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SEARCH AND SEIZURE

by
Gary A. Udashen

Gary A. Udashen
Sorrels, Udashen & Anton
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100
214-468-8104 (fax)

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SEARCH AND SEIZURE

Constitutional Provisions

U. S. Const., Amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches or 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. XIV

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Const., Art. 1, §9

> The people shall be secure in their persons, houses, papers, and possessions, from all unreasonable seizures or 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.

Statutory Provision

Art. 1.06, Tex. Code Crim. Proc.

> Searches and seizures: The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. 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.

What is a Search

A search occurs under the Fourth Amendment when the government violates a subjective expectation of privacy that society considers objectively reasonable. *Kyllo v. United States*, 533 U.S. 27 (2001) (prohibiting use of thermal imaging device without a warrant; search includes obtaining information by sense enhancing technology regarding the interior of a home that could not otherwise be obtained without entry); *United States v. Jacobsen*, 466 U.S. 109 (1984) (search occurs on infringement of privacy that society is prepared to consider reasonable).

Visual encounter between government agent and individual is not a search without more. *Marshall v. United States*, 422 F.2d 185, 189 (5th Cir. 1970).

Officers did not need any degree of suspicion to knock on apartment door because this was a non-detention contact. *State v. Perez*, 85 S.W.3d 817 (Tex. Crim. App. 2002)

If an officer moves an object to obtain more information about it that may reveal its character as contraband or evidence, it is a search. *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987).

Dog sniff of car at check point not a search. *United States v. Dovali-Avila*, 895 F.2d 206, 207 (5th Cir. 1990).

Searches conducted by private individuals without the assistance, knowledge, collusion, encouragement, or approval of a government agent do not fall within the protections afforded by the Fourth Amendment. *Walter v. United States*, 447 U.S. 649, 656-57 (1980). The same is true of a search by a foreign government. *United States v. Janis*, 428 U.S. 433 (1976).

In Texas searches by private individuals are covered by the Texas exclusionary rule, Art. 38.23, Tex. Code Crim. Proc.; *State v. Johnson*, 939 S.W.2d 586 (Tex. Crim. App. 1996).

Drug testing in the work place does constitute a search subject to Fourth Amendment protections. *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Rabb*, 489 U.S. 656 (1989) (upholding drug testing).

What is a Reasonable Expectation of Privacy

A person has a reasonable expectation in being free from an unreasonably prolonged detention. *Kothe v. State*, 152 S.W.3d 54 (Tex. Crim. App. 2004).

In determining whether a person other than the lessee of a rental car who is driving had standing to contest search, consider the circumstances surrounding the use of the vehicle, as well as the nature of the relationship between the driver and lessee to determine whether the driver had a

legitimate expectation of privacy. *Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006).

Person has reasonable expectation of privacy from searches for evidence within his body. *Schmerber v. California*, 384 U.S. 757 (1966).

Passenger in another person's automobile had no reasonable expectation of privacy in the vehicle and could not challenge search and seizure of evidence found under front seat. *Rakas v. Illinois*, 439 U.S. 128, 142-44 (1978).

Taxi passenger has privacy expectation in area of taxi that the passenger legitimately occupies. *Chapa v. State*, 729 S.W.2d 723, 725-26, n. 1 (Tex. Crim. App. 1987).

House guest staying overnight has a reasonable expectation of privacy in the host's home. *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990).

Guest who had been in home for a short time and did not intend to make overnight stay has no expectation of privacy in the host's home and lacks standing to challenge search. *Villareal v. State*, 935 S.W.2d 134, 139 (Tex. Crim. App. 1996).

In determining whether a person other than the lessee of a rental car who is driving had standing to contest search consider the circumstances surrounding the use of the vehicle, as well as the nature of the relationship between the driver and lessee to determine whether the driver had a legitimate expectation of privacy. *Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006).

Person who has proprietary or possessory interest in personal property has a legitimate expectation of privacy in that property. *Jones v. United States*, 362 U.S. 257, 262-64 (1960).

Person waived privacy interest by placing property in another person's purse. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

An arrestee does not have a reasonable expectation of privacy in a conversation with another arrestee in the jail that was secretly taped by law enforcement officer. *State v. Scheineman*, 77

S.W.3d 810 (Tex. Crim. App. 2002).

A city employee was found to have a legitimate expectation of privacy in his work computer. *United States v. Slania*, 283 F.3d 670 (5th Cir. 2002).

A teacher was found not to have a privacy interest in a work computer. *Voyles v. State*, 133 S.W.3d 303 (Tex. App. - Fort Worth 2004, no pet.).

Persons privacy interest in his own body or medical records not sufficiently strong to require protection of blood alcohol test results from tests taken by hospital personnel for medical purposes after an accident. *State v. Hardy*, 963 S.W.2d 516 (Tex. Crim. App. 1997).

A person has a legitimate expectation of privacy in letters and other sealed packages. *United States v. Jacobsen*, 466 U.S. 109 (1984).

A dog sniff does not violate any privacy interest because there is no reasonable expectation of privacy in contraband and is therefore not a search. *United States v. Place*, 462 U.S. 696 (1983). *Illinois v. Caballes*, 543 U.S. 405 (2005).

Border patrol agent squeezing luggage of bus passenger in overhead bin was a search under the Fourth Amendment because the passenger had a reasonable expectation of privacy in the luggage and tactile inspection is more intrusive than visual inspection. *Bond v. United States*, 529 U.S. 334 (2000).

There is no expectation of privacy in garbage left outside the curtilage of a home. *California v. Greenwood*, 486 U.S. 35 (1988).

A person has no expectation of privacy in a computer turned over to a technician for repair. *Rogers v. State*, 113 S.W.3d 452 (Tex. App. - San Antonio 2003, no pet.).

A person does have a reasonable expectation of privacy in a restroom stall when he occupies it with the door shut. *Cook v. State*, 762 S.W.2d 714 (Tex. App. - Houston [lst Dist.] 1988, no pet.).

There is a legitimate expectation of privacy in the contents of a phone conversation in a phone booth. *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

Standing

In order to have standing to raise a challenge to a search, the defendant must show that he has a reasonable expectation of privacy in the place searched.

Defendant lacked standing to contest seizure of letter from another person even though he sent letter. *Garcia v. State*, 960 S.W.2d 329, 331 (Tex. App. - Corpus Christi 1997, no writ).

A person driving a rented vehicle has standing to contest the search of the vehicle rented by a different person when he was driving the vehicle with the permission of the renter even though the rental contract prohibited other drivers. *Parker v. State*, 182 S.W.3d 923, 927 (Tex. Crim. App. 2006).

Defendant lacked standing to complain of search of suitcase when he told officer it did not belong to him during consensual encounter with the police. Suitcase considered abandoned. *Hypolite v. State*, 985 S.W.2d 181, 186 (Tex. App. - San Antonio 1998).

Practice Notes

The state may raise a challenge to the defendant's standing for the first time on appeal or the appellate court may address the question *sua sponte*. The appellate court can decide that the state has forfeited the issue by not raising it in the trial court. *Kothe v. State* 152 S.W.3d 54 (Tex. Crim. App. 2004).

A defendant seeking to suppress evidence obtained during a search always has the burden of proving he has standing to complain of the search. *Handy v. State*, 189 S.W.3d 296 (Tex. Crim. App. 2006).

Exclusionary Rule

Tex. Code Crim. Proc. Art. 38.23

> Evidence not to be used
> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.
> (b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

Art. 38.23 applies to evidence obtained by private citizens. *State v. Johnson*, 939 S.W.3d 586 (Tex. Crim. App. 1996).

The Federal Exclusionary Rule is a judicially created rule designed to deter illegal searches and seizures. *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998).

The Federal Exclusionary Rule applies to state courts. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Fourth Amendment exclusionary rule does not ban evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate but later found to be invalid for lack of probable cause. Officer's reliance must be objectively reasonable which would not be the case if the magistrate was misled by false information known to be false by the affiant, or if the magistrate abandoned his neutral role or if the warrant was based on an affidavit so lacking in probable cause as to make belief in it unreasonable or if it is facially deficient in describing the place to be searched or the things to be seized. *United States v. Leon*, 468 U.S. 897 (1984).

Physical evidence, testimony concerning matters learned during a search and evidence derived from the illegal search are all excluded from evidence under the exclusionary rule. *Murray v. United States*, 487 U.S. 533 (1988).

The exclusionary rule does not apply to impeachment evidence. *Manns v. State*, 122 S.W.3d 171 (Tex. Crim. App. 2003).

The exclusionary rule does not apply to searches made pursuant to a search and seizure under a presumptively valid statute that is later found to be unconstitutional. *Michigan v. DeFillipo*, 443 U.S. 31, 37-39 (1979).

Texas statutory exclusionary rule applies to searches pursuant to statute later found unconstitutional. *Howard v. State*, 617 S.W.2d 191, 193, 194 (Tex. Crim. App. 1981).

Practice Tip - Motions to Suppress should always cite Art. 1, Sect. 9, Tex. Const. and Art. 38.23, Tex. Code Crim. Proc. in order to ensure that the greater protections afforded are invoked. *Imo v. State*, 822 S.W.2d 635, 636 (Tex. Crim. App. 1991).

Practice Tip - Art. 38.23 allows the legality of a search and seizure to be presented to the jury. The failure of the trial court to submit a requested jury charge under Art. 38.23 when there was a factual dispute regarding the legality of the seizure is error. *Murphy v. State*, 640 S.W.2d 297 (Tex. Crim. App. 1982).

The exclusionary rule does not apply to grand jury proceedings. *United States v. Calandra*, 414 U.S. 338, 349-52 (1974).

If the connection between the taint of the initial illegality and acquisition of the evidence is sufficiently attenuated, the evidence may still be admitted under an exception to the exclusionary rule, i.e., independent source doctrine. *United States v. Grosenheider*, 200 F.3d 321 (5th Cir. 2000).

If the knowledge of evidence in question is derived from a source independent of the illegal government action the exclusionary rule does not apply. *Autry v. State*, 626 S.W.2d 758 (Tex. Crim. App. 1982).

If the evidence would have been inevitably discovered by means wholly independent of any

constitutional violation, the exclusionary rule does not apply. *Nix v. William*, 467 U.S. 431 (1984).

The inevitable discovery doctrine does not apply to the Texas exclusionary rule, Art. 38.23, Tex. Code Crim. Proc. *State v. Daughterty*, 931 S.W.2d 268 (Tex. Crim. App. 1996).

Probable Cause

A search and seizure must be supported by probable cause. A search without probable cause is not considered valid. *Schmerber v. California*, 384 U.S. 757 (1966); *State v. Ballard*, 987 S.W.2d 889 (Tex. Crim. App. 1999).

Probable cause is established where the facts and circumstances within the officers knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a particular person has committed or is committing an offense. *Amores v. State*, 816 S.W.2d 407 (Tex. Crim. App. 1991); *McNairy v. State*, 835 S.W.2d 101 (Tex. Crim. App. 1991).

Probable cause must be established by facts, not by conclusions. *Toores v. State*, 182 S.W.3d 899 (Tex. Crim. App. 2005).

Probable cause is determined by looking at the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1983); *Eisenhauer v. State*, 754 S.W.2d 159 (Tex. Crim. App. 1988).

The burden is on the state to prove existence of probable cause. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

It is not necessary that the officer actually making the arrest or conducting the search personally have enough information to constitute probable cause, so long as the collective information of law enforcement is sufficient to meet the standard. *Porter v. State*, 969 S.W.2d 60, 65 (Tex. App. - Austin 1998).

A persons mere propinquity to others individually suspected of criminal activity or his

presence on premises lawfully being searched does not, without more, give rise to probable cause to search that person. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

Police had probable cause to arrest everyone riding in a car when drugs were found hidden behind an armrest in the backseat. *Maryland v. Pringle*, 540 U.S. 366 (2003).

No probable cause when an officer saw several people gathered at midnight in a yard in an area known for drug use and saw one of the persons walking and appearing nervous. there was no evidence of furtive gestures or attempt to flee; of viewing commission of a criminal act; of being directed to area in response to reported criminal activity; of any prior arrest in area for drug dealing; or of any reason to suspect defendant dealt with drugs or had propensity for violence. *Davis v. State*, 61 S.W.3d 94 (Tex. App - Amarillo 2001).

It was error to admit evidence seized in search based on anonymous tip, where probable cause was lacking; the information in the anonymous tip was based on second-hand information; there was no evidence the informer ever asserted he had any personal knowledge whatsoever of contraband, and there were no additional facts within the informer's tip to indicate any special or personal knowledge on his part. *Rojas v. State*, 797 S.W.2d 41 (Tex. Crim. App. 1990).

It was error to deny motion to suppress where school officials did not have reasonable suspicion to justify search based on uncorroborated anonymous tip that defendant had a plastic bag containing marihuana in his underwear. *In re K.C.B.*, 141 S.W.3d 303 (Tex. App. - Austin 2004).

It was error to deny motion to suppress evidence seized from defendant where tip from informant was that defendant was going to buy narcotics at location in question, so police officer had no probable cause to believe defendant possessed narcotics where he saw defendant drive to curb at location, did not see any other person approach defendant and there was no evidence to support a conclusion defendant possessed narcotics when he drove away and was stopped and searched.

Sandel v. State, 608 S.W.2d 235 (Tex. Crim. App. 1980).

Officers who saw defendants enter adjacent booths with hole between booths at adult bookstore had no probable cause to believe defendants were about to commit an offense. *Liebman v. State*, 652 S.W.2d 942 (Tex. Crim. App. 1983).

Search of defendant and his motorcycle was not supported by probable cause, even though initial stop may have ben justified by reasonable suspicion based on informant's tip, where informant had been known to officers for only three weeks, there was no testimony he had given police reliable information in the past, there was no indication where defendant was coming from or whether he was going to pick up drugs at that time, no evidence to show town was a well known source of drugs, no testimony defendant acted nervous when approached by officer, and defendant's actions gave no additional facts on which officer could base probable cause. *Coats v. State*, 815 S.W.2d 715 (Tex. Crim. App. 1991).

Frisk of defendant was illegal where officer received anonymous phone tip describing person allegedly selling drugs at store, officer went to investigate, defendant fit description, officer approached him, and defendant appeared "nervous and fidgety," so officer frisked him; defendant did nothing suspicious and his conduct did not justify frisk. *Miller v. State*, 786 S.W.2d 494 (Tex. App. - San Antonio 1990).

Officers lacked probable cause to search defendant where they saw him exchange "something" with another man and on seeing officers defendant walked toward building while sticking "something" in his pocket, but officers could not identify the items. *Smith v. State*, 759 S.W.2d 163 (Tex. App. - Houston [14th Dist.] 1988).

It was error to deny motion to suppress fruits of search of defendant's purse where defendant was passenger in lawfully stopped truck, driver consented to search of truck, second officer to search

truck also searched defendant's purse which was on front seat of truck; no evidence showed that driver (male) had authority to consent to search of defendant's purse, and was no evidence of consent by defendant to the search. *Stokvis v. State*, 147 S.W.3d 669 (Tex. App - Amarillo 2004).

It was error to deny motion to suppress evidence seized in search of defendant's car after accident. No merit to contention search was justified by probable cause to search for evidence related to traffic offense (failure to control speed) or possession of a controlled substance. Defendant was not arrested so search was not incident to arrest; state did not show search of car would produce additional evidence relevant to offense of failure to control speed; was no evidence defendant showed any signs of intoxication; was no evidence of actual motive for search because officer who conducted search was never identified and did not testify; defendant's movement while still in car (that he reached across his body with uninjured arm while police were not watching him and hid something smaller than his fist between driver's seat and center console), even coupled with traffic offense, did not provide probable cause to search vehicle because of its ambiguous and potentially innocent nature. *Wiede v. State*, 157 S.W.3d 87 (Tex. App. - Austin 2005).

Warrantless search of vehicle was unlawful where officer acted solely on radio dispatch that defendant might have a weapon, but officer had just previously dispelled his suspicions regarding a weapon when he had encountered defendant before return to residence and determined defendant did not pose a threat to his safety or to safety of others; no evidence suggested defendant made any furtive movements or gestures that would have rekindled suspicion; officer had no reason to suspect defendant had weapon in his vehicle. *McCraw v. State*, 117 S.W.3d 47 (Tex. App. - Fort Worth 2003).

It was error to deny motion to suppress evidence obtained after illegal stop, where officer stopped defendant based on anonymous tip that driver of a green Camaro occupied by two white

males parked at gas pumps fell down a couple of times trying to get into car and appeared to be highly intoxicated. Officer only confirmed that a green Camaro parked at convenience store was occupied by two individuals. It was not clear that officer could even confirm that car was being driven by man seen to fall by tipster. *Stewart v. State*, 22 S.W.3d 646 (Tex. App. - Austin 2000).

No probable cause for search of trunk of car where report to officer was based purely on suspicion, defendant and his companions conducted their affairs in open daylight and legitimately explained their presence, there were no furtive gestures, resistance or avoidance of officers, fabricated story of lost car key did not give adequate cause for warrantless search of trunk. *Barber v. State*, 611 S.W.2d 67 (Tex. Crim. App. 1981).

Anonymous tip accurately describing the defendant considered in conjunction with elements of courier profile is insufficient to provide probable cause. Information that merely identifies an individual at a particular location lacks sufficient reliability. *Florida v. J. L.*, 529 U.S. 266 (2000).

Search Warrants

As a general rule, all searches conducted without a warrant are deemed unreasonable. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Unless the government can establish that an exception to the warrant requirement applies then a search warrant must be obtained prior to any search. *Coolidge v. New Hampshire*, 403 U.S. 443, 449-455 (1971).

A search warrant must be in writing. Oral authorization from a magistrate is insufficient. *McDole v. State*, 579 S.W.2d 7, 8-9 (Tex. Crim. App. 1979).

General searches are prohibited and therefore the warrant must be specific. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976).

The mere scent of marihuana does not provide probable cause to believe that a specific individual at the location of the scent possessed marihuana. *Steelman v. State*, 93 S.W.3d 102 (Tex.

Crim. App. 2002).

Officer may enter a house to search if probable cause and exigent circumstances exist. *Estrada v. State*, 154 S.W.3d 604 (Tex. Crim. App. 2005); *Parker v. State*, 206 S.W.3d 593 (Tex. Crim. App. 2006) (exigent circumstance and probable cause justified officers entry into a house after they were called on suspicion of underaged drinking. Officers heard a voice in the house say the police were there and someone ran up the stairs. Officers smelled the odor of burnt marihuana when they opened the door and thought the occupants would destroy evidence before warrant could be obtained. Officers allowed to enter home without a warrant.)

Even if one portion of the warrant is unnecessarily broad, the entire warrant is not invalidated. *Walthall v. State*, 594 S.W.2d 74, 79 (Tex. Crim. App. 1980).

Even if the description of the location to search has a mistake, the warrant may still be valid if other descriptive facts are sufficient for the officers to identify the correct premises. *Bridges v. State*, 574 S.W.2d 560, 562 (Tex. Crim. App. 1978) (failure to list name of town).

The primary Texas statutes governing search warrants are found in Chapter 18 of the Code of Criminal Procedure.

> **Art. 18.01. Search Warrant**
> (a) A "search warrant" is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate or commanding him to search for and photograph a child and to deliver to the magistrate any of the film exposed pursuant to the order.
> (b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.
> (c) A search warrant may not be issued pursuant to Subdivision (10) of Article 18.02 of this code unless the sworn affidavit required by Subsection (b) of this article sets forth sufficient facts to establish probable cause; (1) that a specific offense has

been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. Except as provided by Subsections (d) and (i) of this article, only a judge of a municipal court of record or county court who is an attorney licensed by the State of Texas, statutory county court, district court, the Court of Criminal Appeals, or the Supreme Court may issue warrants pursuant to Subdivision (10), Article 18.02 of this code.

(d) Only the specifically described property or items set forth in a search warrant issued under Subdivision (10) of Article 18.02 of this code or property, items or contraband enumerated in Subdivisions (1) through (9) or in Subdivision (12) of Article 18.02 of this code may be seized. A subsequent search warrant may be issued pursuant to Subdivision (10) of Article 18.02 of this code to search the same person, place, or thing subjected to a prior search under Subdivision (10) of Article 18.02 of this code only if the subsequent search warrant is issued by a judge of a district court, a court of appeals, the court of criminal appeals, or the supreme court.

(e) A search warrant may not be issued under Subdivision (10) of Article 18.02 of this code to search for and seize property or items that are not described in Subdivisions (1) through (9) of that article and that are located in an office of a newspaper, news magazine, television station, or radio station, and in no event may property or items not described in Subdivisions (1) through (9) of that article be legally seized in any search pursuant to a search warrant of an office of a newspaper, news magazine, television station, or radio station.

(f) A search warrant may not be issued pursuant to Article 18.021 of this code unless the sworn affidavit required by Subsection (b) of this article sets forth sufficient facts to establish probable cause:

(1) that a specific offense has been committed;

(2) that a specifically described person has been a victim of the offense;

(3) that evidence of the offense or evidence that a particular person committed the offense can be detected by photographic means; and

(4) That the person to be searched for and photographed is located at the particular place to be searched.

(g) A search warrant may not be issued under Subdivision (12), Article 18.02, of this code unless the sworn affidavit required by Subsection (b) of this article sets forth sufficient facts to establish probable cause that a specific felony offense has been committed and that the specifically described property or items that are to be searched for or seized constitute contraband as defined in Article 59.01 of this code and are located at or on the particular person, place, or thing to be searched.

(h) Except as provided by Subsection (i) of this article, a warrant under Subdivision (12), Article 18.02 of this code may only be issued by:

(1) a judge of a municipal court of record who is an attorney licensed by the state;

(2) a judge of a county court who is an attorney licensed by the state; or

(3) a judge of a statutory county court, district court, the court of criminal appeals, or the supreme court.

(i) In a county in which the only judge serving the county who is a licensed attorney is a district judge whose district includes more than one county or in which the only judges serving the county who are licensed attorneys are two or more district judges each of whose district includes more than one county, any magistrate may issue a search warrant under Subdivision (10) or Subdivision (12) of Article 18.02 of this code. This section is not applicable to a subsequent search warrant under Subdivision (10) of Article 18.02 of this code.

Article 18.02. Grounds for Issuance

A search warrant may be issued to search for and seize:

(1) property acquired by theft or in any other manner which makes its acquisition a penal offense;

(2) property specially designed, made, or adapted for or commonly used in the commission of an offense;

(3) arms and munitions kept or prepared for the purposes of insurrection or riot;

(4) weapons prohibited by the Penal Code.

(5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;

(6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;

(7) a drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state;

(8) any property the possession of which is prohibited by law;

(9) implements or instruments used in the commission of a crime;

(10) property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense;

(11) persons; or

(12) contraband subject to forfeiture under Chapter 59 of this code.

Art. 18.03. Search Warrant May Order Arrest

If the facts presented to the magistrate under Article 18.02 of this chapter also establish the existence of probable cause that a person has committed some offense under the laws of this state, the search warrant may, in addition, order the arrest of such person.

Art. 18.04. Contents of Warrant

A search warrant issued under this chapter shall be sufficient if it contains the following requisites:

(1) that it run in the name of "The State of Texas";

(2) that it identify, as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched;

(3) that it command any peace officer of the proper county to search forthwith the person, place, or thing named; and

(4) that it be dated and signed by the magistrate.

Article 18.01 is a statute of prohibition rather than authorization. The statute does not grant Texas magistrates the authority to issue search warrants; rather it prohibits Texas magistrates from issuing search warrants unless certain conditions exist. *State v. Toone*, 872 S.W.2d 750, 752 n.5 (Tex. Crim. App. 1994).

Probable cause to support the issuance of a search warrant exists when the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises at the time the warrant is issued. The sufficiency of a search warrant affidavit is determined by use of 'totality of the circumstances' analysis. Only the facts found within the four corners of the affidavit may be considered. Reasonable inferences may be drawn from the affidavit, however, and the affidavit must be interpreted in a common-sense and realistic manner. *Arrick v. State*, 107 S.W.3d 710, 715 (Tex. App. - Austin 2003, pet. ref'd).

Affidavits accompanying search warrants, if executed, are public information. *Houston Chronicle Publi'g Co. v. Woods*, 949 S.W.2d 492, 499 (Tex. App. - Beaumont 1997, orig. proceeding).

The affidavit must be more than a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. The magistrate must be presented with "sufficient information" to allow that individual to determine probable cause which must be established by "sufficient" and "substantial" facts. The reliability of the affiant and his sources of information are part of the totality of the circumstances that the magistrate should evaluate in making his probable cause determination. A magistrate, however, is entitled to rely on source information supplied by an average citizen, since, unlike many police informants, they are much less likely to produce false or untrustworthy information. The same rule applies to law enforcement officers. The magistrate may rely on the affidavit of a police officer based on his knowledge or the

knowledge of other officers. *State v. Anderson*, 917 S.W.2d 92, 95 (Tex. App. - Houston [14th Dist.] 1996, pet. ref'd).

To justify the issuance of a search warrant under article 18.02(10), there must be a supporting affidavit setting out sufficient facts to establish probable cause that a specific offense has been committed, that the specifically described property or items that are to be searched for or seized constitute either evidence of that offense or evidence that a particular person committed that offense, and that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. *Davis v. State*, 831 S.W.2d 426, 440 (Tex. App. - Austin 1992, pet. ref'd).

An arrest warrant incorporated within a search warrant is no different than an arrest warrant issued separate and independent of a search warrant so that the authority to arrest under an arrest warrant incorporated in a search warrant is *not* limited to the premises described in the search warrant. *Montez v. State*, 608 S.W.2d 211, 215 n.10 (Tex. Crim. App. 1980).

When testing the sufficiency of a warrant, the court uses a two prong test. First, the warrant must be sufficient to enable the executing officer to locate and distinguish the property from other property. Second, it must protect innocent parties from a reasonable probability of a mistaken execution of a defective warrant. However, technical discrepancies in the descriptive portions of a search warrant will not automatically void a warrant. Where a warrant describes a multi-unit dwelling, the description must contain sufficient guidelines to apprise the officers executing the warrant of the particular unit to be searched. *State v. Chavarria*, 992 S.W.2d 22, 24-25 (Tex. App. - Houston [lst Dist.] 1997, pet. ref'd).

The warrant must describe as nearly as possible the items to be seized. The requirement that the search be specific prohibits general searches and constrains the actions of the executing officer.

The requirement for a sufficiently particular description can vary according to what is being described. In a search for property which by reason of its character is illegal, a specific description is unnecessary and ordinarily impossible. *Lindley v. State*, 773 S.W.2d 579, 581 (Tex. App. - Tyler 1989, pet. ref'd).

A search warrant containing no description at all of property to be seized is invalid. Even though the application for the warrant contained the required information, the warrant itself did not and the warrant did not incorporate the application by reference. Since the warrant was so obviously deficient, no reasonable officer could have believed that the warrant complied with the law and therefore good faith exception did not apply. *Groh v. Ramirez*, 540 U.S. 551 (2004).

Officer obtained a warrant authorizing search of a person and "the premises known as 2036 Park Avenue, Third Floor Apartment." They reasonably believed there was only one apartment but after discovering contraband they discovered there were two apartments. Because the mistake was objectively reasonable, suppression of the evidence is not required. *Maryland v. Garrison*, 480 U.S. 79 (1987).

Court order to compel suspect to undergo surgery requiring general anesthesia to remove bullet from suspect's chest for use as evidence held to violate Fourth Amendment even though probable cause existed. Severe intrusion on interests of suspect weighed more than need of prosecution in view of other evidence connecting suspect to the robbery. *Winston v. Lee*, 470 U.S. 753 (1985).

Mere fact that there is probable cause to believe that a person committed an offense does not, without more, establish probable cause to search his residence. *State v. Ozuna*, 88 S.W.3d 307 (Tex. App. - San Antonio 2002, pet. ref'd) (information establishing that the defendant carried heroin on his person is insufficient to establish probable cause with regard to the defendant's residence).

It is permissible for the police to obtain a search warrant to take a blood sample from a defendant involved in an accident. Implied consent law of Chapter 724 of the Transportation Code is not the exclusive means of obtaining a blood sample. *Beeman v. State*, 86 S.W.3d 613 (Tex. Crim. App. 2002).

Affidavit provided probable cause to support issuance of warrant to search residence for drugs, where affidavit stated that a law enforcement officer who drove past residence smelled a strong chemical odor that he associated with manufacture of methamphetamine, allowed reasonable inferences that officer was a local police officer and could recognize odor emitted from a methamphetamine laboratory, and included tip that described a chemical odor emitting from residence and information from confidential informants that defendant was manufacturing methamphetamine inside residence. *Davis v. State*, 202 S.W.2d 149 (Tex. Crim. App. 2006).

Challenging The Truthfulness of Affidavit

A defendant may attack false statements by affiant in search warrant affidavit. There must be allegation of deliberate falsehood or reckless disregard and an offer of proof. If the challenged material is not essential to probable cause no hearing is required. If it is essential and falsity is shown by a balance of probabilities, the warrant must be voided and fruits of the search excluded. *Franks v. Delaware*, 438 U.S. 154 (1978).

In order to challenge the validity of a search warrant on the basis of untruthfulness in the affidavit under *Franks v. Delaware*, the following must be shown:

1. An allegation of deliberate falsehood or reckless disregard for the truth, accompanied by an offer of proof.

2. This allegation must specify the portions of the affidavit that are false and there should be a statement setting out the reasons. *Cates v. State*, 120 S.W.3d 352, 357 (Tex. Crim. App. 2003).

3. The false information must have been necessary to establish probable cause. *Jones v. State*, 907 S.W.2d 850, 856-57 (Tex. App. - Houston [lst Dist.] 1995).

Exceptions to Warrant Requirement

Searches Incident to Valid Arrest

If a search is conducted pursuant to a valid arrest, it is considered reasonable without a warrant. *Chimel v. California*, 395 U.S. 752, 755-59 (1969).

Search at time of arrest of the person and the area immediately around the person is allowed as a search incident to a valid arrest. *Carrasco v. State*, 712 S.W.2d 120 (Tex. Crim. App. 1986). This includes the entire passenger area of a vehicle when a person is arrested who is an occupant of a vehicle. *New York v. Belton*, 453 U.S. 454 (1981). As long as an arrestee was a recent occupant of a vehicle, the officers may search that vehicle incident to the arrest. *Thornton v. United States*, 541 U.S. 615 (2004).

When a person is arrested in a motel room, the police are allowed to search the entire room. *Voelkel v. State*, 717 S.W.2d 314 (Tex. Crim. App. 1986).

Defendant stopped for speeding and issued a citation. The officer conducted a full search of the car and found "pot pipe: and marijuana. The court held that concern for safety during a routine stop does not justify the greater intrusion of a full field type search. *Knowles v. Iowa*, 525 U.S. 113 (1998).

Ordinance makes it a crime to refuse to identify oneself when stopped for conduct warranting further investigation. Arrest for failure to comply authorizes search incident to the arrest. Fruits admissible on charge resulting from search even though ordinance was later held unconstitutional. Search authorized by the arrest not by the ordinance. *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

A search that precedes the arrest and forms a basis for the justification for the arrest cannot

be justified as a search incident to arrest. *Smith v. Ohio*, 494 U.S. 541 (1990).

When a search of a person is justified as search incident to arrest, the police may also search personal effects that are immediately associated with the person. *Snyder v. State*, 629 S.W.2d 930 (Tex. Crim. App. 1982).

Consent Searches

If a person gives free and voluntary consent to search, the search is considered valid. Whether consent was freely and voluntarily given is determined by looking at the totality of the circumstances surrounding the consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Under Texas law, a consent to search must be established by clear and convincing evidence and the burden is on the state. *State v. Ibarra*, 953 S.W.2d 242 (1997). The Fourth Amendment requires the government to establish voluntary consent by a preponderance of the evidence. *See*, *Montanez v. State*, 195 S.W.3d 101 (Tex. Crim. App. 2006) (discussing difference in burden of proof on voluntary consent searches).

An officer does not need to have any reasonable suspicion or probable cause to approach a person and ask for consent to search as long as there is no indication that the subject has no right to refuse. *State v. Carranza*, 162 S.W.3d 407, 409 (Tex. App. - Beaumont 2005).

Dawson v. State, 868 S.W.2d 363 (Tex. App. - Dallas 1993, pet. ref'd) contains a good discussion of some of the common issues in consent searches. *Dawson* stated:

> Several factors are to be examined in order to determine whether an accused freely and voluntarily consented: (1) whether, and to what extent, officers exhibited a show of force; (2) whether the actions of the arresting officers can be classified as flagrant misconduct; (3) whether the police threatened to obtain a search warrant if the detainee did not acquiesce, or whether the police claimed a right to search; (4) whether the police first gave the accused *Miranda* warnings; (5) whether the arrest was made in order to obtain consent; (6) whether the accused knew that he could refuse to allow a search; (7) whether consent was first offered by the accused or was in response to a police request; (3) the accused's education, intelligence, and physical condition; and (9) the proximity of the consent to the arrest, since an intervening time

period can provide a degree of attenuation of the taint. *Frierson v. State*, 839 S.W.2d 841, 851 (Tex. App. - Dallas 1992, pet. ref'd) (citing *Fontenot v. State*, 792 S.W.2d 250, 253-54 (Tex. App. - Dallas 1990, no pet.)).

Any person who has joint control or access over property or other sufficient relationship to the property can validly consent to the search. *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *Swinney v. State*, 529 S.W.2d 70, 71 (Tex. Crim. App. 1975). A third party may consent to a search of jointly controlled property if the person giving consent possesses "common authority" over or other sufficient relationship to the premises. *Matlock*, 415 U.S. at 171, 94 S.Ct. at 993. The United States Supreme Court defined and discussed "common authority" in *Matlock* as follows:

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, *see Chapman v. United States*, 365 U.S. 610 [81 S.Ct. 776, 5 L.Ed.2d 828] (1961) (landlord could not validly consent to the search of a house he had rented to another) [full cite omitted], *Stoner v. California*, 376 U.S. 483 [84 S.Ct. 889, 11 L.Ed.2d 856] (1964) (night hotel clerk could not validly consent to search of customer's room) [full cite omitted] but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id., 415 U.S. at 171 n. 7, 94 S.Ct. at 993 n. 7.

"It is fundamental that the doctrine which recognizes the validity of a third party's consent to a search must be applied guardedly to prevent erosion of the protection of the Fourth Amendment, since it makes no requirement of the existence of probable cause for the search and does not constitute an exception based on necessity . . . Thus it has been held that one who has an equal right of control or possession of premises generally does not thereby have authority to consent to a search of an area on the premises which is set aside for the exclusive use of the other." *See United States v. Poole*, 307 F.Supp. 1185, 1188-89 (E.D.La. 1969).

The State bears the burden of proving the consent was voluntary. *Kolb*, 532 S.W.2d at 90. Mere submission to an officer's claim of lawful authority is not effective consent. *Juarez v. State*, 758 S.W.2d 772, 775 (Tex. Crim. App. 1988); *Kolb*, 532 S.W.2d at 90.

Courts have said that a third party may consent to a search of another's property where, for example, (1) a tenant of a rented storage locker fails to pay the rental price, giving the third party/landlord the right to enter or consent to search his storage locker, *Ferris v. State*, 640 S.W.2d 636, 638 (Tex. App. - El Paso 1982, pet. ref'd),

> or (2) the current, non-estranged spouse of the accused consents to the search of jointly-used premises, *see Burge v. State*, 443 S.W.2d 720, 722 (Tex. Crim. App.), *cert. denied*, 396 U.S. 934, 90 S.Ct. 277, 24 L.Ed.2d 233 (1969); *May*, 780 S.W.2d at 870.
>
> The United States Supreme Court has found consent by third parties ineffective in cases involving a warrantless search of a hotel room rented to a hotel patron, *Stoner v. California*, 376 U.S. 483, 487, 84 S.Ct. 889, 892, 11 L.Ed.2d 856 (1964) (consent to search given by hotel clerk while patron absent); and a warrantless search of a tenant's home, *Chapman v. United States*, 365 U.S. 610, 612-13, 81 S.Ct. 776, 777-78, 5 L.Ed.2d 828 (1961) (permission to search given by landlord). Other court have found violative of the Fourth Amendment and the right to privacy a warrantless search of a government employee's desk where the employee had exclusive use of the desk and the search did not concern an employment-related offense, *United States v. Kahan*, 350 F.Supp. 784, 792 (S.D.N.Y. 1972) (where supervisor consented to search), *rev'd in part on other grounds*, 479 F.2d 290 (2d. Cir. 1973), *rev'd*, 415 U.S. 239, 94 S.Ct. 1179, 39 L.Ed.2d 297 (1974); and a warrantless search of a police officer's work locker where he exhibited an expectation of privacy by storing personal items there and placing a lock on the locker. *United States v. Speights*, 557 F.2d 362, 364-65 (3d. Cir. 1977) (where employer consented to search).

A prior illegal detention or search may invalidate a consent. The State must prove by clear and convincing evidence that the taint inherent in the illegal search or seizure had dissipated by the time the consent was given. *Brick v. State*, 738 S.W.2d 676 (Tex. Crim. App. 1987); *State v. Bagby*, 119 S.W.3d 446, 452 (Tex. App. - Tyler 2003, no pet.). And, in determining whether the taint had sufficiently dissipated, the courts consider such factors as whether 1) temporal proximity between the unlawful seizure and consent given was close, 2) the unlawful seizure brought about police observation of the particular object or which they sought consent to search, 3) the illegal seizure was flagrant police misconduct, 4) the consent was volunteered rather than requested by the officers, 5) the detainee was made fully aware of the fact that he could decline to consent to the search, and 6) the purpose underlying the seizure was to obtain the consent. *Id*.

Consent that is given in a mere peaceful submission to a claim of lawful authority by the police is invalid. *Bumper v. North Carolina*, 391 U.S. 543, 548-550 (1968) (officer claimed to have warrant); *Cisneros v. State*, 165 S.W.3d 853, 858 (Tex. App. - Texarkana 2005, no pet.) (officer

falsely claimed he had authority to obtain warrant).

Consent searches are limited by the scope of the consent. *Bratby v. State*, 675 S.W.2d 582, 584-85 (Tex. App. - Dallas 1984, no pet.) (permission to enter premises is not a consent to conduct search); *State v. Bagby*, 119 S.W.3d 446 (Tex. App. - Tyler 2003, no pet.) (consent given to enter shed to look for firearms did not allow general search).

A person consenting to the search of a residence does not need to have actual authority to consent, so long as the police officer's reliance on the consent is objectively reasonable. *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

An owner of premises occupied by the defendant had authority to consent to the police search when, under the agreement allowing the defendant to occupy the premise, the owner still had authority to use the house. *Balentine v. State*, 71 S.W.3d 763 (Tex. Crim. App. 2002).

A request for counsel should terminate further questions, including requests for consent to search. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

The Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches. Law enforcement officers do not violate the Fourth Amendment prohibition on unreasonable seizures merely by approaching individuals in the confining setting of a bus stopped at a rest area during interstate travel and putting questions to them if they are willing to listen. Even when the law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage provided they do not induce cooperation by coercive means. If a reasonable person would feel free to terminate the encounter, then he or she has not been seized. *United States v. Drayton*, 536 U.S. 194 (2002).

Test to determine whether people on a bus were seized when police officers boarded and

requested to search their luggage was whether they felt free to decline the request or otherwise terminate the encounter. *Florida v. Bostick*, 501 U.S. 429 (1991).

One occupant of a home cannot give consent to search when the other occupant is present and refuses consent. *Georgia v. Randolph*, 547 U.S. 103 (2006).

Actions of law enforcement in searching defendant's home without a search warrant were justified under consent exception to warrant requirement; defendant was cooperative, and aside from his initial lie to detectives, denying knowledge of stolen computer, he answered their questions willingly and courteously, exchange between defendant and police was neither confrontational nor provocative, and when asked, defendant agreed to let detectives enter his home, and thus, defendant voluntarily consented to police entry and search of his home. *Gutierrez v. State*, ____ S.W.3d ____, 2007 WL 1217343 (Tex. Crim. App. 2007).

Defendant's acquiescence to hospital personnel's request for blood draw by holding out her arm, in course of treatment following automobile accident, did not support trial court's finding that defendant refused consent for blood draw, and therefore, taking of blood did not constitute assault upon defendant that would render blood test results inadmissible, in trial for driving while intoxicated (DWI); rather, acquiescence to blood draw constituted consent to same, and there was no testimony indicating that defendant expressly refused to allow blood draw by hospital personnel. *State v. Kelly*, 204 S.W.3d 808 (Tex. Crim. App. 2006).

Plain View Doctrine

If an officer is lawfully on the premises, he is allowed to seize what he views in plain sight. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The plain view doctrine allows seizure of items but not searches of them. *Horton v. California*, 496 U.S. 128 (1990).

In order for an officer to seize items under the plain view doctrine, it must be apparent that the item is contraband or evidence of a crime. *Sullivan v. State*, 626 S.W.2d 58, 60 (Tex. Crim. App. 1981).

It was error to admit incriminating contents of greeting card read during search for marihuana, under plain view exception, where when the greeting card was removed from the envelope it was not "immediately apparent" the card contained evidence of criminal activity; the reading of the message was an unreasonable search and contents were inadmissible. *Joseph v. State*, 807 S.W.2d 303 (Tex. Crim. App. 1991).

Officer properly searching for one who fired a shot in a building, for victims and for weapons, may not under the plain view doctrine move stereo components, which they only suspected to be stolen, in order to read and record serial numbers. This constituted an intrusion not justified by the exigency authorizing the entry. Officers could read the numbers only if it was not necessary to move the items. The "immediately apparent" requirement of the plain view doctrine to authorize seizure requires probable cause. Reasonable suspicion not enough. *Arizona v. Hicks*, 480 U.S. 321 (1987).

The following have been found not to be immediately apparent to the officers as contraband or evidence of a crime. Guns, *William v. State*, 743 S.W.2d 642 (Tex. Crim. App. 1988); photographic negatives, *Nicholas v. State*, 502 S.W.2d 169, 172 (Tex. Crim. App. 1973); pillbottle, *Sullivan v. State*, 626 S.W.2d 58 (Tex. Crim. App. 1981).

Plain Feel Doctrine

The plain view doctrine extends to "plain feel." An officer properly patting down a suspect validly stopped under *Terry v. Ohio*, 392 U.S. 1 (1968), in search for weapons may seize an object whose contour and mass make it immediately apparent it is a sizable object. The patdown, however,

must be limited to a search for weapons and the officer may not extend the "feel" beyond that necessary to determine if it is a weapon. *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

Community Caretaking Function

Community caretaking by the police is recognized as a legitimate function of law enforcement and is an exception to the Fourth Amendment. *Cady v. Dombrowski*, 413 U.S. 433 (1973).

As part of his duty to "serve and protect," a police officer may stop and assist an individual whom a reasonable person, given the totality of the circumstances, would believe is in need of help. In determining whether a police officer acted reasonably in stopping an individual to determine if he needs assistance, the following factors are relevant to said determination:

(1) the nature and level of the distress exhibited by the individual;

(2) the location of the individual;

(3) whether or not the individual was alone and/or had access to assistance independent of that offered by the officer; and

(4) to what extent the individual, if not assisted, presented a danger to himself or others. *Wright v. State*, 7 S.W.3d 148 (Tex. Crim. App. 1994).

When the officer's exercise of his community caretaking function is not reasonable, the seizure is invalid. *Corbin v. State*, 85 S.W.3d 272 (Tex. Crim. App. 2002) (defendant's car merely crossed the side stripe on the road for one second and no other driving problems); *Wiede v. State*, 157 S.W.3d 87 (Tex. App. - Austin 2005) (emergency did not justify law enforcement intrusion when defendant was not alone, had access to assistance other than police and the person did not present a danger to himself or others).

The community caretaking exception applies to search of houses. *Laney v. State*, 117 S.W.

3d 854 (Tex. Crim. App. 2003).

Exigent Circumstances

Under limited circumstances, the exigencies of a situation may make a warrantless search permissible.

When officers are in hot pursuit of an armed and fleeing felon, they may enter and search a house. *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

If officers have a reasonable belief that suspects may destroy evidence or escape in the time it would take to obtain a warrant, a warrantless search may be permitted. *Wooten v. State*, 623 S.W.2d 357, 358-59 (Tex. Crim. App. 1981).

If there is a reasonable belief that absent an immediate search, death or serious bodily harm may result, a search warrant is not necessary. *Brimage v. State*, 918 S.W.2d 466 (Tex. Crim. App. 1994); *Laney v. State*, 117 S.W.3d 854 (Tex. Crim. App. 2003).

The state must show that the officers reasonably believed an emergency existed. *Janicek v. State*, 634 S.W.2d 687, 691 (Tex. Crim. App. 1982).

Exigent circumstances exist when officers are justified in believing that evidence or contraband will be destroyed before they can obtain a search warrant. Several factors are used in analyzing whether officers could have reasonably concluded that evidence would be destroyed or removed before they could obtain a search warrant: (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) a reasonable belief that the contraband is about to be removed; (3) the possibility of danger to the officers guarding the site of the contraband while a search warrant is sought; (4) information indicating that the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in

the narcotics traffic. *McNairy v. State*, 835 S.W.2d 101, 106 (Tex. Crim. App. 1991).

Inventory Searches

Law enforcement authorities who have lawfully acquired possession of a vehicle have the right to inventory its contents as part of their caretaking responsibility. *Backer v. State*, 656 S.W.2d 463, 464 (Tex. Crim. App. 1983).

An inventory search is only reasonable if conducted for purposes of an inventory and may not be used by the police as a "ruse for a general rummaging." *Florida v. Wells*, 495 U.S. 1, 3-5 (1990).

Closed container found during inventory search may be opened if police department policy authorizes the opening of containers. *Florida v. Wells*, 495 U.S. 1, 3-5 (1990).

The following factors are considered in determining the reasonableness of an impoundment after a custodial arrest: (1) whether someone was available at the scene of the arrest to whom the police could have given possession of the vehicle, (2) whether the vehicle was impeding the flow of traffic or was a danger to public safety, (3) whether the vehicle was locked, (4) whether the detention of the arrestee would likely be of such duration as to require the police to take protective measures, (5) whether there was some reasonable connection between the arrest and the vehicle, and (6) whether the vehicle was used in the commission of another crime. *Gords v. State*, 824 S.W.2d 785, 787-788 (Tex. App. - Dallas 1992, pet. ref.) (impoundment of defendant's car violated Tex. Const. Art. 1, §9 when there were other people at arrest site to whom car could have been given, car was locked and security alarm activated, and there was no evidence car contained contraband or was used in commission of another crime).

Protective Searches

A protective sweep is a quick and limited search of a premises, incident to an arrest and

conducted to protect the safety of police officers or others. As an incident to arrest in a dwelling, officers may, without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of the arrest from which an attack could be immediately launched. *Maryland v. Buie*, 494 U.S. 325 (1990).

Texas has adopted the test for protective sweeps set out in *Maryland v. Buie* in *Reasor v. State*, 12 S.W.3d 813 (Tex. Crim. App. 1999).

An officer may make a warrantless protective sweep of an area if he has specific and articulable facts that a person could be in the area that poses a danger to the officer. *Newhouse v. State*, 53 S.W.3d 765 (Tex. App. - Houston [lst Dist.] 2001, no pet.) (defendant arrested outside of area searched).

In *Newhouse*, the court stated:

> There are actually two types of checks police officers can conduct arising from safety concerns, a cursory check and a protective sweep. *See e.g., Simpson v. State*, 709 S.W.2d 797, 802-03 (Tex. App. - Fort Worth 1986, no pet.) (holding a cursory check of defendant's bedroom not justified where police found marijuana in kitchen); *Reasor v. State*, 12 S.W.3d 813, 815 (Tex. Crim. App. 2000) (holding a protective sweep of house not justified where police arrested defendant in driveway).

School Searches

Fourth Amendment applies to searches by public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Coronado v. State*, 835 S.W.2d 636 (Tex. Crim. App. 1992). However, school officials are not required to obtain a warrant.

Test to determine reasonableness of a school search is, first, was the search justified at its inception and, second, was the search, as actually conducted, reasonably related in scope to the circumstances which justified the interference in the first place. *New Jersey v. T.L.O.*; *Coronado v. State*.

Administrative Searches

Warrantless inspections of business premises in certain highly regulated industries may be valid exceptions to the Fourth Amendment warrant requirement if three criteria are met. First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection or warrantless search is made. Second, the warrantless inspection must be necessary to further the regulatory scheme. Third, the statutory provision must provide a constitutionally adequate substitute for a warrant so as to limit the discretion of the officers performing the inspection. *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *Santikos v. State*, 836 S.W.2d 631 (Tex. Crim. App. 1992).

Border Searches

Travelers entering the United States may be stopped at the border and routine warrantless searches and seizures may be conducted without probable cause or reasonable suspicion. *United States v. Montoya de Hernandez*, 473 U.S. 531, 533 (1985); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973).

No right of roving patrol to stop and question auto occupants when only basis is they appear to be Mexican. Except for border or functional equivalent, stops may be made only on facts warranting reasonable suspicion. Even then only relevant questions are allowed, but no search is permissible without probable cause or consent. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

Stops and questioning at permanent checkpoint without any individualized suspicion is permissible. Warrant not required for checkpoints. Searches are not permitted except on consent or probable cause. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

No violation of Fourth Amendment for customs officer to open incoming international mail

on reasonable cause to suspect contraband. Incoming international mail is subject to same rules as border search. *United States v. Ramsey*, 431 U.S. 606 (1977).

Fourth Amendment allows detention at the border of a person reasonably suspected of smuggling contraband in her alimentary canal for the time necessary to verify or dispel the suspicion (here 16 hours). *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985).

Respondent was stopped while crossing the Mexican/American border. An inspector tapped the gas tank, which then elicited a solid sound. There had been over 4,500 instances during the preceding five years where drugs had been found in the as tank of automobiles. The respondent and the vehicle were held for approximately an hour during which a mechanic was called and, the gas tank was dropped, inspected and replaced. During the process over 37 kilograms of marijuana were found in the tank. Question was whether it was necessary to have "reasonable suspicion" to hold the vehicle and conduct the search. Supreme Court held that no such showing of reasonable suspicion is required in a case of this kind. The court held that border searches reasonably carried out to protect the country's territorial integrity are *per se* justified. The court concluded that delays of one or two hours at international borders "are to be expected" and therefore are not deemed to be unreasonable. *United States v. Flores-Montano*, 541 U.S. 149 (2004).

Automobile Exception

Under the automobile exception to the search warrant requirement, an officer may search a motor vehicle, without a warrant, if the officer has probable cause to believe the vehicle contains evidence of a crime. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Amos v. States*, 819 S.W.2d 156 (Tex. Crim. App. 1991). Exigent circumstances not required. *Maryland v. Dyson*, 527 US. 465 (1999).

The reason for the vehicle exception to the warrant requirement is the mobility of the vehicle

and the fact that a person in a vehicle has a lower expectation of privacy. *California v. Carney*, 471 U.S. 386 (1985).

Roadblocks

Roadblock checkpoints used to stop a given number of vehicles, as they arrived in sequence, with the intent of interdicting drugs, absent particularized suspicion regarding the vehicles stopped, do not pass the Fourth Amendment muster. The court distinguished prior decisions regarding checkpoints established to prevent illegal immigration and those designed to observe drivers who may be under the influence of alcohol. *City of Indianapolis v. Edmond*, 531 U.S. 32 383 (2000). *See also*, *United States v. Martinez-Fuerte*, 428 U.S. (1976); *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).

Roadblock set up to obtain information from motorists about a hit and run accident that had occurred one week earlier at same location permitted. *Illinois v. Lidster*, 540 U.S. 419 (2004).

Search Pursuant to Investigative Stop

When an officer has reasonable suspicion based on articulable facts that criminal activity is afoot and a certain person is connected with the activity, the officer may make an investigative stop of that person even though grounds for arrest do not exist. *Terry v. Ohio*, 392 U.S. 1 (1968).

An officer may only detain a person if there is reasonable suspicion to believe that the person is engaged in criminal activity. Once the officer concludes the investigation and resolves the suspicious questions, a continued detention is not allowed. *Davis v. State*, 947 S.W.2d 240 (Tex. Crim. App. 1997); *United States v. Santiago*, 310 F.3d 336 (5th Cir. 2002).

Failure of police officer to provide the court with specific facts that led him to believe the defendant violated the law will result in a finding of insufficient factual basis to support reasonable suspicion. *Ford v. State*, 158 S.W.3d 488 (Tex. Crim. App. 2005).

It was error to deny motion to suppress evidence seized after illegal stop where the stop was for making a single swerve over a white line, into a lane of traffic traveling the same direction, and movement was not shown to be unsafe or dangerous. This was not a traffic violation. No merit to state's contention stop was justified under community-caretaking function; single swerve was too minor for officer to reasonably believe defendant was falling asleep and in need of assistance. *Eichler v. State*, 117 S.W.3d 897 (Tex. App. - Corpus Christi 2003).

It was error to deny motion to suppress evidence obtained after illegal stop where officers had received anonymous tip of vehicle traveling southbound in northbound lane, but officers personally saw defendant do nothing wrong, so there was nothing to corroborate anonymous tip. *Hall v. State*, 74 S.W.3d 521 (Tex. App. - Amarillo 2002).

An anonymous tip, without more, will not provide a sufficient basis for a *Terry* stop. *Johnson v. State*, 146 S.W.3d 719 (Tex. App. - Texarkana 2004, no pet.).

Police reasonably suspected, based on specific and articulable facts, that defendant was selling crack cocaine in a public place so as to justify initial stop and detention to further investigate defendant's behavior; police had information from a reliable informant that defendant was selling crack cocaine in a specifically-described drug trafficking area of town which was exactly where the police found him minutes after receiving this information, and police knowledge of defendant's past illegal drug activity, including his arrest for similar activity a day or two before, and his nervousness when they approached him were other specific and articulable circumstances supporting a finding that the police reasonably suspected that defendant was selling crack cocaine. *Griffin v. State*, 215 S.W.3d 403 (Tex. Crim. App. 2006).

Officer was objectively justified in frisking defendant for weapons; police had information from a reliable informant that defendant was selling crack cocaine in a specifically-described drug

trafficking are of town which was exactly where the police found him minutes after receiving this information, defendant had been arrested for similar activity a day or two before, defendant acted nervous when he saw the police approaching him, and defendant moved his hand toward his pocket during officer's investigative detention. *Griffin v. State*, 215 S.W.3d 403 (Tex. Crim. App. 2006).

Officers Geographical Jurisdiction

In *Kurtz v. State*, 152 S.W.3d 72 (Tex. Crim. App. 2004), the court held that city police officers had citywide jurisdiction. In 2005, the legislature amended Art. 14.03(g) to provide that city officers have country-wide jurisdiction.

Warrantless Arrests

Texas statutory law is more stringent in the requirements for a warrantless arrest than Federal Constitutional law. An arrest made without a warrant is deemed to be unreasonable unless specifically authorized by statute and the statute is to be strictly construed. *Honeycutt v. State*, 499 S.W.2d 662, 664 (Tex. Crim. App. 1973).

Art. 14.01. Offense Within View

> (a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.
> (b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Art. 14.02. Within View of Magistrate

> A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate verbally orders the arrest of the offender.

Art. 14.03. Authority of Peace Officers

> (a) Any peace officer may arrest, without warrant:
> (1) persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under section 49.02, Penal Code, or

threaten, or are about to commit some offense against the laws;

(2) persons who the peace officer has probable cause to believe have committed an assault resulting in bodily injury to another person and the peace officer has probable cause to believe that there is danger of further bodily injury to that person;

(3) persons who the peace officer has probable to believe have committed an offense defined by Section 25.07, Penal Code (violation of Protective Order), or by Section 38.112, Penal Code (violation of Protective Order issued on basis of sexual assault), if the offense is not committed in the presence of the peace officer;

(4) person who the peace officer has probable cause to believe have committed an offense involving family violence;

(5) persons who the peace officer has probable cause to believe have prevented or interfered with an individual's ability to place a telephone call in an emergency, as defined by Section 42.062(d), Penal Code, if the offense is not committed in the presence of the peace officer; or

(6) a person who makes a statement to the peace officer that would be admissible against the person under Article 38.21 and establishes probable cause to believe that the person has committed a felony.

(b) A peace officer shall arrest, without a warrant, a person the peace officer has probable cause to believe has committed an offense under Section 25.07, Penal Code (violation of Protective Order), or Section 38.112, Penal Code (violation of Protective Order issued on basis of sexual assault), if the offense is committed in the presence of the peace officer.

(c) If reasonably necessary to verify an allegation of a violation of a protective order or of the commission of an offense involving family violence, a peace officer shall remain at the scene of the investigation to verify the allegation and to prevent the further commission of the violation or of family violence.

(d) A peace officer who is outside his jurisdiction may arrest, without warrant, a person who commits an offense within the officer's presence or view, if the offense is a felony, a violation of Chapter 42 or 49, Penal Code, or a breach of the peace. A peace officer making an arrest under this subsection shall, as soon as practicable after making the arrest, notify a law enforcement agency having jurisdiction where the arrest was made. The law enforcement agency shall then take custody of the person committing the offense and take the person before a magistrate in compliance with Article 14.06 of this code.

(e) The justification for conduct provided under Section 9.21, Penal Code, applies to a peace officer when the peace officer is performing a duty required by this article.

(f) In this article, "family violence" has the meaning assigned by Section 71.004, Family Code.

(g)(1) A peace officer listed in Subdivision (1), (2), or (5), Article 2.12, who is licensed under Chapter 1701, Occupations Code, and is outside the officer's jurisdiction may arrest without a warrant a person who commits any offense within the officer's presence or view, other than a violation of Subtitle C, Title 7, Transportation Code.

(2) A peace officer listed in Subdivision (3), Article 2.12, who is licensed under Chapter 1701, Occupations Code, and is outside of the officer's jurisdiction may

arrest without a warrant a person who commits any offense within the officer's presence or view, except that an officer described in this subdivision who is outside of that officer's jurisdiction may arrest a person for a violation of Subtitle C, Title 7, Transportation Code, only if the offense is committed in the county or counties in which the municipality employing the peace officer is located.

(3) A peace officer making an arrest under this subsection shall as soon as practicable after making the arrest notify a law enforcement agency having jurisdiction where the arrest was made. The law enforcement agency shall then take custody of:

(A) the person committing the offense and take the person before a magistrate in compliance with Article 14.06; and

(B) any person seized during or after the arrest as if the property had been seized by a peace officer of that law enforcement agency.

Art. 14.031. Public Intoxication

(a) In lieu of arresting an individual who commits an offense under Section 49.02, Penal Code, a peace officer may release an individual if:

(1) the officer believes detention in a penal facility is unnecessary for the protection of the individual or others; and

(2) the individual:

(A) is released to the care of an adult who agrees to assume responsibility for the individual; or

(B) verbally consents to voluntary treatment for chemical dependency in a program in a treatment facility licensed and approved by the Texas Commission on Alcohol and Drug Abuse, and the program admits the individual for treatment.

(b) A magistrate may release from custody an individual arrested under Section 49.02, Penal Code, if the magistrate determines the individual meets the conditions required for release in lieu of arrest under Subsection (a) of this article.

(c) The release of an individual under Subsection (a) or (b) of this article to an alcohol or drug treatment program may not be considered by a peace officer or magistrate in determining whether the individual should be released to such a program for a subsequent incident or arrest under Section 49.02, Penal Code.

(d) A peace officer and the agency or political subdivision that employs the peace officer may not be held liable for damage to persons or property that results from the actions of an individual released under Subsection (a) or (b) of this article.

Art. 14.04. When Felony Has Been Committed

Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

Art. 14.05. Rights of Officer

> In each case enumerated where arrests may be lawfully made without warrant, the officer or person making the arrest is justified in adopting all the measures which he might adopt in cases of arrest under warrant, except that an officer making an arrest without a warrant may not enter a residence to make the arrest unless:
> (1) a person who resides in the residence consents to the entry; or
> (2) exigent circumstances require that the officer making the arrest enter the residence without the consent of a resident or without a warrant.

Art. 14.051. Arrest By Peace Officer From Other Jurisdiction

> (a) A peace officer commissioned and authorized by another state to make arrests for felonies who is in fresh pursuit of a person for the purpose of arresting that person for a felony may continue the pursuit into this state and arrest the person.
> (b) In this article, "fresh pursuit" means a pursuit without unreasonable delay by a peace officer of a person the officer reasonably suspects has committed a felony.

Art. 14.06. Must Take Offender Before Magistrate

> (a) Except as provided by Subsection (b), in each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall take the person arrested or have him taken without unnecessary delay, but not later than 48 hours after the person is arrested, before the magistrate who may have ordered the arrest, before some magistrate of the county where the arrest was made without an order, or, to provide more expeditiously to the person arrested the warnings described by Article 15.17 of this Code, before a magistrate in any other county of this state. The magistrate shall immediately perform the duties described in Article 15.17 of this Code.
> (b) A peace officer who is charging a person, including a child, with committing an offense that is a Class C misdemeanor, other than an offense under Section 49.02, Penal Code, may, instead of taking the person before a magistrate, issue a citation to the person that contains written notice of the time and place the person must appear before a magistrate, the name and address of the person charged, and the offense charged.

An offense is deemed to have occurred within the presence or view of an officer when any of his senses afford him an awareness of its occurrence. However, the information afforded to the officer by his senses must give the officer reason to believe that *a particular suspect* committed the offense. The odor of marijuana, standing alone, does not authorize a warrantless search and seizure in a home. *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002).

When there has been some cooperation between law enforcement agencies or between members of the same agency, the sum of the information known to the cooperating agencies or officers at the time of an arrest or search by any of the officers involved is to be considered in determining whether there was sufficient probable cause. *Woodward v. State*, 668 S.W.2d 337, 344 (Tex. Crim. App. 1982).

The term breach of the peace is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community; a disturbance of the public tranquility by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of the public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm disturbs the peace and quiet of the community. *Henderson v. State*, 600 S.W.2d 788, 790-91 (Tex. Crim. App. 1979).

Driving while intoxicated is a breach of the peace. A hospital where the defendant was arrested for driving while intoxicated soon after he was transported there after an accident was a "suspicious place" under Article 14.03(a)(1). Appellant's home, where he was arrested for driving while intoxicated soon after he walked there after abandoning his wrecked truck at the scene of an accident was a "suspicious place" under Article 14.03(a)(1). *Gallups v. State*, 151 S.W.3d 196, 201 (Tex. Crim. App. 2004).

A finding of suspicious circumstances in Art. 14.03(a)(1) requires a finding of exigent circumstances. If the circumstances raise a reasonable belief that calls for immediate action by the police, then the area in which the defendant is found constitutes a "suspicious place." *Gallups v. State*, 151 S.W.3d 196 (Tex. Crim. App. 2004).

The test under Article 14.03(a)(1) is a totality of the circumstances test. First, probable cause

that the defendant committed a crime must be found and second, the defendant must be found in a "suspicious place." *Dyar v. State*, 125 S.W.3d 460, 468 (Tex. Crim. App. 2003).

The "hot pursuit" of a suspect outside a peace officer's jurisdiction doctrine does not apply only "where a police officer has the right to arrest" Under the "hot pursuit" doctrine, the relevant consideration is whether the initial "pursuit" was "lawfully initiated on the ground of suspicion." *Yeager v. State*, 104 S.W.3d 103, 106 (Tex. Crim. App. 2003).

An anonymous call concerning defendant provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation made by the anonymous caller about the gun turned out to be correct does not establish that the officers, prior to the frisks, had a reasonable basis for suspecting the defendant of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. The bare report of an unknown, unaccountable informant who neither explained how he knew the information supplied any basis for believing he had inside information is insufficient. *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

Article 14.04 must be strictly construed in the suspect's favor. The law enforcement officer must have some evidence amounting to satisfactory proof that the defendant was about to escape. In interpreting ambiguous behavior by a suspect, it is important to keep in mind the temporal proximity of the actions of the suspect both to the commission of the crime, and to the suspect's discovery of the police investigation of him. Satisfactory proof of escape is not established by the mere fact that a suspect travels from one place to another. *Dowthitt v. State*, 931 S.W.2d 244, 259 (Tex. Crim. App. 1996).

Police broadcasts, based on probable cause, reporting a felony and a description of the suspect satisfy the requirements for arrest under Article 14.04. Article 14.04 does not require a

showing that the offender was in fact about to escape, nor does it require a showing that there was in fact no time to procure a warrant. The statute merely requires a showing that there is *satisfactory proof from representations by a credible person* that the felony offender "is about to escape, so that there is no time to procure a warrant." The police officers themselves may observe conduct which indicates that the offender is about to escape. *Crane v. State*, 786 S.W.2d 338, 346 (Tex. Crim. App. 1990).

There are several factors which can help to indicate that a suspect may be committing, or have just committed, an offense, or that the suspect may be attempting to escape from the commission of the offense. These factors include furtive movements and gestures, flight at the approach of strangers or law officers, the place where a suspect is found and the direction in which he is traveling, and being on a public street instead of in a private residence. These factors are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of the crime, are properly considered in the decision to make an arrest. *Pyles v. State*, 755 S.W.2d 98, 109 (Tex. Crim. App. 1988).

Officer believed the suspect could be seriously endangering the person or persons inside an apartment. He was aware the suspect had already committed one murder and attempted to commit another in the course of a burglary of a home. He was aware the suspect subsequently attempted to enter another residence while still in possession of a knife. Also, the officer heard the woman's voice, sounding frightened, inside the apartment in response to his knock. Then she began screaming. These factors were sufficient exigent circumstances to justify an entry into the residence to complete the warrantless arrest of the suspect. *Fearance v. State*, 771 S.W.2d 486, 510 (Tex. Crim. App. 1988).

Failure to take an arrestee before a magistrate in a timely manner will not invalidate a

confession unless there is proof of a causal connection between the delay and the confession. Even if the delay was unreasonable, the delay will not vitiate an otherwise voluntary confession if the arrestee was properly advised of his Miranda rights. *Jones v. State*, 944 S.W.2d 642, 649 n. 10 (Tex. Crim. App. 1996).

The purpose of taking an accused before a magistrate is for the magistrate to give him the warnings and discharge the duties required by Art. 15.17 of the Code. Such warnings are not prerequisite to the search of the person of the accused. *Corbin v. State*, 426 S.W.2d 238, 240 (Tex. Crim. App. 1968).

Procedural Rules on Motion to Suppress

The defendant must initially show that his privacy rights were violated in an area in which he has a reasonable expectation of privacy and that there was no warrant. *Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004).

The Texas Rules of Evidence do not apply on motions to suppress. *Granados v. State*, 85 S.W.3d 217 (Tex. Crim. App. 2002).

Upon request of the losing party, the trial court is required to enter findings of fact and conclusions of law when ruling on a motion to suppress. When the trial court makes no findings, the appellate court presumes implicit findings that support its decision on the motion to suppress. *State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006).

Recent Supreme Court Cases

Anticipatory Search Warrant

United States v. Grubbs, 547 U.S. 90 (2006).

Issues:

- Whether anticipatory search warrants are unconstitutional.

- Whether the Fourth Amendment requires that a triggering condition for an anticipatory search warrant be set forth in the warrant itself.

Facts: Defendant was arrested for possession of child pornography after police served an anticipatory warrant at his residence and seized a video tape depicting child pornography. The warrant was "anticipatory" because it was conditioned upon defendant's receipt of the video through the mail. Defendant moved to suppress the evidence of the search on the grounds that (1) anticipatory warrants violate the Fourth Amendment, and (2) the search at issue violated the Fourth Amendment because the officers serving the warrant failed to inform defendant of the triggering condition for the warrant. The Ninth Circuit held that the search violated the Fourth Amendment on the ground that the police had to show the triggering events for an anticipatory warrant to the person being searched.

Held: Justice Scalia reversed the judgment of the Ninth Circuit. Justice Souter filed an opinion concurring in part and concurring in the judgment, in which Justices Stevens and Ginsburg joined. Justice Alito did not participate.

The Court held that anticipatory search warrants are not categorically unconstitutional so long as there is probable cause (established by affidavit) at the time the warrant is issued to believe that contraband will be at the place described. The Court further held that the police's failure to show the triggering events for the anticipatory warrant to defendant did not violate the Fourth Amendment. The Court reasoned that the Fourth Amendment specifies only two things that a warrant must describe: (1) the place to be searched, and (2) the persons or things to be seized. Therefore, a warrant does not need to include the triggering event for an anticipatory search warrant to pass constitutional muster.

Third Party Consent Search

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

Issue: Whether a physically present co-inhabitant's refusal to consent to search renders a warrantless search unreasonable under the Fourth Amendment.

Facts: Defendant was charged with possession of cocaine after police discovered cocaine during a warrantless search of his residence. Defendant moved to suppress the cocaine on the ground that he expressly refused to consent to the warrantless search. The district court denied the motion to suppress because the police had obtained the consent of defendant's estranged wife to search the residence. The state court of appeals reversed the trial court's ruling, and the state supreme court affirmed the court of appeals' ruling.

Held: Justice Souter affirmed the Georgia Supreme Court's judgment. Justice Stevens filed a concurring opinion. Justice Breyer filed a concurring opinion. Chief Justice Roberts filed a dissenting opinion, in which Justice Scalia joined. Justice Scalia filed a dissenting opinion. Justice Thomas filed a dissenting opinion. Justice Alito did not participate.

The Court held that a physically present co-inhabitant's refusal to consent to search renders a warrantless search unreasonable under the Fourth Amendment. The Court emphasized its prior holding that overnight houseguests have a legitimate expectation of privacy in their temporary quarters. By that same token, the Court reasoned that a co-inhabitant should have at least as much of an expectation of privacy.

The Court acknowledged that its holding brings into question the significance of prior cases, *i.e*, *United States v. Matlock*, 415 U.S. 164, and *Illinois v. Rodriguez*, 497 U.S. 177. The Court recalled that in *Matlock*, where the search was held to be constitutional, the defendant was not present with an opportunity to object to the search. However, he was in a police car not far away.

In *Rodriguez*, the defendant was asleep in the residence, and the police might have awakened him and requested consent before they entered with only the consent of the co-inhabitant. Accordingly, the Court drew what it admitted to be a thin line: "[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."

Knock and Announce

Hudson v. Michigan, 126 S. Ct. 2159 (2006).

Issue: Whether a violation of the knock-and-announce rule requires suppression of all evidence found in the search.

Facts: Defendant was charged with drug possession after police executed a search warrant at his home and discovered drugs. Defendant moved to suppress the drugs on the ground that the police violated the Fourth Amendment's knock-and-announce rule, which requires police to wait 20-30 seconds after knocking and announcing their presence before entering the home. The trial court granted defendant's motion, but the state court of appeals reversed the trial court's ruling on interlocutory appeal. The Michigan Supreme Court declined review.

Held: Justice Scalia affirmed the state appellate court's judgment. Justice Kennedy filed an opinion concurring in part and concurring in the judgment. Justice Breyer filed a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined.

The Court first noted that the State did not dispute the violation of the knock-and-announce rule. The Court then reviewed the public policy considerations underlying the knock-and-announce rule: (1) an unannounced entry may provoke violence from the surprised resident; (2) an unannounced entry might result in the destruction of the door, whereas the resident would most often

open the door upon the knock and announce; and (3) "those elements of privacy and dignity that can be destroyed by sudden entrance." Because the interests that were violated as a result of the failure to knock and announce had nothing to do with the seizure of the evidence, the Court declined to apply the exclusionary rule.

In holding that the violation of the rule did not require suppression, the Court emphasized that the exclusionary rule is applied only "where its deterrence benefits outweigh its substantial social costs." Notably, the Court held that suppression of the evidence was not necessary to deter the police from violating the knock-and-announce rule. Instead, the Court noted that sufficient deterrence already exists in the form of civil rights suits and internal police discipline.

Search of Parolee

Samson v. California, 126 S. Ct. 2193 (2006).

Issue: Whether a suspicion-less search of a California parolee violated the Fourth Amendment.

Facts: Defendant-parolee was charged with drug possession after a police officer detained and searched him. The search was warrantless, and the officer conceded that he stopped and searched defendant only because he knew he was a parolee. Defendant moved to suppress the drugs under the Fourth Amendment, and the trial court denied the motion. Defendant was ultimately convicted, and the state court of appeals affirmed the judgment. The State Supreme Court declined to review the case.

Held: Justice Thomas affirmed the state court of appeals' judgment. Justice Stevens filed a dissenting opinion, in which Justices Souter and Breyer joined.

The Court began by noting that the defendant had signed an agreement to be subject to search and seizure without or without a warrant or probable cause as a condition of his parole. The Court also emphasized that a parolee has "severely diminished" privacy expectations because the parolee

is still completing the terms of his sentence, only he is doing so out of physical custody. The Court also acknowledged the State's "overwhelming interest" in supervising parolees because of the likelihood that they will commit future crimes. In holding that the search at issue did not violate the Fourth Amendment, the Court acknowledged that some states and the federal government require an individualized level of suspicion separate and apart from the Fourth Amendment before searching a parolee.