

C.A.L.L.

City Attorney Law Letter

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Arkansas Court of Appeals Holds That Weaving Within One's Own Lane Does Not Constitute Probable Cause for a Stop and Reverses DWI Conviction

Facts Taken From the Opinion: Just prior to midnight on March 14, 2009, a Carroll County sheriff's deputy, Joel Hand, was on patrol in Berryville along Highway 62, a four-lane thoroughfare, when he observed a Chevy pick-up truck just ahead of him weaving in the lane. Hand described the driver as having "trouble keeping control."

Deputy Hand observed the truck move back and forth three times from the dotted-white line in the left side to the right side near the concrete curb. Hand said the truck tires ran onto the horizontal portion of concrete that meets the asphalt. Hand agreed that the driver, Heath Corey Ford, did not strike the actual raised portion of the curb with his truck. Hand stated that Ford's lane was bounded by the dotted-white line and the curb, and Ford was free to drive "straight" between those boundaries.

Hand testified, "[W]hen he is going from one side to the other, consistently, he's not controlling that vehicle very well. . . . [H]e almost ran up on the sidewalk, which is failure to maintain control." Hand's main concern was that the truck "was going to go up on the sidewalk" where any person walking would have been hit by a side mirror or the truck itself. After the stop, Ford was arrested for driving while intoxicated. Hand believed that the offense of failure to maintain control would be subsumed by a citation for driving while intoxicated, so Ford was not cited for the former offense.

The issue presented to the trial judge was whether this presented probable cause to initiate a traffic stop. Ford's attorney argued that this case was indistinguishable from *Barrientos v. State*, 72 Ark. App. 376 (2001), in which the Court of Appeals held that weaving within a lane of traffic does not constitute failing to maintain control over a vehicle. There, although the officer admitted that weaving within the interstate traffic lane was not a moving violation, he stopped Barrientos's vehicle because he thought the driver was sleepy. The Arkansas Court of Appeals held there that the stop was not proper and reversed the denial of the motion to suppress. The State argued that Ford's situation was much more egregious than the facts in *Barrientos* because Ford was weaving over a shorter observed distance and operating the truck near a sidewalk inside a town.

The judge rendered his ruling from the bench, acknowledging that this was an extremely close call but finding that the officer had probable cause to initiate a stop for a moving violation under Ark. Code Ann. § 27-51-104(b)(8). The motion to suppress was therefore denied, and Ford appealed the case to the Arkansas Court of Appeals.

Decision by Arkansas Court of Appeals:

The Arkansas Court of Appeals noted that in *Barrientos*, they had specifically held that "weaving within one's own lane" does not constitute "failing to maintain control." Because Ford was not observed driving outside the boundaries of his designated lane of traffic, the Court concluded that it was clearly erroneous for the trial court to find that probable cause existed to stop his truck for a moving violation.

"Because weaving within the boundaries of a traffic lane does not constitute failure to

maintain control, contemplated in Ark. Code Ann. § 27-51-104(a), (b)(6), and (b)(8)," the Court reversed the denial of Ford's motion to suppress and reversed and remanded the case.

Note From City Attorney: This case, along with the *Barrientos* case cited above, makes it clear that simply weaving within a person's own lane does not constitute probable cause to make a stop.

Case: This case was decided by the Arkansas Court of Appeals on December 1, 2010, and was an appeal from the Carroll County Circuit Court, Eastern District, Honorable Kent Crow, Judge. The case cite is *Ford v. State*, 2010 Ark. App. 795.

Jeff Harper
City Attorney



Arkansas Court of Appeals Upholds DWI Conviction in Case in Which a Fayetteville Police Officer Made the Arrest in Farmington

Facts Taken From the Opinion: Officer Mark Laird of the Fayetteville Police Department testified that on August 14, 2008, at approximately 9:20 a.m., he was working patrol in the Fayetteville city limits about one-half mile from the Farmington city limits when he observed a silver pickup, later determined to be driven by Todd T. Debriyn, traveling at what he approximated to be between sixty-five and seventy miles per hour in the center lane heading westbound toward Farmington. He waited about twenty seconds for oncoming traffic before he was able to pull out safely to

proceed after the pickup; he did not turn on his siren or lights; and he proceeded westbound toward Farmington for a distance between one-quarter and one-half mile before he caught up to the pickup; it was still traveling in the center lane. At that time, they were entering the Farmington city limits, and Officer Laird activated his blue lights. He stated that they traveled another one-half mile or so before the vehicle pulled over and came to a stop.

On cross-examination, Officer Laird said that he was not patrolling in Farmington, but was in the Fayetteville city limits when he first observed Debriyn committing a traffic violation. He testified that he planned to stop Debriyn and issue him a citation after witnessing his driving. He said that when he activated his blue lights, Debriyn did not pull over immediately, but instead made three turns before coming to a stop. He testified that the only reason he went into Farmington was in pursuit of Debriyn because he observed the violation take place in the Fayetteville city limits.

At the close of the hearing, the trial court denied Debriyn's motion to suppress, finding that Officer Laird was in pursuit of Debriyn and reasonably believed that Debriyn had committed a criminal offense in his presence. Prior to trial, Debriyn's counsel conceded that Officer Laird had the ability to stop Debriyn pursuant to the fresh-pursuit doctrine found in Arkansas Code Annotated section 16-81-301 (Repl. 2005), which provides:

Any law enforcement officer of this state in fresh pursuit of a person who is reasonably believed to have committed a felony in this state or has committed or attempted to commit any criminal offense in this state in the presence of the officer, or for whom

the officer holds a warrant of arrest for a criminal offense, shall have the authority to arrest and hold in custody such person anywhere in this state.

However, Debriyn argued that Officer Laird could not, after the stop, then commence to conduct a separate DWI investigation because he was not within his jurisdiction. The trial court denied that motion as well. Todd Debriyn was convicted by a Washington County Jury for driving while intoxicated (fourth offense) and violation of the Arkansas Implied Consent Law. He was sentenced to one year imprisonment and assessed a \$900 fine and \$300 in court costs. Debriyn appealed his case to the Arkansas Court of Appeals, arguing that the trial court erred in denying his motion to suppress because the police officer had no jurisdiction to conduct a DWI investigation after he was stopped.

Decision by Arkansas Court of Appeals:

In affirming the judgment, the Arkansas Court of Appeals reviewed two cases directly on point. In *Brown v. State*, 38 Ark. App. 18 (1992), the officer was inside the city limits when he observed appellant drive by on a road outside the city limits at an excessive rate of speed. The officer pulled behind appellant and followed him for about a mile, during which time the officer observed appellant cross the center line on multiple occasions. The officer who stopped appellant and another officer who had responded as backup administered field-sobriety tests, and appellant was arrested for driving while intoxicated. The Arkansas Court of Appeals found that the officer's actions were justified under the fresh-pursuit doctrine, holding that because the officer was within his territorial jurisdiction when he first observed the appellant's erratic driving and began his pursuit from that

point, the subsequent arrest was valid under the fresh-pursuit doctrine.

In *Smith v. City of Little Rock*, 305 Ark. 168 (1991), a UALR patrolman observed appellant driving in an erratic manner within his jurisdiction; however, when the patrolman activated his blue lights, appellant drove out of the patrolman's jurisdiction. The patrolman followed appellant, pulled him over, and arrested him for DWI when appellant smelled strongly of alcohol and almost fell when he got out of his car. The Arkansas Supreme Court upheld the arrest, holding that Arkansas statutes contemplate arrests under the theory of fresh pursuit for criminal offenses committed in a peace officer's presence, which in that case, as well as the present case, involved traffic offenses. Furthermore, the *Smith* court held that, "more importantly, under such circumstances the patrolman could form a reasonable belief that the appellant was intoxicated and legitimately detain him under our rules." 305 Ark. at 172. The Arkansas Court of Appeals held that the fact that Debriyn was originally stopped for a traffic offense under the theory of fresh pursuit does not prohibit the officer from arresting him for DWI if facts arose during the stop that gave the officer reasonable cause to believe that Debriyn was driving while intoxicated.

Case: This case was decided by the Arkansas Court of Appeals on November 3, 2010, and was an appeal from the Washington County Circuit Court, Honorable Mary Ann Gunn, Judge. The case cite is *Debriyn v. State*, 2010 Ark. App. 738.

Jeff Harper
City Attorney

Eighth Circuit Affirms Conviction Involving Consent to Search a Gun Safe, Which Resulted in the Discovery of a Grenade

Facts Taken From the Opinion: Thomas Hibdon—now known as Rachel Amratiel—entered a conditional guilty plea to possession of an unregistered destructive device in violation of 18 U.S.C. § 5841. The District Court for the Eastern District of Missouri sentenced him to 18 months' imprisonment. Hibdon appealed the denial of his motion to suppress evidence seized during the warrantless search of a gun safe.

On May 24, 2007, police responded to a 911 call about a domestic disturbance at the Hibdon residence. Officers found Ms. Hibdon and the couple's two children at a neighbor's house. After Ms. Hibdon said that she and her husband had a fight—which escalated when he began chasing her around the house with a sword—the officers tried to contact Hibdon who was still inside the house. They called his cell phone, home phone, and knocked repeatedly on the door. Eventually, Hibdon emerged pointing a rifle at one of the deputies. After some time, the officers disarmed him, placed him in a patrol car, and went to speak with Ms. Hibdon. Concerned about the weapons in the house, she gave the police permission to search the residence, signing a "Permission to Search" form. In the garage, officers found a large, locked gun safe. Ms. Hibdon told the officers her husband had the keys. They retrieved the keys from Hibdon who was still in a patrol car not far away. Inside the safe, the officers found 17 firearms, one of which belonged to Ms. Hibdon, and a hand grenade.

The district court denied Hibdon's motion to suppress the grenade, rejecting his argument that Ms. Hibdon's consent to the search was not valid. He appealed to the U.S. Court of Appeals for the 8th Circuit.

Decision by Eighth Circuit: A warrantless search is justified when an officer reasonably relies on a third party's demonstration of apparent authority, even if that party lacks common authority. *See United States v. Hudspeth*, 518 F.3d 954, 958 (8th Cir. 2008) (en banc), quoting *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990) (“[O]f the many factual determinations that must regularly be made by agents of the government,’ the Fourth Amendment does not require the agents always be correct, ‘but that they always be reasonable.’”). Apparent authority exists when “the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.” *Rodriguez*, citation omitted.

Common authority over premises exists where there is mutual use, and joint access or control. Here Ms. Hibdon, as a spouse and co-tenant, possessed common authority over the premises.

Hibdon contended that the officers' reliance on Ms. Hibdon's apparent authority over the gun safe was unreasonable. Here, the available facts would “warrant a person of reasonable caution in the belief that the consenting party had authority over the [gun safe].” At the time of consent, the officers knew: (1) the safe was in a common area, the garage; (2) Ms. Hibdon knew where the keys were (on Hibdon's person) and how to unlock the safe (she unlocked it herself); (3) she never indicated that she had no access to the safe or that it was for Hibdon's exclusive use; (4) as the officers removed the

weapons, Ms. Hibdon identified one of the handguns as hers. Contrary to Hibdon's contention, possession of a key is not the sole factor whether a third party has authority over a locked space. "This court does 'not accept [defendant's] argument that a key is necessary to establish authority over the premises.'" *Iron Wing v. United States*, 34 F.3d 662, 665 (8th Cir. 1994).

The Court held that Hibdon's failure to object when the police took the keys from him is further evidence that the officers acted reasonably. Although Hibdon testified that he objected to the search, this court defers to the district court's determination that because Hibdon's testimony was inconsistent, bizarre and self-serving, he was not credible.

Finally, the Court held that Hibdon's objection that the police should have asked his permission before searching the gun safe is without merit. When officers obtain valid third-party consent, they are not also required to seek consent from a defendant, even if detained nearby. *See U.S. v. Matlock*, 415 U.S. 164, 171 (1974). "[A] potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Georgia v. Randolph*, 547 U.S. 103, 121 (2006).

The Eighth Circuit therefore affirmed the conviction of the district court.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on October 14, 2010. The case cite is *U.S. v. Amratiel*, 622 F.3d 914 (8th Cir. 2010).

Jeff Harper
City Attorney

Arkansas Court of Appeals Holds that Questioning by School Principal is not Subject to *Miranda*

Facts Taken From the Opinion: K.L. was eleven years old and in the fifth grade. This case has its genesis in events that supposedly occurred on December 13, 2007, at Reed Elementary in Dumas, Arkansas. A.M., the alleged victim, accused Q.M. and K.L. of dragging her into the boys' bathroom and pulling her pants down, with each boy holding her down while the other penetrated her, K.L. with his finger. A.M.'s story varied each time it was told, and there were several inconsistencies; however, the trial court credited her testimony and adjudicated the charge of rape against K.L. as true. Based upon a referral from a classroom teacher, A.M. and the boys were brought into the principal's office by the dean of students. The principal then proceeded to interview each of the children to obtain their versions of the events.

At the adjudication hearing, Darlene Montgomery, the principal, acknowledged that she did not advise the boys that they did not have to answer her questions, and she stated that they initially denied all the allegations. She said that she interviewed the boys twice in a short period of time, but she did not record the interviews. Montgomery testified that the first time she interviewed A.M., A.M. told her that the boys pulled her pants down, which the principal considered to be a sexual assault, and there was no allegation of rape. She said that she did not call the boys' parents at that time, but that she called them between 2:30 and 3:00, after she had received the referral about 2:00 p.m. The principal denied that she later told the boys, with her hand on the phone, that they had better tell her what had happened or she

was going to call the school resource officer and that they could go to jail; however, she admitted that she told the boys that they had to tell her the truth, or with those allegations, she would have to call the resource officer.

Montgomery stated that the boys were free to get up and walk out of her office, but that she never told them that they did not have to talk to her. She said that the boys were accusing each other, and that she brought A.M. in to say what had happened. According to the principal, after she said that she was reaching for the phone to call the resource officer, K.L. told her that he was going to tell her the truth. Montgomery testified that K.L. told her that they were going to class; that he went to the bathroom; that Q.M. called his name and told him to come help him; that Q.M. was pulling A.M. into the bathroom; that she fell and they both pulled her into the bathroom; and that they pulled down her jeans. A.M. said that the boys touched her in her private area on top of her underwear, and the boys agreed that something like that had happened in the bathroom.

K.L., a minor (appellant) was adjudicated delinquent in the Desha Court Circuit Court on the charge of rape. He then appealed his case to the Arkansas Court of Appeals.

Decision by Arkansas Court of Appeals:

One of the arguments that K.L. made on appeal is that the trial court erred in failing to suppress Principal Darlene Montgomery's testimony regarding her interview with him. This argument was made in a motion to suppress, which the trial court denied at trial. K.L. argued at trial that the statements made by him to Montgomery were prohibited by Ark. Code Ann. § 9-27-321, which provides:

Statements made by a juvenile to the intake officer or probation officer during the intake process before a hearing on the merits of the petition filed against the juvenile shall not be used or be admissible against the juvenile at any stage of any proceedings in circuit court or in any other court. Ark. Code Ann. § 9-27-321 (Repl. 2009).

He also argued that Montgomery, as the principal, was an officer of the State and questioned him in violation of his right to due process without giving *Miranda* warnings. He further argued that he was in a custodial situation; that any statement given by him was tainted by the overwhelming influence exerted by Montgomery, and that it was clear that he was in a custodial situation and would not be released from that custodial situation until he said or did what he was supposed to do.

The Arkansas Court of Appeals noted that there are no cases on this issue in Arkansas. However, other states have held that students are not entitled to *Miranda* warnings prior to being questioned by principals because principals are not law-enforcement officers and that statements given to principals are deemed to be voluntary and admissible.

In *State of Florida v. J.T.D.*, 851 So.2d 793 (Fla. App. 2003), the middle-school-aged juvenile was charged with lewd or lascivious molestation of another student; he filed a motion to suppress the admission he made to the assistant principal because he asserted that it was made during a custodial interrogation that required *Miranda* warnings. J.T.D. was interviewed twice by the assistant principal in the presence of the principal. J.T.D. denied any wrongdoing in the first interview. During the second

interview, the school resource officer was in and out of the principal's office, but she did not interview J.T.D. or threaten to send him to the juvenile detention center. However, the resource officer testified that she did hear J.T.D. admit to the assistant principal that he had touched the student's "butt," at which time the assistant principal turned the questioning over to the resource officer. The resource officer immediately began to read J.T.D. his *Miranda* warnings but was called away before the warnings were completed and, according to the resource officer, her interview ceased when she was called away while she was reading the student his *Miranda* warnings. The trial court granted the motion to suppress, but the appellate court reversed that determination. The appellate court agreed with the trial court that the assistant principal was not acting as a police agent, but also determined that the fact that an officer was merely present during the interview, asking no questions, did not transform the school official's interview into a custodial interrogation.

In the present case, the resource officer was not present until after the interviews by Montgomery who, as principal, was merely trying to discern what, if anything, had happened in the bathroom through interviewing all of the parties. The Arkansas Court of Appeals, relying on other states that have been faced with this issue, opined that they believed Montgomery had a duty to do so as the school principal. The Court concluded that K.L. was not free to leave the principal's office, but this restriction flowed from his status as a student, not a suspect, and the fact that he could not leave the principal's office is not determinative of whether this was a custodial interrogation that required *Miranda* warnings. *J.T.D.*, *supra*. It has been recognized that "maintaining security and order in the schools requires a certain degree of

flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *Id.* At 797 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985)). "[A] school principal or other school official who questions a student about a possible violation of law or school regulation does not, absent other circumstances, act as a law enforcement officer or agent of the state with law enforcement authority." *J.D.*, 591 S.E.2d at 724.

The Arkansas Court of Appeals also ruled against K.L. on two other issues he raised on appeal and therefore, the adjudication that he was a delinquent made by the Desha County Circuit Court was affirmed.

Case: This case was decided by the Arkansas Court of Appeals on September 29, 2010 and was an appeal from the Desha County Circuit Court, Arkansas City District, Honorable Teresa Ann French, Judge. The case cite is *K.L. v. State*, 2010 Ark. App. 644.

Jeff Harper
City Attorney



Arkansas Court of Appeals Affirms Conviction of D.W.I. Suspect Even With No Bad Driving and No B.A.C.

Facts: On January 2, 2009, at about 4:11 p.m., Rockport Police Officer Nathan Thomason [Officer Thomason] noticed an expired license plate on a blue Jeep Liberty. After confirming with dispatch that the license plate was expired, Officer Thomason

stopped the vehicle. While speaking with the driver, Melvyn Stewart [Stewart], Officer Thomason smelled a strong odor of intoxicants and observed that Stewart's eyes were red and watery. Officer Thomas called Arkansas State Police Trooper Zack Owens [Trooper Owens] to the location to perform a portable breath test [PBT] on Stewart. Trooper Owens testified that he also observed Stewart to have bloodshot and watery eyes and that he could smell the odor of intoxicants when Stewart blew into the PBT. [PBT results were not discussed in this case.] After the PBT was performed, Officer Thomason was unable to perform additional field sobriety tests because Stewart became agitated and because of his close proximity to the highway. Stewart was arrested for driving while intoxicated among other charges.

While in custody, Stewart refused to submit to blood-alcohol-content testing. Both Officer Thomason and Trooper Owens testified that it was their opinion that Stewart's condition precluded him from safely operating a motor vehicle. After the officers' testimony, the State rested. The defendant did not testify. The trial court found Stewart guilty of driving while intoxicated [second offense] and refusal to submit to a chemical test. Stewart appealed arguing that the State presented insufficient evidence supporting the driving while intoxicated conviction.

Argument and Discussion: In reviewing the sufficiency of the evidence on appeal, the Court views the evidence in the light most favorable to the State and affirms if the verdict is supported by substantial evidence. *Springston v. State*, 61 Ark. App. 36, 38, 962 S.W.2d 836, 838 (1988). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or

the other without resort to speculation or conjecture. *Id.* The Court need only consider that testimony that supports the verdict of guilt. *Id.*

The statute prohibiting driving while intoxicated, Arkansas Code Annotated section 5-65-103 (Repl. 2005), states that it is unlawful and punishable for any person who is intoxicated to operate or be in actual physical control of a motor vehicle. "Intoxicated" is defined as "influenced or affected by the ingestion of alcohol...to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians[.]" Ark. Code Ann. § 5-65-102(2) (Repl. 2005). Proof of the offense requires a showing that a defendant had "actual physical control of the vehicle while intoxicated" but does not require a showing that the defendant "was driving the vehicle or driving the vehicle in a hazardous or negligent manner." *Stewart v. State*, 2010 Ark. App. 9, at 2, ___ S.W.3d ___ (citing *Beasley v. State*, 47 Ark. App. 92, 96, 885 S.W.2d 906, 908 (1994)) *Emphasis added.* Further, a conviction for driving while intoxicated is not dependent upon evidence of blood-alcohol content in view of sufficient other evidence of intoxication. *Mace v. State*, 328 Ark. 536, 540, 944 S.W.2d 830, 833 (1997). The observations of the officers with regard to the smell of alcohol and actions consistent with intoxication can constitute competent evidence to support a DWI charge. *Johnson v. State*, 337 Ark. 196, 202, 987 S.W.2d 694, 698 (1999); *Blair v. State*, 103 Ark. App. 322, 327, 288 S.W.3d 713, 717 (2008).

Opinion testimony regarding intoxication is admissible. *Johnson*, 337 Ark. at 202, 987 S.W.2d at 698. Finally, the refusal to be

tested is admissible evidence on the issue of intoxication and may indicate the defendant's fear of the results of the test and the consciousness of guilt. *Id.*, 987 S.W.2d at 698.

In this case, Officer Thomason witnessed Stewart driving the Jeep Liberty. Both Officer Thomason and Trooper Owen testified that they observed Stewart to have bloodshot and watery eyes and they both smelled the odor of intoxicants on Stewart's breath and person. Officer Thomason stated that Stewart became agitated and uncooperative when field-sobriety tests were being attempted and there was evidence that Stewart refused to take the blood-alcohol test once in custody. The Court held that this was sufficient evidence to support the conviction for driving while intoxicated.

Case citation: This case was decided by the Arkansas Court of Appeals on September 15, 2010, and was an appeal from the Hot Springs County Circuit Court. The case citation is *Stewart v. State*, 2010 Ark. App. 584.

Brooke Lockhart
Deputy City Attorney



**Vehicle Lighting Issues:
Addressing Patrol Questions**

Recently, Officer Chris Shirrel posed a very interesting question to the City Attorney's Office regarding lighting on motor vehicles. Specifically, he asked:

I have a question regarding vehicle headlights. On patrol we have been encountering a growing number of

vehicles that have headlights other than the standard white headlights/driving lights. These range from bright yellow like fog-lights to colors that appear blue and purple. The other day while en-route to a call I saw a vehicle with bright yellow (almost orange) colored headlights. I have also noticed a number of vehicles with the blue/purple colored driving lights. My question is how legal are these and can we stop and cite these vehicles?

This is an excellent question, and a very interesting issue. Ark. Code Ann. §27-36-201, *et seq.*, contains the vehicle lighting provisions for the State of Arkansas. These regulations cover such topics as when lights are required, the use of parking lights, signal lamps and devices, and tail lamps and reflectors. However, there are a few of these statutes which are the most commonly encountered by patrol, and therefore will be discussed here.

Red, Blue, or Green Lights. Ark. Code Ann. §27-36-208(b)(1) provides that "[n]o person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red, blue, or green light visible from directly in front of the center thereof". If a vehicle is encountered which violates this section, it may be stopped and the driver may be cited. Notice, however, that this statute has language limiting its application to a vehicle on a street or highway. In other words, this statute could not be enforced on private property or on a parking lot.

Auxiliary Driving Lights. Ark. Code Ann. §27-36-221 addresses auxiliary driving lights. This statute provides that it is unlawful to operate any motor vehicle on a

public street or highway with any auxiliary driving lights on unless the lights are either:

- 1) original equipment lighting installed by the vehicle manufacturer prior to the initial retail sale of the motor vehicle;
- 2) fog lamps conforming to the provisions set forth in § 27-36-214(b), which regulates the number of fog lamps, how they may be mounted, and how they may be aimed;
- 3) auxiliary driving or passing lamps conforming to the provisions set forth in Ark. Code Ann. § 27-36-214(c) and (d), which regulate where these lamps may be mounted, or
- 4) ornamental light-emitting diodes white lights conforming to the provisions set forth in § 27-36-214(e), which provides that no motor vehicle may be equipped with more than two (2) ornamental light-emitting diodes white lights mounted on the front of the vehicle.

Notice, however, that this statute also has language limiting its application to a vehicle on a street or highway. In other words, this statute could not be enforced on private property or on a parking lot.

Miscellaneous Lighting Provisions. Ark. Code Ann. §27-36-217 addresses additional cowl, fender, back-up, and running board lamps. The important thing to remember about these lights is that the statute requires that these lights must be either amber or white. If a vehicle is encountered which violates this section, it may be stopped and the driver may be cited.

NOTE: Should you have a more specific question about a particular lighting provision, please feel free to contact the City Attorney's Office.

Ernest Cate
Senior Deputy City Attorney



Arkansas Court of Appeals Affirms Conviction in Computer Child Pornography Case Out of Crawford County

Facts Taken From the Case: On June 13, 2008, the State filed a criminal information charging David Wayne Fuson (appellant) with one count of computer child pornography. On November 3, 2008, appellant filed a motion to suppress a custodial statement he made to the police as well as certain evidence that was seized from his home. On February 6, 2009, the trial court held a hearing on appellant's motion to suppress.

At the suppression hearing, Detective Ken Howard with the Crawford County Sheriff's Department testified that he interviewed appellant after appellant was arrested. He denied promising appellant anything during the interview. Detective Howard also testified that appellant did not give any indication that he did not understand what was occurring during the interview. Detective Howard testified that he stated to appellant at the beginning of the interview that they "need[ed] to get this cleared up tonight." Detective Howard indicated that the statement was not meant to be a false promise of leniency. Detective Howard identified a document that he indicated was a voluntary statement written by appellant in

which appellant stated that he communicated with someone online whom he believed was a fourteen-year-old female and that he came to Van Buren to have sex with that person. According to Detective Howard, appellant wrote and signed the statement in his presence. In an order entered February 17, 2009, the trial court denied appellant's motion to suppress his custodial statement and granted his motion to suppress items seized from his home following a search by police incidental to a search warrant.

Immediately prior to trial, appellant made a motion to suppress evidence recovered by police following a search of his truck, which included a sack containing condoms and personal lubricant. Appellant's motion was denied by the trial court. Following the trial, the jury returned a verdict of guilty on the charge of computer child pornography. In a judgment and commitment order entered on April 20, 2009, the trial court sentenced appellant to sixty months' imprisonment in the Arkansas Department of Correction, with an additional 180 months' suspended imposition of sentence. Appellant filed a timely notice of appeal on May 18, 2009.

Decision by Arkansas Court of Appeals:

Appellant's first point on appeal was that the trial court erred in denying his motion to suppress his custodial statement. In reviewing a trial court's ruling on the voluntariness of a confession, the Court makes an independent determination based upon the totality of the circumstances. *Wedgeworth v. State*, 374 Ark. 373 (2008).

Appellant argued that Detective Howard made false promises that prompted his confession. If a police officer makes a false promise which misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not

been voluntarily, knowingly, and intelligently made. *Goodwin v. State*, 373 Ark. 53 (2008). If the officer has made an unambiguous false promise of leniency, then any resulting statement is involuntary. See *Clark v. State*, 374 Ark. 292 (2008).

If, however, the officer's statement is ambiguous and it is difficult to determine whether there was a false promise of leniency, the court must examine the defendant's vulnerability, utilizing the following factors: 1) the age, education, and intelligence of the accused; 2) how long it took to obtain the statement; 3) the defendant's experience, if any, with the criminal-justice system; and 4) the delay between the *Miranda* warnings and the confession. *Brown v. State*, 354 Ark. 30 (2003).

Appellant argued that Detective Howard's statement at the beginning of the interview that they "need[ed] to clear this up" and his statement at the conclusion of the interview that "it [would] look good on" appellant that he told the truth during the interview constituted false promises by Detective Howard of leniency. The Court held that an examination of the record revealed no unambiguous promise by Detective Howard during the interview. Therefore, the Court examined the factors set forth in *Brown v. State*, *supra*, which must be considered when it is not clear from an officer's statement whether there has been a promise of leniency.

The evidence at the suppression hearing revealed that appellant was a high-school graduate who was in his mid-thirties at the time of the interview. In addition, the entire interview took no more than ten minutes and appellant was given his *Miranda* warnings at the beginning of the interview. Although there is no evidence that appellant had any

prior dealings with the criminal-justice system, Detective Howard testified that appellant gave no indication of being unaware of what was happening during the interview. None of the statements made by Detective Howard can reasonably be interpreted as false promises that induced appellant to make a confession.

In addition, the Court noted that the object of the rule is not to exclude a true confession, but rather to avoid the possibility of a confession of guilt from one who is innocent. *Williams v. State*, 363 Ark. 395 (2005). The Court held that the only indication by appellant that his confession was untrue was his testimony at trial that he went to the house to get to know the girl, but did not plan on having sex with her. Appellant contradicted this testimony by stating at other times during his testimony that he was being honest when he indicated he planned on having sex with a fourteen-year-old girl. Appellant failed to make a sufficient showing that his confession was not true. Therefore, the Court held that the trial court properly denied appellant's motion to suppress his custodial statement.

Appellant's second point on appeal was that the trial court erred by denying his motion to suppress evidence that was seized from his vehicle by the police. In regard to this argument, Officer Patti Bonewell with the Crawford County Sheriff's Department testified that she searched appellant's truck as a result of his arrest and also for inventory purposes. "If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may

search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search." Ark. R. Crim. P. 12.3(a) (2010). "Although appellant was not in the vehicle when he was arrested, he parked the truck across the street from the address provided by the officer posing as a minor female and was arrested when he walked onto the front porch of the residence."

The Court held this was sufficient for him to be considered "in the vicinity" of the vehicle. Additionally, Officer Bonewell testified that her experience taught her that persons arrested for the same crime as appellant usually carried items connected to the offense in their vehicle, giving her a reasonable suspicion that there would be evidence in the vehicle connecting the arrested person to the crime. The Court held the search of appellant's truck was proper under Arkansas Rule of Criminal Procedure 12.3(a).

The Court noted that even if the search of appellant's truck had not been proper under Arkansas Rule of Criminal Procedure 12.3(a), the evidence seized would still be admissible under the inevitable-discovery doctrine. Arkansas Rule of Criminal Procedure 12.6(b) states that a vehicle impounded in consequence of an arrest, or retained in official custody for other good cause may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents. Because appellant was taken into custody at a time during which his vehicle was parked on a public street, the police impounded the vehicle and were permitted to inventory the contents for safekeeping. During the inventory process, the police would have inevitably discovered the items from the vehicle that were admitted into evidence at the trial. Therefore, the Court held that the

trial court properly denied appellant's motion to suppress the evidence seized from his truck.

Having addressed these two issues, the Arkansas Court of Appeals affirmed the conviction of the Crawford County Circuit Court.

Case: This case was decided by the Arkansas Court of Appeals on September 15, 2010, and is an appeal from the Crawford County Circuit Court, Honorable Michael Medlock, Judge. The case cite is *Fuson v. State*, 2010 Ark. App. 593.

Jeff Harper
City Attorney



Arizona v. Gant Not Extended to Search in Bus Terminal in Eighth Circuit Case

Facts: On November 17, 2008, Investigator Alan Eberle [Investigator Eberle] of the Nebraska State Patrol was on duty in plain clothes at a Greyhound bus terminal in Omaha, Nebraska. At about 6:00 a.m., Investigator Eberle saw a black SUV pull up to the terminal. Jesus Perdoma [Perdoma] exited the vehicle carrying a bag and walked into the terminal. Investigator Eberle decided to follow Perdoma.

Perdoma went to the ticket counter and Investigator Eberle watched from four or five feet away. Investigator Eberle overheard Perdoma request a one-way ticket to Des Moines, Iowa, using the name Jesus Cruz. When Perdoma retrieved cash from his wallet, Investigator Eberle saw a government-issued identification card in the wallet but he could not read the name.

According to Investigator Eberle, Perdoma's hands were shaking and he appeared nervous throughout the transaction.

Investigator Eberle approached Perdoma and without touching Perdoma he identified himself as a police officer and asked Perdoma if he would answer a few questions. Investigator Eberle assured Perdoma that he was "not under arrest or in any kind of trouble," and Perdoma agreed to speak with the investigator. In response to the investigator's questions, Perdoma said that he was on his way from Denver to his home in Des Moines and that he had arrived at the terminal by cab. During the conversation, Investigator Eberle smelled the odor of marijuana emanating from Perdoma. The investigator asked if Perdoma had identification to which he responded that he didn't have any identification with him. Having seen an identification in the wallet previously, Investigator Eberle asked to see Perdoma's wallet. As Perdoma reached for his wallet, he was breathing rapidly, trembling, and looking around the terminal. Based on Perdoma's answers, his nervous behavior and the smell of marijuana, Investigator Eberle suspected that Perdoma was engaged in criminal activity.

Perdoma paused after taking the wallet out of his pocket. Instead of handing the wallet to Eberle, Perdoma put it back in his pocket and ran. After a brief chase, Investigator Eberle and Investigator Scott, who was also on duty that morning, wrestled Perdoma to the ground and placed him under arrest. The officers handcuffed Perdoma and escorted him to an area at the rear of the terminal. Investigator Eberle searched Perdoma and discovered four grams of marijuana in the coin pocket of Perdoma's pants. Investigator Scott found 454 grams of methamphetamine in Perdoma's bag.

Perdoma was indicted with one count of possession with intent to distribute fifty grams or more of a substance containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1). Perdoma entered a conditional plea of guilty reserving the right to appeal the denial of his motion to suppress. Perdoma was sentenced to 120 months imprisonment.

Argument and Discussion: Perdoma moved to suppress the methamphetamine found in his bag, arguing that his initial encounter with Investigator Eberle was not consensual; that the officers had no basis to detain him and that the warrantless search of his bag was not a valid search incident to arrest. Under Perdoma's first argument, the Court stated that "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." *Id.* (internal citation and quotation marks omitted). Here Investigator Eberle approached Perdoma and identified himself as a police officer. Without touching Perdoma or displaying a weapon, the investigator told Perdoma that he was not under arrest and asked him if he would answer a few questions. Nothing about this initial encounter would have caused a reasonable person in Perdoma's situation to believe that he was not free to disregard Eberle's questions and walk away. *See United States v. Mendoza-Cepeda*, 250 F. 3d 626, 628 (8th Cir. 2001).

Perdoma next argued that the investigator had no legal basis for arresting him. The Court disagreed with this argument. Although the initial encounter was consensual, Eberle had probable cause to

arrest Perdoma for marijuana possession once he detected the odor of marijuana emanating from Perdoma. *See United States v. Humphries*, 372 F.3d 653, 659-60 (4th Cir. 2004) (holding that "if an officer smells the odor of marijuana in circumstances where the officer can localize its source to a person, the officer has probable cause to believe that the person has committed or is committing the crime of possession of marijuana" and thus has "authority to arrest him without a warrant in a public place").

Finally, Perdoma argued that Investigator Scott's warrantless search of his bag was not justified under any exception to the warrant requirement. The Government asserts that the search of the bag was a valid search incident to arrest. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. ---, 129 S.Ct. 1710, 1716 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). A search incident to arrest may lawfully extend to "the arrestee's person and the area within his immediate control," that is, "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Chimel v. California*, 395 U.S. 752, 763 (1969) (internal quotation marks omitted).

The crux of Perdoma's argument is that during the search, the bag was "beyond his reach" because he was restrained and a police officer had taken control of the bag. Whether an officer has exclusive control of a seized item does not, however, necessarily determine whether the item remains in "the area from within which [the arrestee] *might* gain possession of a weapon or destructible evidence." *Chimel*, 395 U.S. at 763 (emphasis added). The Court has previously

rejected the notion that an officer's exclusive control of an item necessarily removes the item from the arrestee's area of immediate control. *See United States v. Morales*, 923 F.2d 621, 626-27 (8th Cir. 1991). Here, the record suggests that the search of the bag occurred in close proximity to where Perdoma was restrained, in the rear area beyond the ticket counter of the bus terminal. Moreover, Perdoma had already run from the officers once, and the officers did not know how strong he was. Under these circumstances, the bag was within "the area into which [the] arrestee might reach in order to grab a weapon or evidentiary items." *Chimel* at 763. The Eighth Circuit rejected Perdoma's *Gant* argument and refused to extend that rationale beyond a vehicle context. The Court stated that it has repeatedly recognized in the non-vehicle search-incident-to-arrest context that it may be possible for an arrestee restrained in a room to reach items in that room. The Court concluded that this search was a valid search incident to arrest and upheld the district court's denial of Perdoma's motion to suppress.

Case citation: This case was decided by the U.S. Court of Appeals for the Eighth Circuit on September 13, 2010. The case citation is *United States v. Perdoma*, 09-3394 (8th Cir. Sept. 13, 2010).

Brooke Lockhart
Deputy City Attorney



Defendant Held to Have Constructively Possessed Drug Paraphernalia in Jointly Occupied Home

Facts: In December of 2007, Lieutenant James Kulesa [Lt. Kulesa] of the Lonoke County Sheriff's Office made contact with Blake Burrow [Burrow] and his wife at a residence in Humnoke during a probation search. During a search of the house, officers found drug paraphernalia—syringes, coffee filters, scales, a propane tank, a lithium battery in a bag with metal casing removed, straws, scales and smoking devices—in the bedroom, some of which were on the bed in plain view. Lt. Kulesa stated that Burrow admitted the paraphernalia belonged to him and his wife. Other drug paraphernalia was discovered in the kitchen, laundry room and an outbuilding.

Keith Eaton [Eaton], a narcotics investigator with the Lonoke County Sheriff's Office, testified at trial as to the various items he noticed in the house made him suspicious because the items were used in the manufacture of methamphetamine. Eaton also testified that the bedroom contained pictures of Burrow as well as male clothing that he believed belonged to Burrow and that it appeared that Burrow lived there. Jennifer Floyd, a former forensic chemist with the Arkansas State Crime lab, testified that she collected samples from the residence and that she had only seen batteries broken down in a similar manner in connection with meth labs and that the straws, glass smoking devices and plastic tubing had methamphetamine residue on them. Burrow's mother testified that Burrow had been living with her in Lonoke since Thanksgiving, although she did not know he

had gone to the house in Humnoke on the day of the search.

Burrow was convicted by a jury of possession of drug paraphernalia and was sentenced to one year in the county jail. Burrow appealed his conviction arguing that he did not exercise control over the items of paraphernalia.

Argument and Discussion: The Arkansas Court of Appeals reiterated the Arkansas Supreme Court's holding in *Holt v. State*, 2009 Ark. 482, at 5-6:

In *Walley v. State*, [353 Ark. 586, 595, 112 S.W.3d 349, 353 (2003)], we discussed the analysis necessary to review a sufficiency challenge in cases where two or more people occupy the residence where contraband was found. We stated that:

Under our law, it is clear that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession of a controlled substance if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is, constructively possessed.... Constructive possession can be implied when the controlled substance is in the joint control of the accused and another. Joint occupancy, though, is not sufficient in itself to establish possession or joint possession. There must be some additional factor linking the accused to the contraband. The State must show additional facts and circumstances indicating the accused's knowledge and control of the contraband.

In order to prove constructive possession, the State must establish two elements: "(1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew that the matter possessed was contraband." *Id.* (citing *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995); *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988)).

An additional factor is necessary to link the accused to the contraband in joint occupancy situations. *Ravellette v. State*, 264 Ark. 344, 571 D.W.2d 433 (1978). "It cannot be inferred that one in non-exclusive possession of premises knew of the presence of drugs and had joint control of them unless there were other factors from which the jury can reasonably infer the accused had joint possession and control." *Walley* at 595.

In this case, there was testimony that the residence belonged to Burrow, that he told Lt. Kulesa that he lived there, and that there were male personal effects in the bedroom believed to be Burrow's. The drug paraphernalia in the bedroom was on the bed in plain view. Further, Lt. Kulesa testified that Burrow stated that the items in the bedroom belonged to him and his wife. A jury could reasonably infer from this testimony that Burrow knew the drug paraphernalia was contraband and that he exercised control and management of the contraband. The conviction was upheld.

Case citation: This case was decided by the Arkansas Court of Appeals on October 20, 2010, and was an appeal from the Lonoke County Circuit Court. The case citation is *Burrow v. State*, 2010 Ark. App. 692.

Brooke Lockhart
Deputy City Attorney

Arkansas Court of Appeals Affirms Conviction in Case Involving the Selling of Crack Cocaine

Facts Taken From the Opinion: In response to a tip that Kirby Donald Franklin, Jr. (appellant) was selling crack cocaine, law-enforcement officers located appellant and conducted an investigatory stop pursuant to Arkansas Rule of Criminal Procedure 3.1 (2009). Appellant was charged by information with possession of cocaine with intent to deliver. He filed a timely motion to suppress the vial of crack cocaine that fell out of his pocket during a pat-down search of his person. A suppression hearing was held on January 25, 2010.

Deputy Willie Rex Davis of the Drew County Sheriff's Office was the only witness who testified at the hearing. Deputy Davis testified that he received a call from a confidential informant with whom he had worked in the past and who had supplied information that had led to several felony arrests. Deputy Davis stated that on that day, the confidential informant told both Deputy Davis and Sheriff Gober that he was with appellant when appellant sold someone crack cocaine on Davis Street. Deputy Davis testified that the informant stated that (1) appellant had on him a plastic vial of crack cocaine with a red lid, and (2) appellant was driving a maroon Chevrolet Caprice with big tires and chrome wheels.

Deputy Davis drove to the area to investigate, located appellant driving a maroon Chevrolet Caprice near Davis Street, and began to follow him. According to Deputy Davis, appellant spotted him when he passed by, and when Deputy Davis turned around to follow appellant, appellant

tried to lose him by making a couple of quick turns. Appellant turned into the first yard he could get to, at which time Deputy Davis pulled in, walked up to appellant's vehicle, identified himself, and told appellant he was investigating the information he had received. Deputy Davis noticed that appellant had a screwdriver in his hand and that he used the screwdriver to shut off the vehicle. Deputy Davis stated that he "took precautions at that point." Appellant stepped out of the vehicle, remained cooperative, and consented to a search of the vehicle. During a subsequent pat-down search for weapons, appellant tensed up and became combative, and subsequently, a plastic vial of crack cocaine fell out onto the ground. The circuit court later entered an order denying appellant's motion to suppress.

The cocaine was admitted into evidence at trial. Additionally, Deputy Mitchell, who arrived at the scene just after Deputy Davis initiated the investigatory stop, testified at trial that Deputy Davis asked appellant if he could "pat search" him and that appellant consented. He explained that, after Deputy Davis found a large amount of cash in appellant's front pocket, appellant "tensed up," and they calmed him down. Both deputies testified that, at that point, Sheriff Gober walked up and asked appellant if he could pat him down to see if he had anything, and appellant agreed that he could. All three of the officers stated that appellant unbuckled his own belt so that Sheriff Gober could search him, at which time Sheriff Gober ran his fingers around the edge of appellant's pants causing a vial of crack cocaine to fall down the leg of appellant's pants and onto the ground. Once the vial hit the ground, appellant started to stomp on it, and the officers placed him under arrest.

The jury found appellant guilty of possession of cocaine with intent to deliver, and a judgment and commitment order was entered on March 1, 2010. Appellant was sentenced as a habitual offender to 18 years in the Arkansas Department of Correction. He appealed his case to the Arkansas Court of Appeals and argued that the circuit court erred in denying his motion to suppress physical evidence discovered during the pat-down search of his person.

Decision by Arkansas Court of Appeals:

Appellant submitted that in order for an officer to perform a frisk search under Rule 3.4, an officer must reasonably suspect that the detainee is armed and presently dangerous to the officer or others. Reasonable suspicion has been defined as a suspicion based upon facts or circumstances that give rise to more than a bare, imaginary, or purely conjectural suspicion. Appellant submitted that Rule 3.4 is basically the embodiment of the standard developed by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Sibron v. New York*, 392 U.S. 40 (1968), both of which dealt with “stop and frisk” situations.

The Court noted that a stop is far less intrusive than a frisk, and the constitutional requirements for a stop are correspondingly less. *Leopold v. State*, 15 Ark. App. 292 (1985). Thus, a police officer may constitutionally stop a suspicious person although he has no justification to frisk him. *Id.* Once there is a reasonable stop, the governmental interest that permits the greater intrusion of the frisk is not the prevention or detection of crime but rather the protection of the officer making the stop. Even then, the frisk must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer.

The test in determining whether the frisk was reasonable is an objective one. While the officer need not be absolutely certain that the individual is armed, the basis for his acts must lie in a reasonable belief that his safety or that of others is at stake. Essentially, the question is whether a reasonably prudent man in the policeman’s position would be warranted in the belief that the safety of the police officer or that of other persons was in danger. The officer’s reasonable belief that the suspect is dangerous must be based on specific and articulable facts.

Appellant argued that the officers in the instant case lacked reasonable suspicion that he was armed and dangerous. Accordingly, he contended that, pursuant to Rule 3.4 and *Terry*, the pat-down search of his person was unreasonable under the Fourth Amendment of the United States Constitution; therefore, the crack cocaine should have been suppressed. He maintains that the totality of the circumstances in this case provides no “specific and articulable facts” upon which the inference could reasonably be warranted that Deputy Davis reasonably believed appellant to be “armed and presently dangerous” when the pat-down search was performed.

The Arkansas Court of Appeals disagreed. Neither probable cause nor reasonable suspicion is necessary for an officer to request consent for a search. *Howe v. State*, 72 Ark. App. 466 (2001). An officer may conduct a search of an individual’s person without a search warrant or other color of authority if the individual consents to the search. Ark. R. Crim. P. 11.1(a) and 11.2(a) (2010).

Valid consent to search must be voluntary, and voluntariness is a question of fact to be determined from all the circumstances.

Knowledge of the right to refuse consent to a search is not a requirement to prove the voluntariness of consent. *Medlock v. State*, 79 Ark. App. 447 (2002).

The Court held that there was evidence before them, specifically the trial testimony from Deputies Mitchell and Davis, along with Sheriff Gober, that indicates that appellant consented to a search of his person. Nothing in the record suggested that appellant's consent was not freely or voluntarily given. The officers did not instruct appellant that he was required to cooperate with the search, and they were not required to inform him that he could refuse consent to the search. *Medlock, supra*. To the contrary, testimony indicated that appellant undid his own belt to allow the sheriff to search him. The State argued, and the Court of Appeals agreed, that the search was reasonable and did not exceed the scope of the consent given. Sheriff Gober simply felt the outside edge of appellant's pants, shook them a little, and the vial of crack cocaine fell out on its own.

Additionally, the Court held that the search was lawful because the officers reasonably suspected that appellant was armed and that their safety or that of others was in danger. Appellant was suspected of selling crack cocaine, and people involved in narcotics dealing often carry weapons. *Cf. Kilpatrick v. State*, 322 Ark. 728 (1995). It is undisputed that appellant was actually carrying a screwdriver, which could be used as a weapon. Under such circumstances, a reasonable officer could, out of concern for his safety, conduct a pat-down search for weapons before taking his attention away from a suspect to conduct a vehicle search. Deputy Davis indicated that he was concerned for his safety, as evidenced by his testimony that, when he saw the screwdriver in appellant's hand, he "took precautions at

that point." Accordingly, the Court held that the pat-down search was justified under the totality of the circumstances.

Lastly, the Court held that the officers had probable cause to arrest appellant and search him incident to that arrest. A law-enforcement officer may arrest a person without a warrant if he has reasonable cause to believe that the person has committed a felony. Ark. R. Crim. P. 4.1(a)(i) (2010). Reasonable cause exists when "the facts and circumstances within the officers' collective knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant in a man of reasonable caution the belief that an offense has been committed by the person to be arrested." *Blockman v. State*, 69 Ark. App. 192, 197-98 (2000). An officer who has the authority to make an arrest also has the authority to conduct a search of the person incident to the arrest to obtain evidence of the commission of the offense for which he has been arrested or to seize contraband, the fruits of a crime, or other things criminally possessed or used in conjunction with the offense. Ark. R. Crim. P. 12.1(d) (2010). A search is valid as incident to a lawful arrest even if conducted before the actual arrest as long as the arrest and search are substantially contemporaneous and probable cause to arrest existed prior to the search.

The Court held that the information from the reliable informant, which was confirmed by officers, supplied probable cause to arrest appellant. *See Blockman, supra*. Because the officers had probable cause to arrest appellant, they also had the authority to conduct a search incident to arrest, which is permissibly more intrusive than a frisk under Rule 3.4 and *Terry*. Therefore, appellant's conviction was affirmed.

Case: This case was decided by the Arkansas Court of Appeals on December 1, 2010. This was an appeal from the Drew County Circuit Court, Honorable Robert Bynum Gibson, Jr., Judge. The case cite is *Franklin v. State*, 2010 Ark. App. 792.

Jeff Harper
City Attorney



Arkansas Supreme Court Affirms Conviction in Case in Which Appellant Argued the Admission of DNA Evidence

Facts Taken From the Opinion: On the night of July 4, 2008 and into the morning hours of July 5, 2008, a woman was repeatedly and violently assaulted and raped in her home by an intruder who held her against her will in Miller County, Arkansas. She eventually escaped and fled across the street where she was able to call the police. A subsequent investigation led police to arrest Myka Talley. He was taken to an interrogation room and was given a *Miranda* rights form. Talley acknowledged that he understood his rights but refused to sign a waiver of those rights. He then invoked his right to remain silent.

Police then ceased asking Talley about the crime but did ask him to submit to a DNA test. Talley remained silent and did not respond. After the police requested a DNA sample two more times, he responded, "Y'all are going to get it anyway, right?" Police then took a buccal swab from Talley's mouth. A comparison of DNA collected from the victim with the sample obtained from Talley determined within all

scientific certainty that the DNA was a match.

Prior to trial, on March 17, 2009, Talley filed a motion to suppress the buccal swab, and the subsequent test results, alleging that they were obtained in violation of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding Articles under the Arkansas Constitution. Talley also argued that any DNA results should be suppressed as tainted "fruits" of those violations. At a March 23, 2009 suppression hearing, Talley argued that by continuing to interrogate him after he invoked his right to counsel and right to remain silent, the police coerced him into consenting to a DNA sample.

The Circuit Court denied the motion to suppress finding that: (1) a request for, and the taking of, a DNA sample is not a violation of the Fifth Amendment; (2) the appellant's consent to the DNA sample was voluntary under the totality of the circumstances; and (3) the DNA evidence would have been inevitably discovered during the course of the investigation due to the overwhelming probable cause that had been established.

Talley was convicted by a jury and sentenced to serve eight consecutive life sentences for seven counts of rape and one count of kidnapping. On appeal, he claimed that the circuit court erred in denying his motion to suppress DNA evidence allegedly obtained in violation of his Fifth Amendment right to counsel and right to remain silent; that his consent to the DNA was coerced through police violations of his Fifth Amendment right to counsel and right to remain silent; and that the circuit court erred in allowing two police officers to

testify at trial as to comments made by the victim.

Decision by Arkansas Supreme Court: On appeal, Talley relied on Arkansas Rule of Criminal Procedure 4.5, which states that “[n]o law enforcement officer shall question an arrested person if the person has indicated in any manner that he does not wish to be questioned, or that he wishes to consult counsel before submitting to any questioning.” Ark. R. Crim. P. 4.5 (2010). Talley further cited *Wedgeworth v. State*, for the proposition that “[o]nce a defendant invokes his Fifth Amendment right to counsel at a custodial interrogation, the police may not interrogate him further until counsel is provided, or until the defendant initiates further communication.” 374 Ark. 373, 377 (2008).

The Court held that Talley had invoked his right to counsel and his right to remain silent. The question is whether, by requesting a DNA sample from the appellant, the police continued the interrogation for purposes of the Fifth Amendment. The Court held that it did not.

The police request for a DNA sample did not constitute continued interrogation under *Miranda*. Interrogation, for purposes of *Miranda* protections, means express questioning or any words or actions by the police that the police should have known are reasonably likely to elicit an incriminating response. *State v. Pittman*, 360 Ark. 273, 278 (2005); *see also Rhode Island v. Innis*, 446 U.S. 291 (1980). A request for a DNA sample is neither express questioning in relation to an investigation nor does it constitute words or actions by police that are reasonably likely to elicit an incriminating response. This is true for two reasons. First, a request for DNA is not reasonably likely to elicit incriminating statements, but rather is

an effort to obtain consent for a physical test. A police request for DNA does not call for any verbal response aside from a yes or no. Second, although the results of a DNA test can be incriminating, they are the results of a demonstrative, physical test and are not testimony or a communicative act. *See Moore v. State*, 323 Ark. 529, 537–38 (1996).

Talley next argued that his alleged consent to DNA sampling was, under the totality of the circumstances, involuntary. Appellant claimed that his consent was coerced because the interrogation continued after he invoked his right to counsel and right to remain silent.

"We have already held that the police request for a DNA sample was not a continuation of the interrogation under the Fifth Amendment. In light of this holding, Talley's argument in connection with continued interrogation is without merit. Aside from his Fifth Amendment argument, Talley has not developed any other argument and has cited no additional case law to support his assertion that the police conduct was coercive."

Last, Talley argued that the circuit court erred in alternatively holding that the inevitable-discovery exception to the exclusionary rule would apply in this case. Talley contended that the State did not establish by a preponderance of the evidence that the DNA evidence inevitably would have been discovered by lawful means. The Court held that because they had affirmed the circuit court's primary grounds for denying the Talley's motion, they declined to address this issue.

On the argument of the police officers' testimony, the State called two police officers to testify as to what the victim had

told them. Talley objected, arguing that the witnesses' testimony was inadmissible hearsay. The State responded that the testimony fell under the "excited-utterance" exception found in Arkansas Rule of Evidence 803(2), which states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (2) *Excited Utterance*. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ark. R. Evid. 803(2) (2010).

The Arkansas Supreme Court held that the circuit court did not abuse its discretion in allowing the testimony because the statements made by the victim qualify as excited-utterances under the five-factor test used in *Rodriguez v. State*, 372 Ark. at 337 (2008). These factors are (1) the lapse in time between the event and the statement; (2) the age of the declarant; (3) the declarant's physical and mental condition; (4) the characteristics of the event; and (5) the subject matter of the statement. To be an excited utterance, the statement must appear to be spontaneous, excited, or impulsive, rather than the product of reflection and deliberation.

Talley did not dispute that the victim was excited. She had just been violently assaulted with a knife and raped orally, anally, and vaginally repeatedly for many hours. The victim only escaped after her attacker fell asleep while still wrapped around her. She ran next door and immediately called 9-1-1. The police who testified at trial stated that they arrived to find the victim shaken up, crying, and very upset. The nature of the attack was horrific, brutal, and unrelenting. The attack took place while the victim's eleven-month-old child lay nearby. Under these circumstances,

the Court held that they could not say the circuit court abused its discretion in holding that the victim's statements to the police were excited-utterances. The Court therefore affirmed the circuit court on this point.

The Arkansas Supreme Court found against Myka Talley on all points raised and therefore affirmed the conviction of the circuit court.

Case: This case was decided by the Supreme Court of Arkansas on September 30, 2010 and was an appeal from the Miller County Circuit Court, Hon. Kirk Johnson, Judge. The case cite is *Talley v. State*, 2010 Ark. 357.

Jeff Harper
City Attorney



Eighth Circuit Affirms Dismissal of Claims Against Missouri Police Officers in a Civil Rights Case in Which the Appellant Alleged the Two Officers Failed to Protect Him From an Intoxicated Driver at the Accident Scene

Facts Taken From the Opinion: Late on December 28, 2002, and into the early morning of December 29, Michael S. Dodd (appellant) was at the Route 66 Tavern in Lawrence County, Missouri. A witness reported that Dodd "had way more than enough to drink" and fell off a bar stool. Another witness stated that Dodd was "rowdy" and was "pretty drunk." Bar employees ejected Dodd approximately thirty minutes prior to closing time for breaking a beer mug.

Soon after Dodd departed, Micki Langley left the Route 66 Tavern with two passengers in her vehicle. While traveling south on Route M, she happened upon what appeared to be a single-car accident involving Dodd's pickup truck. Dodd's truck was partially in the ditch and partially blocking the southbound lane, nearly perpendicular to Route M. Kima Montgomery, one of Langley's passengers, noticed Dodd lying in the southbound lane, immediately north of the pickup.

After driving over debris from the accident, Langley stopped her vehicle south of Dodd's body in the northbound lane. Montgomery and fellow passenger Stanley Mason attended to Dodd, who was semi-conscious, and called 911. Langley turned her vehicle around and shined the headlights north toward Dodd. The passersby covered Dodd with a cloth from Langley's vehicle to keep him warm, and tried to assess the extent of Dodd's injuries while waiting for rescue personnel to arrive.

Missouri State Highway Patrolman Steven Jones and Lawrence County, Missouri Deputy Sheriff Mike Thorn arrived in separate vehicles, within minutes of Montgomery's 911 call. They approached the scene from the south and parked their vehicles behind Langley's with headlights on and emergency lights flashing.

The officers feared that Dodd might have suffered a spinal injury, so they did not move him from Route M. Jones asked Mason to hold Dodd's head steady. At some point, Jones directed Langley to move her vehicle to a private drive east of Route M to provide space for an ambulance. During this time, Jones also began investigating Dodd's accident. He attempted to read Dodd's blood-alcohol content on a portable breath testing device. Montgomery noticed Jones

"writing down a lot of things," including the license plate number of Dodd's pickup. Jones also searched Dodd's wallet for identification.

Meanwhile, Deputy Thorn attempted to contact the ambulance crew to notify it that Dodd was seriously injured, but he was unable to call out on his handheld radio. Thorn returned to his vehicle to try other means of contacting the ambulance. He then returned to Dodd's side, and Montgomery observed him shining a flashlight to assist Jones's search for Dodd's identification.

Approximately six minutes after Jones and Thorn arrived, Thomas McSwain's southbound pickup truck approached the scene. Thorn warned Jones and the others about McSwain's oncoming truck, and Jones waved his arms and his flashlight to warn McSwain of the accident scene. But McSwain, whose blood-alcohol content later tested at 0.164 percent, did not stop. McSwain's pickup struck Dodd, pushing his body fourteen feet south of where he initially rested on Route M, and then hit Dodd's truck. Jones and Thorn, with weapons drawn, ordered McSwain to stop. McSwain ignored the order, shifted to reverse, and ran over Dodd a second time, stopping only when Jones knocked on the driver's side window. Jones arrested McSwain for careless and imprudent driving.

After McSwain struck Dodd, Jones ascertained that Dodd had suffered additional injuries but was still alive. While waiting for the ambulance, Mason again tried to minimize Dodd's movements to avoid aggravation of his injuries. Jones asked the ambulance crew to expedite its arrival and requested a rescue helicopter. At this point, Jones again used the preliminary breath testing device to read Dodd's blood

alcohol content. Dodd was unresponsive due to his injuries, so Jones placed the device close to Dodd's lips and tested his normal exhalation. According to Jones, that process provided "plenty of air to get a reading" well above 0.08 percent.

As a result, Jones placed Dodd under arrest for driving while intoxicated. He read Dodd Missouri's Implied Consent Law, which provides that upon arrest for driving while intoxicated, a person "shall be deemed to have given consent to . . . a chemical test or tests of the person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood." Dodd did not respond. Jones asked paramedic Jay Fry to obtain a blood sample from Dodd to test for intoxicating substances. Fry complied, and Jones took possession of the blood sample. Dodd received treatment at a nearby hospital for critical injuries. Jones inexplicably left Dodd's blood sample in his home refrigerator for several weeks, and the sample was not tested until approximately one month after it was obtained.

Dodd sued Jones and Thorn under 42 U.S.C. § 1983 in their individual and official capacities. He alleged that the officers failed to protect him from McSwain, because they did not park their vehicles or set road flares north of the accident, where McSwain later approached Dodd's body. Dodd asserted that in failing to take such measures, Jones and Thorn violated policies of the Missouri State Highway Patrol and Lawrence County. Dodd also alleged that the act of analyzing his blood one month after his arrest violated the Fourth Amendment, and that Jones violated the Health Insurance Portability and Accountability Act (HIPAA) by taking custody of Dodd's blood without express consent.

The district court granted the officers' motions for summary judgment. As to the individual capacity claims, the district court determined that Dodd failed to establish a violation of a constitutional or statutory right. The court also ruled that Dodd failed to show the existence of an unconstitutional policy or a pattern of misconduct, as necessary for the claim against Thorn in his official capacity. Finally, the court dismissed the official capacity claim against Jones based on sovereign immunity. Dodd appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit.

Decision by Eight Circuit Court: The Court first considered Dodd's claim that Jones and Thorn violated his rights under the Due Process Clause by failing to protect him from McSwain. The Due Process Clause generally does not provide a cause of action against state officials for harm caused by private actors. When a State takes a person into custody and holds him against his will, however, the Constitution imposes upon the State a corresponding duty "to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989). A similar responsibility may arise if the State, against a person's will, places him in a position of danger that would not have existed without the State's intervention. *James ex rel. James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006). Even in these situations, the state officials are liable, on a theory of substantive due process, only if their actions are so egregious or outrageous as to "shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). If actual deliberation is practical, then a showing of deliberate indifference is required; otherwise, a purpose to cause harm

may be necessary to trigger liability. *Lewis*, 523 U.S. at 850-51.

"We doubt whether the evidence supports a finding that Jones and Thorn took Dodd into custody and held him against his will so as to trigger the corresponding duty described in *DeShaney*. When the officers encountered Dodd, he was incapacitated and lying on the roadway. There is no showing that Dodd could have removed himself from the roadway, or that a passersby would have moved him out of the path later taken by McSwain, if Jones and Thorn had not arrived on the scene. Langley and her companions had covered Dodd to keep him warm and summoned assistance, but gave no indication of a desire to move his body while awaiting emergency medical personnel. Jones purported to place Dodd "under arrest" only after the intoxicated driver struck Dodd. The absence of a clearly established constitutional duty for the officers to act to protect Dodd under these circumstances is sufficient grounds to affirm the district court's grant of summary judgment in a qualified immunity case." See *Jackson v. Schultz*, 429 F.3d 586, 590-91 (6th Cir. 2005); *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1176-77 (7th Cir. 1997); *Harris v. District of Columbia*, 932 F.2d 10, 14-15 (D.C. Cir. 1991).

Dodd contended alternatively that a constitutional duty of care arose because some actions by Jones and Thorn placed him in a worse position than what prevailed before they arrived, and that he was thus subjected to a "state-created danger." He argued that the emergency lights placed by the officers in the northbound lane might have distracted McSwain and prevented him from noticing Dodd in the southbound lane. He also asserted that Jones put him in a more perilous position by having Langley move her vehicle, because Langley had

shone her vehicle's headlights in Dodd's direction. "We think the possibility that the rescue efforts by Jones and Thorn made Dodd worse off is too speculative to trigger any constitutional duty of care. McSwain was an intoxicated driver who first ignored emergency lights, a flashlight, and waving arms warning him of the accident scene, and then disregarded the order of armed law enforcement officers to halt before he ran his vehicle over Dodd a second time. There is little, if any, reason to believe that the risks to Dodd were greater than if the officers had retained the *status quo* upon their arrival."

"Even assuming, moreover, that a constitutional duty of care arose, the evidence does not support a finding that the conduct of Jones and Thorn was so outrageous as to shock the contemporary conscience. The officers plainly did not act with a purpose to harm Dodd. It is questionable whether actual deliberation was practical in this situation, where Jones and Thorn did not have time to make 'unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations.'" "But accepting for purposes of analysis that deliberate indifference to Dodd's well-being could have given rise to constitutional liability, the evidence does not support such a finding."

"Rather than ignore Dodd's predicament, the officers took affirmative steps designed to protect his health and safety. They parked their vehicles with headlights on and emergency lights flashing to alert oncoming traffic to a hazardous situation. Jones asked passerby Mason to hold Dodd's head still to protect against injury, and directed Langley to move her vehicle to make space for an ambulance. Thorn attempted to relay information about Dodd's condition to

emergency personnel. When McSwain approached the scene, Jones attempted to alert him of the accident scene with his flashlight and waving arms. That placement of a barrier or flares on the road might have been more effective in protecting Dodd does not establish that the officers were deliberately indifferent to Dodd's well-being." "[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process," and the Constitution imposes no obligation on the State to provide perfect or even competent rescue services. *Brown v. Pa. Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 478 (3d Cir. 2003)."

Dodd's next contention was that Jones violated his rights to be free from unreasonable searches under the Fourth Amendment by causing his blood sample to be tested almost one month after it was taken. Dodd argued that any exigent circumstances that justified the taking of his blood dissipated before Jones arranged for the testing, and that chemical analysis conducted without a warrant was unreasonable.

Because the percentage of alcohol in the blood diminishes with time, an effort to secure evidence of blood-alcohol content by drawing blood from a suspect after his arrest is a reasonable search incident to arrest. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); *United States v. Eagle*, 498 F.3d 885, 892 (8th Cir. 2007). Dodd contended that *Schmerber* justifies only the taking of the blood, and not the subsequent testing. He posits that the drawing of the blood is a reasonable "seizure," but that the testing is a separate "search" that must be justified independently.

The Court held on this issue that Jones was entitled to judgment on this claim, because

the testing of Dodd's blood required no justification beyond that which was necessary to draw the blood on the night of the accident. *Schmerber* indicates that the taking and later analysis of the blood are "a single event for fourth amendment purposes," *United States v. Snyder*, 852 F.2d 471, 474 (9th Cir. 1988), and that "a 'search' is completed upon the drawing of the blood." *Johnson v. Quander*, 440 F.3d 489, 500 (D.C. Cir. 2006).

Dodd made further arguments concerning violation of his "right of privacy" by the officer obtaining the blood sample from paramedic, and the Eighth Circuit on this issue agreed with the district court in ruling that this claim failed.

The Court further noted that Dodd's official capacity claim against Thorn amounts to a claim against Lawrence County. Because Dodd had not presented sufficient evidence that Thorn committed a constitutional violation, the claim for municipal liability fails as well. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

Therefore, after deciding the issues in favor of the officers, the Eighth Circuit affirmed the judgment of the district court.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on October 18, 2010. The case cite is *Dodd v. Jones*, 623 F.3d 563 (8th Cir. 2010).

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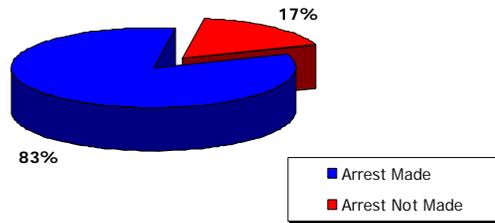


Report on 2009 Intimate Domestic Violence in Springdale

On October 8, 2010, the City Attorney's Office released its 2009 Report on Intimate Domestic Violence in Springdale. The report can be accessed at our website at www.springdalear.gov/cosa by clicking on the name of the report at the bottom of the home page or by clicking on either the "Domestic Abuse" or "Statistics" tab on the right side of the home page and clicking on the title of the report.

There were more intimate domestic violence incidents reported to Springdale Police in 2009 than in any other past year. In 2009, Springdale Police made an arrest or had a warrant issued in 83% of the total intimate domestic violence incidents that was reported. Below is a chart showing the total number of incidents reported to Springdale Police in the past five years, as well as a chart indicating the percentage of arrests made for intimate domestic violence.

CHART 7
Intimate Domestic Violence Incidents Reported to Springdale Police in 2009



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2009 Report on Drunk Driving in Springdale Released

On November 22, 2010, the City Attorney's Office released its 2009 Annual Report on Drunk Driving. The report can be accessed at our website at www.springdalear.gov/cosa by clicking on the name of the report at the bottom of the home page or by clicking on either the "DWI/DUI" or "Statistics" tab on the right side of the home page and clicking on the title of the report.

Also contained in this report is a summary of arrests and crashes for the first decade of the 21st century (Years 2000-2009). That chart is set out below.

CHART 4
Comparison of Intimate Domestic Violence Reported to Springdale Police in Past Five Years

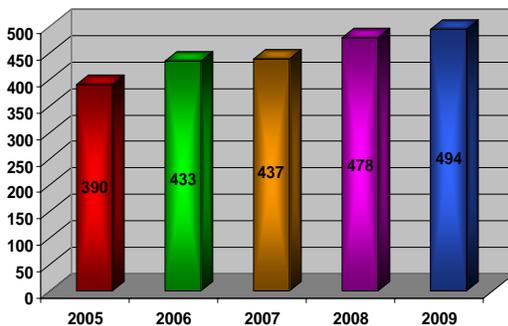
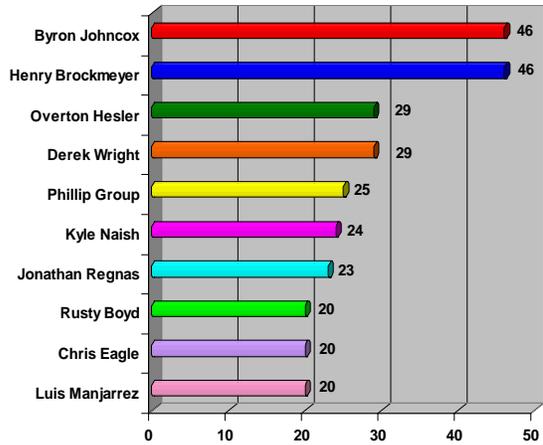


Chart No. 20
Summary of DWI Arrests and
Crashes for the First Decade of the
21st Century in Springdale, Arkansas
(Years 2000 – 2009)

Total Number DWI Arrests	7,566
Total Number DWI Crashes	1,301
Total DWI Fatality Accidents	13
Total Persons Killed in DWI Crashes	14
Total Persons Injured in DWI Crashes	582

most DWI arrests made for Springdale Police Officers, each making 46 DWI arrests.

Diagram 5
 SPD Officers Who Made 20 or More
 DWI Arrests in 2009



Also set out is Diagram 5 which lists every Springdale Police Officer who made 20 DWI arrests or more in 2009. Congratulations to Byron Johncox and Henry Brockmeyer, both who tied for the

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