

# C.A.L.L.

January 1, 2015

City Attorney Law Letter

Issue 15-01

## Duty to Persons Not in Custody (Civil Rights)

Presented by:  
David Phillips  
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Bradley Scott Gladden was found dead of environmental hypothermia on December 12, 2010. Alcohol was listed as a contributing factor. The evening before, Gladden was transported, at his request, by North Little Rock Police officers to an isolated interstate off-ramp east of Little Rock at the Pulaski County line. This law suit ensued on a theory of wrongful death under state law and of a civil rights violation of 42 U.S.C. § 1983.

### I. Facts of the Case

A little after midnight on December 12, 2010, Officer Richbourg responded to a 911 call from the Waffle House, a restaurant near Prothro Junction in North Little Rock. The dispatcher informed Richbourg that "a white male wearing a beige jacket and jeans [had been] inside the business for about two hours refusing to leave." When Richbourg arrived, he saw Gladden, who matched the dispatcher's description. Security camera footage from inside the Waffle House shows that Gladden was wearing jeans, a blue striped shirt, a beige coat with a plaid lining, and tennis shoes. Gladden smelled of alcohol and had cuts on his face. He looked like he had been beaten up.

Gladden complied with Richbourg's request to accompany him outside the restaurant. Richbourg conducted a pat-down search of Gladden and found a small, unopened bottle of whiskey in Gladden's pocket, which he placed on the ground. Richbourg inquired about the cuts on Gladden's face, and Gladden explained that he had been attacked by two men at a gas station earlier that evening. Gladden declined Richbourg's offer to call an ambulance. Richbourg then checked to see if there were any outstanding warrants for Gladden and learned that there were none.

Around this time, Officer Imhoff arrived to assist Richbourg. Imhoff was familiar with Gladden, having on at least two previous occasions called emergency medical services on Gladden's behalf after determining that Gladden was excessively intoxicated. On another occasion, Imhoff had



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given Gladden a ride to the Lonoke County line on Interstate 40 and left Gladden at a place Gladden said was a half mile away from a family member's house. According to Imhoff, Gladden had asked to be let out a half mile away from the house because he did not want a police cruiser to approach the residence.

Gladden was also the subject of a departmental memorandum written by Sergeant Rick Bibb of the North Little Rock Police Department. Bibb's memorandum requested that any officer who arrested Gladden for public intoxication file a detailed report for use in civilly committing Gladden for rehabilitative purposes. Both Imhoff and Richbourg had received this memorandum.

On this particular night, it appeared to the officers that Gladden was only mildly intoxicated. According to both officers, Gladden was not slurring his speech and appeared coherent. Four Waffle House employees testified that Gladden appeared intoxicated but not excessively so. Imhoff, who, as recounted above, had seen Gladden in a severely intoxicated state, testified that "[i]f I had to guess just from the times I've normally dealt with him, he'd probably only had maybe a little bit of alcohol and I'm not sure as to how recent." Gladden told the officers that he was not drunk and asked them not to take him to jail. The officers asked Gladden why he was at the Waffle House, to which Gladden replied that he was looking for a ride to his sister's house in Lonoke. Gladden then asked the officers if they could take him there. Richbourg responded that neither he nor Imhoff could take him all the way to Lonoke because it was "outside [their] area," but Richbourg offered to take Gladden to the Lonoke County line. Gladden agreed.

Gladden asked Imhoff if he could use Imhoff's phone to call his sister so that she could pick him up at the county line. Imhoff told Gladden that he would have to use the phone inside the Waffle House. Unaware of this exchange, Richbourg told Gladden to pick up his whiskey bottle and get in the back of his squad car if he wanted a ride. Gladden then retrieved the bottle and entered the back seat of Richbourg's squad car without having called his sister. Richbourg and Gladden departed the Waffle House and set off towards the county line on Interstate 40 at approximately 12:27 a.m.

Richbourg initially intended to drop Gladden off at the Kerr Road exit near the Lonoke County line. But the Kerr Road exit was isolated and dark, and Richbourg felt it would be unsafe to leave Gladden there. Richbourg instead proceeded to the next exit, the Remington Road exit, and let Gladden out there.

The temperature outside was between 25 and 35 degrees Fahrenheit when Gladden exited Richbourg's squad car at the Remington Road exit. The lights of the nearby Remington Arms factory shone a few hundred feet away. Aside from the factory the area was completely undeveloped.

Gladden asked Richbourg to direct him to the nearest gas station. Richbourg was unsure where the nearest gas station was, but he told Gladden to seek assistance at a guard station at the factory. The station itself was not visible from the Remington Road exit; it lay on the opposite end of a fenced-in parking lot, about a thousand feet from where Gladden stood as the crow flies, and about a half mile by foot. A guard on duty that night testified by affidavit that the guard station was operational and that the guards would have assisted Gladden had he approached the station. After Gladden started walking in the direction of the guard station, Richbourg departed the intersection and returned to North Little Rock.

Gladden was found dead at approximately 10:37 a.m. the next morning. The cause of death was environmental hypothermia, with intoxication as a contributing factor (his blood alcohol content was .34). Gladden's body was found in the grass at a closed weigh station along Interstate 40, about a half mile from where Richbourg had left him, in the opposite direction of the factory.

*Gladden v. Richbourg*, 759 F.3d 960, 962-963 (8th Cir. Ark. 2014)

## II. Analysis.

The Defense claimed that the officers were entitled to qualified immunity for their acts in this case. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). *Id.* at 964. Qualified immunity would serve to defeat the underlying officer liability and also dispose of the claims against the supervisors and the city, as a result. The



Court noted that the facts clearly indicate that the act of transporting a person is a discretionary function.

The Plaintiff also argued that the act of transporting Gladden created a "special relationship" which entitled Gladden to assistance. Citizens are generally not entitled to police assistance unless the police affirmatively limit the individual's ability to care for themselves. Custody is one such instance and creation of a special relationship is another. However, the Court also noted that Gladden voluntarily accepted the ride, therefore no special relationship existed.

The next question in this case had to do with the plaintiff's allegation that Gladden was in custody. The police have a duty to protect those in custody. The argument was that the doors in the back of the police car could not be opened from inside the car and therefore Gladden was not free to leave. This argument was rejected by the Court for two reasons. First, testimony indicated that Gladden would have been released anywhere he wanted or returned to where he was taken from, at Gladden's own request. Secondly, the harm that befell Gladden occurred after he was released from the police car. In either event, this would resolve the question of police duties to Gladden, provided Gladden had the capacity to appreciate his circumstances. The question facing the Court was whether the officers, by their acts, place the subject in danger.

To establish a constitutional violation under a state-created danger theory, a plaintiff must prove (1) that he was a member of a limited, precisely definable group; (2) that the defendants' conduct put the plaintiff at a significant risk of serious, immediate, and proximate harm; (3) that the risk was obvious or known to the defendants; (4) that the defendants acted recklessly in conscious disregard of the risk; and (5) that, in total, the defendants' conduct shocks the conscience. When a mentally competent individual voluntarily assumes a risk with state assistance, the resulting danger is not necessarily state-created. Clearly, had Gladden been sober, the act of leaving him at the interstate exit would not have created a significant risk of immediate harm. As with many cases involving state-created danger, Court analysis focuses on whether the conduct in question "shocks the conscience." Mere negligence, or even gross negligence alone can not meet this element. "The constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability" *Hart v. City of Little Rock*, 432 F.3d 801, 806 (8th Cir. Ark. 2005).

The dispositive issue in this case was the subject's level of intoxication when he was left in near freezing weather at an isolated location. Did Gladden have the capacity to understand his situation? Circumstances that are harmless to a sober person may be dangerous to one who is intoxicated or incompetent. Case law is replete with examples of intoxicated individuals being evicted or otherwise placed in the elements by law enforcement officers who then are sued once the individual dies or is otherwise harmed as a result of the circumstances. The Court took note that signs of manifest intoxication in other cases have included the inability to walk unassisted, the inability to put on garments, and the inability to sign documents.

The subject in this case was factually determined to be only mildly intoxicated at the time of the encounter. The testimony that proved this included the witnesses at the restaurant, who characterized Gladden's behavior as "doing normal things", "walking on his own," and as generally being not as drunk as he usually was. All employees also testified that they did not observe Gladden consume any alcohol from the time he entered the restaurant. Video surveillance also corroborated all testimony.

### III. Conclusion.

The Court reasoned that the subject was able to make decisions for himself and should have been able to reach the near-by guard shack of the Remington Arms factory near the interstate off-ramp where he was dropped off. Therefore, qualified immunity was granted to the officers and the claims were dismissed.

This case could have gone either way. The testimony was not that the decedent was sober, but merely that he was not as drunk as usual. The ultimate disposition of the unopened bottle of whiskey initially in Gladden's possession was not addressed in the appellate decision. Did the officers take it, or was that the instrument of Gladden's demise on that cold, lonely stretch of road?



## Arkansas Court of Appeals Holds That State's BAC Test on DWI was Properly Admitted Since Officer Provided Defendant Reasonable Assistance in Obtaining Additional Test

Presented by:  
Taylor Samples  
Deputy City Attorney

### Facts Taken From the Case:

Christopher Ebel was stopped at 1:30 a.m. on December 2, 2011, when Officer Joe Pruitt of the Benton County Sheriff's Office saw Ebel's SUV cross the center line four times. Officer Pruitt noticed that Ebel's eyes were bloodshot and watery, that he had a bottle of Listerine in his hand and smelled strongly of it, that he fell against the car upon getting out, and that he admitted to having drunk three or four beers. Officer Pruitt performed two field-sobriety tests and then took Ebel to the county sheriff's office, where a breath test was administered that showed Ebel's blood-alcohol content to be .089 percent. Ebel asked for a second test and said that he could pay for it. Officer Pruitt then transported Ebel to Mercy Hospital in Rogers for a test to be administered for \$45.00. Ebel gave the hospital attendant his debit card, which was twice declined. Ebel then asked Officer Pruitt if he could call his parents in Bella Vista so that they could bring money to the hospital, and Officer Pruitt denied his request.

At trial, Ebel filed a motion to exclude the results of the .089 breath test since Officer Pruitt refused to allow him to call his parents to bring money for the second test at the hospital. After a hearing, the trial court denied the motion and found that Officer Pruitt had provided Ebel with assistance in obtaining the second test that was reasonable under the circumstances by transporting Ebel to the hospital. Following the trial court's ruling on the admission of Officer Pruitt's breath test, Ebel was found guilty of DWI second offense.

### Argument and Decision by the Arkansas Court of Appeals:

On appeal to the Arkansas Court of Appeals (Court), Ebel argued that the trial court erred when it denied his motion to exclude the results of the State's breathalyzer test because Officer Pruitt did not allow Ebel to have an

additional, independent blood test administered. The Court first set forth the applicable law, starting with Arkansas Code Annotated § 5-65-204(e), which says:

(e)(1) The person tested may have a physician or qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any test administered at the direction of a law enforcement officer.

(2) The law enforcement officer shall advise the person in writing of the right provided in subdivision (e)(1) of this section and that if the person chooses to have an additional chemical test and the person is found not guilty, the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test.

(3) The refusal or failure of a law enforcement officer to advise a person of the right provided in subdivision (e)(1) of this section and to permit and assist the person to obtain a chemical test under subdivision (e)(1) of this section precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.

Additionally, the Court said that when a defendant moves to exclude a test pursuant to A.C.A. § 5-65-204(e), the State then bears the burden of proving by a preponderance of the evidence that the defendant was advised of his right to have an additional test performed and that he was assisted in obtaining a test. Furthermore, the Court noted that the State's test result may be admitted into evidence if there was substantial compliance with A.C.A.



§ 5-65-204(e). Finally, the Court stated that the officer must provide only such assistance in obtaining an additional test that is reasonable under the circumstances. Whether the assistance provided was reasonable under the circumstances is a question of fact for the trial court to decide, and the trial court must weigh the evidence and resolve the credibility of the witnesses.

Turning to the facts presented to it by Officer Pruitt and Christopher Ebel, the Court noted that A.C.A. § 5-65-204(e) required Officer Pruitt to advise Ebel of his right to obtain a second test and to permit and assist him in obtaining it. The Court said that it is undisputed that Ebel was advised of his right to a second test. Therefore, the Court needed to decide whether Officer Pruitt provided such assistance in obtaining the second test that was reasonable under the circumstances. In answering this question, the Court affirmed the ruling of the trial court and held that the trial court did not clearly err in finding that Officer Pruitt's actions constituted reasonable assistance under the circumstances. The Court reasoned that Officer Pruitt took Ebel to Mercy Hospital in Rogers, where Ebel's debit card was twice declined. Additionally, the Court noted that it was 2:00 a.m., that Ebel's parents lived in another town, and that Ebel did not mention needing additional funds for the test until his debit card was declined. Finally, the Court concluded that Officer Pruitt had no duty to allow Ebel to call his parents to bring him money. For all of these reasons, the Court affirmed the ruling of the trial court allowing the admission into evidence of the State's .089 blood-alcohol content test.

**Case:** This case was decided by the Arkansas Court of Appeals on October 29, 2014, and was an appeal from the Benton County Circuit Court, Honorable Brad Karren, Judge. The case citation is *Ebel . State, 2014 Ark. App. 588*.

## Community Care-Taking and Consensual Encounters

Presented by:  
David Phillips  
Deputy City Attorney

At approximately 1:40 a.m. on May 20, 2012, Trooper Justin Schmiedt observed a broken-down vehicle on the side of the road one to two miles outside Winner, South Dakota. Schmiedt parked behind the vehicle and exited his squad car to assist the motorists. As he approached, Salgado and another man immediately walked from the front of the disabled car to Schmiedt and told him several times that they needed no help. Schmiedt found this response to his presence unusual based on his experience aiding motorists. When he shined his flashlight on the back seat of the vehicle, Schmiedt noticed a third person and a jacket embroidered with a large marijuana leaf; the jacket was partially covering what appeared to be electronic devices.

Schmiedt asked the men who had been driving the vehicle, and Salgado said that he had been. Schmiedt asked Salgado for his driver's license, and Salgado responded that he did not have one. Schmiedt brought Salgado to the squad car to process him for operating a motor vehicle without a license. Schmiedt provided a dispatcher with the name and date of birth that Salgado gave him, but no records in the state databases of Minnesota and South Dakota matched the information. Schmiedt asked Salgado several questions about himself, his associates, and their points of travel. Salgado said they were traveling from Sioux Falls to Mission, South Dakota, and he was unable to identify either of the two passengers, except for knowing one as "Homie."

At that point, at approximately 1:46 a.m., Schmiedt asked the dispatcher how far away the nearest on-duty drug-detection dog was, but he was told that none was nearby. Schmiedt testified in the suppression hearing that Salgado's general behavior in the interaction and his evasive answers



routine questions piqued Schmiedt's suspicion "that there was some type of criminal activity going on." He continued attempting to identify Salgado, and he asked Salgado several times for consent to search the vehicle for illegal drugs and other contraband, but Salgado refused to consent and insisted that there were no drugs in the vehicle. After Salgado refused, at approximately 1:55 a.m., Schmiedt called off-duty Trooper Brian Biehl, who was at his home approximately forty-five miles away, and asked him to bring a drug-detection dog to the scene. Schmiedt also called a deputy for assistance and continued his efforts to obtain information about Salgado and his passengers.

Biehl arrived at approximately 2:45 a.m. with his drug-detection dog. The dog alerted at one location on the vehicle and indicated at another, and the officers conducted a search. As Biehl explained in the suppression hearing, an "alert" is a change in the dog's breathing pattern, while an "indication" is a more concrete signal that the dog has detected a particular odor. The officers recovered a cigarette box containing methamphetamine, a hat band containing trace amounts of marijuana, and a glass pipe. Schmiedt arrested Salgado and the two passengers.

*United States v. Salgado*, 761 F.3d 861, 863-864 (8th Cir. S.D. 2014)

Found guilty of felony drug charges, appellant Salgado challenged his US District Court conviction on the grounds of an illegal detention. He argued that once he declined the officer's offer of assistance, the investigation became an unreasonable seizure under the Fourth Amendment.

The officer's presence was held by the Court to be a consensual motorist assist. The Eight Circuit held that "Police officers reasonably may engage in a community-caretaking function with respect to motor vehicles and traffic". Merely approaching a vehicle, the Court reasoned, does not amount to a seizure under the Fourth Amendment.

"[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required."

*Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (internal quotation and citation omitted).

*United States v. Salgado*, 761 F.3d 861, 865 (8th Cir. S.D. 2014)

The fact that the individuals were free to leave did not require the Law Enforcement Officer to leave. Additionally, the officer may request information from the individuals to establish a record of the citizen contact. The Officer in this case asked for information from the admitted driver of the vehicle, to include his name, date of birth and status of his driver's license. The name the officer was given did not match anything in the state database. This latter fact was in dispute. But the Court reasoned that it did not matter if the Defendant gave his real name and the Officer misunderstood. The relevant inquiry was the officer's state of mind and the officer's testimony was that the Defendant spelled his name in a manner that did not match the database. In either event, the Defendant admitted he had no driver's license, so the officer had probable cause to cite him for that offense.

The Court of Appeals also held that the nearly one hour delay in arrival of the dog was not unreasonable. The Court acknowledged the remoteness of the location and found that the delay was not due to any lack of diligence by law enforcement.

But a necessary predicate to making this determination was the existence of reasonable suspicion of drug activity prior to the delay. The Court listed the factors of unfamiliarity with fellow travelers, adamant and immediate refusal of any help, the irregularities of the Defendant's name and his lack of a driver's license, and also the jacket embroidered with the marijuana leaf, the latter factor the Court specifically reasoned could be associated with potential drug activity. All these factors materialized in the first 6 minutes of the encounter and provided the officer with a reasonable, articulable suspicion sufficient to justify an investigatory stop and a dog sniff. By having reasonable suspicion to justify a dog sniff, the 15 minute clock stops and the standard of reasonability starts. Once the dog both indicated and alerted on the car, probable cause existed for a search.



The conviction for distributing and possessing with intent to distribute a controlled substance was **AFFIRMED**.

## Arkansas Court of Appeals Holds that Officer Performed Constitutionally Valid Terry Frisk of Defendant Who Was Ordered Out of Vehicle

Presented by:  
Taylor Samples  
Deputy City Attorney

### FACTS TAKEN FROM THE CASE

Sergeant Behnke of the North Little Rock Police Department was working traffic enforcement in Maumelle, Arkansas, on the evening of June 1, 2012, when he observed a Dodge Charger that was later determined to be driven by Reggie Blair travelling at an estimated speed of 50 miles per hour in a 30 mile-per-hour zone. Sergeant Behnke did not have radar, but he estimated the vehicle's speed based on his more than 20 years of experience as a police officer, his experience as a certified radar operator and instructor, and his mandatory ability to estimate vehicle speeds within a small window. After following the car for about one minute, Sergeant Behnke initiated a traffic stop. Upon approach to the vehicle, Sergeant Behnke heard the vehicle's sole occupant, Reggie Blair, say "What do you want with me mother fucker?" Sergeant Behnke explained to Blair that he was stopped for driving too fast, and he then asked for Blair's driver's license, registration, and proof of insurance. Blair produced his driver's license, and Sergeant Behnke went back to his patrol car.

At this time, Officers Rappold and Nannen arrived as back up. Officer Rappold stood at the rear passenger side of Blair's car to keep watch while Sergeant Behnke completed the paperwork. Officer Rappold heard Blair say something, so Officer Blair walked to the front of Blair's vehicle, where he heard Blair say, "You going to shoot me, mother fucker?" Officer Rappold then asked Blair to exit the vehicle, and Blair replied "no" and locked the door to his vehicle. Officer Rappold asked a second time, and Blair unlocked the driver's side door and exited his car. Officer Rappold detected on Blair a strong odor of

intoxicants, and both Officers Rappold and Nannen described Blair's demeanor as "aggressive." At this time, Officer Rappold patted down Blair's clothing and felt what he thought was marijuana in Blair's pants pocket, which was consistent with the strong, unique odor coming from Blair while he was both inside and outside his vehicle. Officer Rappold did not need the assistance of a drug-detection dog to verify that the odor was marijuana. After patting down Blair and placing him in handcuffs, Officer Rappold removed the plastic bags of marijuana from Blair's pocket. Officer Rappold then told Blair that his car would be inventoried and impounded because there was no one else present to drive it. The inventory search was done prior to the car being towed, and officers found a loaded firearm with additional ammunition in the car's console. Officer Rappold testified that Blair told him that he had the gun for protection.

At the trial court, Blair filed a motion to suppress claiming that he and his vehicle were impermissibly stopped, detained, and searched. Blair's motion was denied, and after a jury trial in Pulaski County Circuit Court, Blair was convicted of being a felon in possession of firearm and was sentenced as a habitual offender to twelve years in prison. Blair then appealed this decision to the Arkansas Court of Appeals.

### ARGUMENT AND DECISION BY THE COURT OF APPEALS

On appeal to the Arkansas Court of Appeals (Court), Blair claimed that his continued detention, the search of his person, and the search of his car following arrest were illegal,



and therefore the evidence of the gun found in his car should have been suppressed. In setting forth the applicable law, the Court said that warrantless searches are presumptively unreasonable, and the State has the burden to establish an exception to the warrant requirement. Additionally, an officer may stop a motorist if he observes a moving violation, regardless of whether the driver is actually guilty of the observed offense. A police officer may arrest any person without a warrant if the officer has reasonable cause to believe that the person has committed a felony or any violation of the law in the officer's presence. Furthermore, where an officer has a valid basis to stop the vehicle and detain the driver, if that officer has reasonable suspicion that the driver is armed and dangerous to the officer or to others, the officer may search the outer clothing of the person and his immediate surroundings, seizing any weapon or other dangerous thing that is usable against the officer or others. Also, an officer making a valid traffic stop may, as a matter of course, order the driver to exit the vehicle and do a safety-frisk pat down. The safety-frisk pat down shall not be more extensive than is reasonably necessary to ensure the safety of officers or others. The test is whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or the safety of others was in danger, and the officer's reasonable belief must be based on specific and articulable facts.

In addressing Blair's claim that Officer Rappold conducted an unconstitutional pat-down (also known as a Terry Frisk) which resulted in an unconstitutional seizure of the contents of Blair's pocket and vehicle, the Court held that the trial court did not clearly err in concluding that Officer Rappold performed a constitutionally valid safety-frisk of Blair. The Court reasoned that there was objective evidence testified to by Officer Rappold that Blair posed a potential threat by his consistently aggressive demeanor and questioning whether the officer intended to shoot him. Additionally, the Court noted that Blair's aggressive behavior was corroborated by Officer Nannen. Furthermore, the Court pointed-out that Officer Rappold testified that he had already formed a legitimate reason to suspect that Blair was in possession of marijuana, even before Blair exited the car. The Court stated that the marijuana odor emanating from Blair and the vehicle alone provided reasonable suspicion to detain Blair to determine the lawfulness of his conduct, to search the vehicle, and to arrest him, depending on the circumstances. In conclusion, the Court held that it had no hesitancy in holding that the denial of Blair's motion to suppress was not clearly against the preponderance of the evidence.

**Case:** This case was decided by the Arkansas Court of Appeals on November 5, 2014, and was an appeal from the Pulaski County Circuit Court, Barry Sims, Judge. The case citation is *Blair v. State*, 2014 Ark. App. 623.

## Supreme Court of United States Holds that Officer Performing Knock and Talk Was Entitled to Qualified Immunity

Presented by:  
Taylor Samples  
Deputy City Attorney

### FACTS TAKEN FROM THE CASE

On July 3, 2009, the Pennsylvania State Police received a report that a man named Michael Zita had stolen a car and two loaded handguns. The report also said that Zita might have fled to the home of Andrew and Karen Carman. The department sent Officers Jeremy Carroll and Brian Roberts to the Carmans' home to investigate. Neither officer had been to the home before. The officers arrived in separate patrol cars around 2:30 p.m. The Carmans' house sat on a corner lot, and the front of the house faced a main street while the left faced a side street. The officers first

drove to the front of the house, but after seeing that parking was not available there, the officers turned right onto the side street. While turning, the officers saw several cars parked side-by-side in a gravel parking area on the left side of the Carmans' property. The officers parked in the first available spot at the far rear of the property:

The officers exited their patrol cars, and while looking toward the house they observed a small structure (either a carport or shed) with its door open and a light on. Officer Carroll walked over, stuck



his head inside, and announced "Pennsylvania State Police." No one was in the shed, so the officers continued walking toward the house. While approaching, they saw a sliding glass door that opened onto a ground-level deck. Carroll thought the sliding glass door looked like a customary entryway, so he and Officer Roberts decided to knock on the door. As the officers stepped onto the deck, a man came out of the house and belligerently and aggressively approached the officers. The officers identified themselves, explained they were looking for Michael Zita, and asked the man for his name. The man refused to answer and instead turned away and appeared to reach for his waist. Carroll grabbed the man's right arm to ensure that he was not reaching for a weapon, and the man twisted away, lost his balance, and fell into the yard.

At this point, a woman came out of the house and asked what was happening. The officers again explained that they were looking for Zita. The woman then identified herself as Karen Carman, identified the man as her husband, Andrew Carman, and told the officers that Zita was not there. The officers then searched the house after obtaining consent to do so, but they did not find Zita. The officers then left, and the Carmans were not charged with any crimes.

Subsequently, the Carmans sued Officer Carroll in Federal District Court under 42 U.S.C. § 1983, alleging that Carroll unlawfully entered their property in violation of the Fourth Amendment when he went into their backyard and onto their deck without a warrant. At trial in the district court, Carroll argued that his entry was lawful under the "knock and talk" exception to the warrant requirement, an exception that Carroll claimed allows officers to knock on someone's door, so long as the officers stay on those portions of the property that the general public is allowed to go on. The Carmans responded that a normal visitor would have gone to their front door, rather than into their backyard or onto their deck. After a jury trial at the district court, the jury returned a verdict in favor for Carroll.

Following the jury trial, the Carmans appealed to the U.S. Court of Appeals for the Third Circuit. The Third Circuit reversed in part, holding that Officer Carroll violated the Fourth Amendment as a matter of law, reasoning that the "knock and talk" exception requires police to begin their

encounter at the front door, where they have an implied invitation to go. The Third Circuit also concluded that Officer Carroll was not entitled to qualified immunity because his actions violated clearly established law. The Third Circuit reversed the judgment of the district court and held that the Carmans were entitled to judgment as a matter of law. Officer Carroll then appealed the decision of the Third Circuit to the Supreme Court of the United States.

#### **ARGUMENT AND DECISION BY THE SUPREME COURT OF THE UNITED STATES**

The Supreme Court of the United States (Court) set forth the applicable law. The Court said that a government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. The Court continued that a right is clearly established only if its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right. The Court explained that in other words, existing precedent must have placed the statutory or constitutional question beyond debate. The Court stated that this doctrine gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.

In its holding, the Court reversed the ruling of the Third Circuit that Carroll was not entitled to qualified immunity and concluded that the Third Circuit erred when it held that Carroll was not entitled to qualified immunity. The Court reasoned that the Third Circuit cited only one case to support its decision that Carroll was not entitled to qualified immunity, *Estate of Smith v. Marasco*, 318 F.3d 497 (CA3 2003), a case which the Court said does not clearly establish that Carroll violated the Carmans' Fourth Amendment rights. The Court noted that in the view of the Third Circuit, *Marasco* stands for the proposition that a knock and talk must begin at the front door. The Court opined that the Third Circuit was wrong in its conclusion about *Marasco*, which according to the Court held that an unsuccessful knock and talk at the front door does not automatically allow officers to go onto other parts of the property. The Court pointed out that *Marasco* did not hold that knocking on the front is required before officers go onto other parts of the property



that are open to visitors. The Court said that *Marasco* simply did not answer the question whether a knock and talk must begin at the front door when visitors may also go to the back door.

Furthermore, the Court reasoned that to the extent *Marasco* says anything about the facts presented between Carroll and the Carman, it arguably supported Officer Carroll's view. The Court said that *Marasco* noted that "officers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may," and that "when the police come on to private property ... and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment." The Court noted that had Carroll read those statements from the *Marasco* case before going to the Carmans' home that Carroll may have reasonably concluded that he was allowed to knock on any door that was open to visitors. Additionally, the Court opined that the Third Circuit's decision is even more perplexing in comparison to the decisions of other federal and state courts, which have rejected the rule adopted by the Third Circuit.

In conclusion, the Court said that it is not deciding whether a police officer may conduct a knock and talk at any entrance that is open to visitors rather than only at the front door. However, the Court stated that whether or not the constitutional rule applied by the Third Circuit was correct was not beyond debate. Therefore, the Court said that the Third Circuit erred when it held that Carroll was not entitled to qualified immunity.

**Case:** This case was decided by the Supreme Court of the United States on November 10, 2014, and was an appeal from the United States Court of Appeals for the Third Circuit. The case citation is *Carroll v. Carman, et ux*, 574 U.S. \_\_\_\_ (2014).

## Arkansas Court of Appeals Holds that Defendant Had No Reasonable Expectation of Privacy in Evidence Located in Curtilage and Observed in Plain View

Presented by:  
Taylor Samples  
Deputy City Attorney

### FACTS TAKEN FROM THE CASE

On January 7, 2013, four police officers from the Saline County Sheriff's Department went to Donald Jones' home to complete a "knock and talk" after learning of a report that Jones was involved in thefts of utility-type copper from electrical poles along Highway 35 through the city of Benton and into Grant County. The police officers used a drive which encircled Jones' home to access his property, and the police officers parked on the side of Jones' home. There was no fence around Jones' home. Upon exiting the police vehicle, one of the officers, Detective Parsons, saw a burned-out black spot in the backyard about fifteen to twenty yards away that still contained burned copper. In the area around the burned-out black spot, Detective Parsons saw five to six feet sections of ground wire, typically used by utility companies, stacked on top of each other in piles.

Detective Parsons and Corporal Robertson then made contact with Jones' girlfriend, Jacqueline Prevatt, who said that Jones was not at the home. Corporal Robertson did a sweep of the premises to ensure that Jones was not there, and Corporal Robertson exited the premises after confirming that Jones was not present. Detective Parsons then went over to further investigate the burned-out black spot, and he observed a boat that contained tools in plain view that he immediately recognized as stolen utility-contractor tools due to the inspection stickers on them.

Based on the evidence observed on January 7, 2013, a search warrant was issued on February 15, 2013. The search pursuant to the warrant uncovered varying amounts of copper in different forms, various utility tools, and a .22



caliber revolver. On April 8, 2015, Jones was charged with theft by receiving and possession of a firearm by certain persons. Subsequently, Jones filed a motion to suppress physical evidence obtained on January 7 and February 15, 2013. The trial court denied the motion to suppress physical evidence, and Jones entered a conditional plea of no contest as a habitual offender to theft by receiving and possession of a firearm by certain persons, reserving his right to appeal the trial court's denial of his motion to suppress. Jones was concurrently sentenced as a habitual offender on both charges to ten years' imprisonment in the Arkansas Department of Corrections.

### ARGUMENT AND DECISION BY THE COURT OF APPEALS

On appeal to the Arkansas Court of Appeals (Court), Jones argued that the police officers violated his constitutional rights to be free from unlawful search or seizure under the Fourth Amendment and Article 2, section 15 of the Arkansas Constitution, when the police officers entered the curtilage of his home without a warrant or a justifiable exception to a warrant on January 7, 2013. Jones asserted that all evidence obtained from the searches on January 7 and February 15, 2013, should have been suppressed, and that the trial court erred in denying his motion to suppress. The State countered Jones' argument by claiming that the police officers were in an area where Jones did not have a reasonable expectation of privacy when they seized items that were in plain view and evidenced criminal conduct.

The Court first addressed Jones' claim that Detective Parsons and Corporal Robertson were unlawfully in the curtilage of Jones' home and would not have seen the wires had they not been unlawfully present there. In setting forth the applicable law, the Court said that the Fourth Amendment of the U.S. Constitution and Article 2, section 15 of the Arkansas Constitution both protect the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Additionally, the Court said that the touchstone of analysis under both is whether a person has a reasonable expectation of privacy in the area entered or searched. Furthermore, the Court pointed-out that one's dwelling and curtilage have consistently been held to be areas that may normally be considered free from government intrusion. Finally, the Court defined curtilage of a dwelling-house as a space necessary and convenient, habitually used for family purposes and for the carrying on of domestic employment.

Next, the Court stated that four factors identify the extent of the privacy expectation in the curtilage of a residence: proximity of the area claimed to be curtilage to the home; whether the area is included within an enclosure surrounding the home; the nature of the uses to which the area is put; and the steps taken by the resident to protect the area from observation by people passing by. The Court noted that while dwellings and their curtilage generally are protected, an expectation of privacy in driveways and walkways, which are commonly used by visitors to approach dwellings, generally is not considered reasonable. The Court stated that what a person knowingly exposes to the public is not a subject of Fourth Amendment protection.

The Court held that Jones had no reasonable expectation of privacy in the circle drive. In its reasoning, the Court noted that Detective Parsons testified that Jones' home was encircled by a well-used, unpaved drive. There was no fence, gate, or other access-restricting structure at any place around the residence. Furthermore, regarding the officers' choice to use Jones' back door, the Court pointed-out that Detective Parsons testified that he had been to Jones' residence at least of couple of times previously in his official capacity and that he had always gone to the front door but never gotten a response, so he had then always went to the back door. Jones' girlfriend, Jacqueline Prevatt, testified that most of the time the residents of the home entered the house through the back door, but that people used both doors. The Court concluded by stating that if a person has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, then that person should find it equally likely that the police will do so as well. Therefore, even though the circle drive was within the curtilage of the home, Jones had no reasonable expectation of privacy.

Lastly, the Court addressed Jones claim that the items observed by Detective Parsons on January 7, 2013, were not in plain view. In setting forth the rule, the Court said that all searches conducted without a valid warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. The Court said that the burden is on the State to establish an exception to the warrant requirement. Additionally, the Court stated that the observation of evidence in plain view is not a search, and therefore the resulting seizure is not the result of an unreasonable search. The Court

## Arkansas Court of Appeals Holds that Anonymous Tip of Possible Disturbance Constituted Reasonable Suspicion to Seize Driver of Vehicle

Presented by:  
Taylor Samples  
Deputy City Attorney

### FACTS TAKEN FROM THE CASE

On December 24, 2012, Rogers Police Officer Travis Pennington was notified by dispatch of a possible disturbance in progress in the parking lot of the Goodyear Tire building located at New Hope and 8th Streets. Dispatch stated that the callers reported two men were chasing a woman and dragging her to the ground. Pennington was informed that two vehicles, a white Ford truck and a dark Volvo station wagon, were in the parking lot. Pennington was also informed that one of the men had gotten into the white truck and was about to pull out of the parking lot. Pennington was near the location, and he arrived about two minutes after receiving the call. Upon arrival, Pennington observed Matthew Lee driving a white Ford F150 and attempting to leave. Pennington also saw a black Volvo station wagon in the parking lot. Pennington activated his blue lights and made contact with Lee, who was subsequently arrested and charged with DWI.

Lee filed a motion to suppress with the trial court. At the suppression hearing, Officer Pennington said that when he received the call from dispatch, he sped to the location because he thought that someone might be hurt. Pennington acknowledged that he did not personally witness any disturbance; that he did not see a woman when he arrived; that the callers did not give a description of the men; that he did not know any information about the callers; and that he did not see any evidence of a crime scene. The trial court denied Lee's motion to suppress, concluding that if the officer had not initiated a traffic stop and done a criminal investigation perhaps he would have been considered derelict in his duties. Lee subsequently entered a conditional plea to the charge of DWI, and he appealed the trial court's holding on the suppression issue to the Arkansas Court of Appeals.

### ARGUMENT AND DECISION OF ARKANSAS COURT OF APPEALS

Lee argued to the Arkansas Court of Appeals (Court) that the trial court erred in denying his motion to suppress because Officer Pennington did not have reasonable suspicion to stop his vehicle on December 24, 2012. The Court set forth the applicable law by quoting Arkansas Rule of Criminal Procedure Rule 3.1 as follows:

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.

Additionally, the Court said that reasonable suspicion is defined as suspicion 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. In other words, the Court said that the suspicion must be reasonable instead of imaginary or purely conjectural.

Next, the Court discussed the United States Supreme Court holdings in the cases of *Alabama v. White* and *Florida v. J.L.* The Court noted that in the case of *Alabama v. White*, an anonymous tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster also claimed that woman would be transporting

cocaine. After confirming the details, police stopped the station wagon as it neared the motel and found cocaine in the vehicle. The Supreme Court of the United States held that the officers' corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity. The Supreme Court further held that by accurately predicting future behavior, the tipster demonstrated a special familiarity with the suspect's affairs, which in turn implied that the tipster had access to reliable information about the suspect's illegal activities. Finally, the Supreme Court in *White* concluded that an informant who is proved to tell the truth about some things is more likely to tell the truth about other things, including the claim that the object of the tip is engaged in criminal activity.

The Court then discussed the holding of the United States Supreme Court in *Florida v. J.L.*, where the Supreme Court determined that no reasonable suspicion arose from a bare-bones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun. The Court noted that the Supreme Court in *J.L.* opined that the tipster did not explain how he knew about the gun, nor did the tipster suggest that he had any special familiarity with the suspect's affairs. The Supreme Court said that the police therefore had no basis for believing that the tipster had knowledge of concealed criminal activity, and the tip included no predictions of future behavior that could be corroborated to assess the tipster's credibility. For these reasons, the Supreme Court in *J.L.* concluded that the tip was insufficiently reliable to justify a stop and frisk.

In affirming the trial court's denial of Lee's motion to suppress, the Arkansas Court of Appeals held that at the time Officer Pennington made the stop of Lee's truck, the tip had been sufficiently corroborated to give Officer Lee reasonable suspicion. The Court noted that Officer Pennington received a call of a possible disturbance in progress involving two men dragging a woman. Additionally, the court pointed-out that Officer Pennington arrived at the scene approximately two minutes later and was able to verify the presence of the two vehicles the callers reported seeing in the parking lot. Furthermore, the Court said that Officer Pennington was able to verify that the driver of the white truck was trying to leave, just as the callers had indicated. In conclusion, the Court quoted the Arkansas Supreme Court in the case of *Hammons v. State* as follows: "Generally speaking, an officer would indeed be foolish to ignore an anonymous tip. So long as the officer does not invade the privacy and freedom of others, he is free to investigate any police matter in any manner not prohibited by law."

**Case:** This case was decided by the Arkansas Court of Appeals on December 3, 2014, and was an appeal from the Benton County Circuit Court, Honorable Robin Green, Judge. The case citation is *Lee v. State*, 2014 Ark. App. 691.

## What Makes a Violation of an Order Of Protection a Felony

Presented by:  
Sarah Sparkman  
Deputy City Attorney

Officers and attorneys in Arkansas alike have been confused as to what is required to convict someone of a felony violation of an Order of Protection. If we look at The Domestic Abuse Act of 1991, Ark. Code Ann. section 9-15-201 et. al, a person is guilty of a class D felony if he 1) violates an Order of Protection and 2) was convicted of a violation of an Order of Protection within the previous five years. However, under the criminal code at Ark. Code Ann. section 5-53-134 a person is guilty of a class D felony only if:

- (A) The offense is committed within five (5) years of a previous conviction for violation of an order of protection under this section;
- (B) The order of protection was issued after a hearing of which the person received actual notice and at which the person had an opportunity to participate; and
- (C) The facts constituting the violation on their own merit satisfy the elements of any felony offense or misdemeanor offense, not including an offense provided for in this section.



The criminal code gives more requirements for a felony conviction than The Domestic Abuse Act. So which one can we use to convict?

The Supreme Court says any conviction for a violation of an Order of Protection must be done pursuant to the stricter requirements of Ark. Code Ann. Section 5-53-134.

What does this mean? For a violation of an Order of Protection to be considered a felony, there must be a previous conviction within the last five years AND an accompanying criminal act along with the violation. There is another element of proof that requires a person be given actual notice and an opportunity to be heard at the initial Order of Protection hearing; however, the language of the model Final Order of Protection form in Arkansas contains language stating that the Respondent was given notice of the hearing, so the issue of notice will likely only be an issue when an Ex-Parte Order has been issued but no Final Order has been entered yet.

Keep in mind that a violation of an Order of Protection is often accompanied by a criminal act; many times, the suspect's contact with a victim will meet the requirements of harassment, for example. Although the statute does not say that a suspect has to be *charged* with an additional crime – only that the facts on their own merit satisfy another criminal offense – it would likely be helpful to go ahead and charge the suspect with that additional crime in addition to a charge pursuant to Ark. Code Ann. Section 5-53-134.

If there is a previous conviction for violation of an Order of Protection, but the new violation does not satisfy the elements of another criminal offense, then the new violation is a class A misdemeanor. First offense violations are always class A misdemeanors.

**Citation:** The Arkansas Supreme Court clarified the requirements for violation of Order of Protection convictions on December 11, 2014, *Standridge v. State*, 2014 Ark. 151.

## Arkansas Court of Appeals Upholds Arrest

Presented by:  
Sarah Sparkman  
Deputy City Attorney

This is an appeal from a conviction of possession of methamphetamine with intent to deliver and two counts of drug paraphernalia.

### Facts leading to the arrest:

Stephen Briggs, a state trooper, was at a gas station when he overheard a man talking on his cell phone. The man said that he had lost \$3,200 and asked "what was he supposed to do, go back and get his dope?" Based on what he had overheard, Briggs decided to watch the man, who went outside and got into a Cadillac DeVille.

Sometime after the man got into the vehicle, appellant Alton Scott Moody pulled into the gas station and parked on the passenger side of the Cadillac. Moody got out and walked over to the driver of the Cadillac, and the two men went to the trunk of the Cadillac and leaned over. As the men were leaned over, Briggs saw Moody place something in his back pocket. Moody and the driver of the Cadillac went to the driver's side of Moody's vehicle.

Briggs and another officer on scene, Matthew Blasingame, approached the two men. When approaching the two men, Blasingame saw in plain view clear baggies with a white crystallized substance inside. Blasingame suspected the substance in the baggies was methamphetamine.

After Blasingame observed the material he suspected to be methamphetamine, Briggs made contact with the men, identified himself as law enforcement, and told them to get on the ground.

### Argument by the appellant:

The evidence obtained from Moody's vehicle included 132 grams of methamphetamine, a digital scale, a spoon with residue, a pipe, and small plastic baggies. Moody argued at circuit court that the evidence should be suppressed. Moody's argument was that other than the phone call that the driver of the



Cadillac made and Briggs overheard, there was no evidence of any suspicious activity that would give rise to a reasonable suspicion that a felony was being committed. The circuit court denied the motion to suppress.

On appeal, Moody argued that:

1. The officers did not have reasonable suspicion that Moody was involved in the commission of a felony
2. The officers made a warrantless arrest without probable cause, and
3. Because there was no probable cause for an arrest, the resulting search was illegal.

#### **Court's Opinion:**

The court held that there was probable cause for the arrest, and therefore, the resulting search was legal. The court did not address the argument of reasonable suspicion, noting that reasonable suspicion is a less-demanding standard than probable cause.

#### **Reasoning by the court:**

The court looked at several facts in determining that the officers had probable cause to arrest the Moody. Specifically, the facts the court looked at were:

1. The car was parked in a public parking lot
2. Blasingame lawfully approached the vehicle
3. Blasingame saw a crystalline substance on the front seat of Moody's truck
4. Blasingame saw that substance before Briggs ordered Moody to the ground

The court noted that probable cause to arrest without a warrant may be evaluated on the basis of the collective information of the police. The court held that once Blasingame observed methamphetamine in Moody's vehicle, reasonable cause existed to believe that Moody had committed a felony. Therefore, the evidence was properly seized after the arrest. The decision of the circuit court was affirmed.

**Citation:** This case is an appeal from the Pulaski County Circuit Court, Fourth Division, and was decided on November 5, 2014. The citation is *Moody v. State*, 2014 Ark. App. 618

Ernest

*Merry Christmas!*

Taylor

Sarah

Cindy



Dixie

Linda

David

Lynda

Steve

*Happy New Year!*

Jacque

C.A.L.L.

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