No. 14-24-00800-CR

In The Fourteenth Court of Appeals
Houston, Texas

Brian Keith Meaux
Appellant

v.

State of Texas
Appellee

On Appeal from Cause # 1851749 from the 228th District Court of Harris County, Texas

Appellant's Brief

Stephen Aslett
The Aslett Law Firm, PLLC
1221 Studewood St., Ste. 120
Houston, Texas 77008
Tel: (713) 936-4521
Fax: (888) 659-7956
SBOT: 24064841
stephen@aslettlaw.com
Counsel for Appellant

Oral Argument Requested

Identity of Parties and Counsel

Appellant:	Brian Keith Meaux 7327 Loma Alta Dr. Houston, TX 77083
Appellate counsel for Appellant:	Stephen Aslett 1221 Studewood St., Ste. 120 Houston, TX 77008
Appellate counsel for the State:	ADA Jessica Caird 1201 Franklin St. Houston, TX 77002
Trial counsel for Appellant:	Tyler Flood and Savannah Luna 2019 Washington Ave., Ste. 300 Houston, TX 77007
Trial counsel for the State:	ADA Adriana J. Humphrey ADA Thomas Waddle 1201 Franklin St. Houston, TX 77002
Presiding judge:	Hon. Randy Roll 1201 Franklin St., 16th floor Houston, TX 77002

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Statement of the Case

Appellant Brian Keith Meaux was indicted for the felony offense of driving while intoxicated – third offense. (CR 43.)

After a three-day trial, a jury found Appellant guilty. (CR 169; 6 RR 89.) The trial court sentenced him to ten years in prison but suspended the sentence and placed him on three years of community supervision. (CR 170; 6 RR 95.)

The trial court certified Appellant's right of appeal and Appellant timely filed a notice of appeal. (CR 178–79.)

Statement Regarding Oral Argument

This case presents a rare opportunity for this Court to clarify what it means for a judge to abandon neutrality and "assume the role of a prosecutor." *Avilez v. State*, 333 S.W.3d 661, 673 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). Though appellate courts regularly cite this standard, it's not clear when this line is crossed except in the most extreme circumstances. *See Bethany v. State*, 814 S.W.2d 455, 461 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

Here, the judge crossed that line by injecting personal commentary that suggested the answer a witness should give—an answer that directly led to the denial of Appellant's motion to suppress the blood search warrant in his DWI trial. This case would be the first to address whether this type of suggestive judicial conduct violates due process.

Oral argument would aid the court in clarifying the boundary between permissible judicial questioning and impermissible advocacy.

Issues Presented

After Appellant was arrested for driving while intoxicated – third offense, the police drew his blood pursuant to a search warrant. Laboratory testing of the blood showed a blood alcohol content (BAC) of .208.

Appellant moved to suppress the warrant. At the suppression hearing, the officer who prepared the search warrant affidavit testified that she did not swear to it under oath.

Defense counsel argued that the warrant was invalid because the officer did not swear to the affidavit.

In response, the judge commented that he always asked officers to swear to him before he signed warrants. He then instructed counsel to ask the officer again if she had sworn to her affidavit.

For the first time, the officer testified that the judge who issued the warrant swore her to the affidavit. The judge denied the motion to suppress and the lab result was admitted into evidence.

After his conviction, Appellant was ordered to pay a $100 EMS trauma fine, a $15 time payment fee, and a $55 bond approval fee.

1. Did the judge abandon neutrality and assume the role of a prosecutor by invoking his personal experience to lead the officer to give a pro-State answer and then directing defense counsel to elicit that answer?

2. Fines must be orally pronounced in a defendant's presence. The $100 EMS trauma fine was not. Was the $100 EMS trauma fine legally imposed?

3. A $15 time payment fee can be assessed only if a defendant does not pay his fees within thirty-one days after sentencing. An appeal suspends a defendant's duty to pay fees. Was the $15 time payment fee prematurely assessed?

4. A defendant can be charged a $10 bond approval fee for each bond made during a criminal case. Appellant made one bond during his case but was assessed a $55 bond approval fee. Was the $55 bond approval fee legal?

Statement of Facts

1. The State's evidence

A. The wheel witness (Guillermo Leal)

Guillermo Leal was sitting in his truck outside his home, having just returned from work, when he saw a vehicle speed down the street and strike his driver's side mirror. (4 RR 81–82.)

The vehicle didn't stop, so Leal followed it for two blocks until it parked in a driveway. (4 RR 82–83.) Leal parked behind it to prevent the driver from leaving. (4 RR 83.)

Appellant was in the driver's seat. (4 RR 83.) Leal started recording him on his cell phone. (4 RR 83; State's Exhibit #15.) Appellant got out, walked over to Leal's truck, knocked on the driver's side window, and tried to open the door. (4 RR 83.) He told Leal that he needed to leave or he would kill him. (4 RR 84.)

When Leal tried to speak with Appellant, Appellant became "more aggressive" and "insult[ed]" him. (*Id.*)

Leal watched as Appellant walked to the front door of his home. (4 RR 87.) His balance was "bad," and he struggled to unlock the door, dropping his keys before eventually going inside. (4 RR 88.) Appellant remained inside his home for about three minutes. (*Id.*)

Though Leal didn't smell any odor of alcohol on Appellant, he believed that Appellant was intoxicated and called 911. (4 RR 91–92, 96–97, 101; State's Exhibit #17.)

B. The investigation (Deputy Latricia Jones)

Harris County Sheriff's Deputy Latricia Jones responded to the scene. (3 RR 31, 35.)

When she arrived, Appellant was leaning against his truck. (3 RR 42.) She saw damage to the truck consistent with it having struck Leal's side view mirror. (3 RR 66.)

As she spoke with Appellant, she noticed he had slurred speech, bloodshot eyes, and the odor of alcohol on his breath. (*Id.*) Appellant admitted to drinking alcohol and appeared confused when she asked him about the accident. (3 RR 42.)

Deputy Jones performed the horizontal gaze nystagmus (HGN) test on Appellant. (3 RR 43.) Appellant declined to perform other field sobriety tests and refused to give a breath or blood sample. (3 RR 47.)

After his refusal, Deputy Jones obtained a search warrant for Appellant's blood. (3 RR 54; State's Exhibit #4.) Lab testing later revealed a BAC of .208. (3 RR 180; State's Exhibit #13.)

After he was arrested, Appellant admitted to Deputy Jones that this was his third DWI arrest.[1] (3 RR 50; State's Exhibit #2.)

2. The motion to suppress hearing

Defense counsel orally moved to suppress the search warrant, and the trial court conducted a hearing outside the presence of the jury. (3 RR 55.)

Deputy Jones's warrant affidavit indicated that it had been sworn to by Deputy Michael Katz. (3 RR 84; Defendant's Exhibit #1.)

But under questioning by trial counsel, Deputy Jones admitted that neither Deputy Katz nor anyone else swore her to her affidavit:

> Q. Okay. So what did Michael Katz—did he ask you to raise your hand, say do you swear this to be true?
> A. No, sir.
> …
> Q. He just signed—you asked him to sign his name?
> A. Yes, sir.
> Q. Police officers are allowed to sign. But he didn't—he did not administer any oath to you, correct?
> A. Correct.
> Q. So you did not swear to this under any kind of legal oath?
> A. I don't know how to answer that.
> Q. Did Michael Katz or anybody else administer an oath to you before you signed this PC affidavit?
> A. No, sir.[2]

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[1] Appellant stipulated to his two prior DWI convictions at trial. (3 RR 28–29; State's Exhibit #1.)
[2] 3 RR 84–85.

Counsel argued that the warrant should be suppressed because Deputy Jones's affidavit had not been sworn. (3 RR 86–87.)

On cross-examination, the prosecutor asked Deputy Jones if she believed she swore to the affidavit by signing it. (3 RR 88.) She said that she believed she had sworn by signing it—even though no one had administered an oath to her. (*Id.*)

The judge then made the following unsolicited comments before attempting to question Deputy Jones himself:

> THE COURT: Okay. Under cross-exam by Mr. Flood, he asked you did you swear to that document. I've signed hundreds and hundreds of—I personally, as a judge, have signed hundreds of warrants and I always ask the person who's providing it to me do you solemnly swear that all the information contained in this warrant are [sic] true and correct to the best of your knowledge and they say "yes" or "no." And, so, that's the warrant. Did someone ask you and did you—did you swear. You've told her [the prosecutor] you did. You told him [Mr. Flood] you didn't. Which is it?
> THE WITNESS: (No response.)

Having received no answer from Deputy Jones, the judge directed trial counsel to ask the question again. (3 RR 88.) This time, Deputy Jones testified that the warrant judge swore her to her affidavit. (3 RR 90, 93–94.)

The judge then denied the motion to suppress. (3 RR 94.)

3. The conviction and sentence

The jury found Appellant guilty. (CR 169; 6 RR 89.) The judge sentenced him to ten years in prison but suspended the sentence and placed him on three years of community supervision. (6 RR 89.)

The judge did not orally pronounce a fine. Yet Appellant's judgment and sentence reflected a $100 fine, listed in his criminal bill of costs as an "EMS Trauma Fine." (CR 170, 177.)

That bill of costs also listed other fees Appellant was required to pay, among them a $15 time payment fee and a $55 bond approval fee. (CR 177.)

Summary of the Argument

Due process guarantees every defendant a trial before an impartial judge. Here, the judge abandoned impartiality and acted as a prosecutor when he signaled to Deputy Jones the pro-prosecution answer she needed to give to save the warrant from suppression. The judge's prosecutorial advocacy was structural error that requires a new trial.

Though a judge can personally question a witness to determine the admissibility of evidence, that narrow power does not permit a judge to use commentary to suggest a desired answer to a witness, nor does it permit a judge to order defense counsel to ask questions on the judge's behalf.

Appellant was also improperly assessed a fine and several fees. The $100 EMS trauma fine is invalid because the judge did not orally pronounce it at sentencing. The $15 time payment fee (a late fee) was prematurely assessed because an appeal suspends a defendant's duty to pay court costs, and a late fee can't be charged when payment is not yet due. Finally, the $55 bond approval fee is not supported by the record. Appellant made a single bond and the applicable statute authorizes only a $10 fee for each bond made.

Argument

1. The judge demonstrated bias by abandoning neutrality and acting as a prosecutor

A. Legal standards

Due process requires that a defendant be tried before an unbiased judge. *Avilez v. State*, 333 S.W.3d 661, 673 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). A judge demonstrates bias when the judge "assume[s] the role of a prosecutor." *Id.* "Where a trial judge abandons his position as a neutral arbiter and takes on the role of an advocate, [the adversarial] system cannot function and fairness is lost." *Bethany v. State*, 814 S.W.2d 455, 462 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

A defendant does not need to object to preserve a claim of judicial bias on appeal. *Barfield v. State*, 464 S.W.3d 67, 81 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). Nor must a defendant show harm to prevail on a judicial bias claim because judicial bias "is a structural error not subject to harm analysis." *De Leon v. Aguilar*, 127 S.W.3d 1, 7 (Tex. Crim. App. 2004).

B. The judge assumed the role of a prosecutor by invoking his personal experience to lead Deputy Jones to the answer that would save the warrant and by instructing defense counsel to elicit it

Before the judge made his comments, Deputy Jones had testified that she signed her affidavit without swearing to its contents. (3 RR 86–87.) That testimony rendered the warrant invalid because search warrant affidavits must be sworn under oath. *Wheeler v. State*, 616 S.W.3d 858, 863–64 (Tex. Crim. App. 2021).

Though Deputy Jones also testified that she believed signing the affidavit was the same as swearing to it, that subjective belief could not substitute for an actual oath. *Id.* at 866–67.

Faced with this testimony, the judge had no choice but to grant Appellant's motion to suppress. But instead, he intervened to elicit pro-State testimony from Deputy Jones.

First, he launched into a monologue about his own experience swearing officers to affidavits—experience that was irrelevant. Neither side had asked whether the warrant judge swore Deputy Jones to her affidavit, and there was no evidence of the warrant judge's swearing practices either way. The only plausible purpose of the judge's remarks was to lead Deputy Jones to give the pro-State answer needed to save the warrant.

After priming Deputy Jones with his commentary, the judge asked her directly whether anyone had sworn her to her affidavit. She didn't answer. Instead of accepting her silence—or relying on her unambiguous earlier testimony that she had not been sworn—the judge went a step further to get his desired answer: he directed defense counsel to re-ask the question for him. (3 RR 88.)

These were not the actions of a neutral arbiter. They were deliberate efforts to help the State by eliciting testimony from Deputy Jones that would save the warrant.

i. The judge went beyond the limits of permissible judicial questioning

A judge can question a witness in three limited circumstances: (1) to clarify a point, (2) to have the witness repeat something the judge couldn't hear, and (3) to determine the admissibility of evidence—as

long as the judge doesn't "ask questions designed to elicit facts as evidence." *Williams v. State*, 89 S.W.3d 325, 328, 329 (Tex. App.—Texarkana 2002, pet. ref'd).

The first two exceptions don't apply here. There was nothing unclear about Deputy Jones's testimony—she said unequivocally that no one had sworn her to her affidavit. And there's no indication the judge didn't hear her.

That leaves the third exception: a judge can question a witness to determine the admissibility of evidence but only if the questions aren't designed to elicit evidentiary facts. So does this exception apply because the judge's question concerned the warrant's admissibility? Or does it not apply because the judge elicited a new fact to support the warrant's admissibility?

Though the *Williams* court tried to distinguish between questions aimed at admissibility and those aimed at eliciting facts, that distinction collapses under scrutiny—as *Williams* itself shows.

Williams was a drug possession case in which the defense claimed that the trial judge was biased when he questioned an expert witness to determine whether the expert's proposed testimony met *Kelly*'s reliability requirements. *Id.* at 327. Specifically, the judge asked the

expert witness about the "reliability of the testing methods used, the type of device used, and the potential for error in the test." *Id.* The court held that these questions were permissible because they were aimed at determining admissibility, not eliciting evidentiary facts. *Id.* at 329.

But those questions plainly did elicit evidentiary facts—the expert's testing methods, the equipment he used, and the potential error rates. And the judge used those evidentiary facts to determine the admissibility of the expert's testimony. The *Williams* court failed to realize that admissibility cannot be judged in a vacuum. Any admissibility question a judge asks will necessarily elicit an evidentiary fact that the judge will use to determine admissibility. This reality renders *Williams* court's distinction meaningless.

The *Williams* court cited *Milo v. State*, 214 S.W.2d 618 (Tex. Crim. App. 1948) as the source for its distinction. *Williams*, 89 S.W.3d at 329. But *Milo* drew no such distinction.

Milo concerned a rape trial in which the prosecution sought to introduce the clothing the complainant wore the night of the alleged rape. 214 S.W.2d at 619. After the complainant identified the clothes as the same clothes she wore on the night of the rape, the prosecutor

moved to admit them into evidence. *Id.* The defense objected that the proper predicate had not been laid. *Id.* The trial judge then asked the complainant if the clothes appeared different from how they looked on the night of the alleged rape. *Id.* The witness answered "no," and the judge admitted the clothes into evidence. *Id.*

The *Milo* Court ruled that the judge's question was permissible because the judge "had a right to satisfy himself as to whether or not the clothing was admissible in order that he may properly rule on the question before him." *Id.* It drew no distinction between questions asked to elicit evidentiary facts and questions asked to determine the admissibility of evidence.

Notably, the *Milo* Court cited no authority and offered no rationale for its holding, which gives judges the power to do a party's job for them by eliciting predicate testimony the party failed to obtain.

Such a power opens the door to judicial bias, allowing judges to assist one side over another at their discretion—by asking admissibility questions when they want evidence admitted and staying silent when they want evidence excluded.

Worse, *Milo* suggests this power has no limits. Suppose a party makes a hearsay objection to a witness's testimony and multiple hearsay

exceptions might apply. Can the judge ask the witness about all the exceptions—even those not raised by the parties? Can the judge suggest a new theory of admissibility and ask the witness questions to support it?

The better rule would be to forbid judges from asking admissibility questions altogether. That rule is clear, easily administrable, and ensures that judges remain neutral arbiters rather than advocates.

a. A judge's power to question witnesses about admissibility does not include suggesting answers to the witness or directing defense counsel to elicit those answers

Though deeply flawed, *Milo* remains good law and permits judicial questioning about admissibility. But there are two reasons why *Milo*'s exception doesn't apply here.

First, when the judge questioned Deputy Jones, she remained silent. His questioning elicited no testimony at all. Unsatisfied, he then directed defense counsel to repeat his question for him. But *Milo* doesn't authorize a judge to conscript a party's lawyer—much less a defendant's lawyer—as a surrogate examiner for the judge's own admissibility inquiry. After all, "[a] criminal defense attorney's duty is to zealously represent the interests of his client"—not to help the judge

correct the prosecution's mistakes. *In re Schulman*, 252 S.W3d 403, 406 (Tex. Crim. App. 2008).

Second, and more importantly, nothing in *Milo* allows a judge to preface an admissibility question with suggestive commentary intended to steer the witness towards a preferred answer.

Consider this scenario. A police officer sees a man smoking what he believes to be marijuana on the second-floor balcony of an apartment complex. After watching the man go inside, the officer obtains a search warrant for the man's apartment, which leads to the discovery of marijuana. In his affidavit, the officer swears that he has training and experience identifying marijuana.

At a suppression hearing, the officer testifies that his training was brief and only involved identifying marijuana up close and not in joint form. The defense attorney argues that the warrant should be suppressed under *Franks v. Delaware* because the officer lacked the sufficient training and failed to disclose that in his affidavit. *See Melton v. State*, 750 S.W.2d 281, 284 (Tex. App.—Houston [14th Dist.] 1988, no pet.).

The judge interrupts: "When I was in college, I saw people smoking marijuana all the time. I could tell the difference between a joint and a

cigarette even from across the quad, and I've never been to the police academy. Officer, you testified you went to college. Did you ever see people smoke marijuana in college from a distance?"

Would anyone say that judge was behaving as an unbiased arbiter? Though framed as an admissibility question, the judge's prefatory commentary unmistakably signals to the officer what he needs to say to rescue the warrant. The judge's personal experience is not part of the evidence, not testable by cross-examination (how did the judge know he saw marijuana at a distance in college?), and not tied to the facts of the case as elicited by the parties. The only reason for the judge to bring up his personal experience is to guide the officer to the desired, pro-State answer.

So too here. The judge invoked his own experience swearing officers to affidavits—experience that was not part of the evidence, not testable by cross-examination (was there ever a time the judge forgot to administer an oath?), and not relevant to the case. And he did so only *after* the defense argued for suppression. Though the judge technically asked an admissibility question, its only purpose was to point Deputy Jones to the answer she needed to give to save the warrant.

Due process demands that a defendant be tried by a neutral judge, not an advocate for the State. *Milo*'s narrow exception cannot serve as a pretext to disguise partisan advocacy as evidentiary questioning. Otherwise, *Milo*'s exception swallows the rule—and with it, a defendant's right to a fair trial. *Bethany v. State*, 814 S.W.2d 455, 456 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) ("It is axiomatic that every person accused of a crime is guaranteed a fair trial.")

2. The EMS trauma fine was illegally imposed

A defendant convicted of DWI "shall pay a fine of $100" to reimburse "emergency medical services, trauma facilities, and trauma care systems." Tex. Code Crim. Proc. art. 102.0185(a). In Harris County, this $100 fine is reflected in criminal bills of costs as an "EMS Trauma Fine." (CR 170, 177.)

A judge must orally pronounce a fine in the defendant's presence. *Dulin v. State*, 620 S.W.3d 129, 133 (Tex. Crim. App. 2021). When a conflict exists between a judge's oral pronouncement and the written judgment, the oral pronouncement controls. *Id.*

When the judge sentenced Appellant, he did not orally pronounce a fine. (6 RR 89.) Yet the $100 EMS trauma fine was imposed in the written judgment and bill of costs. (CR 170, 177.) Because the judge did

not orally impose the $100 EMS trauma fine, it must be struck from the judgment and Appellant's bill of costs.

3. The time payment fee was prematurely assessed

A convicted defendant "shall pay a reimbursement fee of $15" if the defendant doesn't pay all of his court costs, fines, and restitution within thirty-one days after the judgment is entered. *See* Tex. Code Crim. Proc. art. 102.030(a).

Because "a defendant's appeal suspends the duty to pay court costs," it also "suspends the running of the clock for the purposes of the time payment fee." *Dulin*, 620 S.W.3d at 129. The time payment fee may be assessed after the conviction is affirmed, but only thirty-one days after the mandate is issued and only if the defendant has not paid his court costs, fines, and restitution. *Id.* at 133.

Appellant was assessed a $15 time payment fee. (CR 177.) Because his case is on appeal, the $15 time payment fee has been prematurely assessed and must be struck from the judgment. *Dulin*, 620 S.W.3d at 133.

4. The $55 bond approval fee is not supported by the record

An appellate court must "review the assessment of court costs on appeal to determine if there is a basis for the cost." *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014).

A convicted defendant must pay a $10 reimbursement fee for a peace officer's "taking and approving a bond and, if necessary, returning the bond to the courthouse." Tex. Code Crim. Proc. art. 102.011(a)(5). In Harris County, this fee appears in the criminal bill of costs as "LEA – Bond Approval Fee." (CR 177.)

Appellant made one $25,000 bond which was never revoked. (CR 216.) Yet Appellant was assessed a $55 bond approval fee. (CR 177.) Because the record does not support a $55 bond approval fee, this Court should reduce the bond approval fee to $10.

Conclusion and Prayer

The judge abandoned neutrality and assumed the role of a prosecutor by using personal commentary to lead Deputy Jones into giving pro-State testimony and by commandeering Appellant's counsel to elicit that testimony on his behalf. Had the judge not intervened, he would have had no choice but to grant Appellant's motion to suppress. His conduct violated Appellant's right to a fair trial before an impartial judge and is structural error that requires reversal.

For these reasons, Appellant respectfully asks the Court to reverse his conviction and remand the case for a new trial, or alternatively, modify the judgment to strike the illegally imposed fine and fees.

Respectfully submitted,

/s/ Stephen Aslett____

Stephen Aslett
The Aslett Law Firm, PLLC
1221 Studewood St., Ste. 120
Houston, Texas 77008
Tel: (713) 936-4521
Fax: (888) 659-7956
SBOT: 24064841
stephen@aslettlaw.com
Counsel for Appellant

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Bar No. 24064841
stephen@aslettlaw.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird		caird_jessica@dao.hctx.net	4/2/2025 4:29:45 PM	SENT