



C.A.L.L.

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City Attorney Law Letter

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*Congratulations
to the Springdale Police Officers
who completed the
Legal Survival Skills
for Rookies Class!*

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Motorcycles, Motor-Driven Cycles, and Motorized Bicycles: What are the Rules?

Recently, we have received a number of questions regarding motorcycles and mopeds. Multiple articles addressing this subject have been published in past C.A.L.L. issues. Because of the recent questions, the rules regarding motorcycles, motor-driven cycles, and motorized bicycles will once again be discussed in this article.

The rules involving motorcycles, motor-driven cycles, and motorized bicycles can be found in A.C.A. § 27-20-101 through A.C.A. § 27-20-119. A.C.A. § 27-20-101 states that there are three different categories for cycles. The first category, "*motorcycle*," is defined by A.C.A. § 27-20-101(1) as "every motor vehicle having a seat or saddle for use of the rider and designed to travel on no more than three (3) wheels in contact with the ground and having a motor which displaces more than two hundred fifty cubic centimeters (250 cc)." The second category is "*motor-driven cycle*." A.C.A. § 27-20-101(2) defines motor-driven cycle as "every motor vehicle having a seat or saddle for use of the rider and designed to travel on no more than three (3) wheels in contact with the ground and having a motor which displaces fifty cubic centimeters (50 cc) to two hundred fifty cubic centimeters (250 cc)." The final category, "*motorized bicycle*," is defined by A.C.A. § 27-20-101(3) as "every bicycle with an automatic transmission and a motor which does not displace in excess of fifty cubic centimeters (50 cc)." Mopeds and pocket bikes generally displace less than 50 cc and thus fall into the motorized bicycle category.

What are the age and operator's license restrictions for the three different types of cycles?

A. MOTORCYCLE – A.C.A. § 27-20-106(a) states that no person shall operate a motorcycle upon the public streets and highways of this state unless the person is at least 16 years-old and holds a current valid motorcycle operator's license. The limitation requiring a person to be at least 16 years of age before he or she can operate a motorcycle is also found in A.C.A. § 27-20-107(b).

B. MOTOR-DRIVEN CYCLE – A.C.A. § 27-20-106(a) states that no person shall operate a motor-driven cycle upon the public streets and highways of this state unless the person is at least 16 years-old and holds a current valid motorcycle operator's license. However, A.C.A. § 27-20-106(b)(1) provides that a person who is 14 to 16 years of age may operate a motor-driven cycle if that person obtains a special license. If a person aged 14 to 16 obtains a special license to operate a motor-driven cycle, then A.C.A. § 27-20-106(b)(2)(A) states that the license shall expire on the licensee's 16th birthday. To continue operating the motor-driven cycle, the person turning 16 years-old would then need to obtain a motorcycle operator's license.

C. MOTORIZED BICYCLE – A.C.A. § 27-20-111(c)(1)(A) says that it is "unlawful for any person to operate a motorized bicycle upon a public street or highway within this state unless the person has a certificate to operate such a vehicle." Additionally, A.C.A. § 27-20-111(c)(1)(B)(ii) provides that no certificate to operate a motorized bicycle shall be issued to any person under fourteen (14) years of age. However, A.C.A. § 27-20-111(c)(1)(B) says that a person shall qualify to operate a motorized bicycle and is not required to obtain a certificate to operate a motorized bicycle IF that person already has obtained either a motor-driven cycle license,

a motorcycle license, or a Class A, Class B, Class C, or Class D license.

Must the owner of one of the three types of cycles register it with the State?

A.C.A. § 27-20-105 requires that motorcycles and motor-driven cycles be registered. However, the statute does not require a person to register a motorized bicycle.

Must the operator of one of the three types of cycles provide proof of liability insurance?

The provisions of the Motor Vehicle Safety Responsibility Act (A.C.A. § 27-19-101, *et seq.*) apply only to those vehicles subject to registration under the motor vehicle laws of this state. Therefore, motorcycles and motor-driven cycles are required to have insurance. However, since motorized bicycles are not required to be registered, they are not required to have liability insurance. This conclusion was set forth in a 1992 Attorney General's Opinion (92-118).

Must the operator of or passenger on one of the three types of cycles wear safety equipment?

Yes, A.C.A. § 27-20-104(b) provides that a passenger or operator of a motorcycle, a motor-driven cycle, and a motorized bicycle must wear protective eyewear. Additionally, the operator or passenger must wear a helmet if the person is under 21 years of age.

Must the operator of a motorized bicycle obey the rules of the road?

Yes, A.C.A. § 27-20-111 states that "operators of motorized bicycles shall be subject to all state and local traffic laws,

ordinances, and regulations." Additionally, the statute specifically provides that it is unlawful for motorized bicycles to be operated upon interstate highways, limited access highways, and sidewalks. In other words, a person would not be allowed to operate a motorized bicycle on I-540.

Can the operator of one of the three cycles carry a passenger?

A. MOTOR-DRIVEN CYCLE – A.C.A. § 27-20-110 permits the operator of a motor-driven cycle to carry 1 passenger so long as the operator is at least 16 years-old and so long as the motor-driven cycle "is equipped with a sidecar or an extra seat and supports for the passenger's feet." Additionally, the statute says that it is unlawful for more than 2 persons at a time to ride on a motor-driven cycle. The statute does not provide a minimum age requirement for the passenger of a motor-driven cycle.

B. MOTORIZED BICYCLE – A.C.A. § 27-20-10 states that the operator of a motorized bicycle may carry a passenger so long as the operator is at least 16 years of age. Once again, the statute does not provide a minimum age requirement for the passenger of a motorized bicycle.

C. MOTORCYCLES – The only restriction placed on motorcycle passengers is found in A.C.A. § 27-20-118. That statute states that "it is unlawful for the driver of a motorcycle to allow a child to ride as a passenger on a motorcycle on a street or highway unless the child is at least eight (8) years of age." However, this restriction does not apply to the driver of a motorcycle who is participating in a parade.

Can a person be cited for selling a motorcycle to someone under the age of 16 or for selling a motor-driven cycle to

someone under the age of 16 who does not have a special motor-driven cycle permit?

Yes, A.C.A. § 27-20-103 specifically states that it is unlawful for any person, firm, or cooperation to sell to any person in this state who is under the age of 16 any motor-driven cycle unless the person has a current valid license to operate the motor-driven cycle. Furthermore, the statute also provides that it is unlawful for any person to sell or offer for sale a motorcycle to any person in this state who is under 16 years of age.

In summary, having a good understanding of these basic rules and regulations will help to prevent confusion when dealing with motorcycles, motor-driven cycles, and motorized bicycles.

Taylor Samples
Deputy City Attorney



When is it Permissible to Operate a Golf Cart on a City Street?

Recently, we have had some questions about when it is permissible for someone to operate a golf cart on a city street. Arkansas law makes it clear that a person may operate a golf cart on a city street only in very limited circumstances.

A.C.A. § 14-54-1410, entitled "Operation of Golf Carts on City Streets," states as follows:

(a) It shall be within the municipal affairs and authority of any municipality in the State of Arkansas to authorize, by municipal ordinance, any owner of a golf cart to operate the golf cart upon the city streets of the municipality; provided, however,

operation shall not be authorized on city streets which are also designated as federal or state highways or as a county road.

(b) The municipality may authorize the operation of golf carts on city streets *only from the owner's place of residence to the golf course and to return from the golf course to the owner's residence.*

(c) When authorized by the municipality to operate on the city streets and limited to the circumstances and provisions of this section, there shall be no motor vehicle registration or license necessary to operate the golf cart on the public street.

(d) The term "municipality" as used in this section means any city of the first class, city of the second class, or an incorporated town.

Therefore, per A.C.A. § 14-54-1410, a person may operate a golf cart on a city street only when (a) the operation of the golf cart is in accordance with authorization of municipal ordinance, (b) the city street is not also designated a federal or state highway or county road, and (c) the operator of the golf cart is travelling from his residence to the golf course or vice versa.

A recent Arkansas Attorney General's opinion has made it clear that the operation of a golf cart on city streets is limited to the context set forth in A.C.A. § 14-54-1410. The Attorney General noted that A.C.A. § 14-54-1410 is the only Arkansas statute that specifically deals with the operation of golf carts on city streets and federal and state highways. Op. Ark. Att'y Gen. No. 2009-068. Additionally, the Attorney General

said that A.C.A. § 14-54-1410 constitutes a blanket prohibition against the operation of golf carts on city streets except when a municipality chooses to legalize their operation on city streets in accordance with the provisions of A.C.A. § 14-54-1410. *Id.* Finally, the Attorney General stated that golf carts are prohibited from being operated on the area along the sides of the highway because the definition of the term "highway" found at A.C.A. § 27-49-212 includes the area along the sides of the highway. Op. Ark. Att'y Gen. No. 2008-142.

Is a golf cart considered a motor vehicle as defined under A.C.A. § 27-49-219 (a) & (b) to the extent they are operated on public roads?

Yes, according to the Attorney General, golf carts are "motor vehicles" under Arkansas law, at least to the extent they are operated as vehicles on public roads. Op. Ark. Att'y Gen. No. 2009-082. A.C.A. § 27-49-219 (a) defines "vehicle" as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks." Additionally, section (b) defines "motor vehicle" as "every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires but not operated upon rails." The Attorney General has concluded that golf carts are not to be considered "all-terrain vehicles" because A.C.A. § 27-21-102(1) specifically excludes golf carts from the definition of all terrain vehicles. Op. Ark. Att'y Gen. No. 2008-142. Finally, adding special equipment to a golf cart would make a difference in the applicability of the rules applying to golf carts only if the modification was so extensive that the resulting vehicle could no longer be termed a golf cart. Op. Ark. Att'y

Gen. No. 2009-068. However, since neither A.C.A. § 14-54-1410 nor any other section of the Arkansas Code defines the term "golf cart," it would be difficult to determine what level of modification would be necessary to achieve that result. *Id.*

What traffic citations may be issued when a person operates a golf cart in violation of A.C.A. § 14-54-1410?

Since A.C.A. § 14-54-1410 sets forth no penalty for those who violate its provisions, what offenses may a violator of the statute be charged with? The following guidance has been provided by the Arkansas Attorney General's Office about common offenses that may be committed by a person operating a golf cart in violation of A.C.A. § 14-54-1410. The offenses discussed by the Attorney General should not be considered an exclusive list, but should instead be used as a general guideline to be used should this situation be encountered. Keep in mind that the Attorney General has concluded that golf carts are "motor vehicles" under Arkansas law to the extent they are operated as vehicles on public roads.

The Attorney General has noted that A.C.A. § 27-37-101 requires motor vehicles operated on public roads to be equipped in a certain manner for safety reasons. Op. Ark. Att'y Gen. No. 2009-082. A.C.A. § 27-37-101 states that:

It is a misdemeanor for any person to drive ... on any highway any vehicle ... which is in such unsafe condition as to endanger any persons, or which does not contain those parts, or is not at all times equipped with equipment in proper condition and adjustment as required in this chapter or which is equipped in any manner in violation of this chapter.

The equipment required by the chapter includes: a rearview mirror, pneumatic tires (as opposed to solid rubber tires); a parking brake or other brakes adequate to hold the vehicle in position on any grade on which it is operated; and a seat belt. Op. Ark. Att'y Gen. No. 2009-082. In a separate opinion, the Attorney General noted that Arkansas law requires vehicles to be equipped with parking lights, headlights, brake lamps, and turn signals. Op. Ark. Att'y Gen. No. 2008-142. Furthermore, the Attorney General quoted A.C.A. § 27-51-208(a), which says that "No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law." Op. Ark. Att'y Gen. No. 2009-082. Finally, the Attorney General said that its list of required equipment is by no means exclusive, but is intended to be a sampling of the equipment requirements most relevant to golf carts. *Id.*

Taylor Samples
Deputy City Attorney



United States Court of Appeals For the Eighth Circuit Upholds Grant of Summary Judgment in Favor of Benton County, Arkansas, the Benton County Sheriff and Two Benton County Deputies

Facts Taken From the Opinion: On April 4, 2008, Norman J. Carpenter was sleeping at his home in Benton County with Connie Gunem, his girlfriend. When Gunem awoke, she saw that Carpenter "looked horrible." Carpenter was slurring his speech to the point of incomprehensibility. His face was drawn, saliva was dripping from his mouth,

and he kept falling over. After Gunem said she would call an ambulance, Carpenter argued with her, so Gunem went outside to call 911. When the first responders arrived, one paramedic started to enter the house behind Gunem. At that point, Carpenter met them in a front hallway, denied that he needed medical aid, and ordered them to leave his house, saying, "I got a baseball bat that says you will get out of here." Gunem and the first responder backed out through the door.

Harold Gage, a Benton County deputy sheriff, arrived shortly thereafter. Gage responded to a call from a dispatcher that first responders had been threatened with a baseball bat. Gage spoke with Gunem, who said she believed that Carpenter may have suffered a stroke. Gunem informed Gage that Carpenter had a rifle in the house, but that she did not know where he kept it. The first responders told Gage that Carpenter had chased them out of the house with a baseball bat. Gage pulled his car to the front of the house, walked up to the porch, and knocked on the door.

Meanwhile, Kenneth Paul, another Benton County deputy sheriff, arrived in response to the same information that Gage had received. Paul learned that Carpenter might have a rifle in his house, and joined Gage on the porch. Carpenter eventually answered the door, and Gage identified himself. Paul then asked Carpenter what was the problem. Carpenter responded by pointing to Paul's badge and saying, "that's the f---ing problem right there." Carpenter stepped back inside the house, and the two deputies followed him. Both deputies testified that they entered because they feared Carpenter could be retrieving a weapon.

Once inside, Gage ordered Carpenter to stop moving about and threatened to deploy a

taser gun if Carpenter refused to comply. Gage and Paul claim that Carpenter took a swing at them; Carpenter denies ever raising his hand or swinging at the deputies. In either case, the deputies took Carpenter to the ground and told him to give them his hands so he could be handcuffed. All parties agree that Carpenter neither remained still nor presented his hands to the deputies. According to Deputy Paul, Carpenter resisted and would not offer his hands. Carpenter explained that he tried to use the couch for support because he could not breathe. Deputy Paul then deployed his taser against Carpenter; the taser strike caused Carpenter to begin to buckle. Paul deployed the taser again, and the deputies were able to restrain Carpenter.

Following the scuffle, a first responder entered the house and looked over Carpenter. The deputies then transported Carpenter to jail, where he was processed, cited for third degree assault, and released.

Gunem told Carpenter's children what had happened. The children drove down from Michigan and took Carpenter to the hospital. An emergency room doctor determined that Carpenter had suffered a stroke, and admitted him to the hospital. Carpenter alleges that the stroke caused permanent damage to his vision and hearing, which in turn has limited his employment and undermined interpersonal relationships.

Carpenter brought a lawsuit under 42 U.S.C. § 1983 against Deputies Gage and Paul, Sheriff Keith Ferguson, and Benton County itself. Five claims were the subject of this appeal: (1) that Gage and Paul unlawfully entered Carpenter's home; (2) that the deputies lacked probable cause to detain or arrest Carpenter; (3) that the deputies' physical contact with Carpenter and use of a taser constituted an excessive use of force;

(4) that the deputies' failure to obtain treatment for Carpenter's stroke unlawfully denied him emergency medical care; and (5) that Sheriff Ferguson and the county failed properly to train Gage and Paul how to recognize and treat a person exhibiting symptoms of a stroke. The district court granted summary judgment for the defendants. The court cited qualified immunity, but actually concluded that Carpenter failed to establish that either Gage or Paul deprived him of a constitutional right, and that the absence of an underlying constitutional violation defeated Carpenter's failure-to-train claims. Carpenter appealed the grant of summary judgment to the United States Court of Appeals for the Eighth Circuit.

Argument and Decision by the United States Court of Appeals for the Eighth Circuit:

Argument I: Carpenter first argued that the deputies entered his house in violation of the Fourth Amendment. Absent consent, an officer's entry into a home generally requires a warrant. *See Payton v. New York*, 445 U.S. 573 (1980). An "exigent circumstances" exception to the warrant requirement, however, permits a warrantless entry when the needs of law enforcement are so compelling that a warrantless search is objectively reasonable. Such exigencies include the need to render emergency aid to an injured occupant, hot pursuit of a fleeing suspect, and the need to prevent the destruction of evidence. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011). A warrantless entry is lawful if officers reasonably believed that exigent circumstances existed. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The Eighth Circuit held that a reasonable deputy sheriff could have believed that

exigent circumstances justified entering Carpenter's home without a warrant. Deputies Gage and Paul both received reports that Carpenter had threatened first responders with a baseball bat. Although Carpenter denies wielding a bat while ordering the first responders out of his house, the relevant question is whether the deputies reasonably believed that he had used a baseball bat. Here, the deputies were advised by a reliable source that Carpenter had done so. The deputies also were advised by Carpenter's companion that Carpenter kept a rifle in the home. In light of these facts and Carpenter's belligerence toward the first responders and the deputies, it was reasonable for Gage and Paul to believe that Carpenter may have withdrawn abruptly into his home to retrieve a gun. As neither deputy knew where Carpenter's rifle was located, it was reasonable for them to fear that they lacked time to make a safe retreat. A reasonable officer therefore could have concluded that allowing Carpenter to go unaccompanied back into his home posed a threat to the lives of the law enforcement officers and first responders outside the house. *See United States v. Ball*, 90 F.3d 260, 263 (8th Cir. 1996). For these reasons, the Eighth Circuit Court held that the district court correctly dismissed Carpenter's claim alleging an unreasonable search under the Fourth Amendment.

Argument II: Carpenter also asserted that Gage and Paul lacked probable cause to arrest him, and that the seizure violated the Fourth Amendment. Carpenter argued that there is a genuine issue for trial because he disputes the deputies' account that he swung at them.

The Court held that regardless of whether Carpenter assaulted the deputies, there was probable cause to arrest Carpenter based on his conduct toward the first responders. Both

Deputies Gage and Paul reported to the scene based on information that Carpenter had threatened first responders with a baseball bat. Although neither deputy witnessed this conduct, officials may rely on hearsay statements to determine that probable cause exists. *See Illinois v. Gates*, 462 U.S. 213, 241-42 (1983). The report from the dispatcher provided reasonably trustworthy information that Carpenter had assaulted the first responders, so the deputies had probable cause to arrest him. That the deputies' subjective reason for arresting Carpenter may have been different does not invalidate the arrest. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

Argument III: Carpenter next claimed that the deputies violated the proscription on unreasonable seizures by employing excessive force against him. In evaluating whether a particular use of force was excessive, the Court considered whether it was objectively reasonable under the circumstances. *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009). The Court also relied on the perspective of a reasonable officer present at the scene rather than the "20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

The Court held that when the deputies attempted to arrest Carpenter, he resisted. Deputy Paul testified as follows:

[W]e couldn't get to his arms. The entire time, Mr. Carpenter had his arms underneath him, just huddled up under his chest laying on top of them. We screamed several times, give us your hands, give us your hands, give us your hands, stop resisting. Deputy Gage couldn't get his hands out from underneath him, it was a struggle. Officer Johnson couldn't get his right

hand, based off the location he was at. Mr. Carpenter wouldn't give them to us. So during that time, I removed the cartridge from my tazer, and I said, if you do not give us your hands, I will drive stun you in the back. And he didn't do it—did not cooperate, did not comply. I initiated the tazer and drive stunned him on his back for a five-second cycle.

Deputy Paul testified that after the taser strike, Carpenter continued to resist. The deputies yelled at Carpenter to stop resisting, but he was "physically fighting" and "bucking," trying to throw off Deputy Gage. Deputy Paul then stunned Carpenter with the taser a second time in the lower back. At that point, Carpenter complied by putting his arms to his side, and an officer applied handcuffs.

The Court held that a reasonableness of a use of force depends on the particular facts and circumstances, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Law enforcement officers may use physical force to subdue an arrestee when he fails to comply with orders to lie still during handcuffing. *See Mann v. Yarnell*, 497 F.3d 822, 826 (8th Cir. 2007).

It is undisputed that Carpenter refused to offer his hands when ordered to do so, and Carpenter himself testified that he reached for the couch in an effort to lift himself from the floor. Carpenter does not dispute that he was directed to give his hands to the deputies, that he was warned about use of the taser, or that he refused to comply, but he characterized his struggles merely as an effort to breathe. Even if Carpenter's motive

was innocent, the deputies on the scene reasonably could have interpreted Carpenter's actions as resistance and responded with an amount of force that was reasonable to effect the arrest. *See McKenney v. Harrison*, 635 F.3d 354, 360 (8th Cir. 2011). The Court held that Deputies Gage and Paul are therefore entitled to qualified immunity against Carpenter's excessive force claim.

Argument IV: Carpenter also argued that the deputies exhibited deliberate indifference to his medical needs in violation of his constitutional rights. Because the alleged violation occurred after Carpenter was arrested, the Court noted that its' cases suggest that it is properly analyzed under the Due Process Clause of the Fourteenth Amendment. *McRaven v. Sanders*, 577 F.3d 974, 979 (8th Cir. 2009); *Spencer v. Knapheide Truck Equipment Co.*, 183 F.3d 902, 905 & n.3 (8th Cir. 1999); *cf. Graham*, 490 U.S. at 395 n.10 (noting an unresolved question whether the Fourth Amendment applies to an excessive force claim after an arrest ends and pretrial detention begins).

Deputy Gage acknowledged that when he arrived at the residence, Connie Gunem said she thought Carpenter was having a stroke. Carpenter asserts that Gage, having been so advised, was deliberately indifferent to his serious medical need, and that Deputy Paul also was deliberately indifferent.

Before the deputies could consider responding to Carpenter's medical needs, they had to subdue him and secure the premises. Once this was accomplished, and Carpenter was arrested, first responders examined him briefly. There are conflicting accounts of exactly what happened, but the upshot was that the paramedics did not administer emergency treatment for a stroke,

and the deputies transported Carpenter to jail rather than to a hospital.

Deputy Paul testified that one of the first responders told Carpenter that they wanted to take him to the hospital for examination, but that Carpenter refused to go. The responders wanted Carpenter to sign a form stating that he refused transportation for medical treatment, but Paul did not want to remove Carpenter's handcuffs. So, according to Paul, he and the first responders asked Carpenter orally whether he refused medical treatment. When Carpenter reaffirmed that he refused treatment, Paul noted the refusal on a form, and the first responders left the residence.

Carpenter denied that he refused medical treatment, but he also denied that the paramedics suggested that he should be transported to the hospital. In Carpenter's version, the deputies asked Carpenter after the arrest whether a paramedic could examine him. A paramedic then looked at Carpenter and asked a colleague what should be done with Carpenter. One of the deputies declared that he was "taking him in for an assault." According to Carpenter, the paramedic did not object and say that Carpenter needed to go to the hospital or tell Carpenter "that there was any problem."

The Court held that although the two narratives differ, neither scenario supports a claim of deliberate indifference by the deputies. In Paul's version, the paramedics suggested transportation to a hospital, but then acquiesced in Carpenter's refusal of medical treatment. They never urged the deputies to bring Carpenter to a hospital for medical treatment over his objections. In Carpenter's scenario, the paramedics never even recommended hospitalization. To

prove deliberate indifference, Carpenter must show that the deputies had actual knowledge that failing to provide Carpenter immediate medical treatment posed a substantial risk of serious harm. Where the medical professionals either acquiesced in Carpenter's refusal of medical treatment, or, under Carpenter's own version, never even suggested that treatment was warranted, there is insufficient evidence that a need for medical treatment was so obvious that the sheriff's deputies exhibited deliberate indifference by taking Carpenter to jail. *See Christian v. Wagner*, 623 F.3d 608, 614 (8th Cir. 2010).

Argument V: In his final claim, Carpenter contended that Sheriff Ferguson and Benton County were liable under § 1983 for failing to train deputy sheriffs adequately about how to recognize and respond to symptoms of strokes. The Court held that without a showing that the deputies violated the Constitution, however, there can be no liability for failure to train. *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986) (per curiam). The Court held the district court correctly dismissed the claim against the sheriff and the county. The United States Court of Appeals for the Eighth Circuit thus affirmed the district court's grant of summary judgment in favor of defendants on all of Carpenter's claims.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on July 27, 2012, and was an appeal from the United States District Court for the Western District of Arkansas. The case cite is *Carpenter v. Gage*, 686 F.3d 644 (8th Cir. 2012).

Jeff Harper
City Attorney

Arkansas Court of Appeals Affirms Judgment Denying Motion to Suppress in Craighead County Case

Facts Taken From the Opinion: Officer Blake Bristow with the Jonesboro Police Department testified that an informant who had previously provided information to him contacted him and informed him that William Johnson (Appellant) was going to be involved in a drug deal that day. Officer Bristow assumed that appellant would go to his apartment prior to the transaction, and he had Officer Rick Guimond stationed along appellant's route to conduct a traffic stop of appellant. Officer Bristow informed Officer Guimond that he wanted to conduct a traffic stop of appellant in order to protect his informant. Officer Bristow also contacted Michelle Earnhart, appellant's probation officer, and requested that she assist Officer Guimond.

Officer Guimond testified that he performed a traffic stop on appellant on March 1, 2010, and he returned appellant to his apartment at Earnhart's request. When appellant was returned to his apartment, Ms. Earnhart requested that Officer Bristow perform a strip search of appellant. During the search, Officer Bristow discovered cocaine. He also found a large amount of cash in appellant's couch. Officer Bristow admitted on cross-examination that he had applied for a search warrant but did not mention receiving information from a confidential informant in the affidavit. He further admitted that there was no mention of a confidential informant in his report following the arrest.

Officer Guimond testified that Officer Bristow had asked him to stop the vehicle. He testified that there were several items hanging from appellant's rearview mirror, and he based his stop on an obstructed

windshield and interior. He stated that he believed that he would have been justified in issuing a citation for the items hanging from the rearview mirror. During the stop, Officer Guimond asked permission to search appellant and his vehicle and appellant refused. Ms. Earnhart then told Officer Guimond that they were going to appellant's apartment to perform a parole search. Officer Guimond stated that appellant was walking in an unusual manner, as though he were attempting to hide something in his buttocks or crotch area. Officer Guimond admitted on cross-examination that he did not mention Officer Bristow's request that he stop appellant in his report. He stated that he left his discussion with Officer Bristow out of his report in order to protect Officer Bristow's confidential informant.

Michelle Earnhart testified that the police contacted her and requested that she assist with a search of appellant. She stated that appellant was walking in an unusual manner, and she asked Officer Bristow to search appellant.

At the conclusion of the hearing, the trial court stated that, due to appellant's status as a parolee, he had no expectation of privacy from a search by Ms. Earnhart or any other agent of the Department of Correction and that it was denying the motion to suppress. The trial court entered a written order denying the motion to suppress on May 31, 2011. On that same day, appellant entered a conditional plea of guilty. The trial court sentenced appellant to 120 months' imprisonment followed by five years' suspended imposition of sentence. Appellant appealed to the Arkansas Court of Appeals.

Argument and Decision by Arkansas Court of Appeals: The Court noted that the only issue on appeal was whether the trial court erred in denying appellant's motion to suppress. Appellant contended on appeal

that the stop of his vehicle was illegal. Appellant argued that Officer Guimond did not have probable cause to stop his vehicle and that the drugs found during the parole search by Officer Bristow should be suppressed as fruit of the illegal stop.

The Court held that the search that yielded the evidence appellant sought to suppress was not done in connection with the traffic stop. That search was a parole search performed by Officer Bristow at the request of appellant's probation officer. The terms of appellant's parole required him to submit to a search by an officer of the Department of Community Punishment at any time. Although Officer Bristow was the one who actually performed the search, both this court (Arkansas Court of Appeals) and our supreme court have held that a parole officer may enlist the aid of police, and a police officer may act at the direction of the parole officer without overreaching the scope of the search. *Cherry v. State*, 302 Ark. 462 (1990); *Hatcher v. State*, 2009 Ark. App. 481.

The Court held that the trial court denied appellant's motion to suppress after ruling that the search that yielded the drugs was a permissible parole search and that the appellant has failed to demonstrate that the search during which the evidence was discovered was impermissible. Therefore, the Arkansas Court of Appeals held that the trial court's denial of the motion to suppress was not clearly erroneous and affirmed the judgment of the trial court.

Case: This case was decided by the Arkansas Court of Appeals on September 12, 2012, and was an appeal from the Craighead County Circuit Court, Western District, Honorable Victor L. Hill, Judge.

The case cite is *Johnson v. State*, 2012 Ark. App. 476.

Jeff Harper
City Attorney



No Fourth Amendment Violation in Asking Suspect to Step Out of Vehicle So He Could Be Positively Identified

Facts: On November 16, 2010, Special Agents Scot Umlauf [Umlauf] and Steve Parshall [Parshall] conducted an investigation into a drug overdose death in Alexandria, Minnesota. During the investigation, they learned that a suspected drug dealer fled the scene of the crime and was possibly staying twenty miles away at a known drug house in Lowry, Minnesota. Parshall relayed this information to Deputy Jason Sorenson [Sorenson], who then drove past the Lowry residence and observed a green sport utility vehicle (SUV), registered to Ingrid Stanley [Stanley], in the driveway. Later that day, Sorenson stopped the SUV after he observed the vehicle driving without a front license plate, which is a violation of state law. See Minn. Stat. § 169.79, subd. 6 ("[O]ne [license] plate must be displayed on the front and one on the rear of the vehicle.").

After pulling over the SUV, Sorenson approached the driver's side window and noticed two large dogs and a male driver inside the vehicle. Sorenson asked the driver to produce a driver's license and proof of insurance but the driver, who was visibly nervous, told Sorenson that he did not have either with him. In lieu of providing a driver's license, the driver told Sorenson that his name was David Michael Stoltz and that his date of birth was October 12, 1965. Sorenson returned to his patrol car to verify

the information. Sorenson then began to fill out a citation for no proof of insurance. See Minn. Stat. § 169.791, subd. 2 ("If the driver does not produce the required proof of insurance upon the demand of a peace officer, the driver is guilty of a misdemeanor.").

While Sorenson was filling out the citation, Agents Umlauf and Parshall arrived on the scene and Sorenson explained that the driver of the SUV was David Stoltz. Umlauf became suspicious that the driver was actually Jeffrey Stoltz and that the driver had falsely identified himself. Umlauf was aware that Jeffrey Stoltz lived with Ingrid Stanley, the registered owner of the SUV, but Umlauf was unable to visually confirm the driver's identity from his vantage point. To confirm the identity of the driver, the officers retrieved a photograph of David Stoltz on a database via Parshall's mobile computer. After viewing the photo, Sorenson determined that the driver did not resemble David Stoltz. The officers agreed that, before they proceeded with an arrest, Sorenson should get the driver out of the SUV so the officers could compare the driver with photographs of David and Jeffrey Stoltz. Umlauf advised Sorenson to proceed with caution because Jeffrey Stoltz had been found in possession of firearms in previous encounters with law enforcement.

Sorenson returned to the SUV and told the driver to exit the vehicle so the officers could verify his identity. To ensure officer safety, Sorenson conducted a pat-down search of the driver after he exited the vehicle and, while doing so, retrieved a digital scale from the driver's pocket. The officers then compared the driver to photographs of David and Jeffrey Stoltz and concluded that the driver was, in fact, Jeffrey Stoltz [Stoltz]. The officers then placed Jeffrey Stoltz under arrest for falsely

identifying himself. See Minn. Stat. § 609.506, subd. 2 ("Whoever with intent to obstruct justice gives the name and date of birth of another person to a peace officer . . . when the officer makes inquiries incident to a lawful investigatory stop . . . is guilty of a gross misdemeanor."). Sorenson then searched Stoltz's person and located \$741 in cash. Parshall and Umlauf also performed a field test on Stoltz's digital scale, which tested positive for methamphetamine. Sorenson transported Stoltz to the stationhouse and the SUV was impounded.

The day after Stoltz's arrest, Umlauf applied for and received a search warrant for the SUV. While executing the warrant, Parshall and Umlauf located a wallet between the driver's seat and center console of the SUV that contained Stoltz's driver's license and two pawn receipts. The receipts indicated that Stoltz—a convicted felon—pawned a shotgun, two shotgun barrels, and a rifle with Viking Pawn on June 29, 2010. Parshall then went to Viking Pawn to investigate the transaction. There, two employees viewed a photo of Stoltz and verified that Stoltz pawned the firearms listed on the pawn receipts.

The grand jury indicted Stoltz with being a felon in possession of a firearm, the jury returned a verdict of guilty and Stoltz appealed.

Argument: Stoltz first argues that, under the Fourth Amendment, the district court should have suppressed all evidence obtained after Sorenson told Stoltz to exit the SUV because, at that point, Stoltz was unlawfully arrested without probable cause. The Eighth Circuit Court of Appeals disagreed with this argument. It is well settled that, "once a motor vehicle has been lawfully detained for a traffic violation; the police officers may order the driver to get

out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures." *Maryland v. Wilson*, 519 U.S. 408, 412 (1997) (quotation omitted). Stoltz does not contend that he was unlawfully stopped for driving an SUV without a front license plate, which is a violation of Minnesota law, or that the detention was unreasonably prolonged. See *United States v. Long*, 320 F.3d 795, 799 (8th Cir. 2003) ("Any traffic stop is constitutional . . . so long as the officer had probable cause to believe that a traffic violation actually occurred."); *United States v. Bowman*, 660 F.3d 338, 343 (8th Cir. 2011) ("If complications arise during . . . routine [traffic stop] tasks, the vehicle may be detained for a longer period of time."); *Bowman*, 660 F.3d at 44 ("An officer's suspicion of criminal activity may reasonably grow over the course of a traffic stop as the circumstances unfold and more suspicious facts are uncovered." (quotation omitted)).

Second, Stoltz argues that the pawn receipts officers seized from his wallet, while executing a search warrant on the SUV, should be suppressed because the search of the wallet fell outside the scope of the search warrant. The Court again disagreed. The search warrant at issue expressly authorized officers to search the SUV for "receipts" and "other items evidencing the . . . expenditure of money." And, "[a] lawful search extends to all areas and containers in which the object of the search may be found." *United States v. Weinbender*, 109 F.3d 1327, 1329 (8th Cir. 1997). Because receipts may be found in a wallet, the officers' search of the wallet did not exceed the scope of the search warrant.

Stoltz also argues that there was insufficient evidence to support his conviction for being a felony in possession of a firearm.

Specifically, that although there is evidence that Stoltz "pawned" a shotgun and rifle, there is no evidence that he ever actually carried or touched the firearms.

"Possess[ion]" of a firearm, as contemplated in 18 U.S.C. § 922(g)(1), can be actual or constructive. *United States v. Brown*, 634 F.3d 435, 439 (8th Cir. 2011). Actual possession refers to the "knowing, direct, and physical control over a [firearm]," whereas constructive possession "is established by proof that the defendant had control over the place where the firearm was located, or control, ownership, or dominion of the firearm itself." *Id.* (quotations omitted). Notably, a showing of possession "may be based on circumstantial evidence which is intrinsically as probative as direct evidence." *Id.* (quotation omitted).

The Eighth Circuit found that there was sufficient evidence for a reasonable jury to conclude that Stoltz actually possessed the firearms at issue. At trial, the government introduced evidence that pawn receipts were located in Stoltz's wallet along with Stoltz's driver's license. The pawn receipts bore Stoltz's name and driver's license number, and indicated that Stoltz pawned a shotgun, two shotgun barrels, and a rifle at Viking Pawn on June 29, 2010. The government also introduced the testimony of Judith Collins, the owner of Viking Pawn. Collins testified that Viking Pawn's standard procedure is to write the name and driver's license number of the individual pawning items on a pawn receipt. When Stoltz's attorney asked Collins whether she knew if the firearms belonged to Stoltz or to Stoltz's son, Collins replied, "I don't know who they belonged to. I know Mr. Jeff Stoltz brought them in. That's all I know." Later, Collins, who was familiar with Stoltz from previous transactions, explained that she had "[n]o

doubt" that Stoltz was the individual who pawned the firearms. In addition, Viking Pawn employee Daniel Tillberg testified that Stoltz paid interest on the pawn loans and, on one occasion, attempted to retrieve the firearms. Tillberg explained that Stoltz became angry when Tillberg refused to return the firearms after Stoltz refused to submit to a mandatory background check. The conviction was affirmed.

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on July 10, 2012. The case was from the United States District Court for the District of Minnesota. The case citation is *United States v. Stoltz*, 683 F.3d 934 (2012).

Brooke Lockhart
Deputy City Attorney



Court Finds Reasonable Suspicion When Officer Knows of Suspect's Criminal History

Facts: On January 25, 2011, Minneapolis Police Officer George Judkins [Judkins] observed a Ford Explorer perform an illegal U-turn, back into a snow bank, and temporarily block an intersection. Judkins followed the vehicle which pulled over to the side of the road without signaling and without any signal from Judkins that it should do so. Judkins pulled in behind the vehicle and ran the license plate. As he was doing this, he observed a female, Sherry Smith [Smith], exit the Explorer walk past several homes, look back at Judkins and then knock on the door of a house with no cars in front. Smith looked back and Judkins again. Judkins testified in court that he could see the occupants of the home look through the front window at Smith but they did not open the door. Smith's behavior

seemed suspicious to Judkins and he thought she might be trying to create a distraction.

By this time, Judkins had learned that the vehicle was registered to a car lot, not an individual. When Smith began to walk back to the Explorer, Judkins turned on his squad car lights, exited the car and walked to the driver-side door of the Explorer. Judkins approached the driver, who identified himself as Charles Tate [Tate] and told the officer he did not have a driver's license. Tate explained they were looking for his sister, who was involved in a domestic dispute with her boyfriend. Judkins testified that while talking to Tate, the two passengers in the rear seat were looking "a little too nervous" and not making eye contact, even though Judkins did not include this observation in his report. Judkins radioed for back up at this time, feeling nervous for his own safety.

After Smith returned to the vehicle, Judkins asked if she was license to drive and she stated she was but could not provide a driver's license. She also told Judkins the vehicle was hers and she had just purchased it and it was insured but later claimed the salesman told her she didn't need insurance to drive it off the lot. Judkins approached the other two passengers and asked for identification. One did not have identification but identified herself as Latice Tate, a relative of Charles Tate. The other passenger passed his state identification card to Judkins. Judkins testified that he, Derek Lee Preston [Preston], looked familiar but that he could not place him until he saw the name on the identification card and "[a]s soon as I saw the name on the ID, I remembered who he was."

Judkins knew who Preston was because he had a history of domestic violence calls and some gun cases in the precinct. Judkins had

been on some of the calls himself but also remembered information being disseminated in roll call about officer safety and Preston's name came up. Judkins also knew at the time of the stop that Preston's girlfriend had an order for protection against Preston.

After running the names of everyone in the vehicle, none had outstanding warrants and none were validly licensed to drive the vehicle. Also, without proof of insurance, the vehicle could not be parked on a city street. When back-up officers arrived, Judkins asked the occupants of the vehicle to get out so the vehicle could be searched before it was impounded, as required by police policy.

During his pat-down search of Preston, Officer Tyrone Barz [Barz] felt a hard cylinder on the right side of Preston's jacket. Barz asked Preston if he knew what the item was, and Preston responded that he had a permit to purchase the firearm. Barz found a loaded revolver in an inner pocket of the jacket. Preston also told Barz to check his left side jacket pocket, where Barz found marijuana, crack cocaine and a crack pipe. Barz placed Preston under arrest. Barz learned the Preston was on probation for a domestic assault charge.

Preston was charged with being a felon in possession of a firearm. The district court concluded that the officers did **not** have reasonable suspicion as required for a pat-down search under *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (emphasis added). The government appealed.

Argument: Preston does not contest the lawfulness of the initial stop or his removal from the vehicle as part of a valid impound search, leaving the sole issue on appeal whether the pat-down search was constitutionally permissible.

The Fourth Amendment forbids unreasonable searches and seizures and usually requires police to obtain a warrant before conducting a search. *United States v. Roggeman*, 279 F.3d 573, 577 (8th Cir. 2002) (citations omitted). There is an exception to the warrant requirement that permits a limited search for a weapon if there is a reasonable suspicion that the suspect is armed and poses a danger to officers or others. *Terry*, 392 U.S. at 29.

“Officers may conduct a protective pat-down search for weapons during a valid stop . . . when they have objectively reasonable suspicion that a person with whom they are dealing ‘might be armed and presently dangerous and criminal activity might be afoot.’” *United States v. Robinson*, 664 F.3d 701, 704 (8th Cir. 2011) (quoting *United States v. Davis*, 202 F.3d 1060, 1063 (8th Cir. 2000)). “In determining whether reasonable suspicion exists, we consider the totality of the circumstances in light of the officers’ experience and specialized training.” *United States v. Davis*, 457 F.3d 817, 822 (8th Cir. 2006) (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). “[A] pat-down is permissible if a ‘reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.’” *United States v. Horton*, 611 F.3d 936, 941 (8th Cir. 2010) (quoting *Terry*, 392 U.S. at 27). “In examining the relevant facts and inferences, we must keep in mind that ‘minimally intrusive weapons searches’ at traffic stops will more likely be reasonable because of the ‘inherent danger’ of traffic stops.” *United States v. Shranklen*, 315 F.3d 959, 962 (8th Cir. 2003) (quoting *United States v. Menard*, 95 F.3d 9, 11 (8th Cir. 1996)).

Preston argues that a criminal record, standing alone, is not sufficient to create a reasonable suspicion to support a search or

seizure. The Court concluded that considering the facts collectively, this situation arose out of a nighttime traffic stop. See *Shranklen*, 315 F.3d at 962 (noting the inherent danger of traffic stops); *United States v. Roggeman*, 279 F.3d at 578 (holding that the fact that a traffic stop takes place at night goes to concerns about officer safety). Further, by walking up the street while looking back at Judkins and then knocking on the door of a home whose occupants were visible but who refused to answer, Smith appeared to be attempting to create a distraction. Moreover, the driver of the vehicle did not have a license and the vehicle was registered to a car lot. See *United States v. Garcia*, 441 F.3d 596, 599 (8th Cir. 2006) (citing *Shranklen*, 315 F.3d at 963) (concluding that lack of proof of ownership and valid driver's license supported a finding of reasonable suspicion that defendant might be armed and dangerous). These factors contributed to Judkins's suspicion that criminal activity was afoot and might present a threat to officer safety, as evidenced by Judkins's call for back-up prior to his discovering that the rest of the occupants lacked valid driver's licenses and prior to learning Preston's identity.

Once Judkins learned Preston's identity, he knew that Preston had been involved in prior cases in the second precinct involving domestic violence and guns. Because the most recent of these incidents occurred three years prior to the stop at issue here, Preston argues that such information, without more, was stale and could not create reasonable suspicion. But "[t]here is no bright-line test for determining when information is stale." *Stachowiak*, 521 F.3d at 856 (citing *United States v. Koelling*, 992 F.2d 817, 822 (8th Cir. 1993)); see also *Garcia*, 441 F.3d at 599

(holding that a prior drug conviction, and driving a car owned by neither the passenger nor driver who were both without valid driver's licenses created reasonable suspicion). The Court believed that these prior incidents were relevant when considered with Judkins's knowledge that Preston's girlfriend had an order for protection against him and that Preston's name had been mentioned, around this time, at officer safety briefings. See *United States v. Davis*, 471 F.3d 938, 945 (8th Cir. 2006) (holding that unspecified prior intelligence that defendant possessed firearms was one of several articulable facts creating reasonable suspicion); *United States v. Walker*, No. 96-1124, 1996 WL 686160, at *1 (8th Cir. Dec. 2, 1996) (holding that a "safety warning" posted at police headquarters two or three weeks before a stop created reasonable suspicion for a pat-down).

The Eighth Circuit also recognized that allowing the occupants of the vehicle to walk away unsearched would be a further threat to officer safety. The Court concluded that the totality of the circumstances created an objectively reasonable suspicion that Preston might be armed and dangerous and thus the pat-down search was constitutionally permissible. The order granting the motion to suppress was reversed and the case sent back down to district court for further proceedings.

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on July 13, 2012. The case was from the United States District Court for the District of Minnesota. The case citation is *United States v. Preston*, 685 F.3d 685 (8th Cir. 2012).

Brooke Lockhart
Deputy City Attorney

Supreme Court of Arkansas Holds That DUI Breath Test is Admissible Evidence When Deputy Performed Test in Jurisdiction Outside the Stop

Facts Taken From the Case: On August 8, 2010, Deputy Shawn Harris of the Pope County Sheriff's Office stopped a vehicle driven by Mackenzie Pickering after observing the vehicle travel onto the shoulder and cross the center line. Deputy Harris smelled an odor of intoxicants on Pickering's breath and saw that his eyes were bloodshot and slightly glassy. After performing field sobriety tests, Deputy Harris placed Pickering under arrest for suspicion of underage driving under the influence (DUI). Deputy Harris then transported Pickering from Pope County (where the stop occurred) to the Dardanelle Police Department located in Yell County. After Deputy Harris read Pickering his DUI statement of rights, Pickering agreed to take a breathalyzer test and showed to have a blood-alcohol level of .065.

Deputy Harris later explained that he transported Pickering to the Dardanelle Police Department since he was not certified to operate the new blood-alcohol content (BAC) analysis machine, the BAC Intoxilyzer, which had been installed at the Pope County Sheriff's Office and the Russellville Police Department. Deputy Harris testified that these were the only two BAC machines located in Pope County, and he was not yet certified on the machines because he had only recently returned from medical leave. Deputy Harris also testified that at the time of the arrest (approximately 2:33 a.m.), there was only one other officer working. Since that officer was busy on another call, Deputy Harris said that his only other option was to transport Pickering to another county to conduct the BAC test.

Deputy Harris conceded that he had not checked with the Russellville Police Department to see whether it had an officer available that could administer the BAC test to Pickering. Deputy Harris also agreed that St. Mary's Hospital, which is located in Pope County, could have performed a blood or urine test that could have been sent to the State Crime Lab for testing. Deputy Harris said that the standard department policy was to use a BAC machine.

Procedural Facts Taken From the Case: Pickering was found guilty of underage DUI in Pope County District Court, and thereafter filed an appeal to the Pope County Circuit Court. On May 24, 2011, Pickering filed a motion to suppress asking the Circuit Court to suppress all evidence, namely the results of the breathalyzer test. Pickering argued that following his arrest, he was taken from Pope County to Yell County, which was outside of Deputy Harris' jurisdiction. Pickering claimed that this resulted in an illegal detention.

In response, the State argued that Arkansas law does not prevent a certified law-enforcement officer from transporting a lawfully arrested person outside the officer's territorial jurisdiction. Alternatively, the State argued that Pickering had waived any argument regarding the seizure of this evidence by consenting to the breathalyzer test.

In an order filed July 26, 2011, the Circuit Court denied the motion to suppress and said that "Deputy Harris was justified under these circumstances in transporting Defendant out of his jurisdiction and did not lose custody. The test had to be given without delay and in accordance with Health Department regulations." On September 12, 2011, a bench trial was held in front of the Circuit Court, and Pickering was found

guilty of underage DUI. Pickering appealed his case to the Supreme Court of Arkansas, which accepted certification of the case because it involved an issue of first impression that needed clarification.

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

Pickering claimed that the Circuit Court erred in denying his motion to suppress. In particular, Pickering argued that under Arkansas Rule of Criminal Procedure 4.6., any arrested person must be taken promptly to a jail, police station, or other similar place, and can be taken to some other place only if requested by the arrested person or if necessary to have the arrested person identified. Pickering said that he did not ask to be taken to Yell County, it was not necessary for his identification, Deputy Harris had more than sufficient time and opportunity to follow the law, and there was no urgency presented.

The State argued that the breath test was a valid search performed with Pickering's consent and pursuant to valid exigent circumstances of Pickering's falling blood content. Additionally, the State pointed out that under the implied consent provision of the DUI law, any underage person who operates a motor vehicle or is in actual physical control of a motor vehicle is deemed to have given consent to a chemical test of his blood, breath, or urine for the purpose of determining the alcohol content of his breath or blood if the person is arrested for any offense alleged to have been committed while under the influence of alcohol. The State noted that Pickering consented by signing the consent form before taking the breath test. Furthermore, the State claimed that the search was not unreasonable because Deputy Harris had a reasonable explanation for performing the breath test in Yell County, and time was a

valid exigent circumstance since blood-alcohol content decreases with the passage of time.

The Arkansas Supreme Court (Court) first set forth the standard of review. The Court said that when reviewing the denial of a motion to suppress evidence, it conducts a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. Furthermore, the Court said that a finding is clearly erroneous when the appellate court is left with the definite and firm conviction that a mistake has been made. Finally, the court will defer to the superiority of the circuit court judge to evaluate the credibility of witnesses who testify at a suppression hearing.

The Court said that the issue to be determined in the case before it is whether the breathalyzer test administered by Deputy Harris, outside his territorial jurisdiction, was an unlawful search under the Fourth Amendment. In setting forth the applicable law, the Court stated that the Fourth Amendment of the U.S. Constitution provided that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Additionally, the Court noted that the U.S. Supreme Court has held that compulsory administration of a blood test is subject to the constraints of the Fourth Amendment (see *Schmerber v. California*, 384 U.S. 757 (1966)), and that "subjecting a person to a breathalyzer test, which generally requires the production of alveolar or deep lung breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in

Schmerger, should also be deemed a search." Quoting *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 616-17 (1989). Finally, the Court said that the Arkansas General Assembly had codified four instances in which local police officers are authorized to act outside their territorial jurisdiction: (1) fresh pursuit cases; (2) when the officer has a warrant for arrest; (3) when a local law enforcement agency requests an outside officer to come into the local jurisdiction, and the outside officer is from an agency that has a written policy regulating its officers when they act outside their jurisdiction; and (4) when a county sheriff requests that a peace officer from a contiguous county come into that sheriff's county and investigate and make arrests for violations of drug laws.

Pickering cited three cases in support of his argument that the results of the breath test should be suppressed: *Davis v. Mississippi*, 394 U.S. 721 (1969) (a case which made clear that the Fourth Amendment applies to both arrests and investigatory detentions); *State v. Marran*, No. 94-0525A, 1996 WL 937019 (an unpublished opinion from the Rhode Island Superior Court where the court suppressed the results of the breath test on the premise that the defendant was unlawfully detained since he was taken outside the jurisdiction of the law enforcement agency); and *Thomas v. State*, 65 Ark. App. 134 (1999) (a case where the Arkansas Court of Appeals reversed the denial of the defendant's motion to suppress since the State conceded that the officer stopped and detained the defendant outside of his territorial jurisdiction without a warrant, and the stop and detention did not fit any of the four situations wherein an officer may arrest outside his territorial jurisdiction).

The Court held that Deputy Harris' actions were both reasonable and lawful, and therefore the Court affirmed the Circuit Court's denial of Pickering's motion to suppress. The Court said that Pickering's reliance on *Davis v. Mississippi* was misplaced since the fact that the officers in that case drove the defendant to another jurisdiction during his second detention was not discussed in the opinion and does not appear to be a factor in the court's decision. Furthermore, the Court agreed with the State's position that *Thomas v. State* is distinguishable from the Pickering facts because the cases that discuss the four instances authorizing a police officer to act outside his jurisdiction pertain only to an officer's authority to *apprehend* an offender. Finally, the Court distinguished *State v. Marran* by noting that it was not only an unpublished opinion from a lower court, but also an opinion that the Rhode Island Supreme Court chose not to follow in *State v. Hagan*, 819 A.2d 1256 (R.I. 2003). In conclusion, the Court cited with approval the reasoning used by the Rhode Island Supreme Court in *State v. Hagan*, which in part read, "Most notably under the circumstances now before us, in which the officer acted in apparent good faith, upon consent, and in light of the urgency of obtaining blood alcohol evidence before it is metabolized in the blood, we are satisfied that [the officer] acted pursuant to his lawful authority.

Case: This case was decided by the Supreme Court of Arkansas on June 21, 2012, and was an appeal from the Pope County Circuit Court, Honorable William M. Pearson, Judge. The case citation is *Pickering v. State*, 2012 Ark. 280.

Taylor Samples
Deputy City Attorney

Congratulations to the Springdale Police Officers that Completed the Legal Survival Skills for Rookies Class

week class entitled, "Legal Survival Skills for Rookies." Congratulations to all the officers who completed the class. Their pictures are set out following this article.

From April 30 – May 4, 2012, our office, in cooperation with SPD, conducted a one



Pictured from left to right
Jake Loudermilk, Walter Mercado, Ken Layton, John Mackey,
Mark Bradley and Jacob Canoy

**Election Day – Tuesday,
November 6, 2012**

As most of you know, Election Day will be coming up Tuesday, November 6, 2012. In years past, questions have arisen on what kind of campaigning can be done close to the polls. In regard to what is lawful as far as campaigning at the polls, you should familiarize yourself with the following from Ark. Code Ann. §7-1-103(9)(A):

“no person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever in the building or within one hundred feet (100') of the primary exterior entrance used by voters to the building containing the polling place on election day.”

Also, when early voting occurs at a facility other than the County Clerk's Office (such as in Springdale since the County Clerk's Office is in Fayetteville), the same rules apply as set out above and no electioneering of any kind whatsoever may be done in the building or within 100 feet of the primary exterior entrance used by voters to the building containing the polling place.

Jeff Harper
City Attorney



**Springdale Passes Ordinance
on Soliciting at Commercial
Businesses Within the City**

On August 28, 2012, the City of Springdale passed Ordinance No. 4619, which is in effect, and which relates to soliciting at commercial and industrial businesses. Unlike the residential door to door ordinance, this ordinance does not require solicitors at commercial or industrial business to obtain a peddlers/solicitors permit, but it does prohibit a solicitor or peddler, as defined under the ordinance, from entering upon any commercial or industrial business that has posted at the entry of the business a decal or sign bearing the words, "No Soliciting/No Peddling," "No Peddlers," "No Solicitors," or other words of similar import. As is the case in the residential door to door ordinance, there are exemptions for officers or employees of the city, county, state, or federal government when on official business, and for charitable activities on behalf of a charitable organization, or activities related to religious purpose or political purpose as defined in the ordinance. A copy of the ordinance is attached as the back page to this edition of C.A.L.L. If you should have any questions, let me know.

Jeff Harper
City Attorney



AN ORDINANCE CREATING SEC. 82-4 OF THE CODE OF ORDINANCES OF THE CITY OF SPRINGDALE, ARKANSAS, RELATING TO PEDDLING AND SOLICITING AT INDUSTRIAL AND COMMERCIAL BUSINESSES WITHIN THE CITY OF SPRINGDALE, ARKANSAS; TO DECLARE AN EMERGENCY AND FOR OTHER PURPOSES.

WHEREAS, the City Council for the City of Springdale, Arkansas passed an amended door to door solicitation ordinance that applied to private residences, which went into effect on July 1, 2012;

WHEREAS, since the ordinance was passed, persons operating businesses within the City of Springdale have requested that the prohibition on solicitors or peddlers apply to businesses within the City of Springdale, Arkansas, when the business has a posted "no solicitor or peddler" sign;

WHEREAS, the City finds a substantial interest in protecting the well-being, tranquility, and the privacy of persons operating businesses within the City of Springdale, Arkansas who want to be free from the interference with business and the annoyance caused by peddlers or solicitors who enter their business when "no soliciting/peddling" signs are posted.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL FOR THE CITY OF SPRINGDALE, ARKANSAS, that Sec. 82-4 is hereby added to the Code of Ordinances of the City of Springdale, Arkansas, as follows:

Sec. 82-4. – Solicitation/peddling at commercial and industrial businesses.

(a) *Definitions.* The following words, terms and phrases and their derivations, when used in this section, shall have the meanings ascribed to them in the section, except where the context clearly indicates a different meaning:

(1) *Charitable activity* means any activity represented to be carried on for unselfish, civic or humanitarian motives or for the benefit of others and not for private gain and means, and includes patriotic, philanthropic, social service, health, welfare, benevolent, educational, civic, cultural or fraternal;

(2) *Charitable organization* means a non-profit organization holding a tax exemption certificate from the Internal Revenue Service pursuant to §501 et. seq., and any amendments thereto.

(3) *City* means City of Springdale, Arkansas.

(4) *Political purpose* shall mean any form of communication related to a political issue, a particular candidate to a position or non-partisan office, a political committee, or to a political party;

(5) *Religious purpose* shall mean the use of money or property for the support of a church, religious society or other religious sect, group, or order.

(6) *Peddler* means any person who goes upon the premises of any commercial or industrial business in the City, not having been invited by an authorized representative of the business thereof, carrying or transporting goods, wares, merchandise or personal property of any nature and offering the same for sale.

(7) *Peddling* includes all activities ordinarily performed by a peddler as indicated by the previous paragraph.

(8) *Solicitor* means any person who goes upon the premises of any commercial or industrial business in the City, not having been invited by an authorized representative of the business thereof, for the purpose of taking or intending to take orders for the sale of goods, wares, merchandise or other personal property of any nature for future delivery, or for services to be performed in the future.

(9) Solicitation or soliciting includes all activities ordinarily performed by a solicitor as indicated in the previous paragraph.

(b) *Obtaining "no soliciting/no peddling" decal or sign.* The city clerk shall provide any representative of any commercial or industrial business of the City a decal which reads, "no soliciting/no peddling." This decal may be posted at the front of the any commercial or industrial business in the City, and by posting said notification, any solicitor or peddler has notice that soliciting or peddling at this business is prohibited by city ordinance. The city clerk shall also have signs that may be used instead of the decal, but any representative of a commercial or industrial business that wants a sign must pay the city's cost to obtain the sign.

(c) *Prohibition.* It is unlawful for any solicitor or peddler to enter upon any commercial or industrial business within the City when the premises has posted at the entry of the business a decal or sign bearing the words, "no soliciting/no peddling," "no peddlers," "no solicitors," or other words of similar import.

(d) *Penalty.* Any violation of this section shall be deemed a nuisance and punishable by a fine as provided by section 1-9

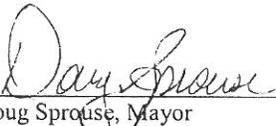
(e) *Exemptions.* The following shall be exempt to all provisions of this section:

(1) Officers or employees of the city, county, state, or federal government, or any subdivision thereof when on official business;

(2) Charitable activities on behalf of a charitable organization, or activities related to a religious purpose or political purpose.

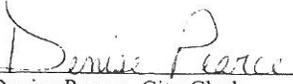
Emergency Clause. It is hereby declared that an emergency exists and this ordinance, being necessary for the preservation of the health, safety and welfare of the citizens of Springdale, Arkansas, shall be in effect immediately upon its passage and approval.

PASSED AND APPROVED, this 28th day of August, 2012.



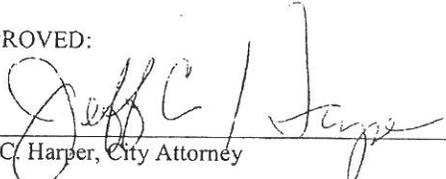
Doug Sprouse, Mayor

ATTEST:



Denise Pearce, City Clerk

APPROVED:



Jeff C. Harper, City Attorney