CRIMINAL LAW

I. PRE-TRIAL

A. INDICTMENTS

State v. Heilman, *W.L. 5651811; LEXIS 12824 (Tex. App.—Beaumont 2013)*

Limitations and Estoppel: The defendant was a police officer who was the subject of an investigation based on an undercover narcotics transaction. The defendant was given the opportunity to either plead guilty to a misdemeanor charge of tampering with a governmental record and received deferred adjudication, or have his case presented to a grand jury. He subsequently filed an application for habeas corpus, which the trial court granted, finding the information was barred by limitations. State argued that the defendant was estopped from attacking the conviction because he bargained for the plea and benefited from it. **Held:** Court holds the doctrine of estoppel does not apply because the trial court had no jurisdiction over the case.

B. SEARCH & SEIZURE

Turrubiate v. State, *W.L. 5338364; LEXIS 11964 (Tex. App.—San Antonio 2013)*

Community Caretaking: The defendant was back in Court of Appeals after the Court of Criminal Appeals reversed the denial of motion to suppress. Court sent the case back to determine if state made argument that exigent circumstances justified the search, and if they didn't could the Court still address it. **Held:** It can rely on any legal authority upon which a ruling may be upheld, whether it was raised or not. The court also held exigent circumstances did not support search. State argued they were concerned for safety of child. However, officer did not search for child, and instead placed the defendant in custody and interrogated him about whether he had drugs.

Wade v. State, *W.L. 4820299; LEXIS 1314 (Tex. Crim. App. 2013)*

Reasonable Suspicion: The defendant was spending his lunch hour in a parking lot of a boat ramp. He had his engine running, when a game warden came by. The warden was suspicious because the truck was out of place since there wasn't a boat attached, and no fishing equipment. He questioned the defendant, who he believed told him several lies about why he was there, and where he lived. He had him get out of the truck, and frisked him. Not finding anything he asked the defendant if there was anything he should know about, and was directed to pipe containing a small amount of methamphetamine. **Held:** An individual's nervousness and refusal to answer an officer's questions are insufficient to create a reasonable suspicion. The statement about the pipe was derived from the illegal detention, and therefore the fruit of the poisonous tree.

Thompson v. State, *408 S.W.3d 614 (Tex. App.—Austin 2013)*

Unreasonably Extending Detention: The defendant was stopped for speeding. When officer approached the car, he noticed the defendant was only in her bra and pants. He thought that was unusual, and also thought she was acting nervous and fidgety. Consent was requested, and she refused. Approximately 11 minutes after officer first approached her, he requested a canine unit. The dog eventually arrived, and alerted on the vehicle. The defendant filed a motion to suppress, arguing the detention was unreasonably extended. The trial court denied the motion. **Held:** The trial court abused its discretion in doing so. The investigation of the traffic violation ended at least 15 minutes before the dog arrived, and he had no reason to hold her other than an unparticularized suspicion or hunch.

C. CONFESSIONS

State v. Saenz, *W.L. 5729973; LEXIS 1507 (Tex. Crim. App. 2013)*

Statements Under Arrest: Officer responded to disturbance at bar where he encountered the defendant and another man sitting in a truck. Believing the defendant was intoxicated he placed him un-handcuffed in the back of a patrol car and called a DWI specialist. In response to a question by the officer the defendant said he drove the vehicle to the bar and got in a fight. He filed a motion to suppress the statements, which the court granted. Trial court made findings that the defendant was under arrest for suspicion of DWI when he was questioned. The court of appelas held the officer had probable cause to arrest the defendant, and did not inform him he was not under arrest. **Held:** Reversed, holding the court of appeals erred in holding the officer's belief that he had probable cause along with placing the defendant in the patrol was enough to indicate to the defendant that he was under arrest. Court should have examined totality of circumstances to determine whether reasonable person would have believed they were under arrest.

D. VOIR DIRE

Jones v. State, *W.L. 5470047; LEXIS 12250 (Tex. App.—Houston) [14th Dist.] 2013)*

Batson Challenge: The defendant challenged the state's strike. They explained they struck everyone who rated law enforcement a 7 on a scale of 1-10. CCA holds the court erred in accepting that explanation because it was contrary to the record—they skipped two jurors with lower numbers who were not african-american.

Tate v. State, *W.L. 3947695; LEXIS 9603 (Tex. App.—Houston [1st Dist.] 2013)*

Juror Misconduct: On the same date the defendant was sentenced the jury foreman sent a note to judge telling him that before selection he had searched the DPS sex offender registry and learned the defendant had a 1981 aggravated robbery conviction. However, the defendant did not file a motion for new trial. **Held:** Court holds any error was not preserved. Even if there was evidence of outside influence though, the defendant did not establish that the information influenced the jury. Court also holds information was not witheld, since he was never specifically

asked about it. **Note:** This is an important tip—ask about any information the jury may have about the defendant, and follow up on anything you find.

E. MISCELLANOUS

Rodriquez v. State, *W.L. 5477366 (Tex. App.—San Antonio 2013)*

Plea Offers: The defendant was charged with three counts of sexual assault of a child, six counts of indecency of a child by contact, and one count of indecency with a child by exposure. Prior to trial state offered ten years which he declined based on the advice of counsel. He then went to trial and obtained 8 life sentences and one 20 year sentence. The defendant hired a new attorney, who filed a motion for new trial claiming ineffective assistance. Trial court granted motion, and also granted a motion to reinstate the 10 year offer. However, he rejected the plea agreement, and advised the defendant that he could withdraw his plea or accept a sentence of 25 years. The defendant rejected that offer, and filed a motion to recuse the trial judge. The motion was granted and a new judge was assigned. The new judge held the "slate was wiped clean" when the motion for new trial was granted, and that there were two options: 1) reach a new plea agreement, or 2) go to trial. State offered 25, which the defendant accepted. **Held:** The defendant should have been re-presented with the original 10 year offer, and presented to an impartial judge. New judge has discretion to either accept or deny the offer.

Ex Parte Obi, *W.L. 4520936; LEXIS 10778 (Tex. App.—Houston [1st Dist.] 2013)*

Advice Regarding Plea: The defendant plead guilty and was placed on deferred adjudication for family violence assault. INS subsequently initiated removal proceedings, and the defendant filed an application for habeas corpus. He claimed his attorney told him that deferred adjudication was not a final conviction, and he could he avoid a final conviction by accepting the agreement. Counsel did not specifically advise him about the immigration consequences of the plea, but only gave the general advice contained in the plea papers. **Held:** It was sufficient to tell the defendant he was subject to deportation and he did not have to go further and use the words "presumptively mandatory" or "virtually certain".

In re Brett Ligon, *408 S.W.3d 888 (Tex. App.—Beaumont 2013)*

Disqualifying District Attorney: The defendant was charged with criminal trespass, based on the entry onto property and breaking into a vehicle. The named victim in the information was the elected District Attorney. The defendant filed a motion to disqualify the District Attorney's office, which was granted. The State appealed. **Held:** The decision was not "outside the zone of reasonable disagreement", and denied the appealed. **Note:** It's hard to believe this was even appealed. How could the office not be disqualified, since even if it was handled by an assistant, their boss was still the victim.

II. TRIAL

A. EVIDENCE

Coleman v. State, *W.L. 5758084; LEXIS 13205 (Tex. App.—Houston [14th Dist.] 2013)*

Expert Testimony: The defendant sought to admit testimony from an expert that he fit the profile of someone who would be susceptible to giving a false confession. Court recognized that the field of expertise was a legitimate one, and the subject matter of the testimony was within the scope of the field. However, the court holds the defendant did not prove the witness properly relied on, or utilized the principles in the field, and therefore court did not err in excluding it.

B. EXAMINATION OF WITNESSES

No significant cases

C. INSTRUCTIONS

Zamora v. State, *W.L. 5729980; LEXIS 1509 (Tex. Crim. App. 2013)*

Accomplice Instruction: Court holds that accomplice instruction is required when the evidence raises the question of whether the witness is an accomplice under a party-conspirator theory.

Martinez v. State, *W.L. 5712546; LEXIS 13066 (Tex. App.—Amarillo 2013)*

Art. 38.23 Instruction: Officers entered a bar and saw a group of men standing by bar; they observed a couple of men changing money, one of whom was the defendant. He was detained, and the officer went to try and find the other individual. When he came back he saw the defendant throw something on the ground, which he subsequently recovered and determined it was cocaine. The defendant requested an Art. 38.23 instruction, which the court denied. **Held:** There was a material issue as to whether there was reasonable suspicion to detain the defendant, and therefore the instruction should have been given.

Arrington v. State, *W.L. 4082305; LEXIS 10096 (Tex. App.—San Antonio 2013)*

Unanimity: The defendant was charged with seven counts of aggravated sexual assault, and one count of indecency with a child. There was evidence of four separate incidents presented, but juror was not instructed that they

needed to be unanimous on which incident they were returning a guilty verdict on. **Held:** Court holds that was error, and also concludes there was some harm because jury was not able to return a verdict on one of the counts.

D. ARGUMENT

No significant decisions

E. SENTENCING

Plummer v. State, *W.L. 5539567; LEXIS 1488 (Tex. Crim. App. 2013)*

Deadly Weapon Finding: The defendant was convicted of both possession of a weapon by a felon and possession of body armor. Court entered a deadly weapon in the possession of body armor case. **Held:** Court holds the gun did not play any role in enabling, continuing or enhancing the offense of possession of body armor. There must be some facilitation connection between the weapon and the felony.

Boston v. State, *W.L. 5538888; LEXIS 1489 (Tex. Crim. App. 2013)*

Evidence of Threats For Deadly Weapon Finding: The defendant went into convenience store with his brother. The brother had a gun, which fell out of his pocket. He picked it up and held it over the counter, and reached over to get money out of register. The defendant argued he couldn't be convicted because there was no evidence he threatened the clerk, and also that evidence was not sufficient to support a deadly weapon finding since there was no evidence the clerk saw the gun. **Held:** The Court rejects both those arguments, and holds that brandishing a weapon is not the only way a victim can be threatened or placed in fear.

Yon v. State, *W.L. 4746554; LEXIS 11315 (Tex. App.—Tyler 2013)*

Alcohol as Deadly Weapon: The defendant was charged with injury to a child by providing alcohol to a 16 month old boy. The child was taken to the hospital and had a blood alcohol content of 0.245. The jury made a deadly weapon finding, finding the alcohol was a deadly weapon. **Held:** Affirmed, noting the high alcohol content of the liquor at the house as well as testimony that the blood alcohol level was in the potentially lethal range.

Halbirt v. State, *W.L. 5658371; LEXIS 12823 (Tex. App.—Beaumont 2013)*

Deadly Weapon—DWI: The defendant was charged and convicted of DWI. The arresting officer testified that he saw the defendant cross his lane into oncoming traffic, although there few, if any cars on the road at that time of night. Jury entered a deadly weapon finding. **Held:** The evidence was insufficient to support that finding. The evidence must establish more than a hypothetical danger, but instead establish that others were actually in danger.

F. SUFFICIENCY

Britain v. State, *W.L. 5538968; LEXIS 1505 (Tex. Crim. App. 2013)*

Sufficiency of Evidence—Criminally Negligent Homicide: The defendant's eight year old daughter went to school nurse complaining of stomach ache. She went home, and vomited a number of times but continued to take fluids. She was found dead by her brother, and cause of death was acute appendicitis. State's expert, as well as two defense experts testified that symptoms could have been easily mistaken for stomach flu. **Held:** Court holds evidence was not sufficient to establish negligence, since there was no evidence that the defendant should have been aware of the risk.

Whatley v. State, *W.L. 5634139; LEXIS 12810 (Tex. App.—Texarkana 2013)*

Voluntary Act: The defendant was charged with sexual assaulting his 11 year old daughter. In her initial interview, as well as her testimony, she stated that the defendant was asleep at the time, and was snoring during one of the incidents. The defendant argued any touching was not voluntary. **Held:** Court holds evidence was insufficient to establish the defendant was awake and consciously engaging in the actions. The burden was on the State to establish the act was voluntary, and they failed to meet that burden.

Chiarini v. State, *407 S.W.3d 922 (Tex. App.—Dallas 2013)*

Sufficiency—Unlawfully Carrying a Weapon: The defendant was charged with UCW, based on carrying a weapon in the common area of his condominium development. There was testimony that the commons area was owned by all of condominium owners. **Held:** Court holds evidence was insufficient to prove that he was not on his own property.

G. MISCELLANEOUS

Farmer v. State, *W.L. 5538876; LEXIS 1490 (Tex. Crim. App. 2013)*

Voluntary Intoxication: The defendant argued he mistakenly took an ambien pill, when he thought he was taking a pain pill, and as a result was intoxicated. The defendant requested instruction on involuntary act, which the court denied. **Held:** The defendant's act of taking the ambien pill was voluntary, even if he mistakenly thought he was taking something else.

Fuelberg v. State, *W.L. 4816801; LEXIS 10739 (Tex. App.—Austin 2013)*

Judicial Disqualification: The defendant was charged with theft from the Pedernales Electric Cooperative, a member owned utility. Prior to trial he filed a motion to disqualify or recuse the judge, claiming he was a member of the cooperative. Another judge was assigned to hear the motions, and denied them. The judge was not disqualified

simply because of his interest in the cooperative. On the motion to recuse, the visiting judge found the trial judge was impartial. **Held:** the visiting judge erred in applying a subjective standard. Instead, the proper standard is whether a reasonable person would doubt the judge's impartiality.

III. POST-TRIAL

A. APPEAL

SIGNIFICANT OPINION

Thomas v. State, *408 S.W.3d 877 (Tex. Crim. App. 2013)*

Waiving Appeal: The defendant filed a motion to suppress, which was denied. The defendant plead guilty the next day without a sentencing recommendation. The admonishment form stated that the defendant waived the right to appeal. However, the trial court certification stated that the plea was not pursuant to a plea bargain, and the the defendant retained the right to appeal. At the punishment hearing the State offered several exhibits, including the evidence that the defendant tried to suppressed. When it was introduced, the defendant stated he had no objection. Trial court sentenced the defendant, and then advised her she had the right to appeal the ruling on the motion to suppress. COA refused to consider the appeal, holding the defendant had waived error by stating he had no objection to the evidence when offered. **Held:** Waiver is not an inflexible concept, and in this case it was clear that the defendant did not intend to waive his right to appeal. The rule that had been developed is "record dependent" and here it was clear the defendant did not waive the right to appeal when the evidence was introduced. **Note:** This is significant decision, which is contrary to what the court has consistently stated. Common sense prevailed, and a defendant can now pursue the issue on direct appeal instead of having to do so through a writ of habeas corpus.

Henson v. State, *407 S.W.3d 764 (Tex. Crim. App. 2013)*

Preserving Error—Speedy Trial Claims: On appeal the defendant claimed a speedy trial violation because his trial occurred two years and ten months after his arrest. The issue had not been raised in the trial court, and the court of appeals held that prevented him presenting the claim on appeal. **Held:** This error is no different from any error, and must be preserved in the trial court.

Vasquez v. State, *W.L. 5729828; LEXIS 1591 (Tex. Crim. App. 2013)*

Findings of Fact: The defendant filed a motion to suppress his confession arguing he was not given his *Miranda* warnings. He subsequently amended the motion to allege it was not admissible under Art. 38.22. **Held:** Whenever a defendant alleges his statement is involuntary, Art. 38.22 requires the trial court to make findings. Even though neither side had requested them, findings were still required, and appeal was abated and sent back to trial court.

B. HABEAS CORPUS

No significant decisions

C. MISCELLANEOUS

Franqrias v. State, *W.L. 5368515; LEXIS 12096 (Tex. App.—Houston [14th Dist.] 2013)*

Ineffective Assistance of Counsel: The defendant filed a motion for new trial, alleging his lawyer did not provide effective assistance because he did not try to obtain the testimony of a witness by deposition. The witness could not travel because he was undergoing chemotherapy, but was available to testify. The witness was crucial to attacking the complainant's testimony. **Held:** Counsel's performance was deficient, and he was prejudiced by the failure to secure the testimony.

Odelugo v. State, *W.L. 3991976; LEXIS 9786 (Tex. Crim. App.—Houston [1st Dist.] 2013)*

Conflict of Interest: The defendant hired a lawyer to represent him. He was a non-citizen, and was concerned about his immigration status. He eventually paid the lawyer $285,000, with the hope that he would receive deferred adjudication and the case would ultimately be dismissed. When it came time to enter the plea the lawyer advised Odelugo that the money was gone, and not available for restitution. After the court sentenced him to 18 years he filed a motion for new trial; the lawyer refused to testify, asserting his Fifth amendment privileged. **Held:** That constituted a conflict of interest, since the lawyer was advancing his own interests ahead of the clients when he used the money for his own purposes. He continued to advance his own interests when he refused to testify at the hearing. Court holds that although it probably would not have granted deferred adjudication, the payment of a significant amount of restitution would have been considered.

Ex Parte MG, *W.L. 3972225; LEXIS 9642 (Tex. App.—Waco 2013)*

Expunction—Conviction of Other Charge: The defendant was arrested for DWI. That charge was eventually dismissed, and he plead guilty to a reduced charge of obstructing a highway. He subsequently filed a petition for expunction directed to the DWI arrest. The trial court granted the motion, but there is no record of any court hearing on the petition. **Held:** The defendant was not entitled to relief because there was no proof that any indictment or information charging the commission of a misdemeanor offense arising out of the same transaction was dismissed.

Lundgren v. State, *W.L. 4473660; LEXIS 10687 (Tex. App.—Ft. Worth 2013)*

Motion to Revoke—Case On Appeal: the defendant was placed on probation for DWI pursuant to a plea agreement which included a provision that the defendant had no right to appeal. After being on probation for a week he got arrested for another DWI. He then filed a Notice of Appeal, as well as a Motion for New Trial. The State

filed a motion to revoke, and the defendant filed a Motion to Quash claiming he was not on probation because he had filed a Notice of Appeal. **Held:** The defendant was on probation when he committed the new offense, and the Notice of Appeal could not retroactively cure those violations.

Ex Parte Helm, *LEXIS 11443 (Tex. App.—Eastland 2013)*

Expunction: The defendant was arrested for possession of a controlled substance, and misdemeanor possession of marijuana. He pled guilty to possession of controlled substance, and pursuant to Section 12.45 admitted guilt to the marijuana charge. After completing supervision on the controlled substance case he moved to expunge the marijuana arrest. **Held:** The expunction was not available because the defendant was placed on supervision for the controlled substance offense. **Note:** The petition was filed prior to the 2011 amendments that made it clear that expunction is not available if the individual is placed on supervision for any offense that stemmed from the same arrest.

In the Matter of AG, *W.L. 5634344; LEXIS 12844 (Tex. App.—El Paso 2013)*

Expunction: The defendant was arrested for DWI, and an information was filed charging that offense. The information was subsequently amended to add a second count of reckless conduct. He entered a plea to reckless conduct, and admitted guilt on the DWI charge. Count I was subsequently dismissed, and the defendant filed a petition for expunction, which the trial court granted. **Held:** The defendant was not entitled to expunction because the evidence established the defendant had been convicted of a lesser charge.