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Criminal Procedure: Confessions, Searches and Seizures

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CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES AND SEIZURES

Brian S. Chandler*
Michael E. Keasler**

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A review of the past year's criminal cases reveals no remarkable departures from prior Texas and federal law pertaining 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 clearly erroneous.

I. CONFESSIONS A. VOLUNTARINESS

"A confession is held voluntary if, under the totality of the circumstances, the statement is the product of the accused's free and rational choice."¹ A review of a confession's voluntariness requires an appellate court to give almost total deference to a trial court's determination of

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1. *United States v. Bell*, 367 F.3d 452, 461 (5th Cir. 2004).

historical facts encompassing an evaluation of credibility and demeanor.² However, *de novo* review is appropriate for mixed questions of law and fact.³ In this past year, several cases continue to demonstrate the significance of appellate court's deference to the trial court's determination of facts.⁴

A promise made by law enforcement that induces a defendant to confess to a crime may compromise the confession's voluntariness. However, an inducement sufficient to transform an otherwise voluntary confession into an involuntary statement must be of "exceptional character."⁵ A confession will be considered involuntary if the promise was (1) negative, (2) made or sanctioned by someone in authority, and (3) of such an influential nature that it would cause a defendant to speak untruthfully.⁶ Whether the defendant in fact spoke untruthfully is irrelevant to a proper analysis.⁷

The Fourteenth Court of Appeals in Houston held that a law enforcement officer's statement "could help yourself" was insufficient to render the appellant's statement involuntary.⁸ The court reasoned this non-specific statement lacked the character necessary to induce the appellant to confess falsely.⁹ In another unlawful inducement case, this same court held that an appellant's wish to save his relatives from prosecution did not make his confession involuntary.¹⁰ In the absence of a threat, an accused's subjective belief that cooperation will relieve a relative from prosecution will not deem his confession inadmissible.¹¹

Police conduct may bring forth "a declaration naturally born of remorse, or relief, or desperation" without producing an involuntary confession.¹² Pointing to his severely depressed and suicidal condition, the appellant in *Jaggers v. State* contended his audio-taped statement was not a product of his free will and rational interest. The First Court of Appeals in Houston disagreed. It held that the evidence before the trial court supported a finding that the confession was a result of a remorseful state of mind, not an overborne will.¹³

2. *Colgin v. State*, 132 S.W.3d 526, 530 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd).

3. *Id.*

4. *See, e.g., May v. State*, 139 S.W.3d 93, 100–01 (Tex. App.—Texarkana 2004, pet. ref'd); *Colgin*, 132 S.W.3d at 530–31; *Hunter v. State*, 148 S.W.3d 526, 530 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

5. *Drake v. State*, 123 S.W.3d 596, 603 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

6. *Martinez v. State*, 127 S.W.3d 792, 794 (Tex. Crim. App. 2004).

7. *Id.* at 795.

8. *Drake*, 123 S.W.3d at 603.

9. *Id.*

10. *Hunter*, 148 S.W.3d at 532.

11. *Id.*

12. *Jaggers v. State*, 125 S.W.3d 661, 667 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (quoting *Culombe v. Connecticut*, 367 U.S. 568 (1961)).

13. *Id.*

In a similar case, the Fifth Circuit rejected a claim of involuntariness based on the accused having taken methamphetamine and not having slept for three days before giving a statement.¹⁴ The Fifth Circuit held the government's evidence satisfied its burden in showing that the confession was made knowingly and voluntarily by a preponderance of the evidence.¹⁵ In reaching this conclusion, the court highlighted the accused's responses to law enforcements' questions, demeanor, and willingness to talk to the case agents.¹⁶

B. CUSTODIAL INTERROGATION

When subjected to custodial interrogation, an accused is vested with *Miranda's* protections that require the accused be adequately and effectively apprised of his rights. Failure to give these mandated rights usually requires exclusion of any statements given to law enforcement. "A person is in custody only if, under all the circumstances, a reasonable, innocent person would believe that the person's freedom of movement was restrained to the degree associated with an arrest."¹⁷ The United States Supreme Court reminded us in *Yarborough v. Alvarado* that the *Miranda* custody test is an objective one and is distinguishable from a subjective analysis undertaken in determining a confession's voluntariness.¹⁸ Reversing the Ninth Circuit, the Court held that it was proper for a state court to refuse to consider an accused's age or prior history with law enforcement in deciding whether the accused was in custody.¹⁹

Merely being questioned at the police station does not necessarily mean that one is being subjected to custodial interrogation. Evidence that an accused went voluntarily to the police station and was free to leave after two separate interviews was held not to be custodial interrogation in spite of testimony describing interrogator's shouting, accusations, and touching of accused's hand.²⁰ DWI investigations that include questioning the driver and administering field-sobriety tests generally do not qualify as custodial interrogations. The First Court of Appeals in Houston held accordingly in *McRae v. State*.²¹ There, the court concluded that appellant's statement admitting he consumed alcohol was admissible despite not being given his *Miranda* warning because there was no evidence in the record that indicated the officer manifested an intent to arrest the appellant before the statement was given.²²

14. *United States v. Reynolds*, 367 F.3d 294, 297–99 (5th Cir. 2004).

15. *Id.* at 299.

16. *Id.*

17. *May*, 139 S.W.3d at 100.

18. *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2151 (2004).

19. *Id.* at 2151–52.

20. *May*, 139 S.W.3d at 100.

21. *McRae v. State*, 152 S.W.3d 739, 748–49 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

22. *Id.* at 749.

To qualify as custodial interrogation, the statements must be the result of interrogation by law enforcement personnel or their agents. Inculpatory statements made to hospital personnel were held not to be interrogation.²³ Additionally, statements made to the news media did not satisfy the requirements for custodial interrogation.²⁴ Finding no offer by law enforcement to the news reporter to act as an agent (nor acceptance by the reporter), the Court of Criminal Appeals found this case dissimilar to those “where the police employ an informant to deliberately elicit incriminating statements.”²⁵

The Supreme Court and the Texas Court of Criminal Appeals have interpreted *Miranda* as requiring its warnings to be given before interrogation begins.²⁶ Both courts expressly disavowed the police practice of questioning an accused before giving *Miranda* warnings. The practice of obtaining a confession, reading the accused his *Miranda* warnings, and then having the accused restate the already-covered ground was held to undermine *Miranda*'s intention of reducing the risk of an admitted coerced confession.²⁷ The Supreme Court further stated that the insertion of *Miranda* warnings in the middle of interrogation “deprive[s] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.”²⁸

An accused must affirmatively invoke his Fifth Amendment right to counsel to enjoy its protections. This invocation must be made in regard to a specific crime.²⁹ In *Jaggers v. State*, the First Court of Appeals held that while appellant did request a lawyer at the interview, the request was insufficient to identify the specific crime to which appellant was attempting to relate his right to counsel.³⁰ Because the appellant potentially had information concerning multiple crimes, the officers could not have known whether appellant was invoking his right to the theft allegation or the pending murder investigation. This ambiguous invocation permitted the officer to inquire further whether the appellant wished to talk to him.³¹ The court concluded that the statement was admissible because after appellant confirmed his desire to talk to the officer, the appellant waived his *Miranda* rights after they were read.³²

When an accused properly requests counsel, all interrogation must cease “until counsel is provided or until the accused reinitiates conversation.”³³ Any statements secured after this invocation are admissible only

23. *Escamilla v. State*, 143 S.W.3d 814, 824–25 (Tex. Crim. App. 2004).

24. *Id.* at 824.

25. *Id.*

26. *Missouri v. Seibert*, 124 S. Ct. 2601, 2610–11 (2004); *Jones v. State*, 119 S.W.3d 766, 775 (Tex. Crim. App. 2003).

27. *Seibert*, 124 S. Ct. at 2613; *Jones*, 119 S.W.3d at 775.

28. *Seibert*, 124 S. Ct. at 2611.

29. *Jaggers*, 125 S.W.3d at 668.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Hunter*, 148 S.W.3d at 529.

if a court finds (1) the accused manifested an intention to re-commence the discussion and (2) he knowingly and intelligently waived the rights previously invoked.³⁴ Whether the accused initiates discussion with law enforcement is reviewed on a case-by-case basis. Granting deference to the trial court's factual findings, a question by the accused concerning the range of punishment was held to be a sufficient re-initiation.³⁵

C. STATUTORY REQUIREMENTS

Miranda warnings are statutorily embodied in Texas Code of Criminal Procedure article 38.22, section 2. Article 38.22 provides that a statement resulting from custodial interrogation is inadmissible, unless the face of the statement provides that the accused has received adequate warnings and has knowingly, intelligently, and voluntarily waived his rights.³⁶ These warnings must include:

- (1) the right to remain silent and any statement may be used at trial;
- (2) any statement may be used as evidence in court;
- (3) the right to have a lawyer present during questioning;
- (4) the right to an appointed lawyer to advise him during questioning if he is unable to employ one; and
- (5) the right to terminate the interview at any time.³⁷

The State's failure to administer article 38.22 warnings is reversible error. But substantial compliance with the articles mandatory requirements will be sufficient. In *Rutherford v. State*, the Dallas Court of Appeals addressed the sufficiency of a pre-printed warning form containing duplicate article 38.22(a)(4) warnings—right to appointed lawyer for questioning—without an (a)(3) warning stating an express right to have counsel present during questioning.³⁸ The court held the warning sufficient. Finding substantial compliance, the court reasoned that the (a)(3) and (a)(4) warnings were identical in substantial part; specifically that “he has the right to have a lawyer . . . to advise him prior to and during any questioning.”³⁹

Article 38.22, section 6 requires a trial court to make written fact findings and conclusions of law when the voluntariness of a statement is challenged.⁴⁰ Section 6's efficacy does not turn on whether a defendant objects to the absence of these filings.⁴¹ When a trial court fails to comply with section 6, proper procedure requires a court of appeals to direct the trial court to make written findings of fact and conclusions of law.⁴²

34. *Id.*

35. *Id.* at 530.

36. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2 (Vernon Supp. 2004).

37. *Id.* art. 38.22, § 2(a).

38. *Rutherford v. State*, 129 S.W.3d 221, 225 (Tex. App.—Dallas 2004, no pet.).

39. *Id.* at 226.

40. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (Vernon 2004).

41. *Urias v. State*, 155 S.W.3d 141, 142 (Tex. Crim. App. 2004).

42. *Id.*

Texas courts continue to require a causal connection between a statutory violation and the resulting confession. In *Sierra v. State*, the appellant claimed law enforcement violated Code of Criminal Procedure article 15.16, which states that the person executing an arrest warrant shall, without unnecessary delay, take the arrested person before the magistrate.⁴³ Sierra further asserted the statutory violation required his subsequent confession to be suppressed by way of Texas's statutory exclusionary rule article 38.23.⁴⁴ In light of evidence that Sierra acknowledged and waived his *Miranda* rights, the court found any delay in bringing Sierra before a magistrate had no causal connection to his statement.⁴⁵

D. JUVENILES

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. Under the Family Code, police must promptly notify the child's parent, guardian, or custodian that the child is in custody and explain why the child is being held.⁴⁶ In *Marsh v. State*, the Fourteenth Court of Appeals held that police complied with the Code's parental-notification provision even though the informing officer gave the juvenile's parents incorrect information on where the juvenile was being held.⁴⁷ Absent any evidence of attempts to intentionally mislead, there is no violation found in providing incorrect information that exceeds the Code's requirements.⁴⁸

Like statutory violations involving adults, a violation of this Code section will not render a confession inadmissible unless there is a causal connection between the violation and the juvenile's confession. The juvenile carries both the burden of producing evidence of the parental-notification violation and a causal connection between the violation and the resulting confession.⁴⁹ Mere speculation that a juvenile's parents might have arranged counsel for him, intervened in the interrogation, or advised the juvenile not to make a statement is insufficient to meet the burden required to show a causal connection.⁵⁰

When a juvenile is taken into custody, police must immediately bring the child to a designated juvenile processing office or to an alternative site provided under the Family Code.⁵¹ A violation was found when officers took a juvenile into custody and placed him in an area with adult

43. *Sierra v. State*, 157 S.W.3d 52, 58 (Tex. App.—Fort Worth 2004, pet. filed).

44. *Id.*

45. *Id.*

46. TEX. FAM. CODE ANN. § 52.02(b) (Vernon Supp. 2004).

47. *Marsh v. State*, 140 S.W.3d 901, 906 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

48. *See id.*

49. *Pham v. State*, 125 S.W.3d 622, 627–28 (Tex. App.—Houston [1st Dist.] 2003, pet. granted); *Gonzales v. State*, 125 S.W.3d 616, 618 (Tex. App.—Houston [1st Dist.] 2003, pet. granted).

50. *Pham*, 125 S.W.3d at 628–29.

51. TEX. FAM. CODE ANN. § 52.02 (Vernon Supp. 2004).

offenders even though the police station had a designated juvenile processing office.⁵² Because the arrested child was not taken to a juvenile processing office or a statutory alternative, the statement obtained by the investigating officer was inadmissible at trial.⁵³

II. SEARCH AND SEIZURE

A. IN GENERAL

Texas state courts 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. In reviewing a motion to suppress ruling, both state and federal courts give great deference to the trial court's determination of historical facts while reviewing questions of law de novo.⁵⁴

An accused only has standing to contest a search if the accused had a legitimate expectation of privacy in a place government officials or agents invaded. To demonstrate standing, a defendant must show that (1) by his conduct, he exhibited an actual, subjective expectation of privacy, and (2) society is prepared to recognize his subjective expectation of privacy as objectively reasonable.⁵⁵ In evaluating whether an individual's subjective expectation is one that society is prepared to recognize as objectively reasonable, courts weigh the following factors:

- 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 normal, customary precautions were taken to secure privacy;
- Whether the place was put to some private use; and
- Whether the privacy claim is consistent with historical notions of privacy.⁵⁶

Weighing these factors, the Fort Worth Court of Appeals found no reasonable expectation of privacy in a work computer used by a teacher in a school classroom.⁵⁷ Courts also look to relevant legislation to evaluate whether a subjective expectation of privacy is reasonable.⁵⁸ In a case involving a Transportation Safety Administration search of a passenger's

52. *In re* U.G., 128 S.W.3d 797, 799 (Tex. App.—Corpus Christi 2004, pet. denied).

53. *Id.*

54. *See, e.g.*, United States v. Phillips, 382 F.3d 489, 494 (5th Cir. 2004); Stone v. State, 147 S.W.3d 657, 659 (Tex. App.—Amarillo 2004, pet. ref'd).

55. Turner v. State, 132 S.W.3d 504, 507 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd).

56. Voyles v. State, 133 S.W.3d 303, 305–06 (Tex. App.—Fort Worth 2004, no pet.).

57. *Id.* at 306.

58. *See generally* Turner, 132 S.W.3d at 507 (referencing the Texas Court of Criminal Appeals's examination of municipal code provisions to examine expectation of privacy in the passenger compartment of a taxi cab in *Chapa v. State*, 729 S.W.2d 723, 728 (Tex. Crim. App. 1987)).

pocket at the airport, the First Court of Appeals referenced a federal statute mandating the screening of all passengers and their luggage before boarding to determine reasonableness.⁵⁹ The court held the accused's harbored subjective expectation that he will not be stopped or searched at the gate is one society does not recognize as reasonable.⁶⁰

Courts have undoubtedly found an expectation of privacy in one's home. And this expectation unequivocally encompasses the house's curtilage or area surrounding the house where the activity of home life extends. However, the restriction against intruding upon one's curtilage is not without limits. An officer can enter a house's curtilage in order to contact its occupants. In fulfilling this purpose, the officer may also open fence gates within the curtilage so long as the occupant does not manifest intent to restrict access or the officer does not stray from the normal path of traffic.⁶¹ A court of appeals held that the operation of a business repairing other people's cars, the unlocked fence, the presence of a well-defined dirt driveway, and the inference that customers used the driveway were sufficient indicia that the appellant did not have an expectation of privacy in a dirt road on his property.⁶²

The Fifth Circuit recognized that a person can have a legitimate expectation of privacy in someone else's property. However, in *United States v. Phillips*, it found the evidence insufficient to warrant such a finding.⁶³ Analogizing to the Supreme Court's decision in *Carter*,⁶⁴ the court held the use of another's storage shed to store cocaine was solely for a commercial purpose—the storage and later distribution of cocaine—and therefore there was no reasonable expectation of privacy.⁶⁵ The court also held that unlike the “overnight guest” cases,⁶⁶ *Phillips* was not given express permission to use the shed, and therefore his presence was wrongful.⁶⁷

An individual has no reasonable expectation of privacy in abandoned or disclaimed property. Whether property has been abandoned or disclaimed may be inferred from an individual's words, acts, or other facts.⁶⁸ When an accused denies ownership of property when asked by law enforcement, it is sufficient to support a finding that the accused abandoned or disclaimed the property, thereby denying the accused standing to contest the seizure.⁶⁹

59. *Turner*, 132 S.W.3d at 507.

60. *Id.*

61. *Buchanan v. State*, 129 S.W.3d 767, 773 (Tex. App.—Amarillo 2004, pet. ref'd).

62. *Id.* at 774.

63. *Phillips*, 382 F.3d at 495-97.

64. *Minnesota v. Carter*, 525 U.S. 83, 91 (1998).

65. *Phillips*, 382 F.3d at 496.

66. *See Minnesota v. Olson*, 495 U.S. 91, 96 (1990) (finding overnight guests may have a reasonable expectation of privacy in their host's home).

67. *Phillips*, 382 F.3d at 497.

68. *Dominguez v. State*, 125 S.W.3d 755, 762 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

69. *Id.* at 763.

B. ARREST, STOP, OR INQUIRY WITHOUT WARRANT

There are three distinct types of police-citizen interactions, each requiring different levels of constitutional protection:

1. encounters, which require no objective justification;
2. investigative detentions, which require reasonable suspicion; and
3. arrests, which require probable cause.⁷⁰

1. Encounters

Unlike nonconsensual encounters, no level of probable cause or reasonable suspicion is required for an officer to approach an individual to ask questions or to request a search. A consensual encounter does not trigger any constitutional protections.⁷¹ An encounter is consensual if a person under the circumstances would feel free to disregard the officer or terminate the encounter.⁷²

Last term, the Supreme Court in *Illinois v. Lidster* approved the use of roadblocks in effecting brief information-seeking highway stops absent reasonable suspicion.⁷³ In response to a fatal hit-and-run that occurred earlier in the week, police set up a highway checkpoint to gather any information drivers may have had about the fatal incident.⁷⁴ Each driver was stopped for approximately ten to fifteen seconds, was asked if they had seen anything happen last weekend, and was given a flyer requesting any information on the incident. While approaching the checkpoint, Lidster swerved and almost hit an officer. After concluding Lidster was intoxicated, officers arrested him for driving under the influence. Distinguishing this case from *Indianapolis v. Edmond*,⁷⁵ the *Lidster* Court highlighted the roadblock's purpose of information gathering, rather than functioning as a general crime control apparatus.⁷⁶ Law enforcement's interest in investigating a crime resulting in human death outweighed the brief delay imposed by the roadblock.⁷⁷

In *United States v. Williams*, plain-clothed officers approached Williams after their drug-sniffing dog alerted them to a bag located on a Greyhound bus.⁷⁸ After agreeing to speak with the officers, Williams was asked to accompany the officers to a separate baggage handling area to avoid the noise of the departing buses.⁷⁹ He complied with the request. Finding no coercive or restrictive circumstances, the Fifth Circuit held that the encounter was consensual and that the encounter's consensual

70. *United States v. Williams*, 365 F.3d 399, 403–04 (5th Cir. 2004).

71. *Id.* at 404.

72. *Id.*

73. *Illinois v. Lidster*, 540 U.S. 419, 427–28 (2004).

74. *Id.* at 422.

75. 531 U.S. 32, 41 (2000) (holding the roadblock's purpose was designed primarily for crime control and therefore the traffic stops must be based on reasonable suspicion).

76. *Lidster*, 540 U.S. at 423–26.

77. *Id.* at 427–28.

78. *Williams*, 365 F.3d at 401–02.

79. *Id.* at 404–05.

nature did not end when the officer requested to speak with him in a different part of the bus station.⁸⁰

When an individual is not free to leave or an officer conveys a message that compliance with the requests is required, the encounter may cross the threshold into the realm of a seizure contemplated by *Terry*. The Austin Court of Appeals so held in *Hayes v. State*.⁸¹ While the encounter was initially consensual, the court held that Hayes was “seized” for Fourth Amendment purposes when the officers took Hayes’s identification back to the patrol car to run a warrant check.⁸² Upon finding an individual seized, courts analyze the seizure under the rubric of *Terry* and its progeny.

2. Investigative Detentions (*Terry* Stops)

A person seizes another when he, “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.”⁸³ The Fifth Circuit found that an officer’s intentional shooting at an individual’s car with the intent to terminate the person’s freedom of movement is a seizure by physical force.⁸⁴ Police may stop and briefly detain an individual suspected of criminal activity on less than probable cause. To effect a valid *Terry* stop, an officer must have reasonable suspicion based on specific articulable facts that, in light of the officer’s experience and general knowledge, would lead the officer to reasonably conclude the detained person is involved in criminal activity.⁸⁵ Police-investigative detentions are reviewed in two parts. Courts examine whether the officer’s action was justified at its inception and then resolve whether the subsequent actions were reasonably related in scope to the circumstances justifying the stop.⁸⁶ The reasonableness of the stop is evaluated based on the totality of the circumstances.⁸⁷

Traffic stops are Fourth Amendment seizures resembling investigative detentions and are analyzed under *Terry*.⁸⁸ While the typical case usually involves an officer’s observations, reasonable suspicion may be based on other reliable sources. In *Harrison v. State*, a police officer stopped Harrison after a concerned citizen called 911 to report Harrison’s erratic driving and suspicion of drunk driving.⁸⁹ Rejecting Harrison’s argument of insufficient suspicion supporting the stop, the Fort Worth Court of Appeals held the tip bore sufficient indicia of reliability.⁹⁰ The court’s hold-

80. *Id.*

81. 132 S.W.3d 147, 152–53 (Tex. App.—Austin 2004, no pet.).

82. *Id.* at 153.

83. Flores v. City of Palacios, 381 F.3d 391, 396 (5th Cir. 2004) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

84. *Id.*

85. *Harrison v. State*, 144 S.W.3d 82, 86 (Tex. App.—Fort Worth 2004, pet. granted).

86. *United States v. Brigham*, 382 F.3d 500, 506 (5th Cir. 2004).

87. *Joubert v. State*, 129 S.W.3d 686, 688 (Tex. App.—Waco 2004, no pet.).

88. *State v. Gray*, 157 S.W.3d 1, 5 (Tex. App.—Tyler 2004, pet. granted).

89. *Harrison*, 144 S.W.3d at 84.

90. *Id.* at 86.

ing noted the caller's personal observation of the potential crime in progress and that the caller was neither connected with police nor solicited for information.⁹¹

However, when an officer detains an individual based on information provided by another officer, a court undertakes a slightly different analysis. First, a court determines whether the officer making the stop reasonably relied on the information.⁹² Second, if the court finds reasonable reliance, then a court looks at whether the officer providing the information had sufficient suspicion to ask for the stop or arrest.⁹³ An officer's reliance on another officer's account that an individual was associated with two girls recently arrested was a mere suspicious association and, without more, did not constitute an objectively reasonable basis to detain an individual.⁹⁴ The El Paso Court of Appeals similarly held that information provided by another officer did not amount to reasonable suspicion.⁹⁵ An officer initiated a traffic stop on the instructions of two undercover narcotics officers conducting surveillance of a particular residence. Suppression hearing testimony indicated the only information the two other officers relayed to the detaining officer was that the car had pulled up to the surveilled residence, stayed a short time, and then left.⁹⁶ Because the officer "did not provide any information about the surrounding circumstances, such as the time of day, whether the officers had reason to suspect that there were drugs at the residence, . . . whether the area was known for drug activity," or information concerning his or the other officer's experience and training, the court held the State did not prove that the officers had sufficient reasonable suspicion to execute the traffic stop.⁹⁷

The next step in determining a stop's reasonableness is whether the stop was reasonably related in scope to the circumstances justifying the interference. As a general rule, an investigative stop can last no longer than necessary to effect the purpose of the stop. A continued detention is justified if, during the valid investigative detention, an officer develops reasonable suspicion that the detainee is connected to criminal activity.⁹⁸ Courts have routinely permitted law enforcement questioning on the purpose and itinerary of a driver's trip and requesting a driver's license and vehicle registration during a traffic stop.⁹⁹ Police questioning on a subject apart from the purpose of the stop is not a violation of the Fourth Amendment.¹⁰⁰ The Fifth Circuit found a continued detention was justified based on the officer ascertaining that the appellant was not the

91. *Id.* at 86–87.

92. *Hayes v. State*, 132 S.W.3d 147, 154 (Tex. App.—Austin 2004, no pet.).

93. *Id.*

94. *Id.*

95. *Young v. State*, 133 S.W.3d 839, 843–44 (Tex. App.—El Paso 2004, no pet.).

96. *Id.* at 843.

97. *Id.*

98. *State v. Gray*, 157 S.W.3d 1, 5 (Tex. App.—Tyler 2004, pet. granted).

99. *United States v. Brigham*, 382 F.3d 500, 507–08 (5th Cir. 2004) (en banc).

100. *Id.* at 508.

owner or lessee of the car, the actual lessee was not present, and the appellant's and passenger's stories conflicted.¹⁰¹ The Court of Criminal Appeals encountered a similar case last year raising the issue of a traffic stop's proper scope.

In *Kothe v. State*, an officer received a radio dispatch about a potentially intoxicated driver with the description of the suspected car.¹⁰² Matching Kothe's car to the broadcasted description, the officer pulled in behind Kothe's parked car at a rest station. After concluding Kothe was not intoxicated, the officer returned to his patrol car to perform a computerized warrant check. The check showed no outstanding warrants. As the officer was about to release Kothe, the officer received notice that Kothe might be in possession of a bag of coins taken from a household safe. Obtaining Kothe's consent to search, the officer found drug paraphernalia in the car. After the officer discovered the paraphernalia, the passenger admitted to possessing heroin, which Kothe asked her to hold. The Court of Criminal Appeals noted that the officer's decision to wait for the results of the warrant check before releasing Kothe was reasonable.¹⁰³ The court noted that the officer received the coin information and the warrant-check results nearly simultaneously. The duration of the stop did not exceed the bounds of the detention.¹⁰⁴ In *Wolf v. State*, however, the Waco Court of Appeals held a three minute period of time was a prolonged detention not supported by reasonable suspicion.¹⁰⁵ The officer in *Wolf* detained the appellant to issue him a warning on a defective tag light. The officer detained the car's occupants for three minutes after discovering criminal histories were unavailable. The detention was longer than necessary in effecting the purpose of the stop.¹⁰⁶ Because nervousness and being overly cooperative were insufficient to warrant a man of reasonable caution to believe prolonging the detention was appropriate, the officer violated appellant's Fourth Amendment rights.¹⁰⁷

Interpreting Court of Criminal Appeals case law, the Fort Worth Court of Appeals curiously announced that "an officer may not, within the scope of a valid traffic stop, request identification and check for outstanding warrants of passengers."¹⁰⁸ The court further added, "[i]n order to conduct such an investigation of the passenger, the officer must have separate reasonable suspicion of the passenger."¹⁰⁹ Finding the detention of the passenger unreasonable, the court held that there was no evidence that established reasonable suspicion supporting the officer's questioning

101. *Id.*

102. *Kothe v. State*, 152 S.W.3d 54, 58 (Tex. Crim. App. 2004).

103. *Id.* at 66-67.

104. *Id.*

105. *Wolf v. State*, 137 S.W.3d 797, 804-05 (Tex. App.—Waco 2004, no pet.).

106. *Id.* at 804.

107. *Id.* at 804-05.

108. *St. George v. State*, Nos. 2-03-421-CR, 2-03-422-CR, 2004 WL 1944779, at *2-5 (Tex. App.—Fort Worth Aug. 31, 2004, no pet.).

109. *Id.* at *5.

of the car's passenger at its inception.¹¹⁰

3. Warrantless Arrests and Searches

Once a person is lawfully detained, an officer may frisk the detainee when he reasonably suspects that the detainee is armed. A pat-down is justified if a reasonably prudent officer would be warranted in believing his or another's safety is in danger. While the focus of a pat-down is safety and the search for weapons, an officer may seize items immediately recognizable as contraband discovered during the frisk for weapons. In confronting an individual loitering in a known drug-trafficking area for a substantial period of time, police officers were justified in conducting a pat-down for weapons.¹¹¹ Further, the officer was entitled to seize a baggie protruding from the appellant's open pocket when the officer readily identified it as a type of baggie used to carry drugs.¹¹² However, courts still maintain "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."¹¹³

Courts apply a similar analysis when evaluating whether law enforcement is justified in conducting a protective sweep of a residence upon lawful entry. Like the *Terry* analysis for pat-downs, whether an officer can perform a quick and limited search of the premise turns on whether an officer reasonably believes that an area to be swept harbors an individual posing a danger to those present at the scene. Expanding on the Supreme Court's opinion in *Maryland v. Buie*¹¹⁴ allowing protective sweeps when performing an in-house arrest, the Fifth Circuit held that an in-home arrest is not a required element of an in-home protective sweep.¹¹⁵ While an arrest tends to show the potential risk of the officer's safety, other circumstances may establish that danger as well.¹¹⁶ A protective sweep is not a full search. It must be limited to a cursory inspection of those spaces where a person may be found. The Eastland Court of Appeals held that officers exceeded the scope of a protective sweep when they lifted up the mattress to look for possible weapons.¹¹⁷ The court reasoned that the officers did not and could not reasonably believe that a person was concealed between the mattress and the box spring.¹¹⁸

110. *Id.* at *6.

111. *Wilson v. State*, 132 S.W.3d 695, 699–700 (Tex. App.—Amarillo 2004, pet ref'd).

112. *Id.* at 700.

113. See *Gregory v. State*, No. 01-03-00192-CR, 2004 WL 2415112, at *2 (Tex. App.—Houston [1st Dist.] 2004, pet. filed) (citing *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000)).

114. 494 U.S. 325 (1990).

115. *United States v. Gould*, 364 F.3d 578, 584 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 437, 160 L. Ed. 2d 317 (2004).

116. *Id.*

117. *Mondragon-Garcia v. State*, 129 S.W.3d 674, 677 (Tex. App.—Eastland 2004, pet ref'd).

118. *Id.*

Police must have probable cause that a search of a residence would produce evidence of a crime. But exigent circumstances must exist to justify a warrantless entry into a home. The following factors in evaluating the existence of exigent circumstances are well recognized:

- The urgency and the time required to secure a warrant;
- The reasonable belief that seizable items were subject to destruction or removal;
- The danger to officers while attempting to obtain a warrant;
- The suspect's awareness of police presence; and
- The destructibility of the contraband.¹¹⁹

In *Parker v. State*, officers approached a residence to investigate a report that minors were drinking.¹²⁰ When they approached, the officers heard someone in the house announce their presence, observed a person running upstairs, and when the door was opened, they smelled burnt marijuana. After finding these observations constituted probable cause, the court found exigent circumstances existed to justify entry into the residence because obtaining a warrant would have taken approximately an hour and the officer's believed the house needed to be secured to prevent evidence destruction.¹²¹ The court concluded that the entry was lawful to secure the house pending application for a search warrant.¹²² Courts have also analyzed the taking of blood samples under exigent circumstances. In an intoxicated assault case, the Texarkana Court of Appeals held that exigent circumstances existed "in cases such as these because alcohol in the blood is quickly consumed and the evidence may be lost forever."¹²³

The emergency doctrine permits an officer to make a warrantless entry when he reasonably believes that a person needs immediate aid. In *Rauscher v. State*, the First Court of Appeals in Houston held the circumstances known to the officer justified his entry into an apartment based on this exception.¹²⁴ Responding to a "check on welfare" call placed by an apartment complex employee, the officer was told that repeated attempts to contact the resident had failed, the lock on the door had been changed without notice, the residents had been heard arguing some time earlier, and that a foul odor was emanating from the unit.¹²⁵ While the officer was incorrect in concluding that the smell was a decomposing body, he was nonetheless justified in entering the apartment without a warrant.¹²⁶

119. *Parker v. State*, No. 07-02-0354-CR, 2005 WL 66942, at *3 (Tex. App.—Amarillo Jan. 12, 2004, pet. filed).

120. *Id.* at *1.

121. *Id.* at *3.

122. *Id.*

123. *Blumensetter v. State*, 135 S.W.3d 234, 243 (Tex. App.—Texarkana 2004, no pet.).

124. *Rauscher v. State*, 129 S.W.3d 714, 722–23 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd).

125. *Id.* at 722.

126. *Id.* at 723.

A peace officer may arrest an individual without a warrant for any offense committed in the officer's presence or view. The officer need not determine whether an offense was in fact committed to justify a warrantless arrest. But probable cause is the touchstone. In *Moreno v. State*, failure to present the officer with a valid, unexpired driver's license and proof of insurance was held to sufficiently establish probable cause for a violation of the Transportation Code.¹²⁷ The State was not required to prove that Moreno's license had actually expired or that he had no insurance.¹²⁸

In *Maryland v. Pringle*, the United States Supreme Court addressed the degree to which probable cause must be particularized to an individual.¹²⁹ A police officer stopped a speeding car carrying three occupants: the driver, Pringle (the front-seat passenger), and a back-seat passenger.¹³⁰ The driver consented to a search of the vehicle. The officer found \$763 of rolled-up cash in the glove box and five plastic baggies of cocaine from behind the rear-seat armrest. When the officer began the search, the armrest was in an upright position laying flat against the rear seats. All three occupants were questioned about ownership of the drugs and money.¹³¹ They were told if no one claimed ownership of the drugs, they were all going to be arrested. All three were arrested when no one provided any information.

Because the cash was directly in front of Pringle and the baggies of cocaine were accessible to all of the passengers, the Court held there was a reasonable inference that all the men in the car had knowledge of, and exercised dominion and control over, the drugs.¹³² The Court distinguished this case from *Ybarra v. Illinois* by stating that the occupants of the car were in a relatively small automobile and not located in a public tavern like the appellant in *Ybarra*.¹³³ The Court again noted that a car passenger "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing."¹³⁴

Under a lawful arrest, a person's privacy interest yields, allowing the police to search for weapons, means of escape, and evidence without any requisite level of suspicion.¹³⁵ A search incident to an arrest extends only to a search of the person and the area within his immediate control. In *Mondragon-Garcia*, the appellant was apprehended outside of a motel

127. *Moreno v. State*, 124 S.W.3d 339, 349 (Tex. App.—Corpus Christi 2003, no pet.).

128. *Id.*

129. *Maryland v. Pringle*, 540 U.S. 366, 370–74 (2003).

130. *Id.* at 367–68.

131. *Id.* at 368–69.

132. *Id.* at 371–72.

133. *Id.* at 373 (referencing *Ybarra v. Illinois*, 444 U.S. 85 (1979), which held that a person's mere propinquity to other suspected individuals does not alone give rise to probable cause to search that person).

134. *Id.* (quoting *Wyoming v. Houghton*, 526 U.S. 295, 304–05 (1999)).

135. *Moreno v. State*, 124 S.W.3d 339, 349–50 (Tex. App.—Corpus Christi 2003, no pet.).

room after fleeing from the police.¹³⁶ Although the record was unclear whether the appellant actually physically re-entered the room, the court rejected the incident-to-an-arrest justification for the search of the motel room. The court noted the proximity component of a search incident to arrest and held that the seized gun was not in appellant's immediate control.¹³⁷ When an arrest involves a recent occupant of a vehicle, the police may search the passenger compartment of that vehicle as incident to the arrest. But the search must occur contemporaneously with the arrest.¹³⁸ Fruits of a search occurring significantly after the arrest are inadmissible.¹³⁹

When executing a search warrant, an officer may detain persons who are present at the scene. This narrow exception to the probable cause requirement does not automatically extend to persons merely on the premises at the time of the execution of the search warrant.¹⁴⁰ Other independent factors must exist linking the person to the unlawful activities on the premises. The Supreme Court has cited several justifications for the detaining individuals at the scene: "(1) preventing flight in the event incriminating evidence is found; (2) minimizing the risk of harm to the officers; and (3) conducting the search in an orderly fashion."¹⁴¹ The detention of a person discovered taking inventory in the business where police were executing a narcotics search warrant was held to be permissible.¹⁴² The act of taking inventory was sufficient evidence that he was not "merely present" at the scene. Also, the search for narcotics implicitly carried with it the potential for sudden violence or frantic efforts to conceal or destroy evidence.¹⁴³ But without probable cause, police are not permitted to conduct strip searches of individuals located at the scene.¹⁴⁴

Provided there is probable cause to believe that a crime was committed and that contraband is located in a vehicle, police may search every part of a vehicle and any container that may contain the object of the search. In applying this automobile exception to the warrant requirement, Texas courts continue to recognize that procurement of a warrant may become impracticable "because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."¹⁴⁵ And like all probable cause determinations, courts look to the totality of the circumstances.

136. *Mondragon-Garcia v. State*, 129 S.W.3d 674, 677-78 (Tex. App.—Eastland 2004, pet. ref'd).

137. *Id.* at 678.

138. *Strong v. State*, 138 S.W.3d 546, 555 (Tex. App.—Corpus Christi 2004, no pet.).

139. *Id.*

140. *Morrison v. State*, 132 S.W.3d 37, 43 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

141. *Id.* at 44 (referencing *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981)).

142. *Id.*

143. *Id.*

144. *Williams v. Kaufman County*, 352 F.3d 994, 1003-05 (5th Cir. 2003).

145. See *Blaylock v. State*, 125 S.W.3d 702, 705 (Tex. App.—Texarkana 2003, pet. ref'd) (citing *Chambers v. Maroney*, 399 U.S. 42, 48-49 (1970)); see also *Conde v. State*, 135 S.W.3d 252, 255 (Tex. App.—Waco 2004, no pet.).

After executing a lawful arrest, an officer may perform a suspicionless search of a person's belongings—including a vehicle—for purposes of making an inventory.¹⁴⁶ A valid inventory search must be conducted in accordance with a standardized criteria or established routine designed to produce an inventory. It cannot “serve as a ruse for a general rummaging in order to discover incriminating evidence.”¹⁴⁷ Despite finding no language in the department policy specifically addressing whether officers are authorized to search locked trunks or closed containers, a court of appeals held that officers' training on how to inventory containers demonstrated an established routine.¹⁴⁸ The court held the search of a closed backpack found in the trunk of appellant's car was a valid inventory search.¹⁴⁹

In two cases decided within a few weeks of each other, the First Court of Appeals in Houston held that “‘in the context of inventories,’ Article I, section 9 of the Texas Constitution does not provide greater protection to individuals against unreasonable searches and seizures than the Fourth Amendment.”¹⁵⁰ The court declined to follow the Court of Criminal Appeals's three-judge plurality opinion in *Autran v. State* which expressed a refusal to presume a search reasonable under the Texas Constitution merely because departmental policies were followed.¹⁵¹ In so holding, the court of appeals noted other courts' failure to follow *Autran* and the subsequent Court of Criminal Appeals cases' inconsistency with *Autran's* pronouncement.¹⁵²

C. AFFIDAVITS IN SUPPORT OF SEARCH WARRANTS

An affidavit must contain sufficient facts allowing a court to conclude that the object of the search would probably be located on the premises.¹⁵³ Appellate courts review the sufficiency of an affidavit on its four corners and any proper inferences that may be drawn from its facts under the totality of the circumstances.¹⁵⁴ Reviewing courts grant significant deference to a magistrate's findings of probable cause in an affidavit.¹⁵⁵

This past year brought review of affidavits using confidential informants' information in obtaining search warrants. Applying the rule in *Illinois v. Gates*,¹⁵⁶ Texas courts reiterate that while an informant's verac-

146. See *Ray v. State*, 148 S.W.3d 218, 223 (Tex. App.—Texarkana 2004, pet. granted).

147. *Richards v. State*, 150 S.W.3d 762, 771 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (citing *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

148. *Id.*

149. *Id.*

150. *Garza v. State*, 137 S.W.3d 878, 885 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd); *Rothenberg v. State*, No. 01-03-00364-CR, 2004 WL 1277542, at *4 (Tex. App.—Houston [1st Dist.] June 10, 2004, pet. ref'd).

151. *Garza*, 137 S.W.3d at 885 (referencing *Autran v. State*, 887 S.W.2d 31, 33 (Tex. Crim. App. 1994)).

152. *Rothenberg*, 2004 WL 1277542, at *4–5.

153. *Davis v. State*, 144 S.W.3d 192, 197 (Tex. App.—Fort Worth 2004, pet. ref'd).

154. *Hankins v. State*, 132 S.W.3d 380, 388 (Tex. Crim. App. 2004).

155. *State v. Gonzales*, 146 S.W.3d 760, 762 (Tex. App.—Eastland 2004, pet. ref'd).

156. *Illinois v. Gates*, 462 U.S. 213 (1983).

ity, reliability, and basis of knowledge are not requirements for a valid affidavit, these elements are highly relevant in determining the value of the information provided by an informant.¹⁵⁷ In *Cardona v. State*, the affidavit stated that a confidential informant provided information to the affiant officer that he personally observed various items in a place of business and that the occupants were “going to cook” methamphetamine on a certain day.¹⁵⁸ The Amarillo Court of Appeals held the affidavit insufficient to establish probable cause. The court found that the affidavit, among other things, failed to address the basis of informant’s knowledge that occupants were “going to cook,” the informant’s reliability, or whether the items informant saw were connected to the manufacture of drugs.¹⁵⁹

The courts of appeals remain uncertain whether an omission from an affidavit should receive a *Franks*¹⁶⁰ analysis like that given to an affidavit’s false statement.¹⁶¹ But a review of previous cases indicates that they often do.¹⁶² In *Franks*, the Supreme Court stated that if a defendant proves by a preponderance of the evidence that the affidavit includes a false statement that the affiant placed in the affidavit intentionally, knowingly, or with reckless disregard for the truth, and the statement was necessary in finding probable cause, then the search warrant is invalid.¹⁶³ In *State v. Gonzales*, law enforcement orchestrated a “controlled delivery” of a package it knew contained marijuana to its intended recipient.¹⁶⁴ When attempting to make the delivery, the postal inspector was greeted by a twelve-year-old child. The child repeatedly told the inspector that Beto Pena, the intended recipient, did not live at the residence despite the package’s labeling.¹⁶⁵ The inspector left the package in the child’s hands. The search warrant’s accompanying affidavit stated that “one Beto Pena and person or persons unknown by name or description who received the controlled delivery . . . did then and there unlawfully possess . . . a controlled substance, to wit: Marihuana.”¹⁶⁶ Finding no delivery to any suspected parties as stated in the affidavit, the court excised this statement from the affidavit and held the corrected affidavit did not establish probable cause.

Apart from a warrant’s supporting affidavit, the search warrant itself must adequately describe the place to be searched and objects to be seized. The United States Supreme Court reviewed the requirements and

157. *State v. Walker*, 140 S.W.3d 761, 766 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

158. *Cardona v. State*, 134 S.W.3d 854, 856 (Tex. App.—Amarillo 2004, pet. ref’d).

159. *Id.* at 857–58.

160. *Franks v. Delaware*, 438 U.S. 154 (1978).

161. *Darby v. State*, 145 S.W.3d 714, 722 (Tex. App.—Fort Worth 2004, pet. ref’d); *Blake v. State*, 125 S.W.3d 717, 724 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

162. *Blake*, 125 S.W.3d at 724.

163. *Franks*, 438 U.S. at 155–56.

164. *State v. Gonzales*, 146 S.W.3d 760, 761 (Tex. App.—Eastland 2004, pet. ref’d).

165. *Id.*

166. *Id.* at 763.

adequacy of a search warrant in *Groh v. Ramirez*.¹⁶⁷ Acting on information from a witness, Groh, an ATF agent, sought a search warrant of Ramirez's home on his Montana ranch.¹⁶⁸ Groh's application, supported by an affidavit, listed various weapons he believed to be located in the house. The completed warrant form did not list any items to be seized and did not incorporate by reference the list in the application. Although the warrant did indicate that the magistrate was satisfied that probable cause existed, the Court held the warrant facially invalid.¹⁶⁹ The fact that the items to be seized were fully listed in the application does not cure the problem with the warrant itself. It is the warrant that must contain the particular items to be seized.

Although an affidavit must establish probable cause to believe certain items probably will be found at a particular location, the police are not limited to one location. In *Price v. State*, the Waco Court of Appeals rejected the argument that law enforcement could not seek specific items in four locations simultaneously.¹⁷⁰ Provided a magistrate has a substantial basis in believing the items could be located in any of these locations, an affidavit and subsequently issued warrant will withstand scrutiny. When empowered with a search warrant, officers must operate within the scope of the magistrate's authorization. In *Long v. State*, the police executed a search warrant authorizing the search of a business establishment named Train's.¹⁷¹ The officers searched the Train's establishment and also a nearby red caboose where the appellant was living. The red caboose was not mentioned in the warrant or affidavit. The Court of Criminal Appeals refused the argument that the authority given to the police under the valid warrant extended to the red caboose.¹⁷² Without mentioning the red caboose in the affidavit or warrant, a neutral magistrate could not adequately review whether probable cause existed to enter appellant's home. The court concluded that the detailed description of the business premises did not implicitly authorize the search of appellant's home.¹⁷³

D. CONSENT TO SEARCH

The Court of Criminal Appeals once again reminded us that a search conducted with the consent of the suspect is a specifically established exception to the warrant requirement. But the consent must be voluntary, which is determined from all the circumstances. The Texas and United States Constitutions diverge on the burden of proof the state must carry to prove the validity of the consent. The United States Constitution requires the State to prove validity by a preponderance of the evidence,

167. *Groh v. Ramirez*, 540 U.S. 551 (2004).

168. *Id.* at 554.

169. *Id.* at 558–59.

170. *Price v. State*, 143 S.W.3d 158, 160–61 (Tex. App.—Waco 2004, pet. ref'd).

171. *Long v. State*, 132 S.W.3d 443, 445 (Tex. Crim. App. 2004).

172. *Id.* at 447–48.

173. *Id.* at 452.

while the Texas Constitution requires proof by clear and convincing evidence.¹⁷⁴

Consent is not voluntary if obtained through duress or coercion, whether actual or implied. Texas courts have utilized six factors to determine whether the consent was voluntarily given, with no one single factor dispositive: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.¹⁷⁵ An officer's failure to inform the suspect of the right to refuse does not automatically render the consent involuntary; however, it is a factor in evaluating voluntariness. Nor will the fact that the suspect is under arrest render the consent involuntary per se. However, the Fort Worth Court of Appeals noted that when a suspect is under arrest and is asked to provide a breath or blood sample, the individual must be provided with the statutory warnings under Chapter 724 of the Transportation Code which include the consequences of refusing.¹⁷⁶

In *Harrison v. State*, when hospital personnel could not extract a testable quantity of blood from Harrison, she consented to providing a urine specimen.¹⁷⁷ But the Fort Worth Court of Appeals held Harrison's consent was involuntary. The court focused on the testimony describing the five or six unsuccessful attempts at extracting blood from Harrison's arm and the bruising and pain resulting from each attempt. Because she was not given her statutory warnings under the Transportation Code and consent was given to avoid further painful probing, Harrison's consent was involuntarily obtained.¹⁷⁸

When consent is given after a Fourth Amendment violation, a second prong is added in addition to voluntariness: whether the consent was an independent act of free will. Under this second prong, courts consider: (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.¹⁷⁹

The scope of the consent under the Fourth Amendment is held to a standard of objective reasonableness. An individual is free to limit the scope of their consent. In the context of a traffic accident, when a patient gives consent to provide a blood sample, the consent reasonably contemplates using the blood to investigate the cause of the accident or any of-

174. *Rayford v. State*, 125 S.W.3d 521, 528 (Tex. Crim. App. 2003).

175. *Wolf v. State*, 137 S.W.3d 797, 805 (Tex. App.—Waco 2004, no pet.) (citing *United States v. Portillo-Aguirre*, 311 F.3d 647, 658 (5th Cir. 2002)).

176. *Ramos v. State*, 124 S.W.3d 326, 332 (Tex. App.—Fort Worth 2003, pet. ref'd).

177. *Harrison v. State*, 144 S.W.3d 82, 88–89 (Tex. App.—Fort Worth 2004, pet. granted).

178. *Id.* at 89.

179. *Wolf*, 137 S.W.3d at 805 (citing *Portillo-Aguirre*, 311 F.3d at 659).

fense connected to the accident.¹⁸⁰

E. MISCELLANEOUS CASES

Other Fourth Amendment issues addressed this year include:

- Knock-and-announce rule: Courts have not deviated from the Supreme Court's holding that police must have a reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would inhibit effective crime investigation by allowing the destruction of evidence.¹⁸¹ In *United States v. Banks*, the police executed a search warrant on Banks's home, suspecting drug sales out of the two-bedroom apartment.¹⁸² After knocking and announcing their presence, they executed a forcible entry after the expiration of fifteen to twenty seconds. The Court held that after this period elapsed, the police could fairly suspect that cocaine would be destroyed if they waited any longer.¹⁸³
- Searches conducted by school officials: Courts continue to recognize these searches need not be supported by the usual probable cause level of suspicion, but rather reasonable suspicion.¹⁸⁴
- The DNA Statute—Texas Family Code section 54.0405: A blood-draw order pursuant to the DNA statute is not an unreasonable search and seizure under the Fourth Amendment.¹⁸⁵ The Fort Worth Court of Appeals held that the statute is not designed to produce evidence of a specific individual's criminal conduct. Therefore, it falls into the "special needs" exception and is a constitutional suspicionless search. The government's interest promoted by the DNA statute outweighs the minimal physical intrusion upon a juvenile's privacy.
- Examination of items taken as inventory: Police may continue to examine and test items validly within their control and custody, regardless of the existence of probable cause or exigent circumstances.¹⁸⁶
- Plain-view doctrine: Courts routinely hold that no invasion of privacy occurs upon a seizure when (1) officers have a right to be where they are, and (2) an item is immediately recognizable as constituting evidence.¹⁸⁷

180. *Ramos*, 124 S.W.3d at 333.

181. *Bedford v. State*, 131 S.W.3d 514, 517–18 (Tex. App.—Waco 2004, pet. dismiss'd).

182. *United States v. Banks*, 540 U.S. 31, 33 (2003).

183. *Id.* at 38.

184. *In re K.C.B.*, 141 S.W.3d 303, 305–06 (Tex. App.—Austin 2004, no pet.) (applying *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985)).

185. *In re D.L.C.*, 124 S.W.3d 354, 373 (Tex. App.—Fort Worth 2003, no pet.).

186. *Threadgill v. State*, 146 S.W.3d 654, 660–61 (Tex. Crim. App. 2004).

187. *Swarb v. State*, 125 S.W.3d 672, 680 (Tex. App.—Houston [1st Dist.] 2003, pet. dismiss'd).

III. CONCLUSION

Despite a few clarifications, a review of this past year's confession, search, and seizure decisions illustrates no significant developments of well-established precedents. This article exemplifies the continued uniformity among state and federal courts in the areas of confession, searches, and seizures.