

◆ FREE DWI training ◆  
**Guarding Texas Highways:  
Revisiting Impaired Driving Investigation & Prosecution**

The Texas District and County Attorneys Association's (TDCAA) statewide DWI training  
in cooperation with the Texas Department of Transportation

This course is specifically designed for prosecutors and officers to attend together. It revisits the DWI case using the four steps in DWI investigation. If the initial traffic stop is suppressed, the whole case fails, so making valid stops is covered in the first segment. But it does not end there. Often the traffic violation gets sold short in trial, so this segment will also focus on presenting the vehicle in motion to a jury. Likewise, personal contact with the driver and SFSTs will get the same treatment. Finally, the course will cover getting and using breath and blood samples. This course is perfect for new officers and prosecutors, but it was also created for experienced folks who need to revisit and expand their skills. We are proud to offer 6 hours of TCOLE and CLE credit for peace officers and prosecutors to attend this free, high-quality training.

### Today's Schedule

8:30-8:40 a.m.	Registration and introductions
8:40-10:00 a.m.	The Traffic Stop
10:00-10:15 a.m.	Break
10:15-11:45 a.m.	Personal Contact: Conversation with the Suspect
11:45 a.m.-1:00 p.m.	Lunch
1:00-2:30 p.m.	Using and Defending SFSTs
2:30-2:45 p.m.	Break
2:45-4:15 p.m.	Getting and Presenting Breath & Blood
4:15 p.m.	Adjourn

✿ In addition to this excellent free training, every attendee will receive two TDCAA publications: DWI Investigation & Prosecution and Traffic Stops. These books give attendees resources in many areas not covered by this conference.

Please be sure you've signed in and double-checked your Bar number or TCOLE number; the TCOLE Course number is [3402](#).

If lunch is not provided, all afternoon times are delayed by 15 minutes.



# **Guarding Texas Highways: Revisiting Impaired Driving Investigation and Prosecution: For police and prosecutors**

## **The Traffic Stop (90 minutes)**

The whole DWI cases is lost if the traffic stop is suppressed. Secondly, too little emphasis is typically made of the driving behavior as impairment in DWI Trials.

### ***Learning Objectives***

*By the end of this session students will be able to:*

1. *Define Arrest, Detention, Probable Cause and Reasonable Suspicion.*
2. *List the legal elements of failure to maintain a single lane .*
3. *Connect lost executive functions to common traffic violations.*

## **Personal Contact: Conversation with the Suspect (90 minutes)**

Revisiting Phase Two (Personal Contact) is essential to both investigating and prosecuting the impaired driver. Conversations with suspects must be done legally and intelligently. This part of the investigation creates evidence a jury understands and trusts..

### ***Learning Objectives***

*By the end of this session students will be able to:*

1. *Define Custodial Interrogation and apply the Mirada case.*
2. *Create a set of fair but effective questions to ask early in an impaired driving investigation.*
3. *Fit jury selection questions to the officers roadside questions*
4. *Develop a plan for an offender who wants to use a cell phone after their arrest..*

## **Using and Defending SFSTs (90 minutes)**

The defense will always go after officers during cross on SFSTs. Prosecutors and officers must learn to put the “Field” bad in SFST. But offensively officers and prosecutors under utilize the standardized clues by failing to tie them to the function necessary to safely operate a vehicle.

### ***Learning Objectives***

*By the end of this session students will be able to:*

- 1. Relate the realities surrounding SFST administration on the side of a highway to a jury during direct examination.*
- 2. Describe each SFST standardized clue clearly and relate that clue to the physical and mental faculties necessary to safely operate a vehicle.*

### **Getting and Presenting Breath and Blood (90 minutes)**

.If it bleeds it pleads. Obtaining blood or breath evidence is essential. Presenting it effectively is also essential. The case law concerning blood search warrants has become complicated and new attacks on search warrants will be explored.

#### ***Learning Objectives***

*By the end of this session students will be able to:*

- 1. Explain in court when a blood or breath sample is not taken.*
- 2. List issues that can add to exigent circumstances.*
- 3. Testify in Court to the fact a warrant affidavit was “sworn”.*

# The Traffic Stop (90 Minutes)

- I. Problem Words with Special Meaning
  - A. PC
  - B. Reasonable Suspicion
  - C. Arrest
  - D. Detain
  - E. Intoxication
  
- II. Three major traps for the unwary in Suppression Hearings
  - A. Free to Go or Under Arrest
  - B. Elements of Traffic Violations
  - C. Totality of Circumstances
  
- III. Random Advice on the Traffic Stop
  - A. Should Officer issue a citation?
  - B. Does the officer need to follow a person committing a traffic violation and exactly how long?
  - C. Should the prosecutor look up the Transportation Code offense and have a copy during suppression hearing?
  - D. Should officer stop for:
    - 1. Window Tinting?
    - 2. 3rd Taillight?
    - 3. License plate light?
  
- IV. Failure to Maintain Single Lane
  - A. State v. Hardin, No. PD-0799-19, 2022 Tex. Crim. App. LEXIS 757
    - 1. BOLO (suspected of being involved in BMV)
    - 2. Observed rear passenger-side tire of the truck briefly straddle the lane divider shortly after rounding a curve
    - 3. Did NOT veer or dash towards other lane, NOT speeding, NOT driving erratically, did NOT hit anything or even come close.
    - 4. Officer pulled Defendant over = traffic violation
    - 5. Motion to Suppress - GRANTED
  
- V. The Law
  - A. Transportation Code 545.060 and Failure to Maintain a Single Lane

- B. Statutory construction
  - 1. “nearly” = “Almost but not quite”
  - 2. “Practical” = “having or displaying good judgment”
  - 3. “Safely” = “free from harm or risk”
- C. Consequently, we hold that a person only violates 545.060 if the person fails to maintain a single marked lane of traffic in an unsafe manner.
- D. How do we prove the violation we saw was “unsafe”?

VI. Failure to Maintain a Single Lane as Reasonable Suspicion of DWI

VII. Database Records

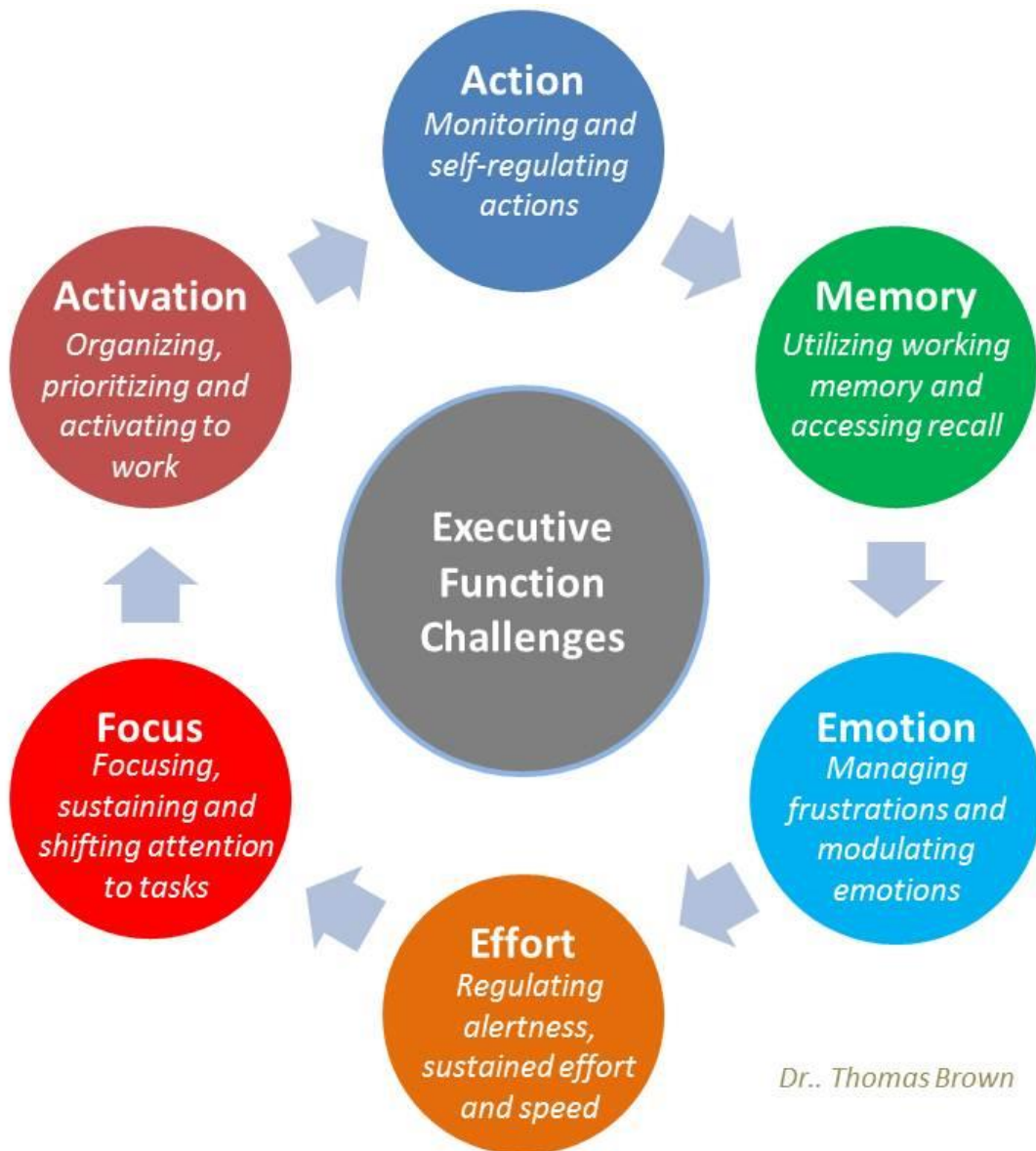
- A. *Kansas v. Glover*, 140 S.Ct. 1183 (April 6, 2020)
  - 1. No 4<sup>th</sup> Amendment violation by initiating a investigative traffic stop after running a vehicle’s LP and learning that the registered owner has a revoked DL.
  - 2. When the officer lacks information negating an inference that the owner is the driver, the stop is reasonable.

VIII. Executive Functions:

- A. All Drug Categories Impair Executive Function
- B. See Later Wheel Chart
- C. Exercise: Take your Offense, which executive functions’ impairment can cause it.
- D. Who Explains This in Trial?
  - 1. A well-trained officer, likely trained by DRE.
  - 2. A DRE as an expert.
  - 3. No one, our prosecutors don’t need proof beyond a reasonable doubt.

IX. The Law...

- A. Does the DRE’s Particular Blend of Medical and Forensic Toxicology Training and Traffic, Drug and Public Order Police Experience Help the Jury Understand the Issues They Must Resolve in a Drugged Driving Case.



# Personal Contact: Conversation with the Suspect (90 min)

- X. Investigative Detention vs. Custodial Interrogation
  - A. *Koch v. State*, 484 S.W. 3d 482 (Tex. App. –Houston (1<sup>st</sup> Dist) 2016)
    - 1. In back of patrol car for her safety
    - 2. Told not under arrest
    - 3. Transported a short distance
  - B. Detained, NOT under Arrest
  - C. Miranda NOT required
  
- XI. NOT Custodial Interrogation
  - A. *Hauer v. State*, 466 S.W. 3d 866 (Tex. App. – Houston (14<sup>th</sup> Dist) 2015)
    - 1. D involved in an accident
    - 2. Handcuffed at scene
    - 3. Placed in back of patrol vehicle to wait for a DWI officer
  - B. Detained, NOT under Arrest
  - C. Miranda NOT required
  - D. NOT Custodial Interrogation
  
- XII. Investigative Detention vs. Custodial Interrogation
  - A. *Raymundo v. State*, No. 07-14-00439, 2015 Tex. App. LEXIS 3062 (Tex. App. – Amarillo, 2015)
    - 1. Officer responded to a possible accident
    - 2. Found D's truck stopped along shoulder of roadway
    - 3. D asleep behind the wheel, Ignition running, Woke D up, Turned off engine
    - 4. Escorted D to rear of truck
    - 5. Ordered wrecker
    - 6. Determined D could not perform SFSTs
    - 7. BEGAN QUESTIONING the D
  
- XIII. When do you make a probable cause determination?
  - A. When you conclude your roadside investigation.
  - B. .How Love and Marriage are like Detention and Arrest.

- XIV. Revisiting Phase Two: Personal Contact
- A. Exercise
  - B. Come up with the 5 best questions you can ask at the window.
  - C. Pick some one to report.
  - D. Report.
- XV. I can smell by your breath you have been drinking, how much have you had to drink?
- XVI. What else?
- XVII. Remember how your suspects think.
- A. Marihuana does not equal drugs.
  - B. Prescriptions do not equal drugs.
  - C. **Ask your questions like a civilian, not a cop.**
- XVIII. Prosecutors you must expose these conceptions on Voir Dire.
- XIX. Prescription Cases
- A. Why Does a Doctor Prescribe the Drug?
  - B. Does the Drug Impair?
  - C. What does a prescription (or lack thereof) mean to your case?
  - D. How much is prescribed (dose)?
  - E. Warnings
  - F. Therapeutic Value
- XX. Simple Questions-Big Results
- A. Where are you coming from?
  - B. Where are you going?
  - C. Where are you now?
- XXI. Voir Dire
- A. What does a person that has had *ONE* too many look like?
  - B. When should the law step in???
  - C. So, what question can you ask at roadside to really make this work?
  - D. “Ok you have been using your cannabis, tell me on a scale of zero to ten, with zero being no effect at all, and ten being the highest you have ever been, where would you put the effect of your medication on you now?”
- XXII. Nail Down the Excuses
- A. Any problems back there?



- B. Are you feeling OK?
- C. Any mechanical problems?
- D. Confirm or Rebut
- E. Details
- F. Was there a 20 foot Purple Chicken in the road?

XXIII. Question passengers separately.

XXIV. Were they really headed home?

XXV. "Hey officer can I call my mommy on my cell?"

- A. Oh please yes! A thousand times yes.
- B. Just record it.
- C. Every word they say until you leave them.

XXVI. Jail Calls

XXVII. General Issues

- A. When do you mirandize?
- B. Why would you tell an impaired defendant to shut up?
- C. Never leave the defense a defense you did not explore.
  - 1. Makes you look fair and thorough.
  - 2. Makes defense lawyers head's explode.
  - 3. Who really has so few cases we need to arrest innocent people?

# Using and Defending SFSTs (90 min)

## XXVIII. Non-Testimonial

- A. Gassaway v. State, 957 S.W.2d 48
- B. *Harrod v. State*, 2007 Tex.App.LEXIS 397
- C. *Jones v. State*, 795 S.W.2d 171
- D. *Martin v. State*, 97 S.W.3d 718
- E. Oguntope v. State, 177 S.W.3d 435
- F. Williams v. State, 116 S.W.3d 788

## XXIX. Revisiting Phase Two: SFST

- A. Standardized Clues Ain't the Only Clues Buckaroos
- B. What Impairment clue do we almost always get from the cannabis user during HGN?
- C. Instructions and executive function.
  - 1. How many times do you repeat?
  - 2. How much evidence do your prosecutors want?
- D. "I can't do that sober"

## XXX. Great Questions During SFSTs

- A. Do you have any medical or physical conditions I should know about?
- B. Do you understand all my instructions?
- C. How many steps did I ask you to take?
- D. How are you supposed to follow the pen?
- E. How do you think you did?

## XXXI. Can We Use SFST for Drugs?

- A. SFSTs are Designed to detect IMPAIRMENT.
- B. Alcohol is a drug.
- C. The SFSTs have been validated in subsequent field and lab studies for alcohol and the other recognized drug categories.
- D. Do People Use More Than One Drug?

## XXXII. Put the "Field" back in SFST

- A. Cross your officer first....
- B. But put it in context!
- C. Like this.

XXXIII. THE PREFACE OF THE SFST MANUAL: The procedures outlined in this manual describe how the SFSTs are to be administered under ideal conditions. We recognize that the SFSTs will not always be administered under ideal conditions in the field because such conditions do not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment. Slight variations from the ideal, i.e., the inability to find a perfectly smooth surface at roadside, may have some effect on the evidentiary weight given to the results; however, this does not necessarily make the SFSTs invalid.

- XXXIV. Exercise: What does each SFST clue tell you about driving
- A. We will go through Standardized Field Sobriety Test Clues
  - B. Describe what the clue looks like
  - C. Explain what physical or mental faculty is impaired.
  - D. Explain how that impairment affects driving.
  - E. Example: HGN Lack of Smooth Pursuit
    - 1. Marble on Sandpaper, windshield wipers on dry windshield
    - 2. Physical ability to see clearly. Mental ability to process visual cues
    - 3. Effects on driving
    - 4. See moving objects clearly.
    - 5. See objects while you are in motion.
    - 6. Judge distance from objects
    - 7. Calculate speed and direction of objects in motion or objects while in motion.
    - 8. Calculate closing speed.

### **Distinct and Sustained Nystagmus at Maximum Deviation**

### **Onset of Nystagmus Prior to 45 Degrees**

### **Vertical Nystagmus**

### **Cannot Keep Balance During Instructions**

### **Starts Too Soon**

### **Stops While Walking**

**Does not Touch Heel to Toe**

**Steps Off Line**

**Uses Arms for Balance (6 inches)**

**Improper Turn (or Loses Balance on Turn)**

**Wrong Number of Steps**

**Sways While Balancing**

**Uses Arms for Balance**

**Hops**

**Puts Foot Down**

Follow Instructions (mental)

Memory

Focus

Effort

Balance (Physical)

Curves

Car Balance

Grades

# Getting and Presenting Breath and Blood

- XXXV. What Role Does Blood or Breath Evidence Play in Your Case?
- XXXVI. Officers
- A. Homicides are investigated not counting on a confession.
  - B. Impaired driving cases should be investigated like we will get the breath or blood suppressed.
  - C. No matter how good the murder investigation is; a confession helps.
  - D. Get breath or blood or be ready to explain why not.
  - E. What are reasons we don't get breath or blood?
    - 1. REFUSAL
    - 2. Warrant Issues
    - 3. Technology Issues
    - 4. Lab Issues
    - 5. If you don't explain, the Jury will!
    - 6. "Hey I became a cop for the guns and chicks, I am really lazy and don't give a crap."
- XXXVII. Prosecutors
- A. Try Murder cases like confession will be suppressed.
  - B. Try impaired driving cases like Breath/Blood will be suppressed.
  - C. Just like a confession show corroboration.
  - D. Let them hear BAC late!
- XXXVIII. Jury Selection
- A. Always Cover Two Definitions of Intoxication
  - B. Always Qualify on Two Definitions of Intoxication
  - C. Billy and Bubba
  - D. "Have you ever seen someone you knew was impaired?"
  - E. "What evidence should an officer gather?"
- XXXIX. Good Video (for State) + Breath/Blood
- A. There is no such thing as "Laydown DWI"
  - B. If it does not plead, look again.

- XL. Defendant Looks Good on Video + Breath or Blood
  - A. Focus on Small Details.
  - B. Careful with “What does a .16 look like”.
  - C. “Bubba and Billy”
  - D. HGN is your friend.
  - E. Remember juries want to do right thing.
  
- XLI. Good Video+ No Breath/Blood
  - A. Explain but don’t apologize
  - B. Two Definitions (get commitment)
  - C. Refusal (use DIC 24)
  - D. Mom’s Sobriety Test
  
- XLII. They look good on video + no breath/blood?
  - A. Diversions
  - B. Training Opportunity
  
- XLIII. Exigent Circumstances
  - A. *Missouri v. McNeely* – natural dissipation of alcohol does not create a per se exigency justifying an exception to the 4<sup>th</sup> Amendment warrant requirement
    - 1. Totality of the Circumstances analysis
    - 2. Metabolization
    - 3. Procedures in place for obtaining a warrant
    - 4. Availability of a magistrate judge
    - 5. Practical problems of obtaining a warrant within a time frame that still preserves the opportunity to obtain reliable evidence.
  - B. *Cole v. State*, 490 S.W.3d 918 (Tex.Crim.App. 2016)
    - 1. Exigent circumstances existed
  - C. *Weems v. State*, 434 S.W.3d 655 (Tex.Crim.App. 2014)
    - 1. No exigent circumstances existed
    - 2. Record did not reflect other factors relevant to the TOC, such as procedures in place for obtaining a warrant, availability of a magistrate
  - D. *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (June 27, 2019)
    - 1. Where Police have PC for a drunk-driving offense *and* the driver’s unconsciousness or stupor requires him to be taken to hospital, no opportunity for BT = warrantless blood test does not violate 4<sup>th</sup> Amendment
  - E. Unconscious Defendant Texas Law
    - 1. *State v. Ruiz*, 622 S.W.3d 549
      - a) *On remand the court held that Exigent Circumstances existed in light of Mitchell*

- b) *Involved in a crash*
  - c) *Fled the scene*
  - d) *Found unconscious – remain unconscious*
  - e) *Had to be carried by LEO*
  - f) *No procedures in place to obtain SW (2012)*
  - g) *Difficult to find a judge*
  - h) *2-3 hours to obtain warrant*
  - i) *2 officers on duty*
2. *State v. Ruiz*, 581 S.W.3d 782 (Tex.Crim.App 2019)
- a) *D was unconscious throughout his encounter*
  - b) *No capacity for self-determination*
  - c) *Could not make a choice*
  - d) *Could not hear the warnings read to him*
  - e) *Could not limit or revoke his consent*
  - f) *NO CONSENT – violation to 4<sup>th</sup> A warrant requirement.*
  - g) *Remanded for reconsideration of exigent circumstances in light of Mitchell.*

XLIV. Execution of Search Warrant

- A. AKA – Forensic Analysis or Chemical Testing of the Blood for BAC

XLV. *State v. Mendez*, No. 05-20-00307-CR, 2021 Tex. App. LEXIS 2211

XLVI. *Schneider v. State*, No. 03-19-00732-CR, 2021 Tex. App. LEXIS 1760

- A. Under CCP Article 18.07, there is NO deadline by which a blood sample seized under a warrant must be tested and analyzed.
- B. The EXECUTION of the warrant is the blood draw NOT the TESTING.

XLVII. Second Search Warrant Required?

- A. *Martinez v. State*, 534 S.W.3d 97 (Tex. App. - Edinburg 2017)
  - 1. Seized blood from hospital via GJ summons = OK
  - 2. Sent to lab for testing = SEARCH
  - 3. No warrant = NOT OK
  - 4. The Court held search violated 4<sup>th</sup> Amendment, need a warrant
- B. *State v. Martinez*, 570 S.W.3d 278 (Tex.Crim.App 2019)
  - 1. upheld trial courts granting of motion to suppress
  - 2. No Expectation of Privacy in the testing of a blood sample taken pursuant to a warrant
  - 3. NO Second Search Warrant Required
- C. *Hyland v. State*, 2019 Tex. App. LEXIS 10073



- D. *Jacobson v. State*, 603 S.W.3d 485 (Tex.App. – Fort Worth 2020)
- E. *State v. Staton*, 599 S.W.3d 614 (Tex.App. – Dallas 2020)
- F. *Crider v. State*, 607 S.W.3d 305 (Tex.Crim.App. 2020)

XLVIII. Authorize Forensic Analysis

- A. *Balderas v. State*, No. 01-20-00174-CR, 2021 Tex. App. LEXIS 3242 (2021)
- B. Defendant charged with Felony Murder
- C. Crash, Victim deceased at scene, D transported to hospital, Deputy went to hospital, signs of intoxication, HGN, Refusal
- D. Warrant established PC but did not expressly state that forensic analysis or chemical testing was authorized
- E. D argued *Martinez* (warrant only authorized the drawing of the blood) and that the analysis was not completed within 3 days.
- F. Court followed *Crider* and *Staton* – Common sense dictates...

XLIX. Legible Signature on Warrant?

- A. *State v. Arellano*, 600 S.W.3d 53(Tex.Crim.App. 2020).
  1. CCP 18.04(5) requires that a search warrant contain a legible signature by the magistrate authorizing warrant.
  2. This warrant did not contain a legible signature nor a handwritten or typewritten name
  3. Trial Court held the “good-faith” exception *did not* apply
  4. COA agreed
  5. The CCA found that the COA *erred*
  6. The CCA held that the “good-faith” exception is not automatically precluded. Even with such a defect, a warrant is still a warrant for purposes of CCP 38.23(b).
  7. Thus, when an officer is acting in good-faith reliance on a warrant based upon a neutral magistrate’s determination of probable cause the “good faith” exception will apply.\*

L. Administer Oath?

- A. *State v. Hodges*, 595 S.W.3d 303 (Tex.App.- Amarillo, 2020)
  1. A motion to suppress was properly granted because no oath was administered to the officer who signed the affidavit
  2. Officer testified he knew he was under oath but acknowledged he had not been “administered” an oath
  3. Officer was not asked by anyone if the statements were “true and correct” nor had he represented in or outside of the affidavit that the statements were true and correct.

4. The State argued that the affidavit complied with the statute because of the preamble "...and being duly sworn, on oath makes the following statement..."

B. Good Faith Exception Apply?

C. *Wheeler v. State*, 616 S.W.3d 858 (Tex. Crim. App. 2021)

1. The Good Faith Exception to the Texas's Exclusionary Rule will not allow the admission of blood alcohol evidence seized from a search warrant issued with an unsworn PC affidavit.

2. Evidence Suppressed

D. Oral or Written Oath

1. *Vaughn v. State*, 177 S.W.2d 59

a) *An oath is any form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully*

b) *The test to determine whether an oath was made is whether the statement would subject a person to perjury.*

E. *Ashcraft v. State*, 03-12-00660-CR, 2013 WL 451619

1. An oath is a matter of substance, not form

F. *Brent v. State*, 916 S.W.2d 34

1. Article 18.01 (b) only requires the affidavit be "sworn" thus leaving room for a verbal, as well as a written, oath.

LI. Return and Inventory

A. *State v. Patel*, 629 S.W.3d 759

B. Failure to make a return will not invalidate a search warrant absent a showing of prejudice

C. Violations of Art. 38.23, which requires evidence to be excluded when obtained in violation of the law

D. Art. 38.23 does not apply to Art. 18.10

LII. A matter of life and death.

LIII. Please drop evaluations off at registration table.

Be careful on the roads

Thanks for all you do.