Criminal Procedure: Arrest, Search and Seizure

Barry Sorrels

Mitchell B. Mitchell

CRIMINAL PROCEDURE: ARREST, SEARCH AND SEIZURE

by

Barry Sorrels and Lawrence B. Mitchell***

THIS Article examines some of the recent developments in the law of arrest, search and seizure. Decisions from the United States Supreme Court, in prior years, diminished the procedural safeguards afforded by the fourth amendment. The decisions during the Survey year affirmed and explicated the diminution of those fourth amendment rights.

I. ABANDONMENT

In a trilogy of cases, *Comer v. State*,[1] *Hawkins v. State*,[2] and *Salcido v. State*,[3] the Texas Court of Criminal Appeals re-examined the issue of abandonment as related to illegal search and seizure. In *Comer*, the court established a new standard that courts should utilize in determining whether abandonment had occurred,[4] and thereby overruled prior decisions in conflict with the new standard.[5] The court applied the new standard in *Hawkins* and *Salcido*.

In *Comer* the court granted the defendant's Petition for Discretionary Review to determine whether the arresting officers possessed sufficient information to justify the investigatory stop that preceded the arrest.[6] Although the court held on original submission that the detention and subsequent seizure

* B.A., Columbia College; J.D., Southern Methodist University. Partner, Burleson, Pate and Gibson.

** B.A., University of Oklahoma; J.D., Southern Methodist University. Sole Practitioner; formerly Associate Justice, Court of Appeals, Fifth District of Texas.

1. 754 S.W.2d 656 (Tex. Crim. App. 1988) (opinion on rehearing).
2. 758 S.W.2d 255 (Tex. Crim. App. 1988).
3. 758 S.W.2d 261 (Tex. Crim. App. 1988).
4. *Comer*, 754 S.W.2d at 659.
5. *Comer, Id.* at 658. In reviewing prior authority on the issue of abandonment the court noted that those decisions failed to properly develop a usable standard. *Id.* One line of cases appeared unconcerned with voluntariness of the abandonment. Rodriguez v. State, 689 S.W.2d 227, 230 (Tex. Crim. App. 1985) (property abandoned subsequent to a pretext stop and search admissible); Clapp v. State, 639 S.W.2d 949, 953 (Tex. Crim. App. 1982) ("When police take possession of abandoned property, there is no seizure under the Fourth Amendment"); McLain v. State, 505 S.W.2d 825, 827 (Tex. Crim. App. 1974). A second line of cases limited the inquiry to whether or not the suspect intended to abandon the property. Sullivan v. State, 564 S.W.2d 698, 702 (Tex. Crim. App. 1978) (opinion on rehearing) ("Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts."); Smith v. State, 530 S.W.2d 827, 833 (Tex. Crim. App. 1975).
6. *Comer*, 754 S.W.2d at 656. The Fort Worth Court of Appeals in an unpublished opinion found the existence of sufficient probable cause to support the arrest and subsequent

were improper,[7] the State argued on rehearing that the court's inquiry should not end with that determination but should also consider whether Comer had voluntarily abandoned the property. The evidence established that when the vehicle in which Comer was a passenger was stopped by the police, he exited, dropped a syringe containing heroin, and attempted to kick it under the truck. The State correctly argued that even if the detention was illegal, the contraband was admissible if it had been voluntarily abandoned.[8]

The court held that while abandonment of property or evidence can attenuate the effect of an illegal arrest or detention, the abandonment must be voluntary and not the product of illegal conduct by the police.[9] The court fashioned a two part test to determine whether property is abandoned.[10] The first component of the test inquires whether the defendant freely decided to abandon the property.[11] The second component questions whether the decision to abandon resulted from illegal police conduct.[12] Although the facts in *Comer* equivocally raised intent to abandon, the evidence clearly established that the relinquishment of the contraband directly resulted from illegal police conduct in the initial improper detention.[13] Invoking the exclusionary rule,[14] the court required that the evidence be suppressed.[15]

Shortly after establishing the new standard in *Comer* for determining whether abandonment had occurred, the Court of Criminal Appeals applied the standard in *Hawkins v. State* and *Salcido v. State*, holding in each case that the abandonment of the contraband occurred as a result of illegal conduct by the police. In *Salcido*, the police received information from an in-

---

seizure of contraband. Comer v. State, No. 2-83-317-CR (Tex. App.-Fort Worth, January 11, 1984).

7. One early evening two officers observed Comer and another male seated in a pickup truck in the parking lot of a local restaurant. The interior dome light was on and the two men were engaged in some type of activity inside the vehicle. As the officers approached the truck, it began to pull away. The officers, believing that criminal activity had occurred, initiated an investigatory stop. The officers also testified that the location in question constituted a high crime area. The Texas Court of Criminal Appeals held that the activity observed was as consistent with innocent activity as with criminal activity, thus rendering the detention and subsequent seizure unlawful. Comer v. State, 754 S.W.2d 656, 658 (Tex. Crim. App. 1988). *Accord* Johnson v. State, 658 S.W.2d 623, 623 (Tex. Crim. App. 1983); Shaffer v. State, 562 S.W.2d 853 (Tex. Crim. App. 1978); Tunnell v. State, 554 S.W.2d 697, 698 (Tex. Crim. App. 1977).

8. *Comer*, 754 S.W.2d at 658.

9. *Id.* at 659.

10. *Id.*

11. *Id.*

12. *Id.* The court could find no meaningful distinction between a search conducted without probable cause that results in the finding of contraband and the seizing of contraband thrown or dropped because of police unlawfulness. *Id.*

13. *Id.* The Fifth Circuit has also held in numerous decisions that voluntariness is a critical factor in determining whether abandonment has occurred. In United States v. Santia-Manriquez, 603 F.2d 575, 578 (5th Cir. 1979), the court ruled that while voluntary abandonment of evidence would cure the taint occasioned by an illegal detention, the abandonment would not be considered voluntary if abandonment was the product of police misconduct. *Accord* United State v. Beck, 602 F.2d 726, 729 (5th Cir. 1979); Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968).

14. For a discussion of the exclusionary rule, see Wong Sun v. United States, 371 U.S. 471, 484 (1963); United States v. Jeffers, 342 U.S. 48, 52 (1951).

15. *Comer*, 754 S.W.2d at 656.

formant[16] that the suspect was selling drugs at a local car wash. The police placed the suspect under surveillance for a few minutes, but an officer observed no illegal activity. A second officer was summoned to join in the surveillance. After brief observation, an officer approached the suspect and advised him that the police had received information that he was selling drugs. The suspect exited the vehicle and attempted to run. As he fled, the suspect threw a small object to the ground. The object contained a controlled substance.

In an unpublished opinion[17] the court of appeals agreed with Salcido's complaint that the police conduct was improper due to insufficient probable cause to arrest or search, and that there was not any reasonable suspicion based upon articulable facts to justify even a temporary investigative detention.[18] The court ruled, however, that Salcido's actions in discarding the contraband in a place where he had no expectation of privacy amounted to abandonment and therefore no fourth amendment violation occurred.[19] The intermediate court did not determine the effect of the legality of police conduct on the abandonment.

The Texas Court of Criminal Appeals rejected the appellate court's reasoning in light of *Comer*, which established the new standard for determining abandonment.[20] The court agreed with the lower court that the facts of the *Salcido* case would not justify either an arrest or an investigative detention.[21] Salcido fled the scene and threw the object away only after the police approached him and related their suspicion of his drug dealing, told him to place his hands on the car, and placed their hands on his shoulder. The court held that the police conduct was improper and that the defendant discarded the object as a spontaneous reaction to the illegal police conduct.[22] The court held that the evidence Salcido had discarded was inadmissible.[23]

16. 758 S.W.2d at 262. In testimony during the Motion to Suppress, the State did not describe the informant, did not show that the informant had provided true and correct information in the past, and did not show how the informant gained the information. The "two-prong" test of Aguilar v. Texas, 378 U.S. 108, 114 (1964) (credibility of informant must be established and basis of informant's information must be provided) would clearly have been violated because no information about credibility of the informant was provided. *Aguilar v. Texas*, however, was modified in Illinois v. Gates, 462 U.S. 213, 241 (1983), where the Supreme Court established the new "totality of circumstances" test. The Court held that "the informant's 'veracity' . . . and 'basis of knowledge' . . . are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." 462 U.S. at 233.

17. Salcido v. State, No. 08-84-00053-CR, (Tex. App.—El Paso, December 27, 1984).

18. Terry v. Ohio, 392 U.S. 1 (1968). The U.S. Supreme Court held in *Terry* that an officer who investigates an individual may temporarily detain that individual if the officer manifests an objective belief that the individual possesses a weapon. *Id.* at 24. The brief detention and search may be conducted for the safety of the officer even when no probable cause to arrest exists. *Id.* at 24-27.

19. Salcido v. State, 758 S.W.2d 261, 262 (Tex. Crim. App. 1988) (citing unpublished court of appeals decision).

20. *Id.* at 263.

21. *Id.* at 265.

22. *Id.*

23. *Id.*

In *Hawkins v. State*[24] the Texas Court of Criminal Appeals examined *in seriatim* the legal doctrines of arrest, detention, and abandonment. Early in the evening, a police officer observed Hawkins standing in a parking lot located in an area designated as a high crime district. Narcotics officers had informed the observing officer that Hawkins "dealt dope." The officer, acting without the authority of an arrest or search warrant, and without having observed criminal activity or having received a tip from an informant, approached Hawkins.

The officer called out for Hawkins to stop so that he could speak with him.[25] Hawkins responded inaudibly and continued on his way. The officer issued a radio message asking for assistance, because the suspect was leaving the scene. A second officer responded to the call, drove to the parking lot, parked his vehicle and approached Hawkins. The first officer was fifty to sixty feet away. When confronted by the second officer, Hawkins jerked his hand out of his pocket and threw a paper bag in a nearby ditch. Although Hawkins escaped this encounter, the police later arrested him and found the discarded package, which contained a controlled substance.

The court first ruled, in accordance with the court below,[26] that Hawkins was not arrested.[27] Numerous Texas cases have held that an arrest occurs when the individual's freedom of movement is restricted or restrained.[28]

---

24. 758 S.W.2d 255, 257 (Tex. Crim. App. 1988). The court noted that the defendant had not filed a written pre-trial Motion to Suppress. *Id.* at 258. Prior to commencement of testimony, the trial court retired the jury, conducted a brief hearing concerning the search, and ruled that no search had occurred. After the defendant excepted to the ruling, the trial court pointed out that the defendant had failed to make a formal Motion to Suppress. *Id.* The defendant then orally moved to suppress and stated his grounds. The trial court denied the motion. *Id.* at 259. The court held that there was no question that error, if any, was preserved. *Id.* This holding follows established precedent, most recently summarized in Calloway v. State, 743 S.W.2d 645, 649 (Tex. Crim. App. 1988), with regard to preservation of error for an illegal search. In *Calloway*, the court ruled that article 28.01 of the Texas Code of Criminal Procedure which permits a pre-trial hearing pursuant to a Motion to Suppress, is not mandatory but is directed to the trial court's discretion. *Calloway*, 743 S.W.2d at 649 (citing TEX. CRIM. PROC. CODE ANN. § 28.01 (Vernon, 1977)). The decision to hold a hearing on a pre-trial Motion to Suppress rests within the sound discretion of the court. The court may elect to rule on the merits of the Motion to Suppress upon the lodging of proper objection. The court may decline to consider any pre-trial Motion to Suppress, yet the defendant retains the right to raise an appropriate objection at trial. *Calloway*, 743 S.W.2d at 649.

25. In Daniels v. State, 718 S.W.2d 702 (Tex. Crim. App. 1986), *cert. denied*, 479 U.S. 885 (1986), the court noted that not all encounters between the police and the public bring into play the protections afforded by the fourth amendment. "Police are as free as anyone else to ask questions of their fellow citizens. Only when the questioning becomes a detention, however brief, must it be supported by reasonable suspicion." 718 S.W.2d at 704. The language in *Daniels* appeared to establish a per se rule that an illegal stop fatally tained a consent to search, whether the consent was valid or not. This interpretation, however, was expressly overruled in Juarez v. State, 758 S.W.2d 772, 780 n.3 (Tex. Crim. App. 1988). The appropriate standard for review is: from the totality of the circumstances, was the consent voluntary and sufficiently a product of free will that it would attenuate the taint of an illegal stop or arrest. *Id.* at 783.

26. Hawkins v. State, 644 S.W.2d 764 (Tex. App.—Fort Worth 1983), *rev'd*, 758 S.W.2d 255 (Tex. Crim. App. 1988).

27. *Hawkins*, 758 S.W.2d at 259. Apparently neither case law nor statutory authority exists in Texas recognizing such a thing as "formal arrest." McCrory v. State, 643 S.W.2d 725, 726, n.3 (Tex. Crim. App. 1983); TEX. CODE CRIM. PROC. ANN. art. 15.22 (Vernon 1977) ("[a] person is arrested when he has been placed under restraint or taken into custody . . . .").

28. Livingston v. State, 739 S.W.2d 311, 327 (Tex. Crim. App. 1987) (arrest is complete

The standard resembles the rule adopted by the United States Supreme Court in *United States v. Mendenhall*, wherein the Court stated that seizure of a person within the limits of the fourth amendment occurs when, in view of the totality of circumstances comprising the incident, a reasonable person would determine that he was not free to leave.[29] The court held that the facts neither supported the conclusion that Hawkins believed that he was not free to leave (he had simply walked away at a normal pace when the first officer approached him) nor established police actions that indicated that they were in the process of arresting Hawkins.[30]

The Court, however, agreed with Hawkins' contention that he was the victim of an improper investigative stop under the doctrine established in *Terry v. Ohio*.[31] An investigative stop is justified when specific and articulable facts, in light of the officer's experience and personal knowledge, combined with rational inferences from those facts, would constitute more than an inarticulate hunch, suspicion, or good faith suspicion that a crime had occurred.[32] The prescriptions of the fourth amendment are not so restrictive as to require a police officer to look the other way while a crime is in progress or a criminal escapes, simply because the officer lacks the exact level of information required for probable cause to arrest.[33]

In *Hawkins* no such articulable facts existed to justify the attempted detention. The officers had no reason to believe Hawkins had engaged in criminal activity or engaged in suspicious activity at the time of the detention. After finding the police conduct illegal, the court turned its attention to whether Hawkins had intended to abandon the property and, if so, whether he had voluntarily abandoned it independent of the police misconduct. The court concluded that Hawkins' decision to abandon the contraband directly resulted from the actions of the police, and excluded the evidence as inadmissible.[34]

The court reached this conclusion only after a careful consideration of a recent decision by the Supreme Court in *Michigan v. Chesternut*.[35] The issue presented therein was whether an investigatory pursuit necessarily consti-

---

when person's liberty of movement is restricted or restrained); Hoag v. State, 728 S.W.2d 375 (Tex. Crim. App. 1987); Gregg v. State, 667 S.W.2d 125 (Tex. Crim. App. 1984) (fourth amendment context, person is arrested whenever his freedom of movement is restrained).

29. 446 U.S. 544, 545, 554 (1980). In *Mendenhall* the Court listed several examples of situation that might indicate a seizure: 1) the threatening presence of several officers; 2) the display of a weapon by the seizing officers; 3) physical contact between the officer and the citizen; or 4) language or demeanor of the officer indicating that compliance with the officer's request may be compelled. *Id.*

30. *Hawkins*, 758 S.W.2d at 260.

31. 392 U.S. 1, 21 (1968). The decision of the intermediate appellate court in *Hawkins* did not address the investigative detention issue. *Hawkins*, 644 S.W.2d at 765.

32. Numerous state decisions are in accord with the general principles contained in *Terry*. *See* Dickey v. State, 716 S.W.2d 499, 504 (Tex. Crim. App. 1986); Johnson v. State, 658 S.W.2d 623, 626 (Tex. Crim. App. 1983); Ferguson v. State, 573 S.W.2d 516, 522 (Tex. Crim. App. 1978).

33. Adams v. Williams, 407 U.S. 143, 145 (1972); *Accord* Williams v. State, 621 S.W.2d 609, 612 (Tex. Crim. App. 1981).

34. *Hawkins*, 758 S.W.2d at 261.

35. 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988).

tutes a seizure under the fourth amendment. Chesternut argued that the police can never pursue an individual absent justification for suspecting that the person is engaged in criminal activity.[36] The State of Michigan posited that the fourth amendment is never implicated unless the police actually stop the individual.[37] The Supreme Court rejected both absolutist positions and adhered to its traditional contextual approach[38] so that the issue would be resolved by taking into account all of the circumstances surrounding the issue in dispute.[39]

In *Chesternut* four officers on routine patrol in a marked squad car observed a car pulling over to the curb. A man exited the vehicle and approached Chesternut who was standing alone on the corner. As the patrol car neared the corner where he was standing, Chesternut turned and fled on foot. The squad car pursued and drove beside Chesternut as he continued to flee. During the flight, the officers watched Chesternut discard a number of small packets from his pocket. One of the officer exited the cruiser and examined the packets. While he did so, Chesternut stopped running and was eventually arrested.

The Court noted that a police car driving parallel to a running pedestrian could be construed as "intimidating."[40] The Court held, however, that such intimidation did not constitute a seizure.[41] The actions of the police did not communicate an attempt on their part to intrude upon Chesternut's freedom of movement.[42]

The facts in *Chesternut*, as noted by the Texas Court of Criminal Appeals, are distinguishable from those in *Hawkins*. In *Chesternut* the police did not attempt to detain the suspect and therefore were not required to possess articulable facts concerning criminal activity. Since no illegal police activity occurred, Chesternut's discarding of the packets was done freely and voluntarily. In *Hawkins* the police did much more than simply follow and observe the suspect. The police closed in on Hawkins in an attempt to detain and question him. The police, by their actions, actually seized Hawkins without reasonable grounds to believe that he had engaged in criminal or suspicious activity. The actions of the police, which violated the precepts of the fourth amendment, caused the suspect to abandon the property, thereby rendering the property inadmissible under the exclusionary rule.

II. WARRANTLESS ARRESTS, SEARCHES AND SEIZURES

For five years, various levels of Texas courts[43] questioned whether the

36. *Id.* at 1975, 1977, 100 L. Ed. 2d 565, 567.
37. *Id.* at 1978, 100 L. Ed. 2d at 568.
38. *E.g.*, INS v. Delgado, 466 U.S. 210, 215 (1984).
39. *Chesternut*, 108 S. Ct. at 1979, 100 L. Ed. 2d at 569.
40. *Id.* at 1982, 100 L. Ed. 2d at 573.
41. *Id.*
42. In United States v. Knotts, 460 U.S. 276 (1983) the Court ruled that continuous surveillance on public streets did not constitute a seizure for fourth amendment purposes. In Florida v. Royer, 460 U.S. 491 (1983) the Court held that the mere approach of the police to a citizen did not constitute a seizure.
43. State v. Eisenhauer, No. 01-82-0501-CR (Dist. Ct. of Harris County, 209th Judicial

totality of circumstances test, established in *Illinois v. Gates*[44] to determine the sufficiency of probable cause to conduct a search and seizure, was applicable when the complaint was based on a purported violation of article I, section 9 of the Texas Constitution[45] rather than a violation of the fourth amendment.[46] The issue was resolved in favor of the applicability of the test,[47] yet the decision failed to resolve the much broader question of conflicting sovereignty between the Texas Constitution and the United States Constitution.

In *Eisenhauer v. State*[48] the intermediate appellate court held that the warrantless arrest, search and seizure in question were improperly conducted for failure to meet the "two-prong" test of *Aguilar v. Texas.*[49] Although unclear from the opinion itself, subsequent events established that the court based this decision solely on federal constitutional grounds. The court found the evidence sufficient to satisfy the first prong of the *Aguilar* test because of the detailed nature of the informant's allegations.[50] The court held, however, that the evidence was insufficient to establish the second prong of the test because no evidence was offered to establish the informant's credibility or that his information was reliable.[51] Finding that

---

Dist. of Texas, 1988) *rev'd and dism'd*, 657 S.W.2d 184 (Tex. App.—Houston [1st Dist.] 1983), *rev'd and rem'd*, 678 S.W.2d 947 (Tex. Crim. App. 1984); *rev'd and dism'd*, 684 S.W.2d 782 (Tex. App.—Houston [1st Dist.] 1984); *rev'd and trial court aff'd* 754 S.W.2d 159 (Tex. Crim. App. 1988).

44. For a discussion of the *Gates* test, see *supra* note 13.

45. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures and searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

TEX. CONST. art. I, § 9.

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

U.S. CONST. amend. IV.

47. Eisenhauer v. State, 754 S.W.2d 159, 160 (Tex. Crim. App. 1988).

48. 657 S.W.2d 184, 187 (Tex. App.—Houston [1st Dist.] 1983), *rev'd*, 678 S.W.2d 947 (Tex. Crim. App. 1984).

49. 378 U.S. 108, 114 (1964). The *Aguilar* test requires a showing of (1) the circumstances underlying the informant's conclusions and (2) the reasons the officer believed the individual credible and the information reliable. *Id.*

50. 657 S.W.2d at 187. The police received information from an unknown informant that Eisenhauer would depart from the local airport on a trip to Miami and that he would return the same day with cocaine in his possession. A complete physical description of Eisenhauer was given as well as a description of his clothing. Each detail concerning his physical description, clothing, date and time of departure, destination, and arrival, and name was verified by police prior to the arrest. *See* Draper v. United States, 358 U.S. 307 (1959).

51. 657 S.W.2d at 187. The State offered no evidence tending to establish the informant's reliability or credibility. The officer had not received information previously from the informant. Therefore, the officer had no basis for believing that the informant was credible or the information reliable. The court contrasted the underlying facts of this case with those of Jones v. State, 640 S.W.2d 918, 920 (Tex. Crim. App. 1982). In *Jones*, the police conducted a search at an airport after being told by an informant of the arrival of a specific person, particularly described physically and by attire, who would be in possession of a controlled substance. Eight of the details supplied by the informant were corroborated by the police prior to the arrest. Unlike the facts of *Eisenhauer*, however, the police had previously received information from

probable cause was not established, the court held that the ensuing warrantless arrest, search and seizure were improper.[52]

The court made a brief reference to the recent decision in *Illinois v. Gates*, which abolished the two-prong test and substituted the totality of circumstances test to determine the legality of arrests and searches and seizures.[53] The Supreme Court in *Gates* allowed the states to retain the two-prong standard at their election.[54] Citing this fact, the *Eisenhauer* court found that Texas had not yet elected to abandon the two-prong standard.[55]

On Petition for Discretionary Review, the Texas Court of Criminal Appeals noted that the intermediate appellate court decided the issue on federal constitutional grounds even though the issue was presented under a Motion to Suppress that alleged violations of both state and federal constitutions.[56] The court granted the petition to determine whether the intermediate appellate court erred in not applying the totality of the circumstances test of *Gates* rather than the two-pronged test of *Aguilar*.

Without discussion or authority, the Texas Court of Criminal Appeals held that the totality of the circumstances test applies to warrantless arrests and searches.[57] The court made a reference to its per curiam decision in *Bellah v. State*,[58] which held that the *Gates* test rather than the *Aguilar* test would be applied in a case involving an affidavit for an arrest warrant. The legality of the arrest and search of Eisenhauer was then tested by the *Gates* standard, and the court found that probable cause existed to justify the actions of the police.[59] The Texas Court of Criminal Appeals reversed the judgment of the court of appeals and the cause was remanded for that court to rule on the points of error complaining of violation of the Texas Constitution.

On remand, the court of appeals again reversed the conviction, holding that state law had been violated.[60] The court ruled that under Texas law

---

the informant on two occasions, which had proved to be correct. Thus, both of the prongs of the *Aguilar* test were met.

52. *Eisenhauer*, 657 S.W.2d at 189. The defense counsel presented a second issue concerning the purported consent of Eisenhauer to permit the search after his illegal arrest. The court held that the totality of the evidence failed to support a finding that Eisenhauer voluntarily gave his consent.

53. 657 S.W.2d at 188 n.1.

54. Illinois v. Gates, 462 U.S. 213 (1983). "Finally, by requiring that the State first argue to the state courts that the federal exclusionary rule should be modified, we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground." *Id.* at 222.

55. 657 S.W.2d at 188 n.1.

56. 678 S.W.2d 947, 949 (Tex. Crim. App. 1984).

57. *Id.* at 952.

58. 653 S.W.2d at 795, 798 (Tex. Crim. App. 1983).

59. Although the court specifically held that the *Gates* test was applicable to warrantless arrests and searches, some doubt on the matter remained. *Eisenhauer*, 678 S.W.2d 947 at 955 (Clinton, J., dissenting). In Whaley v. State, 686 S.W.2d 950, 951 (Tex. Crim. App. 1985), the court held specifically that it was adopting the totality of the circumstances test to determine the legality of warrantless arrests and searches when the challenge is made on federal constitutional grounds.

60. Eisenhauer v. State, 684 S.W.2d 782, 786 (Tex. App.—Houston [1st Dist.] 1984), *rev'd*, 754 S.W.2d 159 (Tex. Crim. App. 1988).

probable cause would be determined under the two-prong test of *Aguilar*.[61] Again, the Texas Court of Criminal Appeals granted the State's Petition for Discretionary Review to determine whether the court of appeals erred in applying the *Aguilar* rule and whether probable cause existed to justify the arrest and search.[62]

The final *Eisenhauer*[63] decision presented the court with its first clear-cut opportunity to establish a uniform guideline for determining the existence of probable cause under the constitution and laws of Texas.[64] In order to formulate its position, the court began an analysis of the nature and extent of the protections afforded by the Texas Constitution.

The court could discern no significant differences as to the protections afforded under the fourth amendment and article I, section 9 of the Texas Constitution. Citing longstanding precedent, the court noted that in all material aspects, the two constitutional provisions are the same.[65] Since the court found the *Gates* standard appropriate in reviewing alleged fourth amendment violations, it adopted that test for reviewing state claims as well.[66]

Although the court clearly held that the *Gates* test was adopted for review of claimed state law violations, a broader issue remained unsettled. The court wrote that the decision was written "to stay in step with the federal constitutional model for probable cause determinations."[67] In a concurring opinion joined by two other judges, Judge Duncan criticized the majority's comments that the decision was made "to stay in step" with the decisions of the Supreme Court.[68] The concurrence noted that the Supreme Court is not vested "with divine guidance" and that the Texas Court of Criminal Appeals should not abdicate its authority to reach different results if such is justified under the law and circumstances.[69] Two dissenting opinions disagreed that the court of criminal appeals was bound in some fashion to follow the pronouncements of the Supreme Court if independent state grounds exist and

61. 684 S.W.2d at 785.
62. 754 S.W.2d 159 (Tex. Crim. App. 1988).
63. *Id.*
64. *Id.* at 161. In Ware v. State, 724 S.W.2d 38, 41 (Tex. Crim. App. 1986) the court held that it was not necessary to determine whether either the *Aguilar* or *Gates* test was applicable since the affidavit in that case failed to satisfy either standard. In Marquez v. State, 725 S.W.2d 217 (Tex. Crim. App. 1987) the court ruled that it need not decide which test was applicable since the facts were sufficient to establish probable cause under either standard. The author of the opinion wrote, however, that "this State has always used stricter *Aguilar-Spinelli* test for analyzing probable cause under article I, section 9 of the Texas Constitution . . . ." *Id.* at 233.
65. *Eisenhauer*, 754 S.W.2d at 162 (*citing* Brown v. State, 657 S.W.2d 797 (Tex. Crim. App. 1983) and Crowell v. State, 180 S.W.2d 343 (Tex. Crim. App. 1944)).
66. 754 S.W.2d at 164.
67. *Id.*
68. *Id.* at 166 (Duncan, J., concurring).
69. *Id.* Under the supremacy clause, article VI of the Federal Constitution, the Supreme Court's decisions are the supreme law of the land. Massachusetts v. Upton, 466 U.S. 727, 737 (1984). If, however, a state court decision is based on adequate and independent state grounds, the Supreme Court has no jurisdiction to decide the case so long as the state court's decision does not fall below minimum guarantees of the federal constitution as made applicable through the fourteenth amendment. Michigan v. Long, 463 U.S. 1032 (1983).

preferred to retain the *Aguilar* standard for claimed violations of article 1, section 9.[70]

A majority of the court of criminal appeals has held that the *Gates* test will be utilized to analyze claimed state violations. The argument made in the lead opinion, that the court was compelled to reach that conclusion because of the decisions of the Supreme Court, appears to conflict with prior authority. The three concurring judges and the two dissenting opinions argued that the court of criminal appeals should maintain the freedom to interpret Texas laws and constitutional provisions in a different fashion than the way the Supreme Court might interpret them under the federal Constitution.[71]

III. PRIVACY INTEREST

In *California v. Greenwood*[72] the United States Supreme Court resolved the hefty issue of the sanctity of garbage. The California Court of Appeals affirmed the ruling of the California Superior Court, which had dismissed charges against the accused because warrantless searches of his trash violated both the fourth amendment and the California Constitution.[73] The Court reversed, holding that citizens have no fourth amendment expectation of privacy in their garbage once it is placed next to the curb in opaque containers.[74]

The controversy involved the actions of members of the Laguna Beach Police Department who had received information that Greenwood might be involved in narcotics trafficking.[75] Realizing that the drug trafficking information was insufficient to obtain a warrant, an officer asked the neighborhood's regular trash collector to pick up the plastic garbage bags that Greenwood left at the curb in front of his house[76] and turn the bags over to her without mixing their contents with garbage from other houses. Once the task was completed, the officer searched through the rubbish and found items indicative of narcotics use. This information was presented in an affidavit in support of a search warrant. Upon execution of this warrant, the police conducted a search that led to the discovery of large quantities of cocaine and hashish at the house. The superior court dismissed the charges,

70. *Eisenhauer*, 754 S.W.2d at 166 (Clinton, J., dissenting); *Id.* at 176 (Teague, J., dissenting).

71. Oregon v. Haas, 420 U.S. 714 (1975).

72. 108 S. Ct. 1675, 100 L. Ed. 2d 30 (1988).

73. California v. Greenwood, 182 Cal. App. 3d 729, 227 Cal. Rptr. 539 (1986).

74. *Greenwood*, 108 S. Ct. at 1627, 100 L. Ed. 2d at 36.

75. An informant had provided information that a truck filled with illegal drugs was en route to the Greenwood home and a neighbor had complained of heavy vehicular traffic late at night in front of Greenwood's single family home. Surveillance conducted by the officer verified the heavy traffic and that a truck proceeded directly from the Greenwood home to another residence also suspected as a narcotics trafficking location.

76. A county ordinance required residents to place their trash at the curb for pickup, ORANGE COUNTY CAL. CODE § 4-3-45(a) (1986) (residents must "remov[e] from the premises at least once each week 'all' solid waste created, produced or accumulated in or about their dwelling house") and prohibited them from disposing of it in any other way, *see id.* § 3-3-85 (1988).

holding that a warrantless search of trash was improper.[77]

Prior decisions of the United States Supreme Court had clearly established that the warrantless search and seizure of the trash bags left at the curb by Greenwood would violate the fourth amendment only if respondent manifested a subjective expectation of privacy in his garbage that society accepts as objectively reasonable.[78] Greenwood argued that he had an expectation of privacy because the trash was placed for collection at a fixed time, the bags were opaque plastic,[79] the collector was expected to pick up, mingle, and deposit the trash at a garbage dump, and the trash was only temporarily on the street with little likelihood that it would be inspected. The Court was unimpressed with these arguments and held that Greenwood had exposed his garbage to the public so as to deprive him of any fourth amendment protection.[80]

The decision focused not on Greenwood's expectation of privacy, a fact readily conceded, but on whether society was prepared to accept that expectation as objectively reasonable. According to the author of the *Greenwood* opinion, numerous decisions by the federal courts of appeal[81] and state appellate courts[82] that had considered the issue upheld warrantless searches

77. 182 Cal. App. 3d at 729, 227 Cal. Rptr. at 539. After Greenwood was released on bail, his garbage was searched again, another warrant was obtained, and a second search was conducted. As a result of the second search, police discovered narcotics, and filed more charges against Greenwood.

78. 108 S. Ct. at 1627, 100 L. Ed. 2d at 36. *E.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987); California v. Ciraolo, 476 U.S. 207 (1986); Oliver v. United States, 466 U.S. 170, 177 (1984); Katz v. United States, 389 U.S. 347, 361 (1967).

79. Prior decisions of the Supreme Court dealing with opaque containers uniformly held that as long as a package is closed against inspection its contents are protected by the fourth amendment. *See ex parte* Jackson, 96 U.S. 727, 733 (1878) (discussing postal inspection of mail). In Robbins v. California, 453 U.S. 420, 427 (1981) Justice Stewart pronounced for a plurality that "unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the fourth amendment." In United States v. Ross, 456 U.S. 798, 800 (1982) the Court held that the fourth amendment protects the owner from warrantless searches and seizures of any container that conceals its contents from plain view. *Accord*, Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977); United States v. Van Leeuwen, 397 U.S. 279 (1970). The applicability of these decisions to Greenwood's opaque trash bags is questionable, however, since the factual basis of each case was a container used for transportation, while Greenwood's containers, the trash bags, were discarded.

80. *Greenwood*, 108 S. Ct. at 1626, 100 L. Ed. 2d at 33.

81. *Id.* at 1626, 100 L. Ed. 2d at 35. Two of the eleven federal courts of appeal decisions relied on are factually or legally distinguishable. *See* United States v. O'Bryant, 775 F.2d 1528 (11th Cir. 1985) (search of valuable briefcase discarded *next* to an overflowing trash bin on busy city street); United States v. Thornton, 746 F.2d 39 (D.C. Cir. 1984) (good faith search of trash approved). Seven of the decisions rely totally or in part on the discredited theory of abandonment. *Greenwood*, 108 S. Ct. 1632, 100 L. Ed. 2d at 42 n.2 (1988), (Brennan, J., dissenting).

82. *Id.* Among the numerous state appellate decisions cited is Willis v. State, 518 S.W.2d 247 (Tex. Crim. App. 1975). In *Willis* the appellant and a friend occupied a room in an apartment complex. The police were on the premises with the consent of the friend. The police conducted a warrantless search of a container used for burning trash. The container, a fifty gallon oil drum with its top removed, was maintained on the apartment premises for the disposal of burnable trash. The contents were burned daily. The officers observed a partially burned wallet among the refuse that was taken in the robbery for which the defendant was on trial. The court of criminal appeals held "that this billfold having been deposited for burning in a receptacle for that purpose was effectively abandoned by the appellant. It is well settled

and seizures of trash left for collection in an area accessible to the public on the grounds that there was no reasonable expectation of privacy in discarded trash.

The Court discerned two reasons why society lacked an expectation of privacy with regard to trash. First, plastic bags filled with rubbish and set on the curb are easy prey for all curious passers-by including animals, children, scavengers, snoops and other members of the public.[83] Second, Greenwood placed his refuse at the curb with one purpose in mind, that is, to cease possession of it in favor of the trash collector, who himself could choose to open the bags and sort through them or allow the police to do so.[84] The Court held that any result other than the one reached would, in essence, have required the police to look the other way when confronted with evidence of criminal activity which is in plain view of any member of the public.[85] Since the majority opinion of the Court posited no exception or limitation on the right to search trash, this weighty issue of overwhelming importance to the nation[86] appears to have been finally and completely resolved.

---

that a warrant is not required for the seizure of abandoned property." *Id.* at 249 (citations omitted).

83. 108 S. Ct. at 1627-28, 100 L. Ed. 2d at 36-37.

84. *Id.* at 1628, 100 L. Ed. 2d at 37.

85. *Id.*

86. Having resolved the burning issue of the right to search trash, the Court briefly addressed Greenwood's argument that the California constitutional amendment, eliminating the exclusionary rule for evidence seized contrary to state but not federal law, violated the due process clause of the fourteenth amendment. *See* CAL. CONST. art. I, § 28d. The Court ruled that the state may eliminate the exclusionary rule for violation of a state right to be free from illegal searches and seizures. *Greenwood*, 108 S. Ct. at 1630, 100 L. Ed. 2d at 39. The Court noted that in several instances it had ruled that evidence obtained in violation of the fourth amendment need not always be suppressed. United States v. Leon, 468 U.S. 897 (1984); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974). The applicability of the exclusionary rule, when placed under scrutiny by either the state or the federal government, is based upon a balancing of the benefits of deterring improper police conduct against the societal costs of excluding reliable evidence of criminal activity.