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Criminal Procedure: Arrest, Search, and Confessions

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CRIMINAL PROCEDURE: ARREST, SEARCH, AND CONFESSIONS

by

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THIS Article examines the most significant developments in the law of arrest, search, and confessions over the past year manifested primarily by decisions of the Texas Court of Criminal Appeals and applicable federal opinions. The Article also emphasizes rulings that signify or illuminate the general trends in the courts on the most consequential and controversial issues. On balance the current Survey period stands in sharp contrast to recent Survey years in this area, which were heavily characterized by the steady dilution of established procedural safeguards for the accused, and the judicial accession of the Texas courts to minimum federal standards of protection. While the pendulum may not yet have completed its swing in that direction, this year's decisions, particularly on the most salient search and seizure issues, reflect a degree of greater restraint. The recent decisions also evidence an attempt to constructively refine and enforce the rights of the accused against the power of the state at the earliest critical stages of the criminal justice process.

I. PRETEXT ARRESTS

One of the more surprising developments during the Survey period involved the overruling of recent precedent by both the Texas Court of Criminal Appeals and a panel of the Fifth Circuit to hold that an arrest or other detention for one offense as a pretext in furtherance of the investigation into another offense renders any evidence obtained as a result thereof inadmissible under the Fourth Amendment. In *Black v. State*[1] officers obtained information leading them to suspect the connection of the defendant with a recent murder, but lacked probable cause to arrest him for the crime. While conducting surveillance of his residence, the officers watched the suspect depart in an automobile. The police followed the suspect in an unmarked car. The officers observed him commit several minor traffic violations, pulled him over, and arrested him. They told the defendant that they wanted to question him about the murder and several hours later obtained a confession. The trial court admitted the confession over objection.[2]

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1. 739 S.W.2d 240 (Tex. Crim. App. 1987).

2. *Id.* at 241. The only information the police possessed to connect the defendant to the

In the lead plurality opinion, the court of criminal appeals noted that it had discussed the pretext arrest doctrine in several of its older opinions,[3] but had never conclusively adopted it.[4] The court then turned to the twenty-year old Fifth Circuit decision of *Amador-Gonzalez v. United States*[5] that struck down a stop of a suspect as a pretext arrest on facts materially indistinguishable from those presented in *Black*.[6] Stressing that the arresting officer in *Black* admitted that the reason he arrested the defendant was to question him about the homicide, the court of criminal appeals concluded that the officers simply used the traffic violations as a pretext to get around the warrant requirement.[7] The defendant's detention, therefore, was illegal[8] even though the officers had probable cause to make the traffic stop and take the defendant into formal custody merely because of the traffic violations.[9] In the wake of *Black*, such arrests will not justify a resultant search or confession on another offense so long as the evidence conclusively demonstrates that the officer's true motive for making the arrest is to further his investigation on the other offense.[10]

The Fifth Circuit had reached exactly the same conclusion several months earlier in *United States v. Causey*.[11] In *Causey* city police officers wanted to

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murder was a statement by the defendant's brother that the defendant was in possession of a stolen .25-caliber automatic weapon, the fact that the deceased had been killed with a .25-caliber weapon, and that the defendant lived in the same vicinity. Curiously, the court of appeals concluded that, in conjunction with the defendant's traffic infractions, this information constituted probable cause to arrest the defendant. *Id.* The court of criminal appeals easily concluded that based on this little information, police had no probable cause to justify arresting the defendant. *Id.* at 243.

3. See Gutierrez v. State, 502 S.W.2d 746, 748 (Tex. Crim. App. 1973); McDonald v. State, 415 S.W.2d 201, 202 (Tex. Crim. App. 1967); Adair v. State, 427 S.W.2d 67, 71-72 (Tex. Crim. App. 1967) (dissenting opinion).

4. 739 S.W.2d at 244-45. In these earlier cases, the courts consistently determined that the officers involved were unaware of the arrestee's possible involvement in the more serious crime until after the arrest for the minor offense. *See, e.g.*, Evers v. State, 576 S.W.2d 46 (Tex. Crim. App. 1978); *Guitterez*, 502 S.W.2d at 748; *McDonald*, 415 S.W.2d at 202; *Adair*, 427 S.W.2d at 67.

5. 391 F.2d 308 (5th Cir. 1968).

6. In *Amador-Gonzalez* the officers observed the defendant because they suspected his involvement in a narcotics transaction. At the trial the officer admitted that the real reason he wanted to stop the defendant was to search for narcotics. The officer was a narcotics officer who did not normally make traffic arrests and possessed no ticket book. The officer did not write out the traffic tickets at the time of the arrest and he delayed for some time between observing the traffic offenses and stopping the defendant. *Id.* at 314.

7. 739 S.W.2d at 245.

8. *Id.*

9. The court of criminal appeals recently made it clear that a full-custody arrest is permissible for any nonspeeding traffic violations, or even for the operation of a motor vehicle that could not pass vehicle inspection. *See* Williams v. State, 726 S.W.2d 99, 101 (Tex. Crim. App. 1986). The officers in *Black* saw the defendant driving without headlights, running stop signs, and driving on the wrong side of the road. The officers also noticed the absence of a light over the license plate of the car, as required by statute.

10. The *Black* court remanded the case to the court of appeals for a determination as to whether the defendant's confession was admissibly nevertheless on grounds that intervening events broke the causal connection between the illegal arrest and the confession. *Black*, 739 S.W.2d at 245, *citing* Brown v. Illinois, 422 U.S. 590, 603 (1975); Self v. State, 709 S.W.2d 662, 665-66 (Tex. Crim. App. 1986).

11. 818 F.2d 354 (5th Cir. 1987).

question a suspect about a bank robbery, but lacked probable cause to arrest him. The officers then uncovered a seven year old outstanding warrant on the suspect for failure to appear in court on a misdemeanor theft charge. The police arrested him, using the theft charge as a pretext to question the suspect about the robbery. The court did not question the validity of the outstanding warrant, but the officers admitted that the sole reason for making the arrest was to gain the opportunity for custodial interrogation of the suspect regarding the bank robbery. Subsequent to the interrogation, the defendant confessed to an FBI agent. The prosecution introduced the confession at trial in order to obtain the defendant's conviction on a federal bank robbery charge.

As did the court of criminal appeals in *Black*, the Fifth Circuit panel in *Causey* found *Amador-Gonzalez* controlling, even though more recent precedent in the circuit had reached precisely the opposite conclusion.[12] The panel noted that in *United States v. Cavallino*[13] the court had refused to suppress evidence obtained by interrogating a defendant taken into custody through a substantially similar pretextual arrest.[14] The *Causey* panel quickly overruled *Cavallino* as an aberration in Fifth Circuit case law.[15] The panel also was concerned that the holding in *Cavallino* would encourage officers to use minor infractions of statutes as a means of incarcerating citizens while ignoring their right to freedom, the degree of the violation, or the government's ability to prone a more serious violation of a criminal statute.[16] The panel therefore ruled that a confession obtained as a result of an arrest made pursuant to a valid warrant is nevertheless inadmissible if the officer involved really made the arrest solely to enable the police to interrogate the detainee about another, unrelated matter; particularly if the arresting officer has no intention to prosecute the suspect for the minor crime on which the arrest was based.[17] The panel stressed that courts objectively assess the circumstances to determine an officer's true intentions in such a situation.[18]

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12. *Id.* at 361.

13. 498 F.2d 1200 (5th Cir. 1974).

14. *Id.* at 1207. The police officers' superior in *Cavallino* directed the officers to follow the defendant, and to arrest him when he committed any kind of traffic violation, and to interrogate him about another offense. The *Cavallino* panel held that the confession to the major offense, obtained as a result of that questioning, was admissible. The panel did so without even mentioning *Amador-Gonzalez*, which directly conflicted with its ruling and should have controlled. *Id.*

15. 818 F.2d at 361. Several en banc decisions had followed the reasoning of *Amador-Gonzalez*. *See, e.g.*, United States v. Cruz, 581 F.2d 535, 539 (5th Cir. 1978); United States v. Tharpe, 536 F.2d 1098, 1101 (5th Cir. 1976); United States v. Davis, 423 F.2d 974, 977-78 (5th Cir. 1970). See also, United States v. Fossler, 597 F.2d 478, 482 (5th Cir. 1979) (evidence admissable when defendant's car searched after divest for "wrong" offense); Moffett v. Wainwright, 512 F.2d 496, 504 (5th Cir. 1975) (confession obtained from unlawful detention excluded); United States v. Saunders, 476 F.2d 5, 7 (5th Cir. 1973) (marijuana obtained during warrantless search for fugitives was valid seizure); Chaney v. Wainwright, 460 F.2d 1263, 1264 (5th Cir. 1972) (where officer inaccurately named offense, search and discovery of evidence still valid if search was for probable cause).

16. 818 F.2d at 360.

17. *Id.* at 360-61.

18. *Id.* at 358; *see* Scott v. United States, 436 U.S. 128, 136-38 (1978) (Court upheld government's contention that "[s]ubjective intent alone . . . does not make otherwise lawful

For this objective assessment the court looked to the fact that the officer did not make the arrest on the outstanding warrant in the course of routine police activity nor in accordance with internal police policies.[19] Thus, a police officer's protestations at a suppression hearing claiming a subjective intent to actually prosecute on the minor offense will not foreclose the operation of the pretext arrest doctrine, so long as the facts and circumstances surrounding the arrest and subsequent interrogation, when viewed objectively by the court, conflict with the officer's stated intent. Although the precise scope and applicability of the pretext arrest doctrine is far from settled,[20] its revival this past year, in both Texas and the Fifth Circuit, signifies an apparent judicial unwillingness to continue unabated the steady dilution of Fourth and Fifth Amendment procedural safeguards noted in recent Surveys.

II. THE PLAIN VIEW DOCTRINE

During the Survey period, both the United States Supreme Court and the Texas Court of Criminal Appeals carefully delineated and arguably limited the scope and application of the frequently invoked "plain view" exception to the warrant requirement. The Supreme Court first recognized the plain view doctrine in 1971 in *Coolidge v. New Hampshire*[21] when a plurality held that the Fourth Amendment justifies under certain circumstances a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area.[22] The *Coolidge* opinion identified three requirements that a police officer must satisfy before the plain view doctrine

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conduct illegal or unconstitutional," but found that circumstances, viewed objectively, justified action taken); United States v. Basey, 816 F.2d 980, 990-91 (5th Cir. 1987) (arrest upheld because in good faith and enforcement scheme had considered unrelated crimes as necessary).

19. 818 F.2d at 358. See 2 LAFAVE, SEARCH AND SEIZURE; A TREATISE ON THE FOURTH AMENDMENT, § 52(e), at 460 and n.110 (2d ed. 1987).

20. The unanimous *Causey* panel opinion is currently under rehearing before the en banc fifth circuit court. In two other cases during the Survey period, other panels of the Fifth Circuit upheld arrests that were arguably pretextual in nature, but under different circumstances from those presented in *Causey*. In United States v. Basey, 816 F.2d 980, 990-91 (5th Cir. 1987), the court held that a warrantless arrest for failure to carry automobile insurance was consistent with Fourth Amendment strictures against a pretext arrest challenge, because the district court found that the officer effected the arrest in good faith, and because the Texas enforcement scheme necessarily contemplated investigatory stops for unrelated crimes. In United States v. Johnson, 815 F.2d 309, 314-16 (5th Cir. 1987) the court found that an arguably pretextual inventory search following an arrest pursuant to an out-of-state warrant did not violate the Fourth Amendment; because the district court found that no pretext existed, and because the secret service possessed a legitimate interest in effecting the suspect's arrest. The United States Supreme Court has yet to directly confront the question. The Court has stated that its decision in United States v. Robinson, 414 U.S. 218 (1973), was influenced by the fact that there was "no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive." South Dakota v. Opperman, 428 U.S. 364, 376 (1976); *see* Cady v. Dombrowski, 413 U.S. 433, 447 (1973) (investigating abandoned car did not prove to be pretext for police intent). The court in *Robinson* did not address, however, the resolution of the result required when a police officer "used the subsequent traffic violation arrest as a mere pretext . . .". 414 U.S. at 221 n.1. The Supreme Court granted writ of certiorari in Missouri v. Blair, 474 U.S. 1049 (1986), a case that might have presented this issue, but later dismissed the writ as improvidently granted. 107 S. Ct. 1596, 94 L. Ed. 2d 679 (1987).

21. 403 U.S. 443, 444 (1971).

22. *Id.* at 465-471.

applies: (1) the police officer must be engaged in a lawful initial intrusion or otherwise properly be in a position from which he can view the object to be seized; (2) the officer must discover the object inadvertently; and (3) it must be immediately apparent to the officer that the object he observes is evidence of a crime, contraband, or otherwise subject to seizure.[23] The Texas Court of Criminal Appeals essentially has adopted the plain view doctrine as a matter of state constitutional law.[24] Neither the Supreme Court nor the court of criminal appeals has precisely articulated the meaning of the third prong of the doctrine, which states the illegality or evidentiary nature of the observed item must be "immediately apparent" to the officer. The Texas court indicated in 1981 that the officer must virtually be certain of the object's criminality in order to trigger the doctrine,[25] but the Supreme Court later reversed that decision as requiring "an unduly high degree of certainty as to the incriminatory character of evidence."[26] The Court, however, expressly reserved the issue of whether mere reasonable suspicion or full-fledged probable cause was required in this context.[27]

The Court subsequently held in *Arizona v. Hicks*[28] that police must establish probable cause to satisfy the immediately apparent element of the plain view doctrine.[29] The police in *Hicks* entered the defendant's apartment, from which someone had fired a bullet through the floor, striking and injuring a man in the apartment below. They entered the apartment to search for the shooter, for other victims, and for weapons. Although they found several weapons, the officers also noticed two sets of expensive stereo components, which appeared out of place in the squalid and otherwise ill-appointed four-room apartment. Suspecting that they were stolen, one of the officers moved a turntable to view and record the serial number. He then reported by phone to his headquarters, which subsequently advised the officer that the turntable had been stolen in an armed robbery. A grand jury later indicted the defendant for the robbery, and the defendant moved to suppress the evidence seized.[30] The *Hicks* majority, moved by the warning in *Coolidge* that

23. *Id.* at 465-69; DeLao v. State, 550 S.W.2d 289, 289-91 (Tex. Crim. App. 1977).

24. Brown v. State, 657 S.W.2d 797, 799 (Tex Crim. App. 1983). *Brown* was a controversial plurality opinion involving the plain view doctrine that declared that the Texas judiciary should not interpret the state constitution any differently from the Supreme Court's interpretation of the federal constitution, at least with regard to search and seizure issues. *Id.* at 799. Although arguably dicta, a majority of the court later embraced this aspect of *Brown* in Osban v. State, 726 S.W.2d 107, 119 (Tex. Crim. App. 1987).

25. Brown v. State, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981).

26. Texas v. Brown, 460 U.S. 730, 741 (1983).

27. *Id.* at 742 n.7. The Court had, however, noted in dicta in Payton v. New York, 445 U.S. 573, 587 (1980), that the police must meet the standard of probable cause observing that "the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." 460 U.S. at 741-42.

28. 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987).

29. *Id.* at 1153, 94 L. Ed. 2d at 351.

30. *Id.* at 1152, 94 L. Ed. 2d at 350. The Arizona trial court granted the motion to suppress, and the Court of Appeals of Arizona affirmed. 146 Ariz. 533, 707 P.2d 331 (Ariz. Ct. App. 1985). The Arizona Supreme Court denied review, and the State filed for certiorari. 107 S. Ct. at 1152, 94 L. Ed.2d at 350.

"the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges,"[31] noted that the officer's moving of the turntable constituted a search, separate and apart from the initial lawful objective of the entry onto the premises.[32] Although the Court would permit mere inspection of those parts of the turntable that came into view, since such an inspection would not constitute an independent search, the movement of the turntable only a few inches produced a new invasion of the defendant's privacy that one could not justify by the circumstances that validated the entry in the first place.[33] Justice Scalia, writing for the Court in his first opinion on criminal procedure, wrote that to hold that a standard less than probable cause is required would be to deny the plain view doctrine's theoretical and effective background.[34]

The Court could find no reason why an object should be subject to search or seizure on lesser grounds in the plain view context than is needed to obtain a warrant for that same object if the object is known to be on the premises in the first place.[35] Significantly, the Court did recognize the possible chilling effect that this probable cause requirement could place on law enforcement activities, but noted that the law sometimes insulates a few from proper punishment in the effort to protect the privacy of all.[36]

The Texas Court of Criminal Appeals applied and refined the *Hicks* analysis several weeks later in *White v. State*,[37] which presented the court with a similar exploratory search by officers for stolen property in a residence. Responding to a disturbance call, two El Paso police officers properly entered an apartment to check for damage, but found none. During their inspection, however, one of the officers observed a credit card that did not match the names of the tenants. The officer telephoned the police department, but the department informed him that no one had reported the card stolen. The officer then proceeded to look around the apartment further, and observed a large amount of jewelry, stereo equipment, and other property. He again checked with the police department after identifying the property until ultimately several of the items in the apartment indeed turned out to be reported as stolen.[38] The court of criminal appeals had no trouble[39] concluding that a

31. 107 S. Ct. at 1154, 94 L. Ed. 2d at 352 (quoting Coolidge, 403 U.S. at 466).
32. 107 S. Ct. at 1152, 94 L. Ed. 2d at 350.
33. *Id.*
34. *Id.* at 1153, 94 L. Ed. 2d at 351.
35. *Id.* at 1154, 94 L. Ed. 2d at 352.
36. *Id.* at 1155, 94 L. Ed. 2d at 353. Justice O'Connor, writing for the three dissenting justices, would have carved out an exception for the mere "cusory examination of items in plain view" that permit such searches upon reasonable suspicion less than probable cause. 107 S. Ct. at 1159, 94 L. Ed. 2d at 357. Perhaps surprisingly, she alternatively opined that police actually satisfied the probable cause standard with regard to the criminality of the stereo equipment, which she observed as both inordinately expensive in relation to its surroundings and known to be a favored target of larcenous activity. *Id.* at 1160, 94 L. Ed. 2d at 358. The state, however, conceded on appeal that it had not shown probable cause.
37. 729 S.W.2d 737 (Tex. Crim. App. 1987).
38. *Id.* at 739. The El Paso Court of Appeals upheld the search under the plain view doctrine in an unpublished opinion. White v. State, No. 08-84-00348-CR (Tex. App.—El Paso, 1985, pet. granted). The El Paso court cited Texas v. Brown, 103 S. Ct. 1535, 1543, 75

court could not justify the officer's systematic investigation of the various items of property as a legitimate plain view search.[40] In doing so, the court arguably has expanded the Supreme Court's holding in *Hicks*. The Supreme Court invalidated the search of the suspected turntable because the officer moved it to view the serial number underneath while he lacked probable cause. The Texas Court of Criminal Appeals, however, disapproved even the mere inspection of the articles for identifying characteristics in open view. The court of criminal appeals came to its conclusion on the basis that the investigation was systematic and exploratory, and because the police had to take further investigative steps before probable cause developed.[41] The Texas court thereby placed primary emphasis on the immediate nature of the probable cause required.[42] The court also concluded that the deliberate and systematic nature of the officer's inspection of each item ran afoul of the inadvertent discovery requirement of the plain view doctrine.[43] The court observed that evidence an officer purposefully seeks out is not in "plain view."[44]

III. STANDING

In *Chapa v. State*[45] the court of criminal appeals significantly refined the

L. Ed. 2d 502, 510 (1988) for the proposition that "the seizure of property in plain view is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Id.* The lower Court noted that "there was no seizure of the goods until the officer had established through the complaining witness that her property was located in the appellant's apartment." 729 S.W.2d at 739.

39. 729 S.W.2d at 742. The *White* court unanimously reversed the court of appeals, with two judges concurring, without separate opinion, in the result only.

40. *Id.* at 741. In previous opinions, the court of criminal appeals had expressly applied the plain view doctrine only against the seizure of property when the officer did not have reason to believe that the property was evidence, or the fruit of a crime. *See, e.g.*, Sullivan v. State, 626 S.W.2d 58, 60 (Tex. Crim. App. 1982); Howard v. State, 599 S.W.2d 597, 602 (Tex. Crim. App. 1980); Thomas v. State, 572 S.W.2d 507, 509 (Tex. Crim. App. 1978); Turner v. State, 550 S.W.2d 686, 688 (Tex. Crim. App. 1977). The *White* court has now expressly extended the doctrine to cover searches conducted in this context where the officer had some reason to believe the property was criminally suspect. 729 S.W.2d at 741.

41. *Id.* at 741.

42. *Id.* The court in *White* did not address the applicability of the collective knowledge doctrine to the plain view exception. The court of criminal appeals first recognized the collective knowledge approach in Woodward v. State, 668 S.W.2d 337, 346 (Tex. Crim. App. 1984), in which the court held that the collective knowledge of all law enforcement personnel and agencies connected with a case can be considered in determining whether probable cause exists, even though the arresting officer or agency does not possess sufficient information to add up to probable cause. *See* Bain v. State, 677 S.W.2d 51, 55-56 (Tex. Crim. App. 1984). *But cf.* United States v. Sanchez, 689 F.2d 508, 512 (5th Cir. 1982) (considered total knowledge of all police officials along with inferences from the circumstances). One could clearly show probable cause in *White* under the standard in *Sanchez*, which would have justified the officer's inspection of the property as well as its seizure. Although *Woodward* and *White* are difficult to reconcile, courts will not likely apply the collective knowledge mode of analysis to the plain view situation. To do so would eviscerate the Supreme Court's rationale in *Hicks* and encourage the very sort of general exploratory search that the immediately apparent and inadvertent requirements were designed to prohibit. Hicks v. Arizona, 107 S. Ct. 1153, 94 L. Ed.2d 347, 351 (1987).

43. 729 S.W.2d at 742.

44. *Id.*; *See* Walter v. United States, 447 U.S. 649, 657 (1980).

45. 729 S.W.2d 723 (Tex. Crim. App. 1987).

scope of recognized privacy expectations under the Fourth Amendment.[46] Almost a decade ago in *Rakas v. Illinois*,[47] the Supreme Court effectively merged the substantive question of what constitutes a "search" under the Fourth Amendment with the procedural issue of "standing" to contest a search.[48] The Court essentially held that, by definition, no search takes place as to a particular individual by virtue of certain governmental action unless that individual possessed a reasonable expectation of privacy in the area searched.[49] The litmus test for determining the existence of such legitimate expectation of privacy as to a particular accused is twofold: (1) whether the accused's conduct exhibited an actual, subjective expectation of privacy; and (2) if it did, whether that subjective expectation was one that society is prepared to recognize as reasonable.[50] The Court thereby concluded that mere passengers in an automobile who failed to assert any property or possessory interest in the automobile, or an interest in the contraband seized, did not have a legitimate expectation of privacy in the glove compartment or the area under the seat of the vehicle.[51] The passengers thus did not have standing to challenge the search of those areas. The court did not deem it determinative of whether the passengers had a legitimate expectation of privacy in the particular areas of the automobile searched based on the mere fact that they were legitimately on the premises, in the sense that they were in the car with the permission of its owner.[52]

In *Chapa* the Texas Court of Criminal Appeals was confronted with a similar factual scenario to that presented in *Rakas*, but the defendant demonstrated more than mere legitimate presence in the premises searched. After waiting for a late city bus in Houston, the defendant and his wife stepped into a lounge to call a taxicab. A friend later joined them and they all got into the cab when it arrived. The defendant sat in the front seat next to the driver while his wife and friend sat in the back seat. They instructed the driver to take them to their hotel. As the cab began to pull out of the driveway of the lounge, two Houston police officers stopped the cab. The police officers removed the defendant from the cab and the officers began to search the area under and around the front seat. After several minutes of searching, the officers discovered an aluminum foil packet under the front seat that contained heroin. The Fourteenth District Court of Appeals in Houston relied upon *Rakas* in upholding the state's challenge to the defendant's standing.[53] The Texas Court of Criminal Appeals employed a more

46. *Id.* at 727-29.
47. 439 U.S. 128 (1978).
48. *Id.* at 142-49.
49. *Id.* at 149.
50. *Id.* at 148-49. *See* Smith v. Maryland, 442 U.S. 735, 740 (1979) (expectation of privacy in phone numbers dialed not legitimate nor reasonable).
51. 439 U.S. at 149.
52. *Id.* at 149. Prior to *Rakas* the law conferred "automatic standing" upon defendants charged with possessory offenses. *See* Jones v. United States, 362 U.S. 257, 269 (1960) (when issuance of search warrant based on information receives through an informant). The Court expressly abandoned the rule in *Jones* subsequent to *Rakas*. *See* U.S. v. Salvucci, 448 U.S. 83, 95 (1980).
53. Chapa v. State, 694 S.W.2d 202, 203 (Tex. App. Houston [14th Dist.], 1985, pet.

meaningful *Rakas* analysis and reached the opposite conclusion. Arguably enlarging the Supreme Court's view of reasonable privacy expectations, the Texas Court of Criminal Appeals essentially held that a defendant's denial of any ownership or possessory interest in the area searched or object seized does not defeat standing, as long as some right of control can be shown to that area or object.[54] After noting that the defendant in *Chapa* had adequately demonstrated his subjective expectation of privacy in the area under the seat of the taxicab,[55] the court refined the test for the objectively reasonable expectation of privacy by including a right to control the property or area, in addition to the previously recognized ownership and possessory rights.[56] Thus, although the defendant asserted neither a property nor a possessory interest in the taxicab he rode in, he nevertheless exercised a significant degree of control over the vehicle. As a presumptively paying fare he could determine its destination for the duration of his presence therein. Moreover, the defendant and his companions possessed the legal right to exclude others from the cab during their ride.[57] The court therefore determined that the defendant had a legitimate expectation of privacy in the cab and, therefore, had standing to challenge the search of the area under the front seat of the taxicab.[58] The court thereby made it clear that resolution of the existence of an objective expectation in this context can be determined by reference to extraneous concepts of real or personal property law or to un-

granted). The court of appeals actually missed the point entirely by confusing case authority involving the warrant requirement with the *Rakas* issue of whether a search has occurred at all as to the particular defendant. The *Chapa* court of appeals cited and relied upon California v. Carney, 471 U.S. 386 (1985), to find that a taxicab customer cannot have an expectation of privacy in the passenger compartment because of the mobile nature of taxicabs and the licensing and registration regulation involving them. 694 S.W.2d at 203. In *Carney*, however, the Supreme Court merely held that motor homes can, under certain circumstances, fall under the automobile exception to the warrant requirement. 471 U.S. at 392. Cases such as *Carney*, which deal with the various exceptions to the warrant requirement, have nothing to do with the issue of standing or probable cause to search.

54. 729 S.W.2d at 727-28.

55. *Id.* at 727. The defendant testified at the suppression hearing that upon entering the taxicab he did in fact have an expectation of privacy therein. In conjunction with that testimony, the court of criminal appeals easily concluded that the defendant's getting into the cab, closing the door and getting out, was conduct sufficient to manifest a subject expectation of privacy in the passenger compartment. *Id.*

56. *Id.* at 727-28. The Texas Court of Criminal Appeals actually derived this concept from a footnote in *Rakas* when the Supreme Court observed as follows:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

439 U.S. 128, 144 n.12 (1978).

57. 729 S.W.2d 723, 728 (Tex. Crim. App. 1987). The court referred to common city ordinances granting taxicab customers the right to exclude others, quoting from Houston's City Code § 46-29 (1985), which provides that "any passenger who engages the services of a taxicab shall have the exclusive right to the passenger compartment of the taxicab and it shall be unlawful for a taxicab driver or permitee to carry additional passengers unless specific permission is obtained from the passenger who engaged the taxicab originally."

58. 729 S.W.2d at 729.

derstandings that society recognizes and permits in general.[59] Thus, a defendant who disclaims ownership and possession of a particular place or thing, but who can nevertheless demonstrate some legal, reasonable or customary right to control the property or exclude others therefrom, will retain his standing to challenge a search of the property in question.[60]

IV. D.W.I. ROADBLOCKS

The use of roadblocks by law enforcement agencies, primarily for the purpose of detecting and apprehending driving while intoxicated (DWI) offenders, has become increasingly popular since the United States Supreme Court's 1979 dicta in *Delaware v. Prouse*.[61] The dicta suggested that nonrandom stops for the purpose of checking driver's licenses might pass constitutional muster.[62] The Court in *Prouse* specifically held that arbitrarily detaining an automobile and driver in order to check the driver's license and the automobile's registration was unreasonable under the Fourth Amendment except when police possessed articulable and reasonable suspicion that the driver was unlicensed or that an automobile was unregistered or otherwise in violation of the law.[63] The Court noted, however, that its holding did not prevent officials from developing methods for spot checks that do not involve the unconstrained exercise of discretion of police officers, specifically stating that questioning all traffic at roadblock type stops might create a possible alternative.[64]

Despite this apparent invitation by the Supreme Court, the State of Texas subsequently attempted to justify roadblocks under a statute that purportedly allowed any peace officer to detain a motor vehicle operator for a driver's license check.[65] The obvious purpose of the roadblocks, however, went beyond the mere checking for driver's licenses.[66] Texas courts and legislators may have necessarily relied on this statute, as opposed to the Constitutional theory opened up by *Prouse*, because of the Texas requirement of specific statutory authority to justify an arrest.[67] No express statutory au-

59. *See* note 55 and accompanying text.

60. The Texas Court of Criminal Appeals expressly limited its holding in *Chapa* to the Fourth Amendment. 729 S.W.2d at 729. The defendant in *Chapa* did not raise, and the court of criminal appeals did not decide, the question of whether he had standing to challenge the search of the taxi under art. 1, § 9 of the Texas Constitution.

61. 440 U.S. 648 (1979).

62. *Id.* at 663.

63. *Id.*

64. *Id.*

65. TEX. REV. CIV. STAT. ANN. art. 6687b, § 13 (Vernon 1977). The pertinent portion of the statute states that "any peace officer may stop and detain any motor vehicle operator for the purpose of determining whether such person has an owner's license as required by this Section." *Id.*

66. *See* Meeks v. State, 692 S.W.2d 504, 507 (Tex. Crim. App. 1985) (court held police search of marijuana possession unreasonable when conducted at owner's license check).

67. Under Texas law any arrest of a person without a warrant and without probable cause is deemed an unreasonable seizure unless the arrest was specifically authorized by statute. Courts are to construe statutes authorizing such arrests strictly. *See* Lowrey v. State, 499 S.W.2d 160, 164-65 (Tex. Crim. App. 1973); Honeycutt v. State, 299 S.W.2d 662, 664 (Tex. Crim. App. 1963); Heath v. Boyd, 175 S.W.2d 214, 216, 141 Tex. 569, 571 (1943). State law

thority in Texas permits detentions of citizens without probable cause or reasonable suspicion except for Article 6687b. Three years ago in *Meeks v. State*[68] the Texas Court of Criminal Appeals struck down these multi-purpose roadblock stops as a violation of Article 6687b, noting that the statute by its very terms restricted itself to driver's license checks, which police could not use as subterfuge to a cover up a search and seizure not based by on probable cause or reasonable suspicion.[69]

The court of criminal appeals finally addressed the constitutionality of DWI roadblocks during the Survey period in the long-awaited decision in *Webb v. State*.[70] The prosecution, precluded by *Meeks* from seriously relying upon the driver's license statute, argued that the roadblock was nevertheless reasonable under the Fourth Amendment in light of *Prouse*.[71] Indeed, the evidence in *Webb* clearly established that the primary purpose of the roadblock was to check for DWI offenders. The Dallas Court of Appeals had concluded that the DWI roadblock ran afoul of the Fourth Amendment despite the dicta in *Prouse*.[72] That court determined that the roadblock failed under the three-pronged analysis set forth by the Supreme Court in *Brown v. Texas*.[73] Under *Brown* a court must consider the public concern that the seizure serves, the degree to which the seizure promotes the public interest, and the degree of interference with individual liberty caused by the seizure.[74] The Dallas Court of Appeals found that the state failed to satisfy

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governs the legality of warrantless arrests, provided the restrictions on the authority to arrest are at least as stringent as those imposed by the United States Constitution. Milton v. State, 549 S.W.2d 190, 192 (Tex. Crim. App. 1977).

68. 692 S.W.2d 504 (Tex. Crim. App. 1985).

69. *Id.* at 508. *See* McMillan v. State, 609 S.W.2d 784, 787 (Tex. Crim. App. 1980); Hall v. State, 488 S.W.2d 788, 789-90 (Tex. Crim. App. 1973). Although the continued viability of art. 6687b, § 13 is highly doubtful in light of *Prouse*, the multi-purpose roadblock could not pass muster even under the statute's broad terms. 692 S.W.2d 504, 508. Due to the fact that the trial in *Meeks* occurred prior to the Supreme Court's *Prouse* decision, the court of criminal appeals deemed it unnecessary to determine the constitutionality of the statute for the roadblock itself pursuant to the *Prouse* analysis. *Id.* In two cases during the Survey period, the Dallas Court of Appeals followed *Meeks* in striking down ostensible drivers license roadblocks as subterfuge DWI roadblocks when the circumstances made it clear that checking for driver sobriety was at least a primary purpose of the checkpoints, despite the officers' testimony to the contrary. *See* Higbie v. State, 723 S.W.2d 802, 803-04 (Tex. App.—Dallas 1987, no pet.); Padgett v. State, 723 S.W.2d 780, 781-82 (Tex. App.—Dallas 1987, no pet.). In a number of pre-*Prouse* opinions, the court of criminal appeals upheld the validity of stops under art. 6687b, § 13, when police made the stops solely to determine whether the driver possessed a valid driver's license or to determine the fitness of the driver and vehicle. *See, e.g.*, Luckett v. State, 586 S.W.2d 524, 528 (Tex. Crim. App. 1979) (officer suspected driver did not have license); Rezo v. State, 577 S.W.2d 709, 711 (Tex. Crim. App. 1979) (license check roadblock); Tardiff v. State, 548 S.W.2d 380, 382 (Tex. Crim. App. 1977) (license check roadblock); Leonard v. State, 496 S.W.2d 576, 577 (Tex. Crim. App. 1973) (police stopped vehicle solely for license check); Oliver v. State, 455 S.W.2d 291, 293 (Tex. Crim. App. 1970) (routine license check).

70. 739 S.W.2d 802 (Tex. Crim. App. 1987).

71. The state actually argued in the first instance that the record supported the conclusion that the roadblock was ostensibly a driver's license checkpoint. The officer who coordinated the roadblock, however, admitted that the real purpose of the roadblock was to ferret out DWI offenders.

72. 695 S.W.2d 676, 683 (Tex. App.—Dallas 1985, no pet.).

73. 443 U.S. 47, 51-52 (1979).

74. *Id.* at 50-51. The Court designed this three-pronged mode of analysis to assure that

its burden of proof as to each element of the *Brown* test.[75]

The court of criminal appeals unanimously struck down the *Webb* roadblock, but did so in such a fashion that it raised more questions than it answered. The court's opinion, written by Justice Davis, generally followed the court of appeals' analysis, but only one other judge joined the opinion.[76] All seven remaining judges of the court concurred in the result only.[77] Thus, while the court has shed no light on what types of roadblocks, if any, the police can constitutionally employ to catch DWI offenders, it has at least made clear that the type of sense check roadblock used as subterfuge for DWI check in *Webb* is constitutionally impermissible.[78]

The *Webb* roadblock was a temporary one during which police stopped every vehicle on a particular street for a brief time period, primarily, but not exclusively, to check for DWI offenders.[79] No prior publicity occurred beforehand, and little if any illumination or other warning existed on the street to approaching drivers, thus subjecting oncoming motorists to a high degree of anxiety by virtue of the surprise and unexpected police roadblock.[80] The state introduced no evidence through empirical data or otherwise to prove up the necessity for or the effectiveness of sobriety checkpoint deterrence as opposed to traditional means of deterring drunk drivers.[81] Finally, and perhaps most significantly, the state did not show evidence in *Webb* that the police used an objective, non-discretionary procedure to conduct the roadblock, such as formal, neutral guidelines formulated by superior law enforcement officials.[82]

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officers in the field cannot arbitrarily invade an individual's reasonable expectation of privacy. 695 S.W.2d at 678 (citing Delaware v. Prouse, 440 U.S., 648, 654-55 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 882-83 (1975); Camera v. Municipal Court, 387 U.S. 523, 532-33 (1967)).

75. 695 S.W.2d at 681-83. The prosecution has the burden of proof to show facts authorizing a warrantless seizure. *See* Coolidge v. New Hampshire, 403 U.S. 443, 453-54 (1971); DeLao v. State, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977).

76. 739 S.W.2d at 803. (Campbell, J., joined in court's opinion, Davis, J.).

77. *Id.* at 812 Justices Onion, McCormick, and White concurred in the result without explanation. Justices Clinton, Miller, and Duncan joined only in the opinion's introduction of the case and recitation of the facts, but in none of the opinion's legal analysis. Justice Teague concurred only in the result, explaining that he would adopt the Court of Appeals' analysis "in principle." *Id.* The court modified the Dallas Court of Appeals' disposition of the case from reversal and acquittal to reversal and remand. *Id.*

78. *Id.* The plurality opinion found the roadblock objectionable under both the Fourth Amendment of the United States Constitution and art. 1, § 9 of the Texas Constitution. *Id.* The appellant in *Webb* relied upon both provisions in attacking the validity of the roadblock, although the court of appeals' analysis appeared to involve only an interpretation of the strictures of the Fourth Amendment. *See* 695 S.W.2d at 683.

79. 793 S.W.2d at 804; 695 S.W.2d at 682, 683.

80. 793 S.W.2d at 810.

81. *Id.* at 15. The plurality opinion observed that an increased number of highly visible patrols watching for erratic driving may have been a more effective and economical means of apprehending drunk drivers than a roadblock. *Id.* (citing Jacobs and Strossen, *Mass Investigation Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C.D.I. REV. 595, 645-49 (1985).

82. *Id.* at 811. The Fourth Amendment requires that a seizure be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that officers carryout the seizure pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers in the field. Brown v. Texas, 443 U.S. 47, 51

The manner in which the court of criminal appeals disposed of *Webb* does not allow for the conclusion that courts will uphold DWI roadblocks as consistent with the Fourth Amendment and article I, section 9 of the U.S. Constitution, even if the record reflects compliance with neutral guidelines, that police intrusiveness and citizen anxiety were minimized, and that such roadblocks create a more effective means of apprehending drunk drivers than other traditional methods.[83] Resolution of the constitutional issue may not answer the ultimate question regarding the validity of such roadblocks. The lack of any specific statutory authority for these warrantless detentions without probable cause would appear to render the roadblocks illegal in any event, regardless of whether they pass constitutional muster. As the court of criminal appeals noted several years ago in *Meeks*, the statute authorizes detentions only when the sole reason is to check driver's licenses.[84]

V SUPPRESSION PROCEDURE

During the Survey period the court of criminal appeals modified and clarified several procedural rules relating to the preservation of suppression claims and production requirements at suppression hearings. In *Miller v. State*[85] the court held that the prosecution has the burden of producing the affidavit supporting an arrest warrant, not the defendant.[86] Several years ago in *Rumsey v. State*,[87] the court strongly indicated that the state's sole burden in justifying a challenged arrest based on a warrant required it to introduce a warrant valid on its face.[88] The defendant must then produce the supporting affidavit for attack on probable cause or other grounds.[89]

(1979); Delaware v. Prouse, 440 U.S. 648, 655-61 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976).

83. A survey of decisions on the issue from other jurisdictions indicates a roughly even split. A number of recent opinions from other state courts have upheld DWI roadblocks. *See* State v. Bartley, 109 Ill. 2d 273, 486 N.E.2d 880, 889 (1985); State v. Deskins, 234 Kan. 529, 673 P.2d 1174, 1186 (1983); Kinslow v. Commonwealth, 660 S.W.2d 677, 678 (Ky. Ct. App. 1983), *cert. denied*, 465 U.S. 1105 (1984); Commonwealth v. Trumble, 396 Mass. 81, 483 N.E.2d 1102, 1108 (1985); State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131, 135 (1980); People v. Scott, 63 N.Y.2d 518, 473 N.E.2d 1, 5-6 (N.Y. 1984). Other state courts, however, have found the conduct of the DWI roadblock in question violative of the Fourth Amendment. *See* State ex rel. Ekstrom v. Justice Court, 136 Ariz. 1, 663 P.2d 992, 996 (1983); State v. McLoughlin, 471 N.E.2d 1125, 1141-42 (Ind. App. 1984); Commonwealth v. McGeoghegan, 389 Miss. 137, 449 N.E.2d 349, 353 (1983); State v. Koppel, 499 A.2d 977, 979-80, 983 (N.H. 1985) (court noted that its state constitution provides more protection than the Fourth Amendment against state intrusion); State v. Smith, 674 P.2d 562, 665 (Okla. Crim. App. 1984); State v. Olgaard, 248 N.W.2d 392, 395 S.D. 1976); State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225, 227-28 (1985). The decisions do not necessarily reveal per se acceptance or rejection of such roadblocks because of the differences in roadblock operation and specific evidence introduced in each case.

84. 692 S.W.2d 504, 508 (Tex. Crim. App. 1985).

85. 736 S.W.2d 643 (Tex. Crim. App. 1987).

86. *Id.* at 648.

87. 675 S.W.2d 517 (Tex. Crim. App. 1984).

88. *Id.* at 520-21.

89. *Id.* This language in *Rumsey* appears to conflict with several previous decisions by the court that arguably placed the burden of producing the affidavit on the state. *See* Gant v. State, 649 S.W.2d 30, 33 (Tex. Crim. App. 1983); Cannady v. State, 582 S.W.2d 467, 469 (Tex. Crim. App. 1979).

The burden of justifying a contested arrest lies on the state.[90] If the sufficiency of warrant depends on the sufficiency of the supporting affidavit, it makes no sense to relieve the state from producing the affidavit to the trial court for a determination of its sufficiency. The court overruled *Rumsey*, noting that placing the burden of production of the affidavit on the defendant was inconsistent with the state's general burden of proof.[91] The *Miller* court thus held that in addition to producing the arrest warrant the state must also carry the burden of producing the supporting affidavit for inspection in the trial court.[92] The court, however, reaffirmed the established rule that the defendant must see that the warrant and supporting affidavit are in the record if they are to be reviewed on appeal.[93] These rules apply equally to suppression hearings involving contested search warrants.[94]

In *Polk v. State*[95] the court of criminal appeals made clear that a defendant need not specifically invoke the state statutory exclusionary rule[96] in the trial court in order to preserve suppression error on state law grounds.[97] The police in *Polk* suspected the defendant of a recent murder and arrested him on an outstanding ticket in order to question him about the homicide.[98] The complaint supporting the outstanding ticket warrant was defective, however, for failure to state a date.[99] An hour after his arrest the defendant gave a confession, portions of which the state introduced into evidence at trial over objection.[100] The court of appeals held that this defect in the complaint supporting the warrant rendered the arrest illegal as violative of state statute and found the resultant confession inadmissible by virtue of the state statutory exclusionary rule embodied in article 38.23 of the Texas Code of Criminal Procedure.[101] The court of appeals also expressly declined to engraft onto article 38.23 the good faith exception adopted by the Supreme

90. *Gant*, 649 S.W.2d at 32.

91. 736 S.W.2d 643, 648 (Tex. Crim. App. 1987).

92. *Id.*

93. *Id.*; *see* Haynes v. State, 468 S.W.2d 375, 377 (Tex. Crim. App. 1971); Dusek v. State, 467 S.W.2d 270, 272 (Tex. Crim. App. 1971).

94. *See* Ortega v. State, 464 S.W.2d 876, 878-82 (Tex. Crim. App. 1971).

95. 738 S.W.2d 274, 276 (Tex. Crim. App. 1987) (en banc).

96. TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 1988).

97. 738 S.W.2d at 276.

98. *Id.* at 275; Polk v. State, 704 S.W.2d 929, 931 (Tex. App.—Dallas 1986, pet. granted). Although neither the court of appeals nor the court of criminal appeals addressed the issue, the factual scenario reported in *Polk* would appear to fall neatly within the pretext arrest prohibition embraced by the court of criminal appeals in Black v. State during the Survey period. The resultant confession would therefore have been inadmissible on this basis regardless of the courts' interpretation of former art. 38.23. *See infra* note 102 and accompanying text.

99. TEX. CODE CRIM. PROC. art. 15.05 (Vernon 1987). This article requires the inclusion of the date on which the offense is alleged to have been committed in all arrest warrant complaints. *Id.*

100. 738 S.W.2d at 275. The court of appeals concluded that the state failed to show that the taint of the arrest on the defendant's confession was attenuated. *Id. See Polk*, 704 S.W.2d at 933 (finding not disturbed by the court of criminal appeals).

101. 704 S.W.2d at 934-35; TEX. CODE CRIM. PROC. ANN. art. 38.23(a) provides:

> no evidence obtained by an officer or other person in violation of any provisions of the constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

Court in *United States v. Leon*[102] with regard to Fourth Amendment violations.[103] In the court of criminal appeals the state argued that the defendant nevertheless waived his right to rely on article 38.23 for suppression by failing to specifically invoke the statute in the trial court.[104] The high court unanimously rejected this contention, noting that article 38.23 is not an independent basis for objecting to admission of evidence, but is a procedural result that applies after a judge sustains an objection to the admission of evidence.[105]

102. 468 U.S. 897 (1984).

103. 704 S.W.2d at 933-34.

104. 738 S.W.2d at 275. The state contended that Nelson v. State, 607 S.W.2d 554 (Tex. Crim. App. 1980), requires defendants to specifically invoke art. 38.23 of Code of Criminal Procedure in the trial court to preserve error on that ground for appeal. In *Nelson*, however, the court merely held that the defendant had waived error by failure to invoke any Texas statutory or constitutional grounds for suppression in the trial court. *Id.* at 555.

105. 738 S.W.2d at 276. Federal law does not require a defendant to specifically object on the basis of the federal exclusionary rule; he need only object to the admissibility of the evidence on the ground that police obtained the evidence through a search or seizure that violated the Fourth Amendment to invoke the federal exclusionary rule. *See* Alderman v. United States, 394 U.S. 165, 171-76 (1969); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961); Goldstein v. United States, 316 U.S. 114, 120 (1942). A federal defendant need not specifically state that his ground for exclusion is the exclusionary rule of Weeks v. United States, 232 U.S. 383, 398 (1914); because there is no other federal exclusionary rule. The defendant need only state federal grounds for excluding evidence; invocation of the federal exclusionary rule is automatic.