1991

Criminal Procedure: Search, Seizure, and Confession

Ruth A. Kollman

Ronald L. Goranson

CRIMINAL PROCEDURE: SEARCH, SEIZURE, AND CONFESSION

*Ruth A. Kollman**
*Ronald L Goranson***

TEXAS criminal defense lawyers will hail 1991 as the year the Court of Criminal Appeals resurrected the Texas Constitution. The interment had lasted almost fifty years.[1] The Court of Criminal Appeals had ended 1990 by reaffirming in December that the "Texas Constitution does not impose any greater restrictions on police conduct than those imposed by the Fourth Amendment."[2] The first flicker of life came in January of 1991 with the court's holding that the Texas Constitution affords greater double jeopardy protection than that provided by the federal Constitution.[3] By midyear the court had denounced its own very recent holdings[4] and announced it would now separately analyze state and federal constitutional due process claims.[5] The revival has broad implications. The most significant impact is in the areas of search and seizure and confession.

I. SEARCH AND SEIZURE

A. The Emergence of Independent State Constitutional Grounds

In *Goodwin v. State* the Court of Criminal Appeals rejected Goodwin's

* B.A., North Texas State University; J.D., Southern Methodist University. Associate, Milner, Goranson, Sorrels, Udashen, Wells & Parker, Dallas, Texas.

** B.B.A., University of Arkansas; J.D., Southern Methodist University. Partner, Milner, Goranson, Sorrels, Udashen, Wells & Parker, Dallas, Texas.

1. *See* Crowell v. State, 147 Tex. Crim. 299, 180 S.W.2d 343 (1944), which held that "Art. I, Sec. 9, of the Constitution of this State, and the 4th Amendment to the Federal Constitution are, in all material aspects, the same." *Id.*, 147 Tex. Crim. at 304, 180 S.W.2d at 346.

2. Gordon v. State, 801 S.W.2d 899, 912 (Tex. Crim. App. 1990).

3. State v. Torres, 805 S.W.2d 418, 420-21 (Tex. Crim. App. 1991) (rejecting United States Supreme Court dicta in Crist v. Bretz, 437 U.S. 28, 37 & n.15 (1978) by holding that double jeopardy attaches in a bench trial in Texas when both sides announce ready and the defendant pleads to the charging instrument, not when the first witness is sworn).

4. *See, e.g.*, Johnson v. State, 803 S.W.2d 272, 288 (Tex. Crim. App. 1990) (quoting Eisenhauer v. State, 754 S.W.2d 159, 162 (Tex. Crim. App.), *cert. denied*, 488 U.S. 848 (1988)) ("Article I § 9 of the Texas Constitution and the Fourth Amendment of the Federal Constitution are 'in all material aspects the same.' "), *cert. denied*, 111 S.Ct. 2914 (1991); Bower v. State, 769 S.W.2d 887, 903 (Tex. Crim. App.) (continuing to "interpret our Texas constitution in harmony with the Supreme Court's opinions interpreting the Fourth Amendment"), *cert. denied*, 492 U.S. 927 (1989); Eisenhauer v. State, 754 S.W.2d 159, 164 (Tex. Crim. App.) (Article I, section 9 of the Texas Constitution is the same as the federal Constitution in determining probable cause), *cert. denied*, 488 U.S. 848 (1988), *overruled by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991).

5. Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991).

claim that the search of the car in which he was riding was improper because it flowed from a pretext arrest.[6] The arresting officer testified that the car did not signal a right turn. The officer stopped the car. The officer saw one of the back seat passengers make a downward movement with the upper portion of his body. When Goodwin opened the front passenger door of the car, one of the officers saw what seemed to be an illegal knife. The arresting officer said he had thought, before the car made the turn, that it might be necessary to check the people in the car. He reiterated, however, that he stopped the car simply because the occupants violated the law, not because he wanted to search them. The court found that there was no pretext arrest.[7] In addition, once the car was legally stopped the officers could take reasonable measures for their own safety.[8] From their observations, the officers could have reasonably believed that the occupants might have been in possession of additional weapons.[9] The officers' observation of an illegal knife justified a continued and more extensive search of the passenger compartment and containers located in the car.[10] In its discussion of the pretext arrest doctrine, the court noted that the Fifth Circuit had overruled the federal case upon which the Texas line of cases prohibiting pretext arrests was based.[11] The court held that the evidence in *Goodwin* showed no pretext arrest.[12] Because it found Goodwin's arrest was not based on a pretext, the Court of Criminal Appeals in *Goodwin* deemed it unnecessary to discuss the lawfulness of pretext arrests in Texas.[13]

The pretext issue arose again in *Gordon v. State*.[14] Authorities arrested Gordon on an arrest warrant based on an outstanding municipal court warrant, then searched his apartment. Gordon confessed to another crime. In analyzing the prohibition against pretext arrests, the court noted that pretext seizures generally involve investigatory stops where (1) there is no initial suspicion that the detainee has committed a crime, or (2) there is a temporary detention or arrest of an individual suspected of having committed a crime.[15] The act that authorities suspect the person of having committed is almost never the conduct initiating the detention or seizure.[16] Under earlier Texas case law, the possession by police of a valid warrant did not affect the basic proposition that authorities could not use an arrest for one crime as a pretext to search for evidence of another crime.[17] The Fifth Circuit, how-

6. Goodwin v. State, 799 S.W.2d 719, 725, 728 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 2913 (1991).
7. *Id.* at 726.
8. *Id.* at 727.
9. *Id.* at 728.
10. *Id.*
11. *Id.* at 725 (citing United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (*overruling* Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968))).
12. *Id.* at 726.
13. *Id.*
14. Gordon v. State, 801 S.W.2d 899 (Tex. Crim. App. 1990).
15. *Id.* at 903.
16. *Id.*
17. *See* Black v. State, 739 S.W.2d 240, 243 (Tex. Crim. App. 1987) (*overruled by Gordon*, 801 S.W.2d 899).

ever, recently rejected the subjective intent test for finding a pretext arrest — that a court may look at the subjective intent of the police at the time of the arrest.[18] Most circuits now agree an objective, rather than a subjective, analysis is proper.[19] An arrest or search without probable cause will generally be redeemed if evidence shows that police officers acted in objective good faith, and the officers have done no more than that objectively allowed by law.[20] Their subjective motives in doing what the law permits are irrelevant to a suppression inquiry.[21]

Gordon also argued that the complaint on which the magistrate issued the arrest warrant was wholly conclusory and did not contain any factual information to show the underlying basis of the affiant's conclusions. The court noted that a complaint must allege facts to establish that the affiant had personal knowledge of the averments of illegal activity.[22] A magistrate must evaluate facts to determine if probable cause exists. Without facts, the judge cannot make an independent determination of probable cause. In the *Gordon* affidavit, the affiant recited that he or she had good reason to believe that Gordon had unlawfully failed to appear in a municipal court. The affidavit did not contain any facts about why Gordon's failure to appear was unlawful or how the affiant came to have this knowledge. Thus, the affiant did not have the indicia of reliability necessary to permit a magistrate to make a proper evaluation. The Court of Criminal Appeals found the complaint did not set out probable cause.[23] Gordon's arrest pursuant to the warrant issued on the complaint was illegal.[24] The search of Gordon's apartment and his confession came after his illegal arrest. Article 38.23(b) of the Texas Code of Criminal Procedure[25] makes evidence taken in violation of the law admissible if an officer obtains the evidence while acting in objective and good-faith reliance on a warrant based on probable cause.[26] The Court of Criminal Appeals held that article 38.23(b) does not apply if the warrant is not based on probable cause, regardless of the good-faith reliance of the officer.[27] The trial court should have excluded the confession

18. *See* United States v. Causey, 834 F.2d 1179, 1184-85 (5th Cir. 1987) (en banc). To the extent *Black*, stands for the proposition disavowed in *Causey*, the Court of Criminal Appeals has overruled it. *Gordon*, 801 S.W.2d at 911.

19. *See*, United States v. Mitchell, 951 F.2d 1291, 1295 (D.C. Cir., 1991); United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989), *cert. denied*, Cummins v. United States, 112 S.Ct. 428 (1991); United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988); United States v. Archer, 840 F.2d 567, 572 (8th Cir.), *cert. denied*, 488 U.S. 941 (1988); United States v. Miller, 821 F.2d 546, 549 (11th Cir. 1987); United States v. Hawkins, 811 F.2d 210, 213 (3rd Cir.), *cert. denied*, 484 U.S. 833 (1987); United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc); United States v. Smith, 643 F.2d 942, 944 (2d Cir.), *cert. denied*, 454 U.S. 875 (1981); United States v. McCambridge, 551 F.2d 865, 870 (1st Cir. 1977). *But see* United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986).

20. *Gordon*, 801 S.W.2d at 909.

21. *Id.*

22. *Id.* at 913 (citing Rumsey v. State, 675 S.W.2d 517, 519 (Tex. Crim. App. 1984)).

23. *Id.* at 916.

24. *Id.*

25. TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 1981 & Supp. 1991) (as amended effective Sept. 1, 1987).

26. *Gordon*, 801 S.W.2d at 912-13.

27. *Id. Accord*, Curry v. State, 808 S.W.2d 481, 482 (Tex. Crim. App. 1991).

unless intervening circumstances had relieved the taint of the illegal procedure.[28] The Eastland court of appeals had not reviewed whether the taint of the illegal arrest was sufficiently dissipated. Accordingly, the Court of Criminal Appeals remanded *Gordon* to the Eastland court to determine if intervening circumstances had purged the taint.[29]

In reaching its conclusion in *Gordon*, the Court of Criminal Appeals held that no greater restrictions on police conduct are imposed by the Texas Constitution than by the Fourth Amendment.[30] The first sparks of life in the Texas Constitution do flicker in Judge Davis' opinion, however:

> This is not to say we shall merely "parrot" the opinions of the Supreme Court; but, where the federal and state constitutional provisions are in all material aspects the same, this Court is free to "follow the lead" of the Supreme Court where the position has a logical and equitable basis and it appears our own state interests will also be served.[31]

Judge Clinton concurred; Judge Teague dissented. Three judges (Judges Campbell, Miller, and Baird) concurred but considered the pretext arrest portion of the opinion dicta since the arrest warrant was invalid.[32] It would take another six months for the court to revitalize the Texas Constitution.

The legal Lazarus took the form of the unconscious William Randolph Heitman.[33] Officers found Heitman slumped in his car in a convenience store parking lot. After they searched him and discovered a loaded pistol, officers arrested him. When they inventoried his car, the officers found a locked briefcase in the passenger compartment. They jimmied open the briefcase and found methamphetamine. After conviction for possession of the drug, Heitman appealed the trial court's adverse ruling on his motion to suppress.

The *Heitman* analysis began with the conclusion "Today we reserve for ourselves the power to interpret our own constitution."[34] The court acknowledged that the Texas Constitution cannot subtract from the rights guaranteed by the federal Constitution.[35] A state constitution may, however, afford greater protection than the federal Constitution.[36] The *Heitman* court also noted that the Supreme Court's interpretation of a Fourth Amendment claim is permissive authority when considering a parallel claim under article I, section 9 of the Texas Constitution.[37] The court concluded that the framers of the Texas Constitution were not necessarily aware of or in agreement with the federal drafters' constitutional intent.[38] Similar lan-

28. *Gordon*, 801 S.W.2d at 916.
29. *Id.* at 917.
30. *Id.*
31. *Id.* at 912.
32. *Id.* at 917.
33. *See supra* note 5 and accompanying text.
34. *Heitman*, 815 S.W.2d at 682.
35. *Id.* at 682 (citing Cooper v. California, 386 U.S. 58 (1967)).
36. *Id.* at 683 (citing Oregon v. Hass, 420 U.S. 714 (1975)).
37. *Id.* at 690 & n.22.
38. *See id.* at 685, 690.

guage does not necessarily equal similar intent and interpretation.[39] The court also cautioned in a footnote that merely citing article I, section 9 in a brief will not preserve error on appeal.[40] Counsel must argue and cite authority for the urged state constitutional construction.[41] The state constitutional claim should be a separate ground of error on appeal, apart from any federal constitutional ground.[42] Otherwise, the appellate court may hold the entire lumped ground to be multifarious and not consider it.[43]

Heitman's reach may exceed the grasp of its actual holding. The court's different drafters, different intent rationale applies with equal force to any provision of the Texas Constitution, not just article I, section 9. The Court of Criminal Appeals did not hold that the inventory search of Heitman's locked briefcase violated the Texas Constitution. It merely remanded the case to the Fort Worth Court of Appeals to re-analyze the independent state ground in light of the high court's conclusion that a state constitutional analysis does not have to comport with federal Fourth Amendment interpretations.[44]

B. DWI Roadblocks

In 1990 the United States Supreme Court in *Michigan Department of State Police v. Sitz* held that DWI roadblocks in Michigan did not violate the Fourth Amendment protection against unreasonable search and seizure.[45] The Supreme Court focused on the presence in Michigan of a legislatively developed administrative scheme that provided authority to police to collect evidence at sobriety checkpoints. The scheme also limited the officers' discretion in conducting the stops.[46] The Court of Criminal Appeals determined that this Supreme Court decision overruled its recent holding that the Fourth Amendment prohibited Texas DWI checkpoints.[47]

One result of *Sitz* was that the Court of Criminal Appeals remanded several cases to the courts of appeals for reconsideration. In one of the first

39. *See id.* at 689.
40. *Id.* at 690 n.23.
41. *Id.*
42. *Id.*
43. *Id.* Several judges on the Court of Criminal Appeals have stressed this briefing requirement in presentations to CLE seminars. *See*, Chuck Miller, *Texas Court of Criminal Appeals Update*, at D-5 to D-6, in *The Advanced Criminal Law Course* (State Bar of Texas, 1991). They mean it. *See also* Schalk v. State, No. 665-89, 1991 WL 194072, at *11 (Tex. Crim. App. October 2, 1991) ("The question of whether our state constitution should provide more protection than the federal constitution in this case was not presented in the appellants' second ground for review, and we therefore express no opinion on that issue.").
44. *Heitman*, 815 S.W.2d at 690.
45. Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481, 2488 (1990).
46. *Id.* at 2486-87.
47. King v. State, 800 S.W.2d 528, 529 (Tex. Crim. App. 1990), *overruling* Higbie v. State, 780 S.W.2d 228 (Tex. Crim. App. 1989). The Court of Criminal Appeals remanded *King* to the Dallas court of appeals for reconsideration in light of *Sitz*. On remand the Dallas court distinguished *Sitz*, noting that Texas has no legislatively-developed administrative scheme like that of Michigan. King v. State, 816 S.W.2d 447, 451 (Tex. App.—Dallas 1991, writ ref'd.). Accordingly, the Dallas court held that the roadblock violated both the Fourth Amendment and art. I, § 9 of the Texas Constitution. *Id.*

cases decided on remand, *State v. Wagner*, Dallas court of appeals held that Texas DWI roadblocks violate the Fourth Amendment because Texas has no administrative scheme authorizing the stops.[48] The Dallas court distinguished driver's license and insurance checkpoints from DWI roadblocks by noting that no regulatory agency enforces drunk driving prohibitions in Texas.[49] Distilling *Heitman*, the Dallas court held that the roadblock violated the defendant's article I, section 9 rights, as well as his Fourth Amendment rights, noting that the Texas Constitution provides at least as much protection as the Fourth Amendment.[50]

C. *Search and Arrest Warrants*

1. *Probable Cause*

In *Rojas v. State*[51] the defendant was convicted of possession of marijuana. The Court of Criminal Appeals reviewed the case to determine if a plainly-secondhand tip received from an anonymous informer gave sufficient probable cause under both the Texas and federal Constitutions. A police officer received an anonymous phone call from an informer who claimed to have been advised there was marijuana in the trunk of Rojas's vehicle and that Rojas would be attending a local funeral. There was no evidence that the informer had personal knowledge of the marijuana. The corroborating information — that Rojas would be attending the funeral of a family member — had been shown on local news broadcasts. The tip did not contain any other information to show the informer's special or personal knowledge. The Court of Criminal Appeals concluded that it was not reasonable to determine that the informer's information about attendance at a funeral gave credence to the informer's marijuana tip.[52] When an anonymous tip furnishes the probable cause for a search, under the totality-of-the-circumstances test the probability that the contraband will be found in the indicated location must be supported by either the informer's claim of personal knowledge or other facts demonstrating that the probability is reasonable.[53] The court held probable cause was lacking.[54]

In *Hass v. State* the Court of Criminal Appeals held that police lacked probable cause to search a mini-warehouse for drugs.[55] The affidavit supporting the search warrant was based in part on information from a confidential informant that Hass had a quantity of amphetamine and manufactured it at his residence. Six months of surveillance preceded the search. The police observed a vehicle at the miniwarehouse. They saw the subjects put an unknown item in the car and drive off. Police stopped the

48. State v. Wagner, No. 05-89-00675-CR, 1991 WL 236892, at *1 (Tex. App.—Dallas Nov. 14, 1991, writ pending).
49. *Id.* at *1, *3.
50. *Id.* at *3.
51. Rojas v. State, 797 S.W.2d 41 (Tex. Crim. App. 1990).
52. *Id.* at 44.
53. *Id.*
54. *Id.*
55. Hass v. State, 790 S.W.2d 609, 610 (Tex. Crim. App. 1990).

car. They could smell the odor of phenylacetic acid, an ingredient of amphetamine. The Court of Criminal Appeals found several of the statements in the affidavit misleading.[56] It noted the mere fact that the suspects had illegal drugs in their automobile after leaving a miniwarehouse did not, without additional facts linking the miniwarehouse with the drugs, justify searching the miniwarehouse for additional drugs.[57] It reversed on probable cause grounds.[58]

2. *Scope*

In *State v. Barnett*[59] the police executed a search warrant at a home. While the search was underway, Barnett, who was not named in the warrant affidavit, drove up in his car. Officers immediately arrested him. They searched his car and found amphetamines in the car. The Court of Criminal Appeals held that the search of Barnett's car violated both article I, section 9 of the Texas Constitution and the Fourth Amendment.[60] The court observed that the affidavit supporting the warrant authorizing search of the house did not provide probable cause to believe that every vehicle on the premises contained contraband.[61]

3. *Good-Faith Reliance on Warrant*

Article 38.23(b) of the Texas Rules of Criminal Procedure[62] provides that evidence taken in violation of the law is admissible if an officer obtains the evidence while acting in objective and good-faith reliance on a warrant based on probable cause. In *Gordon v. State* the Court of Criminal Appeals held that if the warrant is not based on probable cause, then 38.23(b) does not apply regardless of the good-faith reliance of the officer.[63] Police suspected that Gordon had committed a robbery and a sexual assault. They did not have probable cause to arrest. They discovered an outstanding arrest warrant issued by a municipal court on Gordon's failure to appear. Pursuant to an arrest warrant based on the outstanding municipal court warrant, the authorities arrested Gordon. They searched his apartment. They interrogated him about the robbery and assault. The evidence consisted of the testimony of the complainant and Gordon's videotaped and written confessions. The complainant said she got only a glimpse of her attacker. She was not able to positively identify Gordon; however, she said there were no noticeable differences in appearance between Gordon and her attacker. Gordon's confession was far more specific. The Eastland Court of Appeals

56. *Id.* at 611-12.
57. *Id.* at 612.
58. *Id.* at 610.
59. State v. Barnett, 788 S.W.2d 572 (Tex. Crim. App. 1990).
60. *Id.* at 573, 577.
61. *Id.* at 576.
62. TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 1981 & Supp. 1991) (as amended, effective Sept. 1, 1987).
63. Gordon v. State, 801 S.W.2d 899, 912-13 (Tex. Crim. App. 1990). *Accord*, Curry v. State, 808 S.W.2d 481, 482 (Tex. Crim. App. 1991).

relied on the article 38.23(b) good-faith exception to an illegal arrest situation in upholding Gordon's conviction.[64] The Court of Criminal Appeals disagreed. The court noted that the officers had obtained the evidence in Gordon's case in June of 1987.[65] Article 38.23(b) did not go into effect until September 1, 1987 and was not applicable to evidence obtained prior to that date.[66] More importantly, the court distinguished the requirements of *United States v. Leon*[67] from the language of article 38.23(b).[68] The good-faith exception articulated in *Leon*[69] permits an exception if a police officer's probable cause belief is reasonable.[70] Article 38.23(b) requires a threshold finding of probable cause.[71] As a result, the good-faith exception could not support the arrest and search.[72] The Court of Criminal Appeals remanded a similar case, *Curry v. State*, for reconsideration in light of *Gordon*.[73] The Houston court of appeals had held that Curry's arrest and search was lawful, even though the supporting affidavits did not show probable cause, because the arresting officer acted in good faith in arresting Curry on outstanding traffic warrants.[74]

4. *Technical Defects*

In *Green v. State*[75] the search warrant showed that the magistrate signed and issued it on March 20. It also showed that the authorities did not execute the warrant until March 25. Article 18.07 of the Texas Code of Criminal Procedure[76] requires authorities to execute a search warrant within three whole days, excluding the days of issuance and execution. The warrant here was executed one day late. Calling this a "technical defect" (as opposed to a defect in probable cause), the Court of Criminal Appeals permitted the consideration of evidence, other than the controversial documents, to show that a clerical error caused the technical defect.[77] If, at a hearing on a motion to suppress, a magistrate or clerk (1) states that the date on the face of the warrant is wrong; and (2) testifies to the date on which the warrant actually was issued, which date shows the authorities timely executed the warrant, then the warrant is valid notwithstanding the "technical" error.[78] The State did not elicit such testimony in *Green*. The court held that the warrant had

64. Gordon v. State, 767 S.W.2d 866, 868 (Tex.App.—Eastland 1989), *rev'd*, 801 S.W.2d 899 (Tex. Crim. App. 1990).
65. *Gordon*, 801 S.W.2d at 912.
66. *Id.*
67. United States v. Leon, 468 U.S. 897 (1984).
68. *Gordon*, 801 S.W.2d at 912-13.
69. *Leon*, 468 U.S. at 913, 919-20.
70. *See Gordon*, 801 S.W.2d at 912; United States v. Logan, 949 F.2d 1370, 1379 n.15 (5th Cir. 1991).
71. *Gordon*, 801 S.W.2d at 912.
72. *Id.* at 913.
73. Curry v. State, 808 S.W.2d 481, 482 (Tex. Crim. App. 1991).
74. Curry v. State, 780 S.W.2d 825, 826 (Tex. Civ. App.—Houston [14th Dist.] 1990), *vacated by* 808 S.W.2d 481 (Tex. Crim. App. 1991).
75. Green v. State, 799 S.W.2d 756 (Tex. Crim. App. 1990).
76. TEX. CODE CRIM. PROC. ANN. art. 18.07 (Vernon 1981).
77. *Green*, 799 S.W.2d at 760.
78. *See id.* at 758-59.

no force or effect after March 24th.[79] The trial court should have suppressed the fruits of the search conducted pursuant to the expired warrant.[80]

D. Warrantless Arrests

1. On Probable Cause

In *Beverly v. State* the court held that probable cause for arrest under article 14.01(b) of the Texas Code of Criminal Procedure[81] may be partly based on reasonably trustworthy information.[82] The arresting officer was familiar with loiterers at an apartment complex. The manager told the officer he had warned Beverly about trespassing. The officer saw Beverly drive up. In searching him incident to an arrest for criminal trespass, the officer found cocaine. The Court of Criminal Appeals held that an officer may base a warrantless arrest on the officer's prior knowledge and personal observations, combined with another person's reasonably trustworthy information, in making a probable cause assessment.[83]

2. Scope

In *California v. Acevedo* the Supreme Court limited the scope of a warrantless search to the specific object which gives rise to the probable cause to search.[84] Police saw Acevedo leave his apartment. He was carrying a brown paper bag. He put the bag in his trunk. Officers stopped the car, opened the trunk, and seized the bag. In analyzing the law applicable to closed containers in cars, the Court relied on the rules enunciated in *United States v. Chadwick*[85] and *Arkansas v. Sanders*[86] and noted the sometimes conflicting applications.[87] *Chadwick* prohibited the warrantless search of a closed container in a car.[88] *Sanders* extended *Chadwick* to a suitcase actually being transported in the trunk of a car.[89] The rationale behind both cases was the owner's heightened privacy interest in personal luggage. The presence of the luggage in an automobile did not diminish the owner's expectation of privacy.[90] The Court noted that strict application of the *Sanders-Chadwick* rule to Acevedo's paper sack would have required the authorities to get a warrant before opening the bag. The Court held that the Fourth Amendment is not applied differently to the search of a container within an automobile than to the search of the vehicle.[91] It explicitly overruled the

79. *See id.* at 757.
80. *See id.*
81. TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1977).
82. Beverly v. State, 792 S.W.2d 103, 104-05 (Tex. Crim. App. 1990).
83. *Id.* at 105.
84. California v. Acevedo, 111 S.Ct. 1982, 1991 (1991).
85. United States v. Chadwick, 433 U.S. 1 (1977).
86. Arkansas v. Sanders, 442 U.S. 753 (1979), *overruled by* California v. Acevedo, 111 S.Ct. 1982, 1989-91 (1991).
87. *Acevedo*, 111 S.Ct. at 1989-91.
88. *See Chadwick*, 433 U.S. at 11-13.
89. *Sanders*, 442 U.S. at 765; *see, Acevedo*, 111 S.Ct. at 1987.
90. *See Acevedo*, 111 S.Ct. at 1986-87.
91. *Id.* at 1989, United States v. Ross, 456 U.S. 798, 820-22 (1982) (warrantless search of

closed-container warrant requirement in *Sanders*.[92] In dicta, the Supreme Court noted that the officer's probable cause to search the paper bag did not extend to a search of the entire vehicle.

3. *The Inventory Exception*

In *Moberg v. State*[93] the police had arrested Moberg at a motel pursuant to a valid arrest warrant. After taking him to the police station, officers returned to the motel room the same evening and removed Moberg's belongings. They inventoried the belongings and took everything to the police department's property room. Among Moberg's belongings were photographs of nude young girls and of an adult male engaged in sexual activity with various young girls. The arresting officers did not conduct a search contemporaneous with their arrest of Moberg. Instead they obtained a warrant, which apparently did not comply with article 18.01(c) of the Code of Criminal Procedure[94]. The State did not, however, rely on the search warrant. Several days after the seizure investigators identified two of the girls in the photographs. The authorities brought charges against Moberg. The State defended the search on two grounds: first, the hotel manager had consented to the search; and second, the seizure was pursuant to an inventory search. At the hearing on the motion to suppress, Moberg testified about his expectation of privacy in the hotel room. He said he had registered for the night and he intended to check out sometime the following morning. The Court of Criminal Appeals held that the hotel manager could not consent to the search before the expiration of Moberg's rental term for the room.[95] The court noted that a guest in a hotel room is protected against unreasonable searches and seizures because of the expectation of privacy a traveler has even in temporary guest quarters.[96]

An inventory search is usually proper when authorities legitimately possess the belongings or containers of an arrestee.[97] The court looked to factors which would make an inventory search of a motel room reasonable. Property left by patrons at the motel Moberg checked into was kept by the motel for six months. Moberg did not ask the police to take custody of the property, nor did he make arrangements for friends to recover the property. Thus it is unclear whether the police could have been liable for leaving the property alone. The officers did not perform the search under any standardized criteria or policy. An inventory search must be done in accordance

---

automobile could include search of a container inside car when search was supported by probable cause); Carroll v. United States, 267 U.S. 132, 153 (1925) (distinguishing between the need for a warrant to search a dwelling and that to search a movable vessel).

92. *Acevedo*, 111 S.Ct. at 1991.

93. Moberg v. State, 810 S.W.2d 190 (Tex. Crim. App. 1991).

94. TEX. CODE CRIM. PROC. ANN. art. 18.01(c) (Vernon 1981 & Supp. 1991) (as amended effective June 11, 1979).

95. *Moberg*, 810 S.W.2d at 196-97.

96. *Id.* at 194 (citing Stoner v. California, 376 U.S. 483 (1964); Tarwater v. State, 160 Tex. Crim. 59, 267 S.W.2d 410 (1954)).

97. *Id.*

with an established policy[98], which the State in *Moberg* neither followed nor proved up. The inventory search doctrine cannot be invoked as a ruse or asserted after the fact to legitimate an illegal search for evidence.[99] The search of Moberg's hotel room did not meet the criteria established for a proper inventory search.[100]

4. *The Good-Faith Exception*

In *Hall v. State*[101] an informer told a deputy sheriff, who told the sheriff, who told a federal special agent, that Hall possessed a rifle in his home. The agent checked and found that Hall had previously been convicted of a felony. The agent consulted a gun expert who told him 90% of all firearms in Texas were manufactured out of state. The agent decided Hall's rifle was probably manufactured outside Texas and had traveled in interstate commerce in violation of federal statute. The agent got a search warrant. During the search, officers found a rifle and some marijuana. Hall was prosecuted for the marijuana possession. The Court of Criminal Appeals applied the totality-of-the-circumstances test and found that the warrant issued by the magistrate was not based on allegations of fact establishing probable cause to search Hall's residence.[102] The court observed that the statutory good-faith exception now found in article 38.23(b) of the Texas Code of Criminal Procedure[103] did not go into effect until September 1, 1987, after Hall's trial, and therefore did not apply.[104]

5. *The Protective Search Exception*

In *Worthey v. State*[105] police executed a valid search warrant for a residence. A vehicle approached the premises during the search. Worthey and a second person walked to the front porch. The police identified themselves and told Worthey and her companion to keep their hands where they were. Worthey clutched her purse, which was hanging from her right shoulder, and turned to the side so that the purse was away from the officer. The officer testified that he believed Worthey might have had a weapon. The officer removed the purse and conducted a protective pat-down search of the purse to feel for weapons. The officer could not determine whether there was a weapon in the purse, so the officer decided to search the purse. When he opened the bag, he found methamphetamine and drug paraphernalia. The San Antonio court of appeals found the officer had a reasonable suspicion to perform an exterior pat-down of the purse, but held that the officer

98. *Id.* at 195.
99. *Id.* at 196.
100. *Id.*
101. Hall v. State, 795 S.W.2d 195 (Tex. Crim. App. 1990).
102. *Id.* at 197.
103. TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon 1981 & Supp. 1991) (as amended effective Sept. 1, 1987).
104. *Hall*, 795 S.W.2d at 197 n.4.
105. Worthey v. State, 805 S.W.2d 435 (Tex. Crim. App. 1991).

lacked probable cause to search.[106] In reversing the lower court, the Court of Criminal Appeals noted that police may conduct a limited search for weapons where they have reason to believe they are dealing with an armed and dangerous individual, regardless of whether they have probable cause.[107] To legally conduct a protective search, an officer need only have a reasonable belief; probable cause is not required.[108] In order to assess the reasonableness of the officer's conduct, specific and articulable facts must appear in the record which would warrant a self-protective search for weapons.[109]

6. *The Plain View and Mere Evidence Exceptions*

In *Joseph v. State*[110] a warrant authorized the search of Joseph's residence for marijuana. In executing the warrant, an officer discovered an envelope addressed to Joseph containing a greeting card asking Joseph to send to its author something with which to get high. Joseph argued that a search warrant does not authorize police to read the subject's mail. The State responded that the letter was in plain view once the envelope was opened. It argued that the seizure satisfied the two prongs of the plain view doctrine[111]: (1) the officer must be in a proper position to view the item or lawfully be on the premises; and (2) the discovery of evidence must be immediately apparent. The Court of Criminal Appeals held that the plain view doctrine did not apply because it required a showing of probable cause.[112] Once the officer determined that the envelope did not contain marijuana, the ordinary greeting card could not create a reasonable suspicion, much less probable cause, that it was associated with criminal activity.[113] Once an officer fails to discover signs of criminal activity, the officer may not search further.[114] The court noted the illegality of general exploratory searches.[115] Mere evidence, however, not specifically listed in the warrant may be admissible when three conditions are met: (1) the objects are reasonably related to the offense being investigated; (2) the objects are discovered during a good-faith search under a valid search warrant; and (3) the scope of the search is limited to the objects of the search and the places where there is probable cause to believe they may be located.[116] The court found that the letter contained statements potentially connecting Joseph to drug possession. The letter was, therefore, mere evidence.[117] It met the first condition. The officers con-

106. Worthey v. State, 773 S.W.2d 783, 785 (Tex. App.—San Antonio 1989), *rev'd*, 805 S.W.2d 435 (Tex. Crim. App. 1991).
107. *Worthey*, 805 S.W.2d at 437 (citing Terry v. Ohio, 392 U.S. 1, 27, 30 (1968)).
108. *Id.*
109. *Id.* at 438.
110. Joseph v. State, 807 S.W.2d 303 (Tex. Crim. App. 1991).
111. *See* Horton v. California, 496 U.S. 128 (1990).
112. *Joseph*, 807 S.W.2d at 308.
113. *Id.*
114. *Id.*
115. *Id.* at 307 (citing Stanford v. Texas, 379 U.S. 476 (1965)).
116. *Joseph*, 807 S.W.2d at 307 (citing Warden v. Hayden, 307 U.S. 294, 307-10 (1967); United States v. Ross, 456 U.S. 798 (1982)).
117. *Id.*

ducted the search pursuant to a valid search warrant[118], thus meeting the second condition. The written contents of correspondence, however, could not plausibly conceal contraband.[119] The officer testified that he knew he would not find marijuana before he read the card. The evidence failed to meet the third condition. As a result, the officer improperly searched and seized the contents of the card.[120] The court remanded for a harm analysis.[121]

7. *The Good-Faith Exception to Warrantless Searches*

In *United States v. De Leon-Reyna*[122] the Fifth Circuit applied the good-faith exception when an officer objectively and reasonably believes he has an adequate foundation to make a stop. The officer in *De Leon-Reyna* radioed in the license number of a suspicious truck, but not follow his agency's code word policy. The radio dispatcher misunderstood the license number, and reported that the license number was issued to a vehicle other than the one the officer was following. The stop and arrest followed. The court held that the officer's good-faith reliance on the radio report was objectively reasonable, despite the officer's negligence.[123]

E. Investigative Stops

In *Crockett v. State*[124] two police officers were at a train station looking for narcotics when they saw a car stop in front of the station. A woman left the car and stood in line in the depot to purchase tickets to Chicago. Crockett remained outside with the driver. A short time later, Crockett left the car and took three pieces of baggage from the trunk. The driver left. The woman purchased two tickets with about $900 in cash. When Crockett and the woman began walking toward the trains, the police approached Crockett and asked to speak with him. Crockett seemed nervous but told police he was worried about missing his train, which was leaving the station in less than fifteen minutes. The officers told him they were investigating narcotics traffic and asked Crockett if he was carrying illegal drugs. Crockett replied he was not. They then asked him for permission to search his bags. Crockett asked them if they had a search warrant. The police admitted they did not, but said they had the right to detain Crockett long enough to have a dog smell the bags. Crockett then agreed to move the luggage to a location indicated by the police. After an alert to the luggage by a drug-sniffing dog, the officers opened the suitcases and found a large bundle of marijuana. The Court of Criminal Appeals distinguished this case from the drug courier profile case of *United States v. Sokolow*,[125] where evidence that Sokolow

118. *Id.* at 305.
119. *Id.* at 307.
120. *Id.*
121. *Id.* at 309.
122. United States v. De Leon-Reyna, 930 F.2d 396, 399 (5th Cir. 1991).
123. *Id.*
124. Crockett v. State, 803 S.W.2d 308 (Tex. Crim. App. 1991).
125. United States v. Sokolow, 490 U.S. 1 (1989).

matched a drug courier profile, together with empirical data on such profiles, provided sufficient cause for an investigative detention.[126] The Court of Criminal Appeals noted that Crockett was traveling to Chicago, used cash to purchase the tickets, looked around the train station lobby, spoke little with his traveling companion, and became nervous when involuntarily detained in public by narcotics officers. It concluded that Crockett's behavior did not support an inference of wrongdoing.[127] The State introduced no empirical evidence to suggest that persons traveling to Chicago are more likely to be transporting illegal drugs than are persons traveling elsewhere. To be grounds for detention, the suspect's demeanor must particularly indicate drug trafficking, not merely eccentricity.[128] Crockett's behavior was not of such character as to justify an involuntary investigative detention of all persons exhibiting the behavior.[129] The Court held the detention improper.[130]

On the other end of the investigatory stop scale is *Holladay v. State*.[131] Two police officers on narcotics detail at an airport observed Holladay and a companion. Both appeared to be nervous. One of the officers asked Holladay for permission to speak with him. After Holladay consented, the officer identified himself as a police officer. He did not tell Holladay he was conducting an investigation or that he was a narcotics officer. The officer asked Holladay if he had arrived on a flight. Holladay responded he had not. The officer asked to see Holladay's plane ticket. Holladay responded he had not purchased one. The officer asked Holladay about his companion. Holladay denied knowing the companion. The officer then told Holladay the companion had admitted knowing Holladay. At the officer's request, Holladay showed the officer his identification. The officer asked permission to look in Holladay's carry-on bag, telling Holladay he had the right to refuse. Holladay consented to the search. The officer found two plane tickets in Holladay's bag, only one of which had the correct name. The officer then asked for permission to conduct a pat-down search, again telling Holladay he had the right to refuse. Holladay consented. During the search, the officers detected a lump in one of Holladay's boots. The bulge turned out to be cocaine. The Court of Criminal Appeals recalled that "not all encounters between police and citizens invoke the protection of the Fourth Amendment. It is only when police questioning of a citizen becomes a detention that it must be supported by reasonable suspicion."[132] In examining whether a detention is supported by reasonable suspicion, a court looks at the totality of the circumstances surrounding the detention.[133] A "reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch, but it is considerably less than proof of wrongdoing by a preponderance of

126. *Crockett*, 803 S.W.2d at 312-13.
127. *Id.* at 311.
128. *Id.* at 313.
129. *Id.*
130. *Id.*
131. Holladay v. State, 805 S.W.2d 464 (Tex. Crim. App. 1991).
132. *Id.* at 467 (citing Daniels v. State, 718 S.W.2d 702, 704 (Tex. Crim. App.), *cert. denied*, 479 U.S. 885 (1986) (citing Terry v. Ohio, 392 U.S. 1 (1968)).
133. *Id.* at 471 (citing *Sokolow*, 490 U.S. at 9 (1989)).

the evidence."[134] The officer approached Holladay after he had deplaned from a flight from Miami, a known source of drugs. The court concluded that the encounter did not implicate the Fourth Amendment because it was consensual and the intrusion was limited.[135] The officer repeatedly told Holladay he was free to leave and free to refuse any search. The court went on to note that the encounter became an investigative detention when the officer requested permission to search the luggage.[136] The court concluded, however, that the police had sufficient articulable facts on which to base a reasonable suspicion which justified the detention: (1) Holladay deplaned from a flight from Miami; (2) he and his companion appeared nervous before the contact with the officers; (3) Holladay lied about arriving on a flight from Miami, he lied about travelling with the companion, and he lied about not having a ticket; and (4) his nervousness increased when the officers asked for his identification.[137] The officer testified that, based on his past experience as a drug investigator, he had concluded that Holladay fit the drug courier profile. The court held that when these factors were considered together, they were sufficiently probative to give rise to a reasonable suspicion of criminal activity.[138]

In *Florida v. Bostick* the Supreme Court reversed the Florida Supreme Court's adoption of a per se rule defining every encounter on a bus as a seizure.[139] Officers in Florida routinely boarded buses at scheduled stops and requested permission to search the passengers' luggage. Bostick consented to the search. The officers found cocaine in his bag. The Texas supreme court found that the Florida Supreme Court's focus on whether Bostick felt free to leave the bus was too narrow.[140] The court articulated a more appropriate inquiry: "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[141] It remanded the case to Florida for evaluation under the correct standard.[142]

No Texas court has applied *Bostick* to date.[143] This area is ripe for a *Heitman* state constitutional challenge.

F. Abandonment

The Supreme Court in *California v. Hodari D*[144] outlined the factors required to determine if a suspect has voluntarily abandoned seized property.

134. *Id.* at 469 (citing *Sokolow*, 490 U.S. at 7 (1989)).
135. *Id.* at 471.
136. *Id.* at 472.
137. *Id.*
138. *Id.* at 473.
139. Florida v. Bostick, 111 S.Ct. 2382, 2388 (1991).
140. *Id.* at 2387.
141. *Id.*
142. *Id.* at 2388.
143. The Dallas court of appeals addressed a bus search case in an unpublished opinion, but disposed of the case on grounds unrelated to *Bostick*. We note the case not as authority but as illustrative of the courts of appeals' analysis of issues similar to those addressed by the Supreme Court. State v. McDowell, No. 05-90-01159-CR, 1991 WL 141619 (Tex. App.—Dallas July 29, 1991, pet. ref'd) (not designated for publication).
144. California v. Hodari D., 111 S.Ct. 1547 (1991).

A police officer chased some youths who had fled at the approach of his police car. When the officer closed in on him, Hodari tossed away a small rock which turned out to be crack cocaine. Within moments, the officer tackled Hodari and handcuffed him. The Supreme Court noted that seizure under the Fourth Amendment requires either (1) the application of physical force, however slight; or (2) in the absence of force, submission to an officer's show of authority.[145] It concluded that the officer did not apply physical force to Hodari since the officer did not touch him until after Hodari dropped the drugs.[146] It also concluded, even assuming the officer's pursuit was a show of authority to get Hodari to stop, that Hodari did not respond.[147] The officer therefore did not seize Hodari until he tackled him.[148] The dissent characterized the majority opinion as a significant departure from prior Fourth Amendment case law.[149]

The Fifth Circuit applied the two-prong definition of seizure enunciated in *Hodari* to a search that resulted from the defendant's consent to customs officers to search a storage unit.[150] The court noted a conflict in authority between the circuits on the correct standard of review to apply to a trial court's determination of whether a seizure occurred.[151] It explicitly specified that the clearly erroneous standard is now applicable in the Fifth Circuit.[152]

II. CONFESSION

A. DWI Videotapes

In *Miffleton v. State* the Court of Criminal Appeals held that, where a DWI suspect was required to perform a sobriety test on videotape, but no testimonial responses were called for, there was no violation of either the Texas or the federal Constitutions.[153] This holding applied only to the admissibility of the visual recording.[154] In *Jones v. State* the court went further and found that police questioning incident to the videotaped sobriety test, which did not call for testimonial responses, did not constitute interrogation, but was merely the normal activity related to the arrest of a DWI suspect.[155] The court held that sobriety tests are no more than the collection of physical evidence, both visual and aural.[156] The court's exact language is important:

> As long as the suspect's statements are not used for their truth but as circumstantial evidence from which the jury may infer degree of intoxi-

145. *Id.* at 1551.
146. *Id.* at 1550.
147. *Id.* at 1552.
148. *Id.*
149. *Id.* at 1552 (Stevens, J., dissenting).
150. United States v. Valdiosera-Godinez, 932 F.2d 1093 (5th Cir. 1991).
151. *Id.* at 1098 n.1.
152. *Id.*
153. Miffleton v. State, 777 S.W.2d 76, 81 (Tex. Crim. App. 1989).
154. *Id.*.
155. Jones v. State, 795 S.W.2d 171, 172 (Tex. Crim. App. 1990).
156. *Id.* at 175, *see also* Chadwick v. State, 795 S.W.2d 177 (Tex. Crim. App. 1990).

> cation, the attending officers could testify about the statements anyway. . . .
>
> * * *
>
> All of these considerations impel us to hold that audio tracks from DWI videotapes should not be suppressed unless the police conduct depicted expressly or impliedly calls for a testimonial response not normally incident to arrest and custody or is conduct the police should know is reasonably likely to elicit such a response.[157]

In *Chadwick v. State*[158] the Court of Criminal Appeals applied its *Jones* decision to an officer's advice to Chadwick that the State did not have to provide him with a lawyer until after he performed the sobriety tests. The court held that Chadwick's verbal responses to the test questions and the discussion about whether he would undergo breath or blood tests were not testimonial.[159]

B. Custodial Interrogation

In *Melton v. State*[160] a husband had learned his wife was unfaithful. Together, they executed the wife's ex-lover. Several days after authorities discovered the body, officers asked the wife to go with them to the police station. They told her they thought she might have been the last person to see the deceased. At the station she received her *Miranda*[161] warning. Within several hours she confessed. The Court of Criminal Appeals applied four factors in determining that her detention was not custodial: (1) the existence of probable cause to arrest: (2) whether the accused was under investigation; (3) the subjective intent of the police; and (4) the subjective belief of the accused.[162] The court held that when Melton gave her statement, the investigation had not yet progressed from the investigatory to the custodial stage.[163] The statement did not stem from custodial interrogation.[164] The State did not have to show that Melton knowingly and intelligently waived her privilege against self-incrimination.[165] *Melton* was a close case, a five-four decision. The dissenting judges were concerned that the police put form over substance.[166] They suspected the officers testified to the required language to get by at trial.[167] The case could easily have gone the other way.

The facts in *Meek v. State*[168] did not make as close a case. The Court of Criminal Appeals held that Meek was not the focus of an arson investigation

157. *Jones*, 795 S.W.2d at 175-76.
158. Chadwick v. State, 795 S.W.2d 177 (Tex. Crim. App. 1990).
159. *Id.*
160. Melton v. State, 790 S.W.2d 322 (Tex. Crim. App. 1990).
161. Miranda v. Arizona, 384 U.S. 436 (1966).
162. *Melton*, 790 S.W.2d at 325 (citing Turner v. State, 685 S.W.2d 38 (Tex. Crim. App. 1985); Ruth v. State, 645 S.W.2d 432 (Tex. Crim. App. 1979)).
163. *Id.* at 325, 326.
164. *Id.* at 325.
165. *Id.* at 326.
166. *See id.* at 326 (Clinton, J., dissenting).
167. *Id.*
168. Meek v. State, 790 S.W.2d 618 (Tex. Crim. App. 1990).

at the time of his interview by a fire inspector.[169] Nor was Meek in custody during his visit to the fire inspector's office.[170] Meek came to the fire station of his own free will at a time of his own choosing. The fire inspector allowed him to step outside the building and go unaccompanied to his car during the interviews. Meek left, unhindered, after the inspector took his statement. Authorities did not formally arrest Meek until five weeks later. The court held that the trial court did not err in permitting the State to offer the statements against Meek, even though the fire inspector did not give him any *Miranda* warnings before taking his statements.[171] The court noted that the court of appeals had applied the wrong test in determining that Meek was in custody when he gave the statements, at least after he made incriminating remarks.[172] The court outlined two acceptable approaches to analyzing a custodial situation:[173] first, "[o]ne approach merges the idea of 'focus' with the idea of 'whether a reasonable person would believe that his freedom was being deprived in a significant way;' "[174] and second, "[a]nother approach cites four factors as relevant to the inquiry: probable cause to arrest, subjective intent of the police, focus of the investigation, and subjective belief of the defendant."[175]

C. *Corroboration of Oral Confessions*

In *Gribble v. State*[176] Gribble claimed the evidence was insufficient to prove the elements of the offense by corroborating the statements of the defendant. An extrajudicial confession of the accused is insufficient to support a conviction unless it is corroborated.[177] Other evidence tending to show that a crime was committed must corroborate the confession.[178] The evidence need not corroborate the identity of the perpetrator.[179] Identity is not a part of the corpus delicti.[180] An extrajudicial confession standing alone may establish identity.[181] The State had accused Gribble of committing murder in the course of committing the offense of kidnapping. The corpus delicti was therefore more than merely homicide by a criminal agency.[182] Thus, the State had to produce evidence independent of Gribble's oral con-

169. *Id.* at 622.
170. *Id.*
171. *Id.* at 622-23.
172. *Id.* at 621.
173. *Id.*
174. *Id.* (quoting Shiflet v. State, 732 S.W.2d 622, 624 (Tex. Crim. App. 1985)).
175. *Id.* (quoting Wicker v. State, 740 S.W.2d 779, 786 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 938 (1988); Payne v. State, 579 S.W.2d 932, 933 (Tex. Crim. App. [Panel Op.] 1979)).
176. Gribble v. State, 808 S.W.2d 65 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 2856 (1991).
177. *Id.* at 70.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* *See* Walter W. Steele, Jr. and Ruth A. Kollman, *The Corpus Delicti of Murder After Repeal of Article 1204*, 20 VOICE FOR THE DEFENSE 10, 17 (June and July 1991).
182. *Gribble*, 808 S.W.2d at 71.

fession to show his victim had been kidnapped.[183] The evidence need not be sufficient to prove the offense.[184] The evidence need only make the corpus delicti more probable than it would be without the evidence.[185] The evidence in *Gribble* showed there was no struggle at the victim's house. Authorities found the victim about ten miles from her home. The evidence supported the theory that a kidnapping had been committed. Gribble also claimed that authorities had illegally obtained his confession. He argued that without his confession the evidence was insufficient to connect him with the offense. The Court of Criminal Appeals noted that a court must evaluate the probative weight of all the evidence the trial judge permitted the jury to consider, including erroneously admitted evidence, when determining the sufficiency of the evidence to support a conviction.[186] The court therefore declined to acquit Gribble and remanded the case for a new trial.[187]

In *Port v. State*[188] Port told police he had shot his victim twice in the head. Port's father had previously turned over a gun that ballistics tests later showed was the murder weapon. An autopsy corroborated Port's description of the fatal shots. The Court of Criminal Appeals found that the statement contained true assertions of fact that established Port's guilt.[189] The entire statement was admissible under article 38.22, section 3(c) of the Texas Code of Criminal Procedure.[190]

The Court of Criminal Appeals applied *Port* in *Romero V. State*.[191] The court held that once it determines an oral statement was procured during custodial interrogation, a reviewing court must then determine if the statement is otherwise admissible under some exception to the general bar to admissibility.[192] The answer to this inquiry depends on whether the oral statement "contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused."[193] Testimony at the suppression hearing was conflicting and confusing about the sequence of events leading to Romero's statement. Police officers testified they approached Romero at his home shortly after the victim was stabbed. The officers stated that they had no intention of arresting him at that time. One of the officers testified that, when Romero answered the door, the officer told Romero two men had identified Romero as the man who stabbed the victim. The officer said Romero said, "I stabbed him." When the officer asked him where the knife was, he produced it from his pocket, saying, "Here it is." The officers then arrested Romero.

183. *Id.*
184. *Id.*
185. *Id.* at 72.
186. *Id.* at 68.
187. *Id.* at 76.
188. Port v. State, 791 S.W.2d 103 (Tex. Crim. App. 1990).
189. *Id.* at 108.
190. *Port*, 791 S.W.2d at 108, TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(c) (Vernon 1981).
191. Romero v. State, 800 S.W.2d 539 (Tex. Crim. App. 1990).
192. *Id.* at 543.
193. *Id.*

Romero testified, through a Spanish interpreter, that officers came to his home in the early morning hours. They told him he had been accused of stabbing the victim. They said he had to go downtown. Romero testified that he thought he was under arrest. He turned the knife over to the officers because he was afraid that if he opposed them he would be resisting arrest. He denied ever admitting he killed the victim. He did not identify the knife as the one used to stab the victim. He told police, "I didn't do it" when they asked him about the killing. The trial court did not file written findings and conclusions, but in its order stated that Romero's oral statements to police officers "were the result of custodial interrogation and not recorded or otherwise admissible under Art. 38.22 . . . ."[194] The Court of Appeals upheld the State's appeal under the theory that the production of the knife used to commit the stabbing made Romero's statements at his home admissible under article 38.22, section 3(c).[195] Romero argued on petition to the Court of Criminal Appeals that the court below improperly reviewed the facts and did not limit its review of the trial court's determinations. The Court of Criminal Appeals agreed.[196] The admissibility of an oral confession is a question of both law and fact.[197] If the trial court's findings of fact have support in the record, a reviewing court has no discretion to disturb them.[198] The reviewing court can only determine if the trial court properly applied the law to the facts.[199] The trial court in *Romero* did not specify its reason for finding the statement inadmissible. If the trial court's decision is correct on any theory of the law, a reviewing court must sustain it.[200] The testimony conflicted about whether Romero either admitted the offense or identified the knife as the weapon used in the stabbing. The trial court could have believed Romero and not the police officer.[201] The Court of Criminal Appeals' inquiry did not end there. Even if the trial court found that Romero did not identify the knife as the murder weapon, the facts showed that Romero did surrender a knife to police. If other independent evidence showed that the knife was the murder weapon, then the other evidence might establish the facts found to be true, which would authorize admissibility of the oral confession under section 3(c).[202]

In contrast to *Port*, there was no evidence other than the officer's testimony, denied by Romero, that Romero identified the knife as the murder weapon. In *Port* ballistics tests showed Port's gun was the murder weapon. The result of the autopsy also found to be true facts from Port's oral statement. That was not the case in *Romero*. Implicit in *Port* is the concept that "found to be true" refers to facts the police do not know about at the time of

194. *Id.* at 542.
195. State v. Romero, 763 S.W.2d 536, 538 (Tex. App.—El Paso 1988), *rev'd*, 800 S.W.2d 539 (Tex. Crim. App. 1990).
196. *Romero*, 800 S.W.2d at 543-44.
197. *Id.* at 543.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 544.
202. *Id.*

the oral confession, but which, after the confession, prove to be true.[203]

D. Waiver of Right to Counsel

In *Goodwin v. State*[204] Goodwin claimed that the trial court improperly denied his motion to suppress his confession. Iowa authorities had arrested him and put him in county jail. The court appointed an Iowa attorney to represent Goodwin on the Iowa charges. The Iowa lawyer came to the jail to confer with Goodwin. Texas officers were interviewing Goodwin about some Texas incidents. The lawyer was advised of the interview by the Texas officers but did not request to see Goodwin immediately. The lawyer left a short time later. The Iowa authorities did not tell Goodwin that his attorney was present at the station. Goodwin signed a confession and waiver of his right to counsel. The Court of Criminal Appeals held that Goodwin's waiver of counsel was not initiated by the failure to inform him of his lawyer's presence.[205] It noted that police "conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."[206] If a suspect voluntarily decides to waive counsel and knows and understands the *Miranda* warnings, then the waiver is valid.[207] The conduct of the police bore no relevance to the accused's waiver, absent evidence that the police prevented Goodwin from knowing and understanding his rights regarding the waiver.[208]

E. Assertion of Right to Counsel

In *Murphy v. State*[209] officers arrested Murphy shortly after he had fled the complainant's apartment. Two days later a police officer approached him. The officer explained Murphy's *Miranda* rights. Murphy indicated that he wanted to speak with his lawyer before speaking to police. The officer allowed Murphy to speak by telephone to his lawyer while in the officer's presence. A short time later, the officer approached Murphy again and asked him if he wanted to explain what happened. Murphy replied that he did. He answered the officer's questions. Murphy admitted the sexual assault under investigation, as well as a second one. The officer testified about the confession. Murphy testified and denied committing the sexual assault. He denied telling the officer otherwise. The Court of Criminal Appeals noted that once an accused invokes a right to counsel, the authorities may not conduct further interrogation until counsel is present.[210] An excep-

203. *Id.* at 544-45.
204. Goodwin v. State, 799 S.W.2d 719 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 2913 (1991).
205. *Id.* at 730.
206. *Id.* at 729 (quoting Moran v. Burbine, 475 U.S. 412, 424 (1986)).
207. *Id.* at 729-30.
208. *Id.* at 730.
209. Murphy v. State, 801 S.W.2d 917 (Tex. Crim. App. 1991).
210. *Id.* at 919 (citing Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

tion is when the accused initiates the second dialogue.[211] Recently, the Supreme Court held that interrogation must stop when the accused requests counsel.[212] Interrogation may not be re-initiated by officers outside the presence of the accused's attorney.[213] Since Murphy had requested counsel, it was error for the officer to initiate further questioning.[214] The Court of Criminal Appeals found the evidence to be harmful, since it directly contradicted Murphy's testimony and, if believed, was possibly devastating to his defense.[215]

In a capital murder case, *Robinson v. State*,[216] Robinson was convicted and sentenced to death. The police explained Robinson's *Miranda* rights to him when they arrested him. A magistrate later explained his rights a second time. The police did so yet a third time. Robinson then gave a statement. When the police read the statement back to him and asked Robinson to sign it, Robinson asked if he needed to talk to a lawyer before he signed. The officer told Robinson he could have one. Robinson said he was willing to sign without a lawyer. The officer refused to allow Robinson to sign, however, and again took him before a magistrate. The magistrate yet again explained Robinson's *Miranda* rights. Robinson indicated that he understood and wanted to sign the statement without first consulting an attorney. In finding that the confession was valid, the Court of Criminal Appeals reiterated the circumstances under which officials may obtain a statement after the accused has been given a *Miranda* warning. The prosecution must demonstrate that the accused waived the rights voluntarily, knowingly, and intelligently.[217] The burden of proof of the waiver is by a preponderance of the evidence.[218] If a suspect, after being given the warnings, requests the assistance of counsel, the interrogation must stop.[219] The officials may not re-initiate interrogation until an attorney for the suspect is present.[220] Where a person's assertion of the right to counsel is equivocal, rather than clear and unambiguous, cessation of interrogation is not automatically required.[221] The officials, however, may ask only questions aimed at discovering whether the accused wants to proceed without counsel or actually wants counsel.[222] Robinson's statement requesting counsel was equivocal. The police limited further questioning to determining whether he desired counsel.

211. *Id.* (quoting Freeman v. State, 723 S.W.2d 727, 732 (Tex. Crim. App. 1986)).
212. Minnick v. Mississippi, 111 S.Ct. 486 (1990).
213. *Id.* at 491.
214. *Murphy*, 801 S.W.2d at 919.
215. *Id.* Note that in the same month the Court of Criminal Appeals referred to what a "rational" court of appeals could find in performing a harm analysis. Hupp v. State, 801 S.W.2d 920, 922 (Tex. Crim. App. 1991). This has not been a part of the harmless error analysis applied by the Court of Criminal Appeals in the past. Its use here may signal a shift in the court's test for harmless error.
216. Robinson v. State, No. 69,568, 1991 WL 57765 (Tex. Crim. App. Apr. 17, 1991) (not yet released for publication).
217. *Id.* at *3 (citing Miranda v. Arizona, 384 U.S. 436, 475 (1966)).
218. *Id.* (citing Colorado v. Connelly, 479 U.S. 157, 168 (1986)).
219. *Id.* (quoting Minnick v. Mississippi, 111 S.Ct. 486, 491 (1990)).
220. *Id.*
221. *Id.* (quoting Lucas v. State, 791 S.W.2d 35, 45 (Tex. Crim. App. 1989)).
222. *Id.*

Although Robinson indicated that he wanted to sign the statement, the officers waited until he was in front of a magistrate, where he indicated he did not want counsel, before they let him sign the statement. The Court of Criminal Appeals concluded that Robinson knowingly and intelligently waived counsel.[223] The Court also found no Sixth Amendment violation for the same reasons.[224]

F. White-Collar Crime

The Court of Criminal Appeals also considered a white-collar fraud case which addressed whether regulatory disclosure requirements compel self-incrimination. In *Bridwell v. State*[225], Bridwell was convicted of failure to disclose prior fraudulent dealings to two investors in drilling ventures. Three witnesses testified that they had each invested $100,000 to $250,000 with Bridwell based on his representation that he and his cousin had been successful in striking oil at a number of wells. Bridwell deposited a significant portion of the invested funds into his personal bank accounts and used the funds to pay outstanding debts and personal expenses. The complainants in two of the cases indicated that if they had known of Bridwell's dealings with a third investor, which occurred prior to their contact with Bridwell, they would never have invested money with him. Bridwell argued that the Texas Securities Act cannot require him to reveal prior uncharged fraudulent conduct, because to do so would violate his privilege against self-incrimination. The Court of Criminal Appeals found that the Texas Securities Act is not an effort to identify persons engaged in securities fraud, but rather to ensure that investors receive full and fair disclosure.[226] The Securities Act does not require the person soliciting investments to divulge information to the government, simply to those from whom the solicitor seeks funds.[227] Potential investors might or might not choose to contact the government.[228] The Securities Act in no way forces the solicitor to make incriminating statements to those in the chain of prosecution.[229]

G. Harmless Error Analysis

In *Higginbotham v. State*, another harm analysis case, the Court of Criminal Appeals reversed the Fourteenth Court of Appeals and remanded for a new trial.[230] Higginbotham had entered the offices of a church, carrying an automatic pistol. He walked down the hall, passing people and warning them to call an ambulance. He entered the minister's office and, after a loud discussion, shot the minister. A short time later, Higginbotham went home. He told people there he had shot a man. He said he needed help. He

223. *Id.*
224. *Id.* at *4.
225. Bridwell v. State, 804 S.W.2d 900 (Tex. Crim. App. 1991).
226. *Id.* at 906.
227. *Id.*
228. *Id.*
229. *Id.*
230. Higginbotham v. State, 807 S.W.2d 732, 738 (Tex. Crim. App. 1991).

claimed to be the son of King David. He told them to call Pat Robertson, then went into his house. He ultimately surrendered to police. The police took Higginbotham to the police department. They gave him *Miranda* warnings. He did not indicate he wanted a lawyer. When police officers asked him if he would make a statement, he first spoke in tongues, then told the officers he had shot a man and that witnesses saw him do it. The officers then took him before a magistrate. Higginbotham requested an attorney. Upon returning to the jail, police officers asked him again if he wanted to talk to them. After two more *Miranda* warnings, Higginbotham gave a tape-recorded oral confession. The Fourteenth Court of Appeals had found the confession was improperly obtained, since it was obtained after Higginbotham had requested an attorney before the magistrate.[231] The court of appeals also found that the admission of the confession was harmless because of the abundance of overwhelming evidence, so that the confession was merely cumulative.[232]

On appeal to the Court of Criminal Appeals, Higginbotham claimed that the admission of his oral confession was harmful because it affected the jury's rejection of his insanity defense due to evidence of his calm demeanor while giving the confession. The Court of Criminal Appeals noted that an appellate court must examine the entire record in a neutral, impartial, and evenhanded manner in resolving the issue of whether error was harmful.[233] The court rejected the standard applied by the court below that required a reviewing court to view the record in the light most favorable to the prosecution.[234] A neutral review of the evidence is necessary because error which disparages a defense may be harmful, even though it would be harmless had no defense been raised.[235] The reviewing court must not focus on the propriety of the outcome of the case.[236] It should instead be concerned with the procedural integrity resulting in conviction.[237] The reviewing court should consider several factors, including the source and nature of the error, whether it was emphasized by the State and if so to what extent, and any probable collateral implications.[238] The court should also consider the weight a juror would likely place on the error.[239] Finally, the court must determine whether the State will be encouraged in its practices by a finding of harmless error.[240]

The Court of Criminal Appeals concluded that the error in *Higginbotham* involved a principle of law familiar to law enforcement personnel.[241] The

231. Higginbotham v. State, 769 S.W.2d 265, 269-72 (Tex. App.—Houston [14th Dist.] 1989), *rev'd in part*, 807 S.W.2d 732 (Tex. Crim. App. 1991).
232. *Id.* at 274.
233. *Higginbotham*, 807 S.W.2d at 734 (quoting Harris v. State, 790 S.W.2d 568, 585-86 (Tex. Crim. App. 1989)).
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 734-35.
238. *Id.* at 735.
239. *Id.*
240. *Id.*
241. *Id.*

same two officers who originally questioned Higginbotham took him to the magistrate's court. They continued to ask him questions after they took him back to the interview room. In addition, the State had concentrated on Higginbotham's apparently rational conduct during the course of the tape-recorded interviews. Pointing out that this rational behavior was tantamount to an argument that the confession showed Higginbotham was sane.[242] Without the confession, the jury would have been less likely to conclude that Higginbotham was sane, since the evidence also showed that Higginbotham was hysterical and irrational immediately after the shooting.[243] His medical records confirmed that Higginbotham shifted between normalcy and extreme paranoia. A jury could be more likely to harshly punish a calm and unaffected defendant as opposed to one who showed remorse and disturbance after the crime.[244] Further, the jury emphasized the taped confession in its deliberations. It asked to have the taped confession and a tape recorder on which to play it. The jury deliberated for eight hours and was sequestered overnight before reaching a verdict. Finally, the use of a wrongfully obtained confession to disparage the defendant's only defense threatens the fair administration of justice.[245] It is possible that law enforcement will be dissuaded from taking such confessions if the State is discouraged from using them for any purpose.[246] Accordingly, the Court of Criminal Appeals concluded that it could not find beyond a reasonable doubt that the admission of the tape recording made no contribution to Higginbotham's conviction or punishment.[247]

H. The Exclusionary Rule

In *Sossamon v. State*[248] Sossamon was a suspect in a number of aggravated robberies in Montgomery County. When arrested, he offered to provide to Montgomery County authorities information implicating others who were also responsible for the robberies. He told a Montgomery County Sheriff's Deputy that he would provide information on aggravated robberies in other counties in exchange for an agreement that he would not be prosecuted in those counties. The Montgomery County District Attorney agreed to offer fourteen years or less on two Montgomery County cases and guaranteed that Sossamon would not be indicted on any further cases. The Montgomery County Deputy then contacted authorities in Harris and McLennan Counties, who agreed to the deal. Sossamon cooperated. Montgomery and McLennan Counties did not prosecute. The Montgomery County Deputy then contacted the Liberty County Sheriff's Office with the same offer. According to the Montgomery County Deputy, a detective with the Liberty County Sheriff's Office told him that the Liberty County District Attorney

242. *Id.*
243. *Id.* at 737.
244. *Id.*
245. *Id.* at 738.
246. *Id.*
247. *Id.*
248. Sossaman v. State, 816 S.W.2d 340 (Tex. Crim. App. 1991).

agreed to grant Sossamon immunity. Sossamon gave a statement to the Montgomery County Sheriff's Deputy. He implicated himself and others involved in the case out of which the appeal arose. The offense occurred in Liberty County.

Liberty County disputed the assertion that its District Attorney accepted the agreement not to prosecute. Rather, the Liberty County District Attorney's office had told the detective to have the Montgomery County District Attorney contact the Liberty County District Attorney. Sossamon testified that the Montgomery County Sheriff's Deputy promised immunity in Liberty County. He said he would not have confessed if there had not been an agreement of immunity from all prosecution. The State did not introduce the confession into evidence. It relied on the eyewitness testimony of the victim in obtaining the conviction. The Beaumont Court of Appeals reversed the conviction and entered a judgment of acquittal.[249] It concluded that the State obtained both the indictment and the statement with a broken promise of immunity.[250] The Court of Criminal Appeals reversed the Beaumont Court and remanded for a new trial.[251] The court noted that the evidence showed an immunity agreement between Sossamon and the Montgomery County Sheriff's Department.[252] A rational trier of fact could not have found an enforceable contract with Liberty County for immunity from prosecution.[253] Accordingly, the Court of Criminal Appeals reversed the Beaumont court's acquittal order.[254] Sossamon, however, believed that he had reached an agreement with all parties. He gave his statement based on that belief. Montgomery County gave the statement to Liberty County. Liberty County used the statement to solve the offense. There was no evidence of any immunity agreement with Liberty County, where Sossamon was in fact prosecuted. The court concluded that the statement was involuntary because Sossamon thought he was receiving immunity from all prosecution when he gave it.[255] Since Liberty County did not introduce the statement at trial, the court went on to analyze whether any fruits of the confession were used against Sossamon. The court noted that there were no suspects or leads in the Liberty County offense. No physical evidence tied either Sossamon or his cohorts to the crime. None of the other participants implicated by Sossamon was a suspect in the crime. The court concluded that Sossamon's identity and presence in court were directly attributable to his involuntary confession.[256] It observed that "indirect fruits of an illegal search or arrest should be suppressed where they bear a sufficiently close relationship to the underlying illegality."[257] The court noted that the exclu-

249. Sossaman v. State, 740 S.W.2d 543, 547 (Tex. App.—Beaumont 1987), *rev'd in part*, 816 S.W.2d 340 (Tex. Crim. App. 1991).
250. *Id.* at 545-46.
251. *Sossaman*, 816 S.W.2d at 349.
252. *Id.* at 344.
253. *Id.*
254. *Id.*
255. *Id.* at 345-46.
256. *Id.* at 348.
257. *Id.* at 346 (citing Wong Sun v. United States, 371 U.S. 471 (1963)).

sionary rule applies to violations of the Fifth Amendment as well as the Fourth Amendment.[258] The court held that a trial court must exclude a witness's in-court identification if it stems from a Fifth Amendment violation.[259] It observed that penalties assessed against the State for violations of law by its officers must have a relationship to the purpose the law is made to serve.[260] It concluded that application of the exclusionary rule would serve a valid purpose by prohibiting authorities from getting a confession through unkept promises of immunity and then using the confession to connect the defendant with a crime victim.[261]

258. *Id.* (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 77-78 (1962)).
259. *Id.* at 348.
260. *Id.* at 346.
261. *Id.* at 349.