# C.A.L.L.

Issue 01-1 City Attorney Law Letter January 1, 2012

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## Arkansas Supreme Court Affirms Denial of Defendant's Motion to Suppress Evidence and Holds that Officer Obtained Consent to Search Defendant's Person

**Facts Taken From the Case:** On January 26, 2009, Deputy Rex Davis of the Drew County Sheriff's Department received a tip from a confidential informant that Tyrone Webb (who was on parole from the Arkansas Department of Correction) was dealing cocaine from his vehicle. Deputy Davis called Deputy Jeremy Chapman, also of the Drew County Sheriff's Department, and told Deputy Chapman about the tip from the confidential informant. Deputy Davis also told Deputy Chapman that Tyrone Webb was in his vehicle in Wilmar, Arkansas, where Deputy Davis had seen Webb commit a traffic violation.

Deputy Chapman located Webb's vehicle in Wilmar, Arkansas, and he initiated a traffic stop after witnessing Webb's vehicle cross the center line by almost three feet. According to the testimony of Deputy Chapman, after approaching Webb's vehicle he asked Webb to exit the vehicle and for consent to search it, whereupon Webb handed over the keys and said "I don't have anything to hide." Deputy Chapman searched the vehicle and found nothing incriminating. Deputy Chapman then asked to pat down Webb's person, received consent, and felt a hard, foreign object in Webb's groin area. After a short struggle, Webb was detained and a clear plastic vial containing nine white rock-like substances was found in his groin area. Deputy Chapman admitted that he had asked to search Webb's person because Deputy Davis had indicated that the information he received from the informant was that Webb was hiding crack cocaine in his groin area.

Webb's version of the facts differed slightly from Deputy Chapman's version. According to Webb, Deputy Chapman approached the vehicle, asked Webb to step-out of the car, asked Webb if he had any weapons, and patted Webb down. Webb said that Deputy Chapman and Deputy Chris Owen then discovered that a passenger in Webb's car had an active warrant and placed the passenger under arrest. Thereafter, Webb stated that Deputy Chapman searched Webb's vehicle without obtaining Webb's consent. Finally, Webb said that after finding nothing in the car, Deputy Chapman again searched Webb's person without Webb's consent, this time focusing on Webb's groin area. Webb said that he moved when Deputy Chapman touched his groin area, and as a result the officers put him on the ground, unzipped his pants, and pulled them down.

**Procedural Facts Taken From the Trial Court:** Webb filed a motion to suppress the cocaine found on his person, arguing that it was seized in violation of his right to be free from illegal searches and seizures under the Fourth and Fourteenth Amendments of the United States Constitution and article 2, section 15 of the Arkansas Constitution. Webb argued that the search took place after a pretextual traffic stop and was done presumably under the auspices of a search for weapons. Webb said that the traffic stop was based solely on unsubstantiated and unreliable information, and that any consent granted by him was therefore illegally obtained and given without having the benefit of proper warnings to make the consent voluntary.

The State argued that Webb did not have standing to challenge the search because (1) as a parolee, Webb was still in the custody of the Arkansas Department of Correction, and (2) Webb signed a parole agreement agreeing to warrantless searches at the direction of or by his parole officer.

Alternatively, the State argued that the search was valid incident to an investigatory stop pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure.

In response, Webb argued that the advance consent to search that he had signed as a condition of his parole only allowed searches by his parole officer or by a Department of Community Correction officer at the request of his parole officer. Webb said that the parole agreement did not allow warrantless searches by any and all law enforcement officers, and that the traffic stop and search of his car and person was a classic pretextual stop and search.

In denying Webb's motion to suppress evidence, the trial court held that the search of Webb's person was limited in nature; that as a parolee, Webb had no expectation of privacy when stopped in an investigatory matter; and that the search was done incident to an investigatory stop. The trial court also said that while it did not believe that Deputy Chapman needed Webb's consent to pat him down, it found that Deputy Chapman had received Webb's consent. In clarifying its reasoning for Webb, the trial court said that Deputy Chapman's testimony that he initiated the stop after Webb had crossed the center line was credible; that after the stop, Deputy Chapman had a right to conduct a pat-down search; that the stop was a valid investigatory stop; that Webb was on parole and had a stepped-down status as far as the right to privacy; that consent to search was given; and that the frisk was not overly intrusive.

Following the trial court's denial of Webb's motion to suppress evidence, Webb was found guilty by a jury of possession of cocaine, and he was sentenced as a habitual offender by the court to twenty-two years in prison to run concurrent to the sentence he was serving after revocation.

**Argument, Applicable Law, and Decision by the Arkansas Supreme Court:** For his sole argument on appeal, Webb argued that the trial court committed reversible error by denying his motion to suppress on the basis that Webb was provided a lesser expectation of privacy because of his parolee status. Webb asserted that Deputy Chapman had no authority to search his person based on the parolee consent-to-search agreement because based on the terms and condition of that agreement, any search was limited to parole officers or to Department of Community Punishment officers.

The Arkansas Supreme Court (hereinafter referred to as "the Court") first set forth the standard it uses in reviewing the denial of a motion to suppress evidence. The Court said that it conducts a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. Furthermore, the Court said that a finding is clearly erroneous, even if there is evidence to support it, when the appellate court, after review of the entire evidence, is left with the definite and firm conviction that a mistake has been made. Finally, the Court said that it defers to the superiority of the trial judge to evaluate the credibility of witnesses who testify at a suppression hearing.

The Court affirmed the trial court's decision to deny Webb's motion to suppress. The Court said that it affirmed the trial court's denial of suppression on the basis that the search of Webb's person was consensual following a valid traffic stop. Thus, the Court said that it was not necessary to address Webb's status as a parolee.

In its reasoning, the Court noted that Deputy Chapman's initial decision to stop Webb was entirely legal. The Court said that in order

for a police officer to make a traffic stop, the officer must have probable cause to believe that the vehicle has violated a traffic law. Furthermore, whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation that the officer believed to have occurred. In applying the law to Deputy Chapman's traffic stop of Webb, the Court said that Deputy Chapman testified that he observed Webb cross the center line by at least three feet, and that under A.C.A. § 27-51-301 vehicles must be driven on the right half of the road. Finally, the Court noted that the trial court found Deputy Chapman's testimony to be credible on that point.

Next, the Court addressed the search of Webb's person. It said that Arkansas Rule of Criminal Procedure 11.1 allows for an officer to "conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search or seizure," and that a consensual search shall not exceed in duration or scope the limits of the consent given. Ark. R. Crim. P. 11.3. Also, the State has the burden of proving by clear and convincing evidence that consent to search was freely and voluntarily given and that there was no actual or implied duress or coercion. Ark. R. Crim. P. 11.1(b). Furthermore, the Court said that the United States Supreme Court has held that the test for a valid consent to search is that the consent be voluntary, and voluntariness is a question of fact to be determined from all the circumstances. Finally, the Court said that knowledge of the right to refuse consent to search is not a requirement to prove voluntariness of consent.

The Court noted that Deputy Chapman and Webb provided different versions of events, and that it was apparent that the trial court found Deputy Chapman's testimony to be more credible than Webb's testimony. The Court said that it had a long-standing rule that it is the trial court's province to determine credibility of witnesses, and that there was no evidence that Webb was coerced into consenting.

**Case:** This case was decided by the Supreme Court of Arkansas on October 13, 2011, and was an appeal from the Drew County Circuit Court, Honorable R. Bynum Gibson Jr., Judge. The case citation is *Webb v. State*, 2011 Ark. 430.

**Prosecutor's Note:** The one exception to the rule that knowledge of the right to refuse consent to search is not a requirement to prove voluntariness of consent is when consent is used to search a home. When obtaining consent to search a home, the person providing consent must be informed of the right to refuse consent.

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## Arkansas Supreme Court Affirms Conviction in Computer Child Pornography Case From Crawford County, Arkansas

**Facts Taken From the Case:** On May 20, 2008, David Wayne Fuson (appellant) initiated an online conversation in a chat room with Patti Bonewell, a detective in the Crawford County Sheriff's Department, who is affiliated with the task force combating internet crimes against children. Appellant identified himself as a thirty-four-year-old male from Stillwell, Oklahoma.

Bonewell, acting undercover, posed as a fourteen-year-old female named "Kaylee" from Van Buren, Arkansas. As shown by a transcript of their online discussion dated June 6, 2008, "Kaylee" accepted appellant's

invitation to meet with him late that evening after he completed his shift at work. When "Kaylee" asked what they might do, appellant replied, "Well, I can be a romantic guy and like to kiss and hold you is that ok?" Appellant also wrote that "I want to get to know you and kiss that pretty face and hold you and just some love n." "Kaylee" asked appellant if kissing her was all that he wanted to do, and appellant responded "no that's not all . . . maybe if the timing is right we can get naked." Appellant later questioned "Kaylee" as to whether she was a virgin.

After receiving directions by phone, appellant traveled from Stilwell to "Kaylee's" home in Van Buren. When he arrived, appellant parked his truck across the street from the residence, and he was arrested just before he reached the front porch of the house. Officers impounded appellant's truck, where they found condoms and lubricating jelly inside a sack.

Following his arrest, appellant executed a form waiving his rights under *Miranda* and gave a statement to Detective Ken Howard of the Crawford County Sheriff's Department. In this video-recorded interview, appellant admitted that it was his intention that evening to engage in sexual intercourse with a fourteen-year-old female. Appellant also issued a written statement, which read, "I talk[ed] to her online and I know that she was underage and I was coming over to have sex with her."

Prior to trial, appellant filed a timely motion to suppress his custodial statements. Appellant claimed that his oral and written statements were made involuntarily because, immediately following appellant's waiver of rights, Detective Howard initiated the conversation by stating, "What we need to do is we just need to kind of get this cleared up tonight, so I need for you to tell me what's going on over here." Appellant contended that Howard's statement constituted a false offer of reward or leniency because it conveyed the impression that, if he cooperated, he would be allowed to go home. Appellant maintained that his claim was bolstered by Howard's subsequent statement that "I appreciate you being cooperative tonight, it's going to look a lot better on you." At the suppression hearing, Howard testified that he was familiar with the prohibition against making false promises of reward or leniency and that nothing he said during the interview was intended to be a false promise of leniency. The circuit court denied the motion to suppress by written order dated February 19, 2009.

On the day of trial, appellant orally moved to exclude the evidence seized from his truck. Appellant argued that the search was not valid as a search incident to arrest under Rule 12.4 of the Arkansas Rules of Criminal Procedure because he was not in the vicinity of the truck when he was taken into custody and because Detective Bonewell did not have a reasonable belief that the truck contained anything connected with the offense. Bonewell testified on voir dire that she conducted a search of the truck incident to appellant's arrest, taking note of items that were inside the truck. She further testified that it was "our policy" to conduct an inventory of a vehicle and that she did not remove any property from the truck until she performed an inventory of its contents the following day. Bonewell also stated that, based on her experience from previous cases, perpetrators brought to such liaisons the type of things that appellant had in his truck. Based on the voir-dire examination of Bonewell, the circuit court denied appellant's motion to prohibit the introduction of the condoms and lubricating jelly, finding that the search was permitted incident to the arrest and that, in any event, the evidence inevitably would have been

discovered during the inventory search of the vehicle.

At the conclusion of the evidence, which included appellant's testimony, the jury found appellant guilty as charged. He received a sentence of 20 years in prison with 15 of those years suspended. Appellant appealed his conviction to the court of appeals, which affirmed. *Fuson v. State*, 2010 Ark. App. 593. See *Arkansas Court of Appeals Affirms Conviction in Computer Child Pornography Case Out of Crawford County* on page 10 of the January 1, 2011 edition of *C.A.L.L.* Appellant then appealed to the Arkansas Supreme Court.

**Argument and Decision by Arkansas Supreme Court:** Appellant's first point on appeal was that the circuit court erred in denying his motion to suppress his custodial statements. Appellant contended that Howard's comment about "clearing up" the matter that night and the statement that appellant's cooperation would be viewed favorably led him to believe that he would be released from custody if he cooperated with the police.

The Court noted that it is well settled that a statement induced by a false promise of reward or leniency is not a voluntary statement. *Wallace v. State*, 2009 Ark. 90, 302 S.W.3d 580. When a police officer makes a false promise that misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been made voluntarily, knowingly, and intelligently. *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003). For the statement to be involuntary, the promise must have induced or influenced the confession. *Id*.

In considering the totality of the circumstances, the Court considers two main components: first, the statement of the officer and second, the vulnerability of the defendant. If during the first step, this court decides that the officer's statement is an unambiguous false promise of leniency, there is no need to proceed to the second step because the defendant's statement is clearly involuntary. *Clark v. State*, 374 Ark. 292, 287 S.W.3d 567 (2008). The Court also does not move forward to the second step if we conclude that no false promise of reward or leniency was made.

The Court held that Howard's statement about clearing up the matter that evening was not an unambiguous promise of leniency. The Court held this comment does not remotely suggest that appellant would be released from custody following the interview. Moreover, the notion that appellant was falsely led to believe that his release was imminent is belied by appellant's statement during the interview that "I just want to go home. *I don't know if I can*, but I just want to go home." Although appellant contended that Howard's remark that his cooperation would be viewed favorably reinforced the alleged false promise, Howard made this comment *after* appellant confessed. Therefore, this statement could not have influenced the confession. The Court also noted that appellant confirmed in his testimony at trial that he believed he was meeting a fourteen-year-old child that night. He also acknowledged on both direct and cross-examination that he was being honest with Detective Howard when he confessed that his purpose was to have sexual intercourse with the young girl. By this testimony, appellant waived the suppression issue by testifying at trial and adopting as true the material portions of the challenged pretrial statement. For these reasons, the Arkansas Supreme Court held that the circuit court did not clearly err in denying the motion to suppress appellant's custodial statements.

The Court affirmed the judgment of the Circuit Court and vacated the opinion of the Arkansas Court of Appeals.

**Case:** This case was decided by the Supreme Court of Arkansas on September 22, 2011 and was an appeal from the Crawford County Circuit Court, Honorable Michael Medlock, Judge. The case cite is *Fuson v. State*, 2011 Ark. 374.

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## Arkansas Court of Appeals Holds Defendant who Smoked Two Blunts Knowingly, Intelligently, and Voluntarily Waived his Miranda Rights

**Facts Taken From the Case:** On February 1, 2010, at 2:00 p.m., James Thompson was interviewed by detectives of the Texarkana Police Department about his alleged involvement in a rape. Before being interviewed, Thompson was given a detailed explanation of his Miranda rights. Thompson affirmed that he understood his Miranda rights, asked lucid and relevant questions about them, and stated that he wanted to be interviewed without the presence of an attorney. Thompson told the detectives that he had smoked two "blunts" of marijuana sixteen hours earlier, but that he was no longer under the influence of the marijuana. The interview lasted around forty-five minutes.

Initially, Thompson was untruthful about his activities and frequently changed his narrative when caught telling a lie. However, about twenty minutes into the interview, Thompson decided to "tell the truth" and began crying and expressing shame, remorse, and fear of the consequences of his actions. Thompson then regained composure and told detectives that the victim initially laughed at his advances and agreed to have sex with Thompson only after he threatened her with a gun.

**Procedural Facts Taken From Trial Court:** Thompson asked the trial court to suppress the statements he made to detectives and argued that he was too intoxicated to knowingly, intelligently, and voluntarily waive his constitutional rights. At the suppression hearing, the tape of Thompson's statement was played, and the detectives said that Thompson was not intoxicated and offered a coherent, responsive, and voluntary statement. In denying Thompson's motion to suppress statement, the trial court found the testimony of the detectives to be credible and noted that even though Thompson became emotional during the interview, Thompson did not appear to be hysterical or incapable of giving coherent responses.

After a jury trial, Thompson was convicted of two counts of rape and was sentenced to two ten-year terms of prison to be served consecutively.

**Argument, Applicable Law, and Decision by Court of Appeals:** On appeal to the Arkansas Court of Appeals, Thompson argued that the trial court erred when it denied his motion to suppress his recorded statements made to the detectives. In particular, Thompson argued that he was too intoxicated to knowingly, intelligently, and voluntarily waive his constitutional rights. The Court of Appeals rejected Thompson's argument and held that Thompson was not so intoxicated as to render his statement involuntary. Therefore, the Court of Appeals affirmed the decision of the trial court to allow Thompson's statement to be admitted into evidence.

The Arkansas Court of Appeals noted that in ruling on the voluntariness of a confession, it reviews the trial court's findings of fact for clear error, and then it makes an independent determination based on the totality of the circumstances in deciding the ultimate legal question of whether the confession was voluntary. Also, the Court of Appeals said that when a defendant claims that his confession was rendered involuntary because of drug or alcohol consumption, the level of the defendant's comprehension is a factual matter to be resolved by the trial court. Finally, the court said that the test of voluntariness of one who claims intoxication at the time of waiving his rights and making a statement is whether the person was of sufficient mental capacity to know what he was saying (capable of realizing the meaning of his statement) and not suffering from any hallucinations or delusions.

**Secondary Issue on Appeal:** In his appeal to the Court of Appeals, Thompson also argued that the trial judge abused his discretion by disregarding the jury's recommendation that Thompson serve his terms of imprisonment concurrently rather than consecutively. The Court of Appeals rejected this argument and said that a criminal defendant has no right to a suspended sentence or to have his sentences run concurrently. In addition, the Court of Appeals said that these matters are within the sound discretion of the trial court, and that when deciding the issue the trial judge may not take judicial notice of the record in a separate case. Finally, the court said that the trial judge pointed out that Thompson was a sexual predator who had been stalking the victim for some time, and that the trial judge mentioned nothing about matters that were not admitted into evidence. Therefore, the Court of Appeals said the trial court had committed no error.

**Case:** This case was decided by the Arkansas Court of Appeals on October 12, 2011, and was an appeal from the Miller County Circuit Court, Honorable Kirk Johnson, Judge. The case citation is *Thompson v. State*, 2011 Ark. App. 605.

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## Defendant Possessed Items Found in His Brother's Home Court of Appeals Says

**Facts Taken From Opinion:** A search was conducted April 8, 2008, of the residence at 2610 South Broadway in Little Rock. Duke Alexander [Alexander] was one of four people inside the residence when officers entered. Alexander was detained and arrested in the hallway of the residence, less than five feet from the bathroom and adjacent to the kitchen. The residence was owned by Alexander's brother and leased to Alexander's son, Xavier Hood [Hood], and Hood lived there with his girlfriend and baby. Hood was present when the search commenced.

In the northwest bedroom, officers found a loaded pistol under the bed mattress, a plastic bag holding cocaine on the bed, crack cocaine and a plate with powder residue on a television stand, digital scales, and six documents in a safe that had Alexander's name and address listed as 2610 South Broadway in Little Rock. In the southwest bedroom, officers found a plastic bag of marijuana on the dresser. In the northeast bedroom, they found a loaded AK-47 assault rifle in the closet and a glass test tube on the floor. A "cookie" of crack cocaine, weighing over fifty grams, was found in the toilet of the bathroom. Digital scales were found on the kitchen table. Other items found in the house included: plastic sandwich baggies, electronic scales, a plate

with powder residue and a razor blade, another plate, a knife, a strainer, and two test tubes.

Alexander was under a duty to report his address to law enforcement. From July 2007 through March 2008, his address was reported as 407 West 26th Street in Little Rock. This was about 100 feet away from the residence on Broadway. In May 2008, certified mail delivery at the 26th Street address was unsuccessful. A bail bond, dated January 26th, 2009, listed Alexander's address as 2610 Broadway in Little Rock.

Alexander testified that he "stayed" at the 26th Street address, but he was "around" the Broadway residence "quite a bit" because his son lived there. He said he kept old documents in the safe because he did not have a safe. He also said he had owned the Broadway residence in the past, but his brother was the current owner.
Alexander was convicted in a bench trial of simultaneous possession of drugs and firearms, possession of cocaine with intent to deliver, being a felon in possession of a firearm, and possession of drug paraphernalia. He argues on appeal that the State failed to prove that he constructively possessed the contraband.

**Argument and Decision by Court:** Alexander argued on appeal that while the circumstances make it appear as if he was in constructive possession of the contraband and other items, it was not enough to find him guilty. In finding that Alexander constructively possessed the items, the Arkansas Court of Appeals, again reiterated that the State does not have to prove actual possession but may instead prove that the accused was in constructive possession. *Polk v. State*, 348 Ark. 446 (2002). For constructive possession, the State must establish that the defendant exercised care, control, and management over the contraband. *Tubbs v. State*, 370 Ark. 47 (2007). Constructive possession may be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Polk, supra.* Where there is joint occupancy of the premises, there must be some additional factor present to link the accused to the contraband, such as proximity to the contraband, ability to see the contraband in plain view, and ownership of the location where the contraband was found. *State v. Morgan*, 2009 Ark. 257.

In this case, there was a substantial amount of drugs and paraphernalia in plain view throughout the house, Alexander was arrested in close proximity to the large amount of cocaine in the toilet, there were six documents in the bedroom safe listing the address of the residence as his address, and Alexander testified that he was often "around" this residence that he had owned in the past. The Court held that constructive possession could be inferred from these facts and upheld the conviction.

**Case:** This case was decided by the Arkansas Court of Appeals on October 12, 2011, and was an appeal from the Pulaski County Circuit Court. The case citation is: *Alexander v. State*, 2011 Ark. App. 610.

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## Utility Bills Help Prove Constructive Possession and Maintaining Drug Premises

**Facts Taken From Opinion:** A daytime search was conducted on November 19, 2008, of a residence at 6016 Butler Road in Little Rock. An officer estimated that the residence had about 1300 square feet of living space. At the time of the entry by

police, Ariel McDaniel [McDaniel] was sitting in the living room with three children. Adjacent to the living room was the kitchen. Two males, Eric Johnson and Rashawn Williams, were on the kitchen floor. There was a plastic baggie that contained 2.9 grams of an off-white substance between the two men.

In a closed kitchen cabinet to the right of the stove, officers found a plastic bag with off-white rocks in it. Also in that cabinet, officers found a glass Pyrex measuring cup that appeared to have been used for cooking cocaine; it contained residue. In another kitchen cabinet, officers found two baggies containing an off-white substance and a Comet can with a false bottom, typically used to hide contraband. The off-white substances found in the kitchen were determined to be cocaine and typical cutting agents, weighing in aggregate over 88 grams. The State's forensic drug analyst testified that one gram of cocaine is comparable to the amount of sugar in a sugar packet.

The house had three bedrooms. One bedroom had bunk beds and children's clothing in it. Another bedroom filled with junk and appeared to be used for storage. In the third bedroom, officers found a loaded Smith & Wesson .38 caliber revolver under the mattress and $2,066 in currency in a shoe box in the closet. The currency consisted of mostly $20 bills. The closet held women's clothing. No men's clothing or shoes were found in the house. In the living room, officers found mail addressed to McDaniel with a delivery address of 6016 Butler Road. No other person's mail was found in the house. McDaniel also had an active Entergy account for the house in her name only dating back to May 2005.

McDaniel asserted at trial that the State failed to prove she constructively possessed the cocaine found in the kitchen or that she knowingly kept the residence for the purpose of storing or allowing the use of drugs. She was convicted of unlawful possession of a controlled substance (cocaine) and maintaining a drug premises. She was tried by jury in Pulaski County Circuit Court and was sentenced to six years of probation, a $10,000 fine, 250 hours of community service and other minor fees and requirements. She argued on appeal that the State failed to prove she constructively possessed the cocaine found in the house or that she possessed the requisite knowledge to sustain a conviction for maintaining a drug premises. She was acquitted by the jury of other charges stemming from this incident.

**Argument and Decision by Court:** As stated in cases before, the State is not required to prove actual possession but may instead prove that the accused was in constructive possession. *Cantrell v. State*, 2009Ark. 456, 343 S.W.3d 591; *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002). If the location where the contraband is found is under the dominion and control of the accused, then constructive possession may be inferred. *Morgan v. State*, 2009 Ark. 257, 308 S.W.3d 147; *Tubbs v. State*, 370 Ark. 47, 257 S.W.3d 47 (2007). Where there is joint occupancy of premises, however, there must be some additional factor present to link the accused to the contraband, such as proximity to the contraband, ability to see the contraband in plain view, and ownership of the location where contraband is found. *Holt v. State*, 2009 Ark. 482; *Morgan v. State*, supra. Stated another way, there must be other factors from which the jury may reasonably infer that the accused knew of the contraband and had joint control of it. *Holt*, supra. The fact that contraband is found in a common area of a residence, such as the kitchen, has been considered a linking factor to establish constructive possession. *Lueken v. State*, 88 Ark. App. 323, 198

S.W.3d 547 (2004); *Sweat v. State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988).

McDaniel on appeal argued another case, *Embry v. State*, 302 Ark. 608, 792 S.W.2d 318 (1990). In that case a conviction was reversed because the State could not prove constructive possession of the contraband. The evidence in that case showed that Embry had an off-and-on relationship with the residence's occupant and that Embry stayed at the residence frequently and kept some clothing there but was not present during the search and seizure of the drugs. Embry arrived an hour after the search and was arrested and did not make incriminating statements. Embry had no ownership rights in the home, nor did he have a right to control the home. The Supreme Court held that on those facts, there was not enough for constructive possession.

However, in this case, McDaniel was present at the time of the search, it was solely her residence, with long term utility service in her name. Along with mail addressed to her, women's clothing in the bedroom and her children's clothing in the other bedroom and no men's clothing found, and most of the cocaine found in a common area, the kitchen, the Court held that those linking factors could be used to prove McDaniel constructively possessed the cocaine.

McDaniel also argued that her conviction for maintaining a drug premises lacked substantial evidence, specifically challenging proof of her knowledge that cocaine was in her house. The Court disagreed with her argument. Arkansas Code Annotated section 5-64-402(a)(2) (Supp. 2011) defines "maintaining a drug premises" in pertinent part as "knowingly to keep or maintain any . . . dwelling . . . that is resorted to by a person for the purpose of using or obtaining a controlled substance . . . or that is used for keeping a controlled substance[.]" In short, the accused must know that drugs are kept in, used in, or distributed from the premises. *Moseby v. State*, 2010 Ark. App. 5. The State provided sufficient evidence for the jury to conclude that McDaniel knowingly kept cocaine in her house or knew that her house was a place where people came to use or obtain cocaine.

McDaniel was present when law enforcement entered her residence, and she was in a room adjacent to the kitchen, a common area, where the 88-plus grams of cocaine were found. *See Sweat v. State*, supra. There were two men in her kitchen, and there was a clear plastic bag of cocaine between them. This is sufficient evidence from which the jury could conclude that McDaniel had knowledge that her residence was used for keeping cocaine or used by persons to obtain or use cocaine.

**Case:** This case was decided by the Arkansas Court of Appeals on November 9, 2011, and was an appeal from the Pulaski County Circuit Court. The case citation is: *McDaniel v. State*, 2011 Ark. App. 677.

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## Arkansas Court of Appeals Holds That Officers had Probable Cause to Stop Vehicle in Case Involving Tip from Confidential Informant

**Facts Taken From the Case:** On March 30, 2010, a confidential informant told Fort Smith narcotics Detective Greg Napier that the informant could purchase crack cocaine from a person named Latisha Longnecker.

Detective Napier and other officers arranged a controlled buy which was to occur under surveillance at an apartment complex in Fort Smith. Officers met with the informant and gave him $40 in buy money. On the way to the buy location, Detective Napier and the informant observed a white Mitsubishi Galant travelling in the other direction, whereupon the informant ducked down and said to Detective Napier that the driver of the white Mitsubishi was "the dope guy." Detective Napier obtained the license-plate number for the white Mitsubishi, gave it to the other officers, and the controlled buy proceeded.

The officers let the informant out of the car, watched him walk to the apartment complex, and saw him go into the apartment. Another car pulled up, and Latisha Longnecker got out and went inside the apartment. Officers could hear the conversation between the informant and Longnecker, and Longnecker then made a phone call. Ten to fifteen minutes later, the white Mitsubishi pulled into the apartment complex. Longnecker got into the passenger seat of the white Mitsubishi, stayed inside the vehicle for only a short time, and then went directly back inside the apartment. The Mitsubishi drove off and was followed by the officers. The informant came back to the officers' vehicle and showed them a small bag of an off-white, rock-like substance, which field-tested positive for cocaine. Detective Napier gave the order to stop the white Mitsubishi.

Officer Brian Rice stopped the white Mitsubishi, which was driven by Joe McKinley Jones. Officer Rice found Jones to be uncooperative and placed Jones under arrest. Officer Rice found on Jones' person $380 in addition to the $40 in buy money officers had given to the informant. Officer Rice then had his certified drug dog do an exterior sniff of Jones' vehicle, and the dog alerted, meaning it detected the presence of illegal narcotics. In the area located under the radio of the white Mitsubishi, another detective present at the scene named Ray Whitson found fourteen individually wrapped pieces of an off-white, rock-like substance in a small plastic container.

Before his jury trial, Jones filed a motion to suppress evidence, which was denied by the trial court. A Sebastian County jury found Jones guilty of possession of cocaine with intent to deliver and possession of drug paraphernalia. Jones was sentenced as a habitual offender to consecutive terms of imprisonment of thirty years for possession of drug paraphernalia and one hundred years for possession of cocaine with intent to deliver.

**Argument on Appeal, Applicable Law, and Decision of Arkansas Court of Appeals:** On appeal to the Arkansas Court of Appeals (Court), Jones argued that the police officers lacked probable cause to stop and arrest him and conduct a search of his vehicle. Jones said that Detective Napier failed to testify that the informant was reliable and had been an informant in other arrests resulting in conviction, and as such Jones asserted that Detective Napier was "relying on the hearsay of an unproven person to use as a basis for the stop." In addition, Jones found it "hard to see how Napier could have observed the alleged purchase, gotten the contraband, then driven to the police station to do a field test and then instructed Rice to stop" him.

In setting its standard of review, the Court said that it reviews a trial court's granting or denial of a motion to suppress evidence obtained through warrantless searches by making an independent determination based upon the totality of the circumstances. The Court will not set aside the trial court's ruling unless that ruling is clearly against the preponderance of the evidence.

The Court then discussed the applicable law. It noted that an officer has a right to stop a vehicle and make a warrantless search if the vehicle is on a public highway and the officer has reasonable cause to believe the vehicle contains evidence subject to seizure and the circumstances require immediate action to prevent destruction or removal of the evidence. Furthermore, the Court stated that reasonable cause as required by Arkansas Rule of Criminal Procedure 14.1 exists when officers have reasonably trustworthy information, which rises to more than mere suspicion, that the stopped vehicle contains evidence subject to seizure, and a person of reasonable caution would be justified in believing an offense has been or is being committed. Finally, the Court said that probable cause is assessed based on the collective knowledge of the police, and not solely on the knowledge of the officer making the stop or arrest.

In affirming the trial court's denial of the motion to suppress, the Court held that probable cause existed to stop and arrest Jones and conduct a search of his vehicle. In the reasoning supporting its decision, the Court said that officers observed the controlled buy visually and listened to the conversation between the informant and Longnecker. Also, the Court said that based on their observations, officers knew that Longnecker did not have the drugs when the informant first arrived, yet Longnecker returned with drugs after having sat inside the white Mitsubishi. Furthermore, the Court stated that based on the officers' own observations, it was reasonable for the officers to conclude that the driver of the white Mitsubishi was involved in the drug transaction. Therefore, the Court said that probable cause existed regardless of the informant's reliability.

Next, the Court addressed Jones' contention that Detective Napier did not have time to conduct a field test on the substance before ordering the stop. The Court said that it was irrelevant whether the field test was done before or after Jones' vehicle was stopped. The Court pointed out that the informant handed Detective Napier (who had extensive knowledge with narcotics) what appeared to Detective Napier to be crack cocaine, and Detective Napier also knew that Longnecker had represented the white rock-like substance to be crack cocaine. Accordingly, at that point, the Court said that officers had reasonable cause to believe that the driver of the white Mitsubishi was involved in the alleged drug deal.

**Case:** This case was decided by the Arkansas Court of Appeals on November 9, 2011, and was an appeal from the Sebastian County Circuit Court, Fort Smith District, Honorable J. Michael Fitzhugh, Judge. The case citation is *Jones v. State*, 2011 Ark. App. 683.

Taylor Samples
Deputy City Attorney

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## Arkansas Court of Appeals Affirms Conviction and Upholds Confession in Jonesboro, Arkansas Rape Case

**Facts Taken From the Opinion:** Kendall Maurice Davis was charged by felony information with one count of rape by engaging in deviate sexual activity with another person who was less than fourteen years of age. After trial to the court without a jury, the court found Davis guilty of rape and sentenced him to twenty-five years in prison, with an additional ten years' suspended imposition of sentence.

One point that Davis argued on appeal was the circuit court erred in denying his motion to suppress the statements he made during

custodial interrogation. Specifically, Davis argued that, once he asked the investigating officer whether he needed an attorney, the questioning should have ceased.

Davis was questioned about his crime by Officer Jeremy Parnell of the Jonesboro Police Department. Prior to the interrogation, Davis signed a "Statement of Rights" form, waived his rights, and averred that he was willing to make a statement and did not want a lawyer at that time. At the outset of the questioning, Officer Parnell had Davis verbally agree that he understood his rights and still agreed to give a statement. Davis initially denied any wrongdoing. As the interview progressed, however, Davis began questioning the officer about how it would look if he changed his story and said that he felt it would make him "look guilty as hell" if he did so. Detective Parnell said that he could not make any promises or vouch for what the prosecuting attorney would do, but he did comment that he would let the judge know that Davis cooperated. Davis then asked what the possible range of punishment was, and Parnell replied that it was ten to forty years' imprisonment.

> At that point, Davis asked, "How soon can I talk to a lawyer?" Officer Parnell replied, I mean, it would be—be as soon as—as soon as you get one.
>
> I mean, like, I said . . . if you want to talk to one—if you want to stop right now we can stop it now and if you bond out you can get one then, or the judge will—like I said, you'll be coming back here Monday whether you bond out . . . or not; if you bond out, you're still going to come back here Monday and we'll go over the paperwork and it will either be you'll get a public defender or you'll hire your own attorney, and you'll talk to them once everything gets over there.

Davis then said, "But how . . . would it make me look, though, if I just told you all of that stuff before then [and] all of a sudden changed my statement?" The conversation proceeded from there, and Davis never repeated his question or specifically requested an attorney. Moreover, during the suppression hearing, Davis testified that he did not feel that he needed an attorney present when he gave his statement.

The circuit court denied Davis's motion to suppress his statement, finding that Davis never made a demand or a specific request to see a lawyer "at that time." The court also found it

> very significant that after [Davis] asked that question of the officer and after the officer responded with those options of how an attorney would be obtained, [Davis] did not miss a beat and immediately started resuming his questioning of the officer of how it would make him look if he changed his story.

The court stated that it did not hear Davis say that he wanted an attorney to be with him. After a trial in which he was convicted, Davis appealed his case to the Arkansas Court of Appeals and argued the trial court should have suppressed his statements.

**Decision by Arkansas Court of Appeals:** The Arkansas Court of Appeals noted that appellate courts have found that statements such as "You'll furnish me a public defender," *Holsombach v. State*, 368 Ark. at 421, 246 S.W.3d at 876; "Do I need to call an attorney," *Flanagan v. State*, 368 Ark. 143, 160, 243 S.W.3d 866, 878 (2006); and "Do you think I need an attorney," *Higgins v. State*, 317 Ark. 555, 560, 879 S.W.2d 424, 427 (1994), were not unequivocal requests for counsel. Similarly, in *Baker v. State*, 363 Ark. 339, 214 S.W.3d 239 (2005), the

statement "I don't feel like I can talk with you without an attorney sitting right here to give—have them here to give me some legal advice" was held to be an ambiguous reference to an attorney, after which the defendant continued with the interview; on those facts, the Arkansas Supreme Court affirmed the trial court's denial of Baker's motion to suppress his statement. *Id*. at 345, 214 S.W.3d at 243.

Here, the court held that Davis's question—"How soon can I talk to an attorney?"—was not an unambiguous and unequivocal request for an attorney. Moreover, after Davis made that statement, Officer Parnell informed Davis of the process by which he could obtain an attorney's services, and Davis thereafter continued to talk to Officer Parnell without further referencing his desire for an attorney. Davis's comments at the beginning of his recorded statement also make clear that he was aware of his *Miranda* rights and deliberately waived those rights. A reasonable officer in the situation would not have understood that, by saying "How soon can I talk to an attorney?" Davis was clearly and unequivocally invoking his right to counsel. In short, viewing the totality of the circumstances, the Arkansas Court of Appeals concluded that the circuit court did not err in denying Davis's motion to suppress.

Davis argued two other points and after considering the arguments, the Arkansas Court of Appeals affirmed the conviction.

**Case:** This case was decided by the Arkansas Court of Appeals on November 9, 2011, and was an appeal from the Craighead County Circuit Court, Western District, Honorable Cindy Thyer, Judge The case cite is *Davis v. State*, 2011 Ark. App. 686.

Jeff Harper
City Attorney

## A Discussion Regarding the Charging of DWI and DUI Offenses in Arkansas

The Arkansas Omnibus DWI Act, codified at Ark. Code Ann. § 5-65-101 et seq., dictates the punishment one can and will receive upon a DWI conviction in Arkansas. The Arkansas Underage DUI Law, codified at Ark. Code Ann. § 5-65-301 et seq., dictates the punishment one can and will receive upon a DUI conviction in Arkansas. DWI and DUI convictions are enhanceable offenses in Arkansas. This means that the punishment can be more severe for a "repeat" offender, and, in the case of DWI offenses, a fourth offense occurring within a five year period can be a felony. For these reasons, it is crucial for an officer to know when to charge someone with DWI or DUI, how to determine if that person has any prior DWI or DUI convictions, and, finally, how to determine the correct charge based on the number of prior offenses, if any.

### I. The Difference Between DWI and DUI Offenses in Arkansas

Generally speaking, the primary factor distinguishing DWI and DUI offenses in Arkansas is the age of the offender. Typically, an officer should charge a person found operating, or in actual physical control of, a motor vehicle while intoxicated with DWI if the person is at least twenty-one years of age. Conversely, an officer should typically charge a person found operating, or in actual physical control of, a motor vehicle while intoxicated with DUI if the person is under twenty-one years of age. It is never appropriate to charge someone who is over the age of twenty-one with DUI. However, it is possible to charge someone who is under the age of twenty-one with DWI. Regardless of the person's age, any person found operating, or in actual physical control of, a motor vehicle with an alcohol

concentration of eight-hundredths (0.08) or more should be charged with DWI. In addition, regardless of the person's age, any person found operating, or in actual physical control of, a motor vehicle while that person is intoxicated with a controlled substance should be charged with DWI. Any person, who is under the age of twenty-one, found operating, or in actual physical control of, a motor vehicle with an alcohol concentration of at least two-hundredths (0.02) but less than eight-hundredths (0.08), should be charged with DUI. A person, who is under the age of twenty-one, found operating, or in actual physical control of, a motor vehicle and who refuses to take the required tests to determine that person's level of intoxication, can be charged with either DUI or DWI, depending on the other evidence available to the officer making the charging decision. In deciding whether to charge this underage person with DWI or DUI, it would be wise of the officer to consider the person's driving and performance on standard field sobriety tests, as well as any additional evidence available to the officer.

**II. Possible Penalties Upon a DWI Conviction**

Upon a conviction of DWI #1, a person is subject to a minimum fine of $150 and at least twenty-four hours in jail. If this person was traveling with a passenger in their vehicle who was under the age of sixteen, then the mandatory minimum jail time is seven days. Upon a conviction of DWI #2, a person is subject to a minimum fine of $400 and at least seven days in jail. If this person was traveling with a passenger in their vehicle who was under the age of sixteen, then the mandatory minimum jail time is thirty days. Upon a conviction of DWI #3, a person is subject to a minimum fine of $900 and at least ninety days in jail. If this person was traveling with a passenger in their vehicle who was under the age of sixteen, then the mandatory minimum jail time is one hundred and twenty days. Upon a conviction of DWI #4, a person is now guilty of a felony and is subject to a minimum fine of $900 and at least one year in jail. If this person was traveling with a passenger in their vehicle who was under the age of sixteen, then the mandatory minimum jail time is two years. Upon a conviction of DWI #5, a person is subject to a minimum fine of $900 and at least two years in jail. If this person was traveling with a passenger in their vehicle who was under the age of sixteen, then the mandatory minimum jail time is three years.

**III. Possible Penalties Upon a DUI Conviction**

Upon a conviction of DUI #1, a person is subject to a minimum fine of $100 and at least one day of community service. Upon a conviction of DUI #2, a person is subject to a minimum fine of $200 and at least thirty days of community service. Upon a conviction of DUI #3, a person is subject to a minimum fine of $500 and at least sixty days of community service.

**IV. Driving While Intoxicated with a Passenger Under the Age of Sixteen**

As you can see from the enhanced punishment listed in Section II. herein, anytime a person charged with DWI has a passenger under the age of sixteen (16) in the vehicle, the mandatory minimum jail time is enhanced, even on a first offense. Therefore, it is crucial that the court and prosecutors know when a particular DWI case involves a passenger who was under the age of sixteen years. The only way for the court and prosecutors to know this information is if the officer makes note of it in their report. For this reason, an officer should always remember to note in their report if a passenger under the age of sixteen was present in the vehicle of a driver charged with DWI.

## V. Determining the Correct DWI Charge

To enhance a DWI charge to a second, third, fourth, or fifth offense, the State has the burden of proving that the defendant has been convicted on a DWI charge which occurred within the five years preceding the date of the offense in question. The conviction date is irrelevant for purposes of determining the correct charge, so long as the conviction has occurred. The offense date is the relevant date for determining the correct charge. To help illustrate this point and other nuances of DWI law, please consider the following hypothetical arrests:

### A. The Arrest of Drunken Hayes

If an officer arrests Drunken Hayes on December 16, 2011, and charges him with DWI, then the officer can use any prior DWI which occurred on or after December 16, 2006, and for which a conviction has been obtained to enhance the current DWI charge. Under this scenario, if Mr. Hayes was convicted in 2010 on a DWI which occurred on December 15, 2006, then the officer should charge Mr. Hayes with DWI #1. If Mr. Hayes was convicted in 2010 on a DWI which occurred on December 16, 2006, then the officer should charge Mr. Hayes with DWI #2. What if Drunken Hayes has been arrested and charged with DWI on two occasions since December 16, 2006, but he has not yet been convicted on either offense? In this scenario, the officer should charge Mr. Hayes with DWI #1. If, between the date of arrest and the date of conviction, a court convicts Mr. Hayes on one or both of the two prior DWI charges, then the court or prosecutor will amend the DWI #1 charge to DWI #2 or DWI #3, whichever is appropriate. Remember, a prior DWI offense does not count towards enhancement until a conviction is obtained.

### B. The Arrest of Ima Drinker

Assume that an officer arrests Ima Drinker on March 1, 2011, for DWI. Further assume that Ms. Drinker has no prior DWI offenses in Arkansas but has the following DWI convictions: (1) a conviction from a court in Texas stemming from an incident which occurred on June 15, 2008; (2) a conviction from a court in Missouri stemming from an incident which occurred on March 4, 2006; and (3) a conviction from a court in Missouri stemming from an incident which occurred on February 1, 2006. What is the correct charge for Ima Drinker? The correct charge is DWI #3. The Arkansas Omnibus DWI Act provides that the State can use a prior conviction from another state on a charge of DWI or any other equivalent penal law for purposes of enhancing a DWI charge in Arkansas. The officer should not charge Ms. Drinker with DWI #4, however, because prior convictions in other states are still limited by the five year window relating to the date of occurrence. Remember, you can use a prior DWI conviction from another State to enhance a DWI charge, but you are still limited by the five year window relating to the date of occurrence.

### C. The Arrest of Al Kaholic

Now assume that an officer arrests Al Kaholic on August 1, 2011, for DWI. Further assume that Mr. Kaholic has the following convictions on his record: (1) DWI conviction from Springdale stemming from an incident which occurred on July 23, 2011; (2) DWI conviction from Rogers stemming from an incident which occurred on March 21, 2011; (3) DUI conviction from Fayetteville stemming from an incident which occurred on August 4, 2006; (4) DUI conviction from Springdale stemming from an incident which occurred on August 1, 2006; and (5) DUI conviction from Bentonville stemming from an incident which occurred on July 27, 2006. What is the correct charge for Mr. Kaholic? The

correct charge is DWI #3. For purposes of enhancing a DWI offense, the State can count prior DWI convictions. The State cannot, however, use a prior DUI conviction to enhance a DWI charge. Thus, none of Mr. Kaholic's prior DUI convictions count towards the enhancement of his DWI charge. The fact that some of his DUI convictions occurred within five years of the arrest in question has no bearing on whether they can be used to enhance the DWI charge. Remember, you can never use a prior DUI conviction to enhance a DWI charge.

## VI. Determining the Correct DUI Charge

To enhance a DUI charge to a second, third, fourth, or fifth offense, the State has the burden of proving that the defendant has been convicted on a DWI or DUI charge which occurred any time while the defendant was underage. For purposes of enhancing a DUI charge by counting prior DUI or DWI charges, the relevant date is whether the prior offense occurred while the defendant was underage (meaning under the age of twenty-one). In addition, you can use a prior DWI conviction to enhance a DUI charge, so long as the prior DWI conviction stemmed from an incident which occurred while the defendant was underage. To help illustrate the nuances of DUI enhancement law, please consider the following hypothetical arrest:

### A. The Arrest of Mike Robrewer

Assume that an officer arrests Mike Robrewer on November 1, 2011, for DUI. Further assume that Mr. Robrewer is twenty years old on the date of arrest, and that he has the following on his record: (1) DWI pending out of Springdale stemming from an incident which occurred on August 3, 2011; (2) DUI conviction from Springdale stemming from an incident which occurred on April 1, 2011; (3) DWI conviction from Fayetteville stemming from an incident which occurred on January 20, 2010; (4) DUI conviction from Boston, Massachusetts, stemming from an incident which occurred on August 1, 2008; and (5) DUI conviction from Boston, Massachusetts, stemming from an incident which occurred on July 27, 2005. What is the correct charge for Mike Robrewer? The correct charge is DUI #5. For purposes of enhancing a DUI offense, the State can count any prior DWI or DUI conviction stemming from an incident which occurred while the defendant was under age. The pending charge out of Springdale from August 3, 2011, cannot be counted to enhance the DUI offense because there is no conviction on this charge. In addition, there is no requirement, for DUI enhancement purposes, that such an offense take place within the last five years. Instead, the offense must take place while the defendant is underage. In this scenario, Mike Robrewer is still underage, so you could use any prior DWI or DUI conviction on his record to enhance a DUI offense. This includes the two prior convictions out of Boston, Massachusetts, even though one of the DUI convictions stemmed from an incident which occurred more than six years before the arrest in question. Remember, because you can only charge an underage person with DUI, you can use any prior DWI or DUI conviction to enhance a DUI charge.

## VII. Reviewing and Interpreting ACIC Printouts

A few years ago, the State of Arkansas made numerous changes to the ACIC printouts regarding traffic violations. One of the more notable changes, which became effective on October 1, 2005, was that DWIs are now referred to as "DUI" on the printout. DUIs are now referred to as "UNAGE DUI." Furthermore, many other states refer to what

we call DWI in Arkansas as DUI. It is important to note that pending DWI and DUI charges will be listed on a person's ACIC printout, and the entry for a pending DWI or DUI charge looks very similar to the entry for a DWI or DUI conviction. Remember it is crucial to determine whether a listed DWI or DUI offense is a pending charge or is actually a conviction, because only convictions can be used to enhance a DWI or DUI charge. It is perhaps easiest to explain the difference between a "pending" entry and a "conviction" entry by reviewing four entries as they would look in an ACIC printout.

| OFFENSE DATE | CONVICTION DATE | OFFENSE/ACTION | COURT LOCATION | TYPE | INDEX NUMBER |
|---|---|---|---|---|---|
| 10-02-11 | 10-02-11 | DUI @BAC.11 | DEPARTMENT | DC | ADMIN PER |
| 01-11-10 | 07-12-10 | DUI OF DRUGS-1 | ROGERS | MC | 502969554 |
| 10-31-09 | 12-15-09 | DUI 1 @BAC.25 | SPRINGDALE | MC | 502855851 |
| 02-16-09 | 02-16-09 | UNAGE DUI-0 | DEPARTMENT | DC | ADMIN PER |

All four of the above entries evidence a DWI or DUI charge. The top entry, which includes an offense date of October 2, 2011, is an example of what a pending DWI charge looks like on an ACIC printout. As you can see, instead of leaving the "CONVICTION DATE" category blank until a conviction is obtained, the ACIC printout will always list a conviction date even if there has not yet been a conviction. You can tell it is a pending charge, however, because: (1) the conviction date is the same as the offense date (though it is possible, the real conviction date will probably never be the same as the offense date); (2) the entry lists the court location as "DEPARTMENT" (once a conviction is obtained, the actual location of the court is listed); and (3) the entry lists the index number as "ADMIN PER" (once a conviction is obtained, an actual number is listed in this section).

The second entry, which includes an offense date of January 11, 2010, is an example of what a DWI Drugs conviction looks like on an ACIC printout. You can tell this is a DWI Drugs conviction because: (1) the conviction date is different and later than the offense date; (2) the offense is listed as "DUI OF DRUGS-1" which indicates that the DWI involved drugs; (3) the entry lists an actual court location, in this case Rogers; and (4) the entry lists an actual index number, in this case 502969554.

The third entry, which includes an offense date of October 31, 2009, is an example of what a DWI conviction looks like on an ACIC printout. You can tell this is a DWI conviction because: (1) the conviction date is different and later than the offense date; (2) the offense is listed as "DUI 1 @BAC.25" which indicates that the DWI involved alcohol and a blood alcohol level of .25; (3) the entry lists an actual court location, in this case Springdale; and (4) the entry lists an actual index number, in this case 502855851.

The fourth entry, which includes an offense date of February 16, 2009, is an example of what a pending DUI charge looks like on an

ACIC printout. Do not assume that this entry must be a conviction simply because the offense date is several years old. There are several reasons why a DUI or DWI charge could still show as pending even after two or three years. Perhaps the most common reason is that the defendant has failed to appear in court on the charge. You can tell this is a pending charge because: (1) the conviction date is the same as the offense date (which again, though possible, will probably never occur); (2) the entry lists the court location as "DEPARTMENT" (once a conviction is obtained, the actual location of the court is listed); and (3) the entry lists the index number as "ADMIN PER" (once a conviction is obtained, an actual number is listed in this section).

Hopefully, these four entries have helped explain how to determine whether an ACIC DWI or DUI entry reflects a conviction or a pending charge. Remember, only convictions can be used to enhance a DWI or DUI charge. Pending DWI or DUI charges cannot be used to enhance a DWI or DUI charge.

**VIII. Review**

**A. The Arrest of Ivonly Adtobeirs**

Assume an officer makes a probable cause arrest on December 16, 2011. The officer suspects twenty-year-old Ivonly Adtobeirs of DWI. Mr. Adtobeirs takes the BAC test and the final results show a blood alcohol level of .28. The officer checks Mr. Adtobeirs' ACIC and sees the following:

| OFFENSE DATE | CONVICTION DATE | OFFENSE/ACTION | COURT LOCATION | TYPE | INDEX NUMBER |
|---|---|---|---|---|---|
| 11-17-11 | 12-02-11 | UNAGE DUI-0 | ELKINS | MC | 502674223 |
| 10-15-11 | 10-15-11 | DUI @BAC.10 | DEPARTMENT | DC | ADMIN PER |
| 08-14-11 | 08-14-11 | UNAGE DUI-0 | DEPARTMENT | DC | ADMIN PER |
| 04-02-09 | 12-02-11 | UNAGE DUI-0 | ELKINS | MC | 502571388 |
| 12-22-08 | 12-23-08 | DUI 1 @BAC.17 | ROGERS | MC | 502471336 |
| 12-14-06 | 12-10-10 | DUI 1 @BAC.22 | SPRINGDALE | MC | 502214622 |

What is the correct DWI charge for Mr. Adtobeirs? The correct charge is DWI #2. The top entry reflects a DUI conviction which cannot be used to enhance Mr. Adtobeirs' current DWI charge. The second entry reflects a pending DWI charge, which also cannot be used to enhance Mr. Adtobeirs' current DWI charge. The third entry reflects a pending DUI charge which cannot be used to enhance Mr. Adtobeirs' current DWI charge. The fourth entry reflects another DUI conviction which cannot be used to enhance Mr. Adtobeirs' current DWI charge. The fifth entry reflects a prior DWI conviction with an offense date of December 22, 2008. Because December 22, 2008, is within five years of the date of the current offense, December 16, 2011, this prior DWI conviction can be used to enhance Mr. Adtobeirs' current charge to DWI #2. The sixth entry reflects a prior DWI conviction with an offense date of December 14, 2006. Because December 14, 2006, is more than five years prior to the

current offense date of December 16, 2011, this prior DWI conviction is too old and cannot be used to enhance Mr. Adtobeirs' current charge. The fact that the conviction date on this prior DWI occurred on December 10, 2010, which is less than one year before the current offense date, is not relevant for purposes of charging Mr. Adtobeirs because the only relevant date is the date of the offense.

**IX. Conclusion**

The rules regarding the charging of DWI and DUI offenses in Arkansas can be confusing. Trying to interpret an ACIC printout can be just as confusing. I hope this article proves helpful and provides some insight to clarify any confusion you may have. If you ever have a question about enhancing a DWI or DUI charge, please feel free to contact the City Attorney's Office for guidance or confirmation.

Jonathan D. Nelson
Deputy City Attorney

*Drunken Hayes, Ima Drinker, Al Kaholic, Mike Robrewer, and Ivonly Adtobeirs are fictitious names used by the author in this article for illustrative and, hopefully, humorous purposes. Any reference to or implication involving a real person is unintentional.

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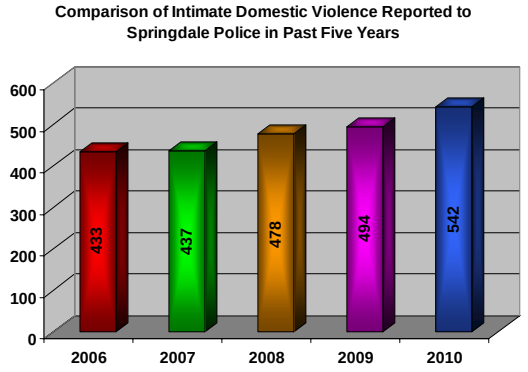
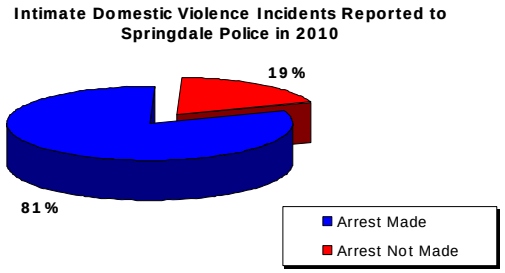
## Report on 2010 Intimate Domestic Violence in Springdale

On October 7, 2011, the City Attorney's Office released its 2010 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 542 intimate domestic violence incidents reported to Springdale Police in 2010, which is the highest number of intimate domestic violence incidents reported to Springdale Police in any year. In 2010, Springdale Police made an arrest or had a warrant issued in 81% of the total intimate domestic violence incidents that were reported. Below is a chart showing the total number of intimate domestic violence incidents reported to Springdale Police in the past five years, as well as a chart indicating the percentage of incidents in which an arrest was made for intimate domestic violence.




Jeff Harper
City Attorney

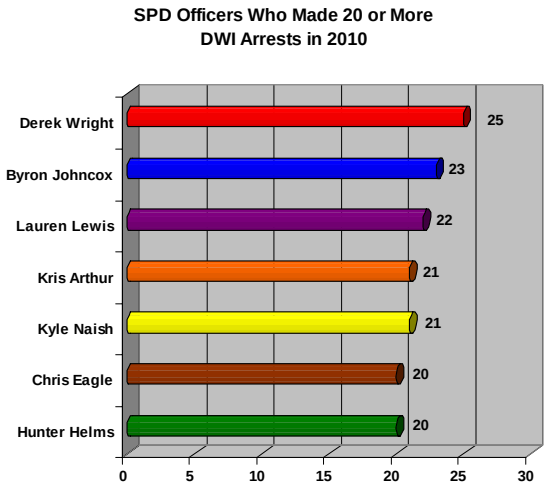
## 2010 Report on Drunk Driving in Springdale Released

On December 1, 2011, the City Attorney's Office released its 2010 Annual Report on Drunk Driving 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 "DWI/DUI" or "Statistics" tab on the right side of the home page and clicking on the title of the report.

The good news contained in the report is that the number of DWI crashes we had in Springdale, Arkansas in 2010 was the lowest number than any other year in the past 10 years. The second lowest year in the past 10 years was in 2001, when Springdale had 111 DWI crashes. The 102 DWI crashes for 2010 is a decrease of almost 20% from the previous year (in 2009 there were 127 DWI crashes).

There is also other good news in that the number of people injured in DWI crashes was the lowest number in the last 10 years. Forty-three persons were injured in DWI crashes in 2010 and the previous lowest number in the last 10 years was 51 persons injured in 2005.

Also contained in the report is a graph that follows which lists every Springdale Police Officer who made 20 or more DWI arrests in 2010. Congratulations to Officer Derek Wright who made 25 DWI arrests, the most by any Springdale Police Officer in 2010.

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