



C.A.L.L.



Issue 10-04

City Attorney Law Letter

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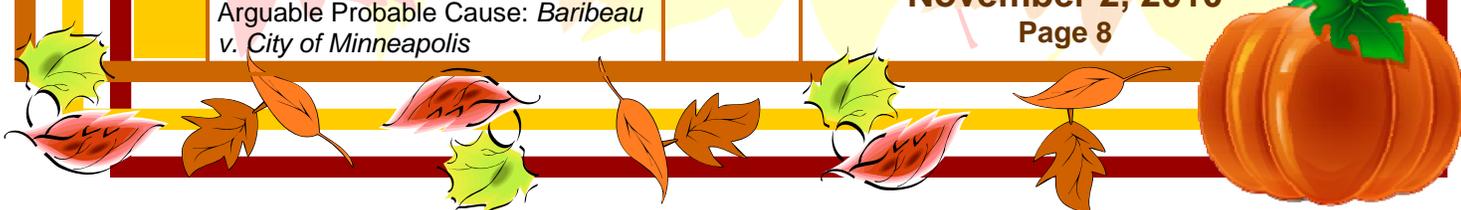
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Calls Involving Children; Hotlining, Emergency Holds, and Charging Decisions

HOTLINE NO.: 1-800-482-5964

Officers are in the unique and difficult position of dealing with children on a variety of calls. You deal with children being lost because a parent or caregiver has failed to supervise them, you deal with domestic battery where children witness their mother being beaten, you enter residences where parents or caregivers are intoxicated, and you arrest people from vehicles for drug possession with children present. These are only a few of the many situations you face. While you have your hands full dealing with the intoxicated subject, the batterer, or the drugs, as officers you are also mandated reporters under Arkansas Code Annotated §12-18-402 and are required by law to **immediately** call the child abuse hotline at 1-800-482-5964. In 2009 a new statute was passed making it a class A misdemeanor to be a mandated reporter and fail to report child maltreatment.

12-18-201. Failure to notify by a mandated reporter in the first degree.

(a) A person commits the offense of failure to notify by a mandated reporter in the first degree if he or she:

(1) Is a mandated reporter under this chapter;

(2) Has:

(A) Reasonable cause to suspect that a child has been subjected to child maltreatment;

(B) Reasonable cause to suspect that a child has died as a result of child maltreatment; or

(C) Observes a child being subjected to conditions or circumstances that would reasonably result in child maltreatment; and

(3) Knowingly fails to notify the Child Abuse Hotline of the child maltreatment or suspected child maltreatment.

(b) Failure to notify by a mandated reporter in the first degree is a Class A misdemeanor.

It is imperative then that you know when and under what circumstances you are required to hotline. (As a rule of thumb if you have any question err on the side of caution and hotline it.)

You are required to hotline under A.C.A. §12-18-402 if you have reasonable cause to suspect a child has:

1) Been subjected to child maltreatment; or died as a result of child maltreatment;

OR

2) You observe a child being subjected to conditions or circumstances that would reasonably result in child maltreatment.

Please note that you are required to separately hotline even if you have called the local DHS office. DHS in Washington County is 521-1270 and in Benton County it is 273-9011. So what is child maltreatment? Child maltreatment is defined under A.C.A. §12-18-103 as abuse, sexual abuse, neglect, sexual exploitation, or abandonment. Each

of these terms are also defined under §12-18-103.

EXAMPLES

Lets look at some scenarios which are more fully explained when you read the definitions for abuse, sexual abuse, neglect, sexual exploitation, and abandonment that are set out below.

Scenario #1: You pull a woman over for speeding, and she has her two juvenile children in the vehicle with her. The woman gives you consent to search her vehicle. You locate a syringe with meth residue in the glove box. Hotline it.

Explanation: You are required to hotline if *you observe a child being subjected to conditions or circumstances that would reasonably result in child maltreatment.* Mom being a meth user certainly fits in this category.

Scenario #2: You are called out to a domestic disturbance. You arrest dad and mom is drunk. A seven-year-old girl is present and no other adults are home. Of course you hotline it because even though she is present it is *neglect* because she is too impaired to supervise her child, but you also don't leave the little girl alone in the drunk mothers care without a responsible adult present so you contact DHS.

Scenario #3: You go to a call for a domestic where mom was holding the baby as dad was taking swings at her. Whether dad made contact or not, you must hotline it and you should charge dad with endangering the welfare of a minor. If the situation is such that you can charge endangering, then you certainly should hotline it.

Scenario #4: You pull over a driver for driving while intoxicated and she has two kids in the vehicle. Hotline it, be sure to write children in vehicle on the face of the DWI ticket, charge endangering and contact DHS.

Scenario #5: You are called to a disturbance where a man has beaten his three-year-old son. Mom is not cooperative, refuses to take the child to the hospital, and is only concerned with protecting dad. Take emergency custody because there are clear and *reasonable grounds that this child is in immediate danger and removal is necessary to prevent serious harm.* Both parents' actions meet the definition of *child endangerment; abuse* on dads part and *neglect* on moms call DHS and Hotline it because even though you call DHS you must also hotline it.

Scenario #6: You are called out to a two-year-old wandering outside alone. Witnesses state the child has been out there 20 minutes with no supervision. You find mom and she shows no concern. Hotline it- that is *neglect*, also charge mom with endangering

Abuse

"Abuse" means any of the following acts or omissions by a parent, guardian, custodian, foster parent, person eighteen (18) years of age or older living in the home with a child whether related or unrelated to the child, or any person who is entrusted with the child's care by a parent, guardian, custodian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person legally responsible for the child's

welfare, but excluding the spouse of a minor:

(i) Extreme or repeated cruelty to a child;

(ii) Engaging in conduct creating a realistic and serious threat of death, permanent or temporary disfigurement, or impairment of any bodily organ;

(iii) Injury to a child's intellectual, emotional, or psychological development as evidenced by observable and substantial impairment of the child's ability to function within the child's normal range of performance and behavior;

(iv) Any injury that is at variance with the history given;

(v) Any nonaccidental physical injury;

(vi) Any of the following intentional or knowing acts, with physical injury and without justifiable cause:

(a) Throwing, kicking, burning, biting, or cutting a child;

(b) Striking a child with a closed fist;

(c) Shaking a child; or

(d) Striking a child on the face or head; or

(vii) Any of the following intentional or knowing acts, with or without physical injury:

(a) Striking a child six (6) years of age or younger on the face or head;

(b) Shaking a child three (3) years of age or younger;

(c) Interfering with a child's breathing;

(d) Pinching, biting, or striking a child in the genital area;

(e) Tying a child to a fixed or heavy object or binding or tying a child's limbs together;

(f) Giving a child or permitting a child to consume or inhale a poisonous or noxious substance not prescribed by a physician that has the capacity to interfere with normal physiological functions;

(g) Giving a child or permitting a child to consume or inhale a substance not prescribed by a physician that has the capacity to alter the mood of the child, including, but not limited to, the following:

(1) Marijuana;

(2) Alcohol, excluding alcohol given to a child during a recognized and established religious ceremony or service;

(3) A narcotic; or

(4) An over-the-counter drug if a person purposely administers an overdose to a child or purposely gives an inappropriate over-the-counter drug to a child and the child is detrimentally impacted by the overdose or the over-the-counter drug;

(h) Exposing a child to a chemical that has the capacity to interfere with normal physiological functions,

including, but not limited to, a chemical used or generated during the manufacture of methamphetamine; or

(i) Subjecting a child to Munchausen syndrome by proxy or a factitious illness by proxy if the incident is confirmed by medical personnel.

(B)(i) The list in subdivision (2)(A) of this section is illustrative of unreasonable action and is not intended to be exclusive.

(ii) No unreasonable action shall be construed to permit a finding of abuse without having established the elements of abuse.

(C)(i) "Abuse" shall not include physical discipline of a child when it is reasonable and moderate and is inflicted by a parent or guardian for purposes of restraining or correcting the child.

(ii) "Abuse" shall not include when a child suffers transient pain or minor temporary marks as the result of an appropriate restraint if:

(a) The person exercising the restraint is an employee of an agency licensed or exempted from licensure under the Child Welfare Agency Licensing Act, § 9-28-401 et seq.;

(b) The agency has policy and procedures regarding restraints;

(c) No other alternative exists to control the child except for a restraint;

(d) The child is in danger or hurting himself or herself or others;

(e) The person exercising the restraint has been trained in properly restraining children, de-escalation, and conflict resolution techniques;

(f) The restraint is for a reasonable period of time; and

(g) The restraint is in conformity with training and agency policy and procedures.

(iii) Reasonable and moderate physical discipline inflicted by a parent or guardian shall not include any act that is likely to cause and which does cause injury more serious than transient pain or minor temporary marks.

(iv) The age, size, and condition of the child and the location of the injury and the frequency or recurrence of injuries shall be considered when determining whether the physical discipline is reasonable or moderate;

Please note the acts following subsection vii above, (that I have bolded), are abuse whether it is with or **without physical injury**.

Sexual Abuse

"Sexual abuse" means:

(A) By a person ten (10) years of age or older to a person younger than eighteen (18) years of age:

(i) Sexual intercourse, deviate sexual activity, or sexual contact by forcible compulsion;

(ii) Attempted sexual intercourse, deviate sexual activity, or sexual contact by forcible compulsion;

(iii) Indecent exposure; or

(iv) Forcing the watching of pornography or live sexual activity;

(B) By a person eighteen (18) years of age or older to a person not his or her spouse who is younger than sixteen (16) years of age:

(i) Sexual intercourse, deviate sexual activity, or sexual contact; or

(ii) Attempted sexual intercourse, deviate sexual activity, or sexual contact;

(C) By a caretaker to a person younger than eighteen (18) years of age:

(i) Sexual intercourse, deviate sexual activity, or sexual contact;

(ii) Attempted sexual intercourse, deviate sexual activity, or sexual contact;

(iii) Forcing or encouraging the watching of pornography;

(iv) Forcing, permitting, or encouraging the watching of live sexual activity;

(v) Forcing the listening to a phone sex line; or

(vi) An act of voyeurism; or

(D) By a person younger than ten (10) years of age to a person younger than eighteen (18) years of age:

(i) Sexual intercourse, deviate sexual activity, or sexual contact by forcible compulsion; or

(ii) Attempted sexual intercourse, deviate sexual activity, or sexual contact by forcible compulsion;

Neglect

"Neglect" means those acts or omissions of a parent, guardian, custodian, foster parent, or any person who is entrusted with the child's care by a parent, custodian, guardian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person legally responsible under state law for the child's welfare, but excluding the spouse of a minor and the parents of the married minor, which constitute:

(i) Failure or refusal to prevent the abuse of the child when the person knows or has reasonable cause to know the child is or has been abused;

(ii) Failure or refusal to provide necessary food, clothing, shelter, and education required by law, excluding the failure to follow an individualized educational program, or medical treatment necessary for the child's well-being, except when the failure or refusal is caused primarily by the financial inability of the person legally responsible and no services for relief have been offered;

(iii) Failure to take reasonable action to protect the child from abandonment, abuse, sexual abuse, sexual exploitation, neglect, or

parental unfitness when the existence of the condition was known or should have been known;

(iv) Failure or irremediable inability to provide for the essential and necessary physical, mental, or emotional needs of the child, including the failure to provide a shelter that does not pose a risk to the health or safety of the child;

(v) Failure to provide for the child's care and maintenance, proper or necessary support, or medical, surgical, or other necessary care;

(vi) Failure, although able, to assume responsibility for the care and custody of the child or to participate in a plan to assume such responsibility; or

(vii) Failure to appropriately supervise the child that results in the child's being left alone at an inappropriate age or in inappropriate circumstances creating a dangerous situation or a situation that puts the child at risk of harm.

(B)(i) "Neglect" shall also include:

(a) Causing a child to be born with an illegal substance present in the child's bodily fluids or bodily substances as a result of the pregnant mother's knowingly using an illegal substance before the birth of the child; or

(b) At the time of the birth of a child, the presence of an illegal substance in the mother's bodily fluids or bodily substances as a result of the pregnant mother's knowingly using an illegal substance before the birth of the child.

(ii) As used in this subdivision (13)(B), "illegal substance" means a drug that is prohibited to be used or possessed without a prescription under the Arkansas Criminal Code, § 5-1-101 et seq.

(iii) A test of the child's bodily fluids or bodily substances may be used as evidence to establish neglect under subdivision (13)(B)(i)(a) of this section.

(iv) A test of the mother's bodily fluids or bodily substances may be used as evidence to establish neglect under subdivision (13)(B)(i)(b) of this section;

Sexual Exploitation

"Sexual exploitation" means:

(A) Allowing, permitting, or encouraging participation or depiction of the child in:

(i) Prostitution;

(ii) Obscene photography;

(iii) Obscene filming; or

(B) Obscenely depicting, obscenely posing, or obscenely posturing a child for any use or purpose;

Abandonment

"Abandonment" means the failure of a parent to:

(A) Provide reasonable support and to maintain regular contact with a child through statement or contact when the failure is accompanied by an intention

on the part of the parent to permit the condition to continue for an indefinite period in the future and support or maintain regular contact with a child without just cause; or

(B) An articulated intent to forego parental responsibility.

(C) "Abandonment" does not include acts or omissions of a parent toward a married minor

There are cases in which you should exercise an emergency hold and take children into custody under A.C.A §9-27-313, which is set out in part below;

9-27-313. Taking into custody.

(a)(1) A juvenile only may be taken into custody without a warrant before service upon him or her of a petition and notice of hearing or order to appear as set out under § 9-27-312:

(C) By a law enforcement officer or by a duly authorized representative of the Department of Human Services if there are **clear, reasonable grounds to conclude that the juvenile is in immediate danger and that removal is necessary to prevent serious harm** from his or her surroundings or from illness or injury and if parents, guardians, or others with authority to act are unavailable or have not taken action necessary to protect the juvenile from the danger and there is not time to petition for and to obtain an order of the court before taking the juvenile into custody.

(2) When any juvenile is taken into custody without a warrant, the officer taking the juvenile into custody shall

immediately make every effort possible to notify the custodial parent, guardian, or custodian of the juvenile's location.

(c) When a law enforcement officer, a representative of the department, or other authorized person takes custody of a juvenile alleged to be dependent-neglected or under the Child Maltreatment Act, §12-18-101 et seq., he or she shall:

(1)(A) Notify the department and make every effort possible to notify the custodial parent, guardian, or custodian of the juvenile's location.

(B) The notification to the parents shall be in writing and shall include a notice:

(i) That the juvenile has been taken into foster care;

(ii) Of the name, location, and phone number of the person at the department whom they can contact about the juvenile;

(iii) Of the juvenile's and parents' rights to receive a copy of any petition filed under this subchapter;

(iv) Of the location and telephone number of the court; and

(v) Of the procedure for obtaining a hearing; or

(2) Return the juvenile to his or her home.

Again, please be aware you must hotline immediately, not in a couple days when you get your report done. This is important

because lets say an officer is called out to a motel for an unsupervised two-year-old walking around the motel pool, mom is located and she is in her motel room asleep and drug paraphernalia is in the room. If you wait three or four days to hotline the report the mother will be long gone from that motel room and DHS won't be able to find mom and child. Also, the sooner you hotline a report, the sooner an investigator will be contacting the parents to ensure the safety of the children.

I know you all are busy and you have a very difficult job and you may even think hotlining or contacting DHS is a waste of time, but isn't it worth the time to hotline just in case it saves one child?

Amber Roe
Deputy City Attorney



Election Day – Tuesday, November 2, 2010

As most of you know, Election Day will be coming up Tuesday, November 2, 2010. In years past, questions have arisen on what kind of campaigning can be done close to the polls. In anticipation of Election Day, you should familiarize yourself with the following from Ark. Code Ann. §7-1-103(9)(A):

“no person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever in the building or within one hundred

feet (100') of the primary exterior entrance used by voters to the building containing the polling place on election day.”

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

Jeff Harper
City Attorney



Arkansas Court of Appeals- Constructive Possession of Drugs and Firearms Upheld

Facts: On October 7, 2008, Little Rock Police and SWAT team members executed a search warrant at 7424 Fairfield Drive in Little Rock. Once the residence was secured, Officer Rick Harmon [Officer Harmon] searched the home. The suspect, Marcus Allen [Allen] was sitting, handcuffed, on the kitchen floor. No contraband was found on Allen, but lying next to him was a bag with a white, rock-like substance and a bag with a green, vegetable-like substance and a set of electronic scales. As Officer Harmon opened cabinets in the kitchen to discover other bags of white substance, Allen laughed and said that the "stuff wasn't real." A rifle was located in a bedroom of the residence. In the living room, a piece of mail was discovered addressed to Allen at 7424 Fairfield Drive. Allen had also stated to an officer that his address was 7424 Fairfield Drive. The Arkansas State Crime Lab determined that

the white substance was not a controlled substance, but the green substance was marijuana and there was cocaine residue on the electronic scales.

At trial for the charges of simultaneous possession of drugs and firearms, possession of a counterfeit substance with the intent to deliver, and possession of drug paraphernalia, Allen was sentenced to ten years, concurrent, in the Arkansas Department of Correction. Allen appealed stating that there was insufficient proof to support a conviction in that he was not in possession of the drugs or firearm.

Argument and Discussion: It is not necessary for the State to prove literal physical possession of contraband in order to prove possession. *Polk v. State*, 348 Ark. 446, 452 (2002). The State can prove that a defendant had constructive possession of contraband by proving that he controlled the contraband or had the right to control it. *Id.* at 452. Constructive possession can be implied where contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control. *Darrough v. State*, 322 Ark. 251, 253 (1995). Joint occupancy of a residence, however, requires an additional factor to link the accused to the contraband such as: that the accused exercised care, control, and management over the contraband; and that the accused knew the matter possessed was contraband. *Id.* at 254.

Allen argued that there was no contraband found on him and that there were other people in the residence. The Court of Appeals held that there was substantial evidence that Allen exercised care, control, and management over the contraband. Allen was there when the raid commenced. Allen gave officers that address as his address. There was mail in the residence addressed to

Allen. And there were several illegal items lying in close proximity to Allen. Also, Allen admitted that the substance in the kitchen cabinets was not "real." Only someone who exercised care, control and management of the white substance would know of its location and the fact that it was counterfeit. The conviction was therefore upheld.

Case citation: This case was decided by the Arkansas Court of Appeals on March 31, 2010, and was an appeal from the Pulaski County Circuit Court. The case citation is *Allen v. State*, 2010 Ark. App. 266.

Brooke Lockhart
Deputy City Attorney



Defendant Convicted of Felony Cocaine Possession in Constructive Possession Case

Facts: Little Rock Police Officer Spencer Smith [Officer Smith] observed a vehicle with a defective brake light. The vehicle was driven by Jesse Mack [Mack]. A vehicle license plate check revealed the tags were fictitious. Officer Smith stopped the vehicle and Mack was unable to provide a driver's license and claimed he had borrowed the vehicle. Mack was asked to exit the vehicle. The passenger, Hattie Temple [Temple], remained inside the vehicle. Officer Smith was accompanied by a partner and testified that under these conditions his partner would usually position himself at the passenger side of the vehicle. Officer Smith discovered that Mack's driver's license was suspended and Mack was placed in the patrol vehicle because Mack's vehicle would be impounded. Temple was then removed from the vehicle so that an inventory of its

contents could be conducted prior to impoundment. During the inventory, a brown tin canister was found wedged between the center console and the driver's seat. The canister contained cocaine and a small amount of marijuana.

At a bench trial, Mack was convicted of felony possession of cocaine and misdemeanor possession of marijuana. Mack appealed arguing that the drug evidence should be suppressed because there was insufficient evidence that he possessed the contraband.

Argument and Discussion: It is not necessary for the State to prove literal physical possession of drugs in order to prove possession; constructive possession-control of or right to control the contraband-is sufficient. *Abshire v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002). Constructive possession may be implied when contraband is in the joint control of the accused and another person. *Id.* However, joint occupancy of an ordinary passenger vehicle, standing alone, is insufficient to establish joint possession or possession; there must be some other factor linking the accused to the contraband. *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005). In cases involving vehicles occupied by more than one person, additional factors to be considered are (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest. *Id.*

In this case, Mack was the driver of the vehicle, thereby exercising dominion and

control over it. Moreover, the drugs were found immediately adjacent to the driver's seat in a location immediately accessible to Mack. The Court held that these factors were sufficient to link Mack to the contraband to establish possession or joint possession.

Case citation: This case was decided by the Arkansas Court of Appeals on June 23, 2010, and was an appeal from the Pulaski County Circuit Court. The case citation is *Mack v. State*, 2010 Ark. App. 514.

Brooke Lockhart
Deputy City Attorney



Pat Down Search Upheld: *Bruce Blount v. State of Arkansas*

On November 14, 2008 Sheriff's Deputies Alvin McMiller and Vince Edwards went to serve a misdemeanor hot check warrant on Robert Roberts in Jefferson County. Upon arrival at Roberts residence, a young girl answered the door and told the Deputies that Roberts was not there. As the Deputies proceeded to their vehicle they saw two men and a woman who appeared to be trying to hide. The deputies approached the subjects and noticed a large bulge in one of the men's pockets. Deputy McMiller was concerned that the object was big enough to be a gun or knife so he performed a pat down of the man and found a knife along with a baggie of a white substance. As the deputies were talking to the subjects, another man, Bruce Blount, came out of a shed that had smoke coming out of it. Blount came towards the deputies with his hands up stating, "I ain't did nothing. I ain't did nothing wrong." McMiller thought that Blount was on some

type of drug, and since Blount approached the deputies hastily with bulges in his front pocket, McMiller patted down Blount also. McMiller located two syringes containing a white liquid, two small knives and two empty containers.

Blount was subsequently charged with possession of a controlled substance and possession of drug paraphernalia. At trial, Blount moved to suppress the hypodermic needles and drugs arguing that the deputies did not have the right to perform the pat-down search. The trial judge denied the motion to suppress stating that the officers had a right to perform a pat down for officer safety, and Blount was sentenced to six years. Blount then appealed the denial of his motion to suppress.

On appeal, Blount argued that the deputies had no reasonable suspicion to believe that he was armed and dangerous, a finding that is necessary to justify the pat-down search. Arkansas Rule of Criminal Procedure 3.4 states as follows:

If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

The standard for whether a pat-down search is valid is if the officer has "a reasonable belief that the officers safety or that of others is at stake." *Terry v Ohio*, 392 U.S. 1 (1968).

The Court of Appeals stated that the trial court did not err in finding that the deputies had reasonable suspicion to believe Blount was armed and dangerous. The court stated that immediately prior to dealing with Blount the deputies were dealing with three people trying to hide from them, one of whom had bulges in his pockets and had a knife on him. Blount then approached the officers appearing to be under the influence and with a similar bulge in his pockets. The court then went on to quote *Stout v State*, 304 Ark 610, 614 which held that the officer was justified in frisking a suspect , "if for no other reason ... to determine that the obvious bulge in [the appellant's] jacket was not a weapon."

Therefore as long as an officer has reasonable suspicion that a person is armed and dangerous they may perform a pat-down search. A reasonable suspicion is more than a hunch, it is facts that an officer is able to articulate so as to justify the pat-down.

Case: This case was decided by the Arkansas Court of Appeals on March 3, 2010 and was an appeal from Jefferson County Circuit Court. The case cite is *Blount v. State*, 2010 Ark. App. 219.

Amber Roe
Deputy City Attorney



Positive Alert From Canine Sniff Constitutes Probable Cause to Search Vehicle: *State of Arkansas v. Jaret Thompson*

On April 9, 2009, Sergeant Chris Chapmond with the Hot Springs Police Drug Task Force received a tip that Jaret Thompson was selling drugs in the parking lot of a hospital. Upon arrival to the hospital, Chapmond saw Jaret's vehicle leaving the parking lot and notified Officer Kenneth Kizer for assistance in surveillance. Officer Kizer observed Thompson drive left of center and pulled Thompson over. As Officer Kizer approached the vehicle he saw an open container and smelled the odor of intoxicants. Officer Kizer had Thompson exit the vehicle to perform field sobriety tests. As Officer Kizer was concluding the field sobriety tests, Officer Michael Jones arrived with police drug dog Nero. Nero was run around the vehicle and gave a positive alert. The vehicle was searched and a large amount of pseudoephedrine was discovered. Thompson was subsequently charged with possession with intent to manufacture.

At trial, Thompson moved to suppress the drugs arguing that the sole basis for the search of the vehicle was the canine alert, and that was insufficient to provide justification for the search. The Garland County Circuit court granted the motion to suppress, and the State appealed the suppression to the Arkansas Supreme Court. The Arkansas Supreme Court stated that while the Arkansas Supreme Court had itself never held that a positive canine alert standing alone provides probable cause to search, the federal courts and the Arkansas Court of Appeals clearly have. In *United States v. Sundby*, 186 F.3d 873, (8th Cir.

1999), the court stated, "A dog's positive indication alone is enough to establish probable cause for the presence of a controlled substance if the dog is reliable. To establish the dog's reliability, the affidavit need only state the dog has been trained and certified to detect drugs. An affidavit need not give a detailed account of the dog's track record or education." The Arkansas Court of Appeals has similarly stated that a canine alert gives probable cause to search a vehicle. "When an officer has a police dog at his immediate disposal, a motorist's detention may be briefly extended for a canine sniff of the vehicle in the absence of reasonable suspicion without violating the Fourth Amendment. Once a canine alerts, an officer has probable cause to suspect the presence of illegal contraband." *Miller v. State*, 81 Ark. App. 401, 411-12, (2003).

The Court in the present case stated that Officer Jones testified as to Nero's reliability and that Nero's training records had been maintained and there was no challenge to Nero's reliability. The Court held that therefore once Nero alerted on Thompson's vehicle, there was probable cause for officers to search.

Cite: This case was decided by the Supreme Court of Arkansas on June 17, 2010 and was an appeal from Garland County Circuit Court. The case cite is *State v. Thompson*, 2010 Ark. 294.

Amber Roe
Deputy City Attorney



Arkansas Supreme Court Holds No Right to Counsel at Time of Breathalyzer Test in Rogers, Arkansas D.W.I. Case

Facts: After midnight on December 1, 2007, Officer Bryan Hanna [Officer Hanna] of the Rogers Police Department pulled over Gregory Forrester [Forrester] because one of his taillights was not working. Officer Hanna testified that Forrester took a long time to pull over and that, upon contacting him, Forrester's eyes were glassy and he smelled of intoxicants. After further investigation, Forrester was arrested for driving while intoxicated and taken to the police station and presented with an implied consent rights form, and asked to submit to a breathalyzer test. Forrester refused to take the test and was transported to the Benton County jail. While at the jail, Forrester alleged that he requested an opportunity to call an attorney and was refused.

Forrester moved to suppress the evidence the State collected at the time of his arrest and to dismiss the case. Forrester argued that by denying him his right to counsel, he was denied the opportunity to gather exculpatory evidence. Benton County Circuit Court Judge Robin Froman Green denied Forrester's motion to suppress and denied his motion to dismiss and he was convicted of operating a motor vehicle while intoxicated.

Argument and Discussion: Forrester appealed arguing, among other things, that the Circuit Court erred in denying his motions for violation of the right to confer with counsel. Forrester asserted that because he was not allowed to contact counsel, he was unaware of the legal and practical consequences of refusing to take the breathalyzer test [such as the driver's license

suspension]. He argued that because he was denied the opportunity to speak with counsel, he was unaware that he should (1) attempt to rescind his refusal to submit to the breathalyzer test, (2) have blood and urine tests taken, (3) have a qualified person give the standard field sobriety tests anew, (4) have the sobriety tests video taped and audio taped, (5) have someone come to the jail to observe him, (6) have photographs taken of his eyes and facial expressions, and (7) obtain an examination by a physician.

Although Forrester admitted that there is no right to confer with counsel prior to taking a breathalyzer test, he asserted that the right to counsel arose after the test was offered and he was jailed and refused permission to contact counsel. The Arkansas Supreme Court looked for guidance in the case of *Wells v. State*, 285 Ark. 9, 684 S.W.2d 248 (1985). In *Wells*, the court concluded that the pretrial procedure of submitting to a breathalyzer test is not a critical stage in the criminal proceedings subject to the right to counsel because it is a scientific test that presents minimal risk that counsel's absence might derogate from the defendant's right to a fair trial. *Wells*, 285 Ark. at 12, 684 S.W.2d at 249 (quoting *United States v. Wade*, 388 U.S. 218, 227-28 (1967) and citing *Holmberg v. 54-A Judicial District Judge*, 231 N.W.2d 543 (Mich. Ct. App. 1975) (applying *Wade* to a breathalyzer test)). The Arkansas Supreme Court restated that clearly, there was no right to counsel at the time the breathalyzer test was offered.

Forrester also argued that he had the right to gather exculpatory evidence and even though the Arkansas Supreme Court determined that he failed to develop this argument at the trial level, the Court went on to state that because the breathalyzer test was refused, there was no right to an independent test. Citing *Hudgens v. State*,

324 Ark. 169, 174, 919 S.W.2d 939, 941 (1996).

Case citation: This case was decided by the Supreme Court of Arkansas on June 17, 2010, and was an appeal from the Benton County Circuit Court, the Honorable Robin Froman Green, Judge. The case citation is *Forrester v. State*, 2010 Ark. 291.

Brooke Lockhart
Deputy City Attorney



Eighth Circuit Determines *Terry* Stop was Unconstitutional

Facts: Omaha police officer Paul Hasiak [Officer Hasiak] was patrolling a high-crime area on a mild September afternoon and saw Fonta M. Jones [Jones] walking across a church parking lot wearing a long-sleeved hooded sweatshirt and "clutching the front area of his hoodie pocket with his right hand." Jones watched as the marked police cruiser drove by. Officers drove around and saw Jones still walking with his right hand clutching his front hoodie pocket. Officer Hasiak decided to stop and frisk Jones. Officer Hasiak patted Jones down and arrested Jones when he found a 9-millimeter handgun in the front hoodie pocket and a loaded magazine in Jones's back pocket. Jones was a felon and charged with being a felon in possession of a firearm.

Jones moved to suppress the seized firearm and ammunition and a post-arrest statement, arguing that Officer Hasiak lacked reasonable suspicion to stop and frisk him. *See Terry v. Ohio*, 392 U.S. 1 (1968). After an evidentiary hearing, the district court granted the motion and the government appealed.

Argument and Discussion: The government conceded that Officer Hasiak's actions were a detention and search to which Fourth Amendment protections apply, and not merely a consensual encounter between a citizen and the police. Reasonable suspicion is determined by "look[ing] at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing [based upon his] own experience and specialized training to make inferences from and deductions about the cumulative information available." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citations and quotations omitted). Though officers may not rely on "inarticulate hunches" to justify a stop, *Terry*, 392 U.S. at 22, the likelihood of criminal activity need not rise to the level required for probable cause. *Arvizu*, 534 U.S. at 274.

The government argued that Officer Hasiak had reasonable suspicion to believe, based upon his training and experience, that Jones was holding a firearm against his body. Officer Hasiak testified that he was trained to look for clues that a person is carrying a firearm, such as walking with his hand held against his midriff. Officer Hasiak testified that in the four years as a cruiser officer, he stopped ten other people walking in this manner and every one of them was carrying a firearm. The government argued that reasonable suspicion is also supported by: the fact that it was a high crime area, that it was sunny and 68 degrees but Jones was wearing a long-sleeved sweatshirt, and that Jones watched the officers as they drove by.

However, the Court noted that the government did NOT identify what criminal activity was suspected. Rather, the government leaped to the officer safety rationale for a protective frisk for weapons,

ignoring the mandate in *Terry* that there must be reasonable suspicion of on-going criminal activity justifying a *stop* before a coercive *frisk* may be constitutionally employed. See, e.g., *United States v. Hughes*, 517 F.3d 1013, 1019 (8th Cir. 2008); *United States v. Gray*, 213 F.3d 998, 1000 (8th Cir. 2000). Here, in contrast to the vast majority of cases in which protective frisks have been upheld, (i) the officers did not have reasonable suspicion that Jones was engaged in criminal activity other than carrying a weapon, such as drug trafficking or theft; (ii) Jones did not panic or flee when Officer Hasiak approached; and (iii) Jones was forcibly detained and searched before he said anything suspicious or incriminating. The Court concluded that Officer Hasiak lacked reasonable suspicion that Jones was in fact carrying a concealed firearm in his hoodie pocket and not some other object, or no object at all.

On cross examination, Officer Hasiak admitted that he was unable to see the size or shape of whatever was in Jones's hoodie pocket, and that Jones exhibited none of the other clues that officers had been trained to look for, such as walking with an unusual gait, turning that part of his body away from officers' view, adjusting his grip or running away. The Court also noted that nearly every person at one time or another has walked in public using one hand to "clutch" an item to prevent it from slipping or breaking and that walking in a high-crime area and wearing a sweatshirt on a 68 degree day and watching a police cruiser drive by are circumstances that are shared by countless, wholly innocent people.

The Court stated that Officer Hasiak could have initiated a consensual encounter, for which no articulable suspicion is required, and which "may both crystallize previously unconfirmed suspicions of criminal activity

and give rise to legitimate concerns for officer safety." *United States v. Davis*, 202 F.3d 1060, 1063 (8th Cir.), cert.denied, 531 U.S. 883 (2000). Even though Officer Hasiak's suspicions were confirmed because Jones not only had a gun, but Jones also stated after he was arrested that he was glad Officer Hasiak stopped him because Jones "was about to go do something that he would never get out of jail for," the Court still concluded that Officer Hasiak's actions violated Jones's Fourth Amendment rights.

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on June 8, 2010. The case citation is *U.S. v. Jones*, 606 F.3d 964 (8th Cir. 2010).

Brooke Lockhart
Deputy City Attorney



Officer Had Reasonable Suspicion to Expand Scope of Traffic Stop

Facts: At 12:10 p.m. on December 30, 2008, Officer Aaron Hanson [Officer Hanson] of the Omaha Police Department initiated a traffic stop on a vehicle bearing California license plates that was following the vehicle in front of it too closely, in violation of Nebraska Law. Officer Hanson approached the vehicle and requested a driver's license, vehicle registration, and proof of insurance. The driver, Edgar Bracamontes [Bracamontes] could not produce a driver's license but provided a California identification card and registration for the vehicle that showed it had been registered recently. Officer Hanson observed a woman and an infant in the back seat of the vehicle. Officer Hanson

requested Bracamontes exit the vehicle and then requested Bracamontes sit in the front seat of the patrol vehicle. The vehicle was also occupied by a drug-detection dog.

Bracamontes told Officer Hanson he had been visiting some cousins in Des Moines for a few days and was returning to California. Officer Hanson went to the vehicle, obtained the VIN and spoke to the passenger, Veronica Bracamontes [Veronica], Mr. Bracamontes's wife. Veronica provided her temporary California license and stated that they had been visiting her husband's Aunt Maria for several days, although she did not know where. Officer Hanson radioed dispatch for identification and warrant checks. Officer Hanson then further questioned Bracamontes while waiting for a reply from dispatch. Bracamontes then explained that they had been visiting cousins in Minneapolis and that he had no aunt there. Dispatch confirmed that Bracamontes did not have a valid driver's license.

Officer Hanson told Bracamontes that he was going to give him a courtesy citation for following too closely and operating a vehicle without a license. After Bracamontes signed the paperwork, Hanson shook hands with him and said, "we are all done." As Bracamontes began exiting the patrol vehicle, Officer Hanson then asked if he would answer a few more questions. Bracamontes agreed and sat back down in the patrol vehicle. Responding to Officer Hanson's questions, Bracamontes indicated that he did not have weapons, drugs, or large sums of currency. Officer Hanson noted that Bracamontes became increasingly nervous and that his voice became soft and difficult to discern. Officer Hanson asked to search the vehicle and Bracamontes was hesitant and then declined consent to search, at which point Officer Hanson informed

Bracamontes that he was going to run the drug-dog around the vehicle.

As Officer Hanson approached the vehicle to inform Veronica about what he was doing, Bracamontes beckoned him over and told him that there was use-quantity cocaine between the driver's seat and the center console of the car. Officer Hanson informed Bracamontes of his *Miranda* rights and awaited arrival of another officer. Officer Hanson found two baggies containing cocaine and Bracamontes was arrested. The vehicle was moved to the police impound lot, where a search revealed an after-market fabricated compartment, accessed by removing the windshield, which contained more than \$68,000 and more than one kilogram of cocaine.

Bracamontes was charged with possession with intent to distribute cocaine and criminal forfeiture and was sentenced to forty-eight months imprisonment.

Argument and Discussion: Bracamontes argued on appeal that the district court erred in concluding that there was reasonable suspicion to expand the traffic stop and that his confession, the narcotics, and the money should have been suppressed. The government responded that Officer Hanson's observations during the traffic stop were sufficient to support a reasonable suspicion of criminal activity and justified additional investigation.

"An officer who observes a violation of the law has probable cause to initiate a traffic stop, and such a stop comports with the Fourth Amendment." *United States v. Peralez*, 526 F.3d 1115, 1119 (8th Cir. 2008) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (per curiam)). The officer may conduct an investigation that is reasonably related in scope to the

circumstances that initially justified the stop. *United States v. Fuse*, 391 F.3d 924, 927 (8th Cir. 2004). Additionally, the officer may ask routine questions such as the destination, route, and purpose of the trip, and whether the officer may search the vehicle. *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 647 (8th Cir. 1999). The occupants of the vehicle may be detained “while the officer completes a number of routine but somewhat time-consuming tasks related to the traffic violation, such as computerized checks of the vehicle’s registration and the driver’s license and criminal history, and the writing up of a citation or warning.” *Id.* “A constitutionally permissible traffic stop can become unlawful, however, ‘if it is prolonged beyond the time reasonably required to complete’ its purpose.” *Peralez*, 526 F.3d at 1119 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

“To continue to detain a vehicle's occupants after the initial stop is completed, the officer must have been aware of particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed.” *United States v. Shafer*, 608 F.3d 1056, 1062 (8th Cir. 2010) (quotation omitted). Bracamontes does not contest the legality of the initial stop. By the time Officer Hanson had completed the citation, he had reasonable suspicion to expand the scope of the traffic stop because Bracamontes and his wife gave conflicting stories, following which Bracamontes changed his story by saying that the visit had taken place in Minneapolis rather than Des Moines, and that he had no aunt in Minneapolis. Bracamontes and his wife's statements were contradictory, thus establishing the requisite reasonable suspicion to detain him for further

investigation. See *United States v. Pulliam*, 265 F.3d 736, 740 (8th Cir. 2001).

Case citation: This case was decided by the United States Court of Appeals for the Eighth Circuit on August 5, 2010. The case citation is *U.S. v. Bracamontes*, 09-3897 (8th Cir. 8-5-2010).

Brooke Lockhart
Deputy City Attorney



Arkansas Court of Appeals Upholds Conviction Involving an Inventory Search by Arkansas State Police

Facts Taken From the Opinion: Broderick J. Cooper was stopped for driving 64 miles per hour in a 55-mile-per-hour zone by State Police Corporal David Forthman. Cooper informed Corporal Forthman that his driver’s license was suspended. During the stop, Gurdon City Marshall Don Childress advised Corporal Forthman to “check for 509,” which means illegal narcotics. When he conducted a records check, Corporal Forthman confirmed that Cooper’s license was suspended. He also learned that Cooper had active felony warrants from Pensacola, Florida, and an active misdemeanor warrant from Rogers, Arkansas, and that Florida was willing to extradite Cooper. Corporal Forthman further discovered that Cooper’s car was uninsured and bore a fictitious tag. Cooper was told to step out of the car. Corporal Forthman handcuffed him and placed him in the back of his patrol car.

Corporal Forthman asked Cooper if he knew someone who could come and get his car. Cooper stated that he could ask his

grandmother to bring a friend to remove the car. Cooper's grandmother was a resident of Gurdon, which was five or six miles away from where he was stopped. Corporal Forthman, however, never allowed Cooper to arrange to have the car picked up. He candidly admitted that by this time, he had begun to suspect that Cooper had drugs in the car. Corporal Forthman stated that he developed his suspicion when Cooper "paused" before answering his question regarding whether he had any drugs in the car, although he also noted that there were several other "red flags."

Corporal Forthman began an inventory search of the car in accordance with the Arkansas State Police policy manual. He used Cooper's keys to open the trunk, and he found a collapsible cooler that contained packages of crack cocaine, scales, and other drug paraphernalia. When Trooper Chris Hunter arrived, Corporal Forthman asked him if he wanted to "look for dope because he was better at looking for dope than [Forthman] was." Trooper Hunter completed the inventory search. They then removed the license plate from the vehicle because they were fictitious.

At the conclusion of the suppression hearing, and after arguments of counsel, the trial court denied Cooper's motion to suppress. The trial court specifically found that the inventory search was proper. The case went to trial, and Cooper was found guilty in a Clark County jury trial of possession of crack cocaine with intent to deliver and was sentenced to 162 months in the Arkansas Department of Correction. On appeal, Cooper argued that the trial court erred by denying his motion to suppress the physical evidence seized from his car during the inventory search.

Decision by Arkansas Court of Appeals:

The Court noted that inventory searches are excepted from the requirements of probable cause and a search warrant. *Welch v. State*, 33 Ark. 158 (1997). The purpose of an inventory search is to protect the property, the police, and the public and police officers can better account for the property if they have an accurate record of what is contained in a vehicle when it is impounded. *Id.* To be valid, an inventory search must be undertaken pursuant to standard operating procedures established by the law enforcement agency conducting the search. *Id.* Even if less intrusive means existed of protecting the property, the police are not obligated by the Constitution to make "fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit." *Id.* (citing *Colorado v. Bertine*, 479 U.S. 367, 375 (1987)).

The Court held that contrary to Cooper's assertions, probable cause was not required to conduct the inventory search at issue. Furthermore, in performing the inventory search, Corporal Forthman clearly followed the written policy of the Arkansas State Police. The fact that the police were aware that an inventory search could also turn up contraband does not make the search constitutionally infirm. Before the law mandates the courts to suppress an inventory search based on an ulterior motive for the search, the movant is required to show that the troopers conducted the inventory search in bad faith for the sole purpose of collecting evidence.

The Court held this factual predicate was not present in this case. "We find no significance in Corporal Forthman's question to Cooper as to whether he could find someone to retrieve his vehicle. Not only was this option not offered to Cooper,

it was not a legally viable option for the officer to allow one of Cooper's friends to drive the car from the arrest site without a valid license plate. The Court held here, as they did in *Welch*, that the trial court did not find that there was an ulterior motive on the part of the police, and the Court declined to superimpose their view of the testimony over that of the trial court's when the law enforcement officers are following standard procedure and in the absence of proof that the sole motivation for the search was to collect evidence. Therefore, the conviction was affirmed.

Case: This case was decided by the Arkansas Court of Appeals on June 30, 2010. The case is an appeal from the Clark County Circuit Court, Honorable Robert E. McCallum, Judge. The case cite is *Cooper v. State*, 2010 Ark. App. 539.

Jeff Harper
City Attorney



Trooper Had Reasonable Articulable Suspicion to Extend Traffic Stop: *United States v. McCarty*

On March 7, 2008 Trooper Oxner of the South Dakota Highway Patrol pulled over Jonathan McCarty for speeding. Trooper Oxner requested McCarty's license and registration and requested that McCarty sit in the passenger seat of the patrol car. As McCarty sat in the patrol car, Trooper Oxner explained the reason for the stop and asked McCarty about his itinerary. As Trooper Oxner waited on the verification of McCarty's documents he asked McCarty if he had any drugs in his car. McCarty became very nervous and Trooper Oxner

encouraged McCarty to be honest. McCarty admitted he had a marijuana roach in the center console. Trooper Oxner then handcuffed McCarty, found the roach, and searched the entire vehicle. While conducting his search, Trooper Oxner noticed markings on the underside of the gas tank that suggested to him that the tank had been removed. Trooper Oxner then transported McCarty and his vehicle to the Highway Patrol garage and the gas tank was removed and fourteen vacuum-sealed packages containing 5.489 kilograms of ecstasy were found. McCarty was indicted on one count of possession of a controlled substance with intent to distribute.

At trial, McCarty moved to suppress both his statement to Trooper Oxner, and the evidence. McCarty argued that there was not probable cause to search the vehicle, that the stop was improperly extended, and that the search was unduly invasive. Trooper Oxner explained the reasons he expanded his investigation beyond the initial traffic stop. Trooper Oxner stated that McCarty was driving from Seattle to Atlanta, a known drug route; McCarty had driven non-stop from Seattle and planned to maintain a very fast pace since he had only rented the car for three days; McCarty was driving a rental car with out-of-state plates; the cost of the one-way car rental exceeded Trooper Oxner's estimate of round-trip airfare; and the remnants of fast food and a small duffel bag were visible in the vehicle. Trooper Oxner stated that in light of his experience as a highway patrolman who has interdicted numerous drug couriers traveling the same route gave rise to a suspicion that McCarty was transporting drugs. Additionally, Trooper Oxner testified that McCarty became increasingly nervous and when asked if marijuana was in the vehicle, he broke eye contact and lowered his voice. McCarty's nervousness then escalated

rapidly to the point that his pulse was visible beneath his shirt. The trial court denied McCarty's motions and McCarty appealed to the Eighth Circuit Court of Appeals.

On appeal, the court first reviewed the law regarding the expansion of the traffic stop. "A reasonable investigation includes asking the driver for his license and registration, requesting the driver to sit in the patrol car to answer questions, verifying the driver's identification and related documents, and asking questions about the driver's itinerary." *United State v. Jones*, 269 F.3d 919, 924-25 (8th Cir. 2001). "To continue to detain a vehicle's occupants after the initial stop is completed, the officer must have been aware of particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed." *United States v. Shafer*, ___F.3d ___, 2010 WL 2519577, *3 (8th Cir. 2010).

The Court held that Trooper Oxner's expansion of the traffic stop was justified based on McCarty's compressed travel schedule along a known drug route, McCarty's puzzling decision to rent a car for a one-way trip at substantial expense, and McCarty's manifestation of atypical nervousness. The court stated that all of these factors taken as a whole and in light of Trooper Oxner's experience gave Trooper Oxner reasonable suspicion to expand the traffic stop to ask McCarty about the presence of drugs.

The court then looked at the statements McCarty made to Trooper Oxner before he was handcuffed, and stated that it was permissible for Trooper Oxner to ask McCarty basic investigatory questions at the time of the stop and to expand the scope of the questions in light of his reasonable suspicions about drug trafficking. "When an

officer develops a reasonable, articulable suspicion of criminal activity during a traffic stop, he has justification for a greater intrusion unrelated to the traffic offense." *United States v. Pereira-Munoz*, 59 F.3d 788, 791 (8th Cir. 1995). The court went on to state that Trooper Oxner employed the least intrusive means to verify or dispel his suspicion by asking McCarty to be truthful and the questions were reasonable under the circumstances and did not amount to custodial interrogation.

Finally, the court looked at the search of the gas tank and stated that once McCarty admitted there was marijuana in his car that admission gave Trooper Oxner probable cause to search for the marijuana and the discovery of the marijuana provided probable cause to search the whole vehicle. Trooper Oxner was able to articulate a specific and objectively reasonable basis for his suspicion that drugs were contained in the gas tank and the removal of the tank was done as expeditiously as possible and was therefore proper.

Note from Deputy City Attorney: The key in this case is that Trooper Oxner was able to articulate reasonable suspicion to extend the stop once the initial probable cause (based on the speeding) was extinguished. Once the basis of a stop is over you must be able to articulate your reasonable suspicion to be able to continue to detain the person and it must be more than nervousness alone.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on July 21, 2010. The case cite is *U.S. v. McCarty*, 612 F.3d 1020 (8th Cir. 2010).

Amber Roe
Deputy City Attorney

Removal from Heavily Tinted Vehicle Upheld: *United States v. Lee T. Newell*

Officer Joseph Baudler of the Omaha, Nebraska Police Department received information from a confidential informant about a black male called "Libra" or "Libray" that was selling crack cocaine in a specific area of town. The informant stated that Libra drove a white Cadillac with heavily tinted windows, gave the license plate number, and stated that he lived with a handicapped white woman. Officer Baudler went to the neighborhood the informant stated that Libra lived, and upon speaking to residents found out that the man the informant referred to as Libra was Lee Newell. The informant was shown a picture of Lee Newell and confirmed that was the man he knew as "Libra".

On March 18, 2008 the informant contacted Officer Baudler and told him that he had seen Newell around an intersection that night with crack cocaine in his Cadillac. At 10:40 pm Officer Baudler, accompanied by Officer Fancher, located the Cadillac which was parked on the side of the street with its headlights on. The officers pulled their patrol vehicle behind the Cadillac and approached the vehicle, one officer on the passenger side, and the other on the driver's side. The windows were so heavily tinted that the officers could not see inside the vehicle, so Officer Fancher opened the driver's side door and told Newell to identify himself and to place his hands on the steering wheel. Officer Fancher saw Newell put his left hand on the steering wheel but could not see Newell's right hand and he believed Newell was reaching for something. Officer Baudler then reached in the passenger side door and grabbed Newell's right arm. The Officers then

removed Newell from the vehicle through the driver's side.

Once Newell was outside of the vehicle, Officer Baudler saw a plastic bag he believed to contain cocaine protruding from Newell's coat pocket. Officer Baudler removed the bag and verified that it contained suspected cocaine. Officer Baudler then asked if Newell had anything else on him to which Newell responded that there was. A second bag of cocaine was then located in Newell's pants pocket, as well as \$2,973.

At trial Newell moved to suppress the drugs. His motion was denied and he was sentenced to 240 months. Newell then appealed the denial of the motion to suppress arguing that while the officer did have reasonable suspicion to conduct an investigative detention, they used unreasonable force when they opened the Cadillac doors, ordered him to place his hands on the wheel and grabbed his right arm. Newell argued that the officers should have instead tried to get his attention and see if he would roll down his window and talk to them and then they should have asked him to step out of his vehicle.

The Court of Appeals agreed with the trial court, stating that the officers acted reasonably within the confines of a *Terry* stop when they opened the door and told him to place his hands on the wheel. An investigatory, or *Terry* stop is valid if officers have "reasonable and articulable suspicion that criminal activity may be afoot." *United States v. Navarrete-Barron*, 192 F. 3d 786, 790 (8th Cir. 1999). Officers must use the least intrusive means of detention and investigation reasonable necessary to achieve the purpose of the stop. Additionally, a *Terry stop* may become an arrest which requires probable cause if the

officers use unreasonable force or it last an unreasonably long time. *Id.*

The Court stated that even though the officers did not have information that Newell was armed, drug traffickers are often armed and since the officers could not see inside the heavily tinted vehicle they were, "not required to hope Newell was not arming himself behind the heavily-tinted windows while they asked him to roll down the window or step out of the Cadillac." The Court went on to hold that the officers' actions were justified for their protection. The court went on to state that when Newell did not place his hands on the steering wheel as instructed and was observed reaching for something the officers acted reasonably by grabbing Newell's arm and removing him from the vehicle. Once Newell was removed from the vehicle the bag of cocaine was in plain view thus giving the officers probable cause to arrest Newell.

Case: This case was decided by the U.S. Court of Appeals for the Eighth Circuit on March 2, 2010. The case cite is *U.S. v Newell*, 596 F.3d 876 (8th Cir. 2010).

Amber Roe
Deputy City Attorney



Search of Vehicle Upheld in Eighth Circuit Case

Facts: At about 1:00 a.m. on December 17, 2006, Minneapolis police dispatch received an anonymous call of two vehicles parked in an alley with their engines running. Officers Roering and Suchta were dispatched to the alley to investigate. The officers, upon turning into the alley, only observed one vehicle, a van, which was parked partially in

a driveway and partially in the alley. As officers approached the van, Roering shined the squad car's spotlight into the van. He observed a woman putting on clothing and a man move from the middle seat into the driver's seat. The driver then drove towards the officers. Suchta activated the squad car's emergency lights to initiate a stop. The van stopped and Roering approached the van. When the driver rolled down the window, Roering smelled what he suspected was smoke from burning crack cocaine and saw what he believed to be a "crack wrapper" inside the vehicle. Roering placed both the driver, Derrick Lamon Johnson, and the passenger in the back of the squad car. The officers searched the vehicle and found a crack wrapper, marijuana residue, marijuana stems and a loaded handgun.

Johnson was charged with one count of being a felon in possession of a firearm. Johnson moved to suppress the evidence seized from the vehicle.

Argument and Discussion: On appeal, Johnson argued that the anonymous tip and other observations did not provide reasonable suspicion to justify the stop by the officers. Johnson also argued that even if the stop was legal, the expansion of the scope of the stop was not based on reasonable, articulable suspicion.

The Eighth Circuit noted that "[f]or an officer to perform an investigatory stop of a vehicle, there must be reasonable suspicion." *United States v. Walker*, 555 F.3d 716, 719 (8th Cir. 2009) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

In order for such a stop to be constitutional under the Fourth Amendment, the officer must be aware of particularized, objective facts, which, taken together with

rational inferences from those facts, reasonably warrant suspicion that a crime is being committed. Whether the particularized facts known to the officer amount to an objective and particularized basis for a reasonable suspicion of criminal activity is determined in light of the totality of the circumstances. *Id.* (internal quotations and citations omitted.)

The Court stated that the anonymous call, along with the other factual circumstances present, adequately support the lawfulness of the initial stop. The Court found the lateness of the hour, the van blocking the alley with its engine running, a woman in the middle seat of the van putting on her clothing, the defendant moving quickly from the middle seat to the driver seat and attempting to drive away upon arrival of the squad car provided justification for an investigatory stop. The Court concluded the search of the vehicle was legal.

Case citation: This case was decided by the U.S. Court of Appeals for the Eighth Circuit on April 15, 2010. The case citation is *U.S. v. Johnson*, 601 F.3d 869 (8th Cir. 2010).

Brooke Lockhart
Deputy City Attorney



Videotape Proves Excessive Force Allegations Are False

A recent 8th Circuit Court of Appeals case demonstrates that videotapes can be of great benefit to officers because you never know with whom you will be dealing and what they will later allege that you did.

On July 30, 2006 Susan Wallingford was pulled over by Deputy Olson for riding her motorized scooter without a proper helmet and for driving without a muffler in Schuyler, Nebraska. Deputy Olson filled out a citation and asked Wallingford to sign it. Wallingford refused stating her lawyer told her not to sign citations. Deputy Olson then explained to Wallingford that failure to sign a citation is an arrestable offense in Nebraska. Wallingford again refused. What happened next was later disputed by Wallingford and Deputy Olson.

Wallingford claimed that Deputy Olson grabbed her breast and threw her face down on the patrol car hard enough to cause bruising. Wallingford then claimed that she felt a burning sensation in her chest and instinctively turned around to slap Deputy Olson. Wallingford then states that Deputy Olson responded by throwing her onto the street causing her to fracture her foot and strike her head on the pavement.

Deputy Olson stated that he instructed Wallingford that she was under arrest and told her to turn around at which time Wallingford began to back away from him. Deputy Olson then grabbed Wallingford's left arm to place it behind her back and cuff her. Wallingford then resisted so he placed her against the hood of his vehicle to gain control of her. Deputy Olson then handcuffed her left hand and asked for her right hand, to which she responded if she was going to jail it was, "going to be for something," at which time she struck Deputy Olson on his face. Deputy Olson stated Wallingford's momentum in striking him continued and she fell to the ground. Wallingford was transported to the hospital where she refused treatment.

Wallingford later filed a 42 U.S.C. §1983 action against Deputy Olson, the other

officer on the scene, the police chief, the City of Schuyler, the County and the County Sheriff alleging 1) excessive force against the officers 2) failure to train and supervise against the chief of police, the County Sheriff, the City of Schuyler and the County; and 3) negligent hiring against the Chief, County Sheriff, City and County. After several summary judgment motions, the only claim left was the excessive force claim against Deputy Olson that the District Court had denied Deputy Olson qualified immunity on.

Deputy Olson appealed the District Courts decision denying him qualified immunity to the Eighth Circuit Court of Appeals. Qualified immunity is "immunity from suit rather than just a mere defense to liability." *Mitchell v Forsyth*, 472 U.S. 511, 527 (1985). "Individual officers are liable if they violate clearly established law that a reasonable officer should know." *Harlow v Fitzgerald*, 457 U.S. 731 (1982). To determine whether an officer is entitled to qualified immunity the Court asks, 1) whether taking the facts in the light most favorable to the injured party, the alleged facts demonstrate that the officials conduct violated a constitutional right and 2) whether the asserted constitutional right is clearly established. Either question may be asked first, and if the answer to either question is no then the official is entitled to qualified immunity." To determine whether a right is clearly established we ask whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *White v. Adams*, 519 F.3d at 813 (8th Cir. 2008).

In the present case there was a videotape of the incident that was included as part of the record. The videotape showed Deputy Olson did not grab Wallingford by the breast, nor did he throw her against the police car or

throw her on the street. The Court stated that the videotape, "conspicuously refutes and completely discredits Wallingford's version of the material facts upon which she bases her excessive force claim against Deputy Olson." The Court of Appeals reversed the District Court and granted Deputy Olson qualified immunity from Wallingford's excessive force claim.

Case: This case was decided by the U.S. Court of Appeals for the Eight Circuit on January 25, 2010. The case cite is *Wallingford v Olson*, 592 F.3d 888 (8th Cir. 2010).

Amber Roe
Deputy City Attorney



Qualified Immunity on Fourth Amendment Violation Claim Denied for Arresting Officers who Lacked Arguable Probable Cause: *Baribeau v. City of Minneapolis*

On the evening of June 22, 2006 the city of Minneapolis was hosting a week long summer festival. Attending the festival were Jessica Baribeau, Jaime Jones, Kate Kibby, Kyle Kibby, Raphi Rechitski, Jake Sternberg, and Christian Utne, hereafter referred to as "the plaintiffs." The plaintiffs were dressed as zombies; most of them had white powder, fake blood, and dark makeup around their eyes. Their stated purpose was to protest the mindless nature of consumer culture. The plaintiffs walked in a stiff lurching fashion and carried four bags of sound equipment comprised of an iPod, radio transmitter, an antenna, a wireless phone handset, radio receivers, amplifiers, and speakers. Some of the equipment

included wiring that was visible on the outside of the bags. As they proceeded down the street they broadcast announcements such as "get your brains here", "brain cleanup in Aisle 5."

At about 6:00 p.m., officers received an anonymous 911 call complaining of a group of people covered in makeup playing loud music from a boombox calling themselves zombies and almost touching people. Four officers responded to the call and saw the plaintiffs walking around close to people and the pedestrians scooting away from them. The plaintiffs explained their actions were meant as an anti-consumerist statement, and the officers explained they had received a complaint and asked them to turn down their music and keep their distance from bystanders. The plaintiffs then continued on their way. Two of the officers subsequently spoke to Sergeant Hoepfner about the plaintiffs and Sergeant Hoepfner expressed concern that the plaintiffs may be affiliated with the Juggalos, a violent gang from Washington known for wearing face paint. The two officers then decided to go back to the plaintiffs in an effort to identify them.

The plaintiffs were located watching an outdoor performance and were no longer playing their music. The officers requested identification but most of the plaintiffs did not have any on them. The officers then told the plaintiffs they were going to take them to the station to be identified. One of the plaintiffs asked if they were being detained to which the officer stated yes. The plaintiff then asked what the charge was and the officer said, "I don't know, let's call it disorderly conduct for now." At the station the plaintiffs later testified that Sergeant Nelson told them that he, "didn't give a g**damn about anybody's constitutional f***ing rights and they were patted down

and placed in a holding cell and removed one at a time for questioning about their identities. Officers also searched the plaintiffs bags and based on the equipment inside, Sergeant Nelson became concerned they were dangerous and requested a bomb technician.

The bomb technician determined that the bags did not contain explosives. Sergeant Nelson then ordered the plaintiffs booked on charges of displaying simulated weapons of mass destruction, a Minnesota state crime punishable by up to 10 years imprisonment. The juvenile plaintiff was taken to the juvenile detention center and the remaining plaintiffs were transported to the adult detention center where Jake Sternberg refused to give his last name. Sternberg had a prosthetic leg from the knee down which contained metal parts. The nurse on duty discussed Sternberg's medical condition with him and Sternberg's prosthetic leg was confiscated, and the nurse explained they were concerned that it could be used as a weapon. Sternberg then agreed to give his last name to finish the booking process and he was given a receipt for his leg and was provided a wheelchair and placed in an ADA-compliant cell. The plaintiff's spent two nights in jail and were then released from custody. A sergeant who had reviewed the plaintiffs arrest and inspected the equipment concluded that the equipment did not meet the definition of a simulated weapon of mass destruction. Criminal charges were never filed against the plaintiffs.

Plaintiff's filed suit against the City of Minneapolis and thirteen of its police officers alleging that they were seized without probable cause in retaliation for exercising their First Amendment rights, and Sternberg sued the county and various County employees alleging that the

confiscation of his prosthetic leg while he was in jail violated his rights under the Fourth, Fifth, and Fourteenth Amendments, the Americans with Disabilities Act, and the Minnesota Human Rights Act. The case was moved from state court to federal court where the Judge granted summary judgment to all defendants. The plaintiffs then appealed.

On appeal, the Court reviewed qualified immunity. "The doctrine of qualified immunity protects the officers from personal liability under §1983 insofar as their conduct does not violate clearly established... constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). The Court agreed with the plaintiffs that their arrest was in violation of their clearly established Fourth Amendment rights to be free from unreasonable searches and seizure. The court went on to analyze whether there was probable cause at the time the plaintiffs were arrested, i.e. when the officers decided to take them to the station. The court discussed the Minnesota disorderly conduct statute and concluded that there was not probable cause because the plaintiffs were engaged in protected expressive conduct and the court was unable to separate the plaintiff's protected speech and expressive conduct from unprotected, non-expressive conduct. In other words their actions were "inextricably linked" to their anti-consumerism message. The court went on to state that the disorderly conduct statute would only apply if the plaintiffs had engaged in "fighting words." That is words that, "by their very utterance inflict injury or tend to incite an immediate breach of peace." The court then held that "because the plaintiff's conduct was expressive conduct and did not amount to fighting words, their conduct clearly did not fall within the narrowed reading of the

Minnesota disorderly conduct statute. Thus, there was no probable cause to believe plaintiff's expressive conduct violated the statute." The court then held that the arresting officers violated the plaintiff's Fourth Amendment rights.

Even though the court ruled that the arresting officer violated the plaintiff's Fourth Amendment rights, it is still possible that they may be shielded from civil liability if, "their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." "The fundamental question under this analysis is whether the state of the law, as it existed at the time of arrest, gave the defendants fair warning that the arrest was unconstitutional." *Young v. Selk*, 508 F.3d 868, 875 (8th Cir. 2007). "In the wrongful arrest context, officers are entitled to qualified immunity if they arrest a suspect under the mistaken belief that they have probable cause to do so, provided the mistake is objectively reasonable." *Amrine v. Brooks*, 522 F.3d 823, 832 (8th cir. 2008). The Court then stated that in other words, they must determine whether the arresting officers had "arguable probable cause" to arrest the plaintiffs for disorderly conduct. The Court concluded that the officers did not have arguable probable cause because the state law was clearly established "such that a reasonable person would have known that there was no probable cause to arrest the plaintiffs for engaging in protected expressive conduct under the disorderly conduct statute." The court stated prior Minnesota case law provided the officers fair warning that the arrests were unconstitutional. The court then reviewed whether probable cause existed to arrest plaintiffs for displaying weapons of mass destruction and came to the same conclusion that there was not arguable probable cause to make an arrest. The Court then reversed

the district courts grant of summary judgment for the defendants.

The court then looked to the plaintiffs claim that they were seized in retaliation for exercising their First Amendment right to free speech. The court stated, like the wrongful arrest claim above, the plaintiff's retaliation claim requires qualified immunity analysis. Because a person's right to exercise their First Amendment guarantees is clearly established, the court looked at whether a reasonable jury could find that the arresting officers violated that right. "To prevail in an action for First Amendment retaliation, plaintiffs must show a causal connection between a defendant's retaliatory animus and plaintiff's subsequent injury." *Osborne v. Grussing*, 477 F.3d 1002, 1005 (8th Cir. 2007). Additionally, "retaliation need not be the sole motive, but it must have been a substantial factor in the decision to arrest." *Kilpatrick v. King*, 499 F.3d 759 (8th Cir. 2007). "Furthermore, the plaintiffs must show that the retaliatory motive was a but-for cause of the arrest- i.e., that the plaintiff's were singled out because of their exercise of constitutional rights. Finally, the plaintiffs must show that the officers' adverse action caused them to suffer an injury that would chill a person of ordinary firmness from continuing in the protected activity." *Williams v. City of Carl Junction*, 480 F.3d 871, 878, (8th Cir. 2007).

The court held that although the arresting officers made an unreasonable mistake when they arrested and detained plaintiffs without arguable probable cause that they engaged in disorderly conduct or displaying weapons of mass destruction, "we cannot say that a reasonable jury could find that retaliatory animus was a substantial factor or but-for

cause of the plaintiffs' arrest and detention." The court then held that the defendants' were entitled to qualified immunity on the First Amendment retaliation claim.

The court then reviewed Sternberg's claims under the Fourth, Fifth and Fourteenth Amendments challenging the confiscation of his prosthetic leg. The Fourth Amendment claim was that seizing his prosthetic leg violated Sternberg's right to be free from unreasonable seizures. The court disagreed stating it wasn't an unreasonable seizure since the court has to balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the governmental interests alleged to justify the intrusion. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). The County argued that the confiscation of Sternberg's leg was justified by a legitimate security concern. The potential of the prosthetic leg to be used as a weapon was then ruled to be a legitimate security concern and was held to be reasonable. The court then reviewed Sternberg's other claims regarding the confiscation of his prosthetic leg and the court found that the leg was not taken as punishment, was not arbitrary and he was given reasonable accommodations when he was provided a wheelchair and a ADA-compliant cell. The case was then remanded for proceeding consistent with the opinion.

Case: This case was decided on February 24, 2010. The case cite is *Baribeau v. City of Minneapolis*, 596 F.3d 465 (8th Cir. 2010).

Amber Roe
Deputy City Attorney



Arkansas Attorney General's Opinion: Liability Insurance Not Required on Mopeds

On August 10, 2010, the Arkansas Attorney General issued opinion number 2010-091. In this opinion, the Attorney General addressed the issue of whether liability insurance is required for "motorized bicycles" or mopeds. A "motorized bicycle" is defined at Ark. Code Ann. §27-20-101 as a bicycle with an automatic transmission and a motor of not more than 50cc.

In the opinion, the Arkansas Attorney General reaffirmed the opinion previously set forth in Arkansas Attorney General Opinion 2000-308. That opinion provided that the provisions of the Motor Vehicle Safety Responsibility Act (Ark. Code Ann. §27-19-101, *et seq.*) apply only to those vehicles subject to registration under the motor vehicle laws of this state. Since motorized bicycles are not required to be registered, they would fall outside these provisions. Therefore, the operator of a motorized bicycle or moped is not required to provide proof of liability insurance when operating on the streets or highways.

NOTE: Motor-driven cycles (between 50 and 250cc) and motorcycles (over 250cc) are required to be registered with the State before being operated on the streets or highway. As such, motor-driven cycles and motorcycles are required to be covered by liability insurance.

Ernest Cate
Senior Deputy City Attorney



New Ordinances Passed

The City of Springdale has passed an amended K-2 ordinance (Ordinance No. 4412) on April 27, 2010, as well as a graffiti ordinance passed by Ordinance No. 4435 and amended by Ordinance No. 4445. Copies of all ordinances, which are in effect, are set out following this article.

Jeff Harper
City Attorney



*C.A.L.L. is a publication of the
Springdale City Attorney's Office
201 Spring Street
Springdale, AR 72764
479-750-8173*



ORDINANCE NO. 4412

AN ORDINANCE PROHIBITING THE PURCHASE, POSSESSION, SALE AND OFFERING FOR SALE THE SYNTHETIC CANNABINOID, KNOWN AS "SPICE" OR "K-2" AND FOR OTHER PURPOSES.

WHEREAS, the City Council of the City of Springdale, Arkansas has determined that certain businesses within the City of Springdale, Arkansas are selling certain substances, when ingested, produce intoxicating effects similar to THC or marijuana; and

WHEREAS, the substances are not yet categorized as illegal controlled substances under state or federal law; and

WHEREAS, the substances, which are described below, are often used as an alternative to marijuana and are potentially dangerous to users and further, the long term effects are not yet known; and

WHEREAS, it has been determined that the effects of these substances are a health concern to the citizens of the City of Springdale, Arkansas;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL FOR THE CITY OF SPRINGDALE, ARKANSAS:

Section 1. It is hereby declared to be unlawful for any person to use, possess, purchase, attempt to purchase, sell, publicly display for sale or attempt to sell, give, or barter any one or more of the following chemicals within the city limits of the City of Springdale, Arkansas:

- (1) Salviadinorum or salvinatorum A: all parts of the plant presently classified botanically as salvia divinorum, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts derivative, mixture or preparation of such plant, its seeds or extracts;
- (2) (6aR,10aR)-9-(hydroxymethyl)-6, 6dimethyl-3-(2-methyloctan-2-yl)-6a, 7, 10, 10a-tetrahydrobenzo[c]chromen-1-ol some trade or other names: HU-210;
- (3) 1-Pentyl-3-(1-naphthoyl)indole-some trade or other names: JWH-018\spice;
- (4) 1-Butyl-3-(1-naphthoyl)indole-some trade or other names: JWH-073;
- (5) 1-(3-[trifluoromethylphenyl]) piperazine-some trade or other names: TFMPP;
- (6) or any similar structural analogs.

Section 2. If any of the aforementioned substances are found in the possession of any person, they may be confiscated and destroyed by law enforcement officials.

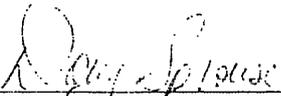
Section 3. It is not an offense under Section 1 above of this Ordinance if the person was acting at the direction of an authorized agent of the City of Springdale to enforce or ensure compliance with this law prohibiting the sale of the aforementioned substance.

Section 4. This ordinance does not apply to any person who commits any act described in this ordinance pursuant to the direction or prescription of a licensed physician or dentist authorized to direct or prescribe such act. This Ordinance likewise does not apply to the inhalation of anesthesia for a medical purpose or dental purpose.

Section 5. Any person found to be in violation of this ordinance will be guilty of a misdemeanor and/or subject to a term of imprisonment not to exceed one year and a fine not to exceed \$1,000 and/or both.

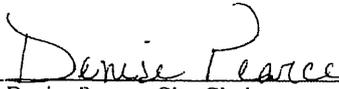
Section 6. Emergency Clause. It is hereby declared that an emergency exists and this ordinance being necessary for the preservation of the health, safety and welfare of the citizens of Springdale, Arkansas, shall be effective immediately upon its passage and approval.

PASSED AND APPROVED this 27th day of April, 2010.



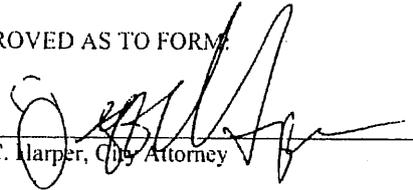
Doug Sprouse, Mayor

ATTEST:



Denise Pearce, City Clerk

APPROVED AS TO FORM:



Jeff C. Harper, City Attorney

ORDINANCE NO. 4435

AN ORDINANCE AMENDING THE CODE OF ORDINANCES OF THE CITY OF SPRINGDALE, ARKANSAS RELATED TO GRAFFITI TO PROVIDE AN IMMEDIATE AND PRACTICAL METHOD TO COMBAT THE EFFECTS OF GRAFFITI VANDALISM ON PUBLIC AND PRIVATELY OWNED STRUCTURES AND REAL PROPERTY WITHIN THE CITY OF SPRINGDALE, ARKANSAS; AND FOR OTHER PURPOSES.

WHEREAS, the City Council for the City of Springdale, Arkansas finds that graffiti located on any real property, including structures such as fences or walls, is a public nuisance and destructive of the rights and values of property owners as well as the entire community; and

WHEREAS, in order to prevent graffiti and to provide an immediate and practical method, to be cumulative with and in addition to all other remedies available at law, of combating the effects of graffiti vandalism on public and privately-owned structures and real property, the City Council for the City of Springdale hereby finds that graffiti is detrimental to property values, degrades the community, causes an increase in crime, is inconsistent with the City's property maintenance goals and aesthetic standards, is a nuisance, and, unless it is quickly removed from public and private property, results in other properties becoming the target of graffiti;

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL FOR THE CITY OF SPRINGDALE, ARKANSAS, that the Code of Ordinances of the City of Springdale, Arkansas regarding graffiti are hereby amended as follows:

Sec. 42-91. Defined.

- (a) Graffiti means and includes any unauthorized inscription, word, figure or design or collection thereof, which is marked, etched, scratched, painted, drawn or printed on any structural component of any building structure or other facility, regardless of the nature of the material of that structural component.
- (b) Spray paint is any paint or pigmented substance in an aerosol or similar spray containing or intended for use in an aerosol or similar spray container.

Sec. 42-92. Declaration as unsightly and a nuisance.

The existence of graffiti on buildings, or on structures, ~~including but not limited to~~ such as fences or walls, ~~that is~~ located upon any public or privately owned property viewable from a public or quasi-public place within the city is detrimental to property values, degrades the community, causes an increase in crime, is inconsistent with the city's property maintenance and aesthetic standards, and is declared to be a nuisance.

Sec. 42-93. Removal: Right of city to remove.

- (a) Whenever the city becomes aware, ~~or is notified and determines that~~ graffiti is so located on the exterior of a building or structure, such as fences or walls, on public or privately owned property viewable from a public or quasi-public place within the city, the city shall be authorized to use public funds for the removal of same, or for the painting of same, but shall not authorize or undertake to provide for the painting of any more

extensive area than that where the graffiti is located, unless the director of public works, or his designee, determines that a more extensive area is required to be repainted in order to avoid an aesthetic disfigurement to the neighborhood or community, of the existence of graffiti visible from the public right-of-way on any property, including structures or improvements within the city, the police department, upon such discovery, shall give or cause to be given, notice to the owner of the property or the property owner's agent, and/or any leasehold tenant, to take corrective action and remove the graffiti from the property within seven days from the date the notice is served.

- (b) All incidents of graffiti shall be reported to the police department, who will investigate the crime and will notify the owner of the property or the property owner's agent and/or any leasehold tenant, concerning the city's graffiti removal program. The police department shall also provide information on how to make contact with the department of public works, for the removal of the graffiti. The police department shall also notify the department of public works of the exact location of the graffiti and the name of the person to be contacted.
- (c) Upon notification by the police department concerning the necessity to remove the graffiti, the department of public works shall make contact with the owner of the property or the property owner's agent, and/or any leasehold tenant and request that they sign a graffiti abatement identification and permission form, allowing the department of public works to enter on the property and remove the graffiti. The document will release the city, it's officers, agents and employees of and from any and all liability, claims, demands, causes of action, or obligations of whatsoever arising out of or in any way related to entry upon the property and for the removal of the graffiti.
- (d) In the event the owner of the property or the property owner's agent, and/or any leasehold tenant refuses to sign the document which authorizes the city to remove the graffiti, the city, through the code enforcement division, shall give or cause to be given notice to the owner of the property or the property owner's agent, and/or any leasehold tenant, to take corrective action and remove the graffiti from the property within seven (7) days from the date the notice is served.

Sec. 42-94. City's right to take corrective action.

If the owner of the property or the property owner's agent and/or leasehold tenant refuses to give the city authorization to remove the graffiti and the graffiti is not removed in the required time provided by the previous section in this article, then the city shall have the right to enter upon private property to the extent necessary to take corrective action. The city may then seek the cost of the graffiti removal from the property owner and/or leasehold tenant including the filing of a lien on the property to cover the city's costs pursuant to Sec. 42-78, 42-79, and 42-80 of the Code of Ordinances of the city.

Sec. 42-95. Possession of spray paint and markers.

Possession of spray paint and markers with intent to make graffiti is prohibited. No person shall carry an aerosol spray paint can or broad tipped indelible marker with the intent to make graffiti.

Sec. 42-96. Unlawful acts.

- (a) It shall be unlawful for any person to sell or offer for sale to any person under 18 years of age any spray paint or hobby kit or any similar kind of kit containing spray paint.

(b) No person may sell or offer to sale spray paint to any other person unless the buyer presents evidence of his or her identity and age.

PASSED AND APPROVED this 13th day of July, 2010

Doug Sprouse
Doug Sprouse, Mayor

ATTEST:

Denise Pearce
Denise Pearce, City Clerk

APPROVED:

Jeff C. Harper
Jeff C. Harper, City Attorney

ORDINANCE NO. 4445

AN ORDINANCE AMENDING CHAPTER 42 OF THE CODE OF ORDINANCES OF THE CITY OF SPRINGDALE, ARKANSAS RELATED TO GRAFFITI REMOVAL ON CERTAIN VACANT PROPERTIES; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES.

WHEREAS, on July 13, 2010, the City Council for the City of Springdale, Arkansas, passed Ordinance No. 4435, which created a procedure for the removal of graffiti in the City of Springdale, Arkansas;

WHEREAS, the graffiti removal procedure has been codified as Section 42-91, *et seq.* of the Code of Ordinances of the City of Springdale, Arkansas:

WHEREAS, in keeping with the intent of Ordinance No. 4435, the City Council for the City of Springdale, Arkansas, finds that it is necessary to amend Section 42-93 of the Code of Ordinances of the City of Springdale, Arkansas, to address the removal of graffiti on certain vacant properties:

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL FOR THE CITY OF SPRINGDALE, ARKANSAS:

Section 1: Section 42-93 of the Code of Ordinances of the City of Springdale, Arkansas, is hereby amended to read as follows:

Sec. 42-93. Right of city to remove.

- (a) Whenever the city becomes aware, or is notified and determines that graffiti is so located on the exterior of a building or structure, such as fences or walls, on public or privately owned property viewable from a public or quasi-public place within the city, the city shall be authorized to use public funds for the removal of same, or for the painting of same, but shall not authorize or undertake to provide for the painting of any more extensive area than that where the graffiti is located, unless the director of public works, or his designee, determines that a more extensive area is required to be repainted in order to avoid an aesthetic disfigurement to the neighborhood or community.
- (b) All incidents of graffiti shall be reported to the police department, who will investigate the crime and will notify the owner of the property or the property owner's agent and/or any leasehold tenant, concerning the city's graffiti removal program. The police department shall also provide information on how to make contact with the department of public works, for the removal of the graffiti. The police department shall also notify the department of public works of the exact location of the graffiti and the name of the person to be contacted.
- (c) Upon notification by the police department concerning the necessity to remove the graffiti, the department of public works shall make contact with the owner of the property or the property owner's agent, and/or any leasehold tenant and request that they sign a graffiti abatement identification and permission form, allowing the department of public works to enter on the property and remove the graffiti. The document will release the city, it's officers, agents and employees of and from any and all liability, claims, demands, causes of action, or obligations of whatsoever

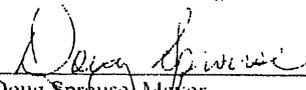
arising out of or in any way related to entry upon the property and for the removal of the graffiti.

- (d) In the event the owner of the property or the property owner's agent, and/or any leasehold tenant refuses to sign the document which authorizes the city to remove the graffiti, the city, through the code enforcement division, shall give or cause to be given notice to the owner of the property or the property owner's agent, and/or any leasehold tenant, to take corrective action and remove the graffiti from the property within seven (7) days from the date the notice is served.
- (e) In the event the property is vacant and the owner of the property cannot be located or cannot be contacted locally, the department of public works shall have the right to enter the property and remove the graffiti without first obtaining a signed graffiti abatement identification and permission form.

Section 2: All other provisions of Chapter 42 of the Code of Ordinances of the City of Springdale, Arkansas, not specifically amended by this Ordinance shall remain in full force and effect.

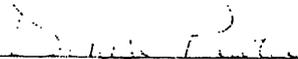
Section 3: Emergency Clause. It is hereby declared that an emergency exists and this ordinance, being necessary for the preservation of the health, safety and welfare of the citizens of Springdale, Arkansas, shall be in effect immediately upon its passage and approval.

PASSED AND APPROVED this 24th day of August, 2010



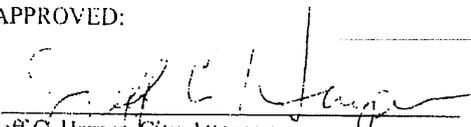
Doug Sprouse, Mayor

ATTEST:



Denise Pearce, City Clerk

APPROVED:



Jeff C. Harper, City Attorney