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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: *[Andreas Marcopoulos v. The State of Texas](#)*

- **OFFENSE:** Possession of Controlled Substance
- **COUNTY:** Harris
- **COURT OF APPEALS:** Houston [1st] 2016
- **C/A CITATION:** 492 S.W.3d 773
- **C/A RESULT:** Conviction Affirmed
- **CCA. CASE No.** PD-0931-16 **DATE OF OPINION:** December 20, 2017
- **DISPOSITION:** Court of Appeals Reversed
- **OPINION:** [Judge Keasler](#) **VOTE:** 6-3
- **TRIAL COURT:** 248th D/C
- **LAWYERS:** [Robb Fickman](#) & [Carmen Roe](#) (Defense); [Kimberly Stelter](#) (State)

(Background Facts): On September 10, 2014, Officer J. Oliver was performing surveillance on a bar in Houston, Texas known for narcotics sales. He observed Appellant drive up to the bar in a truck, enter the bar, and leave within three to five minutes. After Appellant left the bar, Oliver followed him. He saw Appellant change lanes without signaling and asked for a uniformed officer to perform a traffic stop. Officer T. Villa was working that evening and received the request to stop Appellant. Villa encountered Appellant in a left turn lane. After Villa stopped behind Appellant, he observed Appellant make “furtive gestures” around the center console of the truck. Officer Oliver, waiting at the light to the right of Appellant’s truck, also saw Appellant’s furtive gestures. Appellant did not signal his turn until after he began to turn. Villa activated his emergency lights. Appellant immediately pulled into a gas

station and parked. Villa removed Appellant from the truck and placed him under arrest. Villa testified at the hearing on the motion to suppress that his partner began an inventory of the truck. During the inventory, Villa's partner found a small baggie of cocaine between the center console and the passenger seat. He found another inside the console. Villa found a third baggie in Appellant's wallet.

§ 31.09 Search & Seizure / Warrantless Searches / Automobile Exception: Appellant filed a pre-trial motion to suppress the evidence uncovered by the search, but his motion was denied. He pleaded guilty, reserving his right to appeal the trial court's ruling, and was placed on three years' deferred adjudication probation. Before the First Court of Appeals, Appellant claimed that the trial court abused its discretion by denying his motion to suppress. Appellant argued that the search of his vehicle was unreasonable because it did not qualify as an inventory search and it exceeded the scope of his arrest. The State conversely argued that an inventory search was appropriate once Appellant had been arrested and that the "search incident to arrest" issue was irrelevant. A "one-justice plurality" of the Court of Appeals declined to reach the merits of these claims, instead upholding the search under the automobile exception to the Fourth Amendment warrant requirement (see §, [Vol. 24, No. 16](#); 04/18/2016). The Court of Appeals held that, pursuant to this exception, Villa had probable cause to search the vehicle due to Appellant's "repeated history of going to a place . . . known for selling narcotics, his uncommonly short time spent at a bar, and his furtive gestures when he noticed a patrol car behind him." In dissent, Justice Keyes reasoned that the facts did not support a probable cause finding because the search was based on "furtive gestures . . . alone," without any corroborating evidence. The Court of Criminal Appeals granted discretionary review solely to address the question of whether probable cause existed to search Appellant's vehicle under the automobile exception to the warrant requirement.

Holding: [Appellant's] short visit to Diddy's, unsupported by any details concerning the nature of his visit there, did not sufficiently "relat[e]" him to any "evidence of crime." Furthermore, as in [Brown v. State](#), 481 S.W.2d 106 (Tex.Cr.App. 1972), [Appellant] did not exhibit furtive gestures in response to police action (e.g., wailing sirens or flashing lights), but rather mere police presence. He was situated in front of a marked police car that had not yet indicated an intention to stop him, and beside an unmarked police car driven by an undercover officer. Finally, [Appellant]'s movements, unlike those in [Wiede v. State](#), 214 S.W.3d 17 (Tex.Cr.App. 2007)(see §, [Vol. 15, No. 4](#); 02/05/2007), or [Turner v. State](#), 550 S.W.2d 686 (Tex.Cr.App. 1977), were not connected to a known or suspected instrumentality of crime -- e.g., a baggie or matchbox. Under these circumstances, Officer Oliver's notions about [Appellant], though certainly providing reasonable suspicion justifying a temporary investigative detention, did not rise to the level of probable cause justifying a full-blown search. Although Oliver's suspicion was ultimately vindicated, "a search cannot be justified by what it uncovers." *** We reiterate that, although we have discussed the facts of this case sequentially, we have analyzed them holistically. While considering the totality of the circumstances makes this a closer call than it might otherwise have

been, we conclude that the automobile exception cannot be stretched so far as to justify an all-out warrantless search on these facts.

Concurring / Dissenting Opinions: [Judge Keel](#) filed a dissenting opinion in which **Presiding Judge Keller** joined. She believes that probable cause to search existed, and the Court should either “dismiss this petition as improvidently granted or uphold the finding of probable cause to search Appellant’s truck.” **Judge Yeary** dissented without note.

([David A. Schulman](#)) The key here is the Court’s statement that Appellant’s “short visit” to the particular bar, “unsupported by any details concerning the nature of his visit there,” doesn’t mean he was in any way connected to any “evidence of crime.” In the “War on Drugs,” no matter why Appellant went into the bar and stayed only a few minutes, in the eyes of the “drug enforcement” industry, always means he was doing something criminal and that it was related to a transfer of some controlled substance. The fact that the officer was correct in this case doesn’t change the fact that even innocent behavior is suspicious to those whose very livelihood is dependent on everyone being guilty of something.

([John G. Jasuta](#)) Maybe a few more "facts" would have helped the police - like if he had long hair, or was black, or had tattoos or piercing --- and remember children, a law abiding citizen never rummages around in a car or stops by to use a bathroom at a bar. A good call by Judge Keasler.