez v. State, 107 S.W.3d 41 (Tex.App.—San Antonio 2003, pet. ref'd.)
Railsback v. State, 95 S.W.3d 473 (Tex.App.—Houston [1st Dist] 2002, pet. ref'd.).
Fogle v. State, 988 S.W.2d 891 (Tex.App.—Fort Worth 1999, pet. ref'd).
Reagan v. State, 968 S.W.2d 571 (Tex.App.—Texarkana 1998, pet. ref'd).
Massie v. State, 744 S.W.2d 314 (Tex.App.—Dallas 1988, pet. ref'd).

OPERATING A MOTOR VEHICLE

Any action that is more than mere preparation toward operating a motor vehicle is an "action o affect the functioning of his vehicle in a manner that would enable the vehicle's use.
Strong v State, 87 S.W.3d 206, 215 (Tex. App. Dallas 2002, pet.ref'd.)
Barton v. State, 882 S.W.2d 456, 459 (Tex. App. Dallas 1994, no pet)
"Operating" may be proved by circumstantial evidence. Evidence that the engine of the car was still hot has been held to support a finding that the defendant operated the vehicle. See *Johnson v. State,* 517 S.W.2d 536 (Tex. Crim. App. 1975). See also: *Green v. State,* 640 S.W.2d 645, 548 (Tex. App. Houston 14th Dist. 1982, no pet.); *Hernandez v. State*, 773 S.W.2d 761, 762 (Tex. App. San Antonio 1989, no pet.); *Roane v. State* 2010 WL 3399036 (Tex. App. Dallas 2010 pdr ref'd) and cert. denied 130 S. Ct. 3281 (2010)

PUBLIC PLACE

Texas Penal Code Section 1.07(a)(40)
Places held to be a public place:

Gated community with limited access
State v. Gerkenkorn, 239 S.W.3d 357 (Tex. App. San Antonio 2007, no pet)
A marina
Shaub v. State, 99 S.W.3d 253 (Tex. App. Fort Worth 2003, no pet)
A restaurant parking lot
Dornbusch v. State, 262 S.W.3d 432 (Tex. App.-Fort Worth 2008)
A street within a US Air Force Base
Woodruff v. State, 899 S.W.2d 443 (Tex. App.-Austin 1995 pdr ref'd.)
Military Bases
Woodruff v. State, 899 S.W.2d 443 (Tex.App.—Austin 1995, pet. ref'd).
Tracey v. State, 350 S.W.2d 563 (Tex.Crim.App. 1961).
A hotel parking lot
State v. Nailor, 949 S.W.3d 357 (Tex. App.-San Antonio 1997, no pet.)
A closed city park
Perry v. State, 991 S.W.2d 50 (Tex. App.-Fort Worth 1998 pdr ref'd)

Places held to NOT be a public place:

A private residence
Pugh v. State, 55 Tex. Crim. 462 117 S.W. 817 (1909)
A driveway to a private residence
Fowler v. State, 65 S.W.3d 116 (Tex. App.-Amarillo 2001, no pet.)

VOIR DIRE

PROPER QUESTION/STATEMENT

Kirkham v. State, 632 S.W.2d 682 (Tex.App.-Amarillo 1982, no pet.).
Voir dire question, "Do you believe a person is best judge of whether they are intoxicated?" is proper and is not a comment on defendant's right not to testify.
Vrba v. State, 151 S.W.3d 676 (Tex.App.-Waco 2004, pet. ref'd.).
The following questions asked by the prosecution were proper in that they were not "commitment questions:"
"What are some signs that somebody is intoxicated?"
"Who thinks that the process of being arrested would be something that might sober you up a little bit?'
"Why do you think someone should be punished?"
"Which one of these [four theories of punishment] is most important to you in trying to determine how someone should be punished and how much punishment they should receive?"

IMPROPER

Harkev v. State, 785 S.W.2d 876 (Tex.App.-Austin 1990, no pet.).
Defense attorney asking member of jury panel "if they could think of a reason why anyone would not take such a (breath) test" held to be improper in its "form."
Standefer v. State, 59 S.W.3d 177 (Tex.Crim.App. 2001).
The question, "lf someone refused a breath test, would you presume him/her guilty on their refusal alone?" was held to be improper as it constitutes an attempt to commit the juror. This case also reaffirms that a juror may permissibly presume guilt from evidence of a refusal to give a breath or blood test.
Davis v. State, No. 14-03-00585-CR, 2006 WL2194708, (Tex.App.-Houston [14th Dist.]2006, no pet.) (not designated for publication).
Even if State established that breath-testing device was functioning properly at the time of the test, that the fest was properly administered, and that defendant's test result was 0.08 or above, defendant was still entitled to challenge, and the jury to disbelieve, the reliability of the methodology used by the device, and State's misstatements to the contrary during voir dire required reversal.

CHALLENGE FOR CAUSE

1. PRESUMPTION OF INNOCENCE

Harkey v. State, 785 S.W.2d 876 (Tex.App.-Austin 1990, no pet.).
Jurors stating, in response to suggestion by defense counsel that defendant "must be guilty of something or he wouldn't be there" did not provide a basis for challenge for cause.

2. ONE WITNESS CASE

Zinqer v. State, 932 S.W.2d 511 (Tex.Crim.App. 1996).
Leonard v. State, 923 S.W.2d770 (Tex.App.-Fort Worth 1996, no pet.).
Castillo v. State, 913 S.W.2d 529 (Tex.Crim.App.1995).
Garrett v. State, 851 S.W.2d 853 (Tex.Crim.App.1993).
Statement by venire person that "testimony of one witness would not be enough for him to convict even if that testimony proved all elements beyond a reasonable doubt" mav make that juror challengeable for cause .
McKinnon v. State,2004WL 878278 (Tex..App.-Dallas 2004, pet. ref'd) (not designated for publication).
Question of "Would you require the State to bring you a blood or breath test?" is not improper "commitment question," and a juror that says that they would not be able to convict without such a test ls subject to a challenge for cause.
Fierro v. State, 969 S.W.2d 51 (Tex.App.-Austin 1998, no pet.).
Prospective juror who stated he would be unable to convict in the absence of a breath test was entitled to rely. He would be holding State to a higher level of proof of intoxication than the law required.

EVIDENTIARY ISSUES

VIDEO

TRE 901

Leos v. State, 883 S.W.2d 209 (Tex. Crim. App. 1994)-Rule 901 of the Texas Rules of Evidence controls on the issue of proper predicate for admission of videotapes.

PORTIONS OF RECORDING SUBJECT TO SUPPRESSION:

a) Invocation of Right to Counsel

Hardie v. State, 807 S.W.2d 319 (Tex. Crim. App. 1991).
Opp v. State, 36 S.W.3d 158 (Tex. App.-Houston (1st Dist.) 2000, pet ref'd).
Jury should not have been allowed to hear defendant's invocation of his right to counsel on video

b) Miranda Warnings and Inquiry if Defendant wishes to waive his rights

Kalisz v. State, 32 S.W.3d 718 (Tex. App.-Houston (14th Dist.) 2000, pet ref'd).
Dumas v. State, 812 S.W.2d 611 (Tex. App.-Dallas 1991 pet ref'd).
Improper for jury to be allowed to hear the officer give Defendant his Miranda warnings and inquire as to whether he wishes to waive those rights. Turning down the volume to exclude Defendant's refusal could lead the jury to conclude that he did invoke his rights.

c) Invocation of Right to Terminate the Interview

Cooper v. State, 961 S.W.2d 229 (Tex. App.-Houston 1997, no pet).

d) Extraneous Offenses-Objection required

Johnson v. State, 747 S.W.2d 45 (Tex. App.-Houston (14th Dist.) 1988, pet ref'd).
Extraneous offenses mentioned by defendant or law enforcement are suppressIble if objection is made at the time of the offer. Otherwise, error is waived.

PORTIONS OF RECORDING IN WHICH SUPPRESSION SHOULD BE DENIED

a) Refusal to perform SFST's

Barraza v. State, 733 S.W.2d 379 (Tex. App.-Corpus Christ, 1987, pet granted) Aff'd 790 S.W.2d654 (Tex. Crim. App. 1990)

Jury is allowed to hear Defendant's refusal to perform SFSTs

b) If audio is suppressed, video is still admissible.

Fierro v. State, 969 S.W.2d 51 (Tex. App.-Austin 1998, no pet).

c) Refusal to take intoxilyzer test with a request to consult with an attorney.

Griffith v. State, 55 S.W.3d 598 (Tex. Crim. App. 2001).

Defendant's constitutional rights were not violated by the admission, as substantive evidence of guilt, of a recording of the Defendant's request for an attorney when he was asked to take a breath-alcohol test before receiving Miranda warnings or being charged with an offense.

d) Video when audio was not recorded

Akins v. State, 14-06-00545 (Court of Appeals-Houston (14th Dist) 2007).
Court did not err in admitting the videotape from a roadside stop into evidence at trial because the audio portion was not recorded due to a non-working microphone. Defendant failed to rebut the presumption that the videotape was more probative than prejudicial.

e) Video of Field Sobriety Tasks

Townsend v. State, 813 S.W.2d 181 (Tex. App.-Houston (14th Dist.) 1991, pet ref'd). Visual depictions of a sobriety test are not testimonial in nature and therefore do not offend the federal or state privilege against self-incrimination.

f) Absence of a videotape
Not Grounds for Acquittal.
Williams v. State, 946 S.W.2d 886 (Tex. App.-Waco 1997, no pet).

g) Destruction of Tape
To support a motion to dismiss based on the destruction of a video, movant must show the destruction to have been in "bad faith".

h) Failure to Videotape
Logan v. State, 757 S.W.2d 160 (Tex. App.-San Antonio 1988, no pet)
No jury instruction on State's failure to videotape
Manor v. State, 2006 WL 2692873 (Tex. App.-Eastland, 2006, no pet)
Court did not err in failing to submit an instruction on spoliation after the State failed to produce a videotape of the traffic stop in question. The State's law enforcement witness stated that he did not know where it was. A defendant in a criminal prosecution is not entitled to a spoliation instruction where there is no showing that the evidence was exculpatory or that there was bad faith on the part of the State in connection with its loss.

FIELD SOBRIETY TASKS:

1. HGN

a) HGN admissible under the Texas Rules of Evidence 702
b) To be reliable, evidence must satisfy these three criteria:
1) The underlying scientific theory must be valid.
2) The technique applying the theory must be valid: and
3) The technique must have been applied properly on the occasion in question
c) The Court of Criminal appeals in
Emerson v. State, 880 S.W.2d 759, 769 (Tex. Crim. App. 1994). Found criteria (1) and (2) to be met.
In each case it must be shown that the technique was property applied.
d) Police Officer Testimony Needed to Admit HGN Test Result
A police officer must qualify as an expert on the HGN test, specifically concerning its administration and technique, before testifying about a defendant's performance on the test. Proof that the police officer is certified in the administration of the HGN test by the Texas Commission on Law Enforcement Officer Standards and Education satisfies this Requirement
e) Certification is not required. Predicate must satisfy TRE 702
Emerson, 880 S.W.2d at 769.
f) Purpose and Limits of HGN
HGN admissible to prove intoxication.
Emerson, 880 S.W.2d at 769.
Caution: Officer is not allowed to correlate the results of the test to a particular BAC
Smith v. State, 65 S.W.3d 332 (Tex. App.-Waco 2001, no pet)
Webster v. State, 26 S.W.3d 17 (Tex. App.-Waco 2000, pet ref'd)

It is error to take judicial notice of the HGN's reliability: *O'Connell v State*, 17 S.W.3d 746 (Tex. App.-Austin 2000, no pet)

g) A trial court does not violate the Fifth Amendment by allowing an in-court field sobriety test to show that the defendant did not have resting nystagmus because the testing did not elicit testimonial communications. Clement v. State No. 02-14-00267-CR (2nd COA 7/14/16).

2. Impact of failing to perform per NHTSA Guidelines

Small variations on testing procedure do not render HGN inadmissible
Maupin v. State, No. 11-09-00017-CR, 2010 WL 4148343 (Tex. App.-Eastland 2010, pdr ref'd)
Soto v. State, 2009 WL 722266 (Tex. App.-Austin, 2009)

2. ONE LEGGED STAND AND WALK AND TURN

Officer's testimony is lay witness testimony governed by TRE 701
McRae v. State, 152 S.W.3d 739 (Tex. App.-Houston [1st Dist.] December 02, 2004, pdr ref'd.)
Plouff v. State, 192 S.W.3d 213 (Tex. App.-Houston [14th Dist.], 2006)

BREATH TEST PREDICATE

1. *Harrell v. State*,725 S.W.2d 208 (Tex.Crim.App. 1986).
PREDICATE:
a) proper use of reference sample.
b) existence of periodic supervision over machine and operation by one who understands scientific theory of machine.
c) proof of result of test by witness or witnesses qualified to translate and interpret such result so as to eliminate hearsay.

2. *Kercho v. State*, 948 S.W.2d 34 (Tex.App.-Houston [14th Dist.] 1997, pet. ref'd).
The testimony of an Intoxilyzer operator and a technical supervisor to the effect that the instrument was periodically tested to ensure that it was working properly, that a test sample run prior to appellant's Intoxilyzer tests demonstrated the machine was functioning properly at that time, that the operator had been trained in the operation of the Intoxilyzer machine, and that the technical supervisor, who also testified about the theory of the test, was certified by the Department of Public Safety as a technical supervisor, was sufficient predicate to admit the results of the Intoxilyzer test.

BLOOD TESTS

Transp. Code Sec. 724.012(b) Mandatory Blood Draws

Transp. Code Sec. 724.064. Admissibility in Criminal Proceeding of Specimen Analysis

Mandatory Blood Draw:

Missouri v. McNeely, 133 S. Ct. 1152 (2013) A warrantless search of a person for the purpose of gathering evidence in a criminal investigation can be justified only if it falls within a recognized exception to the warrant requirement. This principle applies to compulsory blood-specimen collection during a DWI investigation. The natural dissipation of alcohol does not constitute a per se exigency. Exigent circumstances must be determined by a careful case-by-case assessment of exigency.
The State of Texas v. David Villarreal PD-0306-14 Motion for Re-Hearing granted 2/25/15 denied as improvidently granted 12/16/15 Writ of Cert to US Supreme Court denied 7/11/16
Holding: A nonconsensual search of a DWI suspect's blood conducted pursuant to the mandatory-blood-draw and implied-consent provisions in the Transportation Code, when undertaken in the

absence of a warrant or any applicable exception to the warrant requirement, violates the Fourth Amendment.

Consent:

Birchfield v. North Dakota, US Supreme Court 14-1468 decided 6/23/16

Danny Birchfield drove into a ditch in Morton County, North Dakota. When police arrived on the scene, they administered both the field sobriety tests and the preliminary breath test. He was arrested, but he refused to consent to a blood test. No warrant for a blood test was obtained. Birchfield was charged with a misdemeanor for refusing to consent to a chemical test in violation of state law. He moved to dismiss the charge and claimed that the state law violated his Fourth Amendment right against unreasonable search and seizure. The Court joined two other similar cases: (1) *Bernard v. Minnesota*, 14-1470. Police were called to the South St. Paul boat launch where three men were attempting to pull their boat out of the water and onto their truck. William Robert Bernard, Jr., admitted he had been drinking and had the truck keys in his hands, but he denied driving the truck and refused to perform a field sobriety test. He was arrested on suspicion of driving while impaired (DWI) and taken to the police station, where he refused to consent to a warrantless breath test in violation of Minnesota state law. Bernard was charged with two counts of first-degree test refusal pursuant to state law; and (2) *Beylund v. Levi*, 14-1507. Steve Beylund consented to a blood alcohol to test to confirm he was driving under the influence after being informed it was a criminal offense in North Dakota to refuse a blood alcohol test. The test confirmed he was over the legal limit, and Beylund was charged with driving under the influence. All three defendants argued that criminalizing a refusal to submit to a warrantless chemical test for alcohol violates the 4th Amendment.

Justice Alito wrote the majority opinion in which the court held:

The Fourth Amendment permits warrantless **breath** tests incident to arrests for drunk driving but not warrantless **blood** tests.
The Court analyzed the warrantless breath tests and blood tests as searches incident to arrest. The Court found that the breath tests do not implicated significant privacy concerns. The intrusion is negligible and entail a minimum of inconvenience. The Court also noted that a breath test only yields a BAC reading and leaves no biological sample in the government's possession and finally, that participation in a breath test is not likely to enhance the embarrassment inherent in any arrest.
The Court then noted that the same findings could not be stated for blood tests. They require piercing of the skin and extract a part of the subject's body. The Court found blood tests to be significantly more intrusive than blowing into a tube. The Court also noted that a blood test gives law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading.

This holding resulted in a reversal and remand of *Birchfield v. North Dakota*, an affirmation of *Bernard v. Minnesota* and a vacate and remand of *Beylund v. Levi* to determine whether consent was given voluntarily in light of the opinion in this case.

Justice Sotomayor wrote a dissenting opinion in which Justice Ginsburg concurred in part and dissented in part.

Ramos v. State, 124 S.W.3d 326 (Tex. App.-Fort Worth 2003, pet ref'd)
Bennett v. State, 723 S.W.2d 359 (Tex. App.-Fort Worth 1987, no pet).
Defendant's consent to a blood alcohol test relieved the officers of any obligation to comply with mandatory blood draw statute

Exigent Circumstances:

Cole v. State PD-0077-15 (Texas Court of Criminal Appeals 5/25/16).

Appellant moved to suppress the results of a warrantless blood draw at his trial for intoxication manslaughter. The trial court denied the motion and found that there were exigent circumstances that made obtaining a warrant impractical. The court of appeals did not so find and reversed the trial court's decision. The Court of Criminal Appeals concluded that there were exigent circumstances and that the warrantless search was justified under the exigency exception to the requirement of a warrant under the Fourth Amendment.

Those exigent circumstances included:
The amount of time it took for the arresting officer to investigate the accident scene that took up an entire city block; (3 hours); (2) the arresting officer testified that it was not feasible for him to leave the accident scene and that no one else was capable of determining the nature or cause of the accident and who was at fault; (3) The fourteen officers who were present on the scene were all performing important law enforcement or public safety duties and could not be called away from the scene; (4) Even if the arresting officer had attempted to obtain a warrant from an on-call magistrate, the issuance of a warrant would have taken an hour to an hour and a half "at best" and the uncertainty of appellant's physical condition and his admission that he had used "meth" created a concern that medication administered at the hospital could affect any subsequent blood sample; and (5) the officer did not know the elimination rate of methamphetamine so did not know how much evidence would be lost as time passed.

Judge Keasler delivered the opinion of the Court, in which Presiding Judge Keller and Judges Meyers, Hervey, Alcala, Richardson, and Newell joined.
Judge Johnson, filed a dissenting opinion.
Judge Yeary concurred.

Weems v. State PD-0635-14 5/25/16 Motion for Rehearing filed on 6/9/16

Appellant was involved in a one car accident. A passing car stopped after seeing the car on its roof with its tires spinning. The driver of the passing car witnessed appellant climb out of the driver's side window. He exhibited signs of intoxication including stumbling and difficulty maintaining balance. The witness asked if appellant was okay or if he was drunk. Appellant said he was drunk and then fled the scene. When a Bexar County Sheriff's Deputy (Munoz) arrived on the scene a woman waved him down and told him that someone was under her car. The deputy saw an injured man under the car who matched the description of the driver of the wrecked car. Appellant was detained. Munoz noted appellant's

bloodshot eyes, slurred speech, bloodied face and inability to stand on his own. Appellant was taken into custody by another Bexar County Sheriff's deputy (Bustamante). No field sobriety tasks were conducted due to appellant's injuries.

Appellant refused to give a blood or breath sample. He was treated at the scene by EMS and then transported to University Hospital complaining of neck and back pain. Officer Bustamante followed the ambulance to the hospital. The hospital was located just minutes from the accident scene.

When Bustamante arrived at the hospital, he filled out a form requesting a blood draw and gave it to the nurse in charge. Appellant's blood was drawn at 2:30am over two hours after his arrest. The blood test result was .18 grams per deciliter.

At trial, appellant moved to suppress the blood test results relying on *Missouri v. McNeely,* 133 S.Ct. 1552 (2013). The trial judge overruled appellant's objection and the blood test was admitted. Appellant was convicted of felony DWI and sentenced to eight years confinement.

On appeal, the Fourth Court of Appeals held that failing to suppress the warrantless blood draw results was harmful error. The court found that the record developed at trial did not support admitting the evidence under the exception of exigent circumstances.

The Court of Criminal appeals considered the totality of the circumstances and agreed with the appellate court that the record did not support a finding of exigent circumstances. The record was silent as to the procedures for obtaining a warrant when an arrestee is transported to a hospital. Without that information, the Court was unable to weigh the time and effort required to obtain a warrant against the circumstances that informed Bustamante's decision to order a warrantless blood draw. The Court considered the following factors that weighed against exigency: The hospital was only a couple of minutes away, so transporting the appellant to the hospital did not necessarily make obtaining a warrant impractical; Bustamante had another officer with him (Shannon) who waited with Bustamante and appellant at the hospital until the blood was drawn; and Shannon then transported the sample to an evidence locker at the Magistrate's office for subsequent testing. The Court held that the State was unable to demonstrate that practical problems existed in obtaining a warrant within a timeframe that would still preserve the opportunity to obtain reliable evidence and thus failed to meet its burden to establish that exigent circumstances existed.

Judge Keasler delivered the opinion of the Court, in which Presiding Judge Keller and
Judges Meyers, Johnson, Hervey, Alcala, Richardson, and Newell joined.
Judge Yeary did not participate.

See also: *State v. Keller* No. 05-15-00909-CR (5th COA 8/11/16 not published) A warrantless blood draw was taken while the defendant was in a medically induced coma following a crash that she caused. Holding: a warrantless blood draw was justified by exigent circumstances. Those circumstances included the severity of the crash, the logistical and practical constraints posed by a potentially fatal accident, the necessity of securing the site and protecting the public as well as law enforcement's belief that alcohol did not appear to be the intoxicant and without knowing what intoxicant was involved or its elimination rate, law enforcement faced inevitable evidence destruction without a known elimination rate.

Cosino v. State No. 10-14-00221-CR (10th COA 8/3/16)
When investigating officer of a possible intoxication related crash is the only trooper on duty in the county and is responsible for cleanup of the crash and the investigation, State met its burden to show that there are exigent circumstances justifying a warrantless seizure of blood.

OCCUPATIONAL LICENSE

Texas Transportation Code 521.242 through 521.246

Wood v. Texas Department of Public Safety,33l S.W.3d 78 (Tex.App.-Fort Worth 2010, no pet.). The Court holds that it was improper to deny the defendant an occupational license for failure to pay surcharges. Failure to pay surcharges is not listed as a basis for such denial and Court assumes that if the legislature had intended that drivers suspended for failure to pay surcharges be ineligible for occupational licenses, it would have said so.

DeLeon v. State, 284 S.W.3d 894 (Tex. App.-Dallas 2009) Section 524.246 requires that the person have been convicted of driving while intoxicated, intoxication assault, or intoxication manslaughter before the trial court has authority to require the person's vehicle be fitted with an ignition interlock device. The record does not show appellant has been convicted of any of these offenses, and appellant testified he had never been convicted of any offense. Accordingly, the trial court did not have authority to impose the requirement of an ignition interlock device, and its requirement that appellant have an ignition interlock device installed on his car was without reference to any guiding rule or principle.