

# Traffic Stops and Arrests

Impaired Driving Symposium  
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## Introduction

- ▶ TDCAA – good materials on criminal law
  - “DWI Investigation and Prosecution”
- ▶ Search and Seizure – 4<sup>th</sup> Amendment
  - “The right of the people to be secure in their persons, houses, papers, and effects, against ***unreasonable searches and seizures***, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

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## Introduction

- ▶ Courts are tasked with ensuring that these constitutional protections are not violated.
- ▶ Search and Seizure – DWI
  - In the context of DWI charges ... “How is evidence gathered for prosecution? What are the guidelines and other limits to evidence gathering?”
    - Part 1 – Making the Stop
      - Standards for proper stops
    - Part 2 – Conducting the Investigation
      - Gathering evidence to determine if an arrest is proper

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# Part 1

## Making the Stop

- ▶ DWI charges usually result from warrantless arrests. So, the first issue is to consider the circumstances under which a defendant was initially detained (pulled over).

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### When can I be stopped?

- ▶ In order for an officer to pull someone over, he or she must have "probable cause" that the person is involved in some criminal activity.
- ▶ True or False?
- ▶ False.
  - An officer must only have a "reasonable suspicion" that the person is involved in criminal activity.

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### Important Terms

- ▶ Temporary Detention (e.g. a traffic stop)
  - Requires only a "reasonable suspicion".
- ▶ Arrest
  - Requires "probable cause".
- ▶ The court may be called upon to evaluate either or both of these standards. It doesn't take much to justify the stop. But, it does take probable cause to justify an arrest.

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## Am I detained, or under arrest?

- ▶ **Temporary Detention**
  - Generally for the purpose of investigation.
  - Often referred to as a *Terry* stop.
    - *Terry v. Ohio* (1968 U.S. Supreme Court, 390 U.S. 1)
  - Again, only requires reasonable suspicion.
- ▶ **Arrest**
  - A person is "in custody" (under arrest) if a reasonable person would believe his freedom of movement is restrained to the degree associated with formal arrest.
    - i.e., if the average person would think he's under arrest
  - This requires probable cause.
    - (and triggers *Miranda* warnings before interrogation)

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## Reasonable Suspicion for Stop

- ▶ In order to make an investigative stop, the officer must have a reasonable suspicion that:
  - 1. Some activity out of the ordinary has occurred;
  - 2. The defendant is connected to the activity; and
  - 3. The activity is related to a crime.
- ▶ This must be satisfied by "articulable" facts, and not just the officer's "hunch".
  - Facts that the officer knew at the time of the stop
  - Proper stop can, over time, become unreasonable.

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## Examples (theories for stop)

- ▶ **Traffic Violations**
  - The most common basis, of course.
  - Observing a traffic violation is always sufficient.
  - Even a reasonable mistake of law by the officer may be enough. (See 135 S.Ct. 530 and others)
- ▶ **Weaving Within the Lane**
  - Tremendous amount of litigation on this issue.
  - No clear cut rules – the question remains the same, that is, whether reasonable suspicion exists.
    - Amount of traffic on the road is relevant (i.e. safety).
    - Other facts are relevant – i.e. fluctuating speed.

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## Examples (theories for stop)

- ▶ What about “pretext” stops?
  - An officer stops someone for one stated reason, but has another reason in mind...
    - Officer follows a car from a known drug house (or a bar), watching for a traffic violation. He pulls him over for speeding, but is really looking for drugs (or DWI).
    - Is this a proper stop?
  - This is a proper stop. As long as an objective basis exists for the stop, the fact that the officer had another reason for stopping the defendant will not invalidate the stop. (899 S.W.2d 668)

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## Examples (theories for stop)

- ▶ Community Caretaking
  - In addition to looking for criminals, officers have a duty to come to the aid of citizens in distress.
  - First addressed in *Hulit v. State* (982 S.W. 2d 431)
    - Driver in a running vehicle, slumped over the steering wheel. Officer didn't claim he suspected a crime, but that he wanted to make sure the driver was ok.
  - Depends on the facts – consider the nature of the distress, location of the individual, whether other help was available, the danger posed, etc.
  - “Would a reasonable person believe the individual is in need of help?” If so, the officer can investigate.

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## Examples (theories for stop)

- ▶ Citizen Calls
  - Much more common, of course, due to cell phones.
  - A citizen calls in to report bad driving (speeding, weaving, etc.) and officer stops the defendant, but with no independent basis for the suspicion.
  - Is this enough – “reasonable suspicion” for a stop?
  - Good bit of caselaw – these are generally allowed.
  - Presumption ... As long as the caller is not a criminal informant, he is presumed to be credible.
  - One consideration ... Did the caller place himself in a position where he could be identified, and held accountable? (e.g., caller ID)
    - Again, this touches on his credibility.

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## Examples (theories for stop)

- ▶ Roadblocks and Sobriety Checkpoints
  - Common in other states, not so in Texas.
  - Issue ... Balancing the public interest (safety) with individual driver's right to privacy.
  - U.S. Supreme Court has said that roadblock stops to identify intoxicated drivers are not inherently unreasonable. (*Sitz*, 496 U.S. 444)
  - But, the Texas Court of Criminal Appeals has said roadblocks require statewide authorization, i.e. legislative approval, which Texas does not currently have. (*Holt*, 887 S.W. 2d 16)

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## Part 2 Conducting the Investigation

- ▶ Once a proper stop has occurred, the officer gathers evidence (investigates) to determine whether or not his "reasonable suspicion" can be elevated to the level of "probable cause". If so, an arrest is justified.

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## Common Sources of Evidence

- ▶ Evidence from the driver's actions
  - How he acts (what he does) during the investigation.
- ▶ Evidence from the driver's statements
  - What he says during the investigation.
- ▶ Evidence from inside the driver's body
  - Breath and blood evidence
- ▶ Evidence gathered from the scene
  - In or around the vehicle, witness interviews, etc.
- ▶ All evidence is considered together to determine whether probable cause exists to make an arrest.

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## Evidence – Driver’s Actions

- ▶ Throughout the stop, the officer is watching for clues of intoxication.
- ▶ Many are clues familiar to anyone who’s been around an intoxicated person.
  - Examples?
- ▶ Others are clues identifiable by a trained officer performing specific tests (FST’s).

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## Evidence – Driver’s Actions

- ▶ During the initial detention, the officer may always ask the driver to:
  - Get out of the car.
  - Produce license, insurance, registration, etc. and answer basic questions about where he’s headed.
  - Wait while the officer checks for warrants or writes up a citation or warning.
- ▶ Of course, the officer is watching for common clues of intoxication:
  - Slurred speech, unsteady balance, red or bloodshot eyes, slow to respond, etc.

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## Evidence – Driver’s Actions

- ▶ Once the initial purpose for the stop has been accomplished (i.e. traffic violation), further detention **MAY** become unreasonable.
  - Have enough clues been observed to create a reasonable suspicion of another crime (DWI)?
  - If not, detention has ended – release the driver.
  - If so, further investigation is warranted.
- ▶ If so, of course, FST’s are likely.
  - These are divided attention tests – i.e. they test the driver’s ability to concentrate on more than one task at the same time.

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## Evidence – Driver’s Actions

- ▶ Standardized FST’s
  - These have the studies to show their reliability – e.g., 78 to 90 % reliable, if administered correctly.
  - Again, the officer’s looking for clues of intoxication.
  - Horizontal Gaze Nystagmus (HGN)
    - Jerking of the eyes, tracking, size of pupils, etc.
  - One Leg Stand
    - Balance (arms), putting foot down, hopping, etc.
  - Walk and Turn
    - Balance (arms), steps off line, misses heel to toe, starts or stops too soon, etc.

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## Evidence – Driver’s Actions

- ▶ Non-Standardized FST’s
  - These may aid the officer in his observations, of course, but they don’t have standardized protocols, or the scientific studies to establish their reliability.
  - Examples:
    - Rhomberg – heels together, head back, eyes closed
    - Fingertip counting – e.g. thumb to four fingers
    - Backward counting – from one random # to another
    - Alphabet – from one random letter to another
  - These can be any number of things that might help the officer (and jury) observe clues of intoxication.

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## Evidence – Driver’s Statements

- ▶ Many times, what the driver says during the investigation is as helpful as anything else in determining intoxication.
  - “I had the right to remain silent... but not the ability.”
    - Ron White
  - “Officer, could you hold my beer while I get my license?”
  - “Are you kidding me? I can’t do that sober!”
- ▶ It’s important to understand when the driver’s words are admissible.
  - Detention v. arrest, *Miranda* warnings, voluntary statements (*res gestae*), interrogation, etc.

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## Evidence – Driver’s Statements

- ▶ The general public has watched enough TV to be familiar with *Miranda* warnings, but they don’t really understand what they mean.
- ▶ “I was arrested for DWI, but they never read me my rights. My case should be dismissed!”
  - True or False?
  - The absence of a reading of these rights only affects the admissibility of certain statements made by the defendant.

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## Evidence – Driver’s Statements

- ▶ *Miranda* warnings
  - Statements made by the defendant as a result of “custodial interrogation” are not admissible unless the warnings have been given.
- ▶ “Custodial”
  - The defendant must be “in custody” (under arrest).
- ▶ “Interrogation”
  - The statements must be made in response to interrogation by the state.

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## Evidence – Driver’s Statements

- ▶ A driver is stopped for speeding and the officer is writing him a citation. While doing so, and without giving the warnings, the officer asks, “Have you had anything to drink tonight?” The driver says, “Yeah, we had a few tequila shots about an hour ago.”
  - Admissible?
  - Yes. The defendant is not “in custody”. This is only a temporary detention (not an arrest) and therefore *Miranda* warnings are not required.
  - The warnings only apply to custodial interrogation.

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## Evidence – Driver’s Statements

- ▶ A driver is arrested for DWI, but no warnings are given. While being transported to the jail, he says from the back seat, “I know I’m drunk, officer, but can you give me a break? I can’t afford to lose my job.”
  - Admissible?
  - Yes. The defendant is in custody, but his statement is not in response to an interrogation (questioning or prompting by the officer).
  - The warnings only apply to custodial interrogation.

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## Evidence – Driver’s Statements

- ▶ Videos have greatly reduced the number of DWI trials (during FST’s, inside the patrol car, interviews at the stationhouse, etc.).
  - What if the driver’s not told he’s being taped?
    - No effect on admissibility. (78 S.W.3d 505)
  - What if there’s no audio, or it’s muffled / unclear?
    - No affect on admissibility. (948 S.W.2d 377)
  - What if there was a video made, but now it can’t be located? Should the case be dismissed?
    - Only if destroyed in bad faith. (774 S.W.2d 111)
  - Objectionable material on the video, of course, must be edited out before shown to the jury.

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## Evidence – Driver’s Body

- ▶ Of course, breath and blood evidence has become a significant factor in DWI cases.
- ▶ This is beyond the scope of our presentation today, other than to notice a couple of things:
  - Implied consent – no right to refuse, or to counsel
    - Transportation Code, ch. 724 (also 631 S.W.2d 515)
  - But see Villareal (475 S.W.3d 784) – warrantless, nonconsensual blood draw violates the 4<sup>th</sup> Amend.
  - Very compelling evidence when the BAC reading is greater than .08 (especially if .10 or greater).

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## Evidence – From the Scene

- ▶ An officer can gather a good bit of evidence from the scene of the investigation in making his determination of whether to arrest.
- ▶ Examples
  - Open containers
  - Evidence on the body – e.g. hand stamps
  - Witness interviews
    - Where they've been, what they've had to drink, etc.

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## Evidence – From the Scene

- ▶ Crash Scenes – “Wheeling” the Defendant
  - DWI requires proof that the Defendant was driving, or “operating a motor vehicle”.
  - So, what if the officer responds to a crash scene, and no one actually saw the defendant driving?
  - It takes very little evidence to “wheel” the defendant, at least to get to the jury.
    - e.g. no other passengers, seat belt / air bag injury, etc.
  - But, the state still must prove “operation” to the jury, beyond a reasonable doubt (fact issue).

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## Summary

- ▶ The officer must only have a “reasonable suspicion” in order to make a stop, in order to make a temporary detention. However, in order to make an arrest, he must be able to articulate “probable cause”, based upon evidence gathered during the investigation.
- ▶ The point of these restrictions and guidelines, of course, is to protect our right to be free from “unreasonable” search and seizure. Ultimately, the court has the responsibility of seeing that our constitutional rights are preserved.

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