

COURT OF APPEALS, SECOND APPELLATE DISTRICT OF TEXAS AT FORT WORTH

Russell Finkelberg v. The State of Texas

No. 02-25-00037-CR (Tex. App.—Fort Worth Jan. 22, 2026) (mem. op.) · No. 02-25-00037-CR · Decided January 22, 2026

SUMMARY

The Texas Court of Appeals addresses Russell Finkelberg’s appeal from his conviction for aggravated assault with a deadly weapon and ten-year prison sentence. The court considers challenges to the denial of a motion to suppress evidence obtained through a protective sweep and seizure of a cell phone, the competency of the complainant’s testimony, and an asserted due course of law claim concerning destruction of evidence. The court concludes that the suppression and competency challenges fail and that the due course of law claim was not preserved, affirming the trial court’s judgment.

CASE DETAILS

COURT	Court of Appeals, Second Appellate District of Texas at Fort Worth
WRITING FOR THE COURT	Dabney Bassel; Womack; Wallach
JURISDICTION	Court of Appeals, Second Appellate District of Texas at Fort Worth
DECIDED	January 22, 2026
DOCKET	02-25-00037-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Finkelberg appealed his conviction for aggravated assault with a deadly weapon and the denial of his motions to suppress evidence, quash the indictment, and dismiss the charges based on alleged destruction of evidence.
STANDARD OF REVIEW	For suppression rulings, historical facts and credibility-dependent application-of-law-to-fact questions are reviewed with almost total deference, while application-of-law-to-fact questions not dependent on credibility and the existence of reasonable suspicion or probable cause are reviewed de novo. Explicit findings are reviewed in the light most favorable to the ruling. A witness-competency ruling is reviewed for abuse of discretion. Preservation of error is reviewed under Texas Rule of Appellate Procedure 33.1.

PRECEDENTIAL VALUE	nonprecedential
PARTIES	Russell Finkelberg v. The State of Texas

TOPICS

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QUESTIONS PRESENTED

1. Whether the trial court erred by denying suppression of evidence allegedly derived from an unlawful protective sweep of Finkelberg's home.
2. Whether the warrantless seizure of Finkelberg's cell phone violated the Fourth Amendment or Texas exclusionary rule.
3. Whether viewing a contemporaneous surveillance notification on the phone's lock screen constituted an unlawful search.
4. Whether the trial court erred by refusing to strike the complainant's testimony as incompetent under Texas Rule of Evidence 601(a)(1).
5. Whether Finkelberg preserved a claim that the Texas Constitution's due course of law clause provides a broader remedy for destruction of evidence than federal due process or the Michael Morton Act.

HOLDINGS

1. The protective sweep did not violate the Fourth Amendment because officers had an objectively reasonable belief, based on specific and articulable facts, that another person who could pose a danger might be inside the residence.
2. The warrantless seizure of Finkelberg's cell phone was reasonable under the Fourth Amendment because officer-safety concerns or exigent circumstances justified taking and securing it before officers obtained a warrant.
3. Viewing a contemporaneous surveillance notification displayed on the cell phone's lock screen was not a search because the notification was in plain view, and the State exclusionary rule therefore did not require suppression.
4. Finkelberg's competency challenge was not preserved because his trial objection asserted lack of personal knowledge rather than incompetence or insanity under Rule 601(a)(1). Alternatively, the complainant's memory problems and inconsistencies concerned credibility and weight for the jury, not competency, and the trial court did not abuse its discretion in allowing the testimony.
5. Finkelberg failed to preserve his claim that the Texas due course of law clause affords greater protection or a dismissal remedy for the destruction of evidence than federal due process.

KEY QUOTATIONS

“we conclude that the officers had an objectively reasonable belief that there could have been another person inside Finkelberg’s home who posed a danger to them” (at 25)

“the suppression-hearing evidence established that Sergeant Brun’s warrantless seizure of Finkelberg’s cell phone was permissible based on officer-safety concerns or exigent circumstances.” (at 27)

“Viewing a contemporaneous notification on a cell phone does not require the removal of any portion of the phone, and thus law enforcement’s viewing a text message or an incoming call contemporaneously with its appearing on the outward screen would not constitute a search because the information, at that moment, is in plain view.” (at 29)

FACTUAL BACKGROUND

Police responded to multiple 911 reports that a man had threatened another person with a firearm outside a Denton County residence. Officers detained Finkelberg in handcuffs, conducted a brief protective sweep of his townhome because they did not know whether another armed person remained inside, and seized his cell phone after he attempted to use it and officers believed evidence or additional people might create a safety risk. A later search warrant led to the seizure or copying of firearms and surveillance-related evidence. At trial, the complainant testified despite memory problems following a traumatic brain injury, and Finkelberg challenged the State's failure to preserve a recording of the complainant's 911 call.

PROCEDURAL HISTORY

A Denton County trial court denied Finkelberg's motion to suppress in its entirety, denied his motion to quash the indictment, and later denied his motion concerning electronic evidence and his motion to dismiss based on the State's alleged failure to preserve evidence. A jury conviction for aggravated assault with a deadly weapon resulted in a ten-year prison sentence. The court of appeals overruled all four appellate issues and affirmed the trial court's judgment.

DISPOSITION

affirmed

CASES CITED

- State v. Martinez, 570 S.W.3d 278, 281 (Tex. Crim. App. 2019)
- Wiede v. State, 214 S.W.3d 17, 24-25 (Tex. Crim. App. 2007)
- State v. Sheppard, 271 S.W.3d 281, 291-92 (Tex. Crim. App. 2008)
- Johnson v. State, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013)
- State v. Kelly, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006)
- Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980)
- State v. Martinez, 569 S.W.3d 621, 623 (Tex. Crim. App. 2019)
- Ornelas v. United States, 517 U.S. 690, 696-99 (1996)

- Kothe v. State, 152 S.W.3d 54, 62-63 (Tex. Crim. App. 2004)
- State v. Garcia, 569 S.W.3d 142, 148 (Tex. Crim. App. 2018)
- Reasor v. State, 12 S.W.3d 813, 815-17 (Tex. Crim. App. 2000)
- United States v. Miller, 430 F.3d 93, 100 (2d Cir. 2005)
- United States v. Martins, 413 F.3d 139, 150 (1st Cir. 2005)
- Cooksey v. State, 350 S.W.3d 177, 185 (Tex. App.—San Antonio 2011, no pet.)
- United States v. Gould, 364 F.3d 578, 584 (5th Cir. 2004) (en banc)
- Kentucky v. King, 563 U.S. 452 (2011)
- Minnesota v. Dickerson, 508 U.S. 366, 372 (1993)
- Torres v. State, 182 S.W.3d 899, 901-02 (Tex. Crim. App. 2005)
- State v. Woodard, 341 S.W.3d 404, 412 (Tex. Crim. App. 2011)
- Terry v. Ohio, 392 U.S. 1, 21 (1968)
- Johnson v. State, 622 S.W.3d 384 (Tex. Crim. App. 2021)
- Thomas v. State, 586 S.W.3d 413, 419 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)
- Halili v. State, 430 S.W.3d 549, 554-55 (Tex. App.—Houston [14th Dist.] 2014, no pet.)
- Wilson v. State, 311 S.W.3d 452, 459 (Tex. Crim. App. 2010)
- State v. Sandifer, No. 02-15-00307-CR, 2016 WL 7157249, at *4 (Tex. App.—Fort Worth Dec. 8, 2016, pet. ref'd) (mem. op.)
- Flores v. State, 177 S.W.3d 8, 16 n.9 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd)
- Maxwell v. State, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002)
- Hernandez v. State, No. 05-23-00565-CR, 2024 WL 3174273, at *5 (Tex. App.—Dallas June 26, 2024, no pet.) (mem. op.)
- United States v. Place, 462 U.S. 696, 701 (1983)
- Martinez v. State, 689 S.W.3d 30, 46 (Tex. App.—Fort Worth 2024, pet. ref'd)
- Clark v. State, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012)
- Lovill v. State, 319 S.W.3d 687, 691-92 (Tex. Crim. App. 2009)
- Pena v. State, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009)
- Resendez v. State, 306 S.W.3d 308, 313 (Tex. Crim. App. 2009)
- Dufrene v. State, 853 S.W.2d 86, 88 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd)
- Minor v. State, 659 S.W.2d 161, 163 (Tex. App.—Fort Worth 1983, no pet.)
- Montoya v. State, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009)
- Turner v. State, 422 S.W.3d 676, 692 & n.31 (Tex. Crim. App. 2013)
- McGinn v. State, 961 S.W.2d 161, 165-66 (Tex. Crim. App. 1998)
- Ghanbari v. State, No. 05-17-00257-CR, 2019 WL 1649455, at *10 (Tex. App.—Dallas Apr. 17, 2019, pet. ref'd) (mem. op.)
- Robinson v. State, 368 S.W.3d 588, 604 (Tex. App.—Austin 2012, pet. ref'd)
- United States v. Cooper, 983 F.2d 928 (9th Cir. 1993)

- Brady v. Maryland, 373 U.S. 83 (1963)
- Illinois v. Fisher, 540 U.S. 544 (2004)
- Montelongo v. State, 623 S.W.3d 819, 822 (Tex. Crim. App. 2021)
- Hallman v. State, 721 S.W.3d 307, 314, 324 (Tex. Crim. App. 2025)

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