



2008

Criminal Procedure: Confessions, Searches, and Seizures

Michael E. Keasler

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Michael E. Keasler, *Criminal Procedure: Confessions, Searches, and Seizures*, 61 SMU L. Rev. 767 (2008)
<https://scholar.smu.edu/smulr/vol61/iss3/12>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

Michael E. Keasler*

I. INTRODUCTION	767
II. CONFESSIONS	767
A. VOLUNTARINESS	767
B. CUSTODIAL INTERROGATION	770
C. STATUTORY REQUIREMENTS	773
D. JUVENILES	775
III. SEARCH AND SEIZURE	777
A. IN GENERAL	777
B. ARREST, STOP, OR INQUIRY WITHOUT WARRANT	779
1. <i>Encounters</i>	780
2. <i>Investigative Detentions (Terry Stops)</i>	780
3. <i>Warrantless Searches and Arrests</i>	783
C. ARREST OR SEARCH WITH WARRANTS	788
D. CONSENT	791
IV. CONCLUSION	792

I. INTRODUCTION

A review of Texas and federal court cases over the past year shows few significant changes to the voluminous and well-established jurisprudence related to confessions, searches, and seizures. Federal and state appellate courts give deference to trial court fact-findings unless clearly erroneous and harmless-error analysis is still regularly applied.

II. CONFESSIONS

A. VOLUNTARINESS

An individual's privilege against self-incrimination is protected by the Fifth Amendment to the United States Constitution.¹ Courts routinely apply judicially and legislatively-created rules to guard against the admission of confessions obtained in violation of this privilege.

An individual's statement that is "freely and voluntarily made without compulsion or persuasion" is admissible as evidence against that individ-

* Michael E. Keasler is a Judge on the Court of Criminal Appeals in Austin, Texas.
1. *Herrera v. State*, 241 S.W.3d 520, 525 (Tex. Crim. App. 2007).

ual.² A confession is voluntary if, under the totality of the circumstances, “the statement is the product of the accused’s ‘free and rational’ choice.”³ A statement is involuntary if, in making the statement, “the defendant’s will was ‘overborne’ by police coercion.”⁴ In determining whether a statement is voluntary, courts do not consider the truth or falsity of the statement.⁵

When examining the totality of the circumstances to determine whether a statement was made voluntarily, Texas courts consider the following:

(1) relevant facts about the interrogation itself, such as the physical location of the interrogation, the length of the detention, and the number of people present; (2) the extent to which the accused was denied access to outside resources, such as family, friends, or a lawyer; (3) whether the accused was denied essential physical needs, such as food, drink, or access to a bathroom; (4) the physical comfort or discomfort of the accused; (5) the mental and physical condition of the accused; and (6) the nature and extent of any promises or threats made to the accused.⁶

In *Delao v. State*, the Texas Court of Criminal Appeals held that the totality of the circumstances standard “is also the appropriate standard to apply when a confession is made by someone suffering from mental retardation and mental illness.”⁷ In *Calderon v. State*, the San Antonio Court of Appeals examined whether the appellant’s mental impairment rendered his confession involuntary.⁸ At the suppression hearing, the appellant presented, and the trial judge admitted, evidence that he was learning disabled and suffered from major depression.⁹ The court of appeals determined that “evidence of mental impairment is a factor to be considered . . . in determining from the totality of the circumstances whether the confession is voluntary.”¹⁰ An inquiry into the accused’s mental impairment is needed to determine “whether the accused’s mental impairment is so severe that he is incapable of understanding the meaning and effect of his confession.”¹¹ Evaluating the appellant’s evidence, the court concluded that it failed to establish that the appellant “was inca-

2. TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 2005); Herrera, 241 S.W.3d at 525.

3. Horn v. Quarterman, 508 F.3d 306, 323 (5th Cir. 2007) (quoting United States v. Rogers, 906 F.2d 189, 190 (5th Cir. 1990)).

4. Rodriguez v. State, 248 S.W.3d 764, 768 (Tex. App.—Fort Worth 2008, no pet.) (quoting Creager v. State, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997)).

5. Harty v. State, 229 S.W.3d 849, 854 (Tex. App.—Texarkana 2007, pet. filed).

6. Moseley v. State, 223 S.W.3d 593, 597 (Tex. App.—Amarillo 2007), *aff’d*, 252 S.W.3d 398 (Tex. Crim. App. 2008).

7. 235 S.W.3d 235, 241 (Tex. Crim. App. 2007), *cert. denied*, 128 S. Ct. 1228 (2008).

8. No. 04-05-00657-CR, 2006 Tex. App. LEXIS 9135, at *3-8 (Tex. App.—San Antonio Oct. 26, 2006, no pet.).

9. *Id.* at *6.

10. *Id.* at *5.

11. *Id.*

pable of understanding the meaning and effect of his confession.”¹² In support of its conclusion, the court observed that the Texas Court of Criminal Appeals has repeatedly “upheld the voluntariness of confessions given by defendants with mental deficiencies more severe than those of [the appellant].”¹³

Texas courts have consistently recognized that “[t]rickery or deception does not make a statement involuntary unless the method was calculated to produce an untruthful confession or was offensive to due process.”¹⁴ In *Harty v. State*, the Texarkana Court of Appeals was called upon to determine whether the appellant’s admissions to violating the terms of his community supervision made during a mandatory polygraph examination were involuntary due to the State’s false representation that the statements would be disclosed only to the appellant’s therapist.¹⁵ Setting out the applicable law, the court explained, “Texas law prohibits the use of any confession given by a defendant under the influence of an improper promise.”¹⁶ The court then considered the four requirements of an improper promise, as defined by the Texas Court of Criminal Appeals: “The promise must be: 1) of some benefit to the defendant, 2) positive, 3) made or sanctioned by a person in authority, and 4) of such character as would be likely to influence the defendant to speak untruthfully.”¹⁷ Evaluating the fourth requirement, the court held that the State’s promise did not influence the appellant to speak untruthfully because the appellant had nothing to gain by making false statements; the false statements would have adversely affected his treatment with his therapist and, if disclosed to authorities, would have been against his interest.¹⁸

“When the voluntariness of a statement is challenged, the Due Process Clause requires the trial court to make an independent determination in the absence of the jury as to whether the statement was voluntarily made.”¹⁹ This hearing is commonly referred to as a Jackson-Denno hearing,²⁰ and the burden falls on the prosecution to prove by a preponderance of the evidence that a defendant’s confession was voluntarily made and is admissible.²¹

Texas Code of Criminal Procedure, article 38.22, section 6, provides “a two-step procedure for determining the voluntariness of a statement.”²²

12. *Id.* at *7.

13. *Id.*

14. *Harty v. State*, 229 S.W.3d 849, 852 (Tex. App.—Texarkana 2007, pet. filed).

15. *Id.* at 851-52, 855.

16. *Id.* at 856.

17. *Id.* (quoting *Sossamon v. State*, 816 S.W.2d 340, 345 (Tex. Crim. App. 1991)); see also *Horn v. Quarterman*, 508 F.3d 306, 323 (5th Cir. 2007).

18. *Id.* at 856-57.

19. *Id.* at 852 (citing *Jackson v. Denno*, 378 U.S. 368, 380 (1964)).

20. *Johnson v. State*, No. 01-06-00621-CR, 2007 Tex. App. LEXIS 5497, at *6 (Tex. App.—Houston [1st Dist.] July 12, 2007, pet. ref’d).

21. *Simpson v. State*, 227 S.W.3d 855, 858 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

22. *Smith v. State*, 236 S.W.3d 282, 296 (Tex. App.—Houston [1st Dist.] 2007, pet. ref’d).

“First, the trial court must, in the absence of the jury, make an independent finding as to whether the statement was made voluntarily.”²³ Second, “[i]f the trial court finds that the statement was made voluntarily, evidence pertaining to its voluntariness may be submitted to the jury, and the court must instruct the jury that it may not consider the confession unless it believes, beyond a reasonable doubt, that the confession was voluntarily made.”²⁴

In *Vasquez v. State*, the Texas Court of Criminal Appeals clarified the test for determining when an instruction on voluntariness under article 38.22 is required.²⁵ A jury instruction on voluntariness is not required in every case.²⁶ “[T]here is no error in refusing to include a jury instruction where there is no evidence before the jury to raise the issue.”²⁷ However, because a trial judge’s preliminary voluntariness finding does not prevent the defendant from offering evidence of voluntariness at trial, a jury instruction on voluntariness is required when “the defense introduces evidence at trial from which a reasonable jury could find that the confession was not voluntarily made”²⁸ A defendant is entitled to a voluntariness instruction even though the defendant does not introduce new evidence on the issue at trial and there is no factual dispute about the evidence.²⁹

B. CUSTODIAL INTERROGATION

The United States Supreme Court decided, in *Miranda v. Arizona*, that an individual subjected to custodial interrogation must be admonished of certain warnings.³⁰ Texas codified these “*Miranda* warnings” under article 38.22, section 2(a) of the Texas Code of Criminal Procedure.³¹ Before custodial interrogation, an accused must be told that:

- (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
- (2) any statement he makes may be used as evidence against him in court;
- (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
- (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
- (5) he has the right to terminate the interview at any time;³²

23. *Id.*

24. *Id.*

25. 225 S.W.3d 541, 545 (Tex. Crim. App. 2007).

26. *Id.*

27. *Id.*

28. *Id.* at 546; *Smith*, 236 S.W.3d at 296.

29. *Vasquez*, 225 S.W.3d at 544-45.

30. *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

31. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2(a) (Vernon 2005).

32. *Id.*

Although the warnings in section 2(a), article 38.22 “are virtually identical to the *Miranda* warnings,” *Miranda* requires only the first four warnings.³³ The *Miranda* and article 38.22, section 2(a) warnings were designed “to protect an accused from the combined compulsions inherent in law enforcement custody coupled with law enforcement interrogation.”³⁴

Custodial interrogation is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”³⁵ The burden of proof to show that a confession was the result of custodial interrogation lies with the defendant.³⁶

Interrogation has been defined as “words, actions, or questioning by the police that the police should know are reasonably likely to elicit an incriminating response from the accused.”³⁷ “This definition of ‘interrogation’ focuses ‘primarily upon the perceptions of the suspect, rather than the intent of the police.’”³⁸

For purposes of *Miranda* and article 38.22, “[a] person is in ‘custody’ only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest.”³⁹ A “custody” determination involves a two-step inquiry: “[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.”⁴⁰

Texas courts recognize four situations that may constitute custody:

(1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.⁴¹

The first three situations require more than an investigative detention; rather, a restriction of movement to the degree generally associated with

33. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007).

34. *Russell v. State*, 215 S.W.3d 531, 535 (Tex. App.—Waco 2007, pet. ref’d).

35. *Miranda*, 384 U.S. at 444.

36. *Herrera*, 241 S.W.3d at 526 (quoting *Wilkerson v. State*, 173 S.W.3d 521, 532 (Tex. Crim. App. 2005)).

37. *Pierce v. State*, 234 S.W.3d 265, 272 (Tex. App.—Waco 2007, pet. ref’d) (citing *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)); see also *Moran v. State*, 213 S.W.3d 917, 922-23 (Tex. Crim. App. 2007).

38. *Moran*, 213 S.W.3d at 923.

39. *Herrera*, 241 S.W.3d at 525 (quoting *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996)).

40. *Id.* at 532 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

41. *Resendez v. State*, 256 S.W.3d 315, 325-56 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Dowthitt*, 931 S.W.2d at 254).

a formal arrest is needed.⁴² Furthermore, custody is not automatically established in the fourth situation.⁴³ An officer's "knowledge of probable cause" must be "manifested to the suspect," and "the manifestation of probable cause, combined with other circumstances, [must] lead a reasonable person to believe that he is under restraint to the degree associated with an arrest."⁴⁴

The Houston Court of Appeals for the Fourteenth District addressed this fourth situation in *Resendez v. State*.⁴⁵ There, the appellant, during a videotaped interview with police, admitted that he shot the victim after failing a polygraph test.⁴⁶ The appellant agreed to take the polygraph test and to talk with police after completing the test.⁴⁷ The appellant was not given *Miranda* warnings before the interrogation and was arrested shortly after the interrogation.⁴⁸ The court of appeals held that the appellant was "in custody" for purposes of *Miranda* after he confessed to shooting the victim and that the trial judge therefore erred in refusing to suppress the appellant's statements following the admission.⁴⁹ Even though the officers did not inform the appellant of their probable cause for his arrest, the court of appeals inferred that the appellant was aware that there was probable cause based on the facts known to him before the interrogation as well as those learned during the interrogation.⁵⁰ The court determined that "a reasonable person in appellant's position [would] believe that he was under restraint to the degree associated with an arrest" after admitting to shooting the victim.⁵¹

When an accused invokes the Fifth Amendment right to counsel, the accused may not be interrogated "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."⁵² When examining whether a suspect invoked the right to counsel, courts examine "the totality of the circumstances surrounding the interrogation" and "the alleged invocation."⁵³ A suspect's request for counsel must be clearly stated; "a reasonable police officer" must be able to understand that the accused is requesting an attorney.⁵⁴ When a suspect makes an ambiguous request for counsel, police may continue questioning the suspect and are not required to clarify the suspect's request.⁵⁵ In *Dalton v. State*, the Austin

42. *Id.* (citing *Dowhitt*, 931 S.W.2d at 254).

43. *Id.* at 326.

44. *Id.*

45. *Id.* at 326.

46. *Id.* at 320.

47. *Id.* at 326.

48. *Id.* at 320, 326.

49. *Id.* at 327.

50. *Id.*

51. *Id.*

52. *Cross v. State*, 144 S.W.3d 524, 526 (Tex. Crim. App. 2004) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1983)).

53. *Dalton v. State*, 248 S.W.3d 866, 872-73 (Tex. App.—Austin 2008, pet. filed).

54. *State v. Gobert*, 244 S.W.3d 861, 864 (Tex. App.—Austin 2008, pet. granted).

55. *Id.*

Court of Appeals held that the appellant's request to the arresting officer to ask his friends to get him a lawyer was ambiguous because it only informed the officer that the appellant might want an attorney at some point.⁵⁶

Interrogation must also cease if an accused expresses the right to remain silent "at any time prior to or during questioning."⁵⁷ "The invocation of the right need not be formal; anything said or done by the accused that could reasonably be interpreted as a desire to invoke the right is sufficient to cut off questioning."⁵⁸ When a suspect unambiguously asserts the right to remain silent during questioning, police must cease all interrogation of the accused.⁵⁹ But when the assertion of the right to remain silent is ambiguous, police officers do not have to stop the interrogation or clarify whether the accused invoked this right "before continuing the interrogation."⁶⁰

In *Smith v. State*, the Houston First District Court of Appeals held that the appellant failed to unambiguously invoke his right to silence when he told the interrogating officer that he wanted to stop so he could get something to eat.⁶¹ The court held that the interrogating officer did not violate the appellant's rights by continuing to question the appellant; "[t]he statements indicate only that appellant was hungry and wanted to eat, not that he wanted to end the interrogation."⁶²

In *Ramos v. State*, the Texas Court of Criminal Appeals held that the appellant's statements to an interrogating officer that he "didn't want to talk" and "[t]hat he didn't want to talk about it anymore" were an "unambiguous, unequivocal, and unqualified assertion of [the appellant's] right to remain silent."⁶³ The court also concluded that the officers did not "scrupulously honor" the appellant's invocation when they continued to interrogate the appellant five minutes after the appellant made these statements.⁶⁴ The fact that one of the officers mirandized the appellant for a second time shortly after re-initiating the interrogation did not "negate" the appellant's invocation of his right to remain silent.⁶⁵

C. STATUTORY REQUIREMENTS

Texas Code of Criminal Procedure, article 38.22, governs the admissibility of oral and written confessions made during custodial interro-

56. *Dalton*, 248 S.W.3d at 873.

57. *Smith v. State*, 236 S.W.3d 282, 290 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

58. *Id.*

59. *Simpson v. State*, 227 S.W.3d 855, 858 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

60. *Smith*, 236 S.W.3d at 290.

61. *Id.*

62. *Id.*

63. *Ramos v. State*, 245 S.W.3d 410, 413, 418-19 (Tex. Crim. App. 2008).

64. *Id.* at 419.

65. *Id.* (citing *United States v. Taylor*, 164 F.3d 150, 155 (3d Cir. 1998)).

gation.⁶⁶ With regard to oral confessions, article 38.22, section 3(a) provides:

No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

- (1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;
- (2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;
- (3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
- (4) all voices on the recording are identified; and
- (5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.⁶⁷

While the above requirements are obligatory, article 38.22, section 3(c), explicitly excludes “any statement that contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.”⁶⁸

Additionally, section 5 of article 38.22 provides exceptions for:

- a statement made by the accused in open court at his trial, before a grand jury, or at an examining trial in compliance with articles 16.03 and 16.04 of this code;
- statement that is the *res gestae* of the arrest or of the offense;
- a statement that does not stem from custodial interrogation;
- a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness; or
- any other statement that may be admissible under law.⁶⁹

In *Herrera v. State*, the Texas Court of Criminal Appeals considered whether the defendant “was ‘in custody’ within the meaning of *Miranda*” and article 38.22.⁷⁰ The appellant argued that his oral statement was inadmissible because it was made when he was questioned by a law enforcement officer about an unrelated offense while he was inmate in the county jail.⁷¹ The appellant claimed that *Miranda* warnings must be given “when a person incarcerated on one offense is questioned by law

66. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005); see also *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007).

67. TEX. CODE CRIM. PROC. ANN. ART. 38.22 § 3(a) (Vernon 2005).

68. § 3(c).

69. § 5.

70. 241 S.W.3d at 526-27.

71. *Id.* at 527.

enforcement officials about a separate offense.”⁷²

The court evaluated the appellant’s claim in light of the United States Supreme Court’s decision in *Mathis v. United States*,⁷³ ultimately concluding that, “[a]lthough *Mathis* holds that *Miranda* warnings may be required when an inmate is questioned by law enforcement officials, *Mathis* does not hold that *Miranda* warnings must precede all inmate interrogations.”⁷⁴ The court further held that “incarceration does not always constitute ‘custody’ for *Miranda* purposes when an inmate is questioned by law enforcement officials ‘regarding an offense separate and distinct from the offense for which he was incarcerated.’”⁷⁵ Because the court did not “equate incarceration with ‘custody’ for purposes of *Miranda*,” the court considered whether the appellant was “in custody” under its “traditional ‘custody’ analytical framework.”⁷⁶ The court provided a non-exhaustive list of factors for the bench and bar to consider in this context:

- the language used to summon the inmate;
- the physical surroundings of the interrogation;
- the extent to which the inmate is confronted with evidence of his or her guilt;
- the additional pressure exerted to detain the inmate or the change in the surroundings of the inmate which results in an added imposition on the inmate’s freedom of movement; and
- the inmate’s freedom to leave the scene and the purpose, place, and length of the questioning.⁷⁷

Considering these factors, the court held that the appellant “failed to meet his initial burden of establishing that he was ‘in custody’” because the trial record did not contain “any facts relating to the factors relevant to determining ‘custody[.]’”⁷⁸ The court therefore held that the exclusion of appellant’s oral statement was in violation of the Fifth Amendment and article 38.22.⁷⁹

D. JUVENILES

The Texas Family Code defines a child as a person:

- ten years of age or older and under seventeen years of age; or
- seventeen years of age or older and under eighteen years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming seventeen years of age.⁸⁰

A child’s statement is admissible if the statement does not “stem” from

72. *Id.*

73. *Mathis v. United States*, 391 U.S. 1, 4-5 (1968).

74. *Herrera*, 241 S.W.3d at 531.

75. *Id.* (quoting *United States v. Menzer*, 29 F.3d 1223, 1231(7th Cir. 1994)).

76. *Id.* at 532.

77. *Id.*

78. *Id.*

79. *Id.* at 533.

80. TEX. FAM. CODE ANN. § 51.02(2) (Vernon Supp. 2008).

custodial interrogation.⁸¹ Further, a statement made by a child during custodial interrogation is admissible “in any future proceeding concerning the matter about which the statement was given if” the statement was obtained in compliance with procedures set forth in section 51.095 of the Texas Family Code.⁸² Under section 51.095, a child suspect must receive the same warnings as an adult suspect under article 38.22, section 2(a), Texas Code of Criminal Procedure, except section 51.095(a)(1) provides that the warnings must be given by a magistrate outside the presence of the police or prosecutor.⁸³ The magistrate is required to certify that the child was examined outside the presence of law enforcement and that the “child understands the nature and contents of the statement” and has “knowingly, intelligently, and voluntarily waived” his or her rights.⁸⁴

To determine whether a child’s confession is voluntary, courts consider the totality of the circumstances surrounding the interrogation.⁸⁵ Under this standard, the child’s “age, experience, education, background, and intelligence” are taken into account when evaluating whether the child has the ability to understand the warnings.⁸⁶

A statement obtained as a result of custodial interrogation without any participation by a magistrate does not necessarily render a child’s statement inadmissible. In *Vega v. State*, the Corpus Christi Court of Appeals considered the admissibility of a statement made by Vega, a juvenile, without any participation by a magistrate.⁸⁷ Vega fled to Chicago, Illinois, after she was implicated in a capital murder in Texas.⁸⁸ She was apprehended in Illinois and interviewed about the murder by Chicago police.⁸⁹ At trial, the judge denied Vega’s request to suppress the statement.⁹⁰ On appeal, Vega argued that her statement was inadmissible because a magistrate did not participate in obtaining her statement.⁹¹

At the direction of the Texas Court of Criminal Appeals on remand, the court of appeals stated that it would

analyze the effect of the absence of a magistrate on the admissibility of the challenged statement in a context of fairness to the parties, focusing on the purpose expressed in section 51.01 of the family code, which is ‘to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.’⁹²

81. § 51.095(b).

82. § 51.095.

83. § 51.095(a)(1), (b)(1).

84. § 51.095(a)(1)(B)(ii)(c).

85. *Delao v. State*, 235 S.W.3d 235, 239 (Tex. Crim. App. 2007) (citing *Fare v. Michael C.*, 422 U.S. 707, 725 (1979)).

86. *Id.* (quoting *Michael C.*, 422 U.S. at 725).

87. 255 S.W.3d 87, 94 (Tex. App.—Corpus Christi 2007, pet. ref’d).

88. *Id.* at 87.

89. *Id.* at 87-88.

90. *Id.* at 88.

91. *Id.* at 99.

92. *Id.* at 105.

After reviewing the totality of the circumstances, the court held that Vega's statement was admissible notwithstanding the lack of participation by a magistrate.⁹³ The court reasoned, "[t]he procedures utilized were sufficient to carry out the underlying purpose of the Texas requirements;" "Vega's constitutional and other legal rights were recognized and enforced, and she was assured a fair hearing as directed by section 51.01 of the family code."⁹⁴

III. SEARCH AND SEIZURE

A. IN GENERAL

The United States and Texas Constitutions guarantee individuals protection from unreasonable searches and seizures.⁹⁵ The Fourth Amendment to the United States Constitution specifically provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁹⁶

Texas courts generally follow United States Supreme Court precedent interpreting the Fourth Amendment when addressing search and seizure issues under article 1, section 9, of the Texas Constitution.

The Fourth Amendment affords protection against unreasonable searches and seizures to individuals with standing. Constitutional protections are invoked and standing is established only when an unreasonable search or seizure is conducted by a government entity⁹⁷ and when an individual shows "that he or she personally has an expectation of privacy in the place searched and that the expectation is reasonable."⁹⁸ The Fifth Circuit addressed the privacy inquiry for standing in *United States v. Finley*.⁹⁹ The court explained that whether an individual has a reasonable expectation of privacy depends on: "(1) whether the defendant is able to establish an actual, subjective expectation of privacy with respect to the place being searched or items being seized, and (2) whether that expectation of privacy is one which society would recognize as reasonable."¹⁰⁰

Courts also consider the following factors in evaluating an assertion of privacy:

(1) whether the alleged aggrieved person has a property or possessory interest in the thing seized or the place searched; (2) whether he

93. *Id.* at 119.

94. *Id.* at 115.

95. *State v. Cullen*, 227 S.W.3d 278, 281 (Tex. App.—San Antonio 2007, pet. ref'd).

96. U.S. CONST. amend. IV.

97. *Bessey v. State*, 199 S.W.3d 546, 550 (Tex. App.—Texarkana), *aff'd*, 239 S.W.3d 809 (Tex. Crim. App. Nov. 14, 2007).

98. *Hollis v. State*, 219 S.W.3d 446, 457 (Tex. App.—Austin 2007, no pet.).

99. 477 F.3d 250, 258 (5th Cir. 2007).

100. *Id.* (quoting *United States v. Cardoza-Hinojosa*, 140 F.3d 610, 614 (5th Cir. 1998)).

was legitimately on the premises; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, prior to the search, he took normal precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.¹⁰¹

A frequently litigated issue is whether an individual has standing as an overnight guest. In *United States v. Taylor*, the appellant, Taylor, claimed he had standing under the Fourth Amendment because he was an overnight guest at his girlfriend's home.¹⁰² Taylor relied on the Supreme Court's decision in *Minnesota v. Olson*, which "held that a houseguest has a legitimate expectation of privacy in his host's home, sufficient to 'enable him to be free in that place from unreasonable searches and seizures.'"¹⁰³ The Fifth Circuit explained that under *Olson*, an individual's "rights as a guest are limited to those that he could assert with respect to his own residence."¹⁰⁴ The court held that Taylor, as a houseguest, "was entitled to the same Fourth Amendment protections in his girlfriend's apartment that he would have received in his own home."¹⁰⁵

In June 2007, the United States Supreme Court held that a passenger in a car, along with the driver, has standing under the Fourth Amendment to challenge the constitutionality of a traffic stop and an ensuing search and seizure.¹⁰⁶ In *Brendlin v. California*, the Court explained that "[w]hen a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment."¹⁰⁷ The Court acknowledged that, although it had not "squarely answered the question whether a passenger is also seized" during a traffic stop, it had stated "over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver."¹⁰⁸ As a result, the Court extended standing to a passenger of a vehicle, thereby enabling a passenger to challenge the constitutionality of a traffic stop.¹⁰⁹

Although a probationer's home is subject to the Fourth Amendment's reasonableness requirement, probationers have a diminished expectation of privacy in the home by virtue of their status. In *United States v. LeBlanc*, the Fifth Circuit held that when a probation officer conducts a home visit that is authorized under state law, the visit does not have to be supported by a reasonable suspicion that the probationer is engaging in criminal activity.¹¹⁰ The court also held that a probation officer's brief,

101. *Hollis*, 219 S.W.3d at 457; see also *United States v. Finley*, 477 F.3d 250, 258-59 (5th Cir.), cert. denied, 127 S. Ct. 2065 (2007).

102. 482 F.3d 315, 318 (5th Cir. 2007).

103. *Taylor*, 482 F.3d at 318 (quoting *Minnesota v. Olson*, 495 U.S. 91, 98 (1990)).

104. *Id.*

105. *Id.* at 319.

106. *Brendlin v. California*, 127 S. Ct. 2400, 2403, 2410 (2007).

107. *Id.* at 2403.

108. *Id.* at 2406.

109. *Id.* at 2403.

110. 490 F.3d 361, 369 (5th Cir. 2007).

“plain view search” of a probationer’s home in the course of conducting an authorized home visit does not require proof of reasonable suspicion.¹¹¹

“[T]he Fourth Amendment does not require the exclusion of evidence that is the product of a search or seizure conducted by a private party.”¹¹² The Texas exclusionary rule, article 38.23(a) of the Texas Code of Criminal Procedure,¹¹³ “mirrors the federal one” but, “unlike the Fourth Amendment, [it] applies to certain actions by private individuals as well as those by government officers.”¹¹⁴

In a recent case, the Texas Court of Criminal Appeals addressed the issue of private party seizures when a tow-truck driver arrested an individual for DWI.¹¹⁵ In *Miles v. State*, the appellant filed a motion to suppress under the Texas exclusionary rule, claiming that the evidence obtained during the tow-truck driver’s arrest should have been suppressed.¹¹⁶ After an extensive explanation of the history of the Texas exclusionary rule, the court stated:

If the police cannot search or seize, then neither can the private citizen. Conversely, if an officer may search or seize someone under the particular circumstances, then the private citizen’s equivalent conduct does not independently invoke the Texas exclusionary rule, and the evidence obtained by either the officer or the private person may be admissible.¹¹⁷

The court held that under the circumstances, the tow-truck driver was authorized to make a citizen’s arrest because he had probable cause to believe that the appellant was driving while intoxicated and he effectuated the arrest in a manner that a reasonable police officer could have legally done.¹¹⁸

B. ARREST, STOP OR INQUIRY WITHOUT WARRANTS

The Texas Court of Criminal Appeals has recognized three distinct categories of police-citizen interaction, each of which requires a different level of constitutional protection: (1) encounters, which do not require justification by an officer;¹¹⁹ (2) investigative detentions, which require reasonable suspicion;¹²⁰ and (3) arrests, which must be supported by

111. *Id.* at 368-70.

112. *Bessey v. State*, 199 S.W.3d 546, 550 (Tex. App.—Texarkana), *aff’d*, 239 S.W.3d 809 (Tex. Crim. App. 2007).

113. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005).

114. *Miles v. State*, 241 S.W.3d 28, 32 (Tex. Crim. App. 2007).

115. *Id.* at 29.

116. *Id.*

117. *Id.* at 36.

118. *Id.* at 45-56.

119. *Baldwin v. State*, 237 S.W.3d 808, 811 (Tex. App.—Houston [14th Dist.] 2007, pet. granted) (citing *State v. Perez*, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002)).

120. *Mount v. State*, 217 S.W.3d 716, 730 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

probable cause.¹²¹

1. Encounters

“Encounters are consensual interactions between citizens and police;” thus, they are distinct from investigative detentions and arrests because they “do not implicate constitutional rights.”¹²² A typical encounter involves a police officer approaching an individual “in a public place to ask questions, request identification, or request consent to search as long as the interaction is consensual—that is, as long as an officer does not convey a message that compliance with the officer’s request is required.”¹²³

2. Investigative Detentions (Terry Stops)

An investigative detention, commonly referred to as a “Terry Stop,” “occurs when an individual is confronted by a police officer, yields to the officer’s display of authority, and is temporarily detained for purposes of an investigation.”¹²⁴ Investigative detentions and arrests are considered seizures for constitutional purposes.¹²⁵ But an investigative detention allows law enforcement officers to “stop and briefly detain persons suspected of criminal activity on less information than is constitutionally required for probable cause to arrest.”¹²⁶ Thus, an investigative detention represents a middle ground between an arrest and a consensual encounter.

In *Terry v. Ohio*, the United States Supreme Court established the following two-part test for determining whether an investigative detention is reasonable under the Fourth Amendment: (1) “whether the officer’s action was justified at its inception,” and (2) “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”¹²⁷

Under the first prong of a *Terry* analysis, an investigative detention is justified if, under “the totality of the circumstances,” an officer has reasonable suspicion to detain an individual.¹²⁸ Reasonable suspicion, justifying a police officer’s stop, “exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity.”¹²⁹ Reasonable suspicion must be based on “more than an ‘inchoate and unparticularized

121. *Garcia v. State*, 218 S.W.3d 756, 759 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *State v. Ballard*, 987 S.W.2d 889, 892 (Tex. Crim. App. 1999)).

122. *Franks v. State*, 241 S.W.3d 135, 141 (Tex. App.—Austin 2007, pet. ref’d).

123. *Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)).

124. *Id.*

125. *Bartlett v. State*, 249 S.W.3d 658, 668 (Tex. App.—Austin 2008, no pet. h.).

126. *Arthur v. State*, 216 S.W.3d 50, 55 (Tex. App.—Fort Worth 2007, pet. filed).

127. 392 U.S. 1, 19-20 (1968).

128. *Tanner v. State*, 228 S.W.3d 852, 855 (Tex. App.—Austin 2007, no pet.).

129. *Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007); *see also Tanner*, 228 S.W.3d at 855.

suspicion or hunch' of criminal activity."¹³⁰ The officer's subjective intent is not a factor in determining reasonable suspicion, and "[t]he State has the burden to show that the officer had an objective basis for [making] the stop."¹³¹

The second requirement of a *Terry* analysis commands that "[t]he scope of the detention must be carefully tailored to its underlying justification."¹³² The scope of each detention will vary based on the unique facts and circumstances of each case.¹³³ "An investigative detention must be temporary, and the questioning must last no longer than is necessary to effectuate the purpose of the stop."¹³⁴ Additionally, an officer's investigative methods "should be the least intrusive means reasonably available to verify or dispel the officer's suspicions within a short period of time."¹³⁵

The boundary between an investigative detention and an arrest is often blurry. An investigative detention may transform into an all-out arrest if an officer's use of force exceeds what is reasonably necessary to achieve the goal of the stop.¹³⁶ But how does one distinguish between these two types of seizures? The Texas Court of Criminal Appeals explained in *Mount v. State*, that, "whether a detention is an actual arrest or an investigative detention depends on the reasonableness of the intrusion under all of the facts."¹³⁷ In determining reasonableness, courts have considered such factors as: "the nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, and the reaction of the suspect."¹³⁸ Further, an individual is found to be under arrest "when he or she has been actually placed under restraint or taken into custody."¹³⁹

In *Baldwin v. State*, the Fourteenth Court of Appeals addressed an encounter that developed into an investigative detention and, ultimately, an arrest.¹⁴⁰ In that case, a police officer patrolling a neighborhood was "flagged down by a middle-aged female" resident who informed him that she had just seen a suspicious-looking white male dressed in black peering into the windows of several homes.¹⁴¹ Both the officer and the woman were aware that "there had been a string of recent burglaries in the

130. *Lambeth v. State*, 221 S.W.3d 831, 837 (Tex. App.—Fort Worth 2007, pet. ref'd) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)).

131. *Tanner*, 228 S.W.3d at 855.

132. *Arthur v. State*, 216 S.W.3d 50, 55 (Tex. App.—Fort Worth 2007, no pet.).

133. *Id.*

134. *Lambeth*, 221 S.W.3d at 836; see also *Hart v. State*, 235 S.W.3d 858, 861 (Tex. App.—Eastland 2007, pet. dism'd).

135. *Arthur*, 216 S.W.3d at 55.

136. *Mount v. State*, 217 S.W.3d 716, 724-25 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

137. *Id.* at 724.

138. *Id.* at 725.

139. *Washburn v. State*, 235 S.W.3d 346, 350 (Tex. App.—Texarkana 2007, no pet.).

140. 237 S.W.3d 808, 810-12 (Tex. App.—Houston [14th Dist.] 2007, pet. granted).

141. *Id.* at 810.

neighborhood.”¹⁴² Investigating the woman’s report, the officer discovered the appellant walking on the sidewalk. When the appellant saw the officer’s patrol car, he began to walk “at a very fast pace.”¹⁴³ The officer caught up with the appellant, exited the car, and asked the appellant for his identification. The appellant, who appeared nervous and refused to make eye contact with the officer, questioned the officer’s request and told the officer that he had no right to stop him. Because, at that point, the officer “believed [the] appellant was about to flee or fight,” the officer handcuffed the appellant.¹⁴⁴ The officer then removed the appellant’s wallet from the appellant’s pocket so he could identify the appellant. When he removed the appellant’s license, he discovered a “small baggy containing a white powder[.]”¹⁴⁵ The officer then arrested the appellant.¹⁴⁶

On appeal, the appellant claimed that the trial judge erred in overruling his motion to suppress because the detention was not supported by reasonable suspicion or probable cause.¹⁴⁷ The court of appeals rejected the appellant’s claim. The court of appeals explained that the officer did not need probable cause or reasonable suspicion to talk to the appellant because he was in a public place.¹⁴⁸ Considering the detention, the court held that it was supported by reasonable suspicion:

Appellant’s nervousness, shuddering, evasiveness, refusal to identify himself to a police officer, and manner of wearing all black clothing at 10:30 p.m. in a neighborhood where there had been a recent string of burglaries, coupled with the woman’s report that she had seen appellant looking into houses, are indicative of criminal activity.¹⁴⁹

The court further held that the officer’s “momentary intrusion . . . into appellant’s pants pocket to retrieve his identification was a minimal, necessary, and reasonable encroachment upon appellant’s liberty under the circumstances presented here.”¹⁵⁰

Courts regularly engage in a *Terry* analysis in the context of routine traffic stops, which “resemble[] an investigative detention.”¹⁵¹ Frequently at issue is the scope of the detention.¹⁵² During a traffic stop, an officer is allowed to request the following information from the driver: (1) “information concerning the driver’s license,” (2) “ownership of the vehicle,” (3) “the driver’s insurance information,” (4) “the driver’s desti-

142. *Id.*

143. *Id.* at 811.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 812.

150. *Id.* at 814.

151. *Lambeth v. State*, 221 S.W.3d 831, 836 (Tex. App.—Fort Worth 2007, pet. ref’d).

152. *Hart v. State*, 235 S.W.3d 858, 861-62 (Tex. App.—Eastland 2007, pet. dismiss’d); see also *Lambeth*, 221 S.W.3d at 831.

nation,” and (5) “the purpose of the trip.”¹⁵³ However, an officer can prolong the driver’s detention beyond “the purpose of the initial stop” to issue a citation or if the officer has “reasonable suspicion to believe that another offense has been or is being committed.”¹⁵⁴

In *St. George v. State*, the Texas Court of Criminal Appeals extended the application of *Terry* to passengers of a vehicle.¹⁵⁵ The court held that “[a]lthough *Terry* did not specifically consider passengers in a vehicle subjected to an investigative detention, the test outlined in *Terry* is sufficiently comprehensive to address this issue as well.”¹⁵⁶ There, the appellant was a passenger in a car that was stopped by two sheriff’s deputies for having a broken license plate light.¹⁵⁷ After issuing the driver a citation, the deputies asked for appellant’s name and birth date several times, repeatedly telling him this had “to be resolved before he could leave.”¹⁵⁸ The court held that when the citation was issued to the driver, “the deputies did not have specific articulable facts to believe that Appellant was involved in criminal activity, thus, the questioning of Appellant regarding his identity . . . without separate reasonable suspicion, went beyond the scope of the stop and unreasonably prolonged its duration.”¹⁵⁹

3. Warrantless Searches and Arrests

Under the United States Constitution, warrantless searches and seizures are “presumptively unreasonable.”¹⁶⁰ While “the warrant requirement is not lightly set aside,”¹⁶¹ the Fourth Amendment tolerates some specific, well-established exceptions,¹⁶² which include: “exigent circumstances,”¹⁶³ the “automobile exception,”¹⁶⁴ searches incident to arrest,¹⁶⁵ consent,¹⁶⁶ protective sweeps,¹⁶⁷ frisks,¹⁶⁸ items in plain view,¹⁶⁹ and the community-caretaking function.¹⁷⁰

A defendant who claims a Fourth Amendment violation bears the bur-

153. *Lambeth*, 221 S.W.3d at 836.

154. *Id.*

155. 237 S.W.3d 720 (Tex. Crim. App. 2007).

156. *Id.* at 726.

157. *Id.* at 721-22.

158. *Id.* at 726.

159. *Id.*

160. *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007).

161. *Id.*

162. *Id.*

163. *Id.* at 685.

164. *Curry v. State*, 228 S.W.3d 292, 295 (Tex. App.—Waco 2007, pet. ref’d).

165. *Vasquez v. State*, No. 05-06-00486-CR, 2007 Tex. App. LEXIS 2737 (Tex. App.—Dallas Apr. 10, 2007, pet. ref’d).

166. *Johnson v. State*, 226 S.W.3d 439, 443 (Tex. Crim. App. 2007).

167. *Id.* at 442.

168. *Martinez v. State*, 236 S.W.3d 361, 370 (Tex. App.—Fort Worth 2007, pet. dism’d).

169. *Keehn v. State*, 245 S.W.3d 614, 615 (Tex. App.—Fort Worth 2007, pet. granted)

170. *Franks v. State*, 241 S.W.3d 135, 143 (Tex. App.—Austin 2007, pet. ref’d).

den of proving “that a search or seizure occurred without a warrant.”¹⁷¹ But “the State shoulders the burden to prove that an exception to the warrant requirement applies.”¹⁷²

The Texas Court of Criminal Appeals has identified three categories of exigent circumstances where a warrant is not required: “(1) providing aid or assistance to persons whom law enforcement reasonably believes are in need of assistance; (2) protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous; and (3) preventing the destruction of evidence or contraband.”¹⁷³

In *Gutierrez v. State*, the Texas Court of Criminal Appeals held that law enforcement officials were not justified under the exigent circumstances exception to conduct “a full-blown search of the appellant’s home.”¹⁷⁴ After receiving a report that a stolen computer was located at the appellant’s home, Corpus Christi police officers went to the appellant’s house.¹⁷⁵ The appellant, who saw the officers arrive, met the officers on his porch after he extinguished a marijuana cigarette and closed the front door. When questioned about the computer, the appellant admitted that he had it inside his house. One of the officers detected the smell of marijuana and noticed that the appellant’s eyes were bloodshot and that he was “very nervous.”¹⁷⁶ The officers entered the appellant’s house after the appellant gave his consent. When retrieving the computer, the officers smelled marijuana and saw a burnt marijuana cigarette in plain view.¹⁷⁷ They conducted “a cursory visual search and found cash, a police scanner, and several plastic baggies.”¹⁷⁸ The officers then called narcotics officers to assist them. When the narcotics officers arrived, they “conducted a thorough warrantless search” of the house and discovered “cocaine, cash, a pistol and ammunition, digital scales, and other drug paraphernalia.”¹⁷⁹

Addressing the appellant’s claim that the search violated his Fourth Amendment rights, the court stated that “[t]o validate a warrantless search based on exigent circumstances, the State must satisfy a two-step process.”¹⁸⁰ First, “probable cause to enter or search a specific location” must be present.¹⁸¹ “Second, an exigency that requires an immediate entry to a particular place without a warrant must exist.”¹⁸² Examining the case before it, the court held that while probable cause likely existed,

171. *Amador v. State*, 221 S.W.3d 666, 672 (Tex. Crim. App. 2007) (quoting *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986)).

172. *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007).

173. *Id.*

174. *Id.* at 686.

175. *Id.* at 683.

176. *Id.*

177. *Id.* at 684.

178. *Id.*

179. *Id.*

180. *Id.* at 685.

181. *Id.*

182. *Id.*

“the exigency of the situation called for a measured police response to maintain the status quo.”¹⁸³ The court then concluded that the situation did not justify a full-blown search of the appellant’s home by the narcotics officers.¹⁸⁴

“It is well settled that ‘in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.’”¹⁸⁵ “Evidence seized incident to arrest is admissible if sufficient probable cause existed to justify the arrest.”¹⁸⁶

The Eastland Court of Appeals considered whether the Texas Constitution provides greater protection to searches conducted incident to an arrest in *State v. Oages*.¹⁸⁷ The court of appeals explained that Texas courts have recognized the rule expressed by the United States Supreme Court in *New York v. Belton*,¹⁸⁸ discussing the scope of the “search incident to arrest” exception.¹⁸⁹ In *Belton*, the Supreme Court held that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”¹⁹⁰ The *Oages* court concluded, “[W]here there is a search incident to the arrest of an occupant of a vehicle, Texas follows the bright-line rule of *Belton* in interpreting [a]rticle I, section 9 of the Texas Constitution”¹⁹¹

The Fifth Circuit addressed the scope of the “search incident to arrest” exception in *United States v. Finley*.¹⁹² In that case, law enforcement officials seized the appellant’s cell phone from his pocket after he was arrested.¹⁹³ On appeal, the appellant challenged the search of the cell phone’s call records and text messages because it was conducted without a warrant.¹⁹⁴ Recognizing that law enforcement officers may “look for evidence of the arrestee’s crime on his person in order to preserve it for use at trial,”¹⁹⁵ the court held that the search was lawful because it was a search conducted incident to the appellant’s arrest.¹⁹⁶

A warrantless search of an automobile is justified because “vehicles are inherently mobile and the expectation of privacy with respect to an auto-

183. *Id.* at 686.

184. *Id.*

185. *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007), *cert. denied*, 127 S. Ct. 2065 (2007) (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

186. *Vasquez v. State*, No. 05-06-00486-CR, 2007 Tex. App. LEXIS 2737, *11-12 (Tex. App.—Dallas Apr. 10, 2007, pet. ref’d).

187. 227 S.W.3d 397 (Tex. App.—Eastland 2007, pet. ref’d).

188. *New York v. Belton*, 453 U.S. 454, 460 (1981).

189. *Oages*, 227 S.W.3d at 400.

190. *Belton*, 453 U.S. at 460.

191. *Oages*, 227 S.W.3d at 400.

192. 477 F.3d 250 (5th Cir. 2007), *cert. denied*, 127 S. Ct. 2065 (2007).

193. *Id.* at 254.

194. *Id.* at 258.

195. *Id.* at 259-60 (citing *United States v. Robinson*, 414 U.S. 218, 233-34 (1973)).

196. *Id.* at 260.

mobile is relatively low.”¹⁹⁷ Therefore, the automobile exception allows a law enforcement official to “conduct a warrantless search of a motor vehicle if the officer has probable cause to believe the vehicle contains evidence of a crime.”¹⁹⁸ “Probable cause ‘exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found[.]’”¹⁹⁹ “Known facts and circumstances include those personally known to the officer or those derived from a ‘reasonably trustworthy’ source.”²⁰⁰

In *United States v. Meredith*, the Fifth Circuit considered a case involving a stop and frisk of a passenger.²⁰¹ In *Meredith*, the appellant was a passenger in a car that was stopped by officers for operating without tail lights.²⁰² The driver and appellant were ordered to step out of the car, but the appellant stated that he could not comply with the request because he was a paraplegic. One of the officers frisked the driver while the other opened the passenger-side door and “observed a bulge shaped like a handgun in the left rear side of [the appellant’s] pants.”²⁰³ The officer reached inside the car, frisked the appellant, and removed a loaded handgun. Concluding that the frisk was reasonable, the trial judge found that the officer had reasonable suspicion to believe that the appellant was armed and was therefore a threat to his safety.²⁰⁴

The court upheld the trial judge’s ruling. Extending United States Supreme Court precedent that allows law enforcement officers to order a vehicle’s occupants to step out during a lawful traffic stop, the court concluded that the officer was permitted, without reasonable suspicion, to open the car door and conduct a visual inspection of the appellant, a physically disabled occupant.²⁰⁵ The court also determined that the frisk was lawful; once the officer saw the bulge in the appellant’s pocket, he had reasonable suspicion to believe the appellant was armed and dangerous.²⁰⁶

The seizure of an individual by a police officer is reasonable under the community-caretaking function even though the officer does not have reasonable suspicion or probable cause to believe the individual committed a crime.²⁰⁷ The community-caretaking function was discussed in *Franks v. State*²⁰⁸ and *Gibson v. State*.²⁰⁹ In *Franks*, the Austin Court of

197. *Curry v. State*, 228 S.W.3d 292, 295 (Tex. App.—Waco 2007, pet. ref’d).

198. *McNickles v. State*, 230 S.W.3d 816, 819 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

199. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007) (quoting *Torres v. State*, 182 S.W.3d 899, 901-03 (Tex. Crim. App. 2005)).

200. *McNickles*, 230 S.W.3d at 819 (quoting *Wiede*, 214 S.W.3d at 24).

201. 480 F.3d 366, 367-71 (5th Cir. 2007).

202. *Id.* at 367.

203. *Id.*

204. *Id.* at 368.

205. *Id.* at 369.

206. *Id.* at 371.

207. *Gibson v. State*, 253 S.W.3d 709, 714 (Tex. App.—Amarillo 2007, pet. ref’d).

208. 241 S.W.3d 135 (Tex. App.—Austin 2007, pet. ref’d).

209. 253 S.W.3d 709.

Appeals explained that the following dual inquiry is required to determine whether the community-caretaking exception is applicable: “[F]irst, whether the police officer was primarily motivated by a community-care-taking purpose; and second, whether the officer’s belief that the individual needed help was reasonable.”²¹⁰

The Amarillo Court of Appeals addressed the second inquiry in *Gibson*. There, a police officer stopped the appellant’s car after receiving a report from a woman that her daughter, a juvenile, left a high school football game with the appellant.²¹¹ The woman told the officer that she was concerned about her daughter because the appellant was in his thirties.²¹² The officer stopped the appellant’s car based on the description of the car provided by the girl’s mother.²¹³ After learning that the appellant did not have a valid driver’s license, the officer arrested the appellant.²¹⁴ The officer then conducted a search of the vehicle and discovered marijuana. At trial, the appellant moved to suppress the marijuana, arguing that it was discovered pursuant to an unlawful search and seizure. The trial judge denied the appellant’s motion.²¹⁵

The appellant challenged the trial judge’s refusal to grant the motion on appeal.²¹⁶ Consulting the Texas Court of Criminal Appeals’s opinion in *Wright v. State*,²¹⁷ the court set out four factors that should be considered when determining whether the officer’s belief that his assistance was needed was reasonable:

- (1) the nature and level of the distress exhibited by the individual;
- (2) the location of the individual;
- (3) whether the individual was alone and/or had access to assistance other than that offered by the officer; and
- (4) to what extent the individual, if not assisted, presented a danger to himself or others.²¹⁸

The *Gibson* court evaluated the evidence in light of these factors and held that “the stop was not shown to have been a valid exercise of the community caretaking function.”²¹⁹ In reaching this holding, the court concluded that the stop was not justified because (1) the nature and level of distress exhibited by the woman’s daughter, as relayed to the officer by her mother, was not elevated enough; (2) the stop occurred near the daughter’s house; (3) the officer “could not identify any of the individuals in appellant’s car nor could he identify the number of individuals in the vehicle;” and (4) there was no evidence of how the woman’s daughter “was placed in danger by getting a ride home from appellant,” and the

210. *Franks*, 241 S.W.3d at 144.

211. *Gibson*, 253 S.W.3d at 712.

212. *Id.* at 713.

213. *Id.* at 712.

214. *Id.* at 713.

215. *Id.* at 714.

216. *Id.* at 717.

217. 7 S.W.3d 148, 151-52 (Tex. Crim. App. 1999).

218. *Gibson*, 253 S.W.3d at 714-15.

219. *Id.* at 723.

appellant was not driving in a manner that indicated that he was a danger to himself or others.²²⁰

In addition to the well-established exceptions to the search warrant requirement discussed above, “[c]hapter 14 of the Texas Code of Criminal Procedure defines the statutory exceptions permitting warrantless arrests.”²²¹ “If the accused makes a statutory argument, the proper inquiry is (1) whether there was probable cause with respect to that individual and (2) whether the arrest fell within one of the statutory exceptions [to the warrant requirement].”²²² The State has the burden “to prove the existence of probable cause to justify a warrantless arrest.”²²³

In *Garcia v. State*, the Houston Court of Appeals for the First District discussed the interaction between two statutory exceptions that allow a police officer to make a warrantless arrest. In that case, a Houston Sheriff’s Deputy stopped the appellant because the appellant’s vehicle did not have a front license plate in violation of section 502.404 of the Texas Transportation Code.²²⁴ When the deputy also discovered that the appellant did not have a valid driver’s license in violation of section 521.025 of the Transportation Code, the deputy ordered the appellant to get out of the vehicle and placed him under arrest.²²⁵ The appellant filed a motion to suppress at trial, arguing that the arrest was illegal. The trial judge denied the motion.²²⁶

The court of appeals affirmed.²²⁷ The court held that the arrest was authorized under article 14.01(b) of the Texas Code of Criminal Procedure, which “allows a peace officer to arrest ‘an offender without a warrant for any offense committed in his presence or within his view,’” and section 543.001 of the Texas Transportation Code, which “allows any peace officer to arrest without a warrant a person found committing a traffic violation, except for speeding or a violation of the open container law.”²²⁸

C. ARREST OR SEARCH WITH WARRANTS

In Texas, the requirements for issuing a search warrant are governed by article 18.01 of the Texas Code of Criminal Procedure. On the other hand, the requirements for arrest warrants are governed by chapter 15 of the Texas Code of Criminal Procedure. Although search and arrest warrants are governed by different statutes, “[t]he same standards apply to any challenge to the adequacy of an affidavit presented for issuance of an

220. *Id.* at 722-23.

221. *State v. Cullen*, 227 S.W.3d 278, 283 (Tex. App.—San Antonio 2007, pet. ref’d).

222. *Id.* (quoting *State v. Steelman*, 93 S.W.3d 102, 106 n.5 (Tex. Crim. App. 2002)).

223. *State v. Nelson*, 228 S.W.3d 899, 906 (Tex. App.—Austin 2007, no pet.).

224. 218 S.W.3d 756, 759 (Tex. App.—Houston [1st Dist.] 2007, no pet.); see TEX. TRANSP. CODE ANN. § 502.404 (Vernon Supp. 2008).

225. *Garcia*, 218 S.W.3d at 759; see TEX. TRANSP. CODE ANN. § 521.025 (Vernon Supp. 2008).

226. *Id.*

227. *Id.* at 760.

228. *Id.*; see TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999).

arrest or search warrant.”²²⁹

The Texas and United States Constitutions demand that search and arrest warrants be issued only upon probable cause.²³⁰ “Probable cause to support the issuance of a search warrant exists when the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises at the time the warrant is issued.”²³¹ *Gurrusqueita v. State*²³² and *Glaze v. State*²³³ discuss the requisites for an arrest warrant affidavit, also known as a “complaint” under the Texas Code of Criminal Procedure.²³⁴ Similar to a search warrant affidavit, the complaint “must provide the magistrate with sufficient information to support an independent judgment that probable cause exists to believe that the accused has committed a crime.”²³⁵ An appellate court may consider only the four corners of a search or arrest affidavit when determining whether sufficient probable cause existed to issue the warrant.²³⁶ But a magistrate’s finding of probable cause is given great deference so as “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.”²³⁷

In *Harris v. State*, the Texas Court of Criminal Appeals addressed the consequences of having a false statement in a warrant affidavit. The court, following the United States Supreme Court’s decision in *Franks v. Delaware*,²³⁸ explained that “a defendant who makes a substantial preliminary showing that a false statement was made in a warrant affidavit knowingly and intentionally, or with reckless disregard for the truth, may be entitled by the Fourth Amendment to a hearing, upon the defendant’s request.”²³⁹ To be entitled to a *Franks* hearing, the defendant must:

- (1) Allege deliberate falsehood or reckless disregard for the truth by the affiant, specifically pointing out the portion of the affidavit claimed to be false; (2) Accompany these allegations with an offer of proof stating the supporting reasons; and (3) Show that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant.²⁴⁰

The court also explained that if the defendant establishes, by a preponderance of the evidence, perjury, recklessness, or reckless disregard, the

229. *Glaze v. State*, 230 S.W.3d 258, 259 (Tex. App.—Waco 2007, pet. ref’d).

230. *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007); *Glaze*, 230 S.W.3d at 260.

231. *Brown v. State*, 243 S.W.3d 141, 145 (Tex. App.—Eastland 2007, pet. ref’d).

232. 244 S.W.3d 450, 452 (Tex. App.—Fort Worth 2007, pet. ref’d).

233. 230 S.W.3d at 259.

234. *Id.* at 260.

235. *Gurrusqueita*, 244 S.W.3d at 452; *Glaze*, 230 S.W.3d at 260.

236. *Brown*, 243 S.W.3d at 145; *Glaze*, 230 S.W.3d at 260.

237. *Rodriguez v. State*, 232 S.W.3d 55, 59-60 (Tex. Crim. App. 2007).

238. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

239. 227 S.W.3d 83, 85 (Tex. Crim. App. 2007).

240. *Id.*

false material in the affidavit is discarded.²⁴¹ But if “the remaining content of the affidavit does not then still establish sufficient probable cause, the search warrant must be voided”²⁴²

In *L.A. County v. Rettele*, the United States Supreme Court considered whether the detention of the respondents while law enforcement officials executed a valid search warrant was unreasonable under the Fourth Amendment.²⁴³ There, Los Angeles County Sheriff’s Deputies obtained a valid search warrant for a home believed to house several suspects involved in a fraud and identity-theft crime ring.²⁴⁴ The deputies executed the warrant and entered the respondent’s home, but unbeknownst to the deputies, the suspects had moved out three months earlier.²⁴⁵ The deputies ordered the respondents, who were unclothed and asleep in their bed, to get up and show their hands.²⁴⁶ The respondents attempted to get dressed but were quickly instructed not to move.²⁴⁷ The respondents sued the sheriff’s department, claiming, among other things, that their Fourth Amendment right “to be free from unreasonable searches and seizures” was violated when Los Angeles County Sheriff’s Deputies searched their home.²⁴⁸

The Court held that the search, including the detention of the respondents, was reasonable.²⁴⁹ The Court reasoned that, “[w]hen officers execute a valid warrant and act in a reasonable manner to protect themselves from harm . . . , the Fourth Amendment is not violated.”²⁵⁰

In *Martinez v. State*, the appellant challenged the execution of a valid search warrant, claiming that police officers conducted an unlawful search and seizure by failing “to knock and announce before executing their narcotics search warrant.”²⁵¹ The Austin Court of Appeals concluded that the exclusionary rule did not apply in light of the United States Supreme Court’s decision in *Hudson v. Michigan*.²⁵² The court of appeals explained that “[t]he ‘knock-and-announce’ rule is a prerequisite for forcible entry” and “does not apply if officers gain entry to a house without using force, even if entry is accomplished by a ruse.”²⁵³ The court explained that in the appellant’s case, force was not used to gain entry into his hotel room because the police officers “used a ruse.”²⁵⁴

In *United States v. Bruno*, the Fifth Circuit held that, in light of *Hudson v. Michigan*, suppression is not the remedy for a violation of the federal

241. *Id.*

242. *Id.*

243. 127 S. Ct. 1989, 1992-94 (2007) (per curiam).

244. *Id.* at 1990-91.

245. *Id.* at 1991.

246. *Id.*

247. *Id.*

248. *Id.* at 1990.

249. *Id.* at 1992-94.

250. *Id.* at 1993-94.

251. 220 S.W.3d 183, 186-87 (Tex. App.—Austin 2007, no pet.).

252. *Id.* at 188-89; see also *Hudson v. Michigan*, 547 U.S. 586 (2006).

253. 229 S.W.3d at 189.

254. *Id.*

statutory knock-and-announce requirement under title 18, United States Code, § 3109.²⁵⁵

D. CONSENT

An individual's voluntary consent to a search is also one of the well-established exceptions under the Fourth Amendment warrant requirement.²⁵⁶ The State bears the burden to show that consent was "voluntarily given, and not the result of duress or coercion, express or implied."²⁵⁷

While the United States Constitution "only requires the State to prove the voluntariness of consent by a preponderance of the evidence," the Texas Constitution provides greater protection by requiring "the State to show by clear and convincing evidence that the consent was freely given."²⁵⁸ Furthermore, courts consider the totality of the circumstances to determine whether consent was voluntarily given by an individual.²⁵⁹ The objective standard applies in examining the scope of consent; thus, the relevant inquiry is: What would the ordinary reasonable person have understood under the same circumstances?²⁶⁰

In *Beall v. State*, the Fort Worth Court of Appeals stated that courts consider certain factors in determining whether consent was voluntarily given, including: (1) "whether the consenting person was in custody," (2) "whether he was arrested at gunpoint," (3) "whether he had the option of refusing consent," (4) "the constitutional advice given to the accused," (5) "the length of detention," (6) "the repetitiveness of the questioning, and" (7) "the use of physical punishment."²⁶¹

Beall v. State also discussed the issue of consent given by a third party.²⁶² The appellant was in the shower when the co-occupant of his hotel room allowed police officers to search the room.²⁶³ The appellant argued that "he could neither consent nor object to the entry, and any evidence seized must be suppressed."²⁶⁴ The court rejected the appellant's claim, explaining that the appellant's reliance on *Georgia v. Randolph*²⁶⁵ was improper because his case was not one in which a "cotenant gives consent and the other cotenant is present and objects."²⁶⁶ The court held that the appellant was "on the wrong side of the 'fine line' drawn by the Supreme Court in *Randolph*; as a potential objector, nearby

255. 487 F.3d 304, 306 (5th Cir. 2007) (interpreting 18 U.S.C. § 3109 (1993)).

256. *Johnson v. State*, 226 S.W.3d 439, 443 (Tex. Crim. App. 2007).

257. *Beall v. State*, 237 S.W.3d 841, 848 (Tex. App.—Fort Worth 2007, no pet.) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973)).

258. *Washburn v. State*, 235 S.W.3d 346, 353 (Tex. App.—Texarkana 2007, no pet.) (quoting *Carmouche v. State*, 10 S.W.3d 323, 331 (Tex. Crim. App. 2000)).

259. *Lambeth v. State*, 221 S.W.3d 831, 838 (Tex. App.—Fort Worth 2007, pet. ref'd).

260. *Johnson*, 226 S.W.3d at 443.

261. *Beall*, 237 S.W.3d at 848.

262. *Id.* at 847.

263. *Id.* at 845.

264. *Id.* at 846-847.

265. *Georgia v. Randolph*, 547 U.S. 103 (2006).

266. *Beall*, 237 S.W.3d at 847.

but not invited to take part in the colloquy between [the co-occupant] and the police.”²⁶⁷

“The taking of a blood specimen is considered a search and seizure within the meaning of the Fourth Amendment.”²⁶⁸ But, as the Texarkana Court of Appeals explained in *Washburn v. State*, an individual who drives while intoxicated is found to have impliedly consented to the taking of a blood specimen.²⁶⁹ In doing so, the court observed that Texas Transportation Code, section 724.011, “provides that a person who has been arrested for an offense arising out of acts committed while the person was operating a motor vehicle in a public place while intoxicated is deemed to have consented to the taking of one or more specimens of breath or blood for analysis.”²⁷⁰ But, the court stated that an individual has “an absolute right to refuse a test[,]” and “[c]onsent may be involuntary if induced by an officer’s misstatement of the consequences of refusal.”²⁷¹

In *Neesley v. State*, the Texas Court of Criminal Appeals clarified the meaning of “specimen” in section 724.012(b) of the Transportation Code, which mandates that a police officer take a breath or blood specimen when a person was killed or suffered serious bodily injury as a result of a car accident.²⁷² Although section 724.012(b) plainly states that a police officer is required to take no more than one specimen, the legislative intent suggests that a police officer may take more than one, when necessary, because “specimen” means a “usable sample.”²⁷³

IV. CONCLUSION

Over the past year, Texas state and federal courts have considered various aspects of the law related to confessions, searches, and seizures. Recent decisions by these courts present few changes to the well-established precedent in these areas.

267. *Id.* at 848.

268. *Washburn v. State*, 235 S.W.3d 346, 349 (Tex. App.—Texarkana 2007, no pet).

269. *Id.* at 350.

270. *Id.* (citing TEX. TRANSP. CODE ANN. § 724.001 (Vernon 1999)).

271. *Id.*

272. 239 S.W.3d 780, 783-86 (Tex. Crim. App. 2007) (interpreting TEX. TRANSP. CODE ANN. § 724.012(b) (Vernon 1999)).

273. *Id.* at 785-86. The statute states that an officer “shall require the taking of a specimen” TEX. TRANSP. CODE ANN. § 724.012(b) (Vernon 1999) (emphasis added).