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United States Supreme Court Finds Exigent Circumstances for Entry into House in Michigan Case

Facts Taken From the Opinion: Police officers responded to a complaint of a disturbance near Allen Road in Brownstown, Michigan. Officer Christopher Goolsby later testified that, as he and his partner approached the area, a couple directed them to a residence where a man was “going crazy.” Upon their arrival, the officers found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fence posts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. (It is disputed whether they noticed this immediately upon reaching the house, but undisputed that they noticed it before the allegedly unconstitutional entry.) Through a window, the officers could see respondent, Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand, and they asked him whether he needed medical attention. Fisher ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. Officer Goolsby then pushed the front door partway open and ventured into the house. Through the window of the open door he saw Fisher pointing a long gun at him. Officer Goolsby withdrew.

Fisher was charged under Michigan law with assault with a dangerous weapon and possession of a firearm during the

commission of a felony. The trial court concluded that Officer Goolsby violated the Fourth Amendment when he entered Fisher’s house, and granted Fisher’s motion to suppress the evidence obtained as a result—that is, Officer Goolsby’s statement that Fisher pointed a rifle at him. The Michigan Court of Appeals initially remanded for an evidentiary hearing, after which the trial court reinstated its order. The Court of Appeals then affirmed. The Michigan Supreme Court granted leave to appeal, but, after hearing oral argument, it vacated its prior order and denied leave instead; three justices, however, would have taken the case and reversed on the ground that the Court of Appeals misapplied the Fourth Amendment. The case was appealed to the U.S. Supreme Court.

Decision by U.S. Supreme Court: The Court noted that “the ultimate touchstone of the Fourth Amendment,” as the Court has often said, “is ‘reasonableness.’ ” Therefore, although “searches and seizures inside a home without a warrant are presumptively unreasonable,” that presumption can be overcome. For example, “the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.”

The Court noted that *Brigham City v. Stuart*, 547 U.S. 398 (2006), identified one such exigency: “the need to assist persons who are seriously injured or threatened with such injury.” 547 U.S., at 403. Thus, law enforcement officers “may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” *Ibid.* This “emergency aid exception” does not depend on the officers’ subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only “an objectively reasonable

basis for believing,” that “a person within [the house] is in need of immediate aid.”

Brigham City illustrates the application of this standard. There, police officers responded to a noise complaint in the early hours of the morning. “As they approached the house, they could hear from within an altercation occurring, some kind of fight.” Following the tumult to the back of the house whence it came, the officers saw juveniles drinking beer in the backyard and a fight unfolding in the kitchen. They watched through the window as a juvenile broke free from the adults restraining him and punched another adult in the face, who recoiled to the sink, spitting blood. Under these circumstances, the Court found it “plainly reasonable” for the officers to enter the house and quell the violence, for they had “an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning.”

The Court held a straightforward application of the emergency aid exception, as in *Brigham City*, dictates the officer’s entry was reasonable in this case. Just as in *Brigham City*, the police officers here were responding to a report of a disturbance. Just as in *Brigham City*, when they arrived on the scene they encountered a tumultuous situation in the house—and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City*, the officers could see violent behavior inside. Although Officer Goolsby and his partner did not see punches thrown, as did the officers in *Brigham City*, they did see Fisher screaming and throwing things. It would be objectively reasonable to believe that Fisher’s projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage. In short, the Court found it was plain here as it was in *Brigham City* that the

officer’s entry was reasonable under the Fourth Amendment.

The U.S. Supreme Court noted that the Michigan Court of Appeals thought the situation “did not rise to a level of emergency justifying the warrantless intrusion into a residence.” The Court held that although the Court of Appeals conceded that “there was evidence an injured person was on the premises,” it found it significant that “the mere drops of blood did not signal a likely serious, life-threatening injury.” The Court added that the cut Officer Goolsby observed on Fisher’s hand “likely explained the trail of blood” and that Fisher “was very much on his feet and apparently able to see to his own needs.”

The Court held that even a casual review of *Brigham City* reveals the flaw in this reasoning. Officers do not need ironclad proof of “a likely serious, life-threatening” injury to invoke the emergency aid exception. The only injury police could confirm in *Brigham City* was the bloody lip they saw the juvenile inflict upon the adult. Fisher argued that the officers here could not have been motivated by a perceived need to provide medical assistance, since they never summoned emergency medical personnel. This would have no bearing, of course, upon their need to assure that Fisher was not endangering someone else in the house. Moreover, even if the failure to summon medical personnel conclusively established that Goolsby did not subjectively believe, when he entered the house, that Fisher or someone else was seriously injured (which is doubtful), the test, as the Court has said, is not what Goolsby believed, but whether there was “an objectively reasonable basis for believing” that medical assistance was needed, or persons were in danger.

The Court held it was error for the Michigan Court of Appeals to replace that objective inquiry into appearances with its hindsight

determination that there was in fact no emergency. It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But “[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.” *Brigham City, supra*, at 406. It sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else. The Michigan Court of Appeals required more than what the Fourth Amendment demands. The United States Supreme Court therefore granted certiorari and reversed the judgment of the Michigan Court of Appeals, remanding the case for further proceedings not inconsistent with their opinion.

Case: This case was decided by the United States Supreme Court on December 7, 2009. The case cite is *Michigan v. Fisher*, 558 U.S. ____ (2009).

Jeff Harper
City Attorney



**Arkansas Court of Appeals
Affirms Convictions in Three
Separate Cases Involving
Springdale and Fayetteville
Police Departments**

Facts: Ronney Cain (Appellant) was involved with three arrests in the summer of 2008 involving separate traffic stops. The

charges were consolidated for trial purposes. Appellant was convicted of six separate counts in three consolidated cases in Washington County Circuit Court on November 18, 2008. He was sentenced to a total of 38 years. He argued that the evidence should be suppressed on traffic stops of June 5, July 9, and July 20, 2008.

June 5, 2008 Arrest – On June 5, 2008, appellant was stopped by Officer James Chamberlin of the Springdale Police Department because the license tag was hanging off appellant’s car. According to Officer Chamberlin, appellant was extremely nervous and never calmed down. Appellant produced the registration, but did not have his driver’s license and did not own the vehicle. Officer Chamberlin performed a criminal background check that revealed that appellant had prior narcotics and gun violations. After appellant declined to give consent to have the car searched, Officer Chamberlin walked his canine around the car, and the dog alerted twice at the open windows. Officer Chamberlin then searched the car, finding marijuana and a loaded gun.

July 9, 2008 Arrest – On July 9, 2008, Officer Eric Evans of the Springdale Police Department was called by a drug-task-force officer (C.S. Johnson) who was working the area around appellant’s neighborhood. Evans was called when appellant drove by the undercover officer and stared at him. Appellant then parked facing toward the street in a driveway, which was not his. Officer Evans responded to the call, and appellant pulled out of the driveway in front of Evans. Appellant then turned into his own driveway a few blocks away. Officer Evans testified that appellant failed to use his turn signal when turning. He stopped appellant in his driveway, pulling in behind him.

Appellant got out of the car, and Evans told him to get back in. Appellant showed Evans the knife he had in his car. Evans asked if he

could search appellant's person and car. Evans believed appellant agreed to the request by standing up and cooperating without objection as Evans performed a pat-down search. Appellant allowed Evans to search his pockets, and Evans put the contents on top of the car. When Evans began to remove items from appellant's left pocket, appellant began to struggle and scream. Evans wrestled appellant and called for backup. Another officer (Officer John Bright) arrived and assisted in handcuffing and placing appellant in the squad car. After appellant was secured, Officer Evans found methamphetamine and marijuana in the contents of the items from appellant's pockets. Appellant claimed that the car belonged to a woman. Evans eventually found three large fire safes in the back of appellant's car.

Appellant was placed under arrest after the methamphetamine and marijuana were found, and he was placed in the patrol car once the drugs were discovered. The car was towed to be searched because appellant and his father were becoming belligerent. More marijuana and methamphetamine were found when the car was searched.

July 20, 2008 Arrest – On July 20, 2008, appellant was approached by Officer Scott O'Dell of the Fayetteville Police Department who came in contact with appellant at approximately 2:35 a.m. in the parking lot of the Electric Cowboy. At the time of the contact, the club had been closed for over 30 minutes. The officer smelled alcohol on appellant and suspected him of DWI. Appellant told the Officer he was waiting on a girl named Jodi that worked there. Employees cleaning the parking lot told the Officer that no Jodi worked there.

Officer O'Dell called for backup, and Detective Jason French responded. Detective French conducted three field-sobriety tests on appellant, the horizontal

gaze nystagmus (HGN), the walk and turn, and the one legged stand. Appellant performed the walk and turn and the one legged stand "fairly well"; however, the officer observed four of the six clues of intoxication during the HGN. Appellant was arrested for DWI, and the officers searched his car and found part of a marijuana cigarette and a small amount of methamphetamine in a wallet on the passenger seat.

After the trial court denied appellant's motions to suppress related to evidence seized in each instance, he was found guilty on all counts and sentenced to a total of thirty-eight years. He appealed these convictions to the Arkansas Court of Appeals, arguing that the evidence upon which they rest was the product of three searches and seizures that violated his rights, relying mainly on *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

Argument and Decision by Arkansas Court of Appeals:

Springdale Police Officer Chamberlin's June 5, 2008 Traffic Stop – Appellant argued that his nervousness was not enough to give the officer cause to walk the dog around the car. Appellant did let him search his person, but not the car. He claimed that it was obvious that the officer forced the dog to alert at the windows. Appellant cited *Meraz-Lopez v. State*, 92 Ark. App. 157 (2005), where the officer did not have reasonable suspicion to detain defendant after the issuance of a warning ticket; nervousness, as well as a new cell phone, atlases, fast-food wrappers, and energy drinks were insufficient for reasonable suspicion.

The State cited *Illinois v. Caballes*, 543 U.S. 405 (2005), where the Supreme Court held that the use of a well-trained dog during a lawful traffic stop does not implicate

legitimate privacy interests. *See also State v. Harris*, 372 Ark. 492 (2008). Appellant argued that evidence was inadmissible because the officer did not have reasonable suspicion to conduct a canine sniff of the car. However, the Arkansas Court of Appeals held that based on *Caballes* and *Harris*, his argument is without merit, as the officer did not need additional suspicion to allow the dog to sniff the exterior of the car. Accordingly, the Arkansas Court of Appeals affirmed the judgment on this point.

Springdale Police Officer Evans' July 9, 2008 Traffic Stop – In his argument for reversal, appellant stressed that even the arresting officer testified that appellant did not give a verbal "yes" or "no" when asked if his car could be searched. Appellant simply stood up, and the officer started to search his right pocket, putting the contents on the car. When the officer went to appellant's left pocket, where the officer could see a roll of money and a metal can (that was later found to contain methamphetamine), appellant started jumping up and down and screaming. The officer applied force and took him to the ground because of the safety issue. Appellant argued that these facts do not prove by clear and positive testimony that consent to a search was given. Appellant argued consent must be unequivocal. *See Latta v. State*, 350 Ark. 488 (2002); *Stone v. State*, 348 Ark. 661 (2002); *Norris v. State*, 338 Ark. 397 (1999).

Appellant also disputed Officer Evan's testimony that he neglected to use a turn signal. Appellant pointed out that at the suppression hearing, the officer said appellant was under arrest when placed in the back seat of the squad car, but at the trial, he said appellant was not under arrest at the time he was placed in the squad car, but was put there so the search could be completed. Appellant claimed that he told the officer he did not consent to the search

while he was in the squad car. He argued that because he was not under arrest at that time, then the search of the vehicle was before his arrest and not incident to it.

Appellant claimed that Rule 12.1 (2009) of the Arkansas Rules of Criminal Procedure is now unconstitutional in light of *Gant, supra*, which appellant contended held that searches incident to arrest are unlawful and unreasonable if the arrestee is already secured in the back of a squad car where it is not likely that he can reach into his own vehicle and retrieve a weapon or destroy evidence.

The State pointed out that validity of consent is a fact question, and the trial court's finding of fact will not be reversed unless it is shown to be clearly erroneous. *Gonder v. State*, citation omitted. The Arkansas Court of Appeals noted that the trial court ruled that appellant initially consented to a search of his person, which produced the contraband, but appellant withdrew consent after the arrest. Further, the trial court found that the officers had reasonable cause for the arrest and that the subsequent search of the vehicle was either incident to a lawful arrest or a valid inventory search, and was, therefore, proper under the Arkansas Rules of Criminal Procedure.

The State asserted that appellant was stopped for suspicious behavior and a traffic violation. This was an investigative stop. Police must therefore have had particularized and articulable reasons indicating appellant was involved in criminal activity. Once legally detained, Rule 3.4 (2009) of the Arkansas Rules of Criminal Procedure allows a patdown search for weapons or dangerous items. *Muhammad v. State*, 337 Ark. 291 (1999). There must be justification for detaining the suspect under Rule 3.1. Probable cause or reasonable suspicion is not necessary for an

officer to request consent for a search. *Howe v. State*, 72 Ark. App. 466 (2001). An officer must have reasonable cause to arrest without a warrant. Ark. R. Crim. P. 4.1 (2009). This is when facts within an officer's knowledge are sufficient to permit him to believe that an offense has been committed by the person to be arrested. *McKenzie v. State*, 69 Ark. App. 186 (2000). A search incident to a lawful arrest is valid even if conducted before the arrest, provided that the arrest and search are substantially contemporaneous and there was probable cause to arrest before the search began. Under *Gant, supra*, a search incident to a lawful arrest is permissible related to vehicles when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. This relates to any area of the vehicle. *Id.*

The State admitted that the *Gant* decision limits an officer's authority to conduct a warrantless search of a car incident to an arrest, but contended that circumstances which create probable cause to believe that contraband or evidence of drug crimes would be found in the vehicle give rise to an independent basis for conducting a warrantless search. *United States v. Martinez-Cortes*, 566 F.3d 767 (8th Cir. 2009).

Appellant argued that the State failed to demonstrate that consent was unequivocal. He also argued that the search of his car was unconstitutional because the officer began searching before placing him under arrest, therefore it was not incident to arrest; that he refused permission to search the car; and that the areas of the car searched were beyond the purview of a valid search incident to an arrest under *Gant*. The State claimed, and the Arkansas Court of Appeals agreed, that the officer was justified in stopping appellant to investigate because of the circumstances—a drug-task-force officer saw appellant acting suspiciously in the

neighborhood, and the arresting officer saw appellant fail to use his turn signal. After the stop, appellant gave the officer an improbable reason for his behavior. The officer properly asked if he could search appellant's person. The trial court found consent, and this should be given weight. However, even without the consent, the officer had reason to search appellant because he was a threat to the officer's safety in light of the knives he was carrying. Ark. R. Crim. P. 3.4 (2009). The discovery of methamphetamine and marijuana in the pockets gave rise to appellant's arrest and probable cause to search the car and its contents. *See Gant, supra*.

Accordingly, the Arkansas Court of Appeals affirmed the judgment on this point.

Fayetteville Police Officer O'Dell's July 20, 2008 Traffic Stop - Appellant argued the facts related to this incident fit perfectly with *Gant, supra*, which held that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. He argued that the *Gant* court outlawed a warrantless search of a vehicle after the arrestee, appellant here, had been secured in a police car.

However, the Arkansas Court of Appeals held appellant's reading of *Gant* as applied here is wrong. What was actually found by officers incident to the search is not the standard by which the Court measured whether *Gant* was followed. For example, an open container of alcohol could have been found in appellant's vehicle, making the officer's search permissible under *Gant*. As it happened, evidence of intoxication was found in appellant's car. Under the Omnibus DWI Act, "intoxicated" means "influenced or affected by the ingestion of alcohol, a

controlled substance, any intoxicant, or any combination of alcohol, and a controlled substance.” Ark. Code Ann. § 5-65-102 (Repl. 2005). Since intoxication includes the use of controlled substances, the Fayetteville officers acted reasonably by searching those areas within appellant’s reach as he sat in his car in a deserted parking lot (The Electric Cowboy). The discovery of marijuana and methamphetamine constituted evidence that he was using controlled substances in violation of the Act.

Accordingly, the Arkansas Court of Appeals affirmed the judgment on this point.

Having ruled against the appellant on all three points, the Arkansas Court of Appeals affirmed the convictions in which appellant was sentenced to a total of 38 years.

Case: This case was decided the Arkansas Court of Appeals on January 13, 2010, and was an appeal from the Washington County Circuit Court, Honorable William A. Storey, Judge. The case cite is *Cain v. State*, 2010 Ark. App. 30.

Jeff Harper
City Attorney



**Arkansas Supreme Court
Affirms Conviction for Two
Counts of Rape and Two
Counts of Second Degree
Sexual Assault in Boone County
Case**

Facts Taken From the Opinion: On April 28, 2007, the Boone County Sheriff’s Office was called to the mobile home of Lloyal Willie Bryant (appellant) in Lead Hill, where he lived with his wife and stepchildren, to investigate a domestic

disturbance. During that investigation, five-year-old C.H. alleged that appellant had sexually abused him. Appellant was arrested, and two days later Detective Troy Walker interviewed him regarding the allegations of sexual abuse. Following that interview, appellant was charged with two counts each of rape and sexual assault in the second degree.

At the trial, which began on April 28, 2008, C.H., who was then six years old, testified specifically on the allegations of rape and sexual abuse committed by appellant.

The State also called Detective Walker to testify regarding his interrogation of appellant. Appellant objected to the introduction of the confession on the basis that the detective only *mirandized* appellant once during the six-hour interview and that when appellant indicated he wished to cease the interview, the detective did not honor that request.

Detective Walker testified that prior to the interrogation, he read appellant his rights, using the form required by the sheriff’s office, and that appellant indicated he could read, write, and had received an equivalency diploma after finishing the tenth grade. Detective Walker noted that the interview began just before noon and lasted approximately six hours, with three or four breaks during its course. Upon questioning appellant regarding C.H.’s allegations, appellant’s response was that the child was lying. When the detective asked appellant about specific events, he stated that he did not remember and continued to deny he abused the child. After Detective Walker and appellant viewed the videotaped interview of C.H., appellant said that he had never touched C.H. and that if he had been abused, someone else did it. The interrogation then turned to appellant’s excessive drinking, and Detective Walker asked appellant if he could have

inappropriately touched C.H. while he was drunk. Appellant stated that “[i]f it happened, I don’t remember none of it.” Appellant admitted that he was an alcoholic and that if C.H. was telling the truth, “I don’t remember if it did happen.” Appellant also expressed that “[i]t’s tearing me up right now. It’s hurts [sic] me to know that I could do something like that with him.” The detective then questioned appellant about his history of being sexually abused by his own father. Appellant admitted that his father had molested him and that he occasionally dreamt about the abuse. At one point, appellant stated that “I’m not denying it didn’t happen, it—more than likely, it has happened but I [inaudible] dreams about my dad.” Thereafter, the following colloquy occurred:

DETECTIVE WALKER: We don’t have to wait Willie.

APPELLANT: Troy, I don’t remember it.

DETECTIVE WALKER: Yes, you do.

APPELLANT: No, I don’t.

DETECTIVE WALKER: Yes, you do. Stop, I’m not going to hear it.

APPELLANT: Okay, then we’re through with [inaudible] this interview then.

DETECTIVE WALKER: Be quiet.

APPELLANT: I can’t answer it, I can’t admit something ...

DETECTIVE WALKER: He needs your support Willie.

APPELLANT: I know and I’m ...

Detective Walker continued to question appellant, and he continued to deny the allegations. Detective Walker described appellant’s demeanor throughout the interview as “stoic,” showing “no emotion,” and like a “statue.” The detective stated that appellant never seemed offended, even when the detective used profanity to attempt to elicit an emotional response. Detective

Walker noticed tears in appellant’s eyes at one point during the discussion of his own abuse by his father.

A deputy with the Boone County Sheriff’s Office testified that he served as jailer while appellant was incarcerated prior to trial. The deputy testified that appellant wrote two letters to his wife. Brittany Bailey was recalled to testify regarding letters received at her residence for her mother. She stated that she had seen appellant’s handwriting several times during the three years she lived with him. She indicated that she had no doubt the letters were from appellant. Brittany testified that in one of the letters, appellant wrote that “God, I wish I could turn back this, turn back time but I can’t. Everything happens for a reason. This has opened up my eyes to see where I’m going. The one I need to show is [C.H.]. If I did touch him.” He also indicated in the letter that when he got out the family should move to Missouri where “DHS don’t follow you.”

In addition to another witness, thirteen-year-old C.L. was called to testify. He stated that appellant’s wife babysat him when he was younger and that during that time, appellant touched him inappropriately. C.L. indicated that during the time of the abuse, he often stayed the night at appellant’s home and that he spent significant time with appellant. C.L.’s mother testified that her son’s allegations were investigated and that appellant pled guilty and received nine months’ incarceration.

The State rested, and appellant chose not to testify in his own defense. Appellant moved for directed verdict on the basis that the State failed to offer any evidence to show sexual gratification, which appellant argued was necessary to prove rape and second-degree sexual assault; that there was no physical evidence of abuse; that C.H.’s testimony was not credible nor sufficient alone to sustain a conviction; that the State

failed to prove two counts of rape and two counts of sexual assault rather than a continuing course of conduct; that appellant was forced to forfeit an opportunity to testify in his own defense else be impeached by his prior offense; and that if sentenced as a habitual rape offender, appellant would receive a life sentence without ever addressing the jury. The court denied the motion. The Boone County jury convicted appellant on two counts each of rape and sexual assault in the second degree. Appellant was sentenced to life plus 40 years to run concurrently.

On appeal, appellant asserted that trial court erred (1) in denying his motion to suppress statements he made during interrogation; (2) in admitting into evidence letters he wrote to his wife while incarcerated; (3) allowing testimony regarding a prior sexual assault offense; and (4) in denying his motion for a directed verdict.

Decision by Arkansas Supreme Court:

Sufficiency of Evidence – Appellant argued that the trial court erred in denying his motion for directed verdict. Specifically, he asserted that the evidence was insufficient to prove rape or sexual assault because the State failed to present any evidence other than the testimony of C.H. to support the allegations. Alternatively, appellant contended that he was incorrectly charged with two counts each of rape and second-degree sexual assault.

A person commits rape if he engages in sexual intercourse or deviate sexual activity with a person less than fourteen years old. Ark. Code Ann. § 5-14-103(a)(3)(A) (Supp. 2009). “Deviate sexual activity” means any act of sexual gratification involving the penetration, however slight, of the anus or mouth of a person by the penis of another or by the penetration, however slight, of the anus of a person by any body member or

foreign instrument manipulated by another person. Ark. Code Ann. § 5-14-101 (Supp. 2009). A person commits sexual assault in the second degree when he is over the age of eighteen and engages in sexual contact with a person less than fourteen years old who is not his spouse. Ark. Code Ann. § 5-14-125 (Supp. 2009).

This court has consistently held that the testimony of a rape victim, standing alone, is sufficient to support a conviction if the testimony satisfies the statutory elements of rape. To the extent that there may be inconsistencies in the victim’s testimony, this is a matter of credibility for the jury to resolve. In cases of sexual abuse, it may be assumed that the defendant had sexual contact with the victim for the purpose of sexual gratification, and it is not necessary for the State to directly prove that he was so motivated. It is similarly not necessary for the State to prove specifically when and where each act of rape or sexual contact occurred, as time is not an essential element of the crimes. Furthermore, rape is not defined as a continuing offense; rather, it is a single crime that may be committed by either engaging in sexual intercourse or deviate sexual activity with, as in this case, another person who is less than fourteen years of age. Where the victim testifies to multiple acts of rape of a different nature, separated in a point of time, there is no continuing offense, as a “separate impulse was necessary for the commission of each offense.” *Tarry v. State*, 289 Ark. 193, 195, (1986); *see also Small v. State*, 371 Ark. 244 (2007) (holding that although the acts all occurred within the same night, they each involved a separate impulse and were separate offenses).

The Court held that C.H. clearly identified appellant as the perpetrator and testified that appellant engaged in several different acts of a sexual nature. The Court held pursuant to Arkansas case law, C.H.’s testimony alone

supported appellant's conviction for rape and sexual assault. Moreover, C.H.'s testimony illustrated that there were several different actions of sexual assault and rape—acts that can each be separated in time as involving distinct impulses where appellant touched C.H. on his penis and bottom and where appellant sought sexual gratification by performing sexual acts on C.H. and then sought sexual gratification by forcing C.H. to perform sexual acts on appellant. Therefore, the Arkansas Supreme Court affirmed the conviction on this point because there was sufficient evidence for the jury to convict appellant of two counts each of rape and second-degree sexual assault.

Suppression of Statement – Appellant made two arguments with regard to the suppression of statements he made during custodial interrogation. First, he argued that the trial court should have excluded those statements because he did not knowingly, voluntarily, and freely waive his rights. Specifically, he maintained that due to the length of the interrogation and verbal abuse by the detective, any statement made by appellant was not voluntary. Second, appellant contended that any incriminating statements he made after he asked to stop the interview but was rebuked by the detective should have been suppressed.

Appellant's first sub-point regarding suppression pertained to voluntariness and waiver. In support of his argument, he pointed to the following facts: he was interviewed while in custody and was not free to leave; he was *mirandized* only at the beginning of the six-hour interrogation with only one break; he was not well-educated; and the detective yelled at appellant during the interrogation and called him "son of a bitch," "lying bastard," and "sack of shit." Appellant asserted that due to the length of the interrogation and his low level of education, Detective Walker should have *re-mirandized* appellant to ensure that any

statement was voluntary. Appellant also contended that the verbal abuse by the detective, as well as questions designed to elicit an emotional response from appellant, created a coercive environment.

The State responded and maintained that appellant had a GED diploma and demonstrated he could read and write by reading aloud from the written waiver. The State also noted that neither the length of the interview nor the detective's use of profanity seemed to elicit any response from appellant and that there was no evidence that his will was overborne by those factors.

In order to determine whether a waiver of *Miranda* rights is voluntary, knowing, and intelligent, the court looks to see if the statement was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Flanagan v. State*, 368 Ark. 143 (2006). To make this determination, the Court reviews the totality of the circumstances surrounding the waiver including the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or physical punishment; and statements made by the interrogating officers and the vulnerability of the defendant. *Id.* Again, the Court noted, "we will reverse a circuit court's ruling on this issue only if it is clearly against the preponderance of the evidence." *Id.*

Furthermore, the Court stated that there is no constitutional requirement that a suspect be warned of his *Miranda* rights each time he is questioned. *Williams v. State*, 363 Ark. 395 (2005). There is likewise no mechanical formula for measuring the longest permissible interval between the last warning and the confession. *Id.* *Miranda* warnings need only be repeated when the circumstances have changed so seriously

that the accused's answers are no longer voluntary, or the accused is no longer making a knowing and intelligent relinquishment or abandonment of his rights. *Id.* Important considerations are the length of time that has elapsed between the *Miranda* warnings and the confession and the number of prior warnings. *Id.* An additional consideration is whether the accused initiated the second interrogation. *Id.*

The Court held that that they were satisfied that the circuit court did not err in allowing appellant's custodial statements into evidence. Detective Walker advised appellant of his constitutional rights in writing and appellant signed the waiver form. The entire interview took approximately six hours in a single day. The Court has held that a defendant's constitutional rights were not violated where twenty-two hours elapsed between the *Miranda* warning and the confession and also where three days had elapsed. *See Williams*, 363 Ark. at 409; *Barnes v. State*, 281 Ark. 489 (1984). Moreover, there was no evidence that the length of the interview or the detective's questioning style overrode appellant's will and coerced him into incriminating himself. Rather, the evidence suggests otherwise—that appellant stayed calm and collected throughout the interview. Furthermore, the detective's use of profanity was minimal and not patently offensive. Under the totality of the circumstances, the Court held that "we cannot say that the circuit court clearly erred in refusing to suppress the statement on this basis."

Appellant's second sub-point with regard to suppression is that any comments he made after he asked to cease the interview should have been suppressed because they were taken in violation of his constitutional rights. A person subject to custodial interrogation must first be informed of his right to remain silent and right to counsel under *Miranda v.*

Arizona, 384 U.S. 436 (1966). Statements improperly taken after the invocation of the right to remain silent or the right to counsel must be excluded from the State's case in chief to ensure compliance with the dictates of *Miranda*. *See Michigan v. Harvey*, 494 U.S. 344 (1990). "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74; *see also* Ark. R. Crim. P. 4.5 (2009).

An indication that a defendant wishes to remain silent is an invocation of his *Miranda* rights. *Robinson v. State*, 373 Ark. 305 (2008). Once the right to remain silent is invoked, it must be scrupulously honored. *Id.* The meaning of "scrupulously honored" was discussed in *James v. Arizona*, 469 U.S. 990, 992-93 (1984):

To ensure that officials scrupulously honor this right, we have established in *Edwards v. Arizona*, [451 U.S. 477 (1981)], and *Oregon v. Bradshaw*, [462 U.S. 1039 (1983)], the stringent rule that an accused who has invoked his Fifth Amendment right to assistance of counsel cannot be subject to official custodial interrogation unless and until the accused (1) "initiates" further discussions relating to the investigation, and (2) makes a knowing and intelligent waiver of the right to counsel under the [waiver] standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938), and its progeny.

The Court noted that when invoking a *Miranda* right, the accused must be unambiguous and unequivocal. *Davis v. United States*, 512 U.S. 452 (1994). For example, when invoking the right to counsel, the Court has said:

[H]e must articulate his desire to have counsel present sufficiently clearly

that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, [the law] does not require that the officers stop questioning the suspect. *Davis*, 512 U.S. at 459.

The Arkansas Supreme Court has extended the *Davis* holding by reviewing the question of specificity when invoking the right to silence. See *Standridge v. State*, 329 Ark. 473, 479 (1997). In *Standridge*, the Arkansas Supreme Court held that a suspect's statement "I ain't ready to talk" was not unequivocal. Likewise, the Court held in *Bowen* that the statement that the accused wanted to "think about" talking to police officers was not sufficiently definite. Moreover, in *Bowen* the Arkansas Supreme Court held that the right to remain silent must be made unequivocally, and answering questions following a statement that attempts to invoke the right to remain silent may waive that right by implication.

Turning to the present appeal, appellant argued that the circuit court should have suppressed his statement because he invoked his right to remain silent when he indicated, "Okay, then we're through with this interview then." Viewing that statement in context, it was made after appellant had repeatedly denied sexually assaulting C.H. and the detective had repeatedly refused to believe appellant. The alleged invocation followed the detective's statement, "Stop, I'm not going to hear it." In essence, appellant and the detective were arguing and appellant was informing Detective Walker that if he did not believe him, then there was nothing left to discuss. However, appellant kept talking, denying involvement. The Court held that appellant's statement was not an unequivocal request invoking his right to remain silent and that pursuant to *Bowen*, his willingness to continue the

conversation implicitly waived any attempt to invoke that right.

Admission of Letters – Appellant contended that the trial court erred in allowing into evidence letters that appellant wrote and sent to his wife during his incarceration because the prejudicial effect of those letters greatly outweighed any probative value under Rule 403 of the Arkansas Rules of Evidence. Particularly, appellant maintained that the letters indicated both a consciousness of guilt and of innocence, thus confusing the jury. Appellant argued that the letters shed no light on whether appellant actually committed the sexual-abuse crimes against C.H. and only function to create an unfair prejudice in the jurors' minds that appellant's wife, who committed suicide shortly after receiving the letters, took her own life due to appellant's actions.

The Court held that the trial court did not manifestly abuse its discretion by allowing the State to introduce appellant's letters to his wife. The State argued that the letters show appellant's guilty state of mind and created a reasonable inference that appellant was attempting to convince his wife to help him beat the charges so they could leave the state and DHS's reach. The Court held that in fact, any suggestion of a guilty conscience in the letter is slight. Appellant never confessed to the crime in the letter, and as the weigher of credibility, the jury was charged with interpreting appellant's state of mind and intentions in writing the letter. Additionally, there is no evidence in the record that the jury had any knowledge of appellant's wife's suicide. Furthermore, C.H.'s testimony provided sufficient evidence—without the letter—to support a finding of guilt. Under these circumstances, the Court found no basis for reversal.

Testimony Regarding Appellant's Prior Bad Acts – Appellant asserted that the trial court erred in allowing the State to

introduce, via the testimony of a prior victim and his mother, appellant's prior second-degree sexual assault conviction. Appellant maintained that the State's only purpose in introducing this evidence was to prove that appellant acted in conformity with his prior acts and that the evidence does not fit the pedophile exception because the prior victim did not have an intimate relationship with appellant. Basically, appellant claimed that because his wife—not himself—babysat C.L., appellant was not in the requisite position of authority over C.L.

The Court held that the admission or rejection of evidence under Rule 404(b) is committed to the sound discretion of the circuit court, which will not be disturbed on appeal absent a showing of manifest abuse. *Kelley v. State*, 2009 Ark. ___, ___ S.W.3d ___. Rule 404(b) provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ark. R. Evid. 404(b) (2009).

The Arkansas Supreme Court held the trial court did not err in allowing C.L. and his mother to testify because the testimony was admissible under the pedophile exception. Both witnesses testified that C.L. spent a lot of time with appellant while his wife served as babysitter and that C.L. often slept over at appellant's home. C.L.'s testimony regarding the sexual abuse was similar in nature to the testimony of C.H., both victims were young boys at the time of the abuse, both testified that appellant was often intoxicated at the time of the abuse, and both were subjected to sexual abuse while staying

in appellant's home. Therefore, the circuit court did not err in allowing C.L. and his mother to testify under the pedophile exception.

Having ruled against the appellant on all points, the Court affirmed the judgment of the Boone County Circuit Court.

Case: This case was decided by the Arkansas Supreme Court on January 14, 2010, and was an appeal from the Boone County Circuit Court, Honorable Robert McCorkindale, II, Judge. The case cite is *Bryant v. State*, 2010 Ark. 7.

Jeff Harper
City Attorney



Suspended Driver Licenses and Suspended ID'S; Clearing up the Confusion

There has been some confusion recently about what to do when an officer pulls someone over for a traffic offense and dispatch informs you that the suspect's ID card is suspended. Is the charge no driver's license or suspended driver license? The confusion mainly lies in where you look on the driving record. The proper place to look is "STATUS" not "Class". If the status shows "NCL IS SUSPENDED" that means the persons privilege to drive is suspended regardless of whether or not they posses or ever have possessed a drivers license. Therefore the proper charge is suspended drivers license.

The only way the proper charge would be no drivers license is if the STATUS states something such as no record or "N/A" and Class states ID.

Below is an example of a driving record where the proper charge would be suspended driver's license #4:

1-6-10		ARKANSAS TRAFFIC VIOLATION REPORT			HISTORY			
JOHN DOE 679 MICKEY MOUSE LANE MOUSELAND ENDORSEMENTS:		AR 79467			ADL: 12345 DOB: 8-26-55 ISSUED: 1-10-07 EXPIRES: 1-10-11 PHOTO ON FILE RACE: W TOTAL POINTS: 06 SEX: M DC#:			
STATUS: NCL IS SUSPENDED		PREV DLN: 00000000						
RESTRICTIONS:		CLASS: ID						
OFFENSE DATE...	CONVICTION DATE...	OFFENSE/ACTION	COURT LOCATION...	TYPE	INDEX NUMBER...	COM VEH	HAZ MAT	PTS
10-18-09	10-29-09	D W LIC SUSP	ROGERS	MC	13579			03
06-30-08	09-17-08	D W LIC SUSP	SPRINGDALE	MC	25890			03
01-23-05	11-25-05	D W LIC SUSP	FAYETTEVILLE	MC	32145			03
06-16-05	06-16-05	FTA: FOR ORG	SPRINGDALE	MC	ADMIN PER			00
01-23-05	03-28-05	FL SHOW INSR	SPRINGDALE	MC	18670			00
09-14-04	09-14-04	DUI@08 ADMIN*	DEPARTMENT	DC	ADMIN PER			00
03-19-02	04-22-02	EXP/NO DL/ID	SPRINGDALE	MC	03698			00
SUSP 06-16-05 FOR INDEF.		REIN FEE CT	DEPARTMENT	DC	0000000	N		
SUSP 06-16-05 FOR INDEF.		FTA: FOR ORG	SPRINGDALE	MC	0000000	N		
DENY 03-13-05 TO 09-13-05		INELIGIBLE	DEPARTMENT	DC	0000000	U		
SUSP 09-14-04 TO 03-13-05		DUI@ 08ADMIN*	DEPARTMENT	DC	0000000	U		
SUSP 09-14-04 FOR INDEF.		FEE DUI/REF	DEPARTMENT	DC	0000000	U		
SUSP 09-14-04 FOR INDEF.		REHAB CERT	DEPARTMENT	DC	0000000	U		

Below is an example of a driving record where the proper charge would be no driver's license:

2-9-10		ARKANSAS TRAFFIC VIOLATION REPORT			HISTORY			
JANE DOE 789 GOOFY RD MOUSELAND		AR 79467			ADL: 67890 DOB: 1-29-54 ISSUED: 2-10-07 EXPIRES: 2-10-11 PHOTO ON FILE PREV DLN: 00000000 RACE: W TOTAL POINTS: 00 SEX: F DC#:			
STATUS: NCL IS N/A								
RESTRICTIONS		CLASS: ID						
OFFENSE DATE...	CONVICTION DATE...	OFFENSE/ACTION	COURT LOCATION...	TYPE	INDEX NUMBER...	COM VEH	HAZ MAT	PTS
05-03-05	05-03-05	DUI @ BAC.	DEPARTMENT	DC	ADMIN PER			00
04-03-05	04-29-05	DUI@08BACPLI-1	ROGERS	MC	24689			00
04-03-05		ACCIDENT	ARKANSAS		1230			03
SUSP 05-03-05 TO 10-30-05		DUI@BAC.15	DEPARTMENT	DC	0000000	N		
SUSP 05-03-05 TO 08-20-07		FEE DUI/REF	DEPARTMENT	DC	0000000	N		
SUSP 05-03-05 TO 07-12-07		REHAB CERT	DEPARTMENT	DC	0000000	N		

NOTE: All driving records used in this article are fictitious.

It would be extremely rare to see a suspended ID only because the only way that would happen is if the ID holder failed to pay the department of revenue money that they owed, and since ID's cost only \$5.00 it is something that is hardly, if ever, seen. As

always please don't hesitate to come see me or any of the other attorneys if you have any questions.

Amber Roe
Deputy City Attorney

Landlord/Tenant and Roommate Disputes: When is Criminal Trespass the Correct Charge?

Recently, there has been an increase in the number of calls for service involving disputes between tenants and landlords, and disputes between roommates. These disputes usually involve one of the following scenarios:

- 1) Tenant has not paid rent and landlord wants tenant out;
- 2) Landlord says tenant's lease has expired and tenant will not move out;
- 3) Tenant (who is on lease) wants roommate (who is not on lease) to move out; or
- 4) Family member wants member of family removed from the property.

In each of these scenarios, someone is asking the police to resolve a dispute and to have someone arrested and/or removed from the property. In which of these scenarios, if any, is it proper to utilize the charge of Criminal Trespass? In order to prevent misinforming the public, or making incorrect charging decisions, it is important to know how to adequately handle each of these types of calls. Therefore, each of these situations will be discussed in detail.

The Criminal Trespass statute is found at Ark. Code Ann. §5-39-203, and states:

5-39-203. Criminal trespass.

(a) A person commits criminal trespass if he or she purposely enters or remains unlawfully in or upon:

- (1) A vehicle; or
- (2) The premises of another person.

(b) Criminal trespass is a:

(1) Class B misdemeanor if the vehicle or premises involved is an occupiable structure; or

(2) Class C misdemeanor if otherwise committed.

Scenario #1: Tenant has not paid rent and landlord wants tenant out.

In this scenario, Landlord calls the police and says, "I have been renting this property to Mr. and Mrs. Smith. They have not paid me rent and they won't move out. Will you please remove them from my property and arrest them for trespassing?"

Is Criminal Trespass an option? No. The fact that the tenants have not paid rent and refuse to move out does not constitute the offense of criminal trespass. The tenants may possibly be prosecuted for "refusal to vacate", and the landlord should be referred to the City Attorney's Office for details. However, the case law in Arkansas has made it clear that the criminal trespass statute does not apply to this situation. See *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985), as an example of fact Scenario #1. Furthermore, in Arkansas, a landlord must go through the civil eviction process in order to have a tenant legally removed from the property.

Scenario #2: The lease has expired, but tenant will not move out.

In this scenario, Landlord calls the police and says, "I have been renting this property to Mr. and Mrs. Smith. Their lease ended at the end of last month and they have not paid me rent and they have not moved out. Will you please remove them from my property and arrest them for trespassing?" This is the classic "holdover tenant" situation.

Is Criminal Trespass an option? No. The fact that the tenants have stayed beyond the

end of their lease, have not paid rent, and refuse to move out does not constitute the offense of criminal trespass. The case law in Arkansas has made it clear that the criminal trespass statute does not apply to this situation. See *Polk v. State*, 28 Ark. App. 282, 772 S.W.2d 368 (1989), for the proposition that the criminal trespass statute does not apply to holdover tenants. Just like in Scenario #1, the tenants may possibly be prosecuted for "refusal to vacate", and the landlord should be referred to the City Attorney's Office for details. Furthermore, in Arkansas, a landlord must go through the civil eviction process in order to have a tenant legally removed from the property.

Scenario #3: Tenant (who is on lease) wants roommate (who is not on lease) out.

In this scenario, Officer Jones is shown a lease with O.J.'s name on it as tenant. O.J. says, "I've been letting M.J. stay here for a couple of months. He ain't on the lease and I want him out. I'm tired of his lazy butt being in my apartment eatin' all my food and playin' all my video games. Will you please remove him from my property and arrest him for trespassing?" M.J. says, "I ain't goin' nowhere, I pay part of the bills here."

Is Criminal Trespass an option? Yes. In this scenario, since M.J. has no leasehold interest (his name is not on the lease), if M.J. does not leave the premises when asked to do so by O.J., M.J. would be subject to valid arrest under the criminal trespass statute. A recent Attorney General's Opinion has made it clear that the criminal trespass statute does apply in this situation. See Attorney General's Opinion 2009-154, issued on December 10, 2009. In this scenario, it does not matter if M.J. has remained on the property one hour or one year. If M.J. is not on the lease, O.J. may request the assistance of the police in removing M.J. from the property.

Does it make a difference if M.J. paid part of the rent, utilities, groceries, or other bills for the property? No. According to Attorney General's Opinion 2009-154, the fact that the person has paid part of the costs of occupancy does not mean that the person has any legal status to be on the property.

Obviously, an officer has discretion whether or not to actually make an arrest in this situation, but the intent of this article is to point out that an arrest in this situation would be lawful.

Scenario #4: Family member wants member of family removed from the property.

In this scenario, Officer Jones makes contact with Mr. Andrews, who says that his 25 year old son, Marvin, has been living with him "off and on" for 3 years, and now he wants him out. Andrews tells Officer Jones that Marvin has no ownership interest in the property, nor is there a lease.

Is Criminal Trespass an option? Yes. In this scenario, since Marvin has no legal ownership interest in the property, if Marvin does not leave the premises when asked to do so by his father, Marvin would be subject to valid arrest under the criminal trespass statute. See *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996), as an example of fact Scenario #4. In addition, a recent Attorney General's Opinion has made it clear that the criminal trespass statute does apply in this situation. See Attorney General's Opinion 2009-154, issued on December 10, 2009. This opinion pointed out that the criminal trespass statute would apply in a situation where an adult child has "overstayed their welcome" with a parent, provided that the parent did not otherwise have a legal obligation to support the child (for example, if the child was disabled).

Would it make any difference if Marvin paid part of the rent, utilities, groceries, or other bills for the property? No. According to Attorney General's Opinion 2009-154, the fact that the person has paid part of the costs of occupancy does not mean that the person has any legal status to be on the property.

Obviously, an officer has discretion whether or not to actually make an arrest in this situation, but the intent of this article is to point out that an arrest in this situation would be lawful.

NOTE: Refusal to Vacate. This article references the criminal offense of "refusal to vacate" as an option available to a landlord dealing with a tenant that will not pay rent. Though not an actual "eviction" procedure, the filing of "refusal to vacate" charges against a tenant most often results in the tenant vacating the property. In 2009, the City Attorney's Office filed refusal to vacate charges against 53 tenants.

Refusal to vacate charges are brought pursuant to Ark. Code Ann. §18-16-101, which provides, in relevant part:

If, after ten (10) days' notice in writing shall have been given by the landlord or the landlord's agent or attorney to the tenant to vacate the dwelling house or other building or land, the tenant shall willfully refuse to vacate and surrender the possession of the premises to the landlord or the landlord's agent or attorney, the tenant shall be guilty of a misdemeanor.

The City Attorney's Office has prepared a "landlord packet" that outlines the specifics of a refusal to vacate prosecution, and also contains a sample ten (10) day notice to vacate for use by the landlord. This packet is available upon request from the City Attorney's Office, and is also available

online at the City Attorney's website (www.springdalear.gov/cosa).

Ernest Cate
Senior Deputy City Attorney



Landlord v. Tenant: Is it Ever a Crime?

Recently, there has been an increase in the number of questions involving disputes between tenants and landlords. These disputes usually involve issues outside the civil eviction process. Specifically:

- 1) Landlord has used "self-help" measures to remove tenant from the property;
- 2) Tenant complains that landlord has removed tenants property from the premises; or
- 3) Landlord wants advice on whether tenant's property can be removed.

In each of these scenarios, someone is asking the police to resolve a dispute. In which of these scenarios, if any, is it proper for the police to be involved? Is it ever acceptable for a landlord to use "self-help" measures to evict a tenant? In order to prevent misinforming the public, and in order to know when the call is a civil matter (meaning there is no crime and the parties should be referred to their own attorneys), it is important to know how to adequately handle each of these types of calls.

Scenario #1: Landlord has used "self-help" measures to remove tenant.

In this scenario, Tenant calls the police and says, "I have been renting this property from Landlord for 2 years. I left for work this morning, but when I came home after work, my key won't work". Tenant shows the

officer a note on the door from Landlord that says, "You are evicted because you didn't pay rent, I have changed the locks and have taken your stuff to pay for the back rent you owe me." Tenant wants the property returned, wants back in the property, and wants Landlord prosecuted.

Has a Crime been committed? Yes. The fact that a tenant has not paid rent does not give a landlord the right to use "self-help" to evict a tenant. A landlord must go through the civil eviction process in order to have a tenant legally removed from the property. In our scenario, Landlord may be arrested and prosecuted for Criminal Mischief 2nd Degree (tampering with property of another thereby causing substantial inconvenience). Other types of "self-help" which are not acceptable include, but are not limited to, changing the locks, removing the front door, removing tenant's personal property, shutting off or disconnecting utilities, or any other overt act which essentially "evicts" the tenant from the property. These acts are unacceptable and are punishable by criminal prosecution.

Scenario #2: Do Landlord's actions actually constitute "self-help"?

In this scenario, Tenant calls the police and says, "I have been renting this property from Landlord for 2 years. I left for a week to visit family and came back this morning. Now my key won't work and all my stuff is gone." Tenant wants the property returned, wants back in the property, and wants Landlord prosecuted. What do you do? Obviously, it is helpful to get the other side of the story. Landlord is contacted and says, "Tenant told me she was moving out and that she would be out by the 20th. Today is the 28th. I went by a couple days ago and there were just a few items of property left. I assumed Tenant had moved, so I took the property out and got the property ready to rent to someone else on the 1st."

What action should you take (if any)? When confronted with a situation like this, it is helpful to be aware of Ark. Code Ann. §18-16-108(a), which states:

Upon the voluntary or involuntary termination of any lease agreement, all property left in and about the premises by the lessee shall be considered abandoned and may be disposed of by the lessor as the lessor shall see fit without recourse by the lessee.

In other words, the analysis will be: "Was Landlord reasonable in thinking that Tenant had abandoned the property?" The answer to this question will ultimately be answered in civil court. For our purposes, if the issue is at least debatable, if it appears that Landlord at least *genuinely thought* Tenant had moved out, then no crime has been committed, and Tenant should be told that the situation is a civil matter. If it is a civil matter, then the City is not involved and the parties should be told to seek their own respective legal advice.

Scenario #3: Landlord wants advice.

In this scenario, Landlord calls the police and says, "I have been renting this property to Tenants and now they have stopped paying rent. Can I change the locks? Can I go in and hold tenant's property hostage for the back rent? What are my rights?" Obviously, you are going to tell Landlord to seek the advice of an attorney. However, it is also a good idea to remind Landlord that "self-help" is not an option. Hopefully, the scenarios discussed will give you the tools to answer Landlord's questions.

NOTE: City of Springdale's "landlord registration ordinance". When dealing with a landlord, please remind them of the City's requirement that all residential properties which are not owner occupied must be registered with the City Clerk.

Commonly known as the "landlord registration ordinance", this ordinance requires that the owner of the property provide the City with contact information so that the City will know who and how to contact the owner if a problem arises on the property. This ordinance is found at Section 91-57(c) of the Springdale Code of Ordinances. There is no charge to register, but it is a violation of City Ordinance if the landlord does not register the property with the Springdale City Clerk's Office.

Ernest Cate
Senior Deputy City Attorney



Eighth U.S. Circuit Court of Appeals Affirms District Court's Denial of Motion to Suppress Evidence in Child Pornography Case in Washington County, Arkansas

Facts Taken From the Opinion: In 1998, Guy Wesley Hamilton was convicted in the Circuit Court in Washington County, Arkansas, of first degree sexual abuse of a minor and possessing sexually explicit materials of a child, and Hamilton was separately convicted in the United States District Court for the Western District of Arkansas of transporting and possessing child pornography. He served a 51-month sentence in federal prison and was returned to state prison from where he was paroled on March 11, 2002. The conditions of Hamilton's parole required him to abstain from the use of alcohol but did not prevent him from using a computer or the internet. Hamilton was on state parole during the period of time relevant to this appeal.

On May 29, 2007, two Arkansas Adult Probation and Parole Officers, Mike Parker

and James Tucker, made an unannounced visit to Hamilton's residence (a small 16 foot by 6½ foot camper trailer) at the request of Hamilton's supervising parole officer, Ashley Harvey. The visit was part of a larger spot check on area sex offenders. Around 8:00 p.m., the two parole officers knocked on the door to Hamilton's trailer and identified themselves as parole officers, to which Hamilton responded, "Let me get dressed." Approximately five minutes later, during which time the officers heard shuffling noises and a commotion inside, Hamilton answered the door wearing only sweat pants. Officer Parker advised Hamilton that they were conducting a home search, and he asked Hamilton if he had a problem with that, to which Hamilton responded, "No. Everything's fine." Parker stepped inside the trailer and immediately saw several empty beer cans in the trailer, a clear indication that Hamilton had violated a condition of his parole.

Officer Parker then began to search Hamilton's trailer for further violations, finding a case of beer in the refrigerator. Parker observed Hamilton's laptop computer sitting on the table, and he advised Hamilton that he was going to perform an image scan on it. When Parker opened the laptop, the screen was blank, but he noticed a media window bar with the title "Daddy and Daughter." Officer Parker could not locate the file on the laptop, which indicated to him that it was stored on an external device. Parker confronted Hamilton and advised him that he needed to cooperate, and Hamilton admitted that there were three compact disks (CDs) under a couch cushion that he had been viewing when the officers knocked. Parker put one of the CDs into Hamilton's laptop and saw that it contained a video of child pornography. Parker then contacted the Washington County Sheriff's Office for assistance.

Washington County officers arrived, arrested Hamilton, and took possession of the three CDs Hamilton had identified for the parole officers, as well as sixteen other CDs found in the vicinity of the laptop. Detective Charles Rexford of the Washington County Sheriff's Office secured the scene and, the next morning, he completed an affidavit seeking a search warrant. Detective Rexford averred that based on the parole officers' visit and the CDs they discovered, he believed that Hamilton had concealed at his residence "child p[or]nography recorded on CD's [sic], tapes, photographs, writings, along with computer, computer printer, external hard drive, cellular telephone, i-pod, and assorted computer accessories to aid in the capture and recording of said p[or]nography." A Washington County circuit judge then issued a search warrant, which was executed that afternoon. Detective Rexford, who had prepared the warrant affidavit, led the search and seized a thumb drive, a hard drive, and the laptop computer during the warranted search.

In correcting an error on the warrant he was preparing for the circuit judge's signature, Detective Rexford unknowingly deleted the list of items to be seized from the face of the warrant. However, the items were specified in Detective Rexford's affidavit, which accompanied the warrant application at the time the circuit judge signed and issued the warrant. Although the warrant referenced the affidavit with the words "See Attached Affidavit," the affidavit was not physically attached to the warrant when the warrant was executed on May 30, 2007, and there is no evidence in the record that the affidavit was available at the scene of the search. Detective Rexford executed the warrant and was aware of the items listed in the affidavit to be seized because he had drafted the affidavit. He subsequently discovered the clerical error in the warrant itself and filed an application for an amended search

warrant on June 1, including a list of the items from the affidavit in the amended warrant. The circuit judge signed the amended warrant the same day.

Hamilton was charged with possessing a thumb drive (Count One) and a DVD (Count Two) containing visual depictions of a minor engaged in sexually explicit conduct in violation of Federal law. Following the district court's denial of Hamilton's motion to suppress the items seized from his trailer, Hamilton entered a conditional plea of guilty to count one. The thumb drive charged in count one was the one seized during the warranted search. Hamilton was sentenced to 151 months of imprisonment and a \$15,000 fine. Count two was dismissed pursuant to the plea agreement. Hamilton appealed the denial of his motion to suppress to the United States Court of Appeals for the Eighth Circuit.

Argument and Decision by Eighth Circuit Court of Appeals: Hamilton challenged the warrantless search by the parole officers and the subsequent warranted search conducted by officers from the Washington County Sheriff's Office.

Warrantless Search by Parole Officers – Hamilton challenged the warrantless search of his home by the parole officers as violating his Fourth Amendment right to be free from unreasonable searches. When he was paroled, Hamilton acknowledged that as a condition of his parole, he would "submit [his] person, place of residence and motor vehicles to search and seizure at any time, day or night, with or without a Search Warrant, whenever requested to do so by any Department of Community Punishment Officer." The Arkansas Post Prison Transfer Board's Policies and Procedures limit this search condition to instances where the parole officer has "reasonable suspicion that a [parolee] has committed a release violation or crime." The Court noted that if Arkansas

law allowed suspicionless searches as a condition of parole, then *Samson v. California*, which held that a suspicionless search pursuant to state law did not violate a parolee's Fourth Amendment rights would have ended the inquiry based on Hamilton's express acknowledgment of this condition. The Court held that "because we agree with the district court that reasonable suspicion supported the parole officers' search, and because the government conceded that "reasonable suspicion' was necessary for a lawful search", we need not tarry on any difference between the notice of conditions provided to Hamilton and the Post Prison Transfer Board's policies.

The Court held that for purposes of this appeal then, they would proceed on the premise that the parole officers were entitled to search Hamilton's home without a warrant only upon a finding of reasonable suspicion of a parole violation or a crime. Reasonable suspicion exists when, considering the totality of the circumstances known to the officer at the time, the officer has a particularized and objective basis for suspecting wrongdoing. Because "ordinary Fourth Amendment analysis" applies to a probationary search, the parole officers' subjective purpose for the search is irrelevant to the Court's analysis, and the Court will only look at whether the parole officers' conclusion that reasonable suspicion existed was objectively reasonable.

Hamilton argued that the Court must assess reasonable suspicion as of the time the decision to search was made—when Parole Officer Harvey initially decided to send parole officers to perform a parole search of Hamilton's home based only on the knowledge that he owned a computer and had access to the internet, which were not prohibited by his parole conditions. The Court held that the Fourth Amendment applies to the act of searching, not the initial

decision to search, and it applies an objective standard based on the information known by the searching officers at the time of the search. The Court rejected Hamilton's argument that they may look only at the facts known to Officer Harvey when she decided to send Officers Parker and Tucker to make a home visit to a parolee, and the Court then proceeded to determine whether the parole officers violated Hamilton's rights under the Fourth Amendment based on the officers' knowledge at the scene of the search.

The Court held that in this case, Parole Officers Parker and Tucker knew that Hamilton had previous convictions related to child pornography received over the internet and that Hamilton had told his parole officer that he had a computer and used the internet. Armed with this information, the officers visited Hamilton's residence and knocked on the door to his trailer, identifying themselves as parole officers. At this point, Hamilton's Fourth Amendment rights had not yet been implicated, as "it does not violate the Fourth Amendment merely to knock on a door without probable cause." *United States v. Spotted Elk*, 548 F.3d 641, 655 (8th Cir. 2008) (quoting *United States v. Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 2006) for the proposition that "[a]s commonly understood, a 'knock and talk' is a consensual encounter and therefore does not contravene the Fourth Amendment, even absent reasonable suspicion.").

The Court found no evidence in the record that the officers ordered Hamilton to open the door. Rather, upon hearing the parole officers' identification, Hamilton asked the officers to let him get dressed, and he then opened the door a few minutes later. While waiting for Hamilton to open the door, the parole officers heard a commotion, and, in the officers' view, it took Hamilton an inordinate amount of time to get dressed and

answer the door, considering the size of the trailer and his state of dress—wearing only a pair of sweat pants—when he finally did open the door. Officer Parker informed Hamilton that they were there to do a home visit and a parole search and asked Hamilton if he had a problem with that, to which Hamilton responded, "No. Everything's fine." Parker then stepped inside the trailer and immediately saw several empty beer cans strewn about, a clear indication that Hamilton had violated the condition of his parole requiring complete abstinence from alcohol.

The court held that having lawfully entered Hamilton's trailer and observed in plain view a clear indication that Hamilton had violated his parole conditions, the circumstances known by the officers justified their continued search. The officers were suspicious that Hamilton was attempting to hide evidence of a parole violation or a crime by the inordinate amount of time it took him to answer the door, the commotion they heard while waiting, and Hamilton's state of dress when he finally opened the door. Their suspicions that Hamilton was violating the terms of his parole were confirmed by the empty beer cans. However, it was obvious to the officers that Hamilton had not been attempting to hide evidence that he had been drinking, as the beer cans were strewn about the trailer. The yet unanswered question of what Hamilton may have been trying to hide, coupled with the knowledge that Hamilton was on parole for possessing child pornography received over the internet and that he had told his parole officer that he owned a computer and accessed the internet, justified the officers' actions in opening the lid to the laptop computer that was sitting on the table. See *United States v. Winters*, 491 F.3d 918, 922 (8th Cir. 2007) (considering the totality of the circumstances, including knowledge that the defendant was a prior drug offender, in assessing officers'

reasonable suspicion to search defendant's car); *United States v. Hoosman*, 62 F.3d 1080, 1081 (8th Cir. 1995) (holding that officer had reasonable suspicion to search defendant's automobile based on his belief that defendant was attempting to hide a weapon or contraband, considering the officer's knowledge that defendant had a history of trafficking drugs and officer's observations of defendant moving from side to side in the car when the officer activated his flashing lights); cf. *Wilson v. Arkansas*, 752 S.W.2d 46, 47-48 (Ark. Ct. App. 1988) (holding that appellant, who was subject to identical supervision condition at issue here, was not denied Fourth Amendment protections because his "refusal [to allow officers to search his residence] gave the officers 'reasonable cause to believe that the appellant had failed to comply with a condition of his probation,'" justifying entry of residence where they saw marijuana in plain view).

Once the laptop computer was open, the media title "Daddy and Daughter" provided ample reasonable suspicion to search further for child pornography. The Court held that the district court properly denied Hamilton's motion to suppress the evidence seized during the parole officers' search.

Warranted Search by the Washington County Sheriff's Office – Hamilton next challenged the denial of his motion to suppress the evidence seized the following day pursuant to the search warrant because the list of items to be seized was not included in the warrant as mandated by the Fourth Amendment's Warrant Clause. See U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). The Court held it is undisputed that the affidavit accompanying the warrant application contained a sufficiently limiting

list of items to be seized, but those items were inadvertently not listed in the warrant itself. The Government argued that the reference in the warrant stating "See Attached Affidavit" satisfies the Fourth Amendment's particularity requirement. The Government also asserted that there was no risk that the wrong items would be seized because Detective Rexford, who prepared both the affidavit and the warrant, was the officer who executed the warrant, and that the items seized were, in fact, all within the list of items included in the affidavit.

The Warrant Clause's particularity requirement can be satisfied by including the items to be seized in an affidavit or attachment that is adequately referenced in the search warrant. See *United States v. Gamboa*, 439 F.3d 796, 807 (8th Cir. 2006) ("[A]n affidavit may provide the necessary particularity for a warrant if it is either incorporated into or attached to the warrant." (quoting *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987))). In acknowledging that courts of appeals have allowed a search warrant to be read in conjunction with other documents, see *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) ("We do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents."), the Supreme Court gleaned from the appellate decisions it cited the following conditions under which a warrant will be read to incorporate another document: "if the warrant uses appropriate words of incorporation, *and* if the supporting document accompanies the warrant," *id.* at 557-58 (emphasis added). In *Groh*, both limitations were lacking; the warrant did not incorporate the other documents and the other documents did not accompany the warrant, leaving the Court no reason to "further explore the matter of incorporation." *Id.* at 558.

In this particular case, the Court noted the fighting question was whether the

incorporated document must accompany the warrant to the search in order to satisfy the Fourth Amendment's particularity requirement. In defining the circumstances under which the courts of appeals had allowed supporting documents to meet the particularity requirement in *Groh*, the Supreme Court cited an Eighth Circuit case, *United States v. Curry*, 911 F.2d 72, 76-77 (8th Cir. 1990). In *Curry*, the Eighth Circuit Court of Appeals noted that "a description in a supporting affidavit can supply the requisite particularity if 'a) the affidavit accompanies the warrant, and b) the warrant uses suitable words of reference which incorporate the affidavit therein.'" *Curry*, citation omitted. The Court avoided deciding this issue and held that they were able to do so because, even if the warrant failed to meet the particularity requirement of the Warrant Clause, the facts of this case do not support imposition of the exclusionary rule.

As a judicially-created remedy, the exclusionary rule applies only where "its remedial objectives are thought most efficaciously served." *Arizona v. Evans*, citation omitted. The exclusionary rule is not an individual right, but it "applies only where it 'results in appreciable deterrence.'" *Herring v. United States*, citation omitted.

The Court noted in their opinion that the warrant in this case included a clear incorporation of the affidavit, which itself included an explicit list of items to be seized. The issuing judge signed both the warrant and the affidavit, demonstrating both that the circuit judge approved the search with reference to the affidavit and that the judge had the opportunity to limit the scope of the search. In contrast, the warrant in *Groh* failed to make any reference to the affidavit at all, which led the Court to look only to the face of the warrant. The problem with the warrant here is not a wholesale failure to incorporate the affidavit, but whether the warrant used

"appropriate words of incorporation" sufficient to incorporate the list of items to be seized. The Court held that given the caselaw approving the use of incorporated documents to satisfy the particularity requirement, it was objectively reasonable for an officer with Detective Rexford's knowledge and involvement in the warrant application process to rely on the warrant as incorporating the list of items to be seized from the affidavit, even if the Court were now to conclude that the words of incorporation were less than clear. The Court held that while there is some ambiguity about whether the phrase "See Attached Affidavit" was intended to refer to the list of items to be seized, the phrase is sufficient to distinguish this case from *Groh*, which clearly made no reference to another document. The Court held that although "the warrant was not a model of clarity, we nonetheless cannot say that [the] warrant was so facially deficient that the executing officers could not reasonably have presumed it to authorize" seizure of the items included in the attached affidavit.

The Court concluded Detective Rexford's conduct cannot be construed as more than nonrecurring negligence. He prepared both the affidavit and the warrant, initially including the list of items in both but inadvertently deleting the list from the face of the warrant in correcting another clerical error. The warrant clearly incorporated the affidavit. The circuit judge signed both the warrant and the affidavit. And Detective Rexford, with full knowledge of the items authorized to be seized, carefully executed the warrant, seizing only those items included in the list of items in the affidavit. The Court held that this was not the type of case for which the deterrent effect of excluding evidence outweighs the social costs of "letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'" *Herring*, citation omitted.

The Court held that even if the warrant in this case failed to meet the particularity requirement of the Fourth Amendment's Warrant Clause, Detective Rexford's actions were objectively reasonable in believing that the warrant and its reference to the affidavit authorized the seizure of the items removed from Hamilton's residence on May 30, 2007. Therefore, the Court affirmed the district court's denial of Hamilton's motion to suppress the evidence seized pursuant to the warrant.

Note from City Attorney: It is a good idea for all police officers who are serving search warrants to review the warrant before the judge signs it to make sure all the necessary information is contained in the warrant. Likewise, it is a good idea to also check the affidavit.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on January 13, 2010, and was an appeal from the United States District Court for the Western District of Arkansas, the Honorable Jimm Larry Hendren, United States District Judge for the Western District of Arkansas. The case cite is *U.S. v. Hamilton*, 08-3233 (8th Cir. 1-13-2010).

Jeff Harper
City Attorney



Eight Circuit Court Upholds Search of Vehicle and Confession in Little Rock Bank Robbery Case and Affirms the Conviction

Facts Take from the Opinion: On June 22, 2007, shortly after noon, the Bank of Little Rock, located at 5120 Kavanaugh Boulevard, Little Rock, Arkansas, was

robbed by a single, armed and masked person. The robbery was recorded by a video camera in its entirety. The robber first demanded that everyone get on the floor as he brandished the handgun and then demanded money. He wore a face mask and green jumpsuit and his voice appeared to be that of a black male. He vaulted on and over the bank counter to access the money. The surveillance video confirmed that he stepped on the counter during the robbery. A later audit determined the loss to be \$10,823.00.

A citizen, Mr. Lane Guthrie, was driving east on Kavanaugh Blvd. when he observed a black male sprinting south across Kavanaugh and down an alley in the vicinity of the bank. Mr. Guthrie attempted to follow this person. He then observed a gold Saturn automobile turn westbound on Cantrell Road slightly behind him. Mr. Guthrie had turned right on Cantrell just as the gold Saturn entered heavily traveled Cantrell without slowing down. Mr. Guthrie allowed the gold Saturn, which was swerving, to pass him and observed that it had Arkansas license #668-JHW. Mr. Guthrie observed two black males in the front seat. He followed the vehicle to University Avenue where it turned South. Mr. Guthrie continued to follow the vehicle down University to the Park Plaza area near the intersection of University and West Markham Street. On the way, he observed a third black male sit up in the back seat. Mr. Guthrie then returned to Kavanaugh where he had first observed the suspicious man running across the street. He observed police officers at the bank and provided them with this information.

The masked robber had demanded that the bank tellers put the money in a bag that he brought along. Hidden in the money given to the robber was an electronic tracking device ("ETD") which was activated. Using GPS technology, the ETD allowed the police to track the movement of the get-away vehicle

as it traveled east on Interstate 630, then Southbound on Cedar and finally, westbound on Asher Avenue. This information was broadcast on the police radio.

At approximately 12:05 p.m., Detective Tommy Hudson was filling his patrol car with gas at the corner of Fair Park Blvd. and W. Markham Street near War Memorial Stadium when he heard about the robbery over the radio. He learned that the suspect was a black male in a green jumpsuit. He also learned that the signal from the ETD indicated that the suspect was in a vehicle heading East on I-630 and then South on Cedar Street. Detective Hudson drove South on Cedar to a location near Asher Ave. and Madison St. where he observed a gold Saturn traveling at an unusually high rate of speed across the parking lot of Bennett's Tire Service ("Bennett's"). By this time the area was saturated with marked police vehicles. Detective Hudson was traveling so fast that he passed the gold Saturn before he could stop. He quickly turned his unmarked vehicle around and activated the blue lights.

The gold Saturn exited Bennett's parking lot and quickly parked at an adjacent minimarket. Detective Hudson pulled in behind the Saturn, partially blocking it. Detective Hudson testified that he learned around this time that the robbery suspect was believed to be in a gold Saturn. The male driver, later determined to be the Defendant Myron Sawyer, exited the Saturn and quickly moved away, but was promptly ordered to the ground at gunpoint.

Another officer, Kenny Baer, had arrived by this time in a marked police unit. As he arrived, Officer Kenny Baer found that Detective Hudson was in the process of ordering a suspect to the ground. He pulled his gun and covered while the Defendant was hand-cuffed. The Defendant was then walked to Officer Baer's marked police car

to be frisked. As Detective Hudson walked with Defendant past the Saturn, he observed through the open window a gun on the floor of the front seat passenger side. Officer Baer conducted a pat down of the Defendant and then locked him in his unit. Officer Baer noted that the Defendant was secured at 12:28 p.m.

Officer Hudson then returned to the Saturn to secure the gun, later identified as a Ruger 9 mm pistol that was fully loaded with one cartridge in the chamber. In clear view in the back seat Detective Hudson also observed a green jumpsuit and a bag with money falling out of it. Detective Hudson secured the evidence and disabled the tracking device.

Another officer found additional evidence in and around a dumpster located behind Bennett's. The evidence included a Louis Vuitton purse (reported stolen by a bank customer during the robbery), a wig, sunglasses, and a knit ski mask.

Officer Baer was the officer who completed the form necessary to have the gold Saturn towed. The tow vehicle report . . . shows this occurred at 12:35 p.m. Officer Baer then transported the Defendant to the Little Rock downtown detective station.

Officer Jennifer Zarlingo, a crime scene specialist with the Little Rock Police Department, responded to the Bank at around 12:52 p.m. She retrieved the video. She also located and "lifted" a shoe print which was on the counter top. The imprint clearly showed the following identification: "US Polo Assn."

The Defendant was not questioned at the scene. There is no evidence that he made any statements at the scene. Following his arrest and while sitting in an interrogation room at the police department, the Defendant made a statement confessing to the robbery. Defendant's statement was

made at approximately 3:02 p.m. on the same day in which the Bank of Little Rock was robbed. That statement was tape-recorded and a transcript thereof has been made.

Although other evidence relates to the issue, the two prosecution witnesses relied upon principally by the Government were Little Rock Police Officers Bobby Martin and Eric Hinsley. After the Defendant Myron Sawyer was arrested he was taken to a Little Rock Police Department detective station where he was placed in an interview room. Officer Bobby Martin testified that he advised the Defendant of his *Miranda* rights at approximately 1:35 p.m. by reading same to him. The Defendant gave his date of birth, his address and acknowledged that he could read and write. He declined, however, to sign the form waiving his rights and agreeing to answer questions regarding the bank robbery. Officer Bobby Martin testified that the Defendant advised he had "nothing to say." Officer Martin then left the interrogation room and proceeded to investigate another matter.

Detective Eric Hinsley first responded to the bank robbery by going to the bank and interviewing witnesses there. While he was at the bank, he learned of the shoe print found on the bank counter which clearly displayed the clear logo "US Polo Assn." When Detective Hinsley arrived back at the police station, he went to the interview room to check on the Defendant's shoes. He asked to see the Defendant's shoes and Defendant obliged. As he examined the Defendant's shoes, Detective Hinsley noted audibly in the Defendant's presence that they "matched" the print taken from the counter of the bank. Detective Hinsley may have also mentioned in the Defendant's presence other evidence known to the police including the car, gun, money, clothes, etc. At this point, the Defendant began asking questions about the case, indicating to

Detective Hinsley that he wanted to talk about the case.

Thereupon Detective Hinsley left the interrogation room, obtained a *Miranda* form, returned and carefully read Defendant his *Miranda* rights while having the Defendant read same along with him. After the Defendant had been properly *mirandized* Detective Hinsley took a taped statement from the Defendant. Detective Hinsley did not know that Officer Martin had previously *mirandized* him at 1:35 p.m. The Defendant spent most of the time between 1:35 p.m. and 3:00 p.m. (the time he was *mirandized* by Detective Hinsley) alone in the interrogation room. He was not threatened or cajoled by anyone. He was not interrogated or asked to make a statement.

The Defendant chose to testify at the suppression hearing. The Court specifically found that the Defendant never asked Officer Martin or Detective Hinsley, or anyone else, to obtain an attorney for him, never requested the opportunity to make a phone call, and never stated that he wanted to talk to his mother. The Defendant's testimony was controverted by his own taped statement, in which he acknowledged that he was properly advised of his rights and was agreeing to provide police with a statement regarding the bank robbery. The evidence established that the Defendant voluntarily indicated to Officer Hinsley that he wanted to talk after being made aware of the overwhelming case that the Government had against him. No promises were made to him to elicit his statement, although he surmised that he might benefit if he cooperated.

The police scrupulously honored Defendant's initial invocation of his right to remain silent. At 1:35 p.m., when the Defendant indicated he did not want to talk, Officer Martin immediately left the room and did not thereafter attempt to question the

Defendant. At 3:00 p.m., Defendant himself indicated a desire to talk when he began asking questions of Detective Hinsley. Detective Hinsley advised Defendant of his *Miranda* rights, which the Defendant agreed to waive immediately prior to making a statement confessing to the bank robbery.

Based on these facts, the district court concluded police had a reasonable articulable suspicion to believe Myron Sawyer was involved in the bank robbery and were justified in detaining him briefly. The court further concluded the brief detention led to discovery of the physical evidence in Sawyer's vehicle connecting him to the robbery and gave rise to probable cause for his arrest. Accordingly, the district court denied his motion to suppress the physical evidence.

The district court also denied Sawyer's motion to suppress his confession, concluding police honored his original request to remain silent and only initiated the second interrogation after Sawyer expressed his desire to talk about the robbery.

After the district court denied Sawyer's motions he entered a conditional plea of guilty to armed bank robbery in violation of federal law, reserving his right to appeal the denial of his suppression motions. At sentencing, the district court concluded he was a career offender and sentenced him to 210 months imprisonment.

On appeal, Sawyer argued the court erred in concluding police had a reasonable articulable suspicion to detain him. He further argued that had he not been detained in violation of his Fourth Amendment rights, police would never have discovered the items of physical evidence in his vehicle which gave rise to probable cause for his arrest. Therefore, he argued the court erred in failing to suppress the physical evidence.

He also argued the court erred in concluding police scrupulously honored his request to exercise his right to remain silent by conducting the second interrogation and erred in refusing to suppress his confession. Sawyer also argued that his state conviction for attempted robbery was not a crime of violence and the court erred in concluding he was subject to the career offender provision of the Sentencing Guidelines.

Decision by Eighth Circuit:

Sawyer's Argument No. 1 – The police did not have reasonable articulable suspicion to detain him and had he not been illegally detained, they would not have discovered the physical evidence in his vehicle linking him to the robbery.

In regard to this issue, the Eighth U.S. Circuit Court noted it is well-established that police may stop and briefly question a person if they have a reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). When justifying a particular stop, police officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." "The Fourth Amendment requires at least a *minimal level of objective justification* for making the stop." *Illinois v. Wardlow*, citation omitted (citing *United States v. Sokolow*, citation omitted).

Given the facts as found by the district court, the Eighth U.S. Circuit Court of Appeals held that Sawyer's claim the police lacked even a minimal, objective justification to stop him was incredible. A witness spotted him sprinting from the area near the bank and then followed his vehicle as it sped away from the area, weaving in and out of traffic. The witness immediately reported this information to police and provided a complete description of the

vehicle. The police also had information from the electronic tracking device hidden in the money which indicated the money was in the same area where Sawyer's vehicle was observed and later located. When police located Sawyer's vehicle, it was observed driving at a high rate of speed and as police converged he immediately exited in an apparent attempt to flee. The Eighth U.S. Circuit Court of Appeals held that these facts easily satisfy the minimal, objective justification" standard required by *Terry*. Thus, Sawyer's initial detention, which gave rise to discovery of the physical evidence, did not violate the Fourth Amendment and the district court did not err in refusing to suppress the evidence.

Sawyer's Argument No. 2 - The district court erred in refusing to suppress the confession because police initiated a second interrogation after Sawyer exercised his right to remain silent.

On this issue, the Eighth U.S. Circuit Court of Appeals first noted an invocation of the right to remain silent does not mean questioning can never be resumed, see *Michigan v. Mosley*, 423 U.S. 96, 104-105 (1975), nor does it mean a defendant cannot later waive the right, see *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979). However, once a person in custody has invoked his right to remain silent, admissibility of any subsequent statements depends on whether his "'right to cut off questioning' was 'scrupulously honored.'" *Mosley*, at 423 U.S. at 104 (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)). Once the right is invoked, the police must immediately cease questioning, allow a "significant amount of time" to pass before questioning begins again, re-advise the detainee of his *Miranda* rights, and limit the ensuing interrogation to questions regarding a separate crime not the subject of the first questioning session. *United States v. House*, 939 F.2d 659, 662 (8th Cir. 1991).

The Eighth U.S. Circuit Court of Appeals noted that Sawyer conceded police immediately ceased questioning him once he invoked his right to remain silent. He contended, however, police did not allow a significant amount of time to pass before they resumed questioning him, and the ensuing interrogation did not involve a crime separate from the first. Therefore, Sawyer contended the district court erred when it refused to suppress his confession.

The Eighth U.S. Circuit Court of Appeals noted that the district court did not find police simply resumed questioning Sawyer after he invoked his right to remain silent. Rather, the Court found a detective, while comparing Sawyer's shoe to a print found at the scene, remarked the two matched, and may also have mentioned other evidence against Sawyer connecting him to the crime. Thereafter, Sawyer initiated a conversation and asked to talk about the robbery. He was then re-advised of his *Miranda* rights and voluntarily confessed. Given these uncontested facts, the Court held Sawyer's argument falls squarely within this court's decision in *United States v. Cody*, 114 F.3d 772 (8th Cir. 1997).

In *Cody* the defendant was arrested but not questioned after she allegedly invoked her right to remain silent. Approximately three hours after allegedly invoking her right to remain silent, officers confronted her with evidence discovered at the crime scene linking her to the crime. Upon being confronted with this evidence, Cody spontaneously made incriminating statements. An officer immediately interrupted her confession to re-advise her of her *Miranda* rights and she confessed. Based on those facts, this Eighth Circuit concluded Cody's "right to remain silent . . . was not violated when police later confronted her with additional evidence[,] and her subsequent confession was admissible."

The Eighth Circuit held that the facts in this case were legally indistinguishable from *Cody*. As in *Cody*, it was Sawyer who initiated the interrogation which led to his confession after being confronted with evidence linking him to the robbery. Therefore, Sawyer's right to remain silent was not violated and the district court correctly refused to exclude the confession.

The Eighth U.S. Circuit Court of Appeals also ruled against Sawyer on his final argument regarding the sentencing guidelines, and therefore the judgment of the district court was affirmed.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on December 3, 2009. The case cite is *U.S. v. Sawyer*, 09-1367 (8th Cir. 12-3-2009).

Jeff Harper
City Attorney



Arkansas Supreme Court Upholds Circuit Court's Denial of Motion to Suppress in Fort Smith Capital Murder Case

Facts Taken From the Opinion: James Aaron Miller was charged by felony information with the capital murders of his girlfriend Bridgette Barr, her five-year-old daughter Sydney Barr, and her two-year-old son Garrett Barr. The information alleged that the murders occurred on or about December 22, 2006. Police received a request in the early morning hours of December 26, 2006, from Miller's father, who was then out-of-state, to check on Miller because he had threatened to hurt himself. Fort Smith Police Officer Stephen

Hutchinson testified at the hearing on the motion to suppress that he was dispatched pursuant to a 911 call from Miller's father, who was in Colorado and had received a text message from Miller stating that Miller was thinking of killing himself with pills. Officer Hutchinson and Officer Derek Harwood went to an apartment rented to Bridgette Barr to conduct a welfare check on Miller. They knocked on the door and Miller opened it. They explained to Miller that they were there in response to a 911 call from his father about a suicide threat and that they were checking to see how he was doing. Officer Hutchinson asked if they could come inside to talk because it was so cold outside. After first asking to leave immediately with the officers, Miller agreed to let them in the apartment and to wait for an ambulance to take him to the hospital for a mental-health evaluation. While inside the entryway, Officer Hutchinson began to offer help to Miller and to inquire about what kind of problems he was having. Miller stated that he and his girlfriend had been fighting. While this conversation was occurring inside the apartment, Officer Hutchinson noticed pictures of a woman, whom Hutchinson thought to be Miller's girlfriend because he had his arm around her and two small children. He also noticed a dried blood stain approximately six to eight inches in diameter on the door. Despite having a head cold at the time, Officer Hutchinson also noticed a foul odor in the apartment.

Officer Hutchinson related that the ambulance arrived and Miller left the apartment with the Emergency Management Services personnel. While Officer Harwood sought the keys from Miller to lock the apartment, Officer Hutchinson observed that Miller seemed like he did not care whether the apartment was locked. Officer Hutchinson then recalled that Miller was acting suspicious in wanting to leave the apartment so quickly. He also recalled the blood stain on the door and then wondered

where the people in the picture were. Accordingly, before locking the door, the officers walked through the apartment to make sure everything was okay. Officer Hutchinson stated that since they were dealing with a suicidal subject, he wanted to make sure they were not leaving something out that a child could use to hurt himself.

In conducting the walk-through of the apartment, the officers saw in plain view a foot with toenails painted red extending from a pile of blankets on the floor at the end of a bed. Officer Hutchinson pulled the blanket back just enough to see the forehead of a body that appeared to be decayed. Both officers then left the apartment, returned to the ambulance outside, and read Miller his *Miranda* rights. Officer Hutchinson then asked Miller if he had killed the person in the bedroom; Miller answered yes. Remembering that he had also seen pictures of two small children, Officer Hutchinson asked Miller where the children in the picture were. Miller stated they were in the house and then admitted to killing the children also.

While Officers Hutchinson and Harwood were talking to Miller, Officer Calvin Treat arrived on the scene and entered the apartment with knowledge that a body had been discovered. He discovered the female victim, Ms. Barr, as well as a female child victim, Sydney, lying next to each other. After determining that both were dead and not in need of aid, he left the apartment. Meanwhile, Miller signed a consent-to-search form. Additional law enforcement officers then entered the apartment and discovered the third body, that of Garrett, in the bathtub.

After hearing the foregoing testimony, the trial court denied the motion to suppress, stating that the observations made by the officers entitled them to look through the apartment before they locked it to make sure

there was no one inside who needed attention. Miller was subsequently convicted of three counts of capital murder and sentenced to death on each count. The case was subsequently appealed to the Arkansas Supreme Court.

Decision by Arkansas Supreme Court:

Miller's first assignment of error in the guilt phase is that the trial court erred in denying his motion to suppress evidence seized as a result of the search of his residence, which included all the evidence seized from the crime scene investigation, as well as statements he made subsequent to the search. Miller contended the search of his home was conducted without a warrant, without his consent, and was otherwise unjustifiable under the Fourth Amendment. He further contended his statement should be suppressed as fruit of the poisonous tree.

The Court noted that warrantless searches in private homes are presumptively unreasonable under the Fourth Amendment, and the State bears the burden of proving that the warrantless activity was reasonable. However, law enforcement officers may enter a home without a warrant if the State establishes an exception to the warrant requirement. One such exception is stated in Ark. R. Crim. P. 14.3 (2009) as follows:

Rule 14.3 Emergency searches.

An officer who has reasonable cause to believe that premises or a vehicle contain:

- (a) individuals in imminent danger of death or serious bodily harm; or
- (b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or

(c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;

may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

On the issue of whether the circuit court should have granted the motion to suppress, the Arkansas Supreme Court noted that they have observed that when the police reasonably believe that a victim or occupants of a home are in distress or in need of protection, an emergency entry into a home satisfies the reasonableness requirement of the Fourth Amendment and supplies a compelling reason for immediate entry quite apart from the purpose of prosecuting for crime. The Court concluded that the preponderance of the evidence supports the trial court's determination, and "we cannot say the officers acted unreasonably here." The Court rejected Miller's argument on appeal that once he opened the door to the officers, there was no longer any basis for believing that anyone was in imminent danger. Based on information the officers received when they were dispatched, they knew they were checking on a suicidal subject at the apartment he shared with his girlfriend. The subject had admitted he and his girlfriend had been fighting. The officers saw a blood stain on the door and smelled a foul odor. The subject was eager to leave the apartment. In addition, the officers saw photographs of the subject with his arm around someone they thought was the subject's girlfriend and two small children. It was certainly reasonable to think the children might be in the home and that the officers should ensure they were not in the home before locking and leaving it. It was

likewise reasonable for the officers to ensure that, if the children were not present in the home, no weapons or pills from a suicide attempt or fight between the adults were left accessible to the children. Finally, given the description by the EMS personnel that the odor in the apartment smelled like burned wild game or burned Spam, it was also reasonable for the officers to ensure that there was nothing left in the apartment likely to burn or explode when they locked the door and left. These circumstances are consistent with all the emergencies described in Rule 14.3. Thus, the Court concluded that the initial entry and search of the apartment were in compliance with Rule 14.3.

The Court concluded that subsequent actions by these officers were permissible as within the scope of the emergency that justified them. Once an entry is permitted in accordance with Rule 14.3, any subsequent search and seizure is limited to that which is in plain view and observed incident to the entry in response to the emergency.

Hodge v. State, 332 Ark. 377, 965 S.W.2d 766 (1998). Officer Hutchinson stated he saw the foot extending from the blankets in plain view. Further, Officer Treat's entry into the apartment was permissible, as reports of death can frequently prove inaccurate, and it therefore became incumbent upon Officer Treat to immediately ascertain the situation and whether there might be some hope that one or more of the victims might still be alive. *Id.*

In summary, based on all the foregoing testimony, the Court concluded the evidence established that the officers acted reasonably in response to the emergencies and was thus sufficient to overcome the presumption of unreasonableness. The Arkansas Supreme Court therefore affirmed the trial court's denial of the motion to suppress. Because

the Court affirmed the judgment that the entry and search of the home were valid, we need not address Miller's argument that his statement given while in the ambulance should be suppressed as fruit of the poisonous tree.

Note From City Attorney: The appellant made several arguments for reversal on the guilt phase of the trial but the Arkansas Supreme Court ruled against the appellant and affirmed the judgment of guilty on three counts of capital murder. Therefore, the judgment of convictions for capital murder was affirmed. However, because of an error that occurred in the sentencing phase, the Arkansas Supreme Court reversed the sentences of death and remanded to the trial court for re-sentencing.

Case: This case was decided by the Arkansas Supreme Court on January 7, 2010 and was an appeal from the Sebastian County Circuit Court, Fort Smith District, Honorable James O. Cox, Judge. The case cite is *Miller v. State*, 2010 Ark. 1.

Jeff Harper
City Attorney



Animal Cruelty; The New Laws

The animal cruelty laws have changed in Arkansas. We are the 46th state to make animal cruelty a felony offense. The new animal cruelty law was passed in 2009 and changes both the law on misdemeanor cruelty and allows someone to be charged with a felony if it is aggravated animal cruelty or if it is a 4th offense cruelty to animals. The statutes are Arkansas Code Annotated ("A.C.A") §5-62-103 and §5-62-104.

A.C.A. §5-62-103, **Cruelty to Animals** states as follows:

(a) A person commits the offense of cruelty to animals if he or she knowingly:

(1) Subjects any animal to cruel mistreatment;

(2) Kills or injures any animal owned by another person without legal privilege or consent of the owner;

(3) Abandons an animal at a location without providing for the animal's continued care;

(4) Fails to supply an animal in his or her custody with a sufficient quantity of wholesome food and water;

(5) Fails to provide an animal in his or her custody with adequate shelter that is consistent with the breed, species, and type of animal; or

(6) Carries or causes to be carried in or upon any motorized vehicle or boat an animal in a cruel or inhumane manner.

(b) For purposes of this section, each alleged act of the offense of cruelty to animals committed against more than one (1) animal may constitute a separate offense.

This statute differs from the previous cruelty to animals statute in that it adds failing to supply an animal with a sufficient quantity of wholesome food and water and failure to provide adequate shelter are both cruelty to animals whereas those crimes would have only been an ordinance violation for inhumane treatment before the statutory changes. Additionally, transporting an animal in a boat or motorized vehicle in a

cruel or inhumane way is now cruelty where it was a previously a separate offense under §5-62-119. Animal cruelty has changed from an A misdemeanor to an unclassified misdemeanor however it also is now an enhanceable offense so if another cruelty to animals offense occurs within five years the minimum punishment increases. If there are four violations of §5-62-103 within five years then the fourth offense is a class D felony.

The other big change to the cruelty to animals statute is the offense of **Aggravated Cruelty to a Dog, Cat or Horse** under A.C.A. §5-62-104, which allows a felony on the first offense of this statute. The aggravated cruelty statute states as follows:

(a) A person commits the offense of aggravated cruelty to a dog, cat, or horse if he or she knowingly tortures any dog, cat, or horse.

(b) A person who pleads guilty or nolo contendere to or is found guilty of aggravated cruelty to a dog, cat, or horse:

(1) Shall be guilty of a Class D felony;

The definition of torture is found under ACA §5-62-102. "Torture" means:

(A) The knowing commission of physical injury to a dog, cat, or horse by the infliction of inhumane treatment or gross physical abuse, causing the dog, cat, or horse intensive or prolonged pain, serious physical injury, or thereby causing death; and

(B) Mutilating, maiming, burning, poisoning, drowning, or starving a dog, cat, or horse.

The legislature, in recognizing that domestic batterers use family pets to control and hurt

their victims, also made cruelty to animals in the presence of a child a five-year sentencing enhancement under A.C.A. § 5-4-702. A child is defined under A.C.A. § 5-4-701 as a person under sixteen years of age.

Finally, A.C.A. § 5-62-120 has changed from unlawful dog fighting to **Unlawful Animal Fighting**. Animal fighting includes fighting "between roosters or other birds or between dogs, bears, or other animals."

Please refer to §5-62-102 through §5-62-120 for a complete understanding of the changes to the animal code including Exemptions under §5-62-105 and Prevention of cruelty under §5-62-111.

Amber Roe
Deputy City Attorney



Arkansas Court of Appeals Affirms Little Rock DWI Case

Facts Taken From the Opinion: Officer Hoffine and Officer Maria Langley responded to telephone calls from the Applebee's manager in Little Rock, Arkansas and a taxicab driver about an intoxicated person and a disturbance inside the restaurant. When the officers arrived, they noticed Melvyn Stewart in the driver's seat of a Jeep Liberty backed into a parking spot at the restaurant. The manager and the cab driver, who was in his taxi in the parking lot, indicated that the parked Jeep was the vehicle the officers were looking for. The manager told Hoffine that Stewart was asked to leave the restaurant after the manager, thinking that Stewart had passed out, noticed him with his head resting on the table. Officer Hoffine also was told that a taxicab was called so that Stewart would not have to drive home, that he became belligerent when the cab arrived, and that he

stated he was "fine to drive" and needed no help.

Officer Hoffine walked to the Jeep and tapped on the window, Stewart seemed confused, his eyes were glassy and watery, there was a smell of intoxicants when he rolled down the window, and the vehicle's radio and dash lights were on. The officer also testified that after he approached, Stewart turned off the car, placed the keys in his pocket, "fumbled his wallet," finally produced a driver's license, and failed field sobriety tests. Hoffine placed Stewart under arrest for "driving under the influence" and, in a search incident to arrest, discovered receipts for Samuel Adams beer and Jack Daniels.

Stewart was convicted in district court and appealed to the circuit court and filed a pre-trial motion to suppress evidence. The circuit court denied the motion after conducting a hearing. The case proceeded to a bench trial. At the conclusion of the evidence, the court denied Stewart's motion for dismissal and found him guilty of driving while intoxicated. Stewart appealed the circuit court's judgment to the Arkansas Court of Appeals.

Decision by Arkansas Court of Appeals: One of the points that Stewart brought up on appeal is that the trial court erred in denying his motion to suppress. The Court noted that an officer's mere approach to a car parked in a public place does not constitute a seizure. *Bohanan v. State*, 72 Ark. App. 422, 429, 38 S.W.3d 902, 907 (2001). Additionally, Ark. R. Crim. P. 2.2 (2009) clearly authorizes a law enforcement officer to request any person to furnish information or otherwise cooperate in the investigation or prevention of a crime. An officer who is performing his or her duties may also stop and detain any person who the officer "reasonably suspects is committing, has committed, or is about to commit . . . a misdemeanor involving danger

of forcible injury to persons . . . if such action is reasonably necessary . . . to determine the lawfulness of his conduct.” Finally, information from an identified citizen-informant corroborated by the officer’s own observations can constitute reasonable suspicion of driving under the influence. *Frette v. City of Springdale*, 331 Ark. 103, 120–21, 959 S.W.2d 734, 743–44 (1998).

The Court held that here, in light of reports from the cab driver and restaurant manager, Officer Hoffine acted reasonably by approaching Stewart’s car to investigate whether he was about to drive while intoxicated. Thus, the initial detention was supported by the officers’ reasonable suspicion that Stewart was driving while intoxicated. Furthermore, even if a seizure occurred when Stewart was asked to get out of his car, the information provided by identified citizen-informants combined with Stewart’s obvious intoxication when the officer approached provided the reasonable suspicion that Stewart was about to drive under the influence. Therefore the Court held that the circuit court did not err in denying his motion to suppress on this basis.

The Court further held that the seizure of the receipt was pursuant to an arrest supported by probable cause. A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed the offense of driving a vehicle while under the influence of an intoxicating liquor or drug. *See State v. Lester*, 343 Ark. 662 (2001); Ark. R. Crim. P. 4.1(a)(ii)(C)(2009). Reasonable, or probable cause for a warrantless arrest exists when the facts and circumstances within an officer’s knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person to be arrested. *McKenzie v. State*, 69 Ark. App. 186, 188 (2000). Additionally, an officer

who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the purpose of obtaining “evidence of the commission of the offense for which the accused has been arrested.” Ark. R. Crim. P. 12.1(d) (2009); *McKenzie*, 69 Ark. App. at 188 (applying rule). Under these standards, Stewart’s arrest was supported by probable cause that he was driving under the influence; therefore, the search incident to arrest, which yielded the receipt, was reasonable.

The Court noted that the manager of Applebee’s reported that Stewart appeared to be intoxicated while he was in the restaurant, he was offered a taxicab ride home by the manager, and he refused the ride. Officer Hoffine discovered Stewart while he was sitting in his Jeep, with the keys in the ignition. *Cf. Bohanan*, 72 Ark. App. at 427, 38 S.W.3d at 905–06 (explaining that an intoxicated person in the front seat of a vehicle, with the keys in the ignition, was in actual physical control for purposes of proving driving while under the influence). Moreover, Stewart failed two field sobriety tests. Probable cause therefore supported his arrest for driving while under the influence, and the search that yielded the receipt was reasonable. Therefore, the Court affirmed the judgment of the Pulaski County Circuit Court.

Case: This case was decided by the Arkansas Court of Appeals on January 6, 2010 and was an appeal from the Pulaski County Circuit Court, Honorable Herbert Thomas Wright, Judge. The case cite is *Stewart v. State*, 2010 Ark. App. 9.

Jeff Harper
City Attorney



Arkansas Court of Appeals Says Questioning by Parole Officer Violated *Miranda*

Facts: At about 7:25 a.m. on October 22, 2007, Conway police officers Paul Burnett [Burnett] and Shawn Schichtl [Schichtl] were patrolling near a high school and observed a male walking across the backyard of a residence. The officers asked the male to speak to them and asked his name. The officers noted the male had a "deer-in-the-headlights" look, said an unintelligible name and then ran. The officers chased the individual and arrested him for misdemeanor fleeing and obstruction of justice. While at the police station, officers learned that the individual was Antwan Lavan Fowler [Fowler] and that Fowler was on parole and they contacted his parole officer, Kelly Brock [Brock]. Brock asked the officers to hold Fowler.

Brock arrived at the station and interviewed Fowler who told her that he did not have a travel pass permitting him to be in Faulkner County, he was living in Conway, he ran from officers and he had a gun and drugs in his apartment. Brock, along with Schichtl and Burnett, searched Fowler's apartment and found a gun, drugs, and drug paraphernalia. In addition to the misdemeanor charges, Fowler was also charged with six felonies.

In court, Fowler moved to suppress the statements he made to Brock and all of the evidence obtained because of the officers' illegal stop and arrest, he was not *Mirandized* by the parole officer, and the warrantless search of his home was illegal. The trial court concluded the initial encounter was legal under Arkansas Rule of Criminal Procedure 2.2 but denied suppressing any statements or evidence. Fowler entered a conditional plea of guilty

to possession of a firearm by a certain person and then appealed.

Argument and Discussion: Fowler argued that his statement to the parole officer that he had a gun and drugs at his home should be suppressed because he was not *Mirandized* by the parole officer. *Miranda* warnings are required where there is a custodial interrogation. *Wofford v. State*, 330 Ark. 8, 28, 952 S.W.2d 646 (1997). A person is "in custody" for the purposes of *Miranda* warnings when he is "deprived of his freedom by formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Hall v. State*, 361 Ark. 379, 389, 206 S.W. 3d 830, 837 (2005). In resolving the question of whether a suspect is in custody at a particular time, the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation. *Wofford*, 330 Ark. at 28. The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views of the officers or the suspect. *State v. Spencer*, 319 Ark. 454, 457, 892 S.W.2d 484, 486 (1995).

The Arkansas Supreme Court has stated that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Hughes v. State*, 289 Ark. 522, 526, 712 S.W.2d 308, 310 (1986).

The Court in this case determined that *Miranda* warnings were required. Fowler was in custody when he was arrested. The deprivation of his freedom continued after the formal arrest when he was placed on a "parole hold". Fowler was questioned by the parole officer which led to incriminating responses. The Arkansas Court of Appeals

held that Fowler's statements to his parole officer were inadmissible and that the subsequent evidence obtained based on those statements was "fruit of the poisonous tree" and inadmissible.

Note from Deputy City Attorney: The statements by the suspect in this case and the resulting evidence were all suppressed even though Fowler had signed a parole release form that stated "You must submit your person, place of residence, and motor vehicles to search and seizure at any time, day or night, with or without a search warrant, whenever requested to do so by any Department of Community Punishment officer." Also, the Court of Appeals did note that even though the statements to the parole officer were inadmissible in this criminal action, their holding in this case did not change the fact that the statements would be admissible in the probationer's revocation proceedings.

Case citation: This case was decided by the Arkansas Court of Appeals on January 13, 2010 and was an appeal from the Faulkner County Circuit Court. The case citation is *Fowler v. State*, 2010 Ark. App. 23.

Brooke Lockhart
Deputy City Attorney

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Eighth Circuit Upholds Questioning of Suspect in Marijuana Case

Facts: On July 16, 2007, narcotics detectives Josh Davis [Davis], Jeffrey Seerey [Seerey], and John Cochran [Cochran] went to 15718 Hill House Road in Chesterfield, Missouri, after receiving a tip from a confidential informant about a marijuana growing operation there. The house was owned by Brian M. Sievers

[Sievers] but the informant told Davis that Sievers was growing marijuana with David E. Wise [Wise]. The detectives performed a "knock and talk" at the house. Although the detectives were in plain clothes, they wore their badges around their necks and identified themselves when Sievers opened the door. The detectives explained their information to Sievers, to which Sievers replied "Who ratted me out? That's all I want to know." The detectives read Sievers his *Miranda* warnings and Sievers told them about the marijuana plants in his basement. Sievers also signed a written consent to search form authorizing the search of his home.

Sievers admitted that the house was used as a "grow house" and that Wise was in charge of taking care of the plants. Sievers and the detectives went to Wise's apartment in Saint Louis, Missouri. Seerey and Cochran knocked on the door of the apartment just as Wise was leaving. The detectives asked Wise if he would rather talk inside or outside and Wise indicated he would prefer to talk inside and led the officers into his apartment. Since his family was there, Wise then led the two detectives into the bedroom to talk. When Seerey noticed that Wise appeared nervous, he patted Wise down and felt something in one of Wise's pockets which was marijuana. Wise removed the pouch of marijuana from his pocket and placed it on top of the dresser.

Sievers and Davis then came into Wise's apartment and Sievers stated "They're onto us, they got the whole grow." The detectives read Wise his *Miranda* warnings and Wise admitted that he maintained the plants at Sievers' home. Before leaving the apartment, Davis seized the pouch of marijuana and some marijuana seeds from the top of the dresser. A jury convicted Wise of conspiracy to manufacture marijuana and he was sentenced to 60 months imprisonment. Wise then appealed.

Argument and Discussion: Wise first argued that his statements should be suppressed because he was subjected to a "two part interrogation" by the officers in that they failed to recite his *Miranda* warnings when they initially entered the apartment and that the officers only administered the warnings when the detectives knew Wise was about to confess. If officers question a suspect and deliberately delay reciting the *Miranda* warnings in order to provoke a confession, any statements made after the warnings are inadmissible. *Missouri v. Seibert*, 542 U.S. 600, 622 (2004). This technique referred to as "two part interrogation" is unlawful because it is used to "circumvent *Miranda* requirements," *id.* However, "[w]here there has been no such calculated effort [to elicit a confession], the admissibility of a post warning statement should continue to be governed by *Oregon v. Elstad*," and is therefore admissible if the suspect knowingly waived his Fifth Amendment rights. *Oregon v. Elstad*, 470 U.S. 298, 309 (1985). In this situation, there was no two part interrogation because prior to the recitation of the *Miranda* warnings, officers made no deliberate or calculated effort to elicit a confession from Wise and Wise made no incriminating statements. The detectives went to Wise's apartment to perform a lawful knock and talk. Wise voluntarily allowed the detectives to enter his home and subsequently led the officers to his bedroom. Also, the officers refrained from asking Wise any questions "likely to elicit an incriminating response" prior to reading him the *Miranda* warnings. Therefore, the Eighth Circuit determined that Wise voluntarily made statements subsequent to a lawful recitation of his *Miranda* warnings.

Next, Wise argued that the seizure of the marijuana seeds discovered on the bedroom dresser was not admissible under the plain view doctrine. Under the plain view

doctrine, an officer is permitted to seize evidence without a warrant when certain conditions are met. *United States v. Armstrong*, 554 F.3d 1159, 1162-63 (8th Cir.) The three conditions are: (1) the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed, (2) the object's incriminating character is immediately apparent, and (3) the officer has a lawful right of access to the object itself. However, the record in this case showed that following a knock and talk, Wise told the detectives he preferred to talk inside the apartment and then he voluntarily consented to the detectives' entrance into the apartment. Once inside, it was Wise's suggestion to move to the bedroom; therefore, the detectives were lawfully in the bedroom and the plain view doctrine authorized the seizure of the marijuana seeds. Wise's conviction was upheld.

Case citation: This case was decided by the U.S. Court of Appeals for the Eighth Circuit on December 1, 2009. The case citation is *U.S. v. Wise*, 09-1141 (8th Cir. Dec. 1, 2009).

Brooke Lockhart
Deputy City Attorney



Arkansas Court of Appeals Upholds Constructive Possession when Suspect was Not at Residence

Facts: On March 1, 2006, a search warrant was executed on a residence in Magnolia, Arkansas. Officers seized cocaine and methamphetamine concealed in a canister on a kitchen shelf in the residence. Defendant, Trozzie L. Turner [Turner] was tried by a jury and found guilty of possession of cocaine with the intent to deliver, possession

of methamphetamine with the intent to deliver, and maintaining a drug premises. Turner appealed arguing that there was insufficient evidence to prove that he constructively possessed the drugs found at the residence.

Argument and Discussion: Turner points to several facts to support his argument that he did not constructively possess the drugs. First, when the search warrant was executed, three other people were present; one of whom actually resided at the residence. Second, that prior to the search, Turner's fiancée (now wife) had signed a lease to a residence in Emerson, Arkansas. Also, Turner argued the informant's testimony was not credible, but the Court did not discuss that factor.

It is well-settled law that a person need not be present at a residence at the time of the search. It is not necessary that the State prove literal physical possession of contraband. *See Dodson v. State*, 341 Ark. 41 (2000). Contraband is deemed to be constructively possessed if the location of the contraband was under the dominion and control of the accused. *See Fultz v. State*, 333 Ark. 586 (1998). Further, constructive possession exists where joint occupancy of the premises occurs and where there are additional factors linking the accused to the contraband. *See Embry v. State*, 302 Ark. 608 (1990). Those additional factors include whether the accused exercised care, control, and management over the contraband and whether the accused knew the material was contraband. *Id.* The control and knowledge can be inferred from the circumstances such as the proximity of the contraband to the accused, the fact that it is in plain view and the ownership of the property where the contraband was found. *See Plotts v. State*, 297 Ark. 66 (1988). *See also Morgan v. State*, CR 08-1330 (Ark. 5-7-2009).

The State in this case presented evidence that Turner continued to live at the Magnolia residence at the time of the search. Turner had signed a lease to the premises, and the landlord testified he was unaware of any evidence that anyone had moved out. Also, the landlord had received rent payments from Turner's fiancée in February, 2006, which she paid at the residence (one month before the warrant was executed). In addition, officers found papers at the residence that included a February 23, 2006, telephone bill that was addressed to Turner at the Magnolia residence. Further, the informant testified that he made three controlled drug buys from Turner at the Magnolia residence, two of which were with Turner directly. The last buy occurred on February 3, 2006. In addition, Turner's wife and the three people whom officers found at the residence when the warrant was executed, all denied knowledge of the contraband.

The Court of Appeals found that based on the above constructive possession factors and the evidence presented at trial, the State did prove that Turner constructively possessed the contraband.

Case citation: This case was decided by the Arkansas Court of Appeals on December 9, 2009 and was an appeal from the Columbia County Circuit Court. The case citation is *Turner v. State*, 2009 Ark. App. 822.

Brooke Lockhart
Deputy City Attorney



Eighth Circuit Determines Probable Cause on Failure to Signal Turn

Facts: On April 23, 2008, the Nebraska State Patrol set up a ruse narcotics

checkpoint on Interstate 80 in Nebraska. The troopers posted signs indicating that drug dogs were in use at a vehicle checkpoint a few miles ahead on the interstate. The advertised checkpoint did not exist. The signs were placed a short distance before an exit with no advertised services or rest areas. Trooper Cory Townsend [Townsend] waited at the end of the exit ramp.

Townsend observed Laura J. Adler [Adler] exit, come to a stop sign at the end of the ramp, stop for about three seconds, signal a left turn, and then turn left. Believing he had observed a traffic violation, since Adler failed to signal her turn before she reached the intersection, Townsend executed a traffic stop. After speaking with Adler, who declined a search of her vehicle, Townsend requested another trooper with a drug dog circle the truck. The dog alerted and Townsend searched the truck and found approximately 470 pounds of marijuana in the cargo bed.

Adler was indicted on one count of possessing with intent to distribute marijuana. Adler pled not guilty and filed a motion to suppress the marijuana arguing that Townsend did not have probable cause to stop her because she did not commit a traffic violation. The District Court agreed with Adler and this appeal followed. The United States Court of Appeals for the Eighth Circuit reversed.

Argument and Discussion: The main argument here is the meaning of Section 60-6,161(2) of the Nebraska Revised Statutes which states: A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning. The District Court concluded that the statutes "when required" language restricted the statute only to require a signal 100 feet in advance for turns

where the vehicle did not come to a full stop first. Meaning, Adler, since she came to a stop, would not be required to signal 100 feet before the turn. However, the Eighth Circuit disagreed with the District Court and agreed with the Government's reading of the statute and determined that the "when required" language only referred back to the statute itself and that a turn signal was required 100 feet in advance of any turn.

The Eighth Circuit noted that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996). "Any traffic violation, however minor, provides probable cause for a traffic stop." *United States v. Wright*, 512 F.3d 466, 471 (8th Cir.2008)(quoting *United States v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994). Since the Eighth Circuit interpreted the law to require Adler to signal her turn 100 feet in advance, Townsend had probable cause to stop her vehicle for the traffic violation he observed.

Note from Deputy City Attorney: Arkansas's signaling before turning statute codified at Ark. Code Ann. 27-51-403(b) is a similar statute, but does not have the confusing "when required" language discussed in this case.

Case citation: This case was decided by the U.S. Court of Appeals for the Eighth Circuit on December 31, 2009. The case citation is *U.S. v. Adler*, 09-1775 (8th Cir. Dec. 31, 2009).

Brooke Lockhart
Deputy City Attorney



Arkansas Court of Appeals Affirms Lower Court and Upholds Ruling that Officer had Reasonable Suspicion to Make Stop in Drug Case

Facts Taken From the Opinion: Corey J. Mosley (appellant) was convicted on August 12, 2008, in Miller County Circuit Court of possession of cocaine and sentenced to sixty months' probation. He appealed to the Arkansas Court of Appeals, contending that the trial court erred in denying his motion to suppress, arguing that the police officer who made the traffic stop of his vehicle had no reasonable suspicion to do so.

By criminal information filed October 10, 2007, in Miller County Circuit Court, appellant was charged with possession of cocaine. Appellant filed a motion to suppress the cocaine from being introduced at trial, arguing that it had been seized in violation of his constitutional right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution, article 2, section 15 of the Arkansas Constitution, and Arkansas Rules of Criminal Procedure 3.1 and 4.1 (2008).

At issue in the suppression hearing was the validity of the traffic stop. Officer Todd Harness of the Texarkana Police Department testified that he was patrolling at 2:00 a.m. on the morning of appellant's arrest. He turned behind appellant's vehicle on Eastside Drive. He noticed that appellant's car began to slow, and when it approached the intersection of Preston and Baltimore Street, the car began to slow and then speed up and then slow down. Ultimately, the car merged to the right-hand side of the road after it passed the intersection. Officer Harness testified that this raised his suspicions because he was not sure what the driver's intentions were. He thought the car

was going to turn, but instead, it sped up again and then it again merged onto the side of the roadway. The second time it began to slow and merge to the right side of the roadway caught Officer Harness's attention. He stated that the car again sped up and got back into the travel portion of the roadway, put its right blinker on, and turned onto Park Street, which is not a through street. He stated that the erratic driving led him to believe that the driver was unsure of exactly where he wanted to go. Also, he stated that oftentimes people that are driving under the influence of alcohol or drugs tend to exhibit those types of driving skills in the midst of negotiating a roadway or an intersection, and oftentimes the alcohol or drug impairs their ability to drive safely. Because of his suspicion, Officer Harness stopped appellant.

Officer Harness testified that appellant provided him with a wrong name. Appellant told Officer Harness that his name was Marshall, but spelled it M-a-r-s-h-l-l. Appellant did not have any identification with him, and was unable to recall his social-security number. Officer Harness also noted that appellant provided him with a date of birth that was inconsistent with the date of birth that was in the in-house computer, which further heightened his suspicions. Appellant was extremely nervous and visibly shaking. All this led Officer Harness to believe that appellant was lying about his identity. Officer Harness explained that the tattoo on appellant's shoulder, which read "Mosley," coupled with the other information, led to appellant's arrest for obstructing governmental operations and failure to identify and provide his identity to Officer Harness as an officer.

Appellant was placed in the back of Officer Harness's unit on the left side. Once they arrived at the basement of the police department, appellant's body was positioned

awkwardly such that the right side of his torso was on the right side of the car, which is the opposite side from which he had been placed. After appellant was taken out of the car, Officer Harness checked the backseat for contraband, as is the policy of his police department. On the right side of the vehicle, Officer Harness found a plastic bag that contained crack cocaine.

Appellant argued at the suppression hearing that Officer Harness did not have a reasonable suspicion to make the traffic stop. The trial court denied the motion to suppress, stating that the erratic driving, the time of day, 2:00 a.m., the streets and high-crime area involved, appellant's turning down a street with no exit, and appellant's attempts to hide his identity gave the officer articulable facts upon which to make a probable-cause determination.

After appellant was convicted, he filed a timely notice of appeal to the Arkansas Court of Appeals.

Decision by Arkansas Court of Appeals:

The Court noted that a law-enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. *See* Ark. R. Crim. P. 3.1 (2008). The justification for the investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity. *Hill v. State*, 275 Ark. 71 (1982). "Reasonable suspicion" means a suspicion based on facts or circumstances

which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. *See* Ark. R. Crim. P. 2.1 (2008).

In order for a police officer to make a traffic stop, he must have probable cause to believe that the vehicle has violated a traffic law. Probable cause is defined as "facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected." *Burks v. State*, 362 Ark. 558 (2005).

The appellant contended that Officer Harness did not have reasonable suspicion to justify stopping the vehicle and that it was therefore error to deny his motion to suppress. Appellant cited *Stokes*, where the Arkansas Supreme Court held that there was no probable cause to believe that the defendant was committing a traffic violation. The police officer in *Stokes* observed the defendant driving under the speed limit on the interstate, make a hasty exit, and eventually back down a city street where no other vehicles were around. *Stokes v. State*, 375 Ark. 394 (2009).

Appellant further cited several cases in support of his argument that Officer Harness did not have reasonable suspicion to stop him based upon the testimony that he was on patrol at 2:00 a.m., the area was known for drug activity, and that he did not stop appellant for speeding or for any other traffic violation.

Finally, appellant maintained that the motion to suppress should have been granted based upon the totality of the circumstances, but was improperly denied by the circuit court. He argued that, because the evidence was

obtained during an unlawful stop, the evidence should be deemed “fruit of the poisonous tree.” *Summers v. State*, 90 Ark. App. 25 (2005).

The State argued that the initial stop of appellant’s vehicle was supported by reasonable suspicion, and, thus, the trial court did not err by denying appellant’s motion to suppress. In determining whether an officer had reasonable suspicion, courts must recognize that, “when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion.” *United States v. Cortez*, 449 U.S. 411, 419 (1981). Based upon this reasoning, the State contended that the trial court did not err in denying appellant's motion to suppress.

Officer Harness testified that it was 2:00 a.m., and he was patrolling “a particular area of town which is around Preston Street,” where, at that time of year, “we have quite a few problems with people walking up and down the street, a lot of drug activity, a lot of things going on over there that should not be going on, prostitution and such.” When he turned behind appellant’s vehicle, he noticed that appellant’s car began to slow as it approached the intersection at Preston and Baltimore Street, another area where police had had numerous problems with drug activity. He saw the car begin to slow and then speed up and then slow down, and ultimately merge to the right-hand side of the road. The car slowed again, then sped up and again merged to the right side. The car sped up a bit, pulled back into the travel portion of the roadway, then turned right onto Park Street, which is not a through street.

Officer Harness testified that the street is known for criminal activity. He further

testified that it had been his experience that people driving under the influence of alcohol or another drug tend to exhibit those types of driving skills. He ultimately stopped appellant’s car. Appellant then falsely identified himself to Officer Harness. After the officer handcuffed appellant and put him in the back of his patrol car, he took him to the station. When appellant got out of the car, Officer Harness discovered the contraband underneath the backseat.

The Arkansas Court of Appeals held that Officer Harness had reasonable suspicion to stop and detain appellant to determine whether he was driving under the influence of alcohol or drugs. The Arkansas Supreme Court has determined that, “weaving across road lines at a substantial distance,” *Hoay v. State*, 348 Ark. 80, 84 (2002), and weaving from a highway’s centerline to the shoulder at a late hour, *Piercefield v. State*, 316 Ark. 128 (1994), were circumstances that provided officers with reasonable suspicion to stop a vehicle to determine whether a suspect was driving under the influence. Here, the officer observed appellant, at 2:00 a.m., speeding up and slowing down repeatedly, pulling to the side of the road twice, and ultimately turning into a dead-end road in an area known for criminal activity. Therefore, the Court held the officer had reasonable suspicion and affirmed the lower court's judgment.

Case: This case was an appeal from the Miller County Circuit Court and decided by the Arkansas Court of Appeals on December 2, 2009. The case cite is *Mosley v. State*, 2009 Ark. App. 799.

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