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CRIMINAL PROCEDURE: CONFESSION, SEARCH AND SEIZURE

*Mike Keasler**

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IN reviewing criminal cases of the past year, we see that our courts are interpreting the United States and Texas Constitutions identically as they deal with confessions, searches, and seizures. Harmless error analysis is routinely applied, and both state and federal appellate courts give credence to trial court fact-findings unless they are clearly erroneous.

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I. CONFESSIONS

A. VOLUNTARINESS

Courts determine a confession's voluntariness by considering the totality of the circumstances.¹ Some of the circumstances considered this year, but held not to preclude admissibility, were the following: mental retardation,² lengthy interrogation and sleep deprivation,³ ignorance of the statement's consequences,⁴ intoxication,⁵ and delay in interrogation.⁶

A confession is voluntary if under all the circumstances it is a product of the defendant's free and rational choice,⁷ in the absence of official overreaching, either by direct coercion or subtle psychological persuasion.⁸ It is involuntary if official, coercive conduct makes it "unlikely to have been the product of essentially free and unconstrained choice by its maker."⁹ And if a statement is induced by a promise of some benefit to the defendant, made or sanctioned by one in authority, and is likely to influence the defendant to speak untruthfully, it is involuntary.¹⁰

Some of the following factors may be considered in determining whether a defendant's will has been overborne: length of detention, prolonged interrogation, or whether the suspect is held incommunicado, denial of access to a family member, refusal of suspect's request to call a lawyer, and physical brutality.¹¹

B. CUSTODIAL INTERROGATION

In determining whether a person is in custody, the court will again consider the totality of the circumstances.¹² As applied to interrogation, a person is in custody when he or she has been formally arrested or when a reasonable person would believe that his or her freedom of movement

1. See *Harner v. State*, 997 S.W.2d 695, 699 (Tex. App.—Texarkana 1999, no pet. h.); *Humphries v. State*, 993 S.W.2d 826, 830 (Tex. App.—El Paso 1999, pet. ref'd); *Pace v. State*, 986 S.W.2d 740, 744 (Tex. App.—El Paso 1999, pet. ref'd); *Tinlin v. State*, 983 S.W.2d 65, 71 (Tex. App.—Fort Worth 1998, pet. ref'd); *United States v. Mullin*, 178 F.3d 334, 341 (5th Cir. 1999), cert. denied, 120 S. Ct. 454 (1999); *United States v. Posada-Rios*, 158 F.3d 832, 866 (5th Cir. 1998), cert. denied sub. nom., *Murga v. United States*, 119 S. Ct. 1280 (1999), *Parada v. United States*, 119 S. Ct. 1487 (1999), *Rios-Castano v. United States*, 211 S. Ct. 1792 (1999).

2. See *Jones v. Johnson*, 171 F.3d 270, 278 (5th Cir. 1999), cert. denied, 120 S. Ct. 29 (1999); *Harner*, 997 S.W.2d at 700.

3. See *Barnes v. Johnson*, 160 F.3d 218, 223 (5th Cir. 1998), cert. denied, 119 S. Ct. 1768 (1999).

4. See *id.*; *Humphries*, 993 S.W.2d at 830.

5. See *Pace*, 986 S.W.2d at 748.

6. See *Mullin*, 178 F.3d at 342.

7. See *Posada-Rios*, 158 F.3d at 866.

8. See *Mullin*, 178 F.3d at 342.

9. *Tinlin v. State*, 983 S.W.2d 65, 71 (Tex. App.—Fort Worth 1998, pet. ref'd) (quoting *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995)); *In re M.R.R.*, 2 S.W.3d 319 (Tex. App.—San Antonio 1999, no pet.) (quoting *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995)).

10. See *Humphries v. State*, 993 S.W.2d 826, 828 (Tex. App.—El Paso 1999, pet. ref'd).

11. See *Pace v. State*, 986 S.W.2d 740, 747 (Tex. App.—El Paso 1999, pet. ref'd).

12. See *In re L.M.*, 993 S.W.2d 276, 287 (Tex. App.—Austin 1999, pet. denied).

was restricted to the degree associated with a formal arrest.¹³

The Miranda warnings as codified in the Texas Code of Criminal Procedure apply only to statements made during custodial interrogation.¹⁴ “[I]f an investigation is not at the accusatorial or the custodial stage, a person’s Fifth Amendment rights have not yet come into play and the voluntariness of [those rights] is not implicated.”¹⁵

“Pre-arrest silence is a constitutionally permissible area of inquiry” for the prosecution at trial.¹⁶ On the other hand, a prosecutor may not use a defendant’s post-arrest silence substantively or for impeachment.¹⁷

C. ORAL STATEMENTS

Texas, of course, is the only state that has requirements for oral confessions exceeding those of written statements. Recently, the court of criminal appeals and intermediate Texas appellate courts reiterated that if an accused’s oral statement contains even a single fact assertion unknown to law enforcement at the time, but later found to be true and conducive to establishing his or her guilt, the statement is admissible in its entirety.¹⁸

D. RECORDED (TAPED) STATEMENTS

Texas Code of Criminal Procedure article 38.22 provides greater protection to the accused than the United States Constitution provides. The key requirements are that the recording be a fair and accurate representation of the statement, that it not be altered, and that all voices on the tape be identified. These requirements having been met, the Texarkana court of appeals held a recording admissible, even though the investigating officer did not know who turned on the recording machine, did not know the extent of that person’s training, or whether he or she was competent.¹⁹

E. JUVENILES

Texas courts enforce the legislature’s clear intent to reduce an officer’s impact on a juvenile in custody.²⁰ Failure to strictly observe all Family Code provisions applicable to juvenile interrogation will render a confes-

13. See *id.* at 284-85; *Chiles v. State*, 988 S.W.2d 411, 413 (Tex. App.—Houston [1st Dist.] 1999, pet. ref’d).

14. See *Fiedler v. State*, 991 S.W.2d 70, 79 (Tex. App.—San Antonio 1998, no pet.).

15. *Id.* at 80.

16. *Peters v. State*, 997 S.W.2d 377, 388 (Tex. App.—Beaumont 1999, no pet. h.) (quoting *Waldo v. State*, 746 S.W.2d 750, 755 (Tex. Crim. App. 1988)).

17. See *United States v. Moreno*, 185 F.3d 465, 475 (5th Cir. 1999), cert. denied, 120 S. Ct. 835 (2000).

18. See *Moore v. State*, 999 S.W.2d 385, 401 (Tex. Crim. App. 1999), pet. for cert. filed, (Jan. 4, 2000) (No. 99-8315); *Cameron v. State*, 988 S.W.2d 835, 845 (Tex. App.—San Antonio 1999, pet. ref’d), cert. denied 120 S. Ct. 1185 (2000); *Guevara v. State*, 985 S.W.2d 590, 593 (Tex. App.—Houston [14th Dist.] 1999, pet ref’d).

19. See *Falcetta v. State*, 991 S.W.2d 295, 297-98 (Tex. App.—Texarkana 1999, no pet.).

20. See *Baptist Vie Le v. State*, 993 S.W.2d 650, 653 (Tex. Crim. App. 1999).

sion inadmissible.²¹

II. SEARCH AND SEIZURE

A. IN GENERAL

It is safe to say that under current law, the Texas Constitution affords no greater protection against unreasonable searches and seizures than the United States Constitution. Indeed, in at least one area—that of the requirement of a warrant—it may offer less.²² Texas courts are generally following the United States Supreme Court's lead in search and seizure cases. Virtually all the Texas cases in this area are primarily analyzed in light of the Fourth Amendment, rather than the Texas Constitution.

This year, the courts reminded us that the Fourth Amendment does not forbid all searches and seizures—only unreasonable ones,²³ and that one complaining of a search must have a reasonable expectation of privacy.²⁴ The Supreme Court told us that the extent to which the Fourth Amendment protects people depends upon where those people are. Thus, an overnight guest in a home has a legitimate expectation of privacy and may properly claim the Amendment's protection, but one who is merely present with the consent of the householder may not.²⁵

The Supreme Court also pointed out that in deciding whether a particular governmental action violates the Fourth Amendment, it will first determine whether the action was regarded as an unreasonable search and seizure under the common law when the Amendment was framed. If that inquiry is fruitless, it will evaluate the search or seizure under traditional standards of reasonableness by weighing the degree of intrusion upon the individual's privacy against the degree to which the search or seizure is needed to promote legitimate governmental interests.²⁶

The Fifth Circuit noted that the reasonableness inquiry under the Fourth Amendment is an objective one, wholly divorced from the subjective beliefs of police officers. “[S]o long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry.”²⁷

As to what constitutes a “seizure” for Fourth Amendment purposes, a person is “seized” when he or she is “subjected to application of physical

21. See *In re C.R.*, 995 S.W.2d 778, 785 (Tex. App.—Austin 1999, pet. denied); *In re L.M.*, 993 S.W.2d 276, 287 (Tex. App.—Austin 1999, pet. denied).

22. See *Hulit v. State*, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998).

23. See *Walter v. State*, 997 S.W.2d 853, 859 (Tex. App.—Austin 1999, pet. granted); *Scheneckl v. State*, 996 S.W.2d 305, 309 (Tex. App.—Fort Worth 1999, pet. filed).

24. See *Oles v. State*, 993 S.W.2d 103, 108 (Tex. Crim. App. 1999); *Rovnak v. State*, 990 S.W.2d 863, 867 (Tex. App.—Texarkana 1999, pet. ref'd); *Hypolite v. State*, 985 S.W.2d 181, 185 (Tex. App.—San Antonio 1998, no pet.).

25. See *Minnesota v. Carter*, 525 U.S. 83, 89 (1998).

26. See *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999).

27. *United States v. Castro*, 166 F.3d 728, 734 (5th Cir. 1999) (quoting *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987)), cert. denied, 120 S. Ct. 78 (1999), and cert. denied, 120 S. Ct. 309 (1999).

force or the person submits to an assertion of authority.”²⁸

B. ARREST, STOP, OR INQUIRY WITHOUT WARRANT

As to traffic stops, an officer’s observation of a traffic violation is sufficient authority for an officer to stop the vehicle and to detain the passenger for investigative purposes. It is also probable cause to arrest the driver.²⁹ And when a police officer lawfully arrests an occupant of an automobile, the officer may, as a contemporaneous incident of the arrest, search the passenger compartment of that automobile.³⁰ Furthermore, it does not matter if the search occurs before or after the arrest, so long as probable cause to arrest existed before the search.³¹ Certainly, the occupants of a stolen vehicle have no reasonable expectation of privacy to challenge its search.³²

“An investigative detention or stop is a brief detention of a person reasonably suspected of criminal activity to determine his identity or to maintain the status quo momentarily while obtaining more information.”³³ It is distinguished from an “arrest,” which “occurs when a person’s liberty of movement is restricted or restrained.”³⁴ An officer must have articulable suspicion to make a stop—less than probable cause—since a stop is less intrusive than an arrest.³⁵

In order to justify a pat-down search of an individual during a detention, a police officer need not have probable cause to arrest. Instead, “the issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety or that of others is in danger.”³⁶

A valid consensual encounter with police need not be supported by probable cause or even articulable suspicion. The test for determining whether an encounter with police qualifies as a valid consensual encounter is that set out in *Florida v. Bostick*.³⁷ The issue is “whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter. [The test] applies whether the encounter takes place on a

28. *Schenekl v. State*, 996 S.W.2d 305, 308 (Tex. App.—Fort Worth 1999, pet. filed); *In re J.M.*, 995 S.W.2d 838, 843 (Tex. App.—Austin 1999, no pet. h.).

29. *See Josey v. State*, 981 S.W.2d 831, 837 (Tex. App.—Houston [14th Dist.] 1998, pet. ref’d).

30. *See State v. Ballard*, 987 S.W.2d 889, 892 (Tex. Crim. App. 1999); *Reasor v. State*, 988 S.W.2d 877, 881 (Tex. App.—San Antonio 1999), *rev’d* 2000 WL 228439 (Tex. Crim. App. Mar. 1, 2000).

31. *See Ballard*, 987 S.W.2d at 892.

32. *See Busby v. State*, 990 S.W.2d 263, 270 (Tex. Crim. App. 1999), *cert. denied*, 120 S. Ct. 803 (2000).

33. *Josey*, 981 S.W.2d at 838.

34. *Id.*

35. *See United States v. Webster*, 162 F.3d 308, 332 (5th Cir. 1998), *cert. denied*, 120 S. Ct. 83 (1999); *Josey*, 981 S.W.2d at 837.

36. *Carmouche v. State*, 989 S.W.2d 392, 394 (Tex. App.—Beaumont 1999, pet. granted), *vacated w.r.m.*, 10 S.W.3d 323 (Tex. Crim. App. Jan. 26, 2000).

37. 501 U.S. 429, 435-36 (1991).

city street, in an airport terminal, or on a bus."³⁸

C. AFFIDAVITS SUPPORTING SEARCH WARRANTS

"Whether the facts alleged in a probable cause affidavit sufficiently support a search warrant is determined by examining the totality of the circumstances."³⁹ The affidavit must contain facts "within the affiant's knowledge and of which the affiant has reasonably trustworthy information sufficient to warrant a reasonably cautious person's belief that the offense has been committed and the evidence to be seized is at the particular place to be searched."⁴⁰ The task of the magistrate evaluating a probable cause affidavit is to make a practical, common-sense decision whether, based on the facts set out in the affidavit, there is a fair probability that contraband or evidence of a crime will be found at a particular place. And the magistrate may make reasonable inferences from the information contained in the affidavit.⁴¹

D. SEARCHES WITHOUT WARRANTS

Warrantless searches are unreasonable per se unless they qualify as one of the court-created exceptions to the general rule that a search must be conducted pursuant to a warrant. And the state has the burden to show that a search comes within an exception.⁴² It is not very difficult to do so.

A warrantless search of an automobile is permissible if conducted pursuant to a lawful impoundment.

Reasonable cause for impoundment may exist when: (1) the vehicle has been used in the commission of a crime; (2) an unattended vehicle is abandoned, illegally parked, or otherwise endangering other traffic; (3) the driver is incapacitated and unable to remove the vehicle; or (4) the driver is removed from his [or her] automobile, placed under custodial arrest, and his [or her] property cannot be protected by any means other than impoundment.⁴³

Of course, the search of a person incident to a lawful arrest is excepted from the requirement of obtaining a warrant.⁴⁴ And once a person has been arrested and is in jail, the clothing he was wearing when arrested may be searched without a warrant, since it is lawfully within the custody and control of the police. The expectation of privacy is lowered in arrest and detention situations.⁴⁵

38. *State v. Velasquez*, 994 S.W.2d 676, 679 (Tex. Crim. App. 1999) (quoting *Florida v. Bostick*, 501 U.S. 429, 440 (1991)).

39. *Mahmoudi v. State*, 999 S.W.2d 69, 72 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

40. *Wynn v. State*, 996 S.W.2d 324, 326 (Tex. App.—Fort Worth 1999, no pet. h.).

41. *See Shavers v. State* 985 S.W.2d 284, 289 (Tex. App.—Beaumont 1999, pet. ref'd).

42. *See Rovnak v. State*, 990 S.W.2d 863, 871 (Tex. App.—Texarkana 1999, pet. ref'd).

43. *Lagaite v. State*, 995 S.W.2d 860, 865 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

44. *See In re J.M.*, 995 S.W.2d 838, 841 (Tex. App.—Austin 1999, no pet. h.).

45. *See Oles v. State*, 993 S.W.2d 103, 108 (Tex. Crim. App. 1999).

Where a police officer has reasonable cause to believe, for example, that if a search were delayed to obtain a warrant, serious bodily injury or death might result, the “emergency” or “exigent circumstances” doctrine allows an immediate, warrantless search.⁴⁶ A non-exhaustive list of factors that may be considered in determining whether exigent circumstances exist are:

(1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the reasonable belief that contraband is about to be removed; (3) the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought; (4) information that the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic . . . of persons engaged in the narcotics trafficking.⁴⁷

Another well-established exception to the warrant requirement covers items in plain view of police officers when the officers are where they have a right to be.⁴⁸

Warrantless “inventory searches” of automobiles—including the trunks—are conducted after arrests as standard police policy.⁴⁹ They are proper if they are “conducted pursuant to standardized regulations and procedures that are consistent with (1) protecting property of the vehicle’s owner; (2) protecting the police against claims or disputes over lost or stolen property; and (3) protecting police from danger.”⁵⁰

In addition, the “automobile exception” to the Fourth Amendment’s search warrant requirement has no separate exigency requirement. If probable cause exists to search the car, no warrant is required.⁵¹ And it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. This rule applies to all containers within the car, without qualification as to ownership and without a showing of individualized probable cause for each container. Both passengers and drivers have a reduced expectation of privacy with regard to property they transport in cars.⁵²

On the other hand, when an officer stopped a motorist for speeding, but issued him a citation rather than arresting him, he was not constitutionally authorized to conduct a full search of the car, even though he had probable cause to make a custodial arrest.⁵³

46. See *Shavers*, 985 S.W.2d at 288.

47. *United States v. Morales*, 171 F.3d 978, 982 (5th Cir. 1999).

48. See *Reasor v. State*, 988 S.W.2d 877, 881 (Tex. App.—San Antonio 1999), *rev’d* 2000 WL 228439 (Tex. Crim. App. Mar. 1, 2000).

49. See *Jurdi v. State*, 980 S.W.2d 904, 907 (Tex. App.—Fort Worth 1998, *pet. ref’d*).

50. *United States v. Lage*, 183 F.3d 374, 380 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1179 (2000), and *cert. denied, sub. nom.*, *Diaz v. United States*, 120 S. Ct. 1180 (2000).

51. See *Maryland v. Dyson*, 119 S. Ct. 2013, 2014 (1999).

52. See *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999).

53. See *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998).

E. CONSENT TO SEARCH

Another exception to the Fourth Amendment's warrant and probable cause requirements is a search conducted with the consent of the person searched. Consent must be freely and voluntarily given, and voluntariness is determined from the totality of the circumstances. It must not be the product of duress or coercion, nor is it mere acquiescence to a claim of lawful authority.⁵⁴ The standard for measuring the scope of consent is that of objective reasonableness, that is, what the typical reasonable person would have understood by the exchange between the officer and the suspect.⁵⁵ The burden of proof is on the state to show by clear and convincing evidence that the consent is voluntarily given.⁵⁶

III. CONCLUSION

Our overview of this year's confession, search, and seizure decisions reflect a status quo in the law. We see that Texas courts will continue to afford the accused the same protections guaranteed by the United States Constitution and that those protections are only increased where Texas' statutory laws require it.

54. See *Harris v. State*, 994 S.W.2d 927, 931 (Tex. App.—Waco 1999, pet. ref'd).

55. See *Melugin v. State*, 989 S.W.2d 470, 473 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

56. See *Sanchez v. State*, 982 S.W.2d. 929, 930-31 (Tex. App.—Austin 1998, no pet.).