

# C.A.L.L.

Issue 15-03

July 1, 2015

## ☞ REMEMBER ☞

*New laws go into effect  
at 0001 hours on  
July 22, 2015.*



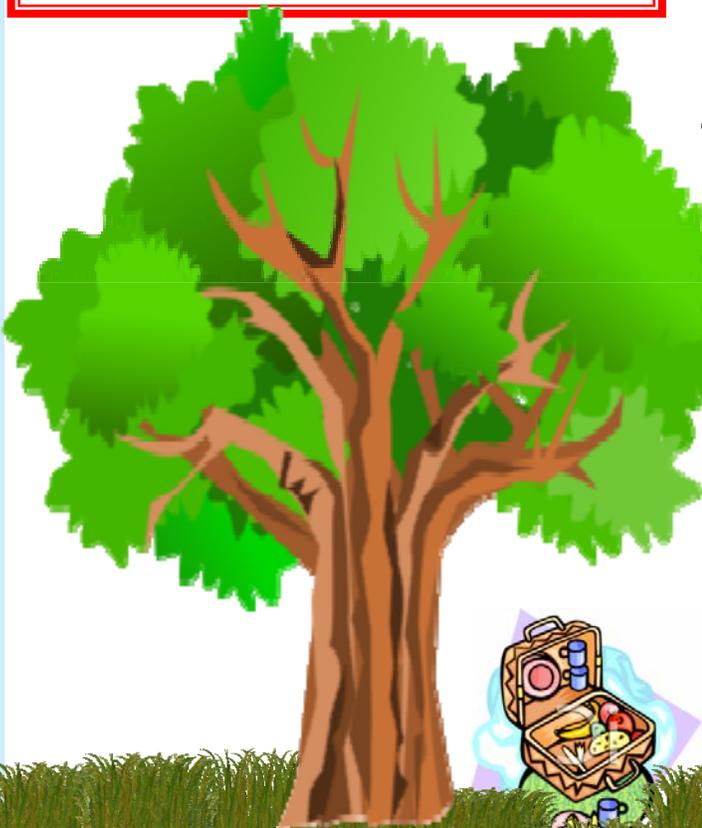
*If you do not already have a "New Laws" book, please stop by the City Attorney's office and pick one up.*



## *Officer Morgan Abernathy Receives the 2014 City Attorney Justice Award*

Each year, the City Attorney's Office presents a Springdale Police Officer with the City Attorney Justice Award. The City Attorney Justice Award is given to an officer who has demonstrated good knowledge of criminal law and criminal procedure in pursuing justice for all persons. Officer Morgan Abernathy was presented with the 2014 award by City Attorney, Ernest Cate, at the Springdale Police Department annual awards ceremony on June 16, 2015.

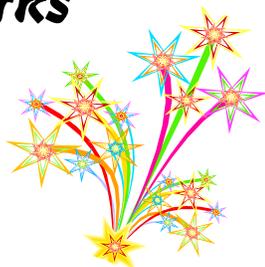
Officer Abernathy began her employment with the Springdale Police Department on July 14, 2013.



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## ***The City Fireworks Ordinance: A Refresher***



Every year about this time, people start asking questions regarding the city's fireworks ordinance. Most of these people will rely on what advice is given to them by the Police Department. In addition, the Police Department inevitably receives a substantial number of calls regarding fireworks issues in the city from the end of June through the first part of July of any year. To assist in answering these questions and responding to these calls, a review of the City's fireworks ordinance is helpful. This review will also ensure that the ordinance is properly enforced. The primary City ordinance on fireworks is found at Section 46-56 of the Code of Ordinances for the City of Springdale.

### Selling Fireworks - Section 46-56(a)

Prior to 2003, the selling of fireworks within

the city limits was strictly prohibited by ordinance. However, in 2003, the Springdale City Council amended the fireworks ordinance to allow the selling of fireworks within the city limits. Now, in order to sell fireworks in the City, a permit to sell fireworks must be obtained from the City Clerk. Before a location can obtain a permit to sell fireworks, certain requirements must be met. Then, once a permit has been issued, the ordinance places several restrictions on the selling of fireworks within the city limits. Specifically:

- \* No fireworks shall be sold or stored within a permanent structure of the city.
- \* No fireworks stand shall be located except in a C-2, C-5, or A-1 zone, provided the A-1 property has frontage on a federal or state highway.
- \* Fireworks may only be sold between June 28th and July 5th.
- \* All locations where fireworks are sold must comply with all fire codes and must be inspected by the fire marshal prior to the sale of fireworks.
- \* No person selling fireworks within the city

shall be allowed to sell any fireworks which travels on a stick, as these are prohibited to be discharged within the city.

\*No fireworks stand shall be located within 250 feet of a fuel dispensing facility.

\*All fireworks stands must have at least a 50 foot setback from the street/highway.

\*No person under the age of 16 shall be allowed to purchase fireworks in the city.

\*All locations where fireworks are sold within the city shall post a sign, visible to the public, which states, "The discharge of bottle rockets or fireworks that travel on a stick are prohibited in the City of Springdale."

### **Prohibited Fireworks – Section 46-56 (b)**

It is a violation of the City's fireworks ordinance for anyone to discharge (or sell) bottle rockets within the city limits of Springdale, even during the time when other fireworks are allowed to be discharged. However, the mere possession of bottle rockets is not prohibited.

### **Permitted Locations/Times – Section 46-56 (c)**

Section (c) of the ordinance sets forth when legal fireworks may be discharged within the city limits. The ordinance provides that **legal fireworks may be discharged on private property between the hours of 8:00 a.m. and 10:00 p.m. beginning on July 1st and ending on July 4th.** Therefore, anyone discharging fireworks after 10:00 p.m. on the night of the 4th would be in violation of the City's fireworks ordinance.

To be in compliance with the ordinance, the owner of the private property where the fireworks are being discharged must consent to this activity.

Furthermore, the ordinance requires that all persons under the age of 16 who are participating in the discharge of fireworks must be supervised by a person of at least 21 years of age.

The City also has an ordinance which prohibits fireworks in a city park, unless the person has obtained written approval from the park director.

### **Public Display of Fireworks**

Section (b)(2) of the ordinance sets forth the requirements for obtaining a permit for a public display of fireworks. The city may issue permits for a public display of fireworks if certain requirements are met. Once a permit is issued, any such public display shall be conducted by a competent operator approved by the fire chief and shall be located and discharged in such a manner as to not be hazardous to any property or dangerous to any person. In addition, **a person or entity may discharge fireworks pursuant to a permit for the public display of fireworks only between the hours of 8:00 a.m. and 11:00 p.m. from July 1st through July 4th of any year.** There are three situations when the city may issue a permit to allow a public display of fireworks on a day not falling between July 1st and July 4th of any year. **First**, the city can issue a permit for a public display of fireworks at a professional sporting event in a P-1 zone between the hours of 6:00 p.m. and 11:00 p.m. from April 1st through September 30th of any year, provided that the property adjacent to the P-1 zone is commercial or agricultural. **Second**, the city can issue a permit for a public display of fireworks for the purpose of allowing small test firing to determine the feasibility of a discharge site for future public display, provided no salute shells are discharged and provided that any such test firings shall occur between the hours of 6:00 p.m. and 10:00 p.m. between April 1st and June 30th of any year. **Third**, the city can issue a permit to allow the Rodeo of the Ozarks to shoot fireworks on regularly scheduled nights of the



Rodeo of the Ozarks. This ordinance was passed by Springdale City Council in 2012 because the Rodeo of the Ozarks now has their first performance starting on Wednesday and ending on a Saturday, which does not always fall between July 1<sup>st</sup> – 4<sup>th</sup> date. For instance, the Rodeo of the Ozarks will be held July 4<sup>th</sup> through July 7<sup>th</sup> this year. Under the new ordinance, the Rodeo of the Ozarks can obtain a permit to shoot fireworks during the Rodeo of the Ozarks, but the fireworks still must not be discharged after 11:00 p.m.



**This article prepared by Ernest Cate, City Attorney**

**Reprint from July 1, 2014 C.A.L.L.**

## ***City Ordinance Defendants Are Not Entitled to Jury Trial***

Calvin Carrick was cited by Code Enforcement Officers in Little Rock for "high grass and the failure to maintain a garage or other accessory structure." He was found guilty at a bench trial in the Little Rock, State of Arkansas, District Court and no punishment was imposed. Carrick appealed the verdict to State Circuit Court and demanded a jury trial. The first trial ended in a mistrial. The case was ultimately dismissed.

Carrick demanded a refund of the \$165.00 filing fee. His demand was refused. Carrick then brought a 42 U.S.C. § 1983 suit in Federal Court alleging impermissible barriers to his 6<sup>th</sup> amendment right to a jury trial. He also alleged ancillary due process violations, including Arkansas Constitutional claims. The U.S. District Court for the Eastern District of Arkansas at Little Rock denied all claims and relief. Carrick appealed.

In reviewing this claim, the U.S. Eighth Circuit Court of Appeals first examined whether a defendant facing a charge of a city ordinance violation is entitled to a jury trial in the State of Arkansas. The entitlement to a jury trial emanates from the Sixth Amendment to the United States Constitution. The right to a jury trial as provided in the Sixth Amendment

applies to "serious" offenses as that term is defined in Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989). In Blanton, a "serious" offense is defined as one in which a jail term of more than 6 months or a fine of more than \$1,000.00 is at risk. The presumption of seriousness can be rebutted by "a showing of some additional consequences or punishments of a different nature and of sufficient severity to indicate that the legislature deemed the offense serious." Id at 542.

In the case at bar, the Court of Appeals acknowledged that no city may impose a fine greater than \$1,000.00, per Ark. Code Ann. § 14-55-504 and those municipal ordinances could not result in imprisonment. The Holding:

We conclude on these facts that Carrick was not charged with a "serious" offense because he faced no possible jail time, he was exposed to a statutory maximum possible fine of \$3,000 total for three alleged violations, and he alleged no other penalties or consequence associated with the citations. Because the violations were not "serious" offenses, he was not entitled to a jury trial and

there was no Sixth Amendment violation.

Carrick v. Beebe U.S. App. LEXIS \_\_\_\_\_ (8th Cir. Ark. April 7, 2015)

Note: The Arkansas Constitution is silent on the distinction between "serious" crimes and "petty" crimes.

**This article prepared by David Phillips,  
Deputy City Attorney**

## ***Supreme Court of United States Holds that Officers Were Entitled to Qualified Immunity in Shooting of Mentally Unstable Person***

### **FACTS TAKEN FROM THE CASE**

In August of 2008, Teresa Sheehan lived in a group home for people dealing with mental illness, and she had a private room. On August 7, 2008, social worker Heath Hodge attempted to visit Sheehan to conduct a welfare check. Hodge was concerned because Sheehan had stopped taking her medication, no longer spoke with her psychiatrist, and reportedly was no longer changing her clothes or eating. After knocking on Sheehan's door but receiving no answer, Hodge used a key to enter Sheehan's room. There he found her on her bed, initially non-responsive to questions. Sheehan then sprang up and yelled, "Get out of here! You don't have a warrant! I have a knife, and I'll kill you if I have to." Hodge left without seeing whether Sheehan actually had a knife, and Sheehan slammed the door shut behind him.

Hodge cleared the building of other people and completed an application to have Sheehan detained for temporary evaluation and treatment. Hodge checked off boxes that Sheehan was a threat to others and was gravely disabled, but he did not mark that she was a danger to herself. Hodge telephoned the police and asked for help to take Sheehan to a secure facility. Officer Kathrine Holder

responded to police dispatch and headed toward the group home. Upon arrival, Officer Holder reviewed the temporary-detention application from Hodge and spoke with Hodge. Sergeant Kimberly Reynolds also arrived on scene, and Hodge confirmed with a nurse at the psychiatric emergency services unit at San Francisco General Hospital that Sheehan would be admitted.

Accompanied by Hodge, the police officers went to Sheehan's room, knocked on the door, announced who they were, and told Sheehan that "we want to help you." Receiving no answer, the officers used Hodge's key to enter the room. Sheehan reacted violently by grabbing a kitchen knife with a 5-inch blade and began approaching the officers, yelling "I am going to kill you. I don't need help. Get out." The officers did not have their weapons and retreated into the hallway, leaving Sheehan behind in her room with the door closed. The officers called for backup and sent Hodge downstairs to let in reinforcements. Because Sergeant Reynolds believed that the situation required the officers' immediate attention, the officers chose to re-enter Sheehan's room. In making that decision, the officers did not pause to

consider whether Sheehan's disability should be accommodated. The officers knew that Sheehan was unwell, but Sergeant Reynolds considered that to be a secondary issue given that they were faced with a violent woman who had already threatened to kill her social worker and two uniformed police officers.

The officers decided that Officer Holder, the larger officer, should push the door open while Sergeant Reynolds used pepper spray on Sheehan. With pistols drawn, the officers moved in. Sheehan had a knife in her hand and again yelled for them to leave. Sheehan was unsure if she threatened death a second time, but Sheehan did concede that it was her intent to resist arrest and to use the knife. Sergeant Reynolds began pepper-spraying Sheehan in the face, but Sheehan would not drop the knife. With Sheehan being only a few feet away, Officer Holder shot her twice, but Sheehan did not collapse. Sergeant Reynolds then fired multiple shots. Sheehan finally fell, and a third officer kicked the knife out of Sheehan's hand. Sheehan survived the shooting.

Subsequently, Sheehan was prosecuted for assault with a deadly weapon, assault on a police officer with a deadly weapon, and making criminal threats. Sheehan was acquitted of making threats, but the jury was unable to reach a verdict on the assault counts. Sheehan then filed suit, alleging that San Francisco violated the Americans with Disabilities Act of 1990 (ADA) by subduing her in a manner that did not reasonably accommodate her disability. Sheehan also sued Sergeant Reynolds and Officer Holder in their personal capacities under 42 U.S.C. § 1983 for violating her Fourth Amendment rights.

The United States District Court granted summary judgment for the City of San Francisco and the two police officers, holding that police officers making an arrest are not required to first determine whether their actions would comply with the ADA before protecting themselves and others. The District Court also held that the police officers

did not violate the Fourth Amendment because the officers had no way of knowing whether Sheehan might escape through a back window or fire escape, whether she might hurt herself, or whether there was anyone else in her room whom she might hurt. The District Court also observed that Officer Holder did not begin shooting until it was necessary for her to do so in order to protect herself, and that Sergeant Reynolds used deadly force only after she found that pepper spray was not enough force to contain the situation.

The Ninth Circuit U.S. Court of Appeals reversed the District Court in part, concluding that it was for a jury to decide whether San Francisco should have accommodated Sheehan by, for instance, "respecting her comfort zone, engaging in non-threatening communications and using the passage of time to defuse the situation rather than precipitating a deadly confrontation. In regard to Sergeant Reynolds and Officer Holder, the Ninth Circuit held that a jury could find that the officers provoked Sheehan by needlessly forcing a second confrontation, and that it was clearly established that an officer cannot forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry.

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

On appeal to the Supreme Court of the United States (Court), the Court chose to address the issue of whether Sergeant Reynolds and Officer Holder can be held personally liable for the injuries suffered by Sheehan. The Court held that the Officers were entitled to qualified immunity.

In setting forth the rule on qualified immunity, the Court said that public officials are immune from suit under 42 U.S.C. § 1983 unless they have violated a statutory or constitutional right that was clearly established at the time of the

challenged conduct. Additionally, the Court stated that an officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent placed that statutory or constitutional question beyond debate. The Court noted that this exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.

The Court pointed-out that the officers did not violate any federal right when they opened Sheehan's door the first time. The Court continued that it was not unconstitutional for the officers to enter the room after Sheehan did not answer because, as it held in *Brigham City v. Stuart*, 547 U.S. 398 (2006), "Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." The Court also noted that the police officers knew that Sheehan had a weapon and had threatened to use it to kill three people, and that delaying could possibly make the situation worse. The Court said that the Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others. Furthermore, the Court stated that after the officers opened Sheehan's door the second time, their use of force was reasonable. The Court pointed-out that Sergeant Reynolds tried to subdue Sheehan with pepper spray, but Sheehan kept coming at the officers until she was only a few feet from a cornered Officer Holder. The Court said at this time, the use of potentially deadly force was justified.

The Court said that the real question is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempt to accommodate her disability. The Court

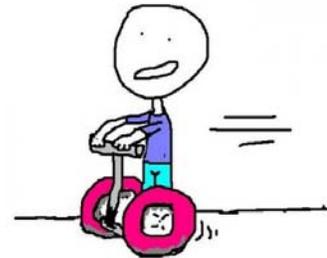
concluded that Sheehan's Fourth Amendment rights were not violated because the officers' failure to accommodate Sheehan's illness did not violate clearly established law. The Court reasoned that there was no precedent clearly establishing that there was not an objective need for immediate entry in the facts confronted by Sergeant Reynolds and Officer Holder. The Court said that there is no precedent that would have led a reasonable police officer to believe that opening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Fourth Amendment. Without such fair notice, an officer is entitled to qualified immunity. In conclusion, the Court held that qualified immunity applies in this case because the police officers had no fair and clear warning of what the Constitution requires. Because the qualified immunity analysis is straightforward, the Court said that it need not decide whether the Constitution was violated by the officers' failure to accommodate Sheehan's illness.

**Case:** This case was decided by the Supreme Court of the United States on May 18, 2015, and was an appeal from the United States Court of Appeals for the Ninth Circuit. The case citation is *City and County of San Francisco, California, et al., v. Sheehan*, 575 U.S. \_\_\_\_ (2015).

**This article prepared by  
Taylor Samples,  
Senior Deputy City Attorney**



## ***A Segway is Not a Motor Vehicle***



Mark Alan Greenman was arrested three times by officers of the City of Medina, Minnesota on the charges of DWI and other traffic infractions. The vehicle in question in each incident was a Segway. In the first two city trials, the Judge held that a Segway was not a motor vehicle within the meaning of their DWI statute, which is similar to our own. A similar finding in the third case led to a governmental appeal. The Minnesota Court of Appeals affirmed the lower court, holding that a Segway was not a motor vehicle within the meaning of the DWI statute. On remand, the State dismissed the charge.

Greenman filed a suit under the Civil Rights Statute, 42 USC § 1983, alleging that the officers, the city and the prosecuting attorney all conspired to deny him his right to be free of unreasonable prosecution. The US District Court dismissed the claim, applying the doctrine of qualified immunity. The US Eighth Circuit Court of Appeals affirmed on the grounds that the arrests could have been justifiable on the basis of the other traffic charges in the absence of the DWI charges.

The legal analysis of the accompanying traffic charges differs from Arkansas law. But the DWI analysis is the same. A Segway is not a motor vehicle for purposes of the Arkansas DWI statute.

**Case:** U.S. Court of Appeals for the Eighth Circuit. *Greenman v/ Kessem*. 2015 u.s. App. LEXIS 8807 (8th Cir. Minn. May 28, 2015)

**This article prepared by David Phillips,  
Deputy City Attorney**

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## ***8th U.S. Circuit Court of Appeals Holds That Police Officer Was Not Entitled to Qualified Immunity in Excessive Force Claim***

### **FACTS TAKEN FROM THE CASE**

On August 22, 2010, Jonathon Ziesmer was driving brothers Travis and Tyler Jones back home on Interstate 94 from a restaurant in St. Paul, Minnesota. Travis attempted to flick a cigarette out the passenger-side window, but the butt flew back in through the rear window and landed on the floor of the backseat. Ziesmer pulled the car over so the cigarette could be retrieved. Moments later,

Trooper Derrick Hagen pulled his patrol car up behind Ziesmer's car and approached to see if the vehicle's occupants needed assistance.

Trooper Hagen approached from the front passenger side of the car, where Travis was seated with his window rolled halfway down. According to Trooper Hagen, Travis was moving around and quickly bent over as if he was reaching for something. Travis denied making any such movements. Trooper Hagen claimed that as he approached he saw a hammer lying on the floor of the car. According to Ziesmer, the hammer was concealed beneath the seat, and Trooper Hagen could not possibly have been aware of it until after a later search. Trooper Hagen also noted that the smell of marijuana was coming from the car, a fact that all three occupants denied. Travis and Ziesmer explained to Trooper Hagen that they were pulled over to extinguish a cigarette. Trooper Hagen received identification from all the occupants, went back to his patrol car to run their names through police dispatch, and discovered no relevant information on any of the three passengers or the vehicle.

Trooper Hagen returned to the car, asked Travis to get out, and told Travis that he was going to be searched. After being frisked, Travis complied with Trooper Hagen's instruction to go stand underneath a highway overpass about 15 to 20 yards away. Trooper Hagen then went to the driver's side of the vehicle and asked Ziesmer to exit. According to Ziesmer, he calmly asked why he had to exit, which led Trooper Hagen to scream "get out of your car right now, I do not have to have a reason to pull you out of your car." Trooper Hagen admitted to raising his voice but denied screaming. Ziesmer also claimed that he tried to call 911 on his cell phone, but that Trooper Hagen reached into the window, hung up the phone, and threw it on the passenger floor. Trooper Hagen denied remembering that Ziesmer had a phone, but the St. Paul Police Department had a record of the received 911 call.

Trooper Hagen claimed that he believed Ziesmer was going to flee the scene by

driving away. Therefore, Trooper Hagen reached in through the window, unlocked the driver's side door, unfastened Ziesmer's seatbelt, and pulled Ziesmer out of the vehicle. Ziesmer claimed that Trooper Hagen threw him against the car and then onto the ground. Trooper Hagen then asked Ziesmer to stand up and wait on the grass by the side of the road. According to Ziesmer, he went and stood by the grass, waiting while Trooper Hagen stared at him for almost a minute. After this pause, Ziesmer said that Trooper Hagen tackled him to the ground and dug his knee into his back, while pulling Ziesmer's hands behind his back, causing Ziesmer's shoulder to pop out of socket. Ziesmer also claimed that Trooper Hagen popped Ziesmer's shoulder back into socket and then punched him in the back of the head four to eight times. Travis Jones said that he observed Trooper Hagen using his forearm to push Ziesmer's face into the ground several times, even after placing handcuffs on Ziesmer. Trooper Hagen denied tackling and hitting Ziesmer, and instead said that once Ziesmer was on the ground outside the car that he handcuffed Ziesmer, searched him and stood him up.

Upon searching Ziesmer, Trooper Hagen found a small amount of marijuana and a pipe with marijuana residue in Ziesmer's pants pocket. After placing Ziesmer in the back of his police car, Trooper Hagen activated his dashboard camera, which had not been recording while the altercation took place, and questioned Ziesmer about what had just occurred. Ziesmer was then issued a written citation for possession of marijuana and released. The charges were later dropped. Ziesmer did not call for an ambulance or go to the hospital, but instead dropped the Jones brothers off at their home before continuing home himself. Ziesmer reported that immediately following the incident he had bruising and scrapes on his face and a large knot on the back of his head. Ziesmer took pictures of his bruised face when he got home. Tyler Jones said that there was a welt on Ziesmer's head the day after the incident. Five days following the incident, Ziesmer went to a physician for x-rays on his spine, head,

and neck area. Ziesmer claimed that a few days or weeks later he called the state patrol office to get the audio and video footage of the incident, but was informed that there was no footage available.

Ziesmer did not see a doctor again until almost three months later. On November 8, 2010, he underwent a MRI and was diagnosed with "minimal disc bulging" and neck and upper-back pain. He then saw a doctor four months later in March for a CT scan to diagnose neck pain, and he was advised that the pain would subside with time. Ziesmer did not return again to the doctor for a year and a half, at which point he complained of neck pain and began receiving physical therapy. In December, after many physical therapy sessions, Dr. David Spight from the Institute of Low Back and Neck Care noted that there is "no change in right neck pain" and "limited cervical right side bending and rotation" due to "post-traumatic right neck pain." Ziesmer then complained of shoulder pain, but not until January of 2013, around two and a half years after the altercation with Trooper Hagen.

Ziesmer then brought a § 1983 action in the United States District Court for the District of Minnesota for money damages. Ziesmer alleged that his injuries resulted from excessive force and unreasonable seizure by Trooper Hagen in violation of the Fourth Amendment. The district court granted summary judgment in favor of Trooper Hagen, concluding that Ziesmer had been unable to substantiate his injury claims and that it was damning to Ziesmer's case that he presented no expert witnesses to opine as to his medical condition, either at the time of the incident or thereafter. The district court held that any injury that had been sustained by Ziesmer was de minimis, and thus Trooper Hagen was entitled to qualified immunity. Ziesmer appealed the district court's ruling to the Eighth U.S. Circuit Court of Appeals.

#### **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 (Court), Ziesmer claimed that the district court erred in granting summary judgment in favor of Trooper Hagen and holding that Trooper Hagen was entitled to qualified immunity. In setting forth the rule on qualified immunity, the Court said that government officials are shielded for civil damages so long as they did not violate a clearly established right that a reasonable person would have known. Furthermore, the Court stated that in a claim of excessive force resulting in a Fourth Amendment violation, the dispositive question is whether the officer's conduct was objectively reasonable under the circumstances, as judged from the perspective of a reasonable officer on the scene at the time the force was applied.

The Eighth U.S. Circuit Court of Appeals reversed the district court's granting of summary judgment in favor of Trooper Hagen and remanded the case back to the district court. In its reasoning, the Court agreed with the district court that Ziesmer's contusions and scrapes did not require any medical attention, resolved themselves without any medical attention, and were therefore de minimis. However, the Court concluded that the district court erred in ruling at the summary judgment stage that the neck and back injuries Ziesmer alleged were not properly substantiated. The Court noted that Ziesmer had seen at least twelve medical providers and physical therapists over three years; had attended eighteen different physical-therapy sessions; had received a MRI, a CT scan, and multiple x-rays; and had maintained that he was experiencing pain in his neck throughout those three years. The Court stated that in Ziesmer's case there is a material question of fact regarding the seriousness of Ziesmer's injuries, pitting Ziesmer's account of his neck problems against Trooper Hagen's expert witness. The Court said that it is a task for a jury to weigh Ziesmer's version of events against Trooper Hagen's and to compare Ziesmer's medical records and subjective assessment of pain against Trooper Hagen's medical-expert testimony. The Court concluded that this weighing of evidence involves a credibility determination that is not

appropriate at the summary judgment phase.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on May 11, 2015, and was an appeal from the United States District Court for the District of Minnesota-Minneapolis. The case citation is *Ziesmer v. Hagen*, \_\_\_ F.3d \_\_\_, (2015).

This article prepared by  
Taylor Samples,  
Senior Deputy City Attorney

## Leon Good Faith Exception

A.C. Jackson was charge with and convicted of two counts of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Jackson appealed the U.S. District Court ruling that denied his motion to suppress the evidence based on a defective search warrant affidavit.

### I. Facts of the Case

On March 28, 2013, a Wayne County, Missouri deputy received a call from a dispatcher that a man wanted to report that his firearm had been stolen. When the deputy arrived at the home of Bob Elledge he discovered the man reporting the stolen firearm was the Defendant, A.C. Jackson. A Missouri Highway Patrol Trooper arrived shortly thereafter to assist. Defendant informed the deputy that he had purchased a .22 caliber rifle from Elledge for \$200 and that Defendant's nephew, Bobby Joe Jackson, had stolen the rifle. When the deputy stepped outside to speak with the trooper, she informed him Defendant was a previously convicted felon with numerous armed criminal actions on his criminal history report. The officers proceeded to contact the nephew, Bobby Joe Jackson. The nephew informed the officers he was

involved in a dispute with Defendant and

feared for his life. He stated defendant had threatened to shoot him. Bobby Joe Jackson stated he had told Elledge this story and asked if he could take the gun to feel safer and keep the gun away from Defendant. Elledge had agreed to give the gun to the nephew. In addition, Defendant's nephew informed the officers there was another gun, a multi-barreled firearm, located in Defendant's home. After questioning the nephew, the officers again questioned Defendant. Defendant denied having any firearms in his home. He stated he had purchased the .22 caliber rifle as an investment, and since it was not in his home he did not think he had broken any rules. The deputy asked to search Defendant's home but he declined stating the deputy would have to get a warrant. The officers then arrested Defendant and took pictures of his home to use in the application of a search warrant. The deputy then prepared an affidavit for the application of a search warrant. The affidavit contained the following sworn statement of probable cause

for the search:

I am a member of Wayne County Sheriff's Department. I am a certified Peace Officer in the State of Missouri and have been since 2011. I have training in investigations and have been involved in investigations that have led to favorable conclusions.

On Thursday, March 28, 2013, this officer received information of a possible stolen firearm from AC Jackson. Upon investigating said report this Officer found the report to be false. This Officer received information that AC Jackson was to be [sic] a convicted felon and to be in possession of other firearms at his residence on Hurley DR, Wappapello, Missouri. This Officer request Jackson to check his residence for firearms wherein he refused. This Officer has reason to believe there are more firearms at Jackson's residence. This Officer has a statement confirming presence of firearms and ammunition at this trailer.

The prosecuting attorney reviewed the application and approved it. The deputy then presented the search warrant affidavit and application to Wayne County, Missouri, Circuit Judge Randy Shuller. Judge Shuller asked the deputy some questions about the case and the basis for the warrant and then signed the warrant. When the officers executed the warrant they discovered a Rossi multibarreled firearm and ammunition in the Defendant's home. Defendant later admitted he had purchased the .22 caliber rifle that he had previously reported stolen, but denied the Rossi multi-barreled firearm found in his home was his. Defendant

claimed the Rossi firearm belonged to his nephew.

United States v. Jackson, 2015 U.S. App. LEXIS 7397, 2-4 (8th Cir. Mo. 2015)

## II. Arguments.

The Defendant claimed that the affidavit lacked probable cause and that reliance on it was unreasonable. The Defendant further argued that the affidavit contained a false statement.

## III. Law.

A search warrant must be supported by oath or affirmation of probable cause. Where it is not, the exclusionary rule causes suppression of evidence illegally obtained. However, the exclusionary rule does not apply where law enforcement officers, who obtained a warrant from a judge, were acting in objective good-faith. In an instance in which a warrant is later found to be invalid, the evidence seized will not be suppressed where objective good-faith can be demonstrated. The good-faith exception was first articulated in the U.S. Supreme Court case of United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 3421, 82 L. Ed. 2d 677 (1984). That case stood for the idea that law enforcement officers should be able to rely on Court approved search warrants and created the standard of objective good-faith reliance on search warrants. The good-faith exception would not apply in four instances:

- 1) When an affidavit contains a knowingly false statement or a statement made with reckless disregard for the truth;
- 2) When the issuing judge wholly abandons his judicial role;
- 3) When the supporting affidavit is so lacking in "indicia of probable cause" as to make belief in its existence unreasonable; and
- 4) When the warrant is so facially

deficient that no police officer could reasonably presume it to be valid.

The reviewing Court looks to the totality of circumstances to determine reasonability.

#### IV. Analysis.

In this case, the Eight Circuit Court of Appeals noted that the affiant Deputy interviewed 3 people, to include the defendant, in making his determination. The interviews, to some degree, corroborated the notion that the defendant had likely possessed a firearm. The Deputy had knowledge that the defendant was a convicted felon and the Deputy had visited the location and had attempted to gain consent for a search.

The Defendant alleged in his appeal that the Deputy's statement that his report was false was itself false. This is a somewhat counterintuitive argument by a person accused of felon in possession of a firearm, but in today's environment of alternative pleading, it is hardly surprising. The Court didn't spend much time on this point but held that the Deputy could reasonably conclude that a theft had not taken place as the person that took the firearm may have intended to give it back. Please note that this is not the law in Arkansas. Here, permanent deprivation is not an element; instead it is merely simple deprivation.

Perhaps the most telling fact in support of objective good-faith was that the Deputy had taken the warrant affidavit to the prosecutor as well as the judge before executing it. It would be quite a stretch to accuse a law enforcement officer of bad-faith where two lawyers agreed with him or her.

The conviction was affirmed.

#### V. Important Points:

- Due diligence in investigations is the best way to invoke good-faith.
- Make sure your prosecutor is on your side when filing your Court documents.

**This article prepared by David Phillips,  
Deputy City Attorney**

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## ***Leafy Uncertainty***

David Allen New filed a Civil Rights law suit against the Benton County, Arkansas Deputy that arrested him on the charge of possession of a controlled substance. His argument was that the Deputy had no probable cause to arrest him. The U.S. District Court for the Western District of Arkansas at Fayetteville, (the decision does not identify the judge) denied qualified immunity to the Deputy, the sole defendant in the suit. The denial was based on the issue of officer credibility in light of the crime laboratory report.

#### I. Facts.

Sheriff's Deputy Kurt Banta stopped New's vehicle for speeding shortly after 8:00 a.m. on a Saturday morning. Banta learned that New and his passenger, New's brother Michael, had

prior arrests for marijuana possession. Though claiming to be in a hurry, New gave Banta consent to search the vehicle. Deputy Santos arrived as back-up and waited with the News outside the car while Banta began his search on the passenger side of the front seat. New told Santos there was a knife in the console, which Banta had already found. Supervisor Denver, patrolling in the area, went to the scene and joined Banta, searching from the driver's side of the vehicle. [\*3] Denver found a dried and curled leaf he identified as marijuana between the driver's seat and the door frame. He advised Banta this was now a probable cause search, and the two searched more aggressively. They found a second leaf on the floor almost under the driver's seat. Denver placed the leaves in a brown sack, arrested David New for possession of marijuana, and submitted the leaves to the crime lab for testing. The lab reported, "no controlled substances detected." This lawsuit followed. The two leaves are not part of the summary judgment record.

At his deposition, Denver testified that he had worked for the Sheriff's Office for twenty years and had substantial training and experience in drug interdiction, including serving two years as handler of a drug detection canine. Denver described the two leaves as green with fingers and testified he was "absolutely convinced" they were leaves from one or more marijuana plants, even if they did not test positive for the controlled substance THC. New testified, with equal adamance, that the leaves were not marijuana because he and his brother did not "have marijuana on the property" they had left that morning. New only briefly saw a "finger [\*4] of a leaf over the corner of this brown paper sack that [Denver] had put them in." He did not recall if the finger came to a point and had only previously seen a

marijuana leaf on television. Michael New testified he did not see the leaves but believed they were not marijuana. He recalled that the brothers had tracked wet leaves into the car from their wooded property that morning. By affidavit, the crime lab's forensic chemist averred that, in the absence of THC, the leaves "did not meet criteria to be a positive [marijuana] sample." However, she noted, "there are many variables as to why [marijuana] leaves may not test positive for THC," and the two leaves had "cystolithic hairs, which are found on but not unique to a [marijuana] leaf."

New v. Denver, 2015 U.S. App. LEXIS 8913, 2-4 (8th Cir. Ark. May 29, 2015)

## II. Law.

The sole issue of denial of qualified immunity was the basis of this interlocutory appeal, which is permissible under Federal rules when the facts are undisputed and the ruling is based only on interpretation of the law. Qualified immunity protects an officer acting reasonably at arrest. It applies when "a reasonable officer could have believed [the] arrest to be lawful, in light of clearly established law and the information the arresting officer[] possessed." New v. Denver, 2015 U.S. App. LEXIS 8913 (8th Cir. Ark. May 29, 2015) (quoting from Hunter v. Bryant, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991)).

## III. Analysis.

The main issue in this case on appeal was whether Deputy Denver could reasonably have believed he had probable cause to make an arrest. Ordinarily, an officer's state of mind is irrelevant as to whether probable cause exists. But in this case, the existence of probable cause depended on the Deputy's belief that the leaves were contraband. As qualified immunity does not protect those who are "plainly incompetent" *Id.*, or those who clearly violate the law, the Deputy's credibility became a relevant issue.

The Court quickly disposed of the suspect's denial and the exculpatory lab report as irrelevant to the necessary inquiry, labeling the former as "hindsight evidence." *Id.* The Court also noted that "the Constitution 'does not guarantee that only the guilty will be arrested.'" *Id.*

The Court reviewed facts known to the arresting officer at the time of arrest. The Court held that the Deputy's training and experience made his believe objectively reasonable and that his actions were consistent with routine police work. No bias, incompetence or knowing violation of the law was evident. Therefore, the Court found the Deputy's belief that the leaves were marijuana objectively reasonable and granted qualified immunity.

The case was remanded and dismissed with prejudice.

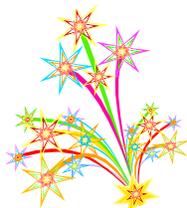
**Case:** Eighth U.S. Court of Appeals. *New v. Denver*, 2015 U.S. App. LEXIS 8913, 2-4 (8th Cir. Ark. May 29, 2015).

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## C.A.L.L.

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