



C.A.L.L.



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City Attorney Law Letter

Issue 11-02

Eighth Circuit Case Law

Arkansas Case Law

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Arkansas Court of Appeals Holds State Trooper's Traffic Stop was Complete After 9.5 Minutes and Therefore Continued Detention was Illegal

Facts Taken From the Case: On October 29, 2008, Arkansas State Trooper Phillip Roark stopped Lisa Diane Menne in her truck for speeding in Lawrence County, Arkansas. The trooper approached Menne and asked for her driver's license, proof of insurance, and registration. Trooper Roark testified that because Menne "seemed to be nervous," it was late at night, he had previously received information that Menne was dealing drugs, and he had found a small amount of marijuana in her vehicle (which someone else was driving at the time) the month before, he returned to his patrol car and called for a drug dog.

According to Trooper Roark, about nine-and-half minutes into the stop Menne had provided all the documentation that he requested and he had verified that documentation. He decided to write her a warning ticket, which he began to fill out. The trooper admitted that up to this point he had not observed anything of an illegal nature and that he had no "probable cause" to search her vehicle. However, he asked Menne, who was still in her truck, to step outside, where he advised her that he was going to issue her a warning ticket. Instead of giving it to her to sign, he asked Menne for permission to search her vehicle. This was approximately fourteen minutes into the stop. The parties dispute whether Menne consented, but there is no dispute that the search took place. The trooper's search of Menne's vehicle revealed drug paraphernalia and marijuana. In Menne's purse, methamphetamine was discovered.

Menne's motion to suppress sought to exclude the contraband found in her truck and purse. The trial court denied the motion, and Menne was convicted by a Lawrence County Circuit Court jury of possession of drug paraphernalia, possession of marijuana, and possession of methamphetamine. Menne appealed to the Arkansas Court of Appeals.

Argument and Decision by Arkansas Court of Appeals: Menne's first point on appeal was that the trial court erred in denying her motion to suppress because she was illegally detained after the traffic stop was completed. As such, any consent she gave was invalid. Specifically, she claimed that the purpose of the traffic stop was completed after nine-and-one-half minutes, which was approximately five minutes before the trooper requested permission to search her vehicle. She pointed out that the trooper had returned all of her documentation and had written the warning ticket. Only her signature on the ticket was lacking. Instead of having her sign the ticket and releasing her, she contended that Trooper Roark unlawfully detained her when he asked that she step outside her vehicle and requested consent to search. She claimed that the delay was a pretext—orchestrated to give the drug dog time to arrive. Menne also contended that because the purpose of the stop was complete at nine-and-one-half minutes, the detention beyond that time required reasonable suspicion of criminal activity under Arkansas Rule of Criminal Procedure 3.1, which was lacking in this case.

The Arkansas Court of Appeals noted that our Supreme Court has stated that a law-enforcement officer, as part of a valid traffic stop, may detain a traffic offender while completing certain routine tasks and, as part of that process, ask for consent to search the

vehicle. *Sims v. State*, 356 Ark. 507, 514 (2004). The court then held (in *Sims*) that after the officer handed the appellant his documentation and the warning ticket, “the legitimate purpose of the stop had terminated.” *Sims*, 356 Ark. at 513. As such, the continued detention of the appellant after that point was a violation of Rule 3.1. *Id.*

Similarly, in *Ayala v. State*, 90 Ark. App. 13 (2005), after pulling the appellant over for speeding, the officer verified the appellant’s documentation, found that “everything was in order,” but did not return the documents to him. While still holding the paperwork, the officer asked the appellant if there were drugs in the vehicle, to which the appellant invited the officer to conduct a search. The officer ran the drug dog around the vehicle, the dog alerted, and a subsequent search revealed marijuana. Under those facts, the Court of Appeals held that it was evident that the purpose of the traffic stop was completed, and absent any reasonable suspicion, it was the officer’s duty to return the paperwork, issue a citation or warning, if necessary, and discontinue the detention. *Ayala*, 90 Ark. App. at 16.

The Court held the issue before them in this case is whether the traffic stop was complete when Trooper Roark obtained consent from Menne. The Court held that based on *Sims* and *Ayala*, it was. The legitimate purpose of the traffic stop ended after nine-and-a-half minutes, when Trooper Roark had received, verified, and returned all of Menne’s documentation. The trooper specifically testified that he had completed his speeding investigation, and he had written the warning ticket. The Court acknowledged that Trooper Roark had not yet given the ticket to Menne to sign. However, relying upon the holdings in *Sims* and *Ayala* along with the trooper’s testimony that his

investigation was complete, that fact does not alter the conclusion. Nine-and-a-half minutes after stopping Menne, the legitimate purpose of the stop was complete. The trooper’s failure to hand over the warning ticket to Menne at that time was nothing more than a stalling tactic to allow time for the drug dog’s arrival. Therefore, the trial court erred when it denied Menne’s motion to suppress. Menne’s detention beyond the completion of the traffic stop was illegal, and any subsequent consent given by Menne was invalid.

The State also argued that under Rule 3.1, the trooper had a total of fifteen minutes to conduct the traffic stop and obtain consent from Menne. The Court rejected this argument. The time limit of fifteen minutes set forth in Rule 3.1 sets the maximum amount of time in which an officer can detain someone where there is reasonable suspicion of criminal activity. Ark. R. Crim. P. 3.1. As such, where a traffic stop is completed prior to the fifteen-minute mark, and there is no reasonable suspicion to detain the person stopped, the person must be released. When the purpose of the traffic stop ends short of fifteen minutes, officers are not at liberty to take the remaining time, up to the fifteen-minute mark, to garner consent from the person stopped.

The Court further held that once the legitimate purpose of the stop had ended, Trooper Roark did not have authority under Rule 3.1 to detain Menne because he had no grounds to reasonably suspect that she was engaged in criminal activity. Trooper Roark testified that after he verified all of Menne’s documentation, he asked her to step out of her truck despite the fact that he had not observed anything of an illegal nature. He further testified that she had not committed any criminal violation for which he could

arrest her and that he did not have probable cause to search her vehicle.

The Court noted they were aware of the other testimony of Trooper Roark that Menne seemed nervous; she was driving late at night; her background search revealed a prior arrest record; he had been previously advised by a Walnut Ridge police officer she was dealing drugs; and the month prior, he had stopped Menne’s truck and found drugs in it. The Court held that the three latter facts do not constitute reasonable, articulable suspicion that Menne was currently engaged in criminal activity because they are not facts that Trooper Roark personally observed that night. The only observations actually made by Trooper Roark on the night in question were that Menne seemed nervous and that she was driving late at night. The Court held that in this case, those two facts considered together fail to constitute reasonable suspicion of criminal activity. *Laine v. State*, 347 Ark. 142 (2001) (holding that mere nervousness, standing alone, does not constitute reasonable suspicion of criminal activity and grounds for detention); *Stewart v. State*, 332 Ark. 138 (1998) (holding that the facts that appellant was walking in a high crime area late at night did not give officers a sufficient reason to stop him under Rule 3.1).

The Court held therefore, based on the totality of the circumstances, the trial court committed error in denying Menne’s motion to suppress evidence. The legitimate purpose of the traffic stop was complete nine-and-a-half minutes after the initial stop when Trooper Roark, by his own testimony, had obtained, verified, and returned Menne’s documentation to her, he had completed his speeding investigation, and he had written the warning citation. Any consent given

after that point by Menne was invalid, and the search was illegal. The Court further held that the trooper lacked reasonable suspicion pursuant to Rule. 3.1 to detain Menne beyond the completion of the traffic stop. Accordingly, the Court reversed and remanded for proceedings consistent with this opinion.

Case: This case was decided by the Arkansas Court of Appeals on December 8, 2010, and was an appeal from the Lawrence County Circuit Court, Honorable Harold S. Erwin, Judge. The case citation is *Menne v. State*, 2010 Ark. App 806.

Jeff Harper
City Attorney

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### **Arkansas Court of Appeals Reverses Conviction Because of Lack of Reasonable Suspicion in Washington County Case**

#### **Facts Taken From the Opinion:**

On July 25, 2009, off-duty West Fork Police Officer Clay Hungate was driving along Highway 71 in his personal vehicle with his family. He passed an area known as Red Gate, which he described as a “party place” on the White River. He noticed three vehicles parked as though they were about to come out onto the highway—two of the vehicles were trucks and one was a red car. Several of the passengers were standing outside the vehicles. Officer Hungate saw a man standing near the lead truck, which was black in color, making an obscene gesture at the passengers of the other two vehicles. Officer Hungate radioed Kenneth Ingalls, a

fellow West Fork Police Officer, and told him about the incident.

Ingalls testified that Hungate told him that there appeared to be some sort of roadside altercation going on. Ingalls headed toward Red Gate, which Ingalls said was “pretty synonymous for a lot of drinking and controlled substances” and where “a fight a time or two [had] broken out.” When Ingalls arrived, however, no one was there. Officer Ingalls continued north on Highway 71 toward Greenland and radioed ahead to Greenland Police Officer Michael Huber, telling him to be on the lookout for vehicles matching Officer Hungate’s description.

After getting the call from Officer Ingalls, Officer Huber headed south on Highway 71 from Greenland to see if he could intercept the vehicles. Soon after, he met a black pickup truck being followed closely by a red Mustang and another black pickup truck. Officer Huber turned around and began to follow the vehicles. He asked Officer Ingalls whether the car Officer Hungate had seen was a red Mustang, and Officer Ingalls thought it “possibly was,” though Officer Ingalls testified that the only vehicle description he had received from Officer Hungate was that two black trucks and one red car were involved. Officer Huber testified that his main concern was the Red Gate disturbance, or, as he described it, “possible road rage.” He engaged his emergency lights, pulled up beside each of the vehicles, and motioned for the drivers to pull over. The driver of the lead truck pulled into a business parking lot, and the drivers of the other two vehicles pulled into the parking lot of a nearby apartment complex. Officer Huber went to the lead truck, informed Officer Ingalls that he had pulled the vehicles over, and told him to tend to the other two vehicles.

Officer Ingalls arrived on the scene shortly thereafter. Officer Ingalls made contact with the driver of the red Mustang, Jamie Leigh Jones, and told her that he had gotten word of some kind of roadside altercation back at Red Gate. According to Officer Ingalls, only about five minutes had elapsed since he had received the initial call from Officer Hungate. According to the incident report, Jones smelled of alcohol and had blood shot, watery eyes. The report further stated that Jones’s initial, portable breath test registered .09 and that her second, certified breath test registered .11.

The circuit court found that the officers had reasonable suspicion to stop Jones’s car. Jones entered a conditional guilty plea to the crime of DWI, first offense, and the circuit court sentenced her to one day in the county jail (with credit for time served), ordered her to pay \$300 in court costs, and fined her \$1000 (the court suspended \$500 of the fine conditioned upon Jones not committing a similar offense within one year). Jones appealed the conviction, challenging the circuit court’s denial of her motion to suppress the evidence of her intoxication. More specifically, Jones argued that officers did not have reasonable suspicion to perform a traffic stop under Arkansas Rule of Criminal Procedure 3.1.

**Decision by Arkansas Court of Appeals:** The Court of Appeals noted that the question here is whether the officers had reasonable suspicion to stop Jones’ vehicle under Arkansas Rule of Criminal Procedure 3.1. That rule provides, in pertinent part, as follows:

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he

reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

Ark. R. Crim. P. 3.1. Reasonable suspicion is defined as “suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.” Ark. R. Crim. P. 2.1.

It is an objective inquiry and “due weight must be given to the specific reasonable inferences an officer is entitled to derive from the situation in light of his experience as a police officer.” *Summers v. State*, 90 Ark. App. 25, 31 (2005).

The legislature has provided factors for the circuit court to consider in its analysis: (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. Ark. Code Ann. § 16-81-203 (Repl. 2005).

The Court reviewed the facts. An off-duty officer observed a man, standing near the lead vehicle in a group of three vehicles, making an obscene gesture at the people in the other two vehicles. The area where this occurred is known for alcohol and controlled substances consumption and as a place where “a fight a time or two [had] broken out.” Three vehicles matching the observing officer’s general description—two black trucks and a red car—were seen a few minutes later following each other closely as they came into Greenland. Witnessing no traffic violations, the officer stopped the vehicles for “possible road rage.” No one ever saw an actual fight or had any indication that one was about to erupt (other than the initial incident). And no one had reported anything specific about Jones.

Looking at the totality of the circumstances, the Court held these facts do not give rise to reasonable suspicion. Because the officers did not have reasonable suspicion to stop Jones, the results from her subsequent breath tests should have been suppressed as fruit of the poisonous tree. *Keenom v. State*, 349 Ark. 381 (2002) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). Therefore, the case was reversed and remanded.

**Case:** This case was decided by the Arkansas Court of Appeals on January 26, 2011 and was an appeal from the

Washington County Circuit Court, Honorable William A. Storey, Judge. The case citation is *Jones v. State*, 2011 Ark. App. 61.

Jeff Harper  
City Attorney

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Arkansas Court of Appeals Upholds Roadblock Set up for the Purpose of Determining that Licensed and Safe Drivers Were Using the Public Roadway

Facts Taken From the Opinion: The safety checkpoint involved in this case was conceived by the Commissioners of the Gosnell, Arkansas Police and Fire Departments. Fire Chief Bobby Trump testified that he and Police Chief Fred Roberts discussed locating the checkpoint station on the main highway (State Highway 151), because the area was well lit, it could be narrowed to one-way traffic each way, and there was a clear, safe area to remove cars from the main roadway if necessary.

Based on officer availability, June 27, 2008, was selected as the date to carry out the safety-check operation. Participating in the checkpoint were officers from the Gosnell Police Department, the Arkansas State Police, the Mississippi County Sheriff's Department, and the Blytheville Police Department. The checkpoint was in force beginning at 9:00 p.m. and continuing through midnight. Six officers were present and were able to check three to four cars each way. The five-lane highway had a speed decrease at the point of check that went from fifty to thirty-five miles per hour. The two outside lanes of the highway were

closed, and blue lights, directional lights, and officers wearing reflective vests were used to direct drivers to the two center lanes. According to the record, at most, five vehicles were stopped at once.

The officers were instructed by Trump to stop every vehicle, check for valid license, insurance, and registration. If the driver complied and all was in order, the driver was permitted to pass through. However, if the driver was unable to comply, further checks were ordered. Furthermore, Trump instructed the checkpoint "chase cars" to pursue only the drivers who avoided the checkpoint by doing a U-turn in the highway. This particular checkpoint (the third one of its kind that year) produced one felony arrest, two DWI arrests, eleven traffic citations for no insurance or driver's license, and one arrest pursuant to a failure-to-appear warrant.

Gosnell Police Department did not have a written policy on checkpoints; did not account for how many total cars were stopped; did not publicize the checkpoint; and did not advise motorists they were approaching a checkpoint. Trump responded that his checkpoint priorities were to ensure the location had ample visibility and room to pull over vehicles. He also stated that he strived for consistency and ordered that every car be stopped in order to avoid any profiling or pretext concerns.

Gosnell Police Department Captain Robert Lewis testified that he did the briefing and position assignments following orders from Trump and Roberts. A memo Lewis generated after the checkpoint stated that all officers were appropriately briefed; all cars were stopped; the officers held the drivers no longer than was necessary to execute all required checks; and all officers wore

reflective vests during the checkpoint. According to the officers' testimony, a driver was released if he had a license, registration, and proof of insurance. However, if a driver did not have a license, a local check through the criminal-information system was done relating to the validity of the license.

In this case, Kenric Partee did not have a valid driver's license as he traveled through the checkpoint and the resulting criminal-information check showed that he had an outstanding warrant. As such, he was placed under arrest. During his arrest, cocaine was found on his person. He entered a conditional guilty plea to possession of thirty-five grams of cocaine with the intent to deliver. He was sentenced to 126 months' imprisonment and an additional five years' suspended imposition of sentence.

At the suppression hearing the trial court found that the purpose of the safety checkpoint was to verify driver's license, registration, and insurance of the drivers who were on the road on this particular date prior to a holiday and that the location of the checkpoint was given ample consideration by the officers who planned it. The court also found that the particular checkpoint location was selected for safety reasons—so that traffic could be easily reduced to one lane traveling each direction. Although there was some inconsistency in recalling if every car was stopped that was due to the passage of time, the trial court specifically found that the weight of the testimony was that every car was stopped and checked for license, insurance, and registration. It also found that despite there being no advance warning of the roadblock, the checkpoint was visible based on the officers' use of directional LED lights, police lights, and reflective safety vests.

The court summarized by stating that "considering the totality of the circumstances . . . this particular checkpoint was reasonable and valid." However, the court went on to note that if Arkansas law required checkpoints to comply with National Highway and Transportation Safety Administration (NHTSA) standards, "then the outcome would certainly be much different." Partee appealed the case to the Arkansas Court of Appeals and claimed that the circuit court erred in its denial of his motion to suppress evidence because he was seized at an unconstitutional checkpoint. Specifically, he urged the court to adopt the standards set forth by the NHTSA.

Decision by Arkansas Court of Appeals:

The Court noted that officers failed to satisfy most of the NHTSA recommended safeguards for checkpoints. However, these deficiencies do not necessarily result in the checkpoint failing to pass constitutional muster.

The Court found here, the roadblock was established for the purpose of determining that licensed and safe drivers were using the public roadway and there was no evidence that the roadblock was established as a subterfuge for detection of any other criminal activity. It was carried out in an area where the speed limit was reduced, the flow could easily be narrowed to two lanes, and there was plenty of space to pull over non-compliant vehicles. The identity of the officers and the presence of their vehicles were obvious due to the identifying vests worn by the officers and the flashing blue lights. The motorists were only stopped briefly and this was a checkpoint stop rather than a roving patrol. Thus, the Court held the level of intrusion was slight.

Further, the officers did not make random stops using unbridled discretion but stopped all vehicles based on an established procedure conceived prior to the roadblock. The roadblock was authorized (the third of its kind that year) by the Commissioner and Police Chief and the officers were briefed on the procedures before and after. It was linked to safe holiday travel and targeted all vehicles traveling that area. Certainly, it would have been preferable for the checkpoint to have been carried out in accordance with a written policy, accompanied by an announcement to the public, with clear warning signs that a stop was coming, and records and data relating to the number of stops made. However, the Court held these things are not constitutional prerequisites for safety-checkpoints under either Arkansas or federal law. As such, the Court affirmed the trial court's denial of the motion to suppress and affirmed Partee's conviction.

Case: This case was decided by the Arkansas Court of Appeals on December 8, 2010 and was an appeal from the Mississippi County Circuit Court, Chickasawba District, Honorable Cindy Thyer, Judge. The case citation is *Partee v. State*, 2010 Ark. App. 805.

Jeff Harper
City Attorney

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**Arkansas Court of Appeals  
Reverses Conviction in Benton  
County Case and Remands for a  
New Trial**

**Facts Taken From the Opinion:** Over a twenty-four hour period, Ciro Jimenez

kidnaped his wife and bound her with duct tape and a cattle rope. During the incident, Jimenez was alleged to have threatened the lives of his family with a gun. The State also argued that he twice had sexual intercourse with his wife "by forcible compulsion." The altercation concluded with an armed standoff between Jimenez and law enforcement. Following the incident, Jimenez gave a custodial statement to the police, after being interrogated by officers Geovanni Serrano and Greg Hines.

The purpose of the interrogation was to further develop the information relating to the accusation of rape. Because Jimenez did not speak English, the interview was conducted in Spanish (Serrano spoke Spanish and took the lead). During the interview, Jimenez admitted to certain illegal conduct relating to the rape of his wife. The interrogation was translated, transcribed, and offered to the jury as evidence against Jimenez.

During the interrogation the following exchanges occurred:

OFFICER: According to your rights you can use the telephone to communicate with your family, friend or lawyer. Do you understand?

JIMENEZ: Can I get it? (Note: here the trial court found the officer's testimony that this statement was a request for a Kleenex not a response to the question asked by the officer).

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OFFICER: Can you sign here?

JIMENEZ: Would rather have a lawyer. I mean I don't know what I would be signing. Is that o.k.?

OFFICER: If that is what you want it is okay. What I read to you are your rights, but if you want a lawyer and you don't want to sign, you have every right to. It's all here in Spanish and English.

JIMENEZ: It's just sometimes I get nervous. My blood pressure drops.

OFFICER: (In English to other officer) He says he might want an attorney here because he doesn't know what he is signing. I told him to go ahead and read them through.

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JIMENEZ: But if you ask me and I don't know how to answer you, I need someone to help me.

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JIMENEZ: I would prefer a lawyer. I don't have rights here.

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JIMENEZ: I have told you some. I answered some questions, but this has affected me, I don't want it to affect me more. What I am saying now is another question; I would need someone to advise me. I am remorseful, sorry to everyone I offended. More questions for me? Well, I would like to, but I need someone to advise me. Then, I'll answer what you want.

Jimenez was charged by criminal information with rape, kidnapping, aggravated assault, and endangering the welfare of a minor. Enhancements were sought because he allegedly committed these felonies in the presence of a minor. Jimenez was found guilty on all charges and was sentenced to fifteen years for the rape and twenty years for the kidnaping. These sentences were ordered to run consecutively, but each of the remaining sentences was ordered to run concurrently. Jimenez appealed to the Arkansas Court of Appeals, arguing three points. The first point being that because he attempted to invoke his right to counsel, his confession was tainted and should have been suppressed.

**Decision by Arkansas Court of Appeals:**

Jimenez claimed that because he asserted his right to counsel, yet was denied the assistance he sought, the trial court erred in its refusal to suppress his confession. The Court first looked to the voluntariness of the question. Voluntariness is a question of law that is reviewed de novo by the Court. In making the determination of voluntariness, the Court's review is directed toward the totality of the circumstances surrounding the custodial statement.

Once a defendant invokes his right to counsel at a custodial interrogation, the police may not interrogate any further until counsel is provided (or until the defendant initiates further communication). *Vidos v. State*, 367 Ark. 296 (2006). Also, a defendant must assert his rights clearly and unambiguously such that a reasonable police officer would understand that the defendant wanted to cut off questioning. *Whitaker v. State*, 348 Ark. 90, 95, (2002). If the statement fails to meet the requisite level of clarity, the officers are not required to end the interview.

The Court noted that the State highlighted the officers' efforts to ensure that Jimenez understood the nature of the interview—his rights were offered in Spanish; a Spanish-speaking officer conducted the interview; the officers reminded him throughout the interview of his rights; and the officers were careful to let Jimenez reinitiate the contact following the would-be request. However, the Court held that even if we were to view the totality of the circumstances surrounding Jimenez's request with a blind eye to the cumulative nature of Jimenez's requests and overlook the real possibility that his lack of precision or equivocacy could be a result of the inevitable fact that words and meaning are often "lost in translation," the final excerpted exchange sounds the death knell for the State's position.

JIMENEZ: The record indicates that I have told you some. I answered some questions, but this has affected me, I don't want it to affect me more. What I am saying now is another question; I would need someone to advise me. I am remorseful, sorry to everyone I offended. More questions for me? Well, I would like to, but I need someone to advise me.

The Arkansas Court of Appeals held at this point, Jimenez asserted his rights in a clear and unambiguous manner to such a degree that a reasonable police officer would understand that questioning must cease. Because Jimenez's incriminating statement was made after he invoked his right to counsel, the trial court's failure to suppress the statement was error. The State had argued that this was harmless error argument, but because the Court of Appeals also found that the denial of Jimenez's request for a mental-health examination was

reversible error, they did not address this issue. Therefore, the case was reversed and remanded.

**Case:** This case was decided by the Arkansas Court of Appeals on December 8, 2010 and was an appeal from the Benton County Circuit Court, Honorable David Clinger, Judge. The case citation is *Jimenez v. State*, 2010 Ark. App. 804.

Jeff Harper  
City Attorney

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8th U.S. Circuit Court of Appeals Affirms Judgment for Faulkner County Deputy Sheriff Who Seized Stolen Property at a Pawn Shop Without a Warrant

Facts Taken From the Opinion: On September 15, 2007, Keadron Walker entered into a pawn agreement with PPS, Inc. (PPS), the owner of the EZ Cash Pawn Shop in Little Rock, Arkansas (EZ), under which Walker pawned a commercial grade Graco brand paint sprayer, serial number BA3166, as collateral for a \$300 advance from EZ. The following week, James Baldwin reported to the Faulkner County Sheriff's Office that Walker, a former employee, had refused to return a pickup truck and a commercial paint sprayer that Mr. Baldwin had allowed him to use as part of his employment. Mr. Baldwin reported to the Sheriff's Office that Walker's mother had informed him that Walker had pawned the paint sprayer at EZ.

During business hours on September 27, 2007, Sergeant David Hall and Dalton Elliott, investigators for the Faulkner County

Sheriff's Office, met Mr. Baldwin at EZ. Sergeant Hall inquired of Robert Casto, Jr., the manager on duty at the pawn shop, whether the sprayer was on the premises, and Mr. Casto confirmed that it was.

Sergeant Hall explained that the sprayer was suspected to be stolen property and requested that the pawn shop turn over the sprayer for the officers' investigation into the theft claim. Mr. Casto resisted releasing custody of the sprayer, and Sergeant Hall told Mr. Casto that he could arrest Casto if he refused. Mr. Casto then called Douglas Braswell, PPS's CEO and part owner, and told him of Sergeant Hall's demand to take the sprayer. Braswell told Mr. Casto to release the sprayer rather than get arrested. Sergeant Hall provided Mr. Casto with a preprinted form entitled Faulkner County Sheriff's Office Pawn Shop Seizure Report/Property Receipt. The form stated that Sergeant Hall was "conducting an official investigation of a Theft of Property" and the possessor "consent[ed] to transfer possession of the listed articles to" Sergeant Hall. By signing the form, Mr. Casto acknowledged that he "consider[ed] this form as [his] official receipt from the Faulkner County Sheriff's Office and underst[ood] that the listed property shall be stored for safekeeping in the Property Room of the Faulkner County Sheriff's Office until the identity of the rightful owner [could] be established." Upon taking possession of the sprayer, Sergeant Hall took the sprayer to the parking lot of the pawn shop and gave it to Mr. Baldwin. Mr. Baldwin signed a Faulkner County Sheriff's Department Evidence Receipt Form, which stated that Baldwin "acknowledge[d] receipt of [the sprayer] and [he was] aware that the [sprayer] may be returned to the Faulkner County Sheriff's Department upon request for the purpose of having the [sprayer] in

court for evidence." Sergeant Hall also completed an Evidence Report listing Baldwin's address as the place of storage for the sprayer and showing that the chain of possession passed from Sergeant Hall to Mr. Baldwin on the date that Sergeant Hall recovered the sprayer from PPS.

Nine months later on June 30, 2008, PPS filed a 42 U.S.C. § 1983 action against Sergeant Hall, Sheriff Karl Byrd, and Faulkner County. At that time, Mr. Baldwin still had possession of the sprayer, and no charges had been filed against Walker for theft of the sprayer. In its complaint, PPS alleged that Sergeant Hall had violated its rights under the Fourth and Fourteenth Amendments of the United States Constitution, that Sheriff Byrd was responsible for the development of the policies and procedures that allowed Sheriff's Office employees to seize property in violation of the Fourth and Fourteenth Amendments, and that Faulkner County, as the employer and ultimate authority over the Sheriff's Office, was responsible for the policies. PPS also asserted state law claims under the Arkansas Constitution and the Arkansas Civil Rights Act.

Following discovery, the District Court for the Eastern District of Arkansas granted summary judgment to all of the defendants. The district court found no basis for municipal liability against the County or the Sheriff in his official capacity, as there was no policy or custom of condoning illegal seizures. It also found that Sheriff Byrd had no knowledge of Sergeant Hall's actions, so there was no basis for individual liability against Sheriff Byrd. The district court concluded that there was no Fourth Amendment violation based on the consent and exigent circumstances exceptions to the warrant requirement. The court also

determined that PPS would have been entitled to predeprivation procedures but that its consent to the seizure waived any due process claim. Finally, the Court concluded that even if PPS did not waive its right to predeprivation procedures, that right was not clearly established such that Sergeant Hall was entitled to qualified immunity to the extent there was a Fourteenth Amendment violation.

PPS appealed to the Eighth U.S. Circuit Court, arguing: 1) that the district court erred in granting summary judgment when there existed disputed material facts; 2) that the seizure violated the Fourth Amendment as it was not consensual or supported by exigent circumstances; and 3) that its Fourteenth Amendment right to a predeprivation hearing was not obviated by a consensual seizure.

Decision by Eighth U.S. Circuit Court of Appeals:

Fourth Amendment: PPS challenged Sergeant Hall's seizure of the sprayer without a warrant as a violation of its Fourth Amendment right to be free from unreasonable seizures. Under Arkansas law, a pawn broker has a security or lien interest in pawned property sufficient to entitle it to due process rights. *Landers v. Jameson*, 132 S.W.3d 741 (Ark. 2003). Thus, the warrantless seizure of the sprayer violated PPS's Fourth Amendment rights unless the seizure was supported by one of what are commonly referred to as the warrant exceptions, including the plain view doctrine, consent, and exigent circumstances.

In a footnote, the district court rejected application of the plain view doctrine because the paint sprayer was in a back

room behind a closed door and not in view of the pawn shop's sales floor. The Eighth Circuit Court of Appeals noted this interpretation of the doctrine reflects its common misunderstanding. The Supreme Court, in explaining the reasoning behind the plain view doctrine, has noted that "[i]t is important to distinguish 'plain view,' as used . . . to justify *seizure* of an object [which implicates the Fourth Amendment], from an officer's mere observation of an item left in plain view," which does not implicate the Fourth Amendment. *Horton v. California*, 496 U.S. 128, 133 n.5 (1990) (quoting *Texas v. Brown*, 460 U.S. 730, 738 n.4 (1983) (plurality)). The Fourth Amendment protects against two distinct governmental actions—unreasonable searches and unreasonable seizures. "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her . . . property." "If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 325 (1987)). "If 'plain view' justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches." *Horton*, 496 U.S. at 134.

The Court noted that the plain view doctrine stems from law enforcement's long-held authority to seize weapons or contraband found in a public place without a warrant. See *Payton v. New York*, 445 U.S. 573, 586-87 (1980). There is no invasion of privacy because the object is in plain view in a public place. *Id.* The only remaining interest is the individual's possessory interest, and the Supreme Court has determined that the intrusion on that interest occasioned by seizing contraband found in a public place

"is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Id.* at 587.

So what of the seizure of property found not in a public place? Privacy rights protected by the Fourth Amendment prevent officers from entering private property to seize contraband that can be seen in plain view from outside the property, no matter how incriminating the contraband, see *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971). "The theory of [the plain view] doctrine consists of extending to nonpublic places such as the home, where searches and seizures without a warrant are presumptively unreasonable, the police's longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband." *Hicks*, 480 U.S. at 326-27. "'Plain view' is perhaps better understood, therefore, not as an independent 'exception' to the warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." *Brown*, 460 U.S. at 738-39.

Focusing then on the officer's prior justification for being in a position to see the incriminating object, the plain view doctrine excuses the need for a warrant if the seizing officer is (1) "lawfully in a position from which [to] view the object, (2) the incriminating character of the object is immediately apparent, and (3) the officer[] ha[s] a lawful right of access to the object." *United States v. Muhammad*, 604 F.3d 1022, 1027 (8th Cir. 2010)

The Court then turned to the facts of the case at hand and noted the fact that Sergeant Hall was lawfully on PPS's premises during business hours, and Mr. Casto consented to his presence. Even though Mr. Casto resisted turning the sprayer over to Sergeant

Hall, he did not object to Sergeant Hall being in the pawn shop or viewing the sprayer. The record indicates that Mr. Casto had the pawn ticket for the sprayer out on the counter before Sergeant Hall even arrived at the pawn shop, that he confirmed that it was the sprayer that Mr. Baldwin had reported stolen, and that he took Sergeant Hall to the back room to view the sprayer without protest. These facts conclusively demonstrate that Sergeant Hall was lawfully in the place to see the sprayer and, via Casto's consent, had lawful access to it. Mr. Casto's identification of the sprayer and Sergeant Hall's inspection, which included matching the serial number to that of the sprayer reported to be stolen, satisfied the need for the object's incriminating character to be immediately apparent. The plain view doctrine justified Sergeant Hall's seizure of the sprayer.

The Court then took up the issue of whether Sergeant Hall seized the sprayer for a proper law enforcement purpose. See *G & G Jewelry, Inc.*, 989 F.2d at 1101 (noting that a plain view seizure does not authorize officers to seize property for the purpose of turning it over to the person claiming rightful ownership). If Sergeant Hall seized the property as part of his investigation of the reported crime of theft, he would have been carrying out a valid law enforcement activity. If, on the other hand, Sergeant Hall seized the sprayer only to turn it over to Mr. Baldwin as the rightful owner absent a judicial determination of the proper owner's identity, he would not have been engaged in a proper law enforcement activity, and there would have been no governmental interest to balance against PPS's possessory interest when making the Fourth Amendment reasonableness inquiry. That is the scenario held to be unconstitutional in *Landers*, where the Arkansas Supreme Court held that

use of Arkansas Code §§ 18-27-202 & 18-27-203 to remove property from a pawn shop and turn it over to the party claiming rightful ownership violated the pawn shop's right to due process. See 132 S.W.3d at 754.

But the Court held that is not what happened here. Sergeant Hall gave Mr. Casto a Pawn Shop Seizure Report/Property Receipt stating that the sprayer was being seized for purposes of investigating the crime of theft and that it would be kept in the Sheriff's Office property room. Sergeant Hall testified in his deposition that he turned the sprayer over to Mr. Baldwin for purposes of holding the property only after he realized how large the sprayer was and determined it would not fit in the property room. Sergeant Hall also gave Mr. Baldwin a Receipt of Property form in which Mr. Baldwin acknowledged that he was obligated to turn the sprayer over to the Sheriff's Office for evidentiary purposes. Mr. Baldwin also signed an Evidence Receipt form, which noted the transfer of the chain of possession from Sergeant Hall to Mr. Baldwin. In these circumstances, Sergeant Hall's initial seizure was for the proper law enforcement purpose of investigating a reported crime. *Landers*, 132 S.W.3d at 752 (recognizing that "placing a 'hold' on pawnshop property that matches stolen property can be a valuable law enforcement tool"). Having determined that the Sheriff's Department had a valid law enforcement need to take control of the property, the Court held that it would leave to law enforcement the decision how best to complete that task. Whether the Sheriff's Office placed a hold on the property and left it in PPS's possession, stored it in the Sheriff's Office property room, or gave it to Mr. Baldwin for safekeeping is a law enforcement decision not addressed by the Fourth Amendment.

PPS argued that Sergeant Hall could have left his partner, Inspector Elliott, at the pawn shop while he went to get a warrant authorizing the seizure of the sprayer. In *G & G Jewelry, Inc.*, the pawnbroker made a similar argument that the plain view doctrine contained an exigent circumstances requirement; otherwise, an officer would never need to obtain a warrant before seizing property from a pawn shop that is reported to be stolen. The Ninth Circuit rejected the argument because it misconstrued the principles underlying the plain view doctrine. "[R]equiring police to obtain a warrant once they have obtained a first-hand perception of . . . stolen property . . . generally would be a 'needless inconvenience.'" *G & G Jewelry, Inc.*, 989 F.2d at 1100 (quoting *Brown*, 460 U.S. at 739). Where the elements of the plain view doctrine are met, the fact that the officers could have left and obtained a warrant does not invalidate the justification for seizing the property.

PPS asserted that an officer would never need a warrant to seize pawned property that is reported stolen and that such seizures will greatly hinder a pawn shop's ability to carry on its business. That statement is true only to the extent the elements of the plain view doctrine are met that justify the seizure and only as it relates to the protections provided by the Fourth Amendment. Here, Mr. Casto admitted to Sergeant Hall that the sprayer in the pawn shop's possession matched the description of the one reportedly stolen as soon as Sergeant Hall entered the pawn shop. Mr. Casto had the pawn ticket on the counter, and he voluntarily took Sergeant Hall to view the sprayer. In these circumstances, the Court emphasized there was no search; PPS challenged only the sprayer's seizure. The Court held that all that was concluded by this decision was that the

seizure in this case did not violate PPS's rights under the Fourth Amendment.

The Court held that their conclusion that the seizure was supported by the plain view doctrine forecloses PPS's argument that the district court improperly made fact-findings in granting summary judgment to the defendants. Whether the person Mr. Casto contacted was an attorney or Mr. Casto's boss is immaterial to our conclusion that Sergeant Hall was lawfully on the premises and properly seized the sprayer under the plain view doctrine. Likewise, the district court did not need to find that Mr. Baldwin was in fact the owner of the property before the plain view doctrine would authorize the sprayer's seizure. The Fourth Amendment requires that the seizing officer have probable cause, not certainty, to believe that the seized property was stolen, and that was satisfied by Mr. Baldwin's report to the Faulkner County Sheriff's Office, coupled with the matching serial number and description of the sprayer in PPS's possession.

The Court held that because it concluded that the seizure was proper under the plain view doctrine, that they need not address whether consent or exigent circumstances, as found by the district court, supported Sergeant Hall's unwarranted seizure of the sprayer.

Due Process: PPS also brought a due process challenge to Sergeant Hall's actions, arguing that it was entitled to predeprivation notice and an opportunity to be heard. The Court noted that in the criminal context, an officer may seize property related to a criminal investigation by way of an *ex parte* warrant as long as the warrant is properly supported by probable cause. See *Fuentes v. Shevin*, 407 U.S. 67, 93 n.30 (1972)

(distinguishing a writ of replevin from a search warrant on the basis that a search warrant may issue only upon a showing of probable cause). It is axiomatic that an individual is not entitled to a predeprivation hearing before an officer may seize property pursuant to a valid search warrant. See *Id.* ("[O]ur decision today in no way implies that there must be an opportunity for an adversary hearing before a search warrant is issued."). The same is true if one of the warrant exceptions allows an officer to seize property without a warrant. "The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of . . . property in criminal cases . . ." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975). Where the plain view doctrine justifies a warrantless seizure for valid law enforcement purposes in a criminal investigation under the Fourth Amendment, any predeprivation due process protections are necessarily subsumed within the Fourth

Amendment analysis. See *Sanders*, 93 F.3d at 1429 ("[W]hen seizing property for criminal investigatory purposes, compliance with the Fourth Amendment satisfies predeprivation procedural due process as well").

The Court noted they were sympathetic to PPS's concern that it may not avail itself of the remedies available under Arkansas criminal procedure until charges are brought against Walker for the alleged theft of the sprayer. "While we presume that there are state law civil remedies available to PPS to recover its interest in the sprayer, PPS does not argue that its right to postdeprivation due process was violated." "We have carefully reviewed the briefs and the parties'

arguments, and PPS's arguments revolve solely around its claim that it was entitled to predeprivation due process. Ours is an adversarial system, and we address only those issues forwarded by the parties. We therefore do not address the potential lack of adequate postdeprivation procedures."

The Eighth U. S. Circuit Court of Appeals affirmed the district court's judgment granting summary judgment in favor of the defendants.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on January 12, 2011 and was an appeal from the United States District Court for the Eastern District of Arkansas. The case citation is *PPS v. Faulkner County, Arkansas*, 630 F.3d 1098 (8th Cir. 2011).

Jeff Harper
City Attorney

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**Arkansas Court of Appeals  
Determines Terry Frisk Not an  
Illegal Search**

**Facts:** Talvis Gilbert [Gilbert] was the back-seat passenger of a vehicle that officers from the Alexander Police Department stopped as part of a roadblock around 10 p.m. one evening. The driver of the vehicle could not provide a valid driver's license, so officers directed him to a nearby parking lot. The front-seat passenger said he did not have any identification either. Upon pulling into the parking lot, officers asked the driver and the front-seat passenger to exit the vehicle so that the officers could speak with them. None of the men could give a clear answer regarding the group's starting point of travel or final destination. Officer Jeremy

Brown noticed Gilbert still sitting in the back seat of the vehicle. The vehicle's windows were dark, so Officer Brown opened the door and asked Gilbert for identification, which Gilbert did not have. Officer Brown then asked Gilbert to step out of the vehicle. Officer Brown did not immediately notice any weapons, see any suspicious bulges, or have any indication that Gilbert had committed a crime. But when Officer Brown inquired whether Gilbert had anything illegal or a weapon on him, Gilbert did not give a direct answer and "fumbled around for 30 seconds or so" before responding that he did not. Officer Brown thought that Gilbert's body language indicated he was lying—Gilbert had shrugged shoulders, would not look Officer Brown in the eyes, and seemed to "tighten up" in denial. Officer Brown asked Gilbert if he could frisk him, and Gilbert complied. During the frisk, Officer Brown felt a gun in Gilbert's waistband and retrieved a loaded gun.

The police arrested Gilbert for possession of a weapon. After running Gilbert's information through the system, the officers discovered that Gilbert was a parolee. Gilbert was searched, and officers discovered a large sum of money in Gilbert's pocket. An officer eventually took Gilbert to the Saline County Jail, where another search of Gilbert's person revealed two plastic baggies of cocaine. Gilbert was charged with possession of cocaine, simultaneous possession of drugs and firearms, and possession of firearms by a certain person.

At pretrial, Gilbert moved to suppress the gun and the cocaine. The motion was denied and Gilbert entered a conditional guilty plea to the charges of possession of cocaine and possession of a firearm by a

certain person (the charge of simultaneous possession of drugs and firearms was *nolle prossed*.) The court sentenced Gilbert to fifteen years' imprisonment. On appeal, Gilbert challenges the denial of his motion to suppress the evidence against him.

**Argument and Discussion:** Gilbert first argues that he was illegally seized when Officer Brown ordered him to exit the vehicle. But in *Maryland v. Wilson*, the United States Supreme Court held that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." 519 U.S. 408, 415 (1997); *see also Wimbley v. State*, 68 Ark. App. 56, 59–60, 3 S.W.3d 709, 711 (1999). Gilbert does not challenge the legality of the roadblock or the initial stop. And Officer Brown testified that when he asked Gilbert to exit the vehicle, other officers were still speaking with the driver and the front-seat passenger. Therefore, ordering Gilbert out of the vehicle during the pendency of the valid traffic stop was not an illegal seizure. Gilbert next challenges whether Officer Brown, as a predicate to frisking Gilbert, had reasonable suspicion that he was carrying a weapon. Arkansas Rule of Criminal Procedure 3.4 provides,

If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably

necessary to ensure the safety of the officer or others.

Reasonable suspicion is "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." Ark. R. Crim. P. 2.1. "The test is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Reeves*, 80 Ark. App. at 66, 91 S.W.3d at 101. "The officer's reasonable belief that the suspect is dangerous must be based on specific and articulable facts." *Id.*

The legislature has laid out certain factors for the circuit court to consider in determining whether an officer had reasonable suspicion to perform a search of this kind. *See* Ark. Code Ann. § 16-81-203 (Repl. 2005). The factors include:

- (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. Ark. Code Ann. § 16-81-203.

The Court concluded, no illegal seizure occurred when Officer Brown ordered Gilbert to exit the vehicle. Further, the initial stop was ongoing during Officer Brown's encounter with Gilbert—officers were still talking to the driver and the front-seat passenger. Thus, the only question for the Court to answer on appeal is whether Officer Brown had reasonable suspicion that Gilbert was armed and presently dangerous when he decided to frisk him.

The pertinent facts were: the traffic stop occurred around 10 p.m.; when Officer Brown asked Gilbert whether he had any weapons or anything illegal on him, Gilbert did not answer directly and fumbled around for about thirty seconds before responding that he did not. Also Officer Brown testified that Gilbert's body language—shrugged shoulders, no eye contact, tightening up—indicated to him that Gilbert was lying. Further, no one traveling in the vehicle could provide identification or say with certainty where the group was coming from or where they were going.

Looking at the totality of the circumstances, the Court agreed with the circuit court and determined that Officer Brown had reasonable suspicion that Gilbert was

carrying a weapon and, therefore, his frisk of Gilbert was not an illegal search. *See, e.g., Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003); *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999); *State v. Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992).

**Note From Deputy City Attorney:** There was a very strongly worded dissenting opinion by Justice Robbins who stated that although there was no problem with the initial removal of Gilbert from the vehicle, he disagreed that the detention of Gilbert was appropriate. Justice Robbins pointed to the fact that the officer stated he had no basis to suspect Gilbert of a crime. Justice Robbins determined that the State failed to present specific, articulable facts that would support a reasonable officer's belief that Gilbert was presently armed and dangerous when the frisk took place. Justice Robbins stated that the lack of a cohesive story and the nervous and slow, negative response to questioning was not enough to make the search legal. Justice Robbins reiterated that nervousness is commonplace when confronted by law enforcement. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004).

**Note From City Attorney:** The majority opinion and dissenting opinion points out the two competing arguments as to whether or not there is reasonable suspicion under the Arkansas Rules of Criminal Procedure to conduct the pat-down search. It is my opinion that you cannot simply frisk anyone asked to step out of a vehicle for weapons. There must be reasonable suspicion. As the majority opinion points out, "the test is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." "The officer's reasonable belief that

the suspect is dangerous must be based on specific and articulable facts."

**Case:** This case was decided by the Arkansas Court of Appeals on December 15, 2010, and was an appeal from the Saline County Circuit Court, Honorable Grisham Phillips, Judge. The case citation is *Gilbert v. State*, 2010 Ark. App. 857.

Brooke Lockhart  
Deputy City Attorney

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Arkansas Attorney General Gives Opinion on Requirement of Motorists to Signal Under Ark. Code Ann. § 27-51-403

On February 11, 2011, the Arkansas Attorney General issued an opinion to John Threet, Prosecuting Attorney for the Fourth Judicial District. In his request for an opinion, John Threet asked:

Section 27-51-403 has caused some confusion with some people in law enforcement. Are the requirements [set out in section 27-51-403] of giving an appropriate signal only required when other traffic is present? In other words, to be in violation of section 24-51-403(b), does other traffic need to be present?

The Attorney General's answer was yes. Section 27-51-403 states:

(a) No person shall turn a vehicle from a direct course upon a highway unless and until the movement can be made with

reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by the movement or after giving an appropriate signal in the manner provided in subsection (b) of this section in the event any other vehicle may be affected by the movement.

(b) A signal of intention to change lanes or to turn right or left shall be given continuously during not less than the last one hundred feet (100') traveled by the vehicle before changing lanes or turning.

(c) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided in this subchapter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

The Attorney General opined that a court faced with the question posed would hold that section 27-51-403 unambiguously requires motorists to signal an intent to change lanes only if "any other vehicle may be affected" by the lane change. Alternatively, if a court were to find the statute ambiguous, it would likely resort to the statute's history, which plainly shows the legislature's intent that the obligation to signal only arises if others may be affected by the lane change.

Note From City Attorney: John Threet, in a memo concerning this opinion, noted that any other vehicle which may be affected could include a law enforcement officer on

the roadway. Therefore, if you cite someone for violation of § 27-51-403 for changing lanes without signaling, you must be able to show from the facts of the case that the motorist who failed to signal a lane change was in such a situation that another vehicle may have been affected. This means in your narrative you should set out approximately how far other vehicles on the roadway were from the vehicle whose driver changed lanes without signaling.

Opinion: This opinion was prepared by Assistant Attorney General Ryan Owsley and approved by Dustin McDaniel, Attorney General. The opinion number is 2010-142 and was issued on February 11, 2011.

Jeff Harper
City Attorney

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### **Eighth U.S. Circuit Court Affirms Drug Conviction in Iowa Case**

**Facts Taken From the Opinion:** On January 20, 2009, Corporal Gilbert Proehl of the Davenport, Iowa Police Department received a tip from a confidential informant that Angelo Hambrick was in town selling crack cocaine. The informant was well known to law enforcement and had provided accurate information in the past which led to three narcotics seizures.

According to Proehl, the informant claimed to have personally witnessed Hambrick remove crack cocaine from his buttocks and distribute it to others. One week later, the informant notified Proehl that Hambrick was en route from Chicago, Illinois, to the 700 block of Pershing Avenue in Davenport,

Iowa, and he was in possession of crack cocaine. The informant indicated Hambrick would be driving a dark-colored or black Monte Carlo with Illinois license plates and a missing gas-tank door.

Based on the information, Proehl proceeded to set up surveillance at the location described, and shortly thereafter, he spotted the vehicle described by the informant. Hambrick, who was driving the vehicle alone, exited the vehicle and briefly entered a residence on Pershing Avenue. At this time, Proehl called for additional law enforcement to assist. After Hambrick left the residence, Proehl followed his vehicle, at which point Davenport Police Sergeant Kevin Smull radioed to Proehl to confirm that Hambrick's license had been suspended. Shortly thereafter, Proehl decided to stop Hambrick before he arrived at his next destination. The officers effectuated the stop by boxing Hambrick's car in to avoid a high-speed chase.

Hambrick was removed from his vehicle and arrested for driving under suspension. He was placed in the rear seat of Officer Jason Ellerbach's patrol car, where Ellerbach read Hambrick his Miranda rights and transported him to the police station. Meanwhile, officers at the site of the arrest searched the passenger compartment of Hambrick's vehicle, discovering marijuana residue on the floorboard. The officers called in K-9 Officer Gary Kerr and his canine to perform a "sniff" of the car, which resulted in the discovery of a digital scale covered in cocaine residue in the trunk.

At the police station, Hambrick was led to an interview room, patted down for weapons, and removed from his handcuffs. After Proehl received word that cocaine residue was found in Hambrick's vehicle,

Proehl informed Hambrick of this fact and Hambrick stated the scale was left by someone else and he did not know anything about the cocaine residue. Proehl then told Hambrick he would be searched to ensure he did not have anything on him, to which Hambrick responded, "That's cool." Hambrick was strip-searched and crack cocaine was recovered from between his buttocks. Hambrick was then escorted to the county jail.

Based on the above events, Hambrick was charged with possession with intent to distribute at least five grams of cocaine base in violation of federal law. Due to a prior felony drug conviction, he was subject to a ten-year mandatory minimum sentence. After the district court denied Hambrick's motion to suppress evidence and statements, Hambrick entered a conditional guilty plea. On January 8, 2010, the district court imposed the mandatory minimum sentence of 120 months' imprisonment and eight years' supervised release. Hambrick appealed his case to the United States Court of Appeals for the Eighth Circuit

**Decision by the Eighth Circuit:** On appeal, Hambrick raises four issues. He first argued the stop of the vehicle and his detention violated his Fourth Amendment rights. Next, he maintained the automobile search was not a valid search incident to arrest. Third, Hambrick argued the search of his person cannot be justified on the basis of his consent to search. Lastly, Hambrick contended his statement to officers should be suppressed.

#### **Issue #1 – The Stop of Hambrick's Vehicle**

Hambrick contended the officers did not stop and arrest him based on his suspended

license, contrary to their testimony. At the suppression hearing, two officers testified the informant identified the individual in the Monte Carlo as "Lolo," which happened to be Hambrick's street moniker. The officers also testified they ran a search of Hambrick's license with the Department of Transportation (DOT) while following Hambrick's vehicle. Hambrick suggests this testimony demonstrates that at the time of his arrest, the officers *only* knew Hambrick's street name, and they did not know Hambrick's real name in order to run the search with the DOT, as it would be impossible to run a search using "Lolo" as an identifier. Hambrick thus contends the officers lacked any articulable, reasonable suspicion for the stop and the stop was made in the hope of discovering some incriminating evidence against Hambrick.

The Court noted that a careful review of the record demonstrated the officers' testimony was not contradictory, contrary to Hambrick's suggestion. The officers stated the informant identified the individual in question as "Lolo," but they were never asked whether "Lolo" was the only name they knew Hambrick by. The officers testified they determined Hambrick's license was suspended by running a check with the DOT prior to stopping Hambrick's vehicle, a fact explicitly credited by the district court in making its determination that the stop was lawful.

The Court further noted that even if they accepted Hambrick's theory, they would reach the same conclusion. "The Fourth Amendment permits an investigative stop of a vehicle if officers have a reasonable suspicion the vehicle or its occupants are involved in criminal activity." *United States v. Bell*, 480 F.3d 860, 863 (8<sup>th</sup> Cir. 2007). In forming the objective and particularized

basis for a reasonable suspicion of criminal activity, officers may rely on an informant's tip if the tip is both reliable and corroborated. *Id.* Here, the informant was well known to the officers and had provided accurate and reliable information used against at least three prior federal defendants. The informant described the vehicle's make, model, and color, as well as the fact that the vehicle was missing its gas-tank cover. The informant also successfully predicted when and where Hambrick would be and described the precise manner in which he carried drugs. In relying on this information, the officers maintained reasonable suspicion to stop Hambrick's vehicle that was based on more than "inarticulate hunches." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). Therefore, the court rejected Hambrick's argument that his Fourth Amendment rights were violated based on the stop of his vehicle.

## **Issue #2 – The Search of Hambrick's Automobile**

Hambrick contended his underlying stop and arrest were unlawful, and therefore the search of his vehicle incident to arrest was also unlawful. In the alternative, Hambrick argued if the arrest was lawful, the applicability of the search incident to arrest exception is restricted by *Arizona v. Gant*, 129 S.Ct. 1710 (2009).

Under *Gant*, police may search the passenger compartment of a vehicle incident to arrest only if (1) the arrestee might have access to the vehicle at the time of the search, or (2) it is reasonable to believe the vehicle contains evidence of the offense of the arrest. *Gant*, 129 S.Ct. at 1723. Hambrick asserted neither circumstance was present in the instant matter. The district court agreed, holding that, while the initial

arrest was lawful, the vehicle search could not be justified as a search incident to arrest pursuant to *Gant* because Hambrick was immediately handcuffed and placed in the back of the patrol car. However, the court further determined the search of the vehicle was proper under the automobile exception.

As discussed above, the Court rejected Hambrick's contention that his initial stop was unlawful, which provided a basis for the arrest under Iowa law. The Court agreed with the district court that the search of Hambrick's vehicle was not incident to arrest under the strictures imposed by *Gant*. After his arrest, Hambrick was handcuffed and placed in the back of a patrol car, and therefore he had no access to the vehicle at the time of the search. Moreover, like the defendant in *Gant*, Hambrick was arrested for driving with a suspended license, and therefore the second prong of *Gant* would not allow the officers to search the vehicle for evidence of the offense of arrest.

However, the Court held the officers had probable cause to search the vehicle, irrespective of *Gant*, under the automobile exception. "Under the automobile exception, if a law enforcement officer has probable cause, he may search an automobile without a warrant." *United States v. Rodriguez*, 414 F.3d 837, 843 (8th Cir. 2005). To support a probable cause determination, officers may rely on an informant's tip if the informant has provided reliable information in the past or if his tip is independently corroborated. *United States v. Morrison*, 594 F.3d 626, 632 (8th Cir. 2010). In this case, the informant was known to the officers as a reliable source of information and he had provided reliable information in three prior narcotics seizures. The informant supplied detailed information regarding the make, model, year, and unique characteristics of

Hambrick's vehicle, and he provided the precise time and address of Hambrick's stop. This information was verified by the officers upon Hambrick's arrival. Under these facts, the Court concluded the district court correctly found probable cause existed for the search of Hambrick's vehicle because the officers reasonably believed a fair probability existed that drugs would be found in the vehicle. See *United States v. Marchena-Borjas*, 209 F.3d 698, 700 (8th Cir. 2000) (per curiam) ("The historical reliability of the confidential informant, his provision of descriptive information not easily discoverable, and the independent corroboration of his information by investigating officers together established probable cause for [the defendant's] arrest . . . [and] create[d] with equal force probable cause to believe that the [vehicle] contained methamphetamine.") (internal quotation marks and citation omitted).

### **Issue #3 – The Search of Hambrick's Person**

The Court next addressed Hambrick's challenge to the validity of his consent to search his person. The Court noted that they determined whether consent is voluntary under the totality of the circumstances, "consider[ing] the characteristics of the person consenting, 'including the party's age, intelligence and education, whether he was under the influence of drugs or alcohol, whether he was informed of his right to withhold consent, and whether he was aware of rights afforded criminal suspects.'" *United States v. Esquivias*, 416 F.3d 696, 700 (8th Cir. 2005). In addition, the Court considered the environment in which the defendant allegedly provided consent, specifically:

(1) the length of time he was detained; (2) whether the police threatened, physically intimidated, or punished him; (3) whether the police made promises or misrepresentations; (4) whether he was in custody or under arrest when the consent was given; (5) whether the consent occurred in a public or a secluded place; and (6) whether he stood by silently . . . as the search occurred.

After citing these factors and reviewing videotape footage of the interrogation, the district court concluded the search of Hambrick's person was not a consensual search. However, the court determined the search was a valid station house search incident to arrest.

The Court agreed with the district court's determination on this point. As discussed above, Hambrick was stopped for driving under a suspended driver's license, which provided a basis for arrest under Iowa law. He was taken to the station house within an hour, where he was searched within the guidelines of normal police protocol. "It is . . . plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." *United States v. Edwards*, 415 U.S. 800, 803 (1974). Hambrick's stop, arrest, and subsequent search incident to arrest squarely fit within *Edwards* and its progeny, and therefore, regardless of whether the search may be deemed involuntary, the district court was correct in concluding the search incident to arrest was valid.

Moreover, the district court correctly held the strip search in this case was reasonable in scope, manner, and location. "The Fourth

Amendment reasonableness of a strip search turns on ‘the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.’” *Richmond v. City of Brooklyn Ctr.*, 490 F.3d 1002, 1006 (8th Cir. 2007) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). The search took place in an interrogation room in the Davenport Police Department and was based on highly reliable information from a well-known informant that Hambrick possessed crack cocaine between his buttocks. Moreover, the officers did not touch Hambrick, and they allowed him to remove the drugs on his own. As a result, there is no evidence the officers were abusive or exceeded the reasonableness of the search in terms of scope, manner, and location.

#### **Issue #4 – Hambrick’s Incriminating Statement to Officers**

Hambrick challenged the district court’s refusal to suppress an incriminating statement he provided to the officers. Hambrick asserted his confession should be suppressed because it was derived from an illegal stop and arrest. He also challenged the voluntariness of his statement, claiming that his limited ability to read and write affected his understanding of the Miranda warnings.

“The test for determining the voluntariness of a confession ‘is whether, in light of the totality of the circumstances, pressures exerted upon the suspect have overborne his will.’” *United States v. Cody*, 114 F.3d 772, 776 (8th Cir. 1997) (quoting *United States v. Jorgensen*, 871 F.2d 725, 729 (8th Cir. 1989)). “Those potential circumstances include not only the crucial element of police coercion, the length of the

interrogation, its location, its continuity, the defendant’s maturity, education, physical condition, and mental health,” but also “the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation.” *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993).

The district court dismissed Hambrick’s assertion that his statement was involuntary, noting Hambrick failed to point to any specific factors making his confession involuntary. The court recognized the interrogation did not last an unreasonably long amount of time, Hambrick was familiar with police procedures based on his criminal history, and there was no evidence he had poor physical condition or mental health.

The Eighth Circuit agreed with the district court. First, the Court noted Hambrick does not argue he was not provided Miranda warnings. Second, the duration of the interrogation was relatively brief, lasting just over an hour. In analyzing Hambrick’s individual characteristics, he is twenty-eight years old and maintains a familiarity with police procedures based on his lengthy criminal history. As the district court noted, there was no evidence and no allegation of Hambrick having a physically poor condition or weakened mental health. The Eighth Circuit noted that the district court duly weighed these factors and found the confession voluntary, and the Court held that under the totality of the circumstances, they cannot say the district court’s determination was incorrect.

Therefore, the Eighth U.S. Circuit Court of Appeals affirmed Hambrick’s conviction in all respects.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on September 22, 2010, and was an appeal from the United States District Court for the Southern District of Iowa. The case citation is *United States v. Hambrick*, 630 F.3d 742 (8<sup>th</sup> Cir. 2011).

Jeff Harper  
City Attorney

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**Arkansas Court of Appeals
Affirms Judgment in Berryville
Rape Case**

Facts Taken From the Opinion: On October 17, 2007, Officer Kevin Disheroon, a patrolman with the Berryville Police Department, was called out to investigate a complaint by a neighbor that a seven-year-old girl, A.C., had been raped by her father. Disheroon spoke with the complainant and a group of neighbors, adults and children, who had gathered. He was directed to the home of Brian Charland (appellant), where he found appellant and appellant’s wife outside in the front yard. A.C. was next door with a neighbor and was visibly upset. Disheroon explained to appellant why he was there and indicated that an investigator would be out the next day to speak with them.

Subsequently, Michelle Gatlin, an investigator with the Arkansas State Police Crimes Against Children Division, interviewed A.C. Gatlin testified that during the interview, A.C. defined rape as “when the dad has sex with his little girl” and defined sex as “when the dad makes the little girl suck on his private,” although she did not say that appellant had raped her. A.C. also stated to Gatlin, “my dad told me

that, if it did happen, that it would only be one time, and that he would have to go to jail.” Gatlin conveyed this information to Disheroon and the next day they went back to appellant’s residence. When Disheroon and Gatlin asked to enter the residence, they were let in. Disheroon was armed and in uniform, and he remained at the front door. Gatlin interviewed appellant’s wife, April Charland, in her bedroom.

Upon completion of the interview, appellant was asked to go to the police station to give a statement, and he drove there in another car with his wife. At the police station, appellant received Miranda warnings, after which he gave written and videotaped statements incriminating himself, specifically confessing that he had A.C. perform oral sex on him.

Appellant filed a motion to suppress his statements, and a suppression hearing was held on March 10, 2008. Disheroon and Gatlin testified for the State, and appellant’s statements were deemed admissible. At the subsequent three-day jury trial that began on February 25, 2009, Disheroon and Gatlin again testified regarding the investigation and resulting statements from appellant.

Appellant testified at the trial, asserting that, when faced with the prospect of losing his children and not knowing what else to do, he felt compelled to say something, to do anything—even risk incarceration at the police station—in an effort to keep the children at home with his wife. He maintained that his statements were completely fabricated.

The jury found appellant guilty of all three counts of rape and sentenced him to twenty-five years’ imprisonment on each count, to be imposed consecutively for an aggregate

sentence of seventy-five years. Appellant appealed his case to the Arkansas Court of Appeals and argued that the circuit court erred in failing to suppress statements he made because the investigating officers violated Ark. R. of Crim. Proc. 2.3 (2009) by failing to inform that he was under no legal obligation to comply with their request to accompany them to the station and give a statement.

Argument and Decision by Arkansas Court of Appeals: The Court noted that a law-enforcement officer may request any person to appear at a police station in order to furnish information or otherwise cooperate in the investigation of a crime. Ark. R. Crim. P. 2.2(a) (2010). In making a request pursuant to the 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 and compliance with the request for information or other cooperation shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law-enforcement officer. Ark. R. Crim. P. 2.2(b) (2010). If a law-enforcement officer acting pursuant to this rule requests any person to come to or remain at a police station he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request. Ark. R. Crim. P. 2.3 (2010).

If a police officer has probable cause to arrest, failure to give a Rule 2.3 warning is irrelevant. Probable cause exists when there is reasonably trustworthy information within a law-enforcement officer's knowledge that would lead a person of reasonable caution to believe that a felony was committed by the person detained. The test for determining probable cause rests on the collective

information of the officers and the degree of proof required to sustain a conviction is not required for probable cause to arrest.

Arkansas Rule of Criminal Procedure 3.1 (2010) provides in part that an 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 a felony, 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 Rule 3.1 may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen 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 2.3 does not require a verbal warning of freedom to leave as a bright-line rule for determining whether a seizure of the person has occurred under the Fourth Amendment and whether a statement to police officers must be suppressed. Rather, a verbal admonition of freedom to leave has been interpreted as one factor to be considered in the analysis of the total circumstances surrounding compliance with Rule 2.3.

Appellant did not maintain that he was under arrest the moment Gatlin and Disheroon entered his residence on October 18, 2007, instead acknowledging that he was subject to a proper investigatory stop pursuant to Rule 3.1. Appellant explained that when Gatlin or Disheroon, for whatever reason, declined to arrest him at the end of a reasonable duration and alternatively asked him to come to the police station, they failed to inform him that he was under no legal

obligation to comply with such a request. He claimed that the events that preceded his going to the police station would have led a reasonable person to believe he was not free to leave, in violation of Rule 2.3. Specifically, appellant submitted that a reasonable person would find that a uniformed police officer near the front door of the home, even if let in voluntarily, could give the impression that there is a police action underway and that he could not leave.

The Arkansas Court of Appeals disagreed. The Court held the officers proceeded properly under Rule 3.1 in returning to appellant's residence to further investigate. Disheroon received the initial information regarding the alleged rape via a third party and interviewed the victim and her parents the same evening. Those facts alone warranted a Rule 3.1 investigatory stop of appellant the following day by Disheroon. Officers had sufficient reason to turn their return visit to appellant's residence the following day into a Rule 3.1 visit—specifically, A.C.'s disturbing, father-based, genital-specific definitions of sex and rape that were significantly different than what would be considered the social norm.

At the conclusion of the visit, Disheroon asked appellant if he would come to the police station to give a statement, and appellant proceeded to do so in a separate vehicle with his wife. The fact that appellant was not given the Rule 2.3 warning is but one factor to be considered in examining whether a seizure of the person has occurred under the Fourth Amendment and whether a statement to police officers must be suppressed. The rule does not require an explicit statement that one is not required to accompany the police; rather, the police only need to take such steps as are reasonable to make clear that there is no

legal obligation to comply with the request to come to the police station. Here, the testimony offered at both the suppression hearing and the trial supports the conclusion that Disheroon complied with those requirements.

Disheroon testified that he waited inside the doorway of appellant's home while Gatlin interviewed appellant's wife. He testified that appellant continued to play video games and listen to music with his brothers and that he did not menace appellant or threaten him in any way. He stated that his interactions with appellant were "very cordial, very polite." Appellant agreed, describing his conversation with Disheroon as "nonchalant."

When Gatlin, who was in plain clothes, concluded her interview with appellant's wife, Disheroon asked appellant if he would be willing to come to the police department to give a statement, appellant responded, "sure, no problem." Appellant, in his testimony, corroborated this, stating, "I [did not] see a problem with it." He added, "I [did not] think there was any issue, so I went ahead and told them I'd go." It is unclear if the officers were in a marked or unmarked car, and appellant fails to indicate how long the officers were on the premises.

Appellant and his wife then traveled to the police station together in their own vehicle. Appellant testified that his motivation to confess stemmed from a conversation he had with his wife en route to the police station. He explained that he believed confessing to the crime was the only way to keep his children in the home, although he admitted that the police never threatened to take his children away.

Additionally, it is undisputed that appellant was advised in writing of his *Miranda* rights, and he signed a form waiving those rights before he gave his oral and written confessions that he raped A.C. The Court held that the evidence before us demonstrated that Disheroon took such steps as were reasonable to make clear that appellant had no legal obligation to comply with a request to come to the police station and make a statement. Accordingly, there was no unreasonable seizure or detention that warranted the suppression of appellant's confessions. Based upon the review by the Court on the totality of the circumstances, the Court held that the circuit court did not err in denying appellant's motion to suppress. Therefore, the Court of Appeals affirmed the circuit court's judgment.

Case: This case was decided by the Arkansas Court of Appeals on January 5, 2011, and it is an appeal from the Carroll County Circuit Court, Eastern District, Honorable Gerald Kent Crow, Circuit Judge. The case citation is *Charland v. State*, 2011 Ark. App. 4.

Jeff Harper
City Attorney

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**Arkansas Court of Appeals  
Determines Constructive  
Possession of Drugs Found in  
Rental Car**

**Facts:** Hot Springs police officers Greg Burden and Mike Hogarth responded to a domestic-battering call at a local hotel. They met Treva Jacobs, wife of Matthew Clayton Jacobs, who at the time had bite marks on her body. Officer Hogarth tried to find

Jacobs, and Treva told him that Jacobs was trying to leave. Officer Hogarth followed Jacobs and stopped him before he left the parking lot. The two police officers arrested Jacobs on suspicion of domestic battering and conducted an inventory search of Jacobs's car. They found rental paperwork, which listed Jacobs as the only driver of the car. On top of the passenger seat was a clothing bag, and on top of that was a small, black bag. This bag contained a broken flashlight, and inside the flashlight was a small amount of methamphetamine and a straw. The methamphetamine could be seen without moving the flashlight. Also in the bag were marijuana, a syringe, a marijuana pipe, and an identification card with Jacobs's name on it. There was no room for a passenger to sit in the seat with the bags on it. Officers also looked into the center console of the car and found 105 pills, later determined to be carisoprodol.

Jacobs's attorney thoroughly cross-examined the officers, and both admitted that they did not see Jacobs carry anything to his car. Defense counsel also called Treva, who claimed that she was not abused, that the bites on her body were the result of sexual activity, and that the contraband found in the car belonged to her.

At the close of evidence, counsel moved to dismiss the charges, claiming that the State failed to show that Jacobs constructively possessed the contraband. But the court denied the motion, found Jacobs guilty of the four drug charges [possession of a controlled substance (methamphetamine), possession of drug paraphernalia, possession with intent to deliver a controlled substance (carisoprodol), and possession of a controlled substance (marijuana)], and sentenced him to a fifteen-year term in the Arkansas Department of Corrections.

**Argument and Discussion:** On appeal, Jacobs argued that the State failed to establish that he constructively possessed the contraband found in his car. While Jacobs admitted that he was the only person in the car at the time officers arrested him, he contended that the testimony could support another conclusion: that the items belonged to his wife, Treva.

It is not necessary for the State to prove literal physical possession of contraband; constructive possession is sufficient. *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002). To prove constructive possession, the State had to show that Jacobs exercised care, control, and management over the contraband. *Id.* Constructive possession can be implied where the contraband was found in a place immediately and exclusively accessible to the accused and subject to his control. *Id.* It may also be established by circumstantial evidence. *Id.*

Jacobs presented evidence to support a finding that his wife actually possessed the items found in his car, but the Court's standard of review requires them to consider only the evidence in favor of a conviction. *Mitchem v. State*, 96 Ark. App. 78, 238 S.W.3d 623 (2006). Viewing only that evidence, the record supports a finding that Hot Springs police officers found contraband in a car rented by Jacobs, that he was listed as the only driver, and that he was the only person in the car at the time of arrest. As the driver and sole occupant of the car, Jacobs exercised dominion and control over its contents. *See Malone v. State*, 364 Ark. 256, 217 S.W.3d 810 (2005); *Little page v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). The State presented sufficient evidence to show that Jacobs constructively possessed the contraband

found in the car. The court upheld the conviction.

**Note:** Jacobs made several other arguments on appeal but the appellate court decided that none of the arguments except this single argument were preserved for appeal.

**Case:** This case was decided by the Arkansas Court of Appeals on December 15, 2010, and was an appeal from the Garland County Circuit Court, Honorable John Homer Wright, Judge. The case citation is *Jacobs v. State*, 2010 Ark. App. 860.

Brooke Lockhart  
Deputy City Attorney



**Defendant Held to Have Constructively Possessed Drugs found in Police Vehicle**

**Facts:** On April 23, 2009, Fort Smith Police Officer Corporal Barney Parsons [Officer Parsons] arrested Wendell Christian [Christian] pursuant to an arrest warrant. At trial, Officer Parsons testified he "patted down" Christian for weapons; handcuffed him, put him in the back seat of his patrol car alone, and took him to the jail. Officer Parsons testified he noticed Christian "squirming around in the back seat" on the way to the jail. Officer Parsons' impression was that Christian was attempting to hide something. Officer Parsons testified that he took Christian to the jail for booking and that he went back to his vehicle and found baggies of marijuana and cocaine and empty baggies under the seat where Christian was sitting.

Officer Parsons testified that it was his policy, and the policy of the Fort Smith

Police Department, to check the back seat of his car for contraband before beginning his shift and again each time someone was removed from the back seat. He said he followed that policy on the day Christian was arrested and that no contraband was there when Christian was put in the car. Officer Parsons also testified that he locked his car after he removed Christian from the back seat and that the car remained locked until he came back out to check under his back seat where he discovered the contraband.

Christian was charged with possession of cocaine, possession of marijuana, and possession of drug paraphernalia and was convicted by a jury of all three charges. His sole point on appeal is that there was insufficient evidence to prove he possessed the contraband.

**Argument and Discussion:** The State is not required to prove that an accused physically held the contraband but may instead prove that the accused constructively possessed the contraband. *Polk v. State*, 348 Ark. 446, 452, 73 S.W.3d 609, 613 (2002). In order to prove constructive possession, the State must establish beyond a reasonable doubt that the defendant exercised care, control, and management over the contraband. *Tubbs v. State*, 370 Ark. 47, 50, 257 S.W.3d 47, 50 (2007). Constructive possession may be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Polk*, 348 Ark. at 453, 73 S.W.3d at 614. Further, an accused's suspicious behavior coupled with proximity to the contraband is clearly indicative of possession. *Tubbs*, 370 Ark. at 50, 257 S.W.3d at 50. Finally the Arkansas

Supreme court held in *Polk* that a single occupant in a borrowed car or a car owned by another (as here) is subject to only the general constructive-possession inquiry and is not entitled to the increased inquiry afforded those in joint-occupancy situations. *Polk*, 348 Ark. at 453, 73 S.W.3d at 614.

In this case, Officer Parsons testified that he checked the back seat before Christian got in his car, and it contained no contraband. He said Christian was squirming while in the back seat, and his impression was that Christian was attempting to hide something. Officer Parsons testified that when he took Christian out of his car and took him in for booking, his car was locked. He then returned to his car and searched the back seat where he discovered the contraband. The contraband was found in a place immediately and exclusively accessible to Christian and subject to his control. In addition, Christian's suspicious behavior coupled with his proximity to the contraband is indicative of possession. The Court held that there was substantial evidence that Christian constructively possessed the contraband.

**Case:** This case was decided by the Arkansas Court of Appeals on January 5, 2011, and was an appeal from the Sebastian County Circuit Court, Honorable James O. Cox, Judge. The case citation is *Christian v. State*, 2011 Ark. App. 8.

Brooke Lockhart  
Deputy City Attorney

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