



July 1, 2013

City Attorney Law Letter

Issue 13-03

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*Come by and meet the new
Deputy City Attorney,
Sarah Sparkman*

*New Law Classes
Will be Held on July 12th at
Arkansas Law Enforcement
Training Academy*

See pages 1 and 2 for new court dates set by Springdale District Court.

Sarah Sparkman Sworn in as New Deputy City Attorney



On May 20, 2013, Sarah Sparkman was sworn in as Deputy City Attorney for the City of Springdale. Sarah joined the City Attorney's office after serving as a staff attorney and the housing workgroup

leader at Legal Aid of Arkansas. She is a graduate of the Arkansas School for Mathematics and Sciences, and she earned her Bachelor of Arts in Journalism, cum laude, and Juris Doctor from the University of Arkansas. Sarah developed and served as program director for the "Road to Justice" outreach program at Legal Aid of Arkansas and has spoken throughout Arkansas on issues relating to housing law and public service. She is a native of Green Forest, Arkansas. You can contact Sarah at ssparkman@springdalear.gov.



New Laws Classes to be Held for Springdale Police Officers

The City Attorney's Office will be holding a class to cover the new laws passed by the Arkansas State Legislature in the 89th General Session. These classes will be held on July 12th at 9:00 a.m. and 3:00 p.m. at the Arkansas Law Enforcement Training Academy.

Springdale District Court Sets New Court Dates



Effective Monday, July 8, 2013, the Springdale District Court will conduct arraignments on Monday, Tuesday, and Wednesday at 8:30 a.m. This is a change from the current arraignment days of Tuesday, Wednesday, and Thursday.

The Spanish interpreter will continue to be present on Tuesday, and the Marshallese interpreter will continue to be present on Wednesday at 8:30 a.m. for arraignments. Therefore, if you are setting an arraignment date for a person that needs the interpreter, please set them on Tuesday for Spanish and Wednesday for Marshallese.

The goal is to set about the same number of defendants for each arraignment day. Since there are more English speaking defendants than Marshallese, Captain Hritz has advised that the patrol shift that works 10:00 p.m. to 6:00 a.m. will set all their English speaking defendants for arraignments on Wednesday, while the other two patrol shifts will set arraignments for English speaking defendants on Monday.

Furthermore, the Judge has asked that Code Enforcement, Animal Services, and Arkansas Highway Police set their tickets for arraignments on Tuesdays, and that Tontitown, Washington County, and Arkansas State Police set their charges for arraignments on Wednesdays.

The following chart summarizes arraignment dates:

MONDAY at 8:30 a.m.	SPD day shift (6 AM to 2 PM) unless the defendant needs the interpreter
	SPD afternoon shift (6 AM to 2 PM) unless an interpreter is needed
TUESDAY at 8:30 a.m.	All defendants needing the Spanish interpreter
	City of Springdale Building Inspection Office & Code Enforcement
	City of Springdale Animal Services officers
	Arrests made by Officers assigned to Springdale Court (Bersi & Parnell); and
WEDNESDAY at 8:30 a.m.	Arkansas Highway Police
	All defendants needing the Marshallese interpreter
	SPD midnight shift (10 PM – 6 AM)
	Arkansas State Police
	Washington County Sheriff's Office
	Tontitown Police Department

Regardless of each assigned days, Tuesday should always be set for defendants that need the Spanish interpreter, and Wednesday should always be set for defendants that need the Marshallese interpreter.

or call the on-call telephone number on Wednesday night, instead of Thursday night.

Please contact the City Attorney's Office or the Court if you should have any questions.

Ernest Cate
City Attorney

One other matter for the jailers, both a Spanish interpreter and a Marshallese interpreter are going to be scheduled for 10:00 a.m. on Monday to see prisoners from the weekend. If you let someone out of jail over the weekend that needs to be arraigned quickly, and they need one of these interpreters, you can go ahead and tell them to be in Springdale District Court at 10:00 a.m. on Monday. However, as always, interpreters will not be assigned on holidays.



**The City
Fireworks
Ordinance:
A Refresher**



Also effective July 8, 2013, trial dates will be changed from Friday to Thursday. The trial date times will remain the same, but trials will be held on Thursday instead of Friday. Therefore, please check the website

Every year about this time, people start asking questions regarding the city's fireworks ordinance. Most of these people will rely on what advice is given to them by

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

Selling Fireworks - Section 46-56(a)

Prior to 2003, the selling of fireworks within the city limits was strictly prohibited by ordinance. However, in 2003, the Springdale City Council amended the fireworks ordinance to allow the selling of fireworks within the city limits. Now, in order to sell fireworks in the City, a permit to sell fireworks must be obtained from the City Clerk. Before a location can obtain a permit to sell fireworks, certain requirements must be met. Then, once a permit has been issued, the ordinance places several restrictions on the selling of fireworks within the city limits. Specifically:

-No fireworks shall be sold or stored within a permanent structure of the city.

-No fireworks stand shall be located except in a C-2, C-5, or A-1 zone, provided the A-1 property has frontage on a federal or state highway.

-Fireworks may only be sold between June 28th and July 5th.

-All locations where fireworks are sold must comply with all fire codes and must be inspected by the fire marshal prior to the sale of fireworks.

-No person selling fireworks within the city shall be allowed to sell any fireworks which travels on a stick, as these are prohibited to be discharged within the city.

-No fireworks stand shall be located within 250 feet of a fuel dispensing facility.

-All fireworks stands must have at least a 50 foot setback from the street/highway.

-No person under the age of 16 shall be allowed to purchase fireworks in the city.

-All locations where fireworks are sold within the city shall post a sign, visible to the public, which states, "The discharge of bottle rockets or fireworks that travel on a stick are prohibited in the City of Springdale."

Prohibited Fireworks – Section 46-56 (b)

It is a violation of the City's fireworks ordinance for anyone to discharge (or sell) bottle rockets within the city limits of Springdale, even during the time when other fireworks are allowed to be discharged. However, the mere possession of bottle rockets is not prohibited.

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

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

To be in compliance with the ordinance, the owner of the private property where the fireworks are being discharged must consent to this activity. Furthermore, the ordinance requires that all persons under the age of 16 who are participating in the discharge of fireworks must be supervised by a person of at least 21 years of age.

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

Public Display of Fireworks

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

discharge site for future public display, provided no salute shells are discharged and provided that any such test firings shall occur between the hours of 6:00 p.m. and 10:00 p.m. between April 1st and June 30th of any year. *Third*, the city can issue a permit to allow the Rodeo of the Ozarks to shoot fireworks on regularly scheduled nights of the Rodeo of the Ozarks. This ordinance was passed by Springdale City Council in 2012 because the Rodeo of the Ozarks now has their first performance starting on Wednesday and ending on a Saturday, which does not always fall between July 1st – 4th date. For instance, the Rodeo of the Ozarks will be held July 4th through July 7th this year. Under the new ordinance, the Rodeo of the Ozarks can obtain a permit to shoot fireworks during the Rodeo of the Ozarks, but the fireworks still must not be discharged after 11:00 p.m.

Ernest B. Cate
City Attorney



8th U.S. Circuit Court of Appeals Holds That Defendant Was Not in Custody During Roadside Questioning, and Probable Cause Existed to Search Defendant's Vehicle

Facts Taken From the Case: On December 7, 2009, at around 11:30 p.m., Roberto Rodriguez was driving east toward Springfield, Missouri, when he was pulled over for no license plates and expired registration. Officer Joshua Hicks approached Rodriguez's vehicle and noticed a television and speakers in the back seat, and a passenger named Joe Murillo in the front seat. When Hicks asked Rodriguez for

his driver's license, Rodriguez replied that his license was suspended but provided his date of birth. Hicks learned that the car was registered to Ashley Henderson, who Rodriguez said was a friend of his. Hicks returned to his police vehicle, ran a record check, and learned that a felony warrant for Rodriguez's arrest was potentially pending in San Bernardino, California. While running the record check, Hicks noticed Rodriguez and Murillo reaching for the floorboard of the vehicle and looking back toward Hicks.

Hicks requested backup, and another officer arrived. The officers were concerned for their safety and instructed Rodriguez to exit the car. After Hicks asked Rodriguez what he had been searching for in the car, Rodriguez said that a handgun was in the center console. Because of the weapon, Hicks handcuffed Rodriguez, told him that he was not under arrest, and placed Rodriguez into the back of his police car. The other officer handcuffed Murillo and placed him in a separate police car. Hicks then asked Rodriguez if there was any other contraband in the car, and Rodriguez replied that there was a methamphetamine pipe under his seat. Hicks searched the vehicle that Rodriguez had been driving and found a cocked pistol with a round in the chamber and a pipe under the driver's seat. Hicks field tested the pipe, which was positive for methamphetamine. Hicks then placed Rodriguez under arrest.

Subsequently, On February 1, 2010, a Missouri State Highway Patrol SWAT Team forcibly entered Rodriguez's home to execute a search warrant. An informant had identified Rodriguez and Murillo as methamphetamine dealers, and a cable installation technician who was a former police officer had reported to authorities suspicious activity, odor of marijuana, and

the smell of chemicals associated with methamphetamine, which he noticed after servicing Rodriguez's home. Based on this information and the traffic stop involving Rodriguez from December 7, 2009, police officers applied for and received a warrant to search the home. Upon entering the residence, the SWAT Team apprehended Rodriguez on the roof and Murillo in the house, and they found contraband that included a loaded shotgun, a handgun, scale, pipes, 86 grams of methamphetamine, and what appeared to be a drug ledger.

After a jury trial held in the United States District Court for the Western District of Missouri, Rodriguez was found guilty of charges related to methamphetamine and firearms and was sentenced to 292 months imprisonment.

Argument, Applicable Law, and Decision by the Eight U.S. Circuit Court of Appeals: On appeal to the Eighth U.S. Circuit Court of Appeals (Court), Rodriguez raised six arguments related to his investigation, trial, and sentence. Three of Rodriguez's arguments and the Court's holdings on those issues will be discussed below.

First, Rodriguez claimed that he was in custody within the meaning of *Miranda v. Arizona* when he was asked to exit his vehicle on December 7, 2009, during the traffic stop. Rodriguez said that the trial court erred when it denied his motion to suppress the statements he made after Officer Hicks asked him to exit the vehicle.

In setting forth the applicable law, the Court quoted the case of *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), where the United States Supreme Court said "The Supreme Court has analogized roadside questioning during a traffic stop to a *Terry* stop, which

allows an officer with reasonable suspicion to detain an individual in order to ask a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." Additionally, the Court noted that in the *Berkemer* case, the Supreme Court held that the driver was not taken into custody for *Miranda* purposes during a roadside stop until the police officer arrested him. Therefore, courts should look for the "functional equivalent of formal arrest" when considering whether *Miranda* applies to a traffic stop.

In applying the law to the facts before it, the Court held that the trial court correctly denied Rodriguez's motion to suppress statement because Officer Hicks' asking Rodriguez to exit the car was not the functional equivalent of formal arrest, but was a temporary detention to investigate Rodriguez's identity and a potential arrest warrant in California. The Court noted that Officer Hicks asked Rodriguez to step out of the car because Officer Hicks believed Rodriguez could be dangerous. Officer Hicks thought that the car was suspicious, that Rodriguez might have a felony warrant, and Officer Hicks observed Rodriguez reaching around the car and looking back at him. Finally, after Rodriguez told Officer Hicks that he had a handgun, Hicks handcuffed Rodriguez but told him that he was not under arrest. The Court quoted its own language from the case of *U.S. v. Miller*, 974 F.2d 953, 957 (1992), where it said that "Numerous cases have held that a police officer's use of handcuffs can be a reasonable precaution during a *Terry* stop." For these reasons, the Court affirmed the trial court's denial of Rodriguez's motion to suppress statement.

For his second argument on appeal, Rodriguez argued that the search of his car

was an improper search incident to an arrest. The government countered Rodriguez's argument by saying that the search was proper under the automobile exception, which allows officers to search a car without a warrant if probable cause exists. The Court agreed with the government and held that the trial court did not err when it denied Rodriguez's motion to suppress. The Court said that probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place. The Court concluded that after Rodriguez told Officer Hicks that a handgun and a methamphetamine pipe were located in the vehicle, probable cause existed to search the car.

For his third argument on appeal and the last one to be discussed herein, Rodriguez claimed that the February 1, 2010 search of his home was improper because the affidavit did not establish probable cause for issuing a search warrant and because the firearms which were seized were not listed in the warrant. The government countered by arguing that the two sources referenced in the affidavit supplied reliable, incriminating information about Rodriguez that was separately corroborated and that Rodriguez's firearms were seized under the plain view doctrine.

The Court set forth the law and said that the issuance of a search warrant must be supported by probable cause, which is determined by evaluating whether in light of the totality of the circumstances there is a fair probability that contraband or evidence of a crime will be found in a particular place. Furthermore, the Court said that it will give great deference to a magistrate's determination of whether an affidavit establishes probable cause. Additionally,

the Court stated that courts should apply a common sense approach when reviewing an affidavit instead of a hypertechnical approach. Finally, if the affidavit relies on information from an informant, the reliability, veracity, and basis of knowledge of the informant are relevant to the determination of whether the affidavit provided probable cause.

The Court held that considering the totality of the circumstances, Agent Adam Crouch's affidavit was sufficient to support the magistrate's determination that probable cause existed to issue a search warrant for Rodriguez's home. The Court reasoned that the affidavit cited the reliable and detailed account of two confidential sources, including a former law enforcement officer who was legally within the home, and independent information corroborated the two sources.

Finally, as part of his third argument, Rodriguez claimed that even if officers were permitted to search under the mattress, they were not permitted to seize the guns because the guns were not listed in the warrant. The Court disagreed with Rodriguez and said that the plain view doctrine allows officers to seize an item if they have a lawful right of access to the item seized and the object's incriminating nature is immediately apparent. The Court stated that the incriminating nature of the guns was immediately apparent since they were nearby to drugs and drug-related equipment and since the officers were aware of Rodriguez's prior criminal record, which probably made him ineligible to possess the guns.

Case: This case was decided by the 8th U.S. Circuit Court of Appeals on April 4, 2013, and was an appeal from the U.S. District Court for the Western District of

Missouri. The case citation is *U.S. v. Rodriguez*, ____ F.3d ____.

Taylor Samples
Deputy City Attorney



Arkansas Court of Appeals Affirms Denial of Motion to Suppress Statement Where Defendant Failed to Clearly Request an Attorney

Facts Taken From the Case: On May 25, 2011, Tara Flute of the Crimes Against Children Division of the Arkansas State Police called Christopher Dodge and asked if he would agree to do an interview as part of a child-maltreatment investigation involving Dodge's niece. Flute told Dodge that the interview would have to take place at the Sebastian County Sheriff's Office. On May 30, 2011, Sergeant Hobe Runion of the Sebastian County Sheriff's Department interviewed Dodge in one of the interview rooms at the sheriff's office, and Flute was present for a portion of the interview. Dodge arrived at the sheriff's office with his brother-in-law, the father of the child who was the victim at the center of the investigation.

According to Sergeant Runion, Dodge's interview lasted about two-and-a-half hours, and Sergeant Runion *Mirandized* Dodge before starting the interview. Sergeant Runion said that Dodge appeared to be of above-average intelligence, literate, confident, and somewhat knowledgeable about the process. Sergeant Runion also said that Dodge executed a waiver-of-rights form and appeared to understand his rights. Sergeant Runion stated that Dodge was not

under arrest, was not placed in cuffs or restraints, and that Dodge would have been free to leave the sheriff's office.

At one point during the interview, the following exchange occurred between Dodge and Sergeant Runion:

Dodge: Hey, can I get a call in for a lawyer?

Sergeant Runion: Hmm?

Dodge: Okay? I really need to call for a lawyer. I mean, I didn't even have to come down here and talk ...

Sergeant Runion: You're right.

Dodge: ... with you today.

Dodge: Okay?

Sergeant Runion: You're right, you didn't. You're right. And I appreciate that. I think that that's the ...

Dodge: Uh, that's the first step on the road to admittance of something.

Sergeant Runion explained that he regarded Dodge's comments as almost a rhetorical question, that Dodge's comments were ambiguous, and that Dodge continued talking after making the comments. Sergeant Runion said that he thought if Dodge was finished talking to him that Dodge would clarify and tell him that he wanted an attorney and was done talking. Sergeant Runion explained that he was ready to stop if Dodge had done so, but that Dodge never did.

Sergeant Runion explained that Dodge later asked to use the bathroom, around two hours after the interview had begun, and that

Dodge was allowed to do so unescorted and unattended. Sergeant Runion said that when he thought Dodge was probably almost done using the bathroom, Sergeant Runion left the interview room, went into the hall, and saw Dodge coming out of the bathroom holding his neck and then falling to the floor. Sergeant Runion said that he initially thought Dodge had suffered a stroke or heart attack and yelled for someone to call 911, but upon getting closer to Dodge, Sergeant Runion saw a small puncture wound on Dodge's neck that did not appear to be serious. Sergeant Runion then had one of the jail nurses and an EMT assess Dodge's neck and discovered that Dodge had poked himself in the neck using his security badge, thereby causing a superficial puncture wound on each side of his neck. The entire incident lasted under five minutes. After returning to the interview room, Sergeant Runion said that Dodge announced, "It's all true," and then explained that he had engaged in anal sex with his niece at several locations in Fort Smith, Hackett, Greenwood, and on White Mountain Road.

At the trial court, Dodge filed two motions to suppress. Dodge asked the trial court to suppress his statement because he did not make an intelligent waiver of his rights and a voluntary statement, and Dodge also claimed that his right to an attorney was violated in obtaining the statement. The trial court denied Dodge's motions, concluding that Dodge was not in custody, that Dodge's comments about an attorney were rhetorical and indicated that Dodge was only considering asking for one, that Dodge never made a request for an attorney to be present before continuing with the interview, and that Dodge carried the conversation forward instead of stopping the conversation. After a jury trial, Dodge was found guilty of three counts of rape and one count of attempted rape of a minor.

Argument and Decision by the Arkansas Court of Appeals: On appeal to the Arkansas Court of Appeals (Court), Dodge argued that he clearly and unequivocally invoked his right to counsel, that he did not initiate contact with officers following that invocation, that he did not thereafter make a knowing and intelligent waiver of his right to counsel, and that therefore the trial court clearly erred in refusing to suppress his statement. Dodge did not challenge the trial court's finding that he was not in custody at the time he made the statement.

In affirming the trial court's denial of Dodge's motion to suppress statement, the Court explained that the trial court's finding that Dodge was not in custody at the time of making the statement served as an independent, alternative basis for denying Dodge's motion to suppress. Therefore, since Dodge did not contest that ruling on appeal, the Court stated that it was unnecessary to address Dodge's argument that he clearly and unequivocally requested an attorney. However, the Court concluded that it would find no basis for reversing the trial court if it were to address the merits of Dodge's claim that he clearly and unequivocally requested an attorney.

In setting forth the applicable law, the Court quoted *Baker v. State*, 363 Ark. 339, a case where the Arkansas Supreme Court said that "The United States Supreme Court has made it very clear that when invoking the *Miranda* right to counsel, the accused must be unambiguous and unequivocal." Additionally, in *Baker v. State*, the Arkansas Supreme Court quoted the United States Supreme Court case of *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350 (1994), as follows:

If we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, ... police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

In applying the law to the facts before it, the Court emphasized that Dodge arrived at the sheriff's office accompanied by his brother-in-law to participate in the maltreatment investigation concerning Dodge's niece. Furthermore, Dodge was given *Miranda* warnings, was not placed under arrest, and was not handcuffed or physically restrained. Additionally, the interview took place in an interview room and lasted about two-and-a-half hours. Sergeant Runion described Dodge as well spoken, confident, and knowledgeable. Also, after asking to use the restroom (where he went unescorted), Dodge returned to the interview room and continued to engage in dialogue with Sergeant Runion, eventually admitting that he had engaged in anal sexual contact with his niece. Finally, Sergeant Runion said that Dodge's reference to an attorney was rhetorical and ambiguous because Dodge never said that he no longer wanted to talk or that he was done talking until he got an attorney. Therefore, the Court concluded that after reviewing the totality of the circumstances, the trial court made no clear error in denying Dodge's motion to suppress.

Case: This case was decided by the Arkansas Court of Appeals on April 17, 2013, and was an appeal from the Sebastian

County Circuit Court, Greenwood District, Honorable Stephen Tabor. The case citation is *Dodge v. State*, 2013 Ark. App. 247.

Taylor Samples
Deputy City Attorney



Conviction Upheld, Arkansas Supreme Court finds No *Miranda* Violation

Facts: On August 17, 2011, Marlin Dval Stevenson was living with Michael Fox and Fox's mother, Christina Atchley. Atchley spoke with Stevenson about his smoking weed in the home. After their conversation, Stevenson went outside, came back into the house and then outside again. Atchley thought Stevenson had gone into the bedroom to get cigarettes when Fox opened the door and said "Mom, I have been stabbed." Atchley testified she saw Stevenson running towards the back of the house. Atchley testified that, a couple of months earlier, she had seen a knife that Stevenson kept in a box beneath the bed. However, she did not see Stevenson retrieve the knife box or knife the evening of the stabbing. Fox later died of his wounds. The knife used to stab Fox was never found.

Paragould Police Officer Tim Erickson took Fox's 911 call for help. He testified that Fox reported he had been stabbed, and when asked who stabbed him, he stated, "Marlin Stevenson." Mario Rios testified that on that night, Stevenson came to his house, out of breath and said he had been in a fight with Atchley's son and that "I think I stuck him."

In a statement to Police Department Lieutenant Mike Addison, Stevenson

admitted that he and Fox had fought, but Stevenson denied having a knife and denied stabbing Fox, but then later stated he might have but didn't remember. Stevenson's argument at trial was that someone other than him had stabbed and killed Fox. Stevenson also asserted that he invoked his right to counsel and that his statement was taken in violation of that right. Stevenson was convicted of first-degree murder and sentenced to life imprisonment.

Argument: On appeal, Stevenson argues that the circuit court erred in denying his motion to suppress his statement. After his arrest, Stevenson was taken to an interrogation room where he asserted his right to an attorney and the interrogation was terminated. Lt. Addison testified that while taking Stevenson to a cell after terminating the interview that he [Lt. Addison] made that statement that "if you decide you ever want to talk to us, you would have to request that...He asked me a question... He would just have to fill out a written request and send it to us... He said he would rather just go ahead and get this over with and talk to me now. He didn't want to have to go through that aspect of writin' a letter."

Stevenson cited the court to *Edwards v. Arizona*, 451 U.S. 477 (1981), arguing that the circuit court should have suppressed his statement, because the statement was made after he had invoked his right to counsel. In that case, the United States Supreme Court stated as follows:

[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has

been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85 (1981). The Court in *Rhode Island v. Innis*, 446 U.S. 291 (1980) also discussed interrogation in this context:

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of

interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 300-02 (emphasis in original) (footnotes omitted). See also *Osburn v. State*, 2009 Ark. 390.

In this case, Stevenson invoked his right to counsel. When Lt. Addison told Stevenson that any further contact with law enforcement would only be upon written request, Stevenson said to Lt. Addison that "he would rather just go ahead and get this over with and talk to me now. He didn't want to have to go through that aspect of writin' a letter." While this statement is in response to the declaratory statement by Lt. Addison regarding how to contact the police, Lt. Addison's statement was not during interrogation and was not a statement that would reasonably elicit an incriminating response. Stevenson expressed a desire to go ahead with the interview, and that he wished to speak with law-enforcement officers. The circuit court's denial of Stevenson's motion to suppress was not clearly against the preponderance of the evidence and the Arkansas Supreme Court affirmed its decision.

Note: There were other trial aspects of this case that were not discussed in this article. The conviction was, nonetheless, affirmed. There was also a strongly worded dissent by Justice Josephine Linker Hart that discussed the difference between the accused initiating further communication versus the police continuing to talk to the accused, even if it is about how to contact the police if the accused wanted to talk. Justice Hart pointed to the fact that Lt. Addison admitted he did not stop talking to Stevenson after Stevenson invoked his right to counsel until

Stevenson agreed to continue the interrogation. Lt. Addison also admitted that, while he was offering Stevenson that "advice", Stevenson told him he "sure couldn't afford a lawyer." Because *Miranda* guarantees an accused the right to a lawyer, whether or not he can afford one, shows that the waiver on Stevenson's part was not knowingly and intelligently made, otherwise he would have known that he would have representation regardless of the state of his finances.

Case citation: This case was decided by the Supreme Court of Arkansas on March 7, 2013. The case was from the Greene County Circuit Court. The case citation is *Marlin Dval Stevenson v. State of Arkansas*, 2013 Ark. 100.

Brooke Lockhart
Deputy City Attorney



Arkansas Court of Appeals Reaffirms that the Administration of Field Sobriety Tests Do Not Require Consent of Suspect or Exception to Warrant Requirement

Facts Taken From the Case: Arkansas State Police Trooper Josh Heckel stopped a vehicle driven by William Fisher when Fisher pulled up to a sobriety checkpoint on Highway 270 West near the post office located in Royal, Arkansas. Trooper Heckel and other troopers had reflective vests, spotlights in the road, and flashlights, and motorists coming from both directions had no option but to stop at the checkpoint. The sobriety checkpoint was Trooper Heckel's sole reason for stopping Fisher's vehicle, and

Trooper Heckel had no suspicion that Fisher had committed an offense of any kind until he made contact with Fisher. Upon stopping Fisher, Trooper Heckel noticed that Fisher had an odor of alcohol on his breath and bloodshot, watery eyes. Fisher also told Trooper Heckel that he had been drinking that day. Fisher had normal speech, was polite, cooperative, and respectful, and appeared to understand what was asked of him.

While Fisher was seated in the driver's seat of his vehicle, Trooper Heckel held a portable breath test (PBT) through the driver's window and told Fisher to blow. Trooper Heckel said that this was his routine practice during a roadblock to require anyone on whom he detected the odor of alcohol. Based on the result of the PBT, Trooper Heckel told Fisher to get out of the vehicle and perform field-sobriety tests. Trooper Heckel administered four additional field-sobriety tests, including a second PBT. Based on Fisher's performance on the tests, Trooper Heckel placed him under arrest for DWI and took him to the Garland County Detention Center, where Fisher submitted two breath samples on the BrAC machine.

Fisher entered a negotiated plea agreement on the DWI charge. In exchange for pleading no contest to the DWI charge, the State agreed that Fisher would be allowed to appeal the denial of his motion to suppress evidence that challenged the manner in which samples of Fisher's breath had been seized.

Argument and Decision by the Arkansas Court of Appeals: On appeal to the Arkansas Court of Appeals (Court), Fisher argued that the State failed to prove the existence of a valid exception to the requirement of a warrant to support the seizure of his breath via the PBT. Fisher

claimed that the State was required to introduce evidence proving that the seizure of his breath was the product of a valid exception to the warrant requirement, or clear and positive evidence that Fisher freely and voluntarily gave consent for the PBT. Fisher said that the incriminating evidence against him was obtained by the exploitation of the presumptively unreasonable roadside seizure of Fisher's breath via the PBT, and that the trial court therefore should have suppressed all the evidence seized as a result of the warrantless seizure.

The State did not dispute that the collection of Fisher's breath was a search under the Fourth Amendment and Arkansas Rules of Criminal Procedure. However, the State said that neither a warrant nor Fisher's consent was required before Trooper Heckel could seize Fisher's breath. The State cited many cases to the Court supporting the proposition that the administration of field-sobriety tests, including PBTs, do not require the consent of the person suspected.

The Court agreed with the State and held that the trial court did not err when it denied Fisher's motion to suppress the PBT. The Court said that law-enforcement officers may detain and investigate the lawfulness of the conduct of those whom they reasonably suspect to have committed a crime, including DWI. Additionally, the Court said that Arkansas Rule of Criminal Procedure 3.1 requires an officer to possess reasonable suspicion that the person is committing, has committed, or is about to commit a felony or misdemeanor involving danger to persons or property. Furthermore, an officer must develop reasonable suspicion to detain before the legitimate purpose of the traffic stop has ended, and reasonable suspicion exists if under the totality of the circumstances, police have specific, particularized, and articulable reasons

indicating that the person may be involved in criminal activity.

Under the facts of this case, the Court said that Trooper Heckel had more than a bare suspicion that Fisher was driving while intoxicated before he administered the PBT. The Court said that Trooper Heckel saw that Fisher had bloodshot and watery eyes, smelled of intoxicants, and failed the HGN and walk-and-turn tests. Also, Fisher admitted that he had been drinking, which taken together with the other evidence met the standard of probable cause. Finally, the Court stated that there was probable cause to arrest even without considering the PBT results. For these reasons, Fisher's DWI conviction was affirmed.

Case: This case was decided by the Arkansas Court of Appeals on May 8, 2013, and was an appeal from the Garland County Circuit Court, Honorable John Homer Wright. The case citation is *Fisher v. State*, 2013 Ark. App. 301.

Taylor Samples
Deputy City Attorney



Arkansas Court of Appeals Holds that Defendant Lacked Standing to Challenge Search of Vehicle & Placement of GPS Device on Vehicle

Facts of the Case: A woman named Billie Williams entered into rental contracts for several vehicles with Enterprise Rental Car. All of the agreements expressly stated that no drivers were permitted other than Billie Williams. According to Billie Williams, Raymond Wilson was the father of Williams' eight-year-old daughter, and

Williams rented the vehicles so that Wilson could provide transportation for their daughter.

According to Sergeant Mark McClendon with the Missouri State Highway Patrol, an investigation of Raymond Wilson revealed that Wilson was using rental vehicles to obtain cocaine from out of state. Early in the morning on September 22, 2011, Sergeant McClendon placed a global-positioning-satellite (GPS) tracking device on a Dodge Charger that was rented by Billie Williams. Raymond Wilson resided at 603 Gertie in Malden, Missouri, and Sergeant McClendon placed the GPS device on the Dodge Charger while it was parked in the side yard of 601 Gertie in Malden, Missouri.

Officer Pat Buchanan of the Dunklin County Missouri Sheriff's Department notified Officer Blake Bristow of the Jonesboro Police Department that Raymond Wilson might be coming through Jonesboro carrying cocaine. Officer Bristow was able to use the GPS device that had been placed on the Dodge Charger by Sergeant McClendon to track Wilson, whereupon Officer Bristow contacted a state trooper and advised the trooper to find probable cause to stop the Dodge Charger. Arkansas State Trooper Brandon Bennett stopped Wilson, who was driving the Dodge Charger that had been rented by Billie Williams, for speeding and crossing the fog line. Wilson told Trooper Bennett that he was returning to Malden from Fort Worth after helping someone move, and Wilson produced the rental agreement on the Dodge Charger between Enterprise and Billie Williams. Trooper Bennett said that Wilson was nervous, would not make eye contact, and gave consent to search the Dodge Charger. After not locating any contraband during the search but observing spots on the vehicle's

carpeting that appeared to have been purposely pulled back, Trooper Bennett requested that a canine be brought to the scene of the stop. The canine alerted, and narcotics were found in the rear of the vehicle under the speakers. Video of the stop revealed that Trooper Bennett stopped Wilson at 9:03 p.m., concluded his search of the vehicle at 9:20 p.m., and recovered the drugs at 9:59 p.m. after the canine alerted at 9:43 p.m.

At the trial court, Wilson argued that the placement of the GPS device and the search of the vehicle were done in violation of his constitutional rights, and that he was unreasonably detained following the traffic stop. The trial court found that the stop of the vehicle was lawful and that the language of the rental contract prohibited Wilson from asserting that he had a legitimate expectation of privacy in the vehicle, thereby depriving Wilson of standing to challenge the legality of the search. In particular, in concluding that the Fourth Amendment was not implicated with respect to Wilson's residence, the trial court credited Sergeant McClendon's testimony that the Dodge Charger was located at 601 Gertie when the GPS device was placed on the vehicle. Finally, the trial court found that Wilson's detention after the initial stop was not unreasonable in light of the totality of the circumstances. Following the trial court's denial of his motion to suppress evidence, Wilson entered a conditional guilty plea to a charge of trafficking a controlled substance (cocaine), and was sentenced to 120 months' imprisonment.

Decision by the Arkansas Court of Appeals: The Arkansas Court of Appeals (Court) agreed with the trial court and held that Wilson lacked standing to challenge both the search of the vehicle and the placement of the GPS tracking device on the

vehicle. In reaching this conclusion, the Court said that a defendant has no standing to challenge the search of a vehicle owned by another person unless the defendant can show that he gained possession of the vehicle from the owner or from someone who had authority to grant possession. The Court noted that the Dodge Charger at issue in the case was owned by Enterprise Rental Car and was rented by Billie Williams pursuant to a rental agreement that clearly stated that Ms. Williams was the only person allowed to drive the vehicle. Furthermore, to support its conclusion, the Court relied on a case with similar facts called *Littlepage v. State*, 314 Ark. 361, where the Arkansas Supreme Court held that the defendant had no expectation of privacy in the vehicle and lacked standing to challenge the search of the vehicle. Finally, the Court said that a defendant cannot challenge actions by police involving someone else's vehicle that occurred while that vehicle was on someone else's property. For the above reasons, the denial of Wilson's motion to suppress evidence was affirmed.

Note from Deputy City Attorney: The holding of the Arkansas Court of Appeals in this case should be viewed as a narrow exception to the general rule that it is necessary to get a warrant anytime law enforcement wants to attach a GPS device to a vehicle to use the device to monitor the vehicle's movements. On January 23, 2012, the Supreme Court of the United States decided the case of *U.S. v. Jones*, 565 U.S. ____ (2012), 132 S.Ct. 945, and held that the attachment of a GPS device to a vehicle and its use of that device to monitor the vehicle's movements constituted a search under the Fourth Amendment. Former City Attorney and current Springdale District Court Judge Jeff Harper wrote a C.A.L.L. article on the *U.S. v. Jones* case, and that

article can be found in the April 1, 2012, issue of C.A.L.L.

Case: This case was decided by the Arkansas Court of Appeals on May 22, 2013, and was an appeal from the Mississippi County Circuit Court, Chickasawba District, Honorable Cindy Thyer. The case citation is *Wilson v. State*, 2013 Ark. App. 337.

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C.A.L.L.
(City Attorney Law Letter)
is a publication of the
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201 Spring Street
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