

SIGNIFICANT DECISIONS
UNITED STATES SUPREME COURT AND THE COURT OF CRIMINAL APPEALS
FROM SEPTEMBER 2017 TO APRIL 2018

HON. DAVID C. NEWELL
JUDGE, PLACE 9
Court of Criminal Appeals

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Acknowledgement

This paper has been the primary responsibility of my briefing attorney, Victoria Ford. Until she got a better job in May. The rest of the stuff, including the dynamic use of italics and typos, comes from me. However, in some of the cases I have included commentary. My briefing attorney cannot be blamed for failing to stop me.

Table of Contents

I. INTRODUCTION 1

II. MOTIONS TO SUPPRESS 1

A. REASONABLE SUSPICION 1

 1. *An officer did not have reasonable suspicion to conduct a traffic stop based upon his belief that the suspect’s car’s tires had touched the “fog line.”* 1

 2. *In establishing an officer’s reasonable suspicion to prolong a traffic stop, the State does not need to prove that the officer is an expert for his determinations and inferences to be afforded heightened weight.* 2

 3. *A police officer did not unduly prolong the traffic stop by waiting for back up before running a license check on the driver five minutes after the traffic stop.* 3

B. PROBABLE CAUSE 4

 1. *Reference to multiple printers seen in a hotel room among other facts provided particularized facts to corroborate informant’s information regarding fraudulent possession of identifying information and tampering with a government document.* 4

 2. *Discovery of drugs on a suspect’s person, after an arrest on traffic warrants but before a search of the suspect’s vehicle, can supply a new basis for arrest that would justify a search of the vehicle as a search incident to arrest.* 4

 3. *Probable cause to arrest an individual for theft can exist when a customer conceals items in her purse, even though she had not yet exited the store and she claimed she was going to pay for the items.* 5

 4. *Police observation of a defendant visiting a known narcotics bar for a brief period of time and making a furtive gestures in his vehicle did not provide sufficient probable cause to support reliance upon automobile exception to search vehicle.* 6

C. QUALIFIED IMMUNITY 6

 1. *Officer who shot woman who refused the officer's command to drop a knife she held while walking towards another woman was entitled to qualified immunity because law regarding use of force in that situation was unsettled.* 6

 2. *When conducting a probable cause determination, a court should ask whether a reasonable officer could conclude, considering all of the surrounding circumstances, including the plausibility of the explanation itself, that there was a substantial chance of criminal activity.* 7

III. TRIAL PROCEDURE 9

A. TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 28.01, SECTION 1, DOES NOT REQUIRE PROVIDING NOTICE OF A PRE-TRIAL HEARING COMMENCED ON THE DAY THE CASE IS SET FOR TRIAL 9

IV. EVIDENCE 10

A. FACEBOOK MESSAGES REGARDING USE OF ECSTACY SIX-TO-SEVEN HOURS BEFORE ASSAULT ON PLAIN-CLOTHES OFFICER WAS INADMISSIBLE UNDER RULE 403 TO REBUT CLAIM OF SELF-DEFENSE WITHOUT EVIDENCE ESTABLISHING DOSAGE AND EFFECT OF THE DRUGS 10

B. AN OFFICER’S VIDEOTAPE RECORDING OF A REPLAY OF A TIME STAMPED SURVEILLANCE VIDEO WAS AUTHENTICATED BY OFFICER WHO TOOK THE VIDEO AND COMPARE IT TO OTHER EVIDENCE INDEPENDENT OF THE RECORDING. 11

V. OFFENSES 11

A. CONTINUOUS SEXUAL ABUSE OF A CHILD—A DEFENDANT DOES NOT COMMIT THE OFFENSE OF CONTINUOUS SEXUAL ABUSE OF A CHILD IF ONE OF THE TWO ACTS OF SEXUAL ABUSE DOES NOT OCCUR IN TEXAS, BECAUSE THAT ACT IS NOT A VIOLATION OF TEXAS’S LAW 11

B. ONLINE SOLICITATION OF A MINOR—THE “REPRESENTS” DEFINITION OF “MINOR” IN THE PRE-2015 ONLINE SOLICITATION OF A MINOR STATUTE IS CONSTITUTIONAL. 12

C. POSSESSION OF CHILD PORNOGRAPHY—A CROPPED IMAGE OF A CHILD IS “MADE” AT THE TIME THE ORIGINAL IMAGE WAS MADE AND CHILD PORNOGRAPHY CAN RESULT FROM IMAGE EDITING AND MANIPULATION 13

D. VIOLATION OF A CIVIL COMMITMENT ORDER 14

 1. *A civilly committed, sexually violent predator may be punished for violating his civil commitment order while an appeal was pending even if the civil commitment order is later reversed on appeal.* 14

- 1. *The statutory innocence-gateway exception will not support a multiple-punishment double-jeopardy claim raised in a subsequent habeas application.*45
- 2. *Moon v. State does not provide a new legal basis to defeat the subsequent writ bar because the relevant legal theory of the case, appellate review of the sufficiency of a juvenile court’s transfer order, was recognized in Texas prior to Moon.*.....46
- E. PAROLE ISSUES -- HABEAS CORPUS IS NOT THE PROPER TOOL TO COMPEL THE PAROLE BOARD TO COMPLY WITH A STATUTE OR REGULATION, HOWEVER MANDAMUS MAY LIE IF THE APPLICANT CAN SHOW HE IS CLEARLY ENTITLED TO RELIEF.47
- F. FEDERAL WRITS48
 - 1. *A federal district court may provide funding to defendants in federal cases, as well as state and federal prisoners seeking collateral relief in federal court, for investigative, expert, or other reasonably necessary services if the judge determines that a reasonable attorney would regard the services as sufficiently important.*.....48
 - 2. *When a defendant files a petition for habeas corpus with a federal district court pursuant to the AEDPA, the federal district court may “look through” an unexplained state court decision to the last related state court decision that provided a relevant rationale and presume that the unexplained decision adopted the same reasoning.*.....49

2.	<i>The Texas Legislature did not violate the Separation of Powers Clause when it decriminalized a sexually violent predator’s failure to participate in and comply with his sex offender treatment program and applied that law to cases pending on appeal.</i>	15
E.	FAILURE TO REGISTER AS A SEX OFFENDER—CONFLICTING EVIDENCE REGARDING ADDRESS PROVIDED TO REGISTRATION OFFICERS DID NOT RENDER EVIDENCE INSUFFICIENT TO SUPPORT DETERMINATION THAT SEX OFFENDER HAD VOLUNTARILY FAILED IN HIS DUTY TO NOTIFY POLICE OF HIS CHANGE OF ADDRESS.	16
F.	VIOLATION OF A PROTECTIVE ORDER—AN INDIVIDUAL SUBJECT TO A PROTECTIVE ORDER VIOLATES THE ORDER BY “COMMUNICATING IN A HARASSING MANNER” WHEN HE INTENTIONALLY OR KNOWINGLY SENDS INFORMATION OR MESSAGES, OR SPEAKS TO, THE PROTECTED PERSON IN A MANNER THAT WOULD PERSISTENTLY DISTURB, BOTH CONTINUALLY, OR PESTER ANOTHER PERSON.	17
G.	OFFICIAL OPPRESSION	18
1.	<i>Evidence was insufficient to show that C.P.S. investigator knew her conduct was unlawful where her search of residence pursuant to a court order did not exceed the scope of the order.</i>	18
2.	<i>Evidence was insufficient to show that CPS investigator “knew” her conduct in seizing and searching a minor’s cell phone because issue of CPS investigator’s authority to do so was unsettled at time.</i>	19
VI.	JURY INSTRUCTIONS	21
A.	IN A DWI CASE, THE DEFINITION OF “INTOXICATED” SUBMITTED TO THE JURY MUST BE SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL.	21
B.	ADMITTING TO HOLDING A HANDGUN AT YOUR SIDE AND SAYING “STOP, LEAVE US ALONE” IS SUFFICIENT TO ESTABLISH THE “CONFESSION” ASPECT OF THE CONFESSION/AVOIDANCE DOCTRINE ASSOCIATED WITH GETTING A SELF-DEFENSE INSTRUCTION.	22
C.	A VARIANCE IN THE MANNER AND MEANS BY WHICH THE DEFENDANT CAUSES BODILY INJURY IN AN ASSAULT CASE IS ONLY MATERIAL WHEN IT CONVERTS THE OFFENSE PROVEN AT TRIAL INTO A DIFFERENT OFFENSE THAN WHAT WAS PLED IN THE CHARGING INSTRUMENT.	22
D.	IN A PROSECUTION FOR AGGRAVATED ASSAULT, THE STATE NEED ONLY PROVE THE DEFENDANT HARBORED A CULPABLE MENTAL STATE AS TO THE UNDERLYING ASSAULT, THEREFORE THE DEFENDANT IS NOT ENTITLED TO A MISTAKE-OF-FACT INSTRUCTION EVEN IF HE REASONABLY BELIEVED HIS ACTIONS WOULD ONLY CAUSE “SIMPLE BODILY INJURY.”	23
E.	THE OFFENSE OF DEADLY CONDUCT IS BY THE USE OR EXHIBITION OF A MOTOR VEHICLE AS A DEADLY WEAPON IS A CAN BE A LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT.....	24
VII.	PLEA AGREEMENTS	25
A.	TRIAL COURT WAS AUTHORIZED TO CONSIDER THE FULL RANGE OF PUNISHMENT DESPITE RECOMMENDATION OF THREE YEARS BECAUSE DEFENDANT AGREED TO CONSIDERATION OF THE FULL RANGE OF PUNISHMENT IF SHE DID NOT SHOW UP ON THE DATE SHE WAS SUPPOSED TO BE SENTENCED TO THREE YEARS.	25
B.	WHEN A STATE AMENDS A CRIMINAL COMPLAINT AFTER ENTERING A PLEA AGREEMENT WITH THE DEFENDANT, THE DEFENDANT MAY BE SENTENCED PURSUANT TO THE NEW PLEA AGREEMENT UNDER THE AMENDED COMPLAINT SO LONG AS THE DEFENDANT WAS PERMITTED TO WITHDRAW HIS ORIGINAL GUILTY PLEA.	26
VIII.	SENTENCING	27
A.	DEATH PENALTY	27
1.	<i>Delusional beliefs and mental illness, alone, are not sufficient to establish incompetence to be executed; the defendant must show that he does not comprehend the causal link between his offense and his imminent execution.</i>	27
2.	<i>A death row inmate who has a disability that prevents him from remembering the crimes for which he was sentenced to death may be executed so long as, despite his memory loss, he has a rational understanding of the connection between the crime he was convicted of and his execution.</i>	28
B.	ENHANCEMENTS—WHETHER A PRIOR CONVICTION IS “FINAL” FOR PURPOSES OF SENTENCING ENHANCEMENTS IS TO BE DETERMINED IN ACCORDANCE WITH TEXAS LAW.	29
C.	IMMIGRATION AND NATIONALITY ACT DEPORTATION—THE DEFINITION OF “CRIME OF VIOLENCE” UNDER 18 U.S.C. §16(B) IS UNCONSTITUTIONALLY VAGUE.	30
IX.	APPEALS	31

A.	MOTION FOR NEW TRIAL—TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING NEW TRIAL BASED UPON CLAIM THAT ATTORNEY HAD IMPROPERLY ADVISED THE DEFENDANT TO WAIVE JURY PUNISHMENT BECAUSE TRIAL COURT COULD HAVE DISBELIEVED THE DEFENDANT'S AFFIDAVIT.	31
B.	JURISDICTION.....	32
1.	<i>Following an appellate decision, the trial court does not regain jurisdiction over the case until the appellate mandate is issued.</i>	32
2.	<i>Texas Code of Criminal Procedure Article 42.12, Section 23(b), authorizes a defendant to appeal an order granting “shock” community supervision.</i>	32
3.	<i>A court of appeals does not have jurisdiction over oral ratifications of pre-existing judgements.</i>	33
C.	PRESERVATION	34
1.	<i>When a timely and specific objection is overruled at trial, it is sufficient to preserve error on appeal so long as the objection comports to the argument made on appeal.</i>	34
2.	<i>A defendant can complain for the first time on appeal that a trial court's statements amounted to a comment on the weight of the evidence because trial judges have an independent duty to refrain from making such comments.</i>	34
3.	<i>When an inflammatory comment is made during jury argument, the complaining party must pursue an objection to an adverse ruling in order to preserve error on appeal.</i>	36
D.	HARM	36
1.	<i>A trial court's failure to require the State to elect which act of sexual abuse it intended to rely upon is harmless when the purposes of the election requirement are satisfied.</i>	36
2.	<i>The erroneous admission of a defendant’s drug use on the morning of the offense and possession of drugs did not affect the defendant’s substantial rights because the State did not emphasize the evidence and other evidence of the defendant’s guilt supported his conviction.</i>	37
E.	COURT COSTS	38
1.	<i>A defendant whose petition for discretionary review raising the issue of the constitutionality of consolidated fees was pending when the Court decided Salinas is entitled to relief.</i>	38
2.	<i>When court costs are not assessed until after judgment is entered, leaving the defendant with no time to object to the trial court, the defendant may raise a challenge to the court costs for the first time on appeal.</i>	38
X.	INEFFECTIVE ASSISTANCE OF COUNSEL	39
A.	HABEAS APPLICANT FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL'S CREDIBLE AFFIDAVIT PROVIDED LEGITIMATE JUSTIFICATIONS FOR CLAIMED DEFICIENCIES IN REPRESENTATION.	39
B.	DEFICIENT PERFORMANCE.....	39
1.	<i>When a defendant’s guilty plea would cause him to automatically lose legal immigration status and become removable, counsel has a duty to correctly advise the defendant of those consequences.</i>	39
2.	<i>Erroneous advice about parole eligibility during plea negotiations can constitute deficient performance.</i>	40
3.	<i>Calling witnesses who provide favorable testimony does not necessarily amount to deficient performance even though those witnesses ultimately provide damning testimony on cross-examination.</i>	40
4.	<i>Plea counsel provided deficient performance by failing to research relevant case law and advise the defendant about case law which clearly established that the State would be unable to meet its burden to prove the offense as alleged.</i>	41
C.	PREJUDICE—A DEFENDANT WAS NOT PREJUDICED TRIAL COUNSEL'S ADVICE TO PROCEED TO TRIAL WITH ELEVEN JURORS INSTEAD OF MOVING FOR A MISTRIAL BECAUSE THE TRIAL JUDGE WOULD NOT HAVE GRANTED A MOTION FOR MISTRIAL AND DENYING THE MOTION WOULD NOT HAVE BEEN ERROR ON THE PART OF THE TRIAL COURT.....	42
XI.	HABEAS CORPUS	43
A.	A HABEAS CORPUS APPLICANT MUST BE ABLE TO SHOW THAT A STATUTORY PROVISION WAS USED AGAINST HIM AT TRIAL IN ORDER TO ESTABLISH STANDING TO CHALLENGE THE PROVISION POST-CONVICTION.	43
B.	A WRIT APPLICANT MUST SHOW GOOD CAUSE IN ORDER TO OBTAIN DISMISSAL OF HIS OR HER APPLICATION WITHOUT PREJUDICE AFTER THE TRIAL COURT DESIGNATES ISSUES AND ORDERS AFFIDAVITS.	43
C.	AN APPLICANT MAY NOT MAKE A FACIAL CHALLENGE TO THE CONSTITUTIONALITY OF A STATUTE FOR THE FIRST TIME IN A POST-CONVICTION HABEAS PROCEEDING.	44
D.	SUBSEQUENT WRIT ISSUES	45

SCOTUS/CCA Update

Significant Decisions from September 2017 to April 2018

I. INTRODUCTION

This paper covers the published opinions issued by the Court of Criminal Appeals between September 1, 2017 and April 23, 2018. It also includes the significant criminal cases from the United States Supreme Court that have broad applicability, issued during that same time frame. I will continue to update the paper through the end of both the United States Supreme Court's term as well as the Court of Criminal Appeals term. If you feel something is missing please email me though Nichole Reedy at Nichole.Reedy@txcourts.gov and we'll do our best to either correct or explain ourselves.

II. MOTIONS TO SUPPRESS

A. Reasonable Suspicion

1. **An officer did not have reasonable suspicion to conduct a traffic stop based upon his belief that the suspect's car's tires had touched the "fog line."** Jose Luis Cortez was driving a minivan down Interstate 40 when he was pulled over. The Trooper who pulled him over indicated that he observed Cortez drive on the improved shoulder of the highway, a violation of the Texas Transportation Code. The Trooper obtained permission to search the vehicle and found drugs in the car. Cortez was arrested for possession with intent to deliver methamphetamine in an amount over 400 grams. Cortez filed a motion to suppress the evidence. At the hearing on the motion to suppress it became evident that the Trooper believed that merely touching the fog line constituted driving on the shoulder and that he pulled Cortez over after Cortez's vehicle had touched the fog line two times. The trial court granted the motion to suppress concluding that: (1) it was not clear from the dashcam video whether Cortez's vehicle even touched the fog line; (2) even if Cortez's vehicle touched the fog line, there was no proof that he crossed the fog line and drove on the improved shoulder; and (3) even if Cortez drove on the improved shoulder, he was statutorily entitled to do so. The court of appeals affirmed,

concluding that driving on an improved shoulder requires more than the mere touching of the fog line.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. *State v. Cortez*, ___ S.W.3d ___, 2018 WL 525696 (Tex. Crim. App. Jan. 24, 2018) (6:0:3). Judge Richardson wrote for the majority of the Court. After reviewing the standards associated with detentions under the Fourth Amendment, Judge Richardson noted that it is generally a traffic violation to "drive on an improved shoulder" and therefore an officer would have reasonable suspicion to stop a vehicle that was driving on an improved shoulder. However, Judge Richardson pointed out that the dashcam video in this case supported the trial judge's finding that it was not clear that Cortez's tires touched the white fog line. Additionally, the Trooper's was on the left side of Cortez's vehicle and he could not have seen Cortez's vehicle touch the fog line on the right hand side of Cortez's vehicle. Even if Cortez's tires touched the fog line, Judge Richardson concluded, the momentary touch of the fog line, without any other indicator of criminal activity, was not enough to justify the stop of Cortez's vehicle for driving on an improved shoulder. This conclusion was based on the totality of the circumstances, considering that vehicles often veer over while driving without an awareness on the driver's part, and is consistent with other Texas appellate courts that have required a vehicle to cross over the fog line to constitute driving on the improved shoulder. Finally, Judge Richardson noted that even if Cortez's vehicle crossed over the fog line, he was statutorily permitted to do so because it appeared as though the Trooper was intending to pass Cortez on the right and Cortez was at the end of an exit ramp, signaling a right turn. Both of these circumstances are statutory exceptions to the prohibition of driving on the improved shoulder that are supported by the record. Therefore, the Court held that the Trooper did not have an objectively reasonable basis to stop Cortez's vehicle.

Judge Newell filed a concurring opinion in which Judge Keel joined. Judge Newell noted that although the court of appeals did not render a decision as to whether Cortez drove upon the improved shoulder to either allow another vehicle to pass or to decelerate to make a turn in, it was appropriate to reach that issue in this case as a matter of judicial economy. Judge

Newell also pointed out that, in cases like this where the text, structure, and history of the statute in question provides no resolution to the inherent ambiguity of the state, the rule of lenity requires the Court to draw the line in favor of Cortez. Lastly, Judge Newell noted that the Court's opinion is consistent with the Court's prior precedent interpreting this statute in which the Court rejected a "shifting-burden, self-defense-style framework."

Presiding Judge Keller filed a dissenting opinion in which Judge Keasler joined. Presiding Judge Keller noted that determining that it was unclear whether Cortez's vehicle touched the fog line did not support the Courts' holding. Presiding Judge Keller would have held that any amount of time in which a moving vehicle is in contact with the fog line constitutes driving on the fog line. Additionally, Presiding Judge Keller noted that the Court should have afforded the parties an opportunity to brief the issue of whether Cortez's driving on the improved shoulder was statutorily permitted.

Judge Yeary filed a dissenting opinion. Judge Yeary opined that the issue of whether Cortez was permitted to drive on the improved shoulder pursuant to one of the statutorily permitted circumstances was not before the Court. Judge Yeary noted that the Court should have limited its review to the issue granted and remanded the case to the court of appeals to address any remaining issues.

2. In establishing an officer's reasonable suspicion to prolong a traffic stop, the State does not need to prove that the officer is an expert for his determinations and inferences to be afforded heightened weight. Elvis Ramirez-Tamayo was driving a rental vehicle on Interstate 40 near Amarillo. [No, that is not a typo. His name was really "Elvis Elvis" rather than simply "Elvi".] Deputy Simpson stopped Ramirez-Tamayo for speeding. Deputy Simpson approached the passenger side of the vehicle. Rather than lower the window, Ramirez Tamayo reached over and opened the passenger door. Deputy Simpson noticed that Ramirez-Tamayo wore a lot of cologne, more than most people; was chain smoking with the windows up; and was extremely nervous. Based on his seven years of experience as a licensed Texas peace officer, Deputy Simpson formed a belief

that Ramirez-Tamayo was trafficking drugs. He based his belief on his knowledge that drug traffickers commonly put drugs in the panels of doors, and this can prevent the windows from rolling down. Additionally, Deputy Simpson knew that drug traffickers often use rental vehicles, instead of their own cars, and use cologne or other cover odors to cover the odor of drugs they're hauling. Based on his suspicion, Deputy Simpson prolonged the traffic stop and had a drug-detection dog come to sniff the vehicle. The drug dog alerted the presence of drugs and approximately twenty pounds of marijuana were found in the car's four door panels. Ramirez-Tamayo was charged with possession of marijuana in an amount greater than five pounds but less than fifty pounds. The trial court denied Ramirez-Tamayo's motion to suppress the drugs. The court of appeals reversed the trial court's ruling denying the motion to suppress. In its view, the record lacked information regarding Deputy Simpson's training and experience that could support the reliability of his formation of reasonable suspicion. According to the court of appeals, the State failed to carry its burden to explain why the activities relied on were sufficiently distinguishable from the activities of innocent people under the same circumstances.

The Court of Criminal Appeals reversed the judgment of the court of appeals and reinstated the trial court's judgment of conviction. *Ramirez-Tamayo v. State*, 537 S.W.3d 29 (Tex. Crim. App. Sept. 20, 2017) (9:0). Judge Alcalá wrote the opinion for the unanimous Court. Judge Alcalá noted that as long as there was some evidence in the record to support the trial court's implied finding that the officer was reasonably capable of making rational inferences and deductions by drawing on his experience and training, the State did not have an additional burden to include extensive details about his training and experience. Here, the Court found that there was sufficient evidence on the record to support the trial court's implied factual findings that Deputy Simpson was credible and reliable and that his training and experience made him reasonably capable of rationally suspecting that Ramirez-Tamayo was in possession of drugs. Additionally, a reviewing court must look to the totality of the circumstances to see whether the detaining officer had reasonable suspicion to prolong a

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