



C.A.L.L.

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City Attorney Law Letter

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No DL Traffic Stops: Asking the Extra Question
Page 1

When Can an Officer Write a Citation on Private Property?
Page 2

An Overview of the City's Noise Ordinance and Its Exceptions
Page 4

No Child Safety Restraint: When is it the Correct Charge?
Page 7

*8th Circuit U.S. Court of Appeals Concludes that Reasonable Suspicion Justified Stop
of Rental Vehicles Traveling in Tandem on Arkansas Interstate*
Page 8

*Arkansas Legislature Increases Fine Amount Owed on No Seat Belt and Failure to
Present Proof of Insurance at the Time of the Traffic Stop Violation*
Page 10

*Arkansas Court of Appeals Affirms Constructive Possession Conviction Where Defendant
Was Found Near Marijuana in a Co-Occupied Residence*
Page 11

Cracked Windshield Valid Reason for Traffic Stop
Page 12

*Eighth Circuit Finds Leon Good Faith Exception for
Search Warrant in Springdale Case*
Page 15



No DL Traffic Stops: Asking the Extra Question

A review of the traffic citations issued by the Springdale Police Department over the last few years indicate that there are a large number of people driving without a valid drivers' license in the City of Springdale. Specifically, the Police Department wrote the following number of citations over the last three years:

<u>Year</u>	<u>NO</u> <u>DL</u>	<u>Suspended</u> <u>DL</u>	<u>TOTAL</u>
2010	1818	1025	2843
2011	1508	983	2491
2012	1297	829	2126

Sometimes, the person driving is actually driving their own vehicle. But in a vast majority of these cases, especially in no DL cases, the person driving is actually driving someone else's vehicle. Which creates the question: How did the person driving obtain possession of the vehicle they are driving? Either the vehicle was taken with the owner's consent, or it was not. Either scenario could likely result in other charges.

If it is determined that the vehicle was taken without the owner's consent, the person driving can be charged with Unauthorized use of a Vehicle. Specifically:

5-36-108. Unauthorized use of a vehicle.

(a) A person commits unauthorized use of a vehicle if the person knowingly takes, operates, or exercises control over another person's vehicle without consent of the owner.

(b) Unauthorized use of a vehicle is a Class A misdemeanor.

In 2010, only 7 people were charged with Unauthorized use of a Vehicle. In 2011, only 9 people were charged. In 2012, only 11 people were charged.

If it is determined that the vehicle was taken with the owner's consent, and the owner knew the person driving did not have a valid drivers' license, the owner can be charged with Permitting Unauthorized Person to Drive. Specifically:

27-16-304. Permitting unauthorized person to drive.

No person shall authorize or knowingly permit a motor vehicle owned by him or her or under his or her control to be driven upon any highway by any person who is not authorized under this chapter or is in violation of any of the provisions of this act.

Permitting Unauthorized Person to Drive is punishable by up to ninety (90) days in jail, or by up to a \$500 fine. In 2010, 21 people were charged with violating this statute. In 2011, 25 were charged. In 2012, 44 were charged. When booking this charge into the computer, use code 034 (allow unauthorized person to drive) in the citation module.

The two charges discussed in this article are often overlooked by officers during a traffic stop. Sometimes, the owner of the vehicle is actually a passenger in the vehicle, which makes it simple to determine if the owner allowed the unlicensed driver to drive. Other times, the owner of the vehicle will

arrived at the scene of the traffic stop to take possession of the vehicle to avoid towing expenses. This also makes it easy for the officer to determine how the driver obtained possession of the vehicle.

Driving without a drivers' license is a public safety issue. After all, there is a reason why the State of Arkansas requires someone to pass a written test and a driving test before the State will give them a drivers' license. Any person driving who has not taken and passed those tests, is a danger to themselves, other people, and other people's property. Therefore, any measures that can be taken to reduce the number of people driving without a drivers' license are a benefit to the public. Holding the owner of a vehicle accountable for allowing an unlicensed person to drive is certainly a step in that direction.

NOTE: Unauthorized use of a Vehicle and Permitting Unauthorized Person to drive are both MUST APPEAR offenses.

Ernest Cate
City Attorney



When Can an Officer Write a Citation on Private Property?

Recently, we have had some inquiries from officers about when a person can be cited for various violations that occur on private property. This issue was last addressed in the July 1, 1999, and July 1, 2012, editions of C.A.L.L. The list of violations addressed in this article includes many that officers routinely encounter.

Question: Can an officer write a citation on private property for the following violations of law: (a) Reckless Driving; (b) Careless Driving; (c) No Seat Belt; (d) Improper Driving (Springdale city ordinance); (e) No Driver's License; (f) No Vehicle License; (g) Fictitious License; (h) No Insurance; (i) Suspended Driver's License; (j) DWI and DUI; and (k) violation of implied consent?

Answer: In taking each of the statutes individually, we find that some have restrictive language, such as: public thoroughfares, highway, public streets, within this State, and private property. Therefore, the definitions of certain terms must be determined prior to discussing the particular statutes.

Street or highway is defined in A.C.A. § 27-14-216 as the entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

Public highways is defined in A.C.A. § 27-51-101 as any highway, county road, state road, public street, avenue, alley, park, parkway, driveway, or any other public road or public place in any county, city, village, or incorporated towns.

In many of the statutes, there is no restrictive language used to limit where the law may be enforced. Therefore, they are to be treated like the criminal statutes. The criminal statutes rarely use limiting language such as "in public place" or "premises of another" to restrict where the law may be enforced. Therefore, the law is enforced anywhere within the State unless some type of limiting language is used. Set

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 3

forth below is an application of the above information to various violations.

A. Reckless Driving – A.C.A. § 27-50-308 contains no restrictive or limiting language. Therefore, this statute can be enforced anywhere within the State, including private property.

B. Careless and Prohibited Driving – A.C.A. § 27-51-104 does use the limiting language of "public thoroughfares or private property in the State of Arkansas." Thus, this statute can be enforced on private property.

C. No Seat Belt – A.C.A. § 27-37-702 contains the limiting language "on a street or highway in this State." Therefore, this statute cannot be enforced on private property.

D. Improper Driving (Springdale city ordinance) – Springdale City Code Chapter 114, Section 114-17, contains the limiting language "within the City of Springdale." Thus, this ordinance can be enforced on private or public property so long as the violation occurs within the City of Springdale.

E. No Driver's License – Three different statutes will be looked at in dealing with driver's licenses.

(1) A.C.A. § 27-20-106 (license for a motorcycle, motor-driven cycle, or similarly classified motor vehicle) – this provision on motorcycle licenses contains the limiting language "upon the public streets and highways of this State." Therefore, this statute cannot be enforced on private property.

(2) A.C.A. § 27-16-602 (regular operator's license) – this provision uses the limiting language "upon a highway," and therefore this statute cannot be enforced upon private property.

(3) A.C.A. § 27-23-107 (commercial driver's license) – this provision uses no limiting language and specifically states that "no person may drive a commercial motor vehicle unless the person holds a commercial driver license with the applicable endorsements valid for the vehicle being driven and is in immediate possession of their commercial driver license when driving a commercial motor vehicle." Thus, this statute can be enforced on private property.

F. No Vehicle License – A.C.A. § 27-14-304 uses the restrictive term "upon any highway," and this language prohibits the statute from being enforced on private property. However, the statute allows an officer to cite not only the operator of the vehicle, but the owner as well when the owner knowingly permits the vehicle to be operated in violation of the statute.

G. Improper Use of Evidences of Registration (Fictitious License) – A.C.A. § 27-14-306 states that no person shall "display upon a vehicle any registration certificate, registration plate, or permit not issued for the vehicle or not otherwise lawfully thereon under this chapter." Therefore, since no limiting language is used, this statute can be enforced on private property against those in violation of the statute.

H. No Insurance – A.C.A. § 27-22-103 uses the broad limiting language of "any person who operates a motor vehicle within

this state." Therefore, this statute can be enforced on private property.

I. Suspended Driver's License – The suspended driver's license violation can be classified into two categories, licenses suspended for DWI, and licenses suspended for everything else.

(1) DWI Suspension – A.C.A. § 5-65-105 prevents any person whose license has been suspended or revoked for DWI from operating a motor vehicle "in this state." Therefore, this statute can be enforced on private property.

(2) Non-DWI Suspension – A.C.A. § 27-16-303 prevents any person, resident or non-resident, from driving any motor vehicle "upon the highways of this state while the license or privilege is cancelled, suspended, or revoked." Therefore, this statute cannot be enforced on private property.

J. DWI, Commercial Motor Vehicle DWI, and Underage DUI – A.C.A. § 5-65-103, A.C.A. § 5-65-303, and A.C.A. § 27-23-114 do not contain any limiting language. Therefore, these violations can be enforced on private property.

K. Violation of Implied Consent – A.C.A. § 5-65-202 (dealing with DWI implied consent), A.C.A. § 27-23-115 (dealing with Commercial Motor Vehicle DWI implied consent), and A.C.A. § 5-65-309 (dealing with Under DUI implied consent) all contain the limiting language "in this state" or "within this state." Therefore, a person stopped on private property can be prosecuted if they refuse to take the test.

Remember, if you have a question concerning whether or not you have the

authority to enforce a statute on private property, then look up the statute and be mindful of any restrictive or limiting terms of language contained therein.

Taylor Samples
Deputy City Attorney



An Overview of the City's Noise Ordinance and Its Exceptions

Recently, we have had some questions about the noise ordinance for the City of Springdale. In particular, we have received questions about when the noise ordinance applies to churches.

From January 1, 2013, through January 17, 2013, dispatch received 57 calls from people who were complaining about noise. Of those 57 calls, 51 of the callers reported noise coming from inside or nearby a building, home, or apartment, and 6 of the callers reported noise coming from a vehicle. Loud music was the reported reason for 45 of the calls. From January 1, 2013, through January 21, 2013, there has been 1 citation issued for violating the city's noise ordinance. Below is a summary of the noise ordinance for the City of Springdale and its exceptions.

The noise ordinance is found in the Code of Ordinances for the City of Springdale at Chapter 42, Article III. Section 42-52 of the ordinance states that "Notwithstanding any other provisions of this chapter, and in addition thereto, it shall be unlawful for any person to make, or continue to cause or permit to be made or continued, any *noise disturbance*." The ordinance goes on to

define *noise disturbance* at Section 42-51 of the ordinance as follows:

(1) The creating of any unreasonably loud and disturbing sound of such character, intensity, or duration as to be detrimental to the life or health of an individual, or which annoys or disturbs a reasonable person of normal sensitivities.

(2) Owning, keeping, possessing, or harboring any animal or animals that continuously, repeatedly, or persistently, without provocation by the complainant, creates a sound which unreasonably disturbs or interferes with the peace, comfort or repose of persons of ordinary sensibilities.

Additionally, Section 42-54 of the ordinance, which is entitled "Limitations by Land Use Category," says that:

(a) No person shall operate or cause to be operated, or permit, contract or allow to be operated on premises on public or private property any identifiable source of sound in such a manner as to create a sound level within the use districts in table 1 below which exceeds the maximum noise levels as set forth in table 1, which shall be measured for violations at the property line from which the sound is emanating, as well as at the property line of the receiving property. When a sound source can be identified and measured in more than one use district, the sound level limits of the most restrictive use district shall apply at that district boundary. All complaints will be measured with

sound level measuring equipment by the responding officer to a complaint.

TABLE 1

Use Districts	Time	Maximum Noise Levels
All residential zones	7:00 a.m. to 11:00 p.m.	65 dB(A)
All residential zones	11:00 p.m. to 7:00 a.m.	60 dB(A)
All commercial zones	7:00 a.m. to 11:00 p.m.	75 dB(A)
All commercial zones	11:00 p.m. to 7:00 a.m.	70 dB(A)
All industrial zones	7:00 a.m. to 11:00 p.m.	85 dB(A)
All industrial zones	11:00 p.m. to 7:00 a.m.	80 dB(A)

Finally, Section 42-54 of the ordinance provides that construction sites are considered as an industrial zone for purposes of the noise ordinance, and nightclubs and restaurants are considered as commercial zoning for purposes of the noise ordinance.

Is it possible to issue a citation for a noise ordinance violation when a decibel reading is not obtained?

Yes, according to Section 42-52 of the ordinance, it is unlawful for a person to make, or continue to cause or permit to be made or continued, any noise disturbance. For example, if an officer is sent to the same residence three separate occasions on the same day between the hours of three a.m. and five a.m. in reference to three separate callers being awoken by loud music coming from the same apartment, then the occupant

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 6

of that apartment could very well be seen as creating an unreasonably loud and disturbing sound of such character, intensity, or duration as to annoy or disturb a reasonable person of normal sensitivities. This is not to suggest that every time you respond to a noise disturbance you should issue a citation. Should you be on a noise call and have uncertainty over whether you should issue a citation, then it is always a good idea to check with your supervisor.

Does the noise ordinance provide separate rules for vehicles?

Yes, per Section 42-55 of the noise ordinance, "It is unlawful to operate any sound amplification device from within a vehicle so that the sound is plainly audible at a distance of 30 feet or more from the vehicle, whether in a street, a highway, an alley, parking lot or driveway, whether public or private property, and such is declared to be a noise disturbance in violation of this chapter." Therefore, should a person be sitting in a vehicle located 30 feet away from you that is playing music that you can plainly hear, then that person has violated the noise ordinance. In addition, Section 42-55 of the ordinance relating to sounds from vehicles provides that "A compression release engine brake, or other hydraulically operated device that converts a power producing diesel or gas engine into a power absorbing retarding mechanism with a correspondingly increased amount of noise emission shall not be engaged or used within the city limits of Springdale, except in the case of failure of the service brake system, adverse weather conditions, or other emergency necessitating the compression release engine brake's use."

What are the exceptions to the noise ordinance?

The noise ordinance at Section 42-57 provides the following 9 exceptions to the noise ordinance which do not constitute a noise disturbance: (1) cries for emergency assistance and warning calls; (2) emergency response vehicles; (3) events sponsored by the Rodeo of the Ozarks held at Parsons Stadium; (4) Rodeo of the Ozarks parade; (5) activities conducted on or in municipal facilities which are approved, sponsored or sanctioned by the city, but this does not apply to lessees at Shiloh Square who use an amplification sound device; (6) activities conducted on or in school facilities which are approved, sponsored or sanctioned by the school; (7) fire alarms and burglar alarms; (8) religious worship activities conducted in a permanent structure in a P-1 zone (which under Code of Ordinances for the City of Springdale, Chapter 130, Article IV, Section 5.2, is a zone which is said to have the purpose of protecting and facilitating use of property owned by larger public institutions and church related organizations); and (9) fireworks displays authorized by the city.

Of the 57 noise calls made through January 17, 2013, 5 calls concerned a single church that is not located in a P-1 zone and is thus not covered by the exception enumerated in category (8) listed above. Remember that if you receive a noise call about a church that is making excessive noise, before simply dismissing the complaint as fitting into the religious worship activity exception, you should first check to see if the church is located in a P-1 zone. If the church is not located in a P-1 zone, then the religious

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 7

worship activity exception to the noise ordinance does not apply, and the church is subject to the rules enumerated in the noise ordinance.

Taylor Samples
Deputy City Attorney



No Child Safety Restraint: When is it the Correct Charge?

Occasionally, we receive questions from officers about whether the correct charge is no child safety restraint or no seat belt in situations where the officer stops a driver who is operating a vehicle containing young children. Below, I have set forth the statute that covers the no child safety restraint violation, which will hopefully provide clarification on this question.

A.C.A. § 27-34-104, which is contained in the Child Passenger Protection Act, states as follows:

(a) Every driver who transports a child *under fifteen (15) years of age* in a passenger automobile, van, or pickup truck, other than one (1) operated for hire, which is registered in this or any other state, shall provide while the motor vehicle is in motion and operated on a public road, street, or highway of this state for the protection of the child by properly placing, maintaining, and securing the child in a child passenger restraint system properly secured to the vehicle and meeting applicable federal motor vehicle safety standards in effect on January 1, 1995.

(b) A child who is less than six (6) years of age and who weighs less than sixty pounds (60 lbs.) shall be restrained in a child passenger safety seat properly secured to the vehicle.

(c) If a child is at least six (6) years of age or at least sixty pounds (60 lbs.) in weight, a safety belt properly secured to the vehicle shall be sufficient to meet the requirements of this section.

The statute clearly says that if the child is less than six (6) years-old, weighs less than sixty pounds (60 lbs.), and is not properly restrained in a child passenger safety seat, then the driver should be charged with no child safety restraint. Conversely, should a child be at least six (6) years-old or at least sixty pounds (60 lbs.), then the driver will comply with the statute by placing the child in a safety belt properly secured to the vehicle.

What is the correct charge when the child is at least six (6) years-old or at least sixty pounds (60 lbs.), yet the child is not wearing a safety belt properly secured to the vehicle? So long as the child is *under fifteen (15) years of age*, then the correct charge is no child safety restraint. For example, should an officer stop a vehicle on a public highway where a fourteen (14) year-old child is seated in the back seat and not wearing a seat belt, then the officer should cite the driver for no child safety restraint. In the same example, should the age of the child be changed so that the child is fifteen (15) years-old, then the correct decision would be to not issue any citation, unless the fifteen (15) year-old child were seated in the front seat, in which case the fifteen (15) year-old should be cited for no seat belt. This conclusion is supported by both the child

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 8

safety restraint law, which is set forth above, and the no seat belt law, which is found at A.C.A. § 27-37-702 and provides as follows:

(a) Each driver and front seat passenger in any motor vehicle operated on a street or highway in this state shall wear a properly adjusted and fastened seat belt properly secured to the vehicle. (b) This subchapter shall not apply to the following: (3) Children who require protection and are properly restrained under The Child Passenger Protection Act, § 27-34-101 et seq.

Taylor Samples
Deputy City Attorney



8th Circuit U.S. Court of Appeals Concludes That Reasonable Suspicion Justified Stop of Rental Vehicles Traveling in Tandem on Arkansas Interstate

Facts Taken From the Case: On March 30, 2010, Glen Allen was driving a green sport utility vehicle (SUV) on Interstate 30 near Arkadelphia, Arkansas, when Arkansas State Police Officer Adam Pinner, who was driving a marked police vehicle, observed Allen while traveling in the same direction as Allen's green SUV. Officer Pinner said that he immediately suspected, based on his experience, that the SUV was a rental vehicle because it was new, clean, had no window tinting, and had no dealer insignia on the rear of the vehicle. Officer Pinner

drove for one or two minutes beside the green SUV and paced it at a speed of seventy-five miles per hour in a seventy mile-per-hour zone.

While following the green SUV, Officer Pinner also saw a white minivan traveling about four car lengths in front of the green SUV at the same speed, and Officer Pinner suspected, based on the same indicators as with the green SUV, that the white minivan was a rental car as well. Both the green SUV and the white minivan displayed Texas license plates, and Officer Pinner said that he knew that Texas was a source state for narcotics entering into Arkansas. Officer Pinner also said that in his experience, a tandem driving formation of rental vehicles suggested a possible narcotics transporting arrangement. As Officer Pinner traveled alongside the white minivan, he observed that the rear seats were folded down and that the driver, who he later identified as Jennifer Lenda, appeared to be nervous. After observing the white minivan cross the fog line, Officer Pinner initiated a traffic stop. The green SUV passed the site of the traffic stop and continued travelling on the interstate.

After stopping the white minivan, Officer Pinner approached it on foot along the passenger side and noticed that the cargo area was packed with large bundles covered by a large blanket. When Officer Pinner reached the passenger-side window, he detected an overwhelming odor of marijuana despite a candle burning in the center console. Officer Pinner placed Jennifer Lenda under arrest and immediately radioed his fellow officers that he had discovered a large amount of marijuana and that the green SUV should be stopped because he

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 9

suspected it was travelling with the white minivan.

Officer Eric Henson, who was parked about five miles down the interstate from the area of Officer Pinner's traffic stop, observed a green Hyundai SUV matching Officer Pinner's description. Officer Henson said that he initiated a traffic stop on the green SUV for investigative reasons to see if the driver, Glen Allen, was travelling with the white minivan. The officers learned that the green SUV and the white minivan were rented on the same day from the same rental location in Champion, Texas, and Glen Allen was placed under arrest. Upon doing an inventory of the green SUV, officers discovered multiple cell phones and SIM cards. Glen Allen was charged with conspiracy to distribute and possession with intent to distribute marijuana.

At a suppression hearing in front of the United States District Court for the Western District of Arkansas, Glen Allen moved to suppress the evidence obtained from the search of both the white minivan and the green SUV, arguing that law enforcement had no probable cause for either traffic stop. The district court held that Allen had no standing to challenge the search of the white minivan because he failed to demonstrate any reasonable expectation of privacy in that vehicle. The district court also held that probable cause existed to justify the stop of the green SUV based on Officer Pinner's testimony that Allen was driving seventy-five miles per hour in a seventy mile-per-hour zone. Based on the district court's ruling, Allen entered a plea of guilty, conditioned on his right to appeal the denial of his motion to suppress evidence.

Argument, Applicable Law, and Decision by the Eighth U.S. Circuit Court of Appeals: On appeal to the Eighth U.S. Circuit Court of Appeals (hereinafter referred to as the Court), Allen conceded that he lacked standing to challenge the search of the white minivan driven by Lenda. Therefore, the Court reviewed the denial of his motion to suppress only with respect to the stop of the green SUV that Allen was driving.

Allen argued that it was clear error to credit Officer Pinner's testimony that Allen was exceeding the speed limit since Officer Pinner did not stop Allen at the time he claimed to observe Allen to be speeding, did not make any reference to speeding during the incident or to other officers, and did not include any reference to speeding in his police report. The Court held that even if a speeding violation failed to provide probable cause for the traffic stop of Allen's green SUV, the stop of the green SUV was justified based on a reasonable suspicion that Allen was involved in trafficking marijuana.

In explaining its decision, the Court first set forth the rule governing an investigatory or Terry stop. "An investigatory or Terry stop without a warrant is valid only if police officers have a reasonable and articulable suspicion that criminal activity may be afoot." *U.S. v. Navarrete-Barron*, 192 F.3d 786, 790 (8th Cir. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 25-31, 88 S.Ct. 1868). "When justifying a particular stop, police officers must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Quoting

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 10

Terry, 392 U.S. at 21. "In deciding whether to conduct a Terry stop, an officer may rely on information provided by other officers as well as any information known to the team of officers conducting the investigation." *Id.* The Court reasoned that in the present case, it was not unreasonable to initiate a brief stop of the green SUV to investigate its possible association with the white minivan. The Court said that in *United States v. Ortiz-Monroy*, 332 F.3d 525 (8th Cir. 2003), a case where an officer observed two vehicles travelling in tandem, initiated a traffic stop of one of them, and observed a drug dog alert to the stopped vehicle, the Court concluded that law enforcement had a reasonable and articulable suspicion to stop the second vehicle because both vehicles had California tags, a drug dog had alerted on the first vehicle, and the officer knew based on his experience and training that drug transporters often travelled in tandem. The Court said that likewise, in the instant case, Officer Pinner observed two apparent rental vehicles with license plates from the same state travelling in tandem, and he then discovered a large amount of marijuana in one of the vehicles. The Court concluded that the information possessed by the officers constituted specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the stop of the green SUV driven by Allen. Therefore, the Court affirmed the denial of Allen's motion to suppress.

Case: This case was decided by the United States Court of Appeals, Eighth Circuit, on February 4, 2013, and was an appeal from the United States District Court for the Western District of Arkansas. The name of

the case is *U.S. v. Allen*, and currently a citation is unavailable.

Taylor Samples
Deputy City Attorney



Arkansas Legislature Increases Fine Amount Owed on No Seat Belt and Failure to Present Proof of Insurance at the Time of the Traffic Stop Violations

On March 6, 2013, Governor Beebe signed Senate Bill 307 into law as Act 282 of 2013. This Act made several changes regarding the assessment and payment of court costs, fines, and restitution. Additionally, the act contained an emergency clause and therefore went into effect immediately. Police officers should be aware of the following changes relating to costs and fines to be assessed for the offenses of no seat belt (found at A.C.A. § 27-37-702) and failure to present proof of insurance at the time of traffic stop (found at A.C.A. § 27-22-111):

No Seat Belt. The "no seat belt" statute states that a no seat belt ticket is punishable by a fine of \$25.00. In addition, for those counties or cities which have passed a jail fee under A.C.A. § 16-17-129, that additional jail fee is also added to the amount of the penalty. Specifically, both the City of Springdale and Washington County have passed ordinances which levy an additional \$20.00 jail fee for each violation. Therefore, prior to the passage of

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 11

Act 282 of 2013, a no seat belt violation in Springdale was punishable by a \$65.00 fine. Act 282 of 2013 now requires that \$25.00 court costs be assessed on a no seat belt violation in addition to the \$25.00 fine and \$40 jail fees. Thus, the new penalty for a no seat belt violation in Springdale will be \$90.00.

Failure to Present Proof of Insurance at the Time of the Traffic Stop. The offense of failure to present proof of insurance at the time of the traffic stop occurs when the operator of a vehicle is unable to show proof of insurance at the time of the traffic stop as requested by law enforcement, but is later able to show that insurance was actually in effect at the time of the stop. The "fail to present proof" statute states that it is punishable by a fine of \$25.00. In addition, for those counties or cities which have passed a jail fee under A.C.A. § 16-17-129, that additional jail fee is also added to the amount of the penalty. Specifically, both the City of Springdale and Washington County have passed ordinances which levy an additional \$20.00 jail fee for each violation. Therefore, prior to the passage of Act 282 of 2013, "fail to present proof" of insurance in Springdale was punishable by a \$65.00 fine. Act 282 of 2013 now requires that \$25.00 court costs be assessed on this violation in addition to the \$25.00 fine and \$40 jail fees. Thus, the new penalty for "fail to present proof of insurance" in Springdale will be \$90.00.

Taylor Samples
Deputy City Attorney



Arkansas Court of Appeals Affirms Constructive Possession Conviction Where Defendant Was Found Near Marijuana in a Co-Occupied Residence

Facts Taken From the Case: In August of 2011, while executing a search warrant at a home located at 10900 Birchwood Drive in Little Rock, AR, police officers discovered Terrance Dugger and Larry Hatchett located in the residence along with a number of bags of marijuana, baggies, and a scale. Little Rock Police Detective John Wesley Lott later testified that upon entering the residence, he saw several large bags of marijuana in the corner of the dining room and kitchen area, and Dugger was on the floor facing the bags. Little Rock Police Detective Charles Weaver testified that the residence had a big open floor plan, that he saw Dugger on the floor next to the kitchen table, and that a number of bags of marijuana were located three or four feet from the kitchen table in plain view. Police also found letters addressed to Dugger in the northwest bedroom of the house. Another letter with Dugger's name and the Birchwood address on the return label was found elsewhere in the house. Detective Lott testified that Dugger gave him the Birchwood address as Dugger's address.

After a jury trial, Dugger was convicted of possessing at least four ounces but less than ten pounds of marijuana, a Class D felony. He was sentenced to seventy-two months in the Arkansas Department of Correction and assessed a fine of \$10,000.00. Dugger appealed his case to the Arkansas Court of Appeals, claiming that there was insufficient evidence to support his conviction.

Argument, Applicable Law, and Decision by the Arkansas Court of Appeals: On Appeal to the Arkansas Court of Appeals (Court), Duggar argued that the State failed to sufficiently prove that he constructively possessed the marijuana. In particular, Duggar claimed that the State failed to connect him to the marijuana because the letters addressed to Duggar did not establish the necessary legal link; the other evidence the police gathered was insufficient and unreliable because there were no fingerprints or photographs taken; the police did not investigate who leased the residence; the utility bills were in someone else's name; and a defense witness named James Tim testified that the marijuana belonged to him, not to Duggar.

The Court said that in order to prove constructive possession, the State must establish that Duggar exercised care, control, and management over the marijuana. Additionally, the Court said that constructive possession may be established by circumstantial evidence.

The Court affirmed Duggar's conviction and held that substantial evidence supported the jury's verdict because the jury could have reasonably inferred that Duggar constructively possessed the marijuana. In its reasoning, the Court said that the facts of Duggar's case were similar to a case it recently decided called *Allen v. State*, 2010 Ark. App. 266. In *Allen*, the Court held that the jury could reasonably infer constructive possession of a controlled substance when the substance was found in the kitchen, the defendant gave the police the address of the scene as his resident address, and the defendant received mail at the address. Furthermore, the Court said that the jury in Duggar's case was not required to speculate

to find that Duggar constructively possessed contraband, and Larry Hatcher's presence in the house when it was raided by police did not require reversal of Duggar's conviction. The Court noted that something more than Duggar's presence in the house was required to establish constructive possession, and the "something more" could be Duggar's proximity to the marijuana, law enforcement's ability to see the contraband in plain view, and whether Duggar owned the residence where the marijuana was found. In conclusion, the Court said that it was clear the jury had sufficient evidence to find that Duggar constructively possessed contraband since the marijuana was found in a common area of the house, the marijuana was observed being near Duggar, Duggar told Detective Lott that he lived at the Birchwood residence, and police found Duggar's mail inside the house.

Case: This case was decided by the Arkansas Court of Appeals on February 27, 2013, and was an appeal from the Pulaski County Circuit Court, Honorable Herbert Wright, Judge. The case citation is *Duggar v. State*, 2013 Ark. App. 135.

Taylor Samples
Deputy City Attorney



Cracked Windshield Valid Reason for Traffic Stop

Facts: Officer Jacob Whorton, while on duty on October 4, 2011, noticed a vehicle, driven by Alfonso Villanueva, with a front windshield crack that went all the way across the windshield. Officer Whorton stopped Villanueva for operating an unsafe

vehicle. Officer Whorton testified that he believed driving with a cracked windshield violated *Arkansas Code Annotated section 27-32-101*. Officer Whorton testified that he thought the cracked windshield was unsafe because it compromised the structural integrity of the vehicle and partially obscured the driver's view. Villanueva was unable to produce a driver's license, but he did produce a Mexican identification card. Dispatch confirmed there was no driver's license listed in Villanueva's name. Officer Whorton cited Villanueva for driving without a license and had the vehicle towed according to department policy. He did not cite Villanueva for the cracked windshield.

After a hearing, the trial court found that there was "absolutely no evidence" that Villanueva's stop was pretextual and that there was no evidence that the stop was the result of "profiling" based on race or national origin. After the trial court announced its' ruling from the bench, Villanueva entered his conditional plea of guilty and received two days home confinement and required to pay \$60 fine and court costs. Villanueva appealed. The Supreme Court of Arkansas assumed jurisdiction from the Court of Appeals because the case involved issues of first impression, clarification of the law, and construction of *Acts of the General Assembly, Ark. Sup.Ct.R. 1-2(b)(1), (5), & (6) (2012)*.

Argument: When the Supreme Court reviews a circuit court's denial of a motion to suppress evidence, it conducts an independent inquiry based on the totality of the circumstances, evaluating findings of historical facts for clear error and determining whether those facts give rise to

reasonable suspicion or probable cause. *Hinojosa v. State*, 2009 Ark. 301, 319 S.W.3d 258. The Court gives due weight to inferences drawn by the circuit court, and will reverse the circuit court only if the ruling is clearly against the preponderance of the evidence. *Id.* The Court also defers to the trial court's superior position to judge the credibility of witnesses. *Id.*

In Villanueva's suppression motion, he asserted that law enforcement lacked probable cause to stop his vehicle. He also challenged *Arkansas Code Annotated section 27-32-101* (Repl. 2008) as being unconstitutional but abandoned the constitutional issue prior to the circuit court considering the issue.

Villanueva first argued that the stop was unlawful because no Arkansas law makes it illegal to operate a vehicle with a cracked windshield. He urged the court to hold that a traffic stop based solely on a cracked windshield is, as a matter of law, an illegal stop. Villanueva contended that windshields are not mentioned in *section 27-32-101* and suggested that the statute only related to mechanical defects. He sought to bolster this argument by examining other statutes that mention windshields, *Arkansas Code Annotated section 27-37-301* (Repl. 2008), which requires that Arkansas motor vehicles be equipped with safety glass, and *Arkansas Code Annotated section 27-37-302* (Repl. 2008), which proscribes driving a vehicle with nontransparent material on the glass that obstructs the operator's view, asserting that these statutes are similarly not helpful to the State. Further, he urged the Court to find persuasive an Alabama case, *J.D.I. v. State*, 77 So. 3d 610 (Ala. Crim. App. 2011), where the Alabama Court of Criminal Appeals declared that a traffic stop of a

juvenile who was operating a motor vehicle with a cracked windshield was improper because it involved a mistaken interpretation of Alabama law. The Court found this argument unpersuasive.

Villanueva's assertion that, as a matter of law, a traffic stop initiated solely because of a cracked windshield should be declared illegal was not raised to the trial court. The Court will not consider arguments for the first time on appeal that were not advanced below as part of the motion to suppress. *Decay v. State*, 2009 Ark. 566, 352 S.W.3d 319. Villanueva has preserved his argument that driving with a cracked windshield did not violate *section 27-32-101* because a cracked windshield was not a "mechanical defect," which the Court agreed with, as far as it goes. Villanueva, however, failed to note that *section 27-32-101(a)(1)* also requires a vehicle's "equipment" to be "in good working order." A windshield, while not "mechanical," is nonetheless "equipment." As the Court noted in *Ragland v. Dumas*, 292 Ark. 515, 520, 732 S.W.2d 119, 120 (1987), equipment is "an exceedingly elastic term, the meaning of which depends on context." Although hitherto not addressed in Arkansas, other jurisdictions routinely refer to operating a vehicle with a cracked windshield as an "equipment violations" in the context of traffic stops predicated on perceived violation of the state's general motor vehicle safety statute. *See Vaughan v. State*, 279 Ga. App. 485, 631 S.E.2d 497 (Ga. Ct. App. 2006); *State v. Jones*, 711 N.W.2d 732 (Iowa Ct. App. 2006); *State v. Kinser*, 141 Idaho 557, 112 P.3d 845 (Idaho Ct. App. 2005); *State v. Miller*, 659 N.W.2d 275 (Minn. Ct. App. 2003); *State v. Kadelak*, 280 N.J. Super. 349, 655 A.2d 461 (N.J. Super. Ct. App. Div. 1995).

Moreover, *section 27-32-101(a)(2)(A)*, which states: "Any law enforcement officer having reason to believe that a vehicle may have safety defects shall have cause to stop the vehicle and inspect for safety defects," indicates that *section 27-32-101* concerns more than just "mechanical" deficiencies. The Court held that under the facts of this case, a windshield with a crack running from roof post to roof post across the driver's field of vision is the type of "safety defect" contemplated by *section 27-32-101(a)(2)(A)*.

At the suppression hearing, Officer Whorton opined, without objection, that a windshield crack of the magnitude he observed in Villanueva's vehicle made the car unsafe because it compromised the structural integrity of the vehicle and impaired the vision of the driver. According to Officer Whorton, that was the reason why he made the traffic stop. In reviewing a trial court's determination that there was probable cause to make a traffic stop, the Court's inquiry is whether there are "facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected." *Hinojosa*, 2009 Ark. 301, at 5, 319 S.W.3d 262. The Court could not say that the trial court clearly erred in crediting Officer Whorton's testimony and finding that the traffic stop was proper.

Villanueva next argued that the traffic stop was based entirely on "profiling" and was thus illegal under Arkansas statutory and constitutional law. He contended that "common sense" dictates that the "real" reason for the traffic stop was that Villanueva was Hispanic. He asserted that "no reasonable person could possibly conclude Officer Whorton sincerely

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 15

believed [his] windshield was unsafe." He directed the Court's attention to the picture of the windshield. The Court found this argument unpersuasive.

Villanueva does not refer the Court to any testimony by Officer Whorton or anyone else suggesting that the stop was based on profiling. Villanueva had placed nothing in the record, except for his surname, that would indicate that he is Hispanic, and he had given no reason to think that his surname would have been known to Officer Whorton prior to the stop. Thus, his argument was flawed.

Further, as noted previously, the trial court credited Officer Whorton's testimony. While the Court's review is de novo, it defers to the superior position of the trial judge in determining a witness's credibility. *Hinojosa, supra*. The picture of the windshield, which showed that the crack ran completely across the vehicle from roof post to roof post, does appear to be in a position that would obstruct the driver's vision and impair the structural integrity of the vehicle. The Court had no reason to question Officer Whorton's credibility and the traffic stop was upheld.

Case citation: This case was decided by the Supreme Court of Arkansas on February 21, 2013. The case was from the Washington County Circuit Court, Judge William A. Storey and the case originated in Springdale District Court with Deputy City Attorney, Brooke Lockhart and Defense attorney, Ken Swindle. The case citation is *Alfonso Villanueva v. State of Arkansas*, 2013 Ark. 70.

Brooke Lockhart
Deputy City Attorney

Eighth Circuit Finds *Leon Good Faith* Exception for Search Warrant in Springdale Case

Facts: On July 14, 2010, Captain Fire Investigator Inspector David Creek, a deputy fire marshal, conducted a routine fire safety inspection at EZ Credit Auto Sales ("EZ Credit"), a car dealership located in Springdale, Arkansas. During the course of his inspection, Captain Creek came upon a locked door. He asked Juan Carlos Figueroa, an EZ Credit manager who had accompanied him during the inspection, what was behind the door. Figueroa replied that it led to "Billy's rooms," referring to William Cannon, a car detailer and night watchman for EZ Credit. Figueroa added that the only key belonged to Cannon. That day, Cannon was off-site working at a different EZ Credit location.

Captain Creek told Figueroa that he needed to see the rooms to complete the inspection, so Figueroa called Cannon and told him to bring his key. When Cannon arrived, he first requested time alone in the rooms, during which Captain Creek heard a large amount of rustling. When Cannon finally opened the door at Captain Creek's request, from the doorway Captain Creek observed that the walls were covered from floor to ceiling with what appeared to be hundreds of pictures of a particular young male's face. He then entered the main room and looked into an adjoining bathroom, which had a collection of bound, blindfolded, and mutilated naked dolls hanging from the ceiling. Captain Creek also saw a third adjoining room. Above the doorway to that room, a sign was posted that read "Boy's Club." Continuing his inspection, Captain Creek entered this third room, here he found a child's bed, many more mutilated dolls, a

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 16

tripod for a camera, a big-screen TV, and several children's toys. Captain Creek noted that there were several pictures of nude children on the walls and that the walls appeared as if some things had been torn down immediately before the inspection. Captain Creek then called the police and told the dispatcher that he believed he had discovered a child pornography operation. While he waited for police to arrive, he saw Cannon remove several items from the rooms. Captain Creek later provided a written statement summarizing what he had observed.

Officer Eric Holland, a uniformed patrolman for the Springdale Police Department, was the first officer on the scene. Although Officer Holland entered the rooms with Cannon's consent and formed the impression that the rooms were Cannon's residence, he did not discuss his observations or his impression with the detectives who ultimately prepared the search warrant application, and he was not involved with the subsequent investigation.

Soon after Officer Holland arrived, Detectives Al Barrios and Darrell Hignite, of the Springdale Police Department Criminal Investigative Division, arrived at EZ Credit. Detective Barrios first made contact with Captain Creek, who explained that he had seen some disturbing posters, signs, and images, including images of nude young boys under the age of thirteen. Captain Creek also told Detective Barrios that he suspected Cannon had removed several pictures from the walls between Captain Creek's initial entry and Detective Barrios's arrival. When Detectives Barrios and Hignite first approached the rooms, the door had been left open. From the hallway they were able to see what they

characterized as one to two hundred photographs of a particular boy's face covering the walls and a large number of mutilated baby dolls hanging from the bathroom ceiling. Detective Barrios then entered the rooms to confirm the rest of Captain Creek's observations. There he found several handmade signs reading "kill little boys," "I eat boys," "boys only," "I [heart] boys," "boys rule," and "boy killer." There were many pictures of boys' faces, boys in various stages of undress, and boys sleeping. There was also one poster of a prepubescent boy showing full-frontal nudity.

After discovering the child's bed in the third room and deciding that he would need a warrant to search further, Detective Barrios took several photographs of the rooms and instructed other officers to secure the premises while he left to obtain a search warrant.

Detectives Barrios and Hignite then left EZ Credit and went to the police station with Cannon, who had consented to an interview, to prepare the warrant application. During the interview, Cannon told Detective Barrios that he was an artist and that he believed others thought his art was offensive. He claimed that the image showing full-frontal nudity came from a magazine, but he later stated that it came from a book. Cannon also told Detective Barrios that he had no home and that he stayed at EZ Credit three nights a week while serving as a night security guard for the business.

Based on the information they had obtained, Detectives Barrios and Hignite prepared a search warrant application, which also included Captain Creek's handwritten statement, and presented it to a state court

judge. The detectives' affidavit stated that before Captain

Creek initially entered the rooms to conduct the fire inspection, Cannon told Captain Creek that he lived there. It also stated that the rooms "appeared to have someone living in [them]." It described the premises to be searched as "[t]he business . . . located at 2679 N. Thompson in Springdale, Washington County, Arkansas. The residence is a business structure consisting of one (1) unit . . . owned by E/Z Credit Auto Sales Inc." The affidavit did not mention that Cannon claimed the poster of the fully nude child was art or that it was allegedly taken from a book. The state court judge issued a search warrant allowing the detectives to search EZ Credit as well as a car allegedly owned by Cannon.

The officers then returned to EZ Credit and executed the warrant. They seized approximately fifteen pictures of nude children, two laptops, approximately twelve video cassettes, and several handwritten journals, among other things. One of the laptops contained thousands of images depicting sexually explicit conduct involving children and its internet browsing history revealed that Cannon had made multiple visits to child pornography websites. Police also found a video that Cannon had created, which depicted a minor female engaging in sexually explicit conduct.

Cannon moved to suppress the items seized pursuant to the search warrant, as well as statements he made while the warrant was executed. He argued that the search warrant lacked probable cause because it was based on information gathered by Detectives Barrios and Hignite in violation of Cannon's *Fourth Amendment* rights. A magistrate

judge determined that Detectives Barrios and Hignite violated Cannon's *Fourth Amendment* rights during the initial warrantless entry because Cannon had a reasonable expectation of privacy in the rooms. However, the magistrate judge further concluded that the exclusionary rule did not apply to the fruits of the warrant-based search due to both the independent source doctrine, *see Murray v. United States*, 487 U.S. 533 (1988), and the *Leon* good faith exception, *see United States v. Leon*, 468 U.S. 897, 920-21 (1984). The district court adopted the magistrate judge's report and recommendations over Cannon's objection.

Cannon subsequently entered a conditional plea of guilty to two counts of sexual exploitation of a minor, *18 U.S.C. §§ 2251(a)* and *(e)*, as well as two counts of receipt of child pornography, *18 U.S.C. §§ 2252(a)(2)* and *(b)(1)*. The district court sentenced Cannon to 840 months' imprisonment. At sentencing, the district court imposed a four-level enhancement based on its finding that one of the videos seized from Cannon "involved material that portrays sadistic or masochistic conduct or other depictions of violence." *See U.S.S.G. § 2G2.1(b)(4)*. This second issue will not be discussed in this article.

Argument: "The *Fourth Amendment* protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Davis v. United States*, 564 U.S. __ (2011) (quoting *U.S. Const. Amend. IV*). Ordinarily, "[e]vidence obtained in violation of the *Fourth Amendment* is subject to the exclusionary rule and, therefore, 'cannot be used in a criminal proceeding against the victim of the illegal search and seizure.'"

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 18

United States v. Riesselman, 646 F.3d 1072, 1078 (8th Cir. 2011) (quoting *United States v. Calandra*, 414 U.S. 338 (1974)).

One exception to the exclusionary rule occurs "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope," even if the warrant is subsequently invalidated. *Leon*, 468 U.S. at 920-21. "In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 926. The courts have recognized four circumstances that preclude a finding of good faith: (1) when the affidavit or testimony supporting the warrant contained a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge; (2) when the issuing judge wholly abandoned his judicial role in issuing the warrant; (3) when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence *entirely unreasonable*; and (4) when the warrant is so facially deficient that no police officer could reasonably presume the warrant to be valid. *United States v. Fiorito*, 640 F.3d 338, 345 (8th Cir. 2011) (quoting *Perry*, 531 F.3d at 665 (8th Cir. 2008)).

Although Cannon does not challenge Captain Creek's inspection of the rooms, he does claim that the *Leon* good-faith exception to the exclusionary rule should not apply in this case because Detectives Barrios and Hignite violated his *Fourth Amendment* rights when they initially entered his living

quarters without a warrant, consent, or exigency. He also argues that the detectives' warrant application was misleading because they failed to tell the judge that the poster of the nude boy allegedly came from an art book. The Court assumes, for purposes of the appeal, that the detectives violated Cannon's *Fourth Amendment* rights during the initial entry, but conclude that the *Leon* exception applies.

The Courts have applied *Leon* where, as here, the search warrant application cites information gathered in violation of the *Fourth Amendment*. See, e.g., *United States v. Kiser*, 948 F.2d 418, 421 (8th Cir. 1991); *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989) ("[E]vidence seized pursuant to a warrant, even if in fact obtained in violation of the *Fourth Amendment*, is not subject to the exclusionary rule if an objectively reasonable officer could have believed the seizure valid."). For the *Leon* exception to apply when the warrant is based on evidence obtained through a *Fourth Amendment* violation, the detectives' prewarrant conduct must have been "close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable." *United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997) (quoting *White*, 890 F.2d at 1419). If "the officers' prewarrant conduct is 'clearly illegal,' the good-faith exception does not apply." *Id.* (quoting *United States v. O'Neal*, 17 F.3d 239, 242-43 n.6 (8th Cir. 1994)).

Cannon argues that *Leon* does not apply because the detectives did not have consent for their initial entry and because there were no exigent circumstances to justify the warrantless entry. The good-faith exception applies in this case, however, because it was

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 19

objectively reasonable when they first entered the rooms for Detectives Barrios and Hignite to believe that they simply were entering rooms that were part of a car dealership business, EZ Credit. The detectives had responded to a call about a potential child pornography operation at a car dealership, not a residence. When detectives arrived at EZ Credit, it was open for business, there were cars for sale on the lot, and there were both employees and customers present. EZ Credit is also located in an area zoned for business use, where residential use is prohibited.

Also, given Cannon's responsibilities as both a car detailer and night watchman, there are numerous explanations for the fact that he alone had a key unrelated to any potential privacy interest. The rooms could have been a storage space for toxic chemicals used to clean cars, or they could have housed expensive security equipment. In either case, it would be logical for Cannon to have the only key, but in neither case would it obviously follow that Cannon had a legitimate expectation of privacy in the rooms. After seeing the child's bed in the third room, Detective Barrios did determine that Cannon may have been living in the rooms, and therefore, might have a reasonable expectation of privacy in them. But at that point, Detective Barrios discontinued the search, exited the rooms, and obtained a search warrant.

In light of these facts, the district court made the following findings with respect to what was known by Detectives Barrios and Hignite: (1) although Officer Holland, the first to arrive on the scene, was aware that Cannon lived in "Billy's rooms," he did not discuss this fact with Detectives Barrios and Hignite prior to their entry; (2) Captain

Creek told the detectives that Cannon lived in the rooms, but only after they already had entered the rooms and made their observations; and (3) the detectives did not observe the bed on the floor in the back room until well after their entry. After reviewing the record, the Court determined that these findings are not clearly erroneous. Based on these factual findings, the United States Court of Appeals for the Eighth Circuit agreed with the district court that the detectives reasonably could have believed that they were entering another part of the car dealership, not a private residence, with EZ Credit's consent. As a result, the detectives' pre-warrant conduct was "close enough to the line of validity" to make their belief in the validity of the subsequent warrant "objectively reasonable." *Conner*, 127 F.3d at 667.

The detectives fully disclosed the nature of the rooms to the state court judge in the warrant application. They noted that in the course of their initial inspection of the rooms, they discovered that someone appeared to be living there. The detectives also disclosed that after their initial entry they discovered that Cannon had told Captain Creek that he lived in the rooms. Once the state court judge considered these facts and issued the warrant, it was reasonable for the detectives to believe the warrant was valid.

Cannon also argues that *Leon* does not apply because the detectives intentionally misled the issuing judge by omitting from the affidavit that the only observed picture depicting a fully nude child was obtained from an art book. *See United States v. Moya*, 690 F.3d 944, 948 (8th Cir. 2012) ("In assessing whether the officer relied in good faith on the validity of a warrant, we

April 1, 2013

C.A.L.L.
City Attorney Law Letter

Page 20

consider the totality of the circumstances, including any information known to the officer but not included in the affidavit" (quoting *United States v. Grant*, 490 F.3d 627, 632 (8th Cir. 2007)). However, the detectives submitted many other incriminating facts in the affidavit. In addition to the nude poster, they observed disturbing signs, mutilated baby dolls, numerous pictures of young boys in various stages of undress, and a camera tripod. At the suppression hearing, Detective Barrios testified at length about how the totality of his observations led him to believe that Cannon possessed child pornography—he did not rely on the nude poster to serve as the sole basis for establishing probable cause. Moreover, there is no evidence that the detectives knew the poster came from an art book aside from the claims Cannon made in his interview. Even if the detectives should have known this, as Cannon contends they should, its omission did not make the affidavit misleading given the overall content of the rooms.

The detectives also had reason to believe that Cannon had removed similar posters from the wall immediately before they entered. Captain Creek reported that he heard a large amount of rustling before Cannon let him into the rooms, that the walls appeared as though several posters had been hastily removed prior to his inspection, and that he saw Cannon remove items from the rooms prior to the detectives' arrival. Given this context, it would make no difference whether this particular poster could have been considered non-pornographic art for the purpose of establishing probable cause. To obtain a warrant, the detectives were not required to

show that they had actually found child pornography. Rather, they needed to establish only the "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In light of these circumstances, the Court found that no "reasonably well trained officer would have known that the search was illegal despite the [issuing judge's] authorization," *Moya*, 690 F.3d at 948 (alteration in original) (quoting *Grant*, 490 F.3d at 632), even if the detectives had known that the poster came from an art book and omitted this fact from the warrant application.

Therefore, assuming that the warrant was based on evidence collected in violation of Cannon's *Fourth Amendment* rights, the *Leon* good-faith exception bars application of the exclusionary rule to evidence seized pursuant to the warrant. The Eighth Circuit affirmed the denial of Cannon's motion to suppress and the evidence should be allowed to be used against him.

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on January 8, 2013. The case was from the United States District Court for the Western District of Arkansas-Fayetteville. The case citation is *United States of America v. William Cannon*, 703 F.3d 407 (2013).

Brooke Lockhart
Deputy City Attorney

