

C.A.L.L.

City Attorney Law Letter

October 1, 2016

Issue 16-04



On October 14, 2016, Lynda Belvedresi will receive the Community Courage Award from the Peace at Home Shelter.

Lynda was hired as Victim Advocate in the Springdale City Attorney's Office in July, 2002. From the day she started, she has made a big impact in not only helping victims of domestic violence, but also in preventing future abuse. She monitors domestic abuse reports on a daily basis and is able to make contact with the victims very quickly to advise them how their case will proceed through the criminal justice system. Lynda also makes herself available to assist the victims in finding the help they need.



	Page No.
Arkansas Court of Appeals Holds Admissible Statements Made During Course of Routine Roadside Questioning	2
Emergency-Aid Exception: Warrantless Entry is Reasonable if the Circumstances, Viewed Objectively, Justify the Action	4
Time-Line Evidence in Proving Intoxication— <i>Fowler v. State</i>	6
8th U.S. Circuit Court of Appeals Holds that Contraband Found in Plain View of Vehicle was Admissible into Evidence	8
Warrantless Entry and Taser Shock not Deprivation of Civil Rights— <i>U.S. v. Shultz</i>	10
Police Officer Convicted in Federal Court for Excessive Force— <i>U.S. v. Boone</i>	14
8th U.S. Circuit Court of Appeals Holds That Evidence Resulting from Terry Frisk was Properly Admitted	18
“Conch Republic” Credentials Are Not Recognized by the State of Arkansas— <i>U.S. v. The-Nimrod Sterling</i>	20

Arkansas Court of Appeals Holds Admissible Statements Made During Court of Routine Roadside Questioning



FACTS TAKEN FROM THE CASE

Kevin Cain was charged in Washington County Circuit Court with negligent homicide the day after a truck crashed, burned, and resulted in a fatality. The circuit court denied Cain's motion to suppress statements he made at the scene to Corporal Jason Davis of the Arkansas State Police, where Cain admitted to being the driver and recently consuming alcohol and prescription drugs. Cain was convicted at a jury trial and sentenced as a habitual offender to forty years' imprisonment in the Arkansas Department of Correction.

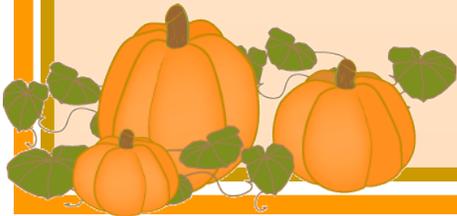
At the suppression hearing, Corporal Davis testified that on August 27, 2014, he received a call about a burning vehicle, drove to the rural crash scene, and arrived around midnight, about an hour after the crash had occurred. Cain was standing on the roadside with sheriff's deputies and paramedics who were administering medical treatment to him. First responders told Corporal Davis that Cain had wandered away down the road but had returned on his own to the scene of the crash. Corporal Davis turned his attention to Cain after learning that a crash victim was deceased. Corporal Davis testified that he questioned Cain, who admitted to being the driver of the vehicle involved in the crash. Corporal Davis also said that he asked Cain if he had consumed alcohol, and Cain responded by saying he had consumed a few beers. Corporal

Davis testified that he did not arrest Cain, that Cain was not handcuffed or placed in the patrol car, but that because Cain was part of a traffic crash, he had to stay and give information on the crash and was detained while Corporal Davis was asking questions and attempting to identify the driver. Subsequently, Cain was transported by ambulance to a hospital, where a blood sample was taken. The next day, after being released from the hospital, Cain was arrested at the request of Corporal Davis.

Cain appealed the denial of his motion to suppress to the Arkansas Court of Appeals, claiming that his statements were inadmissible because they were custodial and he had not been advised on his *Miranda* rights.

ARGUMENT AND DECISION BY THE COURT OF APPEALS

In setting forth the applicable law, the Arkansas Court of Appeals (Court) said that custodial interrogation is questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of action in any significant way. Additionally, the Court stated that a person is in custody for *Miranda* purposes when he is deprived of his freedom by formal arrest or restraint on freedom of movement of the degree associated with formal arrest. *Miranda* safeguards apply as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. Referencing the case of *Berkemer v. McCarty*, 468 U.S. 420 (1981), the Court noted that where a motorist is detained after a traffic stop but not arrested,



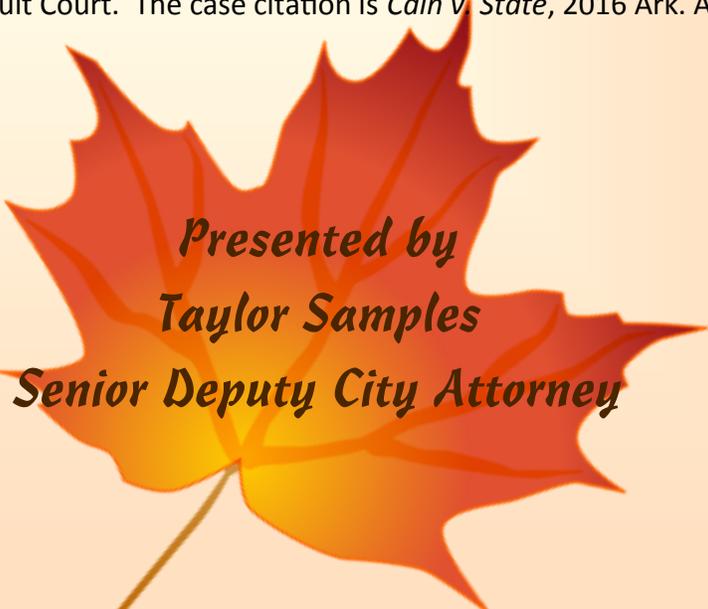


his statements in answer to roadside questioning without *Miranda* warnings were held by the United States Supreme Court to be admissible. Additionally, the Court said that the only relevant inquiry to determine whether a suspect is in custody at a particular time is how a reasonable man in the suspect's shoes would have understood his situation. This is an objective inquiry, depending not on subjective views harbored by the interrogating officers or the person being interrogated, but on objective circumstances of the interrogation. The Court continued by saying a *Miranda* warning is required only when a suspect is subject to custodial interrogation. In determining whether a suspect is in custody, the Court said that all of the circumstances must be examined, including the location and duration of questioning, the presence or absence of physical restraints during questioning, the statements made, and the release of the person when the questioning ends.

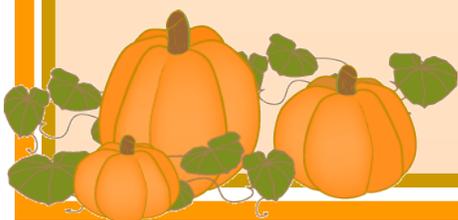
On appeal, Cain argued that his statements should have been suppressed because he made them while in custody without being Mirandized. Cain claimed that this was not a routine traffic stop, that leaving the scene of a personal injury accident is a felony, that knowledge of the law is presumed, and that a reasonable person in Cain's shoes would not have believed he was free to leave. Citing the *Berkemer* case, the State responded that this was an investigation rather than an in-custody interrogation, and that Cain's statements were thus admissible.

The Court affirmed the trial court's denial of Cain's motion to suppress, concluding that Cain's statements were not custodial, and *Miranda* warnings were not necessary. The Court reasoned that although Cain was required to remain at the crash scene, such compulsion is not akin to the restraint of formal arrest. The Court noted that Cain was questioned in the initial investigation of a fatal traffic accident while standing on the roadside, with other people in public view. Additionally, the Court pointed-out that Cain was not restrained or detained, was asked a minimal number of questions, and was allowed to leave afterward. In summary, the Court said that Cain was not questioned in an environment presenting the inherently coercive, incommunicado pressures of station-house questioning, nor was he in custody for *Miranda* purposes merely because of his legal obligation to stay at the scene.

Case: This case was decided by the Arkansas Court of Appeals on September 14, 2016, and was an appeal from the Washington County Circuit Court. The case citation is *Cain v. State*, 2016 Ark. App. 398.



*Presented by
Taylor Samples
Senior Deputy City Attorney*





Emergency-Aid Exception: Warrantless Entry is Reasonable if the Circumstances, Viewed Objectively, Justify the Action

Issue:

Whether an officer had an objectively reasonable basis for entering onto the curtilage of a suspect's residence and looking through a basement window pursuant to the "emergency-aid exception" to the warrant requirement.

Procedural Background:

This is an appeal of Jeremy Daniel Conerd's conviction on the charge of a felon and unlawful drug user in possession of ammunition in the United States District Court for the Northern District of Iowa, Waterloo. Conerd moved to suppress the evidence of the ammunition, saying that the information in the warrant to search his home was based on an illegal entry onto his curtilage. The District Court denied Conerd's motion. Conerd pleaded guilty and reserved his right to appeal the denial of the motion to suppress.

Facts:

On November 27, 2013, Jeremy Daniel Conerd called his sister and told her that he was assaulting two people in his basement. He then told his sister he was about to shoot her. Conerd's sister called Jessica Pirtle, who called the police. Pirtle relayed to the police what she had been told by Conerd's sister.

Police officer Ted Phillips was dispatched to Conerd's residence to conduct a welfare check. Officer Phillips was familiar with Conerd; he

had arrested Conerd several times previously on drug charges, and several reports had been filed on Conerd regarding domestic violence at his residence. Many people, including a fellow officer, had told Phillips that Conerd possessed a firearm. Phillips also believed that there was a camera at the front door of Conerd's residence.

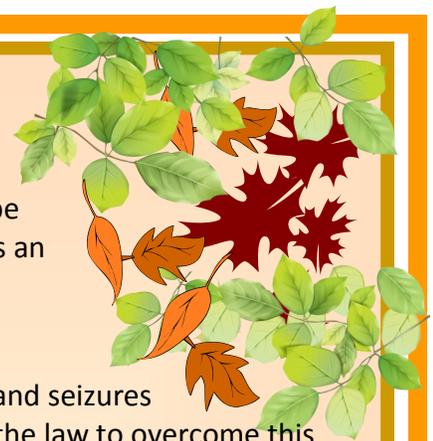
Phillips parked near Conerd's residence and saw that the only light in the residence was coming from the basement window, the place that Phillips had been told the assaults were taking place. Phillips could see nothing else occurring that indicated an assault. Phillips was concerned about knocking on the door to make contact with Conerd, as Phillips had information that Conerd had a firearm and camera at the door. Phillips walked to Conerd's neighbors' driveway then stepped into Conerd's yard and looked into the basement.

Phillips saw Conerd and another man standing in the basement. Phillips saw the other man raise a glass pipe to his mouth, which Phillips believed contain illegal drugs. Based on what he saw while on Conerd's property, Phillips obtained a search warrant to search Conerd's residence. During the search, officers found ammunition. Conerd was charged with being a felon and unlawful drug user in possession of ammunition.

Conerd's motion and reasoning:

Conerd moved to suppress the evidence of ammunition. Conerd argued that there was insufficient information for Phillips to make a





warrantless entry onto his curtilage pursuant to the emergency-aid exception to the warrant requirement. The emergency-aid exception requires that there be objectively sufficient information for a reasonable officer to believe that there is an emergency occurring. The District Court denied this motion.

Law:

The 8th Circuit stated that under the Fourth Amendment, warrantless searches and seizures in a home are presumptively unreasonable, but there are certain exceptions in the law to overcome this presumption. An exception is the emergency aid or community caretaking exception, which allows an officer to "enter a residence without a warrant...where the officer has a reasonable belief that an emergency exists requiring his or her attention." citing *Ellison v. Leshner*, 796 F.3d 910, 915. The 8th Circuit continued that warrantless entry "is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action. The officer's subjective motivation is irrelevant." citing *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

Analysis:

The 8th Circuit stated that "[v]iewed objectively, the circumstances of this case provided a reasonable basis for Officer Phillips's warrantless entry onto the curtilage of Conerd's residence." The 8th Circuit listed the following facts in its analysis:

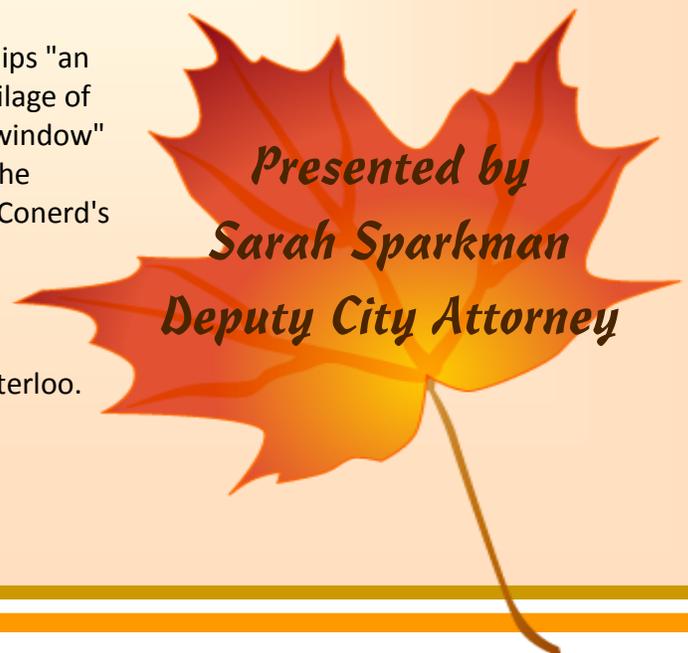
- 1) Phillips was told that Conerd had assaulted someone and was in the process of assaulting another person in Conerd's basement
- 2) Phillips was aware of Conerd's history of domestic violence
- 3) The only light in Conerd's house was coming from the basement, which is where Phillips was told the assault was taking place
- 4) Phillips was aware that Conerd might have a firearm and likely had a camera at the front door of his residence

The 8th Circuit stated that "[w]hether Phillips was motivated primarily by concerns for his own safety or by concerns for the safety of Norton and Owens is irrelevant, because Phillips's actions were reasonable under the Fourth Amendment" because the circumstances *objectively* justified the actions.

Holding:

The 8th Circuit held that those circumstances gave Phillips "an objectively reasonable basis for entering onto the curtilage of Conerd's residence and looking through the basement window" and that the warrantless search was authorized under the emergency-aid exception to the warrant requirement. Conerd's conviction was upheld.

Case: This case is United States v. Jeremy Conerd, U.S. Court of Appeals Case No: 15-3566, an appeal from the U.S. District Court for the Northern District of Iowa, Waterloo.



Presented by
Sarah Sparkman
Deputy City Attorney



Time-Line Evidence in Proving Intoxication—Fowler v. State



On August 15, 2012, a twelve-year-old child was hit and killed while riding an ATV near a road. The driver was located approximately one hour later and subjected to a blood-draw which returned a result of 0.16 blood alcohol content. The driver was charged with felony Negligent Homicide. A jury sentenced the driver, defendant Michael Gene Fowler, to 40 years in prison. The defendant appealed his conviction alleging that the state had not sufficiently proved the element of intoxication at the time of the incident.

I. Facts

On August 15, 2012, after drinking beer and whiskey with Matthew Ballard and Zachary Koontz at a swimming hole at Cadron Creek, appellant drove the three of them from the swimming hole toward Morrilton. Appellant drove at a high rate of speed despite being asked by his friends to slow down. While speeding, appellant hit and killed a [2] twelve-year-old boy who had been riding an ATV. Ignoring requests from his passengers to stop and render aid to the child, appellant continued to flee the scene, even when threatened at knifepoint by Ballard. At some point, he pulled over to let Ballard out. He then continued driving, intending to take Koontz to a local hospital.

Pursuant to a "be on the look out" report, appellant was pulled over approximately one hour after the accident. He was taken to a Conway Regional Medical Center to have his blood drawn as required by state law. His

blood was drawn at 8:30 pm. A later test on the drawn blood showed his blood alcohol content (BAC) as 0.16.

On August 17, 2012, the State filed a felony information charging appellant with negligent homicide due to intoxication pursuant to Arkansas Code Annotated section 5-10-105(a)(1) (A). An amended felony information was filed on March 13, 2013, changing the charge to negligent homicide due to a BAC of 0.08 or more pursuant to Arkansas Code Annotated section 5-10-105(a)(1)(B)(i).

A jury trial was conducted on March 20 and 21, 2013. After the State rested its case, and again after appellant rested his case, appellant moved for a directed verdict on the grounds that the State failed to prove "that his blood alcohol content at the time of the accident was .08%, in other words, DWI, and that his intoxication was in fact the cause of the accident." The court denied both motions. The jury returned a verdict of guilty of negligent homicide. It recommended a sentence of forty years in the Arkansas Department of Correction and a fine of \$15,000.00.

Fowler v. State, 441 S.W.3d 41, 42-43 (Ark. Ct. App. 2014)

II. Law

(b) (1) (A) A chemical test made to determine the presence and amount of alcohol in a person's blood, urine, saliva, or breath to be considered valid under this chapter shall be performed according to a method approved by the Department of Health and State Board of Health or by an individual possessing a valid certificate issued by the department for this purpose.



Ark. Code Ann. § 5-65-204

(a) (1) It is presumed at the trial of a person who is charged with a violation of § 5-65-103 that the person was not intoxicated if the alcohol concentration of the person's blood, urine, breath, or other bodily substance is four hundredths (0.04) or less by weight as shown by chemical analysis **at the time of or within four (4) hours after the alleged offense.**

Ark. Code Ann. § 5-65-206 (emphasis added).

III. Analysis

A negligent homicide is merely a DWI with a fatality as a proximate result. Fatality is never hard to prove in such cases. The case discussed here serves to illustrate the importance of establishing a time-line in all DWI prosecution. "Arkansas Code Annotated section 5-65-206, in pertinent part, permits evidence of the amount of alcohol in the defendant's blood at the time or within four (4) hours of the alleged offense, as shown by chemical analysis of the defendant's blood." *Fowler v. State*, 441 S.W.3d 41, 44 (Ark. Ct. App. 2014). Evidence of the timing of intoxication is foundational in the State's case. If the State cannot prove that the events all took place within 4 hours, no conviction will result.

The usual scenario of an officer following the "ditch-to-ditch" driver skirts this issue. As the driving was observed, the timing is also observed. The essentiality of time-line evidence most usually comes into play where the driving was not observed, such as in an accident. This evidence is especially critical where the driver is not in the car at the time of the encounter with law enforcement.

The best evidence of time-line and driving, short of police observations, are the suspect's admissions. Third-party observations are good only where the names of the witnesses are documented. Even circumstantial evidence, such as the engine temperature, a cool drink in the console or other dissipating conditions can be admitted into testimony. But a complete lack of evidence as to the time-line will prove fatal to the State's case.

In this case, the Court held that "...based solely on the fact that the blood was drawn within the timeframe permitted by statute and the BAC was 0.16, twice the legal limit, we find that there was substantial evidence to support appellant's conviction." *Fowler v. State*, 441 S.W.3d 41, 45 (Ark. Ct. App. 2014).

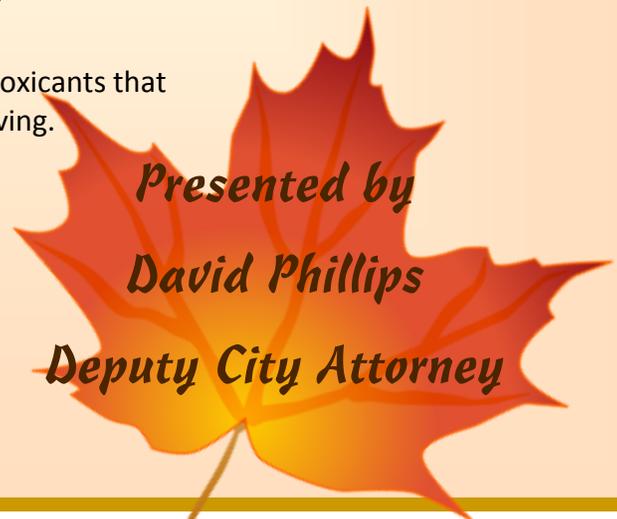
III. Conclusion

Where the driving was not observed by law enforcement, gather evidence to establish the time-line and sequence of events.

Gather evidence to rule out intervening consumption of intoxicants that might have occurred prior to testing and subsequent to driving.

Do not rely on dispatch times

Get confessions and admissions in accordance with the law, where possible.



Presented by

David Phillips

Deputy City Attorney

8th U.S. Circuit Court of Appeals Holds that Contraband Found in Plain View of Vehicle was Admissible into Evidence



FACTS TAKEN FROM THE CASE

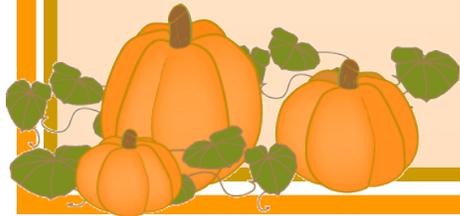
At 11:45 p.m. on August 2, 2013, Charleston, MO, Police Officer Brent Douglas was patrolling in a high crime area and saw a car with lights on parked behind a carwash that Officer Douglas knew was vacant and being condemned. The area was dark because a pole light did not work and there was no electricity in the building. Officer Douglas pulled in behind the car, got out of his vehicle, and saw another car in an open bay of the carwash and a person standing by the driver's side of that car. The person emerged from the bay and walked toward Officer Douglas, who pointed his flashlight in that direction and recognized the person to be Mario Evans. Officer Douglas knew that Evans had prior felony drug convictions and arrests for robbery and firearm offenses. Officer Douglas also saw two other persons in the car he parked behind, and he considered himself to be in a dangerous situation. As Officer Douglas met Evans between the two cars, he tried to keep an eye on both cars as he waited for backup assistance. Evans told Officer Douglas that Evans' family owned the carwash.

Officer Wesley McDermott soon arrived and stood with Evans while Officer Douglas walked to the carwash bay to verify there wasn't another individual hiding within the vehicle

within the bay. Officer Douglas could not tell if there was anyone in the vehicle by shining his flashlight into the bay, so he walked into the bay, stood next to the car, and shined his flashlight on the right side of the interior without opening the door. Officer Douglas saw a substance he recognized as marijuana and a handgun on the front passenger seat. Officer McDermott then arrested Evans and did a pat-down search, discovering a small digital scale and keys for the car in the bay, which Evans admitted was his car.

There were two women in the other vehicle, and the driver, Latrisha Banks, who was Evans' girlfriend, consented to a search of the vehicle. The officers found cash in an envelope, loose marijuana, and a marijuana cigarette in the vehicle and arrested the women. Following the arrests, officers searched the car in the bay and found that the firearm was loaded, and they found cash on the seat and additional marijuana in a cup behind the seatbelt buckle. At the police station, Evans asked what the charges were. Officer Douglas replied he was being charged with drug possession with intent to distribute and being a felon in possession of a firearm. Evans replied, "How are you going to charge me with a gun? It doesn't even work. I just got it yesterday."

At the suppression hearing, the government introduced photographs showing that the open carwash bay was visible from the streets around the property, and no signs prohibited trespassing. Fred Evans testified that he



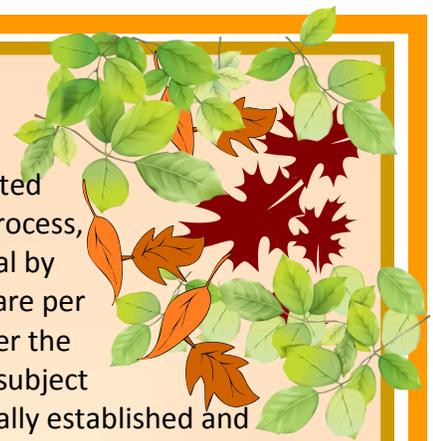
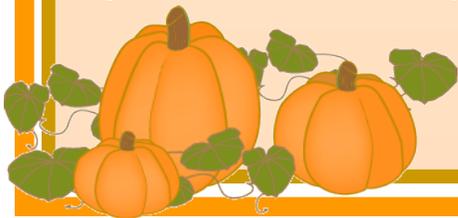
owned the carwash, that it had been vacant for five or six years, and that he did not mind members of the public using his property so long as they did not destroy anything or use it for illegal purposes. Fred also said that his nephew, Mario Evans, had stayed in the carwash but had no ownership interest or control over the property, and that Mario could use the property if he wanted to. The Magistrate Judge recommended that Evans' motion to suppress be denied, finding credible Officer Douglas' testimony that Evans was standing by his car when Officer Douglas arrived. The Magistrate Judge concluded that Officer Douglas' warrantless flashlight search of Evans' car in the vacant carwash by and the seizure of contraband fell within the plain view exception to the Fourth Amendment's warrant requirement. The Magistrate Judge held that Officer Douglas had reasonable suspicion that criminal activity was afoot, which justified his entry into the bay for a protective search for other persons; and the gun and marijuana were contraband in plain view that could be immediately seized from Evans' automobile. The district court adopted the rulings of the Magistrate Judge and denied Evans' motion to suppress. Evans was subsequently convicted for being a felon in possession of a firearm and was sentenced to 221 months in prison.

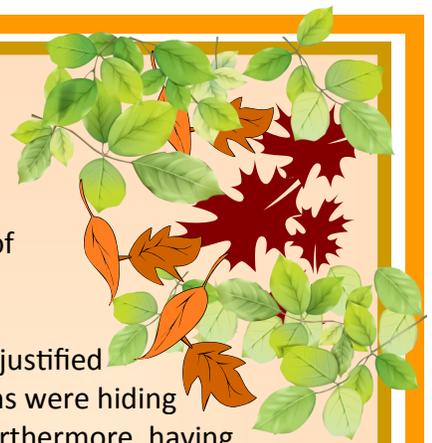
ARGUMENT, APPLICABLE LAW, AND DECISION BY THE 8TH U.S. CIRCUIT COURT OF APPEALS

On appeal to the Eighth U.S. Circuit Court of Appeals, Evans argued that the flashlight search of his car and seizure of the contraband observed inside violated the Fourth Amendment, and thus all evidence seized from the car, from his person following arrest, and the statements he made in custody should be excluded as fruit of the poisonous tree. The Eighth U.S. Circuit Court of Appeals (Court) said

that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. The Court stated that the plain view doctrine permits the warrantless seizure of evidence if the officers are lawfully in a position from which they view the object, the incriminating character of the object is immediately apparent, and the officers have a lawful right of access to the object.

The Court affirmed the holding of the district court denying Evans' motion to suppress evidence, concluding that there was no unlawful search and seizure of contraband seen in plain view in Evans' car. In its reasoning, the Court agreed with the district court that Officer Douglas had reasonable suspicion that criminal activity was afoot when he pulled in behind Banks' car, which was parked in an abandoned carwash parking lot late at night with its lights on, to investigate what the car's occupants might be doing in this high-crime area. The Court pointed-out that Officer Douglas saw Evans, a known felon, standing by another car in the dark carwash bay, that Officer Douglas recognized Evans when he emerged from the bay, and that Officer Douglas believed he was in a dangerous situation. The Court went on to say that when an officer has reasonable suspicion to make a *Terry* stop, it is well established that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. The Court continued that the Fourth Amendment permits





a quick and limited search of the premises during an in-home arrest, if the arresting officers reasonably suspect there may be others present who pose a danger to them, and the same safety concern has justified protective searches of vehicles while executing a search warrant.

The Court concluded that Officer Douglas' reasonable concern for officer safety justified his entering an open bay in an abandoned carwash to see whether other persons were hiding in a car where a dangerous suspect was seen engaging in suspicious activity. Furthermore, having entered the carwash bay, the Court said that Officer Douglas' action in shining his flashlight to illuminate the interior of Evans' car trespassed upon no right secured to Evans by the Fourth Amendment. The Court said that lawfully being in the bay, Officer Douglas shined his flashlight and saw a substance he recognized as marijuana and a firearm he knew Evans as a convicted felon could not lawfully possess. The incriminating nature of the gun was apparent because it was in close proximity to illegal drugs and Evans could not lawfully possess it. Given the obviously incriminating nature of the gun and drugs that Officer Douglas saw, the officers had probable cause to enter the parked, but highly mobile, vehicle without a warrant and to seize the evidence. For the above reasons, the Court affirmed the district court's denial of Evans' motion to suppress evidence.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on July 27, 2016, and was an appeal from the United States District Court for the Eastern District of Missouri – Cape Girardeau. The case citation is *U.S. v. Evans*, ___ F.3d ___, (2016).

Warrantless Entry and TASER Shock Not Deprivation of Civil Rights—U.S. Shultz

*Presented by
Taylor Samples
Senior Deputy City Attorney*



Officer Bryan Buchanan and the City of Highland, Arkansas were sued in Federal District Court by Kim Shultz pursuant to 42 U.S.C. § 1983 and the Arkansas Civil Rights Act on a claim of excessive force and unlawful entry. The District Court granted the motion for summary judgment in favor of the Defendants. The case was appealed to the US Eighth Circuit Court of Appeals.

I. Facts

On March 20, 2011, Buchanan was dispatched to Shultz's residence in response to a citizen complaint that a man had trespassed on the citizen's property and attempted to start a fight. Before Buchanan arrived at Shultz's home, Shultz and his friend, William Vaughn, had been in an altercation with two other men near a former resort community called "the beach club."



Vaughn had entered an abandoned building looking for a string or wire to use as a leash for his dog and was confronted by a man who shoved Vaughn and threatened harm if Vaughn did not leave the property. Vaughn met Shultz on the road near the abandoned building and told him what happened. The man from the building and a companion then started to walk up a hill toward Shultz and Vaughn while shouting threats at them. In response, Shultz told the men: "You need to keep your asses down at the bottom of the hill 'cause if you come up here fucking with me, you're making a mistake." The approaching men said they were going to call the police; Shultz and Vaughn left for Shultz's house.

Buchanan arrived at Shultz's home thirty [3] to forty-five minutes later. Shultz and Vaughn were sitting under the carport. Shultz's wife, Jennifer, was sitting in a truck in front of the house, listening to music. The Shultzes' three children were also home.

Shultz was upset when Buchanan arrived. He knocked his chair over when he stood up, but claimed that he was "very quiet." Buchanan believed (correctly) that both Shultz and Jennifer had been drinking, and he observed blood on Shultz's shirt. Shultz and Jennifer approached Buchanan near his patrol car. Buchanan asked Shultz what had happened at the beach club. Shultz replied that two men had confronted them, and that Shultz had told the men "that they needed to stay down at the bottom of the hill because, if they come up here fucking with me, they're making a mistake."

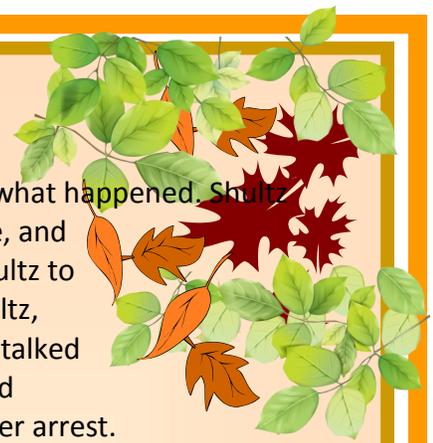
Buchanan told Shultz to control his attitude

and asked Shultz again what happened. Shultz gave the same response, and Buchanan again told Shultz to control his attitude. Shultz, Jennifer, and Buchanan talked further, and Shultz asked Buchanan if he was under arrest. Buchanan replied that Shultz was not under arrest, and Shultz walked into his house.

After Shultz entered the house, Buchanan called for backup and [4] asked Jennifer to go into the house and ask Shultz to come back outside. According to Jennifer, Buchanan said that he would not arrest Shultz if he came outside before the backup officers arrived. Buchanan did not believe that Shultz posed a danger to Jennifer, because they had been "getting along."

Jennifer went inside and relayed Buchanan's message to Shultz. Shultz raised his voice, told Jennifer to "shut the fucking door," and said that if Buchanan came into the house, "it would be his badge." Shultz moved toward the bedroom, tripped over a jug of cat litter, and "slung" it off to the side. Buchanan heard yelling and screaming coming from inside the house. He heard "a loud thud" that caused the windows to shake and observed children run out of the house screaming. Buchanan also heard Shultz yell that he was not coming out without a blood bath.

Buchanan then entered the house and asked Shultz if he was going to come back outside to speak with him. Shultz declined to go outside or continue speaking with Buchanan. Jennifer testified that Buchanan shoved her against a wall to move her out of the way as he followed Shultz into the bedroom. Buchanan said that when he attempted to grab [5] Shultz to take him outside, Jennifer got between the two men and tried to push Buchanan back.



Shultz testified that Buchanan followed him into his bedroom with a Taser drawn and pointed the device at Shultz. Buchanan told Shultz that he was going to arrest him. Shultz asserted that he put his hands in the air "in surrender position" and said "that's not necessary." According to Shultz, however, Buchanan stood approximately four feet from him, said "you asked for it," and deployed the Taser. Buchanan, by contrast, states that Shultz refused to comply with orders, and that he warned Shultz that he would be tased if he did not stop resisting.

The probes of the Taser made contact with Shultz's arm, and he fell back onto the bed. Shultz sat up on the bed and moved as if to pull the Taser's probes out of his arm. Buchanan testified that Shultz broke the leads off the Taser. Shultz asserted that Buchanan yelled at him not to remove the probes, told Shultz that he "better fucking comply," and deployed the Taser a second time. Shultz testified that Buchanan deployed the Taser again a third time, applying the Taser directly to Shultz's thigh. Five to seven officers then entered Shultz's home, [6] tackled him off of his bed, and handcuffed him. Jennifer corroborated Shultz's account of the events, asserting that she witnessed the tasing and screamed at Buchanan to stop.

Shultz was arrested and charged with resisting arrest, fleeing, and disorderly conduct. The officers also arrested Jennifer and charged her with obstructing government operations. Shultz and Jennifer pleaded no contest to a charge of public intoxication, and the State declined to pursue the other charges. Shultz suffered some temporary marks on his legs and arms from the Taser, but neither Shultz nor

Jennifer sustained any permanent injuries, and neither missed any work. *Shultz v. Buchanan*, No. 15-1854, 2016 U.S. App. LEXIS 13146, at *1 (8th Cir. July 19, 2016).

II. Law

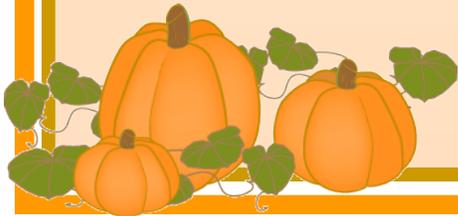
Qualified Immunity will ordinarily be granted to law enforcement officers acting reasonably and lawfully under the circumstances.

"[Q]ualified immunity protects government officials '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.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). As the Supreme Court has emphasized, "qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (per curiam) (internal quotation omitted).

Shultz v. Buchanan, No. 15-1854, 2016 U.S. App. LEXIS 13146, at *7 (8th Cir. July 19, 2016)

Searches of a home without a warrant are presumptively unreasonable. *Michigan v. Fisher*, 558 U.S. 45, 47, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2009) (per curiam).

Entry of a home in order to provide emergency assistance to an injured person or to protect a person from imminent injury is a recognized



exception to the warrant requirement. *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L. Ed. 2d 650 (2006).

The key question in evaluating the merits of a claim of excessive force is whether the force was reasonable under the circumstances. *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011).

A Taser is not categorized, by law, as inherently causing more than *de minimis* injury. *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 990-91 (8th Cir. 2015).

III. Analysis

Appellant Shultz had argued that the entry into the home was unlawful. The Defendant had tried to invoke the Heck Doctrine that "if judgment in a plaintiff's favor in a § 1983 action for damages would necessarily imply the invalidity of his conviction or sentence, then the claim is not cognizable unless the conviction or sentence previously has been set aside in another forum. *Shultz v. Buchanan*, No. 15-1854, 2016 U.S. App. LEXIS 13146, at *8 (8th Cir. July 19, 2016) (quoting *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)). Another way of looking at that is where the plaintiff has already been found guilty of an act that necessitated the entry, the claim is barred. Here, that doctrine was inapplicable as the prosecutor had already dropped the charges that led to entry into the home.

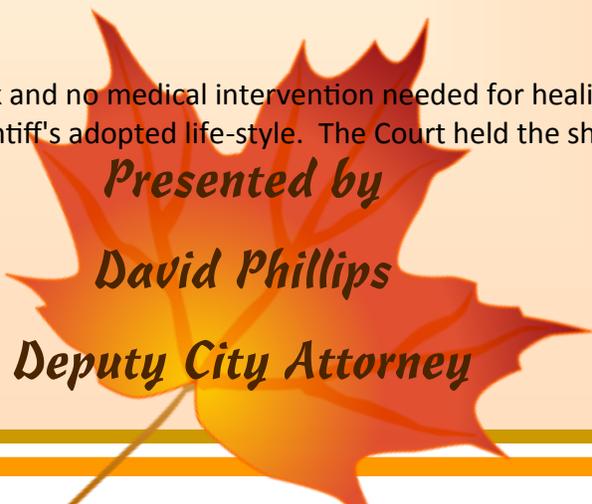
The court then examined the exigent circumstance of rendering immediate aid. The Court noted the factors which led to the entry. The suspect had been drinking, there was yelling, there were children present and they heard a loud "thud." The Court noted that the officer "... was not required to have "ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception."" The Court characterized these factors relative to the standard at law as "close enough." *Shultz v. Buchanan*, at *9.

The Court only briefly noted the allegation that the woman yelling was placed in danger by the police when they asked her to enter the building and contact the plaintiff. This act was characterized as "no more than any private citizen might do." *Id.*

On the claim of excessive force, the Court again reviewed the circumstances under the Fourth Amendment analytical framework of reasonability. A Taser is not inherently dangerous and its use is not necessarily considered as inflicting more than *de minimis* injury. As such, its use is reviewed based on the Totality of Circumstances.

Here, there was no permanent scaring, no loss of work and no medical intervention needed for healing. Anxiety and distrust of police is simply part of the plaintiff's adopted life-style. The Court held the showing to be inadequate to substantiate the claim.

The judgment of the District Court was affirmed.



Presented by
David Phillips
Deputy City Attorney





Police Officer Convicted in Federal Court for Excessive Force—U.S. v. Boone

Colin J. Boone, a former Des Moines, Iowa, police officer, was convicted of willfully depriving Orville Hill of his Fourth Amendment right to be free from the use of unreasonable force by a law enforcement officer, in violation of 18 U.S.C. § 242. The case was appealed to the US Eighth Circuit Court of Appeals.

I. Facts

In the early morning hours of February 19, 2013, Des Moines police officers Trudy Simonson and Lindsey Kenkel came upon the scene of a one-car accident. Hill had crashed his van and was lying unconscious between the van's bucket seats, with his head resting on the first row of back seats. The officers pounded on the windows of the van, but Hill did not respond. Simonson called for back-up, and Officers Cody Willis and Tanner Klinge soon arrived.

Hill regained consciousness and began acting erratically. As the officers shone their flashlights into the van, Hill "started jumping at our lights" and smacked the windows. After being ordered to unlock the van's door, Hill tried to drive away. His vehicle had been damaged in the accident, however, and traveled only [3] a short distance before coming to a stop. Simonson then approached the driver's side of the van, while Willis approached the passenger's side. They

simultaneously broke out the windows near the front of the van. Willis was able to unlock and open the passenger's side door. He reached inside and dragged Hill out, who fell face-down to the ground as Willis tackled him.

Willis held Hill's right arm as he placed his knee on the middle of Hill's back. To assist Willis, Kenkel pressed her knees onto Hill's right shoulder and secured his right forearm with her hands. Hill's left arm had been pinned underneath him, and he flailed his legs as Klinge pinned down Hill's back left side and tried to pull Hill's left arm behind his back. As Simonson came around the van, she saw the three officers on top of Hill. Although Hill was yelling and struggling, he was not kicking, biting, or hitting the officers. Willis believed that Hill would have been handcuffed in a matter of seconds.

Boone also responded to the report of an accident. As he drove to the scene, Boone heard that the vehicle had begun moving and that the officers had requested authorization to break out a window. Boone arrived as Hill was [4] being tackled. According to Boone, he saw a person face-down on the ground, trying to push up with his left arm, with officers on his right side trying to secure Hill's right arm. Boone exited his patrol car and ran toward Hill, saying nothing to Hill or the officers as he ran. Boone testified that he then "used a side kick and tried to sweep that [left] arm out from underneath [Hill]." At the time, Boone weighed almost 400 pounds and was wearing boots.



According to the other officers, however, Boone ran toward Hill and kicked him directly in the face, causing Hill's head to jerk back in a "whiplash motion." The force of Boone's kick caused Kenkel to lose her balance. Hill, who went limp for a moment after the kick, lay face-down on the ground. He bled from his mouth and from cuts on his face. After Hill rolled from his stomach to his back, he gurgled from blood pooling in the back of his throat. The officers then rolled him onto his side "[s]o he wouldn't choke on his own blood." Hill spit out two teeth. Hill was transported by ambulance to the emergency room, where the treating physician determined that his injuries had been caused by considerable blunt trauma "consistent with a kick." [5]

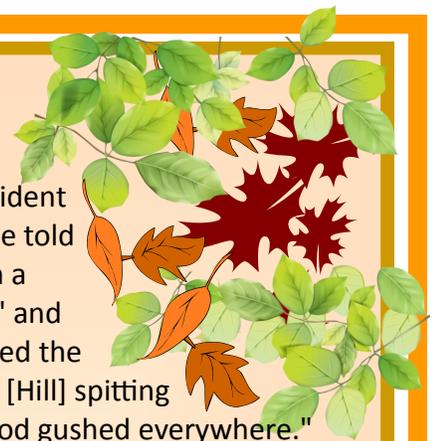
Willis and Klinge accompanied Hill in the ambulance. Before they left the scene, Boone opened the ambulance door and asked Willis "if [he] was good and if [he] needed anything." Willis angrily instructed Boone to complete an arrest incident report, a form officers use to document any use of force. To Willis, it was obvious that Boone "needed to document how Orville Hill was missing teeth," yet Boone seemed to be asking whether he needed to complete any paperwork at all. Boone also approached Simonson and Kenkel, telling them, "[I] meant to knock him out a little bit," or, "I just tried to knock him out." Before returning to the station, Boone told another officer that he had to complete an arrest incident report because he had kicked Hill in the head.

Boone's then-fiancee worked as a dispatcher at the police station. When Boone returned to the station, he told her "that he had put his boot laces across somebody's face." When he

later explained the incident in greater detail, Boone told her that "he had taken a ten-foot running start" and that "after he had kicked the guy[,] . . . [Boone] saw [Hill] spitting teeth out and that blood gushed everywhere." Boone's arrest incident report stated [6] that "[t]he suspect was trying to push up and I kicked the suspect in the area of the left shoulder." Boone did not report that he had kicked Hill in the face, nor did he state that he had caused Hill's injuries, which included two missing teeth, a damaged third tooth, a broken nose, swollen lips, and a laceration above the eye that required six sutures. After Willis learned that Boone's report was incomplete and inaccurate, Willis reported to the police captain that Boone had kicked Hill in the face. Simonson made a similar report to her sergeant.

A grand jury returned a two-count superseding indictment in May 2014, charging Boone with depriving Hill of the right to be free from the use of unreasonable force by a law enforcement officer, in violation of 18 U.S.C. § 242, and with knowingly falsifying an arrest incident report with the intent to obstruct justice, in violation of 18 U.S.C. § 1519. At the trial held later that year, the jury was unable to reach a verdict on the unreasonable-force count, but it found Boone not guilty of the obstruction-of-justice [7] count. The district court accepted the jury's verdict and declared a mistrial on the unreasonable-force count. A second trial was scheduled for early 2015.

Before the second trial began, the government moved to admit evidence of prior bad acts to prove intent, knowledge, motive, and absence of mistake under Rule 404(b) of the Federal Rules of Evidence. Following a hearing, during which the government presented evidence that Boone had used unreasonable force on an arrestee in January 2009 and thereafter tried to



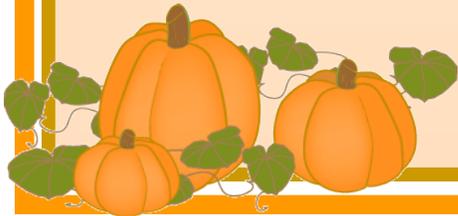
conceal his wrongdoing, the district court granted the government's motion, and the case proceeded to trial.

The second trial began in March 2015. Boone's primary defense was that he did not act willfully, which the court defined as "voluntarily and intentionally, and with the specific intent to do something the law forbids — that is, with a bad purpose to disobey or disregard the law." Boone testified that he "didn't mean to strike [Hill] in the head, and if [he] did, it was not intentional, and [he] didn't mean to hurt him." He explained that initially he thought that he "had hit [Hill] somewhere in the arm or the upper shoulder area," but he began to have doubts after "they rolled [Hill] over and . . . there was some [8] blood on [Hill's] face." Boone also testified that when he saw the gash on Hill's eyebrow, his "first thought was, wow, that looks like maybe something like boot laces or the side of your boot may cause, and [Boone] knew that [he] had struck [Hill] in the upper shoulder, and [Boone] started to wonder if maybe [he had] hit [Hill] in the head, too." Boone did not admit that he had kicked Hill in the face, testifying on cross-examination that he "believed [he] hit him in the upper shoulder and that [he] may have hit him in the face" and that "[i]t's never been proven to me."

Officers Simonson, Kenkel, Willis, and Klinge testified that they were trying to handcuff Hill when Boone arrived. Although they were outfitted with a variety of weapons, they used only hands-on force to control Hill, testifying that no greater force was necessary to effectuate the arrest. The officers further testified that Boone's kick was a straight kick to Hill's face, not a sweep kick to Hill's left shoulder. The dash-cam video from Willis and

Klinge's squad car was played for the jury. It showed Willis's tackle, the officers' attempt to handcuff Hill, and Boone's running kick. The government also presented evidence [9] of Boone's January 14, 2009, use of force against Dawn Dooley. Officer Chris Latcham testified that after Dooley was arrested for operating a vehicle while intoxicated (OWI), Latcham and Boone arrived to transport her to the police station. Latcham described Dooley as "being resistive" and stated that she had kicked him. Dooley slipped on the ice, and either Latcham or Boone grabbed her arm as she fell. The officers eventually placed Dooley in Latcham's squad car and transported her to the police station, where she was detained in an OWI room. Austin Hill (no relative of Orville Hill) also had been arrested for OWI that night and was being detained at the police station, in an area described as "the bullpen."

Latcham testified that while Dooley was seated in a chair in the OWI room, Boone grabbed her arm "[i]n an upward motion," lifting it for approximately ten seconds, while Dooley cried for help. Austin Hill testified that after he heard a woman yelling for help, he looked through a window in a door at the end of the bullpen, where he could see into the OWI room. Austin Hill testified that he saw a woman on the floor of the room and Boone standing over her with "his shoulders thrusting [10] back." According to Austin Hill, Boone "assault[ed] her with his hands," as another officer stood in the OWI room and did nothing. The jury was shown a video that depicted Austin Hill walking to the door and looking through the window, as a woman's voice yells, "Help me!" The video later shows Latcham escorting Dooley through a door, past the bullpen where Austin Hill was detained, and into a second OWI room. Boone exits the same door shortly thereafter. Austin Hill identified Dooley as the woman who was



yelling and Boone as the officer who had assaulted her.

The video of the bullpen area also captured hushed conversations between Latcham and Boone, during which Boone stated that he needed to write a use-of-force report. Boone then checked with another officer to see if the video camera in the bullpen was recording. After the officer said that he had not turned it on, Boone told Latcham what he intended to include in the report: that Dooley had resisted arrest, Latcham grabbed her right arm, Dooley fell, and she injured her right shoulder. Latcham responded, "Yeah." At trial, however, Latcham testified that he knew that Boone's description of the force used against Dooley was inaccurate or incomplete. [11] Boone testified that he wrote an arrest incident report, but the Des Moines Police Department had no record of any such report regarding Boone's use of force against Dooley.

A video of the second OWI room showed Dooley sitting in a chair, crying, and trying to wrap her jacket around her left arm. When asked at trial if he knew why Dooley was crying, Latcham replied, "I believe it's from being grabbed in the other OWI room." Near the end of the video, Dooley states that an unidentified person "hurt [her] arm," that she thought "he did break my arm," and that "officers broke it." The district court overruled Boone's hearsay objection to the video.

Before the case was submitted to the jury, the district court issued a limiting instruction, explaining that the jury could consider the evidence of the Dooley incident to "help you decide [Boone's] intent, knowledge, motive, or absence of mistake," but not as evidence that Boone committed the crime charged in the instant case. Following the entry of the guilty

verdict, Boone was sentenced to 63 months' imprisonment. *United States v. Boone*, No. 15-2409, 2016 U.S. App. LEXIS 12571, at *1 (8th Cir. July 8, 2016)

II. Law

Section 242 provides, in relevant part:

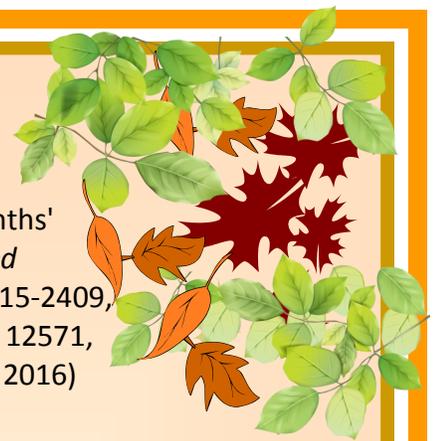
Whoever, under color of [2] any law, . . . willfully subjects any person in any State . . . to the deprivation of any rights . . . secured or protected by the Constitution . . . and if bodily injury results from the acts committed in violation of this section[,] . . . shall be fined under this title or imprisoned not more than ten years, or both . . .

United States v. Boone, No. 15-2409, 2016 U.S. App. LEXIS 12571, at *1-2 n.1 (8th Cir. July 8, 2016) (quoting 18 U.S.C. § 242).

III. Analysis

At the second trial, past instances of bad conduct were admitted into evidence, according to FRE Rule 404(b), to prove motive, intent or lack of mistake, thus satisfying the independent relevance requirement for past acts. The Defendant/Appellant argued that the past acts were not sufficiently similar to the case at bar. The Court rejected that argument as "the prior acts need not be duplicates" and the degree of excessive force and erratic behavior were sufficiently similar. *United States v. Boone* at *13. The Court also held that 4 years was not an excessive time lapse between incidents. *Id.*

Seeing the totality of his behavior, the second jury had no trouble in returning a guilty verdict.





The criminal culpability of this former officer's acts was made even more visible due to the false reports he field in each incident.



...As Boone's attorney pointed out, "this 'case is about less than 15 seconds in a 14-year law enforcement career" and this involved a single strike," Pratt wrote in an order he read in court. "Sadly, it is not uncommon in the criminal justice system for a few seconds of poor judgment in an otherwise productive and mostly law-abiding life to carry severe consequences." The Des Moines Register, posted June 22, 2015.

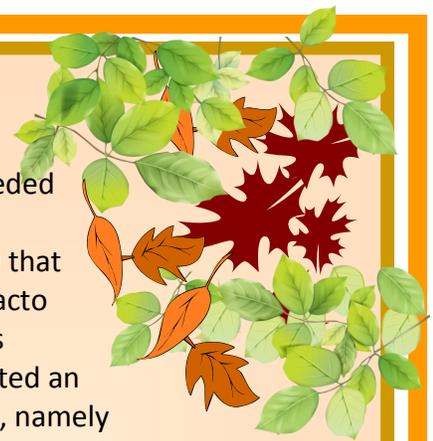
8th U.S. Circuit Court of Appeals Holds That Evidence Resulting From Terry Frisk was Property Admitted

*Presented by
David Phillips
Deputy City Attorney*

FACTS TAKEN FROM THE CASE

On February 24, 2011, Lincoln University Police Chief Bill Nelson and fellow Officers McKinney, Pigford, and Nunn, were gathered for lunch at LU's student cafeteria when they noticed a man seated alone who appeared to them to be intoxicated and not eating. The man was later identified as Terrence Hawkins, and neither the officers nor students they asked recognized Hawkins. Chief Nelson and Officer Nunn approached Hawkins and asked for identification. Hawkins appeared unkempt with bloodshot eyes, and he smelled of alcohol. As Hawkins retrieved his identification, Chief Nelson saw a large amount of cash in Hawkins' wallet. Hawkins was asked if he was an LU student, and Hawkins replied that he had been off and on. Officer Nunn requested a records check from dispatch and discovered that Hawkins was not a student, had a criminal history, and was known to be armed. The officers also learned after telephoning probation and parole that Hawkins had a prior felony conviction.





Hawkins stood up but complied when Chief Nelson and Officer Pigford instructed him to be seated. When Hawkins stood, Officers Nunn and Pigford noticed a bulge in his left pants pocket and told Chief Nelson they were concerned the bulge was a weapon. Hawkins first said that the bulge was money but then said it was nothing. Officer Nunn asked if he could retrieve the item for the pocket, but Hawkins refused. Chief Nelson then told Hawkins they were going to search his pocket for the safety of officers and those in the cafeteria. As Officer Nunn motioned or reached to check the pocket, Hawkins bolted before being tackled and restrained by the officers. In the process, Officer McKinney felt a hard object from outside Hawkins' left pants pocket, reached into the pocket, and pulled out a loaded handgun and marijuana.

Hawkins moved to suppress the evidence, arguing the officers did not have reasonable suspicion to detain him after they discovered he was not a student, and they illegally searched his pocket. The U.S. District Court for the Western District of Missouri – Jefferson City, denied the motion, holding: that Hawkins' interaction with the officers was consensual up to the point the officers ordered him to be seated; that at that point, the encounter became an investigative stop under *Terry v. Ohio*; that the officers had reasonable suspicion to detain Hawkins when he attempted to flee; and that at that point, the officers had acquired reasonable suspicion to believe Hawkins was armed and dangerous to justify a weapons search under *Terry v. Ohio*.

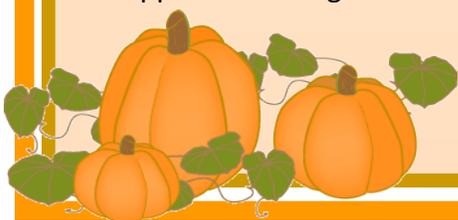
ARGUMENT, APPLICABLE LAW, AND DECISION BY THE 8TH U.S. CIRCUIT COURT OF APPEALS

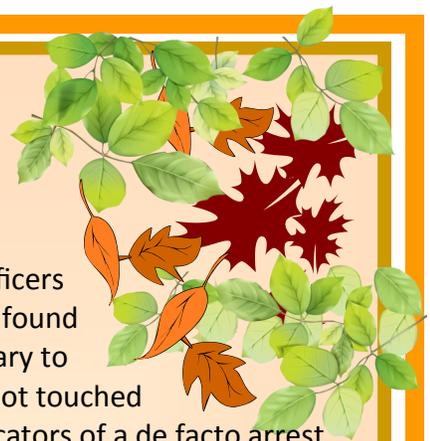
On appeal to the Eighth U.S. Circuit Court of

Appeals, Hawkins conceded that the *Terry* stop was permissible, but argued that the stop became a de facto arrest when the officers threatened and attempted an unconstitutional search, namely reaching into his pocket before conducting a pat-down search to determine if he was in fact armed and dangerous. Hawkins argued that this de facto arrest was not supported by probable cause, and therefore any evidence seized following that point must be excluded as fruit of the unconstitutional arrest.

The Eighth U.S. Circuit Court of Appeals (Court) affirmed the holdings of the trial court and held that Hawkins' motion to suppress evidence was properly denied. In its reasoning, the Court said that Hawkins' argument assumes that the officers intended to forego a pat-down search when Officer Nunn reached toward Hawkins' pocket. But the Court pointed-out that Officer Nunn's hand never reached Hawkins' pocket, so what would have happened had Hawkins not fled was hypothetical. Additionally, the Court concluded that Hawkins' argument also rested on the erroneous legal premise that a pat down is the only permissible way to conduct a *Terry* frisk. The Court said that a *Terry* search must be reasonable under the circumstances, and that officers may take any measures reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop. The Court stated that though a pat-down is often the least intrusive way to search for a hidden firearm, concern for officer safety may justify lifting clothing or even reaching directly for a weapon in a waistband.

The Court reasoned that the pertinent question then was whether the officers' threat to perform a protective search, when they had reasonable suspicion that Hawkins was armed





and dangerous, coupled with a reach, transformed the lawful *Terry* stop into a full-blown arrest. The Court stated that a *Terry* stop may become an arrest, requiring probable cause, if the stop lasts for an unreasonably long time or if officers use unreasonable force. The Court said that in Hawkins' case, the district court found that the detention was fairly brief and lasted only for the period of time necessary to resolve Hawkins' suspicious behavior. The Court also noted that Hawkins was not touched until he attempted to flee this lawful detention, and that none of the usual indicators of a de facto arrest (being handcuffed, isolated, moved to a cop car, or humiliated in any way) were present. For the above reasons, the Court affirmed the district court's denial of Hawkins' motion to suppress evidence.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on July 26, 2016, and was an appeal from the United States District Court for the Western District of Missouri – Jefferson City. The case citation is *U.S. v. Hawkins*, ___ F.3d ___, (2016).

***“Conch Republic”
Credentials Are Not
Recognized by the State
of Arkansas—U.S. v. The
-Nimrod Sterling***



*Presented by
Taylor Samples
Senior Deputy City Attorney*

Appellant, The-Nimrod Sterling, was convicted of impersonating a foreign diplomatic officer, in violation of 18 U.S.C. § 915, and of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The defendant challenged the jury verdicts on grounds of sufficiency of evidence. The case was appealed to the US Eighth Circuit Court of Appeals.

I. Facts

On October 1, 2013, Arkansas State Police Trooper Jeffrey Preston pulled over Sterling's vehicle for exceeding the speed limit. When Officer Preston approached the vehicle, he noticed two stickers on its bumper. One read "Republic of Conch Diplomat," and the other read "Diplomatic immunity. Do not detain." After informing Sterling of the basis for the stop, Officer Preston requested to see Sterling's driver's license, vehicle registration, and proof of insurance. At that point, Sterling gave Officer Preston only a card reading "Diplomatic Identification Card." When Officer Preston asked if Sterling also had a driver's license, Sterling gave him an Arkansas driver's license.

After conversing briefly with Sterling and a passenger in Sterling's vehicle, Officer Preston returned to his vehicle and further examined Sterling's



diplomatic identification card. The card provided Sterling's name and photograph and identified Sterling as an "Ambassador" of the "Conch Republic." The reverse side of the card included a "Notice [3] per Diplomatic Immunity," which stated that the bearer of the card was "Officially Immune From Traffic Infractions[,] Detention[,] Arrest[,] or Civil and Criminal Prosecution Absent His/Her Consent." Below that statement were several additional warnings regarding the bearer's rights as well as a fax number by which "Law Enforcement" could "Fax a Complaint Against The Bearer for Our Investigation."

After examining the card, Officer Preston consulted his department's policies-and-procedures manual regarding treatment of individuals carrying this type of document. He also searched both the department manual and the United States Department of State website for the Conch Republic, but he did not find such a country in either source. According to Officer Preston, he then decided to "err on the side of caution" and issue Sterling a warning rather than "risk an international incident" by giving Sterling a ticket. Officer Preston issued tickets to all of the other drivers he pulled over for speeding during that shift.

On October 14, 2014, Agent Warren Newman of the Bureau of Alcohol, Tobacco, and Firearms ("ATF") executed a search warrant at Sterling's residence in Pine Bluff, Arkansas as part [4] of an ongoing investigation of Sterling's activities. Upon entering a bedroom occupied by Sterling and his wife, Agent Newman found a loaded 12-gauge shotgun with a shortened barrel lying against the wall on the same side of the bed as Sterling's wallet and other personal effects. Agent Newman also found two boxes of shotgun shells lying on a

dresser on that side of the bed. Upon a further search of the residence, Agent Newman found several utility bills and receipts with Sterling's name and the address of the residence.

Following the search of Sterling's residence, Agents George Word and Joseph Mahoney of the United States Department of State Diplomatic Security Service ("DSS") executed an arrest warrant for Sterling. After waiving his rights, Sterling told the DSS agents that his mother had given him the shotgun "a couple of days ago" and had "asked [him] to grease it up."

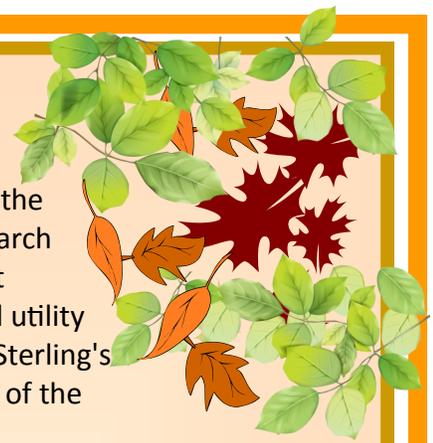
United States v. Sterling, No. 15-3172, 2016 U.S. App. LEXIS 12426, at *2-4 (8th Cir. July 6, 2016)

II. Law

Evidence is sufficient for a conviction where it supports the verdict and insufficient only where no reasonable jury could have found guilt beyond a reasonable doubt. *United States v. Young*, 753 F.3d 757, 782-83 (8th Cir. 2014) (quoting *United States v. Gray*, 700 F.3d 377, 378 (8th Cir. 2012)).

"Whoever, with intent to defraud within the United States, falsely assumes or pretends to be a diplomatic, consular or other official of a foreign government duly accredited as such to the United States and acts as such, or in such pretended character, demands or obtains or attempts to obtain any money, paper, document, or other thing of value, shall be fined under this title or imprisoned not more than ten years, or both." 18 U.S.C. § 915.

The "Conch Republic" is neither a governmental entity nor a sovereign nation.





United States v. Sterling, No. 15-3172, 2016 U.S. App. LEXIS 12426, at *6 (8th July 6, 2016). I'm just sayin'.

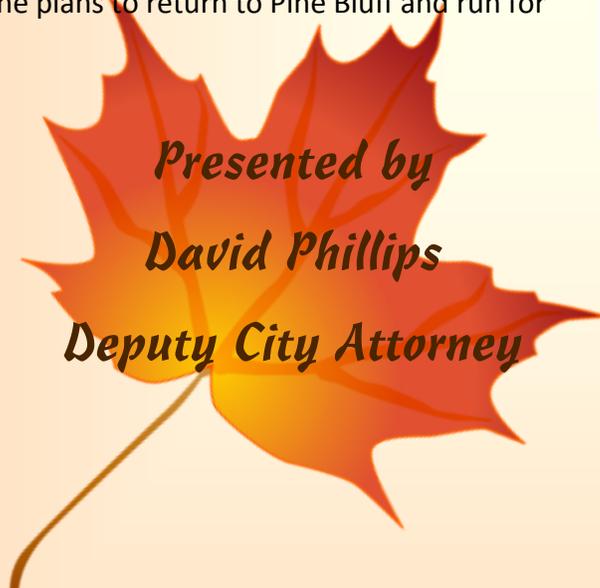
III. Analysis

The Defendant argued that the Federal Statute in question, 18 U.S.C. § 915, was only applicable where a person was impersonating an official from an actual country. He claimed that the fictitious nature of the "Conch Republic" rendered it incapable of being addressed by the statute. The Court looked instead at the individual, who purported himself as being accredited, as opposed to the source of accreditation. The Court determined he was trying to obtain something of value by the misrepresentation and that intent could be inferred.

Sterling's argument that, because he was not holding the shotgun in his hands the evidence was insufficient for conviction did not hold up well, either. As the shotgun was in his bedroom and he acknowledged that it had been transferred from his mother, he was in possession of it.

The conviction of The-Nimrod Sterling was affirmed.

According to an article in the [Pine Bluff Commercial](#), posted on June 8, 2016, The-Nimrod Sterling has, subsequently to this case, been convicted of 2 counts of Aggravated Assault and is awaiting his 2019 TE date, at which time he plans to return to Pine Bluff and run for Mayor.



*Presented by
David Phillips
Deputy City Attorney*

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