Feb 26, 2014

OTHER CONSTITUTIONAL ISSUES
We don't need no stinking Fifth Amendment

Salinas v. State, 369 S. W. 3d 176 (Tex. Crim. App. 2012).(rehearing denied 6/6/12). Womack. Pre-arrest, pre-Miranda silence can be used as substantive evidence of guilt in cases where the defendant does not testify. Ouch. The Fifth Amendment right against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak. Affirmed by : *Salinas v. Texas*, 133 S. Ct. 2174 (2013).

Fifth Amendment: SCOTUS
Right to remain silent, kind of

Salinas v. Texas SCOTUS 6/17/13, 5-4 . 133 S. Ct. 2174 (2013). Alito wrote the majority opinion Breyer authored the dissent. I did not like this case out of TCCA and I like it even less out of the Supremes. The client went to the police station to talk to the cops which he did just fine until they started talking about gun stuff and then he quit talking and started acting nervous. He had not been warned and was not in custody. The state used that as substantive evidence of his guilt at his JT despite the fact that he neither testified nor opened the door to that evidence. SCOTUS aff'd the TCCA because he did not expressly invoke his right to remain silent at the station and there was no allegation of involuntariness or coercion. Actually remaining silent does not invoke the right to remain silent. You have to say you are remaining silent[1] to have the right to remain silent. " A witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim. A really scary concurrence by Thomas and Scalia would find that the Fifth Amendment does not protect against the prosecutors requesting adverse inferences from the jury when the accused fails to explain incriminating circumstances. Dissent (Breyer, Ginsburg, Sotomayor, Kagan) points out that this holding is inconsistent with *Miranda*[2] and that it would be reasonable for the police officers to infer when Salinas quit talking he was invoking his right to remain silent—especially since it coincided with the change of topic in the conversation from the weather to the shotgun. Salinas , not being a lawyer, should not be required to list the constitutional amendment by name. Practice note: raise the Texas Constitution in your motion to suppress and at the hearing on that motion. The Texas Constitution might offer greater protection now on this issue than the United States Constitution. Never concede the second prong, lack of coercion and voluntariness. Nothing happens voluntarily and without coercion when law enforcement is involved. If someone calls you and asks if they should go voluntarily to the station house to talk to cops, tell them no especially if you think they have any exposure at all. If someone really is free to leave they should leave. When telling the police that they do not wish to speak with them it appears that they should mention the Fifth Amendment by name and that they are relying on it not because they are guilty but because they love the Constitution. Hey, maybe even burst into song with *America the Beautiful* at this point. This is a horrible case and I do not think it can be good law forever because it discourages witnesses from talking to the police.

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[1] *Which means you are not actually remaining silent but rather talking. Go figure.*

[2] Miranda v. Arizona*, 384 U. S. 436 (1966).*

Determination of custody: *De novo review*

Johnson v. State, PD-0209-12, Johnson, Publish, 12-11-13. Whether a given set of historical facts amounts to a consensual encounter or a detention is a legal question which is reviewable *de novo* whereas the historical facts –especially those turning on credibility determinations are entitled to due deference. (Unless the defendant wins in the TCT of course). An investigative detention occurs when a person yields to the police officer's show of authority under a reasonable belief that he is not free to believe. Did the ofcr convey a message that compliance with the officer's request was required? Would a reasonable person in the citizen's position have felt free to decline the officer's requests or otherwise terminate the encounter? In this case, a reasonable person would not have felt free to leave or decline the officer's requests. The ofcr shined a 'pretty darn bright' high beam spotlight onto a person sitting in a parked vehicle, parked the police car in such a way behind this person's car to at least partially block their vehicle such that the person would have to "maneuver" around the police car to drive away, using a "loud authoritative voice" in speaking with the person, asking "what's going on" and demanding identification -- that is an interaction that a reasonable person would not feel free to terminate. Reversed and remanded for the intermediate appellate court to consider in the first instance whether the officer had reasonable suspicion to detain appellant and whether that detention was valid. Practice note: this lawyer made a really nice record at the suppression hearing on the factors that the reviewing court needs to know to decide whether or not the client was in custody. What specifically was the police officer doing to make this client believe that he was not free to leave?

More from TCCA and their love of fact findings: specificity

State v. Saenz, No. PD-0043-13, (publish 10/23/13, Alcala). The legal conclusion by the TCT that someone is in custody on a motion to suppress statements is reviewed *de novo* by the appellate courts. Case abated for further fact findings by the TCT. The TCT's findings were faulted for omitting: credibility findings on the officers, whether the TCT believed the officer told the defendant that he was not free to leave when he was placed in the patrol car, or whether the officer said nothing, and how long the defendant had been in the police car when he made the statements in question to LE[3]. Practice Note: this case can be read with the foregoing case to let you know that you need findings and then what those findings should look like. It is not enough that you get the testimony that you need – you need a specific finding with favorable testimony that the TCT finds it credible and then with unfavorable testimony that the TCT finds the testimony to not be credible. Further the TCCA does not equate a finding that the testimony is not credible with a finding that the cop is lying. If you want the latter finding specifically put in your proposed findings of fact and conclusions of law. The appellate courts are supposed to give deference to fact findings (although in practice I question that) and review *de novo* the legal conclusions.

Oral statements

Thai Ngoc Nguyen v. State, 292 S.W. 3d 671 (Tex. Crim. App. 2009) (Keasler, Johnson filed a dissenting opinion, July 1, 2009)(rehearing denied). Oral Statement inadmissible due to failure to comply with Section 3.[4] Nguyen invoked his right to counsel. A microphone recorded his

[3] *LE is an abbreviation for Law Enforcement.*

[4] *TEX. CODE OF CRIM. PROC. 38.22(3).*

conversations with the co-def. Nguyen charged with hindering apprehension because he falsely confessed to possessing the meth. There is no statutory exception in Article 38.22 for statements that constitute a crime committed after LE violated that provision in attempting to obtain evidence of a previously committed crime. A formal arrest always constitutes custody for purposes of 38.22 regardless of the offense that prompted the arrest. We cannot accept the State's argument that Article 38.22(3)(a)permits the admission of an accused's oral statements that are not confessional in nature, do not implicate the accused in the offense prosecuted, or that constitute the offense charged. No court made exceptions to *Miranda's* exclusionary rule apply under 38.22.

Custody

Adrian Estrada v. State, 313 S.W. 3d 274 (Tex. Crim. App. 2010 – cert denied)(publish, 6/16/10, Hervey). (cert denied, habeas denied). Non-custodial questioning. Such a non-custodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment". Any interview of one suspected of a crime will have coercive aspects to it. Even if we were to assume that appellant unambiguously invoked his rights to counsel and to silence during the non-custodial interrogation setting, we do not agree that the police were required to honor those invocations. **Because the appellant was not in custody, LE had no obligation to scrupulously honor a request to terminate questioning.** Although *Miranda* warnings were given unnecessarily that does not alter our analysis. The need to scrupulously honor a defendant's invocation of *Miranda* rights does not arise until created by the pressures of custodial interrogation. Without those pressures, LE is free to attempt to persuade a reluctant subject to talk, and the immediate termination of the interrogation after the invocation of rights is simply not required. [5] Punishment was reversed on other grounds.

CUSTODY FOR *MIRANDA*

State v. Octavio Ortiz (Publish, 10-31-12, Price). 382 S. W. 3d 367 (Tex. Crim. App. 2012). TCT and c/a aff'd. Incriminating oral statements made prior to being *Mirandized*[6] were suppressed because in custody. General rule as announced by SCOTUS[7] is that a traffic stop ordinarily amounts to only a temporary detention, and the occupants of the vehicle are not subjected to custody for *Miranda* purposes. If however the occupants freedom is constrained to the degree associated with formal arrest, then Fifth Amendment protections are triggered and a suspect is entitled to *Miranda* protections. Only looks to objective factors surrounding the detentions. The CCA relies heavily on the number of police (3); the number of patrol cars (2); the fact that the ofcr that stopped appellant communicated to appellant his suspicions of illegal

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[5] *CCA does indicate that "brutal third degree" techniques might render a confession involuntary. See also TEX. CODE CRIM. PROC. 38.21.*

[6] *384 U. S. 436 (1966).*

[7] Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).*

activity; and mentions patdown and handcuffs. CCA still maintains that handcuffing is not automatically custody – just one factor to look at in the mix.[8]

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[1] *384 U. S. 436 (1966).*

[1] Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).*

[1] *How can you not be in custody if you are chained up? How do you leave – unless you are given the keys to the handcuffs?*

[1] *Hell is for children. Pat Benotaur.*

FIFTH AMENDMENT

FIFTH CIRCUIT GIVES US NICE DEFINITION OF CUSTODY

US v. Cavazos, 668 F. 3d. 190 (Fifth Circuit 1/19/12). Interrogation which occurred in subjects home found to be custodial. Nice. " 'A detention of approximately an hour raises considerable suspicion that a subject has been subjected to a custodial interrogation.' " [9] It is noted that the GOVT identifies no evidence in the record to support their contention that Cavazos's incriminating statements were made early in the interrogation. Cavazos was awakened from his bed by LE, ided and handcuffed, while more than a dozen officers entered and searched his home, he was separated from his family and interrogated for at least an hour. His telephone and bathroom use monitored by LE. Notably the Fifth Circuit disagrees with the CCA about handcuffs not being indicative of custody.

[1] US v. Harrell*, 894 F. 2d 120, 124 n. 1(5th Cir. 1990).*

[1] *TEX. CODE CRIM. PROC. 38.22 When statements can be used.*

[1] Miranda v. Arizona*, 384 U. S. 436 (1966).*

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[8] *How can you not be in custody if you are chained up? How do you leave – unless you are given the keys to the handcuffs?*

[9] US v. Harrell*, 894 F. 2d 120, 124 n. 1(5th Cir. 1990).*