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Criminal Procedure: Confessions, Searches and Seizures

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CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES AND SEIZURES

*Michael E. Keasler**

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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 totality of the circumstances,[1] including both the characteristics of the accused and the details of the interrogation.[2] They review trial court decisions as to admissibility under an abuse of discretion standard, and will not disturb them as long as the rulings are within the zone of reasonable disagreement. Indeed, the Texarkana Court of Appeals said that since determination of whether a statement is voluntary turns almost entirely on the evaluation of credibility and demeanor, the appellate court affords

* Judge, Texas Court of Criminal Appeals
1. Gachot v. Stadler, 298 F.3d 414, 418 (5th Cir. 2002).
2. Dawson v. State, 75 S.W.3d 533, 536 (Tex. App.— Texarkana 2002, no pet.).

almost total deference to the trial judge's resolution of this issue.[3]

A statement is involuntary if the record shows such official, coercive conduct that any resulting statement is unlikely to have been a free and unconstrained choice by its maker.[4] Promises made by a police officer to a suspect may invalidate a confession, but before they will do so, it must be shown that the promises induced the confession. To induce a confession, a promise must be:

- positive;
- made or sanctioned by someone in authority; and
- of such an influential nature that a suspect would speak untruthfully in response thereto.[5]

Using this standard, the Houston Court of Appeals for the Fourteenth District held that a detective's statement that "typically, juries and the court system sometimes favor people who tell the truth," was merely a statement of opinion, and that the defendant failed to demonstrate that the party in authority positively and unequivocally promised leniency in return for his confession.[6]

B. Custodial Interrogation

The warning requirements of *Miranda* come into play when a suspect is in custody. In order for a suspect to waive his or her rights under *Miranda v. Arizona*,[7] the relinquishment of the rights must be the product of free and deliberate choice, with full awareness of the rights being abandoned and the consequences of doing so.[8] On the other hand, the Constitution does not require that suspects know every possible consequence of a Fifth Amendment privilege. It is sufficient that they know that they may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time.[9]

Once the *Miranda* warnings are given, if a suspect invokes his right to remain silent, interrogation must cease.[10] But a defendant's statement, "I don't want to talk anymore. I'm tired," was held not to constitute a sufficiently unambiguous invocation of his right to remain silent.[11] The Fort Worth Court of Appeals likened the statement to that in *Dowthitt v. State*,[12] where the suspect said, "I can't say any more than that. I need to rest."[13] The Court of Criminal Appeals held that this merely indicated that the defendant believed that he was physically unable to continue, not

3. *Id.* at 535.
4. *Id.* at 536.
5. Ramirez v. State, 76 S.W.3d 121, 127 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).
6. *Id.*
7. Miranda v. Arizona, 384 U.S. 436 (1966).
8. Soffar v. Cockrell, 300 F.3d 588, 592 (5th Cir. 2002).
9. Ripkowski v. State, 61 S.W.3d 378 (Tex. Crim. App. 2001).
10. *Id.*
11. Franks v. State, 90 S.W.3d 771, 787 (Tex. App.— Fort Worth 2002, pet. ref'd).
12. Dowthitt v. State, 931 S.W.2d 244 (Tex. Crim. App. 1996).
13. *Franks*, 90 S.W.3d at 787.

that he wanted to quit talking.[14]

Courts have also held that a suspect must unequivocally invoke his or her right to counsel for it to be effective. Therefore, when during his interrogation a defendant asked the officer whether he should get an attorney, how he could get one, and how long it would take to have an attorney appointed, such procedural statements were held to be too ambiguous to constitute assertion of his right to counsel, and thus did not preclude admission of the statements made afterward.[15]

But once a suspect has unequivocally invoked his or her right to counsel, all interrogation by the police must cease until counsel is provided or the suspect reinitiates conversation.[16] This is a "clear, bright line, constitutional mandate."[17] Nevertheless, where police obtained a murder defendant's initial statement in disregard of his right to counsel assertion, and the defendant initiated a second interview with no other factors indicating that his second statement was involuntary, he was held to waive his previously asserted right to counsel for purposes of the second interview.[18]

As to the determination of whether a defendant has invoked the right to counsel, the trial judge's decision will usually not be disturbed. In *Jiminez v. State*,[19] the Corpus Christi Court of Appeals held that even though the defendant's statements that he requested counsel before confessing were uncontroverted, the trial judge was free to disbelieve his testimony, and since appellate courts give almost total deference to the trial judge's findings of fact, the confession was admissible.

The Houston Court of Appeals for the First District reiterated that the *Miranda* warnings are not essential to the validity of a confession that has been obtained in a foreign country by foreign officials. It also said that the questioning by foreign police of a citizen under indictment in the United States without the presence of his attorney does not violate the Sixth Amendment right to counsel.[20]

C. Statutory Requirements

In addition to incorporating the *Miranda* warnings, Article 38.22 of the Texas Code of Criminal Procedure sets out additional requirements for a confession's admissibility. Thus, the suppression of an oral confession was upheld where it was the result of custodial interrogation and was not recorded as required by article 38.22, section 3.[21]

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14. *Id.*
15. *Gachot*, 298 F.3d 414 (5th Cir. 2002).
16. Benoit v. State, 87 S.W.3d 668, 675 (Tex. App.— San Antonio 2002, pet. ref'd).
17. McCarthy v. State, 65 S.W.3d 47, 51 (Tex. Crim. App. 2001).
18. Herron v. State, 86 S.W.3d 621, 629 (Tex. Crim. App. 2002).
19. Jiminez v. State, 67 S.W.3d 493, 502-03 (Tex. App.— Corpus Christi 2002, pet. ref'd).
20. Goldberg v. State, 95 S.W.3d 345, 382 (Tex. App.—Houston [1st] 2002, no pet.).
21. Lacy v. State, 80 S.W.3d 207, 211 (Tex. App.— Austin 2002, no pet.) (citing Tex. Crim. Proc. Code Ann. art. 38.22 § 3 (Vernon 2003)).

In another case involving an oral confession, the taped confession was held to be voluntary and admissible, even though the answer to one of the required warnings was inaudible. The court deduced from the entire tape that from context, the answer to the question was affirmative.[22]

Article 38.22, section 6, requires the trial judge in all cases involving a confession's voluntariness to make findings of fact. The judge may do so either by writing and signing them or dictating them into the record. If a judge fails to do so, the appellate court will usually abate the appeal and send the case back to the trial judge to comply with the statute after the fact.[23]

Generally, when an adult suspect confesses in another state to a Texas crime, Texas courts will look to see if the out-of-state officers substantially complied with the required warnings.[24] The Corpus Christi Court of Appeals determined that the officers did not substantially comply with Article 38.22's requirement that the warning that the defendant could terminate the interview at any time be on the face of the written statement. But the evidence did show that the defendant did in fact receive that warning. Therefore, the court held that since the evidence was undisputed that the *Miranda* warnings were given to the defendant in writing, and the additional warning that he could terminate the interview at any time was given orally, his substantial rights were not violated, and the statement's admission was not reversible error.[25]

D. JUVENILES

Like last year, we had an extraordinary number of published juvenile cases. Texas courts continue to look very closely at juvenile confessions and insist that they be obtained in strict adherence to the relevant Family Code provisions. Of course, the Code's provisions generally do not apply to juveniles' non-custodial statements.[26] Last year, the Austin Court of Appeals held in *In re RJH* that since a juvenile's first confession was improperly obtained, subsequent non-custodial statements made to police officers modifying the earlier statement were also inadmissible.[27]

The Supreme Court of Texas reversed that decision.[28] In doing so, it made the following statements:

- If a juvenile's earlier inculpatory statement was made while in custody, but he had been warned of his constitutional rights only by a police officer, rather than by a magistrate, rendering the earlier statement inadmissible under state law, then the voluntariness of a later

22. Randle v. State, 89 S.W.3d 839, 843 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).
23. Gutierrez v. State, 71 S.W.3d 372, 380 (Tex. App.—Amarillo 2001, pet. ref'd).
24. Nonn v. State, 69 S.W.3d 590, 591 (Tex. App.—Corpus Christi 2001, pet. granted).
25. *Id.*
26. *In re* E.M.R., 55 S.W.3d 712, 717 (Tex. App.—Corpus Christi 2001, no pet.).
27. *In re* R.J.H., 28 S.W.3d 250, 254-55 (Tex. App.—Austin 2000), *rev'd*, 79 S.W.3d 1 (Tex. 2002).
28. *In re* R.J.H., 79 S.W.3d 1, 9 (Tex. 2002).

confession, for due process purposes, is determined by the totality of the circumstances, to determine whether the confession was the product of official coercion.[29]

- The juvenile defendant's statement acknowledged that the officer had advised him of his constitutional rights and that he chose to make a statement "freely and voluntarily, without being induced by any compulsion, threats, promises, or persuasion." The juvenile signed the statement, and his father, who was present throughout the officer's questioning, also signed it.[30]
- The juvenile had not been in custody at the time of an earlier oral confession. He had initiated contact with the officer on more than one occasion. He and his cousin had been caught with stolen property from the burglary. His efforts to take sole responsibility for the crime appeared to be consistently motivated by his own belief that any punishment he might receive in the juvenile system would be less than what his adult cousin would receive.[31]

The Fifth Circuit also applied the "totality of the circumstances approach" to determine if a juvenile's confession is voluntary.[32] It stated that the circumstances to be considered include:

- evaluation of the juvenile's age, experience, background, and intelligence;
- whether he has the capacity to understand the warnings given him;
- whether he has the capacity to understand the nature of his Fifth Amendment rights; and
- whether he has the capacity to understand the waiving of those rights.[33]

In another case, Odessa police notified a suspect's mother that he had been taken into custody as a juvenile absconder. The next morning, without re-contacting the mother, they questioned him about a March, 1999 murder. Reversing the El Paso Court of Appeals, the Court of Criminal Appeals held the confession taken from the defendant at a juvenile detention facility, after he was duly warned of his rights, was properly admitted by the trial court. The court found that the police officer properly notified the mother "of the reason for taking the child into custody," as required by Family Code section 52.02(b).[34] He was not also statutorily required to tell her that he suspected her son of committing a murder or to notify her again before questioning him.[35]

In another case involving parental notification, the Court of Criminal Appeals held that a police officer's failure to promptly notify a juvenile's

29. *Id.* at 3.
30. *Id.* at 8.
31. *Id.* at 8-9.
32. *Gachot*, 298 F3d at 418.
33. *Id.* at 418-19.
34. Hampton v. State, 86 S.W.3d 603, 610 (Tex. Crim. App. 2002) (citing TEX. FAM. CODE ANN. § 52.02(b) (Vernon 2002)).
35. *Id.*

parents of his custody did not render his written statement automatically inadmissible in a murder prosecution, since the statutory exclusionary rule requires a causal connection between the family code violation and the making of the statement.[36]

As to how parental notice can be effectively given, the Austin Court of Appeals held that when the Sheriff called police officers at a juvenile's custodian's residence and told them that the juvenile was in custody for murder, and the officers, in turn, relayed the information to the custodian, the statute was satisfied.[37]

A juvenile was arrested in Chicago on a Texas arrest warrant for capital murder. She gave a written confession to Chicago police officers. In reversing the Corpus Christi Court of Appeals, the Court of Criminal Appeals held:

- Texas law, rather than Illinois law, applies to the statement's admissibility;
- its admissibility is determined under the Family Code statute regarding confessions;
- Illinois authorities complied with Texas law to the extent necessary to carry out Texas's intended purpose;
- failure of Chicago police to have a Texas juvenile court officer decide whether the juvenile should be further detained was not a violation of Texas law in light of the no-bond condition of the juvenile's Texas warrant;
- lack of some warnings in juvenile's written statement was not violation of Texas law in light of the fact that Miranda warnings were given;
- Illinois authorities did not comply with Texas law in that they failed to involve a magistrate in the process of obtaining the juvenile's confession;
- the Illinois officers' unknowing violation of Texas law did not automatically render the juvenile's confession inadmissible.[38]

After placing a juvenile in custody, failure to take him or her to a juvenile processing center without unreasonable delay will invalidate a subsequent confession.[39] On the other hand, the statute's "unnecessary delay" requirement contemplates the possibility of a "necessary delay." And there is also the question of when a juvenile is "in custody." Therefore, the Houston Court of Appeals for the Fourteenth District held that an "investigative" or "temporary" detention does not constitute "custody," and even if it does, under some circumstances a resulting delay may be "necessary."[40]

36. Gonzales v. State, 67 S.W.3d 910, 912 (Tex. Crim. App. 2001).
37. Horton v. State, 78 S.W.3d 701, 704 (Tex. App.—Austin 2002, pet. ref'd).
38. Vega v. State, 84 S.W.3d 613, 618 (Tex. Crim. App. 2002).
39. Roquemore v. State, 60 S.W.3d 862, 867 (Tex. Crim. App. 2001).
40. Dang v. State, 99 S.W.3d 172, 183 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

Finally, as to what constitutes custody, the El Paso Court of Appeals held that a thirteen-year-old student, who was being questioned at school by an armed officer in a closed office regarding allegations that he had brought a gun to school was in custody, was entitled to warnings by a magistrate before making any statement. The statement obtained was therefore inadmissible. The court held this despite the fact that the student was not restrained, and the officer was attempting to secure the safety of the other students by locating the gun.[41]

II. SEARCH AND SEIZURE

A. In General

Texas state courts, with a few aberrations, continue to follow the United States Supreme Court's lead in search and seizure cases. Cases are almost always analyzed in light of the Fourth Amendment, rather than under the Texas Constitution.

This year the courts reminded us again that the Fourth Amendment does not forbid all searches and seizures—only unreasonable ones,[42] and that one complaining of a search must have a reasonable expectation of privacy.[43] And as to the standard of review on motions to suppress evidence, both the state and federal appellate courts give great deference to the trial court's determination of historical facts, while reviewing questions of law *de novo*.[44]

Of course, the Fourth Amendment's protection against unreasonable searches and seizures does not come into play unless there is a search involving some governmental action. It does not apply to a search conducted by a private individual not acting under the control or at the behest of law enforcement.[45] And a subsequent police review of items obtained by the private individual is not a search for Fourth Amendment purposes.[46]

Also, the Corpus Christi Court of Appeals reminded us that the Fourth Amendment does not protect those who voluntarily abandon property. The test for determining whether an object has been abandoned is one of intent, which may be inferred from words spoken, acts done, and other objective facts. Once it has been established that the item in question was abandoned, there is no search or seizure under the Fourth Amendment.[47]

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41. *In re* D.A.R., 73 S.W.3d 505, 513 (Tex. App.—El Paso 2002, no pet.).
42. Parham v. State, 76 S.W.3d 60, 63 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).
43. United States v. Gomez, 276 F.3d 694, 696-97 (5th Cir. 2001); Granados v. State, 85 S.W.3d 217, 222-23 (Tex. Crim. App. 2002).
44. United States v. Wilson, 306 F.3d 231, 237 (5th Cir. 2002).
45. United States v. Runyan, 275 F.3d 449, 457 (5th Cir. 2001); Cobb v. State, 85 S.W.3d 258, 270-71 (Tex. Crim. App. 2002).
46. *Runyan*, 275 F.3d at 464.
47. Morrison v. State, 71 S.W.3d 821, 829 (Tex. App.—Corpus Christi 2002, no pet.).

The Houston Court of Appeals for the Fourteenth District held that where a dog sniff outside a suspect's front door alerted officers to the presence of a controlled substance inside, that act was not a "search" for Fourth Amendment purposes. Citing *United States v. Jacobsen*,[48] the court pointed out that an individual has no reasonable expectation of privacy in possessing illegal drugs, and that a governmental investigative technique that discloses only the presence or absence of narcotics, and does not expose non-contraband items, activity, or information that would otherwise remain hidden from public view is constitutionally permissible.[49]

The Fifth Circuit and the Court of Criminal Appeals both said, in *Gomez*[50] and *Granados*[51] respectively, that a person has a legitimate expectation of privacy in the place searched, and thus standing to contest the search, (1) if he or she had a subjective expectation of privacy in the place invaded or the item being seized and (2) if that expectation of privacy is one that society would recognize as reasonable. The Court of Criminal Appeals went on to list factors that are relevant in determining whether a claim of privacy in a place invaded is objectively reasonable. They include:

- whether the accused had a property or possessory interest in the place invaded;
- whether he was legitimately in the place invaded;
- whether he had complete dominion or control and the right to exclude others;
- whether before the intrusion he took normal precautions customarily taken by those seeking privacy;
- whether he put the place to some private use; and
- whether his claim of privacy is consistent with historical notions of privacy.[52]

B. Arrest, Stop, Or Inquiry Without Warrant

The Austin Court of Appeals pointed out that for Fourth Amendment purposes, there are three distinct types of police-citizen interactions:

- arrests, which must be supported by probable cause;
- brief investigative stops, which must be supported by reasonable suspicion; and
- brief encounters between police and citizens, which require no objective justification.

48. United States v. Jacobsen, 466 U.S. 109 (1984).

49. Porter v. State, 93 S.W.3d 342, 346 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

50. *Gomez*, 276 F.3d at 697.

51. United States v. Granados, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002).

52. *Id.*

1. Warrantless Arrests and Searches

Without exigent circumstances, the warrantless entry, arrest, and search of a suspect's home violates the Fourth Amendment.[53]

In *State v. Steelman*,[54] police had received an anonymous tip that someone in defendant father and son's residence was selling drugs. The officers went to the house and knocked on the door, and the son answered. The officers smelled the odor of burnt marijuana in the air, but not on the son himself. When the son, after shutting the door and retrieving identification from inside the house, came out a second time and tried to close the door behind him, the officers burst through the doorway and arrested all the occupants, including the son. The police then obtained a search warrant, searched the premises, and found marijuana. The Court of Criminal Appeals said that the odor of marijuana was not sufficient corroboration for the anonymous tip to provide probable cause to enter the house, because it gave the police no particular reason to believe that the son possessed marijuana.[55] But Texas courts have consistently held that (1) the smell of burnt or burning marijuana constitutes probable cause to believe that an offense is being committed, and (2) it provides exigent circumstances. This opinion contains some regrettably broad language, suggesting that when two or more persons are together, and an officer smells burning marijuana wafting from them without knowing which one is in possession, the officer is powerless to arrest either of them. We will see how far the court will go in limiting or expanding this language.

In *State v. Peyrani*,[56] the Houston Fourteenth Court of Appeals upheld the trial court's suppression of evidence seized incident to arrest when the officers entered the suspect's fenced-in back yard without a warrant in search of the owner of the residence, failed to knock at the front door, failed to ask a man they encountered at the side of the house who and where the homeowner was, and failed to ask that man's permission to go into the back yard.

On the other hand, the Fifth Circuit held that the warrant requirement does not apply to a public employer's search of an employee's workplace if the search is reasonable under the circumstances. Here, there was a search conducted of the employee's computer for child pornography by his supervisor. His supervisor was a law enforcement officer. The court said that while the search had obvious criminal overtones, the purpose of the probe, at the time of the search, remained at least partly an investigation into employee misconduct violating the employer's work policy.[57]

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53. Kirk v. Louisiana, 536 U.S. 635 (2002); *see also Wilson*, 306 F.3d. at 237-38; Gipson v. State, 82 S.W.3d 715, 720 (Tex. App.—Waco 2002, no pet.).

54. State v. Steelman, 93 S.W.3d 102 (Tex. Crim. App. 2002).

55. *Id.* at 108.

56. State v. Peyrani, 93 S.W.3d 384 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

57. United States v. Slanina, 283 F.3d 670 (5th Cir. 2002).

2. Investigative (Terry) Stops

In *United States v. Arvizu*,[58] the Supreme Court explained that in an investigatory stop falling short of a traditional arrest, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion that criminal activity may be underfoot. The likelihood of criminal activity need not rise to the level of probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard. It added that the determination that reasonable suspicion exists need not rule out the possibility of innocent behavior.[59]

To determine the reasonableness of an investigative detention under the Fourth Amendment, an appellate court inquires (1) whether an officer's action was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances that justified the interference initially.[60] A search that is reasonable at its inception may violate the Fourth Amendment by virtue of its excessive intensity and scope. It must be no longer than necessary to satisfy the purpose of the stop.[61] But if, during the scope of an investigatory stop, an officer develops a reasonable suspicion that the suspect is involved in, or is about to be involved, in criminal activity, an extended detention is permissible.[62]

The reasonableness of an investigative detention must be examined in terms of the totality of the circumstances together with the rational inferences from those facts.[63] Of course, the subjective thoughts and intentions of the officer making an investigatory stop are not determinative of whether articulable facts support a reasonable suspicion that a person might have been, is, or may soon become involved in a crime. This suspicion must be based on common sense judgments and inferences about human behavior.[64]

Whether a police officer's detention of a person is reasonable depends on the content and reliability of the information possessed by the officer. It need not be based on his or her personal observations, but may be based on an informant's tip that bears sufficient indicia of reliability to justify an investigative detention.[65]

A rather peculiar case was decided by the Houston Court of Appeals for the Fourteenth District this year. The majority held that an officer did not have reasonable suspicion to stop a suspect when:

- he saw the suspect's pickup truck parked across rather than within painted parking spaces;
- in a small lot where only employees park;

58. United States v. Arvizu, 534 U.S. 266 (2002).
59. *Id.* at 274.
60. Herrera v. State, 80 S.W.3d 283, 287 (Tex. App.—Texarkana 2002, pet. ref'd).
61. Green v. State, 93 S.W.3d 541, 547 (Tex. App. —Texarkana 2002, pet. ref'd).
62. *Id.*
63. Balentine v. State, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002).
64. Martinez v. State, 72 S.W.3d 76, 81 (Tex App.—Amarillo 2002, no pet.).
65. Brother v. State, 85 S.W.3d 377, 381 (Tex. App.—Fort Worth 2002, pet. filed); Blevins v. State, 74 S.W.3d 125, 131 (Tex. App.—Fort Worth 2002, pet. ref'd).

- behind a closed shopping center;
- at which there had been previous burglaries;
- at 2:30 a.m.;
- on a cold morning;
- and the truck left immediately when the officer pulled up to investigate.[66]

As the dissent pointed out, the majority cited a number of cases from the 1970's to support its reasoning and seemed to ignore the United States Supreme Court decision in *United States v. Arvizu* discussed above (as well as Texas cases in accord) that disavow the "as consistent with innocent behavior" test and the court's admonishment condemning "divide and conquer" piecemeal type analysis of the totality of the circumstances test.[67]

3. *Encounters*

Citing *Florida v. Bostick*[68] and *State v. Velasquez*,[69] the Texarkana Court of Appeals reiterated the following principles:

- Mere police questioning does not constitute a seizure;
- The proper test, in deciding whether an officer's request to search a bus passenger's luggage was so coercive as to vitiate that consent was not whether a reasonable person would feel free to leave, but whether he would feel free to decline the officer's request or otherwise terminate the encounter.[70]
- The officer is not required to advise a suspect of the right to refuse consent to a search.

The Supreme Court recently confirmed this last principle. In *United States v. Drayton*,[71] the Court said that the Fourth Amendment does not require police officers to advise bus passengers that they have a right not to cooperate and to refuse consent to search. And the Court of Criminal Appeals has also said that the absence of warning that the defendant has a right to refuse consent does not automatically render his consent involuntary.[72]

On the other hand, citing its own opinion in *Byrd v. State*,[73] the Waco Court of Appeals has repeatedly said that "an officer's failure to warn the person that he does not have to consent is an important factor in determining whether voluntary consent was given."[74] This approach is out of step with both Texas and federal jurisprudence.

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66. Klare v. State, 76 S.W.3d 68, 71 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).
67. *Id.*
68. Florida v. Bostick, 501 U.S. 429 (1991).
69. State v. Velasquez, 994 S.W.2d 676 (Tex. Crim. App. 1999).
70. State v. Hernandez, 64 S.W.3d 548, 531 (Tex. App.—Texarkana 2001, no pet.).
71. United States v. Drayton, 536 U.S. 194 (2002).
72. Johnson v. State, 68 S.W.3d 644, 653 (Tex. Crim. App. 2002).
73. Byrd v. State, 835 S.W.2d 223, 226 (Tex. App.—Waco 1992, no pet.).
74. *See, e.g.*, Lopes v. State, 85 S.W.3d 844, 848 (Tex. App.—Waco 2002, no pet.)

C. Affidavits in Support of Search Warrants

In determining whether probable cause exists for the issuance of a search warrant, a magistrate may draw reasonable inferences from the probable cause affidavit and must interpret the affidavit in a common sense and realistic manner.[75] To effect a valid search warrant, a magistrate is not required to find proof beyond a reasonable doubt or by a preponderance of the evidence, but only a probability that the items sought will be found at the place to be searched.[76] And a trial court reviewing a magistrate's determination to issue a search warrant is limited to examining only the four corners of the affidavit to determine whether probable cause exists.[77]

In making his decision, a magistrate may rely on information supplied by a private citizen, since, unlike many police informants, they are much less likely to produce false or untrustworthy information. And when a named informant, in an affidavit in support of a search warrant, is a private citizen whose only contact with the police is the result of having witnessed a crime committed by another, credibility and reliability of the informant is inherent.[78]

Under Article 18.01 of the Code of Criminal Procedure, an affidavit in support of a search warrant must be signed and sworn to by the affiant. Otherwise, the subsequent search warrant is invalid. But if a law enforcement officer obtains evidence in the execution of the warrant while acting in objective good faith reliance upon it, and it was issued by a neutral magistrate based on probable cause, the evidence is nevertheless admissible under Article 38.23(b).[79]

The Fifth Circuit addressed the federal good-faith exception to the exclusionary rule this year. It reiterated the principle that where probable cause for a search warrant is based on incorrect information, but the officer's reliance on the information's truth is objectively reasonable, the evidence obtained from the search will not be excluded.[80]

The Texarkana Court of Appeals also addressed the exclusionary rule, stating that "if a defendant establishes by a preponderance of the evidence that a false statement made knowingly, intentionally, or with reckless disregard for the truth was included in a probable cause affidavit," and "it was material to establish probable cause, the false statement must be excised from the affidavit, and if the abridged affidavit is insufficient to establish probable cause, the warrant must be voided, and its fruits must be excluded from evidence."[81] But a misstatement in an affidavit that is merely the result of negligence or inadvertence, as opposed to

75. State v. Duncan, 72 S.W.3d 803, 805-06 (Tex. App.—Fort Worth 2002, pet. ref'd).
76. State v. Ozuna, 88 S.W.3d 307, 309 (Tex. App.—San Antonio 2002, pet. ref'd).
77. Legere v. State, 82 S.W.3d 105, 113 (Tex. App.—San Antonio 2002, pet. ref'd).
78. Morris v. State, 62 S.W.3d 817, 824 (Tex. App.—Waco 2001, no pet.).
79. Hunter v. State, 92 S.W.3d 596, 603 (Tex. App.—Waco 2002, pet. ref'd).
80. United States v. Cavazos, 288 F.3d 706, 709 (5th Cir. 2002).
81. Clement v. State, 64 S.W.3d 588, 592 (Tex. App.—Texarkana 2001, pet. ref'd).

reckless disregard for the truth, will not render the warrant invalid.[82]

Nevertheless, under the "independent source exception" to the exclusionary rule, evidence obtained from an illegal source is admissible if the same evidence was also obtained from a lawful source independent of the illegality. In order to qualify for this exception, the government must show (1) that the police would still have sought a warrant in the absence of the illegal search, and (2) that the warrant would still have issued.[83]

D. Consent to Search

Consent to search is one of the well-established exceptions to the constitutional requirements of both probable cause and a warrant.[84] The government must establish that the consent was freely and voluntarily given and that the consenting individual had authority to do so. The United States Constitution requires that validity of consent be proven by a preponderance of the evidence, while Texas law requires clear and convincing evidence.[85]

The Fifth Circuit has listed six factors to consider in deciding voluntariness of consent, no one of which is dispositive or controlling. They are: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of defendant's cooperation with police; (4) defendant's awareness of his or her right to refuse consent; (5) defendant's education and intelligence; and (6) defendant's belief that incriminating evidence will be found.[86]

To determine whether a defendant's consent to search following a constitutional violation was valid, the Fifth Circuit considers the six factors just discussed plus the issue of whether the consent was an independent act of free will.[87] In deciding this issue, the court considers three additional factors: (1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the initial misconduct.

Third party consent to a search is valid if the third party has mutual access and control over the property searched and if it can be said that the defendant assumed the risk that the third party would consent to the search. This rule applies even when defendant is present and does not consent to the search.[88]

But when a person voluntarily consents to a search, the officer's authority to perform the search is not absolute. It is limited to the scope of the consent and is generally defined by its expressed object.[89]

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82. Moss v. State, 75 S.W.3d 132, 140 (Tex. App.—San Antonio 2002, pet. ref'd).
83. United States v. Runyan, 290 F.3d 223, 235 (5th Cir. 2002).
84. *Balentine*, 71 S.W.3d at 772.
85. Maxwell v. State, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002).
86. United States v. Solis, 299 F.3d 420, 436 (5th Cir. 2002).
87. *Id.*
88. Welch v. State, 93 S.W.3d 50, 57 (Tex. Crim. App. 2002).
89. James v. State, 72 S.W.3d 35, 42 (Tex. App.— Texarkana 2001, pet. ref'd).

E. Miscellaneous Cases

In other decisions, courts:

- re-emphasized the validity of the "knock and announce" requirement[90] unless it would be dangerous, futile, or allow the destruction of evidence;[91]
- limited the applicability of the "community caretaking" exception to warrantless searches;[92]
- reminded us that routine searches at United States borders are reasonable under the Fourteenth Amendment and do not require a search warrant, probable cause or even articulable suspicion;[93]
- said that a warrantless search of a suspect's apartment, supported by reasonable suspicion and authorized by a condition of his probation, was reasonable under the Fourteenth Amendment;[94] and
- held that suspicionless drug testing of students who participate in extracurricular activities does not violate the Fourth Amendment.[95]

III. CONCLUSION

This year, our review of the confession, search, and seizure decisions reveals restatement and clarifications of well-established law, as well as a very few unexpected developments. We see that in most areas, federal and state courts interpret the law in these areas similarly.

90. United States v. Valdez, 302 F.3d 320, 321 (5th Cir. 2002); Price v. State, 93 S.W.3d 358, 368-69 (Tex. App.—Houston [14th Dist.] 2002, pet. filed).

91. Broussard v. State, 68 S.W.3d 197, 199 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

92. Corbin v. State, 85 S.W.3d 272, 277 (Tex. Crim. App. 2002); Andrews v. State, 79 S.W.3d 649, 651 (Tex. App.— Waco 2002, pet. ref'd).

93. United States v. Smith, 273 F.3d 629, 632 (5th Cir. 2001); Pena v. State, 61 S.W.3d 745, 753 (Tex. App.—Corpus Christi 2001, no pet.).

94. United States v. Knights, 534 U.S. 112, 121 (2001).

95. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002).