SMU | Dedman School of Law

SMU Law Review

Volume 57
Issue 3 *Annual Survey of Texas Law*

Article 13

2004

Criminal Procedure: Confessions, Searches, and Seizures

Deborah C.S. Riherd

Michael E. Keasler

CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

*Deborah C.S. Riherd**
*Michael E. Keasler***

TABLE OF CONTENTS

A review of the past year's criminal cases reveals few remarkable departures from prior Texas and federal law as to confessions, searches, and seizures. Harmless error analysis is still routinely applied, and both state and federal appellate courts give credence to trial court fact-findings unless clearly erroneous.

I. CONFESSIONS

A. VOLUNTARINESS

A voluntary, noncustodial statement is exempt from *Miranda* requirements and Texas statutory requirements regarding oral and written state-

* Deborah Riherd is the Briefing Attorney for Judge Michael E. Keasler, Texas Court of Criminal Appeals. She earned her J.D. *cum laude* from South Texas College of Law in December 2002. She also served as Assistant Managing Editor of *South Texas Law Review* where she received a Distinguished Writing Award and a Distinguished Service Award. Prior to law school, she graduated from the University of Houston with a B.A. in Political Science.

* Judge, Texas Court of Criminal Appeals. Judge Keasler provided the general format for the article from past articles he has written for the annual Survey but credits Deobrah with all of the research and substantive writing for this article.

ments of an accused.[1] In reviewing the voluntariness of a confession, appellate courts give almost total deference to the trial court's determination of historical facts and review the trial court's rulings on the admissibility of the confession using an abuse of discretion standard. Appellate courts employ a de novo standard of review in reviewing the trial court's application of the law.[2]

A statement is involuntary if the totality of the circumstances indicates that the confessor did not make the decision to confess of his own free will. Factors such as youth, learning difficulties, emotionalism, or confusion alone will not render a confession inadmissible.[3] Also, "a person's illiteracy alone will not necessarily render his statement inadmissible."[4]

A misrepresentation made by the police to a suspect will not render an otherwise voluntary confession inadmissible, although it is relevant in assessing whether the suspect made the confession voluntarily.[5] Unless calculated to produce an untruthful confession, trickery and deception do not make a statement involuntary.[6] But police conduct that passes the line "into the sort of lying that deprives the defendant 'of the knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them'" will invalidate a confession.[7]

A confession that is the fruit of an illegal arrest "requires suppression of the confession unless that confession was an act of free will sufficient to purge the primary taint of the unlawful invasion."[8] In *Kaupp v. Texas*, police roused a seventeen-year old suspect from his bed in the middle of a January night without a warrant or probable cause for his alleged involvement in a murder, telling him, "We need to go and talk." The suspect answered, "Okay," and the police took the suspect to the police station in nothing but his boxer shorts and a T-shirt. At the station, the suspect made an incriminating statement.[9] The Supreme Court of the United States found that that the suspect's answer failed to show consent but merely constituted acquiescence to police authority. The Court determined that the confession must be suppressed unless on remand the State could demonstrate a meaningful intervening event between the illegal arrest and the confession.[10]

---

1. Rodgers v. State, 111 S.W.3d 236, 240 (Tex. App.—Texarkana 2003, no pet.).
2. Licon v. State, 99 S.W.3d 918, 924 (Tex. App.—El Paso 2003, no pet.).
3. *Id.* at 925–26
4. Foster v. State, 101 S.W.3d 490, 497 (Tex. App.—Houston [1st Dist.] 2002, no pet.)
5. Hines v. State, No. 14-99-00515-CR, 2003 Tex. App. LEXIS 6399, at *29 (Tex. App.—Houston [14th Dist.] Jul. 24, 2003, no pet.).
6. Mason v. State, 116 S.W.3d 248, 257 (Tex. App.—Houston [14th Dist.] 2003, no pet.).
7. Hopkins v. Cockrell, 325 F.3d 579, 584 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 430 (2003) (quoting Moran v. Burbine, 475 U.S. 412, 424 (1986)).
8. Kaupp v. Texas, 123 S. Ct. 1843, 1846 (2003).
9. *Id.* at 1845.
10. *Id.* at 1846–47.

B. Custodial Interrogation

A person who is in custody and is subjected to interrogation by law enforcement officials must be given *Miranda* warnings. Otherwise, any statement he makes may not be admissible.[11] A person is in custody if "a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest."[12] In determining whether a person is in custody, the court considers "all of the objective circumstances of the detention."[13] Interrogation means either express questioning or any words or actions that law enforcement officers "should know are reasonably likely to elicit an incriminating response."[14]

The *Miranda* warnings (as codified in the Texas Code of Criminal Procedure Article 38.22) apply only to statements made during custodial interrogation. A voluntary statement which is not the product of custodial interrogation is not subject to *Miranda* (or Article 38.22) and is thus admissible at trial. Questioning at the police station does not, in and of itself, constitute custody.[15]

The First Court of Appeals in Houston found that questioning a DWI suspect during a roadside investigation did not constitute custodial interrogation even though the questioning followed failed sobriety tests and the suspect was in handcuffs during questioning.[16] The Fourteenth Court of Appeals in Houston found that an individual's repeated statements to a police officer that he did not want to cooperate regarding a videotaped sobriety test were not made during custodial interrogation where the officer merely asked the individual to stand on a line while the officer read something to him.[17]

In *Xu v. State*, the San Antonio Court of Appeals reminded us that an appellate court must examine all of the objective circumstances surrounding a suspect's interrogation to determine whether there was custodial interrogation. The court considered that the suspect had been at the police station for five hours, that he was born and lived most of his life in China where there are no *Miranda* warnings, that the suspect had a limited command of the English language, and that he was given only one bottle of water and one restroom break in this time period—even though the suspect had been told hours earlier that he was free to leave—in determining that the suspect was subjected to custodial interrogation.[18]

Once a suspect invokes his right to remain silent, interrogation must cease until counsel is provided unless the suspect reinitiates the conversa-

---

11. Jones v. State, 119 S.W.3d 766, 772 (Tex. Crim. App. 2003).
12. Ramirez v. State, 105 S.W.3d 730, 738 (Tex. App.—Austin 2003, no pet.)
13. *Id.*
14. *Id.* at 740–41 (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).
15. Rathbun v. State, 96 S.W.3d 563, 565–66 (Tex. App.—Texarkana 2002, no pet.)
16. Wappler v. State, 104 S.W.3d 661, 668 (Tex. App.—Houston [1st Dist.] 2003, pet. granted).
17. Smith v. State, 105 S.W.3d 203, 208 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).
18. Xu v. State, 100 S.W.3d 408, 414-15 (Tex. App.—San Antonio 2002, pet. filed).

tion. In *Urias v. State*, during tape-recorded police questioning, the defendant asked to stop the interview. The police discontinued taping the interview but continued to ask the defendant questions resulting in a confession.[19] The El Paso Court of Appeals held that the trial court erred in admitting the statement because it was obtained in violation of his *Miranda* rights.[20]

If an individual is not in custody, the "standard requiring termination of all police interrogation once an attorney is requested is not applicable."[21] The accused reinitiates the conversation where he evinces "a willingness and a desire for a generalized discussion about the investigation," not "merely a necessary inquiry arising out of the incidents of the custodial relationship."[22]

A valid waiver of *Miranda* rights requires that the waiver must be voluntary—"the product of free and deliberate choice rather than intimidation, coercion, or deception."[23] The waiver must also be made knowingly and intelligently "of the nature of the right being abandoned and the consequences of the decision to abandon it."[24] The suspect need not know every possible consequence of the waiver, nor is it critical for the police to supply the suspect with a flow of information to help him decide whether to speak or stand by his rights.[25] The San Antonio Court of Appeals found that just because a suspect was unaware of the actual charges he faced did not mean that he did not knowingly and intelligently waive his Fifth Amendment rights, and his confession was therefore admissible.[26]

C. Statutory Requirements

In addition to incorporating the *Miranda* warnings, Article 38.22 of the Texas Code of Criminal Procedure sets out additional requirements for a confession's admissibility. The statute prohibits the admission of oral statements made by a defendant unless:

(1) the defendant is visually recorded making the statement;

(2) he is given the *Miranda* warnings;

(3) the recording equipment is operating, the operator is competent, and the recording is accurate and has not been altered; and

(4) all material voices are identified.[27]

---

19. Urias v. State, 104 S.W.3d 578, 581 (Tex. App.—El Paso 2003, pet. granted).

20. *Id.* at 588.

21. Brossette v. State, 99 S.W.3d 277, 282 (Tex. App.—Texarkana 2003, pet. ref'd, untimely filed).

22. Cross v. State, 114 S.W.3d 92, 98 (Tex. App.—Eastland 2003, pet. ref'd).

23. Canady v. State, 100 S.W.3d 28, 29 (Tex. App.—Waco 2003, no pet.)

24. *Id.* at 29–30.

25. Murphy v. State, 100 S.W.3d 317, 322 (Tex. App.—San Antonio 2002, pet. ref'd), *cert. denied*, 124 S. Ct. 484 (2003).

26. *Id.* at 322–23.

27. Brown v. State, 92 S.W.3d 655, 660 (Tex. App.—Dallas 2002) (citing Tex. Code Crim. Proc. Ann. art. 38.22 (Vernon 1979)), *aff'd*, 122 S.W.3d 794 (Tex. Crim. App. 2003) *cert. denied*, No. 03-1078, 72 USLW 3506 (U.S. Tex. Mar. 22, 2004).

However, when the defendant's statement is the res gestae of the arrest, Section 5 of Article 38.22 permits admission of the unrecorded oral statement. In *Brown v. State*, the defendant said, "I'm not going to hurt you guys. I've already killed everyone I wanted to kill," as police officers handcuffed him and asked him if he had anything in his pockets. The Dallas Court of Appeals held that the defendant's statement constituted the res gestae of the arrest and was admissible even though it was not recorded.[28]

But if the accused is not in custody, an electronic recording is not necessary for the admission of oral statements the accused made. The San Antonio Court of Appeals found that there was no custodial interrogation when a police officer, during a traffic stop, asked an individual if he had consumed any alcoholic beverages and how many. Thus, the suspect's answer was admissible without a recording.[29]

D. Juveniles

Juveniles must be given statutory admonishments pursuant to the Texas Family Code before they make a statement or the statement will not be admissible. But, just as for adults, if the statement is not the product of custodial interrogation, the statement is admissible even without the statutory admonishments. The courts utilize a "reasonable child" standard in determining custody—whether "a reasonable child of the same age would believe his freedom of movement was restrained to the degree associated with a formal arrest" under the objective circumstances.[30] Under the Family Code, the police must promptly notify the child's parent, guardian, or custodian that the child is in custody and tell him or her why the child is in custody. But if the police violate the provisions of the Family Code and obtain a confession from the juvenile, the statement need not be suppressed unless there is a causal connection between the violation of Family Code provisions and the juvenile's confession. The Tyler Court of Appeals found such a causal connection where the police failed to notify a juvenile's parents about his detention for nine and half hours, and the juvenile would have had access to his parents if the police had notified them.[31]

II. SEARCH AND SEIZURE

A. In General

Texas state courts continue to follow the United States Supreme Court's lead in search and seizure cases. Such cases are almost always analyzed in light of the Fourth Amendment, rather than under the Texas

28. *Id.* at 659–61.
29. Hernandez v. State, 107 S.W.3d 41, 48 (Tex. App.—San Antonio 2003, pet. ref'd).
30. Martinez v. State, No. 04-02-00329-CR, 2003 Tex. App. LEXIS 8059, at *14–15 (Tex. App.—San Antonio Sept. 17, 2003, no pet.) (citing Tex. Fam. Code Ann. § 51.095 (Vernon 2002)).
31. State v. Simpson, 105 S.W.3d 238, 241–43 (Tex. App.—Tyler 2003, no pet.).

Constitution. In reviewing a ruling on a motion to suppress, both state and federal appellate courts give great deference to the trial court's determination of historical facts while reviewing questions of law de novo.[32]

The Fourth Amendment's protection against unreasonable search and seizures extends only to searches involving government action. It does not apply to a search conducted by a private individual not acting under the control of or at the request of law enforcement. In *Dawson v. State*, a motel manager harbored suspicions that a motel guest was dealing drugs from his room. The manager invited a police officer, who dropped by the motel to get a cup of coffee, to accompany him to the room. The manager initiated the entry to check if the room had been abandoned or damaged, since the privacy sign had been on the door for several days, and no one answered when the manager phoned the room. The officer, standing outside the threshold of the room, smelled the odor of burnt marijuana, obtained a search warrant, and found drugs in the room. The First District Court of Appeals in Houston found that the hotel manager was not acting as an agent of the state since he had a legitimate reason to enter the room, and the purpose of his entry was to "further his own ends as the motel manager, not simply to further the State's ends."[33]

Not all searches and seizures implicate the Fourth Amendment,[34] and to have standing to contest a search, an individual must have a reasonable expectation of privacy.[35] In order to challenge the admission of evidence obtained by an allegedly illegal search, the accused must prove (1) that he had an actual subjective expectation of privacy, and (2) that expectation of privacy is one that society would recognize as reasonable.[36] Appellate courts consider the following factors in determining whether an individual's expectation of privacy is one that society would recognize as reasonable:

- whether the accused had a property or possessory interest in the place invaded;
- whether he was legitimately in the place invaded;
- whether he had complete dominion and control and the right to exclude others;
- whether, before the intrusion, he took normal precautions customarily taken by those seeking to guard their privacy;
- whether he put the place to some private use; and

32. United States v. Garcia-Garcia, 319 F.3d 726, 729 (5th Cir. 2003), *cert. denied*, 123 S. Ct. 2264 (2003); Laney v. State, 117 S.W.3d 854, 857 (Tex. Crim. App. 2003).

33. Dawson v. State, 106 S.W.3d 388, 392 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

34. United States v. Sanchez-Pena, 336 F.3d 431, 436 (5th Cir. 2003); Ballard v. State, 104 S.W.3d 372, 374 (Tex. App.—Beaumont 2003, pet. ref'd).

35. Wilson v. State, 99 S.W.3d 767, 770 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

36. Rogers v. State, 113 S.W.3d 452, 457 (Tex. App.—San Antonio 2003, no pet.).

- whether his claim of privacy is consistent with historical notions of privacy.[37]

The San Antonio Court of Appeals found that an individual who took his computer to a repair shop no longer had a legitimate expectation of privacy in photo files left on the computer, because he voluntarily relinquished control to the shop, he failed to take normal precautions to protect his privacy, such as removing the files from the computer before taking it to the shop, and a person generally has no legitimate expectation of privacy in information voluntarily turned over to third parties.[38]

A person's expectation of privacy may be subordinate to legitimate governmental interests, such as inventory searches. The Fourteenth Court of Appeals in Houston held that there is a diminished expectation of privacy during emergency medical care. The court found that there is no Fourth Amendment violation when a hospital performs an inventory search on a patient's belongings so long as the reason for the search is to secure and protect the patient's belongings, rather than to discover contraband or obtain evidence.[39]

The courts reiterated that there is no reasonable expectation of privacy in abandoned property. Property is abandoned if a person intended to abandon the property and the decision to abandon the property was not the result of police misconduct.[40] In *Swearingen v. State*, the defendant's wife left a note for the landlord of the trailer they were renting, telling him that they had to move. She also returned both keys to the trailer. The Court of Criminal Appeals found that the defendant had abandoned the trailer, and thus had no standing to contest the reasonableness of the police search of the trailer without a warrant.[41] The First Court of Appeals in Houston found that a suspect abandoned property when he dropped a bag of narcotics while fleeing the police, so the evidence did not need to be suppressed as the fruit of an illegal seizure.[42] There is also no reasonable expectation of privacy in garbage that is readily accessible to the public, such as garbage placed in the location for pickup by trash collectors.[43]

The Houston Court of Appeals for the First District reiterated that the use of a drug-dog to sniff for narcotics outside a suspect's house is not a search. The court distinguished the use of a drug-dog sniff from the use of a thermal imaging device, which the Supreme Court of the United States found constituted a search in *Kyllo v. United States*.[44] The court found that unlike a thermal imaging device, which records the amount of

37. *Id.*
38. *Id.* at 458.
39. *Wilson*, 99 S.W.3d at 770–71.
40. Swearingen v. State, 101 S.W.3d 89, 101 (Tex. Crim. App. 2003).
41. *Id.*
42. Shelley v. State, 101 S.W.3d 606, 611 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).
43. Nilson v. State, 106 S.W.3d 869, 874 (Tex. App.—Dallas 2003, no pet.).
44. Kyllo v. United States, 533 U.S. 27, 38 (2001).

heat admitted from a home, a drug-dog sniff does not reveal information about the interior of a home other than the presence of illegal narcotics. Thus, it is not a search, and no warrant is required.[45]

The courts have also addressed the issue of strip searches and body cavity searches in the past year. The Court of Criminal Appeals found an officer's visual body cavity search of a suspected drug dealer's buttocks incident to his arrest was not unreasonable given that officer had probable cause to believe the suspect was engaged in illegal activity; an informant told the officer that the suspect was hiding crack cocaine in his buttocks; the officer was qualified to perform the search; the search was not violent; and the officer conducted the search at a fire station so as to protect the suspect's privacy interests.[46] But a strip search without probable cause to believe a suspect has a weapon, drugs or contraband is unreasonably intrusive.[47]

The courts also reminded us that there is no expectation of privacy in blood-alcohol test results taken by hospital personnel solely for medical purposes, so using a grand jury subpoena to obtain those results does not constitute an unreasonable search and seizure.[48]

B. Arrest, Stop, or Inquiry Without Warrant

There are three distinct types of police-citizen interactions, each requiring a different level of constitutional protection:

- arrests, which require probable cause;
- investigative detentions, which require reasonable suspicion; and
- encounters, which require no objective justification.[49]

1. Warrantless Arrests and Searches

In search and seizure law, a home is a sacrosanct place, and one of the chief evils against which the wording of the Fourth Amendment is directed is the warrantless physical entry of the home by government agents. A search and seizure inside a home is presumptively unreasonable without a search warrant.[50] However, one of the exceptions to the warrant requirement is the exigent circumstances doctrine. Under this doctrine, the police must have probable cause at the time of the search, and exigent circumstances must exist that make obtaining a warrant im-

45. Rodriguez v. State, 106 S.W.3d 224, 229–30 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

46. McGee v. State, 105 S.W.3d 609, 616–17 (Tex. Crim. App. 2003), *cert. denied*, 124 S. Ct. 536 (2003).

47. Williams v. Kaufman County, No. 02-10500, 2003 U.S. App. LEXIS 24763, at *19 (5th Cir. Dec. 9, 2003).

48. Tapp v. State, 108 S.W.3d 459, 462 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd); Garcia v. State, 95 S.W.3d 522, 526–27 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

49. *See* McCraw v. State, 117 S.W.3d 47, 51–52 (Tex. App.—Fort Worth 2003, pet. ref'd); *see also* Gaines v. State, 99 S.W.3d 660, 666 (Tex. App.—Houston [14th Dist.] 2003, pet. filed).

50. Estrada v. State, 116 S.W.3d 370, 373 (Tex. App.—El Paso 2003, pet. granted).

practicable. There must be "'some danger to the officer or victims, an increased likelihood of apprehending a suspect, or the possible destruction of evidence.'"[51]

In *Ramirez v. State*, a police officer, investigating a report that Ramirez was selling marijuana from his garage, smelled fresh marijuana and saw drug paraphernalia and residue when Ramirez opened the garage door. The officer requested to pat down one of the other individuals in the garage, Reynosa, and found a knife and a bag of marijuana. The officer placed Reynosa under arrest and moved him out of the garage doorway. The officer also patted down Ramirez, told Ramirez he was being detained, put him in handcuffs, and asked Ramirez if there was any marijuana in the garage. Ramirez told him that there might be some marijuana in a red cooler in the garage. The officer entered the garage to see if anyone else was there, seized a green pipe and the cooler, searched the cooler, seized the marijuana he found inside the cooler, and then applied for a search warrant.[52] The Austin Court of Appeals found that the search of the cooler was not justified without a warrant because no exigent circumstances existed to search the cooler. Ramirez and Reynosa posed no reasonable threat to the officer's safety since they were handcuffed and within the officer's control. There was also no possibility that the marijuana in the cooler would be destroyed because the officer removed the cooler from the garage, and the officer's protective sweep ensured that no one remained in the garage.[53]

Another exception to the warrant requirement is the emergency doctrine. In *Laney v. State*, a sheriff's deputy, responding to a call about a disturbance between neighbors in a mobile home park, saw two young boys exit and re-enter Laney's trailer while Laney was being detained in the deputy's patrol car pending criminal mischief charges. In response to the deputy's questions, Laney told the deputy that the children were not his, and that he had been arrested before for indecency with a child. While one of the boys was outside the trailer, the deputy entered the trailer to look for the other boy. He found the boy in the back bedroom and noticed pornographic photographs of young boys engaging in sexual acts.[54] The Court of Criminal Appeals found that the search was justified under the emergency doctrine. Although the emergency doctrine is considered synonymous with the exigent circumstances doctrine, the court noted that a narrow but critical difference exists between the two doctrines. The exigent circumstances doctrine applies when police act in their crime-fighting role, while the emergency doctrine applies when police act in a "limited community caretaking role to 'protect or preserve life or avoid serious injury.'"[55] The court found that the deputy had an

51. Ramirez v. State, 105 S.W.3d 730, 743 (Tex. App.—Austin 2003, no pet.) (quoting McNairy v. State, 835 S.W.2d 101, 107 (Tex. Crim. App. 1991)).
52. *Id.* at 735–37.
53. *Id.* at 745.
54. Laney v. State, 117 S.W.3d 854, 856 (Tex. Crim. App. 2003).
55. *Id.* at 861 (quoting Mincey v. Arizona, 437 U.S. 385, 392 (1978)).

immediate, objectively reasonable belief of a substantial risk of harm to the boy if he had been left behind while deputies took Laney away, and the deputy immediately took the boy out of the room without expanding his search. Thus, the deputy was not required to secure a warrant to enter and search Laney's residence.[56]

The courts also dealt with the Court of Criminal Appeals's holding last year in *State v. Steelman* that the odor of marijuana emanating from a residence alone did not authorize a warrantless search and seizure.[57] In *Effler v. State*, officers, responding to a report of unusual odors emanating from Effler's home, smelled anhydrous ammonia and ether, which are commonly used in manufacturing methamphetamine. As they approached the door they heard someone running in the house. A person identifying himself as a guest in Effler's home answered the door and told the officers he needed to get Effler's permission to let them in. The guest then turned around and started running. The officers entered the residence and apprehended Effler as he was pouring the contents of two one-gallon jars down the sink.[58] The Eastland Court of Appeals found that the guest's actions, and the officers' knowledge that the guest was not alone in the house, created exigent circumstances justifying a warrantless entry to prevent the destruction of evidence and to protect the personal safety of the officers. The court distinguished *Steelman* on the basis that there was no claim in *Steelman* of exigent circumstances, and the officers in *Steelman* entered the residence to arrest one of its occupants, not to prevent the destruction of evidence or protect the officer's safety.[59]

In *Estrada v. State*, an officer responding to a disturbance call at Estrada's grandmother's house heard people running inside when the officer knocked and identified himself. Initially Estrada did not open the door. When Estrada finally opened the door, the officer smelled marijuana. The officer then entered the house and observed marijuana in several places. The El Paso Court of Appeals, relying on *Steelman*, found that the evidence that the officer smelled marijuana failed to justify the warrantless search of the home.[60] The court concluded that just as in *Johnson v. United States*,[61] (a case the Court of Criminal Appeals relied on in *Steelman*), the delay in answering the door and the sounds of people running inside combined with smell of drugs did not justify a warrantless entry.[62]

2. *Investigative Detentions (Terry Stops)*

Absent probable cause, police may "make a Terry stop and briefly detain a person for investigative purposes if the officer has a reasonable

56. *Id.* at 863.
57. State v. Steelman, 93 S.W.3d 102, 108 (Tex. Crim. App. 2002).
58. Effler v. State, 115 S.W.3d 696, 697–98 (Tex. App.—Eastland 2003, pet. ref'd).
59. *Id.* at 699.
60. *Estrada*, 116 S.W.3d at 374.
61. Johnson v. United States, 333 U.S. 10, 12 (1948).
62. *Estrada*, 116 S.W.3d at 375.

suspicion supported by articulable facts that criminal activity may be afoot."[63] To justify the detention, the officer's reasonable suspicion must be based on "specific articulable facts that, in light of the officer's experience and general knowledge, lead the officer to a reasonable conclusion that criminal activity is underway and that the detained person is connected with the activity."[64] A police officer may rely on an anonymous informant's tip so long as the informant's tip bears sufficient indicia of reliability to justify the detention.[65]

Appellate courts look at the totality of the circumstances in examining the reasonableness of an investigative detention.[66] The Fifth Circuit reiterated that "[t]he reasonableness of the detention depends on (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."[67] In *United States v. Brigham*, a state trooper pulled Brigham over for following another car too closely. The trooper asked Brigham for his driver's license and registration, and Brigham gave the officer his driver's license and rental car contract. The trooper became suspicious because the rental contract stated that a fifty-year-old woman had rented the car but she was not present. The trooper then questioned Brigham and his passengers for about eight minutes about the purpose of their travel and about the details of their trip. After this, the trooper radioed Brigham's driver's license information and car rental information to the dispatcher who responded that the car had not been reported stolen.[68] The Fifth Circuit found that the officer unreasonably and unlawfully prolonged Brigham's detention, violating the Fourth Amendment, because the eight minutes of questioning were unrelated to the officer's reasons for stopping Brigham and the officer's concerns about the discrepancies with the rental contract.[69] The Fifth Circuit has granted a petition for rehearing en banc in this case.

An investigative detention must not last longer than necessary to satisfy the purpose of the stop. "In other words, once an officer's suspicions have been dispelled, the detention must end unless there is additional, articulable, reasonable suspicion."[70] In *State v. Kothe*, a deputy pulled Kothe over for driving erratically, suspecting that Kothe was intoxicated. The deputy conducted a field sobriety check on Kothe and determined that he was not intoxicated. The deputy then made a dispatch to determine whether Kothe had any outstanding warrants which came back neg-

63. *In re* A.T.H., 106 S.W.3d 338, 343 (Tex. App.—Austin 2003, no pet.) (quotations omitted).

64. Sims v. State, 98 S.W.3d 292, 295 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

65. Pipkin v. State, 114 S.W.3d 649, 654 (Tex. App.— Fort Worth 2003, no pet.).

66. *Sims*, 98 S.W.3d at 295; Tasby v. State, 111 S.W.3d 178, 184 (Tex. App.—Eastland 2003, no pet.).

67. United States v. Brigham, 343 F.3d 490, 498 (5th Cir. 2003), *reh'g granted*, 350 F.3d 1297 (5th Cir. 2003) (quotations omitted).

68. *Id.* at 494–96.

69. *Id.* at 505.

70. State v. Kothe, 123 S.W.3d 444, 447 (Tex. App.—San Antonio 2003, no pet.).

ative. Just as the officer was prepared to release Kothe, he received a teletype that described Kothe, his vehicle, and that the vehicle was carrying a blue bank bag with some antique coins which needed to be confiscated. The deputy obtained Kothe's permission to search the vehicle and discovered drug paraphernalia.[71] The San Antonio Court of Appeals found that Kothe's continued detention was unreasonable after the deputy determined Kothe was not intoxicated even for the purpose of running a warrant check.[72]

The permissible scope and duration of investigatory detentions is often litigated in the context of border inspections. The Fifth Circuit reminded us that permanent checkpoints to identify illegal immigrants are constitutional unless the primary purpose is to intercept illegal narcotics.[73] The stop must be brief—only long enough to determine the citizenship status of the individuals stopped. The Fifth Circuit found that that an extended detention violated the Fourth Amendment where a border patrol agent detained a bus passenger for only three additional minutes in order to investigate whether the passenger was carrying drugs, because the agent had already completed his immigration inspection.[74] Border patrol agents may use drug-sniffing dogs at immigration checkpoints only if doing so does not extend the stop beyond the time necessary to verify an individual's immigration status. If the dog alerts border patrol agents before that time expires, it may provide sufficient reasonable suspicion to prolong the stop.[75]

While nothing in the Fourth Amendment, the Texas Constitution, or the jurisprudence of the Supreme Court of the United States requires a warrant for the arrest of a person outside of the home, Texas statutory law generally requires an arrest warrant for an arrest, subject to certain statutory exceptions.[76] Article 14.03(a)(1) of the Code of Criminal Procedure permits warrantless arrests "when officers discover a person in a suspicious place and under circumstances which reasonably show an offense has been or is about to be committed."[77] In *Dyar v. State*, a suspect was arrested in a hospital without a warrant for driving while intoxicated. The suspect had been involved in a one-car accident and taken to the hospital before law enforcement officers arrived at the accident scene. The suspect admitted to a state trooper investigating the accident that he had been drinking alcohol and driving. The trooper observed that the suspect had slurred speech, red glassy eyes, smelled of alcohol, and an-

71. *Id.* at 445-46.

72. *Id.* at 448.

73. *See* United States v. Ellis, 330 F.3d 677, 680 (5th Cir. 2003); United States v. Garcia-Garcia, 319 F.3d 726, 729–30 (5th Cir. 2003), *cert. denied*, 123 S. Ct. 2264 (2003); United States v. Portillo-Aguirre, 311 F.3d 647, 655 (5th Cir. 2002).

74. *Portillo-Aguirre*, 311 F.3d at 656, 658.

75. *Garcia-Garcia*, 319 F.3d at 730.

76. Dyar v. State, No. 1794-01, 2003 Tex. Crim. App. LEXIS 74, at *5–7 (Tex. Crim. App. Apr. 23, 2003) (citing TEX. CODE CRIM. PROC. art. 14.03(a)(1)).

77. *Id.* at *8.

swered many of the trooper's questions unintelligibly.[78] The Court of Criminal Appeals, using a totality of the circumstances approach, found that the hospital was a suspicious place for purposes of the statute, so no warrant was required.[79]

3. *Encounters*

Even without probable cause or reasonable suspicion, a police officer may approach an individual in a public place to ask questions or request a search. Such interactions, known as encounters, require no justification and trigger no constitutional protections.[80] The Fort Worth Court of Appeals noted that "[s]o long as the person remains free to disregard the officer's questions and go about his business, the encounter is consensual and merits no further constitutional analysis."[81]

But an encounter rises to the level of a seizure when a reasonable person believes he is not free to leave and yields to the officer's show of authority. In *Pennywell v. State*, a police dispatcher notified a police officer investigating a burglary at an apartment complex that the suspect was a black male traveling on foot. The officer noticed Pennywell, a black male, walking around the gated apartment complex. When the officer asked Pennywell if he lived there, Pennywell answered that he was just visiting a friend but was unable to give the friend's name or apartment number. Pennywell was also carrying a bag large enough to contain a weapon or items taken in a burglary. The officer placed Pennywell in his patrol car to further investigate the matter. The Fourteenth Court of Appeals found that the officer's questioning of Pennywell was an encounter because nothing suggested that Pennywell was not free to answer the officer's questions. But once the officer placed Pennywell in his patrol car, the interaction elevated to an investigative detention.[82]

C. Affidavits in Support of Search Warrants

Texas law provides that an application for a search warrant must be supported by a sworn affidavit which sets forth substantial facts establishing probable cause.[83] There must be sufficient facts in the affidavit for a magistrate to reasonably conclude that "the object of the search is probably on the premises."[84] But the magistrate may draw reasonable inferences from the facts and circumstances alleged in the affidavit in determining whether the facts mentioned in the affidavit are adequate to

78. *Id.* at *3.
79. *Id.* at *22.
80. McCraw v. State, 117 S.W.3d 47, 51 (Tex. App.—Fort Worth 2003, pet. ref'd).
81. *Id.* (citing Johnson v. State, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995)).
82. Pennywell v. State, No. 01-00-01226-CR, 2003 Tex. App. LEXIS 8931, at *6–7 (Tex. App.—Houston [1st Dist.] Oct. 16, 2003, no pet.).
83. Brown v. State, 115 S.W.3d 633, 636 (Tex. App.— Waco 2003, no pet.) (citing Tex. Code Crim. Proc. Ann. art. 18.01(b) (Vernon 2003)).
84. Lowery v. State, 98 S.W.3d 398, 400 (Tex. App.—Amarillo 2003, no pet.).

establish probable cause.[85] Appellate courts determine whether probable cause existed to issue a search warrant from the four corners of the affidavit alone.[86]

The courts this year addressed the use of information supplied by a confidential informant in an affidavit. In *Serrano v. State*, the affidavit stated that the affiant, a police officer, received a tip from a confidential informant that "Daniel Serrano, [a] [H]ispanic male, approximately [twenty-five] years old, is dealing cocaine in the Austin, Travis County area."[87] The Austin Court of Appeals found that the search warrant was not supported by probable cause because the affidavit failed to show the basis of the informant's knowledge. The affidavit neglected to state when the informant provided the information to police, when the informant obtained his information, or when the events described in the affidavit took place.[88] And the Amarillo Court of Appeals reiterated that under the rule of *Illinois v. Gates*,[89] police no longer must establish the credibility of a confidential informant to establish probable cause. Rather, courts should determine probable cause from a totality of the circumstances approach, and the informant's credibility is just one factor to consider.[90]

Federal law provides a good-faith exception to the probable cause requirement for an affidavit. If an officer's reliance on a warrant is objectively reasonable, but the warrant is later invalidated, the evidence obtained by the warrant does not have to be suppressed. But if the warrant affidavit contains false statements made intentionally or with reckless disregard to the truth, the good faith exception will not protect the evidence from being suppressed.[91] The good-faith exception is statutory under Texas law, with an additional requirement that the search warrant must be based on probable cause.[92]

D. Consent to Search

The Court of Criminal Appeals reminded us that a search conducted with the consent of a suspect is one of the well-delineated exceptions to the Fourth and Fourteenth Amendment requirements of a warrant and probable cause. But the consent must be voluntary, which is determined from all the circumstances. Under the United States Constitution, the burden of proving the validity of consent is by a preponderance of the evidence, while under the Texas Constitution, the burden is by clear and convincing evidence.[93]

---

85. *Id.*
86. Serrano v. State, 123 S.W.3d 58, 58 (Tex. App.—Austin 2003, no pet.).
87. *Id.* at 57 (quotations omitted).
88. *Id.* at 60.
89. Illinois v. Gates, 462 U.S. 213, 232–33 (1983).
90. Carrillo v. State, 98 S.W.3d 789, 792 (Tex. App.—Amarillo 2003, pet. ref'd).
91. United States v. Hinojosa, 349 F.3d 200, 203 (5th Cir. 2003).
92. Long v. State, 108 S.W.3d 424, 429 (Tex. App.—Tyler 2003, pet. granted) (citing Tex. Code Crim. Proc. Ann. art. 38.23(b) (Vernon Supp. 2003)).
93. Guevara v. State, 97 S.W.3d 579, 582 (Tex. Crim. App. 2003).

Consent must be positive and unequivocal to be valid. In *Gallups v. State*, a suspect fled the scene of an accident, leaving his vehicle at the scene. A witness described the driver of the vehicle to police, and a police officer went to Gallups' home to investigate the missing driver. The officer saw Gallups standing inside his home in front of a glass storm door, and he matched the description given by the witness. The officer testified that he asked Gallups to come outside, but instead Gallups motioned with his hand for the officer to come inside.[94] The Dallas Court of Appeals found that this hand motion constituted clear and convincing evidence of Gallup's positive and unequivocal consent.[95] This issue is currently under review by the Court of Criminal Appeals.

Consent is not voluntary if obtained through duress or coercion. While courts look at the totality of the circumstances in determining voluntariness, some relevant factors in assessing voluntariness of consent include (1) the youth, intelligence, and education of the accused; (2) any constitutional advice given to the accused; (3) the length of the detention; (4) the repetitiveness of the questioning; and (5) the use of physical punishment.[96] But a police officer's failure to tell the accused that he can refuse to consent does not automatically invalidate consent.[97] And the fact that a police officer states that he can get a search warrant if an individual refuses to consent does not render consent involuntary.[98]

Once a person consents to a search, the police's authority to search is limited to the scope of the consent.[99] In *United States v. Mendoza-Gonzalez*, a border patrol agent asked to take a look inside of a truck driver's trailer at a permanent immigration checkpoint. The driver consented. While most of the cargo in the trailer was in white boxes, wrapped in cellophane, and on pallets, the agent noticed some brown cardboard boxes sitting on top of the cargo. The agent opened one of the brown boxes, saw some rectangular bundles inside, which he recognized as marijuana bricks, and then cut open one of the bricks to reveal marijuana.[100] The Fifth Circuit found that the agent did not exceed the scope of the consent because Mendoza failed to place any explicit limitations on the agent's search. The defendant has the responsibility to limit the search, and the officer was not required to obtain separate consent for each container within a vehicle that he had been granted consent to search.[101]

The courts also addressed the issue of third party consent this year. If a third party has joint access and control over the property and consents to the search, then a warrantless search of the property does not violate the

94. Gallups v. State, 104 S.W.3d 361, 364–65 (Tex. App.—Dallas 2003, pet. granted).
95. *Id.* at 368.
96. State v. Hunter, 102 S.W.3d 306, 311 (Tex. App.—Fort Worth 2003, no pet.).
97. *Id.*
98. Bellaire v. State, 110 S.W.3d 664, 669 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).
99. United States v. Mendoza-Gonzalez, 318 F.3d 663, 666–67 (5th Cir. 2003), *cert. denied*, 123 S. Ct. 2114 (2003).
100. *Id.* at 665.
101. *Id.* at 667.

Fourth Amendment. Even if the third party does not have actual authority over the premises, the consent is still valid if the third party has apparent authority. In *Whisenhunt v. State*, Whisenhunt was out of town when his home was burglarized. His roommate reported the burglary to the police. When a police officer came to the home to investigate the burglary, the roommate told the officer that Whisenhunt owned the home and was out of town. The roommate showed the officer around, explaining that the home had been ransacked but that he was not sure what, if anything, had been taken from Whisenhunt's room. The officer entered Whisenhunt's room and found marijuana in a jewelry box that he was dusting for fingerprints.[102] The Houston Court of Appeals, First District, found that it was reasonable for the officer to conclude that the roommate had apparent authority to consent to the search, and that the roommate consented to a search of Whisenhunt's room.[103] And in *United States v. Shelton*, the Fifth Circuit found that the defendant's estranged wife possessed common authority to consent to a search of a house that they had shared for the last six years, even though she had no ownership in the house and she was not living in the house at the time of the search because they were separated.[104] The defendant had taken no action to restrict his spouse's access to the house and thus had no reasonable expectation of privacy where she was concerned.[105]

E. Miscellaneous Cases

Courts also addressed the following issues this year:

- Police authority to conduct an investigative detention outside their jurisdiction: Under the "hot pursuit" doctrine, police officers have the authority to detain a suspect outside their jurisdiction if the initial pursuit is lawfully initiated on the ground of suspicion arising within the police's geographic boundary, and there is an immediate and continuous pursuit of the suspect from the scene of a crime.[106] The Dallas Court of Appeals, citing the Court of Criminal Appeals' holding in *Yeager v. State*, interpreted this to mean that an officer lacks authority to conduct an investigative detention outside the geographic boundaries of the officer's jurisdiction if reasonable suspicion does not arise within his jurisdiction. This issue is currently under review by the Court of Criminal Appeals.[107]
- The knock-and-announce rule: The Fifth Circuit reiterated that there is no "blanket rule that police are never required to knock-and-announce when executing a warrant for a drug investiga-

102. Whisenhunt v. State, No. 01-02-00660-CR2003 Tex. App. LEXIS 7764, at *2–3 (Tex. App.—Houston [1st Dist.] Aug. 29, 2003, no pet.).
103. *Id.* at *16.
104. United States v. Shelton, 337 F.3d 529, 534, 538 (5th Cir. 2003).
105. *Id.* at 537.
106. Yeager v. State, 104 S.W.3d 103, 107–09 (Tex. Crim. App. 2003).
107. State v. Kurtz, 111 S.W.3d 315, 322–23 (Tex. App.—Dallas 2003, pet. granted) (citing *Yeager*, 104 S.W.3d at 107).

tion";[108] rather, police must have a reasonable suspicion that, under the particular circumstances the drugs will be readily destroyed or announcing their presence will endanger their safety.[109]

- Seizure of persons: Police observation of a suspect in public, even if it is intimidating, does not constitute a seizure of that suspect.[110]

III. CONCLUSION

A review of the past year's cases regarding confessions, searches, and seizures reveals not only reiteration of well-established precedent in these areas but also new and important interpretations of that precedent. State courts tend to analyze these issues under the Fourth Amendment unless Texas statutes impose different requirements. And, because of the federal constitutional issues involved, there is much overlap between state and federal cases. The Texas Court of Criminal Appeals and the Fifth Circuit have granted review on several courts of appeals's decisions in these areas, so it will be interesting to see how the courts resolve these issues.

108. United States v. Washington, 340 F.3d 222, 226 (5th Cir. 2003), *cert. denied*, 157 L. Ed. 2d 757 (U.S. 2003).

109. *Id.*; Haley v. State, 113 S.W.3d 801, 807 (Tex. App.—Austin 2003, pet. filed); Marsh v. State, 115 S.W.3d 709, 713 (Tex. App.—Austin 2003, no pet.); Ballard v. State, 104 S.W.3d 372, 376 (Tex. App.—Beaumont 2003, pet. ref'd).

110. United States v. Mask, 330 F.3d 330, 337–38 (5th Cir. 2003).