

C.A.L.L.

City Attorney Law Letter
Issue 14-02 April 1, 2014



Supreme Court of United States Holds that Police Officer Did Not Act Plainly Incompetent and Was Thus Entitled to Qualified Immunity

Facts Taken From the Case: Around one a.m. on May 27, 2008, Officer Mike Stanton and his partner responded to a call about an unknown disturbance regarding a person with a baseball bat in La Mesa, California. Officer Stanton was familiar with the neighborhood, which was known for gang violence. The officers, who were wearing uniforms and driving a marked police vehicle, approached the location of the reported disturbance and noticed three men walking in the street. Upon seeing the police car, two of the men turned into a nearby apartment complex, and the other man, Nicholas Patrick, crossed the street about twenty-five yards in front of the police car and ran or quickly walked toward a residence.

Officer Stanton did not see Patrick with a baseball bat, but Officer Stanton considered Patrick's behavior suspicious and decided to detain Patrick in order to investigate. Officer Stanton exited his police car, called out "police," and ordered Patrick to stop in a voice loud enough for all in the area to hear. Patrick did not stop and instead looked directly at Officer Stanton and quickly went through the front gate of a fence that enclosed a nearby front yard (it was later determined that the yard Patrick entered belonged to Drendolyn Sims). The fence surrounding the yard was more than six feet tall and made of wood, therefore when the gate closed behind Patrick, Officer Stanton's view of the yard became blocked. Officer Stanton believed that Patrick had committed a jailable misdemeanor offense under California law by disobeying Officer Stanton's order to stop, and Officer Stanton also feared for his safety. Therefore, Officer Stanton made a split-second decision to kick open the gate in pursuit of Patrick. Unknown to Officer Stanton, the property owner, Drendolyn Sims, was standing behind the gate when it flew open. Sims was struck by the gate and received cuts to her forehead and an injured shoulder as a result of the impact.

Continued on page 2

In this issue

U.S. Supreme Court Holds that Police Officer did not Act Plainly Incompetent and was Thus Entitled to Qualified Immunity	Pg. 1
Arkansas Court of Appeals Holds that Suspect's Custodial Statement was Properly Admitted into Evidence Under Public Safety Exception to <i>Miranda</i>	Pg. 3
Arkansas Supreme Court Concludes Defendant did not Unambiguously and Unequivocally Invoke His Right to Remain Silent	Pg. 4
Arkansas Court of Appeals Upholds DWI Conviction Where Suspect was Arrested out of Garage After Fleeing From Officer in Vehicle	Pg. 5
8th U.S. Circuit Court of Appeals Holds that Officer had Probable Cause to Search Vehicle Based on Automobile Exception	Pg. 7
The Cell Phone and the Law of Search and Seizure in the Context of the Automobile Exception in the Eighth Circuit	Pg. 8

Drendolyn Sims filed suit against Officer Stanton in Federal District Court under 42 U.S.C. § 1983 and alleged that Officer Stanton unreasonably searched her home without a warrant in violation of the Fourth Amendment. The District Court granted summary judgment in favor of Officer Stanton and found that: (1) Officer Stanton's entry was justified by the potentially dangerous situation, by the need to pursue Patrick as he fled, and by Sims' lesser expectation of privacy in the curtilage of her home; and (2) even if a constitutional violation had occurred, Officer Stanton was entitled to qualified immunity because no clearly established law put Officer Stanton on notice that his conduct was unconstitutional.

Sims appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the decision of the District Court and held that Officer Stanton's warrantless entry into Sims' yard was unconstitutional because Sims was entitled to the same expectation of privacy in her curtilage as in her home herself, because there was no immediate danger, and because Patrick had committed only the minor offense of disobeying a police officer. The Ninth Circuit also found the law to be clearly established that Officer Stanton's pursuit of Patrick did not justify his warrantless entry given that Patrick was suspected of only a misdemeanor. The Ninth Circuit held that Officer Stanton was not entitled to qualified immunity.

Officer Stanton then appealed the Ninth Circuit's ruling to the Supreme Court of the United States.

Argument and Decision by the Supreme Court of the United States: The Supreme Court of the United States (Court) said that there was no suggestion that Officer Stanton knowingly violated the Constitution, and therefore the question for the Court to decide was whether, in light of the precedent existing at the time, Officer Stanton was plainly incompetent in entering Sims' yard to pursue Patrick. The Court then

set forth the rule on qualified immunity. In citing language from its prior decisions, the Court stated that:

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law. We do not require a case directly on point before concluding that the law is clearly established, but existing precedent must have placed the statutory or constitutional question beyond debate.

The Supreme Court of the United States reversed the holding of the Ninth Circuit and held that Officer Stanton was entitled to qualified immunity. The Court said that Officer Stanton's actions were not plainly incompetent.

In its critique of the Ninth Circuit's decision, the Court said that the Ninth Circuit concluded that Officer Stanton was plainly incompetent despite the fact that federal and state courts nationwide are sharply divided on the question of whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect. The Court noted that notwithstanding this basic disagreement among the courts nationwide, the Ninth Circuit denied Officer Stanton qualified immunity by relying on two cases, one from the Supreme Court of the United States, *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and one from the Ninth Circuit, *U.S. v. Johnson*, 256 F.3d 895 (2001). The Court said that neither the *Welsh* case nor the *Johnson* case clearly established that Officer Stanton violated Sims'



Fourth Amendment rights. The Court said that its holding in *Welsh* was that "application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned." However, the Court said that in the *Welsh* case it did not lay down a categorical rule for all cases involving minor offenses, but only that a warrant is usually required.

The Court further opined that by concluding that Officer Stanton was plainly incompetent, the Ninth Circuit read the *Welsh* and *Johnson* cases far too broadly. First, the Court said, both the *Welsh* and *Johnson* cases cited the United States Supreme Court case of *U.S. v. Santana*, 427 U.S. 38 (1976), a case where the United States Supreme Court approved an officer's warrantless entry while in hot pursuit. The Court noted that while *Santana* involved a felony suspect, the Court did not expressly limit its holding in *Santana* based on that fact. Second, the Court stated that neither the *Welsh* nor *Johnson* cases involved hot pursuit. Third, the Court pointed out that even in the portion of the *Welsh* case that was cited by the Ninth Circuit, the Supreme Court's opinion was that warrantless entry to arrest a misdemeanor suspect should be rare, not that such entry is never justified. In fact, the Court said, two California state courts in *People v. Lloyd*, 216 Cal. App. 3d 1425 (1989), and *In re Lavoyne M.*, 221 Cal. App. 3d (1990), refused to limit the hot pursuit exception to felony suspects. The Court said that it was especially troubling that the Ninth Circuit would conclude that Officer Stanton was plainly incompetent based on actions that were lawful according to courts in the jurisdiction where he acted. Fourth and finally, the Court said

that its determination that the *Welsh* and *Johnson* cases were insufficient to overcome Officer Stanton's qualified immunity was bolstered by the fact that following the *Johnson* case, two different District Courts in the Ninth Circuit granted qualified immunity precisely because the law about warrantless entry in hot pursuit of a fleeing misdemeanor suspect is not clearly established

In conclusion, the Court said that it did not express any view of whether Officer Stanton's entry into Sims' yard was constitutional. However, Officer Stanton did not act plainly incompetent and was therefore entitled to qualified immunity because the constitutional rule applied by the Federal District Court and the Ninth Circuit was not beyond debate.

Case: This case was decided by the Supreme Court of the United States on November 4, 2013, and was an appeal from the United States Court of Appeals for the Ninth Circuit. The case citation is *Stanton v. Sims*, 571 U.S. ____ (2013).

This article written by
Taylor Samples, Deputy City Attorney

Arkansas Court of Appeals Holds That Suspect's Custodial Statement was Property Admitted Into Evidence Under Public Safety Exception to *Miranda*

Facts Taken From the Case: On December 31, 2009, State Trooper Heath Nelson was patrolling Shackelford Road around Mara Lynn Road in Little Rock when he heard on the police scanner that Little Rock had a home invasion, the suspect was possibly armed, and the suspect was in the same area that Trooper Nelson was patrolling. Trooper Nelson traveled north to the area around Terry Elementary School and saw a suspect (who he later identified as Timothy Holt) that matched the description given on the police scanner. It was a clear day, and according to Trooper Nelson the suspect tried to lie down upon seeing Trooper Nelson. Trooper Nelson put his car in park and exited his vehicle, and the suspect began to flee. While pursuing the suspect on foot at the scene where no other officers were present, Officer Nelson saw the suspect reach for his waistline. Officer Nelson apprehended the suspect, put handcuffs on him, and did a quick pat-down.

Later at a suppression hearing before the trial court, Trooper Nelson said that he did not find anything during the pat-down and that he was concerned since the police dispatcher had said that the

suspect had a weapon. Trooper Nelson stated that they were close to an elementary school, which his own son attended, and that he felt he had to find the gun. Trooper Nelson said that after waiting for Little Rock police officers to arrive, he led the suspect out of the woods and said, "Hey, we know you had a gun. We're by a school. You know, we wouldn't want any kids to get it. Where's the gun?" Trooper Nelson acknowledged that the suspect was in custody at the time he asked the suspect about the gun and that he had not read *Miranda* rights to the suspect. The suspect, Timothy Holt, proceeded to show the officers where the gun was located.

After the trial court denied Holt's motion to suppress, Holt was tried by a jury and found guilty of the offenses of aggravated robbery, aggravated residential burglary, Class B felony theft of property, and Class C misdemeanor fleeing. Holt appealed the trial court's decision to deny his motion to suppress evidence to the Arkansas Court of Appeals.

Argument and Decision by

Arkansas Court of Appeals: On appeal to the Arkansas Court of Appeals, Holt claimed that because he was in custody but was not *Mirandized* before he led the officers to the gun, he was not adequately informed of his Fifth and Sixth Amendment rights under the Constitution (his right against self-incrimination and his right to counsel). Holt acknowledged the existence of a public-safety exception to the *Miranda* rule, but argued that it was not property applied to his case.

In setting forth the applicable law, the Arkansas Court of Appeals (Court) looked to a prior decision it made in the case of *Marshall v. State* (1999), 68 Ark. App. 223, where the Court used precedent from the United States Supreme Court case of *New York v. Quarles*, 467 U.S. 649 (1984). The Court stated that in the *New York v. Quarles* case, the United States Supreme Court held that there is a public safety exception to the requirement that *Miranda* warnings be given before a suspect's statements may be admitted into evidence. In particular, the Court quoted the following language from the *Quarles* case:





We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers ... in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

The Arkansas Court of Appeals held that the trial court did not err in its application of the public safety exception, and the Court therefore affirmed the trial court's denial of Holt's motion to suppress. In doing so, the Court adopted the following reasoning from the *Quarles* case:

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety; an accomplice might make use of it, a customer or employee might later come upon it.

Case: This case was decided by the Arkansas Court of Appeals on January 29, 2014, and was an appeal from the Pulaski County Circuit Court, Honorable Barry Sims, Judge. The case citation is *Holt v. State*, 2014 Ark. App. 74.

This article written by
Taylor Samples, Deputy City
Attorney

Arkansas Supreme Court Concludes Defendant Did Not Unambiguously and Unequivocally Invoke His Right to Remain Silent

Relevant Facts Taken From the Case: This case is an appeal of the order of the Sebastian County Circuit Court convicting Brandon Clark Fritts of first-degree murder.

On January 3, 2012, Fort Smith Police responded to a call that a dead body had been seen in an alley near 17th and Q streets. The Police found the body of Jamie Lee Czeck at the scene. Czeck had been shot many times, and shell casings were found near the body. Fritts was initially questioned in the investigation as a possible witness because he was one of the last people seen with Czeck.

The police spoke with Fritts twice on January 5, 2012. During the first interview, Fritts stated he did not know anything about the death of Czeck. After obtaining phone records that contradicted Fritts's statements, police questioned him

again. After further investigation, Fritts became a suspect.

Fritts and his girlfriend, Christie Clawson, were incarcerated in Sequoyah County jail in Oklahoma when Fritts became a suspect. Fort Smith Detectives traveled to the jail and first spoke with Clawson. During her interview, she told them she knew Fritts was going to murder Czeck and that the murder weapon was hidden under a freezer in the garage.

Officers located the gun, and Detective Carter spoke with Fritts at the jail on January 30, 2012. Carter told Fritts that he knew the truth and wanted Fritts's side of the story. Fritts responded that he had told Detective Carter all he knew on January 5.

Detective Carter did not end the interview. Detective Carter told Fritts that they had recovered the

murder weapon and showed the gun to him. Fritts told Carter that if he would let him have a cigarette, he would talk to him. After allowing Fritts to smoke a cigarette, Detective Carter advised Fritts of his *Miranda* rights and interviewed him. At the beginning of the tape recorded interview, Fritts stated that he had said everything he was going to say but that he would answer the officers' questions. Fritts ultimately confessed to the crime during the interview.

Fritts was charged with first-degree murder. Fritts made several motions at trial to suppress statements he made, including statements made on January 30, 2012 after telling Detective Carter that he had already told him all that he knew. The Circuit Court denied these motions. Fritts was found guilty at trial of first-degree murder and was sentenced, as a habitual offender, to life imprisonment. Fritts

guilty at trial of first-degree murder and was sentenced, as a habitual offender, to life imprisonment. Fritts appealed.

Argument and Decision by the Arkansas Supreme Court: Fritts's only argument on appeal was that the circuit court erred in denying his motion to suppress statements he made on January 30, 2012 while he was incarcerated. Fritts argued that when he told the police that he had already told him everything he knew, he made an unequivocal invocation of his right to remain silent. Fritts argued that when Detective Carter subsequently showed him the murder weapon, this was the functional equivalent of Carter further questioning him after Fritts invoked his right to remain silent. The State argued in response that Fritts did not unequivocally invoke his right to remain silent, and therefore his subsequent statements were admissible. The Arkansas Supreme Court found no error in the Circuit Court's ruling to allow the statements and affirmed.

Fritts was in custody during his questioning on January 30, 2012. A statement made while in custody is presumptively involuntary. *Bryant v. State*, 2010 Ark. 7. The State has the burden of proving that a custodial statement is made voluntarily. Defendant may cut off questioning at any time by unequivocally and unambiguously invoking his right to remain silent. *Miranda v. Arizona*, 384 U.S. 436 (1966). Police officers cannot question an arrested person if he indicates in any manner that he

does not want to be questioned. Ark R. Crim. P. 4.5. Interrogation does not have to be questioning; it can be any conduct which the police should know is "reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291 (1980).

The Arkansas Supreme Court concluded that Fritts did not unequivocally and unambiguously invoke his right to remain silent. In its reasoning, the Court gave examples of previous holdings regarding invocations of the right to remain silent.

The Court held in *Whitaker* a series of "no's" followed by "huh-uh" and "I don't want to talk about it" in response to attempted questioning was an unequivocal invocation of the right to remain silent. The Court held that the word "no" clearly demonstrated a desire not to speak. *Whitaker v. State*, 348 Ark. 90 (2002).

However, the Court ruled in *Standridge v. State*, 329 Ark. 473 (1997), that "I ain't ready to talk" was not an unequivocal invocation of the right to remain silent when the defendant continued to talk. Furthermore, "Okay, then we're through with this interview then," "I don't feel like that I need to be discussing this at all," "I think it's really plumb ignorant to answer any questions right now," and "the best thing I can do is, for myself, is to shut the hell up and not talk about this without first talking to a lawyer" were also not unequivocal invocations of the right to remain silent. *Bryant*, 2010 Ark. at 15,



Sykes v. State, 2009 Ark. 522.

The Court found Fritts's statement that he had already told the police everything he knew was similar more similar to those at issue in *Standridge*, *Bryant*, and *Sykes*. The Court concluded that Fritts's statement did not indicate an unwillingness to answer further questions. The Court stated "At best, it put the officers on notice that Appellant had no new information to share with them." Therefore, because Fritts did not unequivocally and unambiguously invoke his right to remain silent, the Circuit Court did not err in denying Fritts's motion to suppress and the case was affirmed.

Case: This case was decided by the Arkansas Supreme Court on December 12, 2013 and was an appeal from Sebastian County Circuit Court. The citation is *Fritts v. State*, 2013 Ark. 505.

This article written by
Sarah Sparkman,
Deputy City Attorney

Arkansas Court of Appeals Upholds DWI Conviction Where Suspect Was Arrested Out of Garage After Fleeing From Officer in Vehicle

Facts Taken From the Case: On July 31, 2011, Officer Robert Hargus of the Fayetteville Police Department was working as a selective traffic enforcement unit in the Mount Comfort area. At around 1:30 a.m. on Sunday morning, Officer Hargus observed a car that was driven by Charles Stutte exceed the speed limit and fail to maintain its lane. Officer Hargus saw the car move side to side and cross onto the broken white line that separated the lanes. After following the car and observing the vehicle twice move left over the double yellow line and move over the solid white fog line, Officer Hargus activated his blue lights. The vehicle did not pull over and continued on at the same speed. Officer Hargus felt like the car could have safely pulled over because there were large open parking areas in the immediate vicinity.

After the vehicle failed to respond to Officer Hargus' blue lights, Officer Hargus activated his siren. The vehicle failed to pull over and continued travelling at the same pace. In a final attempt to get the driver to stop the vehicle, Officer Hargus shined his spot light into the rear view mirrors of the car. However, the driver failed to stop the vehicle. Eventually, the driver turned the car left onto another street, turned into a driveway, and parked in a garage that had just been opened. Officer Hargus had unsuccessfully attempted to stop the car for more than a minute.

After pulling into his driveway, the driver of the vehicle (Stutte) got out of his car and began walking toward the rear of the car. Officer Hargus asked Stutte to stop and said that he needed to talk to him. Stutte replied "what", and Officer Hargus repeated his request to come talk to him. Stutte replied "why" and turned to walk toward the interior door to the house. Officer Hargus stepped inside the garage, grabbed Stutte's right arm, and told him to stop. Officer Hargus smelled a strong odor of intoxicants on Stutte and observed that he was sweating profusely. Stutte tugged his right arm, used profanities, and tried to walk away. Officer Hargus at this point advised Stutte that he was under arrest for suspicion of drunk driving, and Stutte struggled when Hargus attempted to handcuff him. Stutte was charged with DWI, resisting arrest, violation of implied consent law, and careless driving.

At the trial court, Stutte argued that his arrest constituted an unreasonable search and seizure because the arresting officer entered his home without a warrant or exigent circumstances. The trial court held that there was probable cause for Stutte's arrest, that there were exigent circumstances, and that driving while intoxicated was not a minor offense. The trial court found Stutte guilty of DWI, resisting arrest, and violation of implied consent law, and merged the careless driving charge into the DWI conviction.

ARGUMENT AND DECISION BY THE COURT OF APPEALS: On

appeal to the Arkansas Court of Appeals (Court), Stutte argued that Officer Hargus entered his garage without probable cause or exigent circumstances in order to arrest him for a relatively minor offense. Stutte stated that it was determined in the Arkansas Supreme Court case of *Norris v. State*, 338 Ark. 397 (1999), that DWI is a minor offense for Fourth Amendment purposes and that Officer Hargus did not even have probable cause to arrest him for DWI prior to entering the garage.

In setting forth the applicable law, the Court said that a warrantless entry into a private home is presumptively unreasonable, and that the burden is on the State to prove that the warrantless entry is reasonable. Additionally, the Court said that the Supreme Court of the United States in *Payton v. New York*, 445 U.S. 573, held that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. Finally, the Court said that exigent circumstances are those that require immediate aid or action, and while there is no definite list of what constitutes exigent circumstances, several established examples 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 Arkansas Court of Appeals affirmed the decision of the trial court and held that under the circumstances, the trial court's decision in concluding that the warrantless arrest was reasonable was not clearly against the preponderance of the evidence. In its reasoning, the Court discussed the *Norris* case and the United States Supreme Court case of *Welsh v. Wisconsin*, 466 U.S. 740 (1984). The Court said that in the *Norris* case, a citizen who observed the defendant driving erratically followed the driver home and reported the conduct to police. Subsequently, the police went to the residence, gained entry, and arrested the driver for DWI after locating him in his bedroom. The



Arkansas Supreme Court in *Norris* held that the warrantless home arrest was unreasonable under these circumstances. In discussing the facts of the *Welsh* case, the Court said that a witness saw the driver driving erratically to the point of driving off the road. The witness saw the driver abandon the car and walk away, and the witness reported the incident to police. The police were able to locate an address by checking the vehicle registration, and the police went to the address, entered the home, found the driver in his bed, and arrested him for DWI.

The Arkansas Court of Appeals said that the facts of the *Norris* and *Welsh* cases are clearly distinguishable from the facts presented by Officer Hargus and Stutte. The Court reasoned that even though Stutte was not charged with fleeing, Officer Hargus' testimony that Stutte ignored his blue lights, siren, and spot light provided probable cause to charge Stutte with fleeing. Furthermore, the Court noted that fleeing by means of any vehicle is a Class A misdemeanor that is punishable by a minimum of two days in jail under A.C.A. § 5-54-125(d)(1)(B). The Court said that the facts of the case before it were further distinguishable from the facts of *Norris* and *Welsh* because Officer Hargus was in hot pursuit of Stutte. The Court said that Officer Hargus was in pursuit of Stutte for committing more than a minor and petty offense, such as disorderly conduct. Finally, the Court stated that Officer Hargus had reasonable suspicion that Stutte was driving while intoxicated, which justifies a stop under Rule 3.1 of the

Arkansas Rules of Criminal Procedure. In conclusion, the Court said that when considering the totality of the circumstances, the State had a strong interest in precipitating Stutte's arrest.

Note on Case: There was a strongly worded dissent from Arkansas Court of Appeals Judge Kenneth Hixson, who said that none of the misdemeanors mentioned in the majority opinion, even if supported by probable cause, would provide a constitutionally sound basis for warrantless entry into Stutte's home to search, seize, or arrest Stutte. Please remember that a police officer should be very cautious before ever deciding to arrest a suspect out of a residence for DWI (for a more in depth discussion, see the article from the January 1, 2014, edition of C.A.L.L.). Since the *Norris* case was decided, the approach taken by Springdale Police Officers has been to write the suspect a ticket for DWI when the suspect is encountered at his residence. A few suspects have even voluntarily gone with the officer down to the station to take a test, and have then been taken back to the home after the breath test was administered.

Case: This case was decided by the Arkansas Court of Appeals on February 26, 2014, and was an appeal from the Washington County Circuit Court, Honorable William A. Storey, Judge. The case citation is *Stutte v. State*, 2014 Ark. App. 139.



This article written by
Taylor Samples,
Deputy City Attorney

8th U.S. Circuit Court of Appeals Holds that Officer had Probable Cause to Search Vehicle Based on Automobile Exception

Facts Taken From the Case: On May 7, 2011, officers with the Iowa State Patrol were conducting surveillance of a residence where, based on a tip from a confidential informant, they suspected the presence of stolen trailers. The officers observed two individuals hook a dump trailer to the back of a pick-up truck. One of the individuals, who was later identified as Michael Vore, then drove the truck and trailer off of the property. Trooper John Hitchcock contacted Trooper Craig Zenor and told him to find probable cause to stop the truck.

After seeing that the trailer did not have a visible license plate, Trooper Zenor initiated a traffic stop on the truck. Vore was alone in the truck, and Trooper Zenor asked him for his driver's license, an insurance card for the truck, and registration information for both the truck and trailer. Vore was able to provide his driver's license and insurance, but was unable to provide registration for either the truck or trailer. Trooper Zenor noticed that the VIN number listed on the truck's insurance card differed by one digit from the VIN

number on the truck. Trooper Zenor ran the truck's license plate number through the police databases and discovered that the truck was not registered to Vore. Trooper Zenor asked Vore how he had acquired the truck, and Vore said that he had purchased it from a friend who had lost the title. Trooper Zenor then ran the trailer's VIN through the police databases and learned that it had been reported as stolen. Trooper Zenor found a stray license plate in the trailer that was registered to another trailer that also had been reported stolen.

Vore was placed under arrest, and before Trooper Zenor could request a tow truck for the truck and the trailer, one of the other officers informed Trooper Zenor that Vore had consented to having an officer drive the truck and trailer to the police station. A short time later, Trooper Zenor returned to the station and began a search of the truck. During the search, Trooper Zenor found a metal work booklet, \$1,000 in cash, a glass pipe, an electronic scale, and methamphetamine. During the search, Trooper Zenor opened the

truck's console and found a bag that contained more cash and methamphetamine as well as small Ziploc bags.

A grand jury later indicted Vore for possession with intent to distribute fifty grams or more of methamphetamine. At trial, a fellow inmate testified that he met Vore while in jail and that Vore admitted that he intended to use and sell the methamphetamine in the truck. Vore was convicted of the lesser included charge of possession with intent to distribute five or more grams of methamphetamine.

Argument, Applicable Law, and Decision by the 8th U.S. Circuit Court of Appeals: On appeal to the Eighth U.S. Circuit Court of Appeals (Court), Vore argued that the trial court erred by denying his motion to suppress the drugs, cash, and other items that Trooper Zenor found in the truck. In setting forth the applicable law, the Court quoted the following rule from the United States Supreme Court case of *Katz v. U.S.*, 389 U.S. 347 (1967), "searches conducted outside the judicial process, without prior approval by

judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." Furthermore, the Court said that the automobile exception permits the warrantless search of a vehicle if the police have probable cause to believe the vehicle contained contraband or other evidence of a crime before the search began. Citing *U.S. v. Wells*, 347 F.3d 280 (8th Cir. 2003). Additionally, the Court said that if the automobile exception applies, the vehicle need not be searched immediately. Citing *U.S. v. Castaneda*, 438 F.3d 891 (8th Cir. 2006). Also, the Court said that "Probable cause sufficient to justify a search exists where, in the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Quoting *U.S. v. Kennedy*, 427 F.3d 1136 (8th Cir. 2005). Finally, the Court said that it applies a common sense approach and considers all relevant circumstances in making the probable cause determination.

The Eighth U.S. Circuit Court of Appeals held that Trooper Zenor had probable cause to search the truck. The Court reasoned that the truck was towing a trailer for which

Vore did not provide registration information, that lacked a visible license plate, and that had been reported stolen. Furthermore, the Court said that the trailer contained a license plate registered to another trailer that had been reported stolen. The Court noted that the truck and trailer had just left a residence where the police suspected the presence of stolen trailers, a fact that was known to Trooper Zenor at the time of the search. Additionally, the Court stated that based upon the truck's nexus to both Vore and the trailers, there was a fair probability that the truck contained evidence related to the ownership status and the theft of the trailers. Therefore, the Court said that pursuant to the automobile exception, Trooper Zenor did not need a warrant to search the truck. The Court said that the probable cause allowed Trooper Zenor to search inside the metal work booklet and inside the truck's console as well, since both could have contained information related to the ownership status and the theft of the trailers. The Court noted that in the U.S. Supreme Court case of *U.S. v. Ross*, 456 U.S. 798 (1982), the Supreme Court said that "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." For all of the above reasons, the Court affirmed the trial court's denial of Vore's motion to suppress evidence.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on March 4, 2014, and was an appeal from the United States District Court for the Southern District of Iowa-Council Bluffs. The case citation is *U.S. v. Vore*, ___ F.3d ___ (2014).

This article written by
Taylor Samples
Deputy City Attorney

The Cell Phone and the Law of Search and Seizure in the Context of the Automobile Exception in the Eight Circuit

Timothy Stringer was convicted in federal Court in the Western District of Missouri of the federal offense of producing child pornography. The conviction was based on a traffic stop by a Missouri State Trooper and resulting evidence the Trooper obtained from cell phones and a camera he searched during the traffic stop. The Trooper had no warrant.

One of the issues on appeal was the District Court order overruling a motion to suppress evidence discovered in that warrantless search of the cell phones. I have quoted verbatim the below facts

from the Court's slip opinion because, after all, police stories are much more interesting than legal analysis:

On June 14, 2010, Trooper T.W. Hilburn of the Missouri State Highway Patrol was on duty in Cassville, Missouri. Hilburn observed a car leaving a residence known for drug activity. Hilburn stopped the vehicle because it was missing license plates and did not have working taillights.

When Hilburn approached the car, he observed Stringer, then

thirty-three years old, in the driver's seat. There were two young, female passengers: G.R., then fifteen, in the front seat and A.K., then seventeen, in the back. Stringer said he had just purchased the car but had not yet licensed it. Hilburn obtained paperwork from Stringer, returned to his patrol car to run a computer check, and walked back to Stringer's vehicle. At that point, he noticed "pretty quickly" that G.R.'s eyes were "very dilated." Hilburn suspected that both female passengers were under the influence of illegal drugs, so he





called the chief of police in Cassville and requested that she bring a drug dog to the scene.

Having verified that the vehicle had a valid Arkansas title, Hilburn returned Stringer's paperwork and told him that he was free to leave, but that he could not drive away the vehicle without license plates and functioning taillights. Hilburn requested permission to search Stringer's vehicle; Stringer refused. Stringer then inquired whether he could leave if he fixed the taillights. Hilburn replied that Stringer could attempt to fix the lights but that because the drug dog was en route, the vehicle could not leave.

When Stringer got out of the car, Hilburn observed a knife in Stringer's pocket and asked him to remove it for safety reasons. Stringer emptied his pockets, and one object then displayed was a case for contact lenses. Hilburn asked permission to examine the case, and Stringer consented. Upon opening the case, Hilburn noticed a white crystalline substance around the edges of the lid and saw a white "blob" in the center of each compartment. Hilburn suspected the substance was methamphetamine and asked the dispatcher to send an officer with a field test kit.

Ten minutes later, an officer arrived with a drug test kit. The contact lens case tested positive for methamphetamine. Hilburn then placed Stringer under arrest and placed him in his patrol car. The local police chief then arrived with a drug dog. The canine alerted to the driver's seat and the dash panel area.

Hilburn then searched Stringer's vehicle. In the car, Hilburn located an open purse that contained a forged Missouri driver's license in the name of G.R. and a glass pipe that Hilburn thought was consistent with drug use. He also found a Samsung phone inside the

purse. Looking for drug information, he searched through the text messages and contacts list. During this review, Hilburn discovered photographs of a male and female engaged in sexual intercourse. G.R. confirmed that the male was Stringer and that she was the female. Hilburn returned to his patrol car and informed Stringer that he was now under arrest for statutory rape.

Hilburn continued the search of Stringer's vehicle. He found a digital camera and searched the images on the camera. Several images depicted G.R. and Stringer engaged in intercourse, and many more showed G.R. nude or in a state of undress. The camera also contained pictures of A.K. undressed and nude.

Hilburn also located a Motorola cell phone, which G.R. identified as Stringer's. Hilburn searched that phone and discovered images similar to those found on G.R.'s phone, including images of Stringer and G.R. engaged in sexual intercourse. During subsequent interviews, G.R. confirmed that she had engaged in sexual intercourse with Stringer, and that Stringer used a cell phone and camera to take photographs of her engaged in sexually explicit conduct.

United States v. Stringer, 2014 U.S. App. LEXIS 157, 2-5 (8th Cir. Mo. Jan. 6, 2014)

The holding of the Eighth Circuit Court of Appeals was anticlimactic; the Federal District Court judgment was affirmed due to lack of standing to challenge the search. In other words, they ignored the defense argument all together on procedural grounds. More specifically, they ruled that the defendant could not claim any reasonable expectation of privacy in the cell phone belonging to "G.R.," the Court-redacted abbreviation for the juvenile victim, and that the evidence obtained from Stringer's personal cell phone was cumulative, meaning Stringer could have been convicted without

it.

Hardly the answer we were all looking for regarding cell phone searches. But this does reinforce a very notable exception to the warrant preference rule, that being property not owned or claimed by the suspect. Had charges been filed against the owner of the cell phone, either as a principle or accomplice, the evidence may well have been subject to suppression.

While not central to the issue of cell phone search and seizure, the Court also held that there were sufficient facts and circumstances to justify the continued detention and subsequent arrest of Stringer. Note the factors of the Stinger case:

1. The people were leaving a residence known for drug activity
2. The vehicle was missing license plates and did not have working taillights
3. The difference in age between the driver and unrelated passengers
4. The passengers' eyes were "very dilated."

Other factors were observed later in the stop. But these were the only factors in determining probable cause for the stop and reasonable suspicion for continued detention beyond the time allowable for the traffic infraction alone. I should also note that Trooper Hilburn was a certified Drug Recognition Expert. He was able to articulate enough facts

and circumstantial evidence to persuade the Court that he had reasonable suspicion. These factors can overcome the need for a warrant, particularly when dealing with a stopped automobile.

The Automobile Exception to the Fourth Amendment Warrant Requirement

In a related cell phone case involving a stopped automobile, *United States v. Brooks*, 715 F.3d 1069, (8th Cir. 2013), the Eight Circuit stopped short of addressing the issue of a cell phone in a car as a "container" under the automobile exception to the warrant requirement set out in the Fourth Amendment to the United States Constitution. In that case, officers seized and searched a cell phone and the contents of the cell phone were later introduced by prosecutors at trial. The Defendant moved to suppress the evidence. In its ruling, the Court noted that the police subsequently obtained a search warrant for the seized cell phone on independent grounds, thus invoking the independent source doctrine to save the evidence. The actual language of the Court was instructive:

A warrantless search is per se unreasonable under the Fourth Amendment absent a recognized exception. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). However, "[u]nder the so-called automobile exception to the warrant requirement, police officers may conduct a warrantless search of a vehicle and containers within the vehicle whenever probable cause exists." *United States v. Sample*, 136 F.3d 562, 564 (8th Cir. 1998) (citing *California v. Acevedo*, 500 U.S. 565, 580, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991)). *Brooks* argues that the district court erred in concluding that his cell phone was a "container" for the purposes of the automobile exception as the Supreme Court envisioned traditional containers, such as suitcases or briefcases, when crafting the exception, not modern cell

phones.

In this case, it is unnecessary to decide whether a cell phone is a container for purposes of the automobile exception because in any case, the subsequent warrant was an independent source for the evidence. HN3 Under the independent source doctrine, the exclusionary rule is inapplicable where the evidence was acquired through a source independent of the *tainted search*. *United States v. Swope*, 542 F.3d 609, 613 (8th Cir. 2008). [**10] A warrant obtained after an illegal search is an independent source if: (1) "police [would] have applied for the warrant had they not acquired the tainted information," and (2) "the application affidavits support probable cause after the tainted information has been redacted from them." *Id.* at 613-14.

United States v. Brooks, 715 F.3d 1069, 1075 (8th Cir. 2013) (emphasis added)

Again, the Eight Circuit doges the weightier cell phone issue. But note the characterization of the cell phone search as "tainted." This would suggest that, in the absence of a warrant, any search of the contents of a cell phone under these circumstances, specifically during a traffic stop and when contained in an automobile, would be potentially unconstitutional and subject to suppression, without consent or "exigent circumstances." Exigent circumstances are those that require "immediate aid or action." The most common examples of exigent circumstances involve the removal or destruction of evidence, danger to life, or hot pursuit of a suspect.

Search Incident to Arrest

All of the above discussion involved a cell phone discovered in an automobile and not on the person of the suspect. Once the phone is in someone's pocket, the analysis changes, particularly when the suspect is arrested as part of the stop. In this context, the Doctrine



of search incident to arrest, or SIA comes into play.

The landmark case of *Arizona v. Gant*, 556 U.S. 332, (U.S. 2009) held that vehicle searches incident to arrest of a suspect are no longer an exception to the warrant requirement, and the only time a vehicle may be subjected to a warrantless search pursuant to arrest is "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 556 U.S. 332, 343 (U.S. 2009) (internal citations omitted). But that ruling did not affect searches of the person.

An article in the *C.A.L.L.* from 2007 addressed cell phone search and seizure as articulated in the case of *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007). In *Findley*, the Fifth Circuit Court of Appeals ruled that a warrantless search of a cell phone was permissible as a SIA. Since that ruling, the Circuits have split, some following the holding of *Findley*, others rejecting it. Now, there is no clear consensus among the Circuits on the issue of warrantless cell phone searches and the Eight Circuit, of which we are a part, is deafeningly silent on the issue. Once the Eight Circuit addresses this issue, the analysis as to admissibility or suppression of seized cell phone evidence will depend, as in the *Stringer* case, on reasonable suspicion leading to probable cause.

Reasonable Suspicion in Arkansas

Many criminal cases over the years have defined reasonable suspicion. They all quote Arkansas Rules of

Criminal Procedure, Rule 2.1, which is the statutory definition and enumerated list of factors of reasonable suspicion:

...

"Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

...

The following are among the factors to be considered in determining if a "reasonable suspicion" exists:

(a) The conduct and demeanor of a person.

(b) The gait and manner of a person.

(c) Any knowledge the officer may have of a person's background or character.

(d) Whether a person is carrying anything, and what he is carrying.

(e) The manner of a person's dress, including bulges in his clothing, when considered in light of all the other factors.

(f) The time of the day or night.

(g) Any overheard conversation of a person.

(h) The particular streets and areas involved.

(i) Any information received from third person, whether he is known or unknown.

(j) Whether a person is consorting with others whose conduct is "reasonably suspect."

(k) A person's proximity to known criminal conduct.

(l) Incidence of crime in the

immediate neighborhood.

(m) A person's apparent effort to conceal an article.

(n) Apparent effort of a person to avoid identification or confrontation by the police.

Ark. R. Crim. P. Rule 2.1
(emphasis added)

I have highlighted the factors applicable in the *Stringer* case. While that case was federal application of Missouri procedural law, it is all similar to Arkansas law. By speaking in the terms mentioned above, suspicion becomes "specific and articulable" within the meaning of *Terry v. Ohio*, 392 U.S. 1, 27 (1968), and therefore, potentially "reasonable." The factors are the language of the Court. But please note that the list is not all inclusive.

Reasonable suspicion is the means by which a Law Enforcement official can investigate further and potentially obtain probable cause. However, the final determination of whether an act by a state actor, such as a Law Enforcement official, is reasonable lies with the Court. Officer testimony is the key.

Bottom Line: Seize the cell phone, if you must, but wait for the warrant to search it, if you can. If your case involves a cell phone that is owned or used by the suspect, the rules are different than when someone else not charged with a crime owns the device. In any event, be able to explain what you did in the context and terms of the factors of reasonable suspicion contained in Arkansas Rules of Criminal Procedure, Rule 2.1, as illustrated in *Stringer*.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on January 6, 2014, and was an appeal from the United States District Court for the Western District of Missouri-Joplin. The case citation is *United States v. Stringer*, 739 F.3d 391 (2014).

This article is written by:
David Phillips
Deputy City Attorney



**C.A.L.L.
(City Attorney
Law Letter)**

**is a publication of the
Springdale
City Attorney's Office
201 Spring Street
Springdale, AR 72764
(479) 750-8173**

**This publication is
intended to provide legal
guidance for
Springdale, Arkansas
police officers.**

**Officers reading C.A.L.L.
from other jurisdictions
should consult their own
legal counsel for legal
advice.**