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Supreme Court

***Padilla v. Kentucky*, 559 U.S. 356 (2010), requiring defense attorneys to inform defendants of the deportation risks of guilty pleas, does not apply retroactively to convictions that became final before its announcement.*Chaidez v. United States*, 133 S. Ct. 1103 (2013).**

The Fifth Circuit already so held in *United States v. Amer*, 681 F.3d 211 (5th Cir. 2012).

For purposes of habeas review under 28 U.S.C. §?2254(d), when a state court rules against a defendant in an opinion that rejects some of the defendant?s claims but does not expressly address a federal claim, a federal habeas court must presume that the federal claim was adjudicated on the merits. *Johnson v. Williams*, 133 S. Ct. 1088 (2013).

Federal habeas courts should not assume that any unaddressed federal claim was simply overlooked because state courts do not uniformly discuss separately every claim referenced by a defendant; however, the presumption of merits adjudication may be rebutted where, for example, the state standard is less protective than the federal standard or where the federal precedent was mentioned by the state court only in passing.

Applying this rebuttable presumption of merits adjudication to the facts here, the Supreme Court reversed the Ninth Circuit?s decision granting federal habeas relief, and remanded. The Ninth Circuit erred in finding that the state court of appeals overlooked D?s Sixth Amendment claim (arising from the midtrial dismissal of a juror for bias).

Evidence found through an unwarranted and uninvited search of D?s front porch violated the Fourth Amendment. *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

Police took a drug-sniffing dog to D?s front porch, resulting in a positive alert for narcotics. The officers obtained a search warrant, found marijuana plants, and charged him with trafficking in cannabis. The Supreme Court of Florida approved a suppression of evidence, finding no probable cause for the Fourth Amendment search, rendering invalid the warrant based on information gathered in that search. The U.S.

Supreme Court upheld the evidence suppression.

Acting on an unverified tip that marijuana was being grown in D?s home, officers used a dog to explore the area around the home. They were gathering information in an area belonging to D and immediately surrounding his house?its curtilage, which enjoyed protection as part of the home. They gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner. Officers entered the boundaries of the curtilage, the front porch being a classic example of a constitutionally protected area. While an officer not armed with a warrant could approach a home and knock, introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence was something else. There was no customary invitation to do that. That officers learned what they learned only by physically intruding on D?s property was enough to establish that a Fourth Amendment search occurred.

Supreme Court precedent did not clearly establish that a defendant retains a constitutional right to revoke his waiver of counsel at trial and require reappointment of counsel to file a new-trial motion. *Marshall v. Rodgers,* 133 S. Ct. 1446 (2013).

Inmate filed a habeas petition, arguing that the state courts violated his Sixth Amendment right to effective assistance of counsel by declining to appoint an attorney to assist in filing a motion for a new trial notwithstanding his three prior waivers of the right to counsel. A district court denied the petition. The Ninth Circuit granted relief. The U.S. Supreme Court reversed the Ninth Circuit and remanded.

The question was whether, after a defendant?s valid waiver of counsel, a trial judge had discretion to deny the defendant?s later request for reappointment of counsel. The Supreme Court found that all the case required was to observe that in light of the tension between the Sixth Amendment?s guarantee of counsel at all critical stages of the criminal process and its concurrent promise of a constitutional right to proceed without counsel when a criminal defendant voluntarily and intelligently elected to do so, it could not be said that California?s approach was against, or an unreasonable application of, the general standards established by the Court?s assistance-of-counsel cases. The court of appeals? contrary conclusion rested in part on the mistaken belief that circuit precedent could be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that the Court had not announced. COA erred in concluding that the inmate?s claim was supported by clearly established federal law determined by the Supreme Court and under 28 U.S.C.S. §?2254(d)(1).

Fifth Circuit

A*Garcia*hearing is only required where defense counsel has an actual conflict of interest.*United States v. Hernandez,*690 F.3d 613 (5th Cir. 2012).

District court did not err in failing to hold a hearing, *see United States v. Garcia,* 517 F.2d 272 (5th Cir. 1975), to explore an alleged conflict of interest arising from the fact that D?s counsel previously represented D?s brother (who was a co-defendant) in an unrelated felony case in state court the week before counsel began to represent D. The conflict remained purely hypothetical: (1) counsel did not learn any confidential information from the brother during the short representation of him (counsel did not even speak with the brother before per-suading the state prosecutor to drop the case); (2) the cases were unrelated; and (3) counsel?s representation of the brother had unambiguously ended before counsel?s representation of D began.

However, where D was convicted of conspiracy to possess with intent to distribute cocaine and aiding and abetting the theft of government money, the district court plainly erred in applying a one-level multi-count adjustment for the theft offense because the theft offense was nine or more levels less serious than the cocaine conspiracy offense, *see* USSG §?3D1.4(c). Given that D?s 120-month prison sentence (based on an

incorrect Guideline imprisonment range of 97 to 121 months) significantly exceeded the correct Guideline imprisonment range of 87 to 108 months, D?s substantial rights were affected. The Fifth Circuit exercised its discretion to correct the error and thus vacated the sentence and remanded for resentencing.

The 911 caller?s statements were nontestimonial even if the caller clearly understood that his call would initiate investigative and prosecutorial machinery.*United States v. Polidore,* 690 F.3d 705 (5th Cir. 2012).

Under the limited circumstances of this drug-trafficking prosecution, introducing the recordings of two anonymous 911 calls describing D as being in the midst of selling crack co-caine did not violate D?s rights under the Confrontation Clause. Although the circumstances did not indicate that the primary purpose of the 911 calls was to enable police assistance to meet an ongoing emergency, the calls likewise did not have, as their primary purpose, the creation of an out-of-court substitute for trial testimony. Nor did the introduction of the statements violate the rule against hearsay, as they were admissible under the present-sense-impression exception.

Ds could not, on remand from a partially successful appeal, relitigate their challenges to the jury instructions and indictment based on*Skilling v. United States,* 130 S. Ct. 2896 (2010); because*Skilling* did not change the law as applied to these facts, it did not trigger the intervening-change-of-law exception.*United States v. Teel,* 691 F.3d 578 (5th Cir. 2012).

(2) The fact that on remand for resentencing following a par-tially successful appeal, D?s sentence was increased on one count (from 60 months to 75 months) did not trigger a presumption of vindictiveness. In *United States v. Campbell,* 106 F.3d 64 (5th Cir. 1997), the Fifth Circuit adopted an ?aggregate package approach? to judicial-vindictiveness claims and held that an increase in the sentence on a single count did not give rise to a presumption of vindictiveness unless the aggregate sentence was increased. Here, D?s aggregate sentence actually decreased, from 110 months to 75.

(3) District court did not abuse its discretion in imposing an above-Guidelines fine of $2 million (representing the statutory maximum of $250,000 per count), although it is an abuse of discretion to impose an upward-departure fine based on a defendant?s ability to pay. The district court did not base the fine upon D?s ability to pay; the court properly utilized its discretion to vary from the Guidelines by taking into account D?s financial resources when determining the appropriately punitive fine.

On remand from the U.S. Supreme Court, the Fifth Circuit vacated Ds? sentences and remanded for resentencing consistent with Supreme Court caselaw; the more lenient penalties of the Fair Sentencing Act apply to pre-Act offenders.*United States v. Tickles,* 691 F.3d 592 (5th Cir. 2012).

The Fifth Circuit had previously held that the more lenient penalties of the Fair Sentencing Act of 2010 did not apply to pre-Act offenders even where they were sentenced after the effective date of the Act. *Dorsey v. United States,* 132 S. Ct. 2321 (2012), held otherwise.

Even on plain-error review, the lifetime term of supervised release, although recommended by the Guidelines, was unreasonable; the district court?s comments indicated that its imposition of the lifetime term was virtually automatic in this type of case, without consideration of any of the specific circumstances.*United States v. Alvarado,* 691 F.3d 592 (5th Cir. 2012).

The within-Guidelines, 170-month prison sentence imposed on D, convicted of receipt of child pornography, was neither procedurally nor substantively unreasonable; the lifetime term of supervised release was unreasonable. Even when a given term of supervised release is strongly recommended by the Guidelines, district courts should refrain from imposing that recommended term blindly and without careful consideration of the specific facts and circumstances of the case. The Fifth Circuit vacated D?s lifetime supervised-release term and remanded on that issue.

District court properly denied the 28 U.S.C. §?2255 motion filed by D, who pleaded guilty to misprision of a felony in connection with a judicial bribery; D?s claim that the conduct was rendered noncriminal by*Skilling v. United States,* 130 S. Ct. 2896 (2012), was waived by his failure to raise it in his §?2255 motion.*United States v. Scruggs,* 691 F.3d 660 (5th Cir. 2012).

In any event, the claim was not ?jurisdictional,? as it did not deprive the district court of subject-matter jurisdiction, especially given that the information to which D pleaded charged a facially valid offense against the United States. D also claimed that under *Skilling* he is actually innocent of the charge of misprision of a felony and that he is innocent of all the charges in the original indictment. The Fifth Circuit answered that actual innocence is not a free-standing ground for relief. ?Rather, it is a gateway to consideration of claims of constitutional error that otherwise would be barred from review. We need not decide whether [D] is actually innocent because we have concluded that [D?s] constitutional claims fail on the merits.?

D preserved his challenges to the reasonableness of increasing his prison sentence from 71 to 108 months, even though he did not formally object or fully articulate the basis of his objections.*United States v. Gerezano-Rosales,* 692 F.3d 393 (5th Cir. 2012).

The district court increased D?s sentence based on D?s al-leged disrespect in protesting the 71-month sentence?the Guidelines range was 57 to 71 months. D clearly communicated to the district court the essential substance of his challenges to the procedural and substantive reasonableness of his sentence, and to have further objected would have been futile. The district court did not lack jurisdiction to modify the sentence because there was no formal break in the proceedings after the imposition of the 71-month sentence; nor was the 71-month sentence procedurally or substantively unreasonable. However, the 108-month sentence was substantively unreasonable because the court?s decision to impose a three-year variance based on D?s disrespect constituted a clear error in judgment in balancing the sentencing factors, especially in light of the court?s implicit threat to raise D?s sentence if he questioned the new, higher sentence. The Fifth Circuit vacated D?s sentence and remanded.

Even under the new Guidelines, the imposition of a term of supervised release upon a deportable alien does not constitute a departure triggering special notice or explanation requirements.*United States v. Dominguez-Alvarado,* 695 F.3d 324 (5th Cir. 2012).

Even though the Guidelines were amended, effective November 1, 2011, to advise that a sentencing court ?ordinarily? should not impose a term of supervised release upon a deportable alien, the district court did not plainly err (D?s objection did not preserve the errors he claimed) in imposing a term of supervised release. Moreover, even though the district court was not asked to focus on the relevant language of the amended Guideline, the district court?s explanation was nevertheless suf-ficiently particularized to justify the imposition of a term of supervised release. The Fifth Circuit affirmed the sentence.

District court reversibly erred in refusing to compel grand-jury target to produce foreign bank records he was required to keep under Treasury Department regulations; because these records fell under the Required Records Doctrine, target?s assertion of his Fifth Amendment privilege against self-incrimination was unavailing.*In re Grand Jury Subpoena,* 696 F.3d 428 (5th Cir. 2012).

Under the Required Records Doctrine, compelled production of records does not violate the Fifth Amendment if (1) the record-keeping requirements are essentially regulatory, (2) the records sought are of a kind customarily kept, and (3) the records sought have assumed public aspects that render them at least analogous to public documents.

In sentencing D upon revocation of her supervised re-lease, the district court did not run afoul of *Tapia v. United States,* 131 S. Ct. 2382 (2011), because the court did not impose or lengthen D?s prison term for the pur-pose of enabling her rehabilitation or treatment in prison.*United States v. Receskey,* 699 F.3d 807 (5th Cir. 2012).

Rather, the district court, after selecting its sentence based on the statutory sentencing factors, merely discussed the opportunities for rehabilitation and treatment that D would have while incarcerated.

Court of Criminal Appeals

Upon de novo review, CCA found reasonable suspicion for the investigatory detention that led to D?s arrest.*State v. Kerwick,* 393 S.W.3d 270 (Tex.Crim.App. 2013).

D claimed officer lacked reasonable suspicion to conduct the investigatory detention that led to her DWI arrest. The trial court granted D?s motion to suppress, and COA affirmed. CCA reversed.

A motion to suppress evidence is reviewed under a bifurcated standard. COA failed to grant the trial judge?s factual findings almost total deference and review de novo the trial judge?s legal conclusion that officer lacked reasonable suspicion based on those facts. A trial judge?s determinations of fact and mixed questions of law and fact that rely on credibility are granted almost total deference when supported by the record. But when mixed questions of law and fact do not depend on the evaluation of credibility and demeanor, a trial judge?s ruling should be reviewed de novo, as if considering the issue anew.

CCA found the totality of the circumstances gave officer reasonable suspicion: (1) the report of people fighting and the vehicle damage officer observed indicated that unusual activity occurred, which was some indication that a crime might have taken place, like assault or criminal mischief; and (2) the evidence supported a reasonable basis to believe that D or her occupants might have been connected to this activity.

The Texas civil burdens of proof and standards of review are applied to criminal affirmative defenses; the defendant must prove an affirmative defense by a preponderance of the evidence, and the appellate court must review the rejection of an affirmative defense by civil legal and factual sufficiency standards.*Matlock v. State,* 392 S.W.3d 662 (Tex.Crim.App. 2013).

D, who had six children for whom he was responsible to pay child support, asserted the affirmative defense of inability to pay, Tex. Penal Code §?25.05(d). D was charged with 16 counts of nonsupport for failing to pay support for 16 months. The jury found D guilty on all counts. COA reversed as to one count. CCA reversed COA and remanded to that court to review the legal (and, if necessary, factual) sufficiency of the evidence supporting the jury?s rejection of D?s affirmative de-fense.

COA conflated the standards for legal and factual sufficiency review. COA applied the standard of review for factual sufficiency and sustained D?s claim of inability to pay as to one month in which he had been in jail. However, COA rendered a judgment of acquittal as if it had granted D?s legal insufficiency claim. If COA thought that the jury?s decision was against the great weight of the evidence, then a new trial was required on that count.

CCA set aside the order denying bail because the State failed to substantially show D?s guilt for the felony committed while he was on bail for a prior felony.*Spell v. State,* No. AP-76,962 (Tex.Crim.App. Mar 4, 2013).

While free on bail for several offenses, D was arrested and jailed for a new offense of burglary of a habitation. After a hearing on the State?s motion, the trial court denied bail under Tex. Cons. art. 1, §?11a, because D is alleged to have committed a felony while on bail for a felony for which he had been indicted. D appealed the order denying bail, arguing that at most, the evidence shows criminal trespass. CCA set aside the order.

Under Art. 1, §?11a, the State has the burden to present evidence ?substantially showing? D?s guilt of the burglary. This showing is ?far less? than proof beyond a reasonable doubt. And that burden must be

considered in light of the general rule that favors the allowance of bail. At the bail hearing, the State called officer to testify about the burglary. Officer stated that the owners of a mobile home told him someone had broken in and removed copper wiring. The owners did not live in the home, and told officer they did not know if any other property was missing, but they could tell someone had been staying there without permission. Officer also spoke with people who lived next door; they told him D and his girlfriend had been staying at the neighbors? home the week prior. Given the absence of evidence concerning the timing of the theft in the uninhabited home, D?s presence in the home, without more, does not substantially show his guilt. The order denying bail is set aside, and the case is remanded to the trial court to set bail. No motion for rehearing will be entertained.

CCA set aside D?s conviction; his due process rights were violated because the lab technician solely responsible for testing the evidence was found to have committed misconduct.*Ex parte Hobbs,* 393 S.W.3d 780 (Tex.Crim.App. 2013).

Habeas applicant was convicted of possession of a controlled substance. He did not appeal his conviction. He contends that his due process rights were violated because a forensic scientist did not follow accepted standards when analyzing evidence and therefore the results are unreliable. A Department of Public Safety report shows that the lab technician who was solely responsible for testing the evidence in this case is the scientist found to have committed misconduct. While there is evidence remaining that is available to retest in this case, that evidence was in the custody of the technician in question. CCA believes technician?s actions are not reliable; therefore custody was compromised, resulting in a due process violation. D is entitled to relief. The district court?s judgment is set aside, and D is remanded to the custody of the Sheriff of Galveston County. The trial court shall issue any necessary bench warrant within 10 days after the mandate of this Court issues.

There was no affirmative evidence to infer that the mur-der was committed after a statute lifted the duty to re-treat when a person is justified in using deadly force against another.*Krajcovic v. State,* 393 S.W.3d 282 (Tex.Crim.App. 2013).

D appealed his conviction for murder, arguing the trial court erred in refusing his request for a jury instruction on the Castle Doctrine. COA reversed and remanded for a new trial. CCA reversed COA and affirmed the trial court.

The trial court did not err in failing to instruct the jury on the Castle Doctrine, which went into effect September 1, 2007, and changed Tex. Penal Code §?9.32(c). The Doctrine relieves a person of the duty to retreat when he is justified in using deadly force against another if (1) he has a right to be present at the location where the deadly force is used, (2) he has not pro-voked the person against whom the deadly force is used, and (3) he is not engaged in criminal activity at the time that the deadly force is used. Here there was no affirmative evidence to support a rational inference that the murder was committed on or after September 1st. Some witnesses indicated that the victim was missing the last week of August and the offense occurred August 29th.

The court did not err by instructing the jury on the unknown manner and means of committing the offense; the victim?s injuries could have pointed to a variety of possibilities, and the crime scene did not point to a conclusive list of possibilities.*Moulton v. State,* 395 S.W.3d 804 (Tex.Crim.App. 2013).

D was convicted of murder. COA reversed. CCA reversed COA. The trial court did not err by instructing the jury on the ?unknown? manner and means of committing the offense because the manner and means of the victim?s death remained unknown at the conclusion of the evidence. The victim, D?s wife, was found dead in a pond. Each of the State?s three theories included in the jury charge?that the victim was killed by manual strangulation, by drowning, or by asphyxiation by means unknown?could be supported by the evidence given by the medical expert at trial. The means unknown theory was supported by the fact that

the victim?s injuries did not con-clusively point to a manner and means of asphyxiation but rather her injuries could have pointed to a variety of possibilities. There was unlimited information that was unknown because the crime scene did not point to a conclusive list of possibilities.

CCA firmed up the standard to establish prejudice in claims of ineffective assistance regarding plea offers.*Ex parte Argent,* 393 S.W.3d 781 (Tex.Crim.App. 2013).

D filed two habeas corpus applications, alleging that ineffective assistance caused him to reject the plea offer of eight years? imprisonment. He was convicted of aggravated sexual assault and indecency with a child, and punishment was assessed at 20 years for each. CCA remanded for the convicting court to make findings based on the standard announced by CCA.

Counsel incorrectly told D that he was eligible for judge-ordered community supervision and shock probation when only a jury?s verdict recommending probation could result in shock probation and the judge could order only deferred adjudication. CCA held that to establish prejudice in a claim of ineffective assistance in which a defendant is not made aware of a plea-bargain offer, or rejects a plea-bargain because of bad legal advice, defendant must show a reasonable probability that: (1) he would have accepted the earlier offer if counsel had not given ineffective assistance; (2) the prosecution would not have withdrawn the offer; and (3) the trial court would not have refused to accept the plea bargain. CCA overruled *Ex parte Lemke,* 13 S.W.3d 791 (Tex.Crim.App. 2000), which applied a lesser standard.

NOTE: CCA subsequently denied habeas relief, finding that D would not have accepted the plea bargain even with effective assistance of counsel. *Ex parte Argent,* Nos. AP-76,891 & AP-76,892 (Tex.Crim.App. May 15, 2013).

The judge?s failure to list the confidential informant in the application charge was harmless because the en-trap-ment instructions provided the jury with an ade-quate vehicle to fully consider and give effect to D?s en-trap-ment defense.*Vega v. State,* 394 S.W.3d 514 (Tex.Crim.App. 2013).

District court convicted D of three drug offenses. D complained that the judge reversibly erred by not instructing the jury accurately on his entrapment defense because the application instruction did not list inducement by the confidential informant as well as inducement by an undercover officer. COA held that D?s failure to request the specific application instruction, or object to its omission, forfeited the issue. CCA affirmed COA.

Disagreeing with COA, CCA held that any defect in the charge on entrapment amounts to an error in the charge because the defense of entrapment was ?law applicable to the case.? The jury should have been instructed to find D not guilty if it believed he was induced to commit the first drug sale either by the informant, acting as a law enforcement agent, or by the agent, or by both. The evidence showed that the informant was an agent acting under the control of law-enforcement, and D tes-tified it was the informant who suggested that he de-liver drugs to the officer. The trial judge erred in failing to spe-cifi-cally name the informant in the entrapment application para-graph. However, D?s rights were not harmed by the failure.

The U.S. Supreme Court holding that defense attorneys are required to inform defendants of the deportation risks of pleas does not apply to convictions that became final before its announcement. *Ex parte De Los Reyes,* 392 S.W.3d 675 (Tex.Crim.App. 2013).

D was admitted to the United States as a permanent legal resident. In 1997, he pleaded guilty to misdemeanor theft. In 2004, he pleaded guilty to a second charge of misdemeanor theft; the plea document D signed admonished him that his guilty plea could result in deportation. In this habeas application, D alleged he received ineffective assistance because his trial counsel failed to advise him that he was subject to deportation after he pleaded guilty to a second crime of moral turpitude. Trial counsel admitted that he did not properly review the immigration consequences. The trial court denied the application, but COA granted

relief, holding that *Padilla v. Kentucky,* 559 U.S. 356 (2010), should be applied retroactively. CCA reinstated the trial court order.

Padilla requires defense counsel to inform defendants of the deportation risks of guilty pleas. *Chaidez v. United States,* 133 S. Ct. 1103 (2013), held that *Padilla* does not have retroactive effect. In the instant case, CCA adhered to *Chaidez.*

The search warrant was supported by probable cause and was sufficiently particular, despite officer?s included errors about the location; officer?s ?significant fa-miliarity? with the location left ?little chance? of mistakenly searching the wrong location.*Bonds v. State,* No. PD-0039-12 (Tex.Crim.App. Mar 20, 2013).

D moved to suppress evidence seized pursuant to a search warrant. The trial court overruled the motion. D pled guilty to possession of a penalty-group 1 controlled substance with intent to deliver. COA found that the warrant lacked probable cause and reversed D?s conviction. CCA affirmed the trial court.

Based solely on the affidavit?s four corners, the magistrate had a substantial basis for concluding that probable cause existed to search the location described in the affidavit and warrant. Despite listing an incorrect address and roof color, the balance of the description was sufficient to enable an officer to distinguish which property was intended to be searched. Officer?s familiarity with the location to be searched and the fact that he was both the affiant and participated in the warrant?s execution were circumstances that resolved any ambiguity created by the description?s errors and rendered the warrant sufficiently particular.

When a PDR is filed, the appellate court loses authority to issue an opinion.*Ex parte Shaw,* 395 S.W.3d 819 (Tex.Crim.App. 2013).

D filed a habeas corpus writ seeking pretrial release because the State was not ready for trial within 90 days of the beginning of his detention. The trial court denied relief. COA reversed and remanded. The State filed a PDR on January 11, 2013. On January 24, 2013, COA withdrew its opinion and issued another opinion. CCA held that this second opinion is not permitted since Tex. R. App. P. Rule 50 was abolished in 2011. Accordingly, when a PDR is filed, the appellate court loses authority to issue an opinion. CCA ordered withdrawal of the January 24 opinion; COA?s December opinion is reinstated. Additionally, CCA refused the State?s January 11 PDR and took no action on the State?s amended petition of February 25th since that petition addresses an opinion that has been ordered withdrawn.

Court of Appeals

Summaries by Chris Cheatham of Cheatham Law Firm, Dallas

Search warrant affidavit deemed sufficient even though it failed to describe K-9 dog?s past experience; K-9?s ex-pe-rience inferable merely from affidavit?s reference to ?open-air sniff? and ?positive alerts.?*Skaggs v. State,* No. 11-10-000273-CR (Tex.App.?Eastland Oct 11, 2012).

?It was not unreasonable for the magistrate to conclude that a ?K-9? who conducted an ?open-air sniff? was trained to detect the smell of narcotics and that, from the K-9?s ?positive alerts,? the magistrate could reasonably infer experience with the odor-causing agent. However, we note that the best practice is for an officer to expressly include the officer?s experience, train-ing, and background information so that little is left for the magistrate to infer. . . . Because we conclude that the positive alert alone was sufficient to establish probable cause, we need not address appellant?s other argument.?

CPS worker who met with D was not an agent of law enforcement required to comply with*Miranda;* there was no evidence that law enforcement provided worker with any questions to ask or that she did anything designed to assist law enforcement.*Hailey v. State,* No. 02-10-00247-CR (Tex.App.?Fort

Worth Oct 18, 2012).

?[D] also highlights [detective?s] testimony that she contacted CPS prior to going to the hospital, and that she agreed on cross-examination that it was the usual mode of operation for Fort Worth to coordinate the investigation with CPS and conduct a very purposeful, coordinated investigation. . . . The record demonstrates that law enforcement did not attempt to use [CPS worker] as its anointed agent. Indeed, law enforcement already had a strong case against [D] before [CPS worker] interviewed [D], and there is no evidence that the police used the agent?s interview to accomplish what they could not lawfully accomplish themselves.?

Deemed sufficient for RS was officer?s testimony that D was following too close such that he could not stop if needed to avoid a collision, despite CCA opinion holding insufficient an officer?s conclusory testimony of ?fol-lowing too close.?*Young v. State,* No. 06-12-00045-CR (Tex.App.?Texarkana Oct 19, 2012).

Carter dissented: In *Ford v. State,* 158 S.W.3d 488 (Tex.Crim.App. 2005), ?officer testified that Ford?s vehicle was ?following too close behind another vehicle.? This presented no factual detail to allow a neutral magistrate to evaluate Ford?s conduct. Here, the testimony is very similar. The officer testified [D] was following too close and would have been unable to stop without colliding with the vehicle he was behind. He specifically denied having any knowledge of the distance and stated he was not qualified to estimate it. . . . I cannot see any substantive difference in the testimony that the defendant was ?following too close? behind another vehicle and that the defendant was following too close and could not stop to avoid a collision. Each of those statements is an opinion that the driver was violating the law without providing any factual details[.]?

Officer?s reliance on landlord?s representation that land-lord had authority to consent to search of D?s apart-ment deemed reasonable; landlord told officer that D had vacated apartment, though landlord turned out to be incorrect.*Biera v. State,* 391 S.W.3d 204 (Tex.App.?Amarillo 2012).

?While a landlord generally may not consent to search a leased residence, a valid consensual search does not necessarily depend on actual authority because even if the consenting party does not actually possess the requisite relationship to the premises, the Fourth Amendment is not violated if an officer has an objectively reasonable, even if mistaken, good-faith belief that she obtained valid consent to search the area.?

Furthermore, evidence of D?s drug use was relevant in robbery prosecution to show motive; accomplices testified that D was unemployed yet frequently used drugs, raising inference of D?s motive to obtain money from an illegitimate source.

Video showing that D?s vehicle briefly touched double-yellow line was insufficient to support RS, absent explanation from officer as to why D?s maneuver was unsafe.*State v. Houghton,* 384 S.W.3d 441 (Tex.App.?Fort Worth 2012).

?One other car appears on the video near the time [D?s] vehicle touched the double-yellow line, but that car does not appear to have been in proximity to [D?s] vehicle. Without explanation from [officer] as to observations by him as to why [D?s] maneuver was unsafe (and thus in violation of transportation code section 545.060(a)), we cannot say that the stop of [D?s] vehicle was justified solely based on an alleged violation of section 545.060.?

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