For those who choose to serve in the military forces, both the federal and state governments have instituted protections to ensure that these sacrifices do not include the loss of the service member's employment.

statute requires that the employee may return to the same employment he held before leaving for military service and that the employer not only reemploy the service member, but also do so without any loss of seniority, vacation time, or any other benefit of employment.[12] Additionally, the employee must give notice of his intent to return to employment "as soon as practicable" following his release from duty.

The Texas Government Code also provides for 15 work days' worth of paid military leave specifically for employees who are employed by the state, a municipality, a county, or another political subdivision of the state (such as prosecutors and their staff members).[13] The statute also reiterates that such employees may not be subjected to loss of time, efficiency rating, personal time, sick leave, or vacation time as a result of their leave to perform military duty.

Conclusion

To all those prosecutors and members of county and district attorneys' offices who serve, let me give you a heartfelt "thank you" for your service. Luckily, in my experience, the heads of such offices are overwhelmingly supportive of their service members, even when that service works a hardship on the office if that employee is deployed. It is nonetheless comforting for employees who serve and those considering service to know that the law provides them employment protections. ❇

Endnotes

[1] 38 U.S.C. §§4303–4326. Although it likely does not apply to most prosecutor offices, it should be noted that USERRA's employment protections apply only to service members who are employees of an organization, not independent contractors. 38 U.S.C. §4303(3).

[2] 38 U.S.C. §4311.

[3] 38 U.S.C. §4312.

[4] 38 U.S.C. §§4313, 4316.

[5] 38 U.S.C. §4303(13) (defining service in the uniformed services as including voluntary or involuntary performance of duty including active duty, active duty for training, inactive duty training, full time National Guard duty, etc.).

[6] 38 U.S.C. §4312(a)(1); but see 38 U.S.C. §4312(b) (notice need not be given where giving such notice is precluded by military necessity, or where it is impossible or unreasonable under the circumstances).

[7] 38 U.S.C. §4312(e).

[8] 38 U.S.C. §4312(d).

[9] Tex. Gov't Code §437.204(a) (note that this statute also applies to persons who are members of the military forces of another state).

[10] Tex. Gov't Code §437.001(14)(16).

[11] Tex. Gov't Code §437.204(a).

[12] *Id.*

[13] Tex. Gov't Code §437.202(a).

Get suppression appeals right (the first time)

Findings of fact and conclusions of law can make or break an appeal from a motion to suppress.

By John R. Messinger
Assistant State Prosecuting Attorney in Austin

If there aren't any, the reviewing court will assume the judge implicitly made findings that support the ruling.[1] But if a prosecutor requests them, the trial court must enter its "essential findings," i.e., "findings of fact and conclusions of law adequate to provide a reviewing court with a basis upon which to review the trial court's application of the law to the facts."[2] So a simple request will make the appeal run smoothly, right?

Not so much. As it turns out, "essential findings" means whatever the reviewing court deems essential, including arguments not presented in the trial court.[3] This is because the trial court's ruling will be upheld on any applicable theory of law.[4] Unfortunately, when the reviewing court goes in a different direction, the trial court's findings can become inadequate. Reviewing courts are directed to remand for additional findings made necessary by those new legal theories.[5] The Court of Criminal Appeals has called these "future findings."[6] Four judges now see this practice as "an incentive ... to micro-manage trial courts,"[7] and the practice may come to an end.

State v. Martinez

Two years ago, in *State v. Martinez* (*Martinez I*), the Court of Criminal Appeals remanded the case for further findings of fact.[8] In addition to technical complaints about the findings,[9] a plurality detailed testimony that, if credited, would support probable cause for the arrest.[10] In his concurrence, Judge Newell agreed that remand for additional "essential findings" was prudent under the precedent cited in earlier footnotes, which had "not yet proven to be unworkable or wrongly decided."[11] But he disagreed with the plurality's pre-emptive evaluation of probable cause on "facts" that did not yet exist. "If we keep issuing opinions like the one in this case," he wrote, "we may have to revisit whether remanding for essential findings is truly an act of prudence rather than micro-management."[12]

Judge Newell says the time to stop micromanaging is now. In *Martinez II*—back on a second petition for review—a unanimous Court held there was probable cause to arrest Martinez based on the collective knowledge doctrine.[13] That ground, which was raised but not considered in *Martinez I*, became necessary for disposition because the trial court did not make the findings posited by the plurality the first time around,[14] which reinforced Judge Newell's belief that addressing the "facts" in *Martinez I* was wrong. It was "equally clear" to him that the Court's "precedent requiring a remand for 'necessary' findings provides an incentive for reviewing courts to micro-manage trial courts rather than defer to their findings."[15]

More to the point, he urged the Court to reconsider its "self-inflicted" precedent. "We should remand for 'essential' findings only if there was some objection in the trial court regarding the inadequacy of the existing findings."[16] In the absence of objection, he says, reviewing courts should presume findings in support of the ruling like it does when findings aren't requested.

This call for reconsideration was joined by three members of the current Court.[17] Two of them, joined by a third still on the Court, would go further and hold that interlocutory appeals—such as those from motions to suppress—should not be upheld on theories not raised in the trial

court.[18] This makes sense, as the need for additional findings arises most often when new theories are considered.

So what now?

If either change comes to pass,[19] prosecutors (and defense counsel) will be limited on appeal to what they did in the trial court—win or lose. Here are some tips prosecutors should follow even if nothing changes:

1 Make the defense clarify its grounds before the hearing. Pre-trial hearings are not supposed to be fishing expeditions, and boiler-plate motions stink—many judges are tired of them, too. Forcing counsel, by objection or agreement, to narrow his grounds will allow prosecutors (and the judge) to bone up on the relevant law and identify the necessary witnesses.[20] It might also limit the ways in which an adverse ruling can be affirmed by reducing the testimony that lends itself to new theories on appeal.

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2 Raise all possible responses to those grounds. This is not a new rule. The losing party cannot rely on an argument it did not raise in the trial court. What would be new (if Judge Newell prevails) is the State being unable to keep a favorable ruling if the judge was correct for the wrong reason and the prosecutor did not raise the right one. So always raise everything.

3 Object—and, if necessary, request a continuance should the unexpected happen. If counsel has narrowed his grounds, object when he goes astray. But don't expect the judge to prevent exploration of unanticipated testimony or assume he will refuse to consider an unpled ground. If the State needs another witness to respond to something unexpected, say so and ask for time. Refusing to participate on principle doesn't work.[21]

4 Request findings *on everything*. Obtaining findings of fact should already be prosecutors' practice when the State loses because prosecutors cannot win on appeal without them. If Judge Newell's argument is adopted, prosecutors must do this when we win, too, especially if reviewing courts retain the ability to affirm on any theory of law. Don't guess at what might become relevant—get everything in writing.[22]

5 Request conclusions *on everything*. We tend to ignore legal conclusions because they are reviewed *de novo*. Don't. If you lose, request a ruling on every legal argument you made. If reviewing courts lose the ability to affirm on any theory of law, the same will be true when you win. Proper conclusions of law will show which theories—State and defense—were considered.

6 Object to the omission of any finding or conclusion you might need on appeal. Judge Newell would permit remand for additional "essential" findings if the complaining party objected to their absence. Win or lose, make sure the judge's findings and conclusions embrace every alternative ground the State raised—formally object, if necessary. If the objections go unheeded, raise the issue in a motion to abate the appeal or as a separate point of error.[23]

Help you help yourself

No reviewing court should work harder than prosecutors do to secure victory in a motion to suppress. Following the tips above could avoid numerous problems and years of delay.[24] If the law changes, these steps may become necessary even when the State wins a case. Help yourself by making both the facts and the rulings clear to the reviewing court the first time around. ❇

Endnotes

[1] *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

[2] *State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006).

[3] See, e.g., *State v. Saenz*, 411 S.W.3d 488, 496-97 (Tex. Crim. App. 2013).

[4] *Ross*, 32 S.W.3d at 855-56. There's an exception, because of course there is. See *State v. Esparza*, 413 S.W.3d 81, 90 (Tex. Crim. App. 2013) (alternative legal theory cannot turn upon the production of facts the appellant "was never fairly called upon to adduce").

[5] *State v. Elias*, 339 S.W.3d 667, 675-76 (Tex. Crim. App. 2011). This can also occur when the theory hasn't changed but the findings are meh.

[6] Saenz, 411 S.W.3d at 496-97.

[7] *State v. Martinez*, __S.W.3d__, PD-0324-17, 2019 WL 137754 at * (Tex. Crim. App. Jan. 9, 2019) (*Martinez II*) (Newell, J., concurring) (pagination of side opinions not complete).

[8] PD-1337-15, 2016 WL 7234085, at *8 (Tex. Crim. App. Dec. 14, 2016) (plurality) (*Martinez I*).

[9] *Id*. at *2 ("Many of the findings simply recount the trial court's recollection of the hearing without evaluating the evidence for accuracy or credibility or declaring what the trial court found to have happened on the night of the arrest").

[10] *Id*. at *5-7.

[11] *Id*. at *9 (Newell, J., concurring).

[12] *Id*. at *8.

[13] *Martinez II*, 2019 WL 137754 at *6.

[14] *Id*. at * (Newell, J., concurring) (pagination of side opinions not complete).

[15] *Id*.

[16] *Id*.

[17] Keller, P.J., and Hervey and Richardson, JJ.

[18] *State v. Esparza*, 413 S.W.3d 81, 92-93 (Tex. Crim. App. 2013) (Keller, P.J., concurring, joined by Keasler and Hervey, JJ.).

[19] Our office has asked for both. See *State v. Sanders*, PD-0080/81/82-18 (pet. ref'd May 2, 2018).

[20] See *State v. Velasquez*, 539 S.W.3d 289, 294 (Tex. Crim. App. 2018) (order setting hearing should ensure the parties will have time to subpoena witnesses, conduct legal research, and "otherwise prepare for impending litigation").

[21] *Id*. at 297 (Hervery, J., concurring) (calling the State's refusal "taking its ball and going home").

[22] Oral findings can work but will likely lack the detail needed.

[23] See *Cullen*, 195 S.W.3d at 698-99 (casting omissions following request as a "failure or refusal to act" under Tex. R. App. P. 44.4).

[24] Martinez's suppression hearing was four years ago.

TDCAA wants you! (to write for this journal)

Have you ever found yourself flipping through *The Texas Prosecutor* journal and asked yourself, "How do I join the ranks of these suave, articulate, knowledgeable paragons of the profession?"

By Benjamin I. Kaminar
Assistant County & District Attorney in Lamar County

(Or asked yourself how those poor souls got dragooned into the task?) Have you ever been interested in writing for the journal but didn't know where to start? Have you ever had an idea for an article you hoped to see someday, but you haven't seen anyone write it yet?

If you answered yes to any of those questions (or even answered no but kept reading for some reason), then TDCAA wants you to write for the journal! The articles you enjoy and dog-ear for future reference are almost entirely written by your fellow prosecutors, investigators, victim assistance coordinators, and support staff, and we (that's your friendly neighborhood editorial committee) are always on the lookout for new contributors. If you've ever had questions about how to start or wondered about the process, we'll try to clear things up, bring light to darkness, insert cliché here, etc.

Why write for the journal?

That's a great question, and there are lots of reasons to write. First, it's an opportunity to learn. Even when writing on a topic that you know well, the research and writing process gives you a chance to revisit the subject, kick off the rust, and learn a new useful tidbit or two. Second, it's a chance to share an experience that you or your office had with others who may be facing similar problems. Third, it's one way to steward the profession, by sharing your knowledge with those coming after you. Of course, there's also getting the chance to wow friends and family with seeing your name in print.[1]

How to get started

If you asked Sarah Wolf, the journal's ~~brutal taskmistress~~ hard-working, diligent editor/