

SIGNIFICANT DECISIONS
UNITED STATES SUPREME COURT AND THE COURT OF CRIMINAL APPEALS
FROM SEPTEMBER 2016 TO APRIL 2017

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Acknowledgement

This paper has been the primary responsibility of my briefing attorney, Courtney Corbello. While I have had some slight hand in shaping the summaries, all the smart stuff comes from her.

-DCN

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SCOTUS/CCA Update

Significant Decisions from September 2016 to April 2017

I. INTRODUCTION

This paper covers the published opinions issued by the Court of Criminal Appeals between September 1, 2016 and April 1, 2017. It also includes the significant criminal cases from the United States Supreme Court that have broad applicability, issued during that same time frame. As the terms for both courts continue, we will continue to supplement the paper with significant decisions. If you would like a copy of the completed paper or if you feel something is missing please feel free to email me though Jennifer Berlanga at Jennifer.Berlanga@txcourts.gov and we'll do our best to hook you up with a completed paper

II. MOTIONS TO SUPPRESS

A. Reasonable Expectation of Privacy -- There is a reasonable expectation of privacy in the content of text messages. Albert Leslie Love, Jr believed that Keenan Hubert was responsible for the death of his friend, Emmanuel Bowers, III. In retaliation, Love and two accomplices shot and killed Hubert as he sat in the passenger seat of his friend's vehicle one night. At trial, the State was allowed to introduce Love's cell phone records over Love's objections that the records were obtained without a warrant. The records involved the content of 1,600 text messages, which the State used to establish a number of key facts and elements of the crime. The State emphasized the content of the text messages throughout trial. Love was found guilty of capital murder and sentenced to death. Love's direct appeal to the Court of Criminal Appeals followed.

The Court of Criminal Appeals reversed and remanded on Love's point of error regarding the warrantless retrieval of his cellphone records. *Love v. State*, __S.W.3d__, 2016 WL 7131259 (Tex. Crim. App. Dec. 7, 2016) (6:0:3). Writing for the majority, Judge Yeary first distinguished between the numbers dialed, which one does not have a reasonable expectation of privacy in, and the content of the communications. Since, in this case, the Court was dealing with contents of a text message that had been

transmitted via a cell phone to a service provider and been stored in its server, the Fourth Amendment had been implicated. Judge Yeary explained that this was because text messages are analogous to regular mail and email, that is, a text message has an outside address visible to the third-party carriers that transmit it to its intended location, and also content that the sender presumes will be read only by the intended recipient. Given this, the content of Love's text messages could not be obtained without a probable cause-based warrant. Applying Article 38.23(a), which Love had relied on in his appeal, Judge Yeary stated that the trial court should have suppressed the content of the text messages. Because the text messages offered the strongest evidence of Love's guilt and were heavily relied on by the State, Judge Yeary concluded that the trial court's error was not harmless and Love's case was remanded for a new trial.

Presiding Judge Keller filed a dissenting opinion joined by Judge Hervey. Presiding Judge Keller opined that Love, in his motions to suppress and objections in a hearing outside the jury, had merely raised an objection as to the location data retrieved and had never preserved a complaint as to the content of the text messages.

Judge Meyers dissented without written opinion.

B. Detentions

1. It is not per se objectively reasonable for the police to frisk a suspect for weapons on the basis that he or she is accused of possessing drugs. Officer Alvarez received an anonymous tip that two white males, one in all black and one in a black shirt and carrying a brown backpack, were using drugs on a street corner. Acting upon this tip, Alvarez came upon Furr and a friend, who fit the descriptions, standing on a street corner located in a "high drug, high crime" area. When Furr furtively started walking away, Alvarez and another officer, Ayala, caught up to him. Furr did not initially respond when asked if he had weapons on him and also appeared out of it and under the influence of something. Ayala frisked Furr for weapons. While doing so, he found a crack pipe and two syringes in Furr's front right pocket. After seizing the contraband, Furr was no longer free to leave, according to Ayala. Ayala asked if he had any

identification, and Furr said that it was in his pocket. After removing the wallet and opening it, Ayala found two small balloons of what he believed to be heroin. Furr was charged with possession of a controlled substance. He filed a motion to suppress, which the trial court denied. Furr argued on appeal that the anonymous tip did not establish reasonable suspicion to detain and frisk him, but the court of appeals disagreed.

The Court of Criminal Appeals affirmed. *Furr v. State*, 499 S.W.3d 872 (Tex. Crim. App. Sept. 21, 2016) (7:2). Judge Hervey, writing for the majority, explained that an officer is justified in engaging in a protective frisk if he reasonably suspects that the person who he has lawfully detained is presently armed and dangerous. Judge Hervey cited to *Florida v. J.L.* and distinguished it from the facts of this case. To Judge Hervey, the officers in this case not only operated on an anonymous tip but also made a number of independent observations supporting the tip. While this justified the initial stop and the subsequent frisk, Judge Hervey was not willing to go so far as to create a rule that it is per se objectively reasonable for the police to frisk a suspect for weapons if they are accused of possessing drugs.

Judge Meyers wrote a dissenting opinion in which he stated that he would have held the stop and frisk unlawful. Judge Meyers believed the Court should “go back to the standard where we required specific articulable facts to raise reasonable suspicion that someone is engaged in criminal activity and where anonymous tips had to be independently corroborated for reliability.”

Judge Alcala dissented without written opinion.

2. Community Caretaking -- Police officer justified in initiating a traffic stop after seeing a car stopped at a stop light, smelling alcohol coming from the car, seeing an unconscious passenger, and getting no verbal response from the driver. On the Fourth of July, Officer Figueroa was monitoring a bar district in downtown Fort Worth. At around 5:30 in the afternoon he stopped at a red light with his windows rolled down. An SUV with its front passenger window rolled down pulled up to the light on his left hand side. He was within arm’s reach of the SUV’s open window. Figueroa smelled the odor of alcohol from the SUV

and noticed a woman hunched over in the passenger seat, motionless. The driver of the SUV, Cameron Byram, seemed oblivious to the police officer or his passenger. Officer Figueroa yelled at Byram, who did not answer. When the light turned green, Byram drove off, and Figueroa initiated a traffic stop despite not seeing Byram commit any traffic violations. Based upon evidence obtained after the stop, the State charged Byram with driving while intoxicated.

Byram filed a motion to suppress, which the trial court denied without written findings. Byram pleaded guilty, but appealed the trial court’s ruling on the motion to suppress. The court of appeals reversed Byram’s conviction, holding that Byram’s detention was unreasonable, noting first that the community caretaking exception did not apply. The court of appeals also held that Officer Figueroa lacked reasonable suspicion to stop Byram.

A unanimous Court of Criminal Appeals reversed. *Byram v. State*, ___ S.W.3d ___, 2017 WL 359791 (Tex. Crim. App. Jan. 25, 2017)(9:0). Writing for the majority, Judge Yeary explained that the community-caretaking exception applied to the traffic stop. According to Judge Yeary, determining whether an officer may properly invoke his community-caretaking function is a two-step inquiry into (1) whether the officer was primarily motivated by a community-caretaking purpose; and (2) whether the officer’s belief that the individual’s help was reasonable. Here, Officer Figueroa testified that his primary motivation was to assist Byram’s passenger. Moreover, his belief was reasonable because the passenger was hunched over and motionless along with the strong smell of alcohol coming from the window.

C. Good Faith -- Art. 38.23(b) applies where a search warrant, though later found to be based on an illegality, was obtained by law enforcement in good faith and under an objectively reasonable belief that it was valid and relied upon appropriately obtained evidence. A DPS officer received information that marijuana was being grown inside Bradley McClintock’s residence. McClintock lived in a second-floor apartment over a business. An open staircase on the back of the building leads from the parking lot to the second floor apartment. Officers monitored the apartment and witnessed a male

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