

# C.A.L.L

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City Attorney Law Letter

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**Happy Holidays**  
**From the Springdale City Attorney's Office**

## **Arkansas Supreme Court Affirms Capital Murder Conviction in Washington County Case**

**Facts Taken From the Opinion:** On March 2, 2007, eleven-year-old Svana Stokes woke up late for school and realized her mother, Sandra Stokes, had slept through the alarm. When Svana went looking for her mother, she found her gagged and bound in her bed in the upstairs sleeping loft. Her mother's boyfriend, Jerry Sykes (appellant), who had been present in the house the night before, was gone. His vehicle was not parked in the driveway. Moreover, several items were missing from the home, including a laptop computer, Svana's cellular phone, Sandra's cellular phone, Sandra's purse containing credit cards and cash, and the license plate from Sandra's car. When law enforcement began searching for Sykes, they discovered a trail of ATM transactions and cellular phone communications from Oklahoma through Mexico. Following a six-month manhunt that extended into Central America, Sykes was captured and brought back to Washington County for trial.

Prior to trial, Sykes filed a motion to suppress a statement he made during a custodial interrogation on September 30, 2007. The court held a hearing on the motion on August 21, 2008. Chuck Rexford, Deputy Sheriff of the Washington County Sheriff's Office, testified that he responded to an emergency call at Stokes's home on March 2, 2007. He processed the initial crime scene, interviewed witnesses, and attempted to track down Sykes. In late September, Sykes was discovered in Honduras and brought back to Arkansas for interrogation. Rexford testified that he began the questioning session by advising Sykes of

his rights and the charges against him. Rexford presented Sykes with the rights form, had him acknowledge he understood his rights, and had him sign the form. The interview was audio and video recorded. The questioning began with Sykes explaining his travels from Arkansas to Honduras. Sykes admitted taking \$1500 using Sandra's ATM card. The conversation then turned to the death of Stokes.

OFFICER: Well, how about the laptop?

SYKES: Well, I tell you what Cap'n. I don't mean to be anti-social on this deal or anything like that, you know what I'm saying, but this uh, this whole thing is uh, is, is, is, really something that I pretty much already just, I already pretty well decided I'm in the story about getting down there, and all like that, I don't mind telling you, cause it's a kinda interesting story, if I say so myself, I can't believe it happened, but anyhow, and especially the part about Mexico and Mexico City about sitting in immigration for that long and them letting me go, I mean I just knew you guys had me, huh. Uh, anyhow, uh, because of the seriousness of this thing and, and, and, the price and the cost of this thing, you know, which is my life, probably twice, huh, at least, uh, I really, had ruther, do anything...

OFFICER: Let me, let me ask you this. Well I mean, I worked the scene out there, so I know...

SYKES: Uh huh.

OFFICER: . . . what, what Sandy looked like and, all about the scene...

SYKES: Uh huh.

OFFICER: I did the crime scene. What was your intent? Just, just to get away and keep her from talking?

SYKES: Man, I'd like to tell you this, okay. I, I mean I'd like to answer this to you, I really would. You are very much onto the right track through. I'll go that far, alright. But please try to understand, I don't, *I don't feel like that I need to be discussing this at all. I think it's really plumb ignorant to answer any questions right now, even if, I mean, can you not understand that?* I mean I ...

OFFICER: Oh I understand that.

SYKES: . . . I am up against a fucking wall here.

OFFICER: You're, you're, right now you're, you know, you're in deep, deep trouble.

SYKES: I cert, I certainly am.

OFFICER: But that's why I was sitting here, to give you an opportunity...

SYKES: And it's just, it's just like, it's just like the thing with the kidnapping thing. I mean it's pretty fucking how evident that nobody was trying to kidnap her. Why, why that happened is beyond me. I will say this, okay, the intent was not there. I mean I didn't kill her and then tied her up. I actually had resuscitated her, okay. What I didn't do was I didn't, I didn't call 9-1-1, and, that's right there man how I feel now I've said a lot more than what uh, what I should have already probably said. You know what

I mean. And I feel okay about that. And you've been a real good guy, I mean, and I honestly think you're a real serious profession police officer, and I don't mind really sitting here and talking to you about this, but still you know, *it says right there on that thing, anything I say can and will be used against me in a court of law, so the best I can do is, for myself, is to shut the hell up and not talk about this without first talking to a lawyer.* And I don't have the money or the funds for a lawyer. And I don't, I mean, you have a lot of expertise in the law, alright, and I'm pretty much green ass ignorant about all this stuff, okay, I mean I don't know what, but I imagine, I imagine right now, worst case scenario on just one of those offenses, if not two of them, I could probably sit in a chair.

OFFICER: Yeah, it could go that way. That would depend on probably the prosecutor.

SYKES: I would be, I would be pretty much ignorant to assume that it's going to go any other way. You have to understand that, that's where I'm at with this, okay?

OFFICER: Sure.

SYKES: So it's not that I'm trying to be a dickhead or be uncooperative or anything like that, it's just that I'm just trying to be . . .

OFFICER: I was just trying, I was, you know, just sit you down like I would anyone else, whether it be . . .

SYKES: Well, I . . .

OFFICER: . . . to let them tell their side of the story if they wanna tell it, you know.

SYKES: . . . well . . .

OFFICER: And explain it away, or what, or try to.

SYKES: . . . a lot of those unintentional statements like that can really, you know, do damage to, I mean if, if, if my mind is anywhere near what's fair and what's right, I might be able to just get this thing, I'm thinking in the back of my head, uh, voluntary or involuntary manslaughter.

OFFICER: Okay. Well, that's that's up to the prosecutor.

SYKES: Well, well, man I understand that, but there's no, there's no point in feeding him full, you know what I'm saying, or anybody fuel, as to these accusations. I mean *right now, what I need to do is sit down and talk to a lawyer first* and, and let them, and spill my gut out to them and then whatever that lawyer sees fit to decide, uh . . .

OFFICER: Sure.

(Emphasis added.)

In a letter opinion filed October 8, 2008, the circuit court found that everything Sykes said prior to "I mean right now, what I need to do is sit down and talk to a lawyer first and, and let them, and spill my gut out to them and then whatever that lawyer sees fit to decide," was admissible, and everything following it was inadmissible because Sykes

had unambiguously and unequivocally asserted his right to counsel.

A Washington County jury convicted Jerry Sykes of capital murder, kidnapping, robbery, and theft of property. He was sentenced to life in prison without the possibility of parole on the capital murder charge, 20 years in prison on the kidnapping charge, a \$10,000 fine on the robbery charge, and an \$8,000 fine on the theft of property charge. Sykes appealed his case to the Arkansas Supreme Court and among the arguments he made was that the trial court erred in denying his motion to suppress his statement on the grounds it was unlawfully obtained.

**Decision by Arkansas Supreme Court:**

On the issue of whether the trial court should have suppressed the entire custodial statement Jerry Sykes made to Deputy Sheriff Rexford, Sykes contended that the officer continued to interrogate him after he had invoked his right to remain silent and his right to counsel in violation of his Fifth and Sixth Amendment rights as illustrated in *Miranda v. Arizona*, 384 U.S. 436 (1966), as well as his analogous state guarantees under Article 2 §§ 8 and 10 of the Arkansas Constitution.

The Arkansas Supreme Court held that the issue presented in this case is whether appellant made an unequivocal request for an attorney and unambiguously invoked his right to remain silent. A statement made while an accused is in custody is presumptively involuntary, and the burden is on the State to prove, by a preponderance of the evidence, that a custodial statement was given voluntarily and was knowingly and intelligently made. *Whitaker v. State*, 348 Ark. 90, 71 S.W.3d 567 (2002). A defendant may cut off questioning at any time by unequivocally invoking his right to remain

silent. *Id.* When the right to remain silent is invoked, it must be "scrupulously honored." *Miranda*, 384 U.S. at 479. Our criminal rules provide that a police officer shall not question an arrested person if that person indicates "in any manner" that he does not wish to be questioned or that he wishes to consult counsel before submitting to any questioning. Ark. R. Crim. P. 4.5 (2009).

The Court noted that when invoking a *Miranda* right, the accused must be unambiguous and unequivocal. Furthermore, if a suspect makes a reference to an attorney that is ambiguous or equivocal such that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, precedents do not require cessation of questioning. *Higgins v. State*, 317 Ark. 555, 879 S.W.2d 424 (1994). An equivocal request for counsel does not obligate the police to cease questioning and seek clarification, but interrogation may continue until the suspect clearly requests counsel. *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (1995).

Deciding this issue, the Arkansas Supreme Court noted that the Circuit Court found that appellant's statement that "right now, what I need to do is sit down and talk to a lawyer first," was a clear statement that he wished to have counsel. The trial court suppressed appellant's statement from that point forward. Therefore, the Court noted they only need to consider whether anything appellant said prior to that clearly indicated he wished to invoke his constitutional rights. His early comments include: "I don't feel like that I need to be discussing this at all," "I think it's really plumb ignorant to answer any questions right now," and "the best thing I can do is, for myself, is to shut the hell up and not talk about this without first talking to a lawyer."

The Court held that none of these statements unambiguously and unequivocally indicate a right to remain silent or a right to counsel. In reviewing the entire conversation, it is clear that appellant was conscious of his *Miranda* rights and that he continued to talk to the officer and answer his questions even though he knew it was against his best interest. In fact, after each statement regarding counsel or whether appellant should be discussing the details of what happened, appellant continued the conversation. A reasonable officer in the situation would not have understood that appellant was clearly and unequivocally invoking his right to remain silent or his right to an attorney. Consequently, the Court held there was no error in allowing the indicated portions of the custodial statement.

Appellant also claimed that the State failed to prove that he caused the death of Stokes under circumstances manifesting extreme indifference to the value of human life. He asserted that the State failed to prove that he intended for the victim to die; that her death was not just an "unfortunate side effect of being bound;" that because there was no sign of struggle, the evidence supported a finding that she consented to being tied up; and that her death was not the "natural, probable result" of being bound.

A person commits capital murder if he commits or attempts to commit kidnapping or robbery and, in the course of and in furtherance of the felony or in immediate flight therefrom, he causes the death of a person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-10-101(a)(1) (Supp. 2009).

The Court held on this argument that appellant's sufficiency argument had no

merit. The record demonstrated that he "hog-tied" Stokes with duct tape constricting her hands and feet tightly behind her back; covered her mouth with duct tape; left her alone in a sleeping loft accessible only by a make-shift ladder; took her purse, wallet, cell phone, and other personal belongings; withdrew \$1500 from her bank account; and fled to Central America. The medical examiner testified that Stokes's death was caused by asphyxiation due to the binding of her extremities and mouth. Appellant admitted during interrogation that he should have called 911 after he attempted to resuscitate her, which suggests that Stokes began struggling to breathe prior to Sykes leaving the home. The Court held that our law does not require the State to prove appellant intended for Stokes to die, rather it only requires proof that he caused her death by setting into motion dangerous circumstances in furtherance of the commission of a robbery or kidnapping. Here, there was sufficient evidence to show that appellant bound and robbed the victim, that he left her alone in the loft and fled, and that her death was a result of being bound. Appellant clearly intended to restrict Stokes's ability to breathe and abandoned her in a perilous position, which culminated in her death. There was sufficient evidence to prove appellant deliberately engaged in life-threatening behavior. Thus, the trial court did not err in denying his directed-verdict motion.

The Arkansas Supreme Court therefore affirmed the judgment of conviction.

**Case:** This case was decided by the Arkansas Supreme Court on October 29, 2009. It was an appeal from the Washington County Circuit Court, Honorable William A.

Storey, Judge. The case cite is *Sykes v. State*, 2009 Ark. 522 (2009).

Jeff Harper  
City Attorney

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### **Arkansas Court of Appeals Affirms Conviction in Fayetteville Case**

**Facts Taken From the Opinion:** On the night of October 11, 2007, a caller from the Neighborhood Market Wal-Mart reported consecutive purchases of a large number of matches to the Fayetteville Police Department and described the vehicle in which the purchasers left the parking lot. Following the receipt of the caller's report, Corporal Lee, who was on patrol with the Fayetteville Police Department, observed a white Chevy van matching the caller's description of the vehicle. When he noticed that the tags on the vehicle were expired, Corporal Lee initiated a traffic stop.

Two men occupied the vehicle. One was the driver. The other was Ernest Dean Wade (appellant) who was a passenger in the van. In addition to the van being unlicensed, the driver did not have a driver's license or proof of insurance. Corporal Robbins arrived to assist Corporal Lee and, in verifying appellant's identity, learned that there was possibly an outstanding warrant for appellant's arrest. He then requested appellant to step out of the vehicle while waiting for confirmation of the warrant.

Corporal Robbins testified that, as appellant exited the vehicle, he smelled on appellant a strong chemical odor that he recognized as methamphetamine. After checking appellant

for weapons and drugs, he observed Corporal Lee take the driver into custody. He then read appellant his *Miranda* warnings. In response to Corporal Robbins's questions and requests, appellant brought Corporal Robbins the bags of matches, some with strike plates removed. Appellant told Corporal Robbins that he had purchased the items to take to someone who cooked methamphetamine for him. Shortly thereafter, Corporal Robbins received confirmation of the warrant and placed appellant under arrest for the outstanding warrant. In the course of the inventory of the vehicle, the officers found another bag of strike plates removed from the match packages. Appellant was charged as an accomplice to possession of drug paraphernalia with intent to manufacture methamphetamine.

Following a hearing on a motion to suppress appellant's statement and evidence, the trial court found that the detention of appellant was proper in that Officer Robbins learned almost immediately that there was a high probability that a warrant for appellant's arrest remained outstanding. Appellant was convicted and he appealed to the Arkansas Court of Appeals, arguing that the trial court erred in failing to suppress both his statement and physical evidence obtained by the officers during the traffic stop.

**Decision by Arkansas Court of Appeals:**

On appeal, appellant argued that the facts and circumstances necessary to form a reasonable suspicion to support an investigatory stop of appellant were lacking in this case. He did not contend that either the initial stop of the vehicle for expired tags or the subsequent arrest of the driver on various traffic offenses was improper. Neither did the appellant argue that the outstanding warrant, for which appellant was arrested at the scene, was invalid.

Instead, appellant focused upon the call, concerning the suspicious purchase of large numbers of matches, as the basis for appellant's detention by law enforcement.

Appellant attempted to apply the reasoning in *Summers v. State*, 90 Ark. App. 25 (2005), to his case. In *Summers*, the consensual search of appellant's home was based upon statements made by appellant to the officers following his illegal seizure. There was no break in time between the events leading up to appellant's unlawful arrest and the inculpatory statements he made that led to the search. In other words, the primary taint of the unlawful seizure had not been sufficiently attenuated or purged. Under those circumstances, the fruits of the consensual search were poisoned by the officers' unlawful conduct in seizing appellant. Accordingly, the Court of Appeals concluded that the appellant in *Summers* was deprived of his Fourth Amendment rights and that the evidence should have been suppressed.

However, the Court noted that in this case appellant was initially detained pursuant to a traffic stop of a vehicle that had an expired license. The detention continued when the routine verification of his identity indicated an apparently outstanding warrant for his arrest, followed by his arrest pursuant to that outstanding warrant when the warrant was confirmed. The Court held that under these facts, the trial court did not err in finding that the seizure of appellant was lawful. Appellant was properly *Mirandized* prior to any questioning by the officer, and his statement and actions in retrieving the paraphernalia were done with full knowledge of his rights. Accordingly, the Arkansas Court of Appeals found no error and affirmed the conviction.

**Case:** This case was decided by the Arkansas Court of Appeals on September 2, 2009, and was an appeal from the Washington County Circuit Court, Honorable William A. Storey, Judge. The case cite is *Wade v. State*, 2009 Ark. App. 560 (2009).

Jeff Harper  
City Attorney

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### **Arkansas Court of Appeals Examines Issue of Constructive Possession in Washington County Case**

**Facts:** A Washington County jury found Felipe Nevarez Ibarra [Ibarra] guilty of two counts of delivery of a controlled substance (ecstasy), possession of a controlled substance with intent to deliver (ecstasy), and simultaneous possession of drugs and firearms. He was sentenced to a total of forty-five years' imprisonment. Ibarra appealed and challenged several issues, however, only the constructive possession/possession of drugs and firearms issue will be discussed in this article.

At trial, evidence was introduced regarding two controlled drug purchases by a confidential informant (CI) from Ibarra at his home, which resulted in the execution of a search warrant at Ibarra's house. On October 22, 2007, Detective Greg Lovett and Corporal Josh McConnell participated in a controlled buy with a CI to purchase ecstasy from Ibarra. They searched the CI, fitted him with a wireless recording device, and drove him to Ibarra's house, where the CI obtained ten ecstasy pills. These ecstasy pills were green with Christmas tree imprints on them. On November 8, 2007,

Detective Cameron Crafton assisted Corporal McConnell with another controlled buy operation, this time with the CI purchasing eight ecstasy pills from Ibarra, again at Ibarra's home.

On November 20, 2007, at 6:00 a.m., police executed a search warrant at the residence where the controlled buys from Ibarra had taken place. Ibarra was not home at the time the warrant was executed, but members of his family were. In a locked bedroom on top of a computer desk, police found three of the green ecstasy pills with Christmas trees on them. In the closet of the same bedroom, police found several guns, one of which was loaded. Also found in the room were Ibarra's driver's license and his work uniforms. The bedroom door was locked from the outside and Ibarra's mother informed police that Ibarra had the key to the bedroom.

**Argument and Discussion:** Ibarra, on appeal, argued that the State failed to provide sufficient evidence for a finding of guilt on the simultaneous possession of drugs and firearms charge. Arkansas Code Annotated § 5-74-106(a)(1) (Supp. 2009) states that no person shall unlawfully commit a felony violation of section 5-64-401 (manufacturing, delivering, or possessing with intent to manufacture or deliver a controlled substance) or unlawfully attempt, solicit, or conspire to commit a felony violation of section 5-64-401 while in possession of a firearm. In order to obtain a conviction under section 5-74-106(a)(1), the State must prove that the defendant possessed a controlled substance and a firearm; and that a connection existed between the firearm and the controlled substance. *Vergara-Soto v. State*, 77 Ark. App. 280 (2002).

Ibarra argued that he was not in possession of the drugs and firearms because he was not home at the time the search warrant was issued. However, under a constructive possession theory, a person need not be home or physically present in the home in order to establish possession. It is enough if the State proved that the defendant exercised care, control, and management over the contraband. *McKenzie v. State*, 362 Ark. 257, 263 (2005). In *Manning v. State*, 330 Ark. 699 (1997), the Supreme Court affirmed a simultaneous possession conviction where the defendant had both a loaded handgun and a large supply of illegal drugs in his bedroom closet, and the defendant was in another room of the house when the warrant was executed.

In Ibarra's case, there was evidence that only Ibarra had a key to the bedroom, items distinguishing the room as Ibarra's were found inside, and, in addition, the ecstasy pills found were the same type as the CI had bought from Ibarra at the house. Therefore, the Court held that there was substantial evidence to sustain a conviction for simultaneous possession of drugs and firearms (even when the defendant was not in the home at the time the warrant was executed).

**Case citation:** This case was decided by the Arkansas Court of Appeals on October 28, 2009. The case was an appeal from the Washington County Circuit Court, Honorable William A. Storey, Judge. The case citation for this case is *Ibarra v. State*, 2009 Ark. App. 707 (2009).

Brooke Lockhart  
Deputy City Attorney

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### **Arkansas Court of Appeals Holds Stop Illegal Resulting in Evidence Being Suppressed**

The Arkansas Court of Appeals recently held that the drugs found by an officer must be suppressed because the evidence was obtained in violation of the Rules of Criminal Procedure 2.2 and 3.1. The facts are as follows:

On January 25, 2008 at approximately 6:12 pm Officer Ryan Baker of the Sherwood Police Department was patrolling an area where twelve armed robberies had occurred in the past two weeks. While patrolling the two to three mile stretch, Officer Baker noticed a lone white truck backed into a parking spot near the loading dock of Kohl's department store. Kohl's was open at the time but Officer Baker was unable to see the driver due to the darkness.

Officer Baker pulled his patrol car directly in front of the truck, turned on his bright headlights, his spotlight and his take-down lights and called for assistance. Officer Baker then approached the truck with his flashlight in one hand and his gun in the other. As Officer Baker approached, he observed the driver reach down and saw what he believed to be a small club, (later found to be a landscaping tool), on the front seat floorboard and a baseball bat behind the seat of the truck. Another officer arrived and Officer Baker walked over to the driver's side and asked the driver to step out. While standing outside of the drivers side of the vehicle Officer Baker observed a straw with a band-aid wrapped around it and a razorblade in plain view. The straw and razorblade had cocaine residue on them and the driver, Cockrell, was placed under arrest. Upon searching the vehicle the Officers located a small plastic bag containing

cocaine. Cockrell also had fifteen hydrocodone pills in his pocket.

At trial Cockrell moved to suppress all evidence obtained as a result of Officer Baker's stop and subsequent search of him and his vehicle. The Court denied the motion and Cockrell was found guilty of possession of a controlled substance, possession of drug paraphernalia and carrying a weapon. Cockrell then appealed his conviction to the Arkansas Court of Appeals.

On appeal Cockrell again moved to suppress the evidence against him arguing that the stop was in violation of Arkansas Rules of Criminal Procedure 2.2 and 3.1. Rule 2.2 states:

Rule 2.2. Authority to request cooperation.

(a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

(b) In making a request pursuant to this rule, no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists. Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law enforcement officer.

Arkansas Rule of Criminal Procedure 2.2 describes an encounter such as when an officer merely approaches a citizen asking if they are willing to answer questions. An encounter is in a public place and is consensual. An encounter is not a seizure because the person feels free to leave at any time; therefore the 4<sup>th</sup> Amendment does not apply. In the present case the Court stated the interaction between Officer Baker and Cockrell clearly was not an encounter because first, it was not consensual. Officer Baker parked his patrol car in front of Cockrell in such a way that Cockrell was blocked in and unable to leave. Additionally, Officer Baker had his bright headlights, take-down lights and spotlight shining on Cockrell and a gun in his hand. The Court found that a reasonable person under those same circumstances would not have felt free to leave based on Officer Baker's show of force and authority and therefore the stop was a seizure within the meaning of the 4<sup>th</sup> Amendment.

The Court then analyzed whether the stop was authorized under Arkansas Rule of Criminal Procedure 3.1. Rule 3.1 states:

Rule 3.1. Stopping and detention of person: time limit.

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under

this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Rule 3.1 stops are seizures under the 4<sup>th</sup> Amendment because a reasonable person feels not free to leave. Rule 3.1 allows an officer to restrain a person for a limited time if the officer has articulable suspicion that a crime has or is being committed. "Reasonable suspicion" is defined by Arkansas Rules of Criminal Procedure 2.1 as "a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." Additionally, the Arkansas legislature has codified some of the grounds to detain a suspect under Rule 3.1. These grounds listed under Arkansas Code Annotated §16-81-203 are not exhaustive, i.e., stops under 3.1 are not limited to only these grounds.

Ark. Stat. Ann. 16-81-203. Grounds to reasonably suspect.

The following are among the factors to be considered in determining if the officer has grounds to reasonably suspect:

- (1) The demeanor of the suspect;
- (2) The gait and manner of the suspect;

(3) Any knowledge the officer may have of the suspect's background or character;

(4) Whether the suspect is carrying anything, and what he or she is carrying;

(5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors;

(6) The time of the day or night the suspect is observed;

(7) Any overheard conversation of the suspect;

(8) The particular streets and areas involved;

(9) Any information received from third persons, whether they are known or unknown;

(10) Whether the suspect is consorting with others whose conduct is reasonably suspect;

(11) The suspect's proximity to known criminal conduct;

(12) The incidence of crime in the immediate neighborhood;

(13) The suspect's apparent effort to conceal an article; and

(14) The apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.

The Court looks to the totality of the circumstances in determining whether the police have specific particularized and

articulable reasons indicating the person may be involved in criminal activity. Officer Baker testified that because Cockrell was within the area where the twelve robberies had occurred in the past two weeks, it was dark outside, and because Cockrell was backed into a parking spot away from other vehicles he suspected it could be a get-away car. The Court held that Officer Baker did not have justification for an investigatory stop under Rule 3.1 because he did not have specific, particularized, and articulable reasons indicating Cockrell may have been involved in the areas recent armed robberies. The Court stated all that the evidence proved was that Cockrell was legally parked in a business during regular business hours and stated that being backed in or parked alone in a side parking lot is not basis for reasonable suspicion that Cockrell was involved in the armed robberies. Additionally, being present in a high crime area does not rise to reasonable suspicion to authorize an investigatory stop. *Jennings v State*, 69 Ark. App. 50, 54 (2000).

The State argued that several of the factors listed in Arkansas Code Annotated §16-81-203 were present to support the detention of Cockrell. The State argued §16-81-203 (4), (6), (8), (11), (12), and (13) (see factors listed in 16-81-203 above) were present in this case. The court stated at most five factors existed, §16-81-203 (4), (8), (11), (12), (13). The Court did not consider factor (6) to be significant because although it was dark outside it was only 6:12 p.m. Additionally the Court held that three of the factors (8), (11), (12), all involved Cockrell being within the two to three mile radius of the armed robberies. The Court stated that the final factors (4), and 13) involved the fact that Cockrell had a bat and landscaping tool in his vehicle, and that he tried to conceal something when Officer Baker approached.

The Court went on to hold that the bat and landscaping tool are of little significance because Officer Baker did not have knowledge of them when he seized Cockrell by blocking in Cockrell's vehicle and approaching him with lights and a weapon. Later discovered evidence can not be used to support a stop; the court will only look to facts the officers knows at the time of the stop.

The Court held that Officer Baker violated both Arkansas Rule of Criminal Procedure 2.2, and 3.1, and held that it was clearly a seizure under the 4<sup>th</sup> Amendment because Officer Baker did not have reasonable suspicion that Cockrell had committed or was committing a robbery. Therefore, all items seized as a result of the illegal stop and subsequent search of Cockrell and his vehicle were suppressed.

**Case:** This case was decided by the Arkansas Court of Appeals on October 28, 2009, and was an appeal from the Pulaski County Circuit Court. The case cite is *Cockrell v State*, 2009 Ark. App. 700 (2009).

**Note from Deputy City Attorney:**

**RULE 2.2**

- merely approach a citizen and ask if willing to answer questions
    - public place
    - consensual
- NOT A SEIZURE

**RULE 3.1**

- Restrain for a limited time
    - requires articulable suspicion that the suspect is or has committed a crime
    - reasonable person feels not free to leave
- SEIZURE

**ARREST**

- Requires probable cause  
SEIZURE

Amber Roe  
Deputy City Attorney

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**Search Incident to Arrest  
Upheld (Post *Arizona v. Gant*)**

The United States Court of Appeals for the 8<sup>th</sup> Circuit recently upheld the search of a vehicle incident to arrest. This case, *US v Scott Goodwin-Bey*, was heard following the United States Supreme Court case, *Arizona v Gant*, 129 S. Ct. 1710 (2009). *Gant* is the Supreme Court case that somewhat narrowed the search incident to arrest exception to the warrant requirement to include searches incident to arrest where officer safety issues were present or the search was for evidence related to the crime for which the suspect was arrested on. *Gant* specifically held that a search incident to arrest is not authorized when the recent vehicle occupant has been secured and can't access the interior of the vehicle. (See July '09 C.A.L.L. where *Arizona v Gant* was covered).

The facts of Goodwin-Bey are as follows. On April 3, 2007 Officer Rankey stopped a white Mitsubishi Galant for running a red light. Goodwin-Bey was the driver and three other passengers were in the vehicle. While Officer Rankey was attempting to identify all persons in the vehicle he received a report of an earlier incident in which occupants in a white Mitsubishi Galant had displayed a firearm. Another officer arrived on the scene to investigate that incident. Officer Rankey then discovered that the front seat passenger had

a warrant for a traffic violation and was placed under arrest. Officer Rankey then searched the vehicle and found the glove box locked. Officer Rankey then took Goodwin-Bey's keys over his objection, unlocked the glove box and discovered a Derringer handgun which was seized. Goodwin-Bey was not arrested and he and his two remaining passengers were allowed to leave. Goodwin-Bey was a convicted felon and was later indicted on the charge of being a felon in possession of a firearm.

At trial Goodwin-Bey moved to suppress the gun, the motion to suppress was denied and Goodwin-Bey was sentenced to 70 months. Goodwin-Bey then appealed to the 8<sup>th</sup> Circuit Court of Appeals. On appeal Goodwin-Bey again moved to suppress the gun arguing that the search incident to arrest was impermissible under *Arizona v Gant*.

The Court of Appeals then discussed the exceptions to searches conducted without a warrant. The Court stated that two exceptions are relevant in this case; the search incident to arrest exception, and the reasonable suspicion of dangerousness exception.

Upon lawful arrest an officer may search the area within which an arrestee might reach in order to grab a weapon or evidentiary items, (*Chimel v California*, 395 U.S. 752, 763 (1969)), and when an arrest is made in an automobile, that area includes the passenger compartment of an automobile. "The reaching area rule serves the dual purpose of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. "In *Gant*, the Supreme Court recently held that where those two concerns are not present, the Fourth Amendment does not permit a vehicle search incident to arrest. Where those concerns are present, however

*Belton* continues to permit the search as an exception to the warrant requirement."

is *U.S. v Goodwin-Bey*, 09-1317 (8th Cir. 10-28-2009).

Amber Roe  
Deputy City Attorney

Therefore, the Court analyzes the facts of the case to determine if EITHER 1) protection of officer safety or 2) safeguarding any evidence of the offense of arrest that arrestee may conceal or destroy, is present to authorize the search incident to arrest. The Court stated that in the present case, Officer Rankey received a report of an occupant in a vehicle of the same make, model and color brandishing a hand gun. The court stated that fact along with the number of occupants "sufficiently implicated officer safety concerns to justify a search incident to arrest." Therefore the search incident to arrest exception applied. Additionally, the search was also warranted under the reasonable suspicion of dangerousness exception because based on the prior report of an occupant brandishing a gun, officers had reasonable belief that the suspects were dangerous and could gain immediate control of the weapon. See *Michigan v Long*, 463 U.S. 1032, 1049 (1983).

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### **"Protective Custody" and "Drunk, Insane, and Disorderly": Dealing With the Suicidal or Those in Mental Danger**

Lt. Hritz recently requested that an article be placed in the *C.A.L.L.* regarding how officers should handle situations involving persons who may constitute a danger to themselves or others by virtue of a mental disease or defect, or persons who have either attempted, or threatened to attempt, suicide. He also requested that the use of the "drunk, insane, and disorderly" statute be discussed as well.

#### Drunk, Insane, and Disorderly

The Court also stated that the question of whether a reasonable suspicion of dangerousness exists is looked at under an objective standard. Therefore, even though Officer Rankey did not include in his report or in his testimony that he had any suspicion that Goodwin-Bey or any of the occupants might pose a danger, the court found that a "reasonable prudent officer on scene would be warranted in believing that Goodwin-Bey and his unsecured passengers were dangerous and might access the vehicle to gain immediate control of weapons."

The basis for the "drunken, insane, and disorderly persons" statute is found at Ark. Code Ann. §12-11-110. This statute is not a criminal charge. However, it gives an officer the legal authority to arrest and take someone into custody that has not committed a crime, but that should not be left alone. Most often, the person is held until the following morning or until the person can be delivered to some "discreet person who will undertake to restrain and take care" of the person. In other cases, the person is transported to a hospital or other facility for consideration of an immediate confinement.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on October 28, 2009. The case cite

If the person has committed a crime, and can be arrested for that crime, there is no need to

invoke Ark. Code Ann. §12-11-110. In that instance, the officer already has legal authority to take the person into custody because of the crime, and does not need to utilize the "drunk, insane, and disorderly" statute.

No matter the situation, it is vitally important to clearly document in the report the reasons for taking the person into custody.

### Immediate Confinement

Let's start with an example. Officer Jones is dispatched to a call of a possible suicidal subject. Dispatch advises that the subject has stated that she has attempted suicide in the past, and is contemplating suicide today. Upon arrival, Officer Jones makes contact with the subject. He sees on her arms evidence of past suicide attempts and notices that the subject has a couple of superficial scratches on both wrists. She is not holding a weapon, she denies ingesting any substances, and appears calm. However, she does state to Officer Jones that she is considering suicide and that she is ready to "end it all today". The subject lives alone, has no family here, has no religious affiliation, and states that she does not want help from anyone. She refuses medical treatment and refuses Officer Jones' offer to go to the hospital for an evaluation. The subject then tells Officer Jones to leave so that she can "finish the job" of killing herself.

What should Officer Jones do now? What are his options? Should he leave this subject to her own devices? What possible liability, if any, does Officer Jones face?

This particular situation is addressed in Ark. Code Ann. §20-47-210, and is commonly referred to as "immediate confinement", or

"emergency hold". This statute sets forth the procedure for immediate confinement and evaluation for emergency situations. Under this statute, whenever a person is a "clear and present danger to himself or others" and immediate confinement appears necessary, a law enforcement agency in the jurisdiction shall transport that person to a hospital or receiving facility, if there is no other safe means of transportation available.

Thus, in our example, Officer Jones must first determine if the subject is a "clear and present danger to himself or others". Ark. Code Ann. §20-47-207 provides guidance in this determination.

A person is a "clear and present danger to himself" if:

1) The person has inflicted serious bodily injury on himself or has attempted suicide or serious self-injury, and there is a reasonable probability that the conduct will be repeated if admission is not ordered; OR

2) The person has threatened to inflict serious bodily injury on himself, and there is a reasonable probability that the conduct will occur if admission is not ordered; OR

3) The person's recent behavior or behavior history demonstrates that he so lacks the capacity to care for his own welfare that there is a reasonable probability of death, serious bodily injury, or serious physical or mental debilitation if admission is not ordered; OR

4)(i) The person's understanding of the need for treatment is impaired to the point that he is unlikely to participate

in treatment voluntarily; (ii) The person needs mental health treatment on a continuing basis to prevent a relapse or harmful deterioration of his or her condition; and (iii) The person's noncompliance with treatment has been a factor in the individual's placement in a psychiatric hospital, prison, or jail at least two (2) times within the last forty-eight (48) months or has been a factor in the individual's committing one (1) or more acts, attempts, or threats of serious violent behavior within the last forty-eight (48) months;

A person is a "clear and present danger to others" if:

the person has inflicted, attempted to inflict, or threatened to inflict serious bodily harm on another, and there is a reasonable probability that the conduct will occur if admission is not ordered.

In our example, Officer Jones would be reasonable in determining that the subject is a danger to herself because the subject has threatened to inflict serious bodily injury on herself and there is a reasonable probability that such conduct will occur if admission is not ordered.

Once Officer Jones has made this determination, what should be done next? The subject has already indicated that she has no family, and that she knows no one who could provide her safe transportation to the hospital. Furthermore, the subject has stated that she does not want any help and just wants Officer Jones to leave.

At this point, Officer Jones should not leave the subject, as he has already made a determination that she is a danger to herself. Leaving the subject alone at this point could

possibly result in a claim of "deliberate indifference" against the department and Officer Jones in the event that the subject was to later harm herself.

Officer Jones should instead take the subject into custody and transport her to the hospital for immediate confinement and evaluation, pursuant to Ark. Code Ann. §20-47-210. Once the subject arrives at the hospital, a physician must decide whether the subject is acute enough to warrant admission, and it is possible that she may be admitted against her will. However, the physician may find that admission is not warranted. The subject could be released by the hospital if in the judgment of the treatment staff, the receiving facility, or the treating physician the person does not require further mental health treatment.

Upon leaving the hospital, Officer Jones wonders what could happen to him if he was wrong about the subject. What if she wasn't really going to hurt herself? Does Officer Jones have any liability at this point? Can he be sued for taking the subject to the hospital against her will?

Ark. Code Ann. §20-47-227 should give Officer Jones some peace of mind in this regard. This statute provides that "no officer, physician, or other person shall be held civilly liable for his actions pursuant to this subchapter in the absence of proof of bad faith, malice, or gross negligence". Given the facts of our example, it could not be said that Officer Jones acted in bad faith, malice, or gross negligence in taking the subject to the hospital against her will. In fact, in our example, it was more likely that liability would attach if Officer Jones had not taken the subject to the hospital.

When faced with a situation like the one in our example, it is vitally important to

document everything you see and hear from the person with whom you are dealing. Also, offer the person the opportunity to be admitted to the hospital. If the person refuses, ask if there is a family member, friend, or clergy member that can be called to help the person. In other words, take all steps necessary to assist the person. In doing so, you can show that you acted in good faith, without malice, and that you were not grossly negligent should you decide to initiate an involuntary admission of the person against their will. Therefore, no liability would attach even if it was later determined by a physician that no immediate confinement was needed for the person.

Thanks goes to Lt. Hritz for raising this issue for consideration.

Ernest Cate  
Senior Deputy City Attorney

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### **Second Warrantless Entry into House Violated 4<sup>th</sup> Amendment**

On August 17, 2009, the United States Court of Appeals for the 8<sup>th</sup> Circuit issued its opinion in the case of *United States of America v. McMullin*. This case originated when United States Marshals Sean Newlin and Dave Davis received an assignment to locate Daryl Crowder, who had several warrants out of the State of Illinois. During their investigation, Newlin learned that Crowder had been linked to a residence in Missouri.

On October 10, 2007, Newlin and Davis went to the residence in an attempt to locate Crowder. The marshals did not have a search warrant for the house. Upon arrival, Newlin approached the residence and Gary

McMullin opened the front door and greeted the officer. Newlin asked if he could come inside and speak with McMullin, which McMullin agreed. Newlin asked McMullin who else was in the house, and the two engaged in a two to three minute conversation. Then, Newlin heard Davis yell from outside. Newlin raced outside to find that Davis had located Crowder and was placing him under arrest. McMullin also came outside. Newlin then detained McMullin and placed cuffs on him. McMullin was then taken back inside the house and questioned by Newlin. While inside the house the second time, Newlin noticed ammunition on a desk, and then located several firearms in the residence. These firearms were seized and McMullin was charged with being a felon in possession of firearms.

At trial, McMullin asked for the suppression of the evidence seized and discovered after Newlin entered the house the second time. In the motion to suppress, McMullin argued that Newlin had no legal authority to be in his house, and that Newlin's re-entry into the house fell outside the scope of the original consent. The government argued that McMullin's initial consent to allow Newlin to enter the house was never revoked, thus making the second entry into the house lawful. The trial court agreed with the government and McMullin was ultimately sentenced to 56 months in prison.

McMullin appealed to the 8<sup>th</sup> Circuit Court of Appeals. The issue on appeal was whether the second warrantless entry into McMullin's house by Marshal Newlin violated the Fourth Amendment.

The government contended that the second entry was valid because McMullin's initial consent continued to the second entry because McMullin never effectively

withdrew the original consent. The law provides that once an occupant of a house gives consent for entry, he must make an unequivocal act or statement to indicate the withdrawal of the consent. If the statement is equivocal, police officers may reasonably continue their search in the premises entered pursuant to the initial grant of authority. However, in this case, the Court held that the issue was not whether McMullin withdrew consent, but whether a new consent was required for the second entry. The Court held that a new consent was required, and that the second entry exceeded the scope of the consent given.

The Court stated that the standard for measuring the scope of a person's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? In assessing the scope of a person's consent, the Court examines the totality of the circumstances, which includes the language of a person's consent and his actions during the officers' search.

Here, Marshal Newlin did not leave McMullin's house to seek help, did not establish probable cause to search the house, and in fact fulfilled his visit's purpose by arresting Crowder and detaining McMullin outside of the house in the backyard. By the time Marshal Newlin sought re-entry into McMullin's house, it is undisputed that the marshals had already completed their task of arresting Crowder in the backyard. In other words, the Court held that there was no necessity or legal basis for the officer to re-enter the house. As such, Marshal Newlin's re-entry exceeded the scope of McMullin's consent and therefore violated the Fourth Amendment.

The Court also found that no exigent circumstances existed, in the form of Marshal Newlin's safety, that made re-entry into the house reasonable under the 4<sup>th</sup> Amendment. Although officer safety indeed constitutes exigent circumstances permitting a warrantless search, the Court found that this exception was not inapplicable given the facts of this case. In other words, it was not apparent that officer safety required re-entering the house, as opposed to keeping Crowder and McMullin in the backyard or taking them to the marshals' vehicle. As such, the Court held that the officer did not establish circumstances considered exigent which would validate a re-entry into McMullin's house.

Given that the Court held the second entry into the house to be in violation of the 4<sup>th</sup> Amendment, the Court reversed the trial court and vacated McMullin's 56 month prison term.

**Case:** This case was decided by the Eighth U.S. Circuit Court of Appeals on August 17, 2009. The case cite is *U.S. v. McMullin*, 576 F.3d 810 (8<sup>th</sup> Cir. 2009).

Ernest Cate  
Senior Deputy City Attorney

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### **“Mini-Motorcycles” and Mopeds: What are the Rules? The Sequel**

In the October 2009 edition of *The C.A.L.L.*, an article was published dealing with the various regulations pertaining to motorized bicycles, a/k/a mopeds and mini-motorcycles. This office received a lot of positive feedback regarding this article. This office also received requests that more

information be published regarding these regulations. For example, Frank Cordova requested that we include the regulations regarding who can carry a passenger on a motorized bicycle, and the regulations regarding ages of passengers.

Just to recap, the laws of the State of Arkansas specifically define “motorized bicycle”, “motor-driven cycle”, and “motorcycle”. Under Arkansas law, a moped or a “pocket bike” would be considered a “motorized bicycle”, if it has an automatic transmission and a motor of not more than 50cc. It would be considered a “motor-driven cycle” if it has no more than 250cc. Obviously, over 250cc would be considered a “motorcycle”. Thus, mopeds and “pocket bikes” would more than likely be considered a motorized bicycle because mopeds and “pocket bikes” usually have an automatic transmission of not more than 50cc (usually 47cc or 49cc).

Can the operator of a moped or "pocket bike" carry a passenger?

Yes, as long as the operator is not under sixteen (16) years of age. Ark Code Ann. §27-20-110 makes it unlawful for any person under sixteen (16) years of age to carry another person as a passenger upon a motorized bicycle.

The same age restriction also applies to motor-driven cycles. In addition, the motor-driven cycle must also be equipped with "a sidecar or an extra seat and supports for the passenger's feet", and no more than two (2) persons at a time may ride on a motor-driven cycle.

Is there a minimum age requirement for passengers on a moped or "pocket bike"?

No. While the motorized bicycle statutes provide a minimum age for who may

operate a motorized bicycle with a passenger, the relevant statutes do not contain minimum age requirements for passengers. The same can be said for motor-driven cycles as well. The only restriction on the age of passengers pertains to motorcycles. Specifically, Ark. Code Ann. §27-20-118 provides that passengers on motorcycles must be at least eight (8) years of age (except in a parade).

Thanks goes to Frank for requesting that we include this information in *The C.A.L.L.*

Ernest Cate  
Senior Deputy City Attorney

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### **False Compartment on Vehicle is Probable Cause to Continue Search; Pedro Espinoza & Juan Espinoza v. State of Arkansas**

On April 25, 2008 Trooper Chris Goodman observed a truck make an unlawful lane change and drive on the shoulder of the roadway. Trooper Goodman stopped the Dodge pickup that displayed an Arizona license plate and made contact with Juan Espinoza, the driver/owner, and Pedro Espinoza, the passenger. Both occupants were extremely nervous and Trooper Goodman asked whether there were any weapons in the truck to which Juan responded, "No, go ahead and check the truck." Before checking the truck, Trooper Goodman ran the occupants names through NCIC. Then, while issuing Juan a warning, he again asked if it was okay to check the truck. Juan again consented and Trooper Goodman removed Pedro and patted him down for weapons, Juan was already out of the truck.

Trooper Goodman checked the cab and did not find any weapons; he then checked the bed of the truck and found that the entire bed was a false compartment. Trooper Goodman noticed the bed liner also had several screws across the back of it preventing it from being lifted up like a normal bed liner. Trooper Goodman then called for back-up but got no response so he asked Juan to follow him to a shop to which Juan refused stating that they needed to leave. Trooper Goodman stated that was fine but that the truck was staying there because it had a false compartment. Trooper Goodman then directed the Espinozas to the front of the truck while he worked on the screw. However, they came back to the bed of the truck while he was working on it so he placed them in his patrol car since he was alone. Another officer then arrived and watched the defendants while Trooper Goodman drilled open the compartment and found 120 pounds of marijuana. The Espinozas were then arrested for possession with intent to deliver.

At trial, the Espinozas moved to suppress the 120 pounds of marijuana arguing that the warrantless vehicle search could not continue after consent had been withdrawn despite the fact that no contraband had been found prior to the consent having been withdrawn. Trooper Goodman testified that he knew from his training and experience that false compartments are used to conceal contraband from police and once he found the false compartment he felt he had probable cause to continue the search. Trooper Goodman also testified that the consent to search was not withdrawn prior to him finding the false compartment. The trial judge denied the motion to suppress and the Espinozas pled no contest.

The Espinozas then appealed the trial judge's ruling on their motion to suppress

the evidence. On appeal, the Arkansas Court of Appeals looked to Arkansas Rules of Criminal Procedure; Rule 14.1 states:

Rule 14.1. Vehicular searches.

(a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:

(i) on a public way or waters or other area open to the public;

(ii) in a private area unlawfully entered by the vehicle; or

(iii) in a private area lawfully entered by the vehicle, provided that exigent circumstances require immediate detention, search, and seizure to prevent destruction or removal of the things subject to seizure.

(b) If the officer does not find the things subject to seizure by his search of the vehicle, and if:

(i) the things subject to seizure are of such a size and nature that they could be concealed on the person; and

(ii) the officer has reason to suspect that one (1) or more of the occupants of the vehicle may have the things subject to seizure so concealed; the officer may search the suspected occupants; provided that this subsection shall not apply to individuals traveling as passengers in

a vehicle operating as a common carrier.

(c) This rule shall not be construed to limit the authority of an officer under Rules 2 and 3 hereof.

The Court looked to the pertinent sections, (a) and (i), and held that because Trooper Goodman discovered the false compartment before Juan withdrew his consent, and based on his training and experience he knew false compartments are used to transport drugs, coupled with the Espinozas nervousness gave Trooper Goodman reasonable cause to believe the truck contained things subject to seizure. The Court therefore affirmed the judgment of the lower court.

**Case:** This case was decided by the Arkansas Court of Appeals on September 30, 2009, and was an appeal from the Pope County Circuit Court. The case cite is *Espinoza v State*, 2009 Ark. App. 636 (2009).

Amber Roe  
Deputy City Attorney

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### **Inventory Search Leads to Probable Cause; *Pedro Lopez v. State of Arkansas***

This is an interesting case out of the Arkansas Court of Appeals where a properly conducted inventory search led to probable cause for a more extensive search on the vehicle.

Pedro Lopez was pulled over for speeding on I-40 in Lonoke County. The officer then made contact with Lopez and arrested Lopez for no driver's license. Once Lopez was

placed under arrest, the officer called a tow truck and began an inventory search per department policy. The officer located an open can of beer and marijuana seeds and stems under the driver's seat and smelled the faint odor of marijuana. A drug dog was run around the vehicle and although it showed interest, it did not "alert." While waiting for the wrecker the officer looked underneath the truck and observed that the gas tank appeared to have been altered. The officer observed new clamps underneath the vehicle, visible indications that bolts had recently been turned, and weld markings at the rear of the tank.

The tow truck arrived and the vehicle was impounded. At impound, the officer ran a density meter on the gas tank which gave indication that something may be inside. A fiber-optic camera was then used to look down in the tank where the officer saw two metal boxes that took up the majority of the gas tank. Once the metal boxes were removed, they were opened to reveal 147 pounds of marijuana.

At trial Lopez argued that the drugs should be suppressed because the vehicle was impounded so there was no exigency and that a warrant was required. The officer testified to the facts above and that he had extensive training detecting drug trafficking including teaching such courses at the State Police Academy, and that in his professional experience Lopez's vehicle showed indicators of concealment of narcotics. Lopez was found guilty at bench trial and appealed to the Arkansas Court of Appeals.

On appeal the question is whether Lopez's right to be free from unreasonable searches and seizures was violated because the officer searched the gas tank without a search warrant. The Court of Appeals first looked

to the inventory search and Arkansas Rules of Criminal Procedure 12.6(b) which states:

Rule 12.6. Custodial taking of property pursuant to arrest; vehicles.

(a) Things not subject to seizure which are found in the course of a search of the person of an accused may be taken from his possession if reasonably necessary for custodial purposes. Documents or other records may be read or otherwise examined only to the extent necessary for such purposes, including identity checking and ensuring the physical well-being of the person arrested. Disposition of things so taken shall be made in accordance with Rule 15 hereof.

(b) A vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents.

The police "may impound a vehicle and inventory its contents only if the actions are taken in good faith and in accordance with standard police procedure or policies." See *Thompson v State*, 333 Ark. 92 (1998). Inventory searches are often upheld or not based on whether the police department's policies were followed. Here, the officer properly followed his department policy in conducting an inventory search and in conducting that search he saw the tampering with his naked eye.

The subsequent search of the gas tank with the fiber optic camera and density meter was

more than an inventory search. The inventory search led to probable cause to search the vehicle. The Court upheld the search based on Arkansas Rule of Criminal Procedure 14.1 which states in part:

Rule 14.1. Vehicular searches.

(a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:

(i) on a public way or waters or other area open to the public;

The Court held that the officer obtained probable cause to search the vehicle for narcotics as he was waiting on the wrecker and looked under the vehicle and saw the gas tank had been altered. Because the officer had probable cause to search the vehicle under Arkansas Rule of Criminal Procedure 14.1, and because that justification to conduct the search did not vanish when the car was impounded, the evidence was properly obtained.

**Case:** This case was decided by the Arkansas Court of Appeals on November 11, 2009, and was an appeal from the Lonoke County Circuit Court. The case cite is *Lopez v State*, 2009 Ark. App. 750 (2009).

Amber Roe  
Deputy City Attorney

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## Arkansas Court of Appeals Upholds Probable Cause in Traffic Stop Where Meth was Found

**Facts:** At around 9:30 a.m. Officer Joseph Deer [Officer Deer] and Officer Terry Staggs [Officer Staggs] were heading eastbound on State Highway 80 West in Scott County when they saw a blue Mustang with a white racing stripe heading westbound and driving very close to the yellow line. Officer Deer testified that he could not see the driver because the windows were tinted. Officer Deer turned his car around, caught up to the Mustang and observed the Mustang go left of the center line by two to three feet several times in an area where there are curves in the road, which was a traffic violation.

Officer Deer testified that he approached the car and made contact with the driver, Ansley Rodriguez-Bonilla [Bonilla]. Officer Deer testified that Bonilla told him that he was sorry and gave an excuse for driving left of center, to which Officer Deer responded that it was "okay." Officer Deer then asked Bonilla for his license, proof of insurance, and registration. Officer Deer stated that Bonilla was fumbling about and acting very nervous and that his speech quivered. Officer Deer asked Bonilla where he was going and Bonilla replied that he was going to "do" a bed liner for a friend but could not name the friend or where the friend lived.

Officer Deer asked Bonilla to step out of the vehicle. Officer Deer asked Bonilla why he was so nervous and Bonilla replied that he didn't like police. Officer Deer asked if Bonilla had anything in his vehicle he was not supposed to have and Bonilla replied "no." Then Officer Deer asked for consent to search and Bonilla stated he did not care

if the officer searched his car. Officer Deer then read a consent to search form to Bonilla and obtained Bonilla's signature on the form.

During a search of the vehicle, Officer Staggs noticed a hot drink with a loose lid and something spilled on the console and in the seat. When Officer Staggs took the lid off the drink, he saw two "heat-sealed triangled plastic bags" that had been torn open floating inside the drink. Officer Deer asked Bonilla what was in the drink and Bonilla avoided the question. Officer Deer then *Mirandized* Bonilla and asked again, to which Bonilla replied that it was methamphetamine. Bonilla explained that he was swerving because he was dumping the bags into the drink when he saw the police car behind him.

Bonilla was convicted by a jury of possession of methamphetamine and sentenced to three years imprisonment. He argued on appeal that the evidence should be suppressed because the officers lacked probable cause to stop his vehicle.

**Argument and Discussion:** Bonilla argued that there was no probable cause to stop his vehicle and stated that the officers simply stopped him because he looked Hispanic. In order for a police officer to make a traffic stop, he must have probable cause to believe that the vehicle has violated a traffic law. *Yarbrough v. State*, 370 Ark. 31 (2007). In this case, Officer Deer testified that he initiated a traffic stop because he saw Bonilla's car cross the yellow line several times and go almost completely into the other lane. The Court held that was enough probable cause to initiate a traffic stop on the vehicle. The Court upheld the circuit court's denial of Bonilla's motion to suppress the methamphetamine evidence.

**Case citation:** This case was decided on October 21, 2009, and was an appeal from the Scott County Circuit Court. The case citation for this case is *Rodriguez-Bonilla v. State*, 2009 Ark. App. 688 (2009).

Brooke Lockhart  
Deputy City Attorney

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### **Eighth U.S. Circuit Court of Appeals Affirms District Court's Denial of Qualified Immunity**

**Facts Taken From the Opinion:** At about 1:00 a.m. on December 12, 2006, Kansas City police officers Troy Taff, Manuel Anchondo, and Lee Malek responded to an emergency call. A woman told them she had been assaulted by her boyfriend, Terry C. Smith, Sr. She appeared to have been in a physical altercation, her clothing in disarray, with scrapes, bumps, and bruises on her body.

The woman told the officers that her boyfriend was at either the nearby home of his brother, plaintiff Wilson Smith, or another relative's house. The officers went to plaintiff's home. Taff and Anchondo stood in the driveway while Malek walked to the rear of the home. Returning to the front, Malek told the other officers that there was a "hostile situation."

Taff and Anchondo approached the front door. Taff knocked on it. Plaintiff answered wearing a bathrobe. Taff asked him if he was "Mr. Smith," and to step outside. Plaintiff replied he was Wilson, not Terry, Smith.

The parties disputed the following facts, which are stated here favorably to plaintiff.

After plaintiff opened the door, Taff grabbed his forearm, pulling him outside. Taff then forced plaintiff against the railing on the porch, struggling to handcuff him. Anchondo helped detain plaintiff. All three fell to a concrete walkway, causing injury to plaintiff's knees. Taff and Anchondo then shoved plaintiff's face into the concrete and placed their knees on his back as they handcuffed him.

During the struggle, Malek guarded the front door. After seeing a 12-year-old boy walk toward the door, Malek entered the home, finding Terry Smith in a bedroom.

Plaintiff sued Malek for warrantless entry and Taff and Anchondo for excessive force. The District Court for the Western District of Missouri denied qualified immunity and the officers appealed to the Eighth U.S. Circuit Court of Appeals.

**Decision by Eighth Circuit:** The Court first held that plaintiff correctly noted that this court lacked jurisdiction to consider factual disputes. However, in this case, the court views the facts favorably to plaintiff and does not consider disputed facts.

"To overcome the defense of qualified immunity, a plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." *Howard v. Kansas City Police Dep't.*, 570 F.3d 984, 988 (8th Cir. 2009).

**Warrantless Entry:** Officer Malek argued that exigent circumstances justified his warrantless entry. The Court noted that "Generally, the Fourth Amendment requires the police to obtain a warrant before entering a home." *United States v. Spotted Elk*, 548 F.3d 641, 651 (8th Cir. 2008),

citing *Payton v. New York*, 445 U.S. 573, 590 (1980). Without a warrant, the police may enter a home in response to exigent circumstances. *Id.* Exigent circumstances include threats to an individual's life, a suspect's imminent escape, the imminent destruction of evidence, or situations where "there is a compelling need for official action and there is no time to secure a warrant." *Radloff v. City of Oelwein*, 380 F.3d 344, 348 (8th Cir. 2004).

Malek contended that the fact that a domestic violence suspect was inside the home — with a child — was an exigent circumstance. The presence of a domestic violence suspect, however, does not alone justify Malek's warrantless entry. *See Singer v. Court of Common Pleas, Bucks County*, 879 F.2d 1203, 1206-07 (3d Cir. 1989) (noting that concerns of danger to police or others did not justify warrantless entry into the home of a domestic violence suspect as the victims were no longer present and were in no danger). The Court held that Malek asserted no facts indicating that the suspect was a threat to the child or others.

The Court held that this situation differs from the case Malek relies on, *United States v. Hill*, 430 F.3d 939 (8th Cir. 2005). There, an officer entered a suspect's home without a warrant after seeing an unidentified man run inside the home during the arrest of the suspect. *Id.* at 940. In light of the suspect's aggravated robbery offenses, the officer believed the unidentified man could obtain a weapon inside the home. The Eighth Circuit held in that case that concerns for officer safety justified a warrantless entry. *Id.* at 941. Here, by contrast, the officers saw no other adult acting suspiciously inside the home and had no reason to believe weapons were there.

Malek also claimed that his entry was reasonable because he was conducting a protective sweep for safety purposes. A protective sweep is permitted when an officer enters a home on the reasonable belief that someone dangerous is inside the home. *Spotted Elk*, 548 F.3d at 651. The Court held that on the facts here, Malek's belief that an unarmed domestic violence suspect was inside the home does not itself justify a protective sweep.

Malek also argued that even if he unlawfully entered plaintiff's home, the right against warrantless entry was not clearly established. To be clearly established, a right must be sufficiently clear such that a reasonable officer would understand that what he is doing violates that right. *Lindsey v. City of Orrick*, 491 F.3d 892, 902 (8th Cir. 2007). In cases dealing with exigent circumstances, this court asks whether the officer "could have 'reasonably but mistakenly' concluded that exigent circumstances were present based upon the information [the officer] possessed at the time." *Rogers v. Carter*, 133 F.3d 1114, 1119 (8th Cir. 1998) (alteration added).

The Court held that at the time of the incident, a reasonable officer understood that it was unlawful to enter a home without a warrant, absent consent or exigent circumstances. The Court therefore held that the district court properly denied qualified immunity to Malek.

**Excessive Force:** The district court denied Taff and Anchondo qualified immunity on plaintiff's claim of excessive force. Excessive force claims arise under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The use of force is not excessive if it was objectively reasonable in light of the facts and circumstances confronting the officer. *Crumley v. City of*

*St. Paul*, 324 F.3d 1003, 1007 (8th Cir. 2003). In determining reasonableness, a court considers the totality of the circumstances and "the severity of the crime at issue, the immediate threat the suspect poses to the safety of the officer or others, and whether the suspect is actively resisting or attempting to evade arrest by flight." *Id.*, quoting *Foster v. Metro Airports Comm'n*, 914 F.2d 1076, 1082 (8<sup>th</sup> Cir. 1990).

Officer Taff argued that he did not use excessive force because he acted reasonably. Based on the facts asserted by plaintiff, the court disagreed. Plaintiff never resisted Taff's commands and had no opportunity to comply with his request to step outside before being forcibly removed and eventually injured. On all the facts here — including the lack of exigent circumstances, "the lack of an immediate safety threat, and the lack of active resistance to arrest" — a jury could find that Taff's use of force was not objectively reasonable.

Taff also contended that he acted reasonably because he followed standard police procedures. See *McCoy v. City of Monticello*, 342 F.3d 842, 849 (8<sup>th</sup> Cir. 2003). The Court held that to the contrary, following standard procedure does not necessarily make an officer's acts reasonable. Moreover, a jury could conclude that under the facts asserted, Taff acted unreasonably by forcibly removing Plaintiff from his home and injuring him.

The Court held that at the time of the encounter, the right to be free from excessive force in the context of an arrest was clearly established under the Fourth Amendment and therefore the district court correctly concluded that Taff was not entitled to qualified immunity.

As to Officer Anchondo, the Court held that in viewing the facts favorably to plaintiff, Anchondo was present for the entire encounter, and saw that plaintiff — wearing only a bathrobe — posed no threat to the safety of the officers or others and did not attempt to resist arrest. The Court held that as the district court concluded, a genuine issue of fact existed as to whether Anchondo used excessive force in struggling with and detaining plaintiff.

The Court next considered whether Anchondo had fair notice that his conduct violated a clearly established right. At the time Anchondo acted, it was clear to a reasonable officer that knocking a *non-resisting* suspect to the ground after he had been forcibly removed from his home without cause violated his clearly established Fourth Amendment rights. Therefore, the Court held that the district court properly held that Anchondo was not entitled to qualified immunity.

Having decided these issues in favor of plaintiff, the Court upheld the district court's order denying qualified immunity to the three officers.

**Case:** This case was decided by the Eighth U.S. Circuit Court of Appeals on November 9, 2009. The case cite is *Smith v. Kansas City*, 09-1484 (8th Cir. 11-9-2009).

Jeff Harper  
City Attorney

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## 8<sup>th</sup> Circuit Upholds Protective Sweep of Garage

**Facts Taken From Opinion:** During a drug investigation at a St. Louis residence,

Officer Lankford and his partner observed Michael Anthony Jones [Jones] and another individual leave the residence and enter the garage. The officers followed the men. The men then fled from the garage. After the officers arrested the men for possession of narcotics, the officers entered the garage and observed a tarpaulin covering a large object. Concerned that a person could be under the tarpaulin, Officer Lankford pulled back the tarpaulin, which revealed a large open duffel bag containing several freezer bags of marijuana weighing approximately one kilogram, a firearm, and a digital scale.

A jury subsequently convicted Jones of drug and firearm charges. Jones appealed his convictions, arguing that the district court erred in denying his motion to suppress the contents of the duffel bag.

**Argument and Decision by Court:** Jones argued that the protective sweep of the garage was unlawful. However, the 8<sup>th</sup> Circuit upheld the protective sweep and noted that the officers lawfully conducted a protective sweep of the garage. *See United States v. Cantrell*, 530 F.3d 684, 690 (8<sup>th</sup> Cir. 2008) (holding post-arrest protective sweep is permissible where supported by a reasonable articulable suspicion); *United States v. Turbyfill*, 525 F.2d 57, 59 (8<sup>th</sup> Cir. 1975) (holding police may lawfully seize evidence in plain view where police are lawfully in the position from which contraband was seen).

**Case Citation:** This case was an appeal from the United States District Court for the Eastern District of Missouri to the United States Court of Appeals for the Eighth Circuit. The citation is *U.S. v. Jones*, No. 08-3807 (8<sup>th</sup> Cir. Nov. 6, 2009).

Brooke Lockhart  
Deputy City Attorney

## **United States Court of Appeal for Eighth Circuit Affirms Judgment of the District Court and Therefore Upholds Conviction in Drug Case**

**Facts Taken From the Opinion:** On March 12, 2007, county Deputy Scott Faiferlick saw a hatchback vehicle following too closely to a Ford Ranger on Interstate 80 in Iowa. Deputy Faiferlick stopped the hatchback. He radioed other officers to watch for the Ranger because he believed the two vehicles were traveling together and the Ranger had only a temporary registration tag.

Officer Robert Weir spotted the Ranger. He drove alongside, could not read the expiration date on the Ranger's temporary tag, but saw what he thought was excessive tint on the windows. Officer Weir stopped the Ranger. The stop was videotaped by a camera in the police car, and audio-recorded by a microphone on the officer.

Victor Pena-Ponce was driving the Ranger, accompanied by a passenger. Officer Weir asked Pena-Ponce some questions, including ones about the expiration date of the tag and his destination. Pena-Ponce responded that he did not understand too much English. Both Officer Weir and Pena-Ponce repeated each other's questions and answers. Officer Weir asked no questions about the tinted windows. He obtained the vehicle registration, Pena-Ponce's Washington state driver's license, a temporary Illinois insurance card, and the passenger's Mexican passport. He learned that the passenger was married to Pena-Ponce's sister; they were coming from Lincoln, Nebraska, after visiting some girls; and they were traveling to Chicago, where Pena-Ponce lived and

worked. The entire conversation lasted less than three minutes.

Officer Weir returned to his vehicle with the documents and relayed all the details to Deputy Faiferlick by radio. Officer Weir added that "things could be all screwy here."

Re-approaching the Ranger, Officer Weir directed Pena-Ponce to the police car, where he asked about his age, the ownership of the Ranger, and where the passenger was from. He also inquired about Pena-Ponce's employment, the reason for his trip, and his date of birth.

While Officer Weir was questioning Pena-Ponce, Detective Dennis George arrived to assist. He had a police dog with him, and Deputy Faiferlick soon arrived with yet another police dog. Officer Weir told the other officers what he had learned, including "I just tried to do a quick search on his name and date of birth, uh, doesn't come back." He also told them that Pena-Ponce said he was 26 years old, which based on the date of birth he gave, should be 27. Officer Weir also found it suspicious that Pena-Ponce said they were in Lincoln to meet some girls, when the passenger was married to his sister.

While Officer Weir and Detective George discussed obtaining Pena-Ponce's consent to search, Deputy Faiferlick approached the passenger side of the Ranger. He saw numerous cell phones and the passenger trying to kick one under the seat. On the dash was a Santa Muerte statue, which Deputy Faiferlick testified is commonly used by drug traffickers for protection. The passenger said they were traveling from Lincoln after visiting his wife and kids, which Deputy Faiferlick thought was inconsistent with what Pena-Ponce had told Officer Weir. Deputy Faiferlick also noticed

that the passenger appeared excessively nervous. He believed that the two were involved in criminal activity, and decided that if Pena-Ponce did not consent to search, he would deploy a drug dog around the Ranger.

Officer Weir then asked if Pena-Ponce minded if he searched the Ranger; Pena-Ponce replied, "No." Officer Weir re-asked if it was "ok," and Pena Ponce said, "It's ok." After a few more questions, Officer Weir contacted the dispatch service to run Pena-Ponce's driver's license number, registration, and the vehicle identification number. Dispatch responded that it could not find any information on the driver's license, temporary tag, or VIN. Officer Weir then handed Pena-Ponce (and later the passenger) written consent-to-search forms, advising them that the forms said it is ok to look in the car (the forms were in English). He instructed them to provide their signatures, dates of birth, and social security numbers — which they did.

The initial search revealed receipts showing the pair had been in California a few days before. Detective George then brought his dog around the outside of the Ranger. The dog alerted to the presence of drugs in the area underneath the passenger's door, and inside the truck as well. Deputy Faiferlick's dog also alerted to the presence of drugs. The officers noticed some modifications to the truck, but lacked the tools to investigate them. They took the truck to a state garage. Pena-Ponce and the passenger were transported separately in police vehicles. A Spanish-speaking officer, called to interview Pena-Ponce, gave *Miranda* warnings in Spanish from a form written in Spanish.

At the state garage, the officers discovered a compartment under the passenger seat, with at least five kilos of cocaine. Pena-Ponce

pled guilty to one count of possession with intent to distribute cocaine, in violation of federal law and in his plea agreement Pena-Ponce reserved his right to appeal the denial of his motion to suppress. He then appealed the denial of the motion to suppress to the Eighth U.S. Circuit Court of Appeals.

**Decision by Eighth Circuit:** Pena-Ponce first contended that the district court erred in finding that the initial stop of the truck was not pretextual. "An officer's observation of a traffic violation, however minor, gives the officer probable cause to stop a vehicle, even if the officer would have ignored the violation but for a suspicion that greater crimes are afoot." *United States v. Luna*, 368 F.3d 876, 878 (8th Cir. 2004). Pena-Ponce argued that Officer Weir's actual reason for stopping the truck was Deputy Faiferlick's direction to watch for it. He also stated that the temporary tag does not provide a basis for the stop because having a temporary tag is not illegal. Pena-Ponce asserted that because Officer Weir never mentioned the window tint during the stop, it is not why Officer Weir stopped him.

The district court agreed that unless Officer Weir had some reasonable question about the temporary tag, it alone could not justify the stop. However, Officer Weir testified that he stopped the truck because it had a temporary tag *and* excessive tint on its windows. The district court found that after viewing the truck, Officer Weir, based on his experience and training, believed the window tint violated both Iowa and Illinois law, providing probable cause to stop the truck. The Court held that this finding was supported by the officer's testimony and the exhibit containing the video recording of the stop. In addition, the day after the stop, law enforcement verified with a tint meter that the windows did not allow the required transparency under Iowa law. Therefore, the

Court held that the district court's conclusions were supported by substantial evidence, not based on an erroneous interpretation of law, and are not clear mistakes in light of the entire record.

Pena-Ponce next argued that even if the initial stop was valid, the lawful scope of the traffic stop was impermissibly exceeded. A traffic stop can become unlawful, "if it is 'prolonged beyond the time reasonably required' to complete its purpose." *United States v. Olivera-Mendez*, 484 F.3d 505, 509 (8th Cir. 2007), *quoting Illinois v. Caballes*, 543 U.S. 405, 407 (2005). After stopping a car, an officer may detain the driver while he completes "a number of routine but somewhat time-consuming tasks related to the traffic violation, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning." While performing these tasks, the officer may ask the driver routine questions, including those about the destination and purpose of the trip, and request that the driver sit inside the police car. The officer may also ask passengers these questions, in order to verify the information provided by the driver. The "officer may expand the scope of a traffic stop if he has reasonable suspicion of other criminal activity based on the totality of the circumstances and informed by his training and experience." *United States v. Guerrero*, 374 F.3d 584, 596 (8th Cir. 2004). Whether the stop "is reasonable in length is a fact intensive question, and there is no per se time limit on all traffic stops." *Olivera-Mendez*, 484 F.3d at 510.

Officer Weir asked Pena-Ponce routine questions while doing the normal tasks of the traffic stop. The district court found that he developed reasonable suspicion of criminal activity based on: (1) his belief Pena-Ponce was attempting to stall while

answering questions, (2) his story that he had been in Lincoln to visit some girls, with his sister's husband, and (3) his stated age not matching his date of birth. The officers believed criminal activity was afoot, and decided to seek Pena-Ponce's consent to search the truck.

At this point, Pena-Ponce had been detained less than ten minutes. Immediately thereafter, Deputy Faiferlick, questioning the passenger, noticed suspicious circumstances: the passenger's excessive nervousness, conflicting stories about why the two had been in Lincoln, multiple cell phones in the truck, the passenger attempting to kick one out of sight, and the Santa Muerte figure. Deputy Faiferlick's brief questioning of the passenger to check the information provided by Pena-Ponce was part of the permissible routine traffic stop. Because the officers developed reasonable suspicion while conducting the normal tasks of the stop, the district court properly concluded that the scope of the stop was not unreasonably expanded.

Pena-Ponce next argued that because of the language barrier, his oral and written consent to search the truck was not voluntary. "Whether or not the suspect has actually consented to a search, the Fourth Amendment requires only that the police reasonably believe the search to be consensual." *Barragan*, 379 F.3d at 530. "The focus is not whether [the defendant] subjectively consented, but rather, whether a reasonable officer would believe consent was given and can be inferred from words, gestures, or other conduct." "The determination of whether a reasonable officer would believe that [the defendant] consented is a question of fact, subject to review for clear error."

The Court held that the district court concluded that a reasonable officer would have believed that Pena-Ponce orally consented to the search. While he spoke only broken English and had difficulty understanding some questions, the district court found that Pena-Ponce conversed without difficulty for a substantial portion of the conversation with Officer Weir. Pena-Ponce provided his license and registration on request, and responded appropriately to questions about his name, the details of his trip, where he lived, his work, and the relationship and living arrangements of the passenger. The district court also noted that two times Pena-Ponce told Officer Weir he did not understand a particular question, showing that he usually did understand, but when he did not, he was willing to say so.

According to the audio-recording, Officer Weir asked Pena-Ponce for consent to search the vehicle: "So you don't mind if I check the car for any, any guns, or knives or anything?" Pena-Ponce replies, "No." Officer Weir asks, "It's ok?" Pena-Ponce replies, "It's ok." The Eighth U.S. Circuit Court of Appeals concluded that the district court did not clearly err in finding that a reasonable officer would have believed Pena-Ponce knowingly and voluntarily consented to the search. Therefore the judgment of the district court was affirmed.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on November 25, 2009. The case cite is *U.S. v. Pena-Ponce*, 09-1010 (8<sup>th</sup> Cir. 11-25-2009).

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**Arkansas Court of Appeals  
Determines Value of Vehicle for  
Theft Statute Purposes**

**Facts:** Appellant, Andrew Beasley [Beasley], was convicted of theft by receiving, a Class B felony, by his having possession of a stolen 1994 Honda Civic del Sol on December 26, 2007, and fleeing from the police upon their attempt to apprehend him in Little Rock. Beasley stated that he had purchased the car from an individual in early December for a price of \$900. He appealed his conviction and argued that the State did not prove that he was guilty of a Class B felony because the State did not prove the vehicle was worth at least \$2,500.

**Argument and Discussion:** The vehicle at issue had been stolen from the home of Susan Thomas [Thomas] in early December 2007. Thomas testified that she bought the vehicle in June 1997 for a price of \$9,800. She stated that when the vehicle was recovered, it was considered a total loss by her insurance company and the insurance company paid her \$3,100 after her deductible of \$250. Thomas testified that she worked two jobs to pay for the car; that she maintained the vehicle; that she had driven it conservatively; and that she kept it in the garage for the ten years she owned it.

The Court looked at the theft by receiving statute which states that a person commits theft by receiving if he or she "receives, retains, or disposes of stolen property of another person: (1) [k]nowing that the property was stolen; or (2) [h]aving good reason to believe the property was stolen." Ark. Code Ann. § 5-36-106(a) (Repl. 2006). The offense is a Class B felony if the value of the property is at least \$2,500 but a C felony if the value of the property is less

than \$2,500 but more than \$500. *Id.* at 5-36-106(e)(2)(A).

"Value" is the market value of the stolen property at the time of the theft for statute purposes. Ark. Code Ann. § 5-36-101(12)(A) (Repl. 2006). Although expert testimony as to value is preferred, it is not required. *Russell v. State*, 367 Ark. 557 (2006). The original purchase price can be considered if not too remote in time, or the owner's opinion can be evidence of value. *Sullivan v. State*, 32 Ark. App. 124 (1990).

In this case, the State presented evidence that the rightful owner of the vehicle paid \$9,800 for the vehicle ten years before the theft; that the owner took care of the vehicle; and that the owner's insurance paid over \$3,000 for the vehicle. The Court held that was sufficient testimony to value the property at over \$2,500 and convict Beasley of a Class B felony.

**Case citation:** This case was decided on September 30, 2009. The case was an appeal from the Pulaski County Circuit Court, First Division. The case citation for this case is *Beasley v. State*, 2009 Ark. App. 625 (2009).

Brooke Lockhart  
Deputy City Attorney

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**City Attorney Releases Report  
on Intimate Domestic Violence  
for Year 2008**

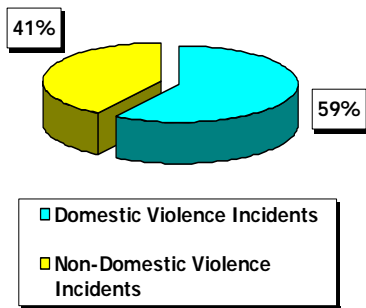
On October 2, 2009, our office released our annual report on intimate domestic violence in Springdale. You can access this report at [www.springdalear.gov/cosa](http://www.springdalear.gov/cosa) by clicking on "Statistics" and choosing "2008 Intimate

Domestic Violence Report." Below are two charts contained in the report.

### City Attorney Releases Annual Report on Drunk Driving for Year 2008

On November 23, 2009, our office released our annual report on drunk driving in Springdale. You can access this report at [www.springdalear.gov/cosa](http://www.springdalear.gov/cosa) by clicking on "Statistics" and choosing "2008 DWI Report." Below are diagrams or charts contained in the report.

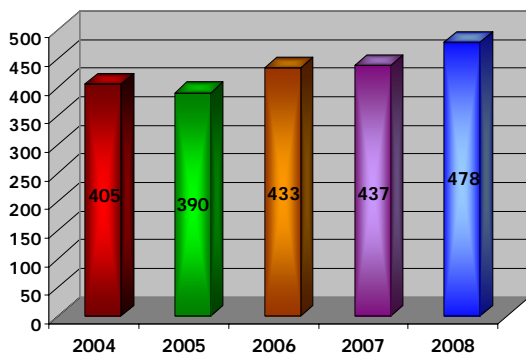
Comparison of Domestic Violence Incidents With Non-Domestic Violence Incidents Reported to Springdale Police in 2008



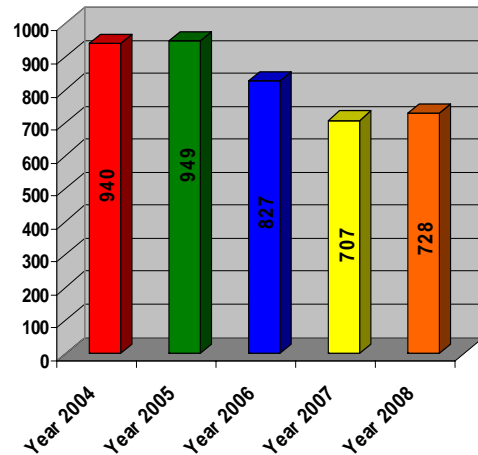
One of the areas of good news contained in the report is that the number of DWI crashes in 2008 was at its lowest point in the past five years. If you access the report, you can review this information in Chart No. 11.

I encourage all Springdale officers to review this report.

Comparison of Intimate Domestic Violence Reported to Springdale Police in Past Five Years



DWI Arrests

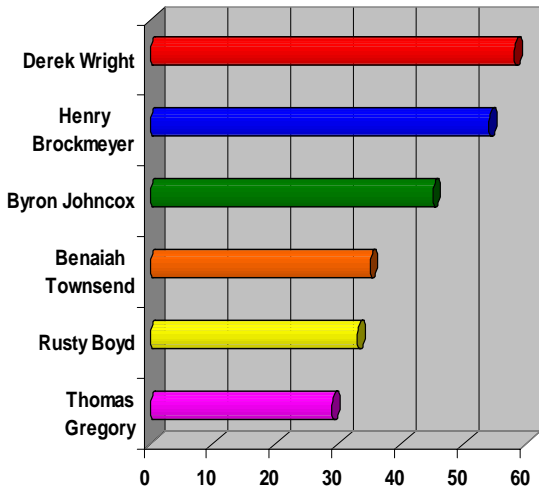


I encourage all Springdale officers to review this report.

Jeff Harper  
City Attorney

2008 Dispositions on DWI Cases Handled by City of Springdale and County Prosecutor's Office (as of 12/7/09)	
Total Arrested	728
Total Handled by City of Springdale	695
Total Handled by County Prosecutor's Office (32 in Washington County and 1 in Benton County)	33
Total No. of cases ending in a finding of Guilty	656
Total No. of cases ending in a finding of Not Guilty	9
Total No. Defendants Failed to Appear (warrants issued)	61
Defendant Died Before Case Adjudicated	1
Case Pending	0
Total Convicted/Total No. Arrested (656/728)	90.10%
Conviction Rate on Cases Adjudicated (656/665)	98.64%

SPD Officers Who Made 25 or More DWI Arrests in 2008



The following chart reflects those officers with 25 or more DWI arrests. Congratulations to Derek Wright for making the most DWI arrests in 2008.

Jeff Harper  
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C.A.L.L.  
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