Reversed in Part; Affirmed in Part; and Opinion filed August 24, 2000.

In The

Fourteenth Court of Appeals

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NOS. 14-99-00829-CR & 14-99-00830-CR

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THE STATE OF TEXAS, Appellant

V.

ARTURO GONZALEZ RIVERA, Appellee

On Appeal from the County Court at Law No. 1
Brazoria County, Texas
Trial Court Cause Nos. 96,967 & 100,874

O P I N I O N

The State of Texas appeals from the trial court's order suppressing (1) the defendant's refusal to take a breath test and (2) the audio portion of a post-arrest video. We reverse the trial court's order suppressing evidence that the defendant refused to take a breath test; we affirm the trial court's order suppressing the audio portion of the video tape.

Two Angleton police officers were leaving the police station's parking lot when they saw a vehicle traveling at an unsafe speed. They watched the vehicle run a stop sign and began to pursue it. The chase lasted only seconds and ended when Mr. Rivera pulled into his driveway. At the scene, Mr. Rivera claimed that he had not seen the officers behind him. Mr.

Rivera refused to give a breath sample. He was arrested and transported to the police station.

All events at the police station were recorded on video-tape. Mr. Rivera was read the DWI statutory warnings. He was then asked to submit a breath sample, which he refused. The officer then read Mr. Rivera the "*Miranda*" warnings. The officer asked Mr. Rivera if he wished to waive his rights and make a statement; Mr. Rivera said no. The officers then administered several sobriety tests. After the tests, which were all preformed satisfactorily, the officer reminded Mr. Rivera of his rights and began to question him regarding the amount of alcohol he had consumed, whether he knew he was unfit to drive, etc.

In a pre-trial hearing, the court suppressed both the refusal to submit to a breath test and the audio portion of the station-house video.

The Breath Test

The State contends the trial court erred in suppressing admission of Rivera's breath test refusal form. The trial court ruled the evidence was inadmissible because Rivera had not been given his DWI statutory warnings before being asked to give a specimen of his breath. The question presented is one of historical fact. Either Mr. Rivera was asked to give a specimen of his breath prior to being given his DWI statutory warning, or he was not. We review for an abuse of discretion. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App.1997).

An officer must give the DWI statutory warnings, both orally and in writing, before requesting a breath specimen. *See* TEX. TRANS. CODE ANN. § 724.015 (Vernon 1997). "The purpose behind this requirement is to ensure that a person who refuses to give a requested specimen does so with a full understanding of the consequences." *O'Keefe v. State*, 981 S.W.2d 872, 874 (Tex. App.–Houston[1 Dist.] 1998, no pet.) (quoting *Nebes v. State*, 743 S.W.2d 729, 730 (Tex. App.–Houston [1st Dist.] 1987, no pet.)). Looking at the facts in the light most favorable to the lower court ruling, the officer requested a specimen at the scene, which was refused, without giving the required warnings. The officer then transported appellant

to the station house, gave the required warnings, and again requested a breath specimen. This second refusal was preceded by the proper statutory warnings. Mr. Rivera was correctly advised of the legal consequences of his choice, and allowed to choose again. His refusal, therefore, is properly admissible. *See O'Keefe*, 981 S.W.2d at 874; *Rowland v. State*, 983 S.W.2d 58, 60 (Tex. App.–Houston[1 Dist.] 1998, pet. ref'd). We reverse the trial court's order of suppression as to Rivera's second refusal to give a breath specimen.

The Station-House Video

The State further contends the trial court erred in suppressing the audio portion of the station-house video. The trial court ruled the evidence was inadmissible because the arresting officers continued to question Mr. Rivera after he asserted his right to remain silent. Again, we review for an abuse of discretion.

It is axiomatic that involuntarily statements resulting from a custodial interrogation are inadmissible. *See* U.S. CONST. Amend. V; TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp.2000); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The trial court found that "Mr. Rivera exercised his legal right to remain silent and never waived that right"; that "Mr. Rivera's statements concerning his drinking were the result of custodial interrogation"; and that "Mr. Rivera's statements concerning his consumption of alcohol were not freely and voluntarily given." This finding is supported by the video tape itself.

After reading Mr. Rivera his *Miranda* warnings, the officer asked if he knowingly, intelligently and voluntarily wished to waive his rights and give a statement. Mr. Rivera said "no. . . I'll just. . .I mean, what kind of statement." Less than five minutes later, after leading Mr. Rivera through three sobriety tests, the officer begins to question him again. The officer said, "I want to go ahead and remind you that I already read you your rights. I'm going to ask you some questions, do you want to answer my questions?" Mr. Rivera's answer is unintelligible. The officer then begins to interrogate Mr. Rivera, asking questions such as

"were you driving a vehicle," "where were you going," "had you been drinking," "how much," "when was your last drink," etc.

When in the course of interrogation a suspect "indicates in any manner" that he wishes to remain silent, the questioning must stop. *Watson v. State*, 762 S.W.2d 591, 597 (Tex. Crim. App.1988) (citing *Michigan v. Mosley*, 423 U.S. 96, 100, 96 S.Ct. 321, 325, 46 L.Ed.2d 313, 319 (1975)). While it is true that there is not "a per se proscription of indefinite duration" against further questioning, the police must "scrupulously honor" the defendant's right to remain silent. *Mosley*, 423 U.S. at 102-03, 96 S.Ct. at 326-27. To do this, the police must immediately cease questioning and resume questioning only after the passage of a significant period of time. *See id.* at 423 U.S. at 104-06, 96 S.Ct. at 326-28. Although they were courteous, the police did not honor Rivera's request to remain silent.

In that the trial judge's finding was supported by the evidence, we cannot say the court abused its discretion in suppressing the audio portion of the station-house video.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed August 24, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
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