



C.A.L.L.

City Attorney Law Letter

July 1, 2016

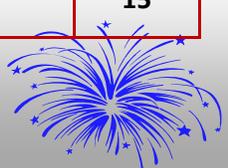
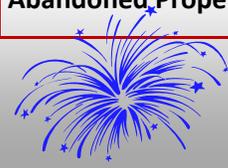


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Holding by U.S. Supreme Court Requires Changes in Arkansas DWI Violation of Implied Consent Law

In an opinion issued by the United States Supreme Court on June 23, 2016, entitled *Birchfield v. North Dakota*, the Court made a holding that will affect DWI law in Arkansas and other states in regards to breath tests and blood tests. In summary, the Court held that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. The Court addressed three particular scenarios. In the first scenario, a defendant was prosecuted for refusing to submit to a warrantless blood draw pursuant to an implied consent statute, and the Court concluded that the defendant was threatened with an unlawful search and that the judgment affirming his conviction had to be reversed. In the second scenario, a defendant was prosecuted for refusing a warrantless breath test pursuant to an implied consent statute, and the Court concluded that the breath test was a permissible search incident to arrest for drunk driving; thus, in that scenario, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and the



defendant had no right to refuse the test. In the third scenario, the defendant was not prosecuting for refusing a blood test because the defendant submitted to the blood test after being told that the law required his submission pursuant to the implied consent law. In the third scenario, the Court remanded the case back to the state trial court to determine if the defendant's consent to the blood test was voluntarily given based on the totality of the circumstances.

What does this mean for the Springdale Police Department? First, it is clear that a suspected impaired driver may be charged with violating Arkansas' implied consent law when the driver refuses to submit to a breath test. Second, it is equally clear that a suspected impaired driver may not be charged with violating Arkansas' implied consent law when the driver refuses to submit to a blood draw. However, a blood draw may still be obtained from the impaired driver if the impaired driver voluntarily agrees to the blood draw. If the driver refuses to agree to the blood draw, then the officer may apply for a search warrant to obtain the blood sample.

It is unclear how the Court will treat a urine sample. Will the Court conclude that obtaining a urine sample is comparable to obtaining a breath sample and therefore a lawful search that may be administered incident to a DWI arrest? Or will the Court conclude that obtaining urine allows for police to preserve a sample where information beyond simple BAC measurements may be obtained, and therefore place urine in the same category as blood?

For now, please be aware that changes have been made to the Springdale Police Department's statement of rights form that is administered to suspected impaired drivers. Please familiarize yourself with these changes and check with your supervisor should you have any questions. The changes made in the DWI statement of rights form also reflect that the suspect should not feel compelled to give consent when you are asking for a blood sample.

The City Fireworks

Ordinance:

A Refresher

Presented by

Taylor Samples

Senior Deputy City Attorney

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

Selling Fireworks - Section 46-56(a)

Prior to 2003, the selling of fireworks within the city limits was strictly prohibited by ordinance. However, in 2003,



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

- * No fireworks shall be sold or stored within a permanent structure of the city.
- * No fireworks stand shall be located except in a C -2, C-5, or A-1 zone, provided the A-1 property has frontage on a federal or state highway.
- * Fireworks may only be sold between June 28th and July 5th.
- * All locations where fireworks are sold must comply with all fire codes and must be inspected by the fire marshal prior to the sale of fireworks.
- * No person selling fireworks within the city shall be allowed to sell any fireworks which travels on a stick, as these are prohibited to be discharged within the city.
- * No fireworks stand shall be located within 250 feet of a fuel dispensing facility.
- * All fireworks stands must have at least a 50 foot setback from the street/highway.
- * No person under the age of 16 shall be allowed to purchase fireworks in the city.
- * All locations where fireworks are sold within the city shall post a sign, visible to the public, which states, "The discharge of bottle rockets or fireworks that travel on a stick are prohibited in the City of Springdale."

Prohibited Fireworks – Section 46-56 (b)

It is a violation of the City's fireworks ordinance for anyone to discharge (or sell) bottle rockets within the city limits of Springdale, even during the time when other fireworks are allowed to be discharged. However, the mere possession of bottle rockets is

not prohibited.

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

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

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

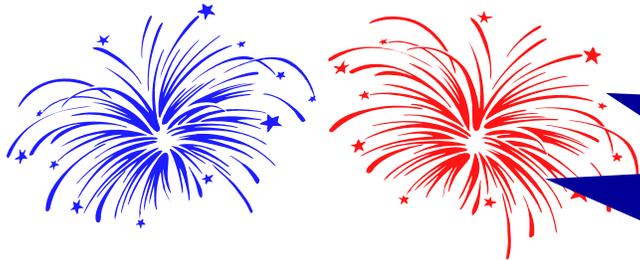
Furthermore, the ordinance requires that all persons under the age of 16 who are participating in the discharge of fireworks must be supervised by a person of at least 21 years of age.

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

Public Display of Fireworks

Section (b)(2) of the ordinance sets forth the requirements for obtaining a permit for a public display of fireworks. The city may issue permits for a public display of fireworks if certain requirements are met. Once a permit is issued, any such public display shall be conducted by a competent operator approved by the fire chief and shall be located and discharged in such a manner as to not be hazardous to any property or dangerous to any person. In addition, a person or entity may discharge fireworks pursuant to a permit for the public display of fireworks only between the hours of 8:00 a.m. and 11:00 p.m. from July 1st through July 4th of any year. There are three situations when the city may issue a permit to allow a public display of fireworks on a day not falling between July 1st and July 4th of any year. **First**, the city can issue a permit for a public display of fireworks at a professional sporting event in a P-1 zone between the hours of 6:00 p.m. and 11:00 p.m. from April 1st through September 30th of any year, provided that the property adjacent to the P-1 zone

is commercial or agricultural. **Second**, the city can issue a permit for a public display of fireworks for the purpose of allowing small test firing to determine the feasibility of a discharge site for future public display, provided no salute shells are discharged and provided that any such test firings shall occur between the hours of 6:00 p.m. and 10:00 p.m. between April 1st and June 30th of any year. **Third**, the city can issue a permit to allow the Rodeo of the Ozarks to shoot fireworks on regularly scheduled nights of the Rodeo of the Ozarks.



Presented by
Ernest B. Cate, City Attorney



Denial-of-Medical-Care Claim—Barton v. Taber

The Estate of Jeffrey Alan Barton filed a cause of action under 42 U.S.C. § 1983 and the Arkansas Civil Rights Act of 1993 (ACRA) under supplemental jurisdiction, both claims alleging that law enforcement officials denied the decedent medical care resulting in his death. The trial Court denied the motion for qualified immunity under the federal statute and statutory immunity under the state claim. The state claim standard for statutory immunity is similar to federal law standard for qualified immunity. *Simons v. Marshall*, 255 S.W.3d 838, 842 (Ark. 2007)). The case was appealed to the US Eight Circuit Court of Appeals.

I. Facts.

On September 12, 2011, Barton was involved in a single-vehicle accident at an overpass located on U.S. Highway 270. Owens arrived at the accident scene, along with Malvern, Arkansas, Police Officer Tim Callison and other law enforcement officials. After the officers arrived, Barton almost fell to the ground on multiple occasions. He swayed and used his truck to steady himself. After a portable breath

test indicated that Barton's blood-alcohol concentration was .11, the officers placed Barton under arrest. During the search of his person, Barton fell to the ground and was not responsive. Callison checked Barton for a pulse after he did not respond to questions or commands. Because Barton could not stand on his own, Callison and Owens lifted Barton and placed him into Owens's patrol car.

Owens transported Barton to the Hot Spring County Detention Center. Barton was unable to answer questions during the booking process, and when he did speak, his speech was slurred. [3] At one point during the booking process, Barton fell off a bench onto the floor.

Barton was incarcerated in the Detention Center as a pretrial detainee and placed in a holding room, to which he was unable to walk without being assisted by jail trustees. Barton was found dead in the holding room shortly after midnight on September 13, 2011. An autopsy determined the cause of death to be a heart condition—anomalous right

coronary artery, fatty infiltration of right ventricle and atrium of heart. The autopsy also revealed a small amount of ethanol, a small amount of hydrocodone, and a non-toxic level of an anti-anxiety medication.

Barton v. Taber, No. 14-3280, 2016 U.S. App. LEXIS 7604, at *1-3 (8th Cir. Apr. 27, 2016).

II. Law.

The standard for qualified immunity in an allegation of denial of rights must first be examined as to the rights alleged and “(1) [whether] the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) [whether] the right was clearly established at the time of the deprivation.” If a right is substantiated, its denial is reviewed under the deliberate indifference standard.

The deliberate-indifference standard requires “both an objective and subjective analysis.” *Hall v. Ramsey County*, 801 F.3d 912, 920 (8th Cir. 2015) (quoting *Scott v. Benson*, 742 F.3d 335, 340 (8th Cir. 2014)). The objective element requires proof of “...obvious signs of an objectively serious medical need.” The subjective component requires a showing that [the defendant] actually knew that [the arrestee] needed medical care and disregarded “a known risk to the [arrestee’s] health.” *Gordon ex rel. Gordon v. Frank*, 454 F.3d 858, 862 (8th Cir. 2006).

III. Analysis

Barton fell down at the scene of his accident, could not walk on his own, and became unresponsive such that an officer was obliged to check for a pulse. The Court focused on this fact to arrive at the decision that the decedent’s medical need was objectively serious. This fact was regarded as an admission that the officer was aware that the decedent’s condition was serious. After determining this fact, the Court took little time to conclude that the Trooper “...had direct knowledge

of Barton’s obvious need for prompt medical attention and yet took no steps to secure such care...” *Barton v. Taber*, No. 14-3280, 2016 U.S. App. LEXIS 7604. But the answer is not as apparent as this fact pattern suggests because the law in such cases is all over the place.

Whether an officer’s denial of medical care violates an arrestee’s constitutional rights is context-specific. Two cases generally provide contextual examples of objectively serious and not objectively serious situations. *McRaven v. Sanders* and *Grayson v. Ross*. All law enforcement officers are expected to know the law articulated by each case.

McRaven v. Sanders, 577 F.3d 974 (8th Cir. 2009). *McRaven* illustrates a case in which the arresting officer should have provided the medical needs of the arrestee. In *McRaven*, Steven Ross McFarland was arrested for DWI Drugs and other charges. He was booked into detention and evaluated by a Drug Recognition Expert (DRE). As the detainee had ingested an unknown quantity of narcotics, the senior jailer had a nurse evaluate the detainee. The nurse concluded that the detainee did not require hospitalization. Later that afternoon, McFarland stopped breathing. He was taken to the hospital, but suffered severe brain damage. The Court held that, while jail officials may reasonably rely on the judgment of medical professionals, it was not reasonable for these officials to rely on the opinion of an unsupervised licensed practical nurse where a DRE had expressed an opinion on the drugs taken and degree of intoxication was obvious. The latter fact was established by video showing the detainee basically motionless for 5 hours.

Grayson v. Ross, 454 F.3d 802 (8th Cir. 2006) is an example of no clear indication of an objectively serious medical condition. In *Grayson*, the subject was arrested on the charge of DWI following a traffic accident that involved a vehicle coming to rest in a creek. The subject became combative at arrest and was struck on the head by the officer using his duty weapon. Afterward, the subject was cooperative, responsive, and had no obvious



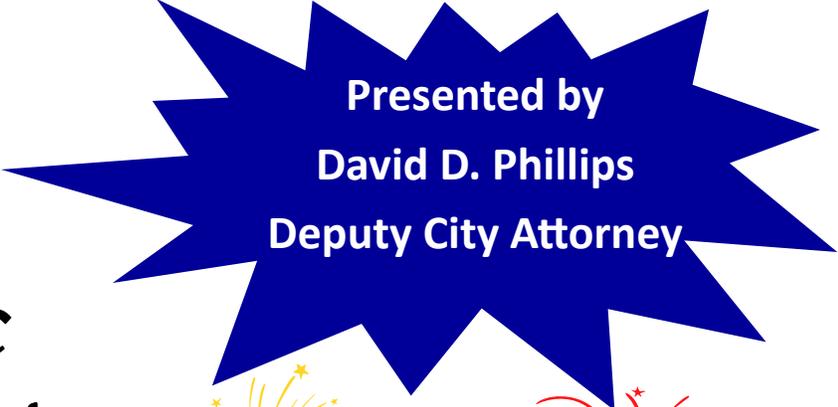
symptoms of any serious condition. Officers suspected had ingested an unknown quantity of methamphetamine prior to his arrest. When Grayson arrived at the jail, he appeared normal, was responsive and attentive, and did not display any signs that he was having hallucinations. However, later, Grayson began to hallucinate and became combative. He was also mutilating himself. A fight with jailers and LE Officers ensued. An ambulance was called, but Grayson had stopped breathing before it arrived. The Court held that the deliberate indifference objective standard had not been met, given the lack of obvious symptoms of a more serious condition at arrest.

The distinctions between these two seminal cases are not readily obvious. In one case, officers are not considered responsible for unknown information and in the other they are held responsible for knowledge of a condition not detectable by a professional health care worker. Those familiar with incarceration may reason that being motionless for 5 hours is not uncommon among otherwise healthy intoxicated detainees. Many distinctions at law are illusory. This vacillation by the Court is indicative of the fact that the law is not fully settled.

The Court held that the case at bar was more factually similar to *McRaven*. The case was an appeal of a denial of Qualified Immunity based upon a motion to dismiss for lack of a stated cause for which relief may be granted, FRCP Rule 12(b)(6). An appeal at this stage of pre-trial proceedings is more deferential to the plaintiff.

The dissent was of the opinion that the deliberate indifference standard had not been met and noted that the law "does not require an arresting law enforcement officer to seek medical attention for every arrestee who appears to be intoxicated." *Barton v. Taber*, No. 14-3280, 2016 U.S. App. LEXIS 7604, at *18 (8th Cir. Apr. 27, 2016). Unfortunately, a dissenting opinion is not law. The trial Court denial of Qualified Immunity was affirmed.

Arkansas Supreme Court Holds That Officer Who Arrested Innocent Person Because of Incorrect ACIC Entry Is Entitled to Immunity



**Presented by
David D. Phillips
Deputy City Attorney**

Facts Taken From the Case:

On May 14, 2012, Bella Vista Police Officer Travis Trammell received a report that shots had been fired in the area known as "Grosvenor Gravel Pits," a place that is off-limits for shooting. While investigating the area, Officer Trammell approached Linda Wright, her co-worker, her daughter, and her daughter's friend. Ms. Wright provided to Officer Trammell her driver's license, and upon checking her identification, the Arkansas Crime Information Center showed that Ms. Wright had an outstanding warrant for her arrest for failing to appear in Elkins District Court. ACIC indicated the same name, date of birth, driver's license number, and picture belonging to Ms. Wright.

Ms. Wright denied being the subject of the warrant. Officer Trammell returned to his car, called Washington County dispatch on the radio, and asked dispatch to confirm the warrant. Dispatch confirmed that the warrant was valid,

and Officer Trammell arrested Ms. Wright and transported her to the Benton County Sheriff's Office, which held her until the Washington County Sheriff's Office could pick her up. After arriving at the Washington County Sheriff's Office, Ms. Wright bonded out of jail.

Ms. Wright was later cleared of wrongdoing. The warrant had been issued against Linda M. Wright, a person having a different home address, date of birth, and driver's license number than Ms. Wright. Officer Trammell never saw the warrant at the scene of the arrest, and it was not the police department's practice for an officer to call the agency to have someone look at the warrant and read the identifying information. The individual who entered the warrant into ACIC assigned it to Ms. Wright's name, driver's license number, date of birth, and photo.

On May 10, 2013, Ms. Wright sued Officer Trammell in his personal capacity, alleging that he committed the state-law torts of false arrest and false imprisonment. Officer Trammell moved for summary judgment, claiming that he was entitled to immunity from being sued. The circuit court denied Officer Trammell's motion. Officer Trammell appealed the circuit court's decision to the Arkansas Supreme Court.

Argument, Applicable Law, and Decision by the Arkansas Supreme Court:

On appeal to the Arkansas Supreme Court (Court), Officer Trammell claimed that he did not commit the torts of false arrest or false imprisonment, and that if the proof demonstrated negligence, he is entitled to immunity pursuant to Arkansas Code Annotated section 21-9-301. In response, Ms. Wright argued that the circuit court was correct in denying immunity because Officer Trammell's acts were not negligent, but intentional, and officials are not immune from intentional acts. Specifically, Ms. Wright claimed that Officer Trammell committed the torts of false arrest and false imprisonment by intentionally refusing to verify the identifying information on the warrant. Ms. Wright argued that if Officer Trammell had asked someone to look at

the face of the warrant, then he would have known that she was not the subject of the warrant and she would not have been arrested.

The Arkansas Supreme Court held that Ms. Wright provided no facts to support her argument that Officer Trammell committed the intentional torts of false arrest or false imprisonment. Therefore, the Court concluded as a matter of law that Officer Trammell did not commit the intentional torts of false arrest or false imprisonment. In setting forth the applicable law, the Court said that false arrest, also sometimes known as false imprisonment, is the unlawful violation of the personal liberty of another consisting of detention without sufficient legal authority. The Court reasoned that Officer Trammell was not in possession of the actual warrant at the time of arrest, but he followed the police department's practice and relied on the information provided by ACIC. The Court noted that when Ms. Wright stated that she was not the subject of the warrant, that Officer Trammell sought verification of that information from dispatch in Washington County. The Court pointed-out that all of the information that Officer Trammell had in his possession, which was verified by dispatch, indicated that Ms. Wright was the subject of the warrant. For the above reasons, the Court concluded that the circuit court erred by denying summary judgment to Officer Trammell, and it reversed the order of the circuit court and remanded for the entry of an order consistent with its holding.

Case: This case was decided by the Arkansas Supreme Court on April 7, 2016, and was an appeal from the Benton County Circuit Court. The case citation is *Trammell v. Wright*, 2016 Ark. 147.

**Presented by
Taylor Samples
Senior Deputy City Attorney**



Arkansas Court of Appeals Affirms Denial of Motion to Suppress Where Officer Knew that Suspect Had a Suspended Driver's License

Facts Taken From the Case:

On June 4, 2014, the Grant County Sheriff's Office executed a search warrant on a residence located on a county road. Deputy Sam Shepard, who was tasked with securing the perimeter of the residence, was positioned at the edge of the driveway near the road. Shortly after 10:00 p.m., Carroll Medlock turned onto the road in route to a different residence and stopped his vehicle. Deputy Shepard recognized Medlock and knew that Medlock's driver's license was suspended, so Deputy Shepard instructed Medlock to pull over and get out of the vehicle. Deputy Medlock was placed into custody on a charge of driving on a suspended license and displaying fictitious tags, and Deputy Shepard, knowing the vehicle would be towed, began an inventory search of the vehicle. Deputy Shepard found what he believed to be methamphetamine in a cigarette pack in the front and later found what appeared to be drug paraphernalia.

At a suppression hearing, Deputy Shepard testified that on June 4, he was securing the perimeter of a residence while a search warrant was being executed and saw a vehicle turn off the highway and onto the road in front of the residence. Deputy Shepard explained that while there were patrol cars parked along the road, the road was not blocked, but the vehicle came to a stop in front of the residence. Deputy Shepard recognized the driver as Medlock and knew that Medlock's driver's

license was suspended. Deputy Shepard asked Medlock to pull the vehicle out of the road and into the driveway, asked him to get out of the vehicle, and asked him why he was driving. Medlock explained that he was going to see someone and that he had a work permit. Deputy Shepard asked another officer to place Medlock into custody and put him in the back of Shepard's patrol car. Deputy Shepard also confirmed through dispatch that Medlock's license was suspended and that he had fictitious tags on his vehicle.

Deputy Shepard also testified that Medlock's vehicle was going to be towed, so he began an inventory of the vehicle. Deputy Shepard found a cigarette pack in the front passenger seat, and because in his experience many people keep money or their identification stuffed inside cigarette packs, he looked inside the cigarette pack and found what appeared to be a small amount of methamphetamine wrapped in cellophane. Deputy Shepard also found a torch between the passenger seat and the center console and a black case that held a glass pipe and a small tin containing methamphetamine and a small spoon between the driver's seat and the center console.

At the suppression hearing, Medlock testified that on the night of June 4, he was going by a friend's house to check on her dogs and to return a tow bar. He stated that when he turned onto her road, the road was completely blocked by law enforcement vehicles. According to Medlock, the first thing he saw was an AR-15 held by Deputy Shepard, and Shepard had his weapon "aimed toward the windshield of the car as he walked around to the shoulder of it." Deputy Shepard denied pointing his weapon at Medlock at any time. Medlock testified that Shepard approached the passenger side of Medlock's car and told him to pull over to the shoulder. Medlock explained that he was handcuffed almost immediately after exiting the vehicle and that Shepard began searching the vehicle. Medlock said that he had just repossessed the car and that the title was sitting on top of the console. Medlock denied

knowing that there were any drugs in the car and said that he had not driven the car in over three weeks. Medlock admitted that his driver's license was suspended but stated that he had a work permit and that he considered returning his friend's tow bar a part of his work.

The circuit court denied Medlock's motion to suppress and found that Deputy Shepard had reasonable cause to arrest Medlock and that the search of Medlock's vehicle was not unreasonable under the circumstances. After a jury trial, Medlock was convicted of possession of methamphetamine with intent to deliver and possession of drug paraphernalia. Medlock appealed to the Arkansas Court of Appeals, claiming that the circuit court erred in denying his motion to suppress evidence found in his vehicle.

Argument and Decision by the Court of Appeals:

On appeal to the Arkansas Court of Appeals (Court), Medlock argued that his detention violated Rule 3.1 of the Arkansas Rules of Criminal Procedure because Deputy Shepard could not have reasonably believed that Medlock was doing anything illegal when Deputy Shepard approached and detained Medlock. Medlock also claimed that the stop violated Rule 2.2 because Deputy Shepard was not investigating any particular crime when he made contact with Medlock. Medlock asserted that he was seized, that the seizure was unconstitutional, and that the search of his vehicle was a "pretextual" inventory search. Conversely, the State argued that Shepard's initial contact with Medlock was valid because Shepard had a reasonable suspicion that Medlock was driving on a suspended driver's license; and once Shepard found methamphetamine in the cigarette pack, he had probable cause to search the rest of the vehicle.

The Court first set forth the applicable law by quoting Arkansas Rule of Criminal Procedure 3.1 as follows:

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

The Court continued by saying that reasonable suspicion is defined as a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. The Court stated that whether an investigative stop is justified depends on whether, under the totality of the circumstances, the police have a specific, particularized, and articulable reason indicating that the person may be involved in criminal activity. The Court pointed out that the following factors have been codified by the Arkansas legislature to be considered when determining whether an officer has grounds to reasonably suspect a person is subject to detention pursuant to Rule 3.1:

(1) demeanor of suspect; (2) gait and manner of 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 the other factors; (6) the time of 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 person, 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.

Then, the Court quoted Arkansas Rule of Criminal Procedure 2.2, which says:

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

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

The Court said that under Rule 2.2, an encounter is permissible only if the information or cooperation sought is to aid an investigation or the prevention of a particular crime. Because the encounter is in a public place and is consensual, it does not constitute a seizure within the meaning of the Fourth Amendment; but if an officer restrains the liberty of a person by means of physical force or show of authority, the encounter ceases to be consensual and becomes a seizure.

The Arkansas Court of Appeals held that Deputy Shepard's initial encounter with Medlock was lawful pursuant to Rule 2.2. The Court emphasized that the circuit court found that Medlock stopped his vehicle on the county road and that once the vehicle had stopped, Deputy Shepard recognized Medlock and knew that his driver's license had been suspended. The Court reasoned that Deputy

Shepard's request that Medlock pull his car over and exit the vehicle was made in the investigation of a particular crime, albeit a minor one, driving on a suspended driver's license. The Court also pointed-out that the circuit court found that after Medlock had been arrested, Deputy Shepard began a lawful inventory search of Medlock's vehicle pursuant to the written policy of the Grant County Sheriff's Department, and that early into the inventory search, Deputy Shepard found what he believed to be methamphetamine. The Court reasoned that this discovery provided probable cause for Medlock's arrest on felony drug charges and the continued search of the vehicle for any other drugs or paraphernalia. For the above reasons, the Court held that the circuit court did not err in denying Medlock's motion to suppress.

Case: This case was decided by the Arkansas Court of Appeals on May 25, 2016, and was an appeal from the Grant County Circuit Court. The case citation is *Medlock v. State*, 2016 Ark. App. 282.



Happy July 4th



An American flag with stars and stripes is at the top left. To its right, three bursts of fireworks in red, yellow, and blue are exploding against a dark background.

Defendant Held to Have Constructively Possessed Weapon Found in Vehicle With Joint Occupants

Facts Taken From the Case:

Special Agent John Carter of the Tenth Judicial Drug Task Force conducted a traffic stop at about 2:00 a.m. on an older-model Tahoe for having no rear license plate. The Tahoe was driven by Misty Johnson. Alex Harrington was a front-seat passenger, and Derrick Lambert was sitting in the backseat on the passenger side. As Agent Carter spoke with Johnson and got her information, Lambert opened the rear passenger door and tried to exit. Agent Carter told Lambert to stay in the vehicle. Around that time, Patrolman Ben Michel arrived and maintained observation of the passengers. Patrolman Michel observed Lambert moving around in the Tahoe, and he did not observe Harrington attempting to reach from his position in the front seat to the backseat area where Lambert was seated.

Agent Carter obtained consent from Johnson to search the vehicle, and a subsequent search revealed a gun in the armrest compartment inside the seat back next to where Lambert had been seated within the Tahoe. The armrest compartment was immediately accessible by Lambert. Johnson denied that the gun belonged to her or that she had ever seen the gun before. Lambert denied that the gun belonged to him, and Lambert claimed that the gun had been placed in the armrest by Harrington, the front-seat passenger. However, Officer Michel's observations refuted Lambert's claim, as did Johnson, who explained that a person in the front seat could not reach backseat without getting out of his or her seat.

Derek Lambert was convicted by a Drew County jury of one count of being a felon in possession of a firearm, and he was sentenced to four years in the Arkansas Department of Corrections and fined \$1,000. Lambert appealed the verdict to the Arkansas Court of Appeals, claiming that the State's case against him relied on the theory of constructive possession and was entirely circumstantial.

Applicable Law and Decision by the Arkansas Court of Appeals

In addressing Lambert's claim that the State's case rested on the theory of constructive possession and was entirely circumstantial, the Arkansas Court of Appeals (Court) set forth the law on constructive possession. The Court said that the State is not required to establish actual physical possession but may prove possession constructively. The Court stated that constructive possession requires the State to prove beyond a reasonable doubt that (1) the defendant exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband. The Court said that constructive possession may be inferred where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control.

Furthermore, the Court said that constructive possession may be inferred where contraband is in the joint control of the accused and another. The Court cautioned that joint occupancy alone, however, is not sufficient to establish possession. Other factors must sufficiently link an accused to contraband found in a vehicle jointly occupied by more than one person. Among the factors sufficient to link an accused to contraband are whether the contraband was found on the same side of the car seat as the defendant or in immediate proximity to him, and whether the accused acted suspiciously before or during the arrest.

Lastly, the Court noted that constructive possession may be established by circumstantial evidence,

which may provide the basis for a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable explanation of the crime. The Court noted that the question of whether the circumstantial evidence would support any other theory is for the jury to decide.

The Arkansas Court of Appeals affirmed the decision of the trial court and held that it did not err in denying Lambert's motion for directed verdict and allowing the jury to determine whether the circumstantial evidence was consistent with Lambert's guilt or whether it would support any other theory. The Court reasoned that while there was joint occupancy of the vehicle, the State demonstrated that other linking factors were present: (1) the gun was found in the backseat, where Lambert had been the sole passenger; (2) the compartment in which the gun was found was immediately and solely accessible by Lambert;

Curtilage Sniff— U.S. v. Hopkins

Donnell Hopkins, also known as: Smokey, also known as: Smoke, Defendant - Appellant, *Pro se*, was convicted of possession with intent to distribute controlled substances with weapons enhancements and gang affiliation. The conviction originated from police surveillance and a Canine "sniff" of defendant/appellant's front door. The denial of a motion to surpass was appealed to the US Eighth Circuit Court of Appeals.

I. Facts

Cedar Rapids police officer Al Fear received information from another officer that "a black male who went by the street name of Smoke was dealing narcotics" from one of the buildings in the Cambridge Townhomes. At

and (3) Lambert acted suspiciously, telling Johnson not to allow the officers to search the vehicle and attempting to exit the vehicle before police could approach it. For these reasons, Lambert's conviction was affirmed.

Case: This case was decided by the Arkansas Court of Appeals on April 27, 2016, and was an appeal from the Drew County Circuit Court. The case citation is *Lambert v. State*, 2016 Ark. App. 229.

**Presented by
Taylor Samples
Senior Deputy City Attorney**

around 10:00 pm on Tuesday, October 22, 2013, Officer Fear took his K-9 Marco to the location to investigate.

The Cambridge Townhomes consists of several rectangular buildings separated by a grid of streets and sidewalks. The building relevant to this case has 6 two story apartments on each side. The doors are arranged in pairs, and walkways lead from a sidewalk in the central courtyard to a concrete slab in front of each pair of doors. Each pair is separated by a wall approximately one foot wide. The remainder of the central courtyard area is covered with grass. Each unit has one first story window facing the [3] courtyard.

Officer Fear unhooked Marco from his leash and directed him to check the building for odors. Marco ran along the sides of the building so that "he was able to sniff the door bottoms on every apartment." Marco detected



the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States Hopkins*, No. 15-3579, 2016 U.S. App. LEXIS 9782, at *7 (8th Cir. May 31, 2016).

The Court of Appeals weighed the factors and concluded that, since the door was a single-use door only for the apartment in question, the curtilage protections applied. This conclusion did not seem to regard the fact that the door is in plain view of the public. Even more inconsistent was the holding that officers detaining the suspect in front of the same door did so reasonably. As the curtilage protections apply, *Jardines* would ordinarily necessitate suppression of the evidence.

In this case, the Law Enforcement Officer had a search warrant signed by a magistrate. This invokes the provisions of *Leon* to preserve evidence. However, there are four circumstances which "preclude a finding of good faith" on the part of the police:

(1) when the affidavit or testimony supporting the warrant contained a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading [12] the issuing judge; (2) when the issuing judge wholly abandoned his judicial role in issuing the warrant; (3) when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when the warrant is so facially deficient that no police officer could reasonably presume the warrant to be valid.

United States v. Hopkins, No. 15-3579, 2016 U.S. App. LEXIS 9782, at *11-12 (8th Cir. May 31, 2016)

The court noted that none of the factors negating good faith were alleged in this case. The Officer fully disclosed all known facts to the magistrate judge, who, other than committing a mistake of law,

performed his role. Therefore, the Good Faith Exception applied.

IV. Conclusion.

To arrive at the results in this case, a Judge had to make a mistake of law in signing the affidavit for a warrant. This was noted by the Court. "Although we conclude that the dog sniff in this case violated *Jardines*, the legal error "rest[ed] with the issuing magistrate, not the police officer." *United States v. Hopkins*, No. 15-3579, 2016 U.S. App. LEXIS 9782, at *14 (8th Cir. May 31, 2016) (quoting *United States v. Cannon*, 703 F.3d 407, 413 (8th Cir. 2013)). While possible, this is not likely to reoccur, certainly not locally.

It is interesting to note that the Court of Appeals did not suggest that the law as articulated in the 2013 *Florida v. Jardines* case was so pervasively known that no reasonable Law Enforcement Officer would ignore it in seeking a warrant. This dimension of the factors is ignored in the decision as was the basis of the initial suspicion that narcotics were being distributed from the residence in question.

While little can be learned from *Hopkins*, *Jardines*, the case that designated a dog sniff at a residential front door as a search, is an example of the arbitrariness of the law. Law is neither intuitive, not reasonable. It is the result of the ever changing compositions of legislatures and the Supreme Court and, indirectly, of society itself. Therefore legal research is becoming more and more critical to all levels of the criminal justice system for proper administration of the law.

The denial of the motion to suppress in *Hopkins* was affirmed.

David D. Phillips
Deputy City Attorney



nothing on the east side of the building. On the west side, however, Marco turned his head and began to sniff the bottom of the door of unit number 6, the second door on the center walkway. Then Marco sat and stared at the front door of unit 6, indicating to Fear that an odor of narcotics was coming from inside.

Officer Fear applied for a search warrant the next day. In his affidavit Fear stated that Marco had "sniffed the door bottoms of all the apartments from the outside common area," and that the area which attracted his special attention was "an exterior door to apartment #6 which [led] to the outside common area of the complex." An Iowa magistrate judge signed the warrant, and Fear continued his surveillance of the apartment that week. On both Wednesday and Sunday nights he watched through binoculars as a black man, later identified as appellant Donnell Hopkins, came and went from unit 6. Subsequently Fear testified that he had seen a number of people coming [4] and going from the apartment, engaging in what he believed to be narcotics transactions with Hopkins.

At 10:00 pm on Monday, October 28, Officer Fear and five of his colleagues arrived at the Cambridge Townhomes to execute the search warrant for unit 6. As the officers rounded the corner of the building, Fear spotted Hopkins and his brother Robert standing in front of the unit. The officers drew their weapons and shouted "police," and the two men by the unit were ordered to the ground. Hopkins complied, but Robert fled and was captured after a foot chase. A search of Hopkins revealed a loaded handgun, 45 small bags of crack cocaine, and 7 small bags of marijuana. Inside unit 6 officers found a shoebox containing heroin, cocaine, and marijuana in one of the upstairs bedrooms.

United States v. Hopkins, No. 15-3579, 2016 U.S. App. LEXIS 9782, at *2-4 (8th Cir. May

31, 2016)

II. Law

The use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment. *Florida v. Jardines*, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

Curtilage is an extension of the home itself and subject to the same protections from intrusion as the interior of the home. Whether a particular area around a home is part of the curtilage of an individual's residence is determined by evaluation of 4 factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. *United States v. Bausby*, 720 F.3d 652, 656 (8th Cir. 2013)

The exclusionary rule need not be applied to suppress unlawfully obtained evidence if "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope," even though a court were later to conclude that the warrant was invalid. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)

III. Analysis

Florida v. Jardines, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) has basically prohibited results of front door canine sniffs use as evidence. The US Supreme Court in that case held that the front porch area was a "classic exemplar" of curtilage, the area "immediately surrounding and associated with the home." *Id.* at 1414-15.

Curtilage is the outside part of the house or residential building that defines a zone of privacy comparable to that inside the house. Classic examples of curtilage include hedges, fences or any demarcation of privacy. The Court of Appeals in *Hopkins* recited the test for curtilage from earlier case law: "We examine four factors in particular: "the proximity of the area claimed to be curtilage to

Abandoned Property — U.S. Nowak

Cody Allen Nowak was convicted of Felon in Possession of a Firearm, 18 U.S.C. § 922(g)(1), based on a conditional plea. He challenged the denial of his motion to suppress the firearm in his appeal to the United States Court of Appeals for the Eighth Circuit.

I. Facts

On August 7, 2014, Nowak asked his friend Harry Madsen for a ride. Nowak got into the front passenger seat of Madsen's car and placed his backpack on the floor in front of him. Shortly thereafter, Madsen was pulled over by Officer Scott Vander Velde with the Sioux Falls, South Dakota, Police Department, because his license plate tags [2] were expired. When Nowak got out of the car, Officer Vander Velde recognized him and told him to get back into the car. Nowak did so. But when Vander Velde returned to his patrol car to contact dispatch, Nowak exited the car a second time and ran from the scene.

Officer Vander Velde did not pursue Nowak. Instead, he spoke to Madsen, who gave Officer Vander Velde permission to search the car. Officer Vander Velde found Nowak's backpack on the floor in front of the passenger seat. Vander Velde asked Madsen if the backpack was Nowak's. Madsen said "yea[h], that was his backpack," and "[t]hat's not mine."

Two other officers canvassed the area looking for Nowak, but did not find him. Nowak did not return to the scene during the approximately twenty-four minute traffic stop. Inside the backpack, Vander Velde found a Hi-Point .45 caliber handgun wrapped in a bandana.

United States v. Nowak, No. 15-2576, 2016

U.S. App. LEXIS 10956, at *1-2 (8th Cir. June 17, 2016)

II. Law

A person who has abandoned his property has relinquished any expectation of privacy. *Id.* at *3.

"Whether property has been abandoned "is determined on the basis of the ... objective facts available to the investigating officers, not on the basis of the owner's subjective intent.'" *Id.* at *3-4, (quoting *United States v. Basinski*, 226 F.3d 829, 836-37 (7th Cir. 2000)).

III. Analysis

The defendant cited *Basinski* for the proposition that leaving property in the care of another did not relinquish the expectation of privacy. In that case, the owner of a briefcase gave it to his friend for safekeeping and then told the friend to destroy the case. The Court noted that it had "held that specific instructions from the owner to destroy private materials are 'the ultimate manifestation of privacy, not abandonment.'" *United States v. Nowak*, No. 15-2576, 2016 U.S. App. LEXIS 10956, at *5 (8th Cir. June 17, 2016) (quoting *United States v. Thomas*, 451 F.3d 543, 546 (8th Cir. 2006)).

In this case, the defendant was in a hurry to depart the area and failed to make explicit arrangements for his property with his fellow traveler. This will likely happen in all similar instances as the fellow traveler may be unwilling to incur the potential liability of possessing the contents of another person's package or bag. At any rate, the defendant's failure to make such arrangements was treated as indicia of abandonment. He abandoned both his property and his rights.

The officer decided not to pursue the defendant. In

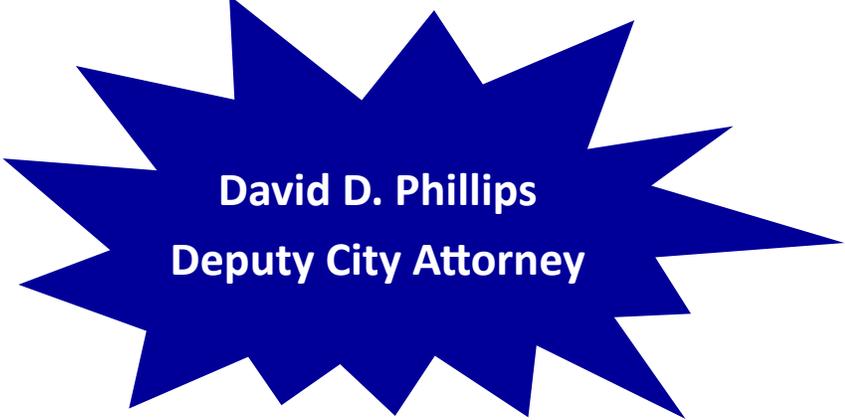
An American flag with stars and stripes is at the top left. To its right, several colorful fireworks (red, yellow, blue) are exploding against a light background.

retrospective, this was particularly shrewd as the defendant's absence from the area negated his ability to object to the search or reassert any rights in the property.

The Court held that the defendant had no objective expectation of privacy in the abandoned property and the denial of the motion to suppress was affirmed.

IV. Conclusion.

There is no expectation of privacy in abandoned property and therefore, any search or seizure of it is not unreasonable.

A large, dark blue, multi-pointed starburst shape with a white outline, containing the name and title of the attorney.

David D. Phillips
Deputy City Attorney

A blue line drawing of the Liberty Bell is centered. To its left and right are clusters of colorful fireworks (green, yellow, red, blue).

*"Those who expect to reap the blessings of
freedom must, like men, undergo the fatigue of
supporting it."*

— Tom Paine