Driving While Intoxicated
Case Law Update

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A. MENTAL OR PHYSICAL FACULTIES

Herrera v. State, 11 S.W.3d 412 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd).
McGinty v. State, 740 S.W.2d 475 (Tex.App.-Houston [1st Dist.] 1987, pet.ref'd).
Sims v. State, 735 S.W.2d 913 (Tex.App.-Dallas 1987, pet. ref'd).

Use of language "Loss of normal use of mental and physical faculties" in charging instrument is proper & the State need not elect because the "and" becomes "or" in the jury instructions.

B. "PUBLIC PLACE" IS SPECIFIC ENOUGH

Ray v. State, 749 S.W.2d 939 (Tex.App.-San Antonio 1988, pet. ref'd).
King v. State, 732 S.W.2d 796 (Tex.App.-Fort Worth 1987, pet. refd).

Allegation of "public place" is a sufficiently specific description.

C. STATE DOES NOT HAVE TO SPECIFY WHICH DEFINITION OF INTOXICATION IT IS RELYING ON IN THE INFORMATION

State v. Barbernell, 257 S.W.3d 248 (Tex.Crim.App.2008).

The State does not have to allege in the charging instrument which definition of "intoxicated" the defendant is going to be prosecuted under. The definitions of "intoxicated" do not create two manners and means of committing DWI. The conduct proscribed is the act of driving while intoxicated. The two definitions only provide alternative means by which the State can prove intoxication and therefore are not required to be alleged in the charging instrument. The Court found that it's holding in *State v. Carter*, 810 S. W. 2d 197 (Tex.Crim.App.1991) was flawed, and it was explicitly overruled by this opinion. This will greatly simplify charging language and may do away with the need for synergistic charges. Bottom line, when you say "intoxicated," you've said it all.

D. NO MENTAL STATE NECESSARY IN DWI CHARGE

1. PRE §49.04

Hardie v. State, 588 S.W.2d 936 (Tex.Crim.App. 1979).

2. POST §49.04

Lewis v. State, 951 S.W.2d 235 (Tex.App.-Beaumont 1997, no pet.).
Reed v. State, 916 S.W.2d 591 (Tex.App.-Amarillo, 1996, pet. ref'd).
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Aguirre v. State, 928 S.W.2d 759 (Tex.App.-Houston [14th Dist.] 1996, no pet.).

E. UNOBJECTED TO ERROR IN CHARGING INSTRUMENT

McCoy v. State, 877 S.W.2d 844 (Tex.App.-Eastland 1994, no pet.).

Where charging instrument mistakenly alleged loss of "facilities" and no objection was made prior to trial, the judge could properly replace the term with "faculties" in the jury instruction.

F. BAC GREATER THAN .15 = ELEMENT

Van Do v. State, No. PD-0556-20, 2021 Tex. Crim. App. LEXIS 926, 2021 WL 4448956

It appeared from the long line of cases that it was well settled law that the "greater than .15 BAC" was and element not an enhancement. This case is interesting. Here the State failed to read the "greater than .15 BAC" allegation during the guilt and innocence phase. There was no objection by the defense. The jury charge did not include the "greater than .15 BAC" allegation. Jury found the defendant guilty. Punishment was to the court not the jury. During the punishment phase, defense counsel objected to the enhanced element at this time and claimed that the State proceeded on a loss of use case. The State responded by asserting that the "greater than .15 BAC" is a punishment element. On appeal the State conceded that the "greater than .15 BAC" was an element and should have been submitted to the jury at the guilt phase. The Court of Appeals agreed. However, the COA held that the error was not harmless beyond a reasonable doubt. ON PDR by the State, the Court of Criminal Appeals, held that the allegation was not abandoned by the State, that the defendant was on notice that the State filed to read an allegation that the defendant believed to be an element of the offense and did not object, by failing to object, he forfeited any error in connection with the State's failure to read the allegation. Furthermore, the defendant was found to have committed all the elements of the class A misdemeanor DWI. Lastly, any error in failing to submit the "greater than .15 BAC" allegation to the jury at the guilt phase was harmless beyond a reasonable doubt.

Ramjattansingh v. State, 548 S.W.3d 540 (Tex.Crim.App. 2018).

The Court granted review to consider whether the State's choice to include the extra element of "at or near the time of the commission of the offense," and the State's acquiescence in a jury charge including that same extra element, takes this case out from under *Malik*. *Malik* set forth the standard for determining what the elements are and stated that the elements are "defined by the hypothetically correct jury charge for the case, a charge that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. The Court held that we measure the sufficiency of the evidence against the elements of the offense as they are defined by the hypothetically correct jury charge. The Court reversed the COA and remanded the case for proceedings consistent with this holding.

Ramjattansingh v. State, 530 S.W.3d 259 (Tex. App. – 1st Dist. Houston 2017).

This was a DWI case where the State alleged driving while intoxicated with an alcohol concentration of at least .15 "at the time of analysis and at or near the time of the commission of the offense" in the charging instrument. The jury found the defendant guilty. Defendant appealed and claimed the evidence was not legally sufficient to prove "at or near the time of the offense." The Court found that the State invited error by including "at or near the time of the offense" in the information and jury charge, therefore, it will be held to a higher burden of proof. The evidence was not sufficient to find beyond a reasonable doubt that the defendant's BAC was .15 or more "near the time of the offense."

*****Judgment reversed and rendered a judgment of acquittal and remanded for a new trial. See 548 S.W.3d 540 (above).**

Pallares-Ramirez v. State, No. 05-15-01347-CR, 2017 Tex. App. LEXIS 3, 2017 WL 33738 (Tex. App. - Dallas 2017).

This case involved a conviction for a DWI with a BAC greater than .15. The Defendant was arraigned on a Class B DWI and the elevated BAC was presented as a punishment issue. However, the Information alleged the Class A offense. The jury found him guilty as charged in the Information. The State conceded error on the issue and acknowledged that the elevated BAC is in fact an element of the class A misdemeanor DWI rather than an enhancement. The Court found that the defendant was not harmed by this mischaracterization because the defendant was aware of the charge against him (he had notice) from the information, the defendant took the position throughout the trial that the State had to prove his BAC was greater than a .15, the jurors were aware that the BAC threshold at issue was a .15 from the onset of voir dire, the jurors were told that the range of punishment was that of class A misdemeanor, and the jurors found "true" that the defendant had a BAC greater than .15.

Castellanos v. State, 2016 Tex. App. LEXIS 11587 (Tex. App. – Corpus Christi – Edinburg (13th Dist) 2016)

This case establishes that the .15 or greater BAC result is an element, and the State has the burden to prove it at the guilt/innocence stage.

Navarro v. State, No. 14-13-00706-CR, 2015 WL 4103565 (Tex.App.-Houston (14th Dist.) 2015)

Prior to this case there was a debate as to whether the aggravated DWI of greater than 0.15 should be treated as an enhancement or not. This decision makes clear that the so-called 0.15 enhancement is actually not an enhancement but is in fact an element of a Class A misdemeanor offense. The court held that a person's blood alcohol concentration (BAC) level provides the basis for a separate offense under 49.04(d) and is not merely a basis for enlargement of the punishment range. Evidence of a blood alcohol level of 0.15 or greater represents a change in the degree of the offense, from Class B to Class A misdemeanor, rather than just an enhancement of the punishment range. The practical impact is that 0.15 or greater at time of test is something the State must prove in the guilt innocence phase, and it raises the tactical issue for the State to consider whether to request a lesser instruction of DWI.

G. READING DWI ENHANCEMENT AT WRONG TIME

Pratte v. State, No. 03-08-00258-CR, 2008 WL 5423193 (Tex.App.-Austin 2008, no pet.).

The court allowed the State to read the enhancement paragraph in front of the jury that alleged a prior DWI conviction over the defendant's objection. *Article 36.01 of the Code of Criminal Procedure* says that when prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment. In this particular case, the defendant stipulated to the prior listed in the enhancement after the information was read and before the State called its first witness, so the Court holds that the asserted error did not contribute to the defendant's conviction.

H. DWI W/CHILD – ONE CASE PER DRIVING INCIDENT:

Gonzalez v. State, 516 S.W.3d 18 (Tex.App.- Corpus Christi – Edinburg 2016)

The "allowable unit of prosecution" under Penal Code 49.045 (DWI w/ Child) is "one offense for each incident of driving or operating a motor vehicle" not for each child in the vehicle.

State v. Bara, No. 11-15-00158-CR, 2016 WL 4118659 (Tex. App. 2016)

This case addressed the question of whether a separate charge can be filed for each child in the car when the driver is arrested for DWI with Child. The Court found that for the offense of DWI w/child there is only one allowable unit of prosecution for each incident of driving a vehicle rather than for each child present in the car.

I. STATUTE OF LIMITATION FOR DWI 3RD OR MORE

Ex Parte Smith, NO. 12-16-00260-CR, 2-17 Tex. App. LEXIS 4958, 2017 WL 2351114 (Tex. App. - Tyler 2017).

The charged offense of DWI 3rd or more is governed by CCP Art. 12.01(7), which sets the limitation period of three years for felonies not specifically listed in subsections one through six of Article 12.01. Article 12.03(d) does not apply.

II. VOIR DIRE

A. PROPER QUESTION/STATEMENT

Kirkham v. State, 632 S.W.2d 682 (Tex.App.-Amarillo 1982, no pet.).

Voir dire question, "Do you believe a person is best judge of whether they are intoxicated?" is proper and is not a comment on defendant's right not to testify.

Vrba v. State, 151 S.W.3d 676 (Tex.App.-Waco 2004, pet. ref'd.).

The following questions asked by the prosecution were proper in that they were not "commitment questions":

- *"What are some signs that somebody is intoxicated?"*
- *"Who thinks that the process of being arrested would be something that might sober you up a little bit?"*
- *"Why do you think someone should be punished?"*
- *"Which one of these [four theories of punishment] is most important to you in trying to determine how someone should be punished and how much punishment they should receive?"*

B. IMPROPER QUESTION/STATEMENT

Harkey v. State, 785 S.W.2d 876 (Tex.App.-Austin 1990, no pet.).

Defense attorney asking member of jury panel "if they could think of a reason why anyone would not take such a (breath) test" held to be improper in its "form."

Standefer v. State, 59 S.W.3d 177 (Tex.Crim.App. 2001).

The question, "If someone refused a breath test, would you presume him/her guilty on their refusal alone?" was held to be improper as it constitutes an attempt to commit the juror. This case also reaffirms that a juror may permissibly presume guilt from evidence of a refusal to give a breath or blood test.

Davis v. State, No. 14-03-00585-CR, 2006 WL 2194708, (Tex.App.-Houston [14th Dist.] 2006, no pet.) (not designated for publication).

Even if State established that breath-testing device was functioning properly at the time of the test, that the test was properly administered, and that defendant's test result was 0.08 or above, defendant was still entitled to challenge, and the jury to disbelieve, the reliability of the methodology used by the device, and State's misstatements to the contrary during voir dire required reversal.

C. CHALLENGE FOR CAUSE

1. PRESUMPTION OF INNOCENCE

Harkey v. State, 785 S.W.2d 876 (Tex.App.-Austin 1990, no pet.).

Jurors stating, in response to suggestion by defense counsel that defendant "must be guilty of something or he wouldn't be there" did not provide a basis for challenge for cause.

2. ONE WITNESS CASE

Zinger v. State, 932 S.W.2d 511 (Tex.Crim.App. 1996).
Leonard v. State, 923 S.W.2d 770 (Tex.App.-Fort Worth 1996, no pet.).
Castillo v. State, 913 S.W.2d 529 (Tex.Crim.App.1995).
Garrett v. State, 851 S.W.2d 853 (Tex.Crim.App.1993).

Statement by venire person that "testimony of one witness would not be enough for him to convict even if that testimony proved all elements beyond a reasonable doubt" may make that juror challengeable for cause but be very careful and read the above cases before you try it.

3. JURORS WHO WOULD REQUIRE BREATH TEST TO CONVICT

McKinnon v. State, No. 05-03-00671-CR, 2004 WL 878278 (Tex.App.-Dallas 2004, pet. ref'd) (not designated for publication).

Question of "Would you require the State to bring you a blood or breath test?" is not improper "commitment question," and a juror that says that they would not be able to convict without such a test is subject to a challenge for cause.

Fierro v. State, 969 S.W.2d 51 (Tex.App.-Austin 1998, no pet.).

Prospective juror who stated he would be unable to convict in the absence of a breath test was challengeable for cause as he had a bias against a phase of the law on which the State was entitled to rely. He would be holding State to a higher level of proof of intoxication than the law required.

4. JURORS ABILITY TO CONSIDER FULL RANGE OF PUNISHMENT

Glauser v. State, 66 S.W.3d 307 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd).

This was an intoxication manslaughter case where the trial court properly denied the defense attorney's challenge for cause on jurors who could not consider probation under the specific facts of the case being tried that went beyond the elements of the offense. The Court cited the standard set out in *Sadler v. State*, *977 S.W.2d 140 (Tex.Crim.App.1998),* which said that a prospective juror is not challengeable for cause because he or she will use facts to determine punishment. A prospective juror is not challengeable for cause based on inability to consider the full range of punishment so long as he or she can consider the full range of punishment for the offense as defined by law. The proper question to determine bias against the law regarding punishment is "Whether in a proper intoxication manslaughter case as defined by statute, where the facts justify it, the venire person could fully and fairly consider the entire range of punishment, including the minimum and maximum."

5. BIAS TOWARDS POLICE OFFICERS DOES NOT ALWAYS MAKE JURORS CHALLENGEABLE

Madrid v State, NO. 01-15-00977-CR, 2017 Tex. App. LEXIS 3979, 2017 WL 1629515 (Tex.App. - Houston 2017).

During jury selection one of the venire members stated that he would give police officers more credibility as he holds them in high regard. The same venire member also stated that he could uphold the oath and render a true verdict. The trial court did not err in denying the defendant's challenge for cause due to the fact that the venire member was able to follow the law provided by the court.

Simpson v. State, 447 S.W.3d 264 (Tex.Crim.App. 2014).

During voir dire jurors stated the following: "Police officers are more credible, and their training causes their testimony to carry more weight." "If unsure who to believe, would go with police officer's testimony because they are more credible." "Being a trained police officer, they would have the benefit of any doubt." Court found these answers did not render the jurors challengeable for bias when followed by a promise not to prejudge credibility of any witness = vacillating. Court held it does not require complete impartiality as it is human nature to give one category of witness a slight edge over another.

6. LYING TO THE COURT DOES NOT AUTOMATICALLY MAKE A JUROR "DISABLED" WITHIN THE MEANING OF CCP 36.29

Price v. State, No. 14-15-00987-CR, 2017 Tex. App. LEXIS 6301, 2017 WL 2959636 (Tex. App.- Houston 2017)

In this capital murder case, one of the empaneled jurors disclosed to other jurors that he had seen news coverage of the case, however, he did not discuss any details of what he had seen. Another juror reported this information to the Court. When the Court asked the juror about it, he denied having seen any news

coverage or hearing anyone else discussing it. This juror was also asked if there was anything that tainted his view of the evidence and whether or not he could still follow the oath that he will decide the case on the evidence he will see and hear in the courtroom, along with the law given by the court. The juror stated that he could. The trial court denied the defense's motion to disqualify the juror on the basis that *CCP Art. 36.29* had not been satisfied. The Court made clear that there is a distinction between a venireperson being disqualified and juror being disabled from sitting. Although lying to the court would have made venireperson subject to a challenge for cause, it does not render a juror disabled from sitting.

D. DEFENDANT HAS 6TH AMEND RIGHT TO A PUBLIC TRIAL= VOIR DIRE

Cameron v. State, 535 S.W.3d 574, (Tex.App. – San Antonio 2017).

The 6th Amendment right to a public trial extends to voir dire. In this case, the friends and family of the Defendant were instructed by the bailiff to leave the courtroom in order to accommodate a large venire panel. The family believed they were not allowed to re-enter the courtroom. The defense objected to a violation of the Defendant's right to a public trial. The court repeatedly stated that the courtroom was not "closed" but there was NO room for the family or any other members of the public. In addition, after the venire panel was seated, the family was never advised that they could re-enter the courtroom. This court held that the Defendant met her burden and that the courtroom had been "closed." The court reversed the murder conviction. **See also:** *Johnson v. United States, 520 U.S. 461, 117 S. Ct. 1544, 137 L.Ed. 2d 718 (1997) and Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 175 L.Ed 2d 675 (2010).*

III. DWI ROADBLOCKS

A. ARE ILLEGAL

Holt v. State, 887 S.W.2d 16 (Tex.Crim.App. 1994).

Held that statewide plan setting out guidelines is needed to make use of roadblock constitutional. Until that time, DWI roadblocks are illegal.

B. AVOIDING ROADBLOCK CAN PROVIDE BASIS FOR STOP

Johnson v. State, 833 S.W.2d 320 (Tex.App.-Fort Worth 1992, pet. ref'd).

Here officer had reasonable suspicion to stop the suspect, and that reasonable suspicion was not affected by the presence of the roadblock.

IV. TRAFFIC VIOLATIONS

You will often find the traffic stop was based on what the officer perceived to be a moving violation. Locating the particular violation can often be a difficult process. To assist you I am including this list of common traffic violations along with the citation to the Transportation Code.

Compliance with Traffic Control Device Unsafe	*§544.004*
Passing to the left of another vehicle	*§545.053*
Passing in a "no passing" zone	*§545.055*
Unsafe Passing to the right of another vehicle	*§545.057*
Driving on Improved Shoulder	*§545.058*
Failure to Drive within a Single Lane	*§545.060*
Following too Closely behind another vehicle	*§545.062*
Passing a School Bus	*§545.066*
Improper turn at Intersection	*§545.101*
Improper use or of Failure to use turn signal	*§545.104*
Failure to signal stop/sudden stop	*§545.105*
Improper stop/Failure to stop at intersection	*§545.151*
Failure to Yield Right of Way at intersection	*§545.153*
Failure to/Improper Yield to Emergency Vehicle	*§545.156*
Improper stopping/parking (i.e. in an intersection)	*§545.302*
Driving at an unsafe speed	*§545.351*
Speed Limits when not otherwise posted	*§545.352*
Reckless Driving	*§545.401*
Leaving Vehicle Unattended	*§545.404*
Driving too slow	*§545.363*
Transporting a Child w.o. child safety seat	*§545.412*
Failure to wear seat belt	*§545.413*
Transporting child in bed of pickup truck	*§545.414*
Improper backing of vehicle	*§545.415*
Driving with operators view obstructed	*§545.417*
Racing (includes rapid acceleration "peeling out"	*§545.420*
Driving through drive way - parking lot	*§545.422*
Failure to Drive within Single Lane/Unsafe lane change	*§545.060*
Driving w.o. lights on	*§547.302*
Absence of License Plate Light	*§547.322*
Tail lamp not emitting plainly visible red light	*§547.322*
Tinted Windows (i.e. too much)	*§547.613*
Failure to display inspection sticker	*§548.602*
Displaying fictitious inspection sticker	*§548.603*
Operating a vehicle in dangerous mechanical condition	*§548.604*
Striking Unattended Vehicle	*§550.024*
Striking Fixture or Highway Landscaping	*§550.025*

V. BASIS FOR VEHICLE STOP LEGAL STANDARD

Stone v. State, 685 S.W.2d 791 (Tex.App.-Fort Worth 1985), aff'd 703 S.W.2d 652 (Tex.Crim.App. 1986).

Need only be reasonable suspicion to justify stop. (Definition of that standard included in this opinion).

A. OFFICER'S MISTAKE OF FACT/LAW WILL NOT MAKE STOP ILLEGAL.

Daniel v. State, No. PD-0037-22

The officer stopped the defendant for Failure to Maintain a Single Lane, Transportation Code Section 545.060. Later the defendant was found to be DWI. State v. Hardin, 664 S.W.3d 867 (Tex. Crim. App. 2022), had not been decided at the time of the stop. The court held that the officer's interpretation " was entirely reasonable in view of the nuanced statutory language and conflicting caselaw from this Court and the intermediate courts of appeals interpreting it."

** Be aware of ***State v. Hardin***, this case will not likely save an officer's misinterpretation of this statute moving forward.

State v. Varley, No. 02-15-00076-CR, 2016 WL 4540491 (Tex. App. – Fort Worth 2016).

Officer's mistaken belief that Defendant violated statute by driving with only one functioning brake light was reasonable. Because the mistake of law was "reasonable" it provided sufficient reasonable suspicion to justify the traffic stop.

State v. Torrez, No. 490 S.W. 3d 279, (Tex.App.-Fort Worth 2016, pet ref'd)

A stop based on an officer's observation of a non-functioning headlight resulted in a DWI. Before leaving the scene, the officer tested the headlights and found that, at that time, both worked. At the MTS hearing, only the officer's testimony supported finding that the headlamp did not function as the vehicle approached. Pointed straight ahead, the in-car camera did not video the vehicle as it headed toward the patrol car. The trial judge found the officer credible, but granted the MTS after concluding the officer made a mistake. Reversing this ruling on state's appeal, the court held that reasonable suspicion may be validly based on articulated facts later found to be inaccurate; in other words, a stop may be based on a reasonable mistake of fact. Also, the trial court mistakenly relied on the repeatedly viewed video which did not factually negate the officer's initial belief.

B. TICKETS THAT PROVIDED BASIS FOR STOP INADMISSIBLE

Nevarez v. State, 671 S.W.2d 90 (Tex.App.-El Paso 1984, no pet.).

Error to allow State to elicit testimony that traffic tickets were issued in connection with DWI stop.

C. INFORMATION FROM CITIZEN/POLICE RADIO/ANONYMOUS CALL

1. SUFFICIENT BASIS FOR STOP

State v. Adrian, No. 09-20-00041-CR, 2021 Tex. App. LEXIS 817, 2021 WL 358395 (Tex.App.–Beaumont 2021). Unpublished.

This stop was based solely on two 9-1-1 calls from the same caller. Defendant filed a motion to suppress alleging that the officer did not have reasonable suspicion for the stop. The trial court held that the stop of the defendant was not justified as an exception to the warrant requirement because the officer lacked probable cause to believe that a traffic violation occurred. The State appealed. This court found that the officer had reliable information from the 911 caller who called twice, identified the vehicle, described the

driver's erratic behavior, gave a location, and the caller stated that they believed that the driver was intoxicated. This court reversed the trial court and remanded the case.

Chrisman v. State, No. 06-16-00179-CR, 2017 Tex. App. LEXIS 2785, 2017 WL 2118968 (Tex.App. - Texarkana 2017).

This stop was based solely on a 911 call from a bartender who stated that an intoxicated person had just driven away from the bar after being denied service and who refused to take a cab. The defendant argued that the stop was improper based on a conclusory statement made by the bartender. The court properly denied the defendant's motion to suppress even if the statement from the bartender was conclusory it was sufficiently corroborated by other details. For example, when the bartender called 9-1-1, he gave his name, phone number and identified himself as the bartender at the establishment. The court found him too reliable. Furthermore, the court found the information provided to the dispatcher by the bartender to be sufficiently corroborated by additional details from which the dispatcher could have surmised from the bartender.

Sowell v. State, No. 03-12-00288-CR, 2013 WL 3929102 (Tex.App.-Austin 2013, pet. ref'd).

This involved an unidentified citizen caller who told the officer that he was being chased by a red Chevrolet pickup truck with a Texas license plate starting with the characters "74W', and that there were multiple occupants in the truck who were throwing objects from the truck at his car. Finally, the informant provided the intersection where the disturbance was occurring and stated that the truck was fleeing the scene heading northbound on Lamar Boulevard. The trial court could have reasonably found that this detailed account of the informant's first-hand observations made the informant's statements sufficiently reliable. In addition, although it appears that the officer did not know the name of the informant at the time he acted on the tip, the informant put himself in a position to be identified by calling 911 from a cell phone and remaining on the phone for an extended period of time while relaying information to law enforcement. By putting himself in a position to be identified by law enforcement, the informant made it more likely that he could be held accountable if the information he provided to law enforcement was false and the officer was able to corroborate some of the information given by the unidentified caller. For all of the above reasons, the stop was upheld.

LeCourias v. State, 341 S.W.3d 483 (Tex.App.-Houston [14 Dist.] 2011).

Arresting officer had reasonable suspicion of criminal activity to conduct an investigative detention of defendant for DWI, even if officer did not witness defendant operating a motor vehicle at any point before the arrest. In this case, a witness had observed defendant's vehicle maneuver erratically on a public roadway, identified himself to emergency dispatcher, followed defendant to the location where police made the arrest, and remained in contact with the dispatcher until the officer arrived at the scene. This coupled with the officer detecting the odor of alcohol both inside a cup the witness saw the defendant carry, and on or about defendant's person and breath justified the detention and arrest of the defendant.

Villarreal v. State, No. 01-08-00147-CR, 2008 WL 4367616 (Tex.App.-Houston [1st Dist.] 2008, no pet.).

Officer received a call from dispatch that a citizen was following a possible drunk driver and had observed the defendant's vehicle pull into a parking lot where she was approached and investigated by the officer. The officer had a dispatcher call the citizen informant and had him meet the officer at the parking lot where he repeated the details of the bad driving, he had observed. In upholding the stop, the Court focused on the fact that the observations reported by the informant of the defendant's driving behavior constituted criminal activity, specifically, DWI. Since the informant chose to follow defendant's vehicle after reporting the

conduct, he was not "truly an anonymous informer." In addition, the officer corroborated the caller's identification details when he located defendant's car in the parking lot.

Hawes v. State, 125 S.W.3d 535 (Tex.App.-Houston [1st Dist.], 2002, no pet.).

Police received a call from tow truck driver reporting reckless driving and that he was following the vehicle. Officer arrived and pulled defendant over based on information received and without seeing any traffic violations. The tow truck driver on seeing defendant pulled over continued without stopping. In holding the stop was valid, the Court found that by presenting his information to the police via his business's dispatcher and following the suspect in his own readily traceable vehicle, the truck driver placed himself in a position where he could be held accountable for his intervention. These indicia of reliability, when combined with the officer's corroboration of the identification details, provided sufficient reasonable suspicion to justify the investigative stop.

State v. Fudge, 42 S.W.3d 226 (Tex.App.-Austin, 2001, no pet.).

Officer's sole basis for the stop was the details of bad driving provided to him by a cab driver in a face-to-face encounter. Court held that that was a sufficient basis for the stop of the defendant. Court referred and distinguished these facts from *Florida v. J. L., 529 U.S. 266, 120 S.Ct.1375, 146 L.Ed.2d 254 (2000).*

State v. Nelson, 228 S.W.3d 899 (Tex.App.-Austin 2007, no pet.).
Winborn v. State, No. 03-05-00716-CR, 2007 WL 1711791 (Tex.App.-Austin 2007, pet. ref'd).
Brother v. State, 166 S.W.3d 255 (Tex.Crim.App. 2005), cert. denied, 546 U.S. 1150 (2006).
Pipkin v. State, 114 S.W.3d 649 (Tex.App.-Fort Worth 2003, no pet.).
State v. Stolte, 991 S.W.2d 336 (Tex.App.-Fort Worth 1999, no pet.).
State v. Sailo, 910 S.W.2d 184 (Tex.App.-Fort Worth 1995, pet. ref'd).
State v. Adkins, 829 S.W.2d 900 (Tex.App.-Fort Worth 1992, pet. ref'd).
Ferguson v. State, 573 S.W.2d 516 (Tex.Crim.App. 1978).
Albert v. State, 659 S.W.2d 41 (Tex.App.-Houston [14th Dist.] 1983, pet. ref'd).

Information from a concerned citizen may provide sufficient basis for officer to make investigative stop.

2. IDENTIFIED CITIZEN--CREDIBLE AND RELIABLE

Gabrish v. State, No. 13-07-00673-CR, 2009 WL 2605899 (Tex.App.-Corpus Christi 2009, no pet.) (not designated for publication).

Civilians observed an apparently drunk defendant get in his car after urinating outside and drive away. One of them called 911 and they all pointed out the car to the officer who stopped the defendant based on their description of multiple indicators of intoxication. In upholding the stop, the Court focused on the fact that the civilian informants placed themselves in a position where they could have been easily identified and held responsible and that the information, they provided to the officer was sufficiently reliable to support the temporary detention.

Hime v. State, 998 S.W.2d 893 (Tex.App.-Houston, [14th Dist.] 1999, pet. ref'd).

Citizen stopped at Burger King to call police after observing suspect swerving towards other cars as it passed. Citizen gave her name and noted that suspect had stopped at BK, too. Officer arrived a minute later just as suspect was leaving BK and stopped suspect. Court held sufficient basis for stop noting that an (identified) citizen who calls in to report criminal acts is inherently credible and reliable.

See also: *Vanderhorst v. State, 52 S.W.3d 237 (Tex.App.-Eastland 2001, no pet.); Mitchell v. State, 187 S.W.3d 113 (Tex.App. -Waco 2006, pet. ref'd); Pospisil v. State, No. 06-08-00101-CR, 2008 WL 4443092 (Tex.App.-Texarkana 2008, no pet.).*

Off-duty firefighter called 911 to report a reckless driver he was following. Based on the details of that call, officer quickly located and stopped the defendant's vehicle. In finding the stop proper, the Court focused on three factors. First, it noted that the firefighter's report was not "anonymous" as he gave his name and occupation thereby making himself accountable for the information he reported. Further, the caller was a "professional firefighter," making him one of the types of people (along with teachers and police officers) that we teach our children are generally trustworthy and reliable. Finally, the officer responded in a short period of time allowing him to corroborate the vehicle description.

3. DETAILS OF POLICE BROADCAST ARE ADMISSIBLE

McDuff v. State, No. 08-10-00104-CR, 2011 WL 1849540 (Tex.App.-EI Paso 2011, pdr ref'd).

Officer testified that he stopped the vehicle defendant was driving after receiving information provided by his on-board computer terminal that the vehicle registration had expired in November 2007. Defendant argues that the State failed to prove that he had committed a traffic violation because it did not offer any evidence to substantiate officer's hearsay testimony regarding the expired registration. In upholding the stop, the Court of Appeals pointed out that the State is not required to prove that the defendant actually violated a particular statute in order to establish a reasonable suspicion or probable cause. The State must only elicit testimony that the officer knew sufficient facts to reasonably suspect that the defendant had violated a traffic law. It further pointed out that hearsay is generally admissible in a suppression hearing but even if the State could not rely on hearsay to establish reasonable suspicion, an officer's testimony regarding a vehicle registration check, like testimony regarding a driver's license check, is admissible under the public records exception.

Kimball v. State, 24 S.W.3d 555 (Tex.App.-Waco 2000, no pet.).

Officer was properly allowed, over objection, to relate information he received over the police radio by unidentified dispatcher that unknown motorist had called 911 to report possibly intoxicated driver in vehicle matching defendants. Court stated that an officer should be allowed to relate the information on which he was acting. Such information is not hearsay as it is not offered for the truth of the matter asserted but to show how and why the defendant's vehicle was initially identified and followed.

Ellis v. State, 99 S.W.3d 783 (Tex.App.-Houston [1 Dist.] 2003, pet ref'd.).

Officer testified that the basis for stop was he ran defendant's license plate on the computer in his car and received a response that appellant's car had possibly been involved in a robbery three days earlier. Defendant objected on basis of hearsay. Here, the testimony was not offered to prove the truth of the matter asserted; it was offered to show probable cause for the detention when appellant was stopped for traffic violations.

4. ANONYMOUS TIP FROM EMS TECHNICIAN

Glover v. State, 870 S.W.2d 198 (Tex.App.-Fort Worth 1994, pet. ref'd).

It was proper for officer who witnessed no erratic driving and based the stop solely on information provided by EMT to make said stop.

5. INFORMATION COMMUNICATED TO 911

Oringderff v. State, No. 06-16-00085-CR, 2017 Tex. App. LEXIS 3606, 2017 WL 1479453 (Tex. App. - Texarkana 2017)

This case involved a 9-1-1 call from a concerned citizen who stated that he was following what he believed to be a drunk driver. He stated the driver had been "weaving on both sides of the road." He also provided his physical location, the license plate number of the vehicle and described the color of the vehicle. The call with dispatch ended before the caller was able to provide his name or phone number. The Trooper was able to locate a vehicle matching the description given by the caller and he observed the vehicle to cross over the fog line and re-enter the lane of travel. At this point, the Trooper initiated a stop and later arrested the driver for DWI. The Court of Appeals found that reasonable suspicion existed.

Pate v. State, No. 518 S.W.3d 911 (Tex. App. – Houston 2017).

Based on information received from an anonymous caller, the officer conducted a traffic stop which led to an arrest for DWI. The caller stated that he was "almost sideswiped and the driver stated something like "I'm a little tipsy or intoxicated or something like that." The caller also provided the location of the suspected drunk driver and a description of the vehicle to the dispatcher, which was all relayed to the officer. When the officer arrived at the location, he observed the vehicle described by the caller and initiated an investigative stop. The Court found that the caller's tip was supported by sufficient indicia of reliability to justify the stop.

Rita v. State, No. 08-14-00098-CR, 2016 WL 419677 (Tex.App.-El Paso 2016).

Another case that held that the 911 caller gave sufficient details to dispatcher and the officer had sufficient ability to corroborate those details to support the stop.

Korb v. State, No. 01-15-00512-CR, 2016 WL 2753509 (Tex.App.-Houston (1st Dist.) 2016, pet filed).

911 caller reported observing a light-colored small truck circling an area in his neighborhood and that he thought the behavior was suspicious in that he had circled 3x in the last ten minutes. The caller gave his name and phone number. Officer arrived at the scene a minute later and saw truck matching the description in the area described and stopped truck solely based on details provided by caller. During the stop officer developed PC to arrest for DWI. Court held stop was valid with details from caller coupled with testimony from officer that he was aware that there had been occurrences of burglary and criminal mischief in that neighborhood.

Derichsweiler v. State, 348 S.W.3d 906 (Tex.Crim.App. 2011), s.ct. cert.denied, Oct. 3, 2011.

The Court holds that a 911 police dispatcher is to be regarded as a cooperating officer for purposes of making a reasonable suspicion determination. Therefore, if information is reported to the 911 operator, that information will go to support reasonable suspicion to stop an individual even if that information is not communicated to the officer who performs the stop.

6. ANONYMOUS TIP FROM HITCHHIKER

Mann v. State, 525 S.W.2d 174 (Tex.Crim.App. 1975).

Anonymous call from hitchhiker provided justification for investigative detention.

7. ANONYMOUS TIP FROM TRUCK DRIVER

Gansky v. State, 180 S.W.3d 240 (Tex. App.-Fort Worth 2005, pet ref'd).

While on routine patrol, Deputy Perkins received reports from multiple truck drivers that a white car was driving the wrong way on the highway and struck or almost struck other vehicles, signs, and gas pumps. In holding that the "anonymous tips" provided a sufficient basis for the stop, the Court focused on potential danger and extreme risk to the public and stated that courts should look to not only the "content of the information but the quality of the information in reviewing an officer's decision to stop and detain."

8. ANONYMOUS TIP - INSUFFICIENT DETAILS

State v. Garcia, No. 03-14-00048-CR, 2014 WL 4364623 (Tex.App.-Austin 2014).

A call from a 911 caller who identified himself as "Eric" reported a possible intoxicated driver in line at a to go line at a nearby fast-food restaurant whom he had seen "swerving" on 151 street, and he further described the driver and the car. An officer saw a car matching that description and pulled behind it at drive-through (in effect boxing it in) and got out of his car and approached the driver. The issue was whether the information conveyed was sufficient to justify the temporary detention. In holding the detention illegal, the Court speaks to the lack of sufficient detail in the 911 caller's report which consisted of conclusory statements.

Martinez v. State, 348 S.W.3d 919 (Tex.Crim.App. 2011).

Police officer lacked reasonable suspicion for investigatory detention of pickup truck driven by defendant based on an anonymous caller's report that a pickup truck of the same make and of similar color had stopped at a particular intersection, where driver placed two bicycles in bed of truck and drove west. Though investigative stop occurred close in time to caller's report and within three quarters of a mile west of the reported incident, there was no complaint of stolen bicycles, anonymous caller did not report contextual factors reasonably linking the unusual and suspicious activity to a theft, and officer did not see any bicycles in bed of truck until he approached the truck. The Court focused on the fact that the anonymous caller did not provide any identification information to the officer or to dispatch, did not follow the suspect's vehicle, was not present at the scene before the stop and the caller never referred to what he saw as a "theft." Judge Keller writes a well-reasoned dissent.

D. BAD DRIVING/CONDUCT NEED NOT = CRIMINAL OFFENSE

Martinez v. State, No. 01-20-00760-CR, 2022 Tex. App. LEXIS 4010, 2022 WL 2124906 (Tex.App. – 1st Dist. Houston 2022).

The court held that the officer had an objectively reasonable basis to stop defendant to ascertain whether he was intoxicated based on Defendant's erratic driving-**striking the curb twice** without apparent cause or explanation during the wee hours. The officer testified that the four-lane road was straight and level, without potholes or obstructions, the road was clearly marked, and its surface was dry. The State introduced footage from the officer's dashcam that was not definitive due to the quality of the footage. The officer also testified that Defendant's erratic driving was unsafe, but it did not pose an immediate danger to someone else (traffic was light). The court found the officer's testimony credible and concluded that the officer had a reasonable basis to stop the Defendant to investigate whether he was driving in an unsafe manner because he was intoxicated or due to some other cause.

State v. Smith, 555 S.W.3d 760 (Tex. App. – Texarkana 2018).

Police officer lacked reasonable suspicion for a traffic stop. Information provided to officers need not point toward an identifiable Penal Code offense but must have sufficient details and reliability to support the reasonable suspicion that criminal activity is about to occur. Here, police received a dispatch about a man named "Smith" who was banging on the complainant's door and drove off in a "silver Mercedes pickup." Based on that information, the police stopped a silver Mercedes SUV after discovering the vehicle was registered to Smith. The court granted Smith's suppression motion and concluded that "no crime was alleged to have been committed, the information the officers had could not objectively and reasonably lead them to believe a crime had occurred, was occurring, or would occur, and there was no link between the alleged crime and Smith because the caller did not provide a physical description of Smith.

Pillard v. State, No. 06-14-00015-CR, 2014 WL 3953236 (Tex.App.-Texarkana 2014).

Weaving within lane and traveling 20 mph in a 40-mph zone, leaving an area populated by bars after closing time together provided a legal basis for the stop that led to this Defendant's arrest.

Martinez v. State, No. 05-09-00147-CR, 2010 WL 188734 (Tex.App.-Dallas 2010).

Officer testified he observed defendant driving on a flat, straight, well-lit road with no obstacles when defendant's vehicle left its lane and hit the curb with enough force to push it back into the lane. In officer's experience, intoxicated drivers sometimes hit the curb, demonstrating they are unable to safely navigate the road. He further testified, it was early Sunday morning shortly after the bars had closed, a "high DWI' time. Because he believed defendant might be intoxicated, he stopped the car to investigate further. Defendant focused on the fact that hitting curb alone was not a traffic violation, but Court of Appeals held that totality of circumstances justified the stop.

Foster v. State, 326 S.W.3d 609 (Tex.Crim.App. 2010).

Court of Appeals found insufficient basis for stop. Court of Criminal Appeals reversed finding. Police had reasonable suspicion to believe that defendant may have been intoxicated, justifying temporary detention for further investigation when at 1:30 a.m. a few blocks from city's bar district, officer observed defendant's truck come up extremely close behind officer's vehicle at red light and appeared to lurch. Officer then heard a revving sound and noticed defendant's truck lurch forward again. In light of the time of night and location, the officer's training and experience, and defendant's aggressive driving, it was rational for the officer to have inferred that the defendant may have been intoxicated.

Derichsweiler v. State, 348 S.W.3d 906 (Tex.Crim.App. 2011), s.ct. cert. denied, Oct. 3, 2011.

The defendant was reported to be stopping next to vehicles in parking lots and staring at the occupants of those vehicles. That conduct resulted in a 911 call that ended with the detention and arrest of the defendant. The issue - was the defendant's non-criminal behavior enough to justify an investigative stop without reasonable suspicion of a particular offense? The Court said yes, pointing out there is no requirement to point to a particular offense, but rather reasonable suspicion that he was about to engage in criminal activity.

State v. Alderete, 314 S.W.3d 469 (Tex.App.-EI Paso 2010, pet. ref'd).

Police officers had reasonable suspicion to stop defendant on suspicion of DWI, where defendant continuously swerved within her lane for half of a mile in the early morning hours, and officers were trained to detect individuals driving while intoxicated, even if defendant did not violate any traffic regulation.

Rafaelli v. State, 881 S.W.2d 714 (Tex.App.-Texarkana 1994, pet. ref'd).

Weaving in his lane, though not inherently illegal act, did provide sufficient basis for officer to stop defendant's vehicle.

Dowler v. State, 44 S.W.3d 666 (Tex.App.-Austin 2001, pet. ref'd.).

In support of an anonymous tip, officer also observed defendant weave or drift within his lane of traffic, touching the outside white line more than once and once crossing into an on ramp when defendant had no reason to enter the on ramp. Defendant was also driving twenty miles per hour below the posted limit and failed to respond when the officer turned on the patrol car's emergency lights. Officer testified in his experience it is uncommon for sober drivers to drive in that fashion.

Fox v. State, 900 S.W.2d 345 (Tex.App. - Fort Worth 1995), pet. dism'd, improv. granted, 930 S.W.2d 607 (Tex.Crim.App. 1996).

Fluctuating speed and weaving within the lane did provide sufficient basis for officer to stop defendant's vehicle.

Townsend v. State, 813 S.W.2d 181 (Tex.App.-Houston [14th Dist.] 1991, pet. ref'd).

Testimony that defendant wove back and forth was sufficient basis even in the absence of any evidence it was unsafe to do so.

Oliphant v. State, 764 S.W.2d 858 (Tex.App.-Corpus Christi 1989, pet. ref'd).

Defendant's car extended into intersection at stop; then defendant made wide turn, drifted in and out of his lane and swerved within his lane.

E. "COMMUNITY CARE-TAKING FUNCTION" (CCF)

Caniglia v. Strom, 209 L.Ed.2d 604 (S.Ct. 2021).

The Community Caretaking Exception to the warrant requirement is limited to vehicles and does not apply to warrantless entry into homes.

Wright v. State, 7 S.W.3d 148 (Tex. Crim. App. 1999) rev'd on remand, 18 S.W.3d 245 (Tex.App.-Austin 2000, pet. ref'd).

The case came to the Court of Criminal Appeals when the Austin Court of Appeals failed to apply the "community care-taking function" in holding the stop in this case to be unreasonable. The basis for the stop was that the officer observed a passenger in the vehicle vomiting out of a car window. The Court of Appeals did not believe that the community caretaking exception covered a passenger's actions. The Court of Criminal Appeals held that the exception could apply to these facts and listed four factors that are relevant in determining when community caretaking provides a sufficient basis for a traffic stop:

1. the nature and level of distress exhibited by the individual
2. the location of the individual
3. whether the individual was alone and/or had access to assistance independent of that offered by the officer; and

4. to what extent the individual-if not assisted-presented a danger to himself or others.

The court added that, "as part of his duty to 'serve and protect' a police officer may stop and assist an individual whom a reasonable person--given the totality of the circumstances--would believe is in need of help." The case was remanded back to the Court of Appeals which in 18 S.W.3d 245 (Tex. App. - Austin 2000) applied the above-mentioned factors and found the stop to be unreasonable.

1. CCF APPLIES

Byram v. State, 510 S.W.3d 918 (Tex. Crim. App. 2017)

At about 5:30 pm, Officer was stopped at a red light with his windows down. An SUV with its front passenger window rolled down pulled up to the light. The officer smelled the odor of alcohol coming from the SUV and noticed a woman "hunched over" in the passenger seat motionless. The officer was concerned that the passenger might be unconscious or in need of medical attention. The officer yelled at the driver asking if the passenger was ok. The driver did not respond. The light turned and the driver drove off. The officer made a stop. The trial court denied the defendant's motion to suppress finding that the stop was proper under the community caretaking function. The Court of Appeals applied the 4-prong test in Wright and found that this was not a proper Community Caretaking stop. The Court of Criminal Appeals reversed, holding that this was proper.

Endter v. State, No. 13-15-00086-CR, 2016 WL 4702377 (Tex. App. – Corpus Christi-Edinburg 2016).

In response to a 911 call, officer arrives and finds Defendant passed out and slumped over in driver's side of car in lane of drive through window at Whataburger. Vehicle was running and in park. As officer opened driver's side door Defendant slumped out of seat towards officer. After several attempts officer wakes Defendant up. Court applied the factors for Community Caretaking and found this case falls into exception.

Dearmond v. State, No. 02-15-00195-CR, 2016 WL 859064 (Tex.App.-Fort Worth 2016, reh-denied).

Traffic stop of Defendant who was driving a vehicle with two flat tires was justified by community caretaking function and also provided reasonable suspicion for violation of traffic law that prohibits operating a motor vehicle that was unsafe (547.004(a)(1) Texas Transportation Code).

Saldana v. State, No. 04-14-00658-CR, 2015 WL 3770499 (Tex.App. –San Antonio 2015).

While investigating hearing a loud "bang" noise at 1:00 a.m. officer noticed Defendant's truck somewhat in middle of a dark roadway and saw Defendant and passenger get out of truck and walk around to back of it and appear to be looking at damage to rear of truck. Officer pulled in behind truck and activated lights. Court held proper community caretaking stop.

Gonzales v. State, 369 S.W.3d 851 (Tex.Crim.App. 2012).

Defendant's detention was justified under the community caretaking exception to the warrant requirement. Officer observed a vehicle pull over to the side of a lightly traveled highway sometime before 1:00 a.m. and was concerned that the operator of the vehicle might need assistance; and thus, officer was motivated primarily by his community caretaking duties and because traffic was minimal in the location where defendant was stopped, there were no houses nearby and only a few businesses in the area. If defendant had needed assistance, he would have difficulty finding anyone other than officer to help him, and officer's belief that defendant needed help was objectively reasonable.

Munoz v. State, No. 2-09-391-CR, 2010 WL 3304242 (Tex.App.-Fort Worth 2010).

Where defendant was observed traveling at almost half the posted speed limit, pulling into the parking lot of closed business alone in her car, absent the officer had no access to assistance, it was a proper community caretaking stop. Police officer's stop of defendant's vehicle to determine if she was lost was reasonable exercise of his community caretaking function. Even though the fourth factor, whether she posed a danger to herself or others if not assisted, weighs against the application of the community caretaking function, "not all factors must support the application of the exception in determining whether the officer acted reasonably in exercising his community caretaking function."

Chilman v. State, 22 S.W.3d 50 (Tex. App.-Houston [14th Dist.] 2000, pet. ref'd.).

Around 2:00 a.m., the officer observed a red car stopped in front of a barricade erected to block campus entrance. The officer did not know when the red car had pulled up to the barricade although he knew the car was not there when he passed by the same spot twenty minutes earlier. Officer observed the passenger leave the red car and survey the barricade to the campus entrance. In an effort to determine what the car's occupants were doing on campus and possibly to provide some assistance because they appeared to be lost, officer turned on his patrol car's emergency equipment. This action prompted the passenger to jump back into the red car. When the officer approached, the Defendant who was in the driver's seat, asked the officer why he had stopped him and declared that there was no reason to stop him. After determining the Defendant was intoxicated, the officer arrested him for DWI. Stop held to be justified.

Hulit v. State, 982 S.W.2d 431 (Tex. Crim. App. 1998).

Police were dispatched in response to a report of a "woman possibly having a heart attack in a vehicle." Officer found a pickup truck sitting in the inside lane of a service road about fifty feet from an intersection and saw an individual slumped over the steering wheel of the truck. The truck engine was still running, and the windows were rolled up. The officer approached the vehicle and began rapping on the window and yelling at the driver to wake up. With the assistance of a second officer, the driver awakened and opened the door of the pickup. The testifying officer smelled alcohol about the driver. Once the driver got out of the truck at the officer's request, the truck began rolling backward. Defendant was arrested for DWI. The Court of Criminal Appeals held "that Article I, Section 9 contains no requirement that a seizure or search be authorized by a warrant, and that a seizure or search that is otherwise reasonable will not be found to be in violation of that section because it was not authorized by a warrant." The court concluded that, based on the totality of the circumstances, the officer's actions were not unreasonable.

Cunningham v. State, 966 S.W.2d 811 (Tex.App.-Beaumont 1998, no pet.).

Officer stopped Defendant after observing her driving late at night at an unsafe speed on a flat tire in a bad neighborhood. Stop justified under CCF.

2. CCF DOESN'T APPLY

Byram v. State, No. 02-14-00343-CR, 2015 WL 6134114 (Tex.App.-Fort Worth 2015).

While stopped alongside Defendant's vehicle at light officer noticed that female passenger in Defendant's car was hunched all the way over and appeared to be either unconscious or in need of medical attention. He also smelled odor of alcoholic beverage coming from vehicle. Officer called out to Defendant asking if female was ok and Defendant ignored him. Officer made stop but it was held not to be proper Community

Caretaking stop as passengers' level of distress was not sufficient, she was not alone, did not present danger to herself or others. There is a well-reasoned dissent that discusses problems with the court's reasoning.

Alford v. State, No.05-10-00922-CR, 2012 WL 5447866 (Tex.App.-Dallas 2012) (not designated for publication) judgment affirmed 400 S.W.3d 924 (Tex.Crim.App. 2013).

This case involves an officer on bike patrol who saw a car stopped in a dead-end alleyway behind an open Jack in the Box. The passenger door was open, and they could tell there was a loud conversation going on between driver and passenger who ultimately changed places. Officer pulled up to passenger side and as Defendant was about to pull away asked him to stop and talked to them about what they were doing. In hearing the answer, the officer developed reasonable suspicion that the Defendant was intoxicated and ultimately arrested him for DWI. At MTS hearing, the State argued Community Caretaking and the Trial Court agreed with this. On appeal the State tried to add argument of encounter, but the Court ruled the State waived that argument by not raising it earlier. It then went on to explain that the stop failed all four of the factors that are to be considered in determining if a stop is a Community Caretaking stop and reversed the trial court's ruling.

Koteras v. State, No. 14-09-00286-CR, 2010 WL 1790808 (Tex.App.-Houston [14th Dist.] 2010, no pet.) (not designated for publication).

Court of Appeals rejected Trial Court's finding that this was a proper community caretaking stop. Specifically, it found that merely pulling one's vehicle onto the shoulder of the road does not warrant detention by a Jaw enforcement officer, and the curiosity of an officer to see "what is going on" is not sufficient to meet the community caretaking function.

Franks v. State, 241 S.W.3d 135 (Tex.App.-Austin 2007, pet. ref'd).

This was an appeal of a motion to suppress denial. The issue was whether the officer's contact with a visibly upset female motorist in a parked car with the motor running and his refusal to allow her to leave, fell within Community Care-taking Exception. The Court found that the officer's initial interaction with the defendant was an encounter, but that encounter became a detention when the officer told the defendant she couldn't leave. The detention was not justified by the officer's community care-taking function because the defendant did not exhibit a high enough level of distress, she was not in an unsafe location, and she did not pose a danger to herself or others.

Corbin v. State, 85 S.W.3d 272, (Tex.Crim.App. 2002).

Defendant's car was observed at 1:00 a.m. crossing over a side stripe onto the shoulder of the road and driving on the shoulder about 20 feet. He was traveling 52 mph when speed limit was 65 mph. Officer pulled Defendant over for failure to maintain a single lane and because he felt the Defendant might be drunk or in need of assistance. Before pulling him over, the officer followed the Defendant for about a mile and observed no traffic violations. Upon stopping, it was discovered that the Defendant had cocaine strapped to his back. The majority focused on whether the officer's belief that Defendant needed help was "reasonable." The Court further held that the most weight should be given to factor number one, namely, "the nature and level of distress exhibited by the individual." The Court held that the "community care-taking function" did not apply in this case.

Andrews v. State, 79 S.W.3d 649 (Tex. App. - Waco 2002, pet. ref'd).

Officer observed Defendant pull to the side of the road and then observed Defendant's wife, front seat passenger, lean out the door and vomit, and the Defendant drove off and was stopped by officer. Court held stop was not justified by the community care-taking function.

F. OFFICER'S ARREST AUTHORITY WHEN OUTSIDE JURISDICTION

1. FOR A TRAFFIC OFFENSE

a. STOPS MADE BEFORE 9-01-05 = NO

State v. Kurtz, 152 S.W.3d 72 (Tex.Crim.App. 2004).

An officer of the police department of a city does not have authority to stop a person for committing a traffic offense when the officer is in another city within the same county.

b. STOPS MADE AFTER 9-01-05 = YES

Article 14.03 (g) (1): Authorizes a municipal police officer to make a warrantless arrest for a traffic offense that occurs anywhere in the county or counties in which the officer's municipality is located. Note: This legislative change effectively overrules the *Kurtz* case listed above.

2. CAN STOP AND ARREST FOR "BREACH OF PEACE"

State v. McMorris, No. 2-05-363-CR, 2006 WL 1452097 (Tex.App. Fort Worth 2006, pet. ref'd) (not designated for publication).

This case addressed the issue of whether a municipal police officer has authority to stop a driver outside of his jurisdiction when he reasonably suspects the driver of DWI. The law in effect is the pre-2005 version of Article 14.04 of the CCP. The trial court suppressed the stop and the Court of Appeals reversed. The trial court viewed this as an officer stopping a vehicle for a traffic offense, failure to yield right of way, which he cannot do, and the Court of Appeals viewed the traffic offense as giving the officer reasonable suspicion that the defendant was DWI which does support the stop.

Valentich v. State, No. 2-04-101-CR, 2005 WL 1405801 (Tex.App.-Fort Worth 2005, no pet.) (not designated for publication).

Officer was authorized to detain Defendant because he had reasonable suspicion to believe he was observing a breach of the peace, that is, driving while intoxicated, and because he pursued her from his lawful jurisdiction in Flower Mound a very short distance into Lewisville.

Ruiz v. State, 907 S.W.2d 600 (Tex.App.-Corpus Christi 1995, no pet.).

Officer, who was outside of his jurisdiction, could properly stop and arrest defendant whom he observed driving the wrong way down a highway for a "breach of the peace."

See also: *Romo v. State, 577 S.W.2d 251 (Tex.Crim.App. 1979).*

3. TO MAKE ARREST FOR DWI

Preston v. State, 983 S.W.2d 24 (Tex.App.-Tyler 1998, no pet.).

Officer may arrest a suspect for DWI even though he is outside of his jurisdiction under Article 14.03(g) of the Texas Code of Criminal Procedure so long as he, as soon as practical, notifies an officer having jurisdiction where the arrest was made.

4. FAILURE TO NOTIFY OFFICERS WITHIN JURISDICTION DOES NOT VIOLATE EXCLUSIONARY RULE

Turnbow v. State, No. 2-02-260-CR, 2003 WL 2006602 (Tex.App.-Fort Worth, May 1, 2003, pet. ref'd.) (not designated for publication). Bachick v. State, 30 S.W.3d 549 (Tex.App.-Fort Worth 2000, pet. ref'd).

Officer undertook a valid traffic stop outside his jurisdiction after observing a traffic offense within his jurisdiction which ultimately led to the arrest of the defendant for DWI. Officer did not notify arresting agency within that jurisdiction as required by 14.03(b). His failure to do so did not warrant evidence suppression under the exclusionary rule. Court held that the notice requirement is unrelated to the purpose of the exclusionary rule.

5. CITY VS. COUNTY-WIDE JURISDICTION

a. COUNTY-WIDE

Sawyer v. State, No. 03-07-00450-CR, 2009 WL 722256 (Tex.App.-Austin 2009, no pet.) (not designated for publication).Dogay v. State, 101 S.W.3d 614 (Tex.App.-Houston (1st Dist.) 2003, no pet.).Brother v. State Brother v. State, 166 S.W.3d 255 (Tex.Crim.App. 2005), cert. denied, 546 U.S. 1150 (2006).

Officer made the traffic stop outside his jurisdiction (city) but within the same county. The court found that there was nothing in the legislative history of amendments to *CCP Art.1403 (Vernon Supp. 2002) and Tex. Loc Gov't. Code Ann §341.001 (e). 341.021(e) (Vernon 1999),* to indicate that the legislature intended to abrogate the common law rule that the jurisdiction of an officer of a class A general-law municipality was county-wide. The Court declined to follow rulings to the contrary.

b. OFFICER WITHIN JURISDICTION'S PARTICIPATION

Armendariz v. State, 123 S.W.3d 401 (Tex.Crim.App.2003).

The lower Court of Appeals reversed this case because it found that the stop occurred outside the arresting officer's jurisdiction and was therefore unlawful. In rejecting this argument, the Court pointed out that the police who were outside their city limits and arguably their jurisdiction were acting on information provided by a county sheriff (within whose county jurisdiction the stop did occur) who observed the traffic offense, radioed the information to the police and stayed in radio contact with the police up to the stop. In effect, the sheriff's participation in the circumstances surrounding the defendant's arrest made him just as much a participant in the arrest as if he had seized the defendant himself.

c. HOT PURSUIT

Yeager v. State, 104 S.W.3d 103 (Tex.Crim.App.2003).

After observing the defendant nearly drive his vehicle into a ditch while leaving the parking lot of a bar within their city limits, officers followed him to further evaluate his driving and ultimately pulled him over for investigation of DWI outside the city limits. They stopped him after they observed him almost hit another vehicle. The trial court held stop was legal and the Court of Appeals reversed holding that the officers' "Type B Municipality" authority ended at the city limits, and it further rejected the "hot pursuit" argument as it found that there was no "chase" or "pursuit" as officers merely followed the defendant. The Court of Criminal Appeals found that this was a good example of "Hot Pursuit" and the dictionary definition of "pursuit" includes "follow." The test is whether the initial "pursuit" was lawfully initiated on the ground of suspicion, and the Court found in this case that it was. The issue of the jurisdiction of a "Type B Municipality" was not reached.

Turnbow v. State, No. 2-02-260- CR, 2003 WL 2006602 (Tex.App.-Fort Worth, May 1, 2003, pet. ref'd.) (not designated for publication).

Officer observed defendant's vehicle speeding and cross over the center line five times. Though the officer tried to initiate the stop within the county line, by the time the defendant was pulled over, he was just under a mile across the line. The officer testified at a Motion to Suppress hearing that he did not feel that he was involved in a chase or in a pursuit while he followed the defendant. The defendant was convicted at a later trial and argued on appeal that the arrest was illegal and not "hot pursuit." The Court of Appeals found that it was a legal stop under the "hot pursuit" doctrine and further found the doctrine applies even when an officer does not subjectively believe he is in hot pursuit.

G. PRETEXT STOPS - NO LONGER BASIS FOR SUPPRESSION

Crittendon v. State, 899 S.W.2d 668 (Tex.Crim.App. 1995).

Pretext stops are valid so long as objective basis for stop exists.

H. OPERATING VEHICLE IN UNSAFE CONDITION

Sweeney v. State, 6 S.W.3d 670 (Tex.App.-Houston [1st Dist.] 1999, pet. ref'd.).
State v. Kloecker, 939 S.W.2d 209 (Tex.App.-Houston [1st Dist.] 1997, no pet h.).

Trial judge held that there was insufficient basis for the stop. Court of Appeals reversed holding that officer observation that defendant was driving on a tireless metal wheel and new this constituted the traffic offense of driving a vehicle on a highway in an unsafe condition.

I. FAILING TO DIM LIGHTS

McCurtain v. State, No. 05-15-00959-CR, 2016 WL 3913043 (Tex. App. – Dallas 2016)
Texas v. McCray, 986 S.W.2d 259 (Tex.App.-Texarkana 1998, pet. ref'd).

Violation of a portion of the traffic code (failing to dim lights) provides a sufficient basis for a traffic stop.

J. RAPID ACCELERATION/SPINNING TIRES

1. YES

Fernandez v. State, 306 S.W.3d 354 (Tex.App.-Fort Worth 2010, no pet.).

Officer heard defendant's pickup loudly squeal its tires and saw light smoke coming from the tires as the pickup fishtailed about two feet outside its lane of traffic supporting officer's opinion that what he observed constituted reckless driving and supported the stop. This was so although there were no vehicles directly around defendant's vehicle though there was testimony there were other vehicles in the area.

Bice v. State, 17 S.W.3d 354 (Tex.App.-Houston [1st Dist.] 2000, no pet.).
Collins v. State, 829 S.W.2d 894 (Tex.App.-Dallas 1992, no pet.).
Harris v. State, 713 S.W.2d 773 (Tex.App.-Houston [1st Dist.] 1986, no pet.).

2. NO

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

The spinning motion of one tire of defendant's truck as truck began to move from a stop after traffic light turned green did not alone give police officer reasonable suspicion that defendant was unlawfully exhibiting acceleration in violation of statute pertaining to racing on highways, and thus officer's stop of defendant's vehicle on that basis was unlawful.

K. WEAVING WITHIN LANE/FAILING TO MAINTAIN SINGLE LANE

1. WEAVING

a. YES

State v. Alderete, 314 S.W.3d 469 (Tex.App.-EI Paso, 2010, pet. ref'd).

Reversing the Trial Court, the Court of Appeals held that officers had reasonable suspicion to stop defendant on suspicion of DWI where defendant continuously swerved within her lane for half of a mile in the early morning hours. Officers were trained to detect individuals driving while intoxicated and based on that training, weaving is a common characteristic of intoxicated drivers, so the Court held that even if defendant did not violate any traffic regulations, there was a sufficient basis for the stop.

Dunkelberg v. State, 276 S.W.3d 503 (Tex.App.-Fort Worth, 2008, pet. ref'd).

The defendant's vehicle was observed weaving within lane in road. The vehicle crossed the lane divider at least once. In supporting this as the basis for the stop and distinguishing it from holdings that have held weaving insufficient as a basis, the Court focused on the following: the officer stated that based on his training, defendant's weaving, slow reaction to officer's emergency lights and driving at that time of night are three of the sixteen clues that indicated the driver might be intoxicated.

Curtis v. State, 238 S.W.3d 376 (Tex.Crim.App. 2007), 209 S.W.3d 688, (Tex.App.-Texarkana 2006), reversed, Curtis v. State, No. PD- 1820-06, 2007 WL 317541 (Tex.Crim.App. 2007), affirmed on remand, Curtis v. State, No. 06-05-00125-CR,2008 WL 707285 (Tex.App.-Texarkana, 2008).

Court of Appeals overruled the Trial Court's denial of motion to suppress on the following facts. Officer's observing the defendant swerving from lane to lane on a four-lane divided highway did not give him reasonable suspicion of intoxication to support a traffic stop, even though the officer testified he had a suspicion that driver's weaving was the result of intoxication, where officers did not testify that anything other than defendant's weaving led them to suspect intoxication, and there were numerous reasons other than intoxication that would cause a driver to swerve. This holding was reversed by the Court of Criminal Appeals which held that the Court of Appeals had applied the wrong legal standard in its determination of the issue of reasonable suspicion to make the traffic stop. The rejected standard arose from the Court's suggestion that the State needed to disprove the non-intoxicated reasons that may have accounted for the weaving of the defendant's car.

State v. Arend, No. 2-03-336-CR, 2005 WL 994710 (Tex.App.-Fort Worth 2005, pet. ref'd.) (not designated for publication).

Trooper's observation that the Defendant weaved within his lane as he followed him for approximately 50 seconds, combined with his experience as a police officer and his belief that said driving tended to indicate intoxication, provided sufficient reasonable suspicion to justify the stop.

Held v. State, 948 S.W.2d 45 (Tex.App.-Houston [14th Dist.] 1997, pet. ref'd).

Weaving need not constitute an offense to provide basis for a proper traffic stop.

Cook v. State, 63 S.W.3d 924 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd).
Gajewski v. State, 944 S.W.2d 450 (Tex.App.-Houston [14th Dist.] 1997, no pet).

Weaving in and out of several traffic lanes may not be negated by the fact that no other traffic was around at the time--in that this action raises reasonable suspicion of intoxication rather than a mere traffic offense.

b. NO

State v. Gendron, No. 08-13-00119-CR 2015 WL 632215(Tex.App.-El Paso 2015).

This comes down to a poorly developed record where Officer was not asked sufficient questions to justify the stop.

State v. Houghton, 384 S.W.3d 441 (Tex.App.-Fort Worth 2012, no pet.).

This case involves an appeal of a Trial Court's ruling that the officer had no reasonable suspicion to stop Defendant based upon testimony at hearing and video recording. State failed to establish that Defendant's crossing solid white stripe as part of her vehicular movement into left-turn lane provided officer with reasonable suspicion or probable cause to stop defendant's vehicle. Although Defendant's vehicle crossed solid white stripe that marked the right boundary of the left-turn lane, Defendant signaled a lane change, moved her vehicle into the left-turn lane, and waited for an approaching car to clear the intersection before turning left and there was no testimony at the hearing that this was done in an "unsafe manner."

Fowler v. State, 266 S.W.3d 498 (Tex.App.-Fort Worth 2008, pet. ref'd).

The defendant's vehicle crossing one time into adjacent lane by tire's width when there was no other traffic in area, did not constitute sufficient basis for traffic stop. The officer also testified that he did not find the driving unsafe but thought it violated Transportation Code. The Court held that an officer's honest but

mistaken understanding of the traffic law which prompted a stop is not an exception to the reasonable suspicion requirement. There is also no mention in the record of the officer's suspecting the driver was intoxicated.

State v. Huddleston, 164 S.W.3d 711 (Tex.App.-Austin, 2005, no pet.).

Officer observed suspect vehicle pull out from the bar's parking lot, proceed to within one-and-a half miles of the bar, drift twice to the right side of the roadway and cross over the white shoulder stripe, or fog line. The activated video shows that the right wheels of the car crossed the fog line three more times during the next three minutes. He never saw the vehicle cross the yellow line separating the two lanes of traffic. He further testified the movements individually were neither unlawful nor unsafe, but the combined number did make them unsafe. Sole basis raised for the stop was failure to stay within a single marked lane. Only after Motion to Suppress was granted did State offer other justifications for the stop: reasonable suspicion of DWI and community caretaking, but these were deemed untimely and therefore waived. Therefore, the Court holding that the officer had no reasonable suspicion to make the stop was upheld.

Bass v. State, 64 S.W.3d 646 (Tex.App.-Texarkana 2001, pet. ref'd).

Observation that the defendant was swerving within his lane and crossing over the lane marker did not provide sufficient basis for a traffic stop. Though the State argues that the officer was stopping the defendant based upon a traffic offense, the Court points out that the officer in this case never testified that the lane change occurred in an "unsafe manner" nor did the record show how many times he had crossed over the lane marker.

State v. Cerny, 28 S.W.3d 796 (Tex.App.-Corpus Christi 2000, no pet.).

This is a State's appeal of the trial judge's granting a motion to suppress. Defendant was observed by the officer swerving across the center lane divider and swerving over the white shoulder line three times. The Court upheld the suppression based upon the lack of testimony that the lane change was in an unsafe manner. The Court also noted that it will give deference to a trial judge's ruling.

State v. Arriaga, 5 S.W.3d 804 (Tex.App.-San Antonio 1999, pet. ref'd).

In a DWI investigatory detention, drifting within the lane does not give rise to reasonable suspicion to pull over. Under the totality of the circumstances, the officer must have more facts which lead him to intoxication. For example , just pulled out of a bar and the time of night. The officer offered no evidence to show that he believed the defendant to be intoxicated. Although mere weaving in one's lane of traffic can justify an investigatory stop when the weaving is erratic, unsafe, or tends to indicate intoxication or other criminal activity, nothing in the record indicated that the arresting officer believed any of the above to be the case.

State v. Tarvin, 972 S.W.2d 910 (Tex.App.-Waco 1998, pet. ref'd).

Where evidence at Motion to Suppress was that officer observed defendant weaving within his lane and there was no testimony that officer found said driving to be "erratic, unsafe or tending to indicate intoxication," trial judge was correct in suppressing the stop. In essence the evidence didn't rise to the level necessary to support stop under Texas Transportation Code 545.060(a). See also Ehrhart v. State, 9 S. W 3d 929 (Tex.App.-Beaumont 2000, no pet.).

2. FAILURE TO MAINTAIN SINGLE LANE (FMSL)

State v. Hardin, No. PD-0799-19, 2022 Tex. Crim. App. LEXIS 757.

The Court of Criminal Appeals has FINALLY settled the debate and concluded that Transportation Code Section 545.060 establishes a single offense not two. The CCA has rejected the plurality opinion in *Leming.* In this case, the CCA held that the elements consist of (1) failure to maintain a single lane of traffic AND (2) the failure to maintain a single lane is unsafe.

Dugar v. State, No. 09-19-00098-CR, 2021 Tex.App. LEXIS 2626 (Tex.App. – Beaumont 2021).

Although the court choose not to address the split among the intermediate courts, it held that because of the different interpretations, a reasonably objective police officer could have interpreted Transportation Code section 545.060 to prohibit "failing to maintain a single lane when it is practical for the driver to do so."

Reyes v. State, 603 S.W.3d 543, 2020 Tex. App. LEXIS 4534 (Tex.App. – El Paso 2020).

Defendant filed a motion to suppress evidence obtained as a result of a traffic stop which he argued was made without reasonable suspicion. Officers testified that defendant was "driving in the middle lane and the right lane directly over the white line" or "driving in between the second and third lane, not choosing a lane for a good amount distance." Defendant argued that the evidence does not show that his failure to maintain a single lane was unsafe. The defendant relied on *Hernandez v. State*, *983 SW2d 867 (Tex.App. – Austin 1998)*, which requires a vehicle to fail to stay within its lane and such movement is not safe or was not made safely. The plurality opinion in *Leming* expressly rejected the *Hernandez* interpretation of Transportation Code Section 545.060. Because *Leming* is a plurality opinion it is not binding. This court analyzed the statutory construction of Section 545.060 and found that the plain language demonstrates that it contains both a requirement ("shall drive") and a prohibition ("may not move"). This constructions gives effect to each of the words and phrases used in the statute. But Section 545.060, in isolation, does not define a criminal offense. To define the offense, you must read Section 545.060 in its context and in reference to Section 542.301. Section 542.301 provides that "a person commits an offense if the person performs an act prohibited or fails to perform an act required by this subtitle. Failure to interpret Section 545.060 in conjunction with Section 542.301 renders the analysis set out in *Hernandez* incomplete and unpersuasive. The court held that "a violation of either the requirement to maintain a single lane or the independent prohibition against changing lanes when conditions are not safe to do so constitute separately actionable offenses. *****Keep eye on this. The CCA will most likely review this decision.**

State v. Meras, No. 10-18-00345-CR, 2020 Tex.App. LEXIS 96 (Tex.App.- Waco 2020).

The trial court erred when it granted defendant's motion to suppress because its conclusion that defendant's failure to drive as nearly as practical entirely within a single lane was not unsafe, and thus that there was no reasonable suspicion to stop defendant for a violation of the Tex. Transportation Code Ann 545.060(a). This Court relied on *Leming* and found that it is an independent offense to fail to remain entirely within a marked lane of traffic when it otherwise practical to do so, regardless of whether the deviation from the marked lane is, under the particular circumstances, unsafe.

State v. Bernard, 512 S.W.3d 351 (Tex.Crim.App 2017).

The court declined to apply the Court of Criminal Appeals' plurality opinion in *Leming* that stated it was "an independent offense to fail to remain entirely within a marked lane of traffic, regardless of whether the

deviation from the marked lane is unsafe." The Court instead applied the *Hernandez* analysis regarding Transportation Code 545.060, that there is only a violation when the State can prove BOTH that the defendant failed to maintain a single land and it was an in an unsafe manner.

Leming v. State, 493 S.W.3d 552 (Tex.Crim.App. 2016 reh denied)

This case involved a stop based on FMSL, Transportation Code 545.060. The Court held that it is an offense to change marked lanes when it is unsafe to do so, and it is also an independent offense to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so regardless of whether or not that failure to do so can be regarded as being unsafe. In so holding the Court of Criminal Appeals explicitly rejects the contrary interpretation of 545.060 by the *Atkinson* and *Hernandez* Courts of Appeals opinions. The Court also found that the Officer's reasonable suspicion that the Defendant was driving while intoxicated supported the stop.

L. DEFECTIVE TAIL LAMP OR BRAKE LAMP AS BASIS FOR STOP

1. NO

Vicknair v. State, 751 S.W.2d 180 (Tex.Crim.App. 1998) (op. on reh'g).

Where stop was based on cracked tail lamp with some white light showing through, there was insufficient evidence that traffic statute was violated. (Red light also showing.)

2. YES

Montes v. State, No. 08-13-00060-CR 2015 WL 737988 (Tex.App.-El Paso 2015).

The issue was whether the Statute that speaks to working taillights was satisfied if the mandatory two were working or if it covered the additional lights that were present in this case. The Defendant's vehicle had four taillights, two more than are required, and one of them was out. Court held that the transportation code section applies to "all" light on vehicle and therefore the single light not working did constitute a traffic violation.

Texas Department of Public Safety v. Hindman, 989 S.W.2d 28 (Tex.App.-Fort Worth 1999, no pet.).

Where stop was based on broken taillight with white light showing through and there was no evidence that any red light was showing, there was sufficient evidence of traffic statute violation and stop was proper. (*Vicknair* Distinguished.)

Starrin v. State. No. 2-04-360-CR, 2005 WL 3343875 (Tex.App.-Fort Worth 2005, no pet.).

Stop was based on observation that one of the three brake lights on the defendant's vehicle was out. Defendant argued on appeal that Texas law requires only two functioning brake lights. The Court finds that federal standard requires three brake lights for cars of a certain width and takes judicial notice of the fact that the car in question fits those dimensions and holds the stop was lawful.

M. MUST RADAR EVIDENCE MEET KELLY TEST?

1. YES

Ochoa v. State, 994 S.W.2d 283 (Tex.App.-EI Paso 1999, no pet.).

Officer's testimony that he was certified to use handheld radar to detect speed, that he calibrated and tested his radar instrument on the day he issued the speeding ticket, and that the gun used radar waves to calculate speed was insufficient to establish proper foundation for admitting radar evidence. Pursuant to *Kelly v. State, 824 S. W. 2d 568 (Tex.Crim.App. 1992)*, the officer must further be able to explain the calculation the gun made or explain the theory underlying the calculation. Error held harmless in this case because officer also gave opinion motorist was driving at a "high rate of speed."

2. JUDICIAL NOTICE OF RADAR

Leke v. State, 36 S.W.3d 913 (Tex.App.-Houston [1st Dist.] 2001, pet. ref'd).

Trial Court took judicial notice of the scientific reliability of radar over defense objection. The defense appealed arguing the Court could not take such notice and the radar reading was not admissible under *Kelly* citing *Ochoa*. The Appellate Court held that where the officer formed the opinion that defendant was speeding before using radar and testified that radar merely confirmed his suspicion that appellant was speeding provided sufficient evidence that the officer had a reasonable suspicion and that the stop was proper. The court speaks to the *Ochoa* cases and comments that the question of whether a judge could properly take judicial notice of the scientific reliability of radar is an interesting one, does not reach the issue or resolve that question.

3. RADAR MEETS 1ST PRONG OF KELLY TEST

Mills v. State, 99 S.W.3d 200 (Tex.App.-Fort Worth 2002, pet. ref'd).

In agreeing with the reasoning of the *Maysonet* opinion, the Court points out the importance of flexibility in determining the admissibility of scientific evidence. "When dealing with well-established scientific theory, *Kelly's* framework provides courts flexibility to utilize past precedence and generally accepted principles of science to conclude its theoretical validity as a matter of law. To strictly construe *Kelly* otherwise would place a significant burden on judicial economy by requiring parties to bring to court experts in fields of science that no reasonable person would challenge as valid." Though the first prong is met under Kelly, the State must still establish that the officer applied a valid technique and that it was correctly applied on the particular occasion in question.

Maysonet v. State, 91 S.W.3d 365 (Tex.App.-Texarkana, October 16, 2002, pet. ref'd).

In this case, the suspect was stopped for going 74-mph in a 70-mph speed zone. The speed was measured with radar. The officer testified he had been using the radar equipment since 1990 and had calibrated and tested his radar unit one day before he stopped the suspect. He could not explain the margin of error or the underlying scientific theory of radar and no evidence showing the validity of the underlying theory or technique applied was offered. The appellant objects and cites Ochoa for the proposition that the predicate under Kelly was not met. The Court rejects that argument holding that in light of society's widespread use of radar devices, "we view the underlying scientific principles of radar as indisputable and valid as a matter of law." All the State needed to establish was that the officer applied a valid technique correctly on the occasion in question and the Court finds that a trier of fact could have found the officer's testimony

sufficient.

4. LIDAR RADAR AS SOLE BASIS FOR STOP WITHOUT PROOF OF RELIABILITY IS INSUFFICIENT

Hall v. State, 297 S.W.3d 294 (Tex.Crim.App. 2009).

This case involved a stop for speeding based on LIDAR radar device. In finding there was no PC to support the stop, the Court of Criminal Appeals held there was no evidence that the LIDAR device was used to confirm the arresting officer's independent, personal observation that defendant was speeding. There was no evidence to show that use of LIDAR technology to measure speed supplies reasonably trustworthy information or that the trial judge took judicial notice of this fact, as well as his basis for doing so. As a result, the State failed to establish that the officer, who relied solely on LIDAR technology to conclude that the defendant was speeding, had probable cause to stop him.

5. RADAR NOT NEEDED TO JUSTIFY STOP FOR SPEEDING

Yoda v. State, No. 11-19-00191-CR, 2021 Tex. App. LEXIS 3526, Tex.App.-Eastland 2021).

Based on the officer's testimony that it took him awhile to catch up to the defendant, his top speed was 73 mph, and his familiarity "with the way a vehicle appears when traveling highway speed" versus the posted speed limit of 45 mph, the Court held there were "specific and articulable facts that showed that an objective officer could have reasonable suspicion that, under the totality of the circumstances, the officer could form reasonable suspicion that the defendant was speeding without the use of a radar.

Deramus v. State, No. 02-10-00045-CR, 2011 WL 582667 (Tex.App.-Fort Worth 2011) (not designated for publication).

Officer had reasonable suspicion that defendant was violating the transportation code by driving at a speed that was neither reasonable nor prudent as required to support the traffic stop. Although there was no evidence of the posted speed limit and no radar was used, the officer testified that defendant was driving at a speed that exceeded the speed limit as he was familiar with what a car traveling that block looked like at the speed limit. In upholding the stop, the Court points out an officer is not required by statute to use radar to confirm speed, and that it is not always possible for an officer to do so. Nor does the State have to show the defendant actually committed a traffic violation as long as evidence shows officer reasonably believed a violation occurred.

N. CITIZEN'S ARREST FOR "BREACH OF THE PEACE" AS BASIS FOR STOP

Cunningham v. State, No. 04-03-00935-CR, 2004 WL 2803220 (Tex.App.-San Antonio, 2004, no pet.) (not designated for publication).

The defendant nearly hit vehicle of a private security officer-forced him off the road and then proceeded to weave in his lane. These actions constituted a breach of the peace and posed a continuing threat to the safety of the community. Additionally, upon being approached after stopping his vehicle at a drive-through, the defendant exhibited further symptoms of intoxication and admitted he had consumed several beers. Court held that the defendant committed a breach of the peace and a citizen's arrest was authorized in this instance.

Kundel v State, 46 S.W.3d 328 (Tex.App. –Houston [14th Dist.] 2001, pet.ref'd)

Defendant challenges the authority of a civilian wrecker driver to stop and "arrest" him. Court found that even though a citizen cannot make an arrest for mere moving violations, the cumulative driving behavior of the defendant in this case amounted to a "breach of the peace." The citizen observed the defendant weaving back and forth over the roadway, hitting and driving over the curb about 20 times over a quarter of a mile before she pulled up the gated entrance of some town homes at which point the civilian pulled in front of her blocking her entrance into the complex, taking her car key and keeping her in her car until the police arrived.

O. SIGNAL VIOLATIONS

1. TURNING/EXITING WITHOUT A SIGNAL

a. YES

Crider v. State, No. 08-12-00332, 2014 WL 2993792 (Tex.App.-EI Paso 2014), 455 S.W.3d 618 (Tex.Crim.App. 2015.)

This case involved a "Y" shaped intersection and the question of whether or not the Defendant should have signaled given that it was not a 90-degree angle. The term "turn" is not defined by statute and Court points to Court of Criminal Appeals reasoning in *Mahaffey v. State, 316 S.W.3d 638 (Tex.Crim.App. 2010)* which says that to "turn" means to "change direction." In this case, the Defendant's leftward movement after coming to a complete stop constituted a turn. It points out that the 90-degree angle comment purportedly from the *Trahan* case was dicta.

Wehring v. State, 276 S.W.3d 666 (Tex.App.-Texarkana 2008, no pet.).

Defendant's failure to signal his intent to turn when entering the turn lane and when actually making the right turn constituted a traffic violation, and therefore, officer was authorized to stop and detain defendant. *Transportation Code 545.104*

Reha v. State, 99 S.W.3d 373 (Tex.App.-Corpus Christi 2003, no pet.).

Defendant turned left at intersection without signaling and was subsequently stopped for traffic violation. Section 545.104 of the Transportation Code requires an operator to use a turn signal "to indicate an intention to turn, change lanes, or start from a parked position." A turn signal is required regardless of the degree of the turn. No language in the Statute limiting it to turns of ninety degrees. Court disagrees with *Trahan and Zeno.*

Krug v. State, 86 S.W.3d 764 (Tex.App.-EI Paso 2002, pet. ref'd.).

Defendant failed to signal his turn off of a public roadway into a private driveway. Court held that the failure to signal was a traffic violation and disagrees with *Trahan and Zeno.*

b. NO

State v. Zeno, 44 S.W.3d 709 (Tex.App.-Beaumont 2001, pet. ref'd).
Trahan v. State, 16 S.W.3d 146 (Tex.App.-Beaumont 2000, no pet.).

Defendant was stopped for failing to signal when he exited the freeway. Court held that 545.104 did not apply as there was no evidence that he made a turn or changed lanes to exit the freeway. It bases the finding that there was no "turn" on its belief that the language only applies to ninety degree turns.

2. FAILING TO TIMELY SIGNAL INTENT TO TURN

Holmquist v. State, No. 05-13-01388-CR 2015 WL 500809 (Tex.App.-Dallas 2015, pdr ref'd).

Laws requirement that a motorist signal a turn applies even when the driver is in the turn only lane.

State v. Kidd, No. 03-09-00620-CR, 2010 WL 5463893 (Tex.App.-Austin 2010, no pet.).

Texas Transportation Code stated that a driver must continuously signal his intent to turn for not less than 100 feet before a turn. The driver admitted that he failed to do so, trial court concluded that strict enforcement of the 100-foot requirement was "a violation of one's right to be free from unreasonable seizures" under the U.S. and Texas Constitutions. Court of Appeals reversed upholding the stop on the basis that the code was clear and unambiguous in its mandatory requirement that a driver intending to turn was required to "signal continuously for not less than the last 100 feet." Court did not find that enforcement of the code led to absurd results, finding that the code provided a reliable bright-line rule for both drivers and police officers.

P. "FOLLOWING TOO CLOSELY"- SUFFICIENT DETAIL?

1. NO

Ford v. State, 158 S.W.3d 488 (Tex.Crim.App. 2005).

Texas State Trooper Andrew Peavy pulled Matthew Ford's vehicle over for following another car too closely on Highway 290 outside of Houston in violation of *Texas Transportation Code § 545.062(a)* which provides that an operator shall, if following another vehicle, maintain an assured clear distance between the two vehicles so that, considering the speed of the vehicles, traffic, and the conditions of the highway, the operator can safely stop without colliding with the preceding vehicle or veering into another vehicle, object, or person on or near the highway. There were no details given beyond the statement that the officer thought the defendant was traveling "too closely." Court of Appeals held stop was proper and the Court of Criminal Appeals reversed holding that the officer's "conclusory statement" was unsupported by articulable facts. "The State failed to elicit any testimony pertinent to what facts would allow Peavy to objectively determine Ford was violating a traffic law in support of his judgment."

2. YES

Stoker v. State, 170 S.W.3d 807 (Tex.App.-Tyler, 2005, no pet.).

Because police officer testified that he saw defendant's vehicle "right up on another" vehicle while traveling at a high rate of speed, such that defendant would not have been able to safely stop his vehicle, officer gave specific, articulable facts to support the reasonable suspicion that defendant had committed a traffic violation so as to justify stop. V.T.C.A. Transportation Code §545. 062.

Wallace v. State, No. 06-05-00126-CR, 2005 WL 3465515 (Tex.App.-Texarkana Dec 20, 2005, pet. dism'd) (not designated for publication).

Testimony that when the defendant changed lanes, he pulled his vehicle in front of another car and caused the driver of this second car to have to apply the brakes because he was too close coupled with officer testimony that the two vehicles were "probably a car length or less" apart when defendant made the lane change presented clear, concrete facts from which the trial court could determine whether the officer did indeed have "specific, articulable facts," which when viewed under the totality of the circumstances could lead the officer to reasonably conclude Wallace had violated a traffic law. The Court distinguished these facts from those in the Ford case.

Q. DRIVING UNDER THE POSTED SPEED LIMIT

1. INSUFFICIENT ON THESE FACTS

Texas Department Of Public Safety v. Gonzales, 276 S.W.3d 88 (Tex.App.-San Antonio, 2008, no pet.).

At 4:00 a.m. officer observed defendant's driving 45-mph in a 65-mph zone on a public highway, and that was the sole basis for the stop. The case arose out of an ALR appeal. At the hearing the officer stated he thought at that speed the defendant was "impeding traffic." He also admitted it was foggy and drizzly and the road was wet. Officer admitted that those conditions might warrant a prudent driver's slowing down and also could not recall if there was any traffic on the roadway that was actually impeded by the defendant's slow driving. The officer's report also mentioned one instance of drifting within his lane. The Court held this was insufficient basis for the stop. In so holding they noted officer did not say he suspected the defendant was intoxicated, and that the slow speed was not clearly in violation of the ordinance that referred to "reasonable and prudent under the conditions" in stating the minimum and maximum speed that should be traveled.

Richardson v. State, 39 S.W.3d 634 (Tex.App.-Amarillo 2000, no pet.).

The Court held that the officer did not have reasonable suspicion to believe that defendant was committing offense of impeding normal and reasonable movement of traffic at time officer made traffic stop. In this case, the defendant was driving approximately 45 miles per hour in what officer believed was 65 mph zone, and defendant increased speed to approximately 57 mph when officer followed him, where road was under construction and speed limit was 55 mph, defendant was in right lane, and only one vehicle passed defendant while officer followed him. This was the holding despite the officer's testimony that he thought the slow speed was a sign of intoxication.

2. SUFFICIENT ON THESE FACTS

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

Police officer's testimony that defendant was driving 25 mph in 45 mph zone, and that officer observed traffic was backed up behind defendant's vehicle due to his driving and heavy amount of traffic, in violation of statute prohibiting drivers from driving in a manner so as to impede traffic, provided officer with probable cause to stop vehicle.

R. APPROACHING A VEHICLE THAT IS ALREADY STOPPED

Murray v. State, No. 07-13-00356-CR, 2015 WL 6937922 (Tex.App.-Amarillo 2015).

At 1:00 a.m. officer saw Defendant's vehicle parked parallel to road, partially on improved road and partially in driveway next to a closed fireworks stand which had been the location of a previous burglary. Officer parked behind the vehicle and walked up to the closed car window and knocked and yelled to get Defendant to wake up. He finally got him to wake up and the encounter led to arrest for DWI. In response to defense argument that this was an illegal stop, the Court held this was a voluntary encounter. Even though the officer testified the Defendant was not going to be allowed to leave once he approached the car, this subjective intent regarding whether he could leave is only relevant when it is in some way communicated to citizen, which was lacking in this case.

1. ENCOUNTER

Monjares v. State, No. PD-0582-21, 2022 Tex. Crim. App. LEXIS 831.

Can a consensual encounter turn into a detention? Yes, in this case, based on these specific facts. Defendant filed a motion to suppress arguing that his interaction with law enforcement was an investigative detention without reasonable suspicion rather than a consensual encounter. The CCA held that although this started as a consensual encounter when the officer "stepped towards the Appellant, stated manos, manos (hands, hands), and showed Appellant to hold his hands out while the other officer had his hand on Appellant's back," a reasonable person in Appellant's positions would not feel free to ignore the officer's statement and this rose to the level of an investigative detention.

Jacob v. State, No. 07-14-00065-CR, 2014 WL 5336487 (Tex.App.-Amarillo 2014).

In response to a call about shots fired from a red Ford Mustang, an officer noticed such a car parked in a closed McDonald's parking lot, pulled into the lot and parked near the Mustang without blocking it and without use of flashing lights or spotlight, and approached the vehicle on foot. When Defendant rolled down the window, the odor of alcohol was detected, and a DWI investigation began. The Defense argued it was an illegal stop and the State argued it was an "encounter." The Court found there was insufficient show of authority to make this a stop and found it was an "encounter." The fact that an officer is in uniform and operating a marked vehicle and taps on a car window to get Defendant to roll it down is not a sufficient show of authority to turn this into a detention.

State v. Lyons, No. 05-13-01607-CR, 2014 WL 3778913 (Tex.App.-Dallas 2014, pdr ref'd).

Officer responded to a call describing a vehicle with two flat tires and a possible intoxicated driver. The Trial Court granted a motion to suppress holding the officer's actions constituted an illegal detention. The Court of Appeals reversed that ruling, finding that the officer's actions constituted an "encounter" and not a "seizure." In doing so the Court focused on the following facts: officer's emergency lights were not activated, he approached Defendant's vehicle which was stopped without his weapon drawn, he never exhibited his weapon, he did not block the Defendant's vehicle, he did not force Defendant out of her car, he did not ask her to exit her car before speaking to her, he never physically touched the Defendant before she exited, he never asked her to roll down her window, and he never spoke to her in a commanding or authoritative voice.

Morris v. State, No. 02-09-00433-CR, 2011 WL 1743769 (Tex.App.-Fort Worth 2011).

Identified citizen called in to report defendant's erratic driving and followed defendant as he drove home. Officer arrived at the home, pulled his vehicle into the driveway with lights flashing, blocking defendant from leaving. Officer said he exited his patrol car and either approached defendant or requested that defendant approach him and asked defendant, who appeared to be confused, had slurred speech and smelled of alcohol, if he had been driving. Defendant, who had keys in his hand, admitted that he had been driving, had been at a bar in Fort Worth, and that he probably should not have driven home. Court found this was a "voluntary encounter" and added that even if it was not, that the officer would have had reasonable suspicion to investigate defendant for DWI.

State v. Woodard, 341 S.W.3d 404 (Tex.Crim.App. 2011).

Responding to a call about a car in a ditch and report that the driver was on foot, the officer on a hunch that a pedestrian he saw on foot near the scene might be the driver led to him approaching and engaging the pedestrian in questioning. Based upon that encounter, the officer developed probable cause to believe the pedestrian/defendant was the operator of the vehicle in the ditch and to arrest him for DWI. The defense objected that the officer had no legal basis for approaching and questioning the defendant. The Court held that an officer needs no justification for a consensual encounter, which triggers no constitutional protections.

State v. Murphy, No. 2-06-267-CR, 2007 WL 2405120 (Tex.App.-Fort Worth 2007, no pet.) (not designated for publication).

This case involved a defendant who accidentally drove his motorcycle down an embankment in a park after hours. The trial judge granted the motion to suppress finding there was no reasonable suspicion or probable cause to stop the defendant. The Appellate Court characterized the officer's initial contact with the defendant when he helped him get his motorcycle up the embankment as a consensual "encounter." In overruling the trial judge, the Court found that this encounter escalated into an investigative detention that was supported by reasonable suspicion that the defendant was intoxicated.

State v. Bryant, 161 S.W.3d 758 (Tex.App.-Fort Worth 2005, no pet.).

Officer saw defendant turn into the parking Jot of a strip shopping center, drive toward the rear of the buildings, turn around, stop between the buildings, and turn off his headlights. Officer drove to where defendant was parked, got out of his patrol car, approached the defendant's car, and knocked on defendant's window. Defendant opened his car door. Officer smelled a strong odor of alcohol and noted defendant had "something all over the front of him" and that his zipper was undone. After conducting an investigation, officer arrested defendant for DWI. Trial Court suppressed the stop finding the officer had no legal basis to approach vehicle. Court held that police officer was not required to have reasonable suspicion that defendant was engaged in criminal activity to approach defendant's car and knock on his window. Court characterizes everything up to the point where defendant opened his door as an "encounter' which is not a seizure for 4th Amendment purposes.

2. NOT AN ENCOUNTER

State v. Carter, No. 2-04-063-CR, 2005 WL 2699219 (Tex.App.-Fort Worth 2005, pet. ref'd) (not designated for publication).

Officer observed passenger in vehicle throwing up out passenger side of vehicle and decided to investigate passenger's medical condition. In response to shining of spotlight on defendant's vehicle,

the vehicle pulled over into parking Jot and stopped. The officer's activating strobe lights and getting out of his vehicle and approaching defendant's vehicle on foot meant the contact was a detention and not an encounter as argued by the State.

3. APPROACHING DEFENDANT OUTSIDE OF AND AWAY FROM VEHICLE = ENCOUNTER

Rossi v. State, 2017 WL 1536462NO. 02-16-00360-CR, 2017 Tex. App. LEXIS 3841

Defendant was involved in a single car crash on a residential street. The car was partially blocking the roadway when the officer arrived on scene. The car was not drivable. The officer found it unusual that the driver hadn't waited with the vehicle or had a tow truck called to the scene. The officer ran the license plates and discovered the registered owner of the car lived one street over. The officer went to that location and made contact with the father of the defendant. In speaking with the officers, the defendant's father confirmed that the car belonged to his son, that his son had been involved in wreck and that he had picked up his son. Due to the rain, the defendant's father invited the officers into his home. The officers asked to speak to the defendant on two occasions. The defendant's father requested his son to come down. The officers observed signs of intoxication on the defendant when he came down the stairs. The defendant spoke with the officers, and this led to his arrest. The court held that this was a voluntary encounter.

State v. Woodard, 2011 WL 1261320 (Tex.Crim.App. 2011).

Defendant drove his car off the road, left the scene and while walking down the road encountered an officer who asked him if he had been involved in an accident and he said he had. This contact culminated in his arrest for DWI. Defendant argued that the initial encounter and questioning was an illegal seizure, but the Court held this initial interaction between police officer and defendant on a public sidewalk was a consensual encounter that did not implicate the Fourth Amendment.

S. PLATE OBSCURING STATE SLOGAN AND IMAGES PROVIDES BASIS FOR STOP

State v. Johnson, 219 S.W.3d 386 (Tex.Crim.App.2007).

Police officer had reasonable suspicion that defendant was violating statute governing visibility of license plates and thus was justified in making traffic stop; dealer-installed frame for Texas license plate on defendant's vehicle entirely covered phrase "THE LONE STAR STATE" and probably covered images of space shuttle and starry night, and phrase and images were all original design elements of license plate. V.T.C.A. Transportation Code § 502.409(a) (7) (8) (2003).

T. DRIVERS LICENSE CHECKPOINT

1. UNREASONABLE

State v. Luxon, 230 S.W.3d 440 (Tex.App.-Eastland 2007, no pet.).

Seizure of defendant at roadblock operated by police officers to check driver's licenses was unreasonable under the Fourth Amendment; operation of roadblock was left to unfettered discretion of officers given that they made decisions as to where, when, and how to operate roadblock, conducted roadblock without authorization or guidance of a supervisory officer, and conducted roadblock in absence of any departmental plan of police department. Thus, operation or roadblock presented a serious risk of abuse of officers' discretion, and thereby intruded greatly on defendant's Fourth Amendment interest in being free

from arbitrary and oppressive searches and seizures.

2. REASONABLE

Bohren v. State, No. 08-10-00097-CR, 2011 WL 3274039 (Tex.App.-El Paso 2011) (not designated for publication).
Lujan v. State, 331 S.W.3d 768 (Tex.Crim.App. 2011).

Officers are not required to conduct a license and registration check wearing blinders and ignoring any other violations of the law that they observe but can still act on what they learn during a checkpoint stop, even if that results in the arrest of the motorist for an offense unrelated to the purpose of the checkpoint. A brief suspicion less stop at a checkpoint is constitutionally permissible if its primary purpose is to confirm drivers' licenses and registration and not general crime control.

Anderson v. State, No. 03-09-00041-CR, 2010 WL 3370054 (Tex.App.-Austin 2010, pdr ref'd).

There was conflicting testimony on whether defendant consented before he fell asleep or passed out at hospital. Trial Court's finding that defendant in fact consented to the blood draw and although he fell asleep and was asleep when the blood was actually drawn, he never withdrew his consent. The Court of Appeals found it was also authorized as unconscious draw under Section 724.011.

U. VEHICLE STOPPED AT LIGHT

State v. Colby, No. 03-19-00710-CR, 2020 Tex. App. LEXIS 4890 (Tex.App. – Austin 2020).

Does a police officer have reasonable suspicion to believe that the defendant, who stopped in the middle of the intersection, violated *Transportation Code Section 545.302(a)(3)*, when *Section 545.302(f)* also permits drivers to stop in an intersection under certain circumstances? Here, the court found that the defendant's reason for stopping in the intersection was an attempt to yield the officer's patrol vehicle, which was permitted under Section 545.302(f). Because this was the only basis for the stop, the court found that the State failed to satisfy its burden of reasonable suspicion.

***Practice Tip** – make sure your officers are articulating in their report the totality of the circumstances of the stop. If they suspect the defendant is DWI, you could overcome a situation like this if properly articulated.

Klepper v. State, No. 2-07-412-CR, 2009 WL 384299 (Tex.App.-Fort Worth 2009, no pet.).

The defendant was stopped at an intersection past the stop line. Texas Transportation Code requires the operator of a vehicle facing only a steady red signal to stop at a clearly marked stop line. *Texas Transportation Code Ann. § 544.007(d) (Vernon 2008*). Additionally, an operator of a vehicle may not stop, stand, or park in an intersection. *Id*. § 545.302(a)(3) (Vernon 2008). The defendant argued that the officer failed to articulate in his testimony that he believed this to be a traffic violation. The Court of Appeals reminds us that the subjective intent of the officer making the stop is ignored, and we look solely to whether an objective basis for the stop exists. As it clearly did in this case, the motion to suppress was properly denied.

V. PASSING ON IMPROVED SHOULDER

State v. Cortez, 543 S.W.3d 198, (Tex.Crim.App., 2018).

The Court of Criminal Appeals agreed with the lower courts (see decision below) that the Trooper did not have a reasonable basis to stop the Defendant's vehicle for merely touching the "fog line." Merely touching the fog line is not the equivalent to driving on the improved shoulder.

State v. Cortez, 512 S.W. 3d 915 (Tex. App. – Amarillo 2017).

The trial court granted the defendant's motion to suppress stating that the stop was unlawful. The issue in this case whether or not a vehicle must cross completely over the "fog line" onto the improved shoulder to be a violation under *Transportation Code Section 545.058* The Court of Appeals concluded that the statute does require the vehicle to not just touch the 'fog line" but cross completely over it onto the improved shoulder to be a violation.

Lothrop v. State, 372 S.W.3d 187 (Tex.Crim.App. 2012).

The sole basis for the stop was that the defendant drove on the improved shoulder to pass a vehicle that had slowed down in front of him. The officer did not testify that the driving was unsafe in any way but felt it violated 549.058(a) of the Transportation Code. The Court of Criminal Appeals found that since it was not demonstrated that the use of the shoulder was dangerous or not necessary, the conduct per that statute was not illegal. Interesting note that the Court gives as an example of what the officer in this situation might say that might rebut the "necessary" wording was that the defendant could have safely passed by using the lane used by oncoming traffic.

W. OBJECTIVE FACTS CAN TRUMP OFFICER'S SUBJECTIVE BELIEF AND SUPPORT STOP

State v. Defranco, No. 02-15-00408, 2016 WL 3960589 (Tex. App. – Fort Worth 2016).

Judge granted motion to suppress based on belief that there was insufficient basis to arrest Defendant for DWI. In reversing, the Court held that there was PC to arrest for various transportation code violations. What officer intended to arrest a Defendant for is irrelevant so long as there is PC to arrest Defendant for something.

Clement v. State, No. PD-0681-15, 2016 WL 4939246 (Tex. Crim. App. 2016).

Responding to dispatch of intoxicated person at gas station driving a described vehicle. Officer found vehicle in motion and saw it was going 62-mph in a 55-mph zone and stopped it. Officer testified the only basis for stop was speeding but he testified he saw it almost strike the guardrail when it pulled over in response to Officer's vehicle lights. He also acknowledged he was responding to a possible intoxicated driver call but that this was not part of basis for stop. The Court of Appeals reversed trial Court's denial of motion based on Officer's testimony he had arrested Defendant based only on odor of alcohol on breath. In reversing this holding, the Court of Criminal Appeals points out the Officer's subjective intent is not relevant to a PC challenge when there are objective factors that support PC.

Meadows v. State, 356 S.W.3d 33 (Tex.App.-Texarkana 2011, no pet.).

Officer had objectively reasonable suspicion that road traversed by defendant without stopping was private drive, such that defendant's failure to stop constituted traffic offense. This was true despite conflicting evidence as to public or private nature of road. The officer's suspicion was reasonable in spite of the brief interval during which officer was out of visual contact with defendant's vehicle as this time was not long enough for defendant to have stopped and then started moving again. The Court of Appeals reminds us that the standard of proof for the existence of traffic offense is preponderance of the evidence, not beyond a reasonable doubt.

Mahaffey v. State, 364 S.W.3d 908 (Tex.Crim.App. 2012).

Officer stopped defendant based on his belief that where there was a sign on the freeway indicating drivers should merge left, the driver is supposed to turn on his signal. The Court of Criminals Appeals reversed the Court of Appeals' finding that his failure to use turn signal was a traffic violation by holding it was not. On remand the Court of Appeals upheld the stop even though the basis was wrong, finding it reasonable based on the language of the statue for the officer to believe what he observed was a traffic violation. The Court of Criminal Appeals once again accepted PDR on this case and reversed the Court of Appeals again holding that no turn signal is required when two lanes become one.

Kessler v. State, No. 2-08-270-CR, 2010 WL 1137047 (Tex.App.-Fort Worth 2010, pet. ref'd.) (not designated for publication).

Officer observed defendant abruptly swerved to the left to avoid a curb, failed to drive the car within a single lane of traffic, and moved "the majority of the vehicle" into a designated left-turn lane while continuing to drive straight. Officer Goodman testified that based on his experience, narrowly avoiding a curb with such a quick movement and failing to remain in a single lane were signs of possible intoxication. He noticed the driving occurred shortly after 2:00 a.m., when local bars closed, which also supported the stop. This was found to provide proper basis for stop even though officer's subjective belief that a traffic violation was committed was wrong.

Reed v. State, 308 S.W.3d 417 (Tex.App.-Fort Worth 2010, no pet.).

Even though trial court found the officer's belief that two traffic violations were committed was erroneous, the officer still had reasonable suspicion to stop defendant for suspected DWI based on the other reasons stated for the stop; namely, he had suspected that she might be intoxicated based on time of day, area of city that she had been coming from, and his experience with intoxicated drivers exhibiting similar characteristics of driving.

Hughes v. State, No. 2-07-370-CR, 2008 WL 4938278 (Tex.App.-Fort Worth 2008, pet.ref'd).

The officer testified that the traffic stop in this DWI case was based on his mistaken subjective belief that defendant had committed a traffic violation (failure to maintain a single lane). In upholding the stop, the Court holds that the stop was supported by the officer's observation and testimony concerning specific driving behavior that was consistent with DWI. Specifically, he noted the defendant was driving well below the posted speed limit, slower than other vehicles on the roadway, and was on the road around 2:00 a.m. when bars are closing and was having trouble maintaining a single lane of traffic.

Singleton v. State, 91 S.W.3d 342, 352 (Tex.App.-Texarkana 2002, no pet.) (opin. on orig. subm).

Officer's basis for stop was that the defendant squealed his tires as he made a turn which he thought at the time was a traffic offense but is not. Though he testified he did not stop the defendant for driving unsafely, he did state the defendant made the turn in an unsafe manner. This was held to be sufficient to sustain the stop even though it was not the reason he had articulated.

X. REVVING ENGINE AND LURCHING FORWARD SUFFICIENT BASIS FOR STOP

Foster v. State, 326 S.W.3d 609 (Tex.Crim.App. 2010).

Defendant drove up to the officer's unmarked vehicle and stopped extremely close to the vehicle at a traffic light. Officer then heard a revving sound from defendant's engine and observed defendant's truck make two forward lurching movements and based on this, the officer stopped the defendant for investigation of DWI. Given that nothing indicated that defendant was out of control when he stopped or that he was otherwise driving recklessly, the Court held that the officer did not have a reasonable suspicion that defendant had committed a traffic violation and found the stop should have been suppressed. Court of Appeals applied wrong standard. Stop supported by reasonable suspicion.

Y. DRIVING LEFT OF CENTER ON UNDIVIDED ROAD WITHOUT CENTER STRIPE

State v. Evans, No. 06-09-00216-CR, 2010 WL 1255819 (Tex.App.-Texarkana 2010, pdr ref'd).

Officer saw the defendant driving left of center of the roadway for an eighth to a quarter of a mile, and the road was an undivided, two-lane road without a center stripe. There was no other traffic on the road and said observation resulted in traffic stop. Trial Court focusing on the lack of evidence that it was unsafe for defendant to drive in that manner granted a motion to suppress. The Appellate Court reversed holding there was reasonable suspicion that a traffic violation was in progress and that none of the statutory exceptions to the requirement to drive on the right half of the roadway were applicable.

Z. BASED ON RUNNING VEHICLE FOR INSURANCE, REGISTRATION, OR VALID Dl

1. NOT VALID

Gonzales-Gilando v. State, 306 S.W.3d 893 (Tex.App.-Amarillo 2010, pet ref'd).

Officer based stop on result from his patrol car's computer database that showed that insurance information was "not available" or "undocumented" which led officer to believe that car did not have insurance. There was no further testimony developed to show the belief was reasonable such as what the database terms meant or that database was accurate. Stop was found to be illegal.

Contraras v. State, 309 S.W.3d 168 (Tex.App.- Amarillo 2010, pet ref'd).

Stop was based on terminal saying insurance information was "unavailable" or "undocumented" without further explanation as to why that supported officer's belief that car did not have insurance and included testimony from officer that this could mean that terms could mean either driver could have insurance or may not have insurance was insufficient to justify the stop.

State v. Daniel, 446 S.W.3d 809 (Tex.App.-San Antonio 2014).

At a motion to suppress hearing that was based on stipulated testimony it was stipulated that the Police officer stopped Defendant based on dispatch response that the vehicle he was driving had "unconfirmed insurance." This information was provided by way of the Financial Responsibility Verification Program. The trial court found that this was insufficient to establish a violation under *Texas Transportation Code Sec. 601.051.*

2. VALID

Kansas v. Glover, 140 S.Ct. 1183 (April 6, 2020).

A police officer does not violate the 4th Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license. The Court held that when an officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable.

Villarreal v. State, No. 14-18-00406-CR, 2020 Tex. App. LEXIS 3180 (Tex.App. – Houston (14th Dist) 2020).

The absence of a database record pertaining to vehicle registration does constitute reasonable suspicion of criminal wrongdoing that authorizes officers to initiate a traffic stop. All an officer needs to stop a vehicle is reasonable suspicion, not probable cause.

Oliva-Arita v. State, No. 01-15-00140-CR, 2015 WL 7300202 (Tex. App.-Houston (1st Dist) 2015).

Traffic stop based on patrol car terminal showing insurance status was "unconfirmed". In upholding the stop the Court of Appeals distinguished this case from contrary authority on the fact that the Officer's testimony in this case developed what the term meant and his experience with the use of the terminal and its accuracy and that in 75% of prior stops the term "unconfirmed" meant the driver had no insurance.

Crawford v. State, 355 S.W.3d 193 (Tex.App. – Houston (1st Houston) 2011, pet ref'd).

Officer entered Defendant's vehicle license plate on MDT which identified the last insurance company that issued a policy on the vehicle, policy number, and showed policy expired 45 days before. In attacking stop Defendant points out that Texas law does not require a person to have liability insurance in they have established financial responsibility by some other means and cites Appellate cases saying reliance on terminal is insufficient. Distinguishing this case, it was pointed out more details were revealed by the MDT then were present in those cases.

Tellez v. State, No. 09-10-00348-CR, 2011 WL 3925627 (Tex.App.- Beaumont, 2011).

Officer testified he was following his usual practice when he randomly ran Defendant's vehicles license plate in the "Spillman" database which checks NCIC/TCIC and insurance. Officer said he receives a status of "confirmed" or "unconfirmed" from data base and that "confirmed" means insurance policy is valid and "unconfirmed" means expired or "no insurance" or that database in no way able to verify whether or not there is insurance. In this case it came back "unconfirmed" and was followed by license plate check that showed insurance was expired. In holding this was sufficient the Court distinguished from contrary Appellate holdings by stating this record shows officer's suspicion of "no insurance" was reasonable based on his explanation of the meaning of "confirmed" and "unconfirmed" and his belief that the database is very

accurate (though he did not know how often system information is updated).

AA. REASONABLE SUSPICION AND PROBABLE CAUSE NOT NEGATED BY CORRECTION OF TRAFFIC VIOLATION

State v. Vinson, No. 01-22-00747-CR, 2023 Tex. App. LEXIS 9655 (Tex. App. –Houston, 1st Dist, 2023).

In this case, the officer saw the Defendant operating his motor vehicle without its lights and initiated a traffic stop. By the time the traffic stop was made, the Defendant had turned his lights on. Defendant argued that the stop was unreasonable under the Fourth Amendment because his lights were on "at the time of the stop." The trial court granted the motion to suppress. The higher court held that once the officer saw the defendant operating his vehicle without headlights or taillights in violation of Texas Transportation Code section 547.032, he had both probable cause and a reasonable suspicion to detain the Defendant. Just because a defendant corrects their behavior before the stop, this does not negate the probable cause or reasonable suspicion for the stop.

VI. PORTABLE ALCOHOL SENSOR DEVICES

Fowler v. State, 2007 WL 2315971 (Tex.App.-San Antonio 2007, pet. ref'd) (not designated for publication).
Fernandez v. State, 915 S.W.2d 572 (Tex.App.-San Antonio 1996, no pet.).

Court rejected argument that evidence of the "passive alcohol sensor" was not admissible because it was not certified on the basis that the device was not taking samples for the purpose of determining alcohol concentration but was rather given as one of several DWI FST tests, and the device merely shows the presence of alcohol. Qualitative score given by device was not admitted.

Cox v. State, 446 S.W.3d 605 (Tex.App.-Texarkana 2014, pet ref'd.)

This case held that it was improper for the Judge to find violation of condition of probation based on reading of a PBT device when that was the only evidence of alcohol consumption. It must be said that there was a total failure on the part of the State to prove that the PBT results were scientifically reliable so this does not speak to the device being unreliable but more to the fact that in the future the State must prove its reliability.

VII. WARRANTLESS ARREST DWI SUSPECT - OFFENSE NOT VIEWED

A. BASED ON PUBLIC INTOXICATION THEORY

Pointer v. State, No. 05-09-01423-CR, 2011 WL 2163721 (Tex.App.-Dallas 2011, pdr ref'd).
Ogden v. State, No. 03-03-00190-CR, 2004 WL314916 (Tex.App,-Austin 2004, no pet.) (not designated for publication).
Chilman v. State, 22 S.W.3d 50 (Tex. App.-Houston [14th Dist.] 2000, pet. ref'd.)
Mathieu v. State, 992 S.W.2d 725 (Tex.App.-Houston [1st Dist.]1999, no pet.).
Porter v. State, 969 S.W.2d 60 (Tex.App.-Austin 1998, pet. ref'd).
Jones v. State, 949 S.W.2d 509 (Tex.App.-Fort Worth 1997, no pet. h.).
Reynolds v. State, 902 S.W.2d 558 (Tex.App.-Houston [1st Dist.] 1995, pet. ref'd).
Segura v. State, 826 S.W.2d 178 (Tex.App.-Dallas 1992, pet. ref'd).
Carrasco v. State, 712 S.W.2d 120 (Tex.Crim.App. 1986).

Warrick v. State, 634 S.W.2d 707, 709 (Tex.Crim.App. 1982).
Flecher v. State, 298 S.W.2d 581 (Tex.Crim.App. 1957).

In accident case where officer did not see the defendant driving his car, the officer may still make a warrantless arrest of the DWI suspect pursuant to Article 14.01 of the Texas Code of Criminal Procedure under the authority of the public intoxication statute.

B. BASED ON "BREACH OF PEACE" THEORY

Gallups v. State, 151 S.W.3d 196 (Tex.Crim.App. 2004).
Kunkel v. State, 46 S.W.3d 328 (Tex.App.-Houston [14th Dist.] 2001, pet.ref'd).
Lopez v. State, 936 S.W.2d 332 (Tex.App.-San Antonio 1996, pet. ref'd).
Romo v. State, 577 S.W.2d 251 (Tex.Crim.App. 1979).

C. BASED ON "SUSPICIOUS PLACE" THEORY

1. FRONT YARD

State v. Parson, 988 S.W.2d 264 (Tex.App.-San Antonio 1998, no pet.).

Defendant whose vehicle was stopped in front yard = "suspicious place."

2. PARKING LOT

Johnson v. State, No. PD-0561-20, 2021 Tex. Crim. App. LEXIS 434 (Tex.Crim.App. 2021).

An officer had reasonable suspicion to conduct an investigation, when he saw someone sitting in a car in the dark at a park-and-ride after midnight. Viewing the totality of the circumstances, the court held that the officer had reasonable suspicion because the parking lot had a significant association with criminal activity and because the occupants of the vehicle engaged in activity that appeared secretive and was unusual for the time and place. The court further held that "reasonable suspicion does not require negating the possibility of an innocent explanation."

Cooper v. State, 961 S.W.2d 229 (Tex.App.-Houston 1st Dist.] 1997, pet ref'd).

Officer arrived at scene of accident (in parking lot) and never saw suspect driving his vehicle but determined suspect was involved in accident. Court held detention and arrest were proper holding that it was reasonable for the officer to conclude that the parking lot, in front of a bar, in the wee hours of the morning, with bleeding people walking around wrecked cars and where suspect appeared intoxicated = Suspicious Place.

3. HOSPITAL

Dyar v. State, 125 S.W.3d 460 (Tex.Crim.App. 2003).

Defendant was involved in a one car accident and was transported to a hospital where he was visited by an officer investigating the accident. The officer noted the following: a visible head injury, speech slurred, admission by Defendant that he had been partying with friends, odor of alcoholic beverage, defendant under 21 years of age. Placed Defendant under arrest and after reading him the DIC-24 Defendant agreed to give a blood specimen. Issue on appeal was whether this was a valid warrantless

arrest, and could a hospital be a "suspicious place?" Court holds that a hospital can be, and was a suspicious place, under the totality of the circumstances relied upon in this case.

4. THE DEFENDANT'S HOME

State v. Newton, 689 S.W.3d 397 (Tex.App. – Corpus Christi-Edinburg).

LE was dispatched to a single car accident and upon arriving on scene, the trooper identified and followed skid marks from the scene to a nearby home where he found defendant's damaged truck. The trooper found the defendant in his home, the defendant admitted to driving and while speaking with the defendant, the trooper noticed signs of intoxication. Initially, the defendant denied drinking but then admitted to having a glass of wine with his stepmother, who was present in the home with him. The trooper performed the HGN but the defendant refused the other SFSTs. On cross examination, the trooper stated initially there was nothing suspicious about the defendant's presence at the home, however, he later said it was suspicious based on the totality of the circumstances, and that he did not witness the defendant commit either of the charged offenses. The trial court granted the motion to suppress and said that all evidence was "fruit of the poisonous tree."

Few places, if any, are inherently suspicious. *LeCourias v. State,* 341 S.W.3d 483, 489 (Tex. App.—Houston [14th Dist.] 2011, **no** pet.). "A key element in determining whether a site is a suspicious place is the time frame between the alleged offense and the apprehension of the suspect." Id. However, "[a]ny 'place' may become suspicious when a person at that location and the accompanying circumstances raise a reasonable belief that the person has committed a crime and exigent circumstances call for immediate action or detention by police." *Swain v. State*, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005). Since Swain, several intermediate courts have required a showing of exigent circumstances or otherwise found exigent circumstances to support a warrantless arrest. The Court of Criminal Appeals in ***State v. McGuire***, failed to address this issue, stating that would require the Court to issue an advisory opinion. This court also pointed out that nowhere in Art. 14.03(a)(1) does it require a finding of exigent circumstances.

The court held that The facts here are strikingly similar to many of the previously cited cases where an appellant's home was found to be a suspicious place and the trial court erred by finding that evidence acquired after defendant's arrest should be suppressed and concluding that defendant was not in a suspicious place, as the fact that defendant was at his home did not prevent it from being a suspicious place for purposes of a warrantless arrest under Tex. Code Crim. Proc. Ann. art. 14.03(a)(1).

Cook v. State, 509 S.W. 3d 591 (Tex. App. – Fort Worth 2016).

This was a DWI case where officers arrived at the defendant's home to investigate her possible involvement in a DWI crash. The court held that the defendant's home was a suspicious place. Therefore, the warrantless arrest was justified. The court focused on the short time from the 911 call, the defendant pulling into her garage, and the detectives arriving at the defendant's home. "Any place may become suspicious when a person at that location and the accompanying circumstances raise a reasonable belief that the person has committed a crime and exigent circumstances calls for immediate action or detention by police."

LeCourias v. State, 341 S.W.3d 483 (Tex.App.-Houston [14 Dist.] 2011).

In holding the warrantless arrest of the defendant was proper, the Court held that the area in front of the home where appellant was arrested was a "suspicious place" because the officer reasonably could believe, based on information provided by citizen that defendant drove while intoxicated, and it was necessary to

take prompt action to ascertain appellant's blood-alcohol level.

Gallups v. State, 151 S.W.3d 196 (Tex.Crim.App. 2004).

Defendant's warrantless arrest in his home for driving while intoxicated (DWI) was not illegal. The evidence showed the defendant walked to his home after abandoning wrecked truck following accident short distance away. The home under these circumstances constituted a "suspicious place," when the police officer who responded noticed that defendant was bleeding from mouth. These circumstances also gave police officer reason to believe that defendant had committed breach of the peace."

5. ACCIDENT SCENE

State v. McGuire, 689 S.W.3d 596, (Tex.Crim.App. 2024).

Michael McGuire, with his wife as a passenger, drove his truck into a motorcycle driven by David Stidman causing Stidman's death. McGuire made a U-turn and drove to a nearby Shell gas station a tenth of a mile from the accident scene. There, he called his mother and two law enforcement friends. Police investigating the collision were also informed that McGuire was waiting at the gas station. One of the officers, Trooper Tomlin, who responded to the collision scene went to the gas station to investigate. There, he encountered McGuire and his wife. He also encountered McGuire's mother—who had come to the gas station after McGuire called—standing outside of McGuire's truck. Trooper Wiles also came to the gas station from the crash scene shortly after Trooper Tomlin. Trooper Tomlin observed a piece of metal from the back fender of the motorcycle wrapped around the front of McGuire's truck. Trooper Tomlin also observed McGuire to have "red glassy eyes" and "an odor of alcohol coming from his person. When he asked McGuire what happened, McGuire told him that he "hit something" while driving and that his wife, sitting in the passenger seat at the time, had told him he "hit a person." In order to continue the investigation and because both McGuire and his wife were showing signs of intoxication, McGuire's mother was asked to bring the truck to the scene of the collision while McGuire and his wife were transported there by patrol car.

The CCA has previously held that "[t]he determination of whether a place is a 'suspicious place' is a highly fact-specific analysis" because "few, if any, places are suspicious in and of themselves. "Rather, additional facts available to an officer plus reasonable inferences from those facts in relation to a particular place may arouse justifiable suspicion. Though several different factors "may be used to justify the determination of a place as suspicious," this Court has recognized at least one important factor common to most scenarios: "The time frame between the crime and the apprehension of a suspect in a suspicious place is short. This Court and a number of the courts of appeals have consequently found suspects lawfully arrested in "suspicious places" where (1) the suspect was arrested at a crime scene or somewhere linked to it, (2) shortly after a crime had taken place, and (3) the totality of [**12] the facts known to the police officer objectively point to the suspect's guilt in the commission of a felony or other breach of the peace under 14.03(a)(1).

The facts in this case were sufficient to warrant an objectively prudent person to believe that Appellee had committed intoxication manslaughter if not felony murder. He had also failed to stop and render aid in a motor collision resulting in serious injury. Alternatively, police also had probable cause to believe that Appellee had unlawfully caused the death of another. Unlawfully causing the death of another, for the purposes of Article 14.03(a)(1), is at the very least a breach of the peace. Further this court found that exigent circumstances existed in this case, even though not required under Art. 14.03.

Polly v. State, No. 04-15-00792-CR, 2016 Tex. App. LEXIS 12508, 2016 WL 6885844

This case stands for the fact that DWI is a breach of the peace. A DWI involving an accident makes the accident scene a suspicious place.

Lewis v. State, 412 S.W.3d 794 (Tex.App.-Amarillo 2013, no pet.).

In determining whether or not the scene of an accident could qualify as a "suspicious place" that would justify a warrantless arrest, the Court points out that any place may become suspicious for purposes of justifying a warrantless arrest based on probable cause, when an individual at the location and the accompanying circumstances raise a reasonable belief that the individual committed a crime and exigent circumstances call for immediate action or detention by the police. The scene in this case qualified because the Defendant voluntarily returned to the scene, admitted to being hit-and-run driver, admitted that she had too much to drink, and only 30 to 60 minutes elapsed between collision and Defendant's return to scene.

State v. Rudd, 255 S.W.3d 293 (Tex.App.-Waco 2008, pet. ref'd).

Contrary to Trial Court's findings, the officer did not need to have even reasonable suspicion to talk with defendant at the accident scene and ask questions about the accident. In determining reasonable suspicion, the fact that an officer does not personally observe defendant operating motor vehicle is irrelevant as Article 14.03(a) (1) of the Code of Criminal Procedure provides in pertinent part that an officer may arrest a person found in a suspicious place under circumstances reasonably showing that he committed a violation of any of the intoxication offenses. The Court found that the Court's excluding HGN because the officer did not videotape the testing was within its discretion and upheld that ruling.

D. NEED NOT ACTUALLY CHARGE SUSPECT WITH PUBLIC INTOXICATION

Peddicord v. State, 942 S.W.2d 100 (Tex.App.-Amarillo 1997, no pet.).
Warrick v. State, 634 S.W.2d 707,709 (Tex.Crim.App. 1982).

There is no requirement that the officer actually arrest the defendant on public intoxication charge for the State to take advantage of the above-mentioned theory.

E. IMPLIED CONSENT LAW STILL APPLIES

Chilman v. State, 22 S.W.3d 50 (Tex. App.-Houston [14th Dist.] 2000, pet. ref'd.).
Arnold v. State, 971 S.W.2d 588 (Tex.App.-Dallas 1998, no pet.).
Elliot v. State, 908 S.W.2d 590 (Tex.App.-Austin 1995, pet. ref'd).

While officer did not observe the defendant driving a motor vehicle and made a warrantless arrest for DWI pursuant to Article 14.01 of the Texas Code of Criminal Procedure and under the authority of the public intoxication statute, the implied consent law was still applicable as it applies to person arrested for any offense arising out of the operation of a motor vehicle while intoxicated and is not limited to arrests for the offense of DWI. [see Section 724.011(a) of the Transportation Code.

VIII. VIDEO

A. PARTS OF PREDICATE CAN BE INFERRED

Roy v. State, 608 S.W.2d 645 (Tex.Crim.App. [panel op.] 1980).
Sims v. State, 735 S.W.2d 913 (Tex.App.-Dallas 1987, pet. ref'd).

That machine was operating properly can be inferred from evidence and testimony supporting predicate can come from non-operator.

B. NEW PREDICATE REPLACES EDWARDS

Leos v. State, 883 S.W.2d 209 (Tex.Crim.App. 1994).

Rule 901 of Rules of Criminal Evidence controls on issue of proper predicate for admission of videotapes.

C. OPERATOR QUALIFICATIONS

Holland v. State, 622 S.W.2d 904 (Tex.App.-Fort Worth 1981, no pet.).

No special training on use of video equipment is necessary if operator has basic knowledge of operating procedures or instructions.

D. AUTHENTICATION

Fowler v. State, 544 S.W.3d 844 (Tex.Crim.App. 2018).

This opinion comes from a theft case where surveillance video footage was obtained from a Family Dollar store. The video footage was not in a format that allowed it to be copied, therefore, the officer recorded it on his department camera. The video footage did not contain any audio. Instead of calling someone from the store, the video footage was authenticated through the officer and with a receipt, establishing a date and time, found during their investigation. The trial court allowed the video in. The court of appeals reversed the conviction based on the video not being properly authenticated. This Court held that although video is most commonly authenticated through testimony of a witness with personal knowledge of the scene, it is NOT the ONLY way. It can also be authenticated with evidence of "distinctive characteristics and the like," which include "the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."

E. SUPPRESSIBLE ITEMS

1. INVOCATION OF RIGHT TO COUNSEL

Opp v. State, 36 S.W.3d 158 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd).
Gray v. State, 986 S.W.2d 814 (Tex.App.-Beaumont 1999, no pet.).
Loy v. State, 982 S.W.2d 616 (Tex.App.-Houston [1st Dist.] 1998, no pet.).
Hardie v. State, 807 S.W.2d 319 (Tex.Crim.App. 1991, pet. ref'd) but see
Griffith v. State, 55 S.W.3d 598 (Tex.Crim.App. 2001).

Jury should not have been allowed to hear defendant's invocation of his right to counsel on

videotape.

Kalisz v. State, 32 S.W.3d 718(Tex.App.—Houston [14th Dist.] 2000, pet.ref'd).
Dumas v. State, 812 S.W.2d 611 (Tex.App—Dallas 1991, pet.ref'd).

Improper for jury to be allowed to hear officer give defendant his Miranda warnings and ask him if he wanted to waive his rights. Turning down volume to exclude defendant's refusal could lead jury to the conclusion he did in fact invoke his rights.

2. INVOCATION OF RIGHT TO TERMINATE INTERVIEW

Cooper v. State, 961 S.W.2d 229 (Tex.App.-Houston 1997, no pet.).

Court of Appeals found that the question of "where is he" upon being told about his right to an attorney did not constitute an invocation of his right to an attorney. Court further held that the defendant's subsequent statement, "I'm not answering any questions" was an invocation of his right to terminate the interview. This, like the invocation of right to counsel, should not have been heard by the jury and reversed the case. Court relied on *Hardie v. State*, 807 S.W.2d 319 Tex.Crim.App. 1991, pet. ref'd).

3. EXTRANEOUS OFFENSES - IF OBJECTED TO

Johnson v. State, 747 S.W.2d 451 (Tex.App.-Houston [14th Dist.] 1988, pet. ref'd).

Extraneous offenses mentioned by defendant or police on tape must be objected to at time tape is offered or no error is preserved.

F. NOT SUPPRESSIBLE

1. AUDIO OF FST'S

Jones v. State, 795 S.W.2d 171 (Tex.Crim.App. 1990).

Even after invocation of Miranda rights, police requests that suspects perform the sobriety tests and directions on how suspects are to do the tests do not constitute "interrogation;" neither do queries concerning a suspect's understanding of her rights. If the police limit themselves to these sorts of questions, they are not "interrogating" a DWI suspect.

State v. Davis, 792 S.W.2d 751 (Tex.App.-Houston [14th Dist.] 1990, no pet.).
Dawkins v. State, 822 S.W.2d 668, 671 (Tex.App.-Waco, 1991, pet. ref'd).
Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct 2638, 110 L.Ed.2d 528 (1990).

Audio portion of video need not be turned off after invocation of rights as they concern performance of sobriety tests so long as police questioning is of the type normally incident to arrest and custody and is not reasonably likely to elicit testimony.

Mathieu v. State, 992 S.W.2d 725 (Tex.App.-Houston [1st Dist.] 1999, no pet.).

An officer's request that suspect perform sobriety tests and directions on how to do the tests do not constitute interrogation, nor do queries concerning a suspect's understanding of his rights.

2. SFST REFUSAL

Rafaelli v. State, 881 S.W.2d 714 (Tex.App.-Texarkana 1994, pet. ref'd).
Dawkins v. State, 822 S.W.2d 668, 671 (Tex.App.-Waco, 1991, pet. ref'd)
Barraza v. State, 733 S.W.2d 379 (Tex.App.-Corpus Christi, 1987, pet. granted) aff'd 790 S.W.2d 654 (Tex.Crim.App. June 20, 1990)

Jury is allowed to hear defendant's refusal to perform the field sobriety tests on the video. No distinction between allowing jury to hear about refusal to do FSTs or BTRs.

3. VIDEO PORTION AFTER AUDIO SUPPRESSED

Fierro v. State, 969 S.W.2d 51 (Tex.App.-Austin 1998, no pet.).
Huffman v. State, 746 S.W.2d 212 (Tex.Crim.App. 1988).

So long as visual portions are true and correct, the video is admissible without sound.

4. VOCATION OF RIGHT TO COUNSEL DURING BT REFUSAL

Compton v. State, No. 02-14-00319-CR, 2015 WL 4599367 (Tex. App.–Fort Worth 2015)
Stringer v. State, No. 2-02-283-CR, 2003 WL 21283181 (Tex.App.-Fort Worth, June 5, 2003, pet. ref'd.) (not designated for publication).
Griffith v. State, 55 S.W.3d 598 (Tex.Crim.App. 2001).
Halbrook v. State, 31 S.W.3d 301 (Tex.App.-Fort Worth 2000, pet. ref'd.).
Ex Parte Jamail, 904 S.W.2d 862 (Tex.App.-Houston [1st Dist.] 1995, pet. ref'd).

Refusal to take breath test coupled with and based upon request to consult an attorney is admissible.

5. VIDEO PORTION ADMISSIBLE EVEN IF AUDIO DID NOT RECORD

Akins v. State, No. 14-06-00545-CR, 2007 WL 1847378 (Tex.App.-Houston [14th Dist.] 2007, no pet.).
Burke v. State, 930 S.W.2d 230 (Tex.App.-Houston [14th Dist.] 1996 pet ref'd).

Video is admissible so long as predicate for introduction of photo is met.

6. FIELD SOBRIETY TESTS ARE NON-TESTIMONIAL

Gassawway v. State, 957 S.W.2d 48
Harrod v. State, 2007 Tex.App.LEXIS 397
Jones v. State, 795 S.W.2d 171
Matin v. State, 97 S.W.3d 435
Williams v. State, 116 S.W.3d 788

The courts have found that the administration and performance of the SFSTs are non-testimonial in nature and are not incriminating, therefore, not subject to *Miranda*.

Townsend v. State, 813 S.W.2d 181 (Tex.App.-Houston [14th Dist.] 1991, pet. ref'd).

The Fifth Amendment protects against testimonial communications. A compulsion that makes an accused

a source of real or physical evidence does not violate the Fifth Amendment. Evidence such as a person's voice, demeanor, or physical characteristics is outside the scope of protection against self-incrimination. Queries by the custodial officer regarding defendant's name, address, height, weight, place of employment, or physical disabilities are the type of questions normally attendant to arrest and custody and do not constitute interrogation under the Fifth Amendment. Visual depictions of a sobriety test are not testimonial in nature and therefore do not offend the federal or the state privilege against self-incrimination.

7. VERBAL FST'S /ALPHABET & COUNTING ARE NOT TESTIMONIAL

Gassaway v. State, 957 S.W.2d 48 (Tex.Crim.App. 1997).

A recitation of the alphabet and counting backwards are not testimonial in nature because these communications are physical evidence of the functioning of appellant's mental and physical faculties. The performance of these sobriety tests shows the condition of a suspect's body. This overrules Vickers v. State, 878 S.W.2d 329 (Tex.App.-Fort Worth 1994, pet. ref'd).

8. RIGHT TO COUNSEL - MUST BE CLEARLY INVOKED

Hoff v. State, No. 09-15-00188-CR, 2016 WL 6110904 (Tex. App. – Beaumont 2016).

Upon being asked to agree to give a blood sample the Defendant responded "I'll give blood, whatever. Do I need to do this before I speak to my Attorney?" The Court holds this statement did not constitute invocation of right to an attorney. In so holding, the Court offers that "Not every mention of a lawyer is sufficient to invoke the Fifth Amendment."

Halbrook v. State, 31 S.W.3d 301 (Tex.App.-Fort Worth 2000, pet. ref'd.).
Granberry v. State, 745 S.W.2d 34 (Tex.App.-Houston [14th Dist.] 1987) pet. ref'd, per curiam, 758 S.W.2d 284 (Tex.Crim.App. 1988).

Defendant's request to make phone call to "find out" who his attorney is does not constitute request for attorney. No violation of right to counsel when defendant who has sought to terminate interview is videotaped performing FSTs.

State v. Norris, 541 S.W.3d 862, (Tex.App – Houston [14th District]).

Not every mention of a lawyer constitutes an invocation of a right to counsel. In this case, the Defendant indicated he wanted to call his sister so that she could try and locate a lawyer to represent him. The Court held it was a "forward-looking statement", contemplating his sister's starting the process of obtaining a lawyer. The Defendant's statement was neither unambiguously a request for counsel nor an indication appellee wished to counsel present for further questioning.

9. RIGHT TO REMAIN SILENT MAY NOT BE SELECTIVELY INVOKED

Anderson v. State, No. 2-05-169-CR, 2006 WL 744272 (Tex.App.-Fort Worth 2006, pdr dismissed) (not designated for publication).

After receiving Miranda warnings on the DWI videotape, the defendant answered questions selectively-some he answered and some he refused to answer. He did not terminate the interview. The defense argued the jury should not have been allowed to hear him refuse to answer certain questions.

The Court held that while it is clear that the prosecution cannot use a defendant's post-arrest silence to impeach him at his trial, an accused may not selectively invoke his right to remain silent. Therefore, the Trial Court did not abuse its discretion by admitting the portion of the videotape in which appellant refused to answer specific questions while answering others.

G. ABSENCE OF VIDEOTAPE

1. NOT GROUNDS FOR ACQUITTAL

Williams v. State, 946 S.W.2d 886 (Tex.App.-Waco 1997, no pet.).
Irion v. State, 703 S.W.2d 362 (Tex.App.-Austin 1986, no pet.).

Absence of videotape in DWI case is not grounds for acquittal.

2. UNLESS DESTRUCTION OF TAPE IN BAD FAITH

State v. Isbell, No. 05-15-00506-CR, 2016 WL 1104984 (Tex.App.-Dallas 2016).
Gamboa v. State, 774 S.W.2d 111 (Tex.App.-Fort Worth 1989, pet. ref'd).

To support motion to dismiss based on destruction of video, said destruction must be shown to have been in "bad faith."

3. NO JURY INSTRUCTION FOR FAILURE TO TAPE

Platero v. State, No. A14-94-00403-CR, 1995 WL 144565 (Tex.App.-Houston [14th Dist.] 1995 pet. ref'd) (not designated for publication).
Logan v. State, 757 S.W.2d 160 (Tex.App.-San Antonio 1988, no pet.).

No jury instruction on state's failure to videotape defendant.

Manor v. State, No. 11-05-00261-CR, 2006 WL 2692873 (Tex.App.-Eastland, 2006, no pet.).

Where the DWI videotape was missing, the defendant was not entitled to a "spoliation" instruction. A defendant in a criminal prosecution is not entitled to a spoliation instruction where there is no showing that the evidence was exculpatory or that there was bad faith on the part of the State in connection with its loss.

4. DESTRUCTION OF SCENE VIDEO WON'T SUPPORT SUPPRESSION OF STATION VIDEO

Higginbotham v. State, 416 S.W.3d 921 (Tex.App.-Houston [1st Dist.] 2013, no pet.).

Destroyed in car video showing 30 seconds of Defendant driving with no erratic behavior, being able to stand on his own and having no trouble reaching for his wallet, would not have affected the outcome of prosecution of Defendant for driving while intoxicated (DWI), such that it was not material under Brady, where recording also contained audio of arresting officer's comments that Defendant smelled of alcohol, had watery eyes, and slurred his speech; the Defendant also admitted to drinking four beers that evening, and a field sobriety test recorded at police station located five minutes from the place of arrest showed Defendant's inability to follow instructions or demonstrate basic coordination. Defendant's

argument that the station video should have been excluded because scene video was destroyed was properly denied.

H. SURREPTITIOUS AUDIO RECORDINGS

1. PRE-ARREST

Wallace v. State, 707 S.W.2d 928 (Tex. App.-Texarkana 1986), affd, 782 S.W.2d 854 (Tex.Crim.App. 1989).

Surreptitiously obtained audio recordings are admissible evidence on pre-arrest situations if no incriminating questions are asked without benefit of Miranda warnings.

2. POST-ARREST

Meyer v. State, 78 S.W.3d 505 (Tex.App.-Austin 2002, pet. ref'd).

After arresting the defendant for DWI, he was placed in the back of the patrol unit and then officer went to search defendant's car. As defendant sat in the patrol unit with doors closed and windows shut, he made oral statements that were recorded by the videotaping equipment. Details of the comments were not disclosed other than being characterized in the brief as an "acrimonious tirade profanely blaming his wife and the two officers for his plight." Court holds there was no reasonable expectation of privacy in the patrol car and holds statement to be admissible.

I. DEFENSE RIGHT TO VIEW TAPE BEFORE TRIAL

Durhan v. State, 710 S.W.2d 176 (Tex.App.-Beaumont 1986, no pet.).

Defendant and/or attorney have right to view DWI video prior to trial. Failure to view won't prevent tape's being admitted into evidence.

Quinones v. State, 592 S.W.2d 933 (Tex.Crim.App. 1980), cert. denied, 101 S. Ct. 256. (1980).

DWI videotapes are discoverable.

J. TAPE MADE IN FOREIGN LANGUAGE

Leal v. State, 782 S.W.2d 844 (Tex.Crim.App. 1989).

When tape is in foreign language, a translation by a sworn interpreter is necessary.

K. PROVIDING DEFENDANT WITH COPY OF DWI VIDEOTAPE

1. DEFENDANT NEED ONLY BE GIVEN "ACCESS"

Lane v. State, 933 S.W.2d 504 (Tex.Crim.App. 1996).

Held Rule 38.22 that says State must provide a true and correct copy of tape to the defense before the 20th day before the date of the proceeding is satisfied if the tape is "made available" to the defense.

2. ACCESS TO THE TAPE IS NOT REQUIRED UNLESS THERE IS "CUSTODIAL INTERROGATION"

Mann v. State, 13 S.W.3d 89 (Tex.App.-Austin 2000, Affirmed other grounds 58 S.W.3d 132 [Tex.Crim.App. 2001]).

Where there were no oral statements resulting from custodial interrogation offered on the DWI videotapes, the rule that said tapes must be provided to defense no later than the 20th day before the trial does not apply.

L. NO SOUND = NO PROBLEM

Aguirre v. State, 948 S.W.2d 377 (Tex.App.-Houston [14th Dist.] 1997, pet. ref'd).

Absence of sound on DWI video will not affect its admissibility.

M. MOBILE VIDEO CAMERA TAPE ADMISSIBLE

Poulos v. State, 799 S.W.2d 769 (Tex.App.-Houston [1st Dist.] 1990, no pet.).

The field sobriety test was videotaped by the officer from a camera mounted on his dashboard. This videotape was not testimonial in nature and therefore did not offend the Fifth Amendment privilege.

N. STATE MAY SUBPOENA/OFFER DEFENDANT'S COPY

Adams v. State, 969 S.W.2d 106 (Tex.App.-Dallas 1998, no pet.).

Where the State or police inadvertently destroyed state's copy of DWI videotape after copy had been made for defendant, it was proper for State to subpoena defendant's copy and introduce it into evidence.

O. LOSING VIDEOTAPE BETWEEN TRIAL AND APPEAL DOES NOT REQUIRE NEW TRIAL

Yates v. State, 1 S.W.3d 277 (Tex.App.-Fort Worth 1999, pet. ref'd).

The fact that a videotape is lost between trial and appeal is not conclusive as to whether a new trial is granted. If the issue on appeal is intoxication, the video needs to be close in time to driving to merit a reversal.

P. PROBLEM OF OTHER STOPS BEING VISIBLE ON DWI TAPE

Hackett v. State, No. 2-02-112-CR, 2003 WL 21810964 (Tex.App.-Fort Worth, 2003, no pet.)(not designated for publication).

The defense objected when it discovered, while the jury was deliberating, that the DWI tape admitted into evidence and being viewed by the jury had other stops on it. The trial court did not allow the defendant to examine the jurors to see if watching the tape of the other stops affected them. The Court found there was no error because the defendant did not show that the jurors' viewing other stops harmed the defendant and because the judge had properly instructed them not to consider those extraneous portions of the tape.

PRACTICE TIP: If your tape has extraneous stops on it, edit them out of the tape before you offer it into evidence.

Q. VIDEO PART OF TAPE MAY BE ADMISSIBLE WITHOUT OPERATOR'S TESTIMONY

Hines v. State, 383 S.W.3d 615 (Tex.App. – San Antonio 2012).

Hines argued the videotape could not be properly authenticated under Rule 901 of the Texas Rules of Evidence due to deletions, additions, and alterations. He also claimed that the tap could not be authenticated through another officer. Rule 901(a) specifically states authentication is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims it is. Rule 901 provides a nonexclusive list of examples of authentication or identification that satisfy the rule. TEX. R. EVID. 901(b). Rule 901(b)(1) provides that evidence is properly authenticated if a witness with knowledge testifies that the matter is what it is claimed to be. TEX. R. EVID. 901(b)(1). Thus, the relevant question here is whether the videotape as presented was supported by sufficient evidence to establish it was a videotape of the scene of the accident on the night in question. We hold that it was.

Kephart v. State, 875 S.W.2d 319 (Tex. Crim. App. 1994).
Removed the requirement that a witness testifying as to the authenticity of a piece of evidence be a "witness with knowledge" in the context of an audio recording.

Angleton v. State, 971 S.W.2d 65, 67 (Tex. Crim. App. 1998).

In other words, a witness is no longer required to be the maker of the recording or have otherwise participated in the conversation in order for his testimony that the recording is what it is claimed to be to sufficiently authenticate it. *Id*. at 69. Further, the court held that the authenticating witness is not required to have observed the events depicted in the videotape firsthand, the witness can authenticate the video by explaining how the recording was made and verifying that the recording has not been tampered with.

Reavis v. State, 84 S.W.3d 716 (Tex.App.-Fort Worth, 2002, no pet.).
Page v. State, 125 S.W.3d 640 (Tex.App.-Houston [1st Dist.] 2003, pet. ref'd).

These cases discuss the way you can admit a videotape even if you don't have the officer/witness available who was in the room with the defendant. The authority for admitting at least the video part of the tape falls under what the federal courts have called the "silent witness" rule. The key is whether there is sufficient evidence to enable a reasonable juror to conclude that the videotape is what the State claimed it to be. A showing of how the tape is loaded, that the machine was working should suffice. Both cases cited above involved a store security video.

Johnson v. State, No. 2-04-497-CR, 2005 WL 3244272 (Tex.App.-Fort Worth 2005, pet. ref'd) (not designated for publication).

In-car videotape provided the only basis for the traffic stop and officer/operator of the tape was unavailable to testify as he had been killed by a drunk driver after this arrest. The court held the tape alone, without the officer's testimony, was sufficient proof that the stop of the defendant's car was proper.

R. INABILITY TO ID ALL BACKGROUND VOICES NOT A PROBLEM

Jones v. State, 80 S.W.3d 686 (Tex.App.-Houston [1st Dist.] 2002, no pet.).

Predicate for admitting video is under Rule 901 of the Texas Rules of Evidence. Nothing in that rule requires that every voice on the tape be identified by name.

Allen v. State, 849 S.W.2d 838 (Tex.App.-Houston [1st Dist.] 1993, pet. ref'd).

This opinion applied the old standard from the Edwards case test for tape admissibility and held that even under that test, the requirement that speakers be identified does not include background voices.

Vasquez Garza v. State, 794 S.W.2d 530 (Tex.App.-Corpus Christi 1990, pet. ref'd).

Under Edwards test, it was sufficient that officer was able to identify the background voices as officers, even though the officers could not be named.

S. OFFICER'S NARRATIVE ON PERFORMANCE OF FST'S

1. CUMULATIVE

Evans v. State, No. 14-05-00332-CR, 2006 WL 1594000 (Tex.App.Houston [14th Dist.] 2006, pet. ref'd).

In this case the defendant objected to admissibility of the audio portion of the DWI tape because of the officer's verbal narrative conclusions about defendant's performance on the FSTs. Because the jury had already heard the officer describe the same matters on direct without objection, the taped comments were merely cumulative and did not require reversal.

2. INADMISSIBLE HEARSAY

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

At a Motion to Suppress hearing, defendant sought to suppress the sound on the videotape where the officer's recorded commentary of what was occurring during traffic stop and where the officer dictated on videotape his observations of DWI suspect. The trial Court denied the Motion to Suppress; the defendant pled nolo and appealed. The Court of Appeals rejected the State's argument that these statements were admissible as "present sense impression" and held that the comments were the equivalent to police report or offense report offered for truth of matter asserted, and thus, inadmissible hearsay, and the case was reversed and remanded.

T. NO REQUIREMENT THAT POLICE ACTUALLY VIDEOTAPE DWI ARRESTS

Rodriguez v. State, No. 04-12-00528-CR, 2013 WL 5656194 (Tex.App.-San Antonio 2013, pdr ref'd).

Judge correctly sustained State objection to defense attorney telling jury that the law required that DWI suspects be videotaped. The opinion from the Texas Attorney General states certain counties are required to obtain and maintain video equipment. See Tex. Atty Gen. Op. No. GA-0731. The opinion does not, however, require that all law enforcement vehicles be equipped with video recorders or that each law enforcement encounter with the public be videotaped. Because Texas law does not require that all law

enforcement vehicles be equipped with video recorders, the Trial Court did not err in sustaining the State's objection during voir dire, nor did it err in advising the venire the law was not as Rodriguez's counsel stated. Accordingly, we hold there was no basis for the motion for mistrial, and thus the Trial Court did not abuse its discretion in denying it.

IX. IN-COURT DEMONSTRATIONS/EXHIBITS

A. FIELD SOBRIETY TESTS

Baker v. State, 879 S.W.2d 218 (Tex.App.-Houston [14th Dist.] 1994, pet. ref'd).

Court properly refused to allow defendant to demonstrate his ability to perform FSTs in court as no predicate was laid as to reliability or probative value of said demonstration.

B. SMELL TEST

Lewis v. State, 933 S.W.2d 172 (Tex.App.-Corpus Christi1996, pet. ref'd).

Defendant claimed beer he was consuming was non-alcoholic beer to explain odor officers detected on his breath at time of stop. Defense counsel wanted to do experiment where officers in front of the jury would be asked to judge which of 9 cups had alcoholic and which had non-alcoholic beer. Test was properly disallowed as conditions of test substantially differed from those existing at time of the stop.

C. SMELL & TASTE TEST

Kaldis v. State, 926 S.W.2d 771 (Tex.App.-Houston [1st Dist.] 1996, pet. ref'd).

Defense request that jurors be allowed to smell and taste non-alcoholic mixtures so jurors would see that it is possible for non-alcoholic mixtures to smell and taste like alcoholic beverages was properly denied.

D. CHART OF SYMPTOMS OF INTOXICATION INADMISSIBLE

Platero v. State, No. A14-94-00403-CR, 1995 WL 144565 (Tex.App.-Houston [14th Dist.] 1995).

Injury trial, chart on which officer listed symptoms of intoxication observed in that case was found to be a proper demonstrative aid but should not have been admitted into evidence. Error in doing so found to be harmless.

E. CHART OF SYMPTOMS OF INTOXICATION- DEMONSTRATIVE EVIDENCE

Baker v. State, 177 S.W.3d 113 (Tex.App.-Houston [1st Dist.] 2005, no pet.).

The Court held that a fill-in-the-blank chart that covered signs of intoxication the officer observed was admissible as demonstrative evidence. The prosecutor filled in the blanks as the officer testified. The fact that the chart might contain information similar to that in the police report does not render it inadmissible as a demonstrative aid.

F. DEMONSTRATION OF DEFENDANT'S SPEECH

Williams v. State, 116 S.W.3d 788 (Tex.Crim.App. October 1, 2003).

To rebut the evidence that defendant's speech was slurred due to alcohol, his attorney sought to have his client provide a voice exemplar before the jury but wanted to do so without being subjected to cross examination. The Court of Appeals found that the Trial Court properly prohibited this holding that other means of showing the same thing were available and that to allow the defendant to do so without being exposed to cross examination risks great potential prejudice to the State and risks misleading the jury. The Court of Criminal Appeals reversed finding that a voice exemplar is not testimonial whether it is offered by the State or the Defense. It is physical evidence.

G. ERROR TO ALLOW BOTTLE OF VODKA TO BE ADMITTED AS DEMONSTRATIVE EVIDENCE

Orrick v. State, 36 S.W.3d 622 (Tex.App.-Fort Worth 2000, no pet.).

State was allowed to offer a full unopened bottle of vodka as demonstrative evidence in this DWI case where a bottle of vodka was found in defendant's car at the time of the arrest. In holding it was error, albeit harmless, to allow the State to do so the Court found that when an object that is substituted for the original used in the commission of a crime is not an exact replica and differs in its distinguishing characteristics, the probative value of that object as demonstrative evidence will be very slight.

H. 911 TAPE ADMISSIBLE/NO CRAWFORD VIOLATION:

Ford v. State, No. 08-14-00093-CR, 2016 WL 921385 (Tex.App.-El Paso 2016, pet ref'd).

State offered a 911 call through the testimony of a 911 call center supervisor. The 911 tape contained a call made by the passenger in Defendant's car who stated Defendant was intoxicated and driving dangerously and that she needed help. Court holds that statement as nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to me in an ongoing emergency.

Smith v. State, No. 10-15-000181-CR, 2015 WL 9256927 (Tex.App.-Waco 2016, pdr ref'd.)

Statements made by Defendant's wife to police in 911 call were properly admitted and heard on 911 tape and did not violate confrontation clause. Further statements to police on arrival about Defendant being drunk were not hearsay and were properly admitted as excited utterances and present sense impression.

Rodgers v. State, No. 09-09-00359-CR, 2010 WL 3043705 (Tex.App.-Beaumont 2010, no pet.).

Recording of call made to 911 by motorist with whom Defendant had a car accident was non-testimonial evidence, and thus admission of the 911 recording did not violate Defendant's right of confrontation in DWI trial. The primary purpose for the 911 call was to enable police to meet an ongoing emergency. Although the accident had already occurred when the motorist called 911, Defendant had driven away, and motorist was notifying emergency services that an intoxicated person had just committed a hit-and-run and was driving on a public roadway.

Cook v. State, 199 S.W.3d 495 (Tex. App.-Houston [1st Dist.] 2006).

This case involved a 911 call to police reporting a drunk driver who threw a bottle at his car. The 911 call was admitted, and the witness was not called. Defendant objected to violation of right to confront the witness and claimed contents of taped call were hearsay. The Court held that the statements made on the 911 tape (1) did not violate the right to confrontation under Crawford because they were non-testimonial, and (2) were not inadmissible under the Rules of Evidence as hearsay because they were excited utterances.

X. ONE WITNESS SUFFICIENT (OPINION TESTIMONY)

Dumas v. State, 812 S.W.2d 611 (Tex.App.-Dallas 1991, pet. ref'd).
Valles v. State, 817 S.W.2d 138 (Tex.App.-EI Paso 1991, no pet.).
Irion v. State, 703 S.W.2d 362 (Tex.App.-Austin 1986, no pet.).

Testimony of arresting officer alone = sufficient to convict DWI.

XI. IMPEACHING POLICE OFFICER

A. FINANCIAL MOTIVE

Castillo v. State, 939 S.W.2d 754 (Tex.App.-Houston [14th Dist.] 1997, pet. ref'd).

Defense wanted to offer into evidence the aggregate, annual overtime income earned by arresting officer by testifying in court. Court held that though relevant, such testimony was properly excluded holding "(the) decision to make allegedly 'marginal' arrests is too attenuated from any potential financial gains to overcome the risk of confusion of the issues, embarrassment, harassment, and undue delay." Court did allow inquiry into amount earned for testifying in that case and his per hour wage.

B. QUOTAS

Alexander v. State, 949 S.W.2d 772 (Tex.App.-Dallas 1997, pet. ref'd).

Reversible error in this case to not allow defense to cross-examine the arresting officer regarding a departmental directive establishing quotas for DWI arrests that was in place at the time of the defendant's arrest.

C. EMPLOYMENT AND DISCIPLINARY HISTORY

Baldez v. State, 386 S.W.3d 324 (Tex.App.-San Antonio 2012, no pet.).

Court held that Defendant could not introduce arresting officer's disciplinary report on cross- examination in trial for DWI where Defendant never argued officer was untrustworthy due to bias or interest against Defendant, and Defendant sought to introduce report for sole purpose of impeaching officer's credibility which is prohibited by Texas Rules of Evidence, Rule 608(b).

Deleon v. State, No. 05-05-01335-CR, 2006 WL 1063765 (Tex.App.-Dallas 2006, no pet.) (not designated for publication).

In this case, the defense sought to cross examine the officer on his employment and disciplinary history. Specifically, the defense counsel sought to question the officer regarding (1) an off-duty incident in which he pursued vandals; (2) a reprimand he received for missed court dates; (3) statements in a "development plan" from officer's personnel record that some of his reports were hastily written; and (4) the circumstances surrounding his resignation from another police department more than ten years before the trial. Held the Trial Court properly excluded the cross- examination on these issues as defense failed to show the relevance of these matters to the merits of the case or to any defensive strategy.

XII. IMPEACHING DEFENDANT AND BOND FORFEITURE EVIDENCE

A. PROPER

Ochoa v. State, 481 S.W.2d 847 (Tex.Crim.App.1972).

Where witness makes blanket statements concerning his exemplary conduct such as having never been arrested, charged, or convicted of any offense, or having never been "in trouble" or purports to detail his convictions leaving the impression there are no others, (i.e. "opens the door'). This false impression may be corrected in cross by directing witness to the bad acts, convictions, etc. even though said acts may not otherwise be proper subject for impeachment.

Stranberg v. State, 989 S.W.2d 847 (Tex.App.-Texarkana 1999, pet. ref'd).

Where defendant on station house videotape made the statement, he does not drink alcoholic beverages, it was proper to elicit testimony from arresting officer that he had seen defendant drink alcoholic beverages on a prior occasion. Voucher Rule is no longer the rule in Texas.

B. IMPROPER

Ochoa v. State, 481 S.W.2d 847 (Tex.Crim.App.1972).

Where witness makes blanket statements concerning his exemplary conduct such as having never been arrested, charged, or convicted of any offense, or having never been "in trouble" or purports to detail his convictions leaving the impression there are no others, (i.e. "opens the door'). This false impression may be corrected in cross by directing witness to the bad acts, convictions, etc. even though said acts may not otherwise be proper subject for impeachment.

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C. EVIDENCE OF BOND FORFEITURE ADMISSIBLE

Pratte v. State, No. 03-08-00258-CR, 2008 WL 5423193 (Tex.App.-Austin 2008, no pet.).

In this case the defendant was charged in 1998 but was not rearrested and tried until 2008. The State,

over objection, offered evidence that the defendant failed to appear and had his bond forfeited in the guilt-innocence phase of the trial. The Court held that the forfeiture of an accused's bail bond may be proved as tending to show flight which, in the context of bail-jumping, may be construed as evidence of guilt. For that reason evidence of the defendant's failure to appear in 1999 and that his bond was forfeited was relevant and admissible as evidence of his guilt.

XIII. STATEMENTS BY DEFENDANT

A. PRE-ARREST STATEMENTS

1. ADMISSIBLE

Wexler v. State, 625 S.W.3d 162 (Tex. Crim. App. 2021).

Appellant challenged the admissibility of statements she made to police during the execution of a search warrant, claiming that the statements were the product of custodial interrogation. Wexler was detained and put in the back of a patrol car. The detective testified that while the appellant was in the patrol car, he stated "we have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what." Appellant told him that the drugs were "in her bedroom in a dresser drawer." The encounter was not recorded. Appellant was not told she was a suspect, and the detective did not give her any warnings. She was later arrested for possession with intent to distribute a controlled substance. At trial, Appellant objected to the admission of her statements, the trial court overruled the objection and allowed the statements. The court of appeal determined that the statements were properly admitted because Appellant was temporarily detained rather than under arrest. The court of criminal appeals upheld the court of appeals determination because the defendant's detention was short and in a public setting, and because there was no evidence the defendant was aware of "an overwhelming police presence." Furthermore, the burden is on the defendant to prove she experienced the functional equivalent of a formal arrest.***Caution - This could have gone a different way depending on the testimony adduced at the suppression hearing.***

Koch v. State, 484 S.W. 3d 482, (Tex.App.-Houston (1st Dist) 2016).

Where officer places suspect in back of patrol car for her safety, told her she was not under arrest, transported a short distance before being questioned, was not in "custody" when questioned and officer did not err in not administering Miranda warnings and DVD of investigation and questions and answers about when how much the Defendant had to drink were properly admitted.

Hauer v. State, 466 SW3d 886 (Tex.App.-Houston (14th Dist) 2015).

Defendant involved in an accident who was handcuffed at scene and put in back of patrol car to await arrival of another officer to contact a DWI investigation was detained and not "under arrest." As a result answers given about how much he had to drink were admissible without him having received Miranda warnings.

Warren v. State, 377 S.W.3d 9 (Tex.App.-Houston [1 Dist.] 2011, pdr ref'd).

Court held that it was not error to admit the following statements by defendant made at the scene upon initial contact with defendant on the basis that he was not Mirandized before statements were made.

1) Deputy asked defendant how he had come to know about the crash, and defendant responded that he drove his truck into the ditch.

2) Deputy asked defendant where he was coming from, and defendant responded that he was coming from his home on Cypresswood. Deputy then asked defendant what his intended destination was, and defendant responded that his destination was his home.
3) Deputy asked defendant for his driver's license. Defendant started fumbling through his wallet, dropping business cards out of it. Defendant then looked back up and asked deputy what he had just asked him for.
4) Deputy asked defendant if he had been drinking and defendant responded that he had "drunk some." When asked how many, defendant referred to it "as a few."
5) While deputy was talking to him, the defendant demanded that deputy call a person identified as J.R. who he asserted was *a* deputy with the sheriff's department.
6) Prior to administering the field sobriety test, deputy asked defendant about any medications he was taking or physical problems he might have. Defendant said he was not taking any type of medications and indicated that he did not have any physical problems or difficulties.
7) When he got out of deputy's patrol car for the field sobriety test, defendant was unsteady on his feet and asked repeatedly what he was being charged with.
8) At the time defendant was asking what he was being charged with, he told deputy that deputy couldn't prove that he was driving the truck. Defendant then told deputy, "I beat one of these already."

Davidson v. State, No. 05-08-00948-CR, 201O WL 118776 (Tex.App.-Dallas 2010, no pet.) (not designated for publication).

After the officer administered the field sobriety tests, he asked the defendant if he thought that he should be driving and asked if the defendant would have been driving if his grandchildren were in the car. Defendant answered "no" to both questions. Defendant argued that such statements were inadmissible custodial interrogation, but Court held he failed to identify any facts of the incident that would objectively show that the officer manifested the existence of probable cause or intent to arrest him at the time he answered the questions. Therefore, questions and answers were admissible.

Froh v. State, No. 2-05-038-CR, 2006 WL 1281086 (Tex.App.-Fort Worth, 2006. May 11, 2006, no pet.) (not designated for publication).

After stopping the defendant for a traffic violation and smelling an odor of alcohol, the officer asked the defendant how much he had to drink, and the defendant responded "at least five" beers. The officer later asked him if he was saying he was intoxicated and appellant responded, "yes." The defendant moved to suppress these statements arguing they were the product of custodial interrogation. The Court held that he was not in custody for purposes of Miranda when he made the statements in question. Though the officer's questions concerning alcohol consumption and field sobriety evaluations may indicate that appellant was under suspicion, they were not so intrusive as to elevate the investigatory stop to a custodial interrogation. The Court further pointed out that the mere existence of probable cause alone is not sufficient to trigger Miranda; other circumstances must exist for a reasonable person to believe that he is under restraint to the degree associated with an arrest and those circumstances were not present in this case.

Hernandez v. State, 107 S.W.3d 41 (Tex.App.-San Antonio 2003, pet. ref'd).

In holding that the defendant's statement was admissible, the Court focused on the standard that it is not what the officer thought, his subjective intent, but rather how a reasonable person in suspect's

position would see the issue of whether he was in custody. After some brief questioning and field sobriety tests were performed, the officer formed a subjective intent to arrest the defendant but did not communicate that to him until the defendant told the officer he had consumed "nine beers" after which he was placed under arrest and handcuffed. Up to that point, the Court found that the defendant "would not have felt completely at the mercy of the police and would have expected to be able to proceed along his way if he passed the field sobriety tests." For that reason, the defendant was not in custody when he made the statement, and the statement was properly admitted.

Lewis v. State, 72 S.W.3d 704 (Tex.App.-Fort Worth 2002, pet. ref'd).

Officer arrived at the scene of the accident and witness pointed out defendant as being the driver. Officer asked defendant for driver's license and insurance, noticed odor of alcoholic beverage, noticed defendant stumble. Officer asked defendant if he had anything to drink and defendant responded he had approximately five beers. Court held statements were admissible as defendant was not in custody.

State v. Stevenson, 958 S.W.2d 824 (Tex.Crim.App. 1997).

Officer arrived at scene of one accident and finds defendant and his wife at the scene and asked who was driving. Both defendant and his wife said she was. Officer noted injuries on wife consistent with her being passenger and repeated the question after which defendant admitted he was the driver. In holding that the statement was admissible, the Court noted that defendant's becoming the focus of a DWI investigation at the time the question was asked did not convert the roadside stop to custodial interrogation.

Loar v. State, 627 S.W.2d 399 (Tex.Crim.App. [panel op] 1981).

Statement made by defendant that he had "one glass of wine" made during traffic stop, not product of custodial interrogation and is admissible.

Abernathy v. State, 963 S.W.2d 822 (Tex.App.-San Antonio 1998, pet. ref'd).

After stopping defendant, the officer smelled a moderate odor of intoxicants, noticed defendant's eyes were glassy, asked him to get out of the vehicle, and if he had had anything to drink. Defendant responded that he had had a few drinks. The officer asked defendant to perform a series of three field sobriety tests after which he again asked him how much he had had to drink, and defendant said he had consumed four drinks. In holding both statements were admissible; the Court found that all the measures employed by the officer until the time of the arrest were in pursuance of a temporary investigation to determine whether defendant was driving a motor vehicle while intoxicated. There was no coercive atmosphere of custodial interrogation as contemplated by Miranda and its progeny. No violations of the Fifth and Fourteenth Amendments have been shown, as defendant simply was not subjected to custodial interrogation.

Galloway v. State, 778 S.W.2d 111 (Tex.App.-Houston [14th Dist.] 1989, no pet.).
Massie v. State, 744 S.W.2d 314 (Tex.App.-Dallas 1988, pet. ref'd).

Questioning that occurs as normal incident of arrest and custody is not interrogation. Officer upon approaching defendant asked if he had been drinking and defendant replied "Yes, I've been drinking a lot." That statement is admissible.

State v. Waldrop, 7 S.W.3d 836 (Tex.App.-Austin 1999, no pet.).

A roadside stop does not place a driver in custody to the degree that Miranda warnings need to be administered. In this case, the Court reversed an order of the trial court suppressing statements about when and where a defendant was drinking and his comment that he was drunk when all statements were made after the stop but before field sobriety tests were conducted.

Hutto v. State, 977 S.W.2d 855 (Tex.App.-Houston [14th Dist.] 1998, no pet.).

Before an accident investigation becomes a custodial situation where Miranda protection is available there must be: 1) evidence that defendant subjectively perceived he was not free to leave; 2) a manifestation by the officer to the defendant of his intent to arrest him. In this case, the Court found the officer's conducting field sobriety testing and questioning of defendant did not convert roadside stop into arrest and that oral statements of defendant were admissible.

Harrison v. State, 788 S.W.2d 392 (Tex.App.-Houston [1st Dist.] 1990, no pet.).

Statement made by defendant, in response to questioning by officer, that he had 3-5 beers, was not result of custodial interrogation where officer had just stopped the defendant, had noted the odor of alcohol on his breath, and had not arrested him. Court stressed officer was 'just beginning to form suspicion that motorist was intoxicated at time of statement."

Morris v. State, 897 S.W.2d 528 (Tex.App.-El Paso 1995, no pet.).

During DWI videotaping, officer asked defendant during recitation of statutory warning, "Are you too intoxicated to understand me?" – not custodial interrogation.

Shepherd v. State, 915 S.W.2d 177 (Tex.App.-Fort Worth 1996, pet. ref'd).

Statement made by defendant that he was not going to take breath test because he was too intoxicated to pass it was admissible when it was an unsolicited response to a query by intox operator over the radio to arresting officer as to whether the defendant was going to take the test.

2. INADMISSIBLE "CUSTODIAL INTERROGATION"

Raymundo v. State, No. 07-14-00439, 2015 WL 4999127 (Tex.App.–Amarillo, 2015).

This case involves the question of whether the Defendant was "in custody" for purposes of Miranda when roadside questioning was done. Officer responded to a call about a possible accident and found Defendant's truck stopped along shoulder of roadway, observed Defendant asleep or passed out behind wheel with engine running, woke him up and turned off engine, escorted him to rear of truck and repositioned patrol vehicle to record FST's, ordered a wrecker to tow vehicle, determined Defendant could not do FST'S and began asking questions that produced incriminating answers. Court held this showed a degree of restriction on freedom of movement that a reasonable person would associate with arrest.

Alford v. State, 22 S.W.3d 669 (Tex.App.-Fort Worth 2000, pet. ref'd).

Defendant who had exhibited signs of intoxication including field sobriety test failures, who was subsequently handcuffed, was in custody when second officer arrived 6-7 minutes after the stop. As

such, the officer's question about whether he had been drinking was custodial interrogation and his answer of 6 beers was inadmissible and warranted reversal of his conviction.

Gonzales v. State, 581 S.W.2d 690 (Tex.Crim.App. 1979).

After viewing vehicle weaving, driver stopped for DWI investigation, asked to sit in patrol car while license was checked, not free to go, asked if "he had been in trouble before."

Scott v. State, 564 S.W.2d 759 (Tex.Crim.App. 1978).

Driver stopped for license check, arrested for outstanding warrant, placed in patrol car, pistol found, asked "who pistol belonged to?"

Newberry v. State, 552 S.W.2d 457 (Tex.Crim.App. 1977).

Driver stopped for traffic violations, had difficulty getting out of car and finding his license, asked if, what and how much he had been drinking, and then placed under arrest. Testimony showed he was not free to go from the time he was stopped.

Ragan v. State, 642 S.W.2d 489 (Tex.Crim.App.1982).

Defendant stopped for weaving. Officer suspected intoxicated. Asked to sit on police car for further questioning. Officer tape recorded statements.

B. "MIRANDA WARNINGS" - RECITATION MUST BE ACCURATE

State v. Subke, 918 S.W.2d 11 (Tex.App.-Dallas 1995 pet. ref'd).

When giving Miranda warning, the wording must be followed precisely. In this case the officer warning that any statement could be used against the suspect "at trial" instead of "in court" rendered statements made inadmissible.

C. ACCIDENT REPORTS STATUTE HAS NO EFFECT ON ADMISSIBILITY OF DRIVER'S ORAL STATEMENTS

State v. Reyna, 89 S.W.3d 128 (Tex.App.-Corpus Christi 2002, no pet.).
State v. Stevenson, 958 S.W.2d 824 (Tex.Crim.App. 1997).
Spradling v. State, 628 S.W.2d 123 (Tex.App.-Beaumont 1981, pet. ref'd).

Statute making accident reports privileged and confidential did not prevent police officer from testifying to oral statements given by defendant concerning said accident.

D. DOES HANDCUFFING DEFENDANT PLACE HIM IN "CUSTODY" FOR MIRANDA PURPOSES?

1. NO

Rhodes v. State, 945 S.W.2d 115 (Tex.Crim.App. 1997).

Based finding of no custody on its determination of whether the defendant was subjected to treatment that resulted in his being in custody for practical purposes and whether a reasonable person in those circumstances would have felt he or she was not at liberty to terminate interrogation and leave.

2. YES

Campbell v. State, 325 S.W.3d 223 (Tex.App. -Fort Worth, 2010, no pet.).

Stop of defendant constituted an arrest after defendant was placed in handcuffs, and thus defendant's subsequent statements were subject to warning requirements of Miranda and State statute for purposes of later driving while intoxicated (DWI) prosecution. Police officer who stopped defendant did not testify that he handcuffed defendant for officer safety purposes, to continue investigation, or to maintain the status quo; and after handcuffing defendant, officer asked defendant identification questions as would be beyond normal Terry stop questions. Even though it was error to allow the jury to hear statements, the case was not reversed as Court found it did not contribute to defendant's conviction or punishment.

Alford v. State, 22 S.W.3d 669 (Tex.App.-Fort Worth, July 20, 2000, pet. ref'd).

Using the same standard listed above and distinguishing this case from that one held that handcuffing the defendant did place him in custody and thereby rendered his statements inadmissible and required reversal.

E. TAKING KEY AND DIRECTING SUSPECT NOT TO LEAVE DOES NOT NECC = ARREST

State v. Whittington, 401 S.W.3d 263 (Tex.App.-San Antonio 2013, no pet.).

This case involves the question of what elevates a detention to an arrest. Citizen caller (CC) came upon Defendant stopped in roadway for no apparent reason. Defendant then, in spite of CC honking to get her attention, backed into CC and then drove away. CC called police dispatcher and per dispatcher's request, followed Defendant as she drove to her home and then CC stopped across the street and waited until officers arrived. Upon arrival officer approached the Defendant who was still sitting in her car in the driveway. Defendant denied being involved in collision, handed officer a map when he asked for proof of insurance, and had inappropriate demeanor. Officer asked Defendant to step out of her vehicle, step to the back, turn over her keys, and told her to stay right there and not go inside while he went back to move his squad car into position to videotape.

F. STATEMENTS BY DEFENDANT'S HUSBAND - NOT HEARSAY

Snokhous v. State, No. 03-08-00797-CR, 2010 WL 1930088 (Tex.App.-Austin 2010, no pet.) (not designated for publication).

Defendant's husband made the statement to officers during his wife's arrest for DWI that "whatever you

guys can do to keep her out of a DWI, I would really appreciate it" was admissible as non-hearsay as a present sense impression. (Concurring opinion)

G. PRE-ARREST SILENCE TESTIMONY/COMMENTS DO NOT VIOLATE 5TH AMENDMENT

Salinas v. State, 369 S.W.3d 176 (Tex.Crim.App. 2012).

This was a murder case (not a DWI case) but the issue of being able to present evidence of pre- arrest silence is an issue that certainly occurs in DWI cases all the time so I think this will prove to be a useful decision. The Court finds that the 5th Amendment right to remain silent is irrelevant when defendant is under no official compulsion to speak and that prosecutors can comment on that silence regardless of whether the defendant testifies.

H. DEFENDANT ACCOMPANYING OFFICER BACK TO SCENE OF ACCIDENT DID NOT = ARREST:

State v. Adams, 454 S.W.3d 48 (Tex.App. – San Antonio 2014).

Trial Court found Defendant was arrested when he was transported from house back to accident scene and suppressed evidence that followed that arrest. In reversing, the Court of Appeals focused on fact that Officer after locating Defendant at residence asked and got him to agree to come back to scene with him did not constitute an arrest. Defendant got into patrol car unhandcuffed. Noticing Defendant might be intoxicated and feeling that the scene of the wreck was not a safe place to conduct the tests he drove him to a fire department parking lot. The Court found the above to constitute an investigative detention which resulted in sufficient PC to justify arrest.

I. DEFENDANT'S RESPONSE THAT HE WOULD NOT ANSWER CERTAIN QUESTIONS INADMISSIBLE.

Friend v. State, No. 01-14-00884-CR, 2015 WL 5026078 (Tex.App.Houston (1st Dist) 2015, pdr filed)

After reading Miranda Warnings Officer interviewed Defendant at station and wrote his answers down. Some questions he answered and some he stated, "Not saying" or "Not saying anything to that one." The Defendant argued that his "not saying" response constituted an invocation of his 5th Amendment rights and argued jury should not be allowed to hear that. Court of Appeals agreed and reversed case.

J. MOVING DEFENDANT TO ANOTHER LOCATION FOR FST NOT ARREST

Moreno v. State, No. 03-14-00596-CR, 2016 WL 3679175 (Tex. App. – Austin, 2016).

Traffic stop was on shoulder of a highway and after seeing signs of intoxication officer transported Defendant in his vehicle to a nearby gas station to do SFSTs. Defendant said she did not want to go but got into Officer's car un-handcuffed. Officer stated reason to move her for SFSTs was for safety reasons and he told her she was not under arrest. Court held this was not an arrest and was merely being detained for investigative purposes.

XIV. FIELD SOBRIETY TESTS

A. STANDARDIZED FIELD SOBRIETY TESTS ARE NON-TESTIMONIAL

1. ADMISSIBLE

Gassawway v. State, 957 S.W.2d 48
Harrod v. State, 2007 Tex.App.LEXIS 397
Jones v. State, 795 S.W.2d 171
Matin v. State, 97 S.W.3d 435
Williams v. State, 116 S.W.3d 788

The courts have found that the administration and performance of the SFSTs are non-testimonial in nature and are not incriminating, therefore, not subject to *Miranda*.

B. HORIZONTAL GAZE NYSTAGMUS

1. IS ADMISSIBLE

Quinney v. State, 99 S.W.3d 853 (Tex.App.—Houston [14th Dist.] 2003, no pet.).
Gullatt v. State, 74 S.W.3d 880 (Tex.App.-Waco 2002, no pet.).
Emerson v. State, 880 S.W.2d 759 (Tex.Crim.App. 1994).

2. OFFICER DOES NOT HAVE TO BE AN OPHTHALMOLOGIST TO TESTIFY

Quinney v. State, 99 S.W.3d 853 (Tex.App.—Houston [14th Dist.] 2003, no pet.).
Gullatt v. State, 74 S.W.3d 880 (Tex.App.-Waco 2002, no pet.).
Emerson v. State, 880 S.W.2d 759 (Tex.Crim.App. 1994).

3. DOES THE OFFICER NEED TO BE CERTIFIED?

a. NO, BUT RULE 702 REQUIREMENTS MUST BE MET

Price v. State, No. 03-04-00710-CR, 2006 WL 1707955 (Tex.App.-Austin 2006, pet. denied) (not designated for publication).
Burkhart v. State, No. 05-02-01724-CR, 2003 WL 21999896 (Tex.App.-Dallas, 2003, no pet.) (not designated for publication).
Hackett v. State, No. 2-02-112-CR, 2003 WL 21810964 (Tex.App.-Fort Worth, 2003, no pet.)(not designated for publication).
Kerr v. State, 921 S.W.2d 498 (Tex.App.-Fort Worth 1996, no pet.).

The Emerson case does not require that an officer have "practitioner certification" before his testimony on HGN is admissible. Such determination is to be covered by Rule 702 of the Texas Rules on Criminal Evidence.

b. CERTIFICATION FROM A TRAINING COURSE WILL SUFFICE

Smith v. State, 65 S.W.3d 332 (Tex.App.-Waco 2001, no pet.).

Officer who had extensive training in standardized field sobriety tests which began at the police

academy and continued with additional course work who also received certification from a course at Texas A & M University was qualified to testify about HGN.

c. OFFICER MUST HAVE SOME CERTIFICATION

Ellis v. State, 86 S.W.3d 759 (Tex.App.-Waco 2002, pet. ref'd).

Officer who testified that he never completed the thirty test cases he was supposed to perform as part of a NHTSA course on HGN and who testified upon cross that he was not certified to perform HGN should not have been allowed to testify about HGN. Error was found to be harmless.

d. LAPSED CERTIFICATION WILL NOT DISQUALIFY

Patton v. State, No. 04-10-00307-CR, 2011 WL 541481 (Tex.App.-San Antonio 2011, pdr ref'd).

In this case defendant contends officer was not qualified to administer the HGN or testify to its results because Officer Patten had not been re-certified under the Texas Administrative Code to perform field sobriety tests when appellant was stopped, that the test was not done properly, and that finding of clues 3 in one eye and 2 in the other rendered test result medically impossible. The Court found certification is not necessary and while finding that the officer may have only held the stimulus for three seconds instead of four, it was within the trial court's discretion to find that any deviation committed by officer during administration of the HGN test was slight and did not affect the reliability and admissibility of the results. Appellant exhibited three clues in the right eye and one clue in the left eye. The odd clue finding was attributed by officer to defendant's not following stimulus, thereby preventing him finding other clues.

Liles v. State, No. 01-08-00927-CR, 2009 WL 3152174 (Tex.App.-Houston [1st Dist.] 2009, no pet.) (not designated for publication).

The Court held that even though the officer's state certification [see TEX.ADMIN.CODE §221.9 (2009)] in HGN had expired the month prior to testing the appellant, and he had not taken the requisite re-certification courses, he was nevertheless qualified to testify as an expert regarding the administration of the HGN test based on his training and experience.

4. IMPROPER FOR TRIAL COURT TO TAKE JUDICIAL NOTICE OF TEST'S RELIABILITY

O'Connell v. State, 17 S.W.3d 746 (Tex.App.-Austin 2000, no pet.).

It was improper for the trial judge to take judicial notice of the HGN test and to include a paragraph in the jury instruction to that effect. The Court holds that the reliability of HGN is a legislative fact, not an adjudicative fact, so Texas Evidence Rule 201 does not apply.

5. WITNESS CORRELATING TEST TO BLOOD ALCOHOL CONCENTRATION

a. CAN'T DO IT

Smith v. State, 65 S.W.3d 332 (Tex.App.-Waco 2001, no pet.).
Webster v. State, 26 S.W.3d 717 (Tex.App.-Waco 2000, pet. ref'd).
Youens v. State, 988 S.W.2d 404 (Tex.App.-Houston [1st Dist.] 1999, no pet.).

Officer's testimony that his finding four clues in HGN told him there was a 75% chance that the subject had a B.A.C. over 0.10 was error. (In Webster, error rendered harmless after instruction to disregard testimony.)

b. EXCEPT WHEN DEFENDANT "OPENS THE DOOR"

Jordy v. State, 413 S.W.3d 227 (Tex.App.-Fort Worth 2013, no pet.).

Defendant opened door to otherwise inadmissible evidence on redirect examination that National Highway Transportation and Safety Association (NHTSA) manual correlated four out of six clues under horizontal gaze nystagmus (HGN) test with blood alcohol content of 0.10 or higher. He did this by eliciting from State's expert on cross-examination that manual did not explicitly state that certain number of clues on HGN test equated to "loss of normal use of person's mental or physical faculties". A party "opens the door" to otherwise inadmissible evidence by leaving a false impression with the jury that invites the other side to respond. By attempting to leave a false impression that HGN did not correlate to one definition, he opened the door to the State offering the other definition.

6. VERTICAL GAZE NYSTAGMUS/RESTING NYSTAGMUS

Stovall v. State, 140 S.W.3d 712 (Tex.App.-Tyler 2004, no pet.).

Evidence of vertical nystagmus should not have been admitted by the trial court without conducting a Daubert/Kelly hearing. The Court points out that a trial court must examine and assess the reliability of VGN before it is admissible, and no Court has (as of yet) done that. So, Emerson could not be cited on the issue of admissibility as that case never mentioned VGN.

Quinney v. State, 99 S.W.3d 853 (Tex.App.-Houston [14th Dist.] 2003, no pet.).

In holding that it was error, albeit harmless, to allow testimony concerning "vertical nystagmus" and "resting nystagmus," the Court distinguished these tests from horizontal gaze nystagmus tests as follows. In Emerson, the Court of Criminal Appeals exhaustively examined the scientific theory behind HGN testing but did not address the theory behind "vertical nystagmus" or "resting nystagmus" testing. For "vertical nystagmus" and "resting nystagmus" evidence to be admissible, the proponent must present evidence of similar research of the scientific theory underlying those tests.

7. IMPACT OF FAILING TO PERFORM FST'S PER NHTSA GUIDELINES

Cox v. State, No. 04-12-00224-CR, 2013 WL 1850781 (Tex.App.-San Antonio 2013, no pet).

In this case the Defense attorney argues that the HGN test should have no probative value because it was administered while the Defendant was in a seated position. The Court disagreed holding that Texas Courts have held that slight variations in administration of HGN tests go to weight not admissibility.

Maupin v. State, No. 11-09-00017-CR, 2010 WL 4148343 (Tex.App.-Eastland 2010, pdr ref'd).

The Trial Court did not err by finding results of HGN test admissible. The Defense points out that the officer moved the stimulus further than proscribed in the manual, and he completed the test in less than the minimum permitted time. The Court held that the variance was comparable to the leeway courts have

previously afforded officers to reflect the fact that this is a field test. The Trial Court could reasonably conclude that the officer's decision to move the stimulus further when Maupin refused to keep his head still during the exam was appropriate. There was no evidence to suggest that this impacted the test's validity, and if Defendant's position were accepted, an individual could always defeat the test merely by moving his head.

Soto v. State, No. 03-08-00256-CR, 2009 WL 722266 (Tex.App.-Austin, 2009).

In this case the officer admitted he deviated from NHTS guidelines. Specifically, in testing for smooth pursuit, he took longer than required as he conducted that portion 3x and not 2x. He also failed to hold stimulus for 4 seconds when checking for maximum deviation and when testing for onset at 45 degrees, he stopped at 35 degrees because that is when he saw onset of nystagmus. He also adapted the test to accommodate the fact that he is left-handed. Court held in spite of these variations, trial court did not err in admitting the HGN test and results.

Leverett v. State, No. 05-05-01496-CR, 2007 WL 1054140 (Tex.App.-Dallas, 2007, no pet.).

In holding that small variations in the way HGN was performed did not render it inadmissible, the Court pointed out that small variations in the administration of the test do not render the HGN test results inadmissible or unreliable but may affect the weight to be given to the testimony. Plouff v. State, 192 S.W.3d 213, (Tex.App.-Houston [14th Dist.] 2006, no pet.) (citing Compton v. State,120 S.W.3d 373, 378 (Tex.App.-Texarkana 2003, pet.ref'd)). Here, the officer took approximately fifty-three seconds to complete the test but allegedly should have taken at least eighty-two. This difference in timing is not a meaningful variation. McRae v. State, 152 S.W.3d 739, 744 (Tex.App.-Houston [1st Dist.] 2004, pet. ref'd) (holding where officer admitted HGN test was invalid, court abused its discretion in admitting HGN testimony). Moreover, there are intervals in the HGN test where the officer is simply positioning the eyes for the next test, and any variation in the time to do so "would have no effect on the reliability of [the] test."

Taylor v. State, No. 03-03-00624-CR, 2006 WL 1649037 (Tex.App.-Austin 2006, pet. ref'd) (not designated for publication).

This case involves an attack on the manner in which the HGN test was performed and attacks on the method put forward by the defense with expert witness Troy Walden. This case involves a detailed recitation of the attacks and is a good read for any prosecutor facing an expert attack on the FSTs. In response to the defense attack that the time of the passes was done incorrectly, the Court found that "Even if the time recommended by Walden and the NHTSA manual is accurate, the difference between this time and that estimated by Officer Clayton appears negligible." The Court further found that there was nothing to show that the difference in time would result in a finding of smooth pursuit of appellant's eyes rather than a lack of smooth pursuit. The Court also found that Walden's testimony that Officer Clayton made only one pass of each eye in checking for smooth pursuit of the eyes when there should have been two passes of each eye did not provide a basis for excluding the HGN test. The defense also attacked the fact that the stimulus was held at maximum deviation for 3 rather than 4 seconds. Again the Court found the time difference negligible. The Court mentioned that the NHTSA manual was not introduced. Nor did the trial Court take "judicial notice" of any such manual.

Reynolds v. State, 163 S.W.3d 808 (Tex.App. Amarillo 2005) affirmed other grounds 204 S.W.3d 386 (Tex.Crim.App. 2006).
Compton v. State, 120 S.W.3d 375 (Tex.App.-Houston [1st Dist.] 2003, pet. ref'd).

Police officer's slight deviation in number of seconds taken to conduct horizontal nystagmus (HGN) test

from number of seconds recommended by DWI Detection Manual did not invalidate test results otherwise indicating that defendant was driving while intoxicated. The objection by the defense was that the officer administered the smooth pursuit portion of the HGN test in eleven seconds instead of the sixteen seconds prescribed in the DWI Detection Manual. He argued that the officer moved the stimulus two and a half seconds faster than recommended for each eye. The Court noted that the manual itself only provides approximations of the time required for properly conducting the tests. The Defendant's argument that the slightly increased speed with which Baggett administered the test amounted to an inappropriate application of the technique, invalidating the results was found by the Court to be untenable and, if accepted, would "effectively negate the usefulness of the tests entirely." As to the OLS, the officer failed to instruct the defendant to keep his arms by his side. The Court found that it was error to admit this test which it did find was not done per the manual but found that error to be harmless. The Court noted that the officer's failure to instruct Compton to keep his arms at his side should have made the test easier to perform.

8. DVD SHOWING HGN PROPERLY ADMITTED AS DEMONSTRATIVE AID

Hysenaj v. State, No. 11-13-00219-CR, 2015 WL 4733068 (Tex.App. 2015)
Keller v. State, No. 06-13-00042-CR, 2014 WL 1260611 (Tex.App.-Texarkana 2014, no pet.).
McCarthy v. State, No. 01-12-00240-CR, 2013 WL 5521926 (Tex.App.-Houston [1st Dist] 2013, no pet.).
Guerrero v. State, No. 01-11-01013-CR, 2013 WL 3354653 (Tex.App.-Houston [1st Dist] 2013, pdr ref'd).
Rodriguez v. State, No. 04-12-00528-CR, 2013 WL 5656194 (Tex.App.-San Antonio 2013, pdr ref'd).
Hartsock v. State, 322 S.W.3d 775 (Tex.App.-Fort Worth 2010, no pet.).

In this case the State offered a DVD featuring videos of an individual's eyes with and without nystagmus. The court held this was a properly admitted demonstrative aid to help the jury understand the signs the officer looks for when conducting the HGN test.

9. HGN TEST DOES NOT HAVE TO BE VIDEOTAPED

Campos v. State, No. 09-14-00481-CR, 2015 WL 6745419 (Tex.App.-Beaumont 2016, pet. ref'd).

In both these cases the Defendant sought to exclude the HGN test evidence because the officer allegedly conducted the test in a location where it could not be captured on video. Due to the lack of authority supporting that position the Court of Appeals holds the trial court did not err in admitting the test results.

James v. State, No. 09-14-00360-CR, 2015 WL 5042123 (Tex.App.-Beaumont 2015).

Defendant objected to admission of HGN test at trial as it was done off camera. Court of Appeals held admission was not error. Defendant cites no authority, and Court could find none, that said that lack of video recording renders HGN inadmissible.

10. IN COURT EXAMINATION OF DEFENDANT FOR HGN PROPER

Clement v. State, No. 02-14-00267-CR, 2016 WL 3902494 (Tex. App. – Fort Worth 2016).

At trial officer testified he had mistakenly marked box in his report indicating Defendant had resting nystagmus. After this was explored on cross examination, the State, in Court, asked officer to step down and check defendant for resting nystagmus. Defense objected on two grounds: One that whether it existed

now does not speak to what Defendant had 3 years ago (rejected). Then objected that it was violation of 5th Amendment (rejected). Officer performed test and testified there was no "resting nystagmus." Comparing the compelled HGN test to voice exemplar the Court rejected this argument and held it was proper.

11. NEED NOT INQUIRE ABOUT MEDICAL HISTORY/GLASSES

Williams v. State, No. 14-16-00292-CR, 2017 Tex. App. LEXIS 3240, 2017 WL 1366690 (Tex. App – Houston 2017).

The defendant argued that the results of the HGN should be suppressed due to the fact that the officer did not properly administer the test because the officer failed to ask the defendant if he had any recent head injuries or whether he was wearing glasses. The court held that the officer properly administered the test when the officer checked the defendant for equal pupil size and equal tracking.

C. ONE LEG STAND = LAY WITNESS TESTIMONY

Taylor v. State, No. 03-03-00624-CR, 2006 WL 1649037 (Tex.App.-Austin 2006, pet. ref'd) (not designated for publication).
McRae v. State, 152 S.W.3d 739 (Tex.App.-Houston [1st Dist.] December 02, 2004, pet. ref'd).

We conclude that the testimony by the arresting officer concerning the one-leg stand, which follows, is lay witness testimony governed by Rule 701 of the Texas Rules of Criminal Evidence. That an officer uses terms like "standardized clues," "test," or "divided attention," does not mean the officer is no longer testifying as a lay witness and begins to testify as an expert, who must therefore be qualified. The Court disagreed with U.S. v. Horn, 185 F Supp. 2d 530, (D.Md.Jan. 31, 2002) opinion to the extent that it holds that using these words automatically changes lay testimony into expert testimony. We conclude that, under the circumstances demonstrated here, the words "clues," "test," and "divided attention" merely refer to observations by the peace officer based on common knowledge observations of the one-leg stand and do not convert the lay witness testimony into expert testimony. We hold that the officer's testimony, as described above, concerning his observations of appellant's performance on the one-leg-stand test were admissible as lay witness testimony under Rule 701 of the Texas Rules of Criminal Evidence.

D. WALK AND TURN = LAY WITNESS TESTIMONY

Plouff v. State, 192 S.W.3d 213 (Tex.App.-Houston [14 Dist.], 2006, no pet.).

Arresting officer's testimony regarding the results of walk-and-turn and one-leg stand tests was admissible as lay witness testimony in driving while intoxicated (DWI) prosecution. Officer's testimony about defendant's coordination, balance, and mental agility problems exhibited during one-leg stand and walk-and-turn tests was observation grounded in common knowledge that excessive alcohol consumption could cause problems with coordination, balance, and mental agility.

E. OFFICER MAY TESTIFY ABOUT SCIENTIFIC STUDIES FINDINGS RE: THE RELIABILITY OF FST'S

Lorenz v. State, 176 S.W.3d 492 (Tex.App.-Houston [1 Dist.] 2004, pet. ref'd).

Arresting officer's testimony that studies had found that the three field sobriety tests conducted on defendant were 91 to 95 percent accurate when used in conjunction with each other, did not impermissibly correlate to defendant's quantitative blood-alcohol content (BAC).

F. OFFICERS MAY COERCE SUSPECT INTO PERFORMING FST'S

Oguntope v. State, 177 S.W.3d 435 (Tex.App.-Houston [1st Dist.] 2005, no pet.).

Officer told Defendant who had initially refused to do FSTs that he would take him to jail if he continued to refuse after which Defendant did FSTs. Prior to his plea, Defendant had moved to suppress the results of his FSTs on the grounds he was improperly coerced into doing the tests by the officer's statement. The Court of Appeals held that there was no due process violation in admitting the test results. In so holding, the Court points out that Court of Criminal Appeals has held that authorities may compel a defendant to submit physical evidence of intoxication. It distinguishes this case from Erdman as there are no statutory warnings that apply to FSTs.

G. REFUSAL TO PERFORM FST'S = PC TO ARREST AND EVIDENCE OF GUILT

Texas Department of Public Safety v. Gilfeather, 293 S.W.3d 875 (Tex.App.-Fort Worth 2009).
Maxwell v. State, 253 S.W.3d 309 (Tex.App.-Fort Worth, 2008, pet. ref'd).

Officer may consider defendant's refusal to do Field Sobriety Tests when determining the issue of probable cause to arrest.

Texas Department Of Public Safety v. Nielsen, 102 S.W.3d 313 (Tex.App.-Beaumont, 2003, no pet.).

Substantial evidence existed of probable cause for driver's arrest for driving while intoxicated (DWI) where police officer noticed several signs of intoxication including alcoholic odor coming from vehicle, driver's refusal to make eye contact with officer, driver's refusal to roll down window, driver's response that he had consumed two to four beers when asked if he had been drinking, and driver's refusal to take field sobriety tests. The totality of the circumstances is substantial evidence of probable cause for Nielsen's arrest.

Lonsdale v. State, No. 08-05-00139-CR, 2006 WL 2480342 (Tex.App.-EI Paso, 2006, pet. ref'd).

Defendant challenged the admission of testimony that he refused to perform the field sobriety tests. He complains that the evidence was irrelevant, and if relevant, more prejudicial than probative. He also points to violations of his constitutional rights, arguing that the invocation of the right to counsel, the right to remain silent, and the right against unreasonable search and seizure may not be relied upon as evidence of guilt. The Court rejects these arguments and finds that a defendant's refusal to perform FST's is relevant and admissible. The court further held that it was proper argument that the jury could infer that his refusal was evidence of intoxication.

State v. Garrett, 22 S.W.3d 650 (Tex.App.-Austin, 2000, no pet.).

Defendant's argument-which prevailed in the trial court- was that classic indicators of inebriation that would be present in a normal DWI arrest were absent in this case. We note that many of these factors such as performance on field sobriety tests, were absent as a direct result of defendant's conduct, i.e., his refusal to participate in any of these tests. While we regard these missing factors as a part of the totality of the circumstances, they are only a part, and where many of the missing factors are due to a defendant's conduct, we believe that the officers could reasonably consider that conduct as part of the totality of the circumstances that provided probable cause to arrest.

Dawkins v. State, 822 S.W.2d 668, 671 (Tex.App.-Waco, 1991, pet. ref'd).

In prosecution for felony driving while intoxicated, admission of video tape which showed defendant's refusal to submit to sobriety tests requiring him to recite alphabet and to count aloud was not violation of defendant's constitutional privilege against self-incrimination. Evidence that defendant refused to submit to sobriety tests did not constitute violation of defendant's constitutional right to be free from self-incrimination where there was no indication that defendant was compelled to perform the sobriety tests.

Barraza v. State, 733 S.W.2d 379 (Tex.App.-Corpus Christi, 1987, pet. granted) aff'd 790 S.W.2d 654 (Tex.Crim.App -June 20, 1990).

A request to perform a field sobriety test is sufficiently similar to a request to perform a breathalyzer test so as to allow an analogy to the law governing the admissibility of evidence of a suspect's refusal to take a breathalyzer test. Both types of tests are designed to test the sobriety of the suspect. We can discern no reason to distinguish between them with regard to the admissibility of refusal to perform the tests.

H. FAILURE TO EXPLAIN FST'S IN DEFENDANT'S NATIVE TONGUE

State v. Tran, No. 03-13-00016-CR, 2014 WL 4362964 (Tex.App.-Austin 2014).

This case involves a Vietnamese Defendant who had some language issues. At the conclusion of a motion to suppress what was termed an illegal arrest, the Judge granted the motion finding that the Defendant spoke very little English and concluding that what the officers called evidence of intoxication in the mistakes he made responding to questions was really caused by the Defendant's lack of understanding. In addition his poor performance on FST's was also caused by his inability to understand the instructions due to a language barrier. In reversing the Trial Court, the Court pointed to the fact that there is evidence shown on the tape that supports probable cause to arrest independent of the FST's and other matters that might be attributable to language difficulties.

Phong Xuan Dao v. State, 337 S.W.3d 927 (Tex.App.-Houston [14th Dist.] 2011, pet. ref'd).

No constitutional violation of defendant's rights and no right to a jury instruction when field sobriety tests are not explained in defendant's native tongue or preferred language.

I. DRE TESTIMONY ADMISSIBLE

Richter v. State, No. 06-15-00126-CR, 2015 WL 9287809 (Tex.App.-Texarkana 2015)

DRE Officer was qualified as an expert in determining whether a person was intoxicated by a substance other than alcohol and allowing him to testify was not error. The court noted that the DRE has been recognized by other appellate courts.

Wooten v. State, 267 SW3d 289 (Tex.App.-Houston (14th Dist.) 2008 pet ref'd).

The trial court was within its discretion in determining that Officer called by State was allowed as a DRE to testify to general factors he looks for when determining whether a person is under the influence of marijuana and that marijuana was found in appellant's urine sample, as reflected in Defendant's medical records. However, the trial court did not permit Officer LaSalle to testify that appellant was under the influence of marijuana.

Everitt v. State, No. 01-10-00504-CR, 2014 WL 586100 (Tex.App.-Houston [1st Dist] 2014, no pet.).

This is the first case I am aware of that speaks to the admissibility of a DRE's testimony after a Kelly Hearing. The Trial Court held that the DRE expert in this case was qualified by education and experience and said his analysis was based on valid scientific method and his application of his expertise was valid as well. The videotape of the Defendant's statement during the DRE evaluation and the testimony of the DRE expert were deemed admissible.

XV. SPECIFIC ELEMENTS

A. PUBLIC ROAD - PLACE

1. PARKING LOTS

Rouse v. State, 651 S.W.2d 736 (Tex.Crim.App. [panel op.] 1983).
Thibaut v. State, 782 S.W.2d 307 (Tex.App.-Eastland 1989, no pet.).

Though a "parking lot" is not a "road" under Article 67011-1, evidence may show a road through a parking lot.

Crouse V. State, 441 S.W.3d 508 (Tex.App.-Dallas 2014, no pet).
Kapuscinski v. State, 878 S.W.2d 248 (Tex.App.-San Antonio 1994, pet. ref'd).
State v. Nailor, 949 S.W.2d 357 (Tex.App.-San Antonio 1997, no pet.).

Parking lot can be a "public place."

Holloman v. State, No.11-95-275-CR, 1995 WL 17212433 (Tex.App.-Eastland 1995) (not designated for publication).

The parking lot was a common area for the complex. The manager of the complex testified that the entire complex was surrounded by a metal fence that the complex had between 200 and 300 residents, and that the parking lot was a common area for the complex. When a resident moved into the complex, the resident received a "gate card" which would "electronically trigger the gate mechanism" to allow the resident to enter the complex. The guests to the complex would push the resident's apartment number and then the phone in the resident's apartment would ring. If the resident wanted the guest to be admitted, the resident would then push a number and the gate would open. The apartment complex placed no restrictions on residents as to whom they could allow to come into the complex. Court held sufficient evidence that parking lot was "public place."

2. MILITARY BASES

Woodruff v. State, 899 S.W.2d 443 (Tex.App.-Austin 1995, pet. ref'd).
Tracey v. State, 350 S.W.2d 563 (Tex.Crim.App. 1961).

Military base can be "public place."

3. PARK AS A PUBLIC PLACE

Perry v. State, 991 S.W.2d 50 (Tex.App.-Fort Worth 1998, pet. ref'd).

The fact that a park is closed (its hours of operation are over) and the public is not supposed to use the park is irrelevant to the determination of whether the place is one to which the public has access. Held park was a "public place."

4. DRIVEWAY

Fowler v. State, 65 S.W.3d 116 (Tex.App.-Amarillo 2001, no pet.).

Unpaved driveway of a rural residence located approximately 1/4 mile from a country road in an isolated and secluded part of county was not a "public place."

5. MARINA

Shaub v. State, 99 S.W.3d 253 (Tex.App.-Fort Worth 2003, no pet.).

In holding that the marina where the defendant operated his vehicle was a public place, the Court focused on evidence that the entire marina area appeared to be accessible to anyone who wants to use it.

6. GATED COMMUNITY

State v. Gerstenkorn, 239 S.W.3d 357 (Tex.App.-San Antonio 2007, no pet.).

The defendant was stopped in a gated community with a security guard and limited access. He argued that it was not a "public place." In rejecting that argument, the Court found that anyone could gain access to the community "under the right set of circumstances." It found the situation analogous to that in the Woodruff case which found the grounds of a military base to be a "public place."

7. PRIVATE ROAD

Texas Department of Public Safety v. Castro, No. 04-08-00687-CV, 2009 WL 1154360 (Tex.App.-San Antonio 2009) (not designated for publication).

This case arises from an ALR ruling that the Defendant was not operating a motor vehicle in a public place. The road the Defendant was stopped on was Private Road 1115, which according to the officer, the public had unrestricted access to. Even though an affidavit from a local resident asserted that the use and actual function of Private Road 1115 was limited to serving residents, and that local residents would occasionally stop unfamiliar vehicles on the road, the Court found that this evidence highlights that the general public could gain access to Private Road 1115. While travelers on the road may have been infrequent, there is no evidence that the public was restricted from accessing Private Road 1115. Based on that evidence, the Court of Appeals found that the road was a "public place."

B. PROOF OF "STATE"

Barton v. State, 948 S.W.2d 364 (Tex.App.-Fort Worth 1997, no pet.).

State proved offense occurred in Texas when it proved it occurred in Denton County. Court could take judicial notice of that fact.

C. PROOF OF "MOTOR VEHICLE"

Flores-Garnica v. State, 625 S.W.3d 651 (Tex.App. – Fort Worth 2021).

Penal code section 32.34(a) defines a motor vehicle as "a device in, on, or by which a person or property is or may be transported or drawn on a highway…) the court held that the State sufficiently proved that an ATV was a motor vehicle. The court reasoned that the jury was 'free to read "*may"* to indicate possibility. Therefore, because the evidence showed the possibility that the ATV was able to transport a person and perty on a highway, the evidence was sufficient. "To hold otherwise would allow intoxicated persons to drive vehicles that are not "street legal" in public places that are not highways with impunity, rending the "public place" element of the DWI statute meaningless."

Turner v. State, 877 S.W.2d 513 (Tex.App.-Fort Worth 1994, no pet.).

Reference by police officer to vehicle as "car" sufficient to establish that the vehicle involved in the DWI was a motor vehicle.

D. "NORMAL USE OF MENTAL OR PHYSICAL FACULTIES"

Hernandez v. State, 107 S.W.3d 41 (Tex.App.-San Antonio 2003, pet. ref'd)

Railsback v. State, 95 S.W.3d 473 (Tex.App.-Houston [1st Dist.] 2002, pet. ref'd).
Fogle v. State, 988 S.W.2d 891 (Tex.App.-Fort Worth 1999, pet. ref'd).
Reagan v. State, 968 S.W.2d 571 (Tex.App.-Texarkana 1998, pet. ref'd).
Massie v. State, 744 S.W.2d 314 (Tex.App.-Dallas 1988, pet. ref'd).

Allegation that defendant did not have the "normal use of his mental and physical faculties" does not require the State to prove what the defendant's normal faculties are. It simply means that the faculties to be tested must belong to the defendant.

E. ADMISSIBILITY OF ILLEGAL DRUGS TO PROVE INTOXICATION

Cook v. State, No. 12-05-00201-CR, 2006 WL 1633250 (Tex.App.-Tyler 2006, no pet.) (not designated for publication).

The defendant was arrested for DWI. Clues of intoxication included horizontal and vertical nystagmus, bloodshot and glassy eyes, odor of alcohol on his breath, slurred speech and unsteadiness on his feet. Incident to his arrest, marijuana was found on his person. The defendant refused to give a sample of his breath. The State alleged the general definition of intoxication in its charging instrument. The Court held that the possession of marijuana made it more likely that he had smoked marijuana, and that supported an inference his intoxication could be explained in part by the use of marijuana. It is worth noting that no odor of marijuana is mentioned by the officer though unobjected to in testimony about vertical nystagmus being present and its relation to the consumption of narcotics. The Court held that the admission at trial of the marijuana was not error.

F. STIPULATING TO AN ELEMENT

Reynolds v. State, No. 08-14-00307-CR, 2017 WL 2824021, 2017 Tex.App. LEXIS 6040 (Tex.App. – El Paso, 2017.

The prosecution is entitled to prove its case by evidence of its own choice. The court distinguishes between an offer to stipulate to an element of the offense and an offer to stipulate to a prior.
Practice Tip: Do not let the defense dictate your evidence. If they are offering to stipulate to a piece of evidence, there is probably a good reason they do not want your jury to hear it.

G. BAC GREATER THAN .15

Ramjattansingh v. State, 548 S.W.3d 540 (Tex.Crim.App. 2018).

The Court granted review to consider whether the State's choice to include the extra element of "at or near the time of the commission of the offense, and the State's acquiescence in a jury charge including that same extra element, takes this case out from under *Malik. Malik* set forth the standard for determining what the elements are and stated that the elements are "defined by the hypothetically correct jury charge for the case," a charge that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. The Court held that we measure the sufficiency of the evidence against the elements of the offense as they are defined by the hypothetically correct jury charge. The Court reversed the COA and remanded the case for proceedings consistent with this holding.

Ramjattansingh v. State, 530 S.W.3d 259 (Tex. App. – 1st Dist. Houston 2017).

This was a DWI case where the State alleged driving while intoxicated with an alcohol concentration of at least .15 "at the time of analysis and at or near the time of the commission of the offense" in the charging instrument. The jury found the defendant guilty. Defendant appealed and claimed the evidences was not legally sufficient to prove "at or near the time of the offense." The Court found that the State invited error by including "at or near the time of the offense" in the information and jury charge, therefore, it will be held to a higher burden of proof. The evidence was not sufficient to find beyond a reasonable doubt that the defendant's BAC was .15 or more "near the time of the offense."

*****Judgment reversed and rendered a judgment of acquittal and remanded for a new trial. See 548 S.W.3d 540 (above).**

Pallares-Ramirez v. State, No. 05-15-01347-CR, 2017 Tex. App. LEXIS 3, 2017 WL 33738 (Tex. App. - Dallas 2017).

This case involved a conviction of a DWI with a BAC greater than .15. The Defendant was arraigned on a class B DWI and the elevated BAC was presented as a punishment issue. However, the Information alleged the class A offense. The jury found him guilty as charged in the Information. The State conceded error on the issue and acknowledged that the elevated BAC is in fact an element of the class A misdemeanor DWI rather than an enhancement. The Court found that the defendant was not harmed by this mischaracterization because the defendant was aware of the charge against him (he had notice) from the information, the defendant took the position throughout the trial that the State had to prove his BAC was greater than a .15, the jurors were aware that the BAC threshold at issue was a .15

from the onset of voir dire, the jurors were told that the range of punishment was that of class A misdemeanor, and the jurors found "true" that the defendant had a BAC greater than .15.

Castellanos v. State, 2016 Tex. App. LEXIS 11587 (Tex. App. – Corpus Christi – Edinburg (13th Dist) 2016).

This case establishes that the .15 or greater BAC result is an element and the State has the burden to prove it at the guilt/innocence stage.

Navarro v. State, No. 14-13-00706-CR, 2015 WL 4103565 (Tex.App.-Houston (14th Dist.) 2015).

Prior to this a subject of some debate was whether the aggravated DWI of greater than 0.15 should be treated as an enhancement or not. This decision makes clear that the so-called 0.15 enhancement is actually not an enhancement but is in fact an element of a class A misdemeanor offense. The court held that a person's blood alcohol concentration (BAC) level provides the basis for a separate offense under 49.04(d) and is not merely a basis for enlargement. Evidence of a blood alcohol level of 0.15 or greater represents a change in the degree of the offense, from class B to class A misdemeanor, rather than just an enhancement of the punishment range. The practical impact is that 0.15 or greater at time of test is something the State must prove in the guilt innocence phase, and it raises the tactical issue for the State to consider whether to request a lesser instruction of DWI.

XVI. BREATH TEST

A. IMPLIED CONSENT LAW

Rodriguez v. State, 631 S.W.2d 515 (Tex.Crim.App. 1982).

Statutory presumption of consent to breath test.

Graham v. State, 710 S.W.2d 588 (Tex.Crim.App. 1986).

"Implied consent law" does not place any mandatory duty on the State to administer a chemical test.

Growe v. State, 675 S.W.2d 564 (Tex.App.-Houston [14th Dist.] 1984, no pet.).

Motorist's implied consent is not subject to motorist's electing to contact an attorney.

B. BREATH TEST PREDICATE

Harrell v. State, 725 S.W.2d 208 (Tex.Crim.App. 1986).

PREDICATE:

1. *proper use of reference sample.*
2. *existence of periodic supervision over machine and operation by one who understands scientific theory of machine.*
3. *proof of results of test by witness or witnesses qualified to translate and interpret such result so as to eliminate hearsay.*

Kercho v. State, 948 S.W.2d 34 (Tex.App.—Houston [14th Dist.] 1997, pet. ref'd).

The testimony of an lntoxilyzer operator and a technical supervisor to the effect that the instrument was periodically tested to ensure that it was working properly, that a test sample run prior to appellant's lntoxilyzer tests demonstrated the machine was functioning properly at that time, that the operator had been trained in the operation of the lntoxilyzer machine, and that the technical supervisor, who also testified about the theory of the test, was certified by the Department of Public Safety as a technical supervisor, was sufficient predicate to admit the results of the lntoxilyzer test.

C. INSTRUMENT CERTIFICATION

1. NEW INSTRUMENT NEED NOT BE RE-CERTIFIED

State v. Krager, 810 S.W.2d 450 (Tex.App.-San Antonio 1991, pet. ref'd).

When police agency substitutes one approved brand of breath testing equipment for another, it was not necessary that there be a re-application for certification of entire breath testing program.

2. CERTIFICATION AND MAINTENANCE RECORDS ADMISSIBLE

Ponce v. State, 828 S.W.2d 50 (Tex.App.-Houston [1st Dist.] 1991, pet. ref'd).

Reports and test records which reflected that the lntoxilyzer machine used to test appellant's alcohol concentration was working properly were admissible under Rule 803(6) and are not matters observed by law enforcement personnel.

D. LIMITED RIGHT TO BLOOD TEST

1. FAILURE TO ADVISE OF RIGHT TO BLOOD TEST

Maxwell v. State, 253 S.W.3d 309 (Tex.App.-Fort Worth 2008).

Defendant argued that breath test was inadmissible because he was not afforded "his right to contact a physician to obtain a specimen of his blood." In overruling this point the Court points out that Section (c) of 724.019 provides that a peace officer is not required to transport someone in custody to a facility for testing, and further, section (d) provides that the "failure or inability to obtain an additional specimen or analysis under this section does not preclude the admission of evidence relating to the analysis of the specimen taken" by the officer originally.

McKinnon v. State, 709 S.W.2d 805 (Tex.App.-Fort Worth 1986, no pet.).
State v. Lyons, 820 S.W.2d 46 (Tex.App.-Fort Worth 1991, no pet.).

Officer has no duty to advise defendant of right to blood test & failure to do so will not affect admissibility of breath test.

2. NO RIGHT TO BLOOD TEST IN LIEU OF BREATH TEST

Aguirre v. State, 948 S.W.2d 377 (Tex.App.-Houston [14th Dist.] 1997, pet. ref'd).
Drapkin v. State, 781 S.W.2d 710 (Tex.App.-Texarkana 1989, pet. ref'd).

Statute does not give the suspect the right to a blood test instead of a breath test.

3. OFFICER'S CHOICE WHETHER BREATH OR BLOOD

State v. Neel, 808 S.W.2d 575 (Tex.App.-Tyler 1991, no pet.).

A police officer arresting a suspect for driving while intoxicated is entitled to choose between asking the suspect to take a breath test or a blood test, both of which are authorized by statute. The officer need not track the statutory language and ask the defendant to take a breath or blood test.

E. MIRANDA WARNINGS

1. NEED NOT GIVE PRIOR TO REQUEST FOR BREATH SAMPLE

Parks v. State, 666 S.W.2d 597 (Tex.App.-Houston [1st Dist.] 1984, no pet.).

Miranda warnings need not be given to suspect prior to breath test request.

2. INVOCATION OF RIGHTS WILL NOT EXCLUDE REFUSAL

Garner v. State, 779 S.W.2d 498 (Tex.App.-Fort Worth 1989) pet. ref'd per curiam, 785 S.W.2d 158 (Tex.Crim.App. 1990).

BTR admissible even if after right to counsel is invoked.

Jamail v. State, 787 S.W.2d 380 (Tex.Crim.App. 1990).

Mixing request for breath sample with warnings during custodial interrogation such that defendant perceived he had the right to consult an attorney will not negate ability to show refusal at trial.

3. NO RIGHT TO COUNSEL PRIOR TO DECIDING WHETHER TO GIVE SAMPLE

Forte v. State, 759 S.W.2d 128 (Tex.Crim.App. 1988).
De Mangin v. State, 700 S.W.2d 329 (Tex.App.-Houston [1st Dist.] 1985) aff'd. 787 S.W.2d 956(Tex.Crim.App. 1990).

F. BREATH AMPULES NEED NOT BE PRESERVED

Turpin v. State, 606 S.W.2d 907 (Tex.Crim.App. 1980).

Breath ampules need not be preserved. Defendant's inability to obtain blood test within two hours did not render breath test results inadmissible.

G. DIC-23 & DIC-24 WARNINGS

1. REQUIREMENT THEY BE GIVEN IN WRITING RELATES ONLY TO ADMISSIBILITY OF REFUSALS

Nebes v. State, 743 S.W.2d 729 (Tex.App.-Houston [1st Dist.] 1987, no pet.).

Rule that DIC-24 warnings be given in writing does not apply to case where breath test was given. This rule only affects admissibility of breath test "refusals."

2. FAILURE TO GIVE WARNINGS IN WRITING NOT NECESSARILY FATAL

Anderson v. State, No. 2-05-169-CR, 2006 WL 744272 (Tex.App.-Fort Worth 2006, pdr. dismissed) (not designated for publication).

The fact that the arresting officer gives an oral warning but fails to give a written warning before requesting a breath test does not, by itself, render the results of the test inadmissible. There must be some showing of a causal connection between the failure to give the written warning and the defendant's refusal to submit to the breath test to render the refusal inadmissible. No such connection was shown in this case and refusal was held admissible.

Martinez v. State, No. 08-03-00240-CR, 2005 WL 787075 (Tex.App.-EI Paso 2005) (not designated for publication).

There was a dispute as to whether the defendant was read the DIC-14 warnings before being asked to give a breath sample. The defendant refused to give a sample and based on the conflict in testimony wanted a charge under Article 38.23 CCP which would allow the jury to disregard the refusal as evidence if they found the warnings were not given. In rejecting that argument, the Court held that defendant had failed to meet the burden of showing a causal connection between any improper warning and the decision whether to submit to a breath test. For that reason, the requested charge was properly denied.

Kely v. State, 413 S.W.3d 164 (Tex.App.-Beaumont 2013, no pet.).
Schaum v. State, 833 S.W.2d 644 (Tex.App.-Dallas 1992, no pet.).

Giving only oral and not "written" warnings to defendant does not always mean evidence of refusal will be inadmissible. It will be subject to a "harmless error" analysis. In this case, held to be "harmless" and evidence of refusal was properly admitted.

Lane v. State, 951 S.W.2d 242 (Tex.App.-Austin 1997, no pet.).

Giving only oral and not written warnings to defendant does not render breath test result inadmissible.

3. WRITTEN WARNINGS NEED NOT BE PROVIDED PRIOR TO REFUSAL

Texas Department of Public Safety v. Jauregui, 176 S.W.3d 846, (Tex.App.-Houston [1 Dist.], 2005, rev. denied).
O'Keefe v. State, 981 S.W.2d 872 (Tex.App.-Houston [1st Dist.] 1998, no pet.).
Rowland v. State, 983 S.W.2d 58 (Tex.App.-Houston [1st Dist.] 1998, pet. ref'd).
Jessup v. State, 935 S.W.2d 508 (Tex.App.-Houston [14th Dist.] 1996, pet. ref'd).

No harm has shown where defendant was not given DIC-24 statutory warnings in writing until after refusal.

4. THAT ARREST PRECEDE READING OF DIC-24 = FLEXIBLE

Nottingham v. State, 908 S.W.2d 585 (Tex.App.-Austin 1995, no pet.).

Though defendant was not told he was under arrest prior to DIC-24 being read to him, the reading of the DIC-24 and circumstances concerning the reading were sufficient to justify a finding that the arrest requirement was met even though officer testifies that he did not think defendant was under arrest at the time. ***See* also:** *Washburn v. State, 235 S.W.3d 346, (Tex.App.-Texarkana 2007, no pet.).* and *Garcia v. State, No. 10-13-00166-CR, 2014 WL 3724130 (Tex.App.-Waco 2014, no pet).*

5. DIC-24 NOTICE IN WRITING REQUIREMENT SATISFIED BY MAKING WRITTEN COPY "AVAILABLE"

Texas Department of Public Safety v. Latimer, 939 S.W.2d 240 (Tex.App.-Austin 1997, no pet.).

Written notice requirement as applied to request for blood sample complied with by officer's leaving the written copy with the nurse to give the defendant the following day.

6. OFFICER WHO READS DIC-24 & REQUESTS SAMPLE NEED NOT BE ARRESTING OFFICER

Texas Department of Public Safety v. Walter, 979 S.W.2d 22 (Tex.App.-Houston [14th Dist.] 1998,no pet.).
McBride v. State, 946 S.W.2d 100 (Tex.App.-Texarkana 1997, pet. ref'd).

For officer to request that allegedly intoxicated driver provide specimen of breath or blood, it is not necessary that same officer observe driver, arrest driver, transport driver, and inform driver of consequences of refusal to take test.

7. CIVILIAN READING WARNINGS NOT NECESSARILY BASIS FOR EXCLUSION

Harrison v. State, 766 S.W.2d 600 (Tex.App.-Fort Worth 1989, pet. ref'd).

A peace officer, rather than a civilian breath test operator, must give a defendant the statutory warning on refusing alcohol tests, but the fact that a civilian gives the statutory warning on alcohol tests does not render a defendant's refusal to take the test automatically inadmissible. Before a trial court is obligated to exclude the evidence, the defendant must show a causal connection between his refusal to give a breath specimen and the fact that a civilian gave the warning.

8. DIC-24 - WORDING .10 OR GREATER - IS CORRECT - THOUGH IT'S NOT TIED TO DRIVING (Note: At the time these cases came down, .10 was the per se standard.)

Texas Department of Public Safety v. Benoit, 994 S.W.2d 212 (Tex.App.-Corpus Christi 1999, pet. denied).
McClain v. State, 984 S.W.2d 700 (Tex.App.-Texarkana 1998, pet. ref'd).
Shirley v. Texas Department of Public Safety, 974 S.W.2d 321 (Tex.App.-San Antonio 1998, no pet.).
Texas Department of Public Safety v. Butler, 960 S.W.2d 375 (Tex.App.-Houston [14th Dist.] 1998, no pet.).

Martin v. Department of Public Safety, 964 S.W.2d 772 (Tex.App.-Austin 1998, no pet.).

The following language on the DIC-24: "If you give the specimen and analysis shows that you have an alcohol concentration of 0.10 or more, your license, permit or privilege to operate a motor vehicle will be suspended..." is not defective for not stating that the concentration must be 0.10 or more "at the time of driving." It is clear that it was not the intent of the legislature to require a test to show that the defendant was 0.10 at the time of driving for a license suspension to be called for. Thus the statute should not, and does not, contain the wording "at the time of driving" because it does not pertain to whether the arrestee was driving while intoxicated.

9. DIC - 24 IN SPANISH

a. ERROR IN WRITTEN TRANSLATION DID NOT MAKE CONSENT INVALID

Gonzalez v. State, 967 S.W.2d 457 (Tex.App.-Fort Worth 1998, no pet.).

Complaint was that the Spanish version of the DIC-24 warning translates to "if you refuse the analysis, that action can be used against you in the future" and that does not exactly track the statutorily language verbatim. The Court held that verbatim tracking is not necessary, and the warning language substantially complies with the statutory mandate.

b. FAILURE TO TRANSLATE SPANISH AUDIO TAPE READING OF WARNING INTO ENGLISH AT TRIAL THOUGH ERROR WAS HARMLESS

Montoya v. State, No. 02-11-00315-CR, 2012 WL 1868620 (Tex.App.-Fort Worth 2012, no pet.).

At the jail the officer handed the defendant a Spanish version of the DIC-24 and played an audio tape of an officer reading those warnings in Spanish. At trial the Spanish audio tape was played to the jury but was not translated. The Court held that "even assuming" the admission of the warnings without translation was error, there was nothing in the record to show the defendant was harmed as it did not have a "substantial or injurious effect on the jury's verdict."

10. COMMERCIAL DRIVER'S LICENSE WARNINGS

a. NEED TO BE GIVEN

Texas Department of Public Safety v. Thomas, 985 S.W.2d 567 (Tex.App.-Waco 1998, no pet.).

Defendant who was arrested for DWI held a commercial driver's license that allowed him to operate both commercial and non-commercial motor vehicles. After his arrest he received the warnings required by Chapter 724 (applying to non-commercial drivers) and refused to give a breath sample. He challenged his subsequent license suspension arguing that because he was not warned of the consequences of his refusal to give a specimen under 724 and Section 522 (regarding commercial licenses), his refusal was not knowing and voluntary. Court of Appeals found that the failure to warn him of both consequences rendered his refusal involuntary.

b. DON'T NEED TO BE GIVEN

Texas Department of Public Safety v. McGlaun, 51 S.W.3d 776 (Tex.App.-Fort Worth 2001, pet. denied).

The issue is whether failure to warn the defendant of the consequences of his refusal to give a breath test as to his commercial license means his license should not be suspended. The defendant was not operating a commercial vehicle when he was stopped. The Court held that the Defendant was properly warned, and his license should be suspended. Specifically, the Court held that 724.015 does not distinguish between commercial and non-commercial vehicles, so it applies to all vehicles. The fact that different consequences are authorized by more than one applicable statute does not reduce the notice given to the defendant of the consequences provided for each. The Court notes the contrary holding in Thomas and declines to follow that opinion. **See also** Texas Department of Public Safety v. Struve, 79 S.W 3d 796 (Tex.App.-Corpus Christi, 2002, pet. denied).

11. DIC 23 & DIC 24 DOCUMENTS ARE NOT HEARSAY

Ford v. State, No. 08-11-00307-CR, 2014 WL 823409 (Tex.App.-EI Paso 2014, no pet.).

This case involved a DWI arrest where Defendant was transported to the jail and read the DIC-24 by an officer that the State did not call to testify at trial as he had subsequently been convicted of a felony. They offered the DIC-24 into evidence without calling the officer who read it and Defendant objected on confrontational grounds. On appeal the Court held that the forms were non-testimonial because they contained only the recitation of the statutory warnings and were therefore properly admitted.

Block v. State, No. 03-96-00182-CR, 1997 WL 530767 (Tex.App.-Houston (14th Dist.) 1997, pet.ref'd) (not designated for publication).

DIC 24 is not hearsay as the warnings form is not offered to prove the truth of the matter asserted in those warnings, but rather is offered to show that the warnings were given to the defendant.

Texas Department of Public Safety v. Mitchell,No.2-01-938-CV, 2003 WL 1904035 (Tex.App.-Fort Worth 2003, no pet.).

DIC 23 and DIC 24 were properly admitted under the public records exception to the hearsay rule 803(8).

12. DEFENDANT DEAF - FAILED TO UNDERSTAND HE COULD REFUSE -NO PROBLEM WHEN SAMPLE GIVEN

State v. Roades, No. 07-11-0077-CR, 2012 WL 6163107 (Tex.App.-Amarillo 2012) (not designated for publication).

This case involved a Defendant who was deaf and the issue of whether he voluntarily agreed to take the breath test, or to put it another way, whether his understanding of his options was hampered by his being deaf Even though the officer testified that prior to the test, he read the Statutory Warning form to the Defendant and placed a copy of it in front of him, the Trial Court granted the motion to suppress finding that it did not believe the Defendant understood he had an option of refusing - take the breath test or refuse to take it. In reversing the Trial Court, the Court of Appeals found that although evidence must show that warnings provided in Section 724.015 were given an accused prior to introduction of evidence of a refusal

to submit to a breath test, Section 724.015 does not require proof of those warnings as a predicate to the introduction of "voluntarily" taken breath tests. Here there is simply no record evidence that the Defendant submitted to the breath test because of any physical or psychological pressure brought to bear by law enforcement. Because there was an absence of evidence establishing that any improper conduct by a law enforcement officer "caused" or "coerced" Defendant to submit to a breath test, The Court of Appeals found that the Trial Court abused its discretion in granting the motion to suppress.

13. FAILURE TO READ "UNDER 21" PORTION OF DIC 24 NOT PRECLUDE ADMISSION OF BT

State v. Klein, No. 10-08-00344-CR, 2010 WL 3611523 (Tex.App.-Waco 2010, reh. overruled pdr ref'd) (not designated for publication).

The defendant's consent to a breath test was voluntarily given, despite the police officer's failure to comply with a statutory requirement to orally recite warnings to defendant before obtaining consent for the breath test. In this case the warnings omitted concerned the consequences of refusing or of giving a sample for someone under 21. There was no evidence that the police officer's failure to read the warnings had any impact on her consent, especially since the defendant was provided with the written warnings.

14. URINE SAMPLE

a. MAY BE REQUESTED

Hawkins v. State, 865 S.W.2d 97 (Tex.App.-Corpus Christi 1993, pet. ref'd).

In holding that it was proper for the officer to ask for a urine specimen, the Court points out that the implied consent statute specifically allows a person to consent to any other type of specimen. Police officer may request urine specimen instead of breath or blood, even though statute specifically recognizes only breath and blood tests.

b. IS ADMISSIBLE WITHOUT EXPLAINING RIGHT TO REFUSE

Harrison v. State, 205 S.W.3d 549 (Tex.Crim.App. 2006).

Defendant was arrested for DWI and after having the DIC-24 read to her agreed to give a breath sample which showed no alcohol. She was asked to give blood and agreed as well and was transported to hospital for blood draw. After five or six somewhat painful attempts to get blood, she was asked if she would give urine instead, and she agreed so as to avoid continuing to be stuck to obtain a blood sample. The urine sample showed controlled substances, and the defense attacked the urine sample on the basis that the officer did not warn her that she did not have to give a sample and her refusal to give urine would not result in a license suspension. The Court of Appeals found that the consent to give urine was not voluntary as it was given to avoid the further pain of a blood draw. The Court of Criminal Appeals found that there was no requirement that any warnings be read before asking for consent to a urine sample and upheld the trial court's finding that the consent was voluntary.

15. DIC -24-KOREAN-LANGUAGE LINE

Song v. State, No. 08-13-00059-CR, 2015 WL 631163 (Tex.App.-El Paso 2015)

Attempt was made to suppress BT given on argument that the Defendant only spoke Korean and the State failed to prove he had knowledge of consequences of his refusal. Warnings were read to Defendant in English and then translated with assistance of Language Line translator and after asking Defendant if he would give a sample he consented. The Court of Appeals found that his consent was voluntary. The Court further rejected Defendant's argument that the translator's qualifications were not shown and that the failure to file business record affidavit rendered the translation inadmissible hearsay. Court found the reliability could have been determined by the fact the Defendant gave appropriate answers to questions and that the translator was acting as Defendant's agent and that his statements were therefore not hearsay.

16. READING OUTDATED AND WRONG DIC-24 WARNING

State v. Dorr, No. 08-1300305-CR, 2015 WL 631033 (Tex.App. – El Paso 2015)

Trial court granted motion to suppress BT because the old DIC-24 was read which did not include language about State being able to apply for search warrant if he refused. Court of Appeals reversed finding no casual connection was shown between the absence of this language and the consent.

17. READING DIC-24 CAN CONSTITUTE PROOF OF ARREST

Chavez v. State, No. 11-14-00034-CR, 2016 WL 595254 (Tex.App.-Eastland 2016)

In this case, while still at scene, officer read DIC-24 to Defendant and got his consent to a blood draw. In later contesting the voluntaries of the consent the Defendant argued that he did not believe he was arrested at the time the DIC-24 was read because he had not yet been handcuffed and placed into police car. Defendant also argued that his consent was not voluntary because officer read warning to quickly and the manner in which it was read made it unintelligible. The Court of Appeals rejected those arguments pointing out that based on totality of circumstances the Defendant did consent and, on the arrest, issued referred to multiple other courts that held that officer's reading DIC-24 is sufficient proof that Defendant was placed under arrest.

H. NOT NECESSARY TO SHOW 210 LITERS OF BREATH

Wagner v. State, 720 S.W.2d 827 (Tex.App.-Texarkana 1986, pet. ref'd).

Not necessary to show that 210 liters of breath were used in the lntoxilyzer test.

I. BREATH TEST NOT COERCED

1. EXTRA WARNING REFERRED TO CONSEQUENCES OF PASSING NOT REFUSING

Bookman v. State, No. 10-07-00156-CR, 2008 WL 3112713 (Tex.App.-Waco, 2008, no pet.).

In holding that the officer's statement to the defendant regarding the breath test "that if the defendant passed, the officer would let him go," did make the defendant's consent involuntary. In so holding the Court states "Texas appellate courts have uniformly held that consent to a breath test is not rendered

involuntary merely because an officer has explained that the subject will be released if he passes the test."

Hardy v. State, No.13-04-055-CR, 2005 WL 1845732 (Tex.App.-Corpus Christi, 2005) (not designated for publication).

In response to her question, officer informed the defendant "if she would pass the breath test, she would probably be released." In response to the defendant's assertion on appeal that this violated Erdman, the Court noted that the "statement to appellant falls far short of the officer's statements found to be coercive in Erdman." The Court focused on the fact that the officer did not make any statements about the consequences of appellant's refusal to take a breath test beyond those listed in Section 724.015 of the Transportation Code. By merely answering appellant's question, Officer Trujillo did not warn appellant that dire consequences would follow if she refused to take the breath test.

Ness v. State, 152 S.W.3d 759 (Tex.App.-Houston (1st Dist.) December 2, 2004, pet. ref'd).

Police officer's statement to defendant at the scene of the arrest that "pending outcome of breath test, defendant would be detained" did not render defendant's submission to breath test coerced, where officer did not make any statements about consequences of refusal to take test beyond those listed in statute, and he did not warn defendant that dire consequences would follow if he refused to take breath test.

Urquhart v. State, 128 S.W.3d 701 (Tex.App.-EI Paso 2003, pet. ref'd).

Statement by officer to defendant that if he passed the breath test, he would be released was alleged to be coercive and should result in suppression of his breath test results. Court found that there was no causal connection between the statement and the decision to give a breath sample.

Sandoval v. State, 17 S.W.3d 792, (Tex.App.-Austin, 2000, pet. ref'd).

Suspect asked what would happen if he "passed the (breath) test?" Officer responded that if suspect failed the test, he would be charged with DWI, but if he passed, the officer would call a relative to come pick up suspect. Suspect took a breath test. Court upheld the test distinguishing these facts from Erdman. It did this by pointing out that Erdman concerned telling a suspect about the extra-statutory consequences of a "refusal" to submit to a breath test while in this case the extra warning dealt with what would happen if he "passed" the test. The Court further pointed out that there was absence of evidence that the extra warning actually coerced the suspect.

2. NO EVIDENCE THAT ADDITIONAL WARNING ACTUALLY COERCED DEFENDANT

Texas Department of Public Safety v. Rolfe, 986 S.W.2d 823 (Tex.App.-Austin 1999, no pet.).

Officer admitted (hypothetically) to telling suspect, when asked, that if she refused to give a sample she would be jailed. Held that consent to breath test was still valid absent; any evidence that this additional warning actually coerced suspect into submitting to a breath test.

3. NO EVIDENCE THAT DEFENDANT RELIED UPON EXTRA WARNING

Ewerokeh v. State, 835 S.W.2d 796 (Tex.App.-Austin 1992, pet. ref'd).

Officer telling defendant "if he failed test he would be jailed," found not to be coercive where there was no evidence that defendant relied on this incorrect statement.

4. DEFENDANT GAVE SAMPLE, CONSEQUENCES UNDERSTATED

Franco v. State, 82 S.W.3d 425 (Tex.App.-Austin 2002, pet. ref'd).

After being arrested for DWI, the defendant was read the standard Texas Transportation Code Ann. 724.015 admonishments as to the consequences of refusing to give a sample. He gave a sample and then argues that he should have been read the admonishments under Texas Transportation Code Ann. 522.103(a) as he also holds a commercial driver's license. The commercial consequences of a refusal are harsher than those for non-commercial holders. Without addressing whether the failure to read him the additional warning was a mistake; the Court holds that he has failed to show he was coerced. Specifically, the Court holds "(The defendant) cannot plausibly argue that his decision to take the breath test was induced or coerced by the officer understating the consequences of a refusal."

See also *Curl v. State, No. 13-97-491-CR, 1997 WL 33757096 (Tex.App.-Corpus Christi 1999, no pet.).*

5. AT MTS IT IS THE DEFENDANT'S BURDEN TO SHOW CONSENT TO GIVE BT WAS NOT VOLUNTARY

State v. Amaya, 221 S.W.3d 797 (Tex.App.-Fort Worth 2007, pet. ref'd).

This involved a claim that the breath test was not voluntary because the warnings were read in English and only the written copy given to the defendant was in Spanish. The trial judge concluded that because the statutory warning was not read in the Spanish language and because we do not know whether the defendant could read the Spanish warning sheet, we have no way of knowing if the defendant understood, or at least substantially understood, what the officer was telling him. The trial judge suppressed the breath test results. The Court of Appeals reversed the trial court, finding it was the defendant's burden to point to some evidence rebutting the presumption arising from the implied consent statute. This finding--that the evidence did not establish whether defendant could or could not read the Spanish DIC-24 form--required the trial court to overrule the defendant's motion to suppress.

6. INSUFFICIENT EVIDENCE OF CAUSAL CONNECTION BETWEEN OFFICER STATEMENT AND CONSENT

Bergner v. State, No. 2-07-266-CR, 2008 WL 4779592 (Tex.App.-Fort Worth 2008, no pet.).

In this appeal the defendant claimed that her breath test result should have been suppressed because of officer's statement regarding consequences of refusal. The defendant when asked for a sample after the warnings were read said she would give a sample. While officer was out of the room, she called a friend on her cell, and he told her to refuse. When she asked officer what would happen if she refused, he told her that she would go to jail if she did not blow. While conceding that the officer's statement was of the type that resulted in suppression in Erdman, the Court found that there was no causal connection between the statement and the refusal. Upon cross examination the defendant admitted

she already knew that she would go to jail if she refused so the officer's statement could not have caused the "psychological pressures" that Erdman and the cases that followed were designed to prevent.

J. STANDARD FOR COERCION CHANGED - ERDMAN OVERRULED

Crofton v. State, No. 06-12-00143-CR, 2013 WL 1342543 (Tex.App.-Texarkana 2013, pet ref'd).

This case involves the question of whether a Defendant who is told it is a No Refusal weekend, that a warrant will be obtained if he refuses, and who consents thereafter has been coerced into doing so. In denying this the Court points out that the testimony of the State's witnesses was that consent was given voluntarily, and Defendant was provided with a form informing him of his right to refuse consent, but he did not sign the form, and that he had previously been arrested for DWI. Also, there was no suggestion that he was unintelligent about his rights, that the detention was lengthy, that questioning was repetitive, or that he was subjected to physical punishment. For all these reasons, the consent was held to be voluntary.

Saenz v. State, No. 08-12-00344-CR, 2014 WL 4251011 (Tex.App.-EI Paso 2014, no pet).

The officer read the DIC-24 to the Defendant and asked for a breath test but then engaged in further discussion that the Defendant argues was coercive and makes his consent to give a breath test involuntary.9 The deviations from the warning included mentioning the consequences of giving a sample versus refusing to give a sample. Specifically, the officer mentioned that if the BT was less than .08, the Defendant would get to keep his license and that in those instances the DA's office typically drops the charges for DWI. The Trial Court granted the motion to suppress and issued lengthy findings of fact and concluded that the numerous extra statutory consequences the officer presented to the Defendant of his refusal to submit to a breath test inherently coerced the Defendant's decision to submit to a test. The Judge also found the officer's credibility to be suspect. The State's position was that the Judge implicitly if not explicitly relied on Erdman to reach that decision. The Court of Appeals agreed and in doing so pointed out that Erdman has been overruled and that the standard is "whether the person's will has been overborne and his capacity for self-determination critically impaired by physical or psychological pressure to such an extent that his consent cannot be considered voluntary." The Court found that evidence at the hearing incontrovertibly establishes that the consent was not the product of physical or psychological pressure.

Bice v. State, No. 13-12-00154-CR, 2013 WL 123709 (Tex.App.-Corpus Christi 2013, pdr ref'd).

The Defendant was initially given the correct statutory warnings by the officer and subsequently refused consent to give a sample. Thereafter, the officer advised appellant of the consequences of his refusal; however, in doing so, he misstated the statutory language by saying "up to 180 days" instead of "not less than 180 days." In other words, the officer understated the consequences of appellant's refusal. Appellant then consented to provide a breath sample. Although the Defendant changed his mind and agreed to provide a breath sample after the second request, that fact alone - without evidence that the Defendant was pressured physically or psychologically - is insufficient to invalidate consent that was otherwise voluntary.

Fienen v. State, 390 S.W.3d 328 (Tex.Crim.App. 2012).

This very important case overrules Erdman and its progeny. Calling Erdman's reasoning "confused and flawed," the Court holds that the rules created by that case fail to consider the circumstances surrounding an officer's statements when analyzing the issue of voluntariness. So, the fact that a law enforcement officer's answer to a question from a suspect goes outside a mere repetition of the statutory warning

will not per se make the Defendant's consent involuntary. The new rule is that a Court should look at the totality of the circumstances in determining voluntariness. Law enforcement is advised it should not misrepresent the law but neither must it simply repeat statutory warnings when asked a question about the implied consent law. In this case it was determined that the Defendant's consent was voluntary.

State v. Serano, 894 S.W.2d 74 (Tex.App.-Houston [14th Dist.] 1995, no pet.).

Where officer told defendant if he passed the breath test, he would be released, and if he failed it, he would be arrested while defendant was at scene, said statement was coercive even though two hours passed from time of the statement to time of breath test and even though another officer properly admonished defendant prior to the sample's being given.

This opinion is implicitly overruled by Fienen v. State, No. PD-10119-12, 2012 WL 5869401 (Tex.Crim.App. 2012).

Erdman v. State, 861 S.W.2d 890 (Tex.Crim.App. 1993).

Officer's incorrectly informing defendant of consequences of refusal to give breath sample will not always = evidence that consent was coerced. Question of voluntariness is a case-by-case question of fact. Court concluded under these facts that officer stating to defendant "if he took the test and passed, he would be released, but if he refused, he would be charged with DWI" constituted coercion.

This opinion is overruled by Fienen v. State, No. PD-10119-12, 2012 WL 5869401 (Tex.Crim.App. 2012).

State v. Sells, 798 S.W.2d 865 (Tex.App.-Austin 1990, no pet.).

Motorist's consent to breath test was not voluntary due to officer's statement that defendant "would automatically be charged and incarcerated" if he refused.

This opinion is implicitly overruled by Fienen v. State, No. PD-10119-12, 2012 WL 5869401 (Tex.Crim.App. 2012).

Hall v. State, 649 S.W.2d 627 (Tex.Crim.App. 1983).

Motorist's consent to breath test held not to be voluntary when officer said, "You're automatically convicted of DWI and your license will be suspended if you refuse to give a breath sample."

******This opinion is implicitly overruled by Fienen v. State, No. PD-10119-12, 2012 WL 5869401 (Tex.Crim.App. 2012).***

K. BREATH TEST REFUSAL EVIDENCE

1. AS EVIDENCE OF GUILT

Mody v. State, 2 S.W.3d 652 (Tex.App.-Houston [14th Dist.] 1999, pet ref'd).
Finley v. State, 809 S.W.2d 909 (Tex.App.-Houston [14th Dist.] 1991, pet. ref'd).

Jury can consider BTR as evidence of defendant's guilt.

2. NO VIOLATION OF 5TH AMENDMENT

Gressett v. State, 669 S.W.2d 748 (Tex.App.-Dallas 1983), aff'd, 723 S.W.2d 695 (Tex.Crim.App.1986).

Evidence of a defendant's refusal to submit to blood alcohol test after lawful request by police officer is admissible at trial when intoxication is an issue.

Bass v. State, 723 S.W.2d 687 (Tex.Crim.App. 1986).

In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood test is not an interrogation within the meaning of the Fifth Amendment.

***See also: Shepherd v. State**, 915 S.W.2d 177 (Tex.App.-Fort Worth 1996, pet. ref'd).*

3. REASON FOR REFUSAL AND CONDITION OF INSTRUMENT IRRELEVANT

Mody v. State, 2 S.W.3d 652 (Tex.App.-Houston [14th Dist.] 1999, pet ref'd).
Moore v. State, 981 S.W.2d 701 (Tex.App.-Houston [1st Dist.] 1998, pet. ref'd).

Evidence of defendant's refusal to take a breath test was properly admitted, and State had no preadmittance burden to show that defendant was over .10 at the time of driving, why the defendant refused, or that instrument was accurate.

4. REFUSAL BASED ON INTOXICATION IS STILL A "REFUSAL"

Malkowsky v. Texas Department of Public Safety, 53 S.W.3d 873 (Tex.App.-Houston [1st Dist.] 2001, pet. denied).

This was an appeal of an ALR hearing where defendant claimed that he did not intentionally refuse to give a sample; he was just too intoxicated to comply. The undisputed testimony was that the defendant agreed to give a sample and according to the breath test operator was truly trying to do so but was too intoxicated to comply. Court held that when a person is unable to give a breath sample because of his voluntary intoxication that qualifies as a refusal under 724.032 of the Transportation Code.

5. INTOXICATION MAY BE PRESUMED FROM BTR

Standefer v. State, 59 S.W.3d 177 (Tex.Crim.App. October 31, 2001)
Thomas v. State, 990 S.W.2d 858 (Tex.App.-Dallas 1999, no pet.).
Gaddis v. State, 753 S.W.2d 396 (Tex.Crim.App. 1988).

Intoxication is a legitimate deduction from defendant's refusal to take a breath test.

6. FAILURE TO FOLLOW BREATH TEST INSTRUCTIONS = REFUSAL

Kennedy v. Texas Department of Public Safety, No.01-08-00735-CV, 2009 WL 1493802 (Tex.App.-Houston [1st Dist.] 2009, no pet.).
Texas Department of Public Safety v. Sanchez, 82 S.W.3d 506 (Tex.App.-San Antonio 2002, no pet.).

Repeatedly failing to follow directions in submitting an adequate sample for breath testing

constitutes an intentional refusal.

7. NO VIOLATION OF 4TH AMENDMENT

McCauley v. State, No. 05-15-00629-CR, 2016 WL 3595478 (Tex. App. – Dallas 2016).

In rejecting the argument that admission of BTR was a violation of the 4th Amendment the Court pointed out that the Supreme Court's recent holding in *Birchfield* that 4th Amendment does not require police to obtain a warrant before they insist on a test of a Defendant's breath, admission of his refusal to give a sample would not violate 4th Amendment.

L. LATE BREATH TEST - CAN BE SUFFICIENT

1. LATE TEST NOT CONCLUSIVE BUT IS PROBATIVE

Owen v. State, 905 S.W.2d 434, 437-39 (Tex.App.-Waco 1995, pet. ref'd).
Martin v. State, 724 S.W.2d 135 (Tex.App.-Fort Worth 1987, no pet.).

Late breath test, though not conclusive, is probative when combined with other testimony.

2. AFTER 1 HOUR & 20 MINUTES

Annis v. State, 578 S.W.2d 406 (Tex.Crim.App. 1979).

Breath test taken 1 hour and 20 minutes after the stop may be sufficient to prove intoxication at the time of stop when coupled with arresting officer's testimony.

3. AFTER 2 HOURS

Holloway v. State, 698 S.W.2d 745 (Tex.App.-Beaumont 1985, pet. ref'd).

Breath test taken 2 hours after the stop of the defendant may provide sufficient basis to find defendant intoxicated at the time of the accident when coupled with other evidence in an involuntary manslaughter case.

4. AFTER 2 HOURS & 15 MINUTES

Dorsche v. State, 514 S.W.2d 755 (Tex.Crim.App. 1974).

Breath test taken 2 hours & 15 minutes after the stop may provide sufficient basis for finding defendant over .10 at time of stop.

5. AFTER 2 HOURS & 30 MINUTES

Verbois v. State, 909 S.W.2d 140 (Tex.App.-Houston [14th Dist.] 1995, no pet.).

6. AFTER 4 HOURS & 30 MINUTES

Douthitt v. State, 127 S.W.3d 327 (Tex.App.-Austin 2004, no pet.).

Results of breath test administered 5 ½ hours after defendant stopped drinking and 4 ½ hours after accident which resulted in a charge of Intoxication Manslaughter were relevant to show the defendant did not have normal use of his mental or physical faculties at time of accident because of excess alcohol consumption.

7. AFTER 7 HOURS

Kennemur v. State, 280 S.W.3d 305 (Tex.App.-Amarillo 2008, pet. ref'd).

In this Intoxication Manslaughter case, approximately seven hours after the accident the defendant had a blood-alcohol content (BAC) of .098. The Court found that his appearance and the blood alcohol test, even though it was taken many hours after the wreck, tended to make it more probable that he was intoxicated at the time of the collision because there had been evidence that he introduced alcohol into his body prior to the accident.

8. AFTER 2 HOURS NOT SUFFICIENT TO PROVE BAC GREATER THAN .15 AT TIME OF DRIVING BUT SUFFICIENT TO PROVE AT TIME OF TESTING

Ramjattansingh v. State, 548 S.W.3d 540 (Tex.Crim.App. 2018).

The Court granted review to consider whether the State's choice to include the extra element of "at or near the time of the commission of the offense, and the State's acquiescence in a jury charge including that same extra element, takes this case out from under *Malik*. *Malik* set forth the standard for determining what the elements are and stated that the elements are "defined by the hypothetically correct jury charge for the case," a charge that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. The Court held that we measure the sufficiency of the evidence against the elements of the offense as they are defined by the hypothetically correct jury charge. The Court reversed the COA and remanded the case for proceedings consistent with this holding.

Ramjattansingh v. State, No. 01-15-01089-CR, 2017 Tex. App. LEXIS 7609, 2017 WL 3429944 (Tex. App. – Houston 2017).

This was a DWI case where the State alleged driving while intoxicated with an alcohol concentration of at least .15 "at the time of analysis and at or near the time of the commission of the offense" in the charging instrument. The court held that the results of a breath test taken two hours after arrest is not sufficient to determine the BAC at the time of driving without retrograde extrapolation. The Court found that the State invited error by including "at or near the time of the offense" in the information and jury charge, therefore, it will be held to a higher burden of proof. The court did not find that two hours after the incident was "near" the time of driving.

*****This case was reversed, and a judgment of acquittal was rendered and remanded for a new trial on the Class B offense. (see above).**

M. OBSERVATION PERIOD

1. MORE THAN ONE OFFICER OBSERVATION REQUIREMENT

State v. Melendes, 877 S.W.2d 502 (Tex.App.-San Antonio 1994, pet. ref'd).

Same operator is not required to observe and administer breath test. Officer, who was also a certified operator, observed defendant for 15 minutes and then turned defendant over to another operator who administered the test.

2. NO NEED TO REPEAT ON 2ND TEST

State v. Moya, 877 S.W.2d 504 (Tex.App.-San Antonio 1994, no pet.).

When test is repeated due to intox error message, an additional 15-minute observation period is not necessary.

3. NO LONGER NECESSARY TO "OBSERVE" DEFENDANT FOR 15 MINUTES

State v. Reed, 888 S.W.2d 117 (Tex.App.-San Antonio 1994, no pet.).

Subject need not be continuously observed for 15 minutes now that regulations expressly provide that subject need only be in the operator's continuous presence.

4. REMAINING IN PRESENCE DOES NOT NECESSARILY REQUIRE OPERATOR BE CONTINUOUSLY IN THE SAME ROOM

Mclntyre v. State, No. 01-11-00821-CR, 2012 WL 5989434 (Tex.App.-Houston [1st Dist] 2012, pdr ref'd).

The Defendant argued that the breath test should have been suppressed because the intoxilyzer operator walked out of the testing room, breaking his line of sight with the Defendant for a few minutes. The State contends that although the operator left the room, he was in Defendant's "presence" because he was in an adjacent room, the door was open, and he was approximately 5 feet away from the Defendant at the time. The Texas Administrative Code provides that "[a breath test] operator shall remain in the presence of the subject at least 15 minutes before the test and should exercise reasonable care to ensure that the subject does not place any substances in the mouth. Direct observation is not necessary to ensure the validity or accuracy of the test result [.]" 37 TEX.ADMIN.CODE § 19.4 (c) (1) (2012). The term "presence" as used in section 19.4 has not been administratively or legislatively defined; therefore, it must be given its ordinary and plain meaning. State v. Reed. 888 S.W.2d 117, 122 (Tex.App.-San Antonio 1994, no pet.). The Reed court defined "presence" as an [a]ct, fact, or state of being in a certain place and not elsewhere, or within sight or call, at hand, or in some place that is being thought of. The existence of a person in a particular place at a given time particularly with reference to some act done there and then. Besides actual presence, the Jaw recognizes "constructive" presence, which latter may be predicated of a person who, though not on the very spot, was near enough to be accounted present by the Jaw, or who was actively cooperating with another who was actually present. Where there is a fact issue raised with respect to the 15-minute waiting period requirement, a Defendant is entitled to an instruction that the jury disregard the test if it believes or has a reasonable doubt as to whether the 15-minute observation requirement was complied with. In reliance on Atkinson, 923 S. W 2d at 25, and as authorized by article 38. 23 of the Code of Criminal Procedure, the Trial Court in this case resolved appellant's motion to suppress

the intoxilyzer test results by concluding the evidence at the hearing presented a fact issue. Thus, the jury was given the final decision by the Trial Court including in its charge an instruction that the jury was to disregard the test results on determining they were obtained without complying with the requirement of 15 minutes of continuous presence under section 19.3(c)(1) of title 37 of the Administrative Code. The jury resolved the fact issue against appellant and in favor of the State, and its determination of the issue is supported by the evidence. The law does not require continua/ observation, 37 Tex.Admin. Code 19.4(c) (1) (2012), and the jury could have rationally concluded that Albers was in Appellant's presence, as that term is defined in Reed, for 15 minutes prior to the test. Reed, 888 S. W. 2d at 122.

5. FAILURE TO RECALL OBSERVATION MAY NOT BE FATAL

Serrano v. State, 464 S.W.3d 1 (Tex.App. – Houston (1 Dist) 2015, pdr ref'd).

Trial Court correctly denied Defendant's motion to suppress BT for failure to comply with 15-minute observation. Even though operator could not specifically recall observing Defendant in holding cell she testified about protocol for observing suspects in holding cell which she believed she followed.

6. CLOCK VARIANCE NOT FATAL

Patel v. State, No. 01-14-00575-CR, 2015 WL 5821439 (Tex. App. – Houston (1st Dist.) 2015).

Court of Appeals upheld judges finding that 15 minutes observation requirement met when operator was sure it was followed and said he used stopwatch to ensure it was followed in spite of fact time stamps on video and intoxilyzer seemed to rebut that. Courts points out there was no testimony that two clocks were synchronized.

N. BREATH TEST DELAY PRECLUDING BLOOD TEST

Hawkins v. State, 865 S.W.2d 97 (Tex.App.-Corpus Christi 1993, pet. ref'd).

Fact that breath test was not taken until two hours after arrest thereby precluding option of defendant's exercising right for blood test within 2 hours of arrest did not render breath test result inadmissible.

O. OFFICER MAY REQUEST MORE THAN ONE TYPE OF TEST

State v. Gonzales, 850 S.W.2d 672 (Tex. App.-San Antonio 1993, pet. ref'd).

Where defendant was unable to give sufficient breath sample due to asthma, it was proper for officer to request a blood test and indicate the DIC-24 consequences of refusal would apply to blood test request as well.

See Also: *Texas Department of Public Safety v. Duggin, 962 S.W.2d 76 (Tex.App.-Houston [1st Dist.] 1997, no pet.).Kerr v. Texas Department of Public Safety, 973 S.W.2d 732 (Tex.App.-Texarkana 1998, no pet.).*

P. BREATH TEST ADMISSIBLE AS PROOF OF LOSS OF NORMAL

Hunt v. State, 848 S.W.2d 764 (Tex.App.-Corpus Christi 1993, no pet.).

Where Court refused to submit charge on .10 definition due to inability or failure of State to extrapolate; it was proper for the State to argue that the jury considers the breath test result as proof of "loss of normal."

Q. BREATH TEST RESULTS ADMISSIBILITY ISSUES

1. BREATH TEST RESULT IS NOT HEARSAY

Stevenson v. State, 895 S.W.2d 694 (Tex.Crim.App. 1995) on remand, 920 S.W.2d 342 (Tex.App.-Dallas 1996, no pet.).

When lntoxilyzer operator did not testify, the Court held the test result became hearsay and remanded case to Court of Appeals to make that determination (controversial decision with 4 dissents). When asked on remand to consider whether breath test results are hearsay, found (logically) that a breath test slip could not be "hearsay" and affirmed the original holding.

Smith v. State, 866 S.W.2d 731 (Tex.App.-Houston [14th Dist.] 1993, no pet.).

"Computer-generated data is not hearsay." Where the computer conducts the test itself, rather than simply storing and organizing data entered by humans, the test result is not subject to a hearsay objection. The proper objection to the admissibility of a computer-generated lntoxilyzer printout slip should be based upon whether the State has shown that the printout is reliable.

2. PARTIAL TEST RESULTS INADMISSIBLE

Boss v. State, 778 S.W.2d 594 (Tex.App.-Austin 1989, no pet.).

Arresting officer should not have been permitted to testify that, although valid lntoxilyzer test result was not obtained, digital indicator preliminarily registered alcohol content of defendant's breath at level that was two- and one-half times the legal level of intoxication.

3. NEW TECHNICAL SUPERVISOR CAN LAY PREDICATE FOR OLD TESTS

Hernandez v. State, No. 02-15-00284-CR, 2016 WL 3364880 (Tex. App. – Fort Worth 2016).
Trigo v. State, No. 01-15-00382-CR, 2016 WL 430879 (Tex.App.-Houston (1st Dist) 2016).
Lara v. State, No. 08-13-00221-CR, 2015 WL 7074798 (Tex.App.-El Paso 2015).

Breath Test may be offered through new tech supervisor. This not a violation of confrontation rights. Case cites holding in Settlemire v. State.

Hysenaj v. State, No. 11-13-00219-CR, 2015 WL 4733068 (Tex.App. 2015).

Consistent with holdings below and specifically citing Settlemire the Court holds there is no violation of confrontation rights when new technical supervisor testifies who was not in charge of supervision and maintenance at time of arrest.

Settlemire v. State, 323 S.W.3d 520 (Tex.App.-Fort Worth 2010, pdr ref'd).

Defendant's confrontation rights were not violated when trial court admitted into evidence breath test results and maintenance logs for breath testing machine, and technical supervisor, in charge of machine at time of trial, testified and sponsored test results and maintenance records; although supervisor who testified about breath testing machine's status did not supervise it at time of defendant's intoxilyzer test, it was not the case that anyone whose testimony might be relevant in establishing chain of custody, authenticity of sample, or accuracy of testing device, had to appear in person as part of the prosecution's case. In explaining why its

holding did not violate Melendez-Diaz, it points out, "This is precisely the type of analysis that the Supreme court anticipated might be challenged based on its holding in Melendez-Diaz." The court made clear, however, that it did not intend it's holding to "sweep away an accepted rule governing the admission of scientific evidence."

Beard v. State, No. 10-12-00169-CR, 2013 WL 6136943 (Tex.App.-Waco 2013).

Testimony of new technical supervisor with current responsibility for breath testing apparatus regarding operation of apparatus and use of reference sample solution based upon records generated under his predecessor in such position did not violate Defendant's constitutional right to confrontation, as supervisor did not testify he prepared or created report that was actually created by his predecessor and did not certify such a report based on machine's results, and neither tests at issue nor records of results thereof were testimonial.

Boutang v. State, 402 S.W.3d 782 (Tex.App.-San Antonio 2013, pet. ref'd).

This case concerns the ability of a new technical supervisor to testify about tests done by the previous technical supervisor. At the time of trial, the previous technical supervisor had retired so the State called the new technical supervisor to prove the proper functioning of the breath testing instrument. Relying on records that were produced by the instrument, the new technical supervisor testified about the working condition of the instrument and the reference. The Defense objected that this violated their confrontation rights under Crawford. The Court of Appeals held that the maintenance records fall under the category of "documents prepared in the regular course of equipment maintenance", which under Melendez-Diaz qualify as non-testimonial records.

Alcaraz v. State, 401 S.W.3d 277 (Tex.App.-San Antonio 2013, no pet.).

This case involved a breath test sample that was supported with the testimony of a technical supervisor who was not the technical supervisor at the time the sample was tested. The new technical supervisor testified based on review of records created by the former technical supervisor. The Defense objected under Crawford. In rejecting this attack, the Court held that the admission of a report of breath machine test results did not violate Defendant's rights under Confrontation Clause of the United States Constitution even though report was admitted without testimony of person who had held position of senior forensic analyst at the time test was administered to Defendant. In finding no Confrontation Clause violation, the Court focused on the fact that the Defendant had the opportunity to confront current senior forensic analyst as to her opinion, based on her review of maintenance and inspection records regarding machine's accuracy and whether machine was working properly on day Defendant's test was administered, and also to confront officer who administered test to Defendant and signed report. In responding to attack that it was improper for the new technical supervisor to testify about reference samples created by former technical supervisor, the Court held that reference samples created by former technical supervisor may be relied upon for purpose of confirming breath test machine's accuracy by demonstrating the machine was working at time of administration of Defendant's test, and were not "testimonial" for purposes of Confrontation Clause, and thus analyst was not required to personally testify at trial.

Henderson v. State, 14 S.W.3d 409 (Tex.App.-Austin 2000, no pet.).

Technical Supervisor who maintained instrument was not called to testify. The State called his successor instead who did not prepare reference sample or personally maintain instrument when sample was given. Court held that succeeding supervisor could rely on previous supervisor's records as basis for opinion that breathe test machine was working properly. Also held to be relevant that new supervisor had personal knowledge that old supervisor was certified.

R. KELLY V. STATE

1. APPLIES TO BREATH TESTS

Hartman v. State, 946 S.W.2d 60 (Tex.Crim.App. 1997).

This was a breath test case in which the issue at the motion to suppress was whether the test set forth in Kelly v. State, 824 S. W 2d 568 (Tex.Crim.App. 1992) applied to breath tests. The Court of Criminal Appeals remands back to the Court of Appeals and holds that the Kelly test is applicable to all scientific evidence offered under Rule 702 and not just novel scientific evidence. The three prongs that must be satisfied are: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question.

2. FIRST TWO PRONGS OF KELLY TEST MET BY STATUTE

Beard v. State, 5 S.W.3d 883 (Tex.App.-Eastland 1999), permanently abated in 108 S.W.3 304(TCA-2003), opinion withdrawn in 2003 WL 21398347 (TA-Eastland, June 18, 2003) (unpublished). (Case was permanently abated due to death. The body of opinion can be found at http://www.cca.courts.state.tx.us/opinions/028200.htm.).

Harmonizing the Transportation Code and Rule 702, we hold that when evidence of alcohol concentration as shown by the results of analysis of breath specimens taken at the request or order of a peace officer is offered in the trial of a DWI offense, (1) the underlying scientific theory has been determined by the legislature to be valid; (2) the technique applying the theory has been determined by the legislature to be valid when the specimen was taken and analyzed by individuals who were certified by, and were using the methods approved by the rules of, the Department of Public Safety; and (3) the trial court must determine whether the technique was properly applied, in accordance with the department's rules on the occasion in question.

Henderson v. State, 14 S.W.3d 409 (Tex.App.-Austin 2000, no pet.).

Testimony regarding the validity of the underlying theory of breath test analysis and technique applying theory was not necessary for test results to be admissible. Legislature recognized the validity of the theory and the technique when it passed the statute authorizing admission of test results in DWI cases.

S. PROPER TO OFFER BT SLIPS TO SHOW NO RESULT OBTAINED

Kercho v. State, 948 S.W.2d 34 (Tex.App.-Houston [14th Dist.] 1997 pet. ref'd).

State offered lntoxilyzer slips to show no test result was obtained. Defense objected that compliance with DPS regulation was not shown. Court held that such compliance is required only when test results are being offered, and in this case since the State conceded the test was invalid and the slips did not show any result, the admission of the test slips was proper.

T. LOSS OF NORMAL & PER SE LAW EVIDENCE NOT MUTUALLY EXCLUSIVE

Daricek v. State, 875 S.W.2d 770 (Tex.App.-Austin 1994, pet. ref'd).

Proof needed at trial to show "loss of faculties" and per se offense are not mutually exclusive in that blood test result is probative of loss of faculties and failure of FSTs makes it probable the breath or blood test

taken an hour before is reliable.

U. NO SAMPLE TAKEN = NO DUE PROCESS VIOLATION

Johnson v. State, 913 S.W.2d 736 (Tex.App.-Waco 1996, no pet.).

Failure of officer who arrested defendant for DWI to offer blood or breath test did not deny defendant his due process rights. No evidence that results would have been useful or that officer acted in bad faith (defendant was belligerent).

V. FAILURE TO TIMELY RESPOND TO REPEATED BT REQUEST = REFUSAL

State v. Schaeffer, 839 S.W.2d 113 (Tex.App.-Dallas 1992, pet. ref'd).

During videotape session, appellant changed his mind several times about consenting to breath test. Officers refused to read appellant his rights for third time or allow him to read them himself. Court found that appellant never affirmatively consented to breath test, and that trial court could have reasonably concluded, based on the record, that appellant did not voluntarily consent or refuse to give a breath test. Judge's suppression of breath test upheld.

W. EXTRAPOLATION

1. IS NOT NEEDED TO PROVIDE DEFENDANT WAS INTOXICATED UNDER CHEMICAL TEST DEFINITION

Wyatt v. State, No. 06-12-00150-CR, 2013 WL 3702148 (Tex.App.-Texarkana 2013, pdr ref'd).

Defendant contends that a BAC of .10 from a sample taken ninety minutes after driving without extrapolation does not establish that he was over .08 at the time of driving. In rejecting this argument, the Court holds the .10 was probative of his BAC at the time of driving and this was supported by accompanying evidence of impairment that was observed at the time of arrest.

Stewart v. State, 129 S.W.3d 93 (Tex.Crim.App. 2004).

In a lower court opinion, the San Antonio Court of Appeals held that a .16 breath test result was inadmissible, irrelevant, and "no evidence" in the absence of extrapolation and should therefore not have been admitted into evidence. The Court of Criminal Appeals reversed and remanded rejecting that argument. It specifically held that the results of a breath test administered eighty minutes after the defendant was pulled over were relevant even without retrograde extrapolation. One argument that the court rejected was that Section 724.064 of the Transportation Code mandates that such results are admissible in DWI cases. The Court also failed to address the issue of whether the probative value of the breath test results was outweighed by the prejudicial effect. The case was remanded to the San Antonio Court of Appeals to address that issue and other points. This case was sent back by the Court of Criminal Appeals so the Court of Appeals could answer the probative vs. prejudicial effect issue. In holding that the probative value outweighed the prejudicial effect, the Court pointed out that both of the samples tested significantly over the legal blood-alcohol limit, the breath test results related directly to the charged offense, presentation of the evidence did not distract the jury away from the charged offense, and the State needed the evidence to prove intoxication due to evidence that defendant took field sobriety tests under poor conditions and she passed four of the field sobriety tests. Note the need for the evidence was not as important to the Court of Criminal Appeals in Mechler. *Garcia v. State, 112 S.W.3d*

839 (Tex.App.-Houston [14th Dist.] August 7, 2003, no pet.). Beard v. State, 5 S.W.3d 883 (Tex.App.-Eastland 1999), permanently abated in 108 S.W.3 304 (TCA-2003), opinion withdrawn in 2003 WL 21398347 (TA-Eastland, June 18, 2003) (unpublished). [Case was permanently abated due to death.

In response to the defendant's argument that without retrograde extrapolation the breath test results themselves were inadmissible as they were irrelevant to show the subject's BAC at the time of the stop unless the State offers extrapolation testimony. Judge Womack pointed out that the argument was one that "we have never accepted and that other courts have rejected."

See Also: *Forte v. State, 707 S.W.2d 89 (Tex.Crim.App. 1986); Price v. State, 59 S.W.3d 297 (Tex.App.-Fort Worth 2001, pet. ref'd); Texas Department of Public Safety v. Thompson, 14 S.W.3d 853 (Tex.App.-Beaumont 2000, no pet.); Mireles v. State, 9 S.W.3d 128 (Texas 1999); O'Neal v. State, 999 S.W.2d 826 (Tex.App.-Tyler 1999, no pet.); Martin v. Texas Department of Public Safety, 964 S.W.2d 772 (Tex.App.-Austin 1998, no pet.); Owen v. State, 905 S.W.2d 434 (Tex.App.-Waco 1995, pet. ref'd).*

2. PROBATIVE VALUE OF BT OUTWEIGHS PREJUDICIAL EFFECT

Gigliobianco v. State, 210 S.W.3d 637 (Tex.Crim.App 2006).

In determining that the trial court and Court of Appeals properly held that even in the absence of retrograde extrapolation, evidence of two breath test samples taken 80 minutes after the defendant was driving which read .09 and .092, the Court of Criminal Appeals found as follows:

1) *probative force of appellant's breath test results was considerable, since those test results showed that appellant had consumed in the hours preceding the breath test, a substantial amount of alcohol-enough alcohol to raise his breath alcohol concentration to 0.09. This evidence tended to make more probable appellant's intoxication at the time he was driving, under either statutory definition of intoxication.*
2) *The State's need for the breath test results was considerable, since the State's videotape which showed appellant as quite lucid, tended to contradict to some extent Officer Heim's testimony concerning appellant's appearance and behavior.*
3) *The breath test results did not have a tendency to suggest decision on an improper basis. The test results were not inflammatory in any sense and they "relate[d] directly to the charged offense.*
4) *The breath test results did not have a tendency to confuse or distract the jury from the main issues because the results related directly to the charged offense.*
5) *The breath test results did not have any tendency to be given undue weight by the jury. Since the State's expert testified that the breath test results could not be used to determine what appellant's breath alcohol concentration was at the time he was stopped, the trial court could have reasonably concluded that the jury was equipped to evaluate the probative force of the breath test results.*

The Court of Criminal Appeals did not say that breath test results will always be admissible in the face of a Rule 403 challenge. It suggested that if a jury was not given adequate information with which to evaluate the probative force of breath test results, it might be reasonable to conclude that the admission of such evidence would pose a danger of misleading the jury. It further suggested that if the test was administered to an accused several hours after he was stopped and the results were at or below the legal limit, it might be concluded that the probative force of the test results was too weak to warrant admission in the face of a Rule 403 challenge.

State v. Mechler, 153 S.W.3d 435 (Tex.Crim.App.2005).

This is a post Stewart case where the Court held that the prejudice of admitting evidence of breath testing machine results taken one and a half hours after defendant's arrest did not outweigh its probative value, and thus results were admissible. The Court so held even though it mentioned the State had other evidence of intoxication and may not have needed the results to convict in this case.

3. PREJUIDICE OUTWEIGHS PROBATIVE (A RIDICULOUS OPINION)

State v. Franco, 180 S.W.3d 219 (Tex.App.-San Antonio 2005, pet. ref'd).

This arose from the State's appeal of a Motion to Suppress Blood Test Results in an Intoxication Manslaughter/Intoxication Assault case. The facts in brief were that the crash was caused by defendant running a stop sign that he claimed he did not see. The offense occurred at 7:50 p.m. The test results in question were two blood test results: one was taken at 10:05 p.m. and was a .07; the second was taken at 11:55 and was a .02. There was also a PBT used at the scene that showed a .09. The Court applied a four-part test as follows:

1) *What is the probative value of the evidence? The Court found the probative value of the results of Franco's blood tests are significantly diminished by the two- and four-hour delay in obtaining the samples and by the fact that both results are below the legal limit, and coupled with the fact that there was no extrapolation evidence (this was held properly excluded in this same opinion). This factor was found to go in the defendant's favor.*
2) *The potential to impress the jury in some irrational yet indelible way: In its examination of this issue, the Court stated it could not fathom a reason for the State to introduce test results showing blood alcohol concentration below the legal limit other than to invite the jury "to conduct its own crude retrograde extrapolation," but it admitted that the Texas Court of Criminal Appeals has rejected this argument (in Stewart which, until this was handed down, was the worst opinion to come out of San Antonio Court of Appeals). It then conceded the results showed the defendant consumed alcohol and found that part of the test favored admission.*
3) *The time needed to develop the evidence: This factor also was found to favor admission.*
4) *The proponent's need for the evidence: The Court then finds the State did not have a great need for this evidence as other evidence showed that officer smelled a strong odor of alcohol on defendant's breath, defendant was swaying and told officer he drank a beer; the results of the field sobriety tests showed signs of impairment; a videotape at the scene, on which defendant states he had been drinking beer before the accident; and possibly the results of the portable breath test taken at the scene an hour after the accident* ***(which has never been found to be admissible in court!?)*** *all led the Court to find the State does not have a great need for the blood test results. This factor thus weighs in favor of exclusion. The Court held that blood test results were properly excluded.*

4. EXTRAPOLATION EVIDENCE IMPROPERLY ADMITTED

Veliz v. State, No. 14-14-00057, 2017 Tex. App. LEXIS 2246 (Tex.App.-Houston [14th Dist] 2015).

Court held retrograde extrapolation evidence was improperly admitted based upon the following: There was only one test, conducted 3½ hours after stop, did not know enough characteristic of Defendant such as drinking pattern, time of first and last drinks, number of drinks or weight. Analyst said she could perform retrograde extrapolation without time of last drink so long as she had the time of stop and time of draw. The court held that these and other answers showed analyst did not understand subtleties of science and risks of

extrapolation and that answers were incorrect according to Mata.

Hazlip v. State, No. 09-11-00086, 2012 WL 4466352 (Tex.App.-Beaumont 2012, reh.denied).

Retrograde Extrapolation testimony improperly admitted: Witness did not know when Defendant stopped drinking, could not say if Defendant was absorbing or in elimination phase, did not know Defendant's weight, how much alcohol he consumed, when he had his last drink, or whether he had eaten earlier that day.

5. IMPROPER ADMISSION OF EXTRAPOLATION EVIDENCE

a. NOT HARMLESS

Bagheri v. State, 119 S.W.3d 755 (Tex.Crim.App.2003).

This was a DWI case where extrapolation evidence was allowed in over objection. On appeal, the State conceded that the extrapolation evidence should not have been admitted. The Court of Appeals found the error to be harmful and reversed. One argument made by the State on appeal was that the Texas Legislature effectively mandated that jurors engage in retrograde extrapolation. They did not agree with that argument pointing out the State did have to show breath results are relevant. The Court upheld the Court of Appeals reversal as it could not say that the erroneous admission of retrograde extrapolation testimony did not influence the jury. It did not address the issue of whether retrograde extrapolation is needed to prove intoxication under the per se definition.

b. HARMLESS

Castor v. State, No. 13-10-00543-CR, 2011 WL 5999602 (Tex.App.-Corpus Christi 2011, no pet.) (not designated for publication).

In holding retrograde extrapolation was improperly admitted, the Court focused on its belief that the State's expert demonstrated an inability to apply and explain it with clarity and did not show an appreciation of the subtleties inherent in it. He knew no personal characteristics of the driver or circumstances of his alcohol consumption. He also offered no testimony on the rate at which alcohol is eliminated from the body. The Court found the error to be harmless. The lesson here is to be thorough in your direct of your expert.

6. EVIDENCE OF DRUG INGESTION STILL RELEVANT WITHOUT EXTRAPOLATION

Straker v. State, No. 08-14-00111-CR, 2016 WL 5845826 (Tex. App. – El Paso 2016)

The Defendant objected to the admission of blood test results showing the presence of Alprazolam and marijuana in blood test without retrograde extrapolation. Pointing to other cases that have held blood test results were relevant without extrapolation the Court rejected that argument.

Manning v. State, 114 S.W.3d 922 (Tex.Crim.App.2003).

This was a manslaughter charge where the State alleged that one of the reckless acts was that the defendant consumed a controlled substance. The only evidence of this was the presence in the blood sample of .15 mg. of a cocaine metabolite known as benzoylecgonine. The testimony at trial was this result at best

showed that some time before the accident, cocaine was ingested. The Court of Appeals felt the evidence was not compelling and should not have been admitted because the State did not extrapolate back to the time of the accident. The Court of Criminal Appeals reversed the Court of Appeals and agreed with the State that the lower Court was confusing sufficiency with admissibility. The evidence was still relevant to show cocaine had been consumed by the defendant.

7. EXTRAPOLATION EVIDENCE PROPERLY ADMITTED

Sutton v. State, No. 05-10-00827-CR, 2011 WL 3528259 (Tex.App.-Dallas 2011, pdr ref'd).

Alf the facts in the chemist's hypothetical here were tied to characteristics of defendant that were introduced into evidence during trial or known to the chemist: appellant's weight, the timing of the stop, the timing and results of his breathalyzer test, the timing of his last drink, and the type of alcohol consumed. The breath tests were administered approximately an hour and a half after the offense and the test indicates the tests were performed within three minutes of each other. The record shows no inconsistencies or errors in the chemist's testimony concerning the retrograde extrapolation and said testimony was properly admitted.

Kennedy v. State, 264 S.W.3d 372 (Tex.App.-Houston [1 Dist.], 2008, pet. ref'd).

The only information known to experts in this case on which to base their extrapolation concerning the defendant's BAC at the time of the collision was his height and weight, the type and approximate number of drinks, the time of the crash and the time of the blood test which was about two hours and 15 minutes after the crash. The expert was also told to rely on certain assumptions such as the time period over which he drank, when and what he last ate, the size of the beer consumed, and the fact that defendant was a "social drinker." The Court held it was not error to admit the extrapolation evidence.

Fulenwider v. State, 176 S.W.3d 290 (Tex.App.-Houston [1 Dist.] 2004, pet. ref'd).

The retrograde extrapolation expert had sufficient knowledge of defendant's characteristics and behaviors to render reliable extrapolation of defendant's alcohol concentration at time of alleged offense of DWI. The expert testified that she did not know when defendant had her last drink, but did know the time of offense, time that breath tests were conducted, and defendant's gender, weight, height, and last meal, and expert had basis on which to determine time that defendant had her last drink, given eyewitness testimony as to defendant's drinking prior to offense.

Peden v. State, No. 01-03-00522-CR, 2004 WL 2538274 (Tex.App.-Houston [1 Dist.] 2004, pet. ref'd).

Retrograde extrapolation was properly admitted in this case based upon the expert's knowing the following details. There was a single test result an hour and forty-four minutes after the stop. She knew defendant's weight and what he ate over a four-hour period and that he did not have any alcohol after 10:30 which was thirty-five minutes before the stop and an hour and nineteen minutes alcohol content had peaked at the time of testing; his alcohol concentration would have been over 0.08 at the time he drove his car.

Bhakta v. State, 124 S.W.3d 738 (Tex.App.-Houston [1 Dist.], 2003, pet. ref'd).

The Court held that the State's expert was qualified to testify about retrograde extrapolation and that he knew sufficient facts about the defendant to offer an opinion. In so holding, the Court stressed that not every single personal fact about the defendant must be known to an expert giving retrograde extrapolation

testimony in a driving while intoxicated prosecution in order to produce an extrapolation with the appropriate level of reliability. In this case, the facts known to the State's expert were the time of his last drink, his weight and height, the time of the breath tests, the results of the breath tests, his last meal prior to being stopped, and the time of that meal.

8. RESULT OF BLOOD DRAWN 5/12 HOURS AFTER ARREST WITHOUT EXTRAPOLATION ADMISSIBLE UNDER RULE 403

Morales v. State, No. 04-11-00363-CR, 2012 WL 1648366 (Tex.App.-San Antonio 2012, no pet.).

In this case there was a 5 Y2 hour delay in drawing blood and the defense objected to its admission under Rule 403. The State expert admitted he could not, and he did not attempt to extrapolate. The Court of Appeals applied balancing test and found probative outweighed prejudice under these facts.

9. OPERATOR NEED NOT UNDERSTAND SCIENCE BEHIND THE INSTRUMENT!

Reynolds v. State, 204 S.W.3d 386 (Tex.Crim.App. 2006).

In response to the question of whether the breath test operator needed to understand the science behind the instrument, the Court said: The fact of certification is sufficient to meet the Kelly criteria with respect to the competence of the breath test operator. That the opponent of the evidence can demonstrate that the operator has not retained all the knowledge that was required of him for certification is a circumstance that goes to the weight, not the admissibility, of the breath test results. As long as the operator knows the protocol involved in administering the test and can testify that he followed it on the occasion in question, he need not also demonstrate any personal familiarity with the underlying science and technology.

X. FAILURE TO NOTE TEMPERATURE

1. OF REFERENCE SAMPLE =BT EXCLUDED

State v. Garza, No. 04-02-00626-CR, 2005 WL 2138082 (Tex.App.-San Antonio 2005, no pet.) (not designated for publication).

Trial court held that evidence of lntoxilyzer test results was inadmissible without testimony that the lntoxilyzer' s reference sample was operating at a "known" temperature at the time the test was administered. The technical supervisor testified it was reasonable to infer the temperature was in range as he had checked it before and after the test. The Court held that it was not abuse of discretion for the trial court to exclude the results. It distinguished this case from Gamez on the basis that the reference was checked the day before and the day after in Gamez, and in this case it was the week before and the week after.

2. OF REFERENCE SAMPLE = BT NOT EXCLUDED

Scillitani v. State, 343 S.W.3d 914 (Tex.App.-Houston [14 Dist.] 2011).

In administering the defendant's intoxilyzer test, the operator, believing the machine checked the temperature before administering the test to appellant, did not check the temperature of a reference sample on the intoxilyzer. He did conduct a diagnostic test on the intoxilyzer, which did not identify or indicate

any invalid conditions; then appellant gave two breath samples, taken three minutes apart. The intoxilyzer did not indicate any malfunction. At first in an earlier hearing, the technical supervisor said regulations were not followed but later testified that the current regulations no longer require that the reference sample be taken at a known temperature. Court held test properly admitted.

3. OF SUSPECT & REFERENCE SAMPLE = BT NOT EXCLUDED

Gamez v. State, No. 04-02-00087-CR, 2003 WL 145554 (Tex.App.-San Antonio, 2003, no pet) (not designated for publication).

The Defense proved through the State's expert that the "Fox study" was accurate in its findings that an elevated alcohol concentration can result if the subject is running a high fever (the State's expert said it would have to be 4 to 5 degrees elevated). On the basis of that answer, the defendant tried to get the Court to suppress the breath test because his temperature was not taken by the operator prior to his sample being taken. The Court rejects that argument finding there is no such requirement in the breath testing regulations. It also found that the operator's failure to check the reference sample temperature was not a basis for exclusion as the technical supervisor had checked it the day before and the day after the test, and both times it was at the correct temperature.

XVII. BLOOD TEST

A. CONSENT NOT INVOLUNTARY OR COERCED

Combest v. State, 953 S.W.2d 453 (Tex.App.-Austin 1997). On remand 981 S.W.2d 958 (Tex.App.-Austin 1998). Same holding.

Reading DIC-24 when defendant is not under arrest will not per-se make subsequent consent to give blood sample involuntary.

Strickland v. State, No. 06-06-00238-CR, 2007 WL 2592440 (Tex.App.-Texarkana 2007).

This case involved an investigation of an alcohol-related crash that would ultimately be charged as Intoxication Assault. The issue challenged was the validity of the defendant's consent to a blood sample that he purportedly gave to the officer while at the hospital. The officer had told the defendant at the time he asked for his consent that if he refused his consent, he would obtain the blood sample as a mandatory blood specimen. The defendant was not under arrest at the time this statement was made. In upholding the consent, the Court distinguishes this case from those where an officer has created and communicated a fiction in order to coerce the consent for a search. Rather it points out that the officer was instead warning the defendant about the reality of the situation. The defendant was subject to immediate arrest based on the information which was in the officer's possession at the time that representation was made and was, in fact, arrested immediately thereafter and without reference to the eventual results of the blood test.

B. PROCEDURE FOR TAKING BLOOD SAMPLE

1. OFFICERS MAY USE FORCE TO TAKE BLOOD

Burns v. State, 807 S.W.2d 878 (Tex.App.-Corpus Christi 1991, pet. ref'd).

No due process violation in involuntary manslaughter case where two police officers held down a

defendant for hospital technician to extract a blood specimen.

2. SAMPLE FROM UNCONSCIOUS DEFENDANT

State v. Ruiz, 622 S.W.3d 549 (Tex.App – Corpus Christi - Edinburg 2021).

In light of *Mitchell* (below) the court re-evaluated the facts and determined that there was in fact exigent circumstances and upheld the warrantless blood draw due to the circumstances surrounding this incident. Specifically, there was a crash, the defendant fled the scene, found unconscious, remained unconscious the entire night, transported to hospital, 2 officers on duty, would have taken 2-3 hours to obtain a warrant, difficulty of finding a judge, and no procedures in place to obtain a warrant. Again, you have to look at the totality of the circumstance to determine if a warrantless blood draw will be upheld under the exigent circumstances exception to the warrant requirement.

Mitchell v. Wisconsin,139 S.Ct. 2525.

This was plurality opinion, in which the plurality determined that when the police had probable cause to believe a person committed a drunk-driving offense and the driver's unconsciousness or stupor required him to be taken to the hospital before the police had a reasonable opportunity to administer a standard evidentiary breath test, they might almost always order a warrantless blood test without offending the 4th Amendment. The reasoning here was that like *Schmerber*, a car accident heightened that urgency, the medical condition of Mitchell did the same.

State v. Ruiz,581 S.W.3d 782 (Tex.Crim.App. 2019).

In a felony DWI case where the defendant fled the scene of a wreck and was found unresponsive in a nearby field and was taken to the hospital. The State took a blood sample from the defendant without a warrant and while the defendant was unconscious. The Court has previously held that implied consent was not a valid basis for a warrantless the blood draw. The question here was whether or not implied consent to a blood draw from an unconscious driver is reasonable under the 4th Amendment and whether exigent circumstances justified the warrantless blood draw.

This court held that implied consent is not the equivalent to voluntary consent and is not a valid basis for a blood draw under the circumstances presented here. Their reasoning was based on whether or not the defendant's consent was given freely and voluntarily. Here, the court held that because the defendant was unconscious throughout the encounter with law enforcement, he could not make a choice, he could not hear the warnings when read to him and could not limit or revoke his consent. The Court vacated the lower courts holding on exigent circumstances and remanded the case to the court of appeals for reconsideration in light of ***Mitchell***. ***Keep an eye on this case ***

Pesina v. State, 676 S.W.2d 122 (Tex.Crim.App.1984).

Blood test evidence collected at request of police officer in DWI case not suppressible where suspect was unconscious and there were exigent circumstances.

3. USE OF ALCOHOL SWAB BEFORE BLOOD DRAW

Kennemur v. State, 280 S.W.3d 305 (Tex.App.-Amarillo 2008, pet.ref'd).
Kaufman v. State, 632 S.W.2d 685 (Tex.App.-Eastland 1982, pet. ref'd).

Use of alcohol solution to cleanse skin before test merely affects the weight of test and not its admissibility.

4. WHAT CONSTITUTES A "QUALIFIED TECHNICIAN"

a. "PHLEBOTOMIST" MAY BE A "QUALIFIED TECHNICIAN"

Brown v. State, No. 12-15-00205-CR, 2016 WL 4538609 (Tex. App. Tyler 2016).

Record showed the hospital Phlebotomist was qualified to do blood draw.

State v. Bingham, 921 S.W.2d 494 (Tex.App.-Waco 1996 pet. ref'd).

Common sense interpretation of term "qualified technician" as used in statute permitting only physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse to draw blood specimen for purpose of determining alcohol concentration or presence of controlled substance upon request or order of police officer, must include phlebotomist whom hospital or other medical facility has determined to be qualified in technical job of venesection or phlebotomy, i.e., drawing of blood.

b. "PHLEBOTOMIST" QUALIFICATION MUST STILL BE SHOWN

Torres v. State, 109 S.W.3d 602 (Tex.App.-Fort Worth 2003, no pet.).

Because a phlebotomist is not one of the occupations listed in the Statute, the qualifications must be proven. Though she had no formal training, the witness had been a phlebotomist for the last 24 years. She was certified through NPA. She drew blood every day and had done so thousands and thousands of times in her career.

Cavazos v. State, 969 S.W.2d 454 (Tex.App.-Corpus Christi 1998, no pet.).

Circumstantial evidence that blood was drawn by a phlebotomist was held insufficient to support that he was qualified. In this case no one testified regarding the qualifications of the person drawing the blood, and no evidence established that the blood was drawn by someone the hospital had determined to be qualified for that task. (Note: the gist of this holding was that this was a problem that could have been cured by an additional witness who was aware of this person's qualifications.)

c. RESTRICTIONS ON WHO MAY DRAW BLOOD ONLY APPLY IF SUSPECT IS UNDER ARREST

Blackwell v. State, No. 03-03-00337-CR, 2005 WL 548245, (Tex.App.-Austin 2005, no pet.) (not designated for publication).

Restrictions that say that only "a physician, qualified technician (other than an emergency medical technician), chemist, registered professional nurse, or licensed vocational nurse may take a blood specimen at the request or order of a peace officer" do not apply when the suspect is not under arrest and the draw

is not done at the request of a peace officer.

d. MEDICAL TECHNOLOGIST/TECHNICIAN IS A QUALIFIED TECHNICIAN

Medina v. State, No. 05-13-00496-CR, 2014 WL 1410559 (Tex.App.-Dallas 2014, no pet.).

An emergency room technician drew a blood sample from a DWI suspect pursuant to a search warrant and Defense argued the technician was not qualified under 724.017 of the Transportation Code. The Court held that the Transportation Code does not govern who can draw blood when a search warrant is used as the draw is not pursuant to the Transportation Code. (Same hold as in State v. Johnston, 336 S.W.3d 649 (Tex.Crim.App. 2011). The Court went on to say that even had the code applied, this technician was clearly qualified.

Edwards v. State, No. 11-11-00135-CR, 2013 WL 6178582 (Tex.App.-Eastland 2013).

Defendant argued that the medical technologist who drew his blood was not a "qualified technician" because he had no certification to draw blood and had not drawn blood at request of law enforcement before. Medical technologist's testimony that he earned a Bachelor of Science degree in medical technology where he was trained to draw blood, had worked for hospital for seventeen years and his duties included both drawing and testing blood, and that he was unaware of any certification offered by the State of Texas and explained that he learned through on-the-job training was sufficient evidence that he was so qualified.

5. STATE NEED NOT PROVE "RECOGNIZED MEDICAL PROCEDURE"

Arismendi v. State, No. 13-16-00140-CR, 2016 WL 5234601 (Tex. App. – Corpus Christi-Edinburg, 2016).

Defendant argued that in order to prove intoxication by blood alcohol concentration the State must show the blood test results came from a blood draw performed in accordance with proper procedure. A checklist was used but only one of the ten items on checklist were checked while witness says all were done. Defense received a charge to jury that had that language but on appeal argues State failed to prove that this was the case. The Court points out there is no statute or case law to support that State must prove that blood was drawn in accordance with recognizable medical procedures.

6. VARIATIONS FROM STANDARD BLOOD DRAW DON'T RENDER INADMISSIBLE

Siddiq v. State, No. 02-15-00095-CR, 2016 WL 4539613 (Tex. App. – Fort Worth 2016).

Medical technician admitted she did not follow her own training or every accepted medical practice in drawing blood sample. Namely: Blood was drawn while Defendant was in a bed and not a chair, arm was not straight but at an angle which increases risk of rupturing cells, up and down motion was used to cleanse draw site instead of concentric circles, After area was sanitized area of draw was tapped with finger in an unsterilized glove, tourniquet left on for longer than one minute, sample was not fully inverted after taking it, a disposable tourniquet was reused. Even though witness said the techniques would not be considered acceptable medical practice at his hospital but could not say any of the lapses impacted the alcohol concentration. Under the totality of circumstances draw was performed in reasonable manner.

C. HOSPITAL RECORDS

1. ARE NOT PRIVILEGED

Baker v. State, No. 07-14-00161-CR, 2015 WL 1518956 (Tex.App. – Amarillo 2015)
State v. Jewell, No. 10-11-00166-CR, 2013 WL 387800 (Tex.App.-Waco 2013, no pet.).
Owens v. State, No. 417 S.W.3d 115 (Tex.App.-Houston [1st Dist] 2013, no pet.).
State v. Liendo, 980 S.W.2d 809 (Tex.App.-San Antonio 1998, no pet.).
State v. Hardy, 963 S.W.2d 516 (Tex.Crim.App. 1997).
Knapp v. State, 942 S.W.2d 176 (Tex.App.-Beaumont 1997, pet. ref'd).
Clark v. State, 933 S.W.2d 332 (Tex.App.-Corpus Christi 1996, no pet.).
Corpus v. State, 931 S.W.2d 30 (Tex.App.-Austin 1996), pet. dism'd, 962 S.W.2d 590 (Tex.Crim.App. 1998).
State v. Hurd, 865 S.W.2d 605 (Tex.App.-Fort Worth 1993, no pet.).
Thurman v. State, 861 S.W.2d 96 (Tex.App.-Houston [1st Dist.] 1993 no pet.)
Blunt v. State, 724 S.W.2d 79 (Tex.Crim.App. 1987).

See Also: *Tex.R.Crim.Evid.509 = no physician/patient privilege*

Court held that defendant has no right to privacy in hospital blood test records and the State could use said records that were obtained by grand jury subpoena.

2. OBTAINING HOSPTIAL RECORDS BY SUBPOENA

State v. Huse, No. PD-0433-14, 2016 WL 1449627 (Tex.Crim.App. 2016).

This case concerned hospital records obtained by GJ subpoena. The trial court granted a MTS regarding the records based on its finding that the State failed to establish an actual GJ investigation existed, calling it an illegitimate exercise of authority. The Courts of Appeals reversed the trial Court's ruling and the Court of Criminal Appeals affirmed reiterating previous holding that HIPPA does not impact the State's ability to obtain the records, that the GJ subpoena was properly issued, and that there is no problem with the State giving the hospital the option of releasing records directly to the prosecutor as opposed to bringing them before the GJ.

Rodriguez v. State, 469 S.W.3d 626 (Tex.App.-Houston [1st Dist] 2015).
Tapp v. State, 108 S.W.3d 459 (Tex.App.-Houston [14th Dist.] 2003, pet. ref'd).
Garcia v. State, 95 S.W.3d 522 (Tex.App.-Houston [1st Dist.] 2002, no pet.).
Knapp v. State, 942 S.W.2d 176 (Tex.App.-Beaumont 1997).

As there is no constitutional or statutory reasonable expectation of privacy in hospital records of blood test results, a suspect has no standing to complain of defects in the GJ subpoena process.

Dickerson v. State, 965 S.W.2d 30 (Tex.App.-Houston [1st Dist.] Feb.19, 1998), 986 S.W.2d 618 (Tex.Crim.App.1999).
Thurman v. State, 861 S.W.2d 96 (Tex.App.-Houston [1st Dist.] 1993, no pet.).

Proper to use grand jury subpoena to obtain medical records.

3. RELEASE OF DEFENDANT'S HOSPITAL RECORDS IN RESPONSE TO A GJ SUBPOENA DOES NOT VIOLATE HIPAA

Murray v. State, 245 S.W.3d 37 (Tex.App -Austin 2007, pet. ref'd).

Health Insurance Portability and Accountability Act (HIPAA) and privacy rule promulgated pursuant to HIPAA did not overrule or preempt holding in State v. Hardy that a defendant did not have an expectation of privacy in blood-alcohol test results obtained solely for medical purposes after an accident. An entity covered by HIPAA regulations is expressly authorized to disclose health information that is otherwise protected under HIPAA without a patient's consent in numerous situations, including for law enforcement purposes pursuant to a grand jury subpoena.

Jacques v. State, No. 06-05-00244-CR, 2006 WL 3511408 (Tex.App.-Texarkana 2006) (not designated for publication).

A hospital's release of medical records to law enforcement is permitted under limited circumstances under HIPAA. 45 C.F.R. § 164.512 (2006). HIPAA specifically authorizes a hospital to release a patient's medical records in response to a grand jury subpoena. 45 C.F.R. §164. 512(f) (1) (ii) (B).

4. NO HIPAA VIOLATION IN HOSPITAL PERSONNEL TELLING POLICE BLOOD-ALCOHOL CONTENT WITHOUT SUBPOENA

Kirsch v. State, 276 S.W.3d 579 (Tex.App.-Houston [1st Dist.] 2008) aff'd 306 S.W.3d 738 (Tex.Crim.App. 2010).

The defendant had been brought into the hospital for treatment after being involved in a motor vehicle collision. The attending physician ordered a blood draw and analysis for medical purposes which showed defendant to be intoxicated. Without a request from law enforcement and without defendant's consent, hospital personnel informed Houston deputies about the results of the blood -alcohol test. The defendant tried to suppress the evidence as a violation of HIPAA. The Court of Appeals points out that under HIPAA, a covered health care provider who provides emergency health care in response to a medical emergency may disclose protected health care information to a law enforcement official if such disclosure appears necessary to alert law enforcement to the "commission and nature of a crime." In affirming the denial of the motion to suppress, the Court held that the defendant's blood-alcohol content in this case suggested he had committed the offense of DWI.

5. BLOOD SAMPLES DRAWN AT HOSPITAL OBTAINED BY GJ SUBPOENA

State v. Martinez, 570 S.W. 3d 278 (Tex. Crim. App. 2019).

The Court of Criminal Appeals agreed with the lower court and said that a defendant has a reasonable expectation of privacy in a blood sample that is drawn for medical purposes. The State may use a grand jury subpoena to obtain medical records and to seize a blood sample drawn for medical purposes, however, a search warrant is required before the State can send it to the lab for forensic testing. The Court held that the testing of the hospital drawn sample constituted a warrantless search of the defendant's blood sample in violation of the 4th Amendment and no exception to the warrant requirement applied. The Court further said that there was insufficient evidence in this case to show that the defendant intentionally abandoned the blood at the hospital.

Martinez v. State, No. 07-15-00353-CR, 2016 WL 1572275 (Tex.App.-Amarillo 2016, pet ref'd).

This case involves a charge of Felony Murder where Defendant was transported to hospital after being involved in a fatal driving accident. Ten blood vials were drawn as part of Defendant's medical treatment at hospital. A GJ subpoena was used by police to obtain samples which were later tested at forensic lab, MTS filed. The Defense argument that HIPPA was violated about having an expectation of privacy in the samples was denied and the fact that the State was the tester of the blood draw samples does not reinstate an expectation of privacy.

D. CHAIN OF CUSTODY REQUIREMENTS/PROVING RESULTS

1. BLOOD TESTED IS SAME AS BLOOD DRAWN

Lynch v. State, 687 S.W.2d 76 (Tex.App.-Amarillo 1985, pet. ref'd).

Can't rely solely on medical records to prove blood test result. State must further show: (1) a proper chain; and (2) that blood tested was same as blood drawn from defendant. In the absence of such evidence, medical records are inadmissible.

2. NOT NECESSARY THAT PERSON WHO DREW BLOOD TESTIFY

Alford v. State, No. 02-16-00030-CR, 2017 Tex.App. LEXIS 720, 2017 WL 370939 (Tex. App. – Fort Worth 2017).

This case involved a blood draw where the phlebotomist who drew the blood at the Denton Regional Medical Center did not testify. Instead, his supervisor testified that he was a trained phlebotomist who had the knowledge and ability to properly collect The supervisor further testified that he could only assume that the phlebotomist followed the proper procedures in drawing the defendant's blood. The blood was then sent to DPS and was tested by a forensic scientist. That forensic scientist testified at trial as to the results. The defense objected based on the Confrontation Clause. This court and several others have held that while blood test results are testimonial, if the person who drew the blood neither played any part in its analysis nor contributed to the report documenting the results, the Confrontation Clause does not require that person to testify before the results may be admitted into evidence.

Russell v. State, No. 14-15-00036-CR, 2016 WL 1402943 (Tex.App.-Houston (14th Dist) 2016).

The State attempted to offer blood analysis evidence through chemist after calling officer who witnessed collection of sample without calling nurse who drew the blood. The defense argued that they should have the right to confront the nurse who drew the blood. Referring to the holding in State v. Guzman, the Court held that the inability of the defense to cross examine the nurse did not violate his right to confrontation as that right is satisfied by his ability to cross examine the analyst.

Adkins v. State, 418 S.W.3d 856 (Tex.App.Houston (14th Dist.) 2013, pet ref'd).

Confrontation Clause did not require state to present nurse who drew Defendant's blood for cross-examination at Defendant's trial for driving while intoxicated prior to admission of blood test results. Despite Defendant's contention that nurse's testimony was necessary to establish quality of blood sample; analyst who tested Defendant's blood and signed report presented at trial certifying that Defendant's blood alcohol content was above legal limit testified at trial and was subjected to cross-examination, and analyst was able to discern quality of blood sample without any reliance on any statement by nurse.

Hall v. State, No. 02-13-00597-CR, 2015 WL 4380765 (Tex.App. Fort Worth, 2015).

This was a DWI case where blood was drawn at hospital pursuant to search warrant. The officer testified to observing blood draw and everything was done according to standard procedure. The Court held that the inability to cross examine the person who drew the blood did not violate confrontation rights as would be the case if the missing witness was involved in the analysis of the blood sample.

State v. Guzman, 439 S.W.3d 482 (Tex.App.-San Antonio 2014, no pet).

State tried to admit blood test result without calling the nurse who drew the blood and trial court granted MTS, but Court of Appeals reversed. In so doing the Court held that *Bullcoming* case does not extend to a person who only performs a blood draw and has no other involvement in the analysis or testing of the blood sample.

Yeary v. State, 734 S.W.2d 766 (Tex.App.-Fort Worth 1987, no pet.).

It is sufficient if officer testifies she witnessed the blood drawn by the nurse and any objections to failure to call nurse to testify go to weight and not admissibility of evidence.
Villarreal v. State, No. 04-15-00290-CR, 2016 WL 4376630 (Tex. App. – San Antonio 2016).

Nurse who drew Defendant's blood was deceased at time of trial, so officer testified that he observed nurse draw the blood and rotate and label and seal them in envelope. Defense argued that a proper chain of custody could not be established without the nurse was rejected by the Court

3. GAPS IN CHAIN GO TO "WEIGHT" NOT ADMISSIBILITY

Dugar v. State, No. 09-19-00098-CR
Patel v. State, No. 2-08-032-CR, 2009 WL 1425219 (Tex.App.-Fort Worth 2009, no pet.) (not designated for publication).
Penley v. State, 2 S.W.3d 534 (Tex.App.-Texarkana 1999, pet. ref'd)
Burns v. State, 807 S.W.2d 878 (Tex.App.-Corpus Christi 1991, pet. ref'd).
Gallegos v. State, 776 S.W.2d 312 (Tex.App.-Houston [1st Dist.] 1989, no pet.).

Where the State shows the beginning and the end of the chain of custody, any gaps in the chain go to the weight of the evidence and not to its admissibility.

4. NOT NECESSARY TO SHOW WHO DREW THE BLOOD

Hennessey v. State, No. 02-09-00310-CR, 2010 WL 4925016 (Tex.App.-Fort Worth 2010).

Admission of hospital blood test results in defendant's trial without calling person who drew blood did not violate HIPPA or the defendant's confrontation rights under Crawford. In this case the primary emergency room nurse, the lab technician who tested the blood and the senior forensic chemist for ME's office all testified about standard trauma patient care including that they all have blood drawn in the same way.

Blackwell v. State, No. 03-03-00337-CR, 2005 WL 548245, (Tex.App.-Austin 2005, no pet.) (not designated for publication).

Hospital records with blood test results were admitted with Business Records Affidavit. The defense

contested their admission because the person who drew the blood could not be identified and did not testify. The State called the surgeon who treated the Defendant, but he could not identify who drew the blood. He said that although he did not conduct or observe the blood draw, he and other doctors routinely relied on such procedures and records in treating patients. There was no evidence that an unauthorized or unqualified person drew the blood or that it was done in an improper manner. The results were therefore held to be admissible.

Beck v. State, 651 S.W.2d 827 (Tex.App.-Houston [1st Dist.] 1983, no pet.).

Proper chain of custody was shown in admission of hospital drawn blood sample in a manslaughter case even though physician witness could not testify who actually drew the blood sample.

5. NOT NECESSARY TO SHOW WHO DREW OR TESTED THE BLOOD!

Durrett v. State, 36 S.W.3d 205 (Tex.App.-Houston [14st Dist.] 2001, no pet.).

Medical records were offered to show defendant's blood was drawn and tested. Testimony failed to show who actually drew the blood and there was contradictory testimony about whether the State had shown who actually tested the blood. There was testimony about the precautions taken by the hospital to ensure blood samples are properly drawn, labeled and tested. The Court held that the testimony was adequate to link the blood result in the records to the defendant and that the beginning and end of chain were adequately proven. That witness could not recall who took the sample and who tested it goes to the weight not the admissibility of the evidence.

6. PROVING HOSPITAL BLOOD RESULTS WITH BUSINESS RECORDS AFFIDAVIT

Debottis v. State, NO. 14-22-00884-CR, 2024 Tex.App. LEXIS 1176, 2024 WL 629397(Tex.App.-Houston [14th Dist] 2024).

After appellant Angel Debottis pleaded guilty to two counts of intoxication manslaughter, a jury assessed her punishment at fifteen years' confinement for each count. She challenges the judgment in two issues. Appellant argues that the trial court reversibly erred in admitting (1) appellant's post-Miranda statements and (2) a toxicology report included in appellant's medical records.

Although the State properly argued that the post-Miranda statements of the defendant were not subject to custodial interrogation, the court of appeals chose to conduct a harm analysis and held that the jury likely did not give this brief conversation with officers significant weight but instead focused on the severity of the crash and the evidence related to it.

As for the admissibility of the toxicology report, the appellant objected that the medical records contained hearsay within hearsay (toxicology report). The State argued that the toxicology report was for purpose of medical diagnosis and treatment. For this exception to apply, the proponent must show that (1) the out-of-court declarant was aware that the statements were made for purposes of medical diagnosis or treatment, and that proper diagnosis or treatment depended upon the veracity of the statements, and (2) the statements are pertinent to diagnosis or treatment, that is, it was reasonable for the care provider to rely on the statements in diagnosing or treating the declarant. *Taylor v. State*, 268 S.W.3d 571, 588-89, 591 (Tex. Crim. App. 2008); *Jackson v. State*, **No**. 14-19-00365-CR, 2020 Tex. App. LEXIS 8497, 2020 WL 6326373, at *2 (Tex. App.—Houston [14th Dist.] Oct. 29, 2020, **no** pet.) (mem. op., not designated for publication). The medical records reflected the hospital staff's diagnosis and treatment, which included a diagnosis that appellant was suffering from acute alcohol toxicity. The State called as a witness the emergency room nurse

who treated appellant on the night of the incident. She explained that an analysis of appellant's blood alcohol content was pertinent to the doctor's diagnosis of acute alcohol toxicity. The medical records reflect the hospital staff's diagnosis and treatment, which included a diagnosis that appellant was suffering from acute alcohol toxicity. The State called as a witness the emergency room nurse who treated appellant on the night of the incident. She explained that an analysis of appellant's blood alcohol content was pertinent to the doctor's diagnosis of acute alcohol toxicity.

Appellant appears to raise an additional challenge to the lab report's admissibility. Appellant contends that the witness called by the State "could not lay a proper foundation, as she: i) could not testify that the lab was properly accredited at the time the testing was conducted; ii) lacked the training and professional credentials to understand or interpret the test results; and iii) was not involved in the testing process at the lab." This argument implicates the Confrontation Clause. *See, e.g., Russell v. State*, No. 14-15-00036-CR, 2016 Tex. App. LEXIS 3613, 2016 WL 1402943, at *5 (Tex. App.—Houston [14th Dist.] Apr. 7, 2016, pet. ref'd) (mem. op., not designated for publication).

The single sentence quoted above from appellant's brief constitutes the entirety of appellant's Confrontation Clause argument. Appellant cites **no** law regarding the Confrontation Clause, nor does she substantively explain that the admission of the toxicology report violated her constitutional rights. Our briefing rules require an appellant's brief to contain a clear and concise argument for the contentions made, with appropriate citations to authorities and the record. Tex. R. App. P. 38.1(i). Appellant's Confrontation Clause contention does not comply with this rule, and therefore we do not address the merit of appellant's argument. *See Cain v. State*, 501 S.W.3d 172, 176 (Tex. App.—Texarkana 2016, **no** pet.) ("To the extent Cain's appeal intends to claim a Confrontation Clause violation, it is overruled as insufficiently briefed."); *accord also Dewitt v. State*, 651 S.W.3d 669, 674 (Tex. App.—Houston [14th Dist.] 2022, **no** pet.) ("Because hearsay and the Confrontation Clause are separate grounds to object to the admission of evidence, we conclude appellant has waived his hearsay complaint due to failure to properly brief the issue."). The court noted that any error in the admission of the lab report was harmless. *See* Tex. R. App. P. 44.2(b). Not only did appellant plead guilty to intoxication manslaughter, but ample evidence of appellant's intoxication was introduced beyond the toxicology results. After reviewing the record and legal authority, the court overruled both issues and affirm the trial court's judgment.

***Practice tip**: Be prepared to properly overcome a Confrontation Clause objection by having the appropriate witnesses to link your medical blood to the results. See above cited cases dealing with hospital drawn samples and results.

Ex Parte Hernandez, No. 11-17-00004-CR, 2017 Tex.App. LEXIS 4325, 2017 WL 1957549 (Tex.App. – Eastland 2017).

The defendant claimed that his counsel was ineffective because he failed to object to the admission of the blood serum test results contained in the defendant's medical records. He claims that their admission violated his constitution right of confrontation. The blood was drawn by medical personnel for medical purposes and the hospital's lab performed the analysis. The results were contained in the hospital's records and accompanied by a business records affidavit. The person who testified about the results was not the person who actually performed the lab test but was the manager of the lab at the hospital. The trial court concluded that the blood was drawn for medical diagnosis and treatment and that the lab report was a business record, as such was non-testimonial in nature and did not violate the defendant's right to confront the witnesses against him. The Court of Appeals agreed with the trial court and pointed to *Melendez-Diaz and Sanders v State.*

Sanders v State, No. 05-12-01186-CR, 2014 WL 1627320 (Tex.App.-Dallas 2014, pet. ref'd).
Desilets v. State, 2010 WL 3910588 (Tex.App.-Beaumont 2010, no pet.) (not designated for publication), Habeas corpus granted by Ex parte Desilets, 2012 WL 333809, (Tex.Crim.App. 2012, reh. denied).

This was a case where the State offered the hospital records without calling the person who took the blood specimen. The defense argued that violated their right to confront the witness. The Court held that blood results from blood drawn for medical purposes that are separate from the criminal prosecution are not "testimonial" because they are not made for the purpose of establishing a fact in a criminal prosecution; therefore, defendant's confrontation rights were not implicated.

Goodman v. State, 302 S.W.3d 462 (Tex.App.-Texarkana 2010, pet. ref'd).

This was a case where the State offered the hospital records without calling the person in the lab who tested the blood. Court held that defendant's hospital blood test results showing his excessive blood-alcohol level were non-testimonial, and thus their admission without testimony of person who actually did the testing did not violate Confrontation Clause in defendant's prosecution for third offense of driving while intoxicated.

7. BLOOD TEST OFFERED WITHOUT TESTIMONTY OF ANALYST SAME PROPERLY ADMITTED:

Smith v. Arizona, 2024 U.S. LEXIS 2712.

Although this case was not a driving while intoxicated case, it deals with expert testimony from a lab analyst similar to the lab analysts used in driving while intoxicated cases. We are again addressing the issue of what is testimonial and what is non-testimonial in the Supreme Court's most recent ruling. The question presented was whether there is a confrontation clause violation when an expert witness restates an absent lab analyst's factual assertion to support his own opinion testimony.

The facts derived from trial are that the testing analyst stopped working at lab before trial, for unexplained reasons, State amended their expert witness list, testify expert will provide "independent opinion," testifying expert had not participated in the testing in any manner, testifying expert relied on testing expert's notes, to form his opinion, on the stand, expert referred to those records (notes) and related what was in them, described the specific scientific method used in the testing, the testing adhered to general principals of chemistry and lab polices and practices, and rendered same opinion as testing analyst, and admitted testing expert's report

The Arizona Court of Appeals affirmed Smith's convictions, rejecting his Confrontation Clause challenge. It relied on Arizona precedent (similar to the Illinois Supreme Court's decision in *Williams*) stating that an expert may testify to "the substance of a non-testifying expert's analysis, if such evidence forms the basis of the [testifying] expert's opinion." App. to Pet. for Cert. 11a-12a (quoting *State ex rel. Montgomery* v. *Karp*, 236 Ariz. 120, 124, 336 P. 3d 753, 757 (App. 2014)). That is because, the Arizona courts have said, the "underlying facts" are then "used only to show the basis of [the in-court witness's] opinion and not to prove their truth." *Ibid.*, 336 P. 3d, at 757. On that view, the Court of Appeals held, Longoni could constitutionally "present his independent expert opinions" as "based on his review of Rast's work." App. to Pet. for Cert. 11a.

The United States Supreme Court held that the Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. The Clause thus bars the admission at trial of an absent witness's statements unless the witness is unavailable and the defendant had a prior chance to subject her to cross-examination. *Crawford* v. *Washington*, 541 U. S. 36, 53-54, 124 S. Ct. 1354, 158 L.

Ed. 2d 177. This prohibition "applies only to testimonial hearsay," *Davis* v. *Washington*, 547 U. S. 813, 823, 126 S. Ct. 2266, 165 L. Ed. 2d 224, and in that two-word phrase are two limits. First, in speaking about "witnesses"—or "those who bear testimony"—the Clause confines itself to "testimonial statements," a category this Court has variously described. *Id.*, at 823, 826, 126 S. Ct. 2266, 165 L. Ed. 2d 224. Second, the Clause bars only the introduction of [*424] hearsay—meaning, out-of-court statements offered "to prove the truth of the matter asserted." *Anderson* v. *United States*, 417 U. S. 211, 219, 94 S. Ct. 2253, 41 L. Ed. 2d 20. Relevant here, the Confrontation Clause applies in full to forensic evidence. For example, in *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314, prosecutors introduced "certificates of analysis" stating that lab tests had identified a substance seized from the defendant as cocaine. The Court held that the defendant [**2] had a right to cross-examine the lab analysts who prepared the certificates. In *Bullcoming* v. *New Mexico*, 564 U. S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610, the Court relied on *Melendez-Diaz* to hold that a State could not introduce one lab analyst's written findings through the testimony of a substitute analyst. Finally, in *Williams* v. *Illinois*, 567 U. S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89, the Court considered a case where one lab analyst related an absent analyst's findings on the way to stating her own conclusion. The state court held that the testimony did not implicate the Confrontation Clause because the absent analyst's statements were introduced not for their truth, but to explain the basis for the testifying expert's opinion. Five Members of the Court rejected that reasoning. But because one of those five affirmed the state court on alternative grounds, Williams lost.

The testing analyst's statements thus came in for their truth, and no less because they were admitted to show the basis of the testifying expert's opinions. All those opinions were predicated on the truth [*436] of the testing analyst's factual statements. The testifying expert could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what the testing expert had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results. The State used the testifying expert to relay what the testing expert wrote down about how she identified the substances.

The Court held that the State used the testifying expert to relay what Rast wrote down about how she identified the seized substances. The testifying expert thus effectively became the testing expert's mouthpiece. He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth. So if the out-of-court statements were also testimonial, their admission violated the [**32] Confrontation Clause. Smith would then have had a right to confront the person who actually did the lab work, not a surrogate merely reading from her records.

What remains is whether the out-of-court statements of the testifying experts conveyed were testimonial. As earlier explained, that question is independent of everything said above: To implicate the Confrontation Clause, a statement must be hearsay ("for the truth") and it must be testimonial—and those two issues are separate from each other. See *supra*, at 3. The latter, this Court has stated, focuses on the "primary purpose" of the statement, and in particular on how it relates to a future criminal proceeding. See *ibid.* (noting varied formulations of the standard). A court must therefore identify the out-of-court statement introduced, and must determine, given all the "relevant circumstances," the principal reason it was made. *Bryant*, 562 U. S., at 369, 131 S. Ct. 1143, 179 L. Ed. 2d 93. The question presented in Smith's petition for certiorari did not ask whether the testing expert's out-of-court statements were testimonial.

A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable, and the defendant has had a prior chance to cross-examine her. See *Crawford*, 541 U. S., at 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177; [*439] *Melendez-Diaz*, 557 U. S., at 311, 129 S. Ct. 2527, 174 L. Ed. 2d 314. Neither may the State introduce those statements through a surrogate analyst who did not participate in their [**36] creation. See *Bullcoming*, 564 U. S., at 663, 131 S. Ct. 2705, 180 L. Ed. 2d 610. And nothing

changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So, a defendant has the right to cross-examine the person who made them.

The United Supreme Court vacated the Arizona Court of Appeals judgment and remanded it to the lower court to address the additional issue of whether the testing expert's records were testimonial. Due to this case being remanded, it is currently not binding.

Currently in the State of Texas, we handle situations involving missing experts in compliance with the following set of cases, in which Smith v. Arizona can be distinguished. ***See Gaddis v. State, Talamantes v. State, and Paredes v. State below.***

Gaddis v. State, No. 13-16-00190-CR, 2017 Tex. App. LEXIS 6506 (Tex. App. – Corpus Christi-Edinburg 2017).

In a trial for DWI, the toxicologist who testified about the blood results testified to the process used to test for drugs and alcohol. She stated that she performed the data analysis, but another analyst performed the "extraction procedures" of the testing process. She evaluated the raw data to ensure protocol was followed during the testing process. She further explained that if the blood sample had been improperly extracted or prepared, it would have resulted in an error present in the raw data, and she saw nothing to indicated that the procedures weren't followed properly. The State offered in the report that was prepared by the analyst who was testifying. The Defendant claims that the admission of the report by an analyst that did not test the blood violated the confrontation clause. The court held that there was no Sixth Amendment confrontation violation that resulted from the admission of the lab report, which was prepared by the testifying analyst, and was based on her own conclusions after she analyzed the machine-generated raw data, and the defendant had the opportunity to cross-examine her about her conclusions. *****Caution*** Do not admit the report of the non-testifying analyst.**

Talamantes v. State, No. 08-14-00142-CR, 2015 WL 6951288 (Tex.App.-El Paso 2015).

At trial the State did not call the DPS analyst who actually tested the blood sample as he was no longer employed by lab. Instead they called another analyst who technically reviewed and verified the result by reviewing the raw data. The trial judge kept actual report out but allowed Tech Review analyst to testify to result based upon her review of underlying data. In upholding the admission of the result, the Court of Appeals held this did not violate the Defendant's right to confront witness as she was not a mere "conduit" of the non-testifying analyst's opinion about the BAC but rather did an independent review and analysis of the raw data generated during the testing.

Paredes v. State, 462 S.W.3d 510 (Tex.Crim.App. 2015).

The Court held that the admission of the supervising DNA analyst's opinion, which was based on computer generated data obtained through batch DNA testing, regarding the DNA match to the defendant did not violate the Confrontation Clause. The analyst did not introduce or testify regarding a formal report or assertion from a non-testifying analyst, but instead used non-testimonial information to form an independent, testimonial opinion and defendant was given the opportunity to cross-examine the witness about her analysis.

E. CERTIFICATE OF ANALYSIS UNDER CCP ARTICLE 38.41

Article 38.41 says that a "certificate of analysis that complies with this article is admissible in evidence . . . to establish the results of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court. Section 3 says that a certificate of analysis under Article 38.41 "must contain" the following information certified under oath: (1) the analyst's name and the name of the laboratory employing her; (2) a statement that the laboratory is properly accredited; (3) a description of the analyst's education, training, and experience; (4) a statement that the analyst's duties include analyzing evidence for one or more law enforcement agencies; (5) a description of the tests or procedures conducted by the analyst; (6) a statement that the tests or procedures were reliable and approved by the laboratory; and finally (7) the results of the analysis.

Section 4, the notice-and-demand provision, requires the offering party to file the certificate with the trial court and provide a copy to the opposing party "[n]ot later than the 20th day before the trial begins. But in any event, "[t]he certificate is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the certificate.

Finally, Section 5 states that a certificate "is sufficient for purposes of this article if it uses the following form or if it otherwise substantially complies with this article.

Williams v. State, 585 S.W.3d 478 (Tex.Crim.App. 2019).

The court held that under CCP Art. 38.41, Certificate of Analysis, someone other than the analyst who conducted the testing can serve as the affiant. There is no requirement that the affiant be the person who actually tested the physical evidence. However, the certificate of analysis must "substantially comply" with section 3 requirements. Here the certificate did not meet all the requirements, but the defendant failed to make the proper objections. The Court went on to reiterate that Article 38.41 does not in any way diminish a criminal defendant's Sixth Amendment right to confrontation.

F. SANITARY PLACE REQUIREMENT

State v. Fikes, 585 S.W.3d 636 (Tex.App. – Austin, 2019).

The phlebotomist used a sharps container (a biohazard bin) as a workstation to draw the blood of the defendant. Defendant complained the blood draw violated the Fourth Amendment by subjecting him to an unjustified risk of infection. The trial court granted the defendant's motion to suppress. The Court of Appeals reversed stating that the Defendant presented no evidence concerning the likelihood that the phlebotomist's actions would spread a pathogen and no evidence that any part of the gauze or bandage that touched the sharps container made contact with the Defendant.

Zalman v. State, No. 13-13-00471-CR, 2015 WL 512914 (Tex.App.-Corpus Christi 2015, pet ref'd).

Presence of insects in room where blood was drawn did not render it unsanitary where one insect that came into contact with Defendant did not crawl down arm used to draw blood and was gone by time of draw and where evidence showed actual draw procedure was reasonable and proper. *Schmerber* does not require an ideal environment, only a safe one.

Battles v. State, No. 05-13-00106-CR, 2014 WL 5475394 (Tex.App.-Dallas 2014, no pet.).

This was a DWI trial where the Defense challenged the admissibility of the blood evidence on the basis that it was not drawn in a "sanitary" place. In support they called a witness who was the former DWI program coordinator at the police department, and he testified that he had told supervisors at the PD that he did not believe the rooms where the blood was drawn, which were intoxilyzer rooms, were "sanitary places" and had suggested they do the draws in nurses' stations instead. The State called the nurse who did the draw who had no problem with drawing blood in the room and pointed out the area of the arm the blood was drawn from was the area that needed to be sterile and added the room used by the PD was in his opinion much cleaner than the hospital ER room. The Court pointed to the evidence of the appearance of the room at time of draw which showed that it was a tidy room with no visible foreign substances. Based on the totality of the circumstances, the Court concluded the blood draw room was safe and did not invite an unjustified element of personal risk, infection or pain and so concluded that the manner in which the blood draw was done was not unreasonable.

Adams v. State, 808 S.W.2d 250, (Tex.App.-Houston [1st Dist.] 1991, no pet.).

Defendant contends that an inspection a month before the blood was drawn at the hospital does not show the sanitary condition when blood was drawn. The statute does not require such evidence. It requires that a "periodic" inspection be done, not an inspection on the date blood was drawn. Even without the nurse's affidavit, the trial judge could have concluded that St. Joseph's Hospital was a "sanitary place," thus satisfying the first part of the statutory predicate.

G. HOSPITAL DRAWN SERUM-BLOOD TEST

Navarro v. State, No. 14-13-00706-CR, 2015 WL 4103565 (Tex.App.-Houston (14th Dist.) 2015).

The State's argument that the definition of intoxication does not distinguish between whole blood and plasma was erroneous. The Court makes clear that the .08 definition must be shown in whole blood terms. It goes on to say that should have been made clear in jury instructions but that is questionable as it would involve charging on language not in the statute. The big issue was the State trying to say it didn't matter which is clearly wrong.

Wooten v. State, 267 S.W.3d 289 (Tex.App.-Houston [14th Dist.] 2008).

This case involved an objection to the admissibility of a medical blood draw result. There was a Kelly hearing, and the case provides a good discussion of the witnesses called and the nature of their testimony. The Court upheld the judge's decision to admit the results into evidence. The Court found it was within the zone of reasonable disagreement for the Trial Court to conclude the State met the three Kelly factors by clear and convincing evidence regarding the Dade Dimension RXL. Accordingly, the Trial Court did not abuse its discretion in allowing appellant's Dimension RXL blood alcohol results or the expert witness testimony regarding appellant's blood test results to be presented to the jury.

Bigon v. State, 252 S.W.3d 360 (Tex.Crim.App.2008).

Defendant objected to the state expert's testimony concerning the conversion of appellant's serum- alcohol level to a blood-alcohol level and retrograde extrapolation on the basis that said testimony was not reliable. The Court of Appeals held both were admissible. The Court of Criminal Appeals held that it was not an abuse of discretion to allow said testimony.

Reidweg v. State, 981 S.W.2d 399 (Tex.App.-San Antonio 1998, pet. ref'd).

Objection to admitting evidence of serum-blood test as opposed to whole blood test overruled as evidence showed that test instrument was standardized such that serum-blood test result would be the same as if whole blood were tested.

H. NEW DPS POLICY ON HOSPITAL SERUM INTERPRETATION

The DPS Crime Lab has a new policy for handling requests for hospital serum alcohol result interpretation. To help keep our blood alcohol chemists and toxicologists on the bench and working on the backlog, the DPS Breath Alcohol Laboratory Technical Supervisors will now handle hospital serum alcohol result interpretation. All of the requests should be routed through Mack Cowan, Scientific Director LES/Crime Lab/Breath Alcohol Laboratory, Texas Department of Public Safety, 5805 N. Lamar, Austin, TX 78752, (512)424-5202 and he will be able to assign the request to the most appropriate Technical Supervisor.

I. HOSPITAL DRAWN SAMPLE

1. NOT AN ASSAULT

Hailey v. State, 87 S.W.3d 118 (Tex.Crim.App. 2002) cert. denied, 538 U.S. 1060 (2003).

Defendant arrested for DWI. The evidence at the time of arrest showed that defendant was: 1) Bouncing off guardrail; 2) Crossing into oncoming traffic; 3) PBT administered at the scene showed an alcohol concentration of .337. Officer, fearing there may be alcohol poisoning transported defendant to the hospital. Defendant was read the DIC-24 and refused to give a sample. Hospital drew a medical sample that showed a .454. Court of Appeals held that blood was illegally taken and that the taking of the blood sample constituted an assault on the defendant by the hospital personnel. The problem was that no witness was called from the hospital to say why the blood was taken. The Court of Criminal Appeals held that it was improper for the Court of Appeals to reverse the case based on a theory not presented to the trial court (that being the hospital assault issue) and so reversed the Court of Appeals decision affirming the trial court's finding that the blood sample was admissible.

Spebar v. State, 121 S.W.3d 61 (Tex.App.-San Antonio, September 3, 2003, no pet.).

Another case where the blood sample was drawn by hospital personnel after the defendant refused to give the police a sample. As in the case above, the defendant claims the evidence was inadmissible because it was obtained when the hospital illegally assaulted him. This claim was rejected by the Trial Court. The defendant cites the Court of Appeals opinion in the Hailey case. The Court first distinguishes Hailey by pointing out that the trial judge in its ruling stated that this was not a case of law enforcement taking a blood sample but rather blood taken as part of the defendant's medical treatment. The Court further rejects the defendant's argument that the hospital personnel were agents of the State.

2. HOSPITAL STAFF NOT AGENTS OF STATE

State v. Spencer, No. 05-13-01210-CR, 2014 WL 2810475 (Tex.App.-Dallas 2014).

Defendant was involved in one vehicle accident and officers at the scene suspected he was intoxicated and later at the hospital where he was taken for treatment, they asked him to provide a blood sample and Defendant refused. Hospital personnel drew a sample for medical purposes which revealed Defendant was intoxicated. Defendant did not consent to the hospital draw but did sign a form consenting to treatment. The

Trial Court found that the hospital personnel, while acting appropriately, were acting as agents of the State when they drew the blood and suppressed the result. The Court of Appeals reverses that ruling finding there is nothing in the record to support that the reason the hospital personnel drew blood was to gain evidence to support criminal prosecution.

J. CONSENT TO BLOOD DRAW

1. ACQUIESCENCE TO HOSPITAL BLOOD DRAW = CONSENT

State v. Kelly, 204 S.W.3d 808 (Tex.Crim.App. 2006).

In response to the objection to the admissibility of a medical blood draw where the defendant objected, she never "consented" to the draw, the court held that an express or implied finding of "mere acquiescence" to the blood draw also constitutes a finding of consent to the blood draw.

2. DEFENDANTS ORAL CONSENT TO DR'S REQUEST SUFFICIENT:

Donjuan v. State, 461 S.W.3d 611 (Tex.App.–Houston (14th Dist) 2015, reh.denied).

Defendant was transported to hospital for a mandatory specimen after a failure to obtain breath sample. The Doctor at hospital who did blood draw was instructed by police to take the mandatory draw but before doing so he asked the Defendant if he could draw his blood and the Defendant said he could. Defendant argued his consent was merely his acquiescence to Officers claim of authority to compel blood specimen, but this argument was rejected as it was only the Doctor who asked for consent. This consent made the holding in Villareal inapplicable.

K. SEARCH WARRANT FOR BLOOD IN DWI CASE

1. IS PROPER

Beeman v. State, 86 S.W.3d 613, (Tex.Crim.App. 2002). See also Dye v. State, No. 08-02- 00018-CR, 2003 WL 361289 (Tex.App.-EI Paso 2003, no pet.) (not designated for publication).

This case involved a rear end collision without injuries that resulted in the suspect's arrest for DWI. After the suspect refused to give a breath sample, the officer got a search warrant that authorized a blood sample be drawn and said sample was taken over the suspect's objection. The issue on appeal is whether the implied consent law prohibits drawing a suspect's blood under a search warrant. The Court of Criminal Appeals holds that it does not; pointing out that to interpret the statute in that way would afford DWI suspects more protection than other criminal suspects.

2. SEARCH WARRANT AFFIDAVIT FAILED TO NOTE DATE/TIME OF STOP

a. NOT FATAL

Dempsey v. State, No. 14-14-00634-CR, 2015 WL 7258751 (Tex.App.-Houston (14th Dist.) 2015). pdr ref'd.

This involved a search warrant attack where the warrant on its face said it was signed before the PC affidavit was executed. In upholding the trial judge's ruling upholding the warrant, the Court of Appeals pointed out the time issue has no impact as there is no requirement that a warrant show what time it was signed so the

problematic time notation is surplusage. Even if they considered time notation it is outweighed by fact magistrate indicated his PC was based on already executed affidavit and it is a reasonable inference that a four-minute difference between time warrant was signed and affidavit was executed was likely due to an inaccurate clock.

State v. Welborn, No. 02-14-00464-CR, 2015 WL 4599379 (Tex.App.-Fort Worth 2015).

This is a blood search warrant case where the affidavit listed two different dates for the stop. In the first paragraph it said offense occurred on September 2, 2013, and in paragraph 5 it stated the stop occurred on September 1, 2013, and then at the end he swore to affidavit on September 2, 2013. While he found the affiant credible and found the mistake as a clerical error the Judge granted the motion based on the *Crider* opinion. In reversing that ruling, the Court distinguishes *Crider* as having no date as opposed to discrepancy in dates and held that the trial judge should have found that clerical error did not invalidate the warrant.

Zalman v. State, No. 13-13-00471-CR, 2015 WL 512914 (Tex.App.-Corpus Christi 2015).

Failure to note time of stop in warrant was not fatal when it stated offense was committed on Sept 13, 2009, and it was issued at 3:09 a.m. the morning of the 13th gave Magistrate sufficient basis to infer that details observed also occurred that same date.

Ashcraft v. State, No. 03-12-00660-CR, 2013 WL 4516193 (Tex.App.-Austin 2013).

Failure to set out the time at which the Defendant was operating a motor vehicle in the affidavit was not fatal where affidavit did state officer made contact with Defendant on May 14th at 11:05 p.m. and was sworn on May 15th which indicates it was sworn to sometime after midnight as it was issued at 12:28 a.m. on the 15th. Since less than two hours elapsed between the time of "contact" with the Defendant and the time warrant was issued and the description of the signs of intoxication observed at the time of said contact, the magistrate had a substantial basis for determining that evidence of intoxication would likely be found in the Defendant's blood within two hours of stop.

State v. Dugas, 296 S.W.3d 112 (Tex.App.-Houston (14th Dist.)2009, pet.ref'd).

In this case the blood search warrant affidavit was challenged because it failed to include the time the alleged offense occurred. Argument raised = no basis upon which the magistrate could have determined whether the defendant's blood contained evidence of a crime. Trial Court suppressed the blood. In reversing Trial Court, the Court of Appeals pointed out that though time is not noted, it is undisputed that offense and issuance of warrant occurred the same day as warrant was signed at 6:03 a.m., leaving the maximum potential time elapsed between traffic stop and warrant as 6 hours and 3 minutes. Nor was it unreasonable for magistrate to have assumed, based on facts in affidavit, that there would be some evidence of intoxication in the defendant's blood when warrant was signed. "The issue is not whether there are other facts that could have or even should have been included in that affidavit; instead, we focus on the combined logical force of facts that are in the affidavit." Cites Rodriguez v. State, 232 S.W.3d 55 (Tex.Crim.App. 2007).

State v. Jordan, 342 S.W.3d 565 (Tex.Crim.App. 2011).

The defense argued that the affidavit did not state the date and time when facts of offense are alleged to have occurred so was insufficient to give magistrate PC to believe blood would constitute evidence of guilt at time warrant issued. Trial Court agreed and suppressed blood. State argued that because warrant was issued at 3:54 a.m. on June 6th, the maximum amount of time that could have elapsed between stop and issuance of warrant was 3 hours and fifty-four minutes. State cited State v. Dugas. Court of Appeals

rejected that it was undisputed that offense and issuance of warrant were in the same day. Though statement in affidavit by officer was, "I have good reason to believe that heretofore, on or about the 6th day of June 2008... did then and there commit offense of DWI," the Court finds this to just be a statement of the officer's "belief' and not a statement of "fact" which distinguishes this case from Dugas as it holds affidavit did not state the offense date. Trial judge suppression is affirmed. This holding was reversed by the Court of Criminal Appeals which upheld the warrant. In its holding, the Court states that the four corners of a warrant affidavit have to be considered to determine probable cause, rejecting the approach of the lower court which seemed to be testing the introductory statement and the description of facts separately. It held that the magistrate could infer that observations of defendant's conduct occurred on the date specified in the introductory statement and find that this was the date of offense. Magistrate had substantial basis to determine evidence of intoxication would be found in defendant's blood. Evidence of any amount of alcohol or other controlled substance could be probative of intoxication as it is evidence that suspect introduced substance into his body.

b. FATAL

Crider v. State, 352 S.W.3d 704 (Tex.Crim.App. 2011).

Affidavit in support of search warrant to draw blood from defendant, who had been arrested for DWI, was insufficient to establish probable cause that evidence of intoxication would be found in defendant's blood at the time the search warrant was issued. Affidavit did not state the time that the officer conducted traffic stop of defendant's vehicle, and nothing in the four corners of the affidavit suggested what time gap existed between defendant's last moment of driving and the moment the magistrate signed the warrant; such that there could have been a 25-hour gap between the time the officer first stopped defendant and the time he obtained the warrant.

3. SEARCH WARRANT AFFIDAVIT LISTED THE WRONG YEAR = NOT FATAL

Schornick v. State, No. 02-10-00183-CR, 2010 WL 4570047 (Tex.App.-Fort Worth 2010, no pet.).

This involved a warrant where the officer erroneously listed the stop occurred on January 21, 2008, rather than January 31, 2009. At the hearing officer testified that it was a clerical error. Trial Court denied MTS. Trial Court holding was affirmed.

4. SEARCH WARRANT AFFIDAVIT HAVING MULTIPLE CLERICAL ERRORS = NOT FATAL

Welder v. State, No. 04-12-00706-CR, 2013 WL 4683156 (Tex.App.-San Antonio 2013, no pet.).

This case concerns a computer program generated warrant that inserted boiler plate language into the body of the warrant that could objectively be argued was untrue. Specifically, it stated the affiant officer personally saw the offense committed when he got there only after the stop. In response the Court points out that the affidavit body correctly states the name of the officer who did see the Defendant operating his vehicle and that the affidavit when read as a whole reflected the collective observations of all officers involved in the investigation.

Salzido v. State, 2011 WL 1796431 (Tex.App.-Amarillo 2011, pet. ref'd).

Defense attacked warrant because an erroneous date, June 7, 2008, was listed in warrant's first word paragraph and the name "Hoover" appeared once where the name Salzido should have been. He further

pointed out the warrant affidavit stated the defendant was asked to perform standard field sobriety test drills (plural}, when only one standard field sobriety test drill was performed (HGN). Trial Court denied the motion. In upholding the warrant, the Court referred to the errors in the date and name as clerical errors based on the officer's failure to change names in the template he used. The explanation, that the defendant was initially asked to perform drills and that some were not later offered due to back issue, adequately explained why that mistake was not a problem. Even without the FST, there was sufficient other evidence to support the PC.

See Also: Munoz v. State, No. 02-12-00513-CR, 2013 WL 4017622 (Tex.App. -Fort Worth 2013, no pet.).

5. SEARCH WARRANT AFFIDAVIT FAILED TO SET OUT THE BASIS FOR THE TRAFFIC STOP = NOT FATAL

Hughes v. State, 334 S.W.3d 379 (Tex.App.- Amarillo 2011, no pet.).

Defendant attacks the affidavit for failing to state the specific articulable facts to authorize the stop of the defendant. It also failed to state how the blood draw would constitute evidence of DWI, and complained about slash marks that are not explained in the part describing FST's. Language asserts that officer swore to affidavit before the magistrate when in fact it was sworn to in front of an officer at station who was notary, so the affidavit constitutes perjury. No exigent circumstances warranted the intrusion of blood draw. In rejecting that argument, the Court explains that the failure to detail facts regarding the basis for the stop is not fatal to magistrate's overall PC determination because the issue is not reasonable suspicion to detain but rather PC to authorize a search. In rejecting the blood use argument, the Court finds that the magistrate is allowed to make a reasonable inference that blood would be analyzed for presence of alcohol for use in prosecution of DWI. Slash marks are merely "/"s that indicate officer observed those matters. As to the issue of who it was sworn to, this is judged to be extra wording that does not impact the legality of the warrant. The Court further finds that no exigent circumstances are required to authorize a warrant based on PC for a blood draw.

6. SEARCH WARRANT DOES NOT REQUIRE A REFERENCE TO A PRIOR BLOOD DRAW

Islas v. State, No. 14-17-00660-CR, 2018 Tex. App. LEXIS 8614 (Tex. App. – Houston [14th Dist.] 2018).

The fact that the defendant had previously had his blood drawn did not disprove probable cause. The fact that the defendant's blood had already been drawn was not material to the determination of probable cause. In this case, the defendant was involved in a crash and his blood was initially taken for medical purposes. Then the officer requested his blood be drawn without a warrant. The officer then subsequently sought a warrant for another blood draw. The court held the warrant was sufficient because it established that the defendant had been drinking prior to the collision, hit another vehicle, smelled of alcohol, had slurred speech, and failed the HGN shortly after the collision.

7. SEARCH WARRANT AFFIDAVIT WAS NOT SIGNED BY AFFIANT = NOT FATAL

Wheeler v. State, No. PD-0388-19, 2021 Tex. Crim. App. LEXIS 140, 2021 WL 476101 (2021).

Appellant was arrested for DWI and refused to submit to field sobriety tests and also refused a blood or breath test. In applying for a search warrant, the officer used a pre-printed, fill-in-the-blank form for the probable cause affidavit, search warrant, return, and order for assistance. The probable cause affidavit form included statements indicating that an oath was required and must be sworn to. The officer never swore to

the affidavit before anyone. He just signed the affidavit, and it was electronically submitted to the magistrate. A motion to suppress was filed and appellant argued that because the affidavit was not sworn under oath as required by the Texas Constitution and Code of Criminal Procedure, it must be excluded pursuant to the Texas Exclusionary Rule (CCP 38.23(a)). The officer testified that he did not swear an oath before a magistrate or anyone else. In fact, he testified that in the 14 months he had worked at this department, he had not sworn to a single probable cause affidavit. The trial court denied the motion and said that it fell within the "good faith" exception to the Exclusionary Rule under (CCP 38.23(b)). The court of appeals reversed. The court of appeals found that the warrant was defective, and the "good faith" exception did not apply. Furthermore, that the officer was unreasonable in relying on the warrant when he executed it. This Court held that "no objectively reasonable officer would execute a search warrant knowing that it was procured through an unsworn probable cause affidavit." The Court held that the officer did not act in ***objective*** good faith. Accordingly, the "good faith" exception does not apply.

Smith v. State, 207 S.W.3d 787 (Tex.Crim.App. 2006).

Affiant swore before magistrate and then failed to sign the affidavit. The magistrate did not notice the omission and signed the SW Court of Appeals held failure to sign affidavit does not invalidate warrant. Court of Criminal Appeals agreed holding that the "purpose of the affiant's signature...memorializes the fact that the affiant took the oath; it is not an oath itself " Dicta in the opinion references that some federal and state courts now permit telephonic warrants "and one can foresee the day in which search warrants might be obtained via email or a recorded video conference with a magistrate located many miles away. In state as large as Texas, such innovations should not be foreclosed by the requirement of a signed affidavit in officer's oath which can be memorialized by other equally satisfying means. We leave those potential future changes to the legislature." The Court further notes that forgetfulness or carelessness in formalities of affidavit may affect credibility of the officer.

8. SIGNATURE ON WARRANT NOT LEGIBLE = NOT FATAL

State v. Arellano, No. PD-0287-19, 2020 Tex.Crim.App. LEXIS 363 (Tex.Crim.App. 2020).

Texas CCP Article 18.04(5) requires, in part, that a search warrant contain a legible magistrate's signature. The trial court granted Appellee's motion to suppress. In its written findings of fact and conclusions of law, the trial court determined that the magistrate's signature "was not in legible handwriting, nor was it accompanied by any name identifying the magistrate in either clearly legible handwriting or in typewritten form." Thus, the court concluded that the warrant was facially invalid in light of its failure to comply with Article 18.04(5). Given the warrant's facial invalidity, the court further concluded that the statutory "good faith" exception could not apply because "in order to rely on the 'good faith exception' to the exclusionary rule . . . an officer must rely on a facially valid warrant." The court of appeals upheld the trial court's suppression ruling. The CCA concluded that the "good faith" exception is not automatically precluded where the defect is an illegible magistrate's signature. The Court indicated that even with such a defect, "a warrant is still a warrant for purposes of Art. 38.23(b)." Thus, the good-faith exception applies when the record establishes that the officer was acting in objective good-faith reliance upon a warrant based upon a neutral magistrate's determination of probable cause.

Nguyen v. State, No. 14-09-00995-CR, 2010 WL 2518250 (Tex.App.-Houston [14 Dist.] 2010, no pet.).

In attacking the blood search warrant, the defendant argued that because the signature on the warrant affidavit was illegible, the warrant was defective. The Court rejected this argument pointing out it is the act of swearing and not the signature that is essential. Additionally, another officer testified that he and the magistrate did recognize the signature.

9. SEARCH WARRANT AFFIDAVIT CONTAINING MULTIPLE ABBREVIATIONS THAT WERE NOT EXPLAINED = NOT FATAL

Hogan v. State, 329 S.W.3d 90 (Tex.App.-Fort Worth 2010, no pet.).

Attacked the warrant affidavit on the basis that it contained "conclusory and nonsensical statements." It described driving path of "IMP" without saying what IMP is or that defendant was driving IMP. It contains terms HGN, WAT and OLS without defining those acronyms or explaining significance of number of clues. Does not state officer is qualified to conduct FST's or that he has experience in DWI cases. Trial Court denied MTS. In rejecting these arguments, the Court found that there was sufficient evidence to tie defendant to IMP. The description of the clues on the FST's and other facts were sufficient to show PC. Although it could have been more complete about officer's experience in DWI cases, such information is not required to make affidavit adequate. Cites *Swearingen v. State*, 143 S.W.3d 808 (Tex.Crim.App. 2004). When reviewing a magistrate's decision to issue a warrant, we apply a highly deferential standard in keeping with constitutional preference for a warrant. "Even in close cases, we give great deference to a magistrate's determination of PC to encourage police officers to use the warrant process rather than making a warrantless search and later attempting to justify their actions by invoking some exception to the warrant requirement."

10. THE RELIABILITY OF THE FST'S DESCRIBED IN THE SEARCH WARRANT AFFIDAVIT ARE ATTACKED = NOT FATAL

Foley v. State, 327 S.W.3d 907 (Tex.App.-Corpus Christi-Edinburg 2010, pet. ref'd).

In attacking the affidavit, the defendant contends that the FST's mentioned were not credible source of information regarding his intoxication because of his age being over 65. Court of Appeal's response is to assume that the FST's described were not good indicators for this defendant but found that there were enough other independent indicators of intoxication to sustain the warrant.

11. FAXED WARRANT WHERE OATH WAS ADMINISTERED BY MAGISTRATE TO AFFIANT OVER THE PHONE = VALID

State v. Hodges, 595 S.W.3d 303 (Tex.App.-Amarillo, 2020).

A motion to suppress evidence was properly granted because no oath was administered to the officer who signed the affidavit in support of a search warrant for blood. Although the officer testified that he knew he was under oath when signing the affidavit, he acknowledged that no one had "administered" any oath. Furthermore, the officer had not been asked in some way by anyone if the statements were true and correct, nor had he personally represented in or outside the affidavit that the statements were true. In this case, the State attempted to argue that the affidavit complies with the statute (requiring an oath) because the preamble stated "the undersigned Affiant, being a Peace Officer … and being duly sworn, on oath makes the following statement…" The Court found this argument less than persuasive and said that language will not suffice in the absence of some form of oath administered.

Clay v. State, 391 S.W.3d 94 (Tex.Crim.App. 2013).

This case involves the legality of an officer swearing to the truth of a search warrant affidavit over the phone with a magistrate. In holding that the oath under these facts was valid, the Court put great weight on the fact that the magistrate testified he recognized the officer's voice. The purpose of a sworn affidavit has two important functions. The first of these is to impress upon the swearing individual an appropriate sense of obligation to tell the truth. The second is that the sum total of information conveyed to magistrate in support

of PC is memorialized (done by affidavit being in writing in this case). The Court finds no compelling reason to construe the terms "sworn affidavit" contemplated by article 18.01(b) to require that oath always be in corporeal presence of magistrate so long as solemnizing function exists similar to that when affiant is in presence of magistrate.

Franklin v. State, No 14-11-00961-CR, 2012 WL 3861970 (Tex.App.-Houston [14th Dist.] 2013,no pet.).

This case involved a telephonic oath swearing to affidavit. The Court upholds this under the "Good Faith Exception" which was argued in this case (distinguishing it from Aylor v. State).

12. THE JURISDICTION OF THE STATUTORY COUNTY COURT IS ATTACKED AND FOUND TO BE LIMITED

Sanchez v. State, 365 S.W.3d 681 (Tex.Crim.App. 2012).

Houston police arrested suspect in Harris County and sought a warrant from Judge of County Court at Law of Montgomery County. Kingwood is in Harris and Montgomery County. The arrest was in Harris. It was during a "No Refusal" weekend in Montgomery a few miles away, so the cop drove 5 miles to MOCO rather than 22 miles to Houston. The issue presented was whether the judge of a statutory county court, acting as a magistrate, may sign a search warrant to be executed in a county other than the one in which he serves? The Court first pointed out that jurisdiction of JP's is limited to county, and the jurisdiction of District Judge is statewide. It then held that County Courts at Law do not have statewide authority because gov't code does not expressly grant them that jurisdiction, so the Court held that legislature limited a statutory county court judge's authority to acting within the county of the court. For this reason, the warrant was invalid. Decision affirmed by Court of Criminal Appeals.

13. SEARCH WARRANT AFFIDAVIT ATTACKED FOR HAVING INSUFFICIENT FACTS TO SUPPORT PC AND FOR FAILING TO NOTE DATE/TIME OF STOP.

a. NOT FATAL

Hyland v. State, No. PD-0438-18, 2019 Tex.Crim.App LEXIS 542, 2019.

The court of appeals held that, after the trial court conducted a Franks hearing the excised portions of the officer's blood-draw search warrant affidavit, the remaining facts in the affidavit did not support a finding of probable cause that evidence of driving while intoxicated would be found in the defendant's blood. The Court of Criminal Appeals disagreed and reversed the holding of the court of appeals. This Court held that strong odor of alcohol and the circumstances of the crash itself, a single car accident, was enough to establish probably cause that evidence of a driving while intoxicated offense would be found in the defendant's blood.

Rentrop v. State, No. 09-14-00060-CR, 2015 WL 993477 (Tex.App.-Beaumont 2015).

The search warrant affidavit failed to list the month the events sworn to were observed. Citing to reasoning of Court of Criminal Appeals in *Jordan*, the Court found this omission not to be fatal, as under totality of circumstances and giving due deference to all reasonable inferences that can be drawn from the rest of the facts in the affidavit to include, the affidavit listed the month, as did the judges signature line, and the fact that there was less than a three hour interval between time of stop and signing warrant.

Wheat v. State, No. 14-10-00029-CR, 2011 WL 1259642 (Tex.App. –Houston (14th Dist.) 2011, pdr ref'd).

Defendant challenges sufficiency of affidavit to establish PC through MTS warrant. Denied by Trial Court. Police received a call from citizen that described defendant running red light and then parking along side of the road. When police responded to call, they found vehicle running and defendant asleep behind the wheel. Deficiency argued were (1) no time reference, (2) no witness saw defendant operating, (3) nothing to show when defendant consumed alcohol, and (4) no indication if vehicle was parked in right of way. Court rejected those arguments pointing out there were sufficient details from which approximate time could be inferred. The defendant was still "operating" vehicle when the officer arrived. No need to show when alcohol was consumed and irrelevant if vehicle was in right of way.

b. FATAL

Farhat v. State, 337 S.W.3d 302 (Tex.App.-Fort Worth 2011, pet. ref'd).

In this case the affidavit was attacked for not containing sufficient basis for concluding PC. Affidavit stated the following:

1. *Defendant was driving 30 mph in a 40-mph zone at 12:50 a.m.*
2. *He was weaving from side to side.*
3. *He continued in left Jane for half mile.*
4. *Turned on right turn signal and then turned left into parking Jot.*
5. *Upon stopping him, officer saw two pill bottles in center console.*
6. *Defendant refused FST's.*
7. *Officer believed he had committed DWI based on the erratic driving, pills in console and personal observations.*

In reversing the case, the Court pointed to the fact that there was no mention in affidavit of what those personal observations were (i.e. odor of alcohol, bloodshot eyes, and slurred speech). That contrary to what is stated in the findings of fact, the record shows only that pill bottles and not pills were observed and no mention of type of pills or that type would point to intoxication. It rejects the Trial Court's interpretation of the testimony that he drove in the left lane meant he was driving into oncoming traffic as the Court does not understand why officer would not have immediately turned-on lights and pulled him over. The Court finds the other driving behavior may be enough to justify reasonable suspicion for stop but not PC.

14. FAILURE TO SPECIFY WHAT POLICE INTEND TO DO WITH BLOOD SAMPLE = NOT FATAL

Balderas v. State, No. 01-20-00174 – CR (2021), 2021 Tex. App. LEXIS 3242 (Tex.App.-Houston 1st Dist. 2021).

The defendant was charged with felony murder (DWI with Child) and as a result of a crash the victim died. Based on defendant showing signs of intoxication, a search warrant for his blood was obtained. The search warrant did not have any language specifically authorizing the forensic analysis or chemical testing of the sample seized by the warrant. The court held that a search warrant for a blood specimen does not have to expressly authorize forensic analysis or chemical testing. The court reasoned that forensic analysis and chemical testing of the blood sample were "the very purpose of the blood extraction."

State v. Webre, 347 S.W.3d 381 (Tex.App. - Austin 2011, no pet.).

Police officer's affidavit was not insufficient to support probable cause for draw of defendant's blood for evidence that she had committed offense of driving while intoxicated simply because affidavit did not detail what police intended to do with sample after it was taken; magistrate simply needed to determine there was probable cause that evidence of the offense would be found in defendant's blood, and magistrate could have reasonably inferred that sample sought would be tested for presence of alcohol or other intoxicants.

15. JURISDICTION OF MUNICIPAL POLICE DEPARTMENT AS REGARDS EXECUTION OF WARRANT IS COUNTY WIDE

Meadows v. State, 356 S.W.3d 33 (Tex.App.-Texarkana 2011, no pet.).

Police officer employed by home-rule municipality had jurisdiction to execute search warrant for sample of defendant's blood outside municipality, but within county in which municipality was located, as municipality's powers were derived from state constitution rather than from statute, and warrant was executable by any "peace officer" with jurisdiction throughout county.

16. SEARCH WARRANT NOT RELATING DETAILS ABOUT CREDIBILITY OF AFFIANT = NOT FATAL

Hughey v. State, No. 02-11-00175-CR, 2012 WL 858596 (Tex.App.-Fort Worth 2012, pdr ref'd) (not designated for publication).

This case involves a search warrant for blood where the defendant contended that the warrant did not provide a reasonable basis for the magistrate to determine PC and that there were matters in the affidavit that were not true. The State conceded that the affidavit did not include information about the credibility of the witness to the bad driving or the fact that he was an off-duty police officer and does not specify that only Rivera and not the officer witnessed the bad driving and redacted by agreement some oral statements referred to in the affidavit. The Court found that none of what was referred to as inaccurate statements was intentional and that even if all the driving facts were redacted, the affidavit still supported the magistrates finding of PC.

17. AFFIANT MISSTATEMENTS IN WARRANT AFFIDAVIT MAY OR MAY NOT INVALIDATE AND MAY LEAD TO SUPPRESSION

a. MAY

State v. Lollar, No. 11-10-00158-CR, 2012 WL 3264428 (Tex.App. - Eastland 2012, no pet.) (not designated for publication).

The case involves a Defendant who was in an accident and was arrested for DWI and the officer got a search warrant to obtain a blood sample. At a motion to suppress hearing, the officer admitted a number of items that he had put in the affidavit were not true and this resulted in the Trial Court suppressing the blood evidence and issuing a finding that the officer was not credible. Not surprisingly, this decision was affirmed by the Court of Appeals. In its ruling the Court points out that form affidavits, like that used in this case, can be a valuable tool for law enforcement when time is of the essence, but if abused, they have the potential to infringe on 4th Amendment rights.

b. MAY NOT

Pullen v. State, No. 01-13-00259-CR, 2014 WL 4219483 (Tex.App.-Houston [1st Dist.] 2014, pdr ref'd).

The Defendant challenged the search warrant on the basis of what he called false statements contained therein. Officer admitted at trial that she had mistakenly said in her affidavit that she had offered "some" field sobriety tests to Defendant when in fact she had only administered the HGN test at the scene as it was another officer at the scene who administered the other tests at lntox room. The Court found that Trial Court could have found that these were simple mistakes and weren't intentional or reckless and that the remaining information in the four corners of the warrant supported probably cause.

18. MAY THE JUDGE WHO SIGNED WARRANT PRESIDE OVER MTS HEARING ON THAT SAME WARRANT - YES

Diaz v. State, 380 S.W.3d 309 (Tex.App. - Fort Worth 2012, pdr ref'd).

In this case the Defendant filed a motion to suppress the blood search warrant in his DWI case and the trial judge who signed the warrant was the same judge who presided over the hearing. The Defendant's motion was denied and on appeal he argues that he received ineffective assistance of counsel because defense counsel did not pursue a motion to recuse the trial judge or otherwise complain or object that the same Judge who had signed the blood warrant also presided over the suppression hearing and the trial. In affirming his conviction, the Court of Appeals found that the mere fact that the same Judge signed a Defendant's search or arrest warrant and then presided in subsequent criminal proceedings does not establish bias pointing out that Judges are often called on to reconsider matters they have previously ruled on. Generally, a Judge is not required to be recused based solely on his prior rulings, remarks, or actions.

19. QUALIFIED PERSON NOT NAMED IN WARRANT MAY DRAW BLOOD

Walters v. State, No. 02-11-00474-CR, 2013 WL 1149306 (Tex.App. - Fort Worth 2013, no pet.).

The issue concerns the fact that an LVN did the blood draw pursuant to a warrant that excluded LVN's from the list of qualified persons who could do the draw. In rejecting that argument, the Court points out that in blood draw cases when the State has obtained a warrant, it is not fatal that the State might draw "in a manner other than that directed by the magistrate". It also found that there was sufficient evidence that the LVN was qualified to do the blood draw.

20. SEARCH WARRANT OATH NOT ADMINISTERED

Ashcraft v. State, No. 03-12-00660-CR, 2013 WL 4516193 (Tex.App. - Austin 2013).

Fact that officer qualified to administer oath to affiant did not actually verbalize the recitation of an oath was not fatal where on the face of the affidavit it begins with statements, "after being duly sworn" and concludes with language "sworn and subscribed". This is sufficient because it supports that if the affidavit were proven to be false, it would subject affiant to charges of perjury.

21. AFFIDAVIT NEED NOT SPELL OUT HOW BLOOD WILL BE EVIDENCE

Kriss v. State, No. 05-12-00420-CR, 2013 WL 6050980 (Tex.App. - Dallas 2013, pdr ref'd).
Hughes v. State, 334 S.W.3d 379 (Tex.App. - Amarillo 2011, no pet.).
Rodriguez v. State, 232 S.W.3d 55 (Tex.Crim.App. 2007).

A blood warrant affidavit in a DWI case that states that blood will be evidence of a crime does not need to state how blood draw would constitute evidence of driving while intoxicated because magistrate can draw logical inferences from affidavit's facts. It is not a great leap of faith or unknown intuitiveness to realize that magistrate knows that blood is being requested to analyze it for presence of blood alcohol.

22. BLOOD NEED NOT BE DRAWN AT LOCATION SPECIFIED IN SEARCH WARRANT

Harrell-MacNeil v. State, No. 07-15-00009-CR, 2016 WL 4492559 (Tex. App. – Amarillo 2016).
Bailey v. State, No. 03-13-00566-CR, 2014 WL 3893069 (Tex.App.-Austin 2014, no pet.)

Body of search warrant said blood would be taken at the county jail when in fact it was drawn at a local hospital. In holding that this was not a basis for suppressing the blood evidence, the Court pointed out there is no authority that blood obtained by warrant may only be drawn at location specified in the warrant.

23. THE NAMED AFFIANT NEED NOT BE THE ONE WHO SIGNS AFFIDAVIT

Patterson v. State, No. 08-12-00289-CR, 2014 WL 5502453 (Tex.App.-EI Paso 2014, no pet).

The warrant affidavit was drafted by one officer while the LEADRS program which was under another officer's name inserted that other officer's name as affiant into the beginning of warrant. The affidavit was actually signed by the first officer. In short, the affiant's name listed and the affiant signature are two different people. The Court holds this error does not invalidate the warrant.

24. DIRECT EVIDENCE OF DRIVING NOT NEEDED TO SUPPORT PC IN SEARCH WARRANT

State v. Castro, No. 07-13-00146-CR, 2014 WL 4808738 (Tex.App.-Amarillo 2014, no pet).

In this case an officer approached a Defendant to assist him in changing a tire. Defendant was outside vehicle at the time retrieving a spare. This contact led to DWI investigation and to arrest for DWI. The search warrant erroneously stated that FST's had been done and that Defendant refused to do them along with other details of the investigation. The Defendant sought to suppress the SW on the basis of the mistakes in the affidavit stated above and with the argument that there was insufficient evidence to prove he had been operating the vehicle. The Trial Court granted the motion. In reversing the Trial Court and upholding the warrant, the Court of Appeals found that the officer's warrant did have sufficient detail to support PC even with the mistakes and that the Trial Court's belief that there needed to be "direct" evidence of driving before PC could exist was erroneous. There was sufficient evidence based on Defendant's presence at the scene to support the interest he was driving.

25. MAGISTRATES WHO SIGNED IS NOT AN ATTORNEY

Zalman v. State, No. 13-13-00471-CR, 2015 WL 512914 (Tex.App.-Corpus Christi 2015).
Barrios v. State, 452 S.W.3d 835 (Tex.App.-Amarillo 2014, pet ref'd.)

Fact that judge who signed warrant was not a licensed attorney permitted by CCP 18.02 (10) and that is not limited by language in 8.01 (j) which lists that all "attorneys" may sign blood search warrants. The Court reconciles what Defendant calls a contradiction and upholds the draw.

26. REVIEW OF WARRANT AFFIDAVIT SHOULD NOT BE HYPER TECHNICAL

State v. Crawford, 463 S.W.3d 923 (Tex.App- Fort Worth 2015).

A motion to suppress on blood search warrant was held and trial granted MTS PC did not support concluding SW. In reversing the trial court the Court of Appeals cautioned against reviewing supporting affidavit hyper technically and said magistrate finding was be deferred to as long as there is a substantial basis for his finding PC. In reversing the trial court's finding the Court of Appeals focused on the following: The fact that the trial court focused on the fact that the affidavit said Defendant had admitted he had been "drinking" and was bothered by the failure to clarify if drinking referred to water, mile, lemonade, etc., or alcohol, statement that he failed field sobriety tests was found lacking because specific tests were not named and how they were failed. Trial Court further focused on the fact that the Defendant was not described as having unsteady balance or needing support. In total 13 of the 24 findings of fact focused not on what was in the warrant affidavit but on what was missing. The court points out that merely because conflicting inferences could be drawn from the affidavit does not justify a reviewing court's conclusion that the magistrate did not have substantial basis upon which to find PC. In this case the Court finds the four corners of warrant affidavit support PC.

27. ADMISSIBILITY OF SEARCH WARRANT AND AFFIDAVIT

Saldinger v. State, No. 14-14-00402-CR, 2015 WL 4594053 (Tex.App.-Houston (14th Dist) 2015).

Search Warrant and Affidavit were admitted into evidence in jury trial over Defendant's objection. State concedes the documents are hearsay but argues that an exception exists that makes them admissible when Defendant makes probable cause an issue before the jury. While agreeing that the exception is correct, the Court held it was not raised in this case by the argument made by defense that police mistakenly believed the Defendant was intoxicated. Court further held their admission was harmless.

28. SEARCH WARRANT AFFIDAVIT DID NOT NAME WITNESS

Gonzales v. State, No. 04-14-00649-CR, 2015 WL 6876822 (Tex. App.-San Antonio 2015).

Search warrant was not invalid based on fact that officer referred to a witness as "W1" and did not name witness. Not naming witness does not make that witness more or less credible and citizen informants are presumed to speak with the voice of honesty and accuracy. It was also not invalid for the Affiant to fail to note that he did not talk to the witness but rather was relaying what another officer told him. This was not shown to be an omission made with reckless disregard for the truth and it was not material.

29. ELECTRONIC WARRANT

State v. Hyo Yu, No. 05-16-00518-CR, 2017 Tex. App. LEXIS 2843, 2017 WL 1192798 (Tex.App. – Dallas 2017).

This case involved a motion to suppress a blood search warrant that was electronically signed by a magistrate. The officer admitted that he had never met the magistrate and did not have personal knowledge that the magistrate who received and signed the warrant was the magistrate actually named in the warrant. The trial court held that that warrant was invalid on that issue. The Court of Appeals held that the defendant failed to meet his burden to prove the search warrant was invalid based only on surmise and speculation that someone other than the magistrate named may have signed off on the warrant.

30. IS A SECOND SEARCH WARRANT NEEDED TO TEST BLOOD SAMPLE

Crider v. State, 607 S.W.3d 305 (Tex.Crim.App 2020).

The CCA has finally put this ridiculous argument that the State needs two warrants to bed…

This was another DWI case where the officer obtained a search warrant for the defendant's blood which was supported by probable cause and signed by a neutral and detached magistrate. The defendant's blood was taken and sent to the lab to be tested. The CCA distinguished this from ***Martinez*** and said that the introduction of evidence of the result of the chemical testing of defendant's blood at his trial was proper, although the warrant for collection of the blood sample did not also expressly authorize the chemical testing of the extracted blood to determine his blood-alcohol concentration. The Court held that there was no indiscriminate "rummaging" through the content of the defendant's blood was authorized by the warrant. The Court further said, that on the basis of the warrant, the State was not authorized to analyze the blood for any other purpose not supported by probable cause that justified the extraction of his blood sample in the first place.

I will not examine in detail each of the cases, but the following is a catalog of opinions from other jurisdictions holding that a defendant does not have an expectation of privacy in the testing of a blood sample taken pursuant to a warrant when the testing involves only the determination of the sample's blood—alcohol concentration. See *United States v. Snyder, 852 F.2d 471, 473-74 (9th Cir. 1988); State v. Hauge, 103 Haw. 38, 79 P.3d 131, 144 (Haw. 2003); State v. Frescoln, 911 N.W.2d 450, 456 (Iowa Ct. App. 2017); State v. Fawcett, 877 N.W.2d 555, 561 (Minn. Ct. App.), aff'd, 884 N.W.2d 380 (Minn. 2016); State v. Swartz, 517 S.W.3d 40, 48-50 (Mo. Ct. App. 2017); People v. King, 232 A.D.2d 111, 663 N.Y.S.2d 610, 614 (N.Y. App. Div. 1997); State v. Price, 2012 UT 7, 270 P.3d 527, 529 (Utah 2012); State v. Martines, 184 Wn.2d 83, 355 P.3d 1111, 1116 (Wash. 2015); [*11] State v. Sanders, 188 Wis. 2d 80, 524 N.W.2d 648, 1994 WL 481723, at *5 (Wis. Ct. App. 1994)* (not designated for publication).

Jacobson v. State, No. 02-19-00307-CR, 2020 Tex. App. LEXIS 3447 (Tex.App. – Fort Worth 2020).

In the case of a blood sample drawn pursuant to a warrant based on probable cause that he was driving while intoxicated, the subsequent test of the drawn blood was not a separate search requiring a separate warrant. There is no reasonable expectation of privacy that required a second warrant to test the sample to determine its blood alcohol content.

State v. Staton, 599 S.W.3d 614 (Tex.App. – Dallas 2020).

Although the warrant did not expressly authorize testing and analysis of the blood sample, it was not required to as **common sense** dictated that blood drawn for a specific purpose would be analyzed for that purpose and no other. Following a car accident, defendant was arrested for DWI. Defendant refused to give a breath or blood sample and a warrant was obtained. The language in the warrant stated "has possession of and is concealing human blood, which constitutes evidence that (defendant) committed the offense" of driving while intoxicated. It further stated, "I believe that the suspect is intoxicated by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, or any other substance into the suspect's body." The affidavit requested a warrant "that will authorize Affiant or Affiant's agent to search the person of the suspect for the blood evidence described above and seize the same evidence that the offense described was committed and that the suspect committed said offense." The trial court said the blood was properly seized but the analysis of the blood was illegal. This case is distinguishable from Martinez because there was a valid search warrant to obtain the blood and it was solely for the purpose of "seizing and maintain as evidence."

Crider v. State, No. 04-18-00856-CR, 2019 Tex. App. LEXIS 8095(Tex.App.-San Antonio 2019).

Appellant appealed his conviction for felony DWI. He argued the trial court erred in deny his motion to suppress because, while the State obtained a valid search warrant to draw a blood sample, the State did not obtain a warrant specifically authorizing testing and analysis of the blood sample. Appellant relied on *Martinez* and argued that the testing and analysis of blood evidence is a separate and discrete 4th Amendment search requiring specific authorization in a warrant. Here, in contrast, police obtained Crider's blood sample pursuant to a valid search warrant. Although the warrant does not expressly authorize testing and analysis of the blood sample, Martinez does not require that it do so. Rather, Martinez merely holds that an individual has an expectation of privacy not only in the blood in his body, but also in blood previously drawn for purposes other than police testing. *See* id. at 291. Crider does not identify, and we are not aware of, any authority requiring that a search warrant authorizing the drawing of a blood sample must also expressly authorize testing and analysis of the blood sample. ******PDR was granted, see In re Crider, 2020 Tex. Crim. App. LEXIS 25 above.***

Hyland v. State, 595 S.W.3d 256 (Tex.App. – Corpus Christi-Edinburg 2019).

This case distinguishes the decision issued in Martinez (below). The court held that the State was NOT required to obtain a second search warrant because the evidence was already lawfully obtained and in the possession of the State. In Martinez, the blood was drawn by the hospital for medical purposes and not pursuant to a valid search warrant.

State v. Martinez, 570 S.W. 3d 278 (Tex. Crim. App. 2019).

The Court of Criminal Appeals agreed with the lower court and said that a defendant has a reasonable expectation of privacy in a blood sample that is drawn for medical purposes. The State may use a grand jury subpoena to obtain medical records and to seize a blood sample drawn for medical purposes, however, a search warrant is required before the State can send it to the lab for forensic testing. The Court held that the testing of the hospital drawn sample constituted a warrantless search of the defendant's blood sample in violation of the 4th Amendment and no exception ot the warrant requirement applied. The Court further said that there was insufficient evidence in this case to show that the defendant intentionally abandoned the blood at the hospital.

State v. Martinez, No. 13-15-00592-CR, 2017 Tex. App. LEXIS 6491, 2017 WL 2979791(Tex. App. Edinburg 2017).

This was an intoxication manslaughter case where the defendant was transported to the hospital for treatment. When he arrived the medical personnel drew his blood, however, the defendant told hospital staff that he did not want them to perform any tests on his blood. The defendant left the hospital without receiving any further medical treatment. The next day a grand jury subpoena was served on the hospital for the blood taken by the hospital and his medical records. The defendant's blood sample was then forwarded to the crime lab for testing. The trial court suppressed the results of the blood analysis holding that the seizure of the blood from the hospital and subsequent search of the blood by the lab constituted a search and seizure under the 4th Amendment. The court held that the initial seizure of the blood from the hospital with a grand jury subpoena was valid. However, the search of the blood without a warrant violated the defendant's 4th Amendment rights. The found that there were no exigent circumstances due to the fact that the blood was no longer subject to metabolization, and it was not subject to destruction.

31. EXECUTION OF BLOOD SEARCH WARRANT IN DWI CASE

State v. Patel, 629 S.W.3d 759 (Tex.App. – Dallas 2021).

This was a motion to suppress where the defense argued a second search warrant was required pursuant to Martinez. At the suppression hearing, the defense stipulated to the validity of the search warrant and only argued Martinez. The trial court granted the suppression based on the failure to timely execute (test) the warrant (within 6 hours – see full opinion) and for lack of a return and inventory. The COA held that a lack of a return and inventory did not invalidate the search warrant. By its plain terms, article 18.10 provides that a failure to make a timely return or submit an inventory does not bar admission of evidence seized pursuant to the search warrant. Moreover, the court of criminal appeals has determined that article 38.23 does not apply to violation of article 18.10. Furthermore, the court of criminal appeals held that article 18.07 merely provides the deadlines for seizing the evidence, not analyzing it. This case was reverse and remanded.

State v. Mendez, No. 05-20-00307-CR (2021), 2021 Tex. App. LEXIS 2211, (Tex. App. – Dallas 2021)
Schneider v. State, No. 03-19-00732-CR (2021), 2021 Tex. App. LEXIS 1760 (Tex. App. – Austin 2021).

Under CCP Article 18.07, there is no deadline by which a blood sample seized under a warrant must be tested and analyzed. The only time requirement applicable is that the blood must be seized within three days of the signing of the search warrant.

L. WHEN DEFENDANT CONSENTS, 724.012 OF TRANSPORTATION CODE DOES NOT APPLY

Subirias v. State, 278 S.W.3d 406 (Tex.App.-San Antonio 2009, pet. ref'd.).

This case involves a defendant who was involved in a wreck that resulted in two deaths and two SBl's. A total of three blood draws were done; he was arrested after the second blood draw but before the third. He challenged the first blood draw as being pre-arrest, and the second blood draw as being in violation of Transportation Code Section 724.012(b) allowing only a single blood draw. The evidence showed he consented to both blood draws and the Court held that when one consents, 724.012 does not apply. He further objected to the first and second blood draws as being in violation of Rule 403 of the Texas Rules of Evidence and that was rejected after applying the six factors that go to that issue. The attack on the reliability of the retrograde extrapolation was also rejected based on the facts of this case. In his final point, he argued that the medical blood draw should have been suppressed because it was not taken by a person qualified to do so under Transportation Code 724.017 while conceding that medical blood draws are not required to meet the standards set forth in section 724.107, but argued they should still be applicable to ensure reliability of said draws. This issue was not properly preserved for review.

M. OFFICER BLOOD DRAW PROCEDURE "NOT UNREASONABLE" UNDER THE 4TH AMENDMENT AND NON-MEDICAL ENVIRONMENT IS UPHELD

State v. Johnston, 336 S.W.3d 649, (Tex.Crim.App., March 16, 2011). Cert. denied Oct.3, 2011.

Defendant was arrested by Dalworthington Gardens Police Dept. for DWI and a search warrant for blood was obtained. Suspect resisted blood draw and was restrained. Result = .19. At MTS hearing the Trial court found that the blood draw was done by recognized medical procedures, force used was reasonable, but officer who did the draw was not qualified under 724.017 of Transportation Code and the seizure of defendant's blood violated the 4th Amendment's reasonableness requirement by not being taken by medical personnel in a hospital or medical environment. Court of Appeals confirmed that Transportation Code does

not apply, held it was not a problem that blood was not drawn in medical environment, and made no finding that officer was not qualified. Under 4th Amendment found the means used were not "reasonable." In so holding the Court mentions no medical history taken, no video recording, no written guidelines for use of force. Court of Criminal Appeals reversed holding that being a police officer does not disqualify an otherwise qualified person from performing a blood draw after stating that the officer in this case was demonstrated by the record to be qualified to do so. It further stated that while a medical environment is ideal for such draws that does not mean that other settings are unreasonable under the 4th Amendment and the setting in this case was proper.

N. PROPER TO BRING OUT IN QUESTIONING DEFENDANT'S FAILURE TO ASK TO RETEST BLOOD SAMPLE

Schmidt v. State, No. 09-09-00149-CR, 2010 WL 4354027 (Tex.App.-Beaumont 2010).

Prosecutor's eliciting testimony from State's chemist that the defense had not requested access to the blood sample to perform its own testing was not improper nor was it an attempt to shift the burden of proof. The Court pointed out that generally, the State can comment on a defendant's failure to present evidence in his favor and even comment on the absence of evidence from the defense so long as said comment refers to evidence other than a defendant's own testimony. They further held this question was a proper response to the defense questioning of the witness about how the sample was preserved.

O. TESTIMONY ABOUT DRUG INGESTION AND ITS EFFECTS

1. IMPROPERLY ADMITTED

Delane v. State, 369 S.W.3d 412 (Tex.App.-Houston [1st Dist.] 2012, pdr ref'd).

Officer, who was not a certified DRE, was not qualified to give testimony regarding the effect defendant's prescription medication would have on his driving. The error of allowing said testimony called for reversal. The Court cited Layton and relied upon it without distinguishing the fact that this case, unlike Layton, alleged intoxication without specification of limitation where part of the reasoning behind the reversal in *Layton* was that it just alleged alcohol.

Layton v. State, 280 S.W.3d 235 (Tex.Crim.App. 2009, reh.denied).

The defendant objected to the admission of the portion of the DWI video where he admitted taking Valium and Xanax as irrelevant. (It should be noted that the definition of intoxication listed in the information in this case alleged only "alcohol" intoxication). In reversing the case, the Court of Criminal Appeals held that without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding Appellant's use of prescription medications was not shown to be relevant to the issue of his intoxication.

2. PROPERLY ADMITTED

Guiterrez v. State, No. 04-16-00218-CR, 2017 Tex.App. LEXIS 848, 2017 WL 429584 (Tex. App. – San Antonio 2017)

This is a DWI case involving a one-car crash. The defendant admitted to drinking and taking a “couple of doses” of Benadryl a “couple of hours ago.” At trial, the court allowed the prosecution to read the warning label from a box of Benadryl. On appeal, the defendant argued that the State was required to produce expert

testimony to establish the reliability and relevancy of Benadryl when proving intoxication for a DWI offense. The defendant relies on *Layton v. State*. In Layton, the defendant was charged with intoxication by introduction of alcohol. Here, the defendant was charged with intoxication by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of these substances, or any other substance into the body. The court distinguished this case from Layton and held that no expert testimony was required to read the label or in determining the side effects listed on the label. The court further held, that a lay juror was in a position to determine whether Benadryl taken a couple of hours before arrest would have any effect on the defendant's intoxication.

Armstrong v. State, No. 05-10-01214-CR, 2012 WL 864778 (Tex.App.-Dallas 2012, no pet.) (not designated for publication).

This case involved a DWI defendant who blew 0's and admitted to taking half a Xanax, the presence of which was confirmed by a blood test. An officer and a chemist testified about the effects of said drug on driving. In upholding the admissibility of said testimony and distinguishing *Delane and Layton*, the Court focused on the following: The officer in this case was a DRE and the chemist demonstrated an understanding of the drug ingested and the effect it would have on the defendant. There was evidence of the dosage and about the drug's half-life. This DWI case, unlike *Layton*, did not involve a charge limited to intoxication by alcohol.

P. DEFENSE MOTION TO DISCOVER LAB RECORDS

1. OVERLY BROAD

In Re William Lee Hon, No. 09-16-00301-CR, 2016 WL 6110797 (Tex. App. – Beaumont 2016).

This case involved a District Attorney seeking mandamus relief from a discovery order signed by a judge. Part of that order required the production of "all proficiency testing results for any person involved in the sample preparation, analysis, or administrative or technical review in the case" This was not limited to time when the Defendant's sample was obtained. The Court also ordered the "testimonial evaluation forms of each laboratory employee involved in the testing process". The order also granted the Defense the opportunity to "inspect, diagram, and photograph the areas under the control of the laboratory containing the equipment used to test the sample". The Court concluded that the Defendant had failed to articulate the materiality of the discovery sought in the above three instances and as to those sections mandamus was granted.

In Re Tharp, No. 03-12-00400-CV, 2012 WL 3238812 (Tex.App.-Austin 2012) (not designated for publication).

In this case the Defendant filed a motion for discovery, that was granted, that sought "all records, documents, testing data, and chain of custody records in Agency Case Number STZPD-201- 39005." The State argued the granting of this discovery award constituted an abuse of discretion. In its holding for the State, the Court found that the Trial Court's order, to the extent that it requires production of "all records, [and] documents" in this case, exceeds both the scope of the Defendant's request, and, more importantly, the range of items which the State may be compelled to produce under Article 39. 14.

2. NOT OVERLY BROAD

In Re Tharp, No. 03-12-00400-CV, 2012 WL 3238812 (Tex.App.-Austin 2012) (not designated for publication).

In this case the Defendant filed a motion for discovery seeking thirty items from the DPS Crime Laboratory in Austin related to the lab's testing of his blood sample and following two hearings, the Trial Court granted most of Nickerson's requests, ordering the production of twenty specific documents. The State asserts that the Court's order is an abuse of discretion because it violates Article 39.14 of the CCP by requiring the disclosure of the State's work product and that the Defendant did not establish good cause or the materiality of the evidence to his defense. In ruling against the State, the Court points at that only a blanket work-product assertion was made, and nothing was provided in the briefing as to why any specific item is not discoverable, nor did she provide any specific explanation or argument in the hearings before the Trial Court.

Q. TESTIMONY ABOUT TRACE AMOUNT OF DRUGS IN BLOOD SAMPLE ADMISSIBLE

Bekendam v. State, No. PD-0452-13, 2014 WL 4627275 (Tex.Crim.App. 2014).

The Trial Court's decision to allow an expert, a forensic scientist with the State crime laboratory, to testify that a trace amount of cocaine was present in Defendant's blood at the time of the blood draw and that cocaine would have been in her bloodstream at the time she was operating her vehicle when it collided with the other vehicle was not an abuse of discretion.

R. EVIDENCE OF AN UNKNOWN SUBSTANCE = ADMISSIBLE

Halloran v. State, NO. 09-16-00187-CR, 2018 Tex. App. LEXIS 8662018 WL 651223 (Tex. App. – Beaumont 2018, unpublished).

Evidence of an unknown substance may be admissible even without evidence as to the nature of the substance, the effects of the substance, or whether it was in the defendant's blood. In this case, someone called 911 after seeing a care drive off the roadway and through a sign. When the deputy arrived, the defendant was still behind the wheel, lethargic, confused, disoriented, he had slurred speech, and red and glossy eyes. A baggy of synthetic marijuana was found on the ground near the driver's side of the vehicle and defendant admitted to smoking the substance 2 hours prior to the crash. The SFSTs indicated intoxication. The blood results revealed that the defendant had methamphetamine and amphetamine metabolites. The blood was not analyzed for synthetic marijuana because the lab was not capable of doing so. The court held that identification of the intoxicating substance is not an element of DWI. "Instead it is an evidentiary matter." The court further held that the evidence of the synthetic marijuana was relevant based on the defendant's admissions. *****This case is very fact specific but could be helpful for the admission of "other substances" if your officer can articulate impairment.***

S. GAS CHROMATOGRAPH

1. KELLY TEST

Drumgoole v. State, No. 01-13-00931-CR, 2015 WL 4497978 (Tex.App.-Houston (1st Dist) 2015).

As related to the Kelly test and blood alcohol testing the court held that: because the validity of the technique of headspace gas chromatography for blood tests has been well established by numerous, previous Kelly hearings and appellate reviews we are not required to repeat the review on appeal. As to conflicting testimony on whether technique was properly applied the Court held it was within trial courts discretion to rule in favor of the State.

2. DATA DESTROYED

Welder v. State, No. 04-12-00706-CR, 2013 WL 4683156 (Tex.App.-San Antonio 2013, no pet.).

The crime lab that tested the blood sample destroyed the raw data created by the gas chromatograph. The Defense argued that the results should have been suppressed as this constituted destruction of potentially exculpatory evidence and denied his expert access to the data which she said she needed. The Court focused on the fact that even if it assumed that the deleted raw data was exculpatory and that confrontation rights were prejudiced, since Defense could not establish the destruction was in bad faith, the Trial Court did not err in admitting the blood test results and the related expert testimony.

T. IF STATE IS NOT OFFERING BLOOD EVIDENCE FACT OF BLOOD DRAW PROPERLY EXCLUDED:

Castillo v. State, No's. 04-14-00207-CR & 04-15-00208, 2016 WL 416091 (Tex.App.-San Antonio 2016, no pet).

Even though a blood sample was properly drawn, and the test result showed a level over the legal limit. The State objected to the Defense eliciting any testimony about the officer obtaining a search warrant and obtaining a blood sample because the State was not going to offer the results but would rather rely on proof that Defendant had lost the normal use of his mental or physical faculties. Trial judge sustained the objection and excluded said testimony. Court of Appeals upheld the ruling saying it was reasonable, in the absence of any intent on the part of the defense to call witness to offer the blood result itself, for the trial court to determine that evidence of a blood draw was irrelevant and would confuse the jury.

U. MISSOURI V. MCNEELY INPACT ON MANDATORY BLOOD LAW

What follows are summaries of some but not all cases that address the impact of Missouri v. McNeely on our mandatory blood statute.

1. CASES HOLDING BLOOD DRAWN WAS UNLAWFUL

I start with a list of McNeely related opinions handed down since my last update that have ruled that blood drawn should be excluded. While we await the Court of Criminal Appeals new opinion after rehearing on Villareal I have decided not to take the time to summarize each of them.

State v. Arredondo, No.13-13-00589-CR, 2015 WL 5895072 (Tex.App.–Corpus Christi-Edinburg, 2015)
State v. Pimentel, No. 08-13-00081-CR, 2015 WL 3878079 (Tex.App.– El Paso 2015)
State v. Rodriguez, No. 13-13-00335-CR, 2015 WL 3799353 (Tex.App,-Corpus Christi-Edinburg 2015)
State v. Clendon, No. 13-13-00357-CR, 2015 WL 4116695 (Tex.App.-Corpus Christi-Edinburg 2015)
State v. Tercero, 467 S.W.3d 1 (Tex.App.-Houston (1st Dist) 2015, pdr ref'd)
Howard v. State, No. 01-14-00112-CR, 2015 WL 4497431 (Tex.App.-Houston (1st Dist) 2015)
Garcia v. State, No. 01-14-00389-CR, 2015 WL 4554289 (Tex.App.-San Antonio 2015)
State v. Esher, No. 05-14-00694-CR, 2015 WL 4527715 (Tex.App.-Dallas 2015)
State v., Munoz, No. 08-13-00164-CR, 2015 WL 4719559 (Tex.App.-El Paso 2015)
Moore v. State, No. 11-13-00347-CR, 2015 WL 5192175 (Tex.App.-Eastland 2015)
Greer v.State, No. 01-14-00033-CR, 2015 WL 6366737 (Tex.App.-Houston (1st Dist) 2015)
Richards v. State, No. 05-14-00075-CR, 2015 WL 2400757 (Tex.App.–Dallas 2015, pdr granted)
Burcie v State, No. 08-13-00212-CR, 2015 WL 2342876 (Tex.App.–El Paso 2015)
State v, Martinez, No. 13-14-00117-CR, 2015 WL 1957087 (Tex.App.–Corpus Christi 2015)
Huff v State, 467 S.W.3d 11 (Tex.App.- San Antonio 2015, pdr filed)
Perez v. State, 464 S.W.3d 34 (Tex.App.–Houston (1 Dist) 2015, pdr ref'd)
Lewis v. State, No. 02-13-00416-CR, 2015 WL 1119966 (Tex.App.–Fort Worth 2015, pdr ref'd)
Bowyer v. State, No. 02-13-00315-CR, 2015 WL 1120332 (Tex.App.–Fort Worth 2015, pet ref'd)
Chidyausiku v. State, 457 S.W.3d 627 (Tex.App.–Fort Worth 2015, pet ref'd.)
Evans v. State, No. 14-13-00642-CR, 2015 WL 545702 (Tex.App.-Houston (14th Dist.) 2015)
Bowman v. State, No. 05-13-01349-CR, 2015 WL 557205 (Tex.App.-Dallas 2015)
State v. Garcia, 457 S.W.3d 546 (Tex.App.- San Antonio 2015, pdr ref'd)
State v. Sandlin, No. 05-14-00072-CR, 2015 WL 294660 (Tex.App.-Dallas 2015)
Burks v. State, 454 S.W.3d 705 (Tex.App.–Fort Worth 2015, pet ref'd)
Lloyd v State, 12. S.W.3d 544 (Tex.App.–Dallas 2014)
Cole v. State, 454 S.W.3d 89 (Tex.App.– Texarkana 2014)
Flores v. State, No. 04-13-00754-CR, 2014 WL 7183481 (Tex.App.–San Antonio 2014, pdr filed.)
State v. Villarreal, 475 S.W.3d 784 (Tex.Crim.App. 2014) (petition for cert. filed, 84 USLW 3484, Feb. 19, 2016).
State v. Garcia, No. PD-0344-17, 2018 Tex. Crim. App. LEXIS 1209 (Tex.App. – El Paso 2017.

A fractured 5:4 court issued a per curiam opinion dismissing last February's decision to grant rehearing as improvident. The one-paragraph decision is joined by three separate concurring opinions and two dissenting opinions. Overall, the Court of Criminal Appeals left standing last year's decision that was adverse to the State in a felony DWI with a compelled blood draw per Section 724.012 of the Transportation Code. Judge Newell's concurring opinion reads this ruling as narrowly applying to felony DWIs. Regardless of his statement, prudence requires that warrants be obtained for all compelled blood draws under Section 724.012. So the original opinion is left standing and its summary can be found below:
In this Nueces County state appeal, the Court held that the warrantless, nonconsensual felony-DWI blood draw violated the Fourth Amendment. The Court of Criminal Appeals in this five to four decision agreed with the lower Courts though it did not address the constitutionality of the statue and held it was error for the Court of Appeals to do so. The 5-vote majority rejected the State's arguments, finding as follows:

1. Implied consent does not fit into any existing exception to the warrant preference, nor does it constitute its own exception.
2. The consent exception does not include implied consent in the form of a prior waiver. Further, consent (specifically, implied consent) becomes involuntary when it cannot be withdrawn. The Court distinguished other contexts where voluntary consent includes a valid prior waiver of rights (regulatory waivers, waivers by parolees and probationers, school-related waivers).

3. The special-needs exception does not apply where the immediate objective is to generate evidence for law enforcement purposes.
4. The search-incident-to-arrest exception only applies to searches which are substantially contemporaneous.
5. A blood draw is a search, not merely a seizure.
6. A generalized balancing-of-interests test under the Fourth Amendment is not a substitute for consideration of the welI-known Fourth Amendment exceptions to the warrant preferences. Also, even applying such a test, the Court would conclude that a DWI suspect's privacy interest outweighs the State's interest in preventing drunk driving through warrantless searches.

Also, this case did not present a facial constitutional challenge to the mandatory-draw statute. Nor did this case involve any arguments pertaining to the invocation of the exclusionary rule based upon the lack of a violation at the time of the seizure.

Gore v. State, No. 01-13-00608, 2014 WL 5896311 (Tex.App.-Houston [1st Dist] 2014).

This was a mandatory draw after a DWI w/child arrest case. Court rejects argument that the privilege of driving comes with a waiver of 4th Amendment rights under certain circumstances. Rejects implied consent not being able to be withdrawn makes draw voluntary. Rejects that statute is unconstitutional. Rejects argument that the 25 minutes it took to find someone to get the kids in the car was a sufficient exigency. Holds warrantless blood draw violated the 4th Amendment.

Leal v. State, 452 S.W.3d 14 (Tex.App.-Houston [14th Dist.] 2014, pet ref'd).

This was a mandatory draw after a felony DWI arrest. In holding the draw was illegal, the Court found insufficient exigent circumstances, rejected argument that a person with two prior convictions for DWI has, pursuant to statute, irrevocably consented to blood draw, invocation of implied consent law does not equal valid consent, and rejects that Justice Sotomayor's dicta supports the Texas mandatory draw law.

Martinez v. State, No. 04-13-00764-CR, 2014 WL 5837162 (Tex.App.-San Antonio 2014, pdr filed).

This was a DWI w/child arrest where blood was drawn under the mandatory blood draw statute. For the reasons the Court of Appeals expressed in its holdings in the Weems and Aviles cases, it holds in this case that section 724.012(b) (2) is not a valid exception to the Fourth Amendment warrant requirement, and results of a nonconsensual blood draw obtained without a warrant may not be admitted based solely on the statute or on the officer's "good faith" reliance on the statute.

State v. Anderson, 445 S.W.3d 895 (Tex.App.-Beaumont 2014).

Trial Court suppressed blood under McNeely. The State argued exigent circumstances existed and the draw was allowed under 724.012 and that the Good Faith exception applied. In upholding Trial Court, the Court of Appeals finds no exigencies to justify draw, finds that mandatory draw does not dispense with need for police to obtain a search warrant, rejects the State's reference in McNeely to language that talks about various State's implied consent statutes as supporting validity of our statute and finds that Good Faith rule in Texas is the one that applies after a warrant has been issued. So Statute is not unconstitutional, but officers were mistaken in their belief that the mandatory statute dispenses with need to obtain a warrant.

Aviles v. State, No. 04-11-00877-CR, 2014 WL 3843756 (Tex.App.-San Antonio 2014).

Without holding our mandatory blood Jaw unconstitutional, the Court holds that the law does not create an exception to the 4th Amendment requirement to obtain a warrant.

Smith v. State, No. 13-11-00694-CR, 2014 WL 5901759 (Tex.App.-Corpus Christi 2014, pdr granted).

This new opinion replaced that which was previously withdrawn which has supported mandatory blood draw. In this new opinion, the Court rejects that implied consent is a valid 4th Amendment exception, rejects that there are sufficient exigent circumstances, rejects the automobile exception and search incident to arrest as valid justifications for warrantless draw, rejects special needs exception applies, and finds that implied consent statute as applied to this Defendant was unconstitutional.

State v. Ballard, No. 11-13-00224-CR, 2014 WL 3865815 (Tex.App.-Eastland 2014, pdr filed).

In upholding the suppression of the mandatory blood draw, the Court finds that implied consent is not a recognized exception to the 4th Amendment warrant requirement and the State cannot rely on the statute alone to justify a warrantless blood draw.

Forsythe v. State, 438 S.W.3d 216 {Tex.App. - Eastland 2014).

In upholding the suppression of the mandatory blood draw, the Court finds that implied consent is not a recognized exception to the 4th Amendment warrant requirement and the State cannot rely on the statute alone to justify a warrantless blood draw. Good Faith exception does not apply.

Fitzgerald V. State, No. 04-13-00662, 2014 WL 3747270 (Tex.App.-San Antonio 2014).

Implied consent and mandatory blood is not a recognized exception to the 4th Amendment warrant requirement and Good Faith exception does not apply.

Gentry v. State, No. 12-13-00168-CR, 2014 WL 4215544 (Tex.App.-Tyler 2014, pdr ref'd).

Implied consent and mandatory blood is not a recognized exception to the 4th Amendment warrant requirement and Good Faith exception does not apply.

McNeil v. State, 443 S.W.3d 295 (Tex.App.-San Antonio 2014, pet filed).

Implied consent and the mandatory blood is not a recognized exception to the 4th Amendment warrant requirement. The Court further rejects that the law draw was permitted under the automobile exception, special needs exception, search incident to arrest exception and the good faith exception.

McGruder v. State, No. 10-13-00109-CR, 2014 WL 3973089 (Tex.App.-Waco 2014, pdr granted).2016 WL 4045049 2016 opinion on remand

This is a McNeely case where the Defense's objection to the blood draw was that the mandatory blood draw provisions are unconstitutional. The Court of Appeals finds that the statute is not unconstitutional and affirms the conviction. On Remand the Court found that issue not preserved by timely objection.

Perez v. State, 464 S.W.3d 34 (Tex.App.-Houston [1 Dist.] 2015, pdr. ref'd).

Warrantless taking of Defendant's blood sample following his arrest for DWI did not violate Defendant's 4th Amendment rights by requiring him to submit to a warrantless blood test without his consent, as Defendant's consent to the taking of a blood sample was implied pursuant to provision of implied consent law requiring the State to obtain a blood or breath sample from an individual arrested for DWI if the arresting officer has reliable information that the individual has two or more previous DWI convictions. It should be noted that the Court found that the Defendant failed to timely raise issues regarding constitutionality of the implied consent statute under McNeely.

State v. Baker, No. 12-12-00092-CR, 2013 WL 5657649 (Tex.App.-Tyler 2013, pet. dism'd) 2014 WL 6421849 (Tex.Crim.App. 2014).

This case involved a BWI case with injury where the game wardens concede they did not comply with the requirements of Chapter 724. The Trial Court found there were sufficient exigent circumstances to support the draw over the refusal of the Defendant. The Court in reviewing this holding points out the only exigency raised was rapid dissipation of alcohol content in the blood and therefore upholds the suppression of the sample.

Sutherland v. State, 436 S.W.3d 28 (Tex.App. - Amarillo 2014, pet. filed).

Felony DWI arrest - mandatory blood draw - no exigent circumstances. Court refers to *Aviles* case being remanded (makes assumptions about what that means) and cites Villarreal in ultimately holding that mandatory blood draw section of 724.012 is unconstitutional.

Holidy v. State, No. 06-13-00261-CR, 2014 WL 1722171 (Tex.App.-Texarkana 2014, pet. granted).

Felony DWI arrest - mandatory blood draw - no exigent circumstances. Court refers to *Aviles* remand by the Supreme Court and cites *Villarreal* and *Sutherland* in holding the mandatory blood draw section of 724.012 is unconstitutional.

Reeder v. State, 428 S.W.3d 924 (Tex.App.-Texarkana 2014, pdr granted).

This was a Felony DWI arrest where a mandatory blood sample was drawn pursuant to 724.012. In holding the statute unconstitutional, the Court focused on the fact that the decision in Aviles upholding the constitutionality of the statue was vacated by the U.S. Supreme Court and remanded for further consideration in light of McNeely and also referenced holdings in Sutherland and Villarreal.
Weems v. State, No. 04-13-00366-CR, 2014 WL 667607 (Tex.App.-San Antonio 2014).

Felony DWI arrest - mandatory blood draw. Court rejects that exigent circumstances are present and the Good Faith exception argument and refers to *Aviles* remand by the U.S. Supreme Court and cites *Villarreal* and *Sutherland* in holding the mandatory blood draw section of 724.012 is unconstitutional.

2. MCNEELY VIOLATION – HARMLESS

Garcia v. State, No. 01-14-00002-CR, 2015 WL 5042143 (Tex.App.-San Antonio 2015).

This case involved a Defendant who was airlifted to hospital after a fatal DWI crash. At hospital trooper found him to be unconscious and did a mandatory draw (why he did not rely on unconscious draw portion of implied consent law is unclear?). In addition to the police requested draw there was a hospital sample

taken that also showed intoxication. The Court held the sample was illegally obtained but found error was harmless as the jury had the hospital draw result to consider.

Nora v. State, No. 03-13-00228-CR, 2015 WL 1216125 (Tex.App.- Austin 2015)

Finding the mandatory blood draw evidence was cumulative, the Court focused on the fact that a hospital sample was offered into evidence and the strength of the other evidence of intoxication presented at trial.

Noriega v. State, No. 04-13-00744-CR, 2015 WL 7339735 (Tex.App – San Antonio 2014)

Defendant pled guilty Felony Murder trial with Mandatory blood draw. On appeal he argued the illegal blood draw contributed to his punishment verdict. Court focused on the strength of the considerable independent evidence of intoxication including the presence of a hospital drawn sample result in finding that alleged erroneous admission of warrantless draw did not contribute to punishment.

3. MCNEELY CLAIMS CAN BE WAIVED IF NOT RAISED PRIOR TO PLEA

Douds v. State, 472 S.W.3d 670 (Tex.Crim.App.2015).

This was a mandatory blood draw where the evidence was held to be illegally drawn by Court of Appeals. The Court of Criminal Appeals reverses as the issue was not preserved on appeal. Apparently, the argument made by defense was that the mandatory blood draw requirements were not met as opposed to arguing that the mandatory laws don't dispense with need for search warrant.

Sneed v. State, No. 10-13-00372-CR, 2014 WL 4792655 (Tex.App. – Waco, 2014, no pet) (not designated for publication).

McNeely claims are not preserved for appellate review if no motion to suppress the involuntary and warrantless blood draw was filed and ruled on in the trial court.

Ex parte Westfall, No. 02-15-00052-CR, 2015 WL 2345597 (Tex. App, - Fort Worth 2015).

Defendant had plead guilty prior to McNeely opinion coming down and through Writ of Habeas tried to have that pleas overturned arguing that had she known the blood tests were inadmissible under *McNeely* she never would have pled guilty. Her claim was denied to at the trial court level on the grounds it was not raised before her plea. Court of appeals rejected her argument finding she had abandoned her complaint when she moved to dismiss a prior appeal.

4. POST MCNEELY CASE WHERE EXIGENT CIRCUMSTANCES JUSTIFIED BLOOD DRAW:

Ex Parte Hernandez, No. 11-17-00004-CR, 2017 Tex.App. LEXIS 4325, 2017 WL 1957549 (Tex. App. – Eastland 2017).

This case was tried before *McNeely* was decided. It involved a motorcycle crash where the passenger was dead, and the driver was unconscious and was being airlifted to another hospital for treatment. The court held that regardless of *McNeely,* exigent circumstances existed to take the defendant's blood without a warrant.

State v. Garcia, No. 08-15-00264-CR, 2017 Tex. App. LEXIS 1635, 2017 WL 728367 (Tex. App. – El

*Paso 2017).***** **This case has been reversed. see *State v. Garcia No. PD-0344-17***

This is a State's appeal. The case involves a car accident that resulted in the death of three people. The Court found that there were exigent circumstances based on the fact that the defendant had to be transported to the hospital and if they waited to get a warrant the defendant's BAC would likely be diluted due to the introduction of saline and other possible medication. The court compared this case to *Cole v. State* and distinguished it from *Weems v. State*.

Dennison v. State, No. 09-15-00525-CR, 2017 Tex. App. LEXIS , 2017 WL 218911 (Tex. App. – Beaumont 2017).

The Court found that exigent circumstance existed based on the DPS Trooper being solely responsible for the accident investigation, that there was only one Judge that she could call to get a warrant, that Judge was out of town and unavailable to sign the warrant, and there were no procedures in place for obtaining a warrant any other way.

Garza v. State, No. 14-15-00902-CR, 2016 Tex. App. LEXIS 13009, 2016 WL 7177710 (Tex. App. – Houston 2016).

The Court found that exigent circumstances existed in this case due to the fact that this was a single car accident, open wine bottles were found in and around the car, and she was unconscious at the scene. When the defendant arrived at the hospital, she was conscious belligerent, combative, and able to talk. The defendant smelled of a strong odor of alcohol and she admitted to drinking "a lot." The defendant was moved to a trauma room for treatment where she was sedated, intubated, and receiving a blood transfusion. The officer believed he could not wait 90 minutes to two hours to get a warrant for her blood because he thought evidence of her BAC was being "lost by the minute." *Cole had been reversed and the Court made it clear that "Reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight."* The Court held that the circumstance surrounding the taking of the defendant's blood sample demonstrated that obtaining a warrant was impractical.

Cosino v. State, No. 10-14-00221-CR, 2016 WL 6134461 (Tex. App. – Waco 2016).

This was a warrantless blood draw in which the State laid out the following factors in support of its argument that exigent circumstances existed: It was a collision here the trooper at the scene was the sole trooper on duty in the County at the time of the collision, he was solely responsible for the cleanup of the crash and investigation thereof, the other two troopers that assisted were the sole troopers on duty in their respective counties, the trooper arrived at the scene an hour after collision and after Defendant was already transported to hospital, the entire highway was blocked off and it was raining when trooper arrived and clearing and opening up highway was time consuming and had to be done before he left to see the Defendant, the Defendant's refusal to give sample and draw of blood happened 2 ½ hours after crash, obtaining a warrant would have taken an additional hour to an hour and a half. Court held that sufficient exigent circumstances existed to support the warrantless draw. The second argument asked Court to hold that 724.102 of the Texas Transportation Code was unconstitutional and that request was overruled.

Texas v. Robinson, No. 03-15-00153-CR, 2016 WL 6068251 (Tex. App. – Austin 2016).

This was a warrantless blood draw in which the District Court suppressed the blood after the State laid out the following factors in support of its argument that exigent circumstances existed: Trooper was dispatched to crash scene, three officers were at scene, Defendant was transported to hospital for treatment, Trooper

was at scene for 2 ½ to 3 hours, a different trooper was dispatched to hospital where got a warrantless blood sample, a judge was on call for signing warrants, the trooper who worked the scene was the only officer who could have obtained a warrant, there were no other troopers available at the time of his investigation to investigate the cause of the crash at the scene, it takes 30-90 minutes to obtain a warrant by fax. Citing the *Cole* opinion the Court found the District Court erred and found there were sufficient exigent circumstances to justify the draw.

Texas v. Keller, No. 05-15-00919-CR, 2016 WL 4261068 (Tex. App. – Dallas 2016).

Does warrantless blood draw from unconscious individual arrested for DWI violate 4th Amendment and were exigent circumstances present? The court does not address the unconscious draw consent issue but does find exigent circumstances, namely: The collision occurred on a busy highway, three individuals were transported to hospitals, investigation at scene was protracted, the time it took to complete scene investigation and lack of available law enforcement hindered ability to obtain warrant, plus issue of metabolism of alcohol.

Balkissoon v. State, No. 03-13-00382-CR, 2016 WL 1576240 (Tex.App.-Austin 2016,pdr filed).

This was a mandatory blood draw case arising out of a felony DWI arrest. Officer admitted on the stand that he could have gotten a warrant but didn't feel he needed to, based on the mandatory blood draw law. Even so he described the length process of completing paperwork, finding a prosecutor to email paperwork to for the warrant, then he had to drive to the judge's house to get warrant reviewed and signed. Then he must go back to jail to pick up the defendant and take him to hospital where he waits for someone to draw blood. He estimated the process will take as long as 4 hours. It would have been further prolonged, in this case, due to the defendant's failure to cooperate in process of having his vehicle released and as Defendant would not say what he wanted done he had to wait for tow truck. He added to all this that he was aware that over time the alcohol level was diminishing and that no assist officer was available to help with process. There was also testimony from magistrate who explained there was no 24-hour magistrate available. The trial court ruled he was basing the denial of the motion on the fact that officer acted on good faith reliance of the mandatory draw statue. Courts of Appeals upheld the denial saying the judge could have found sufficient exigent circumstances out of details listed above.

Schneider v. State, No. 03-14-00189-CR, 2016WL 1423591 (Tex.App.-Auston 2016).

This was a Felony DWI case where the Defendant drove into a car and kept going and got home before police officer arrived. A mandatory draw was done based on fact it was a Felony DWI arrest. The investigation was delayed because Defendant was holed up in his bathroom with a gun, there was evidence that a domestic violence situation was going on between Defendant and his roommate. There was no afterhours magistrate who could issue warrant; prosecutor testified it was the DA's office policy not to get a search warrant when mandatory draw law applied. If an officer had called her, she would have told him he did not need a warrant, officer further testified it could take as much as an hour and a half to get a warrant and one time he had not been able to reach a magistrate when he needed one. In finding exigent circumstances the judge found that it took over three hours to get this blood draw even without a warrant. All these factors led the Court of Appeals to uphold the denial of the motion on the basis of sufficient exigent circumstances.

Garcia v. State, No. 14-14-00387-CR, 2015 WL 2250895 (Tex.App. – Houston (14th Dist.) 2015).

Intoxication Manslaughter & Felony DWI case where mandatory blood draw was done, at Trial Court level "exigent circumstances" were found to justify the warrantless draw. In affirming the conviction the Court

of Appeals found the following exigent circumstances supported that ruling: Defendant could not perform FST's at scene because he was receiving medical treatment; 2) Trooper had to take the time to investigate the traffic fatality at scene; 3) Defendant's transfer to hospital was delayed because of Life Flight; 4) Trooper did not develop PC until he spoke to Defendant at hospital; 5) alcohol from Defendant's blood stream was dissipating 6) there was no on call judge to issue warrant at the time; 7) Defendant was receiving emergency treatment including the possible use of pain medications.

5. UNCONSCIOUS DRAW REQUIRED SEARCH WARRANT

State v. Ruiz, No. 13-13-00507-CR, 2015 WL 5626252 (Tex.App.-Corpus Christi-Edinburg, 2015, pdr granted).

This involves the arrest of a habitual drunk driver from whom a blood sample was drawn while he was unconscious (724.014 Transportation Code). The Court of Appeals held a warrant should have been obtained. This is the first Texas case where a Court of Appeals has held that unconscious draws are covered by line of cases following McNeely which had up to this point addressed cases where warrantless sample was drawn over the objection of the suspect. The Dissent provides a good discussion of why this holding is incorrect.

V. ISSUES SURROUNDING BLOOD TESTING DID NOT RENDER RESULT UNRELIABLE

Jannah v. State, No. 01-14-00250-CR, 2015 WL 1544619 (Tex.App.-Houston (1st Dist) 2015) (not designated for publication).

Defendant objected to blood evidence being admitted and pointed to three pieces of evidence that show result was not reliable: 1) Presence of small blood clots which may have been caused by improper vial inverting; 2) The fact that the blood clots were not eliminated by homogenizing the blood sample after clots were seen; 3) The fact that a pipette used had failed an external test a month after blood was tested. The Court finds that the trial courts could reasonably have found that these matters did not render blood draw analysis unreliable.

W. PRESENCE OF TFMPP "MOLLY" IN BLOOD

Ashby v. State, No. 01-15-00182-CR, 2017 Tex. App. LEXIS 4663, 2017 WL 2255609 (Tex. App. – Houston 2017).

The defense challenged the admissibility of testimony regarding the presence of TFMPP "Molly" in the defendant's blood. The defense asserted that it should not be admissible without the State showing the time of ingestion, quantification of the drug, and the affects the drug has on a person's body. There was a Kelly hearing. The lab expert stated they did not quantify the level and that even if they had it would not have impacted his decision as there is no good data on how different levels speak to impairment or time of ingestion. The defense expert said no opinion could be drawn on the effect of the drug on the Defendant without quantification. The Court upheld the admissibility of the expert's testimony even if by itself was sufficient to prove loss of normal use of his mental or physical faculties, it was some evidence that the defendant consumed the drug although the failure to quantify may lessen the probative value of the evidence but it does not render it inadmissible.

XVIII. SERIOUS BODILY INJURY

Hays v. State, 480 S.W.2d 635 (Tex. Crim. App. 1972)

Texas Courts have not been consistent as to what specific facts constitute serious bodily injury.

Moore v. State, 739 S.W.2d 347 (Tex. Crim. App. 1987)

Whether and injury constitutes serious bodily injury is determined on a case-by case basis.

Camarillo v. State, 82 S.W.3d 529, 537 (Tex. App.—Austin 2002, no pet.)
Moore v. State, 739 S.W.2d 347, 349, 352 (Tex. Crim. App. 1987)

"The distinction between 'bodily injury' and 'serious bodily injury' is often a matter of degree and the distinction must be determined on a case-by-case basis."

A. INJURY AT THE TIME INFLICTED

Goodman v. State, 710 S.W.2d 169 (Tex. App. – Houston [14th Dist.] 1986, no pet.).

When deciding whether the injury rises to the level of serious bodily injury, we consider the extent of injury at the time it was inflicted, not after the effects have been ameliorated or exacerbated by medical treatment.

Stuhler v. State, 218 S.W.3d 706, 714 (Tex. Crim. App. 2007).

The relevant inquiry is the extent of the bodily **injury as inflicted**, not after the effects have been ameliorated or exacerbated by medical treatment.

Blea v. State, 483 S.W.3d 29 (Tex. Crim. App. 2016).

Serious bodily injury may be established without a physician's testimony or records when the injury and its effects are obvious. When deciding whether the evidence is sufficient to establish serious bodily injury, an appellate court should consider "the disfiguring and impairing quality of the bodily injury as it was inflicted on a complainant by an offender," and not "the amelioration or exacerbation of injury by actions not attributable to the offender, such as medical treatment."

Baca v. State, 2020 Tex. App. LEXIS 5086.

Appellant argues that the surgeons' testimony was not sufficient to prove that he caused Bethel serious bodily injury because they did not reassess Bethel after he was discharged from the hospital. Appellant argues: "No physician or medical expert testified that Bethel actually sustained serious bodily injury, only that there was the potential for serious injury" and that "[t]he State's entire case focused on the premise that the injuries caused by appellant put Bethel at risk of serious bodily injury, not that appellant's actions actually caused serious bodily injury." However, although the surgeons were unable to testify about the ultimate prognosis of Bethel's injuries because Bethel did not return for follow-up visits, they described his facial injuries as "serious," "severe," "significant," and would cause scarring.

In addition to the surgeons' testimony, other evidence supported a finding that appellant caused serious bodily injury to Bethel. The evidence was undisputed that Bethel lost consciousness and was unresponsive after appellant punched him in the face multiple times and that appellant continued to punch and kick him

in the face after he lost consciousness. Consistent with this evidence, a responding officer testified that Bethel had "[a] large contusion on the back of his head," "both his eyes were swollen shut, he had blood in his ears, blood all over his face, blood in his mouth"; that the swelling on his face was "[v]ery serious"; that he was "just moaning" "on the ground, kind of almost in a fetal position"; and that he was not able to speak or form words. The store employee similarly testified that Bethel was "very unconscious on the ground, bleeding" and that he "wasn't moving." She also testified about her observations of Bethel a few weeks after the incident. She testified that—at that later time—he looked "badly beat up" and that his "left eye was very swollen and purple, like popped blood vessels, along with the trauma onto his head." The court found that Bethel suffered protracted loss or impairment of the function of a bodily member or organ.

Boney v. State, 572 SW2d 529 (Tex. Crim. App. 1978).

Use of the word "could" does not render his testimony hypothetical or speculative. The court held that the testimony was sufficient to establish serious bodily injury even though the doctor opined that the injuries "could cause shock" which "could result in death" and that "such a wound could cause a substantial risk of death to a person".

B. EXEPRT TESTIMONY IS NOT NEEDED

Blea v. State, 483 S.W.3d 29 (Tex. Crim. App. 2016).

Serious bodily injury may be established without a physician's testimony or records when the injury and its effects are obvious. When deciding whether the evidence is sufficient to establish serious bodily injury, an appellate court should consider "the disfiguring and impairing quality of the bodily injury as it was inflicted on a complainant by an offender," and not "the amelioration or exacerbation of injury by actions not attributable to the offender, such as medical treatment."

Omoleme v. State, 2021 Tex. App. LEXIS 8616 (2021).

In this case, the evidence supported the conclusion that the flashlight indisputably caused SBI. The complainant testified that he spent two days in the hospital recovering from his injuries, which included a concussion, and that months after the incident he still experienced dizziness, headaches, loss of balance, and significant loss of vision.

Hart v. State, 581 S.W.2d 675, 677 (Tex. Crim. App. 1979).

The rule is well established that a person who receives injuries is qualified to express an opinion as to the severity of those injuries.

Denham v. State, 574 S.W.2d 129, 131 (Tex. Crim. App. 1978).

Lay opinion concerning physical condition competent testimony and sufficient proof of serious bodily injury.

Botello v. State, 693 S.W.2d 528 (Tex. App. -- Corpus Christi 1985, pet. ref'd).

Victim's testimony of partial loss of use of hand due to assault sufficient evidence without more.

Boney v. State, 572 SW2d 529 (Tex. Crim. App. 1978).

Use of the word "could" does not render his testimony hypothetical or speculative. The court held that the testimony was sufficient to establish serious bodily injury even though the doctor opined that the injuries "could cause shock" which "could result in death" and that "such a wound could cause a substantial risk of death to a person".

C. PROTRACTED LOSS OR IMPAIRMENT OF BODILY MEMBER OR ORGAN

Mathison v. State, 2014 Tex. App. LEXIS 2248

Neither protracted loss nor protracted impairment has been defined by the legislature, so we must apply its common meaning. One dictionary defines "protract" as to delay, defer, extend, or continue or to prolong in time or space. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1000 (11th ed. 2004).

In this case there was evidence that G.H.'s arm was immobilized for more than two months. Dr. Douglas testified that G.H. suffered "a spiral fracture of the midshaft of the humerus." A humerus fracture is immobilized to prevent movement; if not immobilized, the bone takes longer to heal and may not heal straight. Dr. Coffman agreed and explained that not immobilizing the limb "could cause shortening in the arm or other problems." To keep G.H.'s arm immobilized, it was splinted and placed in a sling. G.H.'s orthopedic doctor restricted G.H.'s activities and the use of his arm for "eight to nine weeks." When the evidence is viewed in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that G.H.'s injury resulted in a protracted loss or impairment because the record shows that G.H.'s arm was immobilized for more than two months because of the injuries caused by Appellant.

Black v. State, 637 S.W.2d 923, 926 (Tex. Crim. App. [Panel Op.] 1982).

There is no bright-line rule for determining whether an injury constitutes a protracted loss, but there must be evidence that the victim lost use of the limb or that the victim's function was impaired, as well as evidence of how long the use was lost or impaired.

In Black, there was evidence that the victim was shot in the leg, that he spent three days in the hospital recovering from surgery, and that "the leg took two to three months to heal," but the court held that the evidence was insufficient to prove serious bodily injury because there was no evidence that the victim "had any loss of use of the limb." The court noted that the State failed to offer hospital records or call any of the treating medical personnel and reasoned that "there is no evidence to indicate [the victim] was unable to walk after leaving the hospital or that he had suffered permanent damage to his thigh."

Hernandez v. State, 946 S.W.2d 108, 113 (Tex. App.--El Paso 1997, no pet.).

For there to be protracted impairment such that a finding of serious bodily injury is proper, the organ or bodily member must lose some function. The loss of function, however, need only be protracted, not permanent.

English v. State, 171 S.W.3d 625, 628 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Blow from baseball bat causing pain, a large gash requiring seven stitches, a scar, bruising, swelling, and a concussion caused serious bodily injury.

Powell v. State, 939 S.W.2d 713, 718 (Tex. App.—El Paso 1997, no pet.).

Concussion, which caused memory loss considered to be serious bodily injury.

Moore v. State, 739 S.W.2d 347, 352 (Tex. Crim. App. 1987) (plurality op.) (en banc).

A "protracted loss or impairment" is one that is "either continuing, dragged out, drawn out, elongated, extended, lengthened, lengthy, lingering, long, long-continued, long-drawn, never-ending, ongoing, prolix, prolonged, or unending."

Nash v. State, 123 S.W.3d 534, 538 (Tex. App.— Fort Worth 2003, pet. ref'd).

For injuries that cause protracted loss or impairment of bodily function, the evidence must show only that the loss or impairment was extended, lengthened, prolonged, or continued.

Hatfield v. State, 377 S.W.2d 647 (Tex. Crim. App. 1964)
Lenzy v. State, 689 S.W.2d 305 (Tex. App. – Amarillo 1985, no pet.).

The Loss of teeth is serious bodily injury without other injuries.

Camarillo v. State, 82 S.W.3d 529 Tex. App. – Austin, 2002).

The evidence was sufficient to support jury's serious bodily injury finding when evidence showed that victim had a broken nose and the nurse testified about "broken nose" and "'lots of nose trauma, which could cause serious impairment of a person's ability to breathe," and "expressed the opinion that when a person sustains a fractured nose there is a likelihood that the person will suffer some protracted loss of the function or an impairment of the use of the organ".

Williams v. State, 575 S.W.2d 30 Tex. Crim. App. 1979

In the instant case appellant used the knife to stab Puckett and Lindsey several times. The most serious wound was inflicted on Puckett's shoulder. The wound was large enough for a muscle to protrude from the body. There was considerable bleeding, and twenty-five stitches were required to close the wound. The court held that the injury which caused Puckett to lose lifting power in his arm for three months constituted a "protracted impairment . . . of the function of any bodily member," so that the wound would be classified as serious bodily injury.

Andrus v. State, No. 05-08-00703-CR, 2010 Tex. App. LEXIS 1665, 2010 WL 797196, (Tex. App.—Dallas Mar. 10, 2010, no pet.)

The victim, who was right-handed, testified that she lost the normal use of her right arm for three months, and that this loss of use interfered with her ability to work, vacuum, and do other things. The fact that her injuries required physical therapy as opposed to continuing medical treatment did not alter the fact that she lost the normal use of her arm for three months.

Coshatt v. State, 744 S.W.2d 633, 636
The evidence revealed that the appellant's wife suffered a fractured vertebra resulting in the partial loss of the use of her back. She testified she was instructed to remain predominately in bed with her back extended

for at least six weeks and to refrain from any heavy work for three months. Thus, her injuries resulted in a "**protracted impairment**" of the use of her back.

Brown v. State, 605 S.W.2d at 575 (Tex.Crim.App. – Lubbock 1980).

The court held that a broken nose was serious bodily injury because it would be disfigured and impaired if not treated.

Dusek v. State, 978 S.W.2d 129, 133 (Tex. App.--Austin 1998, pet. ref'd).

A broken leg was serious bodily injury.

Madden v. State, 911 S.W.2d 236, 244 (Tex. App.--Waco 1995, pet. ref'd).

Inability to walk for four weeks because of injured left hip constituted serious bodily injury.

Botello v. State, 693 S.W.2d 528 (Tex. App. -- Corpus Christi 1985, pet. ref'd) .

Victim's testimony of partial loss of use of hand due to assault sufficient evidence to show impairment of the function of a bodily member.

Coshatt v. State, 744 S.W.2d 633 (Tex. App.--Dallas 1987, pet. ref'd).

The evidence showed that the appellant's wife suffered a fractured vertebra resulting in the partial loss of the use of her back. She was instructed to remain predominately in bed with her back extended for at least six weeks and to refrain from any heavy work for three months. Thus, her injuries resulted in a "protracted impairment" of the use of her back. Accordingly, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Appellant's first point of error is overruled.

Allen v. State, 736 S.W.2d 225, 227 (Tex. App.--Corpus Christi 1987, pet. ref'd).

A broken finger that was stiff and dysfunctional three and a half months later constituted serious bodily injury.

Rowe v. State, No. 05-02-01516-CR, (2004 Tex. App. LEXIS 4244, Dallas).

The victim testified that after appellant collided with his pick-up, the upper half of his body was still facing the windshield, while the lower half was facing the driver's side of his truck. He immediately noticed numbness in his left leg and a severe headache. He was taken to the hospital in an ambulance. He started having difficulty breathing which was caused by the seat belt bruising his chest. It was also discovered that he had a cracked pelvic bone. He was in the emergency room for two hours and was physically unable to walk out of the hospital. As a consequence of the injuries sustained in the accident, the victim consulted with an orthopedic surgeon and received nine months of physical therapy. At the time of trial, seventeen months after the collision, he was still suffering from pain and discomfort. The victim testified he might have to undergo surgery, but he hoped it would not be necessary. Chestnut admitted that six years prior to the accident, he had back surgery for a herniated disk at L-5. He testified, however, that he did not have any further back problems until the appellant collided with his pick-up.

The trial court admitted into evidence an Attending Physician's Evaluation signed by the victim's doctor stating the following: I observed and treated the above-named patient at the time and place mentioned. If I were compelled to testify regarding whether the injuries sustained constituted "**serious bodily injury**" as that term has been explained to me, I would indicate the following, based on reasonable medical possibility: The **injury** to . . . Daniel Chestnut caused, or will cause, protracted loss of(sic) impairment of the function of a **bodily** member or organ, specifically, L-3-4 disk protrusion, L4-5 disk herniation causing back pain and difficulty walking.

Reed v. State, No. 05-13-01509-CR, (2014 Tex. App. LEXIS 13051 Dallas 2014).

Appellant argues the evidence is insufficient to support his conviction because the State did not prove that the victim suffered from a permanent disfigurement or protracted loss or impairment. The victim testified, and his medical records showed, that he suffered trauma to his right eye after appellant hit him in the face and head. The victim was seen by a physician two weeks after the assault at which time the victim complained of blurred vision and informed the doctor, he was having trouble with bright lights. The victim also reported repeated problems with his vision at subsequent appointments over a period of six months after the assault. The problems with the victim's vision prevented him from driving at night, and he had difficulty reading or watching television. The victim also testified that his vision problems forced him to retire.

The victim's treating physician testified that after some inflammation had cleared in the victim's eye, he noticed the beginnings of a cataract. In subsequent visits, he observed that the victim's cataract had progressed faster than expected and testified that this was "a very common result of trauma" such that he diagnosed the victim with a traumatic cataract. Within six months after the assault, the victim's vision declined further, and the cataract had significantly worsened. The physician said if left untreated, the victim's vision would likely continue to get worse. And he agreed that this would be a protracted loss or impairment in the function of the victim's eye. Although the physician acknowledged on cross examination that he did not know whether the rapid growth of the cataract was the "result of the trauma, or, rapid increase by the trauma, or maybe the victim just a guy who grows cataracts quickly," he testified that the victim had reported being hit in the head and eye several times, and the physician had objectively observed the decline in the victim's vision and the rapid growth of the cataract, which was commonly the result of trauma.

The court found that a rational fact finder could have concluded that the injury the victim suffered to his right eye met the definition of a "serious bodily injury" and this injury was caused by appellant's actions.

Powell v. State, 939 S.W.2d 713 (Tex. App. –Beaumont 1997, no pet).

In this case, the evidence is sufficient to show not only that Powell's foot was capable of causing serious bodily injury, but that it actually caused serious bodily injury to Fisher. Officer Carpenter testified that he observed Powell violently kicking Fisher in the head with enough force to raise Fisher's head off of the ground. Carpenter feared for Fisher's life as he observed the kicking. Dr. Haynes testified that blows to the head, depending on the strength or repetitiveness of the blows, are capable of causing serious bodily injury or death. Dr. Haynes confirmed that Fisher suffered a concussion, an injury he considered to be serious bodily injury in part because of potential memory loss. At trial, Officer Fisher testified that he still could not recall events occurring after he attempted to stop Powell from entering the building. thus, the evidence

regarding Fisher's injury, particularly Dr. Haynes's expert assessment of concussion as serious bodily injury and Fisher's loss of memory function, is consistent with the Texas Penal Code definition of serious bodily injury. The evidence presented at trial is such that a rational trier of fact could reasonably conclude that Powell kicked Fisher in the head with sufficient force to cause concussion, a serious bodily injury.

D. SUBSTANTIAL RISK OF DEATH

Moore v. State, 739 S.W.2d 347, 352 (Tex. Crim. App. 1987) (plurality op.) (en banc).

A substantial risk of death "is a risk that gives rise to apprehension of danger to life."

Hermes v. State, No. 05-14-01066-CR, (2015 Tex. App. LEXIS 5466 – Dallas 2015).

The record shows the victim was unconscious at the scene. He was hospitalized for four days and remained unconscious for three of those days. He suffered several fractures to his spine and could only walk with difficulty when released from the hospital. He wore a back brace for two months and was unable to work during that time. At trial, he still could not do some things and his back hurt badly in cold weather. The victim also suffered a brain contusion which caused a portion of his brain tissue to die. The physician testified the victim's brain contusion initially created a substantial risk of death and he puts patients with brain contusions in intensive care for 24 hours "because there is a substantial chance that that gets worse and causes death."

Patterson v. State, No. 11-06-00209-CR, (2008 Tex. App. LEXIS 1525 – Eastland 2008).

In this case, Dr. Larry Mark Bragg testified that he treated the victim in the emergency room for a pneumothorax. Dr. Bragg testified that a pneumothorax is a collection of air in the chest cavity between the chest wall and the lung. He further testified that a pneumothorax left untreated causes a substantial risk of death. Dr. Bragg also testified that the victim also suffered multiple abrasions, bruises, and a broken rib. He stated that it is common for someone who has a broken rib to also have pneumothorax. The victim testified that after the assault she was having trouble breathing. She went to the hospital and was treated by a doctor there. She testified that Dr. Bragg pulled her rib out of her lung and had to cut her in order to put a tube in her lung. She further testified that she was admitted to the hospital for a few days and had some follow-up treatment.

The testimony from Dr. Bragg established that the pneumothorax suffered by the victim created a substantial risk of death. There is no evidence contradicting Dr. Bragg's testimony. The court held that the evidence is both legally and factually sufficient to show that the victim suffered serious bodily injury.

Montgomery v. State, No. 14-16-00365-CR, 2017 WL 248437 (Tex. App. June 8, 2017) pet refused (Nov.2017).

Appellant kicked April repeatedly in the ribs. April met with a police officer and said appellant had assaulted her about an hour earlier. April was holding her ribs, seemed upset, and appeared to be in pain. Less than 36 hours later, April went to an emergency room complaining of sharp chest pain she described as 8 out of 10. Norco, which contains hydrocodone, relieved her pain. Breathing worsened it. X-rays revealed April suffered three broken ribs and a small pneumothorax, which doctors told her was likely caused by a broken rib. She stayed in the hospital for four days and had multiple chest x-rays so doctors could monitor the pneumothorax. Nine months after the assault, April still felt rib pain. The court held that April's injuries amounted to serious bodily injury.

Johnson v. State, No. 07-02-0440-CR, 2003 WL 22332274, 2003 Tex. App. LEXIS 8761.

Defendant argued that the evidence was legally insufficient to sustain his conviction. Specifically, he contended that the State allegedly failed to prove that the victim suffered serious bodily injury since her injuries were no ore than burn areas on her shoulders, fractured ribs, and a tender area over her eye. The appellate court initially noted that the physician who treated the victim testified that her injuries could have been considered life threatening and created a substantial risk of death. The victim also testified that she continued to feel the affect of those injuries approximately a year after the assault. The appellate court held that the use of the word "could" did not render the physician's testimony hypothetical or speculative and constituted some evidence upon which a rational juror could have found beyond reasonable doubt that defendant's assault caused serious bodily injury to the victim. The appellate court concluded that the evidence was sufficient to show that the victim suffered either a substantial risk of death or a serious permanent disfigurement.

St. Clair v. State, 26 S.W.3d 89, 101 (Tex. App.--Waco 2000, pet. ref'd).

The court held testimony that a miscarriage poses a substantial risk of death because it "could" lead to uncontrolled bleeding or a potentially fatal infection, sufficient evidence of serious bodily injury.

Knox v. State, No. 05-14-00551-CR (2015 Tex. App. LEXIS 5481 – Dallas 2015).

The evidence was sufficient to convict defendant of aggravated assault under Tex. Penal Code Ann. §§ 22.01(a)(1), 22.02(a)(1) (2011) as defendant punched and kicked the victim, and the victim suffered serious bodily injury as defined by Tex. Penal Code Ann. § 1.07(a)(46) because a doctor testified that the victim arrived at the hospital with obvious swelling and bruising to her head and face; she was only able to give one or two word responses to questions; the doctor explained that approximately one out of every 30 people with the victim's type of traumatic head injury actually die from the injury; and there was evidence that the victim suffered memory loss following the assault as her mother testified that the victim's memory had been good before the assault but that afterwards she would not remember things told to her just minutes or an hour before.

Gonzales v. State, 191 S.W.3d 741 (Tex. App. –Waco 2006).

The complainant testified that Gonzales hit her in the face multiple times with his hands and elbows and choked her. She said that after Gonzales hit her in the face with his hands and elbows, she lost consciousness briefly. The neighbor whose house the complainant fled to said that she appeared to have a concussion, collapsed on the neighbor's couch, and "kind of passed out." The complainant's treating physician testified that she had lacerations, multiple bruises, a right orbital blow-out fracture, and a closed-head injury (a concussion). He said the orbital fracture is a dangerous injury because it is caused by a "pretty good force" and is places the victim at risk for head injury, brain damage, and potentially death. He also said that the complainant's reported loss of consciousness showed significant injury from either a blow to the head or choking. He concluded that the injury to the complainant's face and head created a substantial risk of death, that the complainant was seriously injured, and that the complainant's serious bodily injuries could have been caused by hands and elbows. On cross-examination, the physician admitted that after he examined the complainant and diagnostic tests had been performed, he did not think she had a serious risk of death. He also was not aware if she had suffered any permanent disfigurement or loss or impairment. The court held the evidence was sufficient to prove serious bodily injury.

E. NOT SBI

Villarreal v. State, 716 S.W.2d 651 (Tex. App. – Corpus Christi 1986).

The State's evidence as to "serious bodily injury" was the testimony of the victim and his treating physician. According to the victim, appellant beat and kicked him on the face and torso. This resulted in two fractured ribs and a split lip. The victim testified that his rib injuries prevented him from raising his arms for ten days and gave him pain for two weeks. He further testified that during that period, he could not lift anything because he did not want to "upset its healing." The victim's physician testified that the victim had a bruise and lacerations to his face, and two fractured ribs. No testimony, expert or non-expert, was offered to show that the victim suffered either a substantial risk of death or a serious permanent disfigurement. The court found that the evidence here failed to show a "protracted impairment" of the victim's arms. Evidence of the victim's inability to raise his arms for two weeks caused by the pain of two fractured ribs, and the fractured ribs themselves, are insufficient to show that appellant caused "serious bodily injury."

Although there was evidence that the victim was not able to raise his arms or lift anything for ten days due to two fractured ribs, the court concluded that ten days did not constitute a protracted loss or impairment.

Hernandez v. State, 946 SW2d 108 (Tex. App. 1997).

A stab wound that lacerated the right lobe of victim's liver was "bodily injury" for purposes of offense of robbery. A knife wound to victim's chest, including laceration of liver, without evidence of impairment of a bodily member or organ, was not sufficient evidence of serious bodily injury.

Williams v. State, 696 S.W.2d 896 (Tex.Crim.App.1985)

A knife wound, or a gunshot wound, although caused by a deadly weapon such as a knife or a gun, is not, per se, serious bodily injury. The shooting [or stabbing] of an individual is a serious and grave matter. Yet, it is the burden of the State to prove that such an act created a substantial risk of death, or caused death, a serious permanent disfigurement, or protracted loss or impairment of the functions of any bodily member or organ. Where the issue is whether the victim sustained bodily injury that created a substantial risk of death, in order for the prosecution to establish that the bodily injury was in fact a serious bodily injury, it is incumbent upon the prosecution not only to present evidence that the victim sustained a bodily injury, it is also incumbent upon the prosecution to establish by competent and relevant evidence beyond a reasonable doubt that the injury was life threatening

Sanchez v. State, 543 S.W.2d 132 (Tex.Crim.App. 1976).

Nowhere in the hospital records admitted or in Flores' own testimony is there any evidence that his injuries created a substantial risk of death nor is there any evidence of permanent disfigurement. The discharge summary states that Flores' condition on discharge was "satisfactory" and his prognosis was "good," no mention is made of any disfigurement, permanent or temporary. His stay in the hospital was further described as "uneventful." The physical examination admitted as State's Exhibit No. 12 states that "[there] are multiple superficial abrasions and contusions of head and body," no other abnormalities or impairment of bodily member or organ is noted. Flores' own testimony as to his temporary amnesia is of itself insufficient to show any "protracted loss or impairment of any bodily member or organ."

XIX. EXPERT TESTIMONY

A. STATE EXPERT OPINION TESTIMONY-WHAT B.A.C = LOSS OF NORMAL = PROPER

Redden v. State, No. 11-13-00214-CR, 2015 WL 4720794 (Tex.App.-Eastland 2015)

The State asked its Technical Supervisor expert at what level she believed a person had lost the normal use of their mental and physical faculties. Over objection she was allowed to answer that by "about .04 or .05" the majority of people are significantly impaired. Finding that the only thing preserved was the objection that an objectionable question was answered. The Court disagreed and cited *Long* & *Adams* cases for proposition that the question was proper and relevant.

Long v. State, 649 S.W.2d 363 (Tex.App. - Fort Worth 1983, pet. ref'd).
Adams v. State, 808 S.W.2d 250 (Tex.App.-Houston [1st Dist.] 1991, no pet.).

Expert testimony that .08 = "loss of normal use of mental and physical faculties" is admissible, even though intoxication is defined as .10 or greater.

B. IMPEACHMENT - PRIOR TESTIMONY (JOHN CASTLE)

Sparks v. State, 943 S.W.2d 513 (Tex.App.-Fort Worth 1997, pet. ref'd).

It was proper for State to impeach defense expert John Castle with circumstances of his prior testimony in a Collin County trial, *State v. Lucido*. Namely, the prosecutors pointed out that an in- court experiment with the lntoxilyzer 5000 demonstrated that contrary to his expert opinion, certain foods, chewing gum, and medications did not affect the test results.

C. EXPERT TESTIMONY ABOUT DWI VIDEO PROPERLY EXCLUDED

Platten v. State, No. 12-03-00038-CR, 2004 WL 100399 (Tex.App.-Tyler 2004, pet. ref'd) (not designated for publication).

Defense attempted to call Dr. Gary Wimbish, a toxicologist, as an expert witness to testify that he believed defendant was not intoxicated based upon the defendant's performance on the DWI video. There were no FSTs on the tape. Though Dr. Wimbish testified in a *Daubert* hearing that his opinions drawn from viewing the tapes were based on independently recognized principles that had been studied, applied and peer reviewed, he admitted that none of those applied to situations where there were no FSTs. He further could not cite any scientific theory supporting the conclusion that intoxication can be determined solely from the viewing of a videotape and he could not refer the Court to any literature on that proposition. The Appellate Court found the exclusion of this testimony was proper and further found that Wimbish's testimony was excludable as it would not be outside the knowledge and experience of the average juror.

D. DEFENSE EXPERT OPENED DOOR TO DEFENDANT'S ALCOHOLISM

Manor v. State, No. 11-05-00261-CR, 2006 WL 2692873 (Tex.App.-Eastland, 2006).

In response to the defendant's putting forth the defense that what appeared to be signs of intoxication was actually a symptom of her suffering from depression and having a panic attack, the State was allowed to rebut this theory by putting on evidence that she also suffered from alcoholism. In response to the attack

that there was no 404(b) notice, the Court held that because the evidence of alcoholism of which Manor complains was introduced in cross-examination and not in the State's case-in-chief, the State was not required to give advance notice to Manor of its intent to introduce such evidence.

E. RESULTS OF DEFENSE EXPERT'S EXPERIMENT PROPERLY EXCLUDED

Noyes v. State, No. 14-05-01169-CR, 2007 WL 470452 (Tex.App.-Houston [14th Dist.] 2007, no pet.) (not designated for publication).

Defense expert was precluded from testifying about an out of court drinking experiment conducted on defendant. Defendant failed to affirmatively show the proposed experiment was substantially similar to the incident and, thus, the trial court did not abuse its discretion in excluding the results.

F. IMPEACHING EXPERT WITH BRADY NOTICE

Diamond v. State, No. PD-1299-18, 2020 Tex. Crim. App. LEXIS 405 (Tex.Crim.App. 2020).

After Appellant's trial, it was revealed that the lab tech who analyzed appellant's blood for alcohol content had—before the trial—mistakenly certified a blood alcohol analysis report in an unrelated case where a police officer had mislabeled the submission form accompanying a blood sample. Due to her self-report of the erroneous certification to her supervisor, the analyst had been temporarily removed from casework at the time of Appellant's trial so she could research and document this incident. The prosecutors in this case, unaware of the problem in the unrelated case, failed to disclose this information to Appellant prior to the analyst's testimony in Appellant's trial. The question before the Court was whether this evidence is material. The Court held the undisclosed evidence at issue in this case was not material. The lab tech's analysis of Appellant's blood alcohol content was proper and reliable. Her error in the unrelated case had to do with an improper certification of a report rather than her failure to catch a mislabeling of a blood sample. In addition, there was overwhelming and uncontested evidence of intoxication. This decision is based on *Brady v. Maryland*, not the *Michael Morton Act*. This decision should not be taken to mean that all errors by the lab technicians will not be material.

Baires v. State, No. 02-16-00022-CR, 2016 WL 5845927 (Tex. App. – Fort Worth 2016).

This was a felony DWI case where the blood was tested by chemist at IFL and results analyzed by Elizabeth Feller, who at the time was employed by IFL and subsequently fired. A Brady notice was issued by the DA's office regarding Feller, and she was not called to testify. During cross of IFL chemist (who re-analyzed the sample) the defense sought to introduce the Brady notice on Feller. The State objection that it was irrelevant, and hearsay was sustained. Defense was allowed to cross on issue of chain of custody and the chemist testified he retested sample because Feller and chemist who did original testing left IFL. The chemist testified to not knowing the circumstances of Feller leaving IFL. The defense was allowed to cross-x chemist about the reinterpretation of Fellers test results but not allowed to go into Feller's alleged misconduct. Court holds this was not error.

G. MUST HAVE EXPERT TO TESTIFY ABOUT DRUG IDENTIFICATION

Amberson v. State, No. 13-16-00306, 2018 Tex. App. LEXIS 3123, (Tex.App. – Edinburg 2018).

This was a DWI arrest that based on a search incident to arrest the officer located several pills in the defendant's purse. From there the officer used Drugs.com and DrugBible to identify the type of pills. The court held that the information obtained from these sources was hearsay and not proper lay witness

testimony. The visual observation of the pills, comparison with drugs.com and Drug Bible, and the conclusion as to the type of drug is in the province of an expert. **NOTE:** This is essentially the same process our experts go through to identify a drug.

XX. DEFENSES

A. ENTRAPMENT DEFENSE

Evans v. State, 690 S.W.2d 112 (Tex.App. - EI Paso 1985, pet. ref'd).

No entrapment where defendant is allowed to drive to station by police and subsequently stopped again and arrested for DWI.

B. NECESSITY DEFENSE

Maciel v. State, NO. 13-18-00586-CR, 2023 Tex.App. LEXIS 4171(Tex. App.- Edinburg 2023).

The court of criminals appeals determined that Maciel was nevertheless entitled to the instruction because "a jury could reasonably infer that [Maciel] operated a motor vehicle while intoxicated" without an admission from her based on the "totality of [her] defensive evidence," which included Officer Shaw's testimony and his body cam video. *Maciel*, 631 S.W.3d at 725. Therefore, the case was remanded for this Court to conduct a harm analysis. The pertinent authority on assessing whether a defendant is harmed by the trial court's failure to include an instruction in the jury charge requires us to apply the test as articulated in *Almanza*. *See* 686 S.W.2d at 171. This test does not require the Court to view the evidence in the light most favorable to the defense. This Court held that Maciel could not have had a "sincere belief that h[er] conduct [was] immediately necessary to avoid imminent harm," because such a belief under these facts is "unreasonable as a matter of law," in light of her own statements at trial and her disorientation at the scene. Maciel clarified that she did not remember what she was thinking that night; she did not feel like she was "all right to drive at that point"; she did not fully understand what was going on; she did not remember taking the SFSTs; the details of that night were "fuzzy"; and she did not know that she did anything wrong. Because defendant did not have normal use of her mental or physical faculties, the court could not conclude that the evidence supported a finding that she had a "reasonable" belief that she was in imminent danger excusing her drunken driving. Therefore, no rational person could have determined that Maciel "reasonably believed" her conduct of driving while intoxicated was immediately necessary, such that Maciel was harmed by the omission of a necessity instruction. Therefore, the failure to instruct on necessity under Tex. Penal Code Ann. § 9.22 was harmless error because there was no reasonable probability that a jury would have opted to acquit defendant had it received a necessity instruction.

Garcia v. State, 667 S.W.3d 756 (Tex.Crim.App. 2023).

The credibility of the defense is a determination for the jury.

Maciel v. State, 631 S.W.3d 720 (Tex.Crim.App. 2021).

Defendant was entitled to a jury instruction on necessity when she denied operating the vehicle. Necessity is a confession-and-avoidance defense requiring the defendant to admit to otherwise illegal conduct. Here the court held the defendant was entitled to an instruction on any defensive issue raised by the evidence. Although the defendant denied operating the vehicle while intoxicated, she admitted to moving the vehicle off the road when the driver became ill. The court looked at the totality of the

evidence to determine if the defendant satisfied the confession-and-avoidance requirement. This is another case in line with *Rodriguez v. State, 629 S.W.3d 229 (Tex. Crim. App. 2021),* where the courts have held that a defendant need not completely admit to the charged offense before they are entitled to a justification instruction.

***Rodriguez v. State*, 629 S.W.3d 229, 231-32 (Tex. Crim. App. 2021). Confession and avoidance** is a judicially imposed requirement that requires defendants who assert a justification defense to admit, or at a minimum to not deny, the charged conduct. *See Bowen v. State*, 162 S.W.3d 226, 230 (Tex. Crim. App. 2005); *see also* ***Juarez v. State*, 308 S.W.3d 398**, 401-02 (Tex. Crim. App. 2010). Texas Penal Code Section 9.02 states that "[i]t is a defense to prosecution that the conduct in question is justified under this chapter." Tex. Penal Code § 9.02. Conduct "means an act or omission and its accompanying mental state." Tex. Penal Code § 1.07(a)(10). Logically, one cannot both justify and deny conduct. Thus the Penal Code implies that the evidence must support, or at least not negate, the act and accompanying mental state that the defense seeks to justify. *See* Tex. Penal Code § 9.02.

The evidence need not unequivocally show that the defendant engaged in the conduct. *See Juarez*, 308 S.W.3d at 404-05; *Gamino v. State*, 537 S.W.3d 507, 512-13 (Tex. Crim. App. 2017). Whether the evidence supports the requested justification is viewed in the light most favorable to the requested instruction. *See Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001). Credibility is for the jury to decide; the courts' only role is to determine if there is some evidence—even if weak, inconsistent, or contradictory—that a rational jury could find supports the defense. *E.g., Juarez*, 308 S.W.3d at 404-05; *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007).

The traditional confession-and-avoidance formulation is that the defendant must admit to "all elements of the charged offense" to warrant an instruction on a justification defense. *See* ***Juarez*, 308 S.W.3d at 401-02.** However, that formulation has been rephrased and even seemingly undermined. *See id.* (discussing different applications of the doctrine); *compare id. with Gamino v. State*, 537 S.W.3d at 512 ("Admitting to the conduct does not necessarily mean admitting to every element of the offense.").

***See also Martinez v. State, 775 S.W.2d 645 (Tex. Crim. Ap. 1989*). This is still good law.**

Braughton v. State, 569 S.W.3d 592 (Tex.Crim. App. 2018)

The evidence must present something more than merely a generalized fear of harm, instead thre must be some plausible basis of the necessity defense.

Shafer v. State, 919 S.W.2d 885 (Tex.App.-Fort Worth 1996, pet. ref'd).

Trial court properly refused to give 'justification" instruction. Defendant's argument was that once she realized she was too intoxicated to drive, she was justified in continuing to drive until she found a safe place to pull over. Sadly, she was stopped and arrested before that point. Court rejected this argument, pointing out it was her own voluntary conduct that caused her to be intoxicated and having done so was not entitled to necessity defense.

Rodriguez v. State, No. 08-03-00497-CR, 2005 WL 2313567 (Tex.App.-EI Paso 2005, no pet.) (not designated for publication).

Defendant was on his way to pick up his in-labor wife and take her to the hospital. Opinion assumes that necessity defense can be raised, but not raised here because there was no evidence that defendant faced an urgent need to avoid harm that outweighed the harm sought to be prevented by driving while intoxicated.

Also, this defendant did not admit the offense.

Texas Department Of Public Safety v. Moore, 175 S.W.3d 270 (Houston [1st Dist.] 2004, no pet.).

Defendant fled scene of altercation after being threatened with a gun which was fired; the defendant drove away but continued to drive after the threat from which he fled ceased to exist by returning to the scene after the police arrived thus, while expressly declining to rule on whether necessity was initially implicated, this defense was not established regarding defendant's subsequent conduct as a matter of law.

Moncivais v. State, No. 04-01-00568-CR, 2002 WL 1445200 (Tex.App.-San Antonio 2002, no pet.) (not designated for publication).

Defendant was victim of continued assault and got into her vehicle and drove to escape her attacker. Defendant held not to be entitled to necessity instruction because did not admit she was intoxicated on night of offense.

Torres v. State, No. 13-98-372-CR, 2000 WL 34251147 (Tex.App.-Corpus Christi 2000, no pet.) (not designated for publication).

An Intoxication Manslaughter case. Held necessity defense not raised because defendant's belief that she needed to drive while intoxicated from coast to San Antonio after being in a fight with a friend/police officer was not objectively reasonable. The Court held that even though defendant feared the person who assaulted her "might" follow her; the fact that she stopped at a convenience store in Victoria for gas and made a telephone call and did not see Dunaway following her at any time; she intended on traveling all the way back to San Antonio; she made no attempt to contact any police officer outside of Point Comfort; and she made no attempt to stop anywhere to spend the night, even though she knew she was intoxicated, led Court to conclude this situation did not involve imminent harm.

Bjornson v. State, 1996 WL 627374 (Tex.App.-Austin 1996, no pet.) (not designated for publication).

Necessity defense not raised because defendant's belief that he needed to drive while intoxicated to look for his missing asthmatic five-year-old was not objectively reasonable.

C. INVOLUNTARY INTOXICATION DEFENSE/INSTRUCTION

Woodman v. State, No. 14-15-00032, 2016 WL 1357365 (Tex.App.-Houston (14th Dist,) 2016).

Defendant was discharged from hospital where she was being treated for seizures and had received morphine doses and oxycodone. She was discharged two hours after last dose, and she left hospital in a taxi. Two hours later Defendant was driving and hit two pedestrians. At jail she consented to blood draw which showed a significant amount of oxycodone in her blood. Defense requested a charge on involuntary intoxication which was denied and objected to a charge on voluntary intoxication which was overruled. The Court of Appeals found the charge was properly denied as there was no evidence presented that Defendant was unaware of the effects of Morphine and Percocet. The court also found the voluntary intoxication instruction was properly given.

Ortega v. State, No. 08-13-00233-CR, 2015 WL 590460 (Tex.App. El Paso 2015).

This was a BTR case where Defendant presented evidence that unbeknownst to himself his brother left an open partially filled gas can in the trunk of the car he was driving and that he and his wife noticed an odor. He argued he passed out due to gas fumes which an expert said could mimic alcohol ingestion. Defendant appealed the denial of his request for a charge on involuntary intoxication. The Court of Appeals finds that this defense does not apply to a DWI prosecution as there is no mental state.

Spence v. State, No. 2-08-411-CR, 2009 WL 3720179 (Tex.App.-Fort Worth 2009, pet ref'd) (not designated for publication).

In the bench trial of this case, the defendant admitted to having a small amount to drink but said she thought someone must have drugged her as the amount she consumed was inconsistent with the observed intoxication at the time of the stop. Testimony was put on of another young woman who was drugged and assaulted at that same establishment, but no evidence beyond the suspect assumption was offered to support that something was put in her drink. In supporting the conviction in spite of the trial court's finding at the time of the conviction that the driver's intoxication was "involuntary," the Court of Appeals held this was not a finding of an involuntary act and did not support a defense to DWI. Since involuntary intoxication was not a defense to DWI and the trial court upheld the conviction; it is plain that the court did not intend to find that she was intoxicated as the result of an involuntary act. Moreover, the record supported the finding that the intoxication was not the result of an involuntary act; thus, a rational trier of fact could have found that the evidence was sufficient to establish the elements of DWI beyond a reasonable doubt.

Brown v. State. 290 S.W.3d 247 (Tex.App.-Fort Worth 2009, pet. ref'd).

Defendant claimed he had two drinks before he went to bed, then woke up and took Ambien by mistake instead of his blood pressure pills, and as a result, had no recollection of consuming any more alcohol that night and didn't recall driving. He asked for a jury instruction on "Involuntary Intoxication." The Court held that such an instruction would never be available in a DWI case as there is no mental state.

Bearden v. State, No. 01-97-00900-CR, 2000 WL 19638 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd) (not designated for publication).

Defendant testified at trial that someone must have slipped him a drug that caused his intoxication and requested a defensive instruction on "Involuntary Intoxication" arguing that an individual who is unaware of the administration of mind-altering drugs cannot engage in the intentional conduct of operating a motor vehicle any more than a woman under the influence of drugs can voluntarily consent to sexual activity. Absent the defense of involuntary intoxication, individuals who have been the victim of an assault by drugs will be unjustly penalized. The Court rejected this argument finding that the Legislature has not seen fit to include a culpable mental state in its definition of the offense. The Court cited a number of decisions that have held that Involuntary Intoxication cannot apply or did not apply to the facts of a case. In this case the Court found there was no evidence of any drug being added to appellant's beer and no evidence that he did not voluntarily consume the beer he drank that night.

Stamper v. State, No. 05-02-01730-CR, 2003 WL 21540414 (Tex.App.-Dallas 2003, no pet.)(not designated for publication).

In this case the Court affirmed the rejection of an involuntary instruction request pointing out that what she really seemed to want is an instruction on involuntary act which she did not properly request.

The court found involuntary intoxication was not applicable in this case, so the lower court was justified in denying her requested instruction and in refusing to let a defense expert testify on this issue.

Nelson v. State, 149 S.W.3d 206 (Tex.App.-Fort Worth 2004, no pet.).

This was a DWI where intoxication arose from defendant's taking prescription drugs. The defense requested an instruction on "involuntary intoxication" and the court affirmed the denial of that request holding that the defense of involuntary intoxication does not apply to persons who are unconscious or semi-conscious at the time of the alleged offense nor does it apply when the defendant's mental state is not an element of the alleged offense.

Aliff v. State, 955 S.W.2d 891 (Tex.App.-EI Paso 1997, no pet.).

Defendant was intoxicated due to ingestion of prescription drugs. He wanted an instruction on "involuntary intoxication" and that request was rejected on two grounds. First, there was no evidence in the record indicating that the defendant took the intoxicating drugs unknowingly, or without knowledge of their effect. Second, involuntary intoxication is a defense to criminal culpability and proof of a culpable mental state is not required in prosecutions for intoxication offenses, including driving while intoxicated.

McKinnon v. State, 709 S.W.2d 805 (Tex.App.-Fort Worth 1986, no pet.).

Defendant testified she only had two glasses of wine and that she "blacked out." She does not believe this was caused by the wine and thought that the man who served her the wine must have slipped something in her drink. The Court held she was properly denied the defense because there is no evidence of any drug having been added to appellant's wine and no testimony that appellant did not voluntarily consume the wine.

Curtin v. State, No. 13-04-630-CR, 2006 WL 347025 (Tex.App.-Corpus Christi 2006, no pet.).

Defendant was arrested for DWI after he caused a traffic accident, and his breath test showed an alcohol concentration of 0.243. Defendant and his physician testified that defendant suffered from traumatic amnesia at the time of the accident. This was allegedly caused when he was struck in the head by a bar patron earlier that evening. Defendant claims he involuntarily drank in excess because of the effects from the blow to his head. In approving the denial of an instruction on involuntary intoxication, the Court found that the defense did not apply as the defendant's mental state is not an element of the alleged offense.

D. INSANITY/AUTOMATISM

Nelson v. State, 149 S.W.3d 206 (Tex.App.-Fort Worth 2004, no pet.).

The defense tried to use the defense of automatism. Automatism is defined as "engaging in what would otherwise be criminal conduct but is not criminal conduct if done in a state of unconsciousness or semi-consciousness." The Court first points out that Texas courts have held that states of unconsciousness or automatism, including epileptic states, fall within the defense of insanity. It then says insanity defense will not stand for an offense like DWI where there is no mental state. With the defense argument that it is focusing on the lack of a voluntary act as a basis for its defense, the Court replies that there is nothing in the record to show that the defendant did not make the decision to get in his car and drive and that he did take the prescription drugs voluntarily, knowing their effect, which bars his claim of involuntary conduct.

Beasley v. State, 810 S.W.2d 838 (Tex.App.-Fort Worth 1991, pet. ref'd).

The defendant admitted to having a few drinks but attributed her signs of intoxication to her body's reaction to her running out of her prescription which she said caused her to be in a state of a trance-like high. The Court affirmed the denial of an instruction on insanity pointing out that the focus of the insanity defense is clearly upon the mental state of the accused at the time of the offense and because there is no mental state in a DWI case, that defense will not stand.

Aliff v. State, 955 S.W.2d 891 (Tex.App.-EI Paso 1997, no pet.).

Defendant was intoxicated due to ingestion of prescription drugs. He wanted an instruction on insanity defense. The Court held that insanity is not available because to convict a defendant for driving while intoxicated, it is not necessary to prove a culpable mental state; therefore, insanity cannot be a defense to the charge of driving while intoxicated.

E. NO "VOLUNTARY ACT" INSTRUCTION

Howey v. State, No. 05-08-000483-CR, 2009 WL 264797 (Tex.App.-Dallas 2009, no pet.) (not designated for publication).

The defendant admitted to having no more than three drinks at trial, and testified she had left her drink unattended at the bar and that something "must have happened" to alter her as much as she was at the time of the stop. She also claimed gaps in her memory in events of that night after she left the bar. The defense requested a charge under 6.01 of the Texas Penal Code of "Voluntary Act" under the theory that something must have been added to her drink. In affirming the trial court's rejection of that requested instruction, the Appellate Court relied on the fact that the defendant did not admit she committed the charged offense and the lack of evidence or testimony that someone put something in her drink. Before the defendant is entitled to such a charge on "voluntariness of conduct," there must be "evidence of an independent event, such as conduct of a third party that could have precipitated the incident."

Farmer v. State, 411 S.W.3d 901 (Tex.Crim.App. 2013).

Defendant's action in taking the Ambien pill was a voluntary act because Defendant, of his own volition, picked up and ingested the Ambien pill. It is of no consequence that he mistakenly took the wrong prescription medication when he knew that he was taking a prescription medication and was aware that he was prescribed medications with intoxicating effects. Moreover, because no other evidence at trial raised an issue of Appellant's voluntariness in taking that medication, the Trial Court properly denied Appellant's request for a voluntariness instruction.

F. DIABETES

Holland v. State, No. 1-14-00136-CR, 2016 WL 2620801 (Tex.App.-Eastland 2016).

In this felony DWI case, the Defendant was a .19 blood alcohol concentration, the trial judge refused to allow evidence from Defendant's daughter about the Defendant's postarrest diagnosis of and treatment for diabetes and how the symptoms of that disease may have made Defendant appear to be intoxicated. The exclusion followed a relevancy objection made by the State and confirmation from defense counsel that he had no medical testimony to offer showing the Defendant had diabetes on the date in question.

G. NO JURY INSTRUCTION ON FAILURE TO ADMINISTER HGN TEST PROPERLY

Spicer v. State, No. 04-15-00247-CR, 2016 WL 889477 (Tex.App.-San Antonio 2016)
Harding v. State, No. 13-14-00090-CR, 2015 WL 6687287 (Tex.App.-Corpus Christi-Edniburd 2016) pdr ref'd

Judge properly denied a requested defense instruction on the reliability of the HGN test and the weight the jury should give it if not properly performed.

XXI. JURY CHARGE

A. DEFINITION OF INTOXICATION

Burnett v. State, 541 S.W.3d 77 (Tex.Crim.App. 2017).

The jury should have been instructed that "intoxication" only meant not having the normal use of mental or physical faculties by reason of the introduction of alcohol. The instruction should NOT have referred to other substances because there was insufficient evidence of intoxication by other substances even though police later found hydrocodone pills in the defendant's vehicle. The Court held that there was NO evidence in the record as to what kind of drug hydrocodone was, whether it could cause intoxicating effects, or whether the symptoms of intoxication defendant was experiencing were also indicative of intoxication by hydrocodone. The jury charge must apply the law to the facts produced at trial.

B. OBSERVATION PERIOD

1. NO CHARGE REQUIRED

Adams v. State, 67 S.W.3d 450 (Tex.App.-Fort Worth 2002, pet. ref'd.).
Davis v. State, 949 S.W.2d 28 (Tex.App.-San Antonio 1997, no pet.).
Ray v. State, 749 S.W.2d 939 (Tex.App.-San Antonio 1988, pet. ref'd).

Not required to charge jury that defendant needs to be observed continuously for 15 minutes before they can consider lntoxilyzer test result.

2. CHARGE REQUIRED

Smithey v. State, 850 S.W.2d 204 (Tex.App.-Fort Worth 1993, pet. ref'd).
Garcia v. State, 874 S.W.2d 688 (Tex.App.-EI Paso 1993, pet. ref'd).
Gifford v. State, 793 S.W.2d 48 (Tex.App.-Dallas 1990), pet. dism'd, improvidently granted, 810 S.W.2d 225 (Tex.Crim.App. 1991).

C. ALTERNATIVE CAUSATION = NO CHARGE

1. IN GENERAL

Neaves v. State, 767 S.W.2d 784 (Tex.Crim.App.1989).

Charge that singles out limited parts of the evidence constitutes improper comment by judge on weight of evidence. In this case not entitled to charge concerning possibility that defendant received a blow to the head the results of which the officer mistook for signs of intoxication.

Grissett v. State, 571 S.W.2d 922 (Tex.Crim.App.1978).

Defendant is entitled to jury instruction on another "causation" factor only when he: (1) denies use of alcohol + (2) can explain his suspect actions.

2. FATIGUE

Drapkin v. State, 781 S.W.2d 710 (Tex.App.-Texarkana 1989, pet. ref'd).

When defendant claims fatigue or some other alternative cause that merely negates existence of element of state's case, no defensive jury instruction need be given.

D. CHARGE ON WORKING CONDITION OF INSTRUMENT

1. NOT ENTITLED TO SUCH A CHARGE

Stone v. State, 685 S.W.2d 791 (Tex.App.-Fort Worth 1985), aff'd., 703 S.W.2d 652 (Tex.Crim.App. 1986).

Improper to charge jury it should disregard results of test if jury had reasonable doubt as to whether instrument was in good working order. Court held that hole in breath test tube went to weight to be accorded the test result.

2. ENTITLED TO CHARGE AS TO DPS REGULATIONS

Atkinson v. State, 923 S.W.2d 21 (Tex.Crim.App. 1996).

Should have charged on issue of whether DPS regulations regarding breath testing were complied with. Court of Criminal Appeals holds that the charge on the working condition of instrument in this case was proper and sets out the following standard for making that determination on page 5 and it does bear reading. It did remand the case to the Fort Worth Court of Appeals because that court applied the wrong standard in determining that the failure to give the charge was not harmless. Upon remand, that court found harm.

E. NO CHARGE ON BLOOD OR URINE IN BREATH TEST CASE

Maddox v. State, 705 S.W.2d 739 (Tex.App.-Houston [1st Dist.] 1986), pet. dism'd, 770 S.W.2d 780 (Tex.Crim.App. 1988).

Not required to include definition of alcohol concentration as it relates to blood/urine when evidence is that breath test given.

F. SYNERGISTIC CHARGES

1. PROPER

Gray v. State, 152 S.W.3d 125 (Tex.Crim.App. 2006).

This appeal involved a DWI case where the State alleged alcohol as the intoxicant and the defense presented evidence that it was the anti-depressants the defendant was taking more than the alcohol that caused his behavior. The State's chemist testified the drugs the defendant took had a synergistic effect and the

Heard/Sutton charge was given. The defense attacked this and argued that the intoxicant was an element of the DWI charge, and that *Sutton* should be overruled. The Court of Criminal Appeals rejected both of those arguments. It concluded that the substance that causes intoxication is not an element of the offense. Instead, it is an evidentiary matter. The Court affirmed that Sutton was properly decided and that a synergistic charge was properly used in this case.

Sutton v. State, 899 S.W.2d 682 (Tex.Crim.App. 1995).
Heard v. State, 665 S.W.2d 488 (Tex.Crim.App. 1984).
Booher v. State, 668 S.W.2d 882 (Tex.App.-Houston [1st Dist.] 1984, pet. ref'd).
Miller v. State, 341 S.W.2d 440 (Tex.Crim.App. 1960).

State entitled to when drug use evidence comes out, even though not alleged in charge.

2. NOT FOR "FATIGUE"

Atkins v. State, 990 S.W.2d 763 (Tex.App.-Austin 1999, no pet.).

Held to be error, albeit harmless, when court gave synergistic charge that spoke to defendant's "allowing his physical condition to deteriorate." Court distinguishes this instruction from other synergistic charge situations and holds it bordered on comment on weight of evidence.

3. NOT FOR "THEORY OF INTOXICATION NOT ALLEGED"

Barron v. State, 353 S.W.3d 879 (Tex.Crim.App. 2011).

Trial court's error in giving "synergistic effect" instruction regarding enhanced effects when individual combines alcohol with medication was not harmless. At trial there was no evidence that defendant had ingested any medication or intoxicating substance other than alcohol. Jury had heard definition of intoxication, and erroneous instruction emphasized State's evidence of combination by suggesting specific mode of action through which use of "medication or drug" together with use of alcohol could produce intoxication.

Rodriguez v. State, 18 S.W.3d 228 (Tex.Crim.App.2000).

Defendant in this felony DWI trial was alleged to have been intoxicated by the introduction of "alcohol" into his body. There was testimony at trial by defendant that he had not been drinking alcohol but had taken cold/flu medication (Contact) that made him drowsy. The charge allowed the jury to convict if they found the defendant intoxicated "by reason of the introduction of alcohol, a drug, or a combination of both of these substances" into the body. The State argued the *Heard* and *Sutton* cases permitted this, but the Court pointed out that *Heard* and *Sutton* only speak to charging that a substance made a suspect more susceptible to alcohol while this expanded the theory by allowing conviction on theory of introducing a drug into the body.

4. NO EXPERT TESTIMONY NEEDED

Nelson v. State, 436 S.W.3d 854 (Tex.App.-San Antonio 2014, no pet).

Defendant admitted to officer that he had taken two prescriptions and tried to say that those, and not the alcohol, explained his condition. The State asked for and received a synergistic charge. Defense says that was error because there was no lay or expert testimony as to what drugs were consumed and what the potential effect of those drugs would be and whether there would be an interaction with alcohol consumed.

The Court held that a synergistic charge is proper without expert testimony so long as evidence is presented at trial that a substance other than alcohol may have contributed to intoxication. The Court further adds "a trial court must provide a synergism effect instruction when a defendant raises evidence of intoxication due to an interaction with medication."

G. GENERAL VERDICT FORM

Nelson v. State, No. 11-14-00276-CR (Tex. App. – Eastland 2016).
Bradford v. State, 230 S.W.3d 719 (Tex.App.-Houston [14th Dist.] 2007, no pet.).
Fulenwider v. State, 176 S.W.3d 290 (Tex.App.-Houston [1st Dist] 2004, pet. ref'd).
Torres v. State, 109 S.W.3d 602 (Tex.App.-Fort Worth 2003, no pet.).

Trial Court properly denied request for specific verdict form in DWI trial. Since the definition of intoxication sets forth alternative means of committing one offense, a special verdict form is not needed when multiple theories of intoxication are alleged.

See Also: *Price v. State, 59 S.W.3d 297 (Tex.App.-Fort Worth 2001, pet. ref'd).*
Blok v. State, 986 S.W.2d 389 (Tex.App.-Houston [1st Dist.] 1999, pet. ref'd).
Chauncey v. State, 877 S.W.2d 305 (Tex.Crim.App. 1994).
Reardon v. State, 695 S.W.2d 331 (Tex.App.-Houston [1st Dist.] 1985, no pet.)
McGinty v. State, 740 S.W.2d 475 (Tex.App.-Houston [1st Dist.] 1987, pet. ref'd).
Sims v. State, 735 S.W.2d 913 (Tex.App.-Dallas 1987, pet. ref'd).
Ray v. State, 749 S.W.2d 939 (Tex.App.-San Antonio 1988, pet. ref'd).

Though separate theories of intoxication are alleged, a general verdict form is sufficient if evidence supports conviction under either theory.

H. SEPARATE VERDICT FORMS?

Reidweg v. State, 981 S.W.2d 399 (Tex.App.-San Antonio 1998, pet.. ref'd).
Ray v. State, 749 S.W.2d 939, 944 (Tex.App.-San Antonio 1988, pet. ref'd).
Atkinson v. State, 923 S.W.2d 21, 23 (Tex.Crim.App. 1996).
Davis v. State, 949 S.W.2d 28, 29-30 (Tex.App.-San Antonio 1997, no pet.).
Owen v. State, 905 S.W.2d 434, 437-39 (Tex.App.-Waco 1995, pet. ref'd).

These opinions say that separate verdict forms should have been given but further hold that the failure to do so was harmless so there was sufficient evidence to support a finding of guilt under either theory of intoxication. So they really don't contradict the cases cited in (F) above.

I. DRIVER'S LICENSE SUSPENSION INSTRUCTION

Hernandez v. State, 842 S.W.2d 294 (Tex.Crim.App. 1992).

Defendant has no burden to show he has a valid driver's license to be entitled to a jury instruction that the jury can recommend his driver's license not be suspended.

J. MOTOR VEHICLE AS A DEADLY WEAPON IN A DWI CASE

1. IS PROPER

Couthren v. State, 571 S.W. 3d 786 (Tex. Crim. App. 2019)

The Court of Criminal Appeals held that the lower court erred in upholding a deadly weapon finding because there was no evidence that the defendant operated his vehicle in a reckless or dangerous manner. The defendant struck a pedestrian as he walked on the roadway. After the collision, the defendant stopped, got out and put the victim in his vehicle to take him to the hospital. Instead of going directly to the hospital, the defendant stopped to exchange vehicles with his girlfriend. An argument ensued, police were called to the location, and defendant was arrested. There was no testimony from any witnesses about how the vehicle was being operated before or at the time of the collision. In addition, officers did not attempt to locate evidence of brake marks, skid marks, road damage, or any other surrounding circumstances that could have demonstrated the manner in which the defendant was operating the motor vehicle.

Moore v. State, 520 S.W. 3rd 906 (Tex. Crim. App. 2017)

Defendant's SUV constituted a Deadly Weapon, It was used in the course of committing a felony DWI, even though no one was seriously injured or killed. The law does not require actual death or serious bodily injury. The evidence showed that the defendant was driving while intoxicated, almost three and a half times the legal limit, there was a collision, the defendant was driving fast enough that the impact caused a chain reaction of collisions that pushed another SUV into the intersection when cars in the intersecting roadway had the right of way, there were other cars present at the intersection and there was a danger that the other SUV could have been struck when pushed into the intersection.

Phillips v. State, No. 07-16-00237-CR, 2017 Tex. App. LEXIS 5439, 2017 WL 2608245 (Tex. App. – Amarillo 2017)

The defendant was operating a motorcycle at a high rate of speed, he passed two vehicles at the same time in a no passing lane, with light rain, at midnight while intoxicated. The Court held that there was sufficient evidence to support a deadly weapon finding.

Pena v. State, No. 07-15-00016-CR, 2015 WL 6444831 (Tex.App.-Amarillo 2015)

This case involves a drunk driver who rear ended another motor vehicle. He was convicted of Felony DWI and got a Deadly Weapon finding. That finding was appealed. The opinion discusses the standard for determining whether a motor vehicle was a deadly weapon including requirement that the danger to others be real and not merely hypothetical. The evidence here was sufficient even though the occupant of the vehicle struck did not suffer serious injury.

Sheffield v. State, No. 01-12-00209-CR, 2013 WL 5638878 (Tex.App.-Houston [1st Dist] 2013, pdr ref'd).

Where witness testified that he had to make evasive maneuvers to avoid colliding with Defendant's car, and other drivers testified they honked their horns and slammed on their brakes to avoid defendant's car, and Defendant nearly hit a car when her car 'jumped up on the curb" at the Wendy's restaurant and observed Defendant's car nearly rear-end several others and caused other vehicles to slam on their brakes to avoid colliding with Defendant's car, there was sufficient evidence to support the Deadly Weapon finding.

Sierra v. State, 280 S.W.3d 250 (Tex.Crim.App. 2009). On remand to Sierra v. State, No. 14-06-00528-CR, 2009 WL 3863288 (Tex.App.-Houston [14th Dist.] 2009).

In this felony DWI case, the Court of Criminal Appeals reversed the Court of Appeals holding that there is insufficient evidence that the defendant's vehicle was used as a deadly weapon. The facts show the defendant struck a vehicle that pulled out of an apartment complex parking lot. The defendant argued he was not speeding, he had the right of way, his view was obstructed, and he tried to avoid the collision. The dissent argues that the finding was not appropriate because the defendant did not cause this accident and was merely involved in an accident with a "careless driver who was injured." The Court majority focused on the lack of evidence that defendant attempted to brake before the crash even though he saw the other vehicle in time to do so, and the fact the jury could have found evidence the defendant was speeding.

Woodall v. State, No. 03-05-00850-CR, 2008 WL 3539997 (Tex.App.-Austin 2008 pet. ref'd) (not designated for publication).

In this case witness testified that defendant entered his lane of traffic and almost hit his truck. Witness had to slow down when defendant entered his lane and further described how defendant struck several traffic barrels which was sufficient proof that he was "actually endangered" by the defendant's driving so a deadly weapon finding would stand.

Ochoa v. State, 119 S.W.3d 825 (Tex.App.-San Antonio 2003, no pet.).

In this case officer testified that there were other vehicles on the road when the defendant drifted out of his lane and came "real close to striking and hitting" another vehicle. The Court found this was sufficient because there were "other drivers on the road who were actually endangered by the defendant's use of his vehicle", so the deadly weapon finding was proper.

Mann v. State, 58 S.W.3d 132 (Tex.Crim.App.2001).

Testimony showed that defendant almost hit another vehicle "head-on" when it crossed the center line, and that other vehicle took evasive action and avoided the collision. The arresting officer further testified that based on his experience reconstructing accidents, he was of the opinion that a collision under those circumstances would have been capable of causing death or serious bodily injury. Charge on and finding of Deadly Weapon was proper.

Davis v. State, 964 S.W.2d 352 (Tex.App.-Fort Worth 1998, no pet.).

Testimony showed that the defendant was weaving and drove in the oncoming lane of traffic resulting in another vehicle having to take evasive action to avoid a collision. Deadly Weapon finding was proper.

2. MAY OR MAY NOT BE PROPER?

Drichas v. State, 175 S.W.3d 795 (Tex.Crim.App.2005) on remand 187 S.W.3d 161 (Tex.App.-Texarkana 2006), pet. granted, judgm't vacated, 210 S.W.3d 644 (Tex.Crim.App. 2006) on remand, 219 S.W.3d 471 (Tex.App.-Texarkana 2007 pet. ref'd).

Court of Appeals had found there was insufficient evidence to show that the motor vehicle in this case was used as a deadly weapon because it found there was no evidence that others were actually endangered. In

reversing this holding, the Court of Criminal Appeals found that the Court of Appeals had misconstrued the actual danger requirement by equating a deadly weapon's capability of causing death or serious bodily injury with its probability of doing, thus reading into the statute an additional requirement of evasive action or zone of danger when said requirement did not exist and therefore reversed and remanded this case to the Court of Appeals. Upon remand, the Court of Appeals once again found there was insufficient evidence to support the deadly weapon finding based on its finding that there was insufficient evidence that there was another motorist present on the roadway "at the same place and time" as the defendant when he drove in a reckless manner. The Court of Criminal Appeals once again accepted PDR and reversed and remanded again, finding that the factual-sufficiency standard of review used by the Court of Appeals was flawed. In last remand Court of Appeals applied proper standard and (big surprise) again held against deadly weapon finding.

3. IS NOT PROPER

Moore v. State, No. 02-15-00402-CR, No. 02-15-00403-CR, 2016 WL 4247978 (Tex. App. – Fort Worth 2016) pdr filed.

This case involved a habitual drunk driver who drove his Mercedes into the back of the car occupied by a woman and her child that was properly stopped at a light and drove them into the intersection where another car was struck by IP vehicle. No one was injured and the Court For reasons that I do not understand Court found this did not meet the standards set out in Cook. Those five factors were 1) Intoxication – which is rejects as a condition and not relating the manner in which he drove vehicle 2) speed – held not sufficient though the speed limit at a signal is "0". 3) Disregard of traffic signal (what the court called a single infraction was not sufficient) 4) Erratic Driving (no evidence of how driving before collision) and 5) failure to control vehicle (insufficient evidence). Court also questioned sufficient of evidence of reckless driving.
Martinez v. State, No. 03-14-00802-CR, 2016 WL 5874863 (Tex. App. – Austin 2016)

In this case officer came upon Defendant and his disabled car on the freeway and determined Defendant had hot retaining wall. In holding insufficient evidence supporting deadly weapon finding the Court focused on the fact that there was evidence supporting only that other "potentially" could have been endangered by Defendant's driving which was not witnessed by witnesses who all arrived after the crash. It also emphasized the lack of any direct evidence that other vehicles were on freeway at the time Defendant was driving.

Glover v. State, No. 09-13-00084-CR, 2014 WL 1285134 (Tex.App.-Beaumont 2014, pdr ref'd).

The Court held that evidence that Defendant was speeding and was intoxicated and that other cars were on the road during the commission of the offense did not support a finding that his vehicle was a deadly weapon.

Brister v. State, 449 S.W.3d 490 (Tex. Crim App. 2015).

Evidence was insufficient to permit inference that Defendant's operation of his vehicle put another person or motorist in actual danger, as required to support deadly weapon finding with respect to Defendant's vehicle in prosecution for DWI. Arresting officer's testimony was that Defendant's vehicle had crossed center line into "oncoming traffic" only once and there was no other evidence indicating that Defendant's operation of vehicle during commission of offense actually put another person or motorist in actual danger.

Voltman v. State, No. 14-12-00590, 2013 WL 4779704 (Tex.App.-Houston [4 Dist] 2013, pet.filed) (not designated for publication).

The Court held a deadly weapon finding was not supported where there is no evidence that Defendant's conduct placed other people in actual danger. In this case the other cars struck by Defendant's vehicle were all parked and unoccupied and no one, including Defendant, present at the scene was injured.

Boes v. State, No. 03-03-00326-CR, 2004 WL 1685244 (Tex.App.-Austin 2004, no pet.) (not designated for publication).

In this case trooper observed defendant failed to come to a complete stop at the stop sign. When turning, defendant over- accelerated and momentarily lost control of his vehicle causing it to fishtail sideways and almost hit the curb of the sidewalk. There was insufficient evidence to support the deadly weapon finding. The Court pointed out there was no evidence that anyone else was actually endangered by the Defendant's driving.

Williams v. State, 946 S.W.2d 432 (Tex.App.-Fort Worth 1997, no pet.). Judgment reformed 970 S.W.2nd 566 (Tex.Crim.App. 1998).

Court of Appeals held that a "deadly weapon" finding was not permissible absent evidence that another motorist was on the highway at the time and place defendant drove in an intoxicated condition. Initially reversed for new punishment hearing. The Court of Criminal Appeals held sufficient to just strike Deadly Weapon finding.

4. NOTICE MUST BE ADEQUATE AND TIMELY

Desilets v. State, 2010 WL 3910588 (Tex.App.-Beaumont 2010, no pet.) (not designated for publication), Habeas corpus granted by Ex parte Desilets, 2012 WL 333809, (Tex.Crim.App.2012, reh. denied).

The State filing an amended motion seven days prior to trial that notified defendant of the State's intent to prove that he "did then and there use and exhibit a deadly weapon, namely, a motor vehicle" was found to be adequate notice.

Hocutt v. State, 927 S.W.2d 201 (Tex.App.-Fort Worth 1996, pet. ref'd).

In felony DWI case with an accident and minor injuries, State faxed notice of intent to seek a deadly weapon finding just 3 days before voir dire began. The notice did not specify on its face that the deadly weapon was the "automobile." The Court of Appeals held that the notice was neither timely nor adequate and reversed the case on punishment only.

5. WHEN TO SUBMIT ISSUE OF DEADLY WEAPON

Dirchas v. State, 175 S.W.3d 795 (Tex. Crim. App. 2005)

The law “directs the trial court to submit to the jury any issue that is raised by the facts” including a deadly weapon finding.

Hill v. State, 913 S.W.2d 581 (Tex. Crim. App. 1996)

Deadly weapon question can be decided at guilt or punishment phase of the trial.

Polk v. State, 693 S.W.2d 391, (Tex. Crim. App. 1985)

Jury finding of guilt of offense as pled in the indictment can constitute a deadly weapon finding.

6. EXPERT TESTIMONY IS NOT REQUIRED

Denham v. State, 574 S.W.2d 129 (No. 56,136, delivered December 13, 1978);

We have recently clarified our law and stated that expert testimony is not required to prove that a weapon is deadly.

Limuel v. State, 568 S.W.2d 309 (Tex.Crim.App, 1978).

No one needs to testify to the conclusion that the weapon was capable of producing serious bodily injury. The jury is free to consider all of the facts of the case, including any actual wounds inflicted or words spoken by the appellant, in deciding if the weapon is deadly.

K. NO DEFINITION OF "NORMAL USE" SHOULD BE GIVEN

Baggett v. State, 367 S.W.3d 525 (Tex.App.-Texarkana 2012, pet. ref'd).
Murphy v. State, 44 S.W.3d 656 (Tex.App.-Austin 2001, no pet.).

It was improper for the Court to charge the jury on a definition of "normal use."
But see *Davy v. State, 67 S.W.3d 382 (Tex.App.-Waco, 2001, no pet.)* for a contrary holding.

L. NO SUCH THING AS "ATTEMPTED DWI"

Strong v. State, 87 S.W.3d 206 (Tex.App.-Dallas, 2002, pet. ref'd).

Evidence was presented that the officer saw a vehicle stopped in the middle of the road, facing north, with its hazard lights blinking. The officer saw the suspect alone in the driver's seat of the vehicle and observed the rear reverse lights were illuminated which he testified meant that the ignition of the vehicle had to be on. After speaking with the suspect and asking her to step out of the vehicle that suspect put the vehicle in park and got out of the vehicle. She was later arrested for DWI. The trial judge directed the State out on DWI and submitted the lesser charge of attempted DWI to the jury for which she was convicted. The State tried to appeal the acquittal on the DWI charge and the Court of Appeals held that it was barred from doing so by double jeopardy and it further held there is no such thing as Attempted DWI and remanded the case for acquittal.

M. NO CHARGE ON INVOLUNTARY INTOXICATION AND AUTOMATISM DEFENSE IN THIS DWI/PRESCRIPTION DRUG CASE

Nelson v. State, 149 S.W.3d 206 (Tex.App.-Fort Worth 2004, no pet.).

Case involved a defendant who was tried for DWI from ingestion of prescription drugs. The Defendant appealed the court's denial of his request for a charge on involuntary intoxication and automatism.

Involuntary intoxication by prescription medication occurs only if the individual had no knowledge of possible intoxicating side effects of the drug, since independent judgment is exercised in taking the drug as medicine, not as an intoxicant. In this case, the defendant had taken the drugs before and was aware of their effect. Another reason the defensive charge was not available was that although involuntary intoxication is a defense to criminal culpability, proof of a culpable mental state is not required in prosecutions for intoxication offenses, including DWI. Claim of automatism fails because that defense is not available when, as here, the defendant voluntarily took the intoxicant.

N. NO MEDICAL EXCUSE INSTRUCTION

Burkett v. State, 179 S.W.3d 18 (Tex.App. San Antonio 2005, reh. overruled).

The defense argued and presented evidence in this case that what the officer thought was signs of intoxication were actually AID's related complications. An instruction was requested on that issue and denied. The Court of Appeals held that the defendant's medical excuse instruction was not a statutorily enumerated defense. It merely served as evidence that they could argue would negate the impairment element of the State's case. Therefore, the trial court properly denied Burkett's requested instruction.

O. NO JURY INSTRUCTION ON FAILURE TO PRESERVE EVIDENCE

White v. State, 125 S.W.3d 41 (Tex.App.Houston [14th Dist.] 2003) pet. ref'd 149 S.W.3d 159 (Tex.Crim.App. 2004).

The defense in this intoxication manslaughter case sought a "spoliation" instruction based on the State's failure to secure a bicycle that was involved in the crash. The duty to preserve evidence is limited to evidence that possesses an exculpatory value that was apparent before the evidence was destroyed. In this case, the only evidence before the trial court regarding the materiality of the bicycle was an affidavit from appellant's counsel stating that appellant's accident-reconstruction expert "has indicated a need to inspect the complainant's bicycle." At best, appellant has shown only that preservation of the bicycle might have been favorable, which is insufficient to satisfy the requirement of materiality. The instruction was properly denied in this case.

P. DEFINITION OF "OPERATING" IN CHARGE

1. NOT ERROR TO DENY REQUEST

Yokom v. State, No. 2-03-181-CR, 2004 WL 742888 (Tex.App.-Fort Worth 2004, pet. ref'd) (not designated for publication).

In response to the denial of the defense request to define "operating" in the jury instruction, the court held that as a general rule, terms not statutorily defined need not be defined in the jury charge, but instead are to be given their common, ordinary, or usual meaning. The term "operating" has not acquired a peculiar meaning in the law. Courts have consistently applied a plain meaning to the word, allowing jurors to freely construe the term to have any meaning within its normal usage.

2. ERROR TO GIVE JURY DEFINITION OF "OPERATING"

Kirsch v. State, 366 S.W.3d 864 (Tex.App.-Texarkana 2012).

This case involves a holding that it was improper for the trial court to define the term "operate" in the jury charge. The Court of Criminal Appeals ruled (Kirsch v. State 357 SW3d 645 (Tex.Crim.App. 2012) that the Trial Court's defining of the term "operate" constituted a comment on the weight of the evidence. The case was remanded for harm analysis and in this opinion the Court of Appeals found the harm to be egregious and that it warranted reversal and a new trial.

Q. NO JURY INSTRUCTION ON BTR CONSIDERED AS EVIDENCE

Helm v. State, 295 S.W.3d 780 (Tex.App.-Fort Worth 2009, no pet.).
Bartlett v. State, 270 S.W.3d 147 (Tex.Crim.App. 2008).
Vargas v. State, 271 S.W.3d 338 (Tex.App.-San Antonio 2008, no pet.).
Hess v. State, 224 S.W.3d 511 (Tex.App.-Fort Worth 2007, pet. ref'd).

Jury Charge instruction stating that jury could consider the defendant's refusal to submit to a breath test as evidence constituted an improper comment on the weight of the evidence.

R. ERROR TO CHARGE ON CONCURRENT CAUSATION IN DWI CASE

Otto v. State, 273 S.W.3d 165 (Tex.Crim.App.2008, reh. denied).

At State's request, the jury instructions included 6.04 of the Texas Penal Code. Defendant claimed that was error and the Court agreed for the following reasons. Unlike Sutton and Gray, the jury charge did not include a susceptibility theory. In Gray and Sutton, the jury charge permitted conviction if the ingestion of drugs made the defendant more susceptible to being intoxicated by the charged intoxicant---alcohol. Here, the jury charge and instructions authorized the jury to find Otto guilty if it found her intoxicated by reason of (1) the introduction of alcohol into her body, the charged intoxicant, or (2) by the introduction of unknown drugs concurrently with alcohol --a combination theory. A jury's finding that Otto was intoxicated by reason of unknown drugs concurrently with alcohol does not mean--- like in Sutton and Gray-- that the jury found Otto intoxicated by alcohol alone. Gray v. State, 152 S.W. 3d at 133 (stating "[i]n both this case and in Sutton, the charge permitted conviction only if the drugs made the defendant more susceptible to the alcohol').

S. NOT ENTITLED TO A CCP 38.23 INSTRUCTION

Tapia v. State, No. 07-14-00203-CR, 2015 WL 1119762 (Tex.App.—Amarillo 2015, pet ref'd)

Dispute over whether or not offense occurs in a public place does not create a right to a 38.23 instruction on the issue. Article 38.23 (a) is an exclusionary rule that is designed to protect a person charged with a crime from illegally obtained evidence. Charge not called for as there is no showing how fact issue is question would result in evidence being admissible. The issue itself was thoroughly covered in Court's charge.

Vogel v. State, No. 05-11-01669-CR, 2015 WL 6992555 (Tex.App.-Dallas 2015)

The officer testified he smelled odor of alcohol on Defendant and Defendant testified he did not "think" the Officer could have smelled alcohol on his breath did not constitute affirmative evidence. That officer did not smell alcohol and therefore he was not entitled to 38.23 charge.

Doyle v. State, No. 01-06-01103-CR, 2008 WL 597450 (Tex.App.-Houston [1 Dist.] 2008, pdr. ref'd).

At the charge conference, defendant objected to the lack of a 38.23 instruction regarding the stop of his car, specifically whether he was weaving or failed to maintain a single lane. Both the officer and the defendant testified that he wove into the lane of oncoming traffic. Defendant explained that he did so to avoid a parked car, but did not dispute the reason why the officer stopped him, i.e., because he was weaving. Because there was no factual issue in dispute regarding the stop, he was not entitled to the requested instruction.

Sledge v. State, No. 09-93-00667-CR, 1994 WL 247961 (Tex.App.-Dallas June 9, 1994, no pet.) (not designated for publication).

The defendant testified that he changed lanes but only because the lane ended, "played out." The Court of Appeals held that the defendant was not entitled to an Article 38.23 instruction because he did not dispute the officer's testimony about his weaving but, instead, sought to explain the reason he drove that way. Id. The Court of Appeals concluded that the evidence did not raise a fact issue about whether the officer stopped the defendant.

Bell v. State, No. 2-04-287-CR, 2005 WL 503647 (Tex.App.-Fort Worth 2005, pet. ref'd) (mem. op., not designated for publication).

The Court of Appeals upheld the trial court's denial of the defendant's request for an Article 38.23 instruction, noting that she did not contest the existence or nature of the evidence underlying the officer's decision to stop her. She merely challenged whether the circumstances he observed authorized the stop. Because only the effect of the underlying facts was disputed, the Court of Appeals held that the defendant was not entitled to an Article 38.23 jury instruction.

Beasley v. State, 810 S.W.2d 838, (Tex.App.-Fort Worth 1991, pet. ref'd).

Where the arresting officers and the defendant testified that she was swerving and weaving between lanes on the highway and the only issue was that the defendant offered an explanation that she swerved because she was trying to stop her children from fighting, the court held she was not entitled to the Article 38.23 instruction she requested.

T. PER SE DEFINITION OPTION SHOULD BE SUBMITTED- LIMITING INSTRUCTION IMPROPER

Flores v. State, No. 01-15-00487-CR, 2016 WL 3362065 (Tex. App. – Houston (1st Dist.) 2016)

Defendant objected to including per se definition in jury instructions as the sample was taken 3 hours after the stop and there was no extrapolation. Citing Kirsch case and rejecting Defendant's argument that Kirsch is flawed the Court finds the per se language was properly submitted.

Kirsch v. State, 306 S.W.3d 738 (Tex.Crim.App. 2010).

It was proper for the Trial Court to instruct the jury that it could find the defendant guilty under the per se impairment definition of intoxication, despite the absence of retrograde extrapolation evidence. The defendant's blood test showed that he had a BAC of 0.10 at the hospital, 80 minutes after he was involved

in the car wreck. The results are evidence from which a jury could find the defendant guilty under the per se impairment definition. Trial Court's instruction in prosecution for driving while intoxicated (DWI), that jury could consider defendant's blood alcohol content (BAC) test result "for the limited purpose of showing that the individual tested had ingested alcohol only at some point before the time of the test," was misleading and an improper comment on the weight of the evidence; BAC test result was also probative to show that defendant was intoxicated at the time he was driving, even though it was not sufficient by itself to prove intoxication at the time of driving.

Williams v. State, 307 S.W.3d 862 (Tex.App.-Fort Worth 2010, no pet.).

Even though BAC was .07 ninety minutes after the defendant's arrest and there was no extrapolation evidence, the trial court properly submitted the per se theory of intoxication as the evidence supported an inference the defendant was intoxicated under both theories.

U. PROPER TO SUBMIT INSTRUCTION THAT INTOXICATION CAUSED BY DRUGS

Quellette v. State, 353 S.W.3d 868 (Tex.Crim.App. 2011).

Even though there was no testimony - expert or otherwise - as to whether the particular drugs found in Quellette's vehicle could have an intoxicating effect or whether Quellette's actions, demeanor, and conduct were consistent with being under the influence of drugs or under the influence of a combination of drugs and alcohol, it was proper for judge to include the language concerning intoxication by drugs in the jury instruction.

V. DEFINITION IN JURY INSTRUCTION SHOULD BE LIMITED TO EVIDENCE PRESENTED AT TRIAL

Burnett v. State, No. 488 S.W.3d 913, (Tex.App.-Eastland 2016, pdr granted)

This was a DWI case where the charge contained the standard general allegation of intoxication. There was evidence that the Defendant had some white and blue pills on his person and that the white pill may have been hydrocodone. The officer who testified about finding pills was not a DRE and had no training to allow him to say whether intoxication he observed was due to drugs and no evidence that Defendant had ingested any of the pills. The Defendant objected to the full definition being submitted to jury and wanted the language about intoxication by drugs struck. The Court of Appeals found that only the alcohol portion of the definition should have been submitted.

Erickson v. State, 13 S.W.3d 850 (Tex.App.-Austin 2000, pet. ref'd).

In this case, the Court instructed the jury that a person is intoxicated within the meaning of the law "when such person does not have the normal use of his physical or mental faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of these substances into the body, tracking the charging instrument and the statutory definition." There was no evidence at trial that defendant consumed any intoxicant except alcohol. For that reason, the Trial Court should have limited the definition in the instructions to just refer to alcohol. This error was found to be harmless because the prosecutor never suggested that the jury could convict on the basis of a finding that appellant was intoxicated by the use of a controlled substance or drug, either alone or in combination with another substance.

Ferguson v. State, 2 S.W.3d 718 (Tex.App.-Austin 1999, no pet.).

In this case, the term "intoxicated" was defined in the charging instrument and the jury charge as "not having the normal use of one's physical or mental faculties by reason of the introduction of alcohol, a controlled substance, a drug, a substance or its vapors that contain a volatile chemical, an abuseable glue, or an aerosol paint, or a combination of two or more of those substances into the body." The statute does not include within its definition of "intoxication" the words "a substance or its vapors that contain a volatile chemical, an abuseable glue, or an aerosol paint." There was no evidence presented at trial that the defendant's alleged intoxication was caused by the introduction into her body "a substance or its vapors that contain a volatile chemical, an abuseable glue, or an aerosol paint." For these reasons and the fact that the prosecutor referred to the erroneous charge in argument, the error was found to be harmful, and the case was reversed.

W. WHEN CHARGE SPECIFICALLY USES SUBJECTIVE DEFINITION OF INTOXICATION AND NOT PER SE DEFINITION, THE PER SE DEFINITION SHOULD NOT BE IN JURY INSTRUCTION

Crenshaw v. State, 378 S.W.3d 460 (Tex.Crim.App. 2012). On remand Crenshaw v. State, 424 S.W.3d 753 (Tex.App.-Fort Worth 2014).

A jury charge, which instructed the jury on both the subjective definition and the per se definition of intoxication despite the information having alleged only the subjective definition, was held to be error. The Court of Appeals held that where the State has elected to narrow its case by relying solely on the subjective definition in the information but at trial sought and obtained (over timely objection) the benefit of both the subjective and per se definitions in the charge, it is error. In its discussion of the harm, it points out that because the information did not allege the "per se" theory of intoxication, there was no notice to appellant of any intent to offer expert evidence of retrograde extrapolation and no opportunity for appellant to secure an expert to rebut the information. The Court of Criminal Appeals reversed the Court of Appeals finding that in this case, the per se definition of intoxication was only in the abstract section of the jury charge, and it was not incorporated into the application paragraph. The application paragraph tracked the language of the information, which alleged the subjective theory of intoxication, and thus restricted the jury's consideration to only those allegations contained in the information. The jury is presumed to have understood and followed the Court's charge, absent evidence to the contrary. Therefore, we presume that the jury convicted Defendant of DWI pursuant to the subjective theory of intoxication. After remand from Court of Criminal Appeals, the Fort Worth Court of Appeals affirmed the conviction.

X. DWI GREATER THAN 0.15 INSTRUCTIONS

Pallares-Ramirez v. State, No. 05-15-01347-CR, 2017 Tex. App. LEXIS 3, 2017 WL 33738 (Tex. App. - Dallas 2017).

This case involved a conviction of a DWI with a BAC greater than .15. The Defendant was arraigned on a class B DWI and the elevated BAC was presented as a punishment issue. However, the Information alleged the class A offense. The jury found him guilty as charged in the Information. The State conceded error on the issue and acknowledged that the elevated BAC is in fact an element of the class A misdemeanor DWI rather than an enhancement. The Court found that the defendant was not harmed by this mischaracterization because the defendant was aware of the charge against him (he had notice) from the information, the defendant took the position throughout the trial that the State had to prove his BAC was greater than a .15, the jurors were aware that the BAC threshold at issue was a .15 from the onset of voir dire, the jurors were

told that the range of punishment was that of class A misdemeanor, and the jurors found "true" that the defendant had a BAC greater than .15.

Castellanos v. State, 2016 Tex. App. LEXIS 11587 (Tex. App. – Corpus Christi – Edinburg (13th Dist) 2016)

This case establishes that the .15 or greater BAC result is an element, and the State has the burden to prove it at the guilt/innocence stage.

Navarro v. State, No. 14-13-00706-CR, 2015 WL 4103565 (Tex.App.-Houston (14th Dist.) 2015)

Prior to this case there was some debate as to whether the aggravated DWI of greater than 0.15 should be treated as an enhancement or not. This decision makes clear that the so-called 0.15 enhancement is not an enhancement but is in fact an element of a Class A misdemeanor offense. The court held that a person's blood alcohol concentration (BAC) level provides the basis for a separate offense under 49.04(d) and is not merely a basis for enlargement of the punishment range. Evidence of a blood alcohol level of 0.15 or greater represents a change in the degree of the offense, from class B to class A misdemeanor, rather than just an enhancement of the punishment range. The practical impact is that 0.15 or greater at time of test is something the State must prove in the guilt innocence phase, and it raises the tactical issue for the State to consider whether to request a lesser instruction of DWI.

Y. DWI .15 CHARGE ERROR

Leonard v. State, No. 14-15-00560-CR, 2016 WL 5342776 (Tex. App. – Houston (14th Dist) 2016).

This was an Aggravated DWI charge where the charging information erroneously alleged that the sample taken from Defendant showed a level of .15 or above at the time of the commission of the offense. The statute requires that it only be .15 or above at the time the sample was tested. At charge conference the State at first sought to have judge submit charge that tracked statute but upon the defense affirming it wanted the charge to reflect the language in charging instrument the State agreed to defense requested language. On appeal the Defendant tried to argue that the charge submitted should have tracked the statute, but the Court holds that when a Defendant requests and is given a charge he can't complain about it on appeal.

Meza v. State, No. 01-15-01050-CR, 2016 WL 3571390 (Tex. App. – Houston (1st Dist) 2016).

This case like the one above involves State incorrectly alleging in the information that the .15 BAC required for a Class A DWI related to time of offense and not to time of testing. They were given and rejected an opportunity to strike language as surplusage before charge was submitted. Jury convicted of the Class A misdemeanor thereby finding the Defendant was .15 or above at the time of the offense. Case in chief had no retrograde extrapolation. The Court rendered a judgment of acquittal.

XXII. JURY ARGUMENT

A. PERMISSIBLE

1. DEFENDANT FAILED TO BLOW BECAUSE HE KNEW HE WOULD FAIL

Nunez v. State, No. 2-06-220-CR, 2007 WL 1299241 (Tex.App.-Fort Worth 2007, no pet.) (not designated for publication).
Gaddis v. State, 753 S.W.2d 396 (Tex.Crim.App. 1988).

It is proper to argue that defendant failed to blow into instrument because "he knew he would fail."

2. DEFENDANT'S FAILURE TO DO FST'S ON VIDEO

Emigh v. State, 916 S.W.2d 71 (Tex.App.-Houston [1st Dist.] 1996, no pet.).

Prosecutors referring to defendant's failure to do FSTs on the station house videotape was not a comment on violation of defendant's privilege against self-incrimination.

3. DEFENDANT'S REFUSAL TO DO ANYTHING (i.e. FST'S, BT)

Castillo v. State, 939 S.W.2d 754 (Tex.App.-Houston [14th Dist.] 1997 pet. ref'd).

Arguments that jurors should not reward defendant "for doing nothing" and that they should not send a message that it's "okay to refuse to do everything, " both constituted a proper plea for law enforcement and a proper response to defense argument that asked jurors not to punish defendant for refusing to do unreliable tests.

4. DEFENDANT'S TRYING TO LOOK GOOD ON TAPE

Gomez v. State, 35 S.W.3d 746 (Tex.App.-Houston [1st Dist.] 2000, pet ref'd).

State argued in response to defense argument that they should rely on how defendant looked on the videotape was as follows, "They walked him into the room and common sense tells you that when an individual knows they are being taped and knows it's important, they will straighten up. They are going to straighten up." Defense argument this was outside the record was rejected by the Court which found that the argument represented a statement of common knowledge and was therefore proper.

5. JURY DOES NOT HAVE TO BE UNANIMOUS ON THEORY OF INTOXICATION

Price v. State, 59 S.W.3d 297 (Tex.App.-Fort Worth 2001, pet. ref'd).

The definition of intoxication sets forth alternate means of committing one offense. It does not set forth separate and distinct offenses. A jury is not therefore required to reach a unanimous agreement on alternative factual theories of intoxication.

6. TESTIMONY REGARDING AND ARGUMENT ABOUT DEFENDANT'S FAILURE TO CALL ITS EXPERT WAS PROPER

Pope v. State, 207 S.W.3d 352 (Tex.Crim.App. Nov. 15, 2006).

Testimony elicited from State's DNA experts indicating that defendant's DNA expert had been provided with the State's DNA testing and had failed to request additional testing did not violate work product doctrine; such fact was within the personal knowledge of the State's experts, and a party could be allowed to comment on the fact that the opponent failed to call an available witness and then argue that the opponent would have called witness if witness had anything favorable to say. This does not violate the attorney work product doctrine.

B. IMPERMISSIBLE

Blessing v. State, 927 S.W.2d 266 (Tex.App.-EI Paso 1996, no pet.).

It was reversible error for prosecutor to inform jury of the existence of two for one good time credit the defendant would receive if sentence was for jail time as opposed to prison and to urge them to consider its existence in assessing punishment.

XXIII. PROBATION ELIGIBLE

Baker v. State, 519 S.W.2d 437 (Tex.Crim.App. 1975).
Tennery v. State, 680 S.W.2d 629 (Tex.App.-Corpus Christi 1984, pet. ref'd).

Burden of proof is on defendant to show by sworn affidavit plus testimony (from some source) that he is eligible for probation.

XXIV. PRIORS/ENHANCEMENTS

A. PROVING DEFENDANT IS PERSON NAMED IN JUDGMENT

1. I.D. MUST BE BASED ON MORE THAN "SAME NAME"

Strehl v. State, 486 S.W. 3d 110, (Tex.App.-Texarkana 2016)

This was a felony DWI trial where the State's only evidence tying the Defendant on trial to one of the two jurisdictional priors was the fact that the name of the Defendant was the same name that was on the prior. The State argued that Defendant's name was unique (Joseph Leo Strejil III). The Court of Appeals said that having the same name is not enough and modified the conviction to reflect a misdemeanor conviction of DWI.

See also: *White v. State, 634 S.W.2d 81 (Tex.App.-Austin 1982, no pet.).*

2. BOOK-IN CARD MUST BE TIED TO JUDGMENT AND SENTENCE

Zimmer v. State, 989 S.W.2d 48 (Tex.App.-San Antonio 1998, pet. ref'd).

Where State proved identity of defendant by using book-in card which it offered in conjunction with a Judgment and Sentence and the judge admitted the Judgment and Sentence but not the card, and there was no evidence tying the card to the Judgment and Sentence, the proof was insufficient as to that prior. (It appears there may not have been a sufficient predicate laid for admission of the slip, i.e. business record, and implies no tie between the slip and the Judgment and Sentence [i.e. cause number on slip tied to J & S] because there was no mention of same in the opinion).

3. PROOF OF ID POSSIBLE WITHOUT PRINTS OR PHOTOS

Phillips v. State, No. 02-21-00116-CR

Appellant argued that the trial court erred by admitting evidence of his prior convictions because the fingerprint expert failed to identify the specific points of comparison relied on by the expert to identify the Appellant. The Court held that counsel failed to ask that specific question. Had counsel asked that question,

the expert, under Texas Rules of Evidence 705, would have to disclose that underlying information. On appeal, appellant attempted to argue that the priors should have been excluded under Kelly, not scientifically reliable because the expert failed to properly apply the technique. The Court held that the error was not properly preserved.

Billington v. State, No. 08-12-00144-CR, 2014 WL 669555 (Tex.App.-EI Paso 2014, no pet.).

In this case the fingerprints on the J & S were in such poor quality they could not be used so Defendant was tied to two pen packets with other evidence including a third useable pen packet. The details from the pen packets that connected him included same DPS number, name and date of birth and tattoos. A certified DL record had the same offense and conviction dates. Under totality of circumstances, there was found to be sufficient evidence to tie Defendant to Pen Packet and prove his priors.

Richardson v. State, No. 05-03-01104-CR, 2004 WL 292662 (Tex.App.-Dallas 2004, no pet.) (not designated for publication).

There were no prints on the certified trial docket sheets, charging instruments, or the judgment and probation order, nor were there any photographs used to prove the defendant was the same person named in the two priors. The defendant's address, gender, race, date of birth, and drivers' license number were on those documents, and they matched the information gained from defendant at the time of the arrest. This was found to be sufficient proof that the defendant was the same person named in the prior.

4. COMPUTER PRINTOUT AS PROOF OF PRIOR CONVICTION

Ex Parte Warren, 353 S.W.3d 490 (Tex.Crim.App. 2011).
Flowers v. State, 220 S.W.3d 919 (Tex.Crim.App.2007).

Held that a computer printout offered to prove prior conviction contained sufficient information and indicia of reliability to constitute the functional equivalent of a judgment and sentence tied to this particular defendant. In this case, the printout states the defendant's name, the offense charged, and date of commission; that he was found guilty of and sentenced for the offense; and gives the specifics of the sentence and the amount of time served. Further, the printout is properly authenticated by the Dallas County Clerk in accordance with evidentiary rule 902(4). The other document offered was a certified copy of defendant's DL record.

5. CERTIFIED DOCUMENTS OFFERED TO PROVE PRIORS NEED NOT BE ORIGNIALS

Haas v. State, No. 14-15-00445-CR, 2016 WL 1165797 (Tex.App.-Houston (14th Dist.) 2016)

In this case, the State offered copies of certified documents to prove up a prior DWI conviction. The Defendant objected that copies are not sufficient, and the documents need to be originals. He also objected that documentation offered was insufficient to tie him to the prior in the absence of fingerprints. The Court held that a certified document number of each page of the document along with a seal on the last page is all that is needed to authenticate the document. As to the other documents, the Judgment of prior conviction had the name and cause number, an order removing the interlock device which had Defendant's name, birthdate, and DL#, and a bail bond in that same cause number listed the Defendant's name, birthdate, and DL# were sufficient to prove prior for enhancement purposes.

6. PEN PACK SUFFICIENT EVEN WHEN NON-CORRESPONDING INFORMATION INCLUDED

Alberty v. State, 528 S.W.3d 702 (Tex.App. – Texarkana 2017).

In this case, the State offered a pen pack that included a fingerprint card, certified copies of judgments of conviction, and a mug shot. The dates shown on the fingerprint cards, as well as the statutes of offenses written on the fingerprint cards, were not associated with the judgments of convictions contained in the pen pack. The Defendant objected to the fingerprint cards and the fingerprint comparison evidence. In addition to the pen packs, the trial court heard evidence from several witnesses that connected the Defendant to the prior convictions. The court overruled the Defendant's objection stating that it went to "weight not admissibility." The Court of Appeals upheld the conviction and stated that the State must prove two elements beyond a reasonable doubt to establish that a defendant has been convicted of a prior offense: (1) a prior conviction exits, and (2) the defendant is linked to that conviction. No specific document or mode of proof is required to prove these two elements. The totality of the circumstances determines whether the State met its burden of proof. The Texas Court of Criminal Appeals has recognized "evidence of a certified copy of a final judgment and sentence may be a preferred and convenient means" to prove a prior conviction.

B. PRIORS FOR WHICH DEFERRED ADJUDICATION GIVEN

Brown v. State, 716 S.W.2d 939 (Tex.Crim.App. 1986). [reversed on other grounds].

Order of DFAJ is admissible in punishment phase of trial regardless of whether probation has been completed. (Applies in general, not specific to DWI prosecution).

C. USE OF DPS RECORDS TO PROVE PRIORS

1. FOR PURPOSE OF TYING DEFENDANT TO J & S

Wilmer v. State, 463 S.W.3d 194 (Tex.App.-Amarillo 2015, no pet)
Clement v. State, 461 S.W.3d 274 (Tex.App.-Eastland 2015, aff'd otter grounds),2016 WL 4938246 (Tex.Crim.App 2016)
Jordan v. State, No. 02-12-00301-CR, 2014 WL 2922316 (Tex.App.-Fort Worth 2014, no pet).
Gibson v. State, 952 S.W.2d 569 (Tex.App.-Fort Worth 1997, no pet.).
Williams v. State, 946 S.W.2d 886 (Tex.App.-Waco 1997, no pet.).
Spaulding v. State, 896 S.W.2d 587 (Tex.App.-Houston [1st Dist.] 1995, no pet.).
Abbring v. State, 882 S.W.2d 914 (Tex.App.-Fort Worth 1994, no pet.).
Lopez v. State, 805 S.W.2d 882 (Tex.App.-Corpus Christi 1991, no pet.).

Use of DPS records to tie defendant to priors is proper.

2. DPS RECORDS ALONE WITHOUT J & S - NOT ENOUGH

Gentile v. State, 848 S.W.2d 359 (Tex.App.-Austin 1993, no pet.).

Use of DPS records alone without judgment and sentence is not sufficient to prove enhanced priors.

3. DPS RECORDS NOT EXCLUDABLE UNDER COLE

Tanner v. State, 875 S.W.2d 8 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd).

Driving records prepared by DPS do not fall under the exclusion of 803(8) (b) described in Cole v. State.

D. FAXED COPY OF JUDGMENT & SENTENCE ADMISSIBLE

Englund v. State, 907 S.W.2d 937 (Tex.App.-Houston [1st Dist.] 1995) affirmed 946 S.W.2d 64 (Tex.Crim.App. 1997).

Court held that requirements of Rules 1001 (3), 1001 (4), & 901 (a) & (b) (7) of the Texas Rules of Criminal Evidence were met when faxed judgment and sentence were offered in lieu of originals.

E. ENHANCEMENT OF FELONY DWI WITH NON-DWI PRIORS

Jones v. State, 796 S.W.2d 183 (Tex.Crim.App. 1990).
Phifer v. State, 787 S.W.2d 395 (Tex.Crim.App. 1990).
Seaton v. State, 718 S.W.2d 870 (Tex.App.-Austin 1986, no pet.).
Rawlings v. State, 602 S.W.2d 268 (Tex.Crim.App. 1980).

Felony DWI can be enhanced with non-DWI prior convictions. (Point being that if felony convictions other than those of felony DWI are used, a person convicted of felony DWI can be a "habitual" criminal.)

F. ERROR IN ENHANCEMENT PARAGRAPH NOT FATAL

1. WRONG DATE ALLEGED

Valenti v. State, 49 S.W.3d 594 (Tex.App.-Fort Worth 2001, no pet.).
Zimmerlee v. State, 777 S.W.2d 791 (Tex.App.-Beaumont 1989, no pet.).

Variance between dates in DWI enhancements as alleged and as proved not fatal absent showing that defendant was surprised, mislead, or prejudiced.

2. WRONG CASE NUMBER ALLEGED

Human v. State, 749 S.W.2d 832 (Tex.Crim.App. 1988).

In the absence of a showing that the defendant was surprised or prejudiced by discrepancy, the fact that cause number in DWI conviction alleged in felony indictment differed from that proven at trial was not fatal. In this case, it was alleged that prior had cause #F80-1197-MN when proof showed it was cause #F80-11997N.

Cole v. State, 611 S.W.2d 79 (Tex.Crim.App. 1981).

No fatal variance in enhancement paragraph that alleged prior was in cause #87954 when it was later proven that it was in fact under cause #87594.

3. WRONG STATE ALLEGED

Plessinger v. State, 536 S.W.2d 380 (Tex.Crim.App. 1976).

Where the enhancement alleged the prior was out of Texas when it was really out of Arizona, proof is sufficient in absence of a showing that the defendant was misled, prejudiced, or surprised.

4. WRONG CHARGING INSTRUMENT ALLEGED

Hall v. State, 619 S.W.2d 156 (Tex.Crim.App. 1980).

Where enhancement alleged that prior arose out of "indictment" when it in fact arose out of an "information" was held not to be a fatal variance.

G. APPEAL OF REVOKED DWI DOESN'T BAR ITS USE FOR ENHANCEMENT

State v. Camacho, 827 S.W.2d 443 (Tex.App.-San Antonio 1992, no pet.).

DWI revocation being appealed doesn't bar its use to enhance DWI to felony.

H. FELONY DWI

1. ORDER OF ENHANCEMENTS

Streff v. State, 890 S.W.2d 815 (Tex.App.-Eastland 1994, pet. ref'd).
Peck v. State, 753 S.W.2d 811 (Tex.App.-Austin 1988, pet. ref'd).

Prior DWI's convictions used to enhance case to felony need not be sequential.

2. UNDERLYING DWI PRIORS ARE ADMISSIBLE IN GUILTY/INNOCENCE STAGE

Barfield v. State, 63 S.W.3d 446 (Tex.Crim.App. 2001).
Maibauer v. State, 968 S.W.2d 502 (Tex.App.-Waco 1998, pet. ref'd).
Will v. State, 794 S.W.2d 948 (Tex.App.-Houston [1st Dist.] 1990, pet. ref'd).
Addington v. State, 730 S.W.2d 788, 789-90 (Tex.App.-Texarkana, pet. ref'd).
Freeman v. State, 733 S.W.2d 662, 663-64 (Tex.App.-Dallas 1987, pet. ref'd).
State v. Wheeler, 790 S.W.2d 415 (Tex.App.-Amarillo 1990, no pet.).

Defendant's prior DWI convictions were jurisdictional elements of the offense of felony DWI. Thus, those convictions were properly part of state's proof at guilt stage of trial.

3. DEFENDANT'S AGREEMENT TO STIPULATE TO PRIORS DOES PRECLUDE THEIR BEING ADMITTED

Hernandez v. State, 109 S.W.3d 491 (Tex.Crim.App. 2003).
Smith v. State, 12 S.W.3d 149 (Tex.App.-EI Paso 2000, pet. ref'd).
Tamez v. State, 11 S.W.3d 198 (Tex.Crim.App.2000).

If a defendant stipulates to two prior convictions, the State may read the indictment at the beginning of the trial mentioning the two prior convictions but may not give any evidence of them during trial. Also, if

stipulated that there are two prior DWIs, evidence of more than two DWIs may not be mentioned during trial.

Robles v. State, 85 S.W.3d 211 (Tex.Crim.App. 2002).

Where the defendant agrees to stipulate to priors, the State can't offer those priors into evidence. The Court points out that details contained in the priors can be prejudicial to the defendant.

4. STIPULATION SHOULD BE ADMITTED INTO EVIDENCE

Hollen v. State, 117 S.W.3d 798 (Tex.Crim.App. 2003).
Hernandez v. State, 109 S.W.3d 491 (Tex.Crim.App. 2003).
State v. McGuffey, 69 S.W.3d 654 (Tex.App.-Tyler 2002, no pet.).
Orona v. State, 52 S.W.3d 242 (Tex.App.-EI Paso 2001, no pet.).

The proper procedure, under *Tamez*, is for the stipulation to be offered into evidence and published to the jury.

5. TWO PRIORS THAT ARISE OUT OF A SINGLE CRIMINAL ACT MAY BE USED TO ENHANCE TO A FELONY

Gibson v. State, 995 S.W.2d 693 (Tex.Crim.App. 1999).

Two previous convictions for manslaughter that were based on two deaths arising out of a single act of driving while intoxicated could be used to enhance a new charge of driving while intoxicated up to a felony charge of driving while intoxicated.

6. JUDGE HAS NO AUTHORITY TO FIND PRIOR CONVICTION TRUE WHEN ISSUE NOT SUBMITTED TO JURY

Martin v. State, 84 S.W.3d 267 (Tex.App.-Beaumont 2002, pet ref'd).

In this case the defendant was tried for Intoxication Manslaughter, and the jury was given a lesser included instruction for DWI. The jury found the defendant guilty of the lesser charge, and the trial court found the defendant had two prior DWIs and found him guilty of Felony DWI. The Court reversed the conviction, holding that there is no support for the argument that the trial court was permitted to assume the role of factfinder on the issue of the two prior convictions. The Court held that the prior convictions are elements and must be included in the jury charge and found to be true before a jury may find a defendant guilty of the offense of Felony DWI.

7. STIPULATING TO PRIORS WAIVES 10 YEAR OBJECTION

Gordon v. State, 161 S.W.3d 188 (Tex.App.-Texarkana 2005, no pet.).
Smith v. State, 158 S.W.3d 463 (Tex.Crim.App.2005).

This was a case where the defendant agreed to stipulate to two prior convictions in a felony DWI trial. He later challenged the conviction on appeal on the basis that one of the priors was too remote under the current rule for calculating such priors as has been articulated in the Getts case. The Court of Criminal Appeals upheld the conviction and the use of the remote prior stating that the defendant waived appellate challenge

to remoteness of the "prior conviction used as predicate conviction for felony sentencing by confessing such prior conviction by stipulation."

8. JURY INSTRUCTION MUST ADDRESS THE STIPULATION

Martin v. State, 200 S.W.3d 635, (Tex.Crim.App. 2006).

This is a felony DWI case that focused on alleged error in the jury instructions regarding failure to address the defendant's stipulation to his priors. This is a great opinion for those who have any doubts about the rules regarding the acceptance of such stipulations and how the priors may be addressed during the trial. In part, the Court reaffirmed that: when a defendant offers to stipulate to jurisdictional priors in a felony DWI case, the State may (but is not required) to read the entire indictment, including the two jurisdictional allegations (but only those two) in arraigning the defendant in the presence of the jury; both the State and the defense may voir dire the jury concerning the range of punishment for both a felony and misdemeanor DWI; the jury need not be informed of the particulars of the prior convictions in reading the indictment, voir dire, opening or closing arguments or in the jury charge itself," a defendant's stipulation to the two prior DWIs, being in the nature of a judicial admission, has the legal effect of removing the jurisdictional element from contention; a defendant may not offer evidence or argument in opposition to his stipulation; during the trial, the jury may be informed of the stipulation and any written stipulation may be offered into evidence before the jury, but the evidence is sufficient to support a defendant's conviction even if the stipulation is not given or read to the jury; in a bench trial, the guilt and punishment stages are not bifurcated, so the State is not required to offer the stipulation during the initial portion of the hearing, even if the proceeding is improperly bifurcated.

The new requirements addressed by the Court are that:

1. *The jury charge must include some reference to the jurisdictional element of two prior DWI convictions in a felony DWI trial;*
2. *The jury charge must include some reference to the defendant's stipulation and its legal effect of establishing the jurisdictional element.*
3. *Any error in failing to include in the jury charge some reference to the jurisdictional element and the stipulation is analyzed under Almanza.*

In this case, the charge failed to do 1 thru 3, but Court found error to be harmless.

9. DEFENDANT WHO STIPULATES TO PRIORS ON CONDITION THEY NOT BE MENTIONED WAIVES ABILITY TO COMPLAIN THEY WERE NOT PROVED

Bryant v. State, 187 S.W.3d 397 (Tex.Crim.App.2005).

In this case, the defendant stipulated on the condition that the State not mention or offer evidence of the priors. He then complained on appeal that the priors, elements in the case, were not proven. The Court held that by stipulating to two prior convictions for DWI, the defendant waived any right to contest the absence of proof on stipulated element in prosecution for felony DWI; he could not argue that the State failed to prove its case on an element to which he had stipulated.

10. PROPER TO USE FEDERAL DWI CONVICTIONS FOR ENHANCEMENT

Bell v. State, 201 S.W.3d 708 (Tex.Crim.App. 2006).

Defendant's two prior convictions in federal court, under federal Assimilative Crimes Act (ACA), for driving while intoxicated (DWI) were properly used to enhance defendant's state conviction of DWI to third degree felony; federal convictions under ACA were convictions for offenses under Texas law.

11. DATES OF PRIOR DWI'S ARE NOT ELEMENTS OF FELONY DWI

Tietz v. State, 256 S.W.3d 377 (Tex.App.-San Antonio 2008, pet. ref'd).

The defendant tried to attack the use of the underlying DWI's for enhancement by arguing that the enhancement law that was in effect at the time the priors were committed (ten-year rule), as opposed to the enhancement law in effect at the time of the primary offense (no ten-year rule), should be applied. This argument was rejected, and the court reiterates that the exact dates of prior convictions used for enhancement are not elements of the primary DWI offense.
See also: *Vanderhorst v. State, 52 S.W.3d 237 (Tex.App.-Eastland 2001, no pet.).*
In re State ex rel. Hilbig, 985 S.W.2d 189 (Tex.App.-San Antonio 1998, no pet.).

12. JURY INSTRUCTION NEED NOT REFER TO PARTICULARS OF THOSE PRIORS

Freeman v. State, 413 S.W.3d 198 (Tex.App.-Houston [14th Dist] 2013). Habeas corpus granted by Ex Parte Freeman, No. WR-76787-02, 2014 WL 1871649 (Tex.Crim.App. 2014).

The jury charge in this case correctly stated the law applicable to the case by requiring the jury to find beyond a reasonable doubt that appellant "was twice convicted of an offense related to the operating of a motor vehicle while intoxicated". The charge stated that the phrase "offenses relating to operating a motor vehicle while intoxicated" included DWI offenses. No greater specificity is required as nothing in the law requires that the jury be informed of the particulars of the prior convictions in the jury charge itself.

13. UNDERLYING DWI'S NEED NOT OCCUR BEFORE REP AND HABITUAL COUNTS

Medrano v. State, No. 02-12-00450-CR, 2013 WL 6198841 (Tex.App.-Fort Worth 2013, pdr ref'd).

The convictions alleged and relied upon to raise a DWI to a felony offense need not have occurred before the offenses or convictions used to enhance Defendant's sentence in rep and habitual counts.

14. IF UNDERLYING PRIOR FOUND INVALID ON APPEAL, REMEDY IS TO MODIFY JUDGMENT TO REFLECT MISDEMEANOR CONVICTION

Gaddy v. State, 433 S.W.3d 128 (Tex.App.-Fort Worth 2014, pdr ref'd).

At the Court of Appeals level after finding one of the necessary underlying DWI priors was invalid, the Court of Appeals rendered a judgment of acquittal. This was appealed and reversed by the Court of Criminal Appeals which held that they should reconsider in light of its holding in Bowen v. State which stated that a proper remedy other than acquittal would be to remand case to Trial Court for modification. On remand the Court of Appeals found that in convicting the Defendant of Felony DWI, the jury must have also found

sufficient evidence to convict of misdemeanor DWI and therefore remanded the case back to Trial Court for punishment hearing on the misdemeanor DWI charge.

I. LIMITS ON USE OF DWI PRIORS FOR ENHANCEMENT

1. PRIOR FELONY DWI MAY BE USED TO ENHANCE FELONY UNDER PENAL CODE SECTION 12.42

Maibauer v. State, 968 S.W.2d 502 (Tex.App.-Waco 1998, pet. ref'd).

The State can use a prior felony DWI conviction under Penal Code Section 12.42 for enhancement purposes, provided that the prior conviction is not also used to elevate the alleged offense to a felony.

2. SAME PRIOR CANNOT BE USED TWICE

Ex parte Clay, No. WR-WR-87,763-01
Rodriguez v. State, 31 S.W.3d 359 (Tex.App.-San Antonio 2000, pet. ref'd).
Phillips v. State, 964 S.W.2d 735 (Tex.App.-Waco 1998, pet. granted in part) 992 S.W.2d 491(Tex.Crim.App. 1999) 4 S.W.3d 122 (Tex.App.-Waco 1999).
Rivera v. State, 957 S.W.2d 636 (Tex.App.-Corpus Christi 1997, pet. ref'd).

The same prior DWI convictions may not be used both to enhance the underlying DWI charge and to prove habitual felony offender status.

3. WHAT IS NOT "USING A PRIOR TWICE"

Perez v. State, 124 S.W.3d 214 (Tex.App.-Fort Worth 2002, no pet.)
Orona v. State, 52 S.W.3d 242 (Tex.App.-EI Paso 2001, no pet.)
Carroll v. State, 51 S.W.3d 797 (Tex.App.-Houston [1st Dist.] 2001, pet. ref'd).

A misdemeanor DWI conviction was used to elevate the DWI jurisdictionally to a Felony and the Felony DWI was enhanced with other Felony DWIs to make the defendant a habitual offender. One of the Felony DWIs relied upon the same misdemeanor conviction described above. Defendant argued that constituted using the same prior twice. This argument was rejected by the Court which held that the State did not use the misdemeanor offense twice because it did not use it for punishment enhancement purposes but rather only jurisdictional purposes. It based this holding on the fact that no independent proof of the misdemeanor's existence is required under 12.42(d) of the Texas Penal Code.

4. PROBATED DWI CONVICTIONS UNDER 6701L MAY BE USED TO ENHANCE NEW DWI OFFENSES

Ex Parte Serrato, 3 S.W.3d 41 (Tex.Crim.App. 1999).

The Court points out that the relevant penalty enhancement provision [49.09(b)] provides when it is shown on the trial of an offense under Section 49.04 that the person has previously been convicted two times of an offense relating to the "operating of a motor vehicle while intoxicated," the offense is a felony of the third degree. 49.09(c) specifically defines the term "offense relating to the operating of a motor vehicle" to include an offense under Article 6701/ -1Revised Statutes, as that law existed before September 1, 1994. 67011 stated: **"For purposes of this article, a conviction for an offense that occurs on or after January 1, 1984, is a final conviction, whether or not the sentence for the conviction is probated."** So, by

incorporating the prior DWI statute, as that law existed before enactment of the new statute, the Legislature declared its intent to continue the status quo, which included permitting probated DWI convictions for enhancement if the offense occurred after January 1, 1984.

5. USE O F OUT O F STATE PRIORS WITH DIFFERENT DEFINITIONS OF INTOXICATION/IMPAIRMENT

State v. Christenson, No. 05-10-00940-CR, 2011 WL 2176656 (Tex.App.-Dallas 2011, pet. ref'd).

The State used a Colorado prior to enhance the Defendant's DWI charge. The Colorado charge was called DWAI (Driving While Ability Impaired). Defendant argued this was improper because the DWAI did not require "intoxication" but rather a lesser degree of "impairment". The DWAI statute said impairment occurs when the consumption of alcohol "affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically ...to exercise clear judgment, sufficient control, or due care in the safe operation of a vehicle." The Defendant pointed out that Colorado had a separate statute prohibiting DUI (Driving Under the Influence) which further required the person's impairment render the person "substantially incapable" of safe operation of a vehicle. In rejecting this argument, the Court held that Colorado DWAI met the requirement of Texas Penal Code Section 49.09(b)(2) and observed that the fact that Colorado recognizes different degrees of impairment through its DUI and DWAI laws does not mean a person "impaired" for the purposes of the DWAI statute is not "intoxicated" for the purpose of the Texas Penal Code. The Court found the definition of impairment under the DWAI statute to be almost identical to the definition of "Intoxication" under Texas law.

Johnson v. State, No. 04-13-00509-CR, 2014 WL 3747256 (Tex.App.-San Antonio 2014, no pet).

New York prior was used to enhance Defendant to felony DWI. The Defendant's motion to quash the indictment for use of the New York prior was denied and he appealed. The Defendant argued that the New York statute under which the State was trying to enhance his charge was not a law that prohibits their operation of a motor vehicle while intoxicated. The New York law was called DWAI (Driving While Ability Impaired) which is committed when a person's ability to operate a motor vehicle is impaired by consumption of alcohol. There was a separate statute which said DWI is committed if a person operates a motor vehicle in an intoxicated condition. Under the DWAI statute, a person is "impaired" if the consumption of alcohol has actually impaired, to any extent, the physical and mental abilities which one is expected to possess in order to operate a motor vehicle as a reasonable and prudent driver. The issue before the Court was therefore whether the definition of "impairment" under the New York law meets the definition of "intoxication" under Texas law. The Court of Appeals found that it did.

6. AN OUT-OF-STATE CONVICTION MUST BE A FINAL CONVICTION UNDER TEXAS LAW

Ex parte Pue, No. WR-85, 447-01 (Tex.Crim.App. 2018).

The trial court used a prior conviction from California to enhance the Defendant's sentence under CCP 12.42. However, the Court of Criminal Appeals said this was error because the Defendant was on probation for the California offense, and it was not a final conviction under Texas Law. Texas law requires that a defendant be "finally convicted" of the alleged prior offense before punishment can be enhanced. It is well established that a conviction (in Texas) is not final for enhancement purposes where the imposition of sentence has been suspended and probation granted. Furthermore, a successfully served probation is not available for enhancement purposes. However, a probated sentence can turn into a final conviction if probation is revoked.

7. PUNISHMENT - STACKING SENTENCES

Mireles v. State, 444 S.W.3d 679 (Tex.App.-Houston [14th Dist.] 2014, pet ref'd).

A Defendant pled guilty to a jury on two cases charging him with Intoxication Manslaughter and Intoxication Assault and the jury assessed his punishment as four years in prison on the first charge and seven years probation on the second charge. The Judge stacked the sentences so that his probated sentence would not begin until he had served his prison sentence. The Defense challenged the Judge's stacking decision. The opinion discusses a potential conflict between the application of 42.04 CCP and 3.03 of the Texas Penal Code but ultimately finds the Judge had the authority to order the stacked sentences.

J. OPEN CONTAINER

1. SUFFICIENT PROOF OF

Walters v. State, 757 S.W.2d 41 (Tex.App.-Houston [14th Dist.] 1988, no pet.).

Half full can of beer found lodged between windshield and dash immediately in front of steering wheel, defendant alone in car, no evidence that can smelled or tasted of alcohol = sufficient.

Troff v. State, 882 S.W.2d 905 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd).

Not required to prove defendant held beer while driving.

2. EFFECT OF IMPROPER READING OF OPEN CONTAINER ENHANCEMENT IN GUILT/INNOCENCE PHASE

Doneburg v. State, 44 S.W.3d 651 (Tex.App.-Fort Worth 2001, pet. ref'd.).

The State erroneously read the open container enhancement to the jury when it arraigned the defendant at the beginning of trial. That this was a mistake is conceded by all. The defense requested that the "open container" paragraph be included as an element that the State had to prove in the guilt innocence jury instructions. This request was denied by the trial court and the Court affirmed the conviction explaining that when the State alleges evidentiary matters that are not necessary to be proved under Article 21.03 of the CCP, the allegations are considered surplusage.

K. PROPER TO ALLEGE DATE PROBATION GRANTED AS OPPOSED TO DATE PROBATION REVOKED

Ogaz v. State, No. 2-03-419-CR, 2005 WL 2898139 (Tex.App.-Fort Worth 2005, no pet.) (not designated for publication).

Defendant argued that the indictments should have alleged the date on which his probation in the prior cases was revoked and should have relied on those judgments revoking probation, not the older judgments of conviction. Even though his probation was revoked, the underlying convictions were final for enhancement purposes, so the indictment referred to the proper dates and judgments.

L. DEFECT IN WORDING OF JUDGMENT/PROBATION ORDER = BAD PRIOR

1. YES

Mosqueda v. State, 936 S.W.2d 714 (Tex.App.-Fort Worth 1996, no pet.).

This was a felony DWI case where there was a defect in the paperwork supporting one of the underlying misdemeanor DWI convictions. The order of probation contained the language "it is therefore considered, ordered, and adjudged, that the verdict and finding of guilty herein shall not be final. that no judgment be rendered thereon, and that the defendant be, and is hereby placed on probation. If you see the underlined wording on the probation order of your DWI prior, it violates 42.01 of the Texas Code of Criminal Procedure in that it does not show that the defendant was "adjudged to be guilty" as is required. The result in this case was that the defendant was ordered acquitted. **NOTE: IF YOU SPOT THIS PROBLEM EARLY YOU CAN PROBABLY SAVE THE PRIOR BY SEEKING A NUNC PRO TUNG ORDER FROM THE JUDGE OF THE COURT OUT OF WHICH THE PRIOR WAS ISSUED.**

2. NO

Gonzales v. State, 309 S.W.3d 48 (Tex.Crim.App. 2010).
Williamson v. State, 46 S.W.3d 463 (Tex.App.-Dallas 2001, no pet.).
Rizo v. State, 963 S.W.2d 137 (Tex.App.-Eastland 1998, no pet.).

3. NOT A PROBLEM FOR UNDERLYING PRIORS

State v. Vasguez, 140 S.W.3d 758 (Tex.App.-Houston [14th Dist.] 2004, no pet.).
State v. Duke, 59 S.W.3d 789 (Tex.App.-Fort Worth 2001, pet. ref'd).

This was a State's appeal of an order setting aside an indictment for Felony DWI. The State relied upon two Felony DWI priors to raise the new charge to a felony. The defense attacked the felony enhancement pointing out that priors that had been relied upon to raise those cases to a felony were faulty. The specific problem with the underlying priors, both out of Dallas, was that the judgments contained language stating the priors "shall not be final." So in a "domino" theory, the defendant argues that if the underlying priors were infirm, then the resulting felony convictions used in the actual enhancement are infirm as well. The Court of Appeals, even granting that the underlying priors were not final, distinguishes this case from *Mosqueda,* by holding that even if the underlying Dallas priors are void, there is no reason to say that the felony DWI's could not be reformed to reflect misdemeanor convictions for DWI and the status of the underlying priors being misdemeanors or felonies is immaterial. The trial Court's order setting aside the indictment was reversed.

4. UNSIGNED JUDGMENT CAN BE USED TO PROVE ENHANCEMENT

Gallardo v. State, No. 07-09-0064-CR,62010 WL 99011 (Tex.App.-Amarillo 2010, no pet.) (not designated for publication).

The validity of a judgment of conviction and the ability to use it to enhance a DWI to a felony is not affected by the failure of the trial judge to sign the judgment. Court cited, Mulder v. State, 707 S.W.2d 908 (Tex.Crim.App. 1986).

M. ERRONEOUS DISMISSAL OF PROBATION BY THE COURT WON'T AFFECT FINALITY OF THE CONVICTION

Chughtai v. State, No. 05-15-01275-CR, 2016 WL 4010833 (Tex. App. – Dallas 2016)
Anderson v. State, 110 S.W.3d 98 (Tex.App.-Dallas 2003, reh. overruled).
Jordy v. State, 969 S.W.2d 528 (Tex.App.-Fort Worth 1998, no pet.).
Mahaffey v. State, 937 S.W.2d 51 (Tex.App.-Houston [1st Dist], 1996, no pet.).

The problem here was not with the face of the judgment but rather with a subsequent order by the sentencing court which issued an order that discharged the defendant from probation, set aside the verdict, dismissed the complaint, and released him from all penalties and disabilities resulting from commission of the offense. The defense argued such an order should prevent the State from offering said prior into evidence as a final conviction. The Court of Appeals rejects that argument pointing out that said order was purportedly made under a section of the code that was at the time of the order repealed. (The section referred to is now Article 42. 12 Section 20 of the CCP which then, as now, does not apply to DWI cases.) Since the order was issued without authority to do so, its order is void and has no effect on the finality of the defendant's conviction.

N. MANDATORY JAIL TIME AS CONDITION OF PROBATION-REPEAT OFFENDERS

State v. Lucero, 979 S.W.2d 400 (Tex.App.-Amarillo 1998, no pet.).

Trial court erred when it probated defendant convicted of DWI who was proven to be a repeat offender [49.09(a)] by not ordering a minimum of three days in jail as a condition of probation.

O. IF YOU ALLEGE MORE PRIOR DWI'S THAN YOU NEED, MUST YOU PROVE THEM ALL?

1. YES

Jimenez v. State, 981 S.W.2d 393 (Tex.App.-San Antonio 1998, pet.. ref'd).

In this felony DWI case, the State alleged three prior DWI's in the charging instrument and then the court charged the jury that if it found any two of three to have been proved, it was sufficient. Court held that it was error in that the state. by alleging three priors had increased its burden of proof and thus had to prove all three priors. Error was found to be harmless in this case. **NOTE: ANOTHER CONTROVERSIAL OPINION THAT SEEMS TO DEFY LOGIC AND PRECEDENT.**

2. NO

Biederman v. State, 724 S.W.2d 436 (Tex.App.-Eastland 1987, pet. ref'd).
Read v. State, 955 S.W.2d 435 (Tex.App.-Fort Worth 1997, pet. ref'd).
Wesley v. State, 997 S.W.2d 874 (Tex.App.-Waco 1999, no pet.).
Washington v. State, 350 S.W.2d 924 (Tex.Crim.App. 1961).

The state may allege as many prior DWI's as it wants and still need not prove any more than two of them.

P. PROOF THAT PRIOR DWI IS WITHIN 10 YEARS OF OFFENSE DATE

1. ONLY ONE OF THE TWO PRIORS MUST BE WITHIN 10 YEARS (FOR DWI OFFENSES PRIOR TO 9-1-01)

Smith v. State, 1 S.W.3d 261 (Tex.App.-Texarkana 1999, pet ref'd).

Held that State need only prove that one of the defendant's two prior DWI convictions was for an offense committed within 10 years of new offense date. The Court further admits it made a mistake in the dicta of its opinion in Renshaw v. State 981 S.W.2d 464 (Tex.App. - Texarkana 1998). "The State correctly points out that dicta in the Renshaw case is in error in stating that the State would have to prove two prior DWI convictions within the same ten-year period."

2. PROOF OF 10 YEARS NOT NECESSARY

Summers v. State, 172 S.W.3d 102 (Tex.App.-Texarkana 2005, no pet.)
St. Clair v. State, 101 S.W.3d 737 (Tex.App.-Houston [1st Dist.] 2003, pet. ref'd).
Weaver v. State, 87 S.W.3d 557 (Tex.Crim.App. 2002).

Priors listed in enhancement paragraphs were too remote (no intervening conviction to bring it under 10-year rule was alleged). Issue raised is whether the State must present evidence of intervening conviction to the jury? Is 49.09 (e) an element of the offense of Felony DWI? Court of Appeals said it is. Court of Criminal Appeals in this opinion says it is not an element and the State does not need to offer evidence of that conviction to the jury, but rather just needs to submit the proof to the trial court which it did in this case.

Bower v. State, 77 S.W.3d 514 (Tex.App.-Houston [1st Dist.] 2002, pet ref'd).

This was a felony DWI trial where the Defendant stipulated to his prior DWI's and pled true to the enhancements. The enhancements did not contain the offense dates of the priors and no evidence of the offense dates was presented by the State during the guilt/innocence phase of the trial. The defendant argued this was a failure of proof and cited Renshaw and Smith. This Court finds that the reasoning of those two opinions is wrong in that the accusation of two priors is all that is needed to give the Court jurisdiction. It distinguishes 12.42(d) from 49.09(b). It also points out that if the State's priors were stale, the proper remedy would have been to move to quash the indictment, object to the admission of the priors, or ask for a lesser charge of misdemeanor DWI. ******It would seem prudent to go ahead and mention at least one of the offense dates in the body of our stipulations in felony DWI cases.***

3. THE 10 YEAR RULE FOR OFFENSES FROM 9-01-01 TO 8-31-05

Getts v. State, 155 S.W.3d 153 (Tex.Crim.App.2005).

This case tells us how to apply the 2001 amendment to the DWI statute to the question of how to calculate in prior DWI convictions to bump the charge up to a felony under 49.09 of the Texas Penal Code. The Court holds that prior DWI convictions are available for enhancement so long as they are within ten years of each other, calculating that time period by using the closest possible dates, whether that be the offense date, date of sentencing, or date of release from sentence, including probation or parole.

For example, if a defendant has a 2005 DWI arrest and his record includes two priors from 1987 and 1993, this case should be filed as a felony DWI because the two prior DWI offenses are within ten years of each other-even though more than ten years' time has lapsed since the priors and the current offense.

4. THE 10 YEAR RULE'S DEMISE DOES NOT VIOLATE EX POST FACTO LAW

Effective September 1, 2005, the legislature repealed subsections (d) and (e) of Section 49.09 of the Texas Penal Code. This means that there are no age limitations on the use of DWI priors to enhance to Class A or Felony DWIs.

Crocker v. State, 260 S.W.3d 589 (Tex.App.-Tyler 2008, no pet.).

This appeal was based on the argument that the statute that did away with the ten-year rule was a violation of the ex post facto law. In rejecting that argument that court held that the previous version of the law that restricted the use of priors was "not an explicit guarantee that those convictions could not be used in the future, but only a restriction on what prior convictions could be used to enhance an offense at that time." As a result, changing the statute did not increase defendant's punishment for his prior conviction and did not violate his right of protection against ex post facto laws.

Q. JUDGE MAY NOT TERMINATE OR SET ASIDE DWI PROBATION EARLY

In re State ex rel. Hilbig, 985 S.W.2d 189 (Tex.App.-San Antonio, 1998, no pet.).

Judge had no authority to terminate and set aside felony DWI probations early - writ of prohibition granted by the Court of Appeals.

R. INTRODUCED JUDGMENT AND SENTENCE PRESUMED PROPER

1. NO WAIVER OF RIGHT TO JURY TRIAL

Battle v. State, 989 S.W.2d 840 (Tex.App.-Texarkana 1999, no pet.).

Where State introduced copies of judgments which were silent as to waiver of a jury trial, the Court held that the priors were properly admitted as the "regularity of the conviction was presumed unless... (the defendant) affirmatively showed that he did not waive his right to a jury trial.

2. IN THE ABSENCE OF JUVENILE TRANSFER ORDER

Johnson v. State, 725 S.W.2d 245 (Tex.Crim.App. 1987).

State offered a proper judgment and sentence, and the defendant challenged the lack of documentation of a proper transfer from juvenile giving district court jurisdiction. The defendant fails to offer any evidence that there was no transfer. The Court spells out the rule as regards priors as follows: "Once the State properly introduced a judgment and sentence and identifies appellant with them, we must presume regularity in the judgments. The burden then shifts to the defendant, who must make an affirmative showing of any defect in the judgment, whether that be to show no waiver of indictment or no transfer order."

S. MISDEMEANOR PRIORS ARE VALID WHEN DEFENDANT WAIVES JURY WITHOUT AN ATTORNEY

Redfearn v. State, 26 S.W.3d 729 (Tex.App.-Fort Worth 2000, no pet.).

Defendant tried to quash enhancement paragraphs because he had not been appointed an attorney prior to waiving the right to a jury. Court points out that under 1.13(c) of Texas Code of Criminal Procedure that right applies only to felony pleas.

See Also: *Moore v. State, 916 S.W. 2d 696 (Tex.App.-Beaumont 1996, no pet.).*

T. DWI SENTENCE MUST INCLUDE JAIL TIME

State v. Cooley, 401 S.W.3d 748 (Tex.App.-Houston [14th Dist.] 2013, no pet.).

This case involves a Defendant who pled open to the Court on a DWI 2nd (Class A) where the Judge assessed punishment at $2,000 fine with no jail time. The State objected to this illegal sentence. The Court holds that a conviction for a second DWI must be assessed a minimum of 30 days confinement in accordance with 49.09(a) of the Texas Penal Code and vacates the sentence and remands the case for resentencing.

State v. Magee, 29 S.W.3d 639 (Tex.App.-Houston [1st Dist.] 2000, pet ref'd).

Judgment reversed where judge sentenced Defendant charged with first offense DWI to pay a $250 fine with no confinement in jail. Statute clearly requires a minimum 72 hours confinement in jail.

U. ILLEGAL SENTENCE ENFORCEABLE IF DEFENDANT ASKED FOR IT OR AGREED TO IT

Mapes v. State, 187 S.W.3d 655 (Tex.App.-Houston [14th Dist.] 2006, pet. ref'd).

Since defendant had enjoyed the benefit of a lesser sentence under his prior conviction pursuant to plea agreement, he was estopped from asserting on appeal that because one of his prior driving while intoxicated (DWI) convictions was void for imposition of a sentence that was less than the minimum sentence required under the statutory range, the Trial Court was precluded from finding defendant guilty of current felony DWI charges.

Ex Parte Shoe, 137 S.W.3d 100 (Tex.App.-Fort Worth 2004), petition for discretionary review granted (Nov 10, 2004), petition for discretionary review dismissed (Oct 10, 2007).

Though the defendant's plea bargain which sentenced him to jail but did not assess any fine was illegal, he could not later complain about a sentence that he requested, accepted the benefit from when he entered in the plea agreement.

V. EXPUNCTION WILL NOT ALWAYS RENDER UNDERLYING FACTS OF CASE INADMISSIBLE IN PUNISHMENT PHASE

Doty v. State, No. 03-03-00668-CR, 2005 WL 1240697 (Tex.App.-Austin May 26, 2005) (mem.op., Not designated for publication), pet. dism'd, improvidently granted, No. PD-1159-05, 2007 WL 841112 (Tex.Crim.App.2007) (not designated for publication).

In the punishment phase of an Intoxication Manslaughter case, the evidence of Defendant's bad driving, appearance, admission of drinking, and result of FSTs was held to be admissible with the fact that the Defendant was arrested was held to be inadmissible. This was the case even though the DWI case in question resulted in an acquittal and the case was expunged. The officer said his testimony was based on his memory and not on the records.

W. FELONY DWI CAN BE THE UNDERLYING FELONY IN A "FELONY MURDER" CHARGE

Alami v. State, 333 S.W.3d 881 (Tex.App.-Fort Worth 2011, reh. overruled).

Felony DWI can serve as the underlying felony in a felony-murder prosecution.

Jones v. State, No. 14-06-00879-CR, 2008 WL 2579897 (Tex.App.-Houston [14 Dist.] 2008, pet. filed) (not designated for publication).

In upholding this felony murder conviction, the court rejected all of the defendant's points. The Court found that the underlying DWI was properly considered as a felony, that there was no need to allege a culpable mental state, and that felony murder and intoxication manslaughter were not in pari materia.

Mendoza v. State, No. 08-04-00369-CR, 2006 WL 2328508 (Tex.App.-EI Paso, 2006, pet. ref'd) (not designated for publication).

In affirming this felony murder conviction, the Court held that since felony DWI is not a lesser- included offense of manslaughter, felony DWI may be the underlying felony for the offense of felony murder. It further held that when felony DWI is the underlying felony, the State is not required to prove a culpable mental state as felony DWI requires no such proof.

Strickland v. State, 193 S.W.3d 662 (Tex.App.-Fort Worth 2006, pet. ref'd).

This case involved an offender who in the course of committing a felony DWI drove the wrong way down a highway and crashed into an oncoming vehicle, killing the front seat passenger. The defense argued that the proper charge was "intoxication manslaughter" and that the State was barred from proceeding by the doctrine of "pari materia." In rejecting that argument, the Court of Appeals found that the felony murder statute and intoxication manslaughter required different elements of proof Penalties for felony murder and intoxication manslaughter were different; although both statutes served general purpose of imposing criminal responsibility for death and preventing homicide, their objectives were not so closely related as to justify interpreting statutes together, and statutes were not enacted with common purpose.

Lomax v. State, 233 S.W.3d 302 (Tex.Crim.App.2007), habeas relief denied, 2008 WL 5085653 (Tex.App.-Houston [14th Dist.] 2008, pet. ref'd).

This case involved an offender who in the course of committing felony DWI was speeding, weaving in and out of traffic, tailgating and engaging in aggressive driving which resulted in a crash and a death. The defense raised a number of arguments against the state's decision to charge the defendant with felony murder. The issues raised were the indictment failed to allege a mental state, that felony driving while intoxicated merges with felony murder, insufficient evidence he committed an "act clearly dangerous to human life, "---all of which were rejected by the Court of Criminal Appeals.

Hollin v. State, 227 S.W.3d 117 (Tex.App.-Houston [1st Dist.] 2006, pet. ref'd).

This case involved a charge of felony murder where the underlying felony was a felony DWI. The felony murder and intoxication manslaughter statutes were not in pari materia, and accordingly, defendant's conduct, namely killing someone with his vehicle while he was driving under the influence, was not exclusively governed by the offense of intoxication manslaughter, and therefore it was within State's discretion to charge defendant with felony murder, penalties for felony murder and intoxication manslaughter were different, the two statutes were not contained in the same legislative acts, intoxication manslaughter and felony murder did not require same elements of proof, and the statutes were not intended to achieve same purpose.

X. DWI W/CHILD CAN BE THE UNDERLYING FELONY IN A "FELONY MURDER" CHARGE

Bigon v. State, 252 S.W.3d 360 (Tex.Crim.App.2008).

The defendant was convicted of felony murder, intoxication manslaughter and manslaughter. The Court dismissed the intoxication manslaughter and manslaughter as it found they were the same as the felony murder for double jeopardy purposes. The Court rejects the argument that the charge could not stand because the State failed to allege or prove a mental state. It further rejected the argument that the act clearly dangerous was not done in furtherance of the underlying felony of DWI w/Child. Court of Criminal Appeals affirmed.

Y. INVOLUNTARY MANSLAUGHTER PRIOR MAY NOT BE USED TO ENHANCE A DWI TO A FELONY

Ex Parte Roemer, 215 S.W.3d 887 (Tex.Crim.App. 2007).

Defendant's prior conviction for involuntary manslaughter which was an "offense relating to the operating of a motor vehicle while intoxicated," could be used to enhance his offense of driving while intoxicated (DWI) from a Class B misdemeanor to a Class A misdemeanor, but could not, by itself, be used to enhance his DWI offense to a felony; to raise DWI to a felony. The statute required a prior conviction for intoxication manslaughter, not involuntary manslaughter as was used in this case. Louviere v. State, abrogated by this opinion.

Z. IN DWI 2nd TRIAL PRIOR NOT ADMISSIBLE IN GUILT INNOCENSE PHASE OF CASE

Oliva v, State, No. PD-0398-17, 2018 Tex. Crim. App. LEXIS 139

The Court of Criminal Appeals reversed the decision in *Oliva* (see below). The existence of a prior conviction in a DWI 2nd case is a punishment issue. This opinion ends the split of authority as to when the jury hears about the prior offense.

Oliva v. State, 525 S.W.3d 286 (Tex. App. – Houston [14th District, 2017]

This case involved a DWI charged as a 2nd offense, class A misdemeanor. The Court reversed and remanded the conviction to the trial court to reform the sentence to reflect a class B misdemeanor DWI offense because the State failed to present proof that the defendant had been previously convicted of a DWI during the guilt

–innocent phase. In this case, the State presented evidence of the prior DWI during the punishment phase. That was not sufficient. The prior offense is an element of the class A offense.

Wood v. State, 260 S.W.3d 146 (Tex.App.-Houston (1st Dist) 2008)

This case involved an allegation of ineffective assistance of counsel in a DWI Misdemeanor-Rep case because he failed to object to introduction of evidence about the alleged prior. The Court of Appeals reversed the case and in doing so confirmed that the prior in a DWI Misdemeanor-Rep case is not admissible until the punishment phase of the case.

XXV. COLLATERAL ESTOPPEL/DOUBLE JEOPARDY/ELECTION

A. JUSTICE COURT FINDINGS

State v. Groves, 837 S.W.2d 103 (Tex.Crim.App. 1992).

Justice court finding that police did not have probable cause to stop vehicle will not have estoppel effect on State's subsequent DWI prosecution.

B. PROBATION REVOCATION HEARINGS

State v. Waters, No. PD-0792-17, 2018 Tex. Crim. App. LEXIS 1011

In this case, the Court was asked to revisit our precedent in Ex Parte Tarver, to determine whether that decision remained good law. More than 30 years ago, the court held that the doctrine of collateral estoppel bars the State from prosecuting an offense following a trial judge's finding of "not true" as to the commission of that same offense at a probation revocation hearing. The Court overruled Tarver. Because there was no possibility of a new conviction and punishment arising from a revocation hearing, jeopardy did not attach for any offense that was alleged as a violation of the terms of community supervision in a revocation hearing. Furthermore, for the doctrine of Collateral Estoppel to apply facts in the first proceeding (revocation hearing) must have been "necessarily decided" and "essential to the judgment." The judge's finding of "true or not true" is not a determination that is "necessary or essential" t the judgment continuing a defendant on community supervision.

Fuentes v. State, 880 S.W.2d 857 (Tex.App. - Amarillo 1994, pet. ref'd).
Ex Parte Weaver, 880 S.W.2d 855 (Tex.App.-Fort Worth 1994, no pet.).

Where new DWI is alleged in petition to revoke but waived prior to revocation hearing there is no collateral estoppel when court does not find sufficient evidence to revoke.

NOTE: HAD IT NOT BEEN WAIVED AND A NEGATIVE FINDING BEEN ENTERED AS TO DWI ALLEGATION IN THE PETITION THAT WOULD PRECLUDE FURTHER PROSECUTION OF THE DWI CHARGE UNDER EX PARTE TARVER, 725 S.W.2d 195 (TEX. CRIM. APP. 1986).

C. ALR HEARINGS---NO DOUBLE JEOPARDY

1. ALR SUSPENSIONS BASED ON BREATH TESTS

Ex Parte Tharp, 935 S.W.2d 157 (Tex.Crim.App. 1996).

In this case there was an ALR license suspension based on the defendant's having a breath test result of .10 or greater. Court held that there was no double jeopardy as the ALR disposition did not constitute "punishment."

2. ALR SUSPENSIONS BASED ON BREATH TEST REFUSALS

Ex Parte Anthony, 931 S.W.2d 664 (Tex.App.-Dallas, 1996 pet. ref'd).
Ex Parte Williamson, 924 S.W.2d 414 (Tex.App.-San Antonio 1996, pet. ref'd).
Ex Parte Vasquez, 918 S.W.2d 73 (Tex.App.-Fort Worth 1996, pet ref'd).

When the ALR suspension is based on a breath test refusal, the "same elements" *Blockburger* test is not met so there is no double jeopardy. The Court found the element that differs was that in the ALR suspension hearing, it must be proven that the defendant had an opportunity to and refused to submit to a breath test.

Johnson v. State, 920 S.W.2d 692 (Tex.App.-Houston [1st Dist.] 1996, pet. ref'd).

Court found no double jeopardy. This case involved a refusal to give a breath sample and the Court found that the Blockburger "same elements test" was not met.
Ex Parte Pee, 926 S.W.2d 615 (Tex.App.-Houston [1st Dist.] 1996, pet. ref'd).

DWI is not a lesser included offense of having license suspended.

D. ALR HEARINGS: NO COLLATERAL ESTOPPEL

Reynolds v. State, 4 S.W.3d 13 (Tex.Crim.App.1999).
Ex Parte Dunlap, 963 S.W.2d 954 (Tex.App.-Fort Worth 1998, no pet.).
State v. Anderson, 974 S.W.2d 193 (Tex.App.-San Antonio 1998, no pet.).
Ex Parte Richards, 968 S.W.2d 567 (Tex.App.-Corpus Christi 1998, pet. ref'd).

Adopts the holding and logic of *Brabson* as precedent. This case, unlike Brabson, did involve a hearing under the new "ALR" statute.

State v. Brabson, 966 S.W.2d 493(Tex.Crim.App.1998).

Based upon a finding that the district attorney and DPS are not the same parties for administrative collateral estoppel, the Court found that collateral estoppel did not preclude the district attorney from litigating the issue of probable cause after the administrative judge found that there was no probable cause for the stop. (Note: this was not a hearing under the new ALR statute.)

Ex Parte Serna, 957 S.W.2d 598 (Tex.App.-Fort Worth1997, pet. ref'd).

(After granting the State's motion for rehearing en bane, the court withdrew its May 8, 1997, opinion and judgment in which it held that collateral estoppel did prevent the State from attempting to prove a breath test that had previously been excluded during an ALR hearing and held as follows.) The State is not

barred by "collateral estoppel" from relitigating the issue of the admissibility of the breath test. "The legislature did not intend that a decision made in a civil, administrative, remedial license suspension hearing could be used to bar the State from prosecuting drunk drivers."

Ex Parte Elizabeth Ayers, 921 S.W.2d 438 (Tex.App.-Houston [1st Dist.] 1996, no pet.).

Judge at ALR hearings made finding of fact that there was no reasonable suspicion to support the stop of the defendant. In holding that there was no collateral estoppel, the court reasoned that probable cause determinations at ALR hearings are made on the basis of the information available at the time of the arrest and do not consider facts coming to light after the arrest, including the fact that accused refused to give a specimen. Therefore, there can be no issue preclusion. Court relied heavily on the *Neaves* opinion.

Holmberg v. State, 931 S.W.2d 3(Tex.App. -Houston [1st Dist.] 1996, pet. ref'd).

Same holding as in the Avers case cited above. The defense argument was that the court's reliance on Neaves as a precedent was misplaced as the new license revocation process, unlike the old one, provides for a full and fair hearing. In rejecting that argument, the court points out that the holding *in Neaves* was not dependent on the procedure, but rather on the fact that the "ultimate issue(s) of ultimate fact are, nevertheless different" between the two proceedings.

Ex Parte McFall, 939 S.W.2d 799 (Tex.App.-Fort Worth 1997, no pet.).

Even though at an ALR hearing the judge found that DPS did not prove by a preponderance of the evidence that there was a reasonable suspicion to stop the defendant and denied the petition to suspend her license, this did not bar the State on double jeopardy or collateral estoppel grounds from subsequently prosecuting the defendant for DWI.

Church v. State, 942 S.W.2d 139 (Tex.App.-Houston [1st Dist.] 1997, pet. ref'd).

ALR judge's finding that DPS did not prove defendant was operating a motor vehicle and denial of motion to suspend license did not bar prosecution of DWI based on collateral estoppel.

Todd v. State, 956 S.W.2d 777 (Tex.App.-Waco 1997, pet. ref'd).

Administrative law judge's determination of "no probable cause" in license suspension proceeding did not collaterally estop trial court from relitigating probable cause issue in criminal proceeding. Primary basis for ruling was that license suspension was not "punishment."

E. NO DOUBLE JEOPARDY BAR TO PROSECUTING DEFENDANT FOR BOTH

1. DWI & OWLS

State v. Rios, 861 S.W.2d 42 (Tex.App.-Houston [14th Dist.] 1993, pet. ref'd).

A defendant can be prosecuted for both OWLS and DWI when they arise from the same criminal episode without violating the rule against double jeopardy.

2. DWI & FSRA

State v. Marshall, 814 S.W.2d 789 (Tex.App.-Dallas 1991) pet. ref'd).

A defendant can be prosecuted for both FSRA and DWI when they arise from the same criminal episode without violating the rule against double jeopardy.

3. FELONY DWI & INTOXICATION ASSAULT

Rowe v. State, No. 05-02-01516-CR, 2004 WL 1050693 (Tex.App.-Dallas 2004, pet. ref'd) (not designated for publication).

Under the Blockburger test, defendant's claim of double jeopardy fails. Intoxication assault differs from felony DWI in that it requires a showing that defendant caused serious bodily injury to another. Felony DWI differs from intoxication assault in that it requires proof of two prior DWI convictions.

4. DWI & CHILD ENDANGERMENT

Bagby v. State, No. 2-06-052-CR, 2007 WL 704931 (Tex.App.-Fort Worth 2007, no pet.) (not designated for publication).

In determining there was no double jeopardy violation in prosecuting this defendant with both DWI and Endangering a Child, the Court found that the child endangerment charge permitted conviction under multiple theories that were not present in the driving while intoxicated charge. After applying the Blockburger test, the Court held that each charging instrument requires proof of an additional element that the other does not. Therefore, there has been no double jeopardy violation.

Ex Parte Walters. No. 2-05-290-CR, 2006 WL 1281076 (Tex.App.-Fort Worth 2006) (not designated for publication) (pet.ref'd.).

Because the offense of driving while intoxicated requires proof of an additional element -"in a public place" that the offense of endangering a child does not, it is not a lesser included offense of endangering a child, and the two offenses are not the same for double jeopardy purposes.

State v. Guzman, 182 S.W.3d 389 (Tex.App.-Austin 2005, no pet.).

Prosecution for child endangerment that was based on allegation that defendant drove while intoxicated with child under age 15 as passenger was not barred by prohibition against double jeopardy after defendant pled guilty to DWI. DWI did not require proof that defendant intentionally, knowingly, recklessly, or with criminal negligence placed child in imminent danger of death, injury or physical or mental impairment.

5. FELONY DWI & INTOXICATION MANSLAUGHTER

Ex parte Benson, 459 S.W.3d 67 (Tex.Crim.App. 2015)
Garcia v. State, No. 14-14-00387-CR, 2015 WL 2250895 (Tex.App.—Houston (14 Dist.) 2015

Defendant could be convicted of both Intoxication Manslaughter and Felony DWI without being in violation of DWI law as Felony DWI is not a lesser included offense of Intoxication Manslaughter.

6. FELONY MURDER & AGGRAVATED ASSAULT

Stanley v. State, No. 05-14-00354-CR, 2015 WL 4572445 (Tex.App.-Dallas 2015)

Defendant was charged with and convicted of Felony Murder and Aggravated Assault which both arose out of the same facts where Defendant struck and killed deputy with his vehicle. As both involve the same victim, and elements of each could be considered same under imputed theory of liability and varied only by degree violates double jeopardy for him to be convicted of both so Aggravated Assault conviction is vacated.

F. OCCUPATIONAL DRIVER'S LICENSE/ALR SUSPENSIONS

State Ex Rel. Curry v. Gilfeather, 937 S.W.2d 46 (Tex.App.-Fort Worth 1996, no pet.).

County criminal court, which had no civil jurisdiction, had no authority to grant an occupational driver's license to a defendant when the defendant had not been convicted of the DWI case from which the suspension arose, and the case was still pending in that court.

G. NO CONFLICT BETWEEN "DUI" AND "DWI" STATUTE

Findlay v. State, 9 S.W.3d 397 (Tex.App.-Houston [14th Dist.] 1999, no pet.)

There is no conflict between the DWI and DUI statutes, and it was proper for the State to opt to prosecute under the DWI statute rather than the DUI statute even though defendant was under 21 years of age.

H. DOUBLE JEOPARDY BARS CONVICTION ON OFFENSES FOR SAME VICTIM

1. NO CONVICTION FOR BOTH INTOXICATION ASSAULT AND AGGRAVATED ASSAULT

Burke v. State, 6 S.W.3d 312 (Tex.App.-Fort Worth 1999) vacated and remanded by 28 S.W.3d 545 (Tex.Crim.App. 2000) opinion withdrawn and substitute opinion submitted 80 S.W.3d 82 (Tex.App.-Fort Worth 2002).

Defendant was convicted upon a plea of guilty to both Aggravated Assault SBI and Intoxication Assault. The Court of Appeals found that double jeopardy barred convictions in both cases and vacated the Aggravated Assault conviction. The COA further found that Intoxication Assault and Aggravated Assault were in "pari materia" so both convictions could not stand and Intoxication Assault being the more specific provision, would control. [The doctrine of "Pari Materia" states that when a general provision conflicts with a specific provision, the provisions should be construed, if possible, so that effect is given to both and if they cannot be reconciled, the specific controls.] (6 S.W. 3d 312, Tex.App.-Fort Worth 1999).

The Court of Criminal Appeals found that provisions were not "pari materia" and that neither was controlling over the other. The Court did not disturb the holding that double jeopardy barred convictions under both charges. The State had discretion as to which offense to prosecute. Case was remanded back to Court of Appeals. [28 S. W. 3d 545 (Tex.Crim.App.2000)].

Upon remand, the Court of Appeals maintained that the Intoxication Assault conviction should stand, and the Aggravated Assault conviction should be reversed by finding that the plea in the Aggravated Assault case was involuntary, remanding it for a new trial. [80 S.W.3d 82 (Tex.App.-Fort Worth 2002)]. The Court

found that the issues of double jeopardy would not properly be before it unless or until the State chose to re-try the Defendant on the Aggravated Assault SBI charge.

2. NO CONVICTION FOR BOTH INTOXICATION MANSLAUGHTER AND MANSLAUGHTER

Ball v. United States, 470 U.S. 856, 864-865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

The court held that intoxication manslaughter and manslaughter are the same offense for double jeopardy purposes when they involve the same victim, and imposing conviction for both in this situation violates the Double Jeopardy Clause. A double jeopardy violation occurs even when, as in the case, the sentences are concurrent. The Supreme Court has directed that when a defendant is convicted in a single criminal action of two offenses that are the "same" for double jeopardy purposes, the remedy is to vacate one of the convictions.

Ervin v. State, 991 S.W.2d 804, 817 (Tex.Crim.App. 1999).

The court vacated the manslaughter conviction but retained the intoxication manslaughter conviction after holding that the two offenses were the same for double jeopardy purposes because they shared a common victim and a common focus and there was no evidence the legislature intended to impose multiple punishments for the two offenses.

Bien V. State, 550 S.W.3d 180, 188 (Tex.Crim. App. 2018).

When a defendant is convicted in a single criminal trial of two offenses that are considered the same for double jeopardy purposes, the remedy is to vacate one of the convictions.

I. EFFECT OF LOSING ONE BT THEORY AT FIRST TRIAL ON SUBSEQUENT TRIAL

Ex Parte Crenshaw, 25 S.W.3d 761 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd).

Where Court held BT results were inadmissible in the course of jury trial and then granted a mistrial. State could retry defendant for DWI and could rely on the loss of faculties theory but could not rely on the 0.10 alcohol concentration theory.

J. COLLATERAL ESTOPPEL BARS INTOXICATION MANSLAUGHTER TRIAL ON DIFFERENT INTOXICANT

Ex Parte Taylor, 101 S.W.3d 434 (Tex.Crim.App.2002).

After being acquitted of Intoxication Manslaughter where the theory of intoxication alleged was alcohol, the State tried to proceed on another case, different victim, and now adding marijuana as a possible source of intoxication. Collateral Estoppel barred State from relitigating ultimate issue of intoxication, regardless of whether State alleged different type of intoxicant.

K. NO DOUBLE JEOPARDY WHERE FAULTY UNDERLYING DWI PRIOR ALLEGATION DENIES COURT JURISDICTION

Gallemore v. State, 312 S.W.3d 156 (Tex.App.-Fort Worth 2010).

After an open plea of guilty to felony DWI and at a later punishment hearing, the defense pointed out that one of the underlying DWI's that was alleged to make the charge a felony was a subsequent not a previous conviction. The defense asked to be sentenced for the misdemeanor DWI. The Court instead granted a mistrial after stating it had no jurisdiction in the case. The State then re-indicted and replaced the defective prior with a good one. The defense filed a writ stating that double jeopardy had attached in the former proceeding. The Court of Appeals held that double jeopardy principles do not forbid multiple trials of a single criminal charge if the first trial resulted in a mistrial that (1) was justified under the manifest necessity doctrine; or (2) was requested or consented to by the defense, absent prosecutorial misconduct which forced the mistrial. This case fell under "manifest necessity" because the trial court did not have jurisdiction.

L. THE STATE NEED NOT ELECT BETWEEN SEPARATE OFFENSES

Ball v. United States, 470 U.S. 856, 864-865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)

The Supreme Court initially explained that double jeopardy did not prevent the government from trying both offenses and submitting both offenses to the jury for verdict. The Court then held that double jeopardy required vacating one of the convictions (and its sentence), but the Court did not specify which one. The Court held that the conviction to vacate is a question of state law.

Ex Parte Pena, 820 S.W.2d 806 (Tex. Crim. App. 1991).

When a defendant is convicted of two or more offenses that were misjoinded, the remedy is to retain the most serious offense and vacate the remaining offenses. The most serious offense is determined by the degree of the felony, the range of punishment and the sentence imposed, with rules of parole eligibility and good conduct time as a tie-breaker.

Landers v. State, 957 S.W.2d 558 (Tex. Crim. App. 1997).

This case addressed the "most serious punishment" test for double jeopardy purposes as opposed to misjoinder offense (as in *Ex Parte Pena*) where the State is not required to elect between offenses/counts. The court followed the "most serious punishment" test and reasoned that the State is permitted to prosecutor both offense and submit both offenses to the jury for consideration, and because the State should have the benefit of the most serious punishment obtained.

XXVI. PUTTING DEFENDANT BEHIND THE WHEEL

A. DEFENDANT STATEMENT THAT HE WAS DRIVER = SUFFICIENTLY CORROBORATED

Harrell v. State, 620 S.W.3d 910 (Tex.Crim.App. 2021).

The Court held the corpus delicti rule was satisfied when there was evidence that the defendant was found in his van with the motor turned off, parked at a gas station, buckled in the driver's seat, no evidence of the key's location was presented and where a 911 caller said the defendant was operating the vehicle.

Taylor v. State, 2019 Tex. App. LEXIS 2811 (Tex.App. – Houston [14th Dist.] 2019).

The corpus delicti rule applies when there is an extrajudicial confession to involvement in a crime. Under the rule, a defendant's extrajudicial confession does not constitute legally sufficient evidence of guilt absent independent evidence. In this case, the defendant ran out of gas and was in the main lane of the freeway. When officers arrived, the defendant was standing alone by the front door of his vehicle. The defendant appealed his conviction, stating that the conviction was not supported by legally sufficient evidence under the corpus delicti rule. The defendant alleged that the only evidence that he was the driver was his extrajudicial statements to the police. The court of appeals disagreed. The evidence showed that the defendant's car was stopped in the main lanes of the freeway while he stood alone by the front door of the vehicle. Furthermore, no other persons were on scene who could have operated the vehicle.

***NOTE:** In the footnotes of this case, there are other decisions cited and that make it clear that it is not unusual for a defendant to be convicted of DWI even though no one has actually seen the defendant driving.

Nieschwietz v. State, No. 04-05-00520-CR, 2006 WL 1684739 (Tex.App.-San Antonio 2006, pet. ref'd).

In this case, the defendant challenged the sufficiency of the evidence to establish that he was driving on a public highway while intoxicated, because his extrajudicial confession on the videotape (that he was making a turn when the other car hit him) was not corroborated by other evidence. The Court found that the defendant's admission in the videotape that he was driving the vehicle was sufficiently corroborated by his presence at the scene, the vehicle insurance documents listing him as owner of the vehicle, and the officer's opinion based on his investigation that defendant was the driver.

Frye v. State, No. 05-03-01050-CR, 2004 WL 292660 (Tex.App.-Dallas 2004, no pet.) (not designated for publication).

Trooper who was dispatched to scene of accident saw defendant leaning against bed of pickup truck. Asked if he was okay, the defendant replied he was "going too fast to negotiate the corner and he wrecked the vehicle." He did not say how long he had been at the scene. He appeared intoxicated and admitted to having had some beers while he was fishing earlier that day. No fishing equipment was observed in the vehicle. Court found that the officer's testimony and the station house video provided sufficient corroboration of his statement he was driving.

Youens v. State, 988 S.W.2d 404 (Tex.App.-Houston [1st Dist.] 1999, no pet.).

Where defendant was seated in truck with engine running, his statement at the scene that he was driving the truck when the accident happened and further statement that 20 to 25 minutes had elapsed since the accident occurred provided sufficient basis for jury to find defendant was driving while intoxicated.

Walker v. State, 701 S.W.2d 2 (Tex.App.-Corpus Christi 1985, pet. ref'd).

Statement by defendant to officer at accident site that he was driver sufficient evidence to prove he was driver.

Bucek v. State, 724 S.W.2d 129 (Tex.App.-Fort Worth 1987, no pet.).

Defendant's statement that he was the driver may be sufficient when other corroborating evidence is available.

Folk v. State, 797 S.W.2d 141 (Tex.App.-Austin 1990, pet. ref'd).

Provided there is other evidence that a "crime was committed" the identification of the defendant as the perpetrator (i.e., statement that he was driver) may rest alone upon his confession. In any event, proof that car was registered to person defendant lived with = sufficient corroboration.

B. SUFFICIENT EVIDENCE OF "DRIVING/OPERATING"

State v. Espinosa, 666 S.W.3d 659 (Tex.Crim.App. 2023).

The Court of Criminal appeals reversed the lower court's decision (see below) and found that the prudent person would conclude that the defendant recently operated her vehicle in a public place. The Court based its decision on the fact that vehicle parked in a moving lane of traffic, in the middle of the day, the pickup line had recently begun to form, the defendant was found asleep at the wheel, in the driver's seat, and she had no explanation as to why she was asleep.

State v. Espinosa, 650 S.W.3d 849 (Tex.App. - 14th Dist. Houston, 2022). REVERSED (see above)

The trial court did not err in granting defendant's motion to suppress because there was insufficient evidence to establish a temporal link between her alleged intoxication and her operation of her vehicle. Defendant was found by a good Samaritan passed out in her vehicle in the after school pick-up line, alone in her car, vehicle was in park, engine running. This is an absurd result.

Harrell v. State, 620 S.W.3d 910 (Tex.Crim.App. 2021).

The Court held the corpus delicti rule was satisfied when there was evidence that the defendant was found in his van with the motor turned off, parked at a gas station, buckled in the driver's seat, no evidence of the key's location was presented and where a 911 caller said the defendant was operating the vehicle.

Wilkins v. State, No. 02-19-00324-CR, 2021 Tex. App. LEXIS 658, 2021 WL 278311 (Tex.App. – Fort Worth 2021).

This is a DWI case where the defendant was found at 5 am (still dark), stopped in the far right-hand lane of traffic on I-35E (at this time it was a four-lane highway in both directions). A passer-by called 911 because the vehicle was in a very dangerous spot with limited visibility. When officer arrived on scene, he found defendant and his passenger were both asleep with seatbelts on, interior and exterior lights were off, engine running, transmission in neutral, and the emergency brake was activated. The officer observed two open beer cans in the center console and another between the driver's leg. The court found that there was sufficient evidence to prove that the defendant operated the vehicle and was driving while intoxicated.

Dansby v. State, No. 12-15-00269-CR, 2017 Tex. App. LEXIS 3897, 2017 WL 1534051 (Tex. App. – Tyler 2017).

This is a DWI case where the defendant was found inside a Whataburger and his vehicle was found running, unoccupied at the convenience store next to the Whataburger. The defendant admitted to owning the vehicle, to driving it to the location and admitted to drinking. The defendant argued that there was no probable cause to arrest because no one saw him driving. The court resolved this issue by stating that there was enough evidence to infer that someone had operated the vehicle to get it to the location coupled with defendant's admission as to where he had driven that night.

Castillo v. State, No. 02-16-00127, 2017 Tex. App. LEXIS 2762, 2017 WL 1173839 (Tex. App. – Fort Worth 2017).

In this case the defendant claimed that the State lacked sufficient evidence to prove he was operating a motor vehicle. A witness found defendant parked in the left lane of the highway attempting to start his vehicle. When the witness approached the defendant, he was attempting to start the vehicle, although the car would not turn over, the raid would turn on. The defendant told the witness that he had ran out of gas and asked him for help getting off the highway. The court found this evidence to be sufficient to support a finding of probable cause.

Anderson v. State, No. 02-15-00405-CR, 2016 WL 1605330 (Tex.App.-Fort Worth).

Officer was dispatched to rear parking lot of bar at 3:24 a.m. in response to call from security guard who reported a man asleep in his vehicle with is engine on. When officer arrived at the scene, he discovered a vehicle oddly parked head on across two spaces that had been marked diagonally. Engine was running and headlights were on, and vehicle was in park. As he approached, he noticed strong order of alcoholic beverage. When he woke Defendant, the Defendant reached for gearshift. No alcohol was found in vehicle though Defendant claimed to have been drinking in his vehicle. His alcohol level was found to be .22. Held to be sufficient evidence of operating. Court took the time to distinguish older pre-Geesa cases cited by defense.

Murray v. State, 457 S.W. 3d 446 (Tex.Crim.App.2015).

This is a case where Court of Criminal Appeals reversed Court of Appeals in its holding that there was insufficient evidence of operating and rendering of an acquittal. The Court of Criminal Appeals found that it was sufficient that vehicle was parked on side of road partially in a private driveway. Defendant was asleep in driver's seat, the engine was running, no one else was in or in vicinity of vehicle when officer arrived, no open containers were in vehicle. Officer smelled odor of alcohol beverage when window was rolled down, and Defendant appeared intoxicated and admitted he had been drinking. The Court of Appeals incorrectly focused on missing evidence.

Priego v. State, 457 S.W. 3d 565 (Tex.App.-Texarkana 2015, pdr ref'd).

Evidence was found sufficient even without anyone seeing Defendant driving based on the following: Defendant arranged for someone to buy her two bottles of whiskey 15 to 20 minutes before discovered unconscious in parked but running vehicle, in a business parking lot a short distance from liquor store, wearing seatbelt, with partially consumed bottle of liquor on truck floorboard.

Arocha v. State, No. 02-14-00042-CR, 2014 WL 6997405 (Tex.App. –Fort Worth 2014).

While investigating scene of accident where it appeared one car had rear ended another vehicle which had someone still in it, the Defendant and companion walked up to officer and said he had been drinking. The other car that he had struck had pulled in front of him. Later investigation supported DWI arrest of Defendant. Based on the other driver's injuries and debris on road pointing to crash being of recent origin, Defendant being present at scene making it more likely had had driven one of the cars, and the details given on how crash occurred there was sufficient corroboration of statement he was driving to support arrest.

Stephenson v. State, No. 14-13-00303-CR, 2014 WL 3051229 (Tex.App. –Houston [14th Dist.] 2014, pdr ref'd).

Citizen's vehicle was struck by a vehicle which did not immediately stop. He followed vehicle as it traveled down the road and when it did stop, he saw a female exit the passenger's side door and come to speak to him. When police arrived, the female was seated in the driver's seat. There is no mention of any testimony explaining how the female came to be there but ultimately the Court of Appeals found that a jury could conclude that the evidence that a female was in the proximity of the passenger side after the vehicle stopped was sufficient circumstantial evidence that the Defendant (who is male) was the driver of the vehicle.

Marroquin v. State, No. 08-12-00316-CR, 2014 WL 1274136 (Tex.App -El Paso 2014).

The Defense argued that there was insufficient evidence that the Defendant was operating a motor vehicle while he was intoxicated. In rejecting that argument, the Court focused on the fact that the evidence showed the Defendant was found stopped in the middle of the road where he had run out of gas during rush hour traffic, was the only occupant inside the truck, the keys were in the ignition and the truck was not in park when he exited it. In response to the argument the State could not show how long he was there before the officer arrived, the Court found that the jury could have reasonably inferred that the Defendant was found shortly after he ran out of gas focusing on the facts mentioned above and the fact that one of the beers found in the vehicle was still cold to the touch. The fact that the Defendant was not observed driving by the officer does not matter as the jury could have inferred he had been doing so when he ran out of gas.

Mccann v. State, 433 S.W.3d 642 (Tex.App.-Houston [1st Dist] 2014, no pet.).

Court held that evidence was sufficient to prove Defendant was operating a vehicle while intoxicated when he was found alone and nearby his vehicle, failed sobriety tests, and his vehicle was on a median with air bags deployed after having crashed into a tree. Additionally, the engine was warm, there were no nearby places where Defendant could have procured alcohol, and he admitted he had been driving after consuming four drinks. Cites Kuciemba v. State reasoning regarding inferences that can be drawn from one vehicle crashes where driver is intoxicated when found at the scene.

Rodriguez v. State, No. 08-11-00345-CR, 2013 WL 6405500 (Tex.App.-EI Paso 2013, no pet.).

Even though the State did not present the testimony of any witnesses who observed Defendant drive the car, it did offer statements and circumstantial evidence from which it can be inferred that he operated the vehicle. The convenience store clerk saw Defendant walk into the store alone and observed his car parked in the handicap space. She told him that he could not park in there. He did not deny driving the car but insisted that he was not parked in the handicap space and that he would only be in the store for a short time. Defendant told the officer that he parked in the handicap spot and claimed he did not know that he couldn't do so. After being placed under arrest for driving while intoxicated, Defendant told the officer that he could not be arrested for driving while intoxicated because he had been driving earlier, but he had gotten out of the car by the time the officer arrived, and therefore, he could only be arrested for public intoxication. The jury could have rationally found beyond a reasonable doubt that Appellant was operating a motor vehicle at the time of the accident.

Schragin v. State, 378 S.W.3d 510 (Tex.App.-Fort Worth 2012, no pet.).

This case involves a challenge to the sufficiency of the evidence that Defendant was "operating" a motor vehicle. Officer responded to dispatch call and found the Defendant's vehicle parked, approximately two feet away from the curb, with the lights on. Despite the vehicle's distance from the curb, it was legally

parked. The officer "spotlighted the vehicle", and observed a male slumped over in the driver's side seat. Officer testified he found Defendant asleep in driver's seat with engine on. Court found this evidence was sufficient to support the jury finding that he was operating a motor vehicle.

Molina v. State, No. 07-09-00022-CR, 2010 WL 980560 (Tex.App.-Amarillo 2010).

Officers were called out to investigate a suspicious vehicle in a cul-de-sac and upon arrival observed defendant asleep behind the wheel of the vehicle. The keys were in the vehicle's ignition and the car and radio were both on. Defendant was also in a position in the vehicle that he was able to reach the brake pedal. The police officers proceeded to wake him and, after conducting field sobriety tests, arrested him for driving while intoxicated. In holding State had proved operating, the Court points out that any person intending to drive would first have to turn the key to start the car; the fact that the key was turned and the engine was running could be interpreted by the jury as operating the vehicle. Though no one observed appellant start the vehicle, the fact that defendant was the only person in the vehicle, and in the driver's seat, and able to operate the brake lights is circumstantial evidence that the jury could have used in determining guilt.

Roane v. State, No. 05-09-00927-CR, 2010 WL 3399036 (Tex.App.-Dallas 2010, no pet.) (not designated for publication).

In this case a 911 call about a major accident led officer to arrive at scene of crash where he found defendant outside of the vehicle. Court held evidence sufficient that defendant had driven the vehicle based on fact that defendant was found standing next to the driver's door of the vehicle, had the vehicle's keys in his pocket, and told officer that passenger's injury prohibited her from driving.

Ledet v. State, No. 01-08-00367-CR, 2009 WL 2050753 (Tex.App.-Houston [1st Dist.] 2009, no pet.) (not designated for publication).

Police dispatcher received approximately 15 reports of a disabled car blocking two lanes of traffic on the freeway. When officer arrived at the scene around 6:00 a.m., he saw that the car was perpendicular to the flow of traffic, blocking two of the freeway's four lanes, located approximately a quarter mile from the nearest freeway exit ramp and 200 to 300 yards from the nearest freeway entrance ramp. Defendant was unconscious and sitting in the driver's seat, which was in the "laid- back position." The car's engine was running, the transmission was in the "park" gear, and the driver's window was down. Defendant smelled of alcohol and eventually woke up after officer administered two "sternum rubs." Defendant refused to take field-sobriety tests, and admitted on cross-examination he had no idea how long the car had been stopped on the freeway, whether he had driven the car, or if another passenger had been in the car before he arrived at the scene. Court held evidence was sufficient and cites to other cases that remind us that "reasonable hypothesis" standard is gone.

Villa v. State, No. 07-06-0270-CR, 2009 WL 2431511 (Tex.App.-Amarillo 2009, pet. ref'd).

Defendant's vehicle was found parked in the landscaped area of the apartment complex with headlights on, engine running and defendant sitting behind the wheel with his head resting against the steering wheel. Defendant argues that his vehicle was in park and that no one saw him start, shift, or otherwise operate the vehicle. The Court rejected this argument pointing out that even though there was no direct evidence to show defendant drove the car to its resting place, there was legally and factually sufficient circumstantial evidence that he did so.

Watson v. State, No. 2-07-429-CR, 2008 WL 5401497 (Tex.App.-Fort Worth 2008, pet. ref'd).

In this case a taxicab driver testified that he observed a vehicle driving erratically on the date in question and reported the incident to the police. An officer in the vicinity testified that he found a vehicle matching the description given by the taxi driver stopped on a grassy median with the defendant slouched over in the driver's seat with the lights on and engine running. Citing the Denton case, the Court stated that it rejected the contention that to operate a vehicle within the meaning of the statute, the driver's personal effort must cause the automobile to either move or not move. Purposely causing or restraining actual movement is not the only definition of "operating" a motor vehicle. In this case there was sufficient proof of "operating" a motor vehicle.

Dornbusch v. State, 262 S.W.3d 432 (Tex.App.-Fort Worth 2008, no pet.).

Where defendant's vehicle was found in back of restaurant parking lot with headlights on, engine running, radio playing loudly, and defendant was sitting in driver's seat either asleep or passed out, and there was testimony indicating that vehicle was not in park and that the only thing keeping vehicle from moving was the curb - then that was sufficient evidence that he was "operating" his motor vehicle.

Vasquez v. State, No. 13-05-00010-CR, 2007 WL 2417373 (Tex.App.-Corpus Christi 2007, no pet.).

Officer found defendant asleep in the driver's seat of his vehicle with the engine running, the gear in "park," and the headlights on. The vehicle was situated in the center of two eastbound lanes on a public roadway. After officer approached the vehicle, he proceeded to open the driver's side door, and as he leaned inside the car to turn off the engine, he noticed a strong odor of alcohol on defendant's breath and person. Appellant was unresponsive at first but ultimately woke up and was determined to be intoxicated. Evidence held to be sufficient proof of operating.

Cartegena v. State, No. 14-05-00103-CR, 2006 WL 278404 (Tex.App.-Houston [14th Dist.] 2006, pet. ref'd) (not designated for publication).

Case where officer first spotted defendant's vehicle parked on the shoulder of the roadway and defendant standing next to it urinating. Driver's seat was empty and his wife was in the front passenger seat, held that his statement that he was driving was sufficiently corroborated.

Farmer v. State, No. 2-06-113-CR, 2006 WL 3844169 (Tex.App.-Fort Worth Dec 28, 2006, pet.ref'd).

Officer noticed a car on the shoulder that had its hazard lights on. He testified that a female appeared to be changing a flat tire. He and another trooper stopped to see if the female needed assistance and noticed she appeared to be intoxicated. In attacking the sufficiency of the proof that the defendant operated her vehicle, she points to the fact that there was no evidence that the car's engine was running or had been running before the troopers approached the car, that neither trooper testified that the vehicle's hood or engine compartment was warm, that there was no evidence to show how long the car had been parked in the access road before the troopers saw it, that the state failed to offer any evidence that she was the owner of the car, that no witnesses testified that they saw her operate the car, and that there was no evidence to link her physical state at the scene of the arrest to her physical state at the time of the alleged driving. The defendant had told the officers she was on her way home from Denton. This statement was sufficient corroborated by the evidence that the troopers had stopped to help the defendant about ten miles outside of Denton. The defendant's car, with the flat tire, was in the middle of the Interstate service road. The troopers noted that the defendant's hazard lights were flashing and that the keys were in the ignition. Although the troopers remained at the scene for an extended period of time, no one besides defendant approached the car. The Court held that this

evidence sufficiently corroborated the defendant's extrajudicial admission that she was on her way home from Denton and was therefore operating a motor vehicle.

Young v. State, No. 2-04-437-CR, 2005 WL 1654763 (Tex.App.-Fort Worth 2005, no pet.) (not designated for publication).

Defendant's extrajudicial statements that he consumed six to eight beers, that he drove the vehicle on the freeway and lost control were sufficiently corroborated by testimony he was found next to the vehicle, parked on shoulder of roadway, facing wrong direction, smelled of alcohol, and failed or refused various sobriety tests.

Claiborne v. State, No. 2-04-116-CR, 2005 WL 2100458 (Tex.App.-Fort Worth, 2005, no pet.) (not designated for publication).

Witnesses saw appellant's car being driven erratically. One witness saw appellant walking away from the driver's side door minutes after he saw the car being driven. Additionally, appellant walked away from police officers and into a grocery store after the police called out to him. After the officers found appellant, he led them to the car that witnesses had seen driving erratically. Under these facts, the Court held that there was sufficient proof that the defendant "operated" a motor vehicle.

Newell v. State, No. 2-04-234-CR, 2005 WL 2838539, (Tex.App. - Fort Worth, 2005, no pet.) (not designated for publication).

At 3:05 a.m., police officers found defendant asleep in the driver's seat of his vehicle with the engine running, the gear in "park," the headlights on, and his foot on the brake pedal. The car was on the shoulder of the I-20 ramp directly over the southbound lanes of Great Southwest Parkway, an area where it is generally unsafe to park. Upon awakening the defendant, it was determined he was intoxicated. Defendant claimed that there was insufficient proof of operating the vehicle because no witness saw defendant drive the vehicle to the location or knew how long he had been parked there, how long he had been intoxicated, or if anyone else had driven the car. Court of Appeals held evidence was sufficient. The Texas Court of Criminal Appeals has held that "[t] to find operation under [the DWI] standard, the totality of the circumstances must demonstrate that the defendant took action to affect the functioning of [the] vehicle in a manner that would enable the vehicle's use." Although driving always involves operation of a vehicle, operation of a vehicle does not necessarily always involve driving.

Peters v. Texas Department of Public Safety, No. 5-05-00103-CV, 2005 WL 3007783 (Tex.App.-Dallas 2005, no pet.) (not designated for publication).

Suspect found asleep in driver's seat of a car parked in a field near highway frontage road (record does not speak to whether car was running). It took several attempts to wake suspect who was observed to have bloodshot eyes, slurred speech, and odor of alcohol. Officer noted there was damage to front end of car. Defendant admitted he had been drinking all night. Refused to do FSTs and refused to give breath sample. The above was held to be sufficient probable cause to arrest suspect for DWI.

Benedict v. State, No. 2-03-310-CR, 2004 WL 2108837, (Tex.App.-Fort Worth, 2004, pet. ref'd).

Citizen called dispatch regarding suspicious vehicle parked in roadway for almost two hours with its lights on. The vehicle was stopped in the roadway with its keys in the ignition and in drive. The two front tires were on rims. When officer arrived, he observed that the car was in a lane of traffic up against an island median, the engine was running, the car was in gear, the headlights were on, and appellant's foot was on the

brake. The officer testified that damage she observed on the car's wheels was consistent with the wheels scraping the curb, and it appeared the car had been driven on its rims. Court found evidence was sufficient on issue of operating. In response to the argument that the car's mechanical condition prevented its being driven, the Court held that the State did not have to prove that appellant drove or operated a fully functional car.

Yokom v. State, No. 2-03-181-CR, 2004 WL 742888 (Tex.App.-Fort Worth 2004, pet. ref'd) (not designated for publication).

On the issue of whether the State proved "operating." The officer found the defendant in his parked vehicle with motor running and slumped over the wheel of the car. He also found him to be intoxicated and the defendant admitted to consuming alcohol earlier. There were no open containers in the car. The court held that regardless of whether the defendant operated his truck in the officer's presence, a rational trier of fact could have found beyond a reasonable doubt that he operated his truck prior to the officer's arrival and that he was intoxicated when he did so.

Freeman v. State, 69 S.W.3d 374 (Tex.App.-Dallas 2002, no pet.).

Officer found defendant in her Ford Explorer with its right front tire against a curb, its motor running, the gear in the "drive" position, and its lights on. He tried to rouse the sleeping woman in the driver's seat, but she did not respond at first. Ultimately, he woke her up and arrested her for DWI. The Court found that the circumstantial evidence indicated that the defendant, while intoxicated, exerted personal effort upon her vehicle by causing the motor to be running, the lights to be on, and by shifting the gear to drive. Further, as the result of her effort, the vehicle's wheel rested against the curb of a public street. Conviction affirmed.

Hearne v. State, 80 S.W.3d 677 (Tex.App.-Houston [1st Dist.] 2002, no pet.).

Defendant's truck was parked in a moving Jane of traffic on a service road. His head was resting on one hand and leaning against the driver's side window. The other hand was near his waist. The engine was running; gearshift was in park. He was not touching the accelerator or brake pedals. The officer did not see the defendant exert any action to attempt to control the truck. Court held that there was sufficient proof of "operating" citing Denton and Barton.

Chaloupka v. State, 20 S.W.3d 172 (Tex.App.-Texarkana, 2000, pet ref'd).

The following facts were held to be sufficient under the New Post-Geesa "legal sufficiency" standard. Two witnesses observed defendant driving erratically--at one point driving into adjoining lane and hitting another vehicle and then continuing to drive off at a high rate of speed. One witness got the license number of the defendant's vehicle. Police with aid of license number and notice that defendant was in a rest area found defendant in rest area. A witness at rest area noticed defendant get out of his vehicle with two beer bottles and a sack and noted he was stumbling and had difficulty with his balance and proceeded to urinate in public. When officer arrived at scene, defendant was sitting on a bench and drinking beer and was obviously intoxicated. Defendant failed FSTs and was arrested for DWI. Rest area was a couple miles from scene of collision. Good discussion of old standard that required the "reasonable hypothesis" analysis which was replaced in Geesa v. State, 820 S.W. 2d 154 (Tex.Crim.App. 1991).

Hernandez v. State, 13 S.W.3d 78 (Tex.App.-Texarkana 2000, no pet.).

In DWI accident, evidence that showed witness placed defendant on the driver's side of a pickup truck that belonged to him immediately after the accident, was sufficient evidence for jury to find he was driving. This

was the case even though defendant told the police at the scene and later on the tape that someone other than himself was driving and no witness could testify that they saw defendant driving.

Purvis v. State, 4 S.W.3d 118 (Tex.App.-Waco 1999, pet ref'd).

Defendant was found by civilian witness in his pickup in a ditch, with truck lights on. Defendant was passed out on floorboard with feet on driver side and head on passenger side, no one else in the area. Evidence at the scene appeared to show path truck traveled from the road. Defendant admitted driving, appeared intoxicated and failed HGN--sufficient evidence under New Post- Geesa Standard and oral admission that defendant was driving was sufficiently corroborated.

Gowans v. State, 995 S.W.2d 787 (Tex.App.-Houston [1st Dist.] 1999, pet. ref'd).

Here the facts were that the defendant while driving left the highway and drove onto IP's private driveway, striking the car IP was sitting in, causing his death. The defendant argued that since the car that he struck was on private property, the State failed to prove the public place element. The Court held that evidence that he drove on public highway prior to accident was sufficient.

Milam v. State, 976 S.W.2d 788 (Tex.App.-Houston [1st Dist.] 1998, no pet.).

1. defendant was found asleep in his car in which he was the sole occupant;
2. engine was running and his foot was on the brake;
3. evidence showed car had been at the location less than 5 minutes;
4. when awakened, defendant put car in reverse = sufficient evidence defendant "operated" his car.

Kerr v. State, 921 S.W.2d 498 (Tex.App.-Fort Worth 1996, no pet.).

Held that there was sufficient factual corroboration of defendant's statement that he was driver to prove he "operated the motor vehicle." Namely, that witness heard a car sliding into gravel and immediately came outside of his house and saw defendant get out of the car which was in the ditch.

State v. Savage, 933 S.W.2d 497 (Tex.Crim.App. 1996).

1. police found defendant's truck stopped on entrance ramp of highway;
2. defendant sitting behind the wheel asleep;
3. his feet were on floorboard;
4. headlights were on and engine was running;
5. gearshift was in park;
6. no empty alcoholic beverage containers were in car.

Wright v. State, 932 S.W.2d 572 (Tex.App.-Tyler 1995, no pet.).

Basis for stop came over radio dispatch where concerned citizen observed the bad driving and got close enough to see there was only one person in the vehicle and then lost sight of defendant who drove away. Officer found vehicle that matched description stopped in the roadway with his foot on the brake pedal. Even though citizens could not identify driver in court, it was held there was enough proof for jury to find defendant was the same person driving.

Denton v. State, 911 S.W.2d 388 (Tex.Crim.App.1995).

To find "operation" of a motor vehicle, the totality of the circumstances must demonstrate that the defendant took action to affect the functioning of his vehicle that would enable the vehicle's use. Starting the ignition and revving the accelerator was sufficient. Court rejected argument that some actual movement was required and cited Barton.

Barton v. State, 882 S.W.2d 456 (Tex.App.-Dallas 1994, no pet.).

Officer found vehicle standing still in roadway with engine idling. Motorist was alone in early morning hours and was asleep behind wheel with feet on clutch and brake. When aroused by police officer, motorist immediately exerted personal effort to control truck and affect functioning by engaging clutch, changing gears, and reaching to start engine which had been turned off by officer. Discussion of the rejection of the "reasonable hypothesis standard" rejected in Geesa. Looking at the totality of the circumstances, Court held the evidence was sufficient. In so finding, the Court explained: "We do not accept the contention that to operate a vehicle within the meaning of the statute, the driver's personal effort must cause the automobile to either move or not move."

Turner v. State, 877 S.W.2d 513 (Tex.App.-Fort Worth 1994, no pet.).

1. police respond to accident scene;
2. defendant standing next to car;
3. steam coming from hood of car;
4. electricity transformer appeared to have been hit and electricity went out about 15 minutes before;
5. defendant admitted driving.

This case held that defendant's admission of driving, though not sufficient by itself, need only be corroborated by some other evidence.

Nichols v. State, 877 S.W.2d 494 (Tex.App.-Fort Worth 1994, pet. ref'd).

1. witness viewed defendant drive away from party in an intoxicated state;
2. 20 minutes later defendant's vehicle found abandoned alongside of the road, and the defendant was standing 30 feet away from it.

Ray v. State, 816 S.W.2d 97 (Tex.App.-Dallas 1991, no pet.).

Defendant found in his vehicle with engine running, stopped crosswise behind truck, slumped behind steering wheel, foot on brake pedal holding car in place while transmission in drive = sufficient.

Lopez v. State, 805 S.W.2d 882 (Tex.App.-Corpus Christi 1991, no pet.).

1. officer observed defendant move from driver's seat to rear seat upon stopping his vehicle;
2. defendant found in rear seat feigning sleep;
3. officer had encountered defendant on previous stop attempting this same ruse.

Pope v. State, 802 S.W.2d 418 (Tex.App.-Austin 1991, no pet.).

1. defendant's truck found stopped in roadway;
2. engine was running and lights were on;
3. truck belonged to defendant;

4. defendant sitting behind steering wheel.

Boyle v. State, 778 S.W.2d 113 (Tex.App.-Houston [14th Dist.] 1989, no pet.).

1. defendant's car was stopped in traffic;
2. defendant was not asleep;
3. defendant had her foot on brake pedal;
4. car was in gear and engine running;
5. no other person around car.

Reynolds v. State, 744 S.W.2d 156 (Tex.App.-Amarillo 1987, pet. ref'd).

1. defendant 's car was halfway in a ditch;
2. defendant was alone;
3. defendant was behind the wheel;
4. defendant's feet were on the floorboard under steering wheel;
5. driver's door closed;
6. defendant admitted he was driving.

Yeary v. State, 734 S.W.2d 766 (Tex.App.-Fort Worth 1987, no pet.).

1. defendant's vehicle involved in two car accident;
2. no one but defendant in cab of truck;
3. defendant only person in vicinity of accident;
4. windshield missing from truck and lying on top of defendant;
5. defendant told witness he wanted to get back up & drive truck.

Bucek v. State, 724 S.W.2d 129 (Tex.App.-Fort Worth 1987, no pet.).

1. confessed he was the driver of vehicle;
2. defendant present at scene of accident;
3. his car was only other car on road;
4. approached victim almost immediately disclaiming fault;
5. defendant was only other person present;
6. told his doctor he had hit his head in mv collision.

Keenan v. State, 700 S.W.2d 12 (Tex.App.-Amarillo 1985, no pet.).

1. defendant observed sitting behind wheel of car;
2. defendant slumped over;
3. car sitting partially in main traffic Jane;
4. exhaust fumes seen coming from car.

Green v. State, 640 S.W.2d 645 (Tex.App.-Houston [14th Dist.] 1982, no pet.).

1. single vehicle accident;
2. witness arrived at scene of crash as soon as he heard it;
3. witness found defendant lying in front seat near steering wheel;
4. defendant positioned with his feet near steering wheel and head near passenger side;
5. nobody else in the car.

C. INSUFFICIENT CORROBORATION OF "DRIVING/OPERATING"

Texas Department of Public Safety v. Allocca, 301 S.W.3d 364 (Tex.App.-Austin 2009, no pet.).

Court of Appeals found under the following facts that motorist was not "operating" his vehicle while intoxicated, for purposes of suspension of license for refusal of test. He was found sleeping in the car with the front seat reclined, the car in park, the lights off, and the engine running (per suspect) solely for the purpose of air conditioning, while parked in a parking lot behind his place of employment.

Hanson v. State, 781 S.W.2d 445 (Tex.App.-Fort Worth 1990). Appeal abated, 790 S.W.2d 646 (Tex.Crim.App.1990).

1. one car accident;
2. defendant found standing next to wrecked car;
3. defendant did not appear to be injured;
4. defendant admitted to the police that she had been driving.

Reddie v. State, 736 S.W.2d 923 (Tex.App.-San Antonio 1987, pet. ref'd).

1. defendant found slumped over wheel of car;
2. intoxicated;
3. motor running & car in gear.

Note: But see Barton cited above.

Ford v. State, 571 S.W.2d 924 (Tex.Crim.App. 1978).

1. officers arrived at intersection of public/private road;
2. defendant's truck found 15-20 feet off roadway;
3. another car and 3 other people already at scene;
4. no one inside the truck;
5. upon inquiry defendant admitted he was driver;
6. no other evidence truck had traveled on road.

Chamberlain v. State, 294 S.W.2d 719 (Tex.Crim.App. 1956).

Defendant steering an automobile with engine not running as it moved upon a highway being pushed by another automobile was sufficient to constitute "driving and operating" of such automobile within statute prohibiting the driving or operating of a motor vehicle while under the influence of intoxication liquor. Vernon's Ann. P. C. Art. 802.

D. EVIDENCE OF INTOXICATION AT TIME DEFENDANT WAS DRIVING

1. INSUFFICIENT

McCafferty v. State, 748 S.W.2d 489 (Tex.App.-Houston [1st Dist.] 1988, no pet.).

Where officer arrived at the scene of the accident one hour and twenty minutes after it occurred and a witness testified defendant did not appear intoxicated at the time of the crash, there was no extrapolation evidence. More than two hours passed before the defendant gave a breath test, and the State failed to establish that the

defendant was not drinking in the time period following the crash and before the officer arrived = insufficient evidence defendant was "intoxicated while driving." Reasonable hypothesis standard was applied. NOTE: This is a Pre-Geesa opinion.

2. SUFFICIENT

Murphy v. State, No. 03-13-00281-CR, 2014 WL 4179443 (Tex.App.-Austin 2014, pdr ref'd).

Defendant was found passed out at the wheel of his car in the lane of travel with engine running and transmission in park, no evidence of any alcohol in the vehicle, failed FST's provided sufficient proof that he was driving while intoxicated.

Moseman v. State, No. 05-13-00304-CR, 2014 WL 2993826 (Tex.App.-Dallas 2014, no pet).

Officer came across a one car roll over and stopped and approached a group of people standing around the car. Defendant was in that group and appeared to have a fresh cut on his hand and wrist. Defendant admitted he had been driving and said the accident had just happened. Officer observed signs of intoxication and Defendant initially denied drinking but then admitted he had a beer an hour ago at a restaurant. Defendant challenged the sufficiency of the evidence and the Court found the following: his presence near the car, the injuries, the car's title and registration reflecting the owners shared Defendant's last name and address, and the denial by others that they had been driving were sufficient proof he was operating the vehicle. Even without extrapolation there was sufficient evidence, failed FST's and blood test result, to raise an inference he was intoxicated at time of driving.

Pointer v. State, No. 05-09-01423-CR, 2011 WL 2163721 (Tex.App.-Dallas 2011, pdr ref'd).

The defendant was involved in a one-car accident with a parked car and was found to be intoxicated at the scene. Evidence showed he was the registered owner of the vehicle and no one else was in the vehicle. He admitted having four or five drinks two hours before the wreck, and he failed the sobriety tests. Officer arrived at the scene twelve minutes after receiving the dispatch. Court concluded that the evidence was sufficient to link defendant's intoxication to his driving, and there was sufficient corroboration to his statement that he was driving the vehicle.

Scillitani v. State, 343 S.W.3d 914 (Tex.App.-Houston [14 Dist.] 2011).

This involved officer coming upon defendant's vehicle in a ditch off the road. Court of Appeals originally found an insufficient temporal link. Court of Criminal Appeals reversed and remanded in light of Kuciemba. On remand Court of Appeals found evidence was sufficient to show that defendant was intoxicated while driving, as required to support conviction for driving while intoxicated (DWI); defendant was involved in single car accident where he left road and struck fence pole, there were no skid marks on road to indicate that defendant had applied brake, defendant told trooper who responded to dispatch call of accident that he was driver, trooper noticed alcohol on defendant's breath, defendant exhibited numerous clues of intoxication during field sobriety tests, and preliminary breath samples taken within two hours showed defendant's breath alcohol level to be .135 and .133.

Warren v. State, 377 S.W.3d 9 (Tex.App.-Houston [1 Dist.] 2011, pdr ref'd).

Officer comes upon defendant's vehicle in a ditch with defendant standing outside the vehicle. Challenges the sufficiency of the evidence to say he was intoxicated at the time he was driving. In holding evidence was sufficient, Court of Appeals focused on the following:

1. Defendant drove his car into a ditch and was found intoxicated at the scene of the accident.
2. Deputy testified that the hood of defendant's truck was still warm, indicating to him that the truck had been recently driven.
3. He also testified that the inside of the cab was warmer than the outside temperature of 60 degrees Fahrenheit.
4. Deputy found an open container of alcohol in the cab of the truck and saw that some of the drink had spilled onto the passenger's seat which he assumed happened at time of accident.

Hughes v. State, 325 S.W.3d 257 (Tex.App.-Eastland 2010, no pet.).

Officer was dispatched to one-car accident and encountered defendant walking alongside highway. He stopped and spoke to defendant who stated he had gotten vehicle stuck in ditch. Scene evidence corroborated vehicle was wrecked and inoperable and officer noted signs of intoxication on the defendant. Issue raised was that even though he was intoxicated when officer made contact with him, there was no evidence he was intoxicated earlier when accident occurred. In finding there was sufficient circumstantial evidence presented that defendant was intoxicated when he was driving, the Court held that proof of the precise time of accident is not required and that being intoxicated at the scene of a traffic accident in which the defendant was the driver is some circumstantial evidence that the defendant's intoxication caused the accident, and the inference of causation is even stronger when the accident is a one-car collision with an inanimate object.

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

Defendant was found behind the steering wheel, injured and intoxicated, at the scene of a one-car rollover accident, with a blood-alcohol level of more than twice the legal limit. The Court of Appeals found the evidence to be insufficient to show that appellant was intoxicated at the time that the accident occurred as there was no evidence of anyone who saw defendant driving on the road or evidence of when the accident occurred. The Court of Criminal Appeals reversed finding, among other things, that being intoxicated at the scene of a traffic accident in which the actor was a driver is some circumstantial evidence that the actor's intoxication caused the accident, and the inference of causation is even stronger when the accident is a one-car collision with an inanimate object. They focused on the driver's failure to brake, his high BAC, and the fact that he was still bleeding as supporting an inference that the accident was recent, and he had been intoxicated for quite a while.

Stoutner v. State, 36 S.W.3d 716 (Tex.App.-Houston [1st Dist.] 2001, pet. ref'd).

The defendant tried to argue that McCafferty was controlling. The Court distinguished this case from McCafferty as follows: In this case, there were fifteen to twenty minutes that passed from the time of crash to time officer arrived. Blood sample was taken twenty minutes after the arrest (fifty minutes after officer's arrival). Extrapolation evidence was offered. No alcoholic beverage containers were noticed near defendant. The testimony that defendant did not appear to be intoxicated to another officer who observed him upon arriving at the scene was not dispositive as the officer was a car length away from the defendant at the time and was not focused on the defendant. State was not required to exclude every other reasonable hypothesis except defendant's guilt as that standard was discarded by Geesa. Evidence found to be sufficient that defendant was intoxicated while operating a motor vehicle on June 11, 2008.

XXVII. CONDITIONS OF PROBATION- LIMITATIONS-REVOCATIONS

A. STAY OUT OF BARS-CHANGE JOB = OK

Lacy v. State, 875 S.W.2d 3 (Tex.App.-Tyler 1994, no pet.).

Requiring defendant to stay out of bars and taverns or similar places, preventing defendant's continuing current employment, held to have a reasonable relation to crime and defendant's criminality.

B. DENIAL OF PROBATION DUE TO LANGUAGE BARRIER-PROPER

Flores v. State, 904 S.W.2d 129 (Tex.Crim.App. 1995).

Defendant was convicted of DWI and sentenced by the judge to jail in large part because he spoke only Spanish, and there were no appropriate rehabilitation programs for Spanish speakers. Decision held not to violate defendant's rights as was rationally related to legitimate government interest.

C. ORDER OF RESTITUTION PROPER IF DAMAGE CAUSED BY OFFENSE COMMISSION

Hanna v. State, 426 S.W.3d 87 (Tex.Crim.App. 2014).

This case involved an appeal from an Appellate Court decision that denied restitution in a DWI case where property damage occurred. The Court of Criminal Appeals upheld the denial of restitution in this case because it agreed that there was sufficient evidence that the Defendant's intoxicated driving caused the accident that caused the damage. An important part of the decision benefits victims of DWI related damage by holding that for the purposes of the restitution statute; a "victim" is any person who suffered loss as a direct result of the criminal offense. In so holding, they rejected the argument that a victim had to be named in the charging instrument.

See also: *Sanders v. State, No. 05-12-01186-CR, 2014 WL 1627320 (Tex.App.-Dallas 2014, pet. ref'd).*

D. URINE TEST RESULT FROM UNACCREDITED LAB SHOULD NOT HAVE BEEN ADMITTED

Hargett v. State, No. 06-15-00022-CR, 2015 WL 5098964 (Tex.App.-Texarkana 2015)

Defendant was on probation for DWI and was revoked based on proof that she had ingested Methamphetamine and Alcohol. That proof came from a urine test administered per probation conditions. Court held that objection to urine test result should have been sustained as its admission violated Article 38.35 CCP since lab that did testing was not “accredited”. Judgement of revocation reversed.

XXVIII. NO J.N.O.V. IN CRIMINAL CASES

Savage v. State, 933 S.W.2d 497(Tex.Crim.App. 1996).

Trial judge has no authority to grant a j.n.o.v. in criminal case. It can grant a motion for new trial based on insufficiency of the evidence but when it does, State can appeal.

XXIX. COURT OF APPEALS SHOULD NOT RE-WEIGH EVIDENCE

Perkins v. State, 19 S.W.3d 854 (Tex.App. - Waco 2000, pet. denied).

Officer came upon car parked in the middle of the road. Firefighter testified that defendant seemed intoxicated. There were beer cans in back seat noted by one officer and not by another officer. Officer noted strong odor of alcoholic beverage on defendant's breath, slurred speech, disoriented, refused to give sample. Defendant admitted only one beer and no evidence he had more. Court of Appeals improperly re-weighed evidence, including how good defendant looked on videotape and substituted its findings for those of the jury and reversed. Case went to Court of Criminal Appeals which granted PDR and pointed out correct standard in 993 S.W.2d 116 (Tex.Crim.App. 1999). Upon rehearing, Court of Appeals found evidence factually sufficient and affirmed the conviction.

XXX. MISDEMEANOR APPEAL BOND CONDITIONS

Grady v. State, 962 S.W.2d 128 (Tex.App.-Houston [1st Dist.] 1997, pet. ref'd).

Courts have no authority to put conditions on misdemeanor appeal bonds that are not provided for by statute. In this case, the conditions that the defendant: 1) submit to random UA; 2) place interlock device on vehicle; 3) home confinement; 4) electronic monitoring were upheld. Condition that he attend AA was held to be invalid.

Ex Parte Leverett, No. 05-05-01557-CR, 2006 WL 279388 (Tex.App.-Dallas 2006, no pet.) (not designated for publication).

The following conditions imposed on appeal bond after misdemeanor DWI conviction were held to be proper:

1. Commit no offense against the laws of Texas or any other state or the United States;
2. Consume no alcoholic beverages;
3. Report in person to the pretrial release supervising officer (hereinafter "supervising officer") of the Grayson County Community Supervision and Corrections Department, beginning on the date of this order, and one time per month thereafter;
4. Pay a monthly supervisory fee in the amount of $20.00 to the Grayson County Community
5. Supervision and Corrections Department;
6. Remain within Grayson County, Texas, unless express permission to leave said county is granted by the supervising officer or by the Court;
7. Submit a specimen of breath or blood as directed from time to time by the supervising officer
8. for the detection of alcohol in the defendant's body and pay any and all fees associated therewith;
9. Operate no motor vehicle with any detectable amount of alcohol in the defendant's body;
10. Submit a specimen of breath or blood for analysis to determine the alcohol concentration in the defendant's body upon the request of any peace officer as authorized by law;
11. Have installed on the motor vehicle owned by the defendant, or on the vehicle most regularly operated by the defendant, an ignition interlock device, approved by the Texas Department of Public Safety, that uses a deep lung breath analysis mechanism to make impractical the
12. operation of a motor vehicle if ethyl alcohol is detected in the breath of the operator. Such device shall be installed on the appropriate vehicle, at the defendant's expense, within 30 days from the date of this order;
13. Provide proof of installation of such ignition interlock device to the supervising officer on or before the 30th day after the date of this order; and
14. Operate no motor vehicle that is not equipped with an ignition interlock device.

XXXI. INTERLOCK DEVICES

A. AS A PRE-TRIAL BOND CONDITION

Ex Parte Elliott, 950 S.W.2d 714 (Tex.App.-Fort Worth 1997, pet. ref'd).

Court held that 17.441 is not unconstitutional, and that the judge did not abuse his discretion in ordering an interlock device as a condition of bond in this case.

B. AS A CONDITION OF PROBATION

State v. Lucero, 979 S.W.2d 400 (Tex.App.-Amarillo 1998, no pet.).

A trial court may waive (as a condition of probation) the installation of a deep lung device under Article 42. 12, Section 13 (i), upon making a finding that to do so would not be in the "best interest of justice".

C. AS PROOF OF PROBATION VIOLATION

Kaylor v. State, 9 S.W.3d 205 (Tex.App.-San Antonio 1999, no pet.).

In this case, the State proved a defendant had violated the probation condition that he does not consume alcohol by calling a system administrator from an interlock company to interpret readings gathered from interlock device installed on suspect's car. The witness was able to distinguish those readings caused by other substances from those caused by alcoholic beverages. The proof was held to be sufficient even though the State was unable to present evidence that the defendant was the person who actually blew into the device.

XXXII. JUDGE MAY CHANGE JURY SENTENCE OF JAIL TIME TO PROBATION

Ivey v. State, 277 S.W.3d 43 (Tex.Crim.App. 2009).

This was a DWI trial where the defendant went to the jury for punishment and deliberately failed to file a sworn motion with the jury declaring that he had never before been convicted of a felony offense in this or any other state, thus rendering himself ineligible for a jury recommendation. The jury assessed his punishment at $2000 fine and thirty-five days in jail. After conferring informally with the jury off the record, the judge announced she would suspend the imposition of the appellant's sentence, place the defendant on community supervision for a period of two years, and suspend all but $500 of the fine. The trial judge also imposed a thirty-day jail term and a requirement that the appellant complete 60 hours of community service as conditions of the community supervision. The issue on appeal was whether a trial court can suspend a jury-assessed punishment and order community supervision when the jury itself could not have recommended community supervision. The Court of Criminal Appeals held it was not error for the trial court in this case to place the appellant on community supervision even though the jury assessed his punishment and did not recommend it. It was within the discretion of the trial court under Article 42. 12, Section 3, to do so, so long as the appellant met the criteria for community supervision spelled out there.

XXXIII. PLEA OF GUILTY TO JURY = JURY ASSESSES PUNISHMENT

In re State ex rel. Tharp, 393 S.W.3d 751 (Tex.Crim.App. 2012, reh denied).

This case involves a Defendant who had already reached an agreement with the State. The trial judge, after speaking with the Defendant and ordering a PSI, decided he knew better than the State what the punishment should be and determined upon the Defendant's plea of guilty to the jury that he would assess punishment. The State sought mandamus and argued that Art. 26. 14 provide that upon a plea of guilty to a jury in a felony case, that the jury will assess punishment. The only way around this is when the State agrees to waive its right to a jury trial which it refused to do in this case. The Court orders the case remanded back to the Trial Court with instruction that all relevant issues, including punishment, be submitted to jury.

XXXIV. TRIAL COURT MAY NOT DISMISS WITH PREJUDICE

State v. Mason, 383 S.W.3d 314 (Tex.App.-Dallas 2012, no pet.).

The State moved for a continuance based on the officer not appearing and their inability to locate the officer. The trial judge denied the motion so the State filed a motion to dismiss the case without prejudice. The trial judge over State's objection dismissed case with prejudice and the State appealed. In overruling the Trial Court, the Court of Appeals found that the Trial Court abused its discretion in dismissing driving the case with prejudice, after State moved for dismissal without prejudice, where there was no suggestion of prosecutorial misconduct, defendant never raised a speedy trial or due process complaint, and future charges would not have been barred by statute of limitations.

XXXV. SPEEDY TRIAL

Stone v. State, No. 08-16-00343-CR, 2018 Tex. App. LEXIS 2537 (Tex.App. – El Paso, 2018).

The court held that the charge for the lesser-included offense of DWI does not begin the speedy trial clock for the greater charged offense of intoxication assault. A defendant's right to speedy trial does not attach until he is formally accused. A charging instrument is a formal accusation.

XXXVI. DISCOVERY

Burton v. State, No. 14-22-00794-CR, 2024 Tex.App. LEXIS 3126 (14th Dist. – Houston 2024).

On October 15, 2019, appellant filed a request for discovery, notice of extraneous bad acts, and *Brady* information. Appellant's requests asked for, among other things, "all discovery evidence including but not limited to offense reports, witness statements, photographs, recordings and any other material items within the State's possession." On December 16, 2019, appellant filed another request for discovery pursuant to article 39.14 of the Code of Criminal Procedure, commonly known as The Michael Morton Act. The State produced copies of three surveillance videos on January 28, 2022. On March 31, 2022, appellant filed a motion to suppress the videos because they were not produced as soon as practicable pursuant to article 39.14. The videos were recovered on the day of the offense.

Appellant raises the following five issues on appeal (1) Whether the trial court used the correct standard — willfulness to determine whether the State violated Article 39.14? (2) What is the correct mens rea to be used in reviewing the State's failure to provide discovery pursuant to Article 39.14? (3) What is the meaning

of "as soon as practicable" for purposes of Article 39.14? (4) Does the prosecutor have a duty to find and produce discovery held by other agencies subject to Article 39.14? (5) What is the proper remedy when the State fails to produce discovery sought under Article 39.14?

By asking this court to determine the "correct mens rea," the meaning of "as soon as practicable," and the prosecutor's duty to produce discovery held by other agencies, appellant invites us to issue an advisory opinion, which the Texas Constitution prohibits. However, the court did address whether or not the trial court erred in denying the motion to suppress.

Historically, courts have held "evidence willfully withheld from disclosure under a discovery order should be excluded from evidence." *Francis v. State*, 428 S.W.3d 850, 854-55 (Tex. Crim. App. 2014) (quoting *Hollowell v. State*, 571 S.W.2d 179, 180 (Tex. Crim. App. 1978)). "Extreme negligence or even recklessness on the prosecutor's part in failing to comply with a discovery order will not, standing alone, justify the sanction of excluding relevant evidence." *Id.* at 855 (citing *State v. LaRue*, 152 S.W.3d 95, 97 (Tex. Crim. App. 2004)). Exclusion of evidence in this context constitutes a court-fashioned sanction for prosecutorial misconduct that hinges on the prosecutor's intent. *Oprean v. State*, 201 S.W.3d 724, 726-27 (Tex. Crim. App. 2006). A continuance can be an appropriate remedy for failure to timely disclose evidence that is within the trial court's discretion**. *State v. Heath*, 642 S.W.3d 591, 598 (Tex. App.—Waco 2022, pet. granted)**. This court held that they were not bound by Heath and declined to follow that interpretation, stating "to the extent *Heath* holds that evidence not timely produced in discovery must be excluded despite a showing of prejudice to the defendant, we decline to follow that holding as it is contrary to high court authority and this court's authority. *See Francis*, 428 S.W.3d at 859; *Hernandez v. State*, 610 S.W.3d 106, 115 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd) (defendant must show prejudice to exclude evidence not promptly turned over in discovery under the Michael Morton Act); *see also* ***Watkins*, 619 S.W.3d at 291 (remanding to court of appeals for harm analysis).**

The court concluded that the defendant failed to point to any evidence showing that the untimely disclosure resulted in prejudice. Therefore, the court held that the trial court did not err in denying the defendant's motion to suppress.

State v. Heath, NO. PD-0156-22, 2024 Tex.Crim.App. LEXIS 446

Although this case is not specific to DWI it will be relevant to all criminal cases. In this case the defense counsel emailed the State and simply requested "discovery" on this case. The State provided law enforcement records, CPS records, and photos. As the case proceeded forward, the State announced ready for trial 3 times. Six days before the 4th trial setting (14 months after initial discovery was produced) prosecutors learned there was 911 call. The State immediately obtained it from the law enforcement agency and provided it to the defense. The Defendant filed a writ and a motion to suppress the 911 call in violation of Code of Criminal Procedure Art. 39.14.

The questions presented were (1) does Art. 39.14(a) include items, unbeknownst to the prosecuting attorney, that are in the possession of law enforcement, (2) doe a trial court have the authority to exclude evidence that was not timely disclosed by the State absent a showing of bad faith or prejudice, (3) what does "as soon as practicable after receiving a timely request" mean?

The State argued that it was unaware of the existence of the 911 call and only learned about it when it met with the complaining witnesses' mother, provided it as soon as it received it from law enforcement, no showing of bad faith, and the appropriate remedy would be a continuance. The defense argued that it was not asking for a continuance, showing a bad faith was not required under Art. 39.14(a) and that because the recording had been in law enforcement's possession since 2016, the disclosure was untimely and should be excluded.

The trial court held that the State has a "specific duty …to ascertain what evidence within the terms of Art. 39.14 is held by the police and to make such evidence available to the defense. Because the State failed to ascertain the existence of the 911 call before the 4th trial setting the State's failure to disclose is a violation of Art. 39.14(a) and it excluded the evidence.

Interestingly enough, the court of appeals held that the trial court abused its discretion because defense counsel's email requesting discovery was not sufficient to trigger Art. 39.14(a), therefore, it did not require the State to comply. The Court of Criminal Appeals held that the COA erred to address an issue not presented to the trial court or raised by the parties and remanded the case to the COA. The COA later held that the State now has an affirmative duty to search for the item and produce it in a timely manner. A failure to at least inquire about the existence of discoverable items in response to a proper request in a timely manner is all the evidence necessary to show that the failure to timely produce the item in discovery was due to what was previously characterize as a "willful violation" or "bad faith." A prosecutor need not know what it is that is not being produced, but the failure to even look to see if there is something responsive is adequate for the trial court to fashion a remedy appropriate to the situation.

The Court of Criminal Appeals held that the "State" includes the prosecution, law enforcement, as well as third party contractors with the state. Further it held that Art. 39.14 can be violated by a prosecutor's non-disclosure of evidence due to LE's failure to turn evidence over, even if LE's possession of evidence is unknown to the State. See Article 2.1397 and *Villarreal* below.

The Court of Criminal Appeals also addressed the meaning/interpretation of "as soon as practicable." It held that it meant when reasonably capable of being accomplished. The court further found that reasonableness was interpreted as a requirement of reasonable diligence on the part of the prosecutor to discover what items the State has in its possession that it intends to introduce at trial. The Court was clear that "as soon as practicable" was NOT when the evidence becomes known to the prosecutor. This interpretation greatly expands the requirement on prosecutors to diligently seek out evidence held by our law enforcement agencies and third-party contractors with the State. *****Keep an eye on this case*****

State v. Villarreal, NO. 13-23-00054-CR, 2024 Tex. App. LEXIS 3541 (Edinburg 2024)

Although this is not a DWI case, this case provides a distinction between spoilation and a disclosure violation. Spoilation is where the state no longer has possession or control over evidence because it has been lost or destroyed and a disclosure violation is where the State still has possession or control over evidence but has failed to timely disclose it.

Villarreal argued that the State failed to keep an accounting of its evidence, and as evidence of bad faith, Villarreal pointed to the State's failure to timely disclose that the evidence had been lost and the State's persistence in prosecuting the charges. The State countered that it had opted, pursuant to office policy, to

conduct an internal search for the lost evidence before immediately notifying Villarreal. According to the State, any delay in notifying Villarreal was reasonable in that the State wanted to be certain that evidence was, in fact, lost and could no longer be replicated. At the hearing, the State maintained that Villarreal had previously been provided discovery, which Villarreal does not dispute; the State was unaware if Villarreal possessed evidence provided by the State that is no longer in possession of the State; and all evidence in the State's possession to-date had been provided to Villarreal. The trial court granted Villarreal's motion to dismiss the case with prejudice and the State appealed.

"Although courts occasionally blur the distinction between *Youngblood* and *Brady, Youngblood* is properly applied to cases in which the government no longer possesses the disputed evidence, whereas *Brady* is properly applied to cases in which exculpatory evidence remains in the government's possession." To satisfy the standard enunciated in *Youngblood*, a defendant has the burden of demonstrating that the State or its actors lost or destroyed the evidence and did so in bad faith. *See* *Youngblood*, 488 U.S. at 58. We, therefore, hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Guzman*, 539 S.W.3d at 401; *see also* *State v. Tooley*, No. 07-21-00103-CR, 2021 Tex. App. LEXIS 7758, 2021 WL 4282632, at *1 (Tex. App.—Amarillo Sept. 21, 2021, pet. ref'd) (mem. op., not designated for publication).

Bad Faith Defined

Significant effort has been expended trying to determine the meaning of "bad faith." *See* *Ex parte Napper*, 322 S.W.3d 202, 231 (Tex. Crim. App. 2010). Bad faith is more than simply being aware that one's action or inaction could result in the loss of evidence. *See* *id.* at 238. "[B]ad faith entails some sort of improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful." *Id.* A showing of gross negligence or poor judgment does not qualify as bad faith. *See* *Youngblood*, 488 U.S. at 58;

As evidence of bad faith here, Villarreal argued that the State failed to properly maintain its case management system, which resulted in the intentional, negligent, or reckless loss or destruction of evidence. The State's inability to maintain a proper case management system and find evidence—however problematic—is not evidence of bad faith where it remains undisputed that the State does not know what happened to the lost evidence. Moreover, there was no evidence that establishes the State or any of its actors specifically knew the nature of the missing evidence—i.e., that the evidence was favorable to Villarreal—thereby indicating a possible improper motive.

Evidence of Greenlee's undisputed delay in notifying Villarreal that the State had lost the evidence in the case is equally unavailing. Greenlee's delayed disclosure neither resulted in the loss or destruction of evidence, *see Napper*, 322 S.W.3d at 238, nor is it exemplary of evidence of improper motive.

Article 2.1397 Violation

Villarreal additionally argued the State's noncompliance with Texas Code of Criminal Procedure article 2.1397 necessitated the dismissal of charges. The State asserts on appeal as it did before the trial court: no such remedy exists under article 2.1397. Article 2.1397 places an affirmative duty on the law enforcement agency that files a case with a prosecuting office to produce all information that would be required to be produced pursuant to article 39.14(a).

In *Black v. State*, No. 13-22-00147-CR, 2023 Tex. App. LEXIS 8346, 2023 WL 7204472, at *7-8 (Tex. App.—Corpus Christi—Edinburg Nov. 2, 2023, pet. ref'd) the court examined whether noncompliance with article 2.1397 could be remedied by the suppression of evidence or the issuance of a new trial. The court concluded that the plain text of the statute is **"silent on its face as to the consequences of noncompliance," and the "legislative history also does not indicate whether a defendant may use the statute to exclude relevant testimony from officers who fail to comply with the statute."** *See* 2023 Tex. App. LEXIS 8346, [WL] at *7. Because article 2.1397 is not a mechanism for dismissal, a dismissal predicated on an article 2.1397 violation is error. *See Mungia*, 119 S.W.3d at 816; *Fellows*, 471 S.W.3d at 568-69.

Article 39.19 (a) Violation

"According to the plain text of [a]rticle 39.14, criminal defendants now have a general statutory right to discovery in Texas beyond the guarantees of due process," requiring the State to "disclose all 'exculpatory, impeaching, and mitigating' evidence to the defense that tends to negate guilt or reduce punishment" within its "possession, custody, or control." *Watkins v. State*, 619 S.W.3d 265, 277, 291 (Tex. Crim. App. 2021) (citing Tex. Code Crim. Proc. Ann. art. 39.14(a)). To be clear, the evidence must be within the State's possession, custody, or control for purposes of an article 39.14 compliance challenge. *See In re State ex rel. Skurka*, 512 S.W.3d 444, 455 (Tex. App.—Corpus Christi—Edinburg 2016, no pet.); *see also Mitchell v. State*, No. 01-23-00251-CR, 2024 Tex. App. LEXIS 312, 2024 WL 187385, at *7 (Tex. App.—Houston [1st Dist.] Jan. 18, 2024, no pet.) (mem. op., not designated for publication) ("The defendant has the burden to show the complained-of evidence was in the State's possession but withheld."); *Mumphord v. State*, No. 13-22-00388-CR, 2023 Tex. App. LEXIS 7954, 2023 WL 6886119, at *8 (Tex. App.—Corpus Christi—Edinburg Oct. 19, 2023, pet. ref'd) (mem. op., not designated for publication) ("We will not impose a burden on the State to produce evidence which may not be available or might not even exist."). Further, we have previously held that where complained-of evidence is not within the State's possession because it has been inadvertently destroyed, dismissal is not warranted under article 39.14. *Garcia*, 2022 Tex. App. LEXIS 6038, 2022 WL 3452413, at *5. The parties in Villarreal agreed that the complained-of lost evidence here is not in the State's possession, custody, or control. Therefore, in accordance with our precedent, dismissal under article 39.14 was error.

Watkins v. State, 619 S.W.3d 265, 277, 291 (Tex. Crim. App. 2021)

Prior to trial, Appellant's attorney timely requested disclosure of "any other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the case" pursuant to Article 39.14 of the Code of Criminal Procedure. The prosecutor provided notice of the State's intent to introduce evidence of these prior convictions and extraneous offenses at punishment. The prosecutor didn't disclose copies of the exhibits themselves until it was time to introduce them at trial. The exhibits are a collection of booking records, pen packets, and judgments of prior convictions that were used to prove two prior convictions for enhancement and other extraneous offenses that Appellant had committed. The court held that the exhibits at issue were "material" under the new version of Tex. Code Crim. Proc. Ann. art. 39.14 because the word "material" was interpreted as having some logical connection to a fact of consequence and the exhibits at issue in the case fit that definition as they had a logical connection to subsidiary punishment facts. Thus, the State erred by failing to produce those exhibits prior to trial.