

Driving While Intoxicated Case Law Update



Jessica L. Frazier
Vehicular Crimes Task Force, Chief
Bexar County District Attorney's Office

jfrazier@bexar.org

210.335.2308

Charging Issues



Defendant: DEONDRE J JENKINS

JN #: 1573311-1

CLERK'S ORIGINAL

Address: 2469N N 37TH ST, MILWAUKEE, WI 53210-3045

Complainant: [REDACTED]

CoDefendants:

581181

Offense Code/Charge: Continuous Trafficking of Persons—25-Life

G.J: 572027

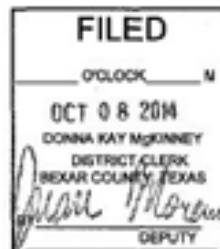
PH Court:

Court #: 186

SID #: 1008391

Cause #: 2014 CR 8396

Witness: State's Attorney



TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS, the Grand Jury of Bexar County, State of Texas, duly organized, empaneled and sworn as such at the September term, A.D., 2014, of the 186 Judicial District Court of said County, in said Court, at said term, do present in and to said Court that in the County and State aforesaid, and anterior to the presentment of this indictment:

Count I

on or about the 15th day of February, 2012, through the 15th day of December, 2013, a period of thirty days or more in duration, in Bexar County, Texas, the defendant engaged two or more times in conduct that constitutes an offense under Section 20A.02—Trafficking of Persons against [REDACTED] and [REDACTED]; in that

1. The defendant knowingly trafficked [REDACTED] and through force, fraud or coercion, caused [REDACTED] to engage in conduct prohibited by Section 43.02—Prostitution; and
2. The defendant knowingly received a benefit from participating in a venture that involved trafficking [REDACTED] and through force, fraud and coercion caused her to engage in conduct prohibited by Section 43.02—Prostitution; and
3. The defendant knowingly trafficked [REDACTED], a child, and by any means caused [REDACTED] to engage in or become the victim of conduct prohibited by Section 43.05—Compelling Prostitution; and
4. The defendant knowingly received a benefit from participating in a venture that involved trafficking [REDACTED], a child, and by any means caused [REDACTED] to engage in or become the victim of conduct prohibited by Section 43.05—Compelling Prostitution;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Foreman of the Grand Jury

INDICTMENT – CLERK'S ORIGINAL

Ch

Jenkins v.

District, S

• Tex. Co

• Indictm

• Caption

nt

774 (4th

person”

Alleging Intoxication



Which Definition to Use?

- The State no longer has to specify which definition of Intoxication it is relying on in the information
 - State v. Barbernell, 257 S.W.3d 248 (Tex. Crim. App. 2008)
 - The 2 definitions provide alternative means that State can prove intoxication
 - Once you have said “Intoxication” you have said it all.

Element or Enhancement?



Element or Enhancement?

- Penal code section 49.04(d)
 - Element: “the forbidden conduct, the required culpability, any required result, and the negation of any exception to the offense”
 - Enhancement: “a fact that increases the punishment range...”
- **Navarro v. State**, 469 S.W.3d 687 (Tex. App. – Houston [14th Dist.] 2015)
 - ELEMENT – because this represents a change in the degree of offense, rather than just the enlargement of the punishment range for a Class B misdemeanor
- **Castellanos v. State** 2016 Tex. App. LEXIS 11587 (Tex. App. – Corpus Christi – Edinburg (13th Dist) 2016)
- **Pallares-Ramirez v. State**, No. 05-15-01347-CR, 2017 Tex. App. LEXIS 3, 2017 WL 33738 (Tex. App. - Dallas 2017)

Basis for Stop



Operation



Operation

- Not defined by Penal Code
- The CCA had held:
 - ***The TOC must demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use.***
 - **Denton v. State**, 911 S.W.2d 388 (Tex. Crim. App. 1995)
 - Driving does involve operation, **operation does not involve driving**
 - Any action that is **more than** mere preparation

Operating = Legally Sufficient

- **Murray v. State**, 457 S.W.3d 446 (Tex. Crim. App.2015)
 - Vehicle parked on side of the road
 - Partially in a private drive
 - D was asleep in driver's seat
 - Engine running
 - No one else present
 - No open containers ***
 - Odor of alcohol
 - D appeared intoxicated and admitted to drinking

Operating = Legally Sufficient

- **Anderson v. State**, No. 02-15-00405-CR, 2016 WL 1605330 (Tex. App. – Fort Worth)
 - D asleep in vehicle
 - Oddly parked (head on across two spaces)
 - Engine running, headlights on, vehicle in park
 - Parking lot of bar at 3:24 am
 - Strong odor of alcoholic beverage
 - D reached for gearshift
 - No alcohol found in vehicle

“Fog Line”



- **State v. Cortez**, NO. PD-0228-17, CCA (512 S.W.3d 915 (Tex. App. – Amarillo 2017))
- Cortez was stopped for driving on the improved shoulder because his tires touched the “fog line”.
- Driving on an improved shoulder requires more than the mere touching of the fog line
- If touch fog line **without any other indicator of criminal activity** = not enough to justify stop

Transportation Code 545.058(a)

- The offense of illegally driving on an improved shoulder can be proved in one of two ways:
 - driving on the improved shoulder was not a **necessary** part of achieving one of the seven approved purposes, **or**
 - driving on the improved shoulder could not have been done **safely**.



Case Law

- **State v. Tarvin**, 972 S.W.2d 910 (Tex. App. – Waco 1998)
- **State v. Dietiker**, 345 S.W.3d 426 (Tex. App. – Waco 2011)
- **Stegal v. State**, No. 05-16-00098-CR, 2017 WL 1536516 (Tex. App. – Dallas 2017)

Failure to Maintain Single Lane = Reasonable Suspicion?



FMSL = Reasonable Suspicion?

- **Transportation Code 545.060**
 - (a) An operator on a roadway divided into two or more clearly marked lanes for traffic:
 - (1) Shall drive as nearly as practical entirely within a single lane; and
 - (2) may not move from the lane unless that movement can be made safely
- **Hernandez v. State**, 983 S.W.2d 867 (Tex. App. – Austin 1998)
 - Based on 1947 construction of Transportation Code
 - A driver must **BOTH** fail to maintain a single lane and do not change lanes unless safe to do so before it commits an offense
 - Up to this point, most courts have adopted this interpretation

FMSL = Reasonable Suspicion = YES

- **Leming v. State:**

- Based on codification in 1995

- Rejected Hernandez interpretation

- Compared statutory construction to FSRA

- **It is an offense to:**

- **Change lanes when unsafe to do so; AND/OR**

- **Fail to remain entirely within a marked lane of traffic so long as it remains practical to do so; REGARDLESS of whether the deviation from the marked lane UNSAFE**

CAUTION

- *State v. Bernard*, No. 14-15-00822-CR, Tex. App – Houston [14th Dist.] November 2106
 - The 14th COA declined to apply the plurality decision in *Leming v. State* (even though the concurring judges agreed with the plurality’s analysis)
 - It applied *Hernandez v. State*
- Keep your eye on this

Attempts to Exclude Blood



The History

- Mandatory Blood Draws
 - TRC 724.012
 - SBI or Death
 - Bodily injury and transported to hospital
 - DWI w/ Child
 - Previous conviction for DWI w/ Child, Intoxication Assault or Intoxication Manslaughter
 - DWI 3rd or More

April 2013



Missouri v. McNeely

- The **natural dissipation of alcohol** does NOT present a **per se exigency** that justifies an exception to the 4th Amendment
- Exigency is a **case by case** determination based on the **totality of the circumstances**
- Compelled intrusion into the human body implicates significant constitutional protections
- In order to determine if there are **EXIGENT CIRCUMSTANCES** must look at:
 - Procedures in place to obtain a warrant
 - The availability of a magistrate
 - Practical problems to obtaining a warrant within a reasonable time frame

The *AFTERMATH*



Mandatory Blood Draws = *Excluded*

- State v. Arredondo, No.13-13-00589-CR, 2015 WL 4497431 (Tex.App.–Corpus Christi-Edinburg, 2015)
- State v. Pimentel, No. 08-13-00000-CR, 2015 WL 4554289 (Tex.App.–San Antonio, 2015)
- State v. Rodriguez, No. 13-13-00000-CR, 2015 WL 4527715 (Tex.App.–Dallas, 2015)
- State v. Clendon, No. 13-13-00000-CR, 2015 WL 4719559 (Tex.App.–El Paso, 2015)
- State v. Tercero, No. 13-13-00000-CR, 2015 WL 1119966 (Tex.App.–Houston (1st Dist.), 2015)
- Howard v. State, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Garcia v. State, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- State v. E, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- State v., No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Moore, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Greer, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Richard, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Burcie, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- State v., No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Huff v., No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Perez v., No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Lewis v. S, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Bowyer v. S, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Chidyausiku v., No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Evans v. State, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Bowman v. State, No. 13-13-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- State v. Garcia, 457 S.W.3d 705 (Tex.App.–Dallas, 2015)
- State v. Sandlin, No. 05-14-00000-CR, 2015 WL 1120332 (Tex.App.–Fort Worth, 2015)
- Burks v. State, 454 S.W.3d 705 (Tex.App.–Dallas, 2015)
- Lloyd v State, 12. S.W.3d 544 (Tex.App.–Dallas 2014)
- Cole v. State, 454 S.W.3d 89 (Tex.App.–Texarkana 2014)
- Flores v. State, No. 04-13-00754-CR, 2014 WL 7183481 (Tex.App.–San Antonio 2014, pdr filed.)

The AFTERMATH

- *State v. Villarreal*, 475 S.W.3rd 784 (Tex. Crim. App. 2014)
 - Warrantless blood draws **violate** the 4th Amendment
 - Implied consent still applies **BUT**... not an exception to the warrant requirement
 - Special Needs exception does **NOT** apply
 - Search Incident to Arrest does **NOT** apply
 - **Must have a WARRANT**

Exigent Circumstances

- Ex Parte Hernandez, No. 11-17-00004-CR, 2017 Tex. App. WL 1957549, 2017 WL 1957549 (Tex. App. – Eastland 2017)
- State v. Garcia, No. 08-15-00264-CR, 2017 Tex. App. WL 728367 (Tex. App. – El Paso 2017)
- Dennison v. State, No. 09-15-00525-CR, 2017 Tex. App. WL 218911 (Tex. App. – Beaumont 2017)
- Garza v. State, No. 14-15-00902-CR, 2016 Tex. App. WL 7177710 (Tex. App. – Houston 2016)
- Cosino v. State, No. 13-16-00344-CR, 2016 Tex. App. WL 134461 (Tex. App. – Waco 2016)
- Texas v. Robinson, No. 15-16-00344-CR, 2016 Tex. App. WL 6068251 (Tex. App. – Austin 2016)
- Texas v. Keller, No. 05-16-00344-CR, 2016 Tex. App. WL 4261068 (Tex. App. – Dallas 2016)
- Balkissoon v. State, No. 15-16-00344-CR, 2016 WL 1576240 (Tex. App.-Austin 2016, pdr filed)
- Schneider v. State, No. 03-16-00344-CR, 2016WL 1423591 (Tex.App.-Austin 2016)
- Garcia v. State, No. 14-14-00344-CR, 2015 WL 2250895 (Tex. App. – Houston (14th Dist.) 2015)



Where is Waldo?



Do I need the Nurse? = NO!

- **Confrontation Clause** does **NOT** require State to present nurse who drew blood prior to admission of blood evidence:
 - **Russell v. State**, No. 14-15-00036, 2016 WL 1402943 (Tex. App. – Houston [14th Dist.] 2016)
 - **Adkins v. State**, 418 S.W. 3d 856 (Tex. App. Houston [14th Dist.] 2013)
 - **Villarreal v. State**, No. 04-15-00290-CR, 2016 WL 4376630 (Tex. App. – San Antonio 2016)

Gaps in Chain go to WEIGHT not Admissibility



- **Patel v. State**, No. 2-08-032-CR, 2009 WL 1425219 (Tex. App. – Fort Worth 2009)
- **Penley v. State**, 2 S.W.3d 534 (Tex. App. – Texarkana 1999)
- **Burns v. State**, 807 S.W.2d 878 (Tex. App. – Corpus Christi 1991)

"I DON'T NEED
A WARRANT!"



CARTOONSTOCK
GOM
Search ID: man8308

Challenges to Blood Warrant

- **Martinez v. State**, No. 13-15-0059-CR, 2017
Tex. App. Lexis 6491, Edinburg 2017
 - Seized blood from hospital via GJ summons = OK
 - Sent to lab for testing = SEARCH
 - No warrant = NOT OK
 - **The Court held search violated 4th Amendment, need a warrant**
 - **PDR has been filed**

“At the Time of Driving”



Extrapolation Testimony

- **Mata v. State**, 46 S.W.3d 902 (Tex. Crim. App. 2001)
 - Extrapolation is **NOT necessary** to prove guilt or to get the results in
- **Mata Factors:**
 - Length of time Defendant drinking
 - Time of last drink
 - Defendant's weight
 - Gender
 - Defendant's tolerance
 - How much Defendant drank that night
 - What Defendant ate
 - **Expert must be able to apply the science and explain it with clarity**
 - **Difficulties with retrograde extrapolation**

How many/what Factors are needed?

- **Veliz v. State**, 474 S.W.3d 354 (Tex. App. – Houston [14th Dist.] 2015)
 - *Improperly admitted*: only 1 test, test 3.5 hours after stop, did not know enough characteristics of Defendant
- **Corley v. State**, 2017 Tex. App. LEXIS 10653 (Tex. App. – Houston [14th Dist.] 2017)
 - *Properly admitted*: Expert knew amount of food and time last ate, time of last drink, and time and results of Breath Tests.

Drug Recognition Experts

- DREs are Experts
- Can explain even if they can't give ultimate opinion.
- Fill gap left by Toxicologist
- DRE Reconstruction
- Strengthen officer's testimony



Qualified to Testify

- **Richter v. State**, 482 S.W.3d 288 (*Tex. App. - Texarkana 2015*)
- **Wooton v. State**, 267 S.W.3d 289 (Tex. App. - Houston [14th Dist.] 2008)
- **Everitt v. State**, No. 01-10-00504-CR, 2014 Tex. App. LEXIS 1667, 2014 WL 586100 (Tex. App. – Houston [1st Dist.] 2014)
- **Armstrong v. State**, No. 05-10-01214-CR, 2012 Tex. App. LEXIS 2041, 2012 WL 864778 (Tex. App. – Dallas 2012)

Evidence of the Effects of Drugs



STOP FRYING YOUR BRAIN

THIS IS YOUR
BRAIN ON
DRUGS

Evidence of the effects of Drugs

- Is **testimony** regarding the *type of intoxicant, time of ingestion, quantification of the drug in a defendant's system, and pharmacokinetics of the drug* **required** before the evidence is admissible?
 - **Ashby v. State**, No. 01-15-00182- CR (May 2017)
 - TFMPP (alternative to MDMA)
 - **Gonzalez v. State** (8th COA) No. 08-14-00293 (January 2017)
 - Murder case/self-defense claim

Maybe????

- Both courts said that *it will depend* on the drug in question
 - For **common intoxicants**, such as alcohol and marijuana, a jury's common experience can be enough.
 - However, **for less common drugs**, not having this information could lessen the probative value of the evidence

Investigative Detention vs. Custodial Interrogation



Investigative Detention vs. Custodial Interrogation?

- **Koch v. State**, 484 S.W.3d 482 (Tex. App. – Houston (1st Dist) 2016
 - Suspect placed in back of patrol car for her safety
 - Told not under arrest
 - Transported a short distance before being questioned
- Detained, NOT under Arrest
- Miranda NOT required
- **NOT Custodial Interrogation**

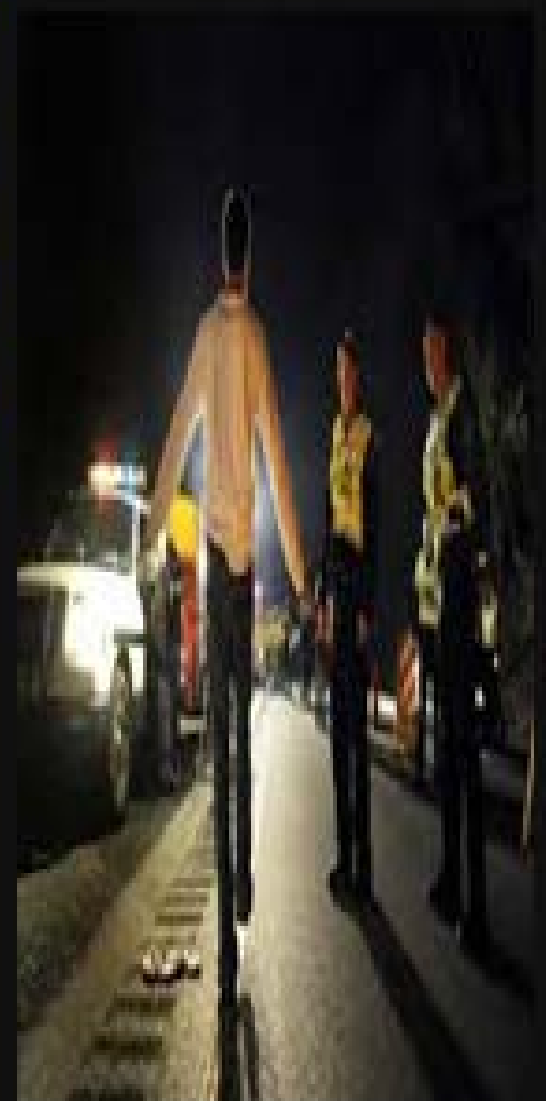
Investigative Detention vs. Custodial Interrogation?

- **Hauer v. State**, 466 S.W.3d 866 (Tex. App. – Houston [14th Dist] 2015)
 - D involved in an accident
 - Handcuffed at scene
 - Placed in back of patrol vehicle to wait for a DWI officer
- Detained, NOT under Arrest
- Miranda NOT required
- **NOT Custodial Interrogation**

Investigative Detention vs. Custodial Interrogation?

- **Raymundo v. State**, No. 07-14-00439, 2015 WL 4999127 (Tex. App. – Amarillo, 2015)
 - Officer responded to a possible accident
 - Found D's truck stopped along shoulder of roadway
 - D asleep behind the wheel, Ignition running, Woke D up, Turned off engine
 - Escorted D to rear of truck
 - Ordered wrecker
 - Determined D could not perform SFSTs
 - BEGAN QUESTIONING the D
- **Custodial Interrogation**

Standardized Field Sobriety Tests



Standardized Field Sobriety Tests

- **Jones v. State**, 795 S.W.2d 171, (Tex. Crim. App. 1990)
- **Chadwick v. State**, 766 S.W.2d 819 (Tex. App. – Dallas 1988)
 - Non-testimonial
 - Collection of physical evidence
 - May be compelled to give physical evidence
 - Shows the condition of the suspect's body
 - Audio need not be excluded
 - Requests to perform SFSTs and directions do not = “interrogation”

Non-Testimonial

Admissible



Questions???



Jessica Frazier
Vehicular Crimes Task Force, Chief
Bexar County District Attorney's Office

jfrazier@bexar.org

210.335.2308