TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-850-6544

Web Site: www.texindbar.org

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Richard Hyland v. The State of Texas***

- **OFFENSE**: Intoxication Manslaughter
- **COUNTY**: Nueces
- **COURT OF APPEALS**: Corpus Christi 2018
- **C/A CITATION**: Unpublished
- **C/A RESULT**: Conviction Reversed
- **CCA. CASE No**. PD-0438-18 **DATE OF OPINION**: June 5, 2019
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Yeary **VOTE**: 4-4-1
- **TRIAL COURT**: 319th D/C
- **LAWYERS**: Christopher Dorsey & John Gilmore (Defense); Douglas Norman, Tara Tzitzon, & David Jakubowski (State)

31.01 Search & Seizure / Search Warrants (Misrepresentations in Affidavit): While operating his motorcycle, with his wife as a passenger, Appellant was involved in an accident that injured him seriously and killed his wife. An investigating officer subsequently obtained a search warrant for and then obtained a sample of Appellant's blood, which demonstrated that he was intoxicated. Appellant was convicted of the intoxication manslaughter of his wife, but the Thirteenth Court of Appeals reversed Appellant's conviction. The Court of Appeals held that, after the trial court conducted a hearing on the motion to suppress which Appellant filed pursuant to ***Franks v. Delaware***, 438 U.S. 154 (1978), the remaining facts in the affidavit did not support a finding of

probable cause that evidence of driving while intoxicated would be found in Appellant's blood. Specifically, the court of appeals held that, in light of ***McClintock v. State***, 444 S.W.3d 15 (Tex.Cr.App. 2014)(see ☙, Vol. 22, No. 40; 10/06/2014)("***McClintock I***"), and the Eleventh Court of Appeals' unpublished decision in ***State v. Lollar*** (11-10-00158-CR), the excised affidavit did not "*clearly*" establish probable cause. The Court of Criminal Appeals granted the State's PDR to determine whether a sustained ***Franks*** motion and the consequent purging of false statements from a search warrant affidavit trigger a heightened probable cause standard, namely, that the affidavit must "clearly" establish probable cause.

Holding: The Court of Appeals' opinion treated our use of the word "clearly" in ***McClintock I*** as evidence of a heightened probable cause standard for assessing whether probable cause exists from the facts remaining in a search warrant affidavit that has been partially excised pursuant to ***Franks***. *** Indeed, the Court of Appeals repeatedly quoted ***McClintock I*** for the proposition that the probable cause requirement after a sustained ***Franks*** objection is that the affidavit must "clearly" establish probable cause. *** [In] ***Brown v. State***, 605 S.W.2d 572 (Tex.Cr.App. 1980), we cited [*W. LaFave, 3 Search & Seizure*], for the proposition that, "in cases where search warrants have been issued on the basis of an affidavit that included tainted information, . . . the warrant is nonetheless valid if it clearly could have been issued on the basis of the untainted information in the affidavit. *** But we have never suggested that our use of the word "clearly" was intended to enshrine a "heightened" probable cause standard. *** Moreover, in ***Franks*** itself, the Supreme Court indicated that "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause," then no grounds exist for invalidating the warrant. *** Even assuming that ***McClintock I***'s use of the word "clearly" should be imported into a ***Franks*** analysis, it would only express the notion that a reviewing court must ensure that whatever remains in the purged affidavit is still enough to establish probable cause that evidence of a crime will be found.

Concurring / Dissenting Opinions: Judge Hervey concurred and was joined by **Judge Richardson**, **Judge Walker**, and **Judge Slaughter**. She agreed that neither federal law nor state law currently calls for applying a heightened probable-cause standard after sustaining a ***Franks*** motion. She suggested, however, that "*Professor LaFave might be on to something in advocating that reviewing courts should err on the side of caution when assessing an affidavit that contained falsified statements that were intentionally or knowingly included*."

(**David A. Schulman**) First, this opinion is spot on in holding that, after removing the offending language in a search warrant affidavit, the only question is whether the rest of the affidavit demonstrates probable cause. I would say that the definition of probable cause is well known, and probable cause is either present or it's not. I am, however, troubled by Judge Hervey's reference to a 40+ year old treatise. I have a problem with idea that something Professor LaFave said in 1978 should now begin to guide courts to "err on

the side of caution." The last I heard, "caution" wasn't a party to the proceedings. Does that mean courts should err on the side of the State or the Accused? Also, by "reviewing courts," does she mean trial courts reviewing the case in the first instance, or a Court of Appeals (or Court of Criminal Appeals) reviewing the trial court's ruling on the motion to suppress? The statement is simply too ambiguous to be of any help.

(John G. Jasuta) I believe Judge Hervey's statement to mean a reviewing court should err on the side of caution to not violate a constitutional right, i.e., err on the side of the defendant. I hope I am right but certainly do not know precisely what Judge Hervey meant.

31.024 Search & Seizure / Probable Cause: The Court of Criminal Appeals also granted review to determine whether, after removing the required language from the affidavit, as required by ***Franks***, "whether a police officer's detection of the strong smell of alcohol emanating from the driver of a motor vehicle that was involved in a serious, single-vehicle accident supports a finding of probable cause that evidence of driving while intoxicated would be found in the driver's blood."

Holding: The court of appeals in this case likened the facts presented here to those presented in ***McClintock I***. It explained that "the redacted affidavit's theory of probable cause rest[ed] solely on smell and circumstances: the vaguely-described smell of alcohol and the circumstance of a fatal collision." *** But in its focus on "smell and circumstances[,]" the court of appeals did not observe how the particular facts in this case are different. In this case, Officer Harrison indicated in his search warrant affidavit that he smelled a "strong odor" of alcohol on Appellant's person: "I made the following observations about the suspect: . . . Odor of alcohol: strong." The court of appeals' opinion paid little attention to this fact. Instead, it characterized Harrison's description as: "the vaguely-described smell of alcohol." Harrison did not "vaguely" describe the smell of alcohol -- to the contrary, he articulated the smell as "strong" and related it directly to Appellant. *** The odor of alcohol that Officer Harrison detected on Appellant's person was an important piece of information in his probable cause affidavit, but the odor was not the only thing in the affidavit to suggest that Appellant's blood contained evidence of an intoxicated driving offense. *** When we consider the totality of the remaining facts in Officer Harrison's search warrant affidavit, giving no deference to the magistrate's initial reading of those facts, we conclude that it still demonstrated the existence of probable cause. Appellant was known to be the driver of a motorcycle that had recently been involved in a serious, single-vehicle accident that resulted in a fatality and serious injuries to himself. Also, Harrison detected the strong odor of alcohol emanating from Appellant's person. Taken together, these were "reasonably trustworthy facts and circumstances within the knowledge of" Harrison that "would lead a man of reasonable prudence to believe that . . . evidence pertaining to a crime [would] be found" in a search of Appellant's blood.

Concurring / Dissenting Opinions: Judge Hervey concurred and was joined by **Judge Richardson**, **Judge Walker**, and **Judge Slaughter**. She noted that the officers use of a "preprinted form that

was supposed to make the process easier has instead drawn it out, depleting limited governmental resources." She believes "this case underscores the need for training." **Judge Newell** concurred without note.

(**David A. Schulman**) In my mind, this part of the analysis, which is also correct, is and should be the analysis mandated by ***Gates v. Illinois***, 462 U.S. 213 (1983), and it's prodigy.