November 2016

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**Recommended Citation**


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CRIMINAL PROCEDURE: ARREST, SEARCH, AND CONFESSIONS

by

S. Michael McColloch

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 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.

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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, but had never conclusively adopted it. The court then turned to the twenty-year old Fifth Circuit decision of *Amador-Gonzalez v. United States* that struck down a stop of a suspect as a pretext arrest on facts materially indistinguishable from those presented in *Black*. 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. The defendant's detention, therefore, was illegal 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.

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.

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


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); Gutierrez, 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.


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. The panel noted that in United States v. Cavallino the court had refused to suppress evidence obtained by interrogating a defendant taken into custody through a substantially similar pretextual arrest. The Causey panel quickly overruled Cavallino as an aberration in Fifth Circuit case law. 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 prove a more serious violation of a criminal statute. 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. The panel stressed that courts objectively assess the circumstances to determine an officer's true intentions in such a situation.

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 admissible when defendant's car searched after divest for "wrong" offense); Moffett v. Wainwright, 512 F.2d 128, 136-38 (5th Cir. 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. 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, 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 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. The Coolidge opinion identified three requirements that a police officer must satisfy before the plain view doctrine 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).


22. Id. at 465-471.
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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.\(^2\) The Texas Court of Criminal Appeals essentially has adopted the plain view doctrine as a matter of state constitutional law.\(^2\) \(^3\) 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,\(^2\) but the Supreme Court later reversed that decision as requiring "an unduly high degree of certainty as to the incriminatory character of evidence."\(^2\) The Court, however, expressly reserved the issue of whether mere reasonable suspicion or full-fledged probable cause was required in this context.\(^2\)

The Court subsequently held in *Arizona v. Hicks*\(^2\) that police must establish probable cause to satisfy the immediately apparent element of the plain view doctrine.\(^2\) 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.\(^3\)

The *Hicks* majority, moved by the warning in *Coolidge* that

\(24. \) *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).
\(27. \) *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.
\(29. \) *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," 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. 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. 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.

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 "cursory 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.
court could not justify the officer's systematic investigation of the various items of property as a legitimate plain view search. 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. The Texas court thereby placed primary emphasis on the immediate nature of the probable cause required. 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. The court observed that evidence an officer purposefully seeks out is not in "plain view."

III. STANDING

In Chapa v. State the court of criminal appeals significantly refined the
scope of recognized privacy expectations under the Fourth Amendment. Almost a decade ago in *Rakas v. Illinois*, 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. 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. 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. 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. 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.

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. The Texas Court of Criminal Appeals employed a more

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46. *Id.* at 727-29.
48. *Id.* at 142-49.
49. *Id.* at 149.
51. *439* U.S. at 149.
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.\footnote{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,\footnote{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.\footnote{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.\footnote{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.\footnote{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-

\footnote{54} 729 S.W.2d at 727-28.\footnote{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.\footnote{56} 729 S.W.2d 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).\footnote{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 permittee to carry additional passengers unless specific permission is obtained from the passenger who engaged the taxicab originally."

\footnote{58} 729 S.W.2d at 729.
derstandings that society recognizes and permits in general. 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.

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. The dicta suggested that nonrandom stops for the purpose of checking driver's licenses might pass constitutional muster. 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. 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.

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. The obvious purpose of the roadblocks, however, went beyond the mere checking for driver's licenses. 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. 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.
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.
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).
Authority in Texas permits detentions of citizens without probable cause or reasonable suspicion except for Article 6687b. Three years ago in *Meeks v. State* 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 cover up a search and seizure not based on probable cause or reasonable suspicion.

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*. 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*. 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*. That court determined that the roadblock failed under the three-pronged analysis set forth by the Supreme Court in *Brown v. Texas*. 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. The Dallas Court of Appeals found that the state failed to satisfy

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).


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.).


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.\footnote{75}{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)).}

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.\footnote{76}{739 S.W.2d at 803. (Campbell, J., joined in court's opinion, Davis, J.).} All seven remaining judges of the court concurred in the result only.\footnote{77}{Id. at 812.} 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.\footnote{78}{Id. at 811.}

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.\footnote{79}{793 S.W.2d at 804; 695 S.W.2d at 682, 683.} 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.\footnote{80}{Id. at 15.} 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.\footnote{81}{Id. at 115.} 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.\footnote{82}{Id. at 811.}

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. 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.

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* the court held that the prosecution has the burden of producing the affidavit supporting an arrest warrant, not the defendant. Several years ago in *Rumsey v. State*, 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. The defendant must then produce the supporting affidavit for attack on probable cause or other grounds.

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86. Id. at 648.
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. 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. 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. 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. These rules apply equally to suppression hearings involving contested search warrants.

In Polk v. State the court of criminal appeals made clear that a defendant need not specifically invoke the state statutory exclusionary rule in the trial court in order to preserve suppression error on state law grounds. 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. The complaint supporting the outstanding ticket warrant was defective, however, for failure to state a date. An hour after his arrest the defendant gave a confession, portions of which the state introduced into evidence at trial over objection. 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. The court of appeals also expressly declined to engraft onto article 38.23 the good faith exception adopted by the Supreme Court.

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.

90. Gant, 649 S.W.2d at 32.
92. Id.
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).
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.\(^{105}\)

\(^{103}\) 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.