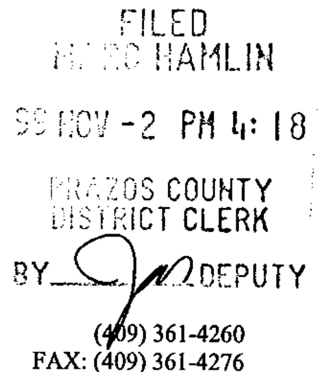

RICHARD W. B. DAVIS
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October 27, 1999

The Honorable Richard Price
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Brazos County, Texas

The Honorable Jim James
Attorney for the Defendant

RE: The State of Texas v. Jamar Leon Toombs, Cause No. 3022-99, In Brazos County Court at Law No. 2, Brazos County, Texas

Gentlemen:

On August 27, 1999, the Court heard the Defendant's Motion to Suppress wherein the Defendant contends that the evidence obtained against him, *ergo* marijuana (and which constitutes the basis of the charge that was filed against him), was unlawfully obtained, and, therefore, it ought to be excluded from admission during the trial of the case.

I. Background

Since the case involves a novel issue, the Court took the case under advisement and permitted the parties to submit letter briefs. The Defendant's brief was submitted within a week. The State's brief was submitted over a month later, and 'covers the waterfront'. Given the delay between the original hearing and the receipt of the briefs, I reviewed all of the testimony with the Court Reporter (some parts twice) in order to refresh my memory.

A brief recitation of the facts would be useful for the analysis. On or about May 2, 1999, the Defendant was patronizing a night club in Brazos County called the Epicenter. While in the entrance to the club, and while he was striking up a conversation with one of the clubs female cashiers, the Defendant was approached by one of the clubs bouncers, "Tiny" Arishin. The Defendant appeared to be intoxicated. Mr. Arishin observed what appeared to be part of a plastic baggie protruding out of one of the rear pockets of the Defendant. Mr. Arishin asked the Defendant what it was that was in the baggie, and, after the second query by Mr. Arishin, the Defendant pulled the baggie out of his

pocket and handed it to Mr. Arishin. Mr. Arishin concluded that its contents was marijuana, returned it to the Defendant, and insisted that the Defendant wait in a hallway not far from where the initial conversation took place, and had someone call the police.

Officer Brad Smith arrived shortly thereafter, approached the Defendant, patted him down, and asked him what was in the baggie. The Defendant gave the baggie to the officer, after which the Defendant was placed under arrest for possession of marijuana.

The Defendant's attack on the propriety of the manner in which the evidence was obtained is two fold: first, Mr. Arishin's apprehension of the Defendant was not lawful; second, assuming arguendo that it was not, Officer Smith's procurement of the evidence was contrary to the United States and Texas Constitution and contrary to Texas law.

It is not common for a trial judge in State court to write an opinion setting forth his or her legal and factual analyses, but since this involves a somewhat novel issue (at least one that does not appear in reported case law), I would like, for my own edification, to have the benefit of the Court of Appeals' critique of my reasoning in the event this case is appealed.

II. The Statutory Exclusionary Rule

Mr. Arishin and the other bouncer were not 'state actors' (ie. police officers), and therefore, their conduct towards the Defendant is not evaluated under art. I § 9 of the Texas Constitution or the Fourth Amendment of the U.S. Constitution.

On the other hand, the Texas Court of Criminal Appeals, in *State v. Johnson*, 939 S.W.2d 586, 587 (Tex. Crim. App. 1996), held that a statutory exclusionary rule applies to evidence unlawfully obtained by private citizens as well as to that obtained by state actors, a rule not mandated by the U.S. or Texas Constitution. The Court observed:

> No doubt, the plain language of art. 38.23 supports the conclusion that the unlawful or unconstitutional actions of all people, governmental and private alike, fall under the purview of Texas' exclusionary rule. One need only turn to a dictionary of the English language: "[O]ther" means "being the ones distinct from those first mentioned". The New Merriam-Webster Dictionary (1989). Since "officer[s]" are "those first mentioned," "other person[s]" are those distinct from officers.

The conclusion of the matter is that a Defendant, in a proper case, can have excluded evidence improperly obtained by another private citizen under art. 38.23 of the Texas Code of Criminal Procedure. In Texas, citizens have, by simple legislative act, greater protections than those accorded by the Federal and State Constitutions against unwanted intrusions.

It is upon this proposition that Mr. Toombs' first argument is based, an argument that is by no means frivolous. The Defendant contends that Mr. Arishin's detention of him was not lawful, and essentially constituted a 'false imprisonment'. I have not found, and neither side has presented, any case that has been decided since *Johnson*, and which addresses the legal effect of false imprisonment by a citizen that led to procurement of evidence by the prosecution, and it is this

proposition that I consider to be novel.

III. No Restraint

I have thoughtfully considered the evidence in this case (indeed, I have heard or reviewed the testimony at least two times; Officer Smith's three times), and have concluded that there was no false imprisonment of the Defendant by Mr. Arishin.

§ 20.01 of the Texas Penal Code states that ""Restrain" means to restrict a person's movements without consent, so as to interfere substantially with his liberty, by moving him from one place to another or by confining him. Restraint is "without consent" if it is accomplished by... force, intimidation, or deception".

Likewise, § 20.02 (a) of the Penal Code defines "Unlawful Restraint" as follows: "A person commits an offense if he intentionally or knowingly restrains another person." Furthermore, "(d) It is no offense to detain or move another under this section when it is for the purpose of effecting a lawful arrest or detaining an individual lawfully arrested."

There was no evidence that any force was used to detain Mr. Toombs in the hallway at the Epicenter. There was no evidence that any deception was used to keep the Defendant there until the police arrived. There was no evidence that Mr. Toombs sought to force his way out of the club, although if his "detention" was, in fact, an illegal citizen's arrest, he would have been within his rights to do so. "An arrest occurs when a person's liberty of movement is restricted or restrained. A person has the right to use all force necessary to extricate himself from an illegal citizen's arrest." *Young v. State*, 957 S.W.2d 923 (Tex. App.-Texarkana 1997).

Yet, these facts are not dispositive of the question. The key question to address, at this part of the analysis, is whether Mr. Arishin used intimidation to restrain the Defendant.

I do not believe that Mr. Toombs is intimidated by anyone. Indeed, at the suppression hearing, he candidly admitted that he bench presses 380 pounds, and he is quite stocky. In my view, Mr. Toombs' acquiescence to Mr. Arishin's albeit insistent request the he wait and not leave is attributable to the former's intoxication (discussed below) more than anything else.

IV. Citizen's Arrest would have been lawful

Assuming arguendo that Mr. Arishin had effected a citizen's arrest, such an arrest would have been lawful.

Article 14.01 of the Texas Code of Criminal Procedure, *Offense within view*, which sets forth the circumstances when a citizen can make a citizen's arrest provides:

> (a) A peace officer or **any other person**, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace. (emphasis mine)

The Court in *Dunn v. State*, 979 S.W.2d 403 (Tex. App. – Amarillo 1998, reh'g. den.), set out a useful discussion of article 38.23(a) in the context of a citizen's arrest. The Court observed:

> Under article 38.23(a) of the Code of Criminal Procedure:
>
> > (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
> >
> > In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.
>
> Tex. Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp.1998). This statute prohibits the admission of evidence illegally obtained by law enforcement officials and private individuals alike. *State v. Johnson*, 939 S.W.2d 586, 587 (Tex. Cr. App.1996). Therefore, in order to determine the admissibility of the complained of evidence, we must determine whether it was seized as a result of an illegal arrest.
>
> An arrest does not require the actual physical taking into custody, but occurs at the moment a person's liberty of movement is restricted or restrained. *Amores v. State*, 816 S.W.2d 407, 411 (Tex. Cr. App.1991); *Hoag v. State*, 728 S.W.2d 375, 379 (Tex. Cr. App.1987); *Wilson v. State*, 943 S.W.2d 43, 45 (Tex. App.--Tyler 1996, pet'n ref'd); *Knot v. State*, 853 S.W.2d 802, 805 (Tex. App.--Amarillo 1993, no pet'n).

Thus, assuming arguendo that there was a citizen's arrest, the legality of that arrest must be evaluated in light of art. 38.23 in order to determine whether the evidence procured thereby will be admissible in the prosecution of the case.[1] As set forth above, if the Defendant committed a felony or a misdemeanor offense that involved a breach of the peace in the presence of Mr. Arishin, then the latter would have been justified in making a citizen's arrest.

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[1]There are also circumstances when ordinary citizens have the right to detain other persons apart from effecting a citizens arrest, circumstances that have no application here. For example, Art 18.16 Texas Code of Criminal Procedure, *Preventing consequences of theft*, provides:

> All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay.

Similarly, § 124.001 of the Texas Civil Practice and Remedies Code, *Detention*, provides:

> A person who reasonably believes that another has stolen or is attempting to steal property is privileged to detain that person in a reasonable manner and for a reasonable time to investigate ownership of the property.

The Court, in *Trent v. State*, 925 S.W.2d 130 (Tex. App.-Waco 1996) held:

A citizen other than a police officer may make an warrantless arrest for a misdemeanor offense when the individual commits a breach of the peace. Tex. Code Crim. Proc. An. art. 14.01(a) (Vernon 1977); *Heck v. State*, 507 S.W.2d 737, 740 (Tex. Crim. App.1974). Driving While Intoxicated, as well as Public Intoxication, has been found to be a breach of the peace, which allows a citizen other than a police officer to make an arrest without a warrant. *Romo v. State*, 577 S.W.2d 251, 253 (Tex.Crim.App.1979); *Heck*, 507 S.W.2d at 740.

The State asks the Court to accept the proposition that the Defendant's possession of marijuana was a 'breach of the peace' which would justify a citizen's arrest. Neither side presents any case law that stands for the proposition that mere possession of marijuana is an offense that constitutes a breach of the peace. I disapprove of the possession of and use of marijuana as much as the next citizen, but I am unwilling to make the suggested intellectual leap and accept the proposition that mere possession of marijuana constitutes a breach of the peace, particularly in this case where the Defendant, through his furtive gestures, attempted to conceal from everyone the fact that he had marijuana. Were mere possession a breach of the peace, it would be difficult to think of any offense that did not constitute a breach of the peace, and the statute limiting citizen's arrests would become meaningless.

On the other hand, the fact that the Defendant's mere possession of marijuana does not constitute a breach of the peace does not end the inquiry. The testimony was clear that the Defendant was intoxicated. Mr. Arishin testified to that fact, and Officer Smith was unequivocal in his assessment that the Defendant was intoxicated. Admittedly, Ms. Mace testified that the Defendant did not appear intoxicated, however, given her vantage point as a cashier working in a booth, I am not persuaded she was in the best position to make that assessment. Further, given her clear inexperience with marijuana (and refreshing naivete), I am not persuaded that she understood that a query about intoxication could mean intoxication from marijuana as well as intoxication due to alcohol.

Indeed, the Defendant acknowledged that he might have stumbled. When queried by the prosecutor "If you had been smoking some (marijuana) that night would someone looking at you and your actions assume that you might be under the influence of something whether it was alcohol or otherwise?", the Defendant responded "Yes, sir, they might have."

I am persuaded that the Defendant's intoxication on May 2, 1999 was sufficiently marked to constitute Public Intoxication as defined by the Texas Penal Code. Assuming as true for the sake of this analysis the Defendant's argument that he was arrested by Mr. Arishin and the other bouncer at Epicenter, I am of the opinion that such an arrest would have been lawful anyway.

V. A Bouncer's Duty

§ 28.11 of the Texas Alcoholic Beverage Code, *Breach of Peace,* provides:

The commission or administrator may suspend or cancel a mixed beverage permit after

giving the permittee notice and the opportunity to show compliance with all requirements of law for the retention of the permit if it finds that a breach of the peace has occurred on the licensed premises or on premises under the control of the permittee and that the breach of the peace was not beyond the control of the permittee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control.

This law imposes upon a mixed beverage permit holder a duty to supervise its patrons in order to prevent breaches of the peace. It seems reasonable to me to conclude that the creation of a duty to act gives a person the means to act. I have searched rather extensively, and have not found a case that stands directly for this proposition, but see, for example, *Hawkins v. State*, 891 S.W.2d 257 (Tex. Crim. App. 1994) and *Sabine Consolidated, Inc. et al. v. State*, 806 S.W.2d 553 (Tex. Crim. App. 1991).

Thus, even apart from determining whether there was an 'unlawful restraint', and apart from determining whether or not there was a justified citizen's arrest, I conclude that a person in Mr. Arishin's position, as agent for an alcoholic beverage license holder, has an implied duty to detain a person that has breached the peace by virtue of his employer's obligations that arise appurtenant to its license.

VI. The Officer's 'Seizure' of the Marijuana

Since I have concluded that there was not an 'unlawful restraint' by the bouncer, it is necessary to address the Defendant's second argument: that the procurement of the marijuana from the Defendant by Officer Smith was unlawful.

Obviously, Officer Smith was a 'state actor', therefore, art. I § 9 of the Texas Constitution or the Fourth Amendment of the U.S. Constitution apply. Since this aspect of the Defendant's argument is not novel, I will not engage in a lengthy discussion of the matter, but observe that in light of the Defendant's assent to Officer Smith's requests (and, alternatively, under the 'plain feel test', see *Graham v. State*, 893 S.W.2d 4, 7 (Tex. App. – Dallas 1994)), the procurement of the evidence by Officer Smith from the Defendant was lawful.

VII. Conclusion

In light of the foregoing, the Defendant's Motion to Suppress is Denied.

Rick Davis