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Case Law & Attorney General Opinion Update
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Except where otherwise noted, the following case law and opinions were handed down August 31, 2007 through October 1, 2008.

I. Constitutionality
A. 6th Amendment
1. Right to Counsel

What marks the initiation of adversarial judicial proceedings that trigger 6th Amendment protections?

Rothgery v. Gillespie County, No. 07-440 (6/23/08)

In an 8-1 opinion, the U.S. Supreme Court ruled that in Texas, the presentation before the magistrate (not the filing of formal charges by a prosecuting attorney) constitutes a "critical stage" where the 6th Amendment right to counsel attaches.

Relying on erroneous information, law enforcement in July 2002 arrested Rothgery for the offense of felon in possession of a firearm. While Rothgery, in fact, possessed a firearm, he was not (as initially reported by law enforcement in California) a felon. Following his arrest, pursuant to state law, he was brought before a justice of the peace acting as a magistrate for what the Court referred to as the "article 15.17 hearing" (interestingly, the Court also noted the lack of a formal name for what they also acknowledged as "magistration"). After the hearing, the magistrate committed Rothgery to jail, and he was released after posting a surety bond. While out of jail Rothgery, who claimed to have no money for a lawyer, made several requests orally and in writing for appointed counsel. His request for a court appointed attorney was not granted. In November 2002, six months after his initial arrest, Rothgery was indicted and rearrested, his bail was increased, and he was jailed when he could not post the bail. Thereafter, Rothgery was assigned a lawyer, who documented that Rothgery was, in fact, not a felon. The district attorney's office subsequently dismissed the indictment.

Pursuant to 42 U. S. C. §1983, Rothgery sued Gillespie County, claiming that if it had provided him a lawyer within a reasonable time after

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Policy Issues on Status Offenses

by Mark Goodner, Program Attorney, TMCEC

What is a status offense? Don't worry if you are unsure. I will admit that I had no idea what a status offense was before I started working with TMCEC. It sounded to me like a football term. Perhaps it was the counterpart to the "prevent defense" a team employs when trying to hold on for a win. That made sense—it must be when the team is simply operating its offense in order to maintain status quo (its lead). Of course, contextually that did not make any sense at all. Why would we be hearing about football terms in the world of municipal courts? We hear the term "status offense" used from time to time in municipal courts, but its definition is not immediately ascertainable.

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AROUND THE STATE

TMCA ANNOUNCES OUTSTANDING JUDGE AND CLERK OF THE YEAR

TMCA President, The Honorable Robin D.Smith presenting award to Judge Kaufman (left)

The Honorable Aaron Kaufman of Dallas has been selected by the Texas Municipal Courts Association (TMCA) to receive the Outstanding Judge of the Year Award in recognition of his dedication and service to municipal courts in the Dallas area. Currently serving as the Judge of the Civil Adjudication Court for the City of Dallas, Judge Kaufman hears cases involving property code violations in a civil administrative procedure, the first of its kind in Texas. In the first three years of the court's existence, Judge Kaufman has disposed of over 46,000 cases on the docket and conducted hearings in more than 13,000 cases, which has significantly resulted in the clean-up of many neighborhoods. Judge Kaufman is "what a municipal judge should exemplify on a daily basis – unquestionable integrity; knowledge of the law; fair and impartial application of the law to the facts of the case before him; hard work ethic; and the patience to allow all parties before him, most of which are pro se, to have a full opportunity to try their case and to be heard," said Judge Jay Robinson of the City of Dallas. Judge Kaufman is a graduate of the University of Texas Law School in Austin.

TMCA President, The Honorable Robin D. Smith presenting award to Rebecca Stark

The Texas Municipal Courts Association also recognized Rebecca Stark, Chief Clerk of the Austin Municipal Court. During the last eight years in Austin, Ms. Stark, has applied her "seemingly boundless energy" to improvements in the Court in the implementation of an electronic case management system with web access, initiating the annual Warrant Round-Up, and developing a comprehensive collection and compliance program. To enhance organization health and develop the workforce, she instituted a weekly newsletter, scheduled employee recognition events, established minimal traning standards for employees, and upgraded performance measures. Ms. Stark is active as a member and officer in the Texas Court Clerks Association and is a highly rated presenter for the Texas Municipal Courts Education Center.

The President of TMCA, The Honorable Robin D. Smith of the City of Midland, commented, "These individuals are representative of the hardworking public servants that work in the municipal courts of Texas. Most work without recognition or acclaim, therefore, it is with great pride that we are able to recognize Judge Kaufman of Dallas and Rebecca Stark of Austin as the Texas Municipal Courts Association Judge and Clerk of the Year."

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Generally, a status offense is an action prohibited only to a certain class of people. This makes sense. We know that an offense is a violation of the law. We use the term "offense" all the time. Status is defined generally as "position or rank in relation to others" or, more applicably, the "condition of a person or thing in the eyes of the law." According to *Black's Law Dictionary*, a status offense is "a minor's violation of the juvenile code by doing some act that would not be considered illegal if an adult did it, but that indicates that the minor is beyond parental control." In other words, a status offense is an action prohibited to minors or children because of their age. It is an action that would be okay if an adult performed it but that violates the law when the actor is a minor.

To remember the character of a status offense, I think of a couple of helpful illustrations. The first thing that pops into my head is the scenario where a couple of 14-year-olds sneak into an R-rated movie after purchasing tickets for one rated PG. There is nothing wrong with seeing an R-rated movie, but it is prohibited for people under the age of 17 without a parent or guardian. Another, and probably better, illustration was provided by Ryan Turner who told me that status offenses are like the sign at the roller coaster that says "you must be this tall to ride this ride" and is accompanied by some measuring line. Again, there is nothing wrong with riding a roller coaster, but it is prohibited for certain people that are too short. Both examples are helpful. The movie example illustrates children performing an act that prohibited because of the actors' age. The roller coaster sign helps to illustrate the role that status offenses play in society. Riding a roller coaster designed for people 54 inches tall by someone who is just 48 inches tall is not safe. The roller coaster could injure the person, because it was not designed for them. They are not ready for that ride yet, and they should try it after they have grown another six inches. Likewise, society has determined for various public policy reasons that certain activities are not appropriate for people under a certain age. Status offenses are our sign that says: "You're not ready for this ride yet."

The public policy behind status offenses stems from the legal theory of parens patriae. Parens patriae is Latin for "father of his country" and refers to the public policy power of the state to be a provider of protection for those unable to care for themselves. This can be seen in the roller coaster sign example. The State is acting in this paternal role to protect minors from activities they are not ready for yet. This concern for protection of our children, however, isn't the only public policy reason behind status offenses.
Consider the example of a 14-year-old child who is driving after he has been drinking. If you were driving down the road and saw this child approaching behind the wheel, your first concern may very well not be for this child's safety. If I were in this predicament, I would attempt to exit the roadway as quickly as possible to get my family out of the path of danger. This illustrates another reason for status offenses: the protection of the public. Of course, we are concerned with the harm that the 14-year-old may do himself, but we also have to be concerned with the harm he could do to everybody else along the way.

In addition to protecting the children and protecting society, there is a third good reason behind status offenses. Skipping school, drinking alcohol, and smoking cigarettes are all activities prohibited to kids by certain status offense statutes. Some may view these offenses as relatively minor, and perhaps to some extent they are. Adults can drink, smoke, and not attend school, and the law does not get involved; the world does not fall apart. However, we want kids to refrain from these activities because we want to set them on the right path for the future. In this way, we can look at status offenses as governing "gateway" conduct. We do not want these misdemeanors to open the door more to severe criminal activity. We are often less worried about the fact that a child is skipping school than we are about what they are doing (and the people they are with) while they are away from school. We use status offenses to keep them headed in the right direction and to teach them about the consequences of not following the rules.

These three public policy reasons underlying our need for status offenses are evident in the Juvenile Justice Code. This section of the Family Code, Section 51.01, deals with many of the laws and procedure concerning children and minors in Texas. At the beginning of the Juvenile Justice Code, several purposes are outlined. Among them are the following:

- To provide for the care, the protection, and the wholesome moral, mental, and physical development of children;
- To provide for the protection of the public and public safety;
- To protect the welfare of the community and to control the commission of unlawful acts by children;
- To promote the concept of punishment for criminal acts; and
- To provide treatment, training, and rehabilitation that emphasizes

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the article 15.17 hearing, he would not have been indicted, rearrested, or jailed. Rothgery claimed that the county's policy (which is by no means unique to Gillespie County) of denying appointed counsel to indigent defendants out on bond until an indictment or information is entered violates his 6th Amendment right to counsel.

If you are a magistrate in Texas, it cannot be emphasized enough that the U.S. Supreme Court *did not* rule that a person cannot be "magistrated" or that an article 15.17 hearing cannot occur without the presence of counsel. To the contrary, Justice Alito wrote a very important concurring opinion, joined by Chief Justice Roberts and Justice Scalia stating that the ruling should not be construed to mean that a defendant is entitled to the assistance of appointed counsel as soon as his 6th Amendment right attaches and that the term "attachment" signifies nothing more than the beginning of the defendant's prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel.

While *Rothgery* may not redefine the nature of the article 15.17 hearing, it certainly has the potential to redefine what occurs subsequently. This may or may not impact judges acting in the role of a magistrate. Depending on the county, a municipal judge or justice of the peace acting as a magistrate may play a primary or limited role in the appointment of counsel. All judges who perform magistrate duties should not only re-read their county's local indigent defense plan but should be aware that such plan may be modified in light of *Rothgery*. Likewise, now is a good time to re-read Article 15.17 and Article 1.051, Code of Criminal Procedure. *Rothgery* in effect nullifies Article 1.051(j) which states "Notwithstanding any other provision of this section, if an indigent defendant is released from custody prior to the appointment of counsel under this section, appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first." Article 1.051(j) is the provision that many counties have relied upon to legally delay the appointment of counsel for people who manage to post bond to get out of jail.

Rothgery will inevitably impact the conduct of law enforcement as it relates to the questioning of people who are under arrest. The invocation of the 6th Amendment right to counsel at magistration will legally preclude further questioning by law enforcement. Thus, if a defendant is arrested and magistrated in El Paso for an offense alleged to have occurred in Tyler, there can be no questioning of the person by law enforcement during the long road trip from west to east Texas.

Only with time will the full implications of *Rothgery* be known. In the interim, one of the more practical, though unintended, implications of opinion for academics and practitioners is that the term "magistration" has ascended from the loose guttural ranks of Texas legal jargon to a higher echelon of law speak.

Can a defendant effectively waive his right to counsel without an admonishment from the court regarding the dangers of self-representation?

Lucas v. State, 245 S.W.3d 611 (Tex. App.—Houston [14th Dist.] 2007)

No. Lucas was charged with possession of marijuana and the case proceeded to trial without Lucas being appointed counsel and without an admonishment by the court concerning the dangers and disadvantages of self-representation. The court of appeals held that because there was no proper admonishment regarding the dangers of self-representation that Lucas did not effectively waive his right to counsel. Therefore, it was reversible error. The case was reversed and remanded.

2. Right to Confront Witnesses

Does a peace officer's testimony recounting the statements of an unavailable witness concerning the identification of the defendant as the perpetrator violate the defendant's constitutional right to confront his accuser?

Vinson v. State, 252 S.W.3d 336 (Tex. Crim. App. 2008)

It depends on whether the statements are testimonial or non-testimonial in nature. Vinson was charged with family violence assault after a 911 hang-up call was placed from the apartment Vinson shared with his girlfriend. After a deputy sheriff arrived, he discovered the girlfriend bleeding. She told the deputy that Vinson assaulted her. Vinson was then placed in custody in the deputy's patrol car. The deputy then interviewed the girlfriend and she described the assault. At trial, the girlfriend was unavailable to testify and the deputy recounted her statements. Vinson objected on the ground that this testimony violated his constitutional right to confront his accuser.

The U.S. Supreme Court held in *Crawford v. Washington,* 541 U.S. 36 (2004), that the Confrontation Clause "would not have allowed admission of testimonial statements

of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." The Supreme Court has clarified this holding and held that statements are non-testimonial when they are made during a police interrogation under circumstances where the primary purpose is to allow the police to assist in an ongoing emergency situation. A statement is testimonial when there is no ongoing emergency situation and the primary purpose of the police interrogation is to establish or prove facts that may be important to a later prosecution.

The Court of Criminal Appeals held that in this case, that the girlfriend's statement identifying Vinson as her attacker was non-testimonial because it was made in order to assist police in an ongoing emergency situation. Therefore, the statement identifying Vinson did not violate the Confrontation Clause. However, the girlfriend's statements after Vinson had been placed in custody detailing the circumstances of the assault were testimonial because the deputy had secured the scene and there was no longer an ongoing emergency. Vinson had no previous opportunity to cross-examine his girlfriend. The admission of her statements to the deputy concerning the details of the assault violated the Confrontation Clause. The Court did not reach the question of whether the violation of the Confrontation Clause was sufficiently harmful to require reversal of the defendant's conviction.

Note: On remand, the court of appeals held that it was harmful error to admit the statements made by the girlfriend to the deputy detailing the assault. The judgment of the trial court was reversed. *Vinson v. State*, Nos. 01-05-00784-CR and 01-05-00785-CR (Tex. App.—Houston [1st Dist.] 8/21/08).

In a case where there is no ongoing emergency and the responding officer is the only witness at trial was it reversible error for the trial court to admit the statements made by the victim to the officer detailing the assault?

Zapata v. State, 232 S.W.3d 254 (Tex.App.—Houston [1st Dist.] 2007)

Yes. The court of appeals held that the statements in this case were testimonial as there was no ongoing emergency situation at the time the officer interrogated the victim. Although the victim had been recently assaulted, she was able to make an emergency call, speak to the operator, and then was able to leave the residence to wait outdoors for emergency assistance. By the time the officer who testified at trial arrived, there was no evidence indicating that there was an ongoing emergency situation. Further, the officer admitted at trial that she interrogated the victim in order to gather evidence for prosecution.

The court of appeals held that it was a violation of the Confrontation Clause for the trial court to admit the statements made by the victim to the officer because the statements were testimonial in nature, the state failed to show that the witness was unavailable, and the defendant had no previous opportunity to cross-examine the witness. Because the officer was the only witness to testify at trial, it was clear that the victim's out-of-court statements provided evidence that was critical to establishing the elements of the offense. Therefore, the court could not conclude that the error was harmless and reversed the defendant's conviction.

In an assault trial, did the court's admission of the tape recording of the victim's 911 call violate the defendant's constitutional right to confrontation?

Santacruz v. State, 237 S.W.3d 822 (Tex.App.—Houston [14th Dist.] 2007)

No. In *Davis v. Washington*, 547 U.S. 813 (2006), the U.S. Supreme Court held that statements made by a victim of domestic violence to a 911 operator are non-testimonial and thus admissible even if the victim is unavailable at trial. The factors to consider in determining if a 911 call is testimonial or non-testimonial include whether 1) the caller was describing events as they were happening rather than past events, 2) any reasonable listener would recognize that the caller was facing an ongoing emergency, 3) the nature of the statements were necessary to resolve the ongoing emergency, and 4) the caller was in a frantic state or in an environment that was unsafe. In this case, the victim called 911 and requested that an ambulance and police be sent to her mother's home. She indicated that her husband had hit her in the mouth with a rifle, that she was bleeding profusely and that although she had left the location where the assault occurred she was still distraught and breathing heavily.

The court of appeals held that although the victim was relating past events, any reasonable listener would have recognized that she was facing an ongoing emergency because she was in distress and seeking medical attention for her injuries that were bleeding profusely. Further, the nature of the statements was such that they were necessary to help address the ongoing emergency. The operator sought to determine the extent of the victim's injuries and also to obtain basic information needed so that the police were able to effectively respond with knowledge of the potential level of threat to their safety

and the victim's safety. Therefore, the statements were non-testimonial and the tape recording was admissible at trial.

B. 5th Amendment
1. Custodial Interrogation

Did the court of appeals err in deeming inadmissible the statement of a juvenile given to a municipal judge acting as magistrate? Was the murder weapon that was discovered pursuant to the giving of the juvenile's statement "fruit of the poisonous tree?"

In re H.V., 252 S.W.3d 319 (Tex. 2008)

No to both. Affirming the lower court, the Texas Supreme Court held that H.V. had invoked his right to counsel during custodial interrogation. Thus, the statement of the juvenile was affirmed as inadmissible. When asked whether he wanted to waive his rights and speak to police, H.V. said he wanted to speak to his mother, but was told he could not. H.V. then responded that he "wanted his mother to ask for an attorney." When the magistrate responded that only he (not his mother) could ask for an attorney, H.V. replied, "But, I'm only sixteen." The magistrate then reiterated that only H.V. could ask for an attorney, after which H.V. talked to the police. In a second written statement, H.V. claimed the victim accidentally shot himself with H.V.'s gun, after which H.V. placed him in a bathtub where he bled to death. Based on a drawing by H.V., police recovered the gun from a storm sewer close to H.V.'s home.

However, the Texas Supreme Court reversed the court of appeals determination that the gun retrieved from the storm sewer should also be suppressed, noting that the U.S. Supreme Court and the Texas Court of Criminal Appeals have rejected the "fruits of the poisonous tree" doctrine in the 5th Amendment context of physical evidence obtained after failing to give Miranda warnings.

Commentary: It is fascinating when the Texas Supreme Court hands out decisions that, albeit are civil matters stemming from Title 3 of the Family Code, require the Court to delve into matters so closely associated with questions of constitutional criminal law and balance opinions from the U.S. Supreme Court and the Texas Court of Criminal Appeals.

Was the custodial, videotaped confession of a defendant suffering from bi-polar disorder voluntarily given?

Oursburn v. State, 259 S.W.3d 159 (Tex. Crim. App. 2008)

A confession is involuntary under the Federal due process clause or Miranda rights only where there is some police coercion or overreaching. Where there is no police coercion, there is no Constitutional basis for concluding that the confession was involuntary or in violation of his rights, even if a suspect is suffering from a mental illness. However, under the Texas Confession Statute found in Article 38.22 of the Code of Criminal Procedure, evidence of a mental illness, disease, or defect is relevant to a determination of the voluntariness of a statement. The Court held that in this case, the question of whether the defendant's confession was voluntary due to his mental illness should have been submitted to the jury as a general voluntariness questions. However, the defendant never requested a general jury instruction regarding voluntariness. The Court remanded the case for further proceedings to determine if the lack of a jury instruction on general voluntariness was egregiously harmful.

2. Double Jeopardy

Did the defendant's conviction for driving at an unsafe speed bar for double jeopardy reasons a subsequent prosecution for intoxication assault?

Ephraim v. State, 237 S.W.3d 438 (Tex. App.—Texarkana 2007)

No. Ephraim was the driver of a vehicle involved in a single vehicle accident in which the defendant's two passengers were injured. Ephraim was charged with intoxication assault and driving at an unsafe speed. Ephraim pled guilty to the unsafe speed violation prior to the trial for the intoxication assault charge. Ephraim then asserted that the conviction for driving at an unsafe speed barred the subsequent prosecution for intoxication assault.

Where the same action or transaction constitutes a violation of two separate statutory provisions, the test to determine whether there are two offenses or one is whether each statutory provision requires proof of a fact that the other does not require. The court of appeals held in this case that although there are some common elements to both charges (e.g., operation of the vehicle) the essential elements of the unsafe speed charge and the elements of the intoxication assault charge are not the same. Therefore, the conviction for driving at an unsafe speed did not subject Ephraim to double jeopardy for the intoxication assault charge.

C. 4th Amendment
1. Expectation of Privacy

Is there a reasonable expectation of privacy in a police interview room/ juvenile processing office?

Cortez v. State, 240 S.W.3d 372 (Tex. App. Austin 2007)

No. The 4th Amendment serves to safeguard an individual's privacy from unreasonable governmental intrusions. A defendant may challenge the admission of evidence obtained by governmental intrusion only if he had a legitimate expectation of privacy in the place invaded. To determine whether a person had a reasonable expectation of privacy, it must be determined whether the person exhibited a subjective expectation of privacy and, if so, whether that subjective expectation is one that society is willing to recognize as reasonable. The defendant did not have a reasonable expectation of privacy in a police interview room that doubled as a juvenile processing office.

2. Reasonable Suspicion/ Detention

Did the court of appeals err in holding that St. George, a passenger in an automobile, was illegally detained when he was questioned by the deputies once the initial reason for the traffic stop had ended?

St. George v. State, 237 S.W.3d 720 (Tex. Crim. App. 2007)

No. At the time the driver was issued the warning citation, the deputies did not have specific articulable facts to believe that St. George, a passenger, was involved in criminal activity. Therefore, the questioning of St. George regarding his identity and checks for warrants, without separate reasonable suspicion, went beyond the scope of the stop and unreasonably prolonged its duration.

Writing for the 8-1 majority, Judge Meyers stated that the court's ruling is not intended to create a bright line rule that would automatically make an investigative detention unreasonable the moment that the initial reason for the traffic stop ends. However, in this instance, the prolonged detention was unjustified, the encounter was non-consensual, and the officers failed to show reasonable suspicion long after the warning citation was issued to the car's driver.

Was the officer's continued detention of a driver after learning that his registration was, contrary to her initial suspicion, reasonable under the 4th Amendment?

Hart v. State, 235 S.W.3d 858, 861 (Tex. App. Eastland 2007)

Yes. A police officer stopped Hart because the computer in her patrol car showed that his automobile registration was expired. After approaching the vehicle and speaking to him, she soon learned that he had recently renewed his registration. Upon learning this, she asked Hart about his driver's license. He told her that his driver's license was expired. After checking to see if Hart had any outstanding arrest warrants, she learned that Hart had a prior drug history and that his license was expired. Because Hart had a drug history, she called for a canine officer. She was in the process of writing Hart a citation when the canine officer arrived. The dog alerted on Hart's vehicle. Another officer searched Hart's person and found a rock of crack cocaine in his pocket.

Hart contended that any detention past the time that police officer discovered that he had renewed his vehicle registration, thereby negating the reason for the traffic stop, was unreasonable. In affirming the trial court's ruling to deny Hart's motion to suppress, the court of appeals held that although the license check was conducted after concluding that Hart's registration was valid, the investigative stop was reasonable because the detention was not unduly prolonged. The canine sniff search was valid because defendant was not unlawfully detained at the time that the drug dog alerted (he was being issued a citation for driving with an expired driver's license). Thus, at the time he was still in lawful custody. The court stated that it does not matter that that the arrest occurred after the search, as long as there was probable cause for arrest prior to the search.

Did the court of appeals apply the appropriate standard of review in assessing reasonable suspicion?

Curtis v. State, 238 S.W.3d 376 (Tex. Crim. App. 2007)

No. The court of appeals applied an incorrect standard to determine whether the officers had reasonable suspicion to stop appellant's vehicle. The "as consistent with innocent activity as with criminal activity" construct is no longer a viable test for determining reasonable suspicion in the context of an investigative stop. There may be instances when a person's conduct, viewed by such a standard appears purely innocent, yet when viewed in light of the totality of the circumstances, such conduct gives rise to reasonable suspicion in the context an investigative stop. The reasonableness of a temporary detention must be examined in terms of the totality of the circumstances and will be justified when the detaining officer has specific articulable facts, that when considered with rational inferences from those facts, lead an officer to conclude that the person detained actually is, has been, or soon will be engaged in criminal activity. In light of the court of appeal's failure to apply the proper standard, the Court of Criminal Appeals reversed the judgment of that

court and remanded the case in order to address appellant's remaining points of error.

Did an officer's mistaken belief as to the law regulating window tint render a traffic stop unreasonable?

Johnson v. State, 237 S.W.3d 390 (Tex.App.—Waco 2007)

No. A state trooper relied on an outdated provision of law that had been superseded regarding window tint when stopping Johnson's vehicle. As a result of the stop, Johnson was charged with possession of less than one gram of cocaine. The defendant sought to suppress the evidence of the cocaine arguing that the traffic stop was unreasonable because it was based on the trooper's mistaken belief that the defendant's window tint was in violation of the law.

The court of appeals held that when considering the totality of the circumstances, an officer who was correctly interpreting the current law would have still had reasonable suspicion to stop the vehicle because the tinting did not comply with the current law requiring at least a 25% light transmittance value. Therefore, the trooper was justified in conducting the stop.

Did reasonable suspicion exist to stop a vehicle when the vehicle was observed swerving on a moderately busy roadway on a flat tire as the wheel emitted sparks?

Carillo v. State, 235 S.W.3d 353 (Tex. App.—Texarkana 2007)

Yes. A peace officer observed a vehicle being driven at approximately 40 miles per hour on a very flat tire down a moderately busy roadway. He observed the vehicle swerving and saw sparks being emitted from the wheel rim. The officer then stopped the vehicle. The defendant was subsequently charged with DWI and sought to suppress the evidence gathered as a result of the traffic stop arguing that it was an unreasonable stop.

The court of appeals held that because the officer articulated the specific facts that led him to believe that the defendant was committing the offense of operation of an unsafe vehicle and the officer's in-dash camera clearly showed that the vehicle was not equipped to comply with proper safety or operation standards there was reasonable suspicion to stop the defendant's vehicle.

Was the officer's detention at a rest stop justified by the community caretaking standard?

Franks v. State, 241 S.W.3d 135, 143 (Tex. App. Austin 2007)

No. While responding to a daytime call, a police officer observed a black Toyota Camry sedan parked just off the highway at a rest area with a picnic table. In the evening, he observed the "same vehicle parked at the same location. The next day, in route to a collision, the officer saw the same vehicle parked in the same spot. He became suspicious that the car was abandoned, stolen, or broken down but did not note the license-plate number of the car. Rather, the officer planned to return later in the day and look into the situation if the car remained there. After dark that evening, that officer observed the "same vehicle" at the rest area. The rest area did not have any lighting, and except for one car, it was unoccupied. He decided to conduct a "check welfare" stop. He observed that the car's engine was running and its dome light was on. As he parked his patrol car behind the car, the officer noticed that the dome light that had been activated turn off. The officer immediately turned on his overhead lights, approached the vehicle, and began talking to Franks, the driver and sole occupant of the vehicle. At some point during the conversation, Franks asked the officer if she could leave. The officer told her that she could not. Eventually, Franks was asked to step out of her vehicle, the vehicle was searched, and cocaine was found. Franks filed a motion to suppress the evidence, which the trial court denied.

Under the community-caretaking exception to the 4th Amendment, and as part of their duty to serve and protect, police officers may stop and assist an individual whom a reasonable person—given the totality of the circumstances—would believe is in need of help. A community-caretaking stop does not require the officer to have reasonable suspicion or probable cause to believe that an offense has been committed. The exception stems from the recognition that a police officer's duties involve activities other than gathering evidence, enforcing the law, and conducting investigations.

The court of appeals held that, once the officer refused Franks' request to leave, the encounter became an investigative detention requiring reasonable suspicion of criminal activity. Finding none, the appellate court reversed the trial court's denial of the motion to suppress.

Did the uncorroborated tip from a restaurant manager give rise to reasonable suspicion to detain?

State v. Griffey, 241 S.W.3d 700 (Tex. App. Austin 2007)

No. A police officer was dispatched to a Whataburger in response to a call from a manager reporting a person "passed out behind the wheel in the drive-through." The officer testified

that he was not given any other information other than that someone was passed out behind the wheel in the drive-through lane. When he arrived at the scene, an unidentified Whataburger employee pointed to Griffey's car. The officer testified that Griffey was awake at the time he arrived and that her vehicle was sitting next to the drive-through window. He pulled his patrol car in front of Griffey's vehicle, blocking it from the front, while the line of vehicles behind Griffey's blocked her vehicle from the rear. At the hearing on the motion to suppress, the officer conceded that he detained Griffey at the time he used his vehicle to stop her from leaving. He testified that he detained her based on the report that someone was passed out behind the wheel in the drive-through lane. After detaining her, he asked her to turn off her engine and step out of the vehicle. After she had done so, he detected the odor of an alcoholic beverage coming from Griffey. This was Nelson's first indication that alcohol was involved. Because his shift was nearing an end, he called for another officer to conduct the DWI investigation. A few minutes later, another officer arrived and after administering field sobriety tests, placed Griffey under arrest for DWI.

In a pretrial motion, Griffey moved to suppress all evidence obtained as a result of the stop on the ground that her detention was improper because it was based solely on the manager's report that someone was passed out behind the wheel in the drive-through lane. The trial court ruled that the officers' testimony was credible but that the initial detention of Griffey was unreasonable and not authorized by law. Accordingly, the trial court suppressed all of the evidence obtained as a result of the stop. The State appealed.

Based on the totality of the circumstances, the court of appeals concluded that the officer did not have reasonable suspicion to detain Griffey and that the trial court properly applied the law to the facts in granting the motion to suppress. The ruling of the trial court was affirmed.

Did the time of day and recent crimes in the areas justify an investigatory detention?

Hudson v. State, 247 S.W.3d 780 (Tex. App. Amarillo 2008)

No. Hudson argued that the trial court erred in denying his motion to suppress evidence in violation of the 4th Amendment and Tex. Const. art. I, § 9. The court of appeals agreed that the officer illegally detained defendant without reasonable suspicion. Under the totality of the circumstances, the court found that the factors cited by the officer: (1) time of day, and (2) recent crime in the area were an illegal pretext for stopping Hudson. Nevertheless, the court concluded that discovery of a criminal trespass warrant for Hudson prior to discovery of the contraband provided sufficient attenuation to render the contraband admissible. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to suppress evidence. The trial court's judgment was affirmed.

Was a 27-minute detention unreasonable in light of the totality of the circumstances?

Belcher v. State, 244 S.W.3d 531 (Tex. App. Fort Worth 2007)

No. Despite the fact that the officer had concluded investigating the traffic offenses of excessive speed, failure to maintain a single lane and failing to signal lane changes, a DWI investigation was subsequently underway when the first officer requested a second officer's assistance at the scene. A legitimate law enforcement purpose was served by the 27-minute delay caused by a wait for the arrival of the second officer, who, according to the testimony, possessed greater expertise in DWI investigations and was able to complete such investigations more efficiently than the first officer. The court of appeals rejected the argument that the period of small talk regarding snowboarding and hunting was indicative that no investigation was underway and that Belcher had been unlawfully detained. The court affirmed the trial court's judgment.

See also, *Love v. State*, 252 S.W.3d 684 (Tex. App. Texarkana 2008), holding that 45 minute duration from moment of initial detention to time of "free air" search by drug dog was not unreasonable under the 4th Amendment.

Was the peace officer justified in conducting a "vehicle frisk?"

Green v. State, 256 S.W.3d 456, 465 (Tex. App. Waco 2008)

No. The court of appeals concluded that the peace officer did not possess a reasonable belief based on specific and articulable facts that, taken together with the rational inferences from those facts, reasonably warranted him to believe that Green was dangerous and had in his truck a weapon that he could gain immediate control of. The officer's "vehicle frisk" for his own safety was illegal.

While the court rejected the notion of a vehicle frisk, it acknowledged that under certain circumstances, the right to conduct a protective frisk may also extend to the passenger compartment of the detainee's automobile but only to those limited areas where a weapon may be placed or hidden. The officer

must also possess a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Though the vehicle frisk was illegal, under the totality of the circumstances, the officer had probable cause to search Green's truck. Accordingly, the court of appeals concluded that the trial court did not err in denying Green's motion to suppress.

Commentary: "Frisking a vehicle," really?

Does the "spinning of tires" give rise to reasonable suspicion?

State v. Guzman, 240 S.W.3d 362 (Tex. App. Austin 2007)

No. A police officer was stopped at a stoplight near the frontage road of Interstate 35. His car was the third car in line. A red pickup driven by Guzman was the second vehicle in line at the stoplight and was stopped directly in front of the officer's car. The officer noticed that as the stoplight turned green, Guzman's right rear tire started to spin for approximately three to six seconds.

The officer noticed that the spinning motion of the tire caused the tire to smoke and it caused the right rear tire to appear shiny. Immediately, the officer activated his overhead light and made a traffic stop. The officer's in-car video camera captured images of Guzman's truck. The video does not show the spinning tire, but the back rear tire appears "shiny." The officer based his stop on his opinion that the defendant had accelerated at an unreasonable speed.

He wrote in his probable cause affidavit that the defendant had committed the offense of "exhibition of acceleration."

The trial court made two conclusions of law relevant to this issue: "On Friday, July 1, 2005, there was no offense of 'exhibition of acceleration' in the Transportation Code," and "There were no facts adduced to give the officer reasonable suspicion that the Guzman was in violation of Sec. 545.420–'Racing on a Highway'… ."

The State argued that the legislature did not intend for a 2003 amendment of the Transportation Code to decriminalize exhibitions of acceleration that are not connected to speed competitions. However, the court of appeals rejected this based on the plain language of the statute. Furthermore, there was no evidence that Guzman was operating his pickup truck in a "drag race".

The court of appeals noted that there are innocent reasons why a tire may lose traction and spin upon acceleration from a stop. It did not believe that a reasonable suspicion of intoxication can be based on the act of spinning one tire under the circumstances shown here. It expressly declined to hold that an officer may lawfully detain on suspicion of intoxication any driver who is seen by the officer to spin a tire at a downtown intersection at night. It held that the trial court correctly concluded that the spinning motion of Guzman's tire after the traffic light turned green did not alone warrant the officer's suspicion that Guzman was unlawfully exhibiting acceleration in violation of Section 545.420. The State's points of error were overruled and the trial court's order granting Guzman's motion to suppress evidence was affirmed.

Does slow driving give rise to reasonable suspicion of impeding traffic?

DPS v. Gonzalez, 04-07-00702-CV (Tex. App. San Antonio 8/20/2008)

No. Despite the officer's testimony that the traffic stop occurred at 4:00 a.m. on a Sunday morning, the asphalt was wet, it was "foggy and drizzly, and that such conditions were "not the safest," the officer, nevertheless, claimed to have reasonable suspicion to stop Gonzalez for impeding traffic because Gonzalez was driving 20 miles per hour under the speed limit. The court of appeals disagreed and concluded that there was no evidence besides the officer's conclusory statement to support the assertion that Gonzalez was impeding traffic. Furthermore, there was no reasonable suspicion to stop the defendant for violating the city's minimum speed ordinance because driving 10 miles per hour or more under the speed limit is not a per se violation.

3. Arrest

Did the police violate the 4th Amendment when they made an arrest that was based on probable cause but prohibited by state law, or when they performed a search incident to the arrest?

Virginia v. Moore, No. 06–1082 (4/23/08):

No. A warrantless arrest based on probable cause is constitutional, even if unlawful under state law. Rather than issuing the summons required by Virginia law, the police arrested Moore for the misdemeanor of driving on a suspended license. Subsequent to his arrest, crack cocaine was discovered and Moore was tried on drug charges. The trial court declined to suppress the

evidence on 4th Amendment grounds. Moore was convicted. Ultimately, the Virginia Supreme Court reversed, reasoning that the search violated the 4th Amendment because the arresting officers should have issued a citation under state law, and the Fourth Amendment does not permit search incident to citation.

States may choose a more restrictive search-and-seizure policy but that does not render less restrictive ones unreasonable or unconstitutional. The court was unwilling to inject its 4th Amendment jurisprudence into what it deemed a matter of state criminal procedure. Incorporating such state arrest rules into the Constitution would make 4th Amendment protections as complex as the underlying state law, and variable from place to place and time to time.

Did multiple violations of Texas traffic laws while executing a citizen's arrest trigger the exclusionary rule?

Miles v. State, 241 S.W.3d 28 (Tex. Crim. App. 2007)

No. A tow-truck driver arrested Miles for DWI after pursuing him at night through busy Houston streets. Miles was charged with DWI and unlawfully carrying a weapon. He filed a motion to suppress under Article 38.23, the Texas exclusionary statute, and claimed that evidence obtained as a result of this citizen's arrest should have been excluded because the tow-truck driver violated multiple traffic laws during his pursuit. After the trial court denied the motion to suppress, appellant pleaded guilty and appealed the trial court's suppression ruling. The court of appeals affirmed the trial court's ruling. It concluded that laws regulating the flow of traffic do not fall within the category of "laws" implicated by Article 38.23 because those laws do not exist to regulate the acquisition of evidence to be used in a criminal case. The judgment of the court of appeals was affirmed. Commentary: Judge Cathy Cochran of the Texas Court of Criminal Appeals is truly a gifted writer and legal historian. In terms of making sense of the Texas statutory exclusionary rule, this opinion is a "must read" for students of Texas criminal procedure.

Handcuffing

Was a defendant subject to an arrest for 4th Amendment purposes when he was handcuffed for transport to the police station?

T*urner v. State*, 252 S.W.3d 571 (Tex.App.—Houston [14th Dist] 2008)

No. The determination of whether an individual has been placed in custody must be made on a case-by-case basis. The Court of Criminal Appeals has identified four situations which may constitute custody: (1) when the suspect is physically deprived of freedom of action in any significant way, (2) when a law enforcement officer tells a suspect that he cannot leave, (3) when a law enforcement officer creates a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he may leave. In these circumstances, the restriction of movement must be more than just an investigatory detention.

In this case, when the officers went to Turner's home they found him sitting on the porch and identified themselves. They told Turner that they wanted to ask him some questions about the offense and asked if he would mind going with them to the police station. Turner replied that he would go with them. The officers then told Turner that before putting him in the vehicle that they had to handcuff him for safety purposes because they did not have a cage between the back and front seats of their patrol vehicle. The officers told Turner that he was not under arrest. Turner's sister then approached the officers and asked if her brother was under arrest. The officers again reiterated that he was not under arrest and told her she was free to join them if she wanted. Once they arrived at the station, the handcuffs were removed. Turner testified that he did not feel that he was free to leave or refuse to go with the officers.

The court of appeals held that the defendant was not in custody when he was handcuffed. There was sufficient evidence to determine that the defendant voluntarily went with the officers, was not coerced, and was aware that he was free to leave or free to refuse to speak with the officers. The very act of placing an individual in handcuffs does not mean that the person is in custody.

Was the defendant, a suspect in an assault, subject to an arrest for 4th Amendment purposes when he was handcuffed and transported from a biker rally concert?

Bartlett v. State, 249 S.W.3d 658 (Tex.App.—Austin 2008)

No. Bartlett was charged with assault after an altercation between two large groups of people at a motorcycle rally. He sought to have his statement and photographs taken of him suppressed as the fruit of a warrantless arrest.

Soon after the assault, the victim's friends pointed out Bartlett as the assailant to law enforcement. A peace officer then approached Bartlett,

put his hands on the defendant's shoulders, identified himself, told the defendant that he needed to go with them and then put the handcuffs on the defendant. The officer testified that he handcuffed Bartlett for safety purposes and that he did not want anyone to get injured and wanted to remove the defendant from the large crowd as quickly as possible without incident because the victim's group of friends and the Bartlett's group of friends were both present and becoming agitated.

Bartlett was escorted to the officer's patrol car approximately 500-1,000 yards away. The officer then told Bartlett that he was not under arrest but that they wanted to drive him away from the two rival groups so that they could talk. When they arrived at an open barn area approximately 2,000 yards away, the officer removed the handcuffs from the defendant and they sat at a table and talked. Bartlett was again told that he was not under arrest. Bartlett made a written statement on a voluntary statement form and photos were taken of some wounds on his hands. Bartlett was driven back to his campsite and the officer asked the Bartlett's friends to avoid the other group.

The court of appeals held that the officer was justified in making an investigative detention of Bartlett because the officers reasonably suspected him of being involved in the assault. Although an investigative detention is a seizure, it does not amount to a warrantless arrest. Likewise, an investigative detention does not become a warrantless arrest merely because a defendant is handcuffed and transported away from the immediate area. The decision to handcuff and transport Bartlett away from the campsite was reasonable given the potentially dangerous circumstances.

Sufficiency of Arrest Warrant "Complaint"

Did the trial court err by denying a motion to suppress because under the "totality of the circumstances" test, the "four corners" of the arrest warrant affidavit did not provide sufficient probable cause to justify the issuance of a warrant?

Gurrusqueita v. State, 244 S.W.3d 450 (Tex. App. Fort Worth 2007)

No. The arrest warrant provided sufficient probable cause to justify the magistrate's issuance of an arrest warrant. In an illustration of how less is not always more, the court of appeals described the affidavit in this case as an excellent example of a proper affidavit to support an arrest.

4. Search Issues

Did probable cause exist to obtain a search warrant of the defendant's garage?

Rodriguez v. State, 232 S.W.3d 55 (Tex. Crim. App. 2007)

Yes. The defendant was convicted of possession of cocaine with intent to distribute. He moved to suppress the evidence claiming that there was not sufficient probable cause to support a search warrant for his garage.

Police received a tip that the defendant's uncle was selling large quantities of cocaine. During routine surveillance police observed the uncle drive to the defendant's home, enter the garage, and come back looking nervous a short time later with a package that he tossed into the backseat. Police followed the uncle and when he failed to signal a turn, he was stopped and gave consent for his vehicle to be searched. Police found the package on the back floorboard and saw that it contained three brick-shaped objects that looked like packaged cocaine. The uncle told the police that he had gotten the cocaine from the defendant's garage and that there was more cocaine in the garage. After the search warrant was issued the garage was searched and officers found a large quantity of cocaine.

The probable cause affidavit submitted to the magistrate stated that the officers watched the uncle walk out of the garage with the package, put it in his car, that it was the only package found in his car during the search and that they had reason to believe there was more cocaine in the garage. The Court of Criminal Appeals held that although the probable cause affidavit could have been made clearer by the addition of certain relevant facts such as the fact that the uncle told officers that the defendant had more cocaine in the garage that omission did not amount to a lack of probable cause for the search.

Where the probable cause affidavit contained a misstatement of fact, was the magistrate misled into issuing the search warrant?

Wise v. State, 223 S.W.3d 548 (Tex. App.—Amarillo 2007)

No. The defendant was convicted of aggravated sexual assault of a child and indecency with a child. He was the subject of a multi-state investigation for using his computer to meet young girls for sexual purposes. The initial investigation occurred in Wisconsin. A Wisconsin police officer drafted two search warrant affidavits, one for the defendant's home in Iowa and one for records related to the defendant's AOL account. An Iowa police officer assisted the Wisconsin police in having a search warrant issued for the defendant's home. The search warrant was executed and all the evidence

that was seized was turned over to the Wisconsin police. A videotape that was seized showed the defendant having sexual intercourse with a young female who was later identified as a 13 year old girl from Lubbock, Texas. The defendant sought to have the evidence suppressed, arguing that the affidavit in support of the search warrant for his home was based upon misinformation and omissions.

The court of appeals held that although there was some misinformation included in the probable cause affidavit used for the search warrant for the defendant's home it was not done intentionally on the part of the officer or with reckless disregard for the truth. Rather, the misstatements were likely due to the rush in which the probable cause affidavit was drafted without the aid of the officer's reports in order to prevent any destruction of evidence. Therefore, the magistrate was not misled into issuing the search warrant.

Did the trial court err by denying a motion to suppress because the facts set out in the affidavit had become stale by the time the search warrant was issued?

McKissick v. State, 209 S.W.3d 205 (Tex. App. Houston 1st Dist. 2006)

No. The probable cause affidavit indicated that McKissick told law enforcement that he downloaded pictures of girls onto his personal computer and that in the detective's experience as an investigator, sexually inappropriate photographs of children were typically stored on personal computers. Furthermore, that the affidavit stated that defendant admitted taking pictures of girls on the beach on March 29, 2002, the day of his arrest for the offense of improper photography or visual recording (Section 21.15, Penal Code). The pictures at the time of his arrest depicted, in part, the buttocks of young girls. The affidavit was subscribed and sworn four days after defendant's arrest. The affidavit recited primarily facts that occurred on March 29 or between March 29 and April 2. Moreover, while the affidavit did not provide a specific time frame the defendant downloaded photographs onto his computer, the magistrate could have inferred that the illegal activity described in the affidavit was of a continuous and protracted nature, making the passage of time between the activity and defendant's arrest less relevant. The judgment of conviction for possession of child pornography was affirmed.

Blood Draw Issues

Did the district court err in reversing the administrative decision to suspend a driver's license suspension because blood was drawn by an unauthorized person?

Tex. Dep't of Pub. Safety v. Hutcheson, 235 S.W.3d 312 (Tex. App. Corpus Christi 2007)

No. Section 724.042 of the Transportation Code provides that "[o]nly a physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse may take a blood specimen at the request or order of a peace officer under this chapter. The blood specimen must be taken in a sanitary place." Because the peace officer in this case was not an authorized individual and because there is no evidence that he requested that an authorized individual carry out the drawing of Hutcheson's blood specimen, the court of appeals held that the Department of Public Safety failed to present substantial evidence that there was an appropriate request.

Was the justice of the peace authorized to issue a blood draw warrant?

Muniz v. State, No. 01-07-00129-CR (Tex.App. [Houston 14th Dist.] 7/31/08)

Yes. The record established that two district judges served more than one county and where attorney municipal judges were not judges of a municipal court of record, as required by Article 18.01(c), the justice of the peace was authorized to issue the blood draw warrant per Article 18.01(i).

In agreeing with the State, the court of appeals explained, "when the district judges of a county are serving more than one county and peace officers are forced to travel and spend considerable time to find the judge across multiple counties, there is a risk of loss or destruction of evidence. The plain purpose of the exception is to facilitate the timely issuance of a warrant to prevent the loss or destruction of evidence by allowing a peace officer to seek the warrant from any magistrate." *Muniz* at 13. The court concluded that under Muniz's interpretation of the statute peace officers would have been required to travel across four counties to seek out one of the two district judges to sign an Article 18.02(10) warrant. The judgment was affirmed.

Plain View

Did the trial court err in ruling that the police officers were required to obtain an additional search warrant before opening the two safes that they seized from the premises to be searched and opened the following day?

State v. Powell, No. 2-05-477-CR (Tex.App.–Ft. Worth 6/5/08)

No. A peace officer submitted an affidavit to the municipal judge to

obtain an arrest warrant and a search warrant. The affidavit accused a third party of stealing checks and possessing stolen property purchased with forged checks and listed various property as "concealed and kept in violation of the laws of Texas". At the pre-trial suppression hearing, the officer testified that he seized the safes when he executed the warrant. He did not, however, testify that they were in a place that the warrant authorized him to search. The officer did not testify where or under what circumstances he found the safes. He did not testify how large, how old, or what brand the safes were. It was possible that at least one of the safes was the right size to hold checks because the officer testified that the police found checks in one. It was not known from the trial courts ruling, however, whether it believed that the police did find checks there. Consequently, the trial court could have properly found that the State did not prove that the plain view exception applied. As a result, the seizure and later search of the safes were illegal; a new warrant would have been necessary to justify them.

Was a search warrant that was executed more than three full days after it was issued stale?

State v. Rico, 241 S.W.3d 648 (Tex. App.—Amarillo 2008)

Yes. Article 18.06(a) of the Code of Criminal Procedure provides that a search warrant must be executed within three days from the time it is issued. Article 18.07 provides the method for computing the period of time for execution of a search warrant. It states that the time allowed shall be "three whole days, exclusive of the day of its issuance and of the day of its execution." A search warrant that is not executed within that time becomes stale and is no longer valid. Affirming the trial court, the court of appeals held that the State had until midnight on the 4th day after the warrant was issued to have it executed. Here, the warrant was issued on August 19, 2005 at 2:10 p.m. and executed on August 24, 2005 at 9:10 a.m. Excluding the date of issuance (8/19/05) and the last possible date for execution (8/23/05), the State had three whole days available to execute the warrant but failed to do so. As such, the warrant is stale and is no longer a valid search warrant.

Did an officer falsify facts asserted in an affidavit for a search warrant when after aerial surveillance he asserted that the marijuana plants were near the home but the defendant argues that they were 200-250 yards away and could not be seen from above?

Fenoglio v. State, 252 S.W.3d 468 (Tex.App.—Ft. Worth 2008)

No. Two officers flew over the defendant's property in a helicopter looking for marijuana plants. As the officers were flying over the property they observed five or six marijuana plants growing in large plastic containers. The plants were three-to-four feet tall. The officers then landed nearby to confirm what they had seen from above and radioed a waiting ground crew. While they were waiting for the ground crew to arrive one of the officers typed a probable cause affidavit on his laptop. The ground crew secured the property while the other two officers went to obtain a search warrant. After the search warrant was issued the officers observed Fenoligio in his truck and served him with the warrant. Marijuana, drug paraphernalia, methamphetamines, and a to-do list including drug related activities were found in the truck. In the home, Fenoligio agreed to show them all of the drugs. There was a large quantity of methamphetamines and materials used to manufacture methamphetamines as well as materials related to the marijuana growing operation found behind the home.

Fenoligio filed a motion to suppress the evidence arguing that the officer falsified the facts asserted in the probable cause affidavit. The court of appeals held that when reviewing a trial court's decision on a suppression issue almost total deference is given to the trial court's rulings on questions of fact and questions of application of law to the facts. In this case, the trial court weighed the credibility of the officers' testimony at the suppression hearing and determined that they did not falsify the affidavit. The court of appeals deferred to the trial court and held that the officers did not falsify the affidavit and the evidence presented was sufficient to support the search warrant.

Was the inclusion in the probable cause affidavit of the language "any and all vehicles owned and or controlled by the person(s) which are located on the property named in this warrant" sufficiently particularized to uphold the search warrant?

Hedspeth v. State, 249 S.W.3d 732 (Tex.App.—Austin 2008)

Yes. Officers received information that Husdspeth and a female associate had been trafficking crack cocaine out of their motel room for two months. The officers then used a confidential informant to conduct a controlled buy from the Husdspeth. The officers then wrote a probable cause affidavit documenting the results of their ongoing investigation and obtained a search warrant. The warrant incorporated by reference

the probable cause affidavit which included "any and all vehicles owned and or controlled by the person(s) which are located on the property named in this warrant" as suspected places to be searched. When the search warrant was executed, the officers searched a vehicle rented by Husdspeth and found a quantity of crack cocaine. Husdspeth moved to have this evidence suppressed on the ground that the warrant was not sufficiently particularized to permit a search of the vehicle.

The court of appeals held that the warrant was sufficiently particularized to uphold the search of the vehicle. The officers specifically referred in the affidavit to the vehicles on the property that were owned or under the control of Husdspeth or his associate; the keys to the vehicle were discovered in the premises for which the search warrant was obtained; the vehicle was parked in the lot outside of the motel room during the search; and, Husdspeth had control over the vehicle; it was reasonable for the officers to infer that contraband might be located in the vehicle. The facts included in the four corners of the probable cause affidavit included information that was sufficient to support a search of the vehicle.

D. 2nd Amendment

Does the 2nd Amendment provide an individual's right to hold and use handguns for self-defense in the home?

District of Columbia v. Heller, No. 07-290 (6/26/08)

Yes. Justice Scalia delivered the opinion of the U.S. Supreme Court. In a 5-4 decision, the Court held that the 2nd Amendment provides an individual's right to possess a firearm regardless of service in a militia, and to use that firearm for traditionally lawful purposes (e.g., self-defense at the home). The Court based its holding on the text of the 2nd Amendment, as well as the language in state constitutions adopted soon after the 2nd Amendment.

Justices Stevens and Breyer filed dissenting opinions, each joined by the other as well as Justices Souter and Ginsburg. Justice Stevens argued that the 2nd Amendment only protects the rights of individuals to bear arms as part of a well-regulated state militia, not for other purposes even if they are lawful. Justice Breyer agreed with Stevens' argument but also stated that even if possession were to be allowed for other reasons, any law regulating the use of firearms would have to be "unreasonable or inappropriate" to violate the 2nd Amendment. In Breyer's view, the laws at issue were reasonable and appropriate.

E. Article VI

Did the President of the United States act within his authority when he ordered the State of Texas to comply with the United States' treaty obligation under the Vienna Convention and to give effect to the International Court of Justice *Avena* judgment pertaining to the cases of the 51 Mexican nationals?

Does the Constitution require state courts to honor the treaty obligation of the United States by enforcing a decision of the International Court of Justice?

Medellin v. Texas, No. 06-984 (3/25/08)

No. In a 6-3 opinion, the court upheld the rulings of the Texas Court of Criminal Appeals and held that absent the Congress implementing legislation, the Vienna Convention is not a self-executing "binding federal law" that can displace state procedural default law. Furthermore, the court characterized the presidential memorandum as an attempt by the executive branch to enforce a non-self executing treaty without the necessary Congressional action, giving it no binding authority on state courts. Justice Stevens concurred in the opinion. Justice Breyer, joined by Justices Souter and Ginsburg dissented.

II. Substantive Law Issues

A. Transportation Code

Was the evidence presented sufficient to support a conviction for driving while license invalid (DWLI)?

Stautzenberger v. State, 232 S.W.3d 323 (Tex.App.—Houston [14th Dist] 2007)

Yes. Stautzenberger was convicted of driving while license invalid. On appeal, he argued that the evidence presented was insufficient to support the conviction because the State failed to prove that he was driving a motor vehicle on a highway while his license was invalid. The evidence showed that on 9/11/2005 a DPS trooper stopped the defendant for speeding and requested that Stautzenberger produce his driver's license and proof of insurance. Stautzenberger was not able to produce a driver's license and stated that his had expired in 1997. The trooper asked Stautzenberger why he did not have a driver's license and was told that he did not believe in the validity of a Texas driver's license. Stautzenberger gave the trooper his name and birth date. The trooper transmitted that information by radio and was told that Stautzenberger's driver's license had been suspended in 2004. Stautzenberger was then arrested and charged with DWLI. The charging instrument listed

three distinct manners and means of committing the offense of driving while license invalid. These included driving after his license was cancelled, driving while his license was suspended or revoked, and driving while his license was expired and his license expired during a period of suspension. The State proved that the defendant was driving after his license had been revoked. The court of appeals thus held that the evidence was sufficient to support the defendant's conviction.

B. Penal Code

1. Failure to Appear and Bail Jumping

Are the Penal Code offense of Failure to Appear and the Transportation Code offense of Violate Promise to Appear to be read in pari materia?

Azeez v. State, 248 S.W.3d 182 (Tex. Crim.App. 2008)

Yes. In a foray into an area of law that impacts the lives of hundreds if not thousands of defendants in Texas local trial courts on a daily basis, the court delineated failure to appear and violate promise to appear and effectively put everyone on notice that the two offenses are not interchangeable.

Sheriff K. Azeez was stopped and issued a citation for speeding by a Houston police officer on June 19, 2003. In signing the citation, Azeez promised to appear in Houston Municipal Court no later than July 21, 2003. Subsequently, however, he failed to appear, and was charged by complaint with unlawfully and knowingly failing to appear in accordance with the terms of his release after having been lawfully released from custody on condition that he subsequently appear in court. On the day of trial in municipal court, before jury selection commenced, the Azeez's defense attorney moved to quash the complaint, arguing that, whereas it charged Azeez with an offense in the express terms of the Penal Code's bail jumping and failure to appear (FTA) (Section 38.10, Penal Code which carries a maximum penalty of a fine not to exceed $500), he should instead have been charged under the Transportation Code's violation of promise to appear (VPTA) (Section 543.009(b), Transportation Code) The defense contended that VPTA is the more specific offense and carries a maximum penalty of a fine not to exceed $200. The assistant city attorney prosecuting the case responded that the complaint had not charged the appellant of either offense, but rather with violating City of Houston Ordinance 16-47. The defense answered that Azeez could not be charged under the ordinance because the city "cannot legislate in areas there is a controlling State law, so that's void - even if he is under that ordinance." Alternatively, he argued that in light of the city ordinance, he should not have been charged by a complaint that seemed to be couched in terms of a Penal Code's bail jumping and failure to appear. The municipal court denied his motion to quash. Azeez was tried for this offense in Houston Municipal Court No. 8, and was convicted by a jury and fined $400.

He appealed his conviction to the County Criminal Court at Law No. 12 of Harris County, which affirmed his conviction. The 14th Court of Appeals likewise affirmed the appellant's conviction, but opted to ignore the procedural-default rationale offered by the county court-at-law. Rather, the court of appeals concluded that the defendant was in fact charged with violation of promise to appear (VPTA) although the complaint alleged the mental state for bail jumping and failure to appear (FTA).

The Court of Criminal Appeals held that the court of appeals erred in two significant respects. First, in holding that Azeez was actually charged with the Transportation Code offense (VPTA), the court of appeals ignored (1) the express language of the complaint itself, (2) the fact that the court's charge instructed the jury to convict the Azeez (if at all) under the express language of the Penal Code provision (FTA), and (3) the fact that the jury was authorized to, and did in fact, assess a fine in excess of that which is permitted for the Transportation Code offense. 2nd, in the process of holding that the Transportation Code provision and the Penal Code provision are not in pari materia (such statutes that relate to the same matter or subject are to be construed together), the court of appeals misconstrued the scope of Section 38.10(a) of the Penal Code. The Court held that the two provisions should, in fact, be construed in pari materia, and that the trial court erred in allowing the appellant to be prosecuted and punished under the Penal Code provision instead of the Transportation Code provision. Accordingly, the case was remanded to the municipal court for further proceedings not inconsistent with the court's opinion.

2. Criminal Mischief

Could the jury have found beyond a reasonable doubt that the inflicted damage at a cost of repair of at least $500 and less than $1,500?

Barnes v. State, 248 S.W.3d 217 (Tex. App. Houston 1st Dist. 2007)

Yes. The evidence was sufficient to support Barnes's conviction for

criminal mischief. Barnes and her boyfriend were occupying a house without the owner's permission. The complainant and the home's owner drove to the house in his vehicle to attempt to get Barnes to leave. Barnes approached the vehicle and began shouting and banging on the closed car window. Barnes removed the car jack from her trunk, returned to the complainant's vehicle, lifted the car jack, and used it to strike the hood of the vehicle. The arresting officer arrived on the scene. He had been a police officer for 10 years and had extensive experience with criminal mischief cases. At trial, he estimated that the cost of repairing the damage to the hood of the complainant's vehicle at about $1,500. He also testified that the body shop's repair estimate was $1,530.01.

Criminal mischief is unique in that establishing the value of pecuniary loss or repair is a crucial element of the offense because it forms the basis of the punishment. In this case the court of appeals held that it was appropriate to use the officer's opinion testimony as it was based on his experience and that there was no need for the prosecution to prove that the damage to the vehicle was repaired. The judgment was affirmed.

3. Criminal Trespass

Did the city's unofficial policy allowing police officers to ban people from city parks violate the Due Process Clause of the U.S. Constitution and render evidence of criminal trespass legally insufficient?

Anthony v. State, 209 S.W.3d 296 (Tex.App. Texarkana 2006)

Yes. The unwritten policy of the City of Henderson, giving the police unfettered authority to ban people from the City's parks failed to provide for any hearing and violated procedural due process. Hence evidence used to support Anthony's conviction for criminal trespass was held legally insufficient. The court of appeals reversed the judgment of conviction and rendered a judgment of acquittal.

Note: Anthony was cited by the Court of Criminal Appeal in answering whether challenges to the validity of a penal statute must be raised in the trial court or on appeal. "Questions involving the constitutionality of a statute upon which a defendant's conviction is based should be addressed by appellate courts, even when such issues are raised for the first time on appeal.') A defendant must make an 'as applied' challenge to the constitutionality of a procedural statute in the trial court. That timely challenge gives the trial court an opportunity to decline to apply that procedural statute or make appropriate modifications to its operation. But the trial court can do nothing more or less than an appellate court when the defendant challenges the constitutionality of a penal statute under which he is prosecuted after all of the evidence is submitted and a jury has returned a guilty verdict. If the defendant prevails on his 'as applied' constitutional claim, there will be no new trial." *Flores v. State*, 245 S.W.3d 432, 443 (Tex. Crim. App. 2008). Accordingly, there is only one remedy for either a trial or an appellate court: dismiss the charging instrument and enter an acquittal because the defendant was convicted under an unconstitutional application of an otherwise valid penal statute.

4. DWI

Is a gated community a public place for purposes of DWI?

State v. Gerstenkorn, 239 S.W.3d 357 (Tex. App. San Antonio 2007)

Yes. The court of appeals concluded that a gated community is a public place as defined by Tex. Penal Code Ann. § 1.07(a)(40). The record provided ample reason to conclude that under the right set of circumstances anyone could gain access to the community even though the community was gated.

5. Defenses

Is vicarious consent a defense to wiretapping?

Alameda v. State, 235 S.W.3d (Tex. Crim. App. 2007)

Yes. Alameda was a friend of the victim's mother and lived with the 12 year old victim and her mother while going through a divorce. After Alameda moved out, the victim's mother became suspicious that her daughter and Alameda were communicating without her knowledge and installed a recorder on a telephone jack to tape all incoming and outgoing calls. Neither the victim nor Alameda knew that they were being taped. Upon listening to the tapes, the victim's mother discovered that the victim and Alameda were having a sexual relationship. The victim's mother then took the tapes to the police and Alameda was charged with aggravated sexual assault of a child. At trial, he sought to suppress the tapes and transcripts of the tapes arguing that it was an offense to intentionally intercept a wire communication without consent and therefore the police were prohibited from using the tapes. The trial court admitted the tapes.

The Court of Criminal Appeals held a parent can vicariously consent to the taping of her child's calls if the parent has an objectively reasonable, good faith belief that consenting

for the child was in the child's best interest. Applied to this case, because the victim's mother was able to vicariously consent to the taping of her daughter's telephone calls the wiretap was not an offense. Therefore, the tapes and transcripts could be used by the police and were admissible against Alameda.

III. Procedural Law Issues

A. Magistrate Issues

Does the creation of a county court at law strip a county judge of his powers as a magistrate?

Op. Tex. Atty. Gen. No. GA-0642 (7/8/08)

No. As a result of the establishment by the Legislature of the Aransas County Court at Law all civil, probate, juvenile, and criminal jurisdiction was removed from the County Court of Aransas County. That jurisdiction was vested in the Aransas County Court at Law. The powers of a magistrate are not determined by the subject matter jurisdiction of the court upon which the judge ordinarily sits. Section 26.104 of the Government Code, establishing the Aransas County Court at Law addresses the subject matter jurisdiction of that court. It does not make any mention of the judge's duties and powers as a magistrate. Therefore, the creation of the county court-at-law did not strip the county court judge of his powers as a magistrate.

B. Recusal, Disqualification, and Removal

Did the trial court err in requiring the defendant seeking recusal to demonstrate extrajudicial bias?

Kniatt v. State, 239 S.W.3d 910 (Tex. App. Waco 2007)

Yes. Defendant argued that the judge made remarks at a pre-trial hearing that called into question the judge's impartiality in a subsequent habeas corpus application hearing and that the judge gained personal knowledge of disputed evidentiary facts that were relevant to the habeas corpus application. The court of appeals held that in denying Kniatt's motion for recusal the assigned judge abused his discretion by strictly applying an extrajudicial-source rule. Rule 18b(2)(a) of the Texas Rules of Civil Procedure does not require a showing of bias arising from an extrajudicial source outside the judicial proceeding. Rather, when judicial conduct or remarks serve as the basis for a recusal motion, the movant must show a deep-seated favoritism or antagonism that would make fair judgment impossible. Under Rule 18b(2)(b), the movant must show that the judge's possession of personal knowledge of disputed evidentiary facts either was wrongfully obtained or led to a wrongful disposition of the case. An unfavorable predisposition towards a party arising from events occurring during judicial proceedings could nonetheless support recusal if it was so extreme as to display a clear inability to render fair judgment. The court of appeals granted the defendant's motion for rehearing in part and withdrew its prior opinion and judgment. It abated the appeal and remanded the cause to the trial court for a new hearing on defendant's recusal motion.

Note: The case was subsequently vacated and remanded. *Kniatt v. State*, 255 S.W.3d 311 (Tex. App. Waco 2008)

Does prosecution of a defendant who is the prosecutor's former client violate due process?

Landers v. State, 256 S.W.3d 295 (Tex. Crim. App. 2008)

No. As long as the case for which the prosecutor formerly represented the defendant and the current case are not closely or substantially related through inextricable facts, it is not a violation of the defendant's due process rights. A due process violation only occurs if the defendant can point to confidential information that the prosecutor gained knowledge of by virtue of the former representation that was used against the defendant in the current prosecution.

A prosecutor cannot be disqualified from the case unless the trial court determines that an actual conflict of interest exists. An actual conflict of interest exists where a prosecutor or a prosecutor's staff member previously represented the defendant with regard to the charges currently being prosecuted and has obtained confidential information as a result of that representation that may be used against the defendant at trial.

In this case, there was no due process violation because no confidential information that was obtained by the prosecutor in the former case was used in the current prosecution. Also, the prior representation was not for the same matter as the current charge. Therefore, there was no actual conflict of interest and the prosecutor could not be disqualified.

Did the trial court err in disqualifying a defense attorney who had a previous or ongoing relationship with local government and local officials?

Klapesky v. State, 256 S.W.3d (Tex. App.—Austin 2008)

No. Klapesky's court appointed criminal defense attorney was

disqualified upon motion by the State. The defense attorney had been previously employed by Williamson County to represent the county and its officials in civil cases. At the time of the hearing on the motion to disqualify, the defense attorney was representing the county on appeal in a federal case in which the district attorney was a party and was also representing the county and sheriff in a pending case in which the district attorney and some assistants would possibly be witnesses.

The court of appeals held that the trial court did not abuse its discretion in removing the defense attorney and appointing new counsel. The evidence presented to the trial court was undisputed and the court determined that there was a conflict of interest between the attorney's current representation of the county in civil matters and the representation of the defendant in the murder prosecution.

C. Procedural Law Pertaining to Dangerous Dog Cases

Did the county court err in concluding that it did not have jurisdiction of a municipal court's dangerous dog determination?

In re Loban, 243 S.W.3d 827 (Tex. App. Fort Worth 2008)

No. The court of appeals concluded, pursuant to Section 822.0421, Health and Safety Code, that the owner of the dogs could appeal the decision of the municipal court of record affirming the declaration that his two dogs were dangerous in the same manner as appeal from other cases from the municipal court. Only one problem, because the underlying action was not a criminal action, the appellate provision of the Code of Criminal Procedure was not triggered. Furthermore, pursuant to Section 30.00014(a), Government Code, because Tarrant County did have statutory county criminal courts, Tarrant County Court at Law No. 3 did not have jurisdiction over the resident's appeal. No statutory provision authorized Loban to appeal the municipal court of record's affirmation of the City Animal Control Officer's dangerous dog declaration. The joint petition for writ of mandamus was denied.

May a non-record municipal court hear appeals stemming from compliance applications disputes and dangerous dog determinations?

Op. Tex. Atty. Gen. No. GA 0660 (9/2/08)

Yes. A non-record municipal court has jurisdiction under Section 822.042(c), Health and Safety Code, over a compliance application filed under that section if the court also has territorial and personal jurisdiction. Under Section 822.0421(b), Health and Safety Code, such a municipal court also has jurisdiction over an appeal of a municipal animal control authority's dangerous dog determination made under Section 822.0421(a) if the court also has territorial jurisdiction. The phrase "court of competent jurisdiction" in Section 822.0421(b) refers to a court with territorial jurisdiction over the matter.

A municipal court may not, on the grounds of a lack of subject-matter jurisdiction, refuse to hear an appeal of a dangerous dog determination by a municipal animal control authority if the court has territorial jurisdiction. The court may, however, determine that it does not have territorial jurisdiction. A dog owner may file an appeal of a municipal animal control authority's dangerous dog determination with any municipal court, justice court, or county court that has territorial jurisdiction under Section 822.042(c). Barring a lack of territorial jurisdiction, a municipal court may not transfer the appeal of a dangerous dog determination to another court of jurisdiction. Nor may a local government attempt to restrict where a dog owner may appeal such a determination.

D. Pretrial Appeals/Issues

1. Suppression of Evidence

Did an officer's failure to comply with notice requirements for an out of jurisdiction arrest require suppression of evidence obtained during the stop?

State v. Purdy, 244 S.W.3d 591 (Tex. App.—Dallas 2008)

No. A citizen approached a Plano police officer in the parking lot of the municipal court and related that the defendant had rear-ended the citizen and had not stopped. The citizen described the vehicle, told the officer the first three digits of the defendant's license plate number and stated that he believed the defendant was driving while intoxicated. The officer located the defendant's vehicle and followed it for a short time. The officer saw the defendant drifting within his lane and stopped the vehicle. Upon approaching the vehicle the officer noticed that the defendant smelled of alcohol, had slurred speech, bloodshot eyes, and appeared to have lost some control of his motor skills. The defendant then failed field sobriety tests and was placed under arrest for driving while intoxicated. The officer was outside of his jurisdiction at the time of the arrest and did not notify the City of Allen police department that he had taken the defendant into custody as required by Article 14.03(d) of the Code of Criminal Procedure.

The court of appeals held that although it was an error for the

officer to fail to notify the City of Allen police, the notice requirement is not related to the purpose of the exclusionary rule, which is to deter police activity that could not have been reasonably believed to be lawful by the officers committing the conduct. Therefore, this error did not trigger the exclusionary rule and did not require suppression of the evidence obtained as a result of the stop.

2. Finding of Fact and Conclusion of Law

Did the defendant adequately request that the trial court make findings of fact and conclusions of law stemming from the denial of a motion to suppress?

Blocker v. State, 231 S.W.3d 595 (Tex. App. Waco 2007)

Yes. Citing *State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006), the court reiterated that when a losing party on a motion to suppress timely requests findings of fact and conclusions of law, the trial court is required to make such findings. When a trial court does not file findings of fact, an appellate court views the evidence in the light most favorable to the trial court's ruling on a suppression motion and assumes that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record. A trial court's findings and conclusions in a motion to suppress evidence need to be recorded in some way, whether written out and filed by the trial court, or stated on the record at the hearing. Cullen does not mandate the form for a request for findings and conclusions. As Cullen does not state that the findings and conclusions need be recorded in any particular way, request can likewise be timely written or orally made on the record.

Commentary: This case seems consistent with the notion that Cullen is applicable even when a non-record court motions to suppress. Even more so if you read *State v. Alley*, 158 S.W.3d 485 (Tex. Crim. App. 2005). Bottom line: all municipal judges should probably be prepared to oversee the drafting of conclusions of law and findings of fact.

3. Gag Orders

Was it an abuse of discretion for a trial court to issue a gag order focusing on the quantity rather than substance of statements made to the media?

In Re Benton, 238 S.W.3d 587 (Tex. App.—Houston [14th Dist.] 2007)

Yes. Benton, a juvenile, was charged with a gang-related murder and certified to be tried as an adult. The State sought a gag order prior to the first trial but the court did not grant the motion at that time. The case received a great deal of media attention and the first trial resulted in a mistrial after the jury was unable to reach a verdict. Prior to the 2nd trial, there were numerous articles in the local media concerning ongoing plea bargain negotiations. After Benton rejected plea bargain offers from the State and a date was set for a 2nd trial, the court entered a gag order prohibiting either party from making statements to the media. The court's findings that preceded the order focused largely on the number of statements made to the media rather than any prejudice to the judicial process that resulted from those statements.

The court of appeals held that the order was not an order that was narrowly tailored and set in place to prevent a substantial likelihood of material prejudice. The court of appeals agreed that the trial court focused largely on the quantity of media statements rather than the content of those statements without any showing that the publicity of the case would be materially prejudicial to either the State or Benton. Therefore, the trial court abused its discretion in entering the gag order.

4. Severance

Was trial court's refusal to grant defendant's severance motion harmful error?

Scott v. State, 235 S.W.3d 255 (Tex. Crim. App. 2007)

No. The defendant was charged with nine offenses against three victims in three separate charging instruments. Prior to trial, the State filed a motion to consolidate. Scott objected and moved to sever. The trial judge denied the motion to sever and granted the motion to consolidate. The defendant pled guilty to count three of each charging instrument and was convicted by the jury of the remaining two counts.

The Court of Criminal Appeals held that the trial judge's failure to sever the offenses did not affect the Scott's substantial rights. The Court held that in this case the conduct captured on the videotapes that led to Counts Three was the same conduct at issue in Counts One and Two and that the circumstances surrounding Counts Three would be admissible at trial on the other counts. The only difference that severance would have made is that the jury would not have heard that Scott had pled guilty to Counts Three. The Court held that based on the overwhelming evidence, Scott's admission of guilt to Counts Three likely had only an incremental effect on the jury's verdict if it had any effect at all.

E. Contempt

Could a witness who indicated a refusal to answer any questions be found guilty of one count of contempt for each time he subsequently refused to answer each individual question asked by the prosecutor?

Ex Parte Thompson, No. AP-75720 (Tex. Crim. App. 3/5/08)

No. The prosecution called Thompson to testify as a witness in a criminal case. Thompson had told the court during a hearing outside of the jury's presence that he would refuse to testify. The court responded that Thompson would be held in contempt for each refusal and that he would receive up to three days confinement and a $50 fine for the first charge and that for each subsequent refusal he would receive up to six months in the county jail and a $500 fine and that each sentence would run consecutively. When called to testify before the jury, Thompson refused to answer 13 of the 14 questions he was asked. The trial court entered a criminal contempt judgment against Thompson for each refusal to answer and sentenced Thompson to 2,163 days of confinement and a $6,050 fine.

The Court of Criminal Appeals held that only one instance of contempt occurred and that the prosecution could not make the witness liable for multiple counts of contempt by putting him on the stand, getting him to refuse to answer multiple questions despite his prior statement that he would refuse to testify. Due process allows only one conviction for contempt.

F. Trial

1. Voir Dire

Did the trial court's ex parte communication with the State during voir dire preclude the defendant from receiving a fair trial?

Abdygapparova v. State, 243 S.W.3d 191 (Tex.App.—San Antonio 2007)

Yes. During voir dire, the prosecutor and the trial judge exchanged numerous notes which were not shown to the defense. These notes discussed the defendant's ability to communicate with her defense attorney, defense counsel's voir dire of at least two potential jurors, the hairstyle of a potential juror, the State's presentation of the law to the venire panel, the prosecutor's line of questioning, and updates on unrelated proceedings. Defense counsel objected to the passing of notes between the trial court and the State and requested all the notes be entered into evidence and read into the record. The trial court required the State to read into the record any notes that did not constitute the prosecutor's work product.

The court of appeals held that the communications between the trial court and prosecutor constituted ex parte communications because they were made without all parties being privy to the communication and with the expectation that the matters discussed would remain private between the parties who were involved in the communication. Some of the specific comments made constituted guidance from the trial court to the prosecutor regarding the presentation of his case and discussions regarding the defendant's ongoing request for an interpreter. The statements were strong evidence of bias and partiality on the part of the trial court. The court of appeals held that this lack of impartiality combined with other evidence of ongoing hostility and bias towards the defendant by the trial court showed that the defendant was not afforded the fair trial guaranteed to her by the Constitution.

Did the defendant make a prima facie showing of racial discrimination under Batson?

Kassem v. State, No. 01-07-00463-CR (Tex. App. Houston 1st Dist. 5/8/08)

Yes. Defendant was convicted in the Houston Municipal Court of failure to obey a traffic control device. The Harris County Criminal Court at Law No. 12 affirmed. Defendant appealed.

Kassem argued that the Houston Municipal Court during his trial for failure to obey a traffic control device erred by denying his *Batson* motion because the State used 100 percent of its peremptory strikes toward African-Americans that comprised approximately a third or maybe 40 percent of the panel. The court of appeals agreed. On appeal, the Harris County Criminal Court at Law No. 12 properly determined that the municipal court erred by stating that *Batson* applied only when the defendant was of the same race as the jurors who were struck. However, the county criminal court at law erroneously determined that defendant failed to meet his prima facie burden under *Batson*. Defendant's assertion, which was confirmed by the record, that the State used all of its strikes on jurors of a single race, was held sufficient to meet Kassem's prima facie burden. Additionally, the county criminal court at law erred by holding that the issue of the sufficiency of the evidence was waived. The judgment was reversed and the case was remanded for further proceedings.

2. Interpreters

Did the trial court err by failing to appoint a licensed interpreter for

a witness who did not understand English?

Ridge v. State, 205 S.W.3d 591 (Tex. App.—Waco 2006)

No. At trial Ridge requested that a licensed interpreter be appointed to aid the testimony of one of the alleged victims who did not understand English. That victim did testify using the services of an interpreter that was contacted by the prosecutor. On appeal, Ridge contended that the trial court erred by failing to appoint a licensed interpreter for the testimony of the victim.

The court of appeals held that a trial court has an independent duty to appoint a licensed interpreter if the court is made aware that a defendant or witness does not understand English. However, in this instance, there was nothing in the record that supported Ridge's contention that the person who interpreted the victim's testimony was not a licensed interpreter. Absent evidence in the record to the contrary, the presumption of regularity controls and it is presumed that the interpreter was licensed.

Should the court have provided a deaf-relay interpreter to a defendant who was pre-lingual deaf?

Linton v. State, 246 S.W.3d 698 (Tex. App.—Corpus Christi 2007)

Yes. Linton was charged with driving while intoxicated. Linton was pre-lingually deaf, meaning that she had become deaf at an age younger than the age at which understanding and comprehension of the English language is gained. She did not understand American Sign Language (ASL) and only read at a 4th grade level. After repeated requests from defense counsel and the appointed interpreter a hearing was held regarding Linton's comprehension of the proceedings.

At the hearing a pastor who had known Linton for many years testified and stated that Linton did not understand ASL and had indicated to him on the first day of the proceedings that she was confused and didn't understand the signs being used. An expert testified that Linton read at a 4th grade level and that approximately 20 percent of the interpretation thus far had been finger spelling that was above Linton's comprehension and that the delivery of literal transliteration was insufficient for effective communication with Linton. The expert requested that a deaf-relay interpreter be allowed to work alongside the hearing interpreter. The court did not provide a deaf-relay interpreter and instead appointed a 2nd interpreter to sit at the defense table and "break things down to a level that Linton could understand" during breaks in the trial.

The court of appeals held that the trial court had an obligation to come up with a remedy that would be suitable to overcome the defendant's particular disability. The court of appeals held that once Linton's disability and needs were fully exposed (namely that she has a form of communication that lies somewhere between coded English and ASL) the trial court then had a responsibility to take whatever steps were necessary to insure minimum understanding. The steps taken by the court in appointing a 2nd interpreter did not address the defendant's right to understand the proceedings as they happened. The court was aware of a viable option that could be used to ensure that the defendant understood the proceedings but failed to provide that assistance to the defendant. This failure was reversible error.

3. Evidence

Did the recording of the peace officer's observations by his patrol car dashboard camera qualify as a present sense impression?

Fischer v. State, 252 S.W.3d 375 (Tex. Crim. App. 2008)

No. A trooper stopped defendant's vehicle with the intention of citing defendant for failing to wear a seatbelt, and the trooper subsequently discovered that defendant had been drinking and arrested him for DWI. During the stop, the trooper contemporaneously dictated his observations on to his patrol car videotape. The trial court denied defendant's motion to suppress the trooper's recorded observations during a traffic stop on the ground that they were admissible as a present sense impression under Texas Rule of Evidence 803(1). On appeal of the appellate court's decision that the trooper's taped observations were not admissible as a present sense impression hearsay exception under Rule 803(1), the Court of Criminal Appeal affirmed. The evidence showed that the trooper calmly walked back and forth from his patrol car to defendant several times, and that he carefully and deliberately narrated the results of his DWI field tests and investigation. The court opined that the trooper's statements were testimonial and reflective in nature, and they were the type of statements that were made for evidentiary use in a future criminal proceeding; therefore, they were not the sort of spontaneous, unreflective, contemporaneous present sense impression statements that qualified for admission under Rule 803(1).

Should the video footage of defendant requesting counsel at traffic stop have been suppressed as unfairly prejudicial?

Lajoie v. State, 237 S.W.3d 345 (Tex. App. Fort Worth 2007)

Yes. The video of defendant mentioning an attorney was deemed by the court of appeals inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice (Texas Rule of Evidence 403). It was not harmless error to deny the defendant's motion to suppress.

4. Closing Arguments

Was the prosecutor's argument that the jury had "heard from the State's witnesses, and State's witnesses only" an improper comment on the defendant's failure to testify?

Crocker v. State, 248 S.W.3d 299 (Tex.App.—Houston [1st Dist] 2007)

Yes. The defendant exercised his right not to testify. During closing argument the prosecutor stated that the State and defense have the same right to bring in witnesses through a subpoena and yet the jury had heard only from the State's witnesses regarding who was present at the time of the offense. Defense counsel immediately objected and the objection was sustained. However, when counsel sought an instruction for the jury to disregard the comments and a mistrial the request was denied.

The court of appeals held that the prosecutor's comment amounted to an impermissible comment on the defendant's failure to testify because the victim had testified that only he and the defendant were present at the time of the offense and the prosecutor's comment drew the jury's attention to evidence that only the defendant himself could have provided. The trial court should have instructed the jury to disregard the comment and failure to do so was an error. The court held that they could not say that the error was harmless, so the judgment of the trial court was reversed.

5. Jury Instructions

Was it harmless error for the court to speculate during pretrial jury instructions that one reason a defendant may choose not to testify is because he is guilty?

Duffey v. State, 249 S.W.3d 507 (Tex. App.—Waco 2007)

Yes. During voir dire the judge presented general instructions to the jury regarding the trial procedure. As a part of those instructions the judge informed the jury that the defendant had a right not to testify and gave some examples of reasons why the defendant might choose not to testify. The judge stated that an obvious reason why a defendant might not testify is because he was guilty. The defense counsel and the judge then had an off the record discussion. Immediately afterward, the judge repeated the statement that the defendant may choose not to testify because he is guilty. The court then broke for lunch. Immediately after lunch, defense counsel objected to the prior statements and moved for a mistrial; the trial court denied the motion.

The court of appeals held that it was erroneous for a judge to speculate why the defendant might choose not to testify and the specific comment made by the trial judge here was erroneous. Based on a review of the full trial transcript and the totality of the circumstances it was clear that the judge's comment did not contribute to the conviction or punishment because the judge discussed the presumption of innocence of every defendant and the basic constitutional right to remain silent. Therefore, the error was harmless.

Did the evidence give rise to a disputed fact issue warranting a jury instruction to determine the legality of the traffic stop?

Madden v. State, 242 S.W.3d. 504 (Tex.Crim.App 2007)

No. In reiterating it prior holdings, the court reminded all that to be entitled to such a jury instruction (1) the evidence heard by the jury must raise an issue of fact, (2) that the evidence must be affirmatively contested, and (3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining evidence.

G. Judgments

1. Cumulative Fines

Does the "concurrent sentence" provision of Section 3.03(a) apply to the entire sentence, including fines?

State v. Crook, 248 S.W.3d 172 (Tex. Crim. App. 2008)

Crook was charged by a single indictment and convicted of 13 counts of barratry (Section 38.12, Penal Code). The judge, over the objection of the prosecution, placed defendant on probation on each count, with the periods of probation to run concurrently, and ordered the $10,000 fine for each count to run concurrently instead of consecutively. The 8th Court of Appeals in El Paso affirmed the sentence. The State appealed, arguing that the defendant's fines should have run consecutively.

Four of the nine members of the Court of Criminal Appeals rejected such argument holding that the concurrent sentences provision of Section 3.03(a), Penal Code, either predated Section 3.03(a) or relied on cases decided prior to its adoption.

Such cases, the plurality concluded, provided little guidance on whether the concurrent sentences provision of Section 3.03(a) applied to fines. Thus, the concurrent sentences provision of Section 3.03(a) applied to the entire sentence, including fines. The judgment was affirmed.

Commentary: While the Court's ruling certainly gave Mr. Crook something to be happy about, attempts to infer the reasoning of *Crook* into municipal and justice court cases is attenuated at best. This case received a substantial amount of attention by some in the media and many "bean counters" in local government. While Judge Cochran's "show stealing" dissent successfully stoked the imagination and fear of a lot of readers, when it comes to the adjudication of Class C misdemeanors, the opinion (read in its entirety) has limited potential implications. See, Ryan Kellus Turner, *By Hook or Crook, I Maintain that Everything is Fine*, 17 Municipal Court Recorder (May 2008).

2. Restitution

Must restitution be included in the oral pronouncement of the sentence in order to be included in the judgment?

Weir v. State, 252 S.W.3d 85 (Tex. App.—Austin 2008)

Yes. Weir was adjudicated guilty of burglary after the court found that he violated the terms of his deferred adjudication agreement. The court orally sentenced him to 10 years in prison and then in the written judgment also assessed amounts due for court costs, attorney's fees, and restitution.

In the past, the Court of Criminal Appeals has pronounced that restitution is punishment. The court of appeals, in this instance, held that because restitution is punishment it must be included in the oral pronouncement of the sentence in order to be properly included in the written judgment. Court costs are at least partially punitive in effect and must also be included in the oral pronouncement in order to be properly included in the written sentence. However, appointed attorney's fees are not punishment and are not required to be included in the oral pronouncement in order to be properly included in the written judgment.

Commentary: While not specific to deferred disposition, this case provides an ample basis to argue by analogy that restitution in cases adjudicated pursuant to Chapter 45 must be included in the oral pronouncement of the sentence in order to be included in the judgment. This case also alludes to the lurking issue of how to classify court costs.

3. Jail Credit

Is a defendant entitled to credit for time spent in jail prior to his sentencing when the written terms of his plea agreement are silent with respect to awarding that credit?

In re Gomez, No. 03-08-00512-CV (Tex.App. Austin 9/16/08)

Yes. Awarding back-time credit is mandated by Article 42.03(2)(a), Code of Criminal Procedure. A trial court has a mandatory ministerial duty to grant a defendant's motion for a judgment nunc pro tunc reflecting the proper amount of jail credit.

H. Bond Forfeiture

Did the trial court err in taking judicial notice of a bail bond during proceedings to finalize bond forfeiture?

Kubosh v. State, 241 S.W.3d 60 (Tex. Crim. App. 2007)

No. While the judgments nisi and bonds were not formally introduced into evidence by the State during bond forfeiture proceedings and the trial judge did not clearly announce that he had taken judicial notice of the documents, the written judgments recited that they were in the trial court's file prior to the hearing and that he had considered them.

In a motion for new trial, which was denied, Kubosh challenged the sufficiency of the evidence. The surety did not argue that the terms of the judgments nisi were in any respect at variance with the tenor of the bonds. The Court of Criminal Appeals held that judicial notice could be taken, under the common law, of both the judgments nisi and the bonds. Although Article 22.10 of the Code of Criminal Procedure provides that civil rules govern bond forfeiture proceedings, Texas Rule of Evidence 101(d) indicates that proceedings regarding bail are not covered by the Rules of Evidence (hence, neither is the judicial notice provision contained in Rule 201). The Court affirmed the judgment of the court of appeals.

Note: The Court had previously held that a trial court may take judicial notice of the judgment nisi. See, *Hokr v. State*, 545 S.W.2d 463,466 (Tex. Crim. App. 1977).

Which party has the burden of proof with respect to equitable grounds for remittitur of forfeited bail bonds?

McKenna v. State, 247 S.W.3d 716 (Tex. Crim. App. 2008)

The surety has the burden of proof. In this case McKenna owned a bail bonds company that issued a bond

for a defendant charged with a felony drug offense. The amount of the bond was $25,000. The defendant failed to appear for trial. A judgment nisi was entered against her and McKenna jointly and severally for the $25,000. A capias was also issued for the defendant's arrest. At the bond forfeiture hearing, McKenna presented the testimony of an employee of his who had assisted McKenna in attempting to locate the defendant and have her arrested when she failed to appear in court. McKenna argued for a substantial remittitur because he had expended substantial efforts in locating and apprehending the defendant and the State failed to show any evidence that it was prejudiced by the seven month delay in apprehending the defendant. The State argued that equity did not require remittitur.

The Court of Criminal Appeals held that the even though the State has superior access to documents and facts important for proof the surety has the burden of proof with respect to the existence of equitable grounds for the remittitur of all or part of the forfeited bond.

IV. Ordinances
A. Smoking

Did the trial court err in holding the "necessary steps" provision of the smoking ordinance unconstitutionally vague and permanently enjoining its enforcement?

Roark & Hardee LP v. City of Austin, 522 F.3d 533, 538 (5th Cir. Tex. 2008)

Yes. What "necessary steps" the owners had to take (such as removing ash trays and asking smokers to stop or leave) were sufficiently clear. The guidelines provided standards to inspectors and a "how to" guide for the owners. The owners often failed to implement any steps to prevent patrons from smoking or even tried to circumvent the ordinance. Charges were usually filed only after three notices. The owners could use common sense to implement the types of steps needed for enforcement.

Attention City Attorneys: In this case the City of Austin was also enjoined from imposing a fine in excess of $500. While it is likely that a smoking ordinance violation could carry a higher fine pursuant to Section 54.001 of the Local Government Code, in this case the ordinance stated "A person who violates the provisions of this chapter commits a Class C misdemeanor, punishable . . . by a fine not to exceed $2,000. A culpable mental state is not required for a violation of this chapter, and need not be proved." Such language should be avoided in drafting penal ordinances as it violates Section 6.02(f) of the Penal Code.

Were the plaintiffs entitled an injunction because the Houston smoking ordinance was pre-empted by state law?

Houston Ass'n of Alcoholic Bev. Permit Holders v. City of Houston, 508 F. Supp. 2d 576 (S.D. Tex. 2007)

No. Association was not entitled to preliminary injunction to bar enforcement of ordinance banning smoking in public places because the ordinance was not preempted by Sections 109.57, 1.06, or 5.31 of the Alcohol Beverage Code because these sections did not regulate smoking in licensed establishments and the ordinance in question did not regulate the sale or distribution of alcohol.

The court denied the association's request for a preliminary injunction and allowed the City of Houston to enforce its ordinance.

B. Zoning

Did the city's zoning ordinance violate the 1st Amendment and was the city limited to using criminal prosecution to enforce violations of the zoning ordinance?

S*martt v. City of Laredo*, 239 S.W.3d 869 (Tex. App. Amarillo 2007)

No. The ordinance was content neutral under the 1st Amendment and simply regulated the time, place, and manner of sexually oriented business activity. The mere fact that the ordinance also authorized criminal prosecution and the imposition of fines did not in anyway restrict the City from also seeking an injunction to prohibit the violation of the ordinance. The court of appeals affirmed the trial court's judgment.

C. Sexually Oriented Businesses

Was the municipal court correct when it determined that it did not have jurisdiction over violations of a fine-only offense related to sexually oriented businesses?

State v. Chacon, No. 04-07-0069-CR (Tex.App. San Antonio 9/17/08)

Yes. Chacon was one of three employees working at XTC Cabaret, issued a citation for violating a City of San Antonio ordinance regulating "human display establishments." Violation of the ordinance carried a maximum fine of $2,000. The citations were filed in the San Antonio Municipal Court of Record. Chacon and her coworkers filed a plea to the jurisdiction of the court. The municipal court agreed and dismissed the cases. Pursuant to Article 44.01 of the Code of Criminal Procedure, the State appealed to the county court, which sustained the ruling of the municipal court. The

State then perfected its appeal to the court of appeals arguing that the county court erred in finding that the penalty provided within the city ordinance conflicts with Texas Local Government Code Chapter 243. The court of appeal affirmed the ruling of the municipal and county courts holding that the city ordinance did contain an enforcement provision that directly conflicted with the enforcement provision of a state statute Section 243.010(b), Local Government Code (providing that person commits a Class A misdemeanor if the person violates a municipal or county regulation adopted under pursuant to Chapter 243). The ordinance's enforcement provision was therefore deemed preempted.

In a dissent, Justice Hilbig took issues with the majority's construction of Chapter 243. He interprets Section 243.010(b), as an additional grant of authority, rather than a limitation on local governments. Through its legislative history, he asserted that Chapter 243 was not intended to diminish the authority of a local government to regulate sexually oriented businesses. Thus, the City of San Antonio, relying on its authority as a home-rule city, was legally allowed to pass the ordinance in question and set the penalty as a Class C misdemeanor and that the majority opinion renders Section 243.010(b) meaningless.

V. Judicial Conduct

May a justice of the peace who is also an attorney be appointed to represent criminal defendants in appellate proceedings?

Op. Tex. Atty. Gen. No. GA-0651 (7/29/08)

Neither Section 82.064 of the Government Code nor Article 26.06 of the Code of Criminal Procedure prohibits a justice of the peace who is an attorney from accepting an appointment to represent an indigent criminal defendant at the appellate level. Both implicitly recognize a justice of the peace's authority to take such an appointment.

A justice of the peace who is also an attorney is subject to the Code of Judicial Conduct and the Texas Disciplinary Rules of Professional Conduct. Whether such a justice of the peace may be appointed to represent criminal defendants in appellate proceedings without violating the Code of Judicial Conduct or the Disciplinary Rules of Professional Conduct is a question requiring the resolution of fact issues and cannot be determined by the Office of the Attorney General.

Policy Issues continued from page 3

and shows the paternal role that the government is assuming in protecting the children. The next two stated purposes of the Juvenile Justice Code above relate to the safety of the public and the welfare of the community that we discussed. The final two reasons mention the concept of punishment, accountability, and responsibility. These support the public policy of educating the kids about the consequences of their actions and setting them on the right path.

The public policy on which status offenses stand can be seen in the specific statutes themselves. The concern for the protection of children in some of the conduct that is prohibited (drinking alcohol and smoking tobacco, for instance). Some of the prohibited conduct reflects society's concern for public safety (underage driving, juvenile curfew). Our concern for setting the right example and keeping children on the right path can be seen in the penalties judges can assess for the commission of status offenses. For instance, a judge may require a student to attend a special program to train in self-esteem and leadership.

The next time you see a minor or child in your court or at your window, keep these public policy reasons in mind. Upon first glance, it may just seem like another kid that has done something stupid, but we need to remember our role in protecting them, protecting society, and redirecting their wayward steps. We need to point at that sign in front of the roller coaster and let them know they aren't ready for this ride yet.

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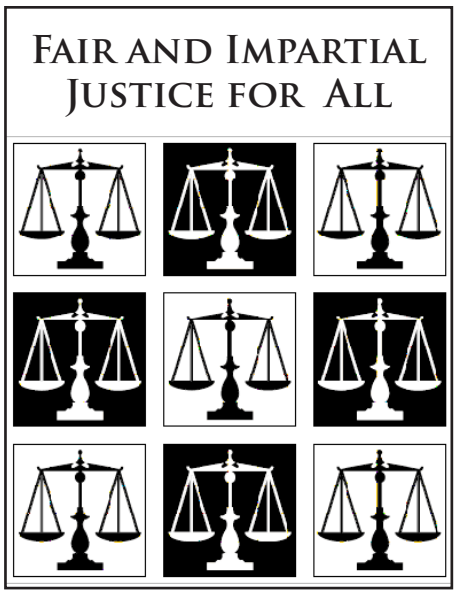
[i] *Black's Law Dictionary* 1110 (Bryan A. Garner ed., 8th ed., Thomson West 2004).
[ii] http://www.merriam-webster.com/dictionary/status
[iii] http://www.merriam-webster.com dictionary/status
[iv] *Black's Law Dictionary* 1112 (Bryan A. Garner ed., 8th ed., Thomson West 2004).
[v] http://criminal.findlaw.com/crimes/juvenile justice/juveniles-and-age-offenses.html
[vi] http://dictionary.law.com/default2 asp?selected=1444&bold=
[vii] *Black's Law Dictionary* 1144 (Bryan A. Garner ed., 8th ed., Thomson West 2004).
[viii] Tex. Fam. Code § 51.01(3).
[ix] Tex. Fam. Code § 51.01(1).
[x] Tex. Fam. Code § 51.01(4).
[xi] Tex. Fam. Code § 51.01(2)(A).
[xii] Tex. Fam. Code § 51.01(2)(C).



TO MARK OR NOT TO MARK, IS YOUR PATROL VEHICLE LEGAL??

by Randy Harris, Chief Marshal, City of San Angleo

How many marshals are operating illegally unmarked vehicles around the State? That is the real question. While researching the law on this recently, I discovered that Marshal Offices are not in the list of exempt agencies under Transportation Code, Section 721.005 that can utilize unmarked vehicles.

Let's back up a little to Transportation Code, Section 721.004 which requires all municipally owned vehicles to be marked clearly on each side with the name of the municipality and the office or the department having custody of the vehicle. The lettering must be clearly legible from 100 feet away. There are some limited exceptions to this rule but many municipalities assume that law enforcement is exempt. This is not the case, as my research revealed.

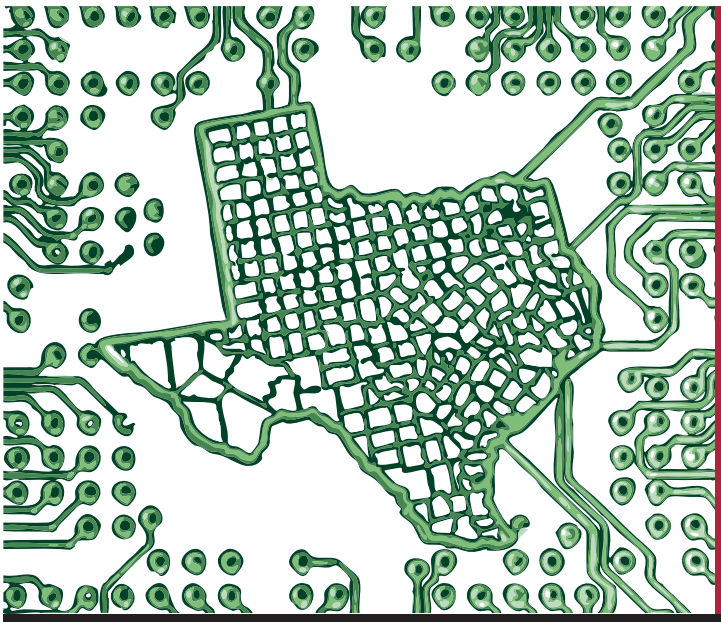
The only way an unmarked vehicle may be used is to perform an official duty by a police department, magistrate, medical examiner, code enforcement officer while enforcing environmental criminal laws, fire marshal, arson investigator, or when investigating fraud or mismanagement within the municipality. There is even a fine authorized for violation that ranges from $25.00 to $100.00 (721.006).

Nowhere do you see marshals listed as exempt. Yet, I know that there are a good many marshals in Texas operating unmarked vehicles illegally. Warrant officers working for the police department are covered by their employment with the police department and can operate in unmarked vehicles.

Marshals serving warrants need stealth on their side for some fugitive investigations but it is not legal for them to do so. How many times has that one person that evaded you for months spotted your marked unit and fled into the unknown? Several months of investigation and work is gone in a puff of smoke because you were made. It is circumstances such as this that justify the need for marshals to have the availability of stealth on their side.

Most of you want to know what we can do about this. The answer is simple; there must be a legislative change. Several marshals around Texas are meeting with their representatives to change the wording of the law to include the phrase "or when engaged in warrant service and fugitive apprehension duties" to Section 721.005. Hopefully it will be put forth in the next legislative session.

Now remains the question of what to do until there is a legislative change. The only option you have is to legally mark your vehicles. It can be as simple as placing two inch contrasting letters on all sides of the vehicle indicating the name of the municipality and the department/office having custody of the vehicle. Or, it can be all out with lights, emblems, and emergency equipment as outlined in Transportation Code, Section 546.001, 546.002, 546.003, 547.305, 547.702, and 502.2015. Regardless, you should seek guidance from your city attorney and risk manager before proceeding to insure that you are in compliance with the law and with the wishes of your municipality.



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