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Criminal Procedure: Confession, Search and Seizure

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CRIMINAL PROCEDURE: CONFESSION, SEARCH AND SEIZURE

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WHEN we review the past year's criminal cases, we find no remarkable departures from prior Texas and Federal law as to confessions, searches, and seizures. Harmless error analysis is still routinely applied, and both state and federal appellate courts give credence to trial court fact-findings unless they are clearly erroneous.

I. CONFESSIONS

A. VOLUNTARINESS

Courts determine a confession's voluntariness by considering the total-

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ity of the circumstances.[1] They give almost total deference to the trial court's resolution of the facts[2] and will not disturb its findings if they are supported by the record.[3]

Some of the circumstances considered this year but not found to preclude admissibility include the following:

- questioning over a thirteen hour period;[4]
- tag-team tactics employed by interrogators;[5]
- "talking short" with the suspect;[6] and
- calling the suspect a liar during interrogation.[7]

B. Custodial Interrogation

In determining whether a person is in custody, the court will again consider the totality of the circumstances.[8] Our courts consider the following objective factors to determine when custody is established:

- an officer has probable cause to arrest a suspect and does not tell him he is free to leave;
- the officer manifests this knowledge to the suspect; and
- a reasonable person in the suspect's position would believe he is under restraint to the degree associated with an arrest.[9]

The Supreme Court of the United States recently ended all speculation about the possible demise of *Miranda v. Arizona.* In a 7-2 decision, Chief Justice Rehnquist, writing for the majority, declared that *Miranda* had announced a constitutional rule that could not be superseded legislatively, that was firmly established and relied upon, that was more easily applied than the old "totality of the circumstances" rule, and that would remain in effect. The majority opinion went on to say that the exceptions to the *Miranda* requirements do not negate their general applicability.[10]

The *Miranda* warnings as codified in the Texas Code of Criminal Procedure apply only to statements made during custodial interrogation. If an investigation is not at an accusatorial or custodial stage, a person's Fifth Amendment rights have not yet come into play, and the voluntariness of those rights is not implicated.

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1. Wyatt v. State, 23 S.W.3d 18 (Tex. Crim. App. 2000).
2. Rocha v. State, 16 S.W.3d 1, 12 (Tex. Crim. App. 2000); Gonzalez v. State, 21 S.W.3d 595, 597 (Tex. App.—Houston [1st Dist.] 2000, pet. granted).
3. *See* Wyatt, 23 S.W.3d at 23.
4. Guardiola v. State, 20 S.W.3d 216 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd.)
5. *Id.*
6. *Wyatt*, 23 S.W.3d at 23.
7. *Id.*
8. *Guardiola*, 20 S.W.3d at 222.
9. *Id.*
10. Dickerson v. United States, 530 U.S. 428 (2000).

C. 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. Recently, a sharply divided Court of Criminal Appeals applied the admissibility requirements of Article 38.22 to oral confessions offered in a Texas trial court but obtained in another state by that state's law enforcement officers.[11]

D. Juveniles

In keeping with prior Texas law, the courts look very closely at juvenile confessions and insist that they be obtained in strict adherence to the relevant Family Code provisions. The Austin Court of Appeals held that since a juvenile's first confession was improperly obtained, subsequent statements made to police officers modifying the earlier statement were also inadmissible.[12]

E. Sixth Amendment Right To Counsel

It is well established that once a suspect has an attorney, any interrogation without first notifying the attorney is unlawful, and any statement obtained as a result of the interrogation is excludable. A divided Court of Criminal Appeals addressed this issue this year, the majority holding that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is closely related factually to the offense charged."[13] The Supreme Court of the United States granted certiorari in that case. [Note: On April 2, 2001, the Supreme Court (5-4) reversed the Court of Criminal Appeals decision, holding that because the Sixth Amendment right to counsel is "offense specific," it does not necessarily extend to offenses that are "factually related" to those that have actually been charged.[14]]

II. SEARCH AND SEIZURE

A. In General

It is still safe to say that under current law the Texas Constitution affords no greater protection against unreasonable searches and seizures than the United States Constitution. Texas courts continue to follow the Supreme Court of the United States' lead in search and seizure cases.

11. Davidson v. State, 25 S.W.3d 183 (Tex. Crim. App. 2000).

12. *In re* R.J.H., 28 S.W.3d 250 (Tex. App.—Austin 2000, pet. filed).

13. Cobb v. State, 2000 WL 275644, *3 (Tex. Crim. App. 2000) (citing State v. Frye, 897 S.W.2d 324, 328-329 (Tex. Crim. App.1995); Upton v. State, 853 S.W.2d at 555-556; accord, United States v. Arnold, 106 F.3d 37, 41 (3d Cir.1997), and cases cited therein; *see* 2 W. LaFave, et al., Criminal Procedure § 6.4(f) n. 127 (2nd ed.1999)). .

14. Texas v. Cobb, 121 S.Ct. 1335 (2001).

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 again that the Fourth Amendment does not forbid all searches and seizures—only unreasonable ones,[15] and that one complaining of a search must have a reasonable expectation of privacy.[16]

The Court of Criminal Appeals noted that the reasonableness inquiry under the Fourth Amendment is an objective one, wholly divorced from the subjective beliefs of police officers.[17] It involves an objective assessment of the officer's actions under the circumstances, and not on the officer's actual state of mind at the time the challenged action was taken.[18]

As to the standard of review on motions to suppress alleging illegally obtained evidence, the reviewing court gives almost total deference to the trial court's determination of historical facts and reviews *de novo* the court's application of search and seizure law.[19]

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 arrest the driver. When a police officer lawfully arrests an occupant of an automobile, the officer may, as a contemporaneous incident of the arrest, search that individual.[20]

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. It is distinguished from an "arrest" which occurs when a person's liberty of movement is restricted or restrained. An officer must have articulable suspicion to make a stop—less than probable cause—since a stop is less intrusive than an arrest.

The Supreme Court of the United States recently compared a probing tactile examination of soft-sided luggage stored by a bus passenger in an overhead luggage compartment to a pat down of a suspect under *Terry v. Ohio*.[21] Chief Justice Rehnquist's majority opinion stated that the passenger had a reasonable expectation of privacy in his luggage, distinguished between visual and tactile observation, and concluded that the Border Patrol agent's feeling of the bag in an exploratory manner, absent any justification, violated the passenger's Fourth Amendment rights.[22]

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15. Ibarra v. State, 11 S.W.3d 189 (Tex. Crim. App. 2000).
16. Walter v. State, 28 S.W.3d 538 (Tex. Crim. App. 2000); Westfall v. State, 10 S.W.3d 85 (Tex. App.—Waco 1999, no pet.)
17. *Walter*, 28 S.W.3d at 542.
18. O'Hara v. State, 27 S.W.3d 548 (Tex. Crim. App. 2000); State v. West, 20 S.W.3d 867 (Tex. App.—Dallas 2000, no pet.)
19. *O'Hara*, 27 S.W.3d at 550.
20. *West*, 20 S.W.3d at 872.
21. 392 U.S. 1 (1968).
22. Bond v. United States, 529 U.S. 365 (2000).

The Supreme Court also made clear in a unanimous decision delivered by Justice Ginsburg that an anonymous tip lacking indicia of reliability will not justify a *Terry* stop.[23]

In addition, the Supreme Court held in a 5-4 decision by Chief Justice Rehnquist that reasonable suspicion under *Terry* might arise when a person flees at the sight of a police officer. It did not, however, adopt a *per se* rule that flight always justifies reasonable suspicion.[24]

On the other hand, a valid consensual encounter with police need not be supported by probable cause or even articuable suspicion. The test for determining whether an encounter with police qualifies as a valid consensual encounter is that set out in *Florida v. Bostick*.[25] 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.[26]

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. Probable cause exists when the facts submitted to the magistrate will justify a conclusion that the object of the search is probably on the described premises at the time the warrant is issued. Only the facts contained in the affidavit may be considered, but the magistrate may draw reasonable inferences from them and must interpret the affidavit in a common sense manner.[27]

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. Usually it is not very difficult to do so.

There is, however, one recent clarification as to court-created exceptions. In a *per curiam* decision, the Supreme Court has held that there is no murder scene exception to the Warrant Clause of the Fourth Amendment.[28]

Of course, the search of a person incident to a lawful arrest is excepted from the requirement of obtaining a warrant. But recently a divided Fourteenth Court of Appeals held that a search of the arrestee's anal

23. Florida v. J.L., 529 U.S. 266 (2000).
24. Illinois v. Wardlow, 528 U.S. 119 (2000).
25. 501 U.S. 429 (1991).
26. *See* Carmouche v. State, 10 S.W.3d 323 (Tex. Crim. App. 2000).
27. Davis v. State, 27 S.W.3d 664 (Tex. App.—Waco 2000, pet. ref'd).
28. Flippo v. West Virginia, 528 U.S. 11 (1999).

cavity for cocaine was unconstitutionally intrusive.[29]

III. CONCLUSION

Our overview of this year's confession, search, and seizure decisions reveals significant but predictable clarifications of well-established 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.

29. McGee v. State, 23 S.W.3d 156 (Tex. App.—Houston [14th Dist.] 2000, pet. granted).