

*Merry Christmas  
to all  
and to all a goodnight!*



December 31, 2012

City Attorney Law Letter

Issue 13-01

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## Thanks for the Support of C.A.L.L.

The *City Attorney Law Letter (C.A.L.L.)* was first published by the Springdale City Attorney's Office on July 1, 1997. As you know, *C.A.L.L.* is published four times a year, and this is the 63<sup>rd</sup> edition of *C.A.L.L.* that I have been a part of.

As most of you know, December 31, 2012 will be my last day as City Attorney of the City of Springdale, as I will become Springdale District Judge on January 1, 2013. I want to thank all Springdale Police personnel for their support of *C.A.L.L.* throughout the 15 1/2 years that *C.A.L.L.* has been published. *C.A.L.L.* has also been well received throughout law enforcement in the State of Arkansas, with copies provided to members of the Arkansas State Police, Washington County and Benton County Sheriff's Offices, Rogers Police Department, and Bentonville Police Department. I even once received a call from a law enforcement officer in Illinois who read *C.A.L.L.* online.

Even though I am leaving my job as City Attorney, my successor, Ernest Cate, has told me that he plans on continuing the *C.A.L.L.* publication. Because Ernest worked for the City Attorney's Office for 12 1/2 years, he has already contributed many articles to *C.A.L.L.* and knows how important it is to have communication between the City Attorney's Office and Springdale law enforcement.

Thanks again.

Jeff Harper  
City Attorney



## Arkansas Court of Appeals Holds that Motion to Suppress Evidence was Properly Denied Since Legitimate Purpose of Stop was Ongoing

**Facts Taken from the Case:** On October 26, 2010, Corporal Trenton Behnke of the Arkansas State Police stopped a vehicle travelling east on Interstate 40 for an improper lane change and following too close. The vehicle contained the following three people: Leonard Maysonet (driver), Ronald Jackson (front-seat passenger), and John Fykes (back-seat passenger). Maysonet provided Trooper Behnke his driver's license and a vehicle-rental agreement that showed Jackson as the renter of the vehicle. During his initial encounter with the vehicle and its occupants, Trooper Behnke observed that the four-door pickup truck contained fast-food wrappers, a large road atlas, and a single small suitcase. Also, Trooper Behnke noticed that according to the terms of the rental agreement, the vehicle was due back at the rental company on October 25, which was the day before.

Trooper Behnke next questioned Maysonet, who said that he and the passengers were returning to Memphis after visiting a cousin for a few days in Dallas. Trooper Behnke then questioned Jackson, who corroborated Maysonet's statement. Trooper Behnke took both Maysonet's and Jackson's driver's licenses to determine whether either had active warrants. While waiting for the database search results, Trooper Behnke became suspicious and asked Jackson for consent to search the vehicle, and Jackson refused to give consent. At this point, Trooper Behnke deployed his drug dog, Major, around the vehicle. Major alerted that the vehicle contained narcotics, and Behnke searched the vehicle. Prior to the

search of the vehicle, Jackson stated that there were four or five pounds of marijuana inside. After Jackson made this statement, Trooper Behnke arrested Jackson and read him *Miranda* rights. During the search, Trooper Behnke found five clear Ziploc bags filled with marijuana in the suitcase. All three men were taken to the sheriff's office, where they were again provided their *Miranda* rights on a written form. After being read his rights, Jackson said, "There's nothing for me to say because you already have my weed."

At the suppression hearing, the trial court suppressed the statement Jackson made at the scene about there being four to five pounds of marijuana in the car, finding that Jackson was in custody but was not informed of his rights. However, the trial court denied both the motion to suppress the physical evidence under Rule 3.1 and the Fourth Amendment and the motion to suppress Jackson's statement at the sheriff's office. Jackson was convicted of possession of marijuana with intent to deliver, and the trial court sentenced him to five years' imprisonment in the Arkansas Department of Corrections. Jackson appealed to the Arkansas Court of Appeals the trial court's denial of his motion to suppress evidence based on Ark. R. Crim. Pro. 3.1 and the Arkansas and United States Constitutions, his motion to suppress statements obtained in violation of *Miranda*, and his motion to suppress evidence based on an unreasonable search and seizure.

**Standard of Review, Argument, and Decision by the Arkansas Court of Appeals:** In setting forth its standard of review, the Arkansas Court of Appeals (Court) said that in reviewing a trial court's denial of a motion to suppress evidence, it conducts a de novo review based on the totality of the circumstances, reviewing

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 and proper deference to the trial court's findings. The Court said that it will reverse a trial court's finding only if its ruling is clearly against the preponderance of the evidence.

For his first argument, Jackson conceded that the initial stop of the vehicle was valid, but claimed that Trooper Behnke illegally detained him after the purpose of the stop had concluded and lacked reasonable suspicion to continue the investigation. The Court set forth in its entirety Ark. R. Crim. Pro. 3.1:

A law enforcement officer 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 person or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Additionally, the Court said that a law-enforcement officer, as part of a valid traffic stop, may detain a traffic offender while

completing certain routine tasks, such as computerized checks of vehicle registration, driver's license, criminal history, and the writing of a citation or warning. Furthermore, during this process, the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle. The officer may act on whatever information is volunteered. However, after these routine checks are completed, unless the officer has reasonably articulable suspicion for believing that criminal activity is afoot, continuing to detain the driver can become unreasonable.

The Court rejected Jackson's first argument and found that the legitimate purpose of the stop was ongoing, and additional reasonable suspicion was not required. The Court noted that Trooper Behnke testified that he was still waiting for the results of the database search, and while waiting for those results he asked for consent to search the vehicle, which Jackson denied. Trooper Behnke then deployed the drug dog, and the Court stated that officers do not need additional reasonable suspicion to allow the dog to sniff the exterior of the car. Furthermore, the Court quoted *Menne v. State*, 2012 Ark. 37, where the Arkansas Supreme Court said that "a stop is not complete until the warning citation and other documents are delivered back to the driver." The Court concluded that Trooper Behnke's routine tasks were not completed since Behnke was still waiting for the criminal history check when the drug dog was deployed and was also processing the warning citation for the traffic violation.

For his second argument, Jackson asserted that the drug dog was unreliable, and even if the stop was permitted, the subsequent search of the vehicle based on the dog's indication was unreasonable. The Court rejected this argument and said that an

indication by a reliable drug dog constitutes probable cause to conduct a warrantless search of a vehicle under the automobile exception. The Court said that at the suppression hearing, Trooper Behnke provided both his and his dog's training and certification records, and that was sufficient to establish the dog's reliability.

For his third and final argument, Jackson claimed that the trial court should have suppressed Jackson's statement given at the Sheriff's office as "fruit of the poisonous tree." In particular, Jackson pointed-out that he told Trooper Behnke at the scene that there were four to five pounds of marijuana in the vehicle, and later at the sheriff's office after being read *Miranda* rights Jackson said, "There's nothing else for me to say because you already have my weed." According to Jackson, admitting his second statement into evidence was improper under the doctrine enunciated by the U.S. Supreme Court in *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, the defendant confessed after being interrogated by police at the station without being read *Miranda* rights, and then confessed again after a twenty-minute break and after being read *Miranda* rights. The Supreme Court in *Seibert* excluded both statements on the basis that the "question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted."

The Arkansas Court of Appeals disagreed with Jackson's argument and affirmed the trial court's denial of Jackson's motion to suppress the second statement he made while at the sheriff's office. The Court reasoned that no evidence of coercion exists and that Jackson's statements at the scene were given in response to the trooper's request to search the vehicle. The Court said that Jackson's situation was different

than the facts presented in *Seibert* since Jackson was questioned briefly on the side of the road and confessed again after being taken to the sheriff's office and read his *Miranda* rights. Finally, the Court said there is no evidence that Jackson's statement given at the scene resulted from a question-first policy like the one given in *Seibert*, where the officer admitted that the confession resulted from a conscious strategy to withhold *Miranda* warnings.

**Case:** This case was decided by the Arkansas Court of Appeals on September 19, 2012, and was an appeal from the Lonoke County Circuit Court, Honorable Judge Barbara Elmore. The case citation is *Jackson v. State*, 2012 Ark. App. 508.

Taylor Samples  
Deputy City Attorney



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

### **Facts Taken From the Case:**

On September 13, 2010, at about 1:11 a.m., Corporal Matthew Sutley was in the area of Gregg and Douglas Streets in Fayetteville, Arkansas. He pulled a vehicle over on North Gregg Street for "bright-lighting" other vehicles on Dickson Street. After giving the driver of the stopped vehicle a verbal warning, Corporal Sutley heard yelling nearby and noticed a half-undressed woman lying in a brushy area a short distance away along the side of Gregg Street. Because they were not intoxicated, Corporal Sutley let the occupants of the car initially stopped leave the scene.

Corporal Sutley parked his patrol vehicle in the southbound lane of traffic, facing north, and got out to investigate the yelling. He discovered a female individual, intoxicated and naked from the waist up, in a grown-up-brush area near a parking lot. Corporal Sutley called for backup. Four more patrol vehicles arrived, two from the Fayetteville Police Department and two from the University of Arkansas Police Department, and they also parked along Gregg Street in such a way as to create an obstruction in traffic flow.

While the officers were attempting to deal with the intoxicated female, two vehicles slowly passed between the police vehicles in the road, a Jeep Grand Cherokee heading north and a BMW sedan heading south. During this time, there were no officers in the roadway directing traffic, none of the officers were wearing vests, there were no cones, and none of the police vehicles had their blue lights on. Essentially, there was nothing to let people know about the upcoming obstruction.

At approximately 1:20 a.m., Taylor Larrick Ward (appellant) turned onto Gregg Street traveling north. As appellant approached the obstruction, Corporal Sutley called out to him with a raised voice that he was not going to fit. However, at that point, appellant's window was barely cracked.

The patrol-car video that was introduced into evidence indicates that appellant pulled forward slightly going north on Gregg Street, toward the patrol vehicles, but almost immediately stopped and began backing up the truck. At that time, Corporal Sutley effectuated the stop by taking one or two steps and knocking on appellant's back window. Appellant rolled down his window, and Corporal Sutley asked, "At what point did you think you were going to fit?"

As he began speaking with appellant, Corporal Sutley smelled the odor of intoxicants, and he stated that appellant looked intoxicated. Corporal Sutley ordered appellant to stop the truck and get out. He conducted field sobriety tests, after which appellant was arrested.

At a suppression hearing on March 9, 2012, the Washington County Circuit Court denied appellant's motion to suppress the evidence obtained on September 13, 2010. On April 16, 2012, appellant pled guilty, reserving an appeal of the denial of his suppression motion under Rule 24.3 to charges of driving while intoxicated ("DWI"), driving on a suspended drivers' license, violation of implied consent, and careless and prohibited driving. On May 9, 2012, a sentencing order was filed, and appellant filed his timely notice of appeal on May 10, 2012.

**Argument and Decision by the Arkansas Court of Appeals:** Appellant argued that Corporal Sutley's conduct in stopping and talking to him constituted a seizure in the context of the Arkansas Supreme Court's categorization of police-citizen encounters as explained in *Frette v. City of Springdale*, 331 Ark. 103, 108 (1998). In the present case, Corporal Sutley testified that it was the patrol cars of the officers on the scene, rather than civilian vehicles, that had the lanes of traffic on Gregg Street obstructed. Corporal Sutley acknowledged that appellant had committed no crime when he knocked on appellant's back window, and that if the police vehicles had not been creating an obstruction, appellant would have passed through the road.

Corporal Sutley testified that it was not his intention to create a seizure at that time. However, the Court noted that the Arkansas Supreme Court in *Frette* held a consensual encounter is transformed into a seizure when

a reasonable person would believe that he is not free to leave. Appellant submitted that he was blocked from leaving on three sides by the obstruction caused by the police vehicles, and to the back by Corporal Sutley. Appellant claimed that in this situation, a reasonable person would believe that leaving was not an option. As such, appellant asserted that Corporal Sutley's conduct constituted a seizure within the context of the Arkansas Supreme Court's categorization of police-civilian encounters. He argued that the particular circumstances surrounding the stop and subsequent seizure do not provide specific, particularized, and articulable facts leading to a reasonable suspicion that appellant was engaging in criminal activity that justified Corporal Sutley's actions. As such, appellant claimed that the motion to suppress evidence was improperly denied.

The State analogized this situation to a vehicle accident or other roadway obstruction that drivers often and unexpectedly happen upon and where police often require the drivers to stop and turn around or wait, unable to proceed, until the way is cleared. Corporal Sutley indicated that, in the ordinary performance of police duties, he found himself needing to direct appellant's vehicle because, in backing up toward the officers attending to the woman in the ongoing incident, appellant placed the officers in harm's way.

Appellant stopped his truck after Corporal Sutley got his attention by knocking on the window. In *Thompson v. State*, 303 Ark. 407 (1990) a police officer had observed Thompson's vehicle parked with its light on and motor running in the same parking space twice over a ten-minute period, and approached to investigate, stating that the reasons were that something might be wrong with the driver or that something might be

going on that should not be. Here, Corporal Sutley testified that he wanted the truck to stop backing up in order to protect his fellow officers. Appellant rolled down his window and Corporal Sutley approached. At that time, Sutley noticed the strong odor of intoxicants coming from the truck cab, that appellant's eyes were "bloodshot, glassy, watery," and that appellant looked intoxicated.

The trial court believed Corporal Sutley's testimony that the encounter was nothing more than a police officer attempting to direct traffic, specifically appellant's vehicle, on a dark, congested street amidst a crime scene where other officers were present and their safety was at issue. The Arkansas Court of Appeals deferred to the trial court's credibility determination. While protecting the officers was a specific, particularized, and articulable explanation for knocking on appellant's back window to get his attention, the Arkansas Court of Appeals held that the odor of intoxicants and appellant's appearance provided Corporal Sutley with the requisite suspicion to investigate appellant for the possible offense of DWI. Pursuant to Arkansas Rule of Criminal Procedure 3.1, Corporal Sutley then had a duty to investigate further because it is unlawful for any person who is intoxicated to operate or be in actual physical control of a motor vehicle. *See* Ark. Code Ann. § 5-65-103(a) (Repl. 2005). Additionally, after seeing appellant and smelling the intoxicants, Corporal Sutley also had the authority to arrest appellant for DWI. *See King v. State*, 42 Ark. App. 97 (1993).

The Arkansas Court of Appeals further held that even assuming that the investigatory

stop began the moment Corporal Sutley knocked on appellant's window, Corporal Sutley had a reasonable suspicion, based on his experiences as a police officer, that appellant was endangering the police officers on the street behind him, and accordingly, he was within his authority to require appellant to stop the vehicle. When appellant rolled down his window and the odor of alcohol became apparent, Corporal Sutley then had reasonable suspicion to have him step out of the truck. Had this been a traffic-accident scene where appellant was being told to turn around, the same odor of alcohol would cause an officer directing traffic in that scenario to order appellant aside to investigate for the same reason. The Arkansas Court of Appeals held that there was no investigatory stop as contemplated by the Fourth Amendment until after appellant rolled down his window, and the odor of intoxicants and appellant's appearance gave rise to reasonable suspicion to investigate and provided cause to arrest. Accordingly, the Court held that the trial court did not err in denying appellant's motion to suppress and the judgment of the trial court was affirmed.

**Case:** This case was decided by the Arkansas Court of Appeals on November 14, 2012, and was an appeal from the Washington County Circuit Court, Honorable George C. Mason, Judge. The case cite is *Ward v. State*, 2012 Ark. App. 649.

Jeff Harper  
City Attorney



**Arkansas Court of Appeals  
Affirms DWI Conviction Where  
No Bad Driving Observed, No  
Field Sobriety Tests Performed,  
and Defendant Blew .067 BAC**

**Facts Taken From the Case:** On July 9, 2010, at around 8:40 p.m., Arkansas State Police Corporal Charles Lewis observed a vehicle driving on State Highway 5 with a defective headlight and either a broken windshield or broken headlight. Lewis turned on his blue lights, and the vehicle immediately pulled over to the right shoulder and stopped. Lewis approached the vehicle and made contact with the driver, Lisa Foster. As they talked, Lewis noticed a "very present" odor of alcohol, and Foster admitted to having "a couple of beers" (Foster later testified that her husband spilled a beer in the car, and that she had a couple of beers earlier in the day around lunchtime; yet on cross-examination, Foster said that she had only one beer with her lunch). Lewis noticed that Foster was very unsteady when she exited the car, and Foster told Lewis that she could not stand because she was wearing flip-flops.

Foster walked to the front of the car but had to keep leaning on the car. Lewis gave Foster a portable breath test, and while Lewis walked back to his patrol car, Foster nearly fell over (Foster later testified that she had to hold the heavy car door open because she parked on an incline and that she slipped on the gravel in her flip-flops). Lewis grabbed Foster by the shoulders and steadied her and explained to her she was being placed under arrest for suspicion of driving while intoxicated. Foster again said she "had just had a couple of beers," yet according to Lewis only moments later Foster said she had also taken some medicine earlier in the day and had drunk

beer since taking the medicine. Lewis said that he did not perform field sobriety tests on Foster because he did not want to risk her falling due to the unpaved or unfinished surface where Foster was pulled over and her unsteadiness on her feet and difficulty standing. Lewis found two hydrocodone pills in Foster's purse (Foster later testified that she did not take any medication that day and that the hydrocodone pills belonged to her father and accidentally ended up in her purse). Lewis conceded on cross-examination that while he was taking Foster's background information at the scene of the stop, Foster appeared visibly upset and told him that she had just learned her father was hospitalized and near death. Foster and her mother, Erma Price, also testified that Erma told Foster about Foster's dying father shortly before Foster was stopped (about thirty minutes prior to being stopped according to Foster). Lewis also conceded that the odor of intoxicants that he smelled in the car could have come from either Foster or her husband, who was visibly intoxicated.

Foster was taken to the Cabot police department, where she blew .067 on the blood-alcohol-content machine. After administering the breath test, Foster also provided a urine sample (even though Lewis never received the result from the urine test). Foster was found guilty in Lonoke Circuit Court of driving while intoxicated, and she was sentenced to sixty days in jail and a \$1,000.00 fine. Foster filed a timely notice of appeal to the Arkansas Court of Appeals on February 22, 2012.

**Argument and Decision by the Arkansas Court of Appeals:** Foster's sole argument on appeal was that there was insufficient evidence to support her DWI conviction. The Arkansas Court of Appeals (Court) noted that the test for determining the

sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. Additionally, the Court said that substantial evidence is evidence forceful enough to compel a conclusion with reasonable certainty, without resort to conjecture. Finally, the Court stated that it reviews the evidence in the light most favorable to the state, considering only the evidence that tends to support the verdict.

The Court affirmed Foster's DWI conviction, stating that it found no merit to her argument. The Court first set forth the rule provided in Ark. Code Ann. § 5-65-103(a), where it is stated that it is unlawful for any person who is intoxicated to operate or be in actual physical control of a motor vehicle. Additionally, "Intoxicated" is defined in Ark. Code Ann. § 5-65-102(2) as

influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury to himself and other motorists or pedestrians.

In its reasoning, the Court said that proof of blood-alcohol content is not necessary to sustain a DWI conviction, but that such proof is admissible as evidence tending to prove intoxication. Furthermore, the Court noted that the observations of police officers with regard to the smell of alcohol and actions consistent with intoxication can constitute competent evidence to support a DWI charge. Finally, The Court said that discrepancies in the proof go to the weight or credibility of the evidence, which is for

the fact-finder to resolve, and the judge is not required to believe the testimony of any witness, especially the accused, who is the person most interested in the outcome of the proceedings. In conclusion, based on the evidence presented during trial, the Court could not say that the circuit court had to resort to speculation and conjecture to conclude that Foster was guilty to DWI. Therefore, Foster's conviction was affirmed.

**Case:** This case was decided by the Arkansas Court of Appeals on November 7, 2012, and was an appeal from the Lonoke County Circuit Court, Honorable Barbara Elmore, Judge. The case citation is *Foster v. State*, 2012 Ark. App. 640.

Taylor Samples  
Deputy City Attorney



## **Arkansas Court of Appeals Reverses Trial Court Since Officers Had Neither Reasonable Basis to Believe Suspect Was Present When Executing Arrest Warrant Nor Exigent Circumstances to Permit Entry Into Home**

**Facts Taken From the Case:** Elfido Gutierrez (Elfido) was arrested on October 14, 2010, when federal agents were attempting to execute an arrest warrant for his nephew, Alonzo Gutierrez (Alonzo), at a residence in Vilonia, AR. Special Agent Jon Vannatta of the Drug Enforcement Administration was tasked with finding Alonzo. The State introduced into evidence an arrest warrant for Alonzo Gutierrez dated October 8, 2010, which was issued by the United States District Court for the Eastern

District of Arkansas. During the course of a long-term investigation, Alonzo had been observed at 83 Hollands Hill Loop in Vilonia on numerous occasions, including following narcotics transactions. On October 13, 2010, agents observed Alonzo in the front yard of 83 Hollands Hill Loop, where agents believed he was staying, and Alonzo's truck was parked there. At around 6:00 a.m. on October 14, 2010, agents initiated ground and aerial surveillance to determine whether anyone was at the residence. Agent Vannatta said that the agents' goal was to allow people to leave the residence and to then conduct traffic stops to make it safe for Alonzo to be taken into custody. Vannatta said that around 6:20 a.m., the aerial surveillance team notified the ground team that headlights from a vehicle were seen in the woods, and that the vehicle was on the adjoining property. Vannatta stated that around 7:00 a.m., he did ground reconnaissance to see if he could locate the vehicle or any people at the residence. Vannatta did not see any vehicles at or around the residence, but he did notice that upstairs windows were open and that one window in the back of the residence was broken. Vannatta saw glass on the ground both inside and outside, and he thought that there could be a kidnapping because of a possible break in. Vannatta said that he had in the past encountered cases where people had attempted to break into rural stash houses, kidnap the occupants, and torture them. Vannatta stated that he thought Alonzo might still possibly be at the residence, which the agents knew was a stash house for crystal methamphetamine, and that crystal methamphetamine organizations are usually more violent and paranoid than other organizations.

The agents decided to enter the residence to look for Alonzo and make sure there was no foul play, and Vannatta entered through the

broken window. Vannatta later clarified on cross-examination that he "really didn't want to be sitting out there all day waiting to see if anything was going to happen," and they wanted to move forward. Vannatta also said that the agents made the decision to go in and secure the residence because of exigent circumstances. Agents announced themselves in both English and Spanish, and they heard movement upstairs. As he was securing the stairwell at the far end of the house, Vannatta heard what sounded like a bullet being chambered into a pistol. He alerted the rest of the team, yelled "police" and "come out." A woman appeared at the top of the stairs and indicated that there was another person upstairs. Vannatta and Agent Juan Storey then encountered Elfido Gutierrez and took him into custody. Officers did not find Alonzo or anyone else, but they did find in plain view controlled substances and drug paraphernalia. On Elfido's person, agents recovered \$850 in currency, a plastic baggy containing a white powdery substance found in his front pocket, aluminum foil with suspected crystal methamphetamine found in his other pants pocket, and numerous firearms in the bedroom that Elfido occupied.

Elfido filed a motion to suppress the evidence with the Circuit Court, arguing that the seizure violated the Fourth Amendment, Article 2 Section 15 of the Arkansas Constitution, and the Arkansas Rules of Criminal Procedure. The Circuit Court denied Elfido's motion to suppress, and it based its ruling on two separate grounds: (1) the existence of a valid arrest warrant that authorized the officers to enter the property, and (2) exigent circumstances as shown by the broken window and the surveillance that identified the residence as a stash house. Elfido was sentenced to 120 months' imprisonment on drug possession charges and 72 months' imprisonment on the

possession of a firearm by certain person charge, to be served concurrently. Elfido appealed the Circuit's Court decision to deny his motion to suppress to the Arkansas Court of Appeals.

**Argument and Decision by the Arkansas Court of Appeals:** The first issue that the Arkansas Court of Appeals (Court) had to decide was whether the agents had a reasonable belief that Alonzo Gutierrez was present when they entered the residence. In setting forth the applicable law, the Court quoted language from *Payton v. New York*, 445 U.S. 573 (1980), where the United States Supreme Court said that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." The Court said that the issue of whether the house was Alonzo's residence was waived for appeal since Elfido conceded to the Circuit Court that Alonzo resided at the house where Elfido was arrested. Furthermore, the Court said that under *Payton v. New York*, officers executing an arrest warrant at a residence must have (1) a reasonable belief that the suspect resides at the place to be entered and (2) reason to believe the suspect is present. Finally, the officers' assessment of the two-pronged analysis must not be accurate; instead, the officers must only "reasonably believe" that the suspect resides at the dwelling to be searched and is currently present at the dwelling. See *U.S. v. Risse*, 83 F.3d 212 (8th Cir. 1996).

The Court held that the Circuit Court's denial of Elfido Gutierrez's motion to suppress based on the existence of the arrest warrant was clearly erroneous. The Court reasoned that there must be some reasonable basis for officers to believe a suspect is

present in order to enter a residence to execute an arrest warrant, and that under these facts there was no vehicle present or any other reason to believe that Alonzo was there when agents made the decision to enter the house. Additionally, the Court noted that Alonzo had been seen at the residence the day before, but at that time his vehicle was there, thus making it even less likely that he was home the following day when his vehicle was not there. Finally, the Court pointed-out that Agent Vannatta admitted that he did not want to be "sitting out there all day waiting to see if anything was going to happen," so he decided to go into the house.

The second issue the Court had to decide was whether the facts of the case fit within the exigent circumstances exception to the search warrant requirement. According to Ark. R. Crim. Pro. 14.3,

An officer who has reasonable cause to believe that premises or a vehicle contain: (a) individuals in imminent danger of death or serious bodily harm; or (b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or (c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed; may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

The Court said that in *Steinmetz v. State*, 366 Ark. 222, the Arkansas Supreme Court explained that warrantless searches in private homes are presumptively unreasonable, and the State has the burden

to show that the warrantless activity was reasonable. Also, the Supreme Court in *Steinmetz* stated that probable cause is determined by using a totality-of-the-circumstances approach and exists when the facts and circumstances within the officers' knowledge are based on reasonably trustworthy information to warrant a person of reasonable caution to believe that an offense has been or is being committed. Finally, the Supreme Court in *Steinmetz* said that while there is no definite list of what constitutes exigent circumstances, exigent circumstances are those that require immediate aid or action and include the risk of removal or destruction of evidence, danger to the lives of police officers or others, and the hot pursuit of a suspect.

The Court held that the Circuit Court clearly erred when it denied Elfido Gutierrez's motion to suppress based on exigent circumstances. The Court noted that at the time the agents entered the home, they had conducted surveillance for over an hour, and they did not see or hear the window break nor see any movement from within the house. Also, Agent Vannatta's testimony about the violent nature of methamphetamine organizations and statement that he had seen instances where kidnapped individuals were being tortured, yet had no basis in this case for believing that a kidnapping was underway that morning, was according to the Court exactly the kind of potential or speculative harm that the Arkansas Court of Appeals has rejected as exceeding the scope of the imminent danger exception. For these reasons, the Arkansas Court of Appeals reversed the Circuit Court's rulings on the above two issues and remanded the case.

**Case:** This case was decided by the Arkansas Court of Appeals on November 7, 2012, and was an appeal from the Faulkner

County Circuit Court, Honorable Judge David L. Reynolds. The case citation is *Gutierrez v. State*, 2012 Ark. App. 628.

Taylor Samples  
Deputy City Attorney



## Tires of Motor Home Crossing Fog Line Upheld as Valid Traffic Stop

**Facts:** On July 31<sup>st</sup>, 2012, Thomas Coleman [Coleman] was driving his motor home on Interstate 80 in Hall County, Nebraska. Nebraska State Patrol Trooper Jason Bauer [Trooper Bauer] observed two vehicles with Florida license plates traveling under the posted speed limit on Interstate 80 and began following the vehicles. Trooper Bauer then observed the second vehicle, Coleman's motor home, swerve and the passenger-side tires cross over the fog line at the shoulder of the highway twice. Trooper Bauer stopped Coleman for driving on the shoulder.

Trooper Bauer asked Coleman to sit with him in his patrol car while the officer wrote a warning citation and checked Coleman's license and criminal history. Trooper Bauer asked Coleman if he had a criminal history, which Coleman denied. Dispatch was unable to check Coleman's criminal history with only a name and date of birth, so the officer relayed Coleman's social security number. Dispatch responded that Coleman had an extensive criminal history, including drug, robbery, and weapons offenses. Trooper Bauer again asked Coleman about any criminal history and if Coleman had ever been arrested and Coleman said he had not. Trooper Bauer questioned Coleman about drug use, and Coleman admitted he

used medically prescribed marijuana while in California a few months prior. Trooper Bauer inquired if Coleman had any medical marijuana on him and Coleman replied he did in the front part of the motor home. Trooper Bauer then placed Coleman in the back seat of his patrol care and entered the motor home.

Trooper Bauer conducted a sweep of the motor home to ensure it was unoccupied. In a large compartment under the bed, he located a black weapons-style bag. Trooper Bauer opened the bag which contained a high-point rifle and ammunition. Trooper Bauer confirmed with dispatch that Coleman was a convicted felon. Trooper Bauer then located marijuana in the front of the motor home.

After Coleman's motion to suppress the evidence was denied, he entered a conditional guilty plea to being a felon in possession of a firearm, reserving his right to appeal the district court's suppression decision. Coleman was sentenced under the armed career criminal sentence enhancement mandating a minimum 15 year prison sentence. Coleman's arguments on this enhancement will not be discussed in this article.

**Argument:** On appeal, Coleman first argued that there was no probable cause for the traffic stop. A traffic violation, no matter how minor, provides an officer with probable cause to stop the driver. *See United States v. Jones*, 275 F.3d 673, 680 (8th Cir. 2001). "An officer is justified in stopping a motorist when the officer 'objectively has a reasonable basis for believing that the driver has breached a traffic law.'" *United States v. Mallari*, 334 F.3d 765, 766-67 (8th Cir. 2003) (quoting *United States v. Thomas*, 93 F.3d 479, 485 (8th Cir. 1996)). The government argued that Coleman violated a

Nebraska Statute that stated it was a violation to drive on the shoulders of the highways. Trooper Bauer testified that he twice observed Coleman's motor home swerve over the fog line separating the right lane of the highway from the shoulder. The Eighth Circuit concluded that the case law at the time of the stop, led to the conclusion that Trooper Bauer had an objectively reasonable basis for believing Coleman violated the statute, and therefore had probable cause for the traffic stop. [Note: There is a Nebraska case being decided now on whether crossing the fog line momentarily will continue to be probable cause for a stop.]

Next, Coleman argued that the traffic stop was impermissibly extended. "A constitutionally permissible traffic stop can become unlawful, . . . 'if it is prolonged beyond the time reasonably required to complete' its purpose." *United States v. Peralez*, 526 F.3d 1115, 1119 (8th Cir. 2008) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). An officer may detain the occupants of a vehicle while performing routine tasks such as obtaining a driver's license and the vehicle's registration and inquiring about the occupants' destination and purpose. *See id.* "[I]f the officer develops reasonable suspicion that other criminal activity is afoot, the officer may expand the scope of the encounter to address that suspicion." *Id.* at 1120. Reasonable suspicion is "a particularized and objective basis' for suspecting criminal activity." *United States v. Linkous*, 285 F.3d 716, 720 (8th Cir. 2002) (quoting *Ornelas v. United States*, 517 U.S. 690, 699 (1996)).

Coleman argued that Trooper Bauer's questioning regarding drug use improperly exceeded the scope of a normal traffic stop. The Eighth Circuit disagreed, stating that Trooper Bauer was justified in asking

Coleman about drug use in order to eliminate drug use as a possible cause of Coleman's swerving. Thereafter, Coleman's dishonesty regarding his criminal history reasonably raised Trooper Bauer's suspicions and prompted him to ask clarifying questions. See *United States v. Riley*, 684 F.3d 758, 763-64 (8<sup>th</sup> Cir. 2012) (finding undue nervousness, conflicting answers, and misrepresentation of drug-related criminal history gave the officer reasonable suspicion criminal activity was afoot); *United States v. Suitt*, 569 F.3d 867, 872 (8th Cir. 2009) (finding evasive and incomplete answers gave the officer reasonable suspicion to prolong the traffic stop for additional questioning).

Even if Trooper Bauer lacked reasonable suspicion to extend the questioning, any intrusion on Coleman's Fourth Amendment rights was de minimis. Coleman's traffic stop was permissibly prolonged for a brief period because the state patrol dispatch was unable to obtain Coleman's personal history information by using only his name and date of birth. See *United States v. Olivera-Mendez*, 484 F.3d 505, 510 (8th Cir. 2007) ("When there are complications in carrying out the traffic-related purposes of the stop . . . police may reasonably detain a driver for a longer duration than when a stop is strictly routine."). After Trooper Bauer provided Coleman's social security number to dispatch and received Coleman's criminal history, Trooper Bauer's additional questioning was brief, lasting only a couple of minutes.

For his third argument, Coleman argues his Fifth Amendment rights were violated when Trooper Bauer questioned him without first advising Coleman of his *Miranda* rights. *Miranda* warnings are required when an individual has been subjected to custodial interrogation. See *Miranda v. Arizona*, 384

U.S. 436, 444-45 (1966). Although a motorist is technically seized during a traffic stop, *Miranda* warnings "are not required where the motorist is not subjected to the functional equivalent of a formal arrest." *United States v. Morse*, 569 F.3d 882, 884 (8th Cir. 2009); see also *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984) (holding *Miranda* warnings were not required where the defendant "failed to demonstrate . . . he was subjected to restraints comparable to those associated with a formal arrest"). The lower court found Coleman was seated in the front seat of Trooper Bauer's patrol car when he was questioned. Coleman was not handcuffed and had not been told his detention would be anything other than temporary. Trooper Bauer's tone was conversational and the questions were limited in number and scope. Based on the totality of the circumstances, the district court did not err when it found Coleman was not subjected to restraints comparable to those of a formal arrest. Trooper Bauer was not required to give *Miranda* warnings before questioning Coleman.

Coleman's final argument on appeal was the search of the motor home. Officers may search a vehicle without a warrant if they have probable cause to believe the vehicle contains contraband. See *United States v. Ross*, 456 U.S. 798, 800 (1982). This automobile exception applies equally to motor homes. See *California v. Carney*, 471 U.S. 386, 390-94 (1985). Coleman told Trooper Bauer there was marijuana in his vehicle, providing probable cause to search the vehicle for drugs. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825. Trooper Bauer could lawfully search every part of the motor home where marijuana might have

been, including under the bed where the weapon was found.

Assuming the trooper lacked probable cause to search beyond where Coleman told him the marijuana was located in the motor home, the trooper was justified, at the time, in performing a protective sweep to make sure no passengers were hiding in the motor home. *See United States v. Thomas*, 249 F.3d 725, 730 (8th Cir. 2001) (explaining the “search of the van was reasonably necessary for the officers’ personal safety in conducting the stop because other occupants in the van could pose a significant danger to the officers”).

Coleman argued the motor home was more like a residence than a vehicle, and as such, the sweep should have been limited to the space within Coleman’s immediate control. However, a motor home in transit on a public highway is being used as a vehicle and is therefore subject to a reduced expectation of privacy. *See Carney*, 471 U.S. at 392-93. In the context of a traffic stop, the Court has repeatedly held “officers may take such additional steps as are reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.” *Thomas*, 249 F.3d at 729 (quoting *United States v. Doffin*, 791 F.2d 118, 120 (8th Cir. 1986)) (internal quotation marks omitted). The district court found that the space under the bed was large enough to hide a person, and the sweep justifiably could extend to this area for the officer’s protection from a possible hidden assailant.

Once Trooper Bauer observed the weapons-type bag in plain view during the lawful protective sweep, and the bag was readily identifiable as a gun case, the trooper had probable cause to believe the bag contained contraband, *see, e.g., United States v. Banks*,

514 F.3d 769, 774-75 (8th Cir. 2008), because Trooper Bauer knew Coleman’s criminal history included felony offenses. Because the search of the motor home was conducted with probable cause, and was reasonable otherwise, the district court did not err in finding Coleman’s Fourth Amendment rights had not been violated and the search was upheld.

**Case citation:** This case was decided by the United States Court of Appeals for the Eighth Circuit on November 8, 2012. The case was from the United States District Court for the District of Nebraska. The case citation is *United States v. Coleman*, 2012 U.S. App. LEXIS 23055.

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## Report on 2011 Intimate Domestic Violence in Springdale

On October 16, 2012, the City Attorney's Office released its 2011 Report on Intimate Domestic Violence in Springdale. This report can be accessed on the City of Springdale website, [www.springdalear.gov](http://www.springdalear.gov), by selecting "City Attorney" under "Departments," clicking on "Annual Reports" on the left side of the City Attorney page, and clicking on "Annual Report on Intimate Domestic Violence in Springdale, Arkansas for the Year 2011."

There were 530 intimate domestic violence incidents reported to Springdale Police in 2011, which is lower than the 542 reports of intimate domestic violence incidents reported to Springdale Police in 2010. In 2011, Springdale Police made an arrest or

had a warrant issued in 80% of the total intimate domestic violence incidents that were reported. Below is a chart showing the total number of intimate domestic violence incidents reported to Springdale Police in the past five years, as well as a chart indicating the percentage of incidents in which an arrest was made for intimate domestic violence.

CHART 3  
Comparison of Domestic Violence Incidents Reported to Springdale Police in Past Five Years

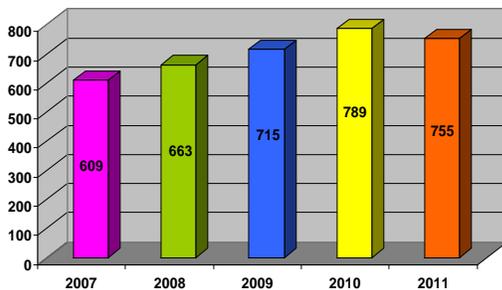
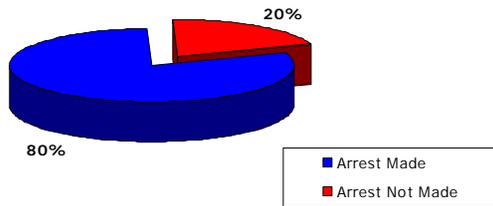


CHART 7  
Intimate Domestic Violence Incidents Reported to Springdale Police in 2011



Jeff Harper  
City Attorney



### 2011 Report on Drunk Driving Released; Congratulations to Cody Ross for Making Most Arrests

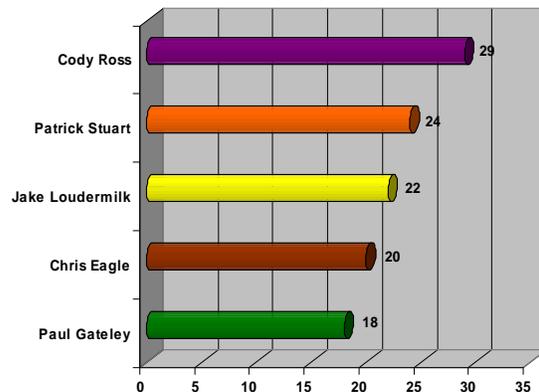
On December 10, 2012, the City Attorney's Office released its 2011 Annual Report on

Drunk Driving in Springdale. This report can be accessed on the City of Springdale website, [www.springdalear.gov](http://www.springdalear.gov), by selecting "City Attorney" under "Departments," clicking on "Annual Reports" on the left side of the City Attorney page, and clicking on "Annual Report on Drunk Driving in Springdale, Arkansas for the Year 2011."

The total number of DWI's went down from 691 total arrests in 2010 to 598 total arrests in 2011. Also, the number of DWI crashes in Springdale were down with only 95 crashes, which is the lowest number of DWI crashes in the past 10 years. The second lowest year in the past 10 years was in 2010, when Springdale had 102 DWI crashes. The 95 DWI crashes for 2011 is a decrease of approximately 7% from the previous year.

Also contained in the report is a graph, which is set out below that lists every Springdale Police Officer who made 18 or more DWI arrests in 2011. Congratulations to Officer Cody Ross who made 29 DWI arrests, the most by any Springdale Police Officer in 2011.

Diagram 5  
SPD Officers Who Made 18 or More DWI Arrests in 2011



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