



C.A.L.L.

Issue 16-01
City Attorney Law Letter



Orders of Protection, No Contact Orders, and Restraining Orders: A Refresher



There seems to still be some confusion that exists as to how to deal with No Contact Orders, Restraining Orders, and Orders of Protection. Given these circumstances, it is important to know the difference between these types of orders, who issues them, where they may be enforced, and what action can (or cannot) be taken upon the violation of one of these orders.

Before describing the differences in these types of orders, it is first necessary to know exactly which type of order is being dealt with. To the average citizen, the terms “restraining order”, “no contact order”, or “protection order” can be used interchangeably. If a citizen contacts you regarding a violation of one of these orders, you must first determine which type of order, if any, is actually in effect. The action you take will certainly depend on which type of order is in effect. If possible, have the citizen show you a copy of the order. You can then tell which type of order is in effect. If they do not have a copy of the order, then you can either check in-house to see if it is a No Contact Order, or you can run an ACIC to see if it is an Order of Protection. NEVER, NEVER, NEVER take someone’s “word for it” that a No Contact Order or Order of Protection actually exists. ALWAYS verify the existence of these orders before making an arrest.

Once the determination has been made as to which type of order is being dealt with, you can then apply the following rules and guidelines.



Orders of Protection

Orders of Protection or “protection orders” are issued by a Circuit Judge. These types of orders are issued in situations involving intimate or family relations, and the person seeking the Order of Protection has petitioned the Circuit Court stating they are afraid of physical harm from someone they

Table of Contents

	Page No.
<i>Orders of Protection, No Contact Orders, and Restraining Orders: A Refresher</i>	1
<i>Can an Officer Enter a Residence to Arrest a Suspect—One of the Most Complicated Legal Issues Officers Will Face—REVISTED</i>	3
<i>Arkansas Court of Appeals Affirms DWI Conviction Under Police Officer Community Caretaking Function</i>	17
<i>The Check Engine Light Is On — U.S. v. Ball</i>	19
<i>An Open Door— U.S. v. Vinson</i>	21
<i>Arkansas Court of Appeals Holds Defendant Lacked Standing to Assert Expectation of Privacy in Building Located on Open Fields</i>	24
<i>Arkansas Court of Appeals Holds that Motion to Suppress Properly Denied Since 3.1 Seizure was Valid and No Miranda Violation Occurred</i>	25



used to be intimate with, or are related to. Orders of Protection are NOT issued by the City Attorney's Office, and they are NOT issued by the Springdale District Court. If someone is interested in obtaining an Order of Protection, the City Attorney's Office can provide them with the information they need, or you can refer them to the Washington County Prosecutor's Office for assistance.

The violation of an Order of Protection is a criminal offense (Ark. Code Ann. §5-53-134). As such, it will be prosecuted where the violation takes place, regardless of which court issued the Order of Protection. For example, John Smith is determined to have violated an Order of Protection in Springdale, but the Order was issued by the Madison County Circuit Court. The charge would therefore be prosecuted in Springdale District Court (if it is a misdemeanor) or Washington County Circuit Court (if it is a felony), since violation of Order of Protection is a criminal charge. A first offense is a Class A Misdemeanor, and a second or subsequent offense is a Class D Felony. The bottom line: jurisdiction of an offense of violation of Order of Protection is where the offense takes place, as opposed to a violation of a No Contact Order.

The Rule 9.3 No Contact Order, commonly referred to as a "no contact order" or a "9.3 order", originates when a defendant is arrested for a domestic offense or pleads guilty at arraignment. The Judge, as a condition of the defendant's pretrial release, orders the defendant to have no contact with certain individuals prior to trial. These are NOT issued by the City Attorney's Office. Also, these are NOT issued until a person has been charged with a crime.

A violation of a Rule 9.3 No Contact Order is treated as a Contempt of Court issue. As such, the charge will go through Springdale District Court ONLY if the No Contact Order was issued by Springdale District Court. If the No Contact Order was issued by another Court, the case will be prosecuted in that Court, not in Springdale District Court. For example, you arrest John Smith for violating a No Contact

Order. The No Contact Order was issued by Fayetteville District Court. The prosecution of the offense of violating the Rule 9.3 No Contact Order would take place in Fayetteville District Court, and not in Springdale. The reason for this is because violating a No Contact Order is technically contempt of court. Thus, jurisdiction will not always be where the violation occurred. Instead, jurisdiction will be in the court that actually issued the Rule 9.3 No Contact Order.

Furthermore, Rule 9.5(b) of the Arkansas Rules of Criminal Procedure provide that "a law enforcement officer having reasonable grounds to believe that a released defendant has violated the...terms of an order under Rule 9.3 is authorized to arrest the defendant...when it would be impracticable to secure a warrant". Attorney General's Opinion #95-357 further provides that an officer having reasonable grounds to believe that a violation of a Rule 9.3 No Contact Order has taken place may make an arrest without a warrant. However, this should only be done if the violation has taken place within the last several hours and if the defendant can be located outside his home. Otherwise, take a report and refer them to the City Attorney's Office for follow up. Obviously, if the violation of a No Contact Order should occur in your presence, you may make an arrest.

One other note on No Contact Orders. Remember, the No Contact Order means that the Defendant has been ordered to have no contact with specific individuals. It does NOT mean that these specific individuals have been ordered to have no contact with the defendant. Thus, you may NOT arrest these specific individuals for a violation of a No Contact Order. The only person who may be arrested and charged with contempt of court for violating a No Contact Order is the defendant who has been ordered by the Court to have no contact with specific individuals.

Again, always verify the existence of a No Contact Order before making an arrest, and NEVER take someone's "word for it" that a No Contact Order actually exists.



Restraining Orders

Restraining Orders are issued by Circuit Judges, usually in the context of a pending divorce. These orders are intended to keep the parties from bothering each other, and are intended to maintain the *status quo* with regard to property, etc., until the divorce case is heard and decided by the Judge. Restraining Orders are NOT issued by the City Attorney's Office, and are NOT issued by the Springdale District Court.

Furthermore, **a violation of a restraining order is NOT a criminal offense.** Should you encounter a situation involving only a violation of a restraining order, tell the person it is a civil matter that is enforced by the Judge who issued the restraining order. Do NOT send them to the City Attorney's office to have charges filed for violating the restraining order. Being knowledgeable regarding these issues is important to keep the public from feeling like they are "getting the runaround", and bolsters public confidence in the police department.

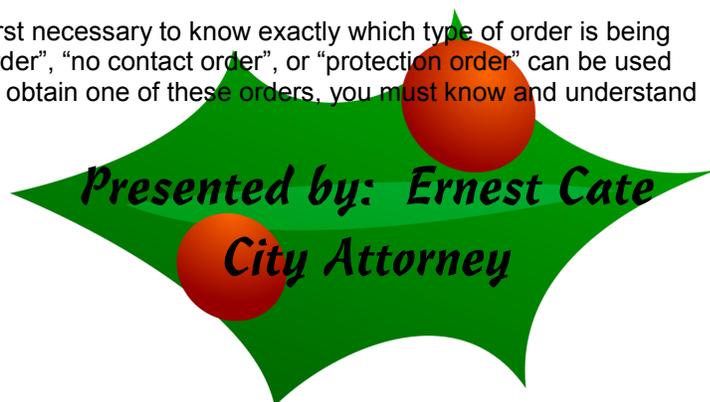
Conclusion

Again, given the differences in these types of orders, it is first necessary to know exactly which type of order is being dealt with. To the average citizen, the terms "restraining order", "no contact order", or "protection order" can be used interchangeably. If a citizen contacts you regarding how to obtain one of these orders, you must know and understand the differences between them.

Can an Officer Enter a Residence to Arrest a Suspect—One of the Most Complicated Legal Issues Officers Will Face— REVISTED

The following article was taken from the July 1, 2012 edition of *C.A.L.L.* written by then City Attorney, Jeff Harper

Arrest out of the home without a warrant? The United States Supreme Court has noted that, "with few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United*



States, 533 U.S. 27 (2001). The United States Supreme Court wrote in *Payton v. New York*, 445 U.S. 573 (1980), the following: "The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance of the house. Absent exigent



circumstances, that threshold may not reasonably be crossed without a warrant."

The language from the *Payton* decision was cited by the Arkansas Supreme Court when they decided the case of *Holmes v. State*, 374 Ark. 530 (2002). After quoting language from *Payton*, the Arkansas Supreme Court noted that they have held repeatedly that warrantless searches in private homes are presumptively unreasonable. *McFerrin v. State*, 344 Ark. 671 (2001); *Norris v. State*, 338 Ark. 397 (1999); *Williams v. State*, 327 Ark. 213 (1997). The court further held that the burden is on the state to prove that the warrantless activity was reasonable. *Warford v. State*, 330 Ark. 8 (1997).

The bottom line is that an arrest out of a home without a warrant is presumed to be unreasonable unless there is consent to enter the home, or there are exigent circumstances. Both of these exceptions to the requirement of not being able to enter a residence without a warrant are discussed below.

Consent: Rule 11.1 of the Arkansas Rules of Criminal Procedure is the authority to search and seize pursuant to consent and is set out in its entirety below.

Rule 11.1. Authority to search and seize pursuant to consent.

An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search.



(b) The state has the burden of proving by clear and positive evidence that consent to a search was freely and voluntarily given and that there was no actual or implied duress

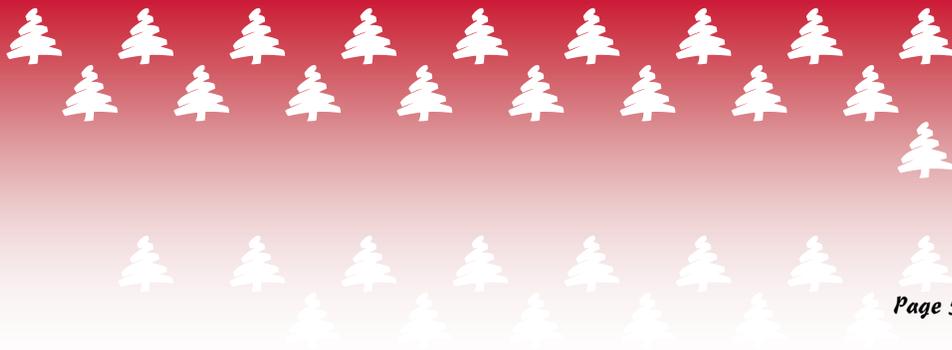
or coercion.

(c) A search of a dwelling based on consent shall not be valid under this rule unless the person giving the consent was advised of the right to refuse consent. For purposes of this subsection, a "dwelling" means a building or other structure where any person lives or which is customarily used for overnight accommodation of persons. Each unit of a structure divided into separately occupied units is itself a dwelling.

As to who can give consent to search a dwelling, Rule 11.2 provides the consent justifying a search and seizure can only be given, in the case of (c) search of premises, by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent.

Consent to search a dwelling is one legal issue where the Arkansas Supreme Court, citing the Arkansas Constitution, has been more restrictive than United States Supreme Court. Prior to the Arkansas Supreme Court case of *State v. Brown*, 356 Ark. 460 (2004), the State only had to prove that the consent by a person allowed to give consent to search a dwelling was voluntarily given by an authorized person.

In the *Brown* case, three agents of the Fifth Judicial District Drug Task Force approached the residence of Jaye Brown and Michael C. Williams in Russellville, Arkansas. They did so because of information received from two anonymous sources that Brown and Williams were involved in drug activity and that a small child inside the trailer had become ill due to drug manufacturing. Upon reaching the door to the trailer home, they smelled a strong and familiar chemical odor. One of the agents knocked on the door and Jaye Brown answered. The agent told her that the three agents had information that someone was possibly growing marijuana there and there was illegal drug use at the residence and that they wanted to investigate.



Brown asked that the agents wait a minute. She closed the door, but then returned a short while later. One of the agents presented her with a consent to search form to sign which read, "I give permission to the Fifth Judicial District Drug Task Force to search my vehicle/residence (circle one) for contraband or illegal terms." Brown and one of the officers signed the consent form. Jaye Brown did not circle vehicle or residence. A search of the residence by the agents ensued. Evidence of precursors used to manufacture methamphetamine were found in the residence. Brown and Williams were arrested, and one of the agents subsequently sought and received a search warrant to search the residence and seize any evidence or contraband found. The search warrant was executed, and evidence of methamphetamine manufacture and usage, as well as marijuana growth and possession was seized. Brown and Williams were later charged with manufacture of methamphetamine and marijuana and possession of methamphetamine with intent to deliver.

The Arkansas Supreme Court, in deciding the *Brown* case, noted that Article 2, Section 15 of the Arkansas Constitution reads in relevant part: "The right of the people of this state to be secured in persons, houses, papers or effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." The Arkansas Supreme Court held that the failure of the drug task force agents in this case to advise Jaye Brown that she had the right to refuse to consent to the search violated her right and the right of Michael Williams against warrantless intrusions into the home, as guaranteed by Article 2, Section 15 of the Arkansas Constitution. The court therefore affirmed the suppression of all evidence seized in the case that flowed from the unconstitutional search. The court also opined, "While we do not hold that the Arkansas Constitution requires execution of a written consent form which contains a statement that

the homeowner has the right to refuse consent, this undoubtedly would be the better practice for law enforcement to follow."

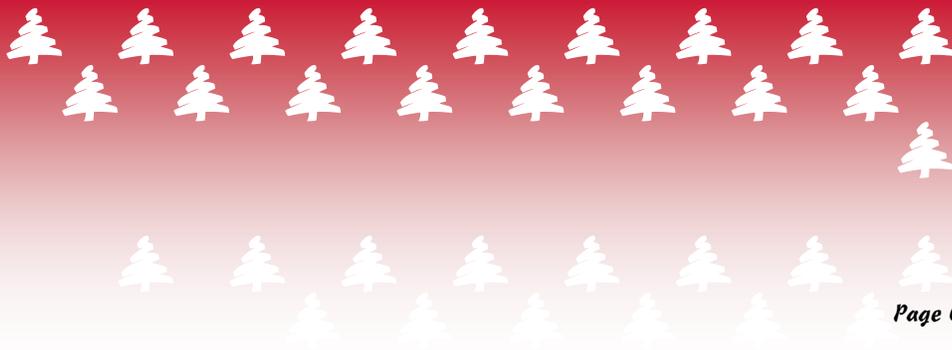
After the *Brown* decision, Rule 11.1 was modified to contain the language that consent to search the dwelling shall not be valid unless the person giving the consent was advised of the right to refuse consent.

A case the Arkansas Supreme Court decided a little over a year after *Brown* makes it clear that failure to notify the person giving consent to search a dwelling of their right to refuse consent is fatal to the search. In *Carson v. State*, 363 Ark. 158 (2005), an officer of the Greenwood Police Department and the Twelfth and Twenty-first Judicial Drug Task Force received a phone call from a store in Fort Smith that David Carson had purchased strong iodine tincture, an item used in the manufacture of methamphetamine. In response to the phone call, the officer traveled alone to Carson's residence on Johnson Street in Fort Smith about eleven o'clock in the morning. The



officer was dressed in a pair of jeans and t-shirt, and was driving an unmarked Dodge pickup truck. Although the officer was carrying a weapon, it was not visible.

The officer went to the door and knocked. When Carson came to the door, the officer pulled out his badge, identified himself as a police investigator, and asked Carson if he could step inside to speak with him. Carson replied that he was a little busy, but he would step outside to speak with the officer. The officer thought it was odd that Carson was too busy to let him in, but would come outside to speak. The officer also noticed that Carson was sweating, had trouble making eye contact, and was shaking. The officer immediately started to point out evidence that he had heard and observed, such as the iodine purchase; the officer also mentioned the strong



chemical odor in the air, and the fact Carson's hands looked like they were stained. As the officer pointed out to Carson, "everything [he] could see that [he] thought would relate to the manufacture of methamphetamine," Carson broke down and began to cry, telling the officer that he was correct, and that he did have a lab inside, and that he would show the officer where everything was. According to the officer's testimony, Carson invited him inside the home without the officer asking. In response to Carson's revelation about the lab, the officer followed him inside the house, where the officer saw in plain view items used to manufacture methamphetamine. At that time, Carson was placed into custody. Later that day, Carson gave a statement to police in which he again confessed that he was manufacturing methamphetamine.

Carson entered a conditional plea of guilty to a lesser charge of conspiracy to manufacture methamphetamine, a Class A felony and appealed the case to the Arkansas Supreme Court. Carson argued on appeal that the trial court erred in denying his motion to suppress the evidence seized as a result of the search of his home.

The Arkansas Supreme Court pointed out that in the case of *State v. Brown* (citation omitted), they declared a bright line rule: "When an officer does not inform a suspect of his or her right to refuse consent, any subsequent search – even one based on the suspect's apparent consent – is invalid." The court held in this case, the officer conceded at the suppression hearing that he never advised Carson of his right to refuse to consent to the search.

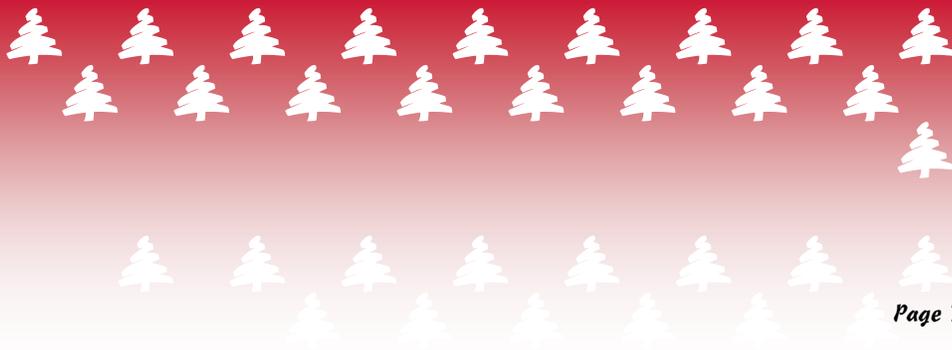
Therefore, the court held that the search of the house was invalid, and the trial court erred in denying Carson's motion to suppress. Therefore, Carson's conviction was reversed and the case was remanded back to the Sebastian County Circuit Court.



It is clear that if you want consent to perform a search in a dwelling, whether it is a search for a person or personal property, you cannot enter the dwelling unless you have valid consent, which includes the warning that the person giving consent has a right to refuse consent as provided under Rule 11.1.

What is a search? Another issue that has come up in regard to consent to search a dwelling is whether or not a search is involved at all. Rule 10.1 of the Arkansas Rules of Criminal Procedure explains that a "search" is: "any intrusion other than arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or *sufficient consent* would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state."

In *Burroughs v. State*, 96 Ark. App. 289 (2006), one of the issues was whether or not the entry was pursuant to a search. In this case, a lieutenant with the Hot Springs Police testified at the suppression hearing that on September 9, 2004, he was assisting Arkadelphia police officers who had a warrant for a burglary suspect. He said they went to a residence in Hot Springs, which was the residence of Jason Wayne Burroughs (appellant), and knocked on the door. The lieutenant related that a female answered the door, and he explained that he had a warrant for the arrest of some individuals, and asked her for identification. The lieutenant said she informed him her name was Alice Ashmore and he again asked her for identification. He testified that she then said, "come in, I'll get it out of my purse." He said that he went in, along with a detective from the Hot Springs Police Department; that the female went to her purse, got her identification, and gave it to him; that he ran it through ACIC and NCIC; and it showed there was an outstanding warrant for her through another agency. He stated that he asked her if there was anyone else in the house, and she



said there was not.

On cross-examination, the lieutenant explained that there were a total of five or six officers who approached the house, that all were armed, and only he was in uniform. He explained that when he first entered the residence, he watched Ashmore go and get her identification. He said he did not see any contraband in the room, but that he was not looking. He acknowledged that no one ever told Ashmore that she had the right to refuse entry to the officers. He said that he believed the other officers entered the rooms off the living room, that noises were heard, and that one of the officers observed what he thought were the makings of a meth lab. The lieutenant said that the officers reported hearing noise and could not see into the rooms, so he assumed the doors off the living room were closed. On redirect, the lieutenant stated he did not enter the house to search and that he did not ask for consent to search. On re-cross, he stated he entered the house because Ashmore invited him in as she was getting her identification and that the purpose of asking for her identification was to find out if she was who she said she was and whether she was related to the individuals for whom they were looking. The lieutenant acknowledged that they were looking for evidence of her identity, but stated that he did not consider going into the house as looking for evidence.

The Hot Springs detective testified that he looked toward the kitchen and saw what he believed to be bottled acid iodine salt crystals, and a gas generator (hydrogen peroxide). He also stated that there was a strong odor in the room. He stated that he recognized the odor from his experience working with narcotics. He testified that he and another detective heard some sounds in the back bedroom; that they asked if anyone else was in the house; that the female, Ms. Ashmore, said no; and that for officer's safety, they checked both the bedroom and the bathroom. He stated that they found a Mrs. Cotten in the bathtub; that she also had outstanding warrants for her arrest; that there was an active

meth lab in the back corner of the bedroom; that the house was secured; that the drug task force was notified; and that a search warrant was secured to search the premises.

The trial court, in a letter opinion, denied appellant's motion to suppress, specifically finding "that the officers' entry into the residence was by a spontaneous invitation and not in response to a request for consent, so that the provisions of *State v. Brown* do not apply." Appellant was then subsequently tried by the jury for the offense of manufacturing methamphetamine and found guilty. On appeal, he contended that the trial court erred in denying his motion to suppress the evidence that was seized from his house because "the officers that furnished the information leading to the issuance of the search warrant were in his home illegally."

The Arkansas Supreme Court, in deciding the case, noted the definition of search under Rule 10.1 of the Arkansas Rules of Criminal Procedure. (See previous page for definition of search.) The court then concluded that "the facts of this case fit more in the category of a "search" than in the straight service of arrest warrants, the only "sufficient consent" would have been consent preceded by advice of the right to refuse consent, as explained in *Brown*, and as stated in Arkansas Rules of Criminal Procedures 11.1, which was not done here." "A search by any other name is still a search, and this search of the dwelling should have been preceded by advising Ms. Ashmore that she did not have to give consent." Consequently, the court held the trial court erred in denying appellant's motion to suppress, and reversed and remanded the case.

In deciding this case, the majority looked at the reason why the officers were at this Hot Springs residence to start with (to search for persons they had warrants for). Based on the court's decision, if you are





going to a dwelling with the purpose to search (by consent), do not enter the dwelling without first advising the person giving consent that they have the right to refuse.

It can sometimes be confusing, but in determining whether you need to get consent, determine why you are at the residence. If an informant calls you and asks you to come over so he can talk to you, and invites you in, you are not there to perform a search and therefore you do not have to tell them that they can refuse to let you in. Likewise, when someone calls the police to report a theft and invites you in, you do not have to tell them they can refuse to give you consent because you are there to investigate a crime and not to perform a search. If you look at the *Burroughs* case, the reason they were there was to search for someone they had a warrant for. Therefore, to search, they were required to follow Rule 11.1 and get consent, advising the person that they could refuse consent.



What about when one owner gives consent and the other owner refuses? Another issue on consent to search a residence is what you do when one co-occupant who is present at the residence gives you consent, but another co-occupant who is present tells you that you cannot search. This issue was addressed in the United States Supreme Court case, *Georgia v. Randolph*, 547 U.S. 103 (2006). This case involved a domestic dispute in Americus, Georgia. On the morning of July 6, 2001, Janet Randolph complained to the police that after a domestic dispute, her husband took their son away, and when officers reached the house, she told them that her husband was a cocaine user whose habit had caused financial troubles. She mentioned the marital problems and said that she and their son had only recently returned after a stay of several weeks with her parents. Shortly after the police arrived, Scott Randolph returned and explained that he had removed the child to a neighbor's house out of concern and that his wife might take the boy out of

the country again. He denied cocaine use, and countered that it was in fact his wife who abused drugs and alcohol.

One of the officers went with Janet Randolph to reclaim the child, and when they returned she not only renewed her complaints about her husband's drug use, but also volunteered that there were "items of drug evidence" in the house. The officer asked Scott Randolph for permission to search the house, which he unequivocally refused. The officer then turned to Janet Randolph for consent to search, which she readily gave. She led the officers upstairs to a bedroom that she identified as Scott's, where the officer noticed a section of a drinking straw with a powdery residue he suspected was cocaine. The officer left the house to get an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search and apply for a warrant. When the officer returned to the house, Janet Randolph withdrew her consent. The police took the straw to the police station, along with the Randolphs, and after getting a search warrant, they returned to the house and seized further evidence of drug use on the basis of which Scott Randolph was indicted for possession of cocaine. He moved to suppress the evidence, as product of a warrantless search of his house and authorized by his wife's consent over his expressed refusal. The court opined, "this case invites a straight forward application of the rule that a physically present inhabitant's expressed refusal of consent to a police search is dispositive as to him, regardless of the consent of the fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent." "The state does not argue that she gave any indication to the police of the need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting probable cause for a warrant issued later). Nor does the state claim that the entry and search should be upheld under exigent



circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained." Therefore, the United States Supreme Court affirmed the judgment of the Supreme Court of Georgia and held the search unconstitutional.

The *Randolph* case made it clear that when both co-occupants of the residence are present, and one gives consent while the other refuses, you cannot search. However, the Eighth U.S. Circuit Court of Appeals, after the *Randolph* case, decided a case involving a co-tenant (husband) who was arrested at his business and refused to give consent to the officers to search his home computer. Officers never dealt with him at his residence. The officers then went to the residence and asked the wife for consent to search the home computer. The wife said she did not know what to do and asked what would happen if she refused to allow the officers to take the home computer. One of the officers explained he would apply for a search warrant, and in the meantime, he would leave an armed, uniformed officer in the home to prevent the destruction of the home computer and other evidence. The officer did not tell the wife that her husband previously denied consent to search the home computer.

The case was subsequently appealed to the U.S. Eighth Circuit Court of Appeals. The court held that unlike *Randolph*, the officers in the present case were not confronted with a "social custom" dilemma, where two physically present co-tenants have contemporaneous competing interests and one consents to a search while the other objects. Instead, when the officer asked for the wife's

consent, the husband was not present because he had been lawfully arrested and jailed based on evidence obtained wholly apart from the evidence sought on the home computer. Thus the court held that the

rationale for the narrow holding in *Randolph*, which repeatedly referenced the defendant's physical presence and immediate objection, is inapplicable to this case. The *Randolph* opinion repeatedly referred to an "expressed refusal of consent by a *physically present resident*." The *Randolph* majority candidly admitted, "We are drawing a fine line; if a potential defendant with self-interest in objecting is in fact *at the door and objects*, the co-tenant's permission does not suffice for reasonable search. The court noted that the co-tenant (the husband) in this case was not at the door and objecting and therefore the case does not fall within *Randolph's* "fine line." Thus the court concluded that the officers' failure to advise the wife of her husband's earlier objection to a search of the home computer did not convert an otherwise reasonable search into an unreasonable one. This case is *U.S. v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008), and was discussed in detail in the July 1, 2008 edition of *C.A.L.L.*

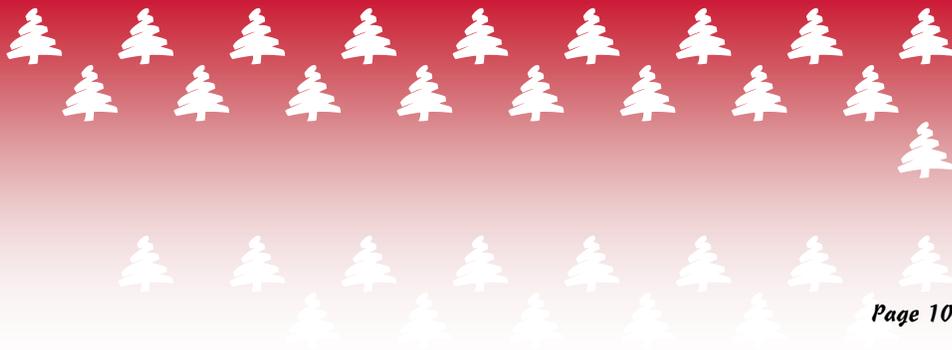
Exigent Circumstances: Rule 14.3 of the Arkansas Rules of Criminal Procedure, entitled emergency searches, provides:

An officer who has reasonable cause to believe that premises or a vehicle contain:

- (a) individuals in imminent danger of death or serious bodily harm; or
- (b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or
- (c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;

may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.





The United States Supreme Court has noted that the ultimate touchstone of the Fourth Amendment "is reasonableness." Therefore, although "searches and seizures inside a home without a warrant are presumptively unreasonable," that presumption can be overcome. For example, the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.

In *Michigan v. Fischer*, 558 U.S. ___, 130 S.Ct. 546 (2009), a police officer responded to a complaint of a disturbance in Brownstown, Michigan. One officer later testified that, as he and his partner approached the area, a couple directed them to a residence where a man was "going crazy." Upon their arrival, the officers found a household in considerable chaos; a pickup truck in the driveway with its front smashed, damaged fence post along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors into the house. Through a window, the officers could see respondent, Jeremy Fischer, inside the house screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

The officers knocked, but Fischer refused to answer. They saw that Fischer had a cut on his hand and they asked him whether he needed medical attention. He ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. An officer pushed the front door part way open and ventured into the house. Through the window of the opened door he saw Fischer pointing a long gun at him and the officer withdrew. Fischer was later charged under Michigan law with assault with a dangerous weapon and possession of a firearm during the commission of a felony.

The case was eventually appealed to the United

States Supreme Court. The Court noted that the case of *Brigham City v. Stuart*, 547 U.S. 398 (2006), identified the need to assist persons who are seriously injured or threatened with such injury as an exigent circumstance. Thus, law enforcement officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." This "emergency aid exception" does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only "an objectively reasonable basis for believing," that a person within [the house] is in need of immediate aid.

Brigham City illustrates the application of this standard. There, police officers responded to a noise complaint in the early hours of the morning. As they approached the house, they could hear from within an altercation occurring, "some kind of fight." Following the tumult to the back of the house whence it came, the officers saw juveniles drinking beer in the backyard and a fight unfolding in the kitchen. They watched through the window as a juvenile broke free from the adults restraining him and punched another adult in the face, who recoiled to the sink, spitting blood. Under these circumstances, the Court found it "plainly reasonable" for the officers to enter the house and quell the violence, for they had "an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning."

The Court held in the *Fischer* case, that just as in *Brigham City*, the police officers here were responding to a report of a disturbance. Just as in *Brigham City*, when they arrived on the scene they encountered a tumultuous situation in the house – and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City*, the officers could see violent behavior inside.





The Court held that officers do not need ironclad proof of "a likely serious, life-threatening injury to invoke the emergency aid exception." The only injury police could confirm in *Brigham City* was the bloody lip they saw the juvenile inflict upon the adult. Fischer argued that the officers here could not have been motivated by a perceived need to provide medical assistance, since they never summoned emergency medical personnel. The Court held this would have no bearing, of course, upon their need to assure that Fischer was not endangering someone else in the house.

The Court further opined that it does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But the role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties. It suffices to invoke the emergency aid exception that it was reasonable to believe that Fischer had hurt himself (albeit non-fatally) and needed treatment that in his rage he was unable to provide, or that Fischer was about to hurt, or had already hurt someone else.

In deciding a case under exigent circumstances, the Arkansas Supreme Court has held that to enter a residence or private dwelling without a warrant, two things must be present: probable cause and exigent circumstances. *Mitchell v. State*, 294 Ark. 264 (1988). Probable cause is determined by applying a totality of the circumstances test and exists when the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Exigent circumstances are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples

include the risk of removal or destruction of evidence, danger to the lives of police officers, or others, and the hot pursuit of the suspect. *Butler v. State*, 309 Ark. 211 (1992).



In a Springdale case, *Norris v. State*, 338 Ark. 397 (1999), Norris (appellant) was arrested for DWI out of his residence. Appellant was allegedly seen driving erratically by another driver. The citizen followed appellant to his home and called police. Based on the citizen's information, the officer approached appellant's home, where he was admitted into the house by the appellant's visiting mother-in-law. When the officer asked for the appellant, the mother-in-law went to appellant's bedroom to retrieve him. The officer followed her. In the bedroom, the officer questioned appellant, administered field sobriety tests, and arrested appellant for the offense of DWI #1.

The appellant asserted on appeal that the police had no authority to enter his home to make a warrantless arrest for a minor offense and no valid consent was given to allow police to enter appellant's home to make a warrantless arrest. The Arkansas Supreme Court agreed with the defendant and held that a DWI first offense did not create exigent circumstances such that a warrantless arrest can be made out of the home.

The State also contended that because the appellant's blood-alcohol content decreases with the passage of time, it is therefore equivalent to "destruction of evidence" and that determining the blood-alcohol content is, then, an "exigent circumstance" that justifies a warrantless entry into appellant's home. The Court held in this case, because they considered DWI #1 a minor offense, a warrantless arrest cannot be upheld simply because evidence of the offender's blood alcohol level might have dissipated while the police obtained a warrant.



The Court also looked at consent to enter the home. The Court noted that they have suggested that so long as a searching police officer reasonably believes that a person giving consent had authority to do so, the consent is valid, notwithstanding a later determination that the consenter had no such authority. *Grant v. State*, 267 Ark. 50 (1979). The Court then looked to the scope of the consent in this case and noted that the mother-in-law had asked the officer to step inside the house because the family dog was making a disturbance but that she never asked or verbally consented to the officer coming any farther into the house, and specifically, not down the hall and into appellant's bedroom. The Court noted that testimony was undisputed. Further, the officer's testimony made it clear that while his initial entry into the house was in response to the mother-in-law's initial invitation to step inside, that entry was distinct and separate from his decision to follow her out of the living room, down the hall, and into appellant's bedroom. The officer never asserted that he perceived the initial invitation as anything more than entry inside the front door or that he relied on that invitation in any way as a basis for going into the interior of appellant's home. Therefore, the Court held that the officer did not have consent to go back into the bedroom and make the initial contact with the suspect.

Now that we have gone over the basics of consent and exigent circumstances, let's take some scenarios on making an arrest out of a residence without a warrant.

Scenario #1: Let's now take the *Norris* case described above, and change the facts slightly.



Springdale Police receive a call of a drunk driver. The person making the call is following the vehicle and describing the vehicle driving all over the road, including driving northbound in the southbound lane at times. The driver, however, makes it

home and the complaining witness waits on the officer, who arrives 5 minutes later. The officer knocks on the door. A lady answers the door and states that, after the officer asks, that her husband has just arrived home in the vehicle, which is now sitting in the driveway. The officer asks how long he has been home, and she said about five minutes. She then tells the officer that he is now in bed. The officer then asks consent to enter the residence to search for the suspect (her husband), and the officer tells the wife that she has the right to refuse consent to allow him in the home to search for her husband. The wife agrees to allow the officer to come in the house and search for her husband. She advises the officer to follow her and takes the officer to a bedroom where the officer makes contact with the suspect. After interviewing the suspect, the officer determines that he is intoxicated and has not been drinking since he came home. *Can an arrest be made?* It is my opinion that an arrest can be made because the officer has entered the house lawfully, under proper consent. In the *Norris* case the officer had consent to step in the door, but did not ask consent to go back in the bedroom and the court held he did not have consent to go back and search for the suspect. **Also, I recommend you get consent in writing before conducting a search of the dwelling if possible. By doing it this way, it takes away the argument that defendant was never advised of his right to refuse consent.**

Scenario #2: Let's take this same case and assume the wife refuses to let the officer in, but says she will bring the suspect to the front door to talk to him. The officer is never able to enter the house under consent. He then talks with the suspect, determines that he is intoxicated and asks if he will voluntarily go in and take a blood test, but the suspect refuses. The officer gets his ticket book, writes a ticket for DWI and hands it to the suspect. Again, this is proper because no arrest has been made out of the home. This is the approach that has been taken by Springdale police officers since the *Norris* case was decided. I do not ever remember a case in which the defendant was found not guilty on



DWI charges when a ticket was written at the home. A few suspects have even voluntarily gone with the officer down to the station to take a test and have then been taken back to the home after the breath test was administered.

Scenario #3: Benton County Sheriff's Office calls the Springdale Police Department and advises that they have probable cause to arrest John Doe for violation of an order of protection, which occurred five hours before in Benton County. John Doe resides in Springdale. The officer goes to the house and observes John Doe in the living room, but John Doe will not answer the door. *Can the officer enter the house?* The answer is no, as you do not have consent to enter, nor do you have exigent circumstances.

Scenario #4: Washington County Sheriff's Office calls Springdale Police Department and advises they have probable cause to arrest Jack Johnson for burglary. The officers go to Jack's house in Springdale and knock on the door. Jack Johnson's wife answers the door. An officer can see Jack inside the living room. Officers ask for consent, and tell Mrs. Johnson she can refuse to give them consent to come in and search for Jack. She refuses. *Can you enter anyway?* No, as there are no exigent circumstances and there is no consent.

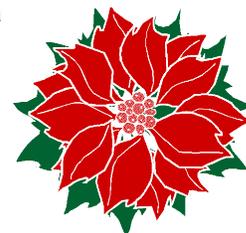
Scenario #5: Washington County Sheriff's Office calls Springdale Police Department and advises they have probable cause to arrest a suspect who lives in Springdale for a murder that just occurred about an 30 minutes before at a residence five miles outside of Springdale. The officers are advised that the suspect should be considered armed and dangerous, and that a handgun was used in the murder. The officers arrive at the residence in Springdale and observe the suspect inside. The officers knock on the door, but no one will come to the door. *May the officers go into the house without a warrant and make an arrest?* Unlike the previous example, this case does have exigent

circumstances in that a grave offense has just been committed and there is probable cause to arrest the suspect on the offense, the suspect is believed to be armed and dangerous, and the suspect is known to be inside the residence. Therefore, it is my opinion that in this fact situation, unlike the example of the burglary case, officers can make entry into the house and arrest the suspect on Washington County's probable cause for murder.

What about entering the residence if you have an arrest warrant?

Based on case law by the Eighth U.S. Circuit Court of Appeals and the Arkansas Supreme Court, it is my opinion that a valid arrest warrant carries with it the authority to enter the residence of the person named in the warrant in order to execute the warrant so long as the police have a reason to believe that the suspect resides in the place to be entered and is currently present in the dwelling. This was the decision of the Eighth U.S. Circuit Court of Appeals in *United States v. Clayton*, 210 F.3d 841 (8th Cir. 2000). However, the Eighth Circuit did note in this case that it is not enough for the police to know that a suspect is a resident of a dwelling, they must also have a reason to believe that the suspect is present at the time of entry.

The Arkansas Supreme Court has also decided a similar case. A murder was committed in Jacksonville, Arkansas. Following the murder, Roberto Benavidez (appellant) left Arkansas, and officers investigating the murder obtained information that Benavidez was staying in Georgia. A warrant for his arrest was issued. On November 4, 1999, a sergeant of the Chamblee, Georgia Police Department received a copy of a warrant authorizing Benavidez's arrest for capital murder from the Jacksonville Police Department in Jacksonville, Arkansas. The Jacksonville police informed





the Chamblee, Georgia police sergeant that Benavidez was staying at a residence in Chamblee and gave them the address. The Jacksonville police also informed the sergeant that Benavidez was driving a 1989 blue, two-door Grand Am with Arkansas plates. In addition, the Jacksonville police provided a picture of Benavidez to the Chamblee police and told the officers that Benavidez might be armed.

A lieutenant with the Chamblee Police Department located Benavidez's car in the parking lot of the apartment complex located at the address given to them by Jacksonville police. Several Chamblee police officers then went to the apartment address given to them by Jacksonville police. An Asian female answered the door, and the officers told the woman that they had a warrant to arrest Benavidez. She pointed to the bedroom. The officers went to the bedroom and found two men sleeping on the floor of an unfurnished room. The officers turned on the light and woke up the two men in the room. Using the picture provided by the Jacksonville police, a Chamblee, Georgia police officer identified Benavidez as one of the persons in the room.

Benavidez was not wearing a shirt, and since it was cold outside, one of the police officers reached into an open closet to get a shirt for Benavidez. When the officer reached for the shirt, he saw an identification card and pulled it out. The officer looked at the identification card and gave it to another officer. The officer again reached for the shirt and when he grabbed it, he found a .380 caliber pistol. Benavidez was then placed under arrest.

Benavidez stated that at the time he was arrested, he had been living in the apartment for four days. He stated he was staying at the apartment with the permission of the Asian woman who lived there.

A Pulaski County jury convicted appellant (Benavidez) of capital murder and sentenced him to

life imprisonment. His sole claim on appeal was that the trial court erred by denying his motion to suppress because the Georgia police officers who arrested him did so by making a "search warrantless" entry into a third party's home without having a reasonable belief that the home was Benavidez's residence.



In deciding this case, the Arkansas Supreme Court noted that in *Steagald v. United States*, 451 U.S. 204 (1981), the United States Supreme Court held that although an arrest warrant carries with it the authority to enter a suspect's residence to arrest him or her, it does not give the authority to enter the residence of a third party to search for the subject of the arrest warrant, absent consent or exigent circumstances. However, in *Payton v. New York*, 445 U.S. 573 (1980), the Court stated that for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

The court held that in the present case, there is no dispute that the arrest warrant for Benavidez was founded on probable cause. With the valid warrant, the Chamblee police officers had the authority to enter the apartment where Benavidez was living if the officers had reason to believe that Benavidez lived in the apartment and that Benavidez was present at the apartment at the time the warrant was executed. The court held that clearly the officers had reason to believe that Benavidez was present in the apartment at the time the warrant was executed. The Jacksonville police had informed Chamblee, Georgia police that Benavidez was staying at an apartment and gave the address to the apartment, and Chamblee police had been told that Benavidez was driving a 1989 blue, two-door Pontiac Grand Am with Arkansas plates, and that vehicle was found in the parking lot of the apartments.



From the totality of the circumstances, it was reasonable for the Georgia police to believe prior to the execution of the arrest warrant that Benavidez was both living in apartment E-11 and actually present inside the apartment. The Georgia police also had received information from the Jacksonville police that Benavidez was driving a 1989 blue, two-door Pontiac Grand Am with Arkansas plates, and that the car was at the apartment complex of the address supplied. Subsequent to receiving this information, the Georgia police officers discovered the subject car parked at the subject apartment complex.

The court held that the officers reasonably believed that Benavidez was residing at the apartment and reasonably believed that Benavidez was present at the apartment at the time they went to execute the warrant. The officers entered the bedroom where Benavidez was sleeping and positively identified him. An officer reaching for a shirt inadvertently discovered the gun and identification card which was wrapped in the shirt. The gun and identification card were plain view. Therefore, the court held that the arrest was valid, as was the seizure of the evidence in plain view.

It is important for officers to remember in this type situation that if the arrest warrant is for a person who is at a third party's house, without consent from the person entitled to give consent to search the dwelling, officers have to get a search warrant for the third party's house even though they have probable cause to believe that the person whom they have an arrest for is inside. However, if it is the house of the person whom you have the warrant for and you have probable cause to believe he is inside; the arrest warrant carries with it the authority to enter the residence.



There is one last word of caution about using the arrest warrant for the authority to

enter a suspect's home. If it is considered a pretextual arrest, then the Arkansas Supreme Court has held it is an unlawful search, and therefore, an unlawful arrest. Such was the case in *Henley v. State*, 95 Ark App. 108 (2006).

In the *Henley* case, an officer of the Faulkner County Sheriff's Office received a call from the investigator of the Van Buren County Sheriff's Office wanting to talk to Marc Henley about a burglary that occurred in Van Buren County. The Van Buren County investigator did not have a warrant, but the Faulkner County officer checked his warrant log and discovered that Henley had a misdemeanor warrant for failure to appear on a speeding ticket.

Later that night around 10:00 p.m., the two officers along with another Van Buren County officer drove to Henley's home, arriving at 10:18 p.m. The officers parked their vehicles in Henley's driveway behind several other vehicles. As the officers exited their car, armed with flashlights, they looked into the other cars parked in the drive. The officers then proceeded to the front door of Henley's home. As they approached the door, the officers looked into Henley's home through a bay window although the window had a blind covering it; a section of the blind was damaged allowing officers to see inside the home. The officers observed Henley and a female inside the home standing around a pool table.

Once the officers arrived at the front door, they began knocking and shouting for Henley to come to the door. As one officer continued knocking on the door, another went to look through a bay window where he observed Henley and the woman under the pool table. Meanwhile, a third officer walked around to the back of the residence.

Eventually Henley opened the front door and was placed under arrest on the misdemeanor warrant and was handcuffed. He was then questioned by the investigator from Van Buren County about the burglary until the investigator was satisfied Henley



was not involved in any Van Buren County burglary. However, when Henley opened the door to exit his home, a Faulkner County deputy smelled an overwhelming chemical odor that he associated with processing methamphetamine. When Henley was being questioned, the female came outside where she was subjected to a pat down search. The search revealed a quantity of an illegal substance (later identified as methamphetamine). She responded to the discovery of the secreted black zippered bag containing methamphetamine by saying, "you can't tell Marc I gave it to you. He told me to put it there. He would kill me if I told you that." At this point the officers asked Henley if he would consent to a search of his home. He refused their request. However, as Henley was being placed in the squad car he mentioned that he was on probation. His Faulkner County probation officer was then contacted and the probation officer and drug agent who was called arrived on the scene. Henley and the female were taken back to the home. As Henley and the female were being watched, officers conducted a search of a home. The search revealed the components of a methamphetamine laboratory. Finding the discovery, Henley was arrested and entered a conditional plea of guilty to the offenses of attempt to manufacture methamphetamine, possession of drug paraphernalia with intent to manufacture, and maintaining a drug premises. He appealed his case to the Arkansas Court of Appeals.

One argument that the state made on appeal was that the search was justified because it followed the arrest of Henley on a valid warrant (the failure to appear warrant from Faulkner County). Henley responded that the evidence seized from his home followed a pretextual arrest and must be suppressed as dictated by *State v. Sullivan*, 348 Ark. 674 (2002) and *Smith v. State*, 265 Ark. 104 (1979). In *Smith*, the Arkansas Supreme Court concluded that if the initial arrest is simply a pretext to search, the search cannot stand. In that case, the Arkansas Supreme Court reasoned that a pretextual arrest exists if the officer would not have gone to the defendant's home to arrest him otherwise.

As to this case, the court noted that the officer's initial intent in their contact with Henley was to interrogate him about a Van Buren County burglary. Having no warrant for that purpose, the Faulkner County officer found an old misdemeanor warrant for Henley. The officers proceeded to Henley's home where he was arrested on the outstanding misdemeanor warrant as a pretext to investigate the burglary. The court held that, "we find no fault with the officer's presence at Henley's home to question him about the crime they were investigating – with or without the pretext of the warrant – the officers were legally entitled to investigate the burglary crime by questioning Henley. However, the court held that the search following the arrest cannot be justified because the serving of the warrant was merely a pretext." There was no evidence that these type of warrants were routinely served in person after 10:00 p.m. Therefore, based on the reasoning obtained in *Smith and Sullivan*, the court agreed with Henley's assertion that the evidence seized from his home followed a pretextual arrest and must be suppressed.

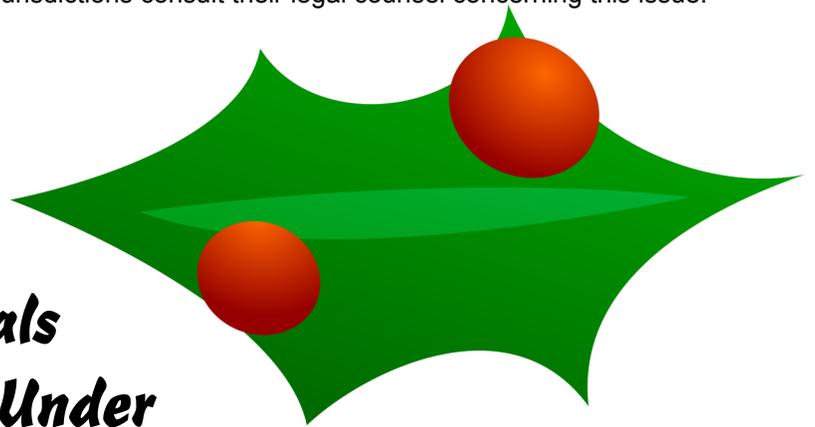


Based on this case, it is my opinion that if officers had gone to this house at a normal hour when they serve misdemeanor warrants, such as 6:00 p.m., the decision on this particular part of the case would be different. It is my opinion that officers should follow the laws of criminal procedure for when a search warrant can be executed, 6:00 a.m. – 8:00 p.m., unless there are exigent circumstances. Of course, if the Faulkner County officers had been called to a disturbance at 10:30 p.m. and the house was entered lawfully, then they determined they had a misdemeanor warrant, there would be no problem with an arrest on the misdemeanor warrant.

Note From City Attorney: This article is intended to provide a guideline for Springdale officers on the complicated issue of making an arrest out of the home. Case law helps to give officers what factors should be considered in deciding whether to make



an entry without a warrant, or whether to make an entry when you have an arrest warrant but not a search warrant. Of course, it will always come down to the facts that you have at the time you make the decision. I hope this article helps Springdale officers who are making that decision. *C.A.L.L.* is intended to provide legal guidance for Springdale police officers. As always, I recommend officers from other jurisdictions consult their legal counsel concerning this issue.



Arkansas Court of Appeals Affirms DWI Conviction Under Police Officer Community Caretaking Function

Facts Taken From the Case: On March 2, 2013, at 4:30 a.m., Fayetteville Police Officer Greg Dawson was on patrol when he noticed a vehicle parked in a parking lot on Block Street in Fayetteville with its lights on. Officer Dawson parked his vehicle a few spots from the vehicle, walked up to the car, and noticed that the vehicle was running and that someone was in the driver's seat laid back, somewhat leaning over the center. Officer Dawson knocked on the window several times without any response or movement. Officer Dawson then opened the unlocked door and leaned into the vehicle, whereupon he shook the driver (Aaron Szabo), asked if the driver was awake, and failed to get a response. At this point, Officer Dawson noticed an odor of intoxicants from inside the vehicle, figured the driver was intoxicated, and turned off the vehicle. Officer Dawson knew the driver was breathing, but he did not know if the driver was just asleep or was unconscious. Officer Dawson did not eliminate his medical concerns for the driver, but upon smelling the alcohol, Officer Dawson thought that the driver was probably drunk and passed out. After several failed attempts to wake up the driver, Officer Dawson did a sternum rub on the driver. Upon waking up, the driver was arrested for driving while intoxicated.

At a suppression hearing before the trial court, the Defendant filed a motion to suppress evidence, claiming an unlawful seizure under the Fourth Amendment. After hearing testimony, the trial judge made the following ruling:

I think that the testimony of Corporal Dawson is important to the extent that he did consider when he approached the vehicle – again the facts are not in dispute at all, about 4:00 a.m. on March 2nd, last year. At that particular time of day with the motor of the vehicle running, with the Defendant, Mr. Szabo apparently unconscious or sound asleep, described it a variety of ways, unresponsive when the officer bangs on the window or taps on the window



or beats on the window. Given the fact, at least in my view, that he at least, he, being the police officer, Corporal Dawson considered the fact that it may be a medical problem, although clearly he didn't know and as it turned out it was not, so I don't see any particular need to include that in the report. But I think it was clearly appropriate to continue the investigation by opening the door, and to some extent it can be argued and I think with some force, that the situation as presented and as described may well have constituted exigent circumstances. So once he opens the door, he being Officer Dawson, smells the odor of alcohol and then clearly has a right under 3.1 to continue his investigation by seizing the Defendant and so in my judgment – and it's an interesting case. And perhaps there are obviously not a number of cases in any jurisdiction that are identical, but nonetheless, I feel as though the seizure did not occur until the keys were removed from the ignition, the car was turned out – again, turned off after the odor of alcohol was apparent. So in my judgment the State has met its burden and the motion is denied.

Following the ruling of the trial court, Aaron Szabo entered a conditional guilty plea to the charge of driving while intoxicated, whereby he appealed the trial judge's ruling to the Arkansas Court of Appeals.

Argument and Decision by the Court of Appeals:

On appeal to the Arkansas Court of Appeals (Court), the defendant argued (1) that Officer Dawson illegally seized him by opening the driver's door and positioning himself between the open door and the seat occupied by the defendant; (2) that Officer Dawson had no objective reason to believe that the defendant was in immediate need of medical assistance and imminent danger of death or serious bodily harm, and thus, no exigent circumstances existed authorizing the officer's opening of the car

door and entry into the defendant's vehicle; (3) that the police officer illegally searched the defendant's vehicle by opening the driver's door and leaning into the driver's vehicle; and (4) that the police officer illegally seized the defendant by opening the driver's door, entering the defendant's vehicle, turning off the vehicle, and removing and taking possession of the keys to the vehicle.



The Arkansas Court of Appeals affirmed the ruling of the trial court wherein the Defendant's motion to suppress was denied. In doing so, the Court said that it had previously recognized the existence of an officer's "community caretaking function." The Court noted that in *Cady v. Dombrowski*, 413 U.S. 433, 441

(1973), the United States Supreme Court held that a search of the trunk of a disabled vehicle without a warrant did not violate the Fourth and Fourteenth Amendments, explaining that local police officers frequently engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. The Court also quoted language from its prior decision in *Blakemore v. State*, 25 Ark. App. 335 (1998), where it held that "although [the deputy] did not see any blood or physical injuries, [the deputy] did not know if the appellant was ill, drunk, or merely asleep. Given these circumstances we believe that [the deputy], as part of his community caretaking function, was justified in knocking on the appellant's window to question him and make an inquiry."

The Court pointed-out that Officer Dawson approached Szabo's vehicle and observed him unconscious in the front seat with the motor running. Furthermore, the Court reasoned that after Szabo failed to respond to Officer Dawson's knocking on his window, that Officer Dawson continued his community caretaking function in opening the unlocked door. The Court noted that the trial court



specifically found that once Officer Dawson opened the door, he smelled an odor of alcohol, which permitted Officer Dawson under Arkansas Rule of Criminal Procedure 3.1 to detain Szabo for further investigation. For these reasons, the Arkansas Court of Appeals held that the trial court properly denied Szabo's motion to suppress. Szabo's conviction for DWI therefore was affirmed.

Case: This case was decided by the Arkansas Court of Appeals on September 23, 2015, and was an appeal from the Washington County Circuit Court, Honorable William A. Storey, Judge. The case

*Presented by:
Taylor Samples
Senior Deputy
City Attorney*

The Check Engine Light Is On — U.S. v. Ball

I. Summary

The Defendant, Frolly Ball, entered a conditional plea to one count of conspiracy to distribute heroin, cocaine, and crack cocaine after the car in which he was a passenger was stopped by the Illinois state police. An inventory search uncovered the narcotics in the engine compartment. Ball's motion to suppress the evidence from the search was denied. He appealed the denial of his motion to suppress to the US Eight Circuit Court of Appeals. The denial was affirmed.

II. Facts

On November 12, 2010 Officer Chad Martinez of the Illinois state police stopped a vehicle heading west on Interstate 80 after it made a sudden change of lanes while passing his location. Officer Martinez became suspicious when he approached the car and saw multiple air fresheners hanging from the rearview mirror, several cell phones, and numerous fast food wrappers. He also observed that the driver of the car, Darrick Johnson, was visibly nervous when responding to questions. The car was registered to an Iowa woman, apparently Ball's girlfriend. Ball himself was seated in the passenger seat.

After Officer Martinez checked Johnson's driver's license and determined that it was suspended and that Ball did not have a license to show, he told them that he would have to impound the car because neither had a valid license.



Martinez then conducted an inventory search of the car as required by department policy for all towed vehicles. The policy restricts such searches "to those areas where an owner or operator would ordinarily place or store property or equipment," including the "[t]runk and engine compartments." When Martinez opened the hood of the car, he noticed fresh fingerprints on the air filter box. He opened the cover of the box and discovered two packages of cocaine. Martinez then arrested both men.

United States v. Ball, 2015 U.S. App. LEXIS 18817, 1-3 (8th Cir. Iowa Oct. 29, 2015)

III. Law

Law enforcement officers may conduct a warrantless search when taking custody of a vehicle to inventory the vehicle's contents "in order to protect the owner's property, to protect the police against claims of lost or stolen property, and to protect the police from potential danger." *United States v. Hartje*, 251 F.3d 771, 775 (8th Cir. 2001).

Officers may act on discoveries resulting from an inventory search. However, the inventory search may not be invoked as a ruse for a mere search for evidence. *United States v. Beal*, 430 F.3d 950, 954 (8th Cir. 2005). An inventory search "must be reasonable in light of the totality of the circumstances." *Id.*



IV. Analysis

The Defendant argued that the search was pretextual, though he conceded that the stop itself and resulting inventory search were constitutional. This was an interesting approach, as the law here in Arkansas may have afforded a different outcome. In Arkansas, a vehicle may be stopped for any traffic infraction. *Travis v. State*, 331 Ark. 7; 959 S.W.2d 32; 1998. The test is whether the officer has a good faith belief that an offense occurred, not whether the offense actually did occur. *Id.* In Arkansas, the offense precipitating a traffic stop must be an enumerated offense. *Barrientos v. State*, 72 Ark. App. 376; 39 S.W.3d 17 (2001). The latter meaning that a specific code provision must form the basis for the stop. It is not clear from the recited facts if the stop would have been held proper in this state.

As part of Defendant's argument that the search was pretextual, he claimed that the searching officer violated his own departmental policy in his conduct of the search. He argued that Officer Martinez, the searching officer, exceeded the scope of his department's policy by searching outside "areas where an owner or operator would ordinarily place or store property or equipment." *Ball*, 2015 U.S. App. LEXIS 18817.

Officer Martinez testified that it was standard department procedure to search an engine compartment and to open the air filter box. Martinez testified that he had conducted over a thousand inventory searches of vehicles, that he always searches the engine compartment, and that at least 90% of the time he also checks the air filter box where he has previously found narcotics and currency. The last bit of testimony would appear to support the Defendant's argument that the search was pretextual.

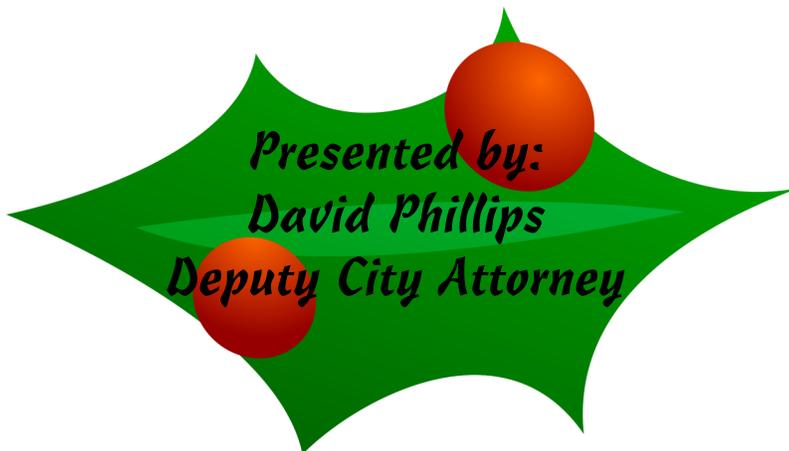
The Court did not further develop the admission that the officer routinely finds narcotics in that area of the



engine compartment. The inclusion of the fact that recent fingerprints were discovered on and near the filter box is also left completely undeveloped. This begs the question of whether fingerprints in that area may have led to reasonable suspicion, given the officer's experience and other factors present in the passenger compartment. But that question is left unanswered by the Court. The Court merely noted that the Law Enforcement policy at issue explicitly listed the engine compartment as an area to be searched. The Court did not analyze what type of personal equipment might be stored in either the engine compartment or in the engine filter box. The fact that the policy enumerated this area was not examined for a rational basis, but was merely accepted as constitutionally sound and formed the basis for denying Defendant's motion.

Important points:

- ♦ Written policies regarding inventory searches must be known and followed.
- ♦ In the judicial sense of Constitutional validity, the check engine light is on.



An Open Door— U.S. v. Vinson

I. Summary

A St. Cloud, Minnesota, police officer stopped a white SUV driving in her direction shortly after a reported shooting. During the stop, two handguns were seized from the SUV. Defendant Kenneth Vinson alleged lack of reasonable suspicion for the stop and illegal search in locating the guns in his motion to suppress the evidence. The Defendant conditionally pled to the charge of Felon in Possession of a Firearm and appealed the denial of his motion to suppress to the US Eight Circuit Court of Appeals. The denial of the motion to suppress was affirmed in a short decision.

II. Facts

On February 2, 2014 police officer Christina Zabrocki received a report of a shooting not too far from the location of her squad car by a suspect driving a white Buick. While Zabrocki began driving towards the shooting site with her lights and siren on, the dispatcher reported that the suspect's vehicle was a white SUV. Shortly thereafter, Zabrocki saw a white SUV driving towards her. She slowed her vehicle as the SUV passed and saw the occupants staring back at her. Zabrocki made a Uturn to follow the SUV which first failed to stop but eventually turned into a parking lot.



Zabrocki and fellow officers ordered the three occupants to exit the SUV and placed them all in handcuffs; one of the suspects was Kenneth Vinson. The officers proceeded to inspect the SUV to determine if there was anyone still inside it. One of the passengers had left the rear passenger door open while exiting. When Officer Nicholas Carlson crouched down to look through the open door, he saw a handgun underneath the front passenger seat. Sergeant Laurie Ellering later testified that she had also been able to see the handgun from her position standing next to Officer Carlson outside the SUV. After the first weapon was found, all three passengers were placed under arrest. A search of the vehicle revealed a second handgun tucked into the back seat cushions.

United States v. Vinson, 2015 U.S. App. LEXIS 19966, 2-3 (8th Cir. Minn. Nov. 18, 2015)

III. Law

An investigative stop is proper if a police officer "has a reasonable suspicion supported by articulable facts that criminal activity may be afoot." *United States v. Roberts*, 787 F.3d 1204, 1209 (8th Cir. 2015) (internal quotation marks omitted).

An object may be seized by the police without a warrant under the plain view doctrine if "(1) the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed, (2) the object's incriminating character is immediately apparent, and (3) the officer has a lawful right of access to the object itself." *United States v. Collins*, 321 F.3d 691, 694 (8th Cir. 2003) (internal quotation marks omitted).

IV. Analysis

No mention is made in this case as to whether the charged individual was the person initially sought by

police. This is not necessary in determining reasonableness of the officer's actions as the officers in question are only accountable for what they know or reasonably suspect at the time of the stop and seizure. The officer responding to the report of a shooting only had the description of the type and color of vehicle. A general description such as the one in this case is routinely attacked by defense attorneys as lacking reasonable suspicion. Please note that the Court did not hold that this level of information alone would or would not be sufficient. The Court tacked on "personal observations" of the officer as additional factors. The Court did not further define these observations at this point. The recited facts included the type and color of the vehicle, the fact that it was observed three minutes from the time of the call and the fact that the occupants were "staring back" at the responding officer. As to the significance of the last fact, no further analysis is rendered by the Court. But the timing was compared to a similar case, *United States v. Juvenile TK*, 134 F.3d 899, 902 (8th Cir. 1998), in which the vehicle was spotted in five minutes. The Court in that case found the interval of time was not excessive.

Proximity was part of the totality of circumstances in this case. But here again, the Court did not develop this factor, beyond noting that the incident occurred "not too far" from the point in which the officer encountered the vehicle.



On his motion to suppress the admission of the firearms, the Defendant also alleged that the officers did not have authority to look inside the vehicle once all the suspects had exited the white SUV. Vinson further alleged that officers entered the open door to look under the seat. The Court reviewed video and testimony and held that officers had not entered the vehicle, but instead crouched down to look under the seat from outside the vehicle. As a general rule, an officer may seize any evidence or contraband that is in plain view, if the officer does not alter the environment to create



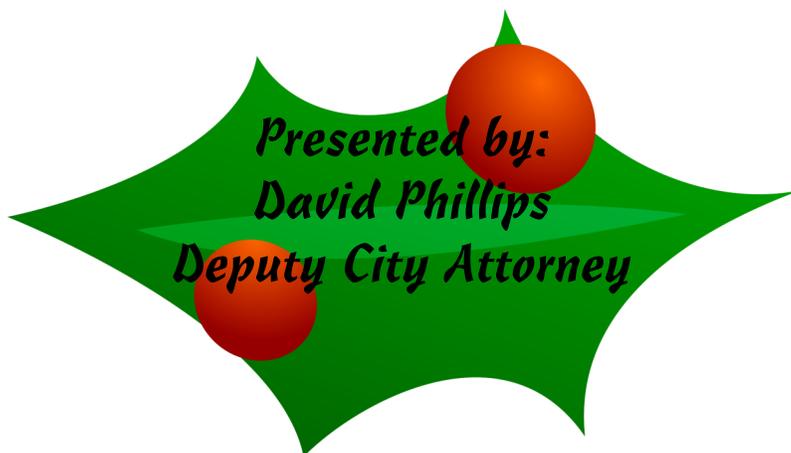
plain view and if the officer is lawfully in a place from which the evidence may be viewed. The third requirement, that an officer have lawful access to the contraband, need not be developed in this case as the diminished expectation of privacy in automobiles would allow an officer to enter the vehicle upon observation of contraband. Further, in this state, Arkansas Rules of Criminal Procedure, Rule 10.2 renders contraband subject to seizure when discovered, regardless of the means of discovery. However, contraband observed in a home may still require a warrant for seizure, again, depending on the specific circumstances.

In this case, the Court held that the firearm was visible by the plain view standard and lawfully seized. An interesting omission here was any discussion about the criminal nature of the firearm. In addition to concealed carry provisions, a person in Arkansas may lawfully possess a firearm while on a journey or if transporting the firearm. Merely seeing a firearm does not necessarily suggest illegal activity. Apparently, as this was an alleged shooting, the nature of the call, alone, made any observed firearm suspect and grounds for reasonable suspicion of related criminal activity. The same analysis should be applicable to the Springdale Code of Ordinances prohibition against discharging a firearm in the city limits, should a citizen report of violation be made.

The Court also failed to analyze whether the officers, at the time of observation, knew of the criminal record of the defendant. Such knowledge would immediately make the criminal nature of firearms possession obvious, regardless of the nature of the call or reason for stop. But the Court was satisfied that simply seeing a firearm in a vehicle occupied by others was sufficient to trigger reasonable suspicion of criminal activity.

Important points:

- Prevailing factors for reasonable suspicion for the traffic stop were: Type and color of vehicle; short time from call - three minutes; close proximity to the incident; and staring back at the officer.
- A firearm is inherently suspicious when responding to a shooting.
- An officer may place him/herself in any lawful position to observe the environment and act on what is observed.





Arkansas Court of Appeals Holds Defendant Lacked Standing to Assert Expectation of Privacy in Building Located on Open Fields

Facts Taken From the Case: On April 11, 2014, Captain Tom Smith of the Boone County Sheriff's Department received a call from a retired sheriff's department employee reporting that he had found several items of property that looked as if they were discarded from a vehicle on the ground near his property. While on his way to pick up the items, Captain Smith learned that a white pickup truck had been reported stolen the night before. Captain Smith collected the items, which included a cell phone that he determined belonged to Shane Ramsey, whom Captain Smith knew. Captain Smith observed a text message on the cell phone from Chris White, whom Captain Smith also knew.

Captain Smith and another investigator drove to White's home and talked with him under his carport. While there, they heard loud banging coming from a small building located about sixty to seventy feet away. White told Captain Smith that Shane Ramsey was in the building, and Captain Smith and the other officer walked to the front of the door to the building where they saw a white pickup truck. Captain Smith then knocked on the door, immediately opened it, and yelled "Sheriff's Office." Captain Smith entered the building with his gun raised, walked to Ramsey, who was holding a ratchet, and ordered him to drop it. Ramsey was arrested and searched, which led to the discovery of drug paraphernalia. Captain Smith did not have a search or arrest warrant, and Ramsey did not give him permission to enter the building. Ramsey claimed that he had been renting the building from White for \$200 per month

for the past six to eight months.

At a suppression hearing with the trial court, Ramsey filed a motion to suppress evidence, claiming that Captain Smith conducted a warrantless search of a building that he was in. Ramsey argued that the deputies illegally entered the building; searched it, seizing a white pickup truck that had been reported stolen; and searched him, seizing drug paraphernalia. Ramsey claimed that he had a reasonable expectation of privacy in the building, and that the warrantless search was per se unreasonable under the federal and state constitutions. Therefore, Ramsey argued that the truck and the drug paraphernalia seized as a result of the search should be suppressed.

The trial court denied Ramsey's motion to suppress evidence, concluding that, "being a non-residential structure in an open field on somebody else's property, who is not asserting any Fourth Amendment rights, clearly reduces the expectation of privacy that party should have in occupancy of such a building." Ramsey was subsequently convicted of possession of drug paraphernalia and theft of property and sentenced to four years in prison for each count.

Argument and Decision by the Court of Appeals: Ramsey appealed the trial court's denial of his motion to suppress to the Arkansas Court of Appeals, claiming that his Fourth Amendment rights were violated since Captain Smith had no warrant to search him or the building, and since no exception to the warrantless search required applied. In setting forth the



applicable law, the Arkansas Court of Appeals (Court) said that the U.S. and Arkansas Constitutions protect the right of the people to be secure in their homes, papers, and effects, against unreasonable searches and seizures. The Court also stated that property located on one's person or residence, or within the curtilage surrounding the residence may not be seized without a search warrant or pursuant to other legal means.

The Court rejected Ramsey's argument and held that the trial court did not clearly err in concluding that Ramsey lacked standing to assert a violation of his Fourth Amendment rights. The Court stated that the problem with Ramsey's argument is that the building where the search was conducted was not his home or his property, and Ramsey therefore lacked standing to challenge the search. The Court reasoned that a person is not entitled to automatic standing simply because he is present in the area or on the premises searched, but the pertinent inquiry is whether the defendant manifested a subjective expectation of privacy in the area searched and whether that expectation is reasonable. The Court concluded that Ramsey failed to establish a legitimate expectation of privacy in the building because he did not own the building (White did), and White directed the officers to his building, advising them Ramsey was in it. Finally, the Court agreed with the trial court that Ramsey's claim that he was renting the building lacked veracity, and the Court pointed-out that neither White nor Ramsey informed Captain Smith of a rental agreement on the day the building was searched. For all the above reasons, the Court affirmed the trial court's denial of Ramsey's motion to suppress evidence.

Case: This case was decided by the Arkansas Court of Appeals on November 18, 2015, and was an appeal from the Boone County Circuit Court, Honorable Gordon Webb, Judge. The case citation is *Ramsey v. State*, 2015 Ark. App. 669.



*Presented by:
Taylor Samples
Senior Deputy
City Attorney*

Arkansas Court of Appeals Holds that Motion to Suppress Properly Denied Since 3.1 Seizure was Valid and No Miranda Violation Occurred

Facts Taken From the Case: On April 16, 2011, Conway Police Officer Andrew Birmingham responded to a call that Antwan Fowler had pointed a gun at someone on Oak Street and then left in a black Ford Taurus. Another officer located a black Ford Taurus at a nearby gas station, and Officer Birmingham pulled up behind the vehicle and relayed the license plate number, which returned to Antwan Fowler. Officer Birmingham rolled down the window of his patrol car and saw that a man, later identified as Fowler, was standing near the vehicle. Officer Birmingham asked if they could talk, and in response, Fowler lifted his shirt to show his waistband. Officer Birmingham asked Fowler to turn around so that Officer Birmingham could verify that Fowler did not have a weapon. Fowler approached Officer



Birmingham's vehicle on foot, and Officer Birmingham asked Fowler if he had any weapons on his person. Fowler said that he did not, but that he did have a gun in his car. At that point, for safety purposes, Officer Birmingham handcuffed Fowler but told him that he was not under arrest. Officer Birmingham then read Fowler Miranda rights and activated his audio/video recorder. In the video, Fowler is shown to again admit to having a gun in his vehicle and being a convicted felon. Officer Birmingham admitted that when he made contact with Fowler and asked to speak with him that Fowler was not free to leave.

Fowler argued to the trial court that Officer Birmingham did not have probable cause or particularized suspicion to justify questioning Fowler and that Fowler was in custody and should have been Mirandized as soon as Officer Birmingham approached Fowler. Therefore, Fowler claimed that his statements made to Officer Birmingham and the discovery of the weapon should have been suppressed. The trial court denied Fowler's motion to suppress evidence, and Fowler was subsequently found guilty by a jury to possession of a firearm by certain persons and sentenced to eighteen years' imprisonment. Fowler appealed the trial court's denial of his motion to suppress to the Arkansas Court of Appeals.

Argument and Decision by the Court of Appeals:

On appeal to the Arkansas Court of Appeals (Court), Fowler claimed that Officer Birmingham's stop and seizure of Fowler could not have been based upon any reasonable articulated suspicion sufficient to authorize even an investigatory stop as Officer Birmingham had no reason to believe that a crime was afoot. The State countered Fowler's argument by claiming Officer Birmingham did have reasonable suspicion that the man standing near the Taurus was Fowler, and that Fowler may have committed an aggravated assault. The State noted that there was a connection

between the reported crime, the black Ford Taurus registered to Fowler, and Fowler's proximity to the Taurus.

The Court first set forth the applicable law by quoting Rule 3.1 of the Arkansas Rules of Criminal Procedure:

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

The Court said that reasonable suspicion is defined as a suspicion that is based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. Finally, the Court noted that an investigative stop is justified when, under the totality of the circumstances, the police have a specific, particularized, and articulable reason indicating that the person may be involved in criminal activity.

Next, the Court set forth the rule on Miranda. The Court stated that Miranda's safeguards apply as





soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. The Court said that Miranda warnings are not required simply because the questioned person is a suspect, and that a person is "in custody" for purposes of Miranda warnings when he is deprived of his freedom by formal arrest or restraint on freedom of movement of the degree associated with formal arrest. The Court continued that the relevant inquiry is how a reasonable person in the suspect's shoes would have understood his situation. Finally, the Court pointed-out that a lawful detention under Rule 3.1 does not curtail a person's freedom of action to a degree associated with a formal arrest, and a Miranda warning is not required.

In addressing the facts as presented by Officer Birmingham and Fowler, the Court held that Officer Birmingham's initial approach was based on reasonable suspicion, considering the matching vehicle description, its proximity to the location of the alleged aggravated assault, and the identification of the vehicle as belonging to Antwan Fowler. The Court also held that Officer Birmingham's initial inquiry of whether Fowler had any weapons on his person was not the result of a custodial interrogation and did not therefore require a Miranda warning. The Court noted that Officer Birmingham testified that he asked the initial question as Fowler approached his vehicle, before placing Fowler in handcuffs, and that Officer Birmingham did Mirandize Fowler after placing him in handcuffs. Finally, the Court stated that the transcript of the recording clearly established that Fowler told Officer Birmingham, after the officer had read Miranda rights, that Fowler had a gun and was a felon in possession of a firearm. For these reasons, the trial court's denial of Fowler's motion to suppress was affirmed.

Case: This case was decided by the Arkansas Court of Appeals on April 15, 2015, and was an appeal from the Faulkner County Circuit Court, David Reynolds, Judge. The case citation is *Fowler v. State*, 2015 Ark. App. 232.

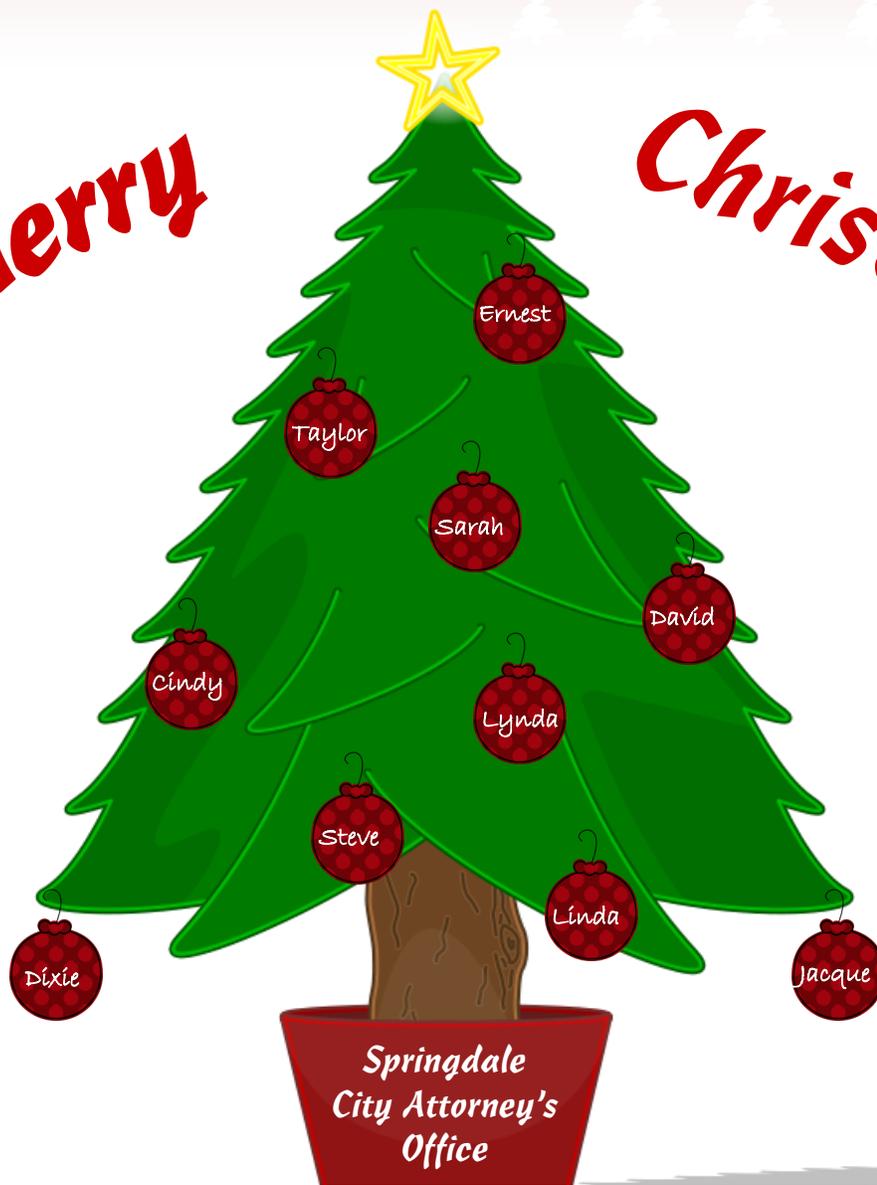


City Attorney Law Letter
Is a publication of the
Springdale City Attorney's Office
201 Spring Street
Springdale, AR 72764
479-570-8173



Merry

Christmas



*and Happy New Year to
one and all !*