Case Law and Attorney General Opinion Update
TMCEC Academic Year 2011

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The following cases and opinions were issued between the dates of August 31, 2009 and October 1, 2010.

I. Constitutional Issues
A. 1st Amendment

Does the City of San Marcos' junked vehicle ordinance violate freedom of expression?

Kleinman v. City of San Marcos, 597 F.3d 323 (5th Cir. 2010)

No. Kleinman, operator of Planet K (a "funky establishment that sells novelty items and gifts"), turned a smashed car into a planter, positioned the car-planter in front of a store as an advertising device, and commissioned artists to paint the car-planter. The City of San Marcos cited the store for violating its junked vehicle ordinance. After 1st Amendment arguments were rejected in municipal court and the car was ordered to be removed, Kleinman and other plaintiffs (the car's artisans) sought an injunction against the City in state district court. On the City's motion, the case was removed to federal district court. The plaintiffs contended that the car-planter was an expressive artwork and that interference with the display violated their rights under the 1st Amendment and the Visual Artists Rights Act (VARA). The appellate court determined that the application of the junked-car ordinance to the car-planter did not violate the 1st Amendment because the car-planter was a utilitarian device, an advertisement, and ultimately a "junked vehicle," and these qualities objectively dominated any expressive component of its exterior painting. Furthermore, the junked vehicle ordinance passed the intermediate scrutiny test as it was content-neutral and pertained to health and safety. The artists' VARA claims failed because the car-planters were promotional in nature and outside of the VARA's protection.

B. 2nd Amendment

Is the 2nd Amendment incorporated into the Due Process Clause or the Privileges or Immunities Clause of the 14th Amendment so as to be applicable to the states, thereby invalidating ordinances prohibiting possession of handguns in the home?

McDonald v. City of Chicago, No. 08-1521 (6/28/10)

Yes. Justice Alito, in a 5-4 plurality decision of the U.S. Supreme Court, concluded that the Due Process Clause of the 14th Amendment incorporates the 2nd Amendment right recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Justice Thomas, writing a separate opinion, reached the incorporation issue on different grounds, using instead the Privileges or Immunities Clause of the 14th Amendment to reach the same result of incorporation. Although not directly dealt with in this case, the opinion also re-affirmed that certain firearms restrictions mentioned in *Heller*, such as (1) prohibiting the possession of firearms by felons or mentally ill, (2) forbidding the carrying of firearms in sensitive places such as

schools and government buildings, and (3) laws imposing conditions and qualifications on the commercial sale of arms are assumed permissible and not directly dealt with in this case.

Justice Stevens dissented on the basis that the 14th Amendment's guarantee of substantive due process does not include a general right to keep and bear firearms for purposes of private self-defense.

Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented on the ground that there is no historical basis to conclude that the 14th Amendment incorporates a private right of self-defense against the States.

Commentary: The scope of the ordinance was indeed quite broad. The ordinance prohibited the registration of handguns (thus effectively banning handguns), required that guns be registered prior to their acquisition by Chicago residents (which is not always feasible), mandated that guns be re-registered annually (which also entails paying a fee), and prohibited any gun from being registered if its registration ever lapses.

C. 4th Amendment
1. Government Issued Wireless Communication Devices

Was the search of a police officer's text messages sent over a government pager to private parties unreasonable and a violation of the officer's 4th Amendment rights?

City of Ontario v. Quon, No. 08-1332 (6/17/10)

No. Quon and others employed by the Ontario Police Department filed a 42 U.S.C. Section 1983 claim that the police department, city, chief of police, and an internal affairs officer violated their 4th Amendment rights in reviewing the content of private text messages sent from city issued text-message pagers. While the city did not have an official text-messaging privacy policy, it did have a general "Computer Usage, Internet and E-mail Policy." The policy stated that the city reserved the right to monitor and log all network activity including e-mail and Internet use, with or without notice, and that users should have no expectation of privacy or confidentiality when using these resources. Employees were told verbally that the text-messaging pagers were considered e-mail and subject to the general policy. The district court entered judgment in favor of the defendants. On appeal, the Ninth Circuit Court of Appeals reversed in part, holding that city employees had a reasonable expectation of privacy for the text messages they sent on their city-issued pagers because there was no text message privacy policy in place. The court also observed that the City could have used less intrusive methods to determine whether employees' had properly used the text messaging service.

In an 8-0 decision, written by Justice Kennedy, the U.S. Supreme Court held that the City of Ontario did not violate its employees' 4th Amendment rights because the search of Quon's text messages was reasonable. Even assuming that Quon had a reasonable expectation of privacy in his text messages, the city's search of them was reasonable because it was motivated by a legitimate work-related purpose and was not excessive in scope. In reaching its conclusion, the Court rejected the Ninth Circuit's "least intrusive" means approach to the issue.

Justice Stevens concurred observing that the majority had not clearly addressed one of the aspects of *O'Connor v. Ortega*, 480 U.S. 709 (1987) for determining the parameters of a reasonable expectation of privacy for public employees. He reasoned that under any of the three approaches, Mr. Quon's expectations were not violated. Justice Scalia concurred in part and concurred in the judgment. He disagreed that the Court tacitly reaffirmed the *O'Connor* framework for determining whether the 4th Amendment applies to public employees, arguing that it was unsupported and without basis.

Commentary: In an increasingly technological age, one of the challenges of all members of the judiciary is to understand technology as it relates to issues before the court. This case received a considerable amount of attention after oral arguments, perhaps undeservedly, because questions from members of the Court raised questions about their understanding of technology. Chief Justice Roberts, who rather than using a computer, reportedly writes his opinions in long hand using pen and paper asked, "What is the difference between the pager and the e-mail?" Justice Kennedy asked what would happen if a text message is sent to an officer at the same time he is sending one to someone else. "Does it say: 'Your call is important to us, and we will get back to you.'?" Justice Scalia appeared unfamiliar with the role of a service provider in terms of text messaging ("You mean (the text) doesn't go right to me?"). Then he asked whether they can be printed out in hard copy.

While Officer Quon, a SWAT team member, got in trouble because of his text messages to his mistress as well as his wife, wireless communication devices also put new age twists on time old search and seizure issues for perpetrators. See, *Deaver v. State*, 314 S.W.3d 481(Tex. App.—Fort Worth 2010) (Evidence was insufficient to establish that the peace officer searched the defendant's phone containing images of child pornography).

2. Sufficiency of Search Warrant Affidavit (Blood)

Did the trial court err in suppressing evidence obtained via a blood warrant where the affidavit did not state the time and date the suspect was suspected of DWI?

State v. Jordan, 315 S.W.3d 660 (Tex. App.—Austin 2010)

No. The arresting officer's affidavit, describing the defendant's driving behavior and opining that the driver was intoxicated, was signed on June 6, 2008, at an unspecified time. The search warrant was signed and issued by the magistrate at 3:54 a.m., and the blood sample was drawn at 4:20 a.m. the same day. The court of appeals held that evidence from the blood test was properly suppressed under Article 18.01(c) of the Code of Criminal Procedure because the warrant affidavit did not state the time and date of the underlying events. Therefore, there were no facts from which the magistrate could reasonably infer that a sufficiently short period of time had passed and that alcohol would still be in the defendant's blood. The magistrate could not infer that the defendant had been stopped and arrested on June 6th merely because the warrant was being sought on June 6th. The court affirmed the judgment.

Commentary: This is an important case because the Austin Court of Appeals appears to take a diametrically opposite position to Houston's 14th Court of Appeals in *State v. Dugas*, 296 S.W.3d 112 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). A matter of first impression, *State v. Dugas* was discussed during the 2010 TMCEC Regional Judges Program and detailed in the December 2009 issue of *The Recorder*. In *Dugas*, the search warrant affidavit stated as a fact that the traffic offense giving rise to the defendant's arrest took place on March 15, 2008. The search warrant was issued at 6:03 a.m. that day. The court of appeals concluded that because no more than six hours elapsed between the offense and the issuance of the warrant, it was not unreasonable for the magistrate to presume that there still would be some evidence of intoxication found in the defendant's blood when the warrant was signed.

Citing *Dugas*, the State, in *Jordan*, argued it was undisputed that both the offense and the issuance of the warrant occurred on the same day, June 6th. The Austin Court of Appeals disagreed. Although the affidavit expressly said that the officer believed the offense was committed on or about June 6th, the officer did not substantiate this belief with any factual basis. Consequentially, the Austin Court of Appeals decided that the affidavit did not give the magistrate a substantial basis for concluding that the defendant was stopped and arrested on June 6th.

3. Sufficiency of Search Warrant Affidavit (Home)

Dumpster Diving and Confidential Informants: Did the magistrate who issued the search warrant for a residence have a substantial basis for concluding that probable cause existed?

Flores v. State, 2010 Tex. Crim. App. LEXIS 618 (Tex. Crim. App. 2010)

Yes. The magistrate could infer that the anonymous informant had familiarity with the defendant and his affairs. The informant's tip, along with the evidence retrieved from the trash of the defendant's residence on two separate instances, was enough to determine probable cause existed. In a footnote, the Court remarked the defendant never contested that the State had a magistrate's warrant to support its search of the residence. Thus, the defendant had the burden of showing that the magistrate's warrant was invalid. *Russell v. State*, 717 S.W.2d 7, 9-10 (Tex. Crim. App. 1986).

In a lone dissent, Judge Meyers asserted that finding marijuana stems, seeds, and residue in the trash does not provide probable cause to search the adjacent house for drugs.

Commentary: TDCAA described this case as being a significant dumpster diving case that should be passed along immediately to officers doing narcotics investigations because it stands for the proposition that two dumpster dives and some supporting corroboration is enough to search a home.

Were the search warrants' affidavits sufficient for the magistrate to find probable cause that evidence of obscenity would be located at the suspect's residence?

Graves v. State, 307 S.W.3d 483 (Tex. App.—Texarkana 2010)

Yes. A cup of liquid was thrown out of defendant's vehicle as it was being pulled over by the officer for an expired registration sticker. Defendant was arrested for furnishing minors with alcohol. In the trunk, the officer found several disturbing items including three fully loaded handguns, four digital cameras, a camcorder, two tripods, an electrical sex toy, and pornographic DVDs. Two search warrants were signed authorizing a search of the defendant's residence. The initial stop for the expired registration sticker was lawful, and the search of the trunk was an authorized inventory search. While the affidavit may not have established probable cause to show that the residence contained child pornography, it did specifically state the residence contained pornography in violation of Section 43.23 of the Penal Code (Obscenity). The judgment was affirmed.

Commentary: Section 43.23 of the Penal Code, which has been the subject of criticism by a number of civil libertarians, provides that "a person commits an offense if, knowing its content and character, he: (1) promotes or possesses with intent to promote any obscene material or obscene device; or (2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity. A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same."

As noted in footnote 6 of the *Graves* opinion, Section 43.23 "was held unconstitutional by *Reliable Consultants, Inc. v. Earle* a few days before the affidavit was signed. 517 F.3d 738 (5th Cir. 2008). However, as our sister court in *Villarreal v. State* stated, 'Fifth Circuit precedent is not binding on Texas courts, and its constitutional pronouncements are highly persuasive at best.' 267 S.W.3d 204, 208 (Tex. App.–Corpus Christi 2008, no pet.). 'This Court thus remains duty-bound, for better or worse, to follow the rulings of the court of criminal appeals, which has held -- in contrast to the Fifth Circuit -- that section 43.23 does not violate the due process clause of the Fourteenth Amendment.' *Id.* at 209. Graves neither raised any constitutional challenge to this statute, nor did he address the issue of whether the affidavit was

sufficient to establish that evidence of a violation of this section would probably be found at Graves' residence." *Graves* at 494. The Court of Criminal Appeals denied PDR in this case on August 25, 2010.

Did police officers unlawfully seize two safes that were not specifically mentioned in the search warrant affidavit for the defendant's home?

State v. Powell, 306 S.W.3d 761 (Tex. Crim. App. 2010)

No. While the search warrant affidavit did not name those specific safes, it did instruct officers to "search for the property described in the affidavit, and to seize the same," and a safe was mentioned in the affidavit (it just was not listed among the items to be seized). Additionally, the other named items to be searched for could reasonably have been inside the safes, making exclusion of any evidence obtained an improper remedy even if the defendant's 4th Amendment rights were violated.

The police received information that the defendant was making forged checks in his home. The police obtained a warrant to search defendant's home and to seize, among other things, checks and materials to make forged checks. The search warrant affidavit indicated that forged checks were used to buy a safe. While executing the search warrant, the police found two safes. The police seized the safes and searched them, finding methamphetamine. Defendant was charged with possession with intent to deliver methamphetamine. The trial court and court of appeals both found that the seizure of the safes violated the defendant's 4th Amendment rights because they were not particularly described in the warrant.

The Court of Criminal Appeals held that the police could have seized the safes because they could have reasonably believed that one safe was property described in the affidavit as purchased with a forged check. Also, the police would have searched the safes whether or not they took them to the police station. Accordingly, there was no causal connection between any unlawful seizure and the otherwise lawful search resulting in the discovery of the methamphetamine. The judgment of the court of appeals was reversed, and the case was remanded for further proceedings.

Concurring, Judge Womack, joined by Judge Johnson and Judge Cochran, would not reach the issue of the applicability of the exclusionary rule. Judge Price agreed with the lower court's finding that the officers could have searched the safes while they were on the premises, but they could not remove the safes to a different location to conduct the search absent exigent circumstance.

Dissenting, Judge Price agreed with the court of appeals that the seizure of the safe in which the methamphetamine was discovered constituted an incremental intrusion upon a possessory interest for 4th Amendment purposes. Even though the officers could have searched the safes while they were on the premises on authority of the warrant, they could not remove the safes to a different location to conduct the search absent some exigent circumstance that would make searching on the premises impracticable or unless the warrant expressly authorized seizure of the safes.

4. *Terry* Pat-Down

Did the trial court properly grant a motion to suppress where the male officer, attempting to avoid a pat-down of a female suspect, ordered the suspect to shake out her bra so he could determine if she had a knife?

State v. Williams, 312 S.W.3d 276 (Tex. App.—Houston [14th Dist.] 2010)

Yes. The court of appeals held that the evidence was properly suppressed on 4th Amendment grounds. Although the officer had information that the defendant might have a weapon, he testified that he did not

conduct a pat-down search because the defendant was female. Reluctance to perform a pat-down on a female provided insufficient justification for broadening the scope of the search, especially when a female officer was immediately available to conduct the pat-down for weapons. The court was aware of no authority prohibiting a male officer from patting down a female suspect. If a pat-down had been conducted, and if a weapon or other contraband had been detected as a result, then either officer could have attempted to extract the item or could have conducted a more intrusive search.

There was no indication that the defendant had a hidden knife in her bra. The court also rejected the argument that the request was less intrusive than a pat-down search. There was no reason to believe that that a pat-down would have been dangerous or ineffective. The record reflected that the defendant did not voluntarily consent to the request. She physically and verbally indicated she did not want to comply, began crying, and said she did not want to pull out her bra. The trial court judgment was affirmed.

5. Warrantless Search

Did the trial court err in suppressing illegal drugs discovered in an automobile where the defendant was arrested for public intoxication after exiting an automobile?

State v. Ogeda, 315 S.W.3d 664 (Tex. App.—Dallas 2010)

Yes. The trial court judge erred by applying a subjective standard, rather than an objective standard. In applying the U.S. Supreme Court's recent holding in *Arizona v. Gant*, 07-542 (4/21/09), the court of appeals held that an officer could reasonably believe that evidence supporting a public intoxication arrest could have been found in the car so as to justify a warrantless search. In this case, when viewed objectively, (1) the officers at the scene were in an area known for drug use, and the officers knew that people in the parking lot often used drugs in their car; (2) the arresting officer warned the defendant in the past that if he found her under the influence in the parking lot again, he was going to arrest her; and (3) when the officer encountered the defendant, she appeared intoxicated and told her boyfriend to hurry and that cops were behind him just before he threw away a plastic bottle into the car. Thus, an officer could have reasonably believed, for 4th Amendment purposes, that evidence supporting a public intoxication arrest would be found in the car, and the trial court erred in granting the defendant's motion to suppress. The court of appeals reversed and remanded for further proceedings.

Did the trial court err in suppressing evidence seized pursuant to arrest for violation of a bicycle helmet ordinance?

State v. Portillo, 314 S.W.3d 210 (Tex. App.—El Paso 2010)

Yes. The court of appeals held, contrary to the determination of the trial court, the Dallas ordinance was a valid exercise of the City's police power, although reasonable minds could differ as to whether it had a substantial relationship to the protection, public health, safety, or general welfare of the public. The ordinance was neither preempted by the U.S. or Texas Constitution nor the general laws of Texas. None of the statutes cited by the defendant limited, with unmistakable clarity, the authority of a home-rule municipality to exercise its powers by enacting a bicycle helmet ordinance. The ordinance did not violate equal protection principles. Although the defendant claimed it was not enforced equally, he did not argue that his arrest was motivated by improper considerations such as race, religion, or the interference of his exercise of a constitutional right. Because an officer observed the defendant riding a bicycle without a helmet, in violation of the Dallas bicycle helmet ordinance, he was permitted by Article 14.01(b) of the Code of Criminal Procedure to arrest the defendant for the ordinance violation and search him incident to arrest. Accordingly, the cocaine found in the search should not have been suppressed. The court of appeals reversed the trial court's order and remanded the case for further proceedings.

Commentary: Criminals on bikes beware! Ordinances provide law enforcement with a tremendous tool, not only for enforcing public safety and quality of life issues, but for discovering felonious contraband. With this said, a lot of this decision hinged on the fact that the City of Dallas is a home-rule municipality. General-law cities and their legal advisors are urged to keep this in mind.

Did the trial court err in ruling that the peace officer who entered the defendant's home without a search warrant after observing drug paraphernalia acted under exigent circumstances?

Wisenbaker v. State, 311 S.W.3d 57 (Tex. App.—San Antonio 2010)

No. The court agreed with the trial court that, for 4th Amendment purposes, the warrantless entry of the house was justified by exigent circumstances. The police received information from the defendant's neighbor that the defendant was smoking marijuana. A police officer corroborated the neighbor's information by seeing the defendant through a hole in a fence holding what looked like a marijuana pipe. This resulted in probable cause to believe that the defendant illegally possessed drug paraphernalia (per Section 481.125 of the Health and Safety Code). The officer walked around the block and approached the defendant's front door which had on it a sign that said "use other door." The officer then went to the back of the property where he saw the defendant through a glass door (the other door) smoking marijuana and smelled the odor of burning marijuana. Based on these observations, the officer had probable cause to believe people were in possession of marijuana, and that the evidence (*i.e.*, the marijuana) could be destroyed by the act of smoking. Therefore, law enforcement had probable cause to search and exigent circumstances existed at the time they entered the room and saw marijuana in plain view on a table. Defendant's motion to suppress was properly denied.

Was the evidence sufficient to show that the scope of the defendant's consent to enter a premise extended to the officer's act of walking down the open hallway to knock on the bathroom door where a reported runaway was said to be taking a shower?

Valtierra v. State, 310 S.W.3d 442 (Tex. Crim. App. 2010)

Yes. It was objectively reasonable for the officer to conclude that the defendant's general consent to come inside the apartment to find and talk to the runaway included consent to walk down the open hallway to knocking on the bathroom door. En route to knock on the bathroom door, one of the police officers encountered additional persons attempting to hide what was subsequently discovered to be methamphetamine. The trial court upheld the officer's actions, but on the basis of a "protective sweep" or "exigent circumstances." The San Antonio Court of Appeals found that the officer did not have consent to walk down the hallway, nor were there exigent circumstances warranting a protective sweep. Because the record supports implied, if not explicit, consent to walk some 20 feet to the bathroom door, the Court of Criminal Appeals concluded that the officer's actions were reasonable and within the scope of the original consent to enter and investigate the runaway's whereabouts. The court of appeals' judgment was reversed and remanded for further proceedings.

Did law enforcement search the defendant's residence, a motel room, in violation of the 4th Amendment and without an applicable exception in Texas law?

State v. Hoffman, 293 S.W.3d 633 (Tex. App.—San Antonio 2009)

Yes. Law enforcement went to a motel where a man who was alleged to sell drugs was living with the defendant. Upon seeing law enforcement approach, the defendant ran into her room and flushed something in the toilet. A warrantless search of her room was performed. A bag of crack cocaine was

removed from the toilet, and marijuana was discovered in the room. Defendant's motion to suppress evidence was granted, and the State sought review. In affirming, the court of appeals considered that the same facts that gave rise to probable cause could have also been relevant to an analysis of exigent circumstances. However, law enforcement simply did not have probable cause to search the defendant's room. The record reflected that entry was gained with intent to obtain information so that a search warrant could be procured. In the absence of probable cause, there was no need to consider if exigent circumstances for a search existed.

6. Reasonable Suspicion

Did an officer have reasonable suspicion to stop and detain the defendant's vehicle, which was spinning its tires so much that they smoked profusely and squealed loudly?

State v. Clark, 315 S.W.3d 561 (Tex. App.—Eastland 2010)

Yes. The court of appeals held that a motion to suppress was improperly granted. Objectively, it was reasonable for an officer to stop the defendant because he appeared to be in violation of an Abilene city ordinance prohibiting the use of a motor vehicle to create a nuisance or disturbance. Even if the officer thought he was stopping the defendant for exhibition of vehicle speed or acceleration as prohibited by Section 545.420 of the Transportation Code (Racing on the Highway) and defendant was not in violation of that section because he was not racing anyone, there only had to be an objective basis for the stop. Any subjective intent on the part of the officer to stop the defendant for violation of a state statute that was no longer applicable was irrelevant. For purposes of the local ordinance, the evidence established that there was a very loud screeching of tires while the defendant was revving his engine so as to cause his tires, but not his vehicle, to move and that his vehicle continued creating a very loud noise after it started moving because the defendant was forcing the accelerator hard enough to continue to screech the tires. The evidence also established that all of this occurred at about 3:20 a.m. in an immediate area that included residential homes. The judgment of the trial court was reversed.

Does driving a clean car, not "fitting" the car, looking away from officers, and obeying traffic laws give rise to reasonable suspicion?

Gonzalez-Gilando v. State, 306 S.W.3d 893 (Tex. App.—Amarillo 2010)

No. Law enforcement stopped the defendant because (1) the vehicle in which the occupants rode was clean or lacked road grime, (2) the young occupants did not "fit" the year and model of the vehicle, the latter being a '99 Lumina, (3) the troopers thought the vehicle's occupants should have been in a sportier car, (4) both occupants simultaneously looked away from the officers as the vehicles met and passed, (5) the occupants turned their hats around so they faced forward after passing the troopers, (6) the car slowed and came to an almost complete stop at a blinking caution light adjacent to an intersection, and (7) the driver drove within the speed limit.

The troopers also checked a computer database to determine whether the vehicle in question was lawfully registered and covered by liability insurance for purposes of Section 601.051 of the Transportation Code (Requirement of Financial Responsibility). While it was discovered that the car was lawfully registered, the information regarding insurance was unavailable. Yet, somehow, the totality of the aforementioned circumstances, led two DPS troopers with the assistance of a sheriff's deputy, to conclude that there was justification in stopping the car. A controlled substance was subsequently discovered. Defendant was arrested. At trial his motion to suppress was denied.

The court of appeals held that the trial court erred in denying the defendant's motion to suppress. Without the drugs ultimately discovered in the car, the State had little or no evidence of the defendant's guilt. The court of appeals reversed and remanded.

Commentary: This is one of the most brazen examples of bad law enforcement I recall ever reading. Though there are always at least two sides to cases like this (the State did unsuccessfully attempt to procure review by the Court of Criminal Appeals), the facts reported really push the bounds of incredulity. I have heard quite a bit of buzz about this opinion. Some of it is not quite accurate. I maintain that contrary to rumors, this is not a case addressing the merits of the Texas Sure insurance verification program. Texas Sure is not even mentioned by name. While the use of databases come into play in this opinion, they are only of tangential importance (see, endnotes 2 and 3 of opinion).

7. Canine Sniff

Was a drug dog's sniffing outside a residence's fence and garage door an illegal search?

Romo v. State, 315 S.W.3d 565 (Tex. App.—Fort Worth 2010)

No. Defendant argued that an illegal search occurred when a drug dog sniffed his garage and backyard fence and the police officers peered into his backyard through an opening in the fence and saw what appeared to be marijuana. The court of appeals held that suppression of the drugs was not required on constitutional grounds or Article 38.23 of the Code of Criminal Procedure. The dog's sniffs of the garage door and the backyard fence were not searches under the 4th Amendment or the Texas Constitution because he sniffed areas that were not protected from observation by passersby and because defendant had no reasonable expectation of privacy in the odor of marijuana coming from his backyard. The affidavit in support of the search warrant specifically set out that the dog alerted two separate times to the backyard fence. Therefore, the affidavit contained sufficient information to support a determination of probable cause without considering an investigator's statements about seeing the marijuana through the fence slats, or whether the tip provided by a confidential informant was stale because it was over a week old. The judgments of the trial court were affirmed.

Commentary: TDCAA commented that this case should be helpful to allow the "alerts" of narcotics detection dogs to be used as the basis for a warrant to search a residence as the alerts were sufficient–standing alone–to provide the probable cause for the search, although there was admittedly other evidence that was included in the search warrant affidavit.

Was the student's expectation of privacy violated when she, along with her classmates, was asked to step into the hallway without her backpack and belongings while a canine conducted a sniff of the classroom and its contents?

In re D. H., 306 S.W.3d 955 (Tex. App.—Austin 2010)

No. Defendant, a juvenile, brought her backpack into a public high school, where she was required to temporarily surrender its possession and leave it in the classroom to be sniffed by a drug dog. The State had the burden to show that the seizure was reasonable as it was undisputed that the search of the juvenile's backpack occurred without a search warrant.

Given the defendant's reduced expectation of privacy, the low level of intrusion involved in the dog's inspection of the airspace surrounding her backpack, the limited information gathered, the school's interest in combating drug abuse, and the school's tutelary and custodial responsibilities for its students, the court of appeals affirmed the decision of the trial court that the detention of defendant's backpack was

deficient under the 6th Amendment. The Court reversed and remanded the case to the court of appeals for determining whether the error resulted in prejudice.

Padilla, a lawful permanent resident of the United States for over 40 years, pled guilty to drug distribution charges in Kentucky. In post-conviction proceedings, he claimed that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleged that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla post-conviction relief on the ground that the 6th Amendment's effective assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

Changes to immigration law have raised the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of deportable offenses and judges had the discretion to prevent deportation, immigration reforms have expanded the class of deportable offenses and have limited judges' authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Commentary: For years most states, including Texas, have viewed deportation as a possible collateral consequence of being convicted of a crime, not as part of the penalty. This case eliminates any such distinction. The burden of defense attorneys is increased as the notion of providing effective assistance of counsel is enhanced. Accordingly, it should be emphasized that this case does not directly pertain to judicial admonishments or defendants proceeding pro se.

Did the municipal court err by not allowing the defendant to withdraw his plea because his plea was involuntary due to ineffective assistance of counsel?

Ogbodiegwu v. State, 2010 Tex. App. LEXIS 1020 (Tex. App.—Austin Feb. 12, 2010)

No. Defendant was charged in the Austin Municipal Court of Record with violating an ordinance making it a criminal offense to operate a car wash without obtaining a conditional use permit. The defendant argued that his plea was involuntary because of ineffective assistance of counsel, in that his attorneys misinformed him about how to bring the car wash into compliance and did not inform him of any defenses. The court of appeals found, however, that the record did not support a finding of ineffectiveness because none of the attorneys testified at the hearing or submitted affidavits and no other evidence of their conduct was admitted. There was also no indication that the plea was involuntary for any other reason. Admonishments were not required. The court of appeals also held that there was no error in denying the defendant's motion to withdraw his plea. The case had been taken under advisement at the time of the motion. Furthermore, the defendant was mistaken as to his right to have a pre-sentence investigation because the case was governed by Article 45.051, and not Article 42.12, Section 9 of the Texas Code of Criminal Procedure.

Commentary: It is just a matter of time until one of the intermediate appellate courts gives complete consideration of the merits of an ineffective assistance of counsel claim in a municipal court proceeding. While *Ogbodiegwu* is not that case, it is still a relatively important decision. Judge Pemberton's opinion exemplifies good code construction. This opinion makes evident that the Austin Court of Appeals knows the difference between *deferred disposition* and *deferred adjudication* (unlike the 14th Court of Appeals in Houston, in *Ex parte Wolf*, 296 S.W.3d 160 (Tex. App.—Houston [14th Dist.] 2009) (deferred disposition called a *Class C special expense* and explained as a type of deferred adjudication). Barring an

opinion from the Court of Criminal Appeals, let us hope, in the interest of judicial economy, that there will be a consensus among the courts of appeals that there is a difference between Article 45.051 and 42.12 and that principles of code construction prohibit them from being conflated.

II. Substantive Law
A. Health and Safety Code
1. Animal Law

Is Section 822.005 of the Health and Safety Code (Attack by Dog) constitutional?

State v. Taylor, 2010 Tex. App. LEXIS 6294 (Tex. App.—Texarkana Aug. 4, 2010)

Yes. Section 822.005(a)(2) of the Health and Safety Code is neither facially unconstitutional nor unconstitutional as applied to the defendant, because the provision was not a strict liability statute, was subject to a culpable mental state of at least recklessly, and complied with the requirements of Section 6.01(a) of the Penal Code. The trial court erred in quashing the indictment, which charged the defendant with failing to secure the defendant's dog, in violation of Section 822.005(a)(1). Because the statute was constitutional, the charging instrument stated the source of the defendant's duty, and the defendant was the owner of the dog, the charging instrument gave sufficient notice of the source of the duty to act.

Does use of Chapter 821 of the Health and Safety Code preclude prosecution for animal cruelty under the Penal Code?

State v. Almendarez, 301 S.W.3d 886 (Tex. App.—Corpus Christi 2009)

No. The provisions of Chapter 821, Subchapter B of the Health and Safety Code (specifically Sections 821.022-023) are civil, not punitive, in nature. In Texas, there are two avenues for protecting animals from cruel treatment: (1) criminal prosecution under Section 42.09 of the Penal Code, and (2) the civil remedy provided under Section 821.023 of the Health and Safety Code.

Section 821.023 expressly contemplates the possibility of criminal proceedings being brought after civil proceedings. In contrast, Section 821.023(b) presumes the reverse and in the criminal proceeding, a defendant may face loss of freedom or fine or both, whereas, a proceeding under Section 821.023 may subject the defendant to a loss, forfeiture, and confiscation of property rights and interests. While there may be some deterrent value in civil proceedings, utilizing the factors set out by the U.S. Supreme Court in *Hudson v. United States*, 522 U.S. 93 (1997), the court held that double jeopardy does not preclude criminal prosecution under the Penal Code.

2. Texas Clean Air Act

Did the Legislature's grant of authority to an executive branch agency, which in turn created criminal offenses, violate separation of powers?

State v. Rhine, 297 S.W.3d 301 (Tex. Crim. App. 2009)

No. Appellee filed a motion to quash the information, alleging that the provision of the Administrative Code under which he was charged was void because the Legislature unconstitutionally delegated authority to the Texas Commission on Environmental Quality (TCEQ), an executive-branch agency, via Section 382.018(a) of the Health and Safety Code, in violation of the doctrine of separation of powers. The trial court granted the motion. The State appealed, and the court of appeals reversed. *State v. Rhine*, 255 S.W.3d 745, 753 (Tex. App.—Fort Worth 2008). Appellee filed a petition for discretionary review.

The Court of Criminal Appeals reasoned that the Legislature declared a policy and set standards and limitations on the authority delegated to TCEQ that are capable of reasonable application, provide guidance, and limit discretion. The authority delegated to the TCEQ to fix elements of an offense was not exclusively that of the Legislature. Therefore, there is no violation of the separation of powers principle of Article II, Section 1, of the Texas Constitution.

Is the unlawful outdoor burning statute unconstitutionally vague?

State v. River Forest Dev. Co., 315 S.W.3d 128 (Tex. App.—Houston [1st Dist.] 2010)

No. Defendant, a real estate development company, was charged under outdoor burning regulations promulgated by the Texas Commission on Environmental Quality (TCEQ) pursuant to the Texas Clean Air Act (Chapter 382 of the Texas Administrative Code). The trial court found that the regulations, banning outdoor burning except when no practical alternative existed, were unconstitutionally vague. The trial court granted the defendant's motion to quash. The State appealed. The court of appeals disagreed. The company and its principal admitted that they had a copy of the outdoor burning regulations but did not contact the TCEQ for clarification even though it was possible to do so before beginning the burn. Further, testimony did not support a conclusion that an ordinary individual would fail to understand the law because it was too vague in describing the conduct it sought to deter. The principal of the development company explained in his testimony to the trial court that he considered logistics and costs in determining whether a practical alternative to burning existed. Furthermore, he did not claim any lack of understanding about what is required by law. The case was remanded to the trial court for trial.

B. Penal Code

Does hosting a "squares" game to collect donations for charity constitute an offense under Chapter 47 of the Penal Code?

Tex. Atty. Gen. Op. GA-0804 (9/30/10)

No, not in this instance, where a host set up a 501(c)(3) to collect donations for charity by having participants purchase squares in a grid, designating their square to represent a different charity. At the end of the game, the charity named in the winning square won the pool of money (think of the office Super Bowl squares or baby birth date pools). Both the Class C misdemeanor offense of "gambling" and the Class A misdemeanor offense of "gambling promotion" require there be a bet, defined by an agreement to win or lose something of value solely or partially by chance. As the person purchasing a square does not stand to gain anything, yet that person loses the money not based on chance but solely by participating, there is no bet; thus the activity does not violate Section 47.02 or 47.03 of the Penal Code.

C. Transportation Code

Does a license plate sitting on a dashboard satisfy Section 502.404(a) of the Transportation Code requiring the license plate be displayed on the "front" of a vehicle?
Spence v. State, 2010 Tex. Crim. App. LEXIS 1056 (Tex. Crim. App. Sept. 15, 2010)

No. The Court of Criminal Appeals granted review to resolve a conflict between courts of appeals regarding whether a license plate must be displayed at the front (*e.g.,* the front bumper) of a car or whether it is sufficient to be displayed somewhere else, such as inside the front windshield. In this case, the Amarillo Court of Appeals held that the front license plate must be displayed at the foremost area of the car. The Austin Court of Appeals, in *State v. Losoya*, 128 S.W.3d 413 (Tex. App.—Austin 2004, pet.

ref'd), held that the Transportation Code does not require the display of a license plate on the front bumper. The Court of Criminal Appeals concluded that the plain language of Section 502.404(a) requires that a license plate be displayed at the foremost part or front of a vehicle, most commonly the front bumper.

Judge Meyers, joined by Judge Hervey, stated in the dissent that the statute is poorly written and "front" means forward facing, not the front bumper.

Is merging to a lane from an ending lane a turn that requires the use of a turn signal?

Mahaffey v. State, 316 S.W.3d 633 (Tex. Crim. App. 2010)

No. A merge to a lane from an ending lane is neither a "turn," nor a "lane change" requiring the use of a turn signal as required by Section 545.104 of the Transportation Code.

The defendant was traveling in the far right lane of a highway. When his lane ended, he was forced to merge left. An officer stopped the defendant for failing to signal the merge, which he considered a lane change, and the defendant was ultimately arrested for DWI. Defendant's motion to suppress, arguing that he had been illegally stopped, was denied. The court of appeals affirmed the conviction. After granting discretionary review, the Court of Criminal Appeals held that under the plain language of Section 545.104, a movement left or right on a roadway that was neither a turn nor a lane change did not require a signal. When a driver turns either left or right out of the direct course of the road, the driver is required to signal his or her intention. However, there is no statutory requirement that a driver who follows the directions of a highway traffic sign stating "Lane Ends-Merge Left" makes a turn under the plain language of Section 545.104. The Court held that a requirement that a driver need signal any movement that was not a perfectly straight trajectory would lead to an absurd result, requiring a driver to signal when swerving for an animal on the roadway or when pulling over for an ambulance to pass. The judgment was reversed and the case was remanded to the court of appeals to determine whether the merge was a lane change that required a signal.

Presiding Judge Keller, dissenting, believed the Court was reading too much into the court of appeals' ruling about when a turn signal must be used. "This Court says that the Tyler court's holding means that a driver must signal any movement that is 'not a perfectly straight trajectory.' I think this overstates the holding, at least to the extent that it suggests that driving on a curved road would require using a turn signal. The Court says that the Tyler court's holding would require a signal before swerving around a turtle or pulling over for an ambulance. First, so what? There is nothing absurd about requiring signals in emergency situations. Second, there is always the defense of necessity if signaling is not possible. Third, drivers have to signal if they change lanes, even in emergencies, so if the Tyler court's analysis leads to an absurd result, it has nothing to do with the holding that a merge is a turn." *Mahaffey* at 643.

May a vehicle or trailer used to transport birds (parakeets), rats, mice, hamsters, and similar animals for sale to pet shops be registered as a "farm vehicle" under Section 502.163 of the Transportation Code?

Tex. Atty. Gen. Op. GA-0801 (9/22/10)

No. The registration fee for a commercial motor vehicle as a farm vehicle is half the usual registration fee if it is used for commercial purposes to transport poultry, dairy, livestock, livestock products, timber in its natural state, or farm products to market or another place for sale or processing. The common meaning of the word poultry does not include birds such as parakeets raised to be sold as pets, and the common meaning of livestock does not include non-poultry birds, rats, mice, or hamsters. Therefore, Section

duties of the sheriff, including accepting or rejecting a bail bond, incarcerating a defendant post forfeiture, or verifying a defendant's incarceration. As it does not appear the Legislature intended Section 171.004 to apply to statutory duties of the sheriff, the conflict of interest provision would not apply.

2. Family Violence

Does a defendant's refusal to acknowledge the form of a protective order invalidate the order or make the evidence insufficient that he committed an offense per Section 25.07 of the Penal Code (Violation of Certain Court Orders or Condition of Bond in Family Violence Cases)?

McIntosh v. State, 307 S.W.3d 360 (Tex. App.—San Antonio 2009)

No, it does not. In rejecting this conclusory assertion the court of appeals noted that the defendant did not cite any legal authority or make any argument in support of the assertion. Nor did the defendant argue the judge who issued the order was without authority or jurisdiction to enter it or that the order was otherwise void.

Commentary: This case hardly warrants mentioning but made the cut due to past phone calls TMCEC has received from magistrates seeking guidance in how to deal with unruly defendants arrested on domestic violence charges who refuse to acknowledge receipt of a magistrate's order of protection (Article 17.292 of the Code of Criminal Procedure).

3. Property Hearings

Subsequent to seizure and forfeiture of cash discovered in a truck axle, did the tow truck operator have a possessory interest in the money?

State v. $281,420, 312 S.W.3d 547 (Tex. 2010)

No. A suspicious tow-truck driver turned over the vehicle to law enforcement after the person who requested the tow failed to retrieve it. Subsequently, law enforcement and the tow-truck operator discovered the cash encased in the housing of the truck's axle.

The Supreme Court held that even if the property was abandoned, the tow truck driver never expressed an intent to acquire title in the currency; the currency was not "lost" or "mislaid" property to which he was entitled because he did not own the towed vehicle and he never knowingly had possession of the cash which was deliberately hidden. The tow truck operator failed to establish a valid legal claim to possession of the currency. Thus, the Court reversed the judgment of the court of appeals awarding the money to the tow truck driver and remanded the case to the trial court for further proceedings.

Commentary: In an interesting twist of importance to municipal judges who as magistrates perform property hearings, the Solicitor General, in an amicus curiae brief, argued that seized property which is not contraband, but remains unclaimed, should be disposed of pursuant to Article 18.17 of the Code of Criminal Procedure. The tow truck operator argued that because the State failed to elect Article 18.17 as a remedy during trial, it waived this argument. However, the Court explained that Article 18.17 is not a remedy but a procedure implemented by the Legislature to dispose of all unclaimed or abandoned personal property of every kind that has been seized by the State and is not subject to the limited exceptions outlined in the statute. Although it stated that the Court was expressing no opinion on Article 18.17, it nevertheless opined that the State is not foreclosed from seeking to dispose of the currency pursuant to Article 18.17.

Does a justice of the peace or municipal judge, acting as a magistrate, have authority to award ownership or title of a motor vehicle?

Tex. Atty. Gen. Op. GA-0761 (3/15/10)

The Attorney General cannot predict whether a court would conclude that a justice of the peace or municipal judge, acting as a magistrate, is authorized to award title or ownership of a motor vehicle under Chapter 47 of the Code of Criminal Procedure (Articles 47.01-.12), which governs the disposition of allegedly stolen property, as there are conflicting intermediate appellate court decisions answering this question. The Eastland Court of Appeals held in *Perry v. Breland*, 16 S.W.3d 182, 189 (Tex. App.—Eastland 2000), that trial courts have limited jurisdiction via the judge's role as a magistrate to determine right to possession only, while an unpublished Dallas Court of Appeals decision held that a municipal court has jurisdiction to determine ownership as well as right to possession (see, *Allstate Ins. Co. v. Troy's Foreign Auto Parts*, No. 05-00-01239-CV, (July 26, 2001)). Depending on the foreclosure proceeding at issue, a justice court could award title or ownership of a motor vehicle through the enforcement of a lien under Section 27.031 of the Government Code.

In either event, if a justice of the peace or municipal judge, acting as a magistrate, awards title or ownership of a motor vehicle, the Texas Department of Motor Vehicles may accept the order to issue a new certificate of title, the ownership having been transferred by operation of law.

4. Motion to Dismiss by Prosecution

Does a judge have a ministerial duty to grant a motion to dismiss by a prosecuting attorney?

State ex rel. Valdez, 294 S.W.3d 337 (Tex. App.—Corpus Christi 2009)

No. Article 32.02 of the Code of Criminal Procedure clearly manifests the Legislature's intent that a criminal prosecution may be dismissed only upon a prosecutor's motion granted with consent of a trial court. The court of appeals held that the trial court's veto power over dismissal was not a ministerial act and that the exercise of such veto power is discretionary and outside the bounds of mandamus relief. The court of appeals lifted the stay and denied the petition for writ of mandamus.

Commentary: A good reminder to prosecutors that a motion to dismiss is akin to a two-party check and that some judges may require persuasion to sign off on a dismissal. Prosecutors should be prepared to expressly state why they are moving for dismissal. Simply stating "in the interest of justice" is hardly informative or persuasive. By the same token, a judge cannot compel a prosecutor to effectively prosecute a case that the prosecutor wishes not to prosecute.

5. Plea Bargains

Did the trial court err in adding conditions to the State's plea bargain even though the defendant did not object at the hearing?

Moore v. State, 295 S.W.3d 329 (Tex. Crim. App. 2009)

Yes. At a plea bargain hearing, the trial court asked whether sentencing would be postponed to a later date, to which neither the State nor defendant objected. The court accepted the plea bargain, warning the defendant that if he did not appear for the sentencing hearing, the guilty plea would be converted to an open plea. The defendant failed to appear and received 40 years in prison. On appeal, the defendant argued that the trial court erred by not allowing him the opportunity to withdraw his plea. The court of

appeals reversed and remanded. The State then petitioned for review claiming the defendant did not preserve error, an issue ignored by the appellate court.

The only proper role of the trial court in the plea-bargain process is advising the defendant whether it will follow or reject the bargain agreement. If the court rejects the agreement, the defendant is allowed an opportunity to withdraw the guilty plea. The Court of Criminal Appeals agreed that a trial court commits error if it unilaterally adds non-negotiated terms to a plea bargain agreement. However, the Court reasoned that the defendant did not object, rather he agreed, to the later sentencing date (*i.e.,* the improper term added by the court), nor did the defendant withdraw his guilty plea at sentencing. The Court disagreed that the error by the trial court could be raised for the first time on appeal. By not raising the error at either the plea hearing or the sentencing hearing, the defendant failed to preserve error for appellate review. Therefore, the judgment of the trial court was affirmed.

6. Pre-Trial Motions

Does Article 38.23 of the Code of Criminal Procedure bar the admissibility of a confession if the interrogating officer fabricates a forensic lab report in violation of Section 37.09 of the Penal Code (Tampering with or Fabricating Evidence) and uses it to persuade a suspect to confess?

Wilson v. State, 311 S.W.3d 452 (Tex. Crim. App. 2010)

Yes. After his motion to suppress was denied, the defendant pleaded nolo contendere to murder. The court of appeals reversed and remanded, finding that a detective violated the Penal Code by using a fabricated document, and thus suppression of the defendant's confession was required by Article 38.23 of the Code of Criminal Procedure. The State petitioned for review.

The Court held that Section 37.09 of the Penal Code (Tampering with or Fabricating Evidence) prohibited anyone, including members of the government, from creating, forging, or otherwise tampering with evidence that could be used in an official investigation. The Court concluded that a violation of Section 37.09 issue barred the admission of other evidence obtained through that violation, even when the defendant's confession was voluntary under federal constitutional standards. The detective in this case admitted that he created the false report, which he intended for the defendant to consider as a genuine report. The detective's conduct caused the defendant to confess to murder, and this conduct violated Section 37.09, which made the defendant's confession inadmissible under Article 38.23, despite the detective's subjective belief that his conduct was lawful. The Court affirmed the judgment of the court of appeals.

Judge Meyers dissented on the basis that the detective would have to be guilty of violating Section 37.09 and that he did not believe he could be found guilty of violating the statute. Judge Keasler, Judge Keller, and Judge Hervey concluded that the error was not properly preserved and that the defendant had no standing to complain about the alleged Section 37.09 issue because the detective did not violate any of the defendant's personal or property rights and, accordingly, was not entitled to relief under Article 38.23 of the Code of Criminal Procedure.

Did the trial court err when it denied the defendant's motion to quash, which alleged that the charging instrument was fundamentally defective for failing to allege the act or acts relied on to constitute recklessness?

Smith v. State, 309 S.W.3d 10 (Tex. Crim. App. 2010)

Yes. The charging instrument was fundamentally defective. Defendant was arrested for Indecent Exposure (Section 21.08 of the Penal Code). He moved to quash on the ground that the State failed to allege in the charging instrument what act or acts constituted recklessness, as required by Article 21.15 of the Code of Criminal Procedure. The trial judge overruled the motion and the defendant was convicted of the charge. The court of appeals held that the information–the charging instrument–sufficiently described the acts relied upon to constitute recklessness. On review, the Court of Criminal Appeals found that although the information was sufficient to satisfy due process notice requirements, it did not comply with the requirements of Article 21.15. The allegation that the defendant exposed his penis and masturbated was not sufficient to meet the requirements of Article 21.15. A trier of fact could not have inferred recklessness from the charging instrument because there was nothing inherently reckless about either exposing oneself or masturbating. The charging instrument would have sufficiently apprised the defendant of the act or acts constituting recklessness if the State had alleged that he exposed his penis and masturbated in a public place. This omission was a substantive defect. The case was reversed and remanded to the court of appeals for a harm analysis.

Commentary: This is a real important reminder for prosecutors when charging offenses that have a culpable mental state of either recklessness or criminal negligence. In *Mays v. State*, 967 S.W.2d 404, 406 (Tex. Crim. App. 1998), the Court stated that subject to rare exceptions, a charging instrument tracking the language of the statute will satisfy constitutional and statutory requirements. "The State need not allege facts that are merely evidentiary in nature." Notwithstanding *Mays*, whenever recklessness enters into or is a part or element of any offense, or it is charged that the accused acted recklessly, Article 21.15 of the Code of Criminal Procedure establishes an additional requirement. The charging instrument must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness.

May a trial court base its ruling on a pre-trial motion to suppress an unsworn police report offered into evidence at the pre-trial suppression hearing?

Ford v. State, 305 S.W.3d 530 (Tex. Crim. App. 2009)

Yes. The State argued that the court of appeals erred in reversing because the trial court did not abuse its discretion by relying upon an officer's unsworn hearsay document at the suppression hearing. The offense report contained sufficient indicia of reliability to serve as the factual basis for the trial court's ruling. The offense report included the defendant's name, correct offense date, and specific information that coincided with the same basic information to which the defendant testified at the hearing. Significantly, the defendant did not argue that the offense report was, in any way, unauthentic, inaccurate, unreliable, or lacking in credibility. Nor did the defendant contest the accuracy of the facts within that offense report; he argued only that the report could not be considered without a sponsoring witness or affidavit. Although it was better practice to produce the witness or attach the documentary evidence to an affidavit, Article 28.01 of the Code of Criminal Procedure, governing pre-trial hearings, does not contain a "best evidence" rule. The trial judge, in such instances, serves a gatekeeping role, determines the qualifications of a person to testify, the existence of a privilege, and the admissibility of evidence. As the Court explained in *Granados v. State*, 85 S.W.3d 217, 227 (Tex. Crim. App. 2002), in making its determination a trial court is not bound by the Rules of Evidence except with respect to privileges. The judgment was reversed.

Judge Price, with a self-admitted lack of enthusiasm, concurred writing "[s]tare decisis compels me to join the majority opinion in this cause. It does not compel me to be particularly sanguine about it." *Ford* at 541.

Judge Meyers, dissenting, stated that while he agreed with the majority that the trial court was permitted to consider the arrest report, the court of appeals had been given the opportunity to review the arrest report and decide whether it supports the trial court's findings of fact.

7. Trial

Was the granting of a defendant's motion for directed verdict really a dismissal as the State had not rested its case?

State v. Moreno, 294 S.W.3d 594 (Tex. Crim. App. 2009)

No. The trial judge entered a verdict of acquittal after jeopardy attached. Because the State is not authorized to appeal an acquittal, the Court of Criminal Appeals affirmed the court of appeals' judgment which had dismissed the appeal for want of jurisdiction.

During the testimony of the State's third witness, the judge conducted a bench conference and told the prosecutor that he knew that he was stalling because a police officer was not present to testify. Defense counsel then moved for a directed verdict, arguing that the elements of the offense were not met by the State. The judge signed an order granting the defendant's motion for a directed verdict and dismissed the case with prejudice. The State appealed the trial judge's order pursuant to Article 44.01 of the Code of Criminal Procedure. The Court of Criminal Appeals (8-1) agreed that the court of appeals properly dismissed the appeal for want of jurisdiction.

Judge Holcombe, dissenting, wrote that the prosecution was not barred by double jeopardy because the defendant voluntarily waived his constitutional right to have his guilt or innocence determined by the jury. Furthermore, the trial court's action in granting the acquittal deprived the public of its valued right to one complete opportunity to adjudicate someone accused of violating its laws.

8. Circumstantial Evidence

Is being intoxicated at the scene of a traffic collision when the intoxicated person is the driver circumstantial proof that the intoxication cause the collision?

Kuciemba v. State, 310 S.W.3d 460 (Tex. Crim. App. 2010)

Yes. Defendant was found behind the steering wheel, injured and intoxicated, at the scene of a one-car rollover accident. His blood-alcohol level was more than twice the legal limit. The court of appeals found the evidence to be insufficient to show that he was intoxicated at the time that the accident occurred. On appeal, the court found that the combination of the facts was sufficient to support the defendant's DWI conviction. No skid marks were found on the roadway, indicating that the defendant did not brake before the rollover occurred. The failure to brake provided some evidence that the accident was caused by intoxication. Defendant's presence behind the steering wheel and the fact that he was still bleeding when a deputy arrived supported an inference that the accident had occurred a short time previously. The high blood-alcohol level, more than twice the legal limit, found in a sample taken at the scene, supported an inference either that he was recently involved in the accident or that he had been intoxicated for quite a while. The Court of Criminal Appeals reversed the judgment of the court of appeals and remanded the case to that court to address the defendant's remaining issue.

Judge Myers states in his dissent that, absent testimony that the defendant's engine was warm or that it was still running, the evidence presented was legally insufficient to support a finding that the defendant was intoxicated at the time he was driving.

Related holding: *Scillitani v. State*, 315 S.W.3d 542 (Tex. Crim. App. 2010)

9. Motion for New Trial

Did the municipal court abuse its discretion in granting a new trial?

State v. Morales, 2010 Tex. App. LEXIS 407 (Tex. App.—Dallas Jan. 21, 2010)

Yes. Defendant was observed by a City of Rowlett police officer making a turn without signaling. He was stopped and asked to show proof of financial responsibility. The defendant had no such proof. The officer ran the defendant's driver's license and discovered that the defendant had several active arrest warrants. The defendant was arrested on the basis of the warrants and his automobile was searched incident to arrest. In the back seat of the car, the officer found a gym bag containing a pipe with marijuana residue. At the police station, the officer issued the defendant a citation for Possession of Drug Paraphernalia and Failure to Maintain Financial Responsibility.

The defendant was tried in the Rowlett Municipal Court of Record. At trial, the defendant moved to suppress the officer's testimony about the arrest and subsequent search on the ground that the State failed to prove the arrest was lawful by producing the warrants in court. The officer testified the arrest was pursuant to the pending arrest warrants but did not produce the warrants to the court. Defendant argued that without the warrants being brought before the court, the State could not show that (1) the arrest pursuant to the warrants was lawful and (2) thus, the search incident to the arrest was lawful. The trial court overruled the objection and admitted the officer's testimony. A jury found the defendant guilty and assessed a $500 fine.

The defendant then filed a motion for new trial asserting the trial court erred by overruling his objection to the officer's testimony about the evidence seized and because the State did not produce the arrest warrants in court for the trial court's inspection. The State responded by arguing the arrest and subsequent search were valid because the officer had probable cause to arrest the defendant for failing to signal when turning and for failing to have proof of financial responsibility. The trial court granted the motion for new trial.

Nearly a month later, the trial court issued a second order granting the motion for new trial that set out the court's reasoning for granting the motion. The trial court stated that admission of evidence of the arrest and search incident to arrest was erroneous because the State failed to present to the court the outstanding arrest warrants and supporting affidavit on which the officer made the arrest. The court stated the record supported the issuance of a citation for failing to maintain financial responsibility, but the court observed that the officer did not tell the defendant before the search that he was being cited for failure to maintain financial responsibility and that the citation was not issued until the defendant arrived at the police station. The court was unwilling to assume when the determination to issue a citation was made. The court, once again, ordered a new trial. The defendant then filed a pre-trial application for writ of habeas corpus asserting his retrial was barred by the prohibition against double jeopardy on constitutional grounds. The trial court granted the application and ordered the defendant acquitted.

The State appealed the granting of the motion for new trial and application for writ of habeas corpus to the Dallas County Criminal Court of Appeals No. 1, which affirmed the orders of the trial court. The State then appealed to the Dallas Court of Appeals.

The court of appeals noted that a trial court abuses its discretion in ruling on a motion for new trial only when no reasonable view of the record could support the ruling. In ruling on a motion for new trial, the trial court may make written or oral findings of fact.

In reversing judgment of the lower courts, the court of appeals held that for the search to be valid based on the defendant's failure to maintain financial responsibility, the officer need not have decided prior to the search to issue a citation for that offense. It was necessary only that the probable cause for the arrest existed prior to the search. Furthermore, the fact that the officer subjectively believed he was arresting the defendant on outstanding warrants did not affect the legality of the arrest or the search incident to the arrest.

No reasonable view of the record supported the trial court's ruling granting the motion for new trial. The court of appeals concluded the trial court abused its discretion in granting the motion, and ordered the defendant's conviction and sentence reinstated. This rendered the double jeopardy claim moot because there would be no need for another trial.

Did the trial court abuse its discretion in granting a new trial in the interest of justice?

State v. Moreno, 297 S.W.3d 512 (Tex. App.—Houston [14th Dist.] 2009)

No. In the court's own words: "The record is unclear as to whether the trial court granted an acquittal or a new trial. The trial court judge, in granting appellee's motion, stated that he granted the motion because the evidence was legally and factually insufficient, and in the interest of justice. If a trial court grants a motion for new trial on the basis of legal insufficiency of the evidence, double jeopardy prevents the trial court from entering any judgment other than an acquittal. *State v. Savage*, 933 S.W.2d 497, 499 (Tex. Crim. App. 1996). We have determined that the trial court abused its discretion in granting the motion for new trial on the basis of legal and factual insufficiency, but that it did not abuse its discretion in granting a new trial in the interest of justice. Therefore, to the extent the record can be read to grant an acquittal on the ground of legal insufficiency of the evidence, the State's issue is sustained. With regard to the grant of a new trial in the interest of justice, the State's sole issue is overruled. Accordingly, to the extent the trial court granted a new trial in the interest of justice, the court's order granting a new trial is affirmed." *Moreno* at 525.

10. Restitution

Was the trial court's written judgment ordering restitution valid?

Sauceda v. State, 309 S.W.3d 767 (Tex. App.—Amarillo 2010)

No. The requirement of restitution in this instance was a provision of punishment and part of the sentence, and it therefore had to be included in the oral pronouncement of the sentence to be included in the written judgment. Because the trial court omitted the restitution provision when it orally pronounced sentence, restitution could not be assessed in the written judgment, and the proper remedy was to modify the judgment to delete the order of restitution.

11. Appeals

When an appeal from a municipal court of record is dismissed and remanded by a county court, may the defendant appeal the order of dismissal to the court of appeals?

Tex. Vital Care v. State, 2010 Tex. App. LEXIS 7507 (Tex. App.—Texarkana Sept. 14, 2010)

No. The defendant was cited for violating City of Bonham Ordinance No. 1048, which regulates the transportation of emergency and non-emergency patients in the City of Bonham and creates a criminal offense. Texas Vital Care was found guilty of violating the ordinance upon trial in the Bonham Municipal

Court of Record and was fined $500.00 for each of three separate violations. The municipal court denied the defendant's motion for new trial, and the case was appealed to the county court per Section 30.00014(a) of the Government Code. The defendant appealed. The State filed a motion to dismiss the appeal, alleging noncompliance with Section 30.00015 of the Government Code, which requires the filing of an appeal bond in order to perfect an appeal to the county court. Having determined that no appeal bond had been filed, the county court dismissed the appeal and remanded the case to municipal court for execution of sentence.

Because the right to appeal is purely statutory and because jurisdiction is fundamental and cannot be ignored, the Texarkana Court of Appeals held that it had no jurisdiction because Section 30.00027 of the Government Code expressly requires the county court to affirm the judgment as a condition precedent for exercising jurisdiction. Accordingly, the court of appeals dismissed the case for a want of jurisdiction.

Commentary: This makes the second time that an intermediate appellate court has held in a published decision that there is no jurisdiction for an intermediate appellate court to consider a subsequent appeal when the appeal from a municipal court of record to a county court is defective. See also, *Jamshedji v. State*, 230 S.W.3d 224 (Tex. App.—Houston [14th Dist.] 2006).

Is the State required to file a notice of appeal for a cross-appeal?

Baines v. State, 2010 Tex. App. LEXIS 7199 (Tex. App.—Texarkana Sept. 1, 2010)

Yes. While the 14th Court of Appeals in Houston has issued a contrary opinion, this is the fifth intermediate court of appeals to hold that the State is required to file a notice of appeal even if the appeal is a cross appeal (the other intermediate appellate courts being Austin, Beaumont, Dallas, and Fort Worth).

Commentary: Is this the case where the Court of Criminal Appeals will resolve the disagreement?

Is Texas Rule of Appellate Procedure 26.2(a)(2) applicable to appeals from county court to an intermediate appellate court when the case originated in a municipal court of record?

Swain v. State, 2010 Tex. App. LEXIS 5407 (Tex. App.—Fort Worth July 8, 2010)

No. Texas Rule of Appellate Procedure 26.2 governing the time to perfect appeals reads as follows: No. 26.2 Criminal Cases.

(a) By the Defendant. --The notice of appeal must be filed:

(1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or

(2) within 90 days after the sentence is imposed or suspended in open court if the defendant timely files a motion for new trial.

Defendant was convicted in the Arlington Municipal Court of Record of an ordinance creating a criminal offense of Itinerant Vending without a License. The court imposed a fine in the amount of $550. The defendant made a motion for new trial, which was denied. He subsequently appealed to the county criminal court per Section 30.00014(a) of the Government Code. The county criminal court delivered a written opinion affirming the municipal court's judgment per Section 30.00024(a)(1) of the Government Code. Sixteen days later the defendant filed a "Motion for Rehearing or, in the Alternative, Motion for

New Trial." Seventy-eight days after the county criminal court had affirmed the judgment of the municipal court, the defendant filed his notice of appeal from the county criminal court's judgment (Section 30.00027(a) of the Government Code).

The State filed a motion to dismiss the appeal because (1) the defendant failed to timely perfect it under Texas Rule of Appellate Procedure 26.2(a)(1) within 30 days of the county criminal court's judgment affirming the municipal court's judgment, and (2) the defendant filed a motion for new trial after the county criminal court had affirmed the municipal court's judgment. The Fort Worth Court of Appeals agreed with the State that Rule 26.2(a)(2)'s 90 day deadline for filing a notice of appeal when a motion for new trial is filed was inapplicable in this instance because the defendant was convicted after a jury trial in a municipal court of record (rather than a non-record municipal court). The case was dismissed for want of jurisdiction.

Was the failure of the court reporter or court clerk to comply with the record preservation requirement attributable to the defendant?

Banks v. State, 312 S.W.3d 42 (Tex. App.—Dallas 2008)

No. On remand from the Court of Criminal Appeals, the court of appeals held that defendant's request for the record was timely under Texas Rule of Appellate Procedure 34.6(b)(1) due to the granting of out-of-time appeals. Under Texas Rule of Appellate Procedure 13.6, the court reporter was required to file the untranscribed notes of the proceeding with the court clerk. However, the reporter either did not file them or the records were lost. The duty to retain the record for three years per Section 52.046(a)(4) of the Government Code did not arise because no request was made until years after the time limit had passed. The time lines in Rule 13.6 and Section 52.046 applied to the court reporter and the trial court clerk, not to the State or to the defendant.

Commentary: Presuming that Section 52.046 of the Government Code is applicable to court reporters in municipal courts of record per Section 30.00010 of the Government Code, this case may be pertinent to municipal courts of record.

12. Expunction

Does the Texas Education Agency (TEA) have to return all documents related to the conduct that led to an acquitted defendant's arrest pursuant to an expunction order?

Texas Education Agency v. T.F.G., 295 S.W.3d 398 (Tex. App.—Beaumont 2009)

No. T.F.G. was acquitted of the charge of indecency with a child and granted an expunction pursuant to Chapter 55 of the Code of Criminal Procedure. At a hearing on TEA's motion for new trial (as an agency with records subject to the expunction), TEA argued that it had in its possession records that were related to the incident and the underlying conduct that were not related to the arrest, and therefore should not be subject to the expunction. The trial court disagreed, holding that the effect of an expunction is to make it so that the arrest and acquittal never existed. TEA appealed arguing that the trial court's order requiring it to relinquish all of its records pertaining to T.F.G. was overly broad.

TEA argued that the legislative intent behind Chapter 55 is to expunge only records related to the wrongful arrest, and that it was not intended to keep TEA from fulfilling its mandate to review and deny education certification applications or take action against educators who lack good moral character or are unworthy to instruct children. The court noted there are no Texas cases directly defining records relating to an arrest, but several appellate courts have recognized that an agency may possess and retain

documents related to the acquitted defendant that are not subject to expunction. Thus, the court held that based on the plain language of the expunction statute, only documents and records that pertain to the criminal investigation, arrest, and prosecution of T.F.G. can be said to relate to the arrest and must be returned. Any other documents relating to TEA's internal investigation are not subject to expunction, except to the extent they are based on or reference the criminal investigation, arrest, or acquittal.

Commentary: Also of interest: *In re Expunction of Jones*, 311 S.W.3d 502 (Tex. App.—El Paso 2009) (Record sufficiently demonstrated that petitioner, an adult, knowingly waived his right to an expunction via a contractual pre-trial plea deal with the prosecution).

IV. Court Administration

A. Judicial Appointments

Did the county court judge, physically incapacitated by pneumonia, improperly appoint an attorney to preside in her absence?

Lackey v. State, 2010 Tex. App. LEXIS 7201 (Tex. App.—Texarkana Sept. 1, 2010)

Yes. Defendant argued that the trial court erred in appointing a local attorney to preside as judge over his pre-trial motions pursuant to Section 26.023 of the Government Code. The attorney was not statutorily qualified to sit as a visiting judge in county court. The appellate court noted that rather than appointing the attorney to act in a particular matter, as envisioned by Section 26.022 of the Government Code, the order purported to be a "general appointment." In light of the language of the order, and the judge's absence from the bench due to physical incapacity, and because Section 26.023 governed the appointment, the appointed judge had no authority to act because he was not qualified to sit as a judge of a constitutional county court. The attorney was neither a retired judge nor a constitutional county judge from another county (although he was a municipal judge in the county seat). The orders entered were void.

Commentary: This case is a good reminder that just as the subject-matter jurisdiction of a court cannot be waived, neither can the authority of the judge to act. The same is true where individuals sit as municipal judges without proper appointment.

B. Court Costs

Did the court of appeals err in charging a surety a $175 filing fee in relation to an appeal of a bond forfeiture in a criminal case?

Safety Natl. Cas. Corp. v. State, 305 S.W.3d 586 (Tex. Crim. App. 2010)

Yes. While the Court of Criminal Appeals has time and time again stated that the bond forfeitures are governed by the same rules governing civil actions, the Court held in a 5-2 opinion that the history of Article 44.44 of the Code of Criminal Procedure and its predecessors indicate that the intermediate appellate courts are precluded from assessing civil case fees in criminal bond forfeiture cases. The Court of Criminal Appeals reversed with regard to the assessment of civil appellate filing fees and remanded with directions to the court of appeals to reassess its fee determination.

Judge Holcomb and Judge Womack, dissenting, agreed with the court of appeals that the procedural rules governing civil appeals apply to criminal bail-bond forfeiture appeals. Therefore, it is proper to assess civil appellate filing fees in such appeals.

Commentary: Although this opinion does not contemplate bond forfeiture occurring in a municipal court, it is a safe assumption that the holding would apply to the appeal of such bond forfeiture determinations.

Does Article 102.002 of the Code of Criminal Procedure authorize a trial court to assess witness fees per Article 35.27 of the Code of Criminal Procedure as a court cost?

Sikalasinh v. State, 2010 Tex. App. LEXIS 6820 (Tex. App.—Amarillo Aug. 20, 2010)

No, no authority existed to require the defendant to pay witness fees pursuant to Article 35.27 because former Article 102.002(a), repealed in 1999, expressly disallowed such an assessment as court costs, and its repeal, based on the bill's history, indicated no intent to make a substantive change in the law.

Commentary: While the issue of reimbursing nonresident witnesses is likely unfamiliar to most municipal courts, under the right circumstances, it is an issue that could be proper for consideration. Article 102.002 is applicable to municipal court cases. In absence of an express intent to the contrary, Article 35.27, despite no provision paralleling "advance by county," could be construed as being applicable in municipal court cases.

Can a judge place a defendant charged with a Parks and Wildlife Code offense on deferred disposition and assess a special expense fee without assessing a fine? If so, must any portion of the special expense fee be remitted to the Parks and Wildlife Department?

Tex. Atty. Gen. Op. GA-0745 (11/20/09)

Yes, then no. Section 12.107 of the Parks and Wildlife Code requires that a justice of the peace, clerk of any court, or any other officer of the state who receives a fine imposed by a court for violation of the Parks and Wildlife Code send a percentage of the fine to the Parks and Wildlife Department. Nothing in Section 12.107 limits a justice of the peace from exercising their authority under Article 45.051 to defer proceedings; thus a defendant may receive deferred disposition for a Parks and Wildlife Code violation and be assessed a special expense fee. As a special expense fee is not a fine, and Section 12.107 only requires the fine to be remitted, no portion of the special expense fee must be sent to the Department.

Commentary: Although it may come as a surprise, some Parks and Wildlife Code Class C misdemeanors are filed in municipal courts. While this opinion answers the question of whether the "special expense fee" is a "fine" for purposes of remitting to the Parks and Wildlife Department, a lingering question remains in Section 12.107. Specifically, what percentage of a fine does a municipal court remit? While it hardly seems equitable, in absence of municipal courts being named in Section 12.107(b), the answer, in light of Section 12.107(a), could be 100 percent of the fine is remitted to the Department.

V. Prosecution

A. Can a prosecutor single out a public official by denying her pre-trial diversion or deferred adjudication?

Ex parte Quintana, 2009 Tex. App. LEXIS 7883 (Tex. App.—El Paso Oct. 8, 2009)

Yes. Appellant, an elected city representative, was arrested and charged with Class A misdemeanor forgery. She filed a pre-trial habeas corpus application, alleging that the district attorney's refusal to allow

her to dispose of her case through pre-trial diversion constituted selective and vindictive prosecution. The trial court denied relief, and appellant sought review.

Although the appellant was eligible for pre-trial diversion under the district attorney's ordinary policies (Texas has no statutory pre-trial diversion), she did not provide any exceptionally clear evidence that the State prosecuted her because it desired to prevent her from exercising any constitutional rights. The State's decision to prosecute the appellant in part because she was a public official, although an arbitrary classification, was rationally related to a legitimate governmental interest because the prosecution of an elected official is more likely to receive media attention and such a prosecution could deter potential similar conduct by others. As to the appellant's claim of vindictive prosecution, the State based its decision to deny her pre-trial diversion on various factors apart from her status as an elected official, and the appellate court could not find that the district attorney's prosecutorial tactics derived solely from appellant's exercise of a protected legal right. The trial court's denial of habeas corpus relief was affirmed.

B. Is a mandamus action proper by the prosecution when a trial court improperly grants a deferred adjudication?

In re Watkins, 315 S.W.3d 907 (Tex. App.—Dallas 2010)

Yes. The prosecutor filed a mandamus proceeding after the trial court entered an order granting deferred adjudication to a defendant on a charge of Driving While Intoxicated (DWI). The Legislature has expressly prohibited trial courts from granting deferred adjudication to defendants accused of DWI. Accordingly, the court of appeals held that the prosecutor had no other adequate remedy at law and that the trial court violated a ministerial duty in entering such an order. Accordingly, the court of appeals conditionally granted the petition for writ of mandamus, in the event the trial court failed to vacate its order.

Commentary: The Legislature has also expressly prohibited municipal and justice courts from granting deferred disposition to defendants who are holders of commercial driver's licenses and who are accused of certain traffic offenses relating to motor vehicle control. Municipal and justice courts have a ministerial duty to deny deferred disposition to such defendants. This case illustrates the State's recourse when such ministerial duties are ignored.

C. Did the trial court abuse its discretion in denying a motion to disqualify the prosecutor where the prosecutor had previously represented the defendant?

Goodman v. State, 302 S.W.3d 462 (Tex. App.—Texarkana 2009)

No. The trial court's failure to disqualify the prosecutor was not error because no prejudice was shown from the prosecutor's prior representation of the defendant.

Commentary: It's never good for the criminal appellant when the first two sentences in an appellate decision read: "Unfortunately, Leslie Gene Goodman has a history of Driving While Intoxicated (DWI). In fact, he had previously been defended on an earlier DWI charge by Gary Young, the current county attorney of Lamar County, whose office prosecuted Goodman on this DWI charge." *Goodman* at 465.

As many prosecutors in municipal courts also currently serve, or have in the past served, as defense counsel, this is a noteworthy case. Not only does it chronicle the Court of Criminal Appeals precedent on the matter, but it also reminds prosecutors that which case controls depends on how the matter of disqualification is raised. When disqualification is raised on direct appeal, the matter is controlled by *Landers v. State*, 256 S.W.3d 295 (Tex. Crim. App. 2008). When disqualification is the matter of a

mandamus action, the matter is controlled by *State ex rel. Young v. 6th Judicial District*, 236 S.W.3d 207 (Tex. Crim. App. 2008). Interestingly, both of these cases also involve Gary Young, the prosecutor in *Goodman*. Furthermore, *State ex rel. Young v. 6th Judicial District* was another DWI case involving Goodman. Hey, it is a small world after all. (Yikes.)

D. Can a prosecuting attorney refuse to file a criminal case against a defendant because of a possible defense to prosecution?

Tex. Atty. Gen. Op. GA-0765 (3/26/10)

Yes. A prosecutor has great discretion in deciding whether and which offenses to prosecute, and courts afford prosecutorial discretion great deference. Though a potential *defense* to prosecution is not a *bar* to prosecution, the possibility that the defendant will raise the defense is one factor prosecutors consider in their discretion. A district attorney's prosecutorial determination regarding the initiation of criminal proceedings is within the prosecutor's substantial discretion.

VII. Local Government

A. Ordinances

1. Could a bicycle rider pursue a civil equitable remedy barring the city from enforcing its ordinance criminalizing failure to wear a bicycle helmet when there was no longer an offense pending in municipal court?

City of Dallas v. Woodfield, 305 S.W.3d 412 (Tex. App.—Dallas 2010)

No. The court of appeals concluded that the civil equity case became moot when the municipal court dismissed the criminal case.

The appellee, a bicycle rider, was cited per an ordinance for operating or riding a bicycle without wearing a helmet. While the criminal charge was pending against him in the Dallas Municipal Court of Record, he filed his civil equity lawsuit in the county court. In the municipal court, the petitioner raised a defense to prosecution contained in the ordinance (*e.g.*, it was his first offense and he provided proof that he owned a bike helmet). The criminal case was dismissed by the municipal court. Appellee then amended his petition to seek both a declaratory judgment and a permanent injunction preventing the City from enforcing its ordinance. The City filed a plea to jurisdiction with the county court. The county court denied the City's plea as to the appellee's request for a declaratory judgment and stayed the City's plea as to the request for injunctive relief. The City appealed the denial of its plea to the jurisdiction.

Because the appellee had not received any more citations for violating the ordinance, there was no longer a live controversy. The court of appeals determined that the capable of repetition, yet evading review, exception to the mootness doctrine did not apply because the appellee had not met his burden to show that the time between issuance of a citation and judgment was too short as to evade review. Appellee had not shown more than a mere physical or theoretical possibility that he might be cited again. The court of appeals vacated the county court's order and dismissed the case.

2. Did the association of merchants and vendors have standing to challenge the City of New Braunfels' Cooler and Container ordinance?

STOP v. City of New Braunfels, 306 S.W.3d 919 (Tex. App.—Austin 2010)

Yes. The court of appeals reversed the district court's judgment dismissing STOP's and the Outfitter plaintiffs' claims challenging the Cooler and Container Ordinance's cooler-size restriction and claims seeking a declaration that the Comal and Guadalupe Rivers are navigable. The case was remanded to the district court for further proceedings. The judgment was otherwise affirmed.

Commentary: Thousands of people float down the Comal and Guadalupe rivers on inner tubes every summer. Complaints that tubers, often fueled by excessive amounts of alcohol, engage in behaviors detrimental to the rivers, surrounding land, and the ability of others to quietly enjoy the river led the city to enact ordinances concerning consumption of alcoholic, volume drinking devices, drinking containers, and coolers and containers. While many Texas cities with struggling economies can only dream of having such a lucrative source of tourism, this case reflects the not-so dreamy aspects of how economic interests can clash with quality of life and efforts to maintain law and order.

B. Substandard Structures

Are alleged violations of Section 214.216 of the Local Government Code (International Building Code) subject to judicial review per Section 214.0012?

Carlson v. City of Houston, 309 S.W.3d 579 (Tex. App.—Houston [14th Dist.] 2010)

Yes. The City argued that Section 214.0012 of the Local Government Code did not establish a right to judicial review in the current case because it applied only to orders issued pursuant to Section 214.001 and not to orders under Section 214.216. The district court agreed. The court of appeals disagreed, holding that Sections 214.001, 214.0012, and 214.216 are to be construed together because they involved the same subject matter (*i.e.*, conditions of buildings) and served the same general purpose (*i.e.*, protecting the public health, safety, and welfare). The provisions could be harmonized to give effect to all sections when an order to vacate related to a building alleged to be hazardous to human life. The provision in question can be harmonized by making an order to vacate a dangerous building issued under Section 214.216 subject to the judicial review procedures of Section 214.0012. Even if it was assumed, for argument's sake, that the provisions could not be harmonized, judicial review still was mandated because the specific provisions in Sections 214.001 and 214.0012 controlled over the general provisions in Section 214.216. The court reversed the district court's order dismissing the case for want of jurisdiction and remanded for further proceedings.

Commentary: Chapter 214 is of potential interest to municipal courts of record, as Section 30.00005(d)(1) of the Government Code provides that "[t]he governing body of a municipality by ordinance may provide that the [municipal] court [of record] has civil jurisdiction for the purpose of *enforcing* municipal ordinances enacted under Subchapter A [Dangerous Structures], Chapter 214, Local Government Code." (Emphasis added). This case leaves me wondering whether judicial review includes "enforcement" per Section 30.00005(d)(1). Although this case originated from a district court, could it have just as easily occurred in a municipal court of record in a city that adopted an ordinance per Section 30.00005(d)(1)? Where would an appeal from such a municipal court of record go? It is high time that the Legislature clarifies the civil jurisdiction of municipal courts, the procedures to be utilized, and the jurisdiction of courts to hear civil appeals from such courts.

Did the trial court err in only providing the owner three days notice of judicial review (per Section 214.0012 of the Local Government Code)?

Perkins v. City of San Antonio, 293 S.W.3d 650 (Tex. App.—San Antonio 2009)

Yes. The city's board determined that the owners' property was a public nuisance, and its conditions were ordered to be abated by demolition. The owner challenged a decision by the district court which affirmed an order regarding the demolition of property in the City of San Antonio. The court of appeals rejected the board's argument that the owner was only entitled to three days' notice under Texas Rule of Civil Procedure 21. Since the trial court's hearing was dispositive of the merits of the underlying case, it was effectively a trial setting. Therefore, 45 days' notice was required per Texas Rule of Civil Procedure 245. The decision was reversed, and the case was remanded for a new hearing.

C. Extraterritorial Jurisdiction

Can a city enforce its "tree ordinance" in the ETJ pursuant to Sections 212.002 and 212.003 of the Local Government Code?

Milestone Potranco Development, Ltd. v. City of San Antonio, 298 S.W.3d 242 (Tex. App.—San Antonio 2009)

Yes. San Antonio's Tree Preservation Ordinance and Streetscape Tree Planting Standards (the "Tree Ordinance") are enforceable against the defendant's property in the city's ETJ pursuant to Sections 212.002 ("municipality may adopt rules governing plats and subdivisions of land within the municipality's jurisdiction to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality") and 212.003 ("municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002") of the Local Government Code. The court held that the tree ordinance (1) is more than simply an aesthetic regulation, but one that promotes the health of the municipality and the orderly and healthful development of the community; (2) is not overly broad; and (3) does not regulate the "use" (*i.e.,* zoning) of property that is prohibited under the statute.

Commentary: Milestone Portanco brought this case in district court to enjoin the city from enforcing its tree ordinance in the ETJ under Subchapter A of Chapter 212, which governs the regulation of subdivisions. The same type of tree ordinance could very likely be seen in municipal court as a criminal matter. Subchapter B of Chapter 212 governs the regulation of property development and provides that a "municipality may adopt general plans, rules, or ordinances governing development plats of land within the limits and in the extraterritorial jurisdiction of the municipality to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality." Section 212.044. Enforcement of Subchapter B is possible through a suit to enjoin in district court, a suit for injunctive relief in county court, or as a Class C criminal violation in municipal court. See, Section 212.050 for the criminal offense.

Does a Type A General-Law city have the authority to enforce a nonpoint source pollution ordinance in its ETJ pursuant to Section 26.177 of the Water Code?

Tex. Atty. Gen. Op. GA-0762 (3/15/10)

Yes. Section 26.177 of the Water Code authorizes a municipality (without distinguishing what type of municipality) to regulate in its ETJ water pollution resulting from generalized discharges of waste which are not traceable to a specific source (commonly referred to as nonpoint source pollution) if the city determines that implementing a water pollution control program in the ETJ is necessary to achieve those objectives inside the city limits. See also, *City of Austin v. Jamail*, 662 S.W.2d 779 (Tex. App.—Austin 1983, writ dism'd). Note that this opinion only addresses the city's authority under Section 26.177 of the Water Code, and does not consider any limitations on this authority that may be found in the Local Government Code.

VIII. Juvenile Justice

Can a juvenile offender (under age 18) be sentenced to life without parole for a non-homicide crime?

Graham v. Florida, No. 08-7412 (05/17/10)

No. In a 6-3 decision (with 4 members of the Court issuing concurring opinions), the U.S. Supreme Court held that sentencing a juvenile to life in prison without parole for crimes other than murder violates the 8th Amendment's ban on "cruel and unusual" punishment. The Court explained that compared to an adult, a juvenile offender who did not kill or intend to kill has a twice-diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis. In such instances, states must afford such juveniles some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Justices Thomas, Scalia, and Alito dissented on the basis that proportionality was not incorporated by the drafters of the 8th Amendment and the majority substitute its own judgment in place of national consensus.

May a child under the age of 14 be charged with prostitution?

In re B.W., 313 S.W.3d 818 (Tex. 2010)

No. The juvenile, who was 13 years old, pled true to the allegation that she had knowingly agreed to engage in sexual conduct for a fee. The trial court found that she had engaged in delinquent conduct (prostitution). The juvenile court placed her on probation for 18 months. The court of appeals upheld the judgment. On review, the Supreme Court concluded that transforming a child victim of adult sexual exploitation into a juvenile offender was not the intent of the Texas Legislature because children lack the capacity to consent to sex as a matter of law per Section 22.021 of the Penal Code (Aggravated Sexual Assault). In the absence of a clear indication that the Legislature intended to subject children under 14 to prosecution for prostitution when they lacked the capacity to consent to sex as a matter of law, and are victims, the Court held that a child under the age of 14 could not be charged with that offense. As the 13-year-old juvenile could not consent to sex as a matter of law, she could not be prosecuted as a prostitute under Section 43.02(a)(1) of the Penal Code. The Court reversed the judgment of the court of appeals and remanded the case to the juvenile court for an appropriate disposition.

Justice Wainright, joined by Justice Johnson and Justice Willett, dissented stating that the majority misconstrues the clear legislative intent in its analysis of applicable law.

Was a juvenile's confession illegally admitted to evidence in light of the admission that the statement was not taken in a juvenile processing office, by an armed police officer, in a locked room?

In re D.J.C., 312 S.W.3d 704 (Tex. App.—Houston [1st Dist.] 2009)

Yes. Defendant, a juvenile, was adjudicated delinquent for committing aggravated sexual assault. On appeal, the defendant argued that the trial court reversibly erred by admitting his statement to police that was obtained in violation of Family Code statutes governing juvenile statements. The court of appeals agreed. The only evidence against the defendant, other than his improperly admitted electronically recorded statement, was the complainant's testimony, which was inconsistent and contradictory. The State had no other proof. Therefore, the trial court's error in admitting the defendant's illegally obtained

statement was harmful error requiring reversal of his conviction. The judgment was reversed and the case was remanded for a new trial.

Did the principal and vice-principal violate the student's rights under the IDEA by placing the student in the school district's alternative education program?

Hollingsworth v. Hackler, 303 S.W.3d 884 (Tex. App.—Fort Worth 2009)

No. The student made an obscene gesture at classmates who were making fun of him. An admission, review, and dismissal (ARD) committee meeting was held and the committee found that the student's behavior was not a manifestation of his attention deficit disorder. The student's parents sued. The school employees challenged the denial of their summary judgment motion. There was no evidence that appellants violated the student's rights under the Individuals with Disabilities Education Act (IDEA) by placing him in a disciplinary alternative education program for 45 days without referring the disciplinary decision to the ARD committee. Thus, appellants were immune from individual liability to the parents for civil damages. The court reversed the denial of appellants' motions for summary judgment and rendered judgment that the parents take nothing on their IDEA claims brought under the Civil Rights Act (42 USC Section 1983).