

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.

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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 Alcala wrote the opinion for the unanimous Court. Judge Alcala 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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