

# Pre-Trial Issues in DWI Cases

Mary Cunningham  
Judicial Program Manager  
Texas Association of Counties



# Topics

- Special Bond Conditions
- Pre-trial Discovery
- Pre-trial Hearings
- Motions to Suppress
- Notices

# Special Bond Conditions

- CCP 17.441 Ignition Interlock
- Magistrate shall require ignition interlock device as a pre-trial bond condition for subsequent DWI offenses, Intoxication Assault, and Intoxication Manslaughter
- Must be installed within 30 days of release on bond if ordered



# Ignition Interlock

- Magistrate may waive this provision if it would not be in the interest of justice to impose the restriction
- Magistrate may designate an appropriate agency to verify the installation of the device and to monitor the device

# Special Bond Conditions

- Court can order other bond conditions as it sees fit
- SCRAM device (secure continuous remote alcohol monitoring)
- In home device (such as backpack)
- Electronic monitor
- Driving restrictions
- No alcohol

# Pre-Trial Discovery

- CCP 39.14 (Michael Morton Act) + Brady v. Maryland, 373 U.S. 83 (1963)
- State must “permit electronic duplication, copying, and photographing” of evidence and information in its possession:
  - Police report
  - In-car video
  - Witness statements
  - Chemical test results

# Pre-Trial Discovery

- State is required to disclose evidence of:
  - Exculpatory evidence
  - Impeachment evidence
  - Mitigating documents/items/information

# Pre-Trial Discovery

- If state is in possession, custody, or control of anything that tends to negate the guilt of D or tends to reduce punishment for offense charged – State MUST turn it over
- NOTE – Neither materiality nor admissibility of evidence matter in the determination of what should be turned over



# Pre-Trial Hearings

- CCP 28.01: Court may set any criminal case for a pre-trial hearing before it is set for trial upon its merits, and direct D and his attorney and State's attorney to appear before court at the time and place stated in court's order for a conference and hearing.
- D must be present at the arraignment, and his presence is required during any pre-trial proceeding.

# Pre-Trial Hearings

- (1) Arraignment and appointment of counsel;
- (2) Pleadings of the defendant;
- (3) Special pleas, if any;
- (4) Exceptions to the form or substance of the indictment or information;
- (5) Motions for continuance;

# Pre-Trial Hearings

(6) Motions to suppress evidence (court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court);

(7) Motions for change of venue (may be reasserted during voir dire);

# Pre-Trial Hearings

- (8) Discovery;
- (9) Entrapment; and
- (10) Motion for appointment of interpreter.



# Pre-Trial Hearings

CCP 28.01 Sec. 2. When a criminal case is set for pre-trial hearing, any such preliminary matters not raised or filed 7 days before the hearing will not thereafter be allowed to be raised or filed, except by permission of court for good cause shown; provided that D shall have sufficient notice of such hearing to allow him not less than 10 days in which to raise or file such preliminary matters. The record made at such pre-trial hearing, the rulings of the court and the exceptions and objections thereto shall become a part of the trial record of the case upon its merits.

# Pre-Trial Hearings

CCP 28.01 Sec. 3. Notice in Section 2 shall be sufficient if given in any one of the following ways:

- (1) By announcement made by court in open court in the presence of D or his attorney;
- (2) By personal service upon D or his attorney;
- (3) By mail to either D or his attorney deposited by the clerk in the mail at least six days prior to the date set for hearing. If D has no attorney of record such notice shall be addressed to D at the address shown on his bond, if the bond shows such an address, and if not, it may be addressed to one of the sureties on his bond. If the envelope containing the notice is properly addressed, stamped and mailed, the state will not be required to show that it was received.

# Motions to Suppress

## Boiler Plate Motions

- Generic – may be filed in every case
- Arrest is invalid because it was without a warrant
- Any search of the vehicle violated D's constitutional rights and therefore anything seized is inadmissible
- All written and/or oral statements were taken in violations of D's rights and are inadmissible

# Motions to Suppress

## Specific Motions

- Specific legal argument that is case specific
- Usually more detailed and may contain case law
- Crossing white line in roadway was not probably cause for the stop
- Getting certain statements redacted from the video because they are inadmissible



# Motions to Suppress – Procedure

- D (movant) has initial burden of proof – an arrest without a warrant/bad stop/inadmissible statement
- Burden then shifts to state – clear and convincing evidence
- If state or defense is using case law, they should provide a copy to the other party and one for the court to reference
- Allegations in the MTS are not evidence
- The state may use multiple theories to justify an arrest or stop – not limited to one

# Arrest Without Warrant

## CCP Chapter 14 – Arrests without a warrant

- Felony or offense against the public peace committed within view of peace officer or magistrate
- Persons found in suspicious places and under circumstance which reasonably show that they are guilty of some felony, engaged in disorderly conduct, breach of the peace, or PI, or threaten, or are about to commit some offense against the laws
- Persons who peace officer has probably cause to believe have committed an assault resulting in bodily injury to another and peace officer has probably cause to believe that there is danger of further bodily injury to that person;

# Arrest Without Warrant

- Persons who peace officer has probably cause to believe have committed an offense involving family violence;
- Persons who peace officer has probably cause to believe have prevented or interfered with another's ability to place telephone call in an emergency, if not committed in presence of peace officer;

# Arrest Without Warrant

- A temporary stop is justified under the Fourth Amendment when the detaining officer has specific articulable facts which, taken together with rational inferences from those facts, lead the officer to conclude that the person detained is, has been, or soon will be engaged in criminal activity. Terry v. Ohio, 392 U.S. 1, 30 (1968).

# Arrest Without Warrant

- These facts must amount to more than a mere hunch or suspicion. A detention is not permissible unless the circumstances objectively support a reasonable suspicion of criminal activity. Davis v. State, 947 W.E.2d 240, 244 (Tex.Crim.App. 1997).



# Arrest Without Warrant

- Consider totality of the circumstances
- Court's decision on a motion to suppress is almost always based on the officer(s) being able to articulate what happened and why he/she/they did what they did

# Suppressing Statements

Miranda applied to DWI:

- Initial traffic stop vs. custodial interrogation

What statements can be suppressed:

- Priors on tape – dispatcher saying D has prior and/or D talking about it
- D talking about prior arrest(s) – “I just got off probation”
- *Fisher* Narration – officer’s narration of D’s SFST performance is testimonial
- Officers narrating too much to other officers and/or their opinions to one another about the situation
- Hearsay issues

# Suppressing SFSTs

- NHTSA annual and case law both say that minor variations to the administration of the SFSTs do not render them invalid
- Problems with the SFSTs goes to weight not admissibility
- Refusal to do them can be used as evidence of guilt (same with failure to take the chemical test)



# Suppressing SFSTs

- Defense attorneys often use suppression hearing as a fishing expedition to determine how much the officer knows about the science behind the SFSTs
- One Leg Stand and Walk and Turn are lay witness testimony



# Suppression Hearings

- Rules of evidence do not apply to pre-trial hearings of MTS
- *Granados v. State* 85 S.W.3d 217 (Tex.Crim.App 2002)
- Hearsay statements etc. that could be objected to at a trial are not limited in pre-trial hearings – an officer can tell the court why they did something

# Suppression Hearings

## Defendant Testimony

- The D may testify for the limited purpose of issues raised at the suppression hearing
- State cannot cross-examine on issues outside of those relevant to suppression
- Works both ways – D must stay within scope

# Suppression Hearings

- State cannot use D testimony from a suppression hearing at trial if D does not testify at trial
- If D does testify at trial, testimony from suppression hearing can be used for impeachment purposes only as a prior inconsistent statement

# Ruling on Motions to Suppress

- The judge can rule on written motion and reply, in affidavits from officers, and/or on oral testimony
- In ruling on the motion the judge can announce a decision or make oral or written findings of fact and conclusions of law – no requirement of written findings

# Appeals on Motions to Suppress

- Appellate courts should give almost total deference to the trial court's ruling of the applications of law to fact questions, mixed questions of law and fact, and evaluation credibility and demeanor
- State may appeal trial court's adverse ruling under CCP 44.01(a)(5)
- If the prosecutor plans on appealing makes sure ruling is made before jeopardy attaches

# Best Practices

- Do before the day of trial or even before jury notices are send  
– often the outcome results in a plea or a dismissal
- Do written Findings of Fact and Conclusions of Law



# Notices

## Designation of Expert Witnesses

- On a party's request – shall disclose experts no later than the 20<sup>th</sup> day before jury selection
- If the request is 30 days before trial



# Notices

## Notice of Priors

- Upon timely request by D
- State must give “reasonable notice” before trial – what does this mean – could be one day – 10 days is presumably reasonable

# Questions?



# Help

(844) 265-8343 – TAC Judicial Hotline

[maryc@county.org](mailto:maryc@county.org)