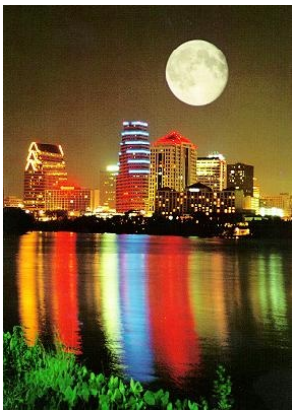
One Fabulous Skyline

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Vol. 10, No. 45 - January 31, 2011

TIBA's Case of the Week

Case Name: Mark Alan Derichsweiler v. The State of Texas

- OFFENSE: DWI (Felony)
- COUNTY: Denton
- COURT OF APPEALS: Fort Worth 2009
- C/A CITATION: 301 S.W.3d 803
- C/A RESULT: Conviction Reversed
- CCA. CASE No. PD-0176-10 DATE OF OPINION: January 26, 2011
- DISPOSITION: Court of Appeals Reversed
- OPINION: Price, J. VOTE: 5-1-2
- TRIAL COURT: 362nd D/C; Hon. Richard Podgorski
- LAWYERS: David Wacker (Defense); Charles Orbison, John Stride (State)

31.024 Search and Seizures / Traffic Stops / Reasonable Suspicion: On New Years Eve, a couple in the drive-thru lane at a fast food restaurant noticed an unknown man had pulled up beside them in another car, and was grinning and looking straight at them. After about a minute, he drove away. Having placed their order, the couple were asked to pull out of the drive-thru lane while their food was being prepared. When they did so, they noticed that the same stranger had positioned his car to the front of theirs and was again grinning and staring at them. He later circled the restaurant and then pulled up behind, and to the left side of, the couple's car, renewed his grinning and staring. The couple suspected that there might be a robbery in progress or that they were themselves being sized up or "stalked." The husband began to call 911 and the stranger drove into the adjacent parking lot of a department store. The couple observed the man engage in similar conduct, pulling up beside at least two parked cars in the parking lot and tarrying there, although they could not see what the man was doing from that distance in the darkness. The husband gave the 911 dispatcher a description of the suspect's vehicle and its license plate, and he continued to talk to the dispatcher until the police arrived. When responding Officer Carraby arrived at the scene, he spotted the suspect's vehicle as it drove down one side of the parking lot and pulled into a space. After several officers had arrived and surrounded the suspect's vehicle, the first officer approached the vehicle and saw that the defendant was in the driver's seat. When the defendant rolled down the driver's side window, the officer smelled a strong odor of alcoholic beverage coming from the vehicle, and he began a DWI investigation that culminated in the defendant's prosecution. The Court of Appeals reversed the conviction, rejecting the State's argument that Carraby did not stop or detain Appellant until after the officer smelled the odor of alcoholic beverages emanating from Appellant's vehicle (see , Vol. 17, No. 48; 12/07/2009).

Holding: A detaining officer need not be personally aware of every fact that objectively supports reasonable suspicion to detain; rather, the cumulative information known to the "cooperating officers" at the time of the stop is to be considered in determining whether reasonable suspicion exists. A 911 police

dispatcher is ordinarily regarded as a "cooperating officer" for purposes of making this determination. Information provided to police from a citizen-informant who identifies himself and may be held to account for the accuracy and veracity of his report may also be regarded as reliable. In such a scenario, the only question is whether the information that the known citizen-informant provides, viewed through the prism of the detaining officer's particular level of knowledge and experience, objectively supports reasonable suspicion to believe that criminal activity is afoot. It does not matter that the dispatcher did not pass all of the couple's details along to the responding officers. It is true that, in order to support reasonable suspicion, the articulable facts must show that some activity out of the ordinary has occurred, some suggestion to connect the detainee to the unusual activity, and some indication that the unusual activity is related to crime. But the facts adduced to give rise to reasonable suspicion need not show that the detainee has committed, is committing, or is about to commit, a particular and distinctively identifiable penal offense. Unlike the case with probable cause to justify an arrest, it is not a sine qua non of reasonable suspicion that a detaining officer be able to pinpoint a particular penal infraction. Particularly with respect to information suggesting that a crime is about to occur, the requirement that there be "some indication that the unusual activity is related to crime" does not necessarily mean that the information must lead inexorably to the conclusion that a particular and identifiable penal code offense is imminent. It is enough to satisfy the lesser standard of reasonable suspicion that the information is sufficiently detailed and reliable-i.e., it supports more than an inarticulate hunch or intuition-to suggest that something of an apparently criminal nature is brewing. While it is admittedly a close call, the information known collectively to the police in this case ultimately satisfies this standard. The defendant's conduct, particularly as directed at the couple, while not overtly criminal in any way, was bizarre to say the least. Moreover, the repetition of similar, apparently scrutinizing, behavior directed at parked cars in the adjacent parking lot reasonably suggests a potential criminal motive that transcended any particular interest in the couple themselves. It reasonably suggests someone who was looking to criminally exploit some vulnerability-a weak or isolated individual to rob or an unattended auto to burgle. We hold that the totality of circumstances, including the defendant's strangely persistent, if admittedly non-criminal, behavior, gave rise to a reasonable suspicion that he was about to engage in criminal activity.

Concurring / Dissenting Opinions: Presiding Judge Keller concurred, believing that the Court had not been presented with the issue of whether the officer had reasonable suspicion with respect to a specific penal code offense. Nevertheless, she would still uphold the officer's actions because he had reasonable suspicion that the defendant soon would be engaged in criminal activity. Judge Meyers dissented and would hold that a general description of non-threatening, non-criminal behavior, that is neither observed nor corroborated by an officer, is not sufficiently detailed and reliable information to suggest that something of an apparently criminal nature is brewing. Judge Johnson dissented without note.

Sidebars: (Kevin Yeary) I think the Court got it right here. However, I will also say that, I think the "related to crime" element is too limiting. It seems to me that police are hired by the citizens to keep us safe from more than just "crime." I believe that, since the Fourth Amendment requires only that the police conduct not be "unreasonable," it may be overkill to require a "related to crime" element in assessing the reasonableness of a detention. It fails to account for situations where people are just acting so out of the ordinary that a failure of the police to look into their conduct would amount to a failure to perform their legitimate duties. I would like to see the courts move toward an element that looks more like "the unusual activity gives rise to a legitimate concern for the safety or security of the individual involved or of some other member or members of the community." At the same time, I am satisfied that the other limitations on temporary detentions - brevity and reasonableness of purpose - would sufficiently restrict police intrusions into the lives of innocent citizens. (David A. Schulman) OK, it's time for me to put on my prosecutor's hat (although I've never been a prosecutor and don't have one of those hats). So, why do I think the Court got it wrong, even with the correct result? This case does not involve a "close call" on the question of reasonable suspicion. There are a list of offenses which Appellee might have either committed or have been getting ready to commit. Note that this involves an "investigative detention" and "reasonable" suspicion, not "probable cause" and an "arrest." The facts lead me to believe that the officer was fully justified in approaching Appellee's car (it was already parked in a public parking lot) and asking whether there was some sort of problem. Once he did that and Appellee rolled down the windows, the officer smelled "a strong odor of alcohol" and it was all over. I agree with Judge Gardner's dissent, below, and don't have any problem with this investigative detention. In the "totality of the circumstance," the officer was justified in the actions that led to the window coming down.