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Arkansas Court of Appeals Finds Suspect Was in Custody For *Miranda* Purposes at Roadside Questioning

Facts Taken From Opinion: On October 21, 2009, Special Investigator David Chastain of the Arkansas State Police [Chastain] received information from Alex Pike [Pike] who had previously provided good information. Pike reported that Misti Michelle O'Dell [O'Dell] and another unknown person were bringing crystal methamphetamine from Little Rock to DeWitt. Pike informed Chastain that O'Dell and the other person were meeting Pike at Kelly Snyder's [Snyder] residence in Almyra. Pike told Chastain that O'Dell would be making the delivery in a white Honda Civic or Accord; although Pike thought O'Dell was not "being honest about what vehicle she was in."

Chastain knew where Snyder lived and immediately drove there. Within minutes, two females in a black Honda arrived at the residence and parked. Chastain parked his vehicle behind the Honda and approached the driver's side and he recognized O'Dell sitting in the passenger seat. Because O'Dell "was trying to hide something," Chastain told her to put her hands on the dash and keep them there and then he asked the other female identified as Pattie Jo James [James] to step out to the back of the vehicle with him. Chastain identified himself to James and told her that he knew there were drugs in the vehicle and asked her where they were. James nodded at O'Dell and Chastain asked, "[D]oes she have them?" James said yes. Chastain acknowledged that he did not advise James of her *Miranda* rights before asking her questions.

After speaking with James, Chastain asked O'Dell to step out of the vehicle, at which

time he noticed a clear plastic baggie containing what he believed to be crystal methamphetamine lying on the passenger seat where O'Dell had been sitting. Chastain also noticed a glass pipe and a more thorough search of the vehicle revealed a black plastic box that contained a spoon, small baggies, a straw, and two plastic baggies that apparently contained methamphetamine. Chastain also found a syringe in O'Dell's purse. Chastain arrested James and O'Dell for possession of methamphetamine with intent to deliver and possession of drug paraphernalia. After transport to the Arkansas County Detention Center, Chastain advised James of her *Miranda* rights, and she gave a more complete statement and identified her supplier.

James was charged with one count of possession of a controlled substance with intent to deliver and one count of possession of drug paraphernalia. The circuit court held a suppression hearing and denied James's motions to suppress her statement and the evidence seized. James then entered a conditional plea of guilty and was sentenced to one year in a regional punishment facility with an additional five years' probation.

Argument and Decision by Court: James argued on appeal that the circuit court erred in denying (1) her motion to suppress a statement made by her that was obtained without officers advising her of her *Miranda* rights, and (2) her motion to suppress evidence resulting from an unconstitutional seizure of her person.

James claimed that her convictions should be reversed because the circuit court erred when it ruled that her statement, taken prior to being advised of her *Miranda* rights, was admissible. *Miranda v. Arizona*, 385 U.S. 436 (1966), established that a person must be advised of the right to be free from

compulsory self-incrimination, and the right to the assistance of an attorney, any time that a person is taken into custody for questioning. Custody occurs not only upon formal arrest, but also under any circumstances where the suspect is deprived of his freedom of movement. *California v. Beheler*, 463 U.S. 1121 (1983). In determining whether a suspect is in custody, courts consider the totality of the circumstances and how a reasonable man in the suspect's position would have understood his situation. *Berkemer v. McCarty*, 468 U.S. 420 (1984). Ultimately, however, the determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v. California*, 511 U.S. 318 (1994).

The contact between Chastain and James was not the result of a routine traffic stop which is less obtrusive and coercive than contact relating to a criminal investigation. See *Conway v. State*, 62 Ark. App. 125 (1998). Chastain specifically admitted that he blocked James's vehicle to prevent her from leaving. Also unlike *Conway*, James was not allowed to remain in her vehicle. James was moved to the rear of her vehicle where Chastain had control of the situation.

In this case, contact between James and Chastain was the result of a criminal investigation. See *Shelton v. State*, 287 Ark. 322 (1985). In *Shelton*, the defendant was removed from his residence. In this case, James was removed from her vehicle. In both cases, individuals were removed from areas under their control and placed into areas under the control of law enforcement. This is not the scenario envisioned by the Supreme Court when it held that an officer may ask the detainee a moderate number of questions to determine his identity and to try

to obtain information confirming or dispelling the officer's suspicions. See *Berkemer, supra*. Investigator Chastain blocked the vehicle in the driveway, ordered O'Dell to remain in the vehicle with her hands on the dash, and demanded that James move to the back of the vehicle. He then informed James that he knew there were drugs in the vehicle and asked her where they were located. The safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. *Berkemer*, 468 U.S. at 440. The determination of custody "depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being interrogated." *Hall v. State*, 361 Ark. 379, 389 (2005).

The Arkansas Court of Appeals decided the circuit court erred when it ruled that James was not in custody for purpose of *Miranda* warnings. Under the totality of the circumstances, based on these particular facts, the Court of Appeals held that a reasonable person in James's position would not have felt free to leave and therefore should have been advised of her right to remain silent prior to being questioned by Chastain. Therefore, James's statements to Chastain at Snyder's residence should have been suppressed.

On her second argument, the Court of Appeals reiterated that pursuant to Arkansas Rule of Criminal Procedure 3.1, a police officer may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit a felony or a misdemeanor involving danger of forcible injury to person or damage to property. "Reasonable suspicion" is defined as a suspicion based on facts or circumstances, which of themselves do not give rise to the

probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion. Ark. R. Crim. P. 2.1. The determination of whether an officer has reasonable suspicion under the totality of the circumstances includes whether an officer has specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity. *Laiame v. State*, 347 Ark. 142, 155 (2001).

Since Chastain's stop and detention did not involve a traffic stop, he was required to have a reasonable suspicion that appellant committed or was about to commit a felony or a misdemeanor involving damage to property or forcible injury to a person. See Ark. R. Crim. P. 3.1. James claims that Chastain did not have this requisite specific particularized suspicion that she committed or was about to commit a felony or misdemeanor. She reiterated that Chastain testified that he received information from Pike that O'Dell would be in a white Honda Accord or Civic, but he admitted that Pike did not necessarily believe that to be the case. She was operating a black vehicle, and he acknowledged that he was not able to discern the identity of the occupants of the vehicle until after he blocked the vehicle and approached it in the driveway. James argued that Chastain did not observe her commit any felonies, nor did he have any specific facts that were specific to her. James argued this was merely a "fishing" expedition stopping a vehicle that simply pulled into Snyder's driveway.

Despite the reversal of the circuit court's admission of James's initial statement, suppression of the evidence seized from her car was not warranted. Regarding an officer's ability to stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit a felony, pursuant to Rule 3.1, the key word is *suspects*, see *Potter v. State*, 342

Ark. 621 (2000), and "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277 (2002). Moreover, "[t]he justification for the investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person may be involved in criminal activity," and the facts articulated by an officer are considered together, not in isolation. *Davis*, 351 Ark. at 415.

The "whole picture must be taken into account," and "the process does not deal with hard certainties, but with probabilities." *United States v. Cortez*, 449 U.S. 411, 418 (1981). Circumstances that are frequently considered include any knowledge the officer may have of the suspect's background or character; any information received from third persons, whether they are known or unknown; and whether the suspect is consorting with others whose conduct is reasonably suspect. Ark. Code Ann. § 16-81-203 (Repl. 2005).

In determining whether an officer had reasonable suspicion, courts must recognize that, "when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion." *Cortez*, 449 U.S. at 419. The Court of Appeals held that the circuit court did not err by denying James's motion to suppress.

Investigator Chastain received information from a reliable known informant that O'Dell and a companion were delivering methamphetamine to Snyder's house in Almyra. Chastain knew both O'Dell and Snyder, and the informant apparently was relaying information about the delivery

Menne was traveling fifty-five miles per hour in a forty-five mile-per-hour zone. According to the affidavit Roark filed after the stop, the truck was driven by Menne and had one passenger, Christopher Smith. In the affidavit, Roark said that Menne “appeared nervous,” that he had “arrested Christopher Smith in the same vehicle on [September 20, 2008] for DWI-Drugs and Possession of Marijuana,” that he “located drugs in this same vehicle” during Smith’s arrest, and that he had “information from the Walnut Ridge Police Department that Menne was a suspected drug dealer.” Roark concluded, in his affidavit, “[t]aking this into consideration, I asked for consent to search, which was granted by Menne.”

Trooper Roark searched Menne’s vehicle and found .0536 grams of marijuana, .0348 grams of methamphetamine, and a prescription bottle with the label torn off. Menne was charged with possession of marijuana, possession of drug paraphernalia, and possession of methamphetamine, a felony. She then moved to suppress the items seized on grounds that the search was illegal. During the ensuing suppression hearing, Roark testified that after he pulled her over, she provided him with her license, registration, and all the documentation he requested. Nevertheless, because Menne “seemed to be nervous” and he had “information that she was dealing drugs,” and “due to the time of night and the previous drug arrest with this vehicle,” Roark called for a K-9 unit to conduct a dog sniff of the vehicle.

On cross-examination, Roark admitted that when he walked up to the vehicle during the traffic stop, he did not observe anything illegal. He also testified that he ran a driver’s license check and “found out that she had a criminal record too.” He could not recall, though, what the criminal record was for or what state it was from, and he

admitted that when he called Menne’s license in to the dispatcher, the dispatcher did not say anything about a criminal record.

Roark testified that about six to seven minutes into the stop, he had determined that Menne’s driver’s license was valid and at about nine to ten minutes into the stop he had determined that the vehicle was properly registered. After he had verified Menne’s documentation, he stated that there was nothing further he needed to do to investigate the traffic violation other than to give Menne her paperwork and a warning citation he had already written but had not yet given to Menne to sign.

Roark further testified that after verifying all of Menne’s documentation, he asked her to step out of the truck approximately thirteen minutes into the stop. He stated that he next requested that Menne consent to a search of her vehicle. This was about fourteen minutes into the stop. He conceded that at some point, Menne said something to the effect of “this is harassment,” although he added that she only said that one time. He proceeded to testify that Menne said he could “go ahead and look.” After she consented, Roark stated that he found in the truck .0368 grams of methamphetamine, .05 grams of marijuana, and a prescription pill bottle with the label torn off. Roark testified that he had not returned Menne’s vehicle registration to her and that he had not had her sign the warning ticket before asking for consent to search the vehicle.

Menne relayed facts different from Roark at the suppression hearing. She testified that Roark returned all of her documents to her eight or nine minutes into the stop. She said that when Roark asked for consent to search her vehicle, she asked him “for what and why.” She said that Roark told her he had “probable cause because of [Smith] being with me.” Menne further said that it was her

understanding that Roark “was going to [search] no matter what I said.” Menne added that she told Roark four times she felt like she was being harassed and that she never voluntarily consented to a search of the vehicle. On cross-examination, Menne said that she told Roark he could not search her vehicle the first two times he asked, and she reiterated to him “you’re harassing me.” When Roark asked if she cared if he searched her vehicle, she denied ever saying “no, I don’t guess I do,” or “go ahead and look.” During her testimony, the prosecutor repeatedly played a video and audio made by Roark of the stop and asserted that a conversation to that effect could be heard on the video. In response, Menne testified that Roark had asked her “do you have anything in your vehicle,” to which she responded, “no, I guess I don’t.”

After hearing all of the testimony and evidence, including the video and audio of the stop, and hearing argument from counsel, the circuit court denied the motion to suppress. The court gave no reason or explanation for doing so. After the subsequent jury trial, Menne was found guilty of possession of methamphetamine, possession of drug paraphernalia with the intent to use, and possession of marijuana. She was fined a total of \$4500.00 for all of the charges and sentenced to thirty-six months’ probation for the methamphetamine charge. On appeal, Menne challenged only the circuit court’s denial of her motion to suppress. The court of appeals reversed the ruling of the circuit court, *Menne v. State*, 2010 Ark. App. 806 (see also article of the Arkansas Court of Appeals decision in April 1, 2011 C.A.L.L., pg. 1-3). The Arkansas Supreme Court then granted the State’s petition for review.

Decision by Arkansas Supreme Court: Menne’s principal argument is that she was illegally detained after the purpose of the

traffic stop was complete in contravention of Arkansas case law and Arkansas Rule of Criminal Procedure 3.1. The Court first observed that Trooper Roark’s initial stop was legal, and Menne did not appear to contest that issue on appeal. Roark testified that Menne was traveling fifty-five miles per hour in a forty-five-mile-per-hour zone. *See* Ark. Code Ann. § 27-51-201. The legality of the stop, accordingly, is not an issue in this appeal.

The Court noted that two issues confront them in the instant case. The first is whether the purpose of the traffic stop was over at the time Trooper Roark requested Menne’s consent to search the vehicle. The second issue is whether Roark developed a reasonable suspicion during the course of the traffic stop that was a sufficient basis to detain Menne further. The parties agreed that at the time Roark requested a consent to search, he had not given Menne the warning citation for speeding. According to Trooper Roark’s testimony, he had not yet returned all of Menne’s documents to her. Arkansas case law suggests that a stop is not complete until the warning citation and other documents are delivered back to the driver. *See Yarbrough v. State*, 370 Ark. 31 (2007) (holding that it was permissible for a police officer to ask for consent to search the vehicle when the officer had determined that he would issue a warning ticket but had not yet returned the driver’s identification papers or issued that ticket); *see also Sims v. State*, 356 Ark. 507 (2004) (noting that the legitimate purpose of the traffic stop ended after the officer handed back the driver’s license and registration along with a warning ticket). Countering that, however, is Menne’s assertion that the warning citation was not provided to her by Roark because he was waiting for the K-9 unit to begin the dog sniff. Because the Arkansas Supreme Court concluded that Roark had reasonable

suspicion to detain Menne, they did not resolve the first issue.

The Court concluded that Roark had reasonable suspicion to detain Menne pursuant to Rule 3.1 of our Arkansas Rules of Criminal Procedure. Rule 3.1 requires the officer to possess reasonable suspicion that the person is committing, has committed, or is about to commit a felony or a misdemeanor involving danger to persons or property. *Malone v. State*, 364 Ark. 256, 262–63 (2005). The officer must develop reasonable suspicion to detain before the legitimate purpose of the traffic stop has ended. Whether there is reasonable suspicion depends upon whether, under the totality of the circumstances, the police have “specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity.” *Malone*, 364 Ark. at 263 (citing *Laipe v. State*, 347 Ark. 142, 155 (2001)).

The Court held that the factors that combined to give Trooper Roark a reasonable suspicion that Menne was engaged in criminal activity are (1) one month earlier he had stopped the same truck and arrested Menne’s passenger, Christopher Smith, for DWI and possession of marijuana; (2) during a criminal history check, Roark discovered Menne had been previously arrested; (3) he had information from a local police department that Menne was suspected of drug dealing; (4) Menne was nervous; and (5) the time of night.

The Court noted that they were mindful that while one of these factors may not have been enough to lead to “reasonable suspicion,” viewing the totality of these circumstances, they could not say the circuit court erred in denying the suppression motion. Arkansas Code Annotated section 16-81-203 specifically mentions the demeanor of the suspect, knowledge of the

suspect’s background and character, time of night, and information received from third parties as factors to be considered by law enforcement officers to determine grounds for reasonable suspicion. *See* Ark. Code Ann. § 16-81-203(1), (3), (6), (9) (Repl. 2005). There is no requirement under the statute that a police officer need to have personally observed any or all of these factors.

The court further emphasized that the search by Roark occurred within fifteen minutes of the stop, even though the fifteen-minute time constraint under Rule 3.1 would not have begun running until after Roark completed his routine tasks associated with the traffic stop. The Court held that Menne was reasonably detained at the time Roark made his request to search.

Regarding the consent itself, the State had the burden of proving by clear and positive evidence that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion. Ark. R. Crim. P. 11.1 (2008). Roark testified that when he asked Menne if he could search her vehicle, she responded, “if you want to, go ahead and look.” Roark acknowledged that at some point Menne alleged that he was harassing her. According to Roark’s testimony, after she made that allegation, he informed her that she had the right to refuse consent. The video and audio of the stop does not contradict Roark’s testimony. This exchange occurred while Roark and Menne were standing behind her truck on the side of the road.

The circuit court apparently believed Roark’s version of the events, which is supported by the video and audio. Hence, it denied Menne’s motion to suppress. The Court held that they could not say that the circuit court erred in finding that Menne’s

2006 produced a hung jury on the conspiracy count.

In March 2007, a grand jury returned another indictment, charging Jones and others with the same conspiracy. The Government introduced at trial the same GPS-derived locational data admitted in the first trial, which connected Jones to the alleged conspirators' stash house that contained \$850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base. The jury returned a guilty verdict, and the District Court sentenced Jones to life imprisonment.

The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. *United States v. Maynard*, 615 F. 3d 544 (2010). The United States Supreme Court granted certiorari.

Decision by United States Supreme Court: The United States Supreme Court held that that the attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search" under the Fourth Amendment. The Government physically occupied private property for the purpose of obtaining information and therefore, the Court held they had no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

The Government also argued in the alternative that even if the attachment and use of the device was a search, it was reasonable—and thus lawful—under the Fourth Amendment because "officers had reasonable suspicion, and indeed probable cause, to believe that [Jones] was a leader in

a large-scale cocaine distribution conspiracy." The Court held that they had no occasion to consider this argument because the Government did not raise it below, and the D. C. Circuit therefore did not address it. Therefore, the Court considered the argument forfeited, and affirmed the judgment of the Court of Appeals for the D.C. Circuit.

Note From City Attorney: It is my opinion that based on the decision in this case, it is necessary to get a warrant anytime law enforcement wants to attach a GPS device to the vehicle, to use the device to monitor the vehicle's movements.

Case: This case was decided by the Supreme Court of the United States on January 23, 2012. The case cite is *United States v. Jones*, ____ U.S. ____ (2012).

Jeff Harper
City Attorney



U.S. Supreme Court Decides *Miranda* Case Which Involved a Murder in Ohio

Facts Taken From the Case: Archie Dixon and Tim Hoffner murdered Chris Hammer in order to steal his car. Dixon and Hoffner beat Hammer, tied him up, and buried him alive, pushing the struggling Hammer down into his grave while they shoveled dirt on top of him. Dixon then used Hammer's birth certificate and social security card to obtain a state identification card in Hammer's name. After using that identification card to establish ownership of Hammer's car, Dixon sold the vehicle for \$2,800.

Hammer's mother reported her son missing the day after his murder. While investigating

Hammer's disappearance, police had various encounters with Dixon, three of which are relevant here. On November 4, 1993, a police detective spoke with Dixon at a local police station. It is undisputed that this was a chance encounter—Dixon was apparently visiting the police station to retrieve his own car, which had been impounded for a traffic violation. The detective issued *Miranda* warnings to Dixon and then asked to talk to him about Hammer's disappearance. Dixon declined to answer questions without his lawyer present and left the station.

As their investigation continued, police determined that Dixon had sold Hammer's car and forged Hammer's signature when cashing the check he received in that sale. Police arrested Dixon for forgery on the morning of November 9. Beginning at 11:30 a.m. detectives intermittently interrogated Dixon over several hours, speaking with him for about 45 minutes total. Prior to the interrogation, the detectives had decided not to provide Dixon with *Miranda* warnings for fear that Dixon would again refuse to speak with them.

Dixon readily admitted to obtaining the identification card in Hammer's name and signing Hammer's name on the check, but said that Hammer had given him permission to sell the car. Dixon claimed not to know where Hammer was, although he said he thought Hammer might have left for Tennessee. The detectives challenged the plausibility of Dixon's tale and told Dixon that Tim Hoffner was providing them more useful information. At one point a detective told Dixon that "now is the time to say" whether he had any involvement in Hammer's disappearance because "if Tim starts cutting a deal over there, this is kinda like, a bus leaving. The first one that gets on it is the only one that's gonna get on." Dixon responded that, if Hoffner knew anything about Hammer's disappearance, Hoffner had

not told him. Dixon insisted that he had told police everything he knew and that he had "[n]othing whatsoever" to do with Hammer's disappearance. At approximately 3:30 p.m. the interrogation concluded, and the detectives brought Dixon to a correctional facility where he was booked on a forgery charge.

The same afternoon, Hoffner led police to Hammer's grave. Hoffner claimed that Dixon had told him that Hammer was buried there. After concluding their interview with Hoffner and releasing him, the police had Dixon transported back to the police station. Dixon arrived at the police station at about 7:30 p.m. Prior to any police questioning, Dixon stated that he had heard the police had found a body and asked whether Hoffner was in custody. The police told Dixon that Hoffner was not, at which point Dixon said, "I talked to my attorney, and I want to tell you what happened." The police read Dixon his *Miranda* rights, obtained a signed waiver of those rights, and spoke with Dixon for about half an hour. At 8 p.m. the police, now using a tape recorder, again advised Dixon of his *Miranda* rights. In a detailed confession, Dixon admitted to murdering Hammer but attempted to pin the lion's share of the blame on Hoffner.

At Dixon's trial, the Ohio trial court excluded both Dixon's initial confession to forgery and his later confession to murder. The State took an interlocutory appeal. The State did not dispute that Dixon's forgery confession was properly suppressed, but argued that the murder confession was admissible because Dixon had received *Miranda* warnings prior to that confession. The Ohio Court of Appeals agreed and allowed Dixon's murder confession to be admitted as evidence. Dixon was convicted of murder, kidnapping, robbery, and forgery, and sentenced to death.

The Ohio Supreme Court affirmed Dixon's convictions and sentence. Dixon filed a petition for a writ of habeas corpus under federal law in the U. S. District Court for the Northern District of Ohio. He claimed that the state court decisions allowing the admission of his murder confession contravened clearly established federal law. The District Court denied relief, but a divided panel of the U.S. Sixth Circuit Court of Appeals reversed.

The Sixth Circuit had authority to issue the writ of habeas corpus only if the Ohio Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," as set forth in this Court's holdings, or was "based on an unreasonable determination of the facts" in light of the state court record. The Sixth Circuit believed that the Ohio Supreme Court's decision contained three such egregious errors.

Discussion and Decision by U.S. Supreme Court: According to the Sixth Circuit, the *Miranda* decision itself clearly established that police could not speak to Dixon on November 9, because on November 4 Dixon had refused to speak to police without his lawyer. The U.S. Supreme Court held this was plainly wrong. It is undisputed that Dixon was not in custody during his chance encounter with police on November 4. And the U.S. Supreme Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.' "

Second, the Sixth Circuit held that police violated the Fifth Amendment by urging Dixon to "cut a deal" before his accomplice Hoffner did so. On this point, the U.S. Supreme Court held that "the Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence,

does so involuntarily". Because no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so, the Court held the Sixth Circuit had no authority to issue the writ on this ground.

Third, the Sixth Circuit held that the Ohio Supreme Court unreasonably applied the Court's precedent in *Oregon v. Elstad*, 470 U.S. 298 (1985). In that case, a suspect who had not received *Miranda* warnings confessed to burglary as police took him into custody. Approximately an hour later, after he had received *Miranda* warnings, the suspect again confessed to the same burglary. This Court held that the later, warned confession was admissible because "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second [warned] statement was also voluntarily made."

As the Ohio Supreme Court's opinion explained, the circumstances surrounding Dixon's interrogations demonstrate that his statements were voluntary. During Dixon's first interrogation, he received several breaks, was given water and offered food, and was not abused or threatened. He freely acknowledged that he had forged Hammer's name, even stating that the police were "welcome" to that information, and he had no difficulty denying that he had anything to do with Hammer's disappearance. Prior to his second interrogation, Dixon made an unsolicited declaration that he had spoken with his attorney and wanted to tell the police what had happened to Hammer. Then, before giving his taped confession, Dixon twice received *Miranda* warnings and signed a waiver-of-rights form which stated that he was acting of his own free will.

The Ohio Supreme Court recognized that Dixon's first interrogation involved "an intentional *Miranda* violation." The court concluded, however, that "as in *Elstad*, the breach of the *Miranda* procedures here involved no actual compulsion" and thus there was no reason to suppress Dixon's later, warned confession.

The Sixth Circuit disagreed, believing that Dixon's confession was inadmissible under *Elstad* because it was the product of a "deliberate question-first, warn-later strategy." In so holding, the Sixth Circuit relied heavily on this Court's decision in *Missouri v. Seibert*, 542 U. S. 600 (2004). In *Seibert*, police employed a two-step strategy to reduce the effect of *Miranda* warnings: A detective exhaustively questioned Seibert until she confessed to murder and then, after a 15- to 20-minute break, gave Seibert *Miranda* warnings and led her to repeat her prior confession. The U.S. Supreme Court held that Seibert's second confession was inadmissible as evidence against her even though it was preceded by a *Miranda* warning. A plurality of the Court reasoned that "[u]pon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again."

In this case, the Court found that no two-step interrogation technique of the type that concerned the Court in *Seibert* undermined the *Miranda* warnings Dixon received. In *Seibert*, the suspect's first, unwarned interrogation left "little, if anything, of incriminating potential left unsaid," making it "unnatural" not to "repeat at the second stage what had been said before." But in this case Dixon steadfastly maintained during his first, unwarned interrogation that he had "[n]othing whatsoever" to do with

Hammer's disappearance. Thus, unlike in *Seibert*, there is no concern here that police gave Dixon *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat. Indeed, Dixon contradicted his prior unwarned statements when he confessed to Hammer's murder. Nor is there any evidence that police used Dixon's earlier admission to forgery to induce him to waive his right to silence later: Dixon declared his desire to tell police what happened to Hammer before the second interrogation session even began. As the Ohio Supreme Court reasonably concluded, there was simply "no nexus" between Dixon's unwarned admission to forgery and his later, warned confession to murder.

Moreover, in *Seibert* the Court was concerned that the *Miranda* warnings did not "effectively advise the suspect that he had a real choice about giving an admissible statement" because the unwarned and warned interrogations blended into one "continuum." Given all the circumstances of this case, that is not so here. Four hours passed between Dixon's unwarned interrogation and his receipt of *Miranda* rights, during which time he traveled from the police station to a separate jail and back again; claimed to have spoken to his lawyer; and learned that police were talking to his accomplice and had found Hammer's body. Things had changed. Under *Seibert*, this significant break in time and dramatic change in circumstances created "a new and distinct experience," ensuring that Dixon's prior, unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing to Hammer's murder.

The Court held that the admission of Dixon's murder confession was consistent with this Court's precedents: Dixon received *Miranda* warnings before confessing to

Hammer’s murder; the effectiveness of those warnings was not impaired by the sort of “two-step interrogation technique” condemned in *Seibert*; and there is no evidence that any of Dixon’s statements was the product of actual coercion. That does not excuse the detectives’ decision not to give Dixon *Miranda* warnings before his first interrogation. But the Ohio courts recognized that failure and imposed the appropriate remedy: exclusion of Dixon’s forged confession and the attendant statements given without the benefit of *Miranda* warnings. Because no precedent of this Court required Ohio to do more, the Sixth Circuit was without authority to overturn the reasoned judgment of the State’s highest court.

The Court held that the petition for a writ of certiorari and respondent’s motion to proceed in forma pauperis was granted. The judgment of the Court of Appeals for the Sixth Circuit was reversed, and the case remanded for further proceedings consistent with the Court’s opinion.

Note From City Attorney: Even though the U.S. Supreme Court ruled for the State of Ohio, my recommendation is that any time the police have an in-custody interrogation, *Miranda* warnings should always be read to the defendant before the interrogation. The Ohio police chose not to do this on the first in-custody interrogation because they were afraid Dixon would not talk to them, since he had refused to do so several days before. Dixon confessed to the forgery and that was later held to be inadmissible. It is my opinion that had he confessed to the murder at the same time, it is possible a second confession in which *Miranda* warnings were read before the interrogation, would also be inadmissible. It is simply too big of risk to intentionally not read *Miranda* warnings at an in-custody

interrogation because you’re afraid that the defendant will not talk.

Case: This case was decided in a per curiam opinion by the Supreme Court of the United States on November 7, 2011. The case cite is *Bobby v. Dixon*, 565 U.S. ____ (2011).

Jeff Harper
City Attorney

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**United States Supreme Court Reverses Decision by United States Court of Appeals for the Sixth Circuit and Holds the Prisoner Being Questioned was not in Custody for *Miranda* Purposes**

**Facts Taken From the Opinion:** While serving a sentence in a Michigan jail, Randall Fields was escorted by a corrections officer to a conference room where two sheriff’s deputies questioned him about allegations that, before he came to prison, he had engaged in sexual conduct with a 12-year-old boy. In order to get to the conference room, Fields had to go down one floor and pass through a locked door that separated two sections of the facility. Fields arrived at the conference room between 7 p.m. and 9 p.m. and was questioned for between five and seven hours.

At the beginning of the interview, Fields was told that he was free to leave and return to his cell. Later, he was again told that he could leave whenever he wanted. The two interviewing deputies were armed during the interview, but Fields remained free of handcuffs and other restraints. The door to the conference room was sometimes open and sometimes shut.

About halfway through the interview, after Fields had been confronted with the allegations of abuse, he became agitated and began to yell. Fields testified that one of the deputies, using an expletive, told him to sit down and said that “if [he] didn’t want to cooperate, [he] could leave. Fields eventually confessed to engaging in sex acts with the boy. According to Fields’ testimony at a suppression hearing, he said several times during the interview that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell prior to the end of the interview.

When he was eventually ready to leave, he had to wait an additional 20 minutes or so because a corrections officer had to be summoned to escort him back to his cell, and he did not return to his cell until well after the hour when he generally retired. At no time was Fields given *Miranda* warnings or advised that he did not have to speak with the deputies.

The State of Michigan charged Fields with criminal sexual conduct. Relying on *Miranda*, Fields moved to suppress his confession, but the trial court denied his motion. Over the renewed objection of defense counsel, one of the interviewing deputies testified at trial about Fields’ admissions. The jury convicted Fields of two counts of third-degree criminal sexual conduct, and the judge sentenced him to a term of 10 to 15 years of imprisonment. On direct appeal, the Michigan Court of Appeals affirmed, rejecting Fields’ contention that his statements should have been suppressed because he was subjected to custodial interrogation without a *Miranda* warning. The court ruled that Fields had not been in custody for purposes of *Miranda* during the interview, so no *Miranda* warnings were required. The court emphasized that Fields was told that he was free to leave and return to his cell but that he

never asked to do so. The Michigan Supreme Court denied discretionary review.

Fields then filed a petition for a writ of habeas corpus in Federal District Court, and the court granted relief. The Sixth Circuit affirmed, holding that the interview in the conference room was a “custodial interrogation” within the meaning of *Miranda* because isolation from the general prison population combined with questioning about conduct occurring outside the prison makes any such interrogation custodial per se. The Court of Appeals reasoned that this Court clearly established in *Mathis v. United States*, 391 U. S. 1 (1968) , that “*Miranda* warnings must be administered when law enforcement officers remove an inmate from the general prison population and interrogate him regarding criminal conduct that took place outside the jail or prison.” Because Fields was isolated from the general prison population and interrogated about conduct occurring in the outside world, the Court of Appeals found that the state court’s decision was contrary to clearly established federal law as determined by this Court in *Mathis*. The case was appealed to the United States Supreme Court who granted certiorari.

**Decision by United States Supreme Court:** The Court held that in this case, it is abundantly clear that the court’s precedents do not clearly establish the categorical rule on which the Sixth Circuit relied. The United States Supreme Court has repeatedly declined to adopt any such rule. *See, e.g., Illinois v. Perkins*, 496 U. S. 292 (1990). The Court held that the Sixth Circuit misread *Mathis*, which simply held, as relevant here, that a prisoner who otherwise meets the requirements for *Miranda* custody is not taken outside the scope of *Miranda* because he was incarcerated for an unconnected offense. It did not hold that imprisonment alone constitutes *Miranda*

custody, nor does the statement in *Maryland v. Shatzer*, 559 U. S. \_\_\_\_ (2010) that "[n]o one questions that [inmate] Shatzer was in custody for *Miranda* purposes" support a per se rule. It means only that the issue of custody was not contested in that case. Finally, contrary to respondent's suggestion, *Miranda* itself did not hold that the inherently compelling pressures of custodial interrogation are always present when a prisoner is taken aside and questioned about events that occurred outside the prison.

The Court held the Sixth Circuit's categorical rule — that (1) imprisonment, (2) questioning in private, and (3) questioning about events in the outside world created a custodial situation for *Miranda* purposes — was simply wrong. The Court held that the initial step in determining whether a person is in *Miranda* custody is to ascertain, given "all of the circumstances surrounding the interrogation, how a suspect would have gauge[d]" his "freedom of movement," *Stansbury v. California*, 511 U. S. 318–322, 325 (1994). However, not all restraints on freedom of movement amount to *Miranda* custody. See *Berkemer v. McCarty*, 468 U. S. 420–423 (1984). *Shatzer*, distinguishing between restraints on freedom of movement and *Miranda* custody, held that a break in *Miranda* custody between a suspect's invocation of the right to counsel and the initiation of subsequent questioning may occur while a suspect is serving an uninterrupted term of imprisonment. If a break in custody can occur, it must follow that imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*. The Court held that at least three strong grounds support this conclusion: questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest; a prisoner is unlikely to be lured into speaking by a longing for

prompt release; and a prisoner knows that his questioners probably lack the authority to affect the duration of his sentence. Thus, service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody.

The Court held that the other two elements in the Sixth Circuit's rule are likewise insufficient. Taking a prisoner aside for questioning may necessitate some additional limitations on the prisoner's freedom of movement, but it does not necessarily convert a non-custodial situation into *Miranda* custody. Isolation may contribute to a coercive atmosphere when a non-prisoner is questioned, but questioning a prisoner in private does not generally remove him from a supportive atmosphere and may be in his best interest. Neither does questioning a prisoner about criminal activity outside the prison have a significantly greater potential for coercion than questioning under otherwise identical circumstances about criminal activity in the prison walls. The coercive pressure that *Miranda* guards against is neither mitigated nor magnified by the location of the conduct about which questions are asked.

The Court further held that when a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. The record in this case reveals that respondent was not taken into custody for *Miranda* purposes. While some of the facts lend support to his argument that *Miranda's* custody requirement was met, they are offset by others. Most important, he was told at the outset of the interrogation, and reminded thereafter, that he was free to leave and could go back to the cell whenever he wanted. Moreover, he was not physically restrained or threatened, was interviewed in a well-lit, average-size conference room where the door was sometimes left open, and was offered food and water. These facts

are consistent with an environment in which a reasonable person would have felt free to terminate the interview and leave, subject to the ordinary restraints of life behind bars.

Therefore, the United States Supreme Court reversed the decision of the United States Court of Appeals for the Sixth Circuit.

**Case:** This case was decided by the United States Supreme Court on February 21, 2012. The case cite is *House v. Fields*, 565 U.S. \_\_\_\_ (2012).

Jeff Harper  
City Attorney

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**Arkansas Court of Appeals  
Holds Evidence Properly  
Admitted Since Legitimate  
Purpose of Stop Had Not Ended  
Prior to Canine Sniff**

**Facts Taken From the Case:** Beebe Patrol Officer James Armstrong began following Howard Lynn Crowder (a known seller of narcotics) at the intersection of Dewitt and Main Streets in downtown Beebe, Arkansas. After following Crowder for about a mile and a half, Officer Armstrong ran an ACIC check on Crowder to verify information about Crowder's criminal history and to verify that Crowder was the driver of the vehicle. The ACIC search revealed that Crowder was on parole for various narcotics crimes. At 6:57 p.m. while following Crowder, Officer Armstrong observed Crowder make an illegal right-hand turn. Officer Armstrong activated his emergency lights, and Crowder pulled over into a gas-station parking lot at around 6:58 p.m.

Officer Armstrong approached Crowder's vehicle and asked for license and

registration. As Crowder produced the requested documents, Officer Armstrong noticed that Crowder was extremely nervous, had unsteady hands, and was sweating profusely. Because Officer Armstrong thought Crowder's behavior was suspicious, he radioed for an additional officer to join him at the scene. While waiting for the backup officer to arrive, Officer Armstrong returned to Crowder's vehicle and informed Crowder that he was receiving a citation for making an improper turn. Crowder then waited on a curb in the lot while Officer Armstrong prepared the ticket.

In addition to the backup officer requested by Officer Armstrong, another canine officer named Randy Reed with the White County Sheriff's department was also notified about Crowder's stop. Officer Armstrong continued working on Crowder's citation and was still in the process of working on the citation at 7:11 p.m. when canine officer Randy Reed arrived at the scene. Two minutes later (at 7:13 p.m.), the canine alerted, and a search of the vehicle produced narcotics. Crowder was arrested and placed in the back of a patrol car. Once in the police car, Crowder's paperwork was returned, and he was given a citation for improper turn.

**Argument and Decision by the Arkansas Court of Appeals:** On Appeal to the Arkansas Court of Appeals (Court), Crowder argued that the trial court erred in denying his motion to suppress evidence found in his vehicle as a result of an allegedly unlawful search. In particular, Crowder claimed that he was detained without reasonable suspicion after the legitimate purpose of the traffic stop had ended so that the canine officer would have time to arrive. Crowder based his argument primarily on the case *Menne v. State*, 2010 Ark. App. 806, where the Arkansas Court of

Appeals held that the legitimate purpose of the traffic stop had ended within nine-and-a-half minutes when the trooper had received, verified, and returned all of Menne's documents. In *Menne*, the Court noted that the trooper's failure to return the completed ticket was simply a stalling tactic to allow additional time for the drug dog to arrive.

The Court rejected Crowder's argument and held that the trial court properly denied Crowder's motion to suppress the evidence recovered from the search. The Court said that its approach in *Menne* was specifically rejected by the Arkansas Supreme Court in *Menne v. State*, 2012 Ark. 37, where the Supreme Court found that Menne's continued detention was legitimate. Thus, the Court said that to any extent Crowder relied on its holding in *Menne*, that holding was vacated by the Arkansas Supreme Court (see discussion of Arkansas Supreme Court's decision in *Menne* on page 5). Furthermore, the Court said that even if its holding in *Menne* had not been vacated, Crowder's argument still lacked merit because Officer Armstrong had not yet completed writing the ticket when the canine arrived. The Court pointed out that the dog arrived only thirteen minutes after the initial stop and alerted fifteen minutes after the initial stop, and the Court said that it has specifically found that a stop completed in less than fifteen minutes is constitutionally reasonable. Finally, the Court stated that Officer Armstrong was still in the process of conducting the investigation when the dog arrived, and the canine not only arrived, but alerted, in less than the presumptively reasonable fifteen-minute time period. As such, the legitimate purpose of the traffic stop had not ended prior to the canine alerting, and the evidence obtained from the search of Crowder's vehicle was properly admitted.

**Case:** This case was decided by the Arkansas Court of Appeals on February 8, 2012, and was an appeal from the White County Circuit Court, Honorable Robert Edwards, Judge. The case citation is *Crowder v. State*, 2012 Ark. App. 114.

Taylor Samples  
Deputy City Attorney

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**Search of Tractor-Trailer Upheld, Consent Given By Driver**

**Facts Taken From Opinion:** At about 1:40 a.m. on April 13, 2010, Arkansas State Police Corporal Chris Goodman [Goodman] was patrolling Interstate 40 near Russellville. He observed a red and white tractor-trailer swerve onto the right shoulder of the freeway. He initiated a traffic stop and made contact with the driver, and only occupant, Carle A. Freeman [Freeman]. Goodman informed Freeman of the reason for the stop. As can be seen on video of the stop [although not audio as Goodman's microphone battery had died] Goodman approached the vehicle and interacted with Freeman for about five minutes.

Goodman testified at the suppression hearing that he asked for Freeman's driver's license, log books, and bills of lading, which Freeman provided. Goodman described Freeman as "nervous", "shaking", and "excited with his demeanor and nervousness." Goodman believed Freeman's route was unusual considering he was coming from California and headed to Miami, Florida but the route went through Wyoming and other northern roadways to get to Arkansas. Goodman testified that Sacramento was a common origin of higher-grade marijuana. Goodman also noted that

Freeman could not account for 2.5 hours off duty by presenting a scale ticket, nor could he explain why he took off 20 hours in Oklahoma. Goodman also found it strange that Freeman had six seals of product receipt on his paperwork but only five bills of lading.

Goodman testified that he ushered Freeman to the back of the trailer about six minutes into the stop and as they stood there, Goodman asked whether a drug dog would alert if it ran around the truck, to which Freeman stated "No." Goodman stated he asked Freeman if he could search the truck and trailer, to which Freeman responded, "Go ahead." Goodman entered his patrol unit to run Freeman's driver's license and request back-up and returned about three minutes later to give Freeman a warning ticket. Freeman is then seen using the keys to open the trailer. No contraband was found inside. Goodman then entered the cab and observed clothing, a box of black rubber bands, and loose shelves behind the front seats. Behind the shelves was a hidden, steel metal door with fresh paint and new screws. Goodman believed that, based on his fourteen years of training, this was evidence of a hidden compartment and he used a screw driver to open the door and found twenty-six packages of high-grade marijuana.

Freeman testified at the suppression hearing, stating he recalled being pulled over by Goodman for swerving, which he denied doing. Freeman said he tendered his log book to Goodman and answered all his questions. Freeman said his chosen route was faster for what he was trying to accomplish and he denied ever giving consent to search. He further testified that after he was handed the warning ticket, Goodman told him that he needed to look in the trailer, and Freeman was unaware that he did not have to consent to it. Freeman stated

he thought he had to go along with whatever Goodman wanted to do.

On this evidence and testimony, the trial court denied Freeman's motion to suppress the drug evidence. Freeman entered a conditional plea of no contest to possession of marijuana with intent to deliver and then he appealed the denial of his motion to suppress.

**Argument and Decision by Arkansas Court of Appeals:** Freeman argued on appeal that (1) the State failed to carry its burden to demonstrate that the officer obtained valid consent, and (2) the officer improperly detained Freeman, either of which would require a reversal of the denial of his motion to suppress the drugs found in his truck.

A police officer may stop and detain a motorist where the officer has probable cause to believe that a traffic violation has occurred. *Hinojosa v. State, supra*; *Sims v. State*, 356 Ark. 507 (2004); *Flores v. State*, 87 Ark. App. 327 (2004). On appeal, Freeman does not contest that the officer had a valid basis upon which to initiate a traffic stop.

Generally, a search warrant and probable cause are required as prerequisites to a search. *Turner v. State*, 94 Ark. App. 259 (2006). An exception exists where the search is conducted pursuant to consent, which must be established by clear and convincing evidence that it was obtained freely, voluntarily, and without implied or actual duress or coercion. Ark. R. Crim. P. 11.1 (2010). While an officer is required to advise an individual of his right to refuse consent in the case of a home, this requirement does not apply to consent to search a vehicle. *Welch v. State*, 364 Ark. 324 (2005). A consensual search shall not exceed, in duration or scope, the limits of

the consent given. Ark. R. Crim. P. 11.3 (2010). Where there are no limits placed on the search, the consent to search includes any containers found in the vehicle. *Miller v. State*, 342 Ark. 213 (2000). 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. *Webb v. State*, 2011 Ark. 430. Knowledge of the right to refuse consent is not a requirement to prove the voluntariness of the consent. *Id. See also Scott v. State*, 347 Ark. 767 (2002). The appellate court will not reverse a trial court's finding of fact on the validity of consent unless the finding is clearly wrong. *Gonder v. State*, 95 Ark. App. 144 (2006).

Freeman argued that the trial court clearly erred in finding that he gave valid consent to search his truck and trailer but the Arkansas Court of Appeals disagreed. It is a long-standing rule that it is the province of the trial court to determine the credibility of witnesses. *Webb v. State, supra*. In this case, the trial court gave credence to the video showing the character of the interaction between Goodman and Freeman and to Goodman's testimony that he obtained free and voluntary consent to search without limitation. Based on the applicable substantive law and the standard of review, the Court of Appeals held that the trial court did not clearly err in finding that free and voluntary consent was given.

Freeman next argued that the trial court clearly erred because he was illegally detained after the legitimate purpose of the traffic stop had ended. Because Freeman failed to obtain a ruling from the trial court on his continued-detention argument, it is not preserved for review on appeal. *Hinojosa v. State, supra*. However, the Court of Appeals stated that it would still affirm the denial of the suppression motion and noted that as part of the valid traffic

stop, Goodman could detain Freeman while completing certain routine tasks such as checking the driver's license, criminal history, and writing of a citation or warning. *Sims v. State, supra*. During that process, the officer may ask questions about the driver's destination, purpose of the trip, and whether the officer may search the vehicle. *Id.* The officer may act on whatever information is volunteered. *Id. Compare Menne v. State*, 2012 Ark. 37.

Goodman's testimony established that he asked for and received consent to search when he first brought Freeman to the back of the trailer. This was approximately six minutes into the traffic stop, according to the video. Goodman testified that this was prior to running Freeman's driver's license, running a criminal-history check, and issuing him a warning ticket. The video indicates that the written warning was handed to Freeman approximately nine minutes into the traffic stop. The search commenced when Freeman unlocked the back of his trailer for Goodman, about three minutes after the warning ticket was given. After a de novo review on the totality of the circumstances, the Court of Appeals held that the trial court did not clearly err in denying Freeman's motion because consent was obtained prior to the completion of the traffic stop. *See also Yarbrough v. State*, 370 Ark. 31 (2007); *Davis v. State*, 99 Ark. App. 173 (2007).

**Case:** This case was decided by the Arkansas Court of Appeals on February 15, 2012, and was an appeal from the Pope County Circuit Court, Honorable William M. Pearson, Judge. The case citation is: *Freeman v. State*, 2012 Ark. App. 144.

Brooke Lockhart  
Deputy City Attorney

## **Arkansas Court of Appeals Finds No *Miranda* Violation When Suspect Initiates Second Conversation**

**Facts Taken From Opinion:** Detective Tommy Hudson [Det. Hudson] of the Little Rock Police Department investigated the December 13, 2008 death of Anthony Fogle [Fogle]. According to Det. Hudson, Fogle died as the result of a single gunshot wound to his chest. Det. Hudson stated that Derek Lee Jackson [Jackson] was developed as the suspect in Fogle's death. He said that he went to Jackson's address in January, 2009 because there was an active warrant for Jackson's arrest in an unrelated case. Jackson was taken into custody at 3:40 p.m., and Det. Hudson met with him at 4:35 p.m. Det. Hudson testified that he read Jackson his *Miranda* rights twice on January 12, 2009 [this was necessary because Jackson was interviewed on two separate occasions on this date]. Det. Hudson stated that Det. Greg Siegler was present during Jackson's first interview, and that Det. J.C. White was present during the second interview.

Det. Hudson stated that after he informed Jackson that he was being charged with Fogle's murder, Jackson was placed in an interview room at the end of the hall. Jackson's second interview took place at 6:35 p.m. Det. Hudson said that he made contact with Jackson after the first interview in order to obtain Jackson's personal information to fill out the arrest report. At that time, Jackson asked Det. Hudson if he was really being charged. When Det. Hudson answered in the affirmative, Jackson stated that he needed to tell Det. Hudson what happened. After Jackson was read his rights the second time, he confessed to shooting Fogle. Det. Hudson contended that he did not initiate the conversation that led to Jackson's confession. He also stated that

he did not threaten Jackson and that he did not promise Jackson anything in exchange for the statement.

At a hearing on Jackson's motion to suppress his custodial statement, Jackson testified that when he asked Det. White about his stepson following his arrest, Det. White told him that the child was going to D.H.S. He also stated that Det. Hudson told him that his wife could be charged with murder. Jackson stated that he invoked his rights but that Det. Hudson did not stop asking him questions. Jackson stated that he said he had not been threatened during the statement implicating himself in the murder because he wanted to protect his family. Jackson's counsel argued that the statement should be suppressed as a product of coercion, and that Det. Hudson improperly re-initiated the interrogation after Jackson invoked his rights.

The motion to suppress was denied. A Pulaski County jury found Jackson guilty of the second-degree murder of Fogle. He was sentenced to thirty years' imprisonment with an additional fifteen-year enhancement for using a firearm in the commission of the murder.

**Argument and Decision by Court:** Jackson makes two arguments with regard to the suppression of the statement he made during custodial interrogation. First, he argues that the court should have excluded his statement because it was the product of coercion. Second, Jackson argues that any statement he made after he invoked his right to remain silent should have been suppressed because the police violated his rights by improperly re-initiating contact with him.

A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was

given voluntarily. *Bryant v. State*, 2010 Ark. 7. The appropriate standard of review for cases involving a trial court's ruling on the voluntariness of a confession is that the Court makes an independent determination based upon the totality of the circumstances and review the trial court's findings of fact for clear error, and the ultimate question of whether the confession was voluntary is subject to an independent, or de novo, determination by the court. *Id.* Issues regarding the credibility of witnesses testifying at a suppression hearing are within the province of the circuit court and any conflicts in the testimony are for the circuit court to resolve, as it is in a superior position to determine the credibility of the witnesses. *Porter v. State*, 2010 Ark. App. 657. The circuit court is not required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings. *Vance v. State*, 2011 Ark. 243.

In order to determine whether a waiver of *Miranda* rights is voluntary, knowing, and intelligent, the Court looks to see if the statement was the product of free and deliberate choice rather than intimidation, coercion, or deception. To make this determination, the Court reviews the totality of the circumstances surrounding the waiver including the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or physical punishment; and statements made by the interrogating officers and the vulnerability of the defendant. *Bryant, supra*. The proper inquiry is whether appellant's will was overborne or his capacity for self-determination critically impaired. *Standridge v. State*, 357 Ark. 105 (2004).

The Court found that Jackson's statement was not the product of coercion. The court was faced with conflicting testimony, and those conflicts were for the circuit court to resolve. There was no evidence to support Jackson's allegation that the detectives made statements that overrode his will and coerced him into implicating himself in the murder of Fogle. In fact, Jackson stated on the recording that he had not been threatened. Additionally, Jackson stayed calm and collected throughout the interview.

Jackson also argues that the court erred by denying his motion to suppress when the detectives re-initiated contact with him after he invoked his right to remain silent. A person subject to custodial interrogation must first be informed of his right to remain silent and right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966). Statements improperly taken after the invocation of the right to remain silent or the right to counsel must be excluded from the State's case in chief to ensure compliance with the dictates of *Miranda*. An indication that a defendant wishes to remain silent is an invocation of his *Miranda* rights. *Robinson v. State*, 373 Ark. 305, (2008). Once the right to remain silent is invoked, it must be scrupulously honored. *Id.* The meaning of "scrupulously honored" was discussed in *James v. Arizona*, 469 U.S. 990, 992-93 (1984):

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



any cows, and Clark responded that Officer Cole needed to speak to Ashley. Officer Cole went to the driver's side where Ashley was sitting and asked Ashley to exit the car. Officer Cole testified that Ashley was not under arrest or in custody at this point. Officer Cole asked Ashley how many cows he had in his apartment, and Ashley said that he was buying the iodine for someone else. Officer Cole then asked Ashley what he thought this other person was using the iodine for, and Ashley said it was to "cook dope." Officer Cole testified that at this point he considered Ashley to be under arrest. Officer Cole then asked Ashley if he had anything illegal on his person. Ashley did not verbally respond, but instead looked down at his shirt pocket, took a deep breath, and did not look back up at Officer Cole. Officer Cole then checked Ashley's shirt pocket and found two small containers that contained five baggies of methamphetamine. Officer Cole then placed Ashley under arrest. The entire transaction lasted around twelve to fifteen minutes. Ashley's vehicle was thereafter searched, and five one-pound bags of iodine were found.

After being advised of his *Miranda* rights at the police station, Ashley said that the iodine was being used to "cook dope" and that he was going to trade the iodine for meth. Ashley refused to say who he was going to trade with.

Officer Cole testified that Clark and Ashley were free to leave when he approached them to talk. Officer Cole also said that even though he knew Ashley did not have cows, if Ashley had told him the iodine was for cows, he could not have arrested him. Officer Cole and Agent Keathley were in plain clothes when they talked to Clark and Ashley. Officer Cole had his badge on his belt, was wearing a weapon, and had his hand on his gun for safety purposes, while Agent Keathley was wearing a badge on a

chain around his neck and was wearing a weapon.

After a jury trial, Ashley was found guilty of possession of methamphetamine and guilty of possession of drug paraphernalia with intent to manufacture methamphetamine. After being sentenced as a habitual offender and receiving ten-year sentences on both convictions to run consecutively, Ashley filed an appeal to the Arkansas Court of Appeals.

**Argument, Applicable Law, and Decision by the Arkansas Court of Appeals:** On appeal, Ashley argued, among other things, that the trial court erred by denying his motion to suppress verbal statements and physical evidence. The Arkansas Court of Appeals (Court) said that in reviewing the denial of a motion to suppress, it conducts a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, and giving due weight to inferences drawn by the trial court and proper deference to the trial court's findings. The Court will not reverse the trial court's ruling unless it is clearly against the preponderance of the evidence.

Ashley claimed that he was seized when officers approached him since the officers positioned their car behind him so that there was no way for him to leave and ordered him to step out of his car. Furthermore, Ashley argued the police lacked reasonable suspicion to stop him under Arkansas Rule of Criminal Procedure 3.1, and that therefore the evidence seized by the officers and the statements made to officers were fruit of the poisonous tree that should have been suppressed. Arkansas Rule of Criminal Procedure 3.1 provides:

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony ... if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period, the person detained shall be released without further restraint, or arrested and charged with an offense.

The State argued that Ashley's motion to suppress was properly denied because Ashley was never stopped or seized by police. Instead, the State claimed that Ashley stopped his car voluntarily and was approached by police as authorized under Arkansas Rule of Criminal Procedure 2.2, which states that an officer may approach a citizen and request they furnish information or otherwise cooperative in the investigation or prevention of a crime. The Court noted that a Rule 2.2 encounter is consensual and does not constitute a seizure. The Court also said that a seizure of a person occurs when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. Finally, the Court said that an encounter that is initially consensual is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave.

The Court held that Ashley became detained under Rule 3.1 when Officer Cole asked Ashley to exit the vehicle. The Court said

that since Ashley was detained, Officer Cole must have had reasonable suspicion that Ashley was committing, had committed, or was about to commit a felony. Reasonable suspicion is "a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." Ark. R. Crim. P. 2.1. The Court stated that the existence of reasonable suspicion must be determined by an objective standard, and due weight must be given to the specific reasonable inferences an officer is entitled to derive from the situation in light of his experience as an officer. When reasonable suspicion is based solely on a citizen-informant's report, the Court said that there are three factors for determining reliability: (1) whether the informant is exposed to possible criminal or civil prosecution if the report is false; (2) whether the report is based on personal observations of the informant; and (3) whether the officer's personal observations corroborate the informant's observations.

Ashley argued that there was not reasonable suspicion to detain him, and in particular Ashley claimed there was a lack of personal observations by the police to corroborate the informant's tip. The Court disagreed with Ashley and held that there was reasonable suspicion for Officer Cole to detain Ashley. In reaching this conclusion, the Court noted that the informant (Carroll) told police that a white male had bought five one-pound bags of iodine from the feed store just down the road from the police department, and Carroll also provided the vehicle's license-plate number. After running the license-plate and determining the registered owner was Danny Ashley, Officer Cole observed a car with that license-plate number pass them with two white males inside. The Court said that

this was sufficient corroboration of the informant's observations. Additionally, the Court stated that while following the car, the officers observed the passenger looking back at the officers and acting very suspicious. The Court reasoned that nervous and evasive behavior alone does not constitute reasonable suspicion of criminal activity, but in this case it was coupled with Officer Cole's knowledge that Ashley lived in an apartment and did not own cows. Therefore, the Court said that it was unlikely that Ashley had a legitimate purpose for buying such a large amount of iodine, and the Court gave due weight to the reasonable inferences that Officer Cole was entitled to derive in light of his sixteen years in law enforcement and qualifications as a certified methamphetamine-lab technician.

Ashley lastly argued that he was under arrest upon being questioned by Officer Cole at the bank and should have been read *Miranda* before being questioned. The Court disagreed and held that although Ashley was detained under Rule 3.1, *Miranda* warnings were not required because Ashley's freedom of action was not curtailed to a degree associated with formal arrest. The Court said that *Miranda* warnings are required only in a custodial interrogation situation, and the *Miranda* safeguards apply only when a suspect's freedom of action is curtailed to a degree associated with formal arrest. For all of the above reasons, the Court affirmed the trial court's denial of Ashley's motion to suppress evidence.

**Case:** This case was decided by the Arkansas Court of Appeals on February 8, 2012, and was an appeal from the Grant County Circuit Court, Honorable Phillip H. Shirron, Judge. The case citation is *Ashley v. State*, 2012 Ark. App. 131.

Taylor Samples  
Deputy City Attorney

## **Arkansas Court of Appeals Holds That Informant's Tip Constituted Reasonable Suspicion to Stop Vehicle**

**Facts Taken From the Case:** Detective Alan Keller of the Bi-State Narcotics Task Force (BNTF) testified that he and his partner received information that an unknown black male, driving a dark-colored Chrysler, was about to deliver methamphetamine to a confidential informant (CI) at an E-Z Mart located on Highway 71. According to Detective Keller, the detectives went across the street from the E-Z Mart located at Highways 71 and 245 and set up surveillance. Detective Keller saw a blue Chrysler pull into the parking lot, but Detective Keller did not remember seeing the driver or the female passenger go into the store. Detective Keller testified that he received information that he was at the wrong E-Z Mart. Detective Keller stated that he told the CI to call the suspected dealer and have him meet the CI at E-Z Mart located South of the one where they were. Detective Keller stated that shortly after talking to the CI, he observed the car he was watching leave the E-Z Mart and head south. He stated that a patrol unit was contacted to stop the vehicle. Lee James Owens (appellant) and his girlfriend, Ashley Howard, were subsequently arrested.

Officer Todd Harness testified that he was contacted by "narcotics" to make a traffic stop on appellant's vehicle. He said he came to a location close to the E-Z Mart and witnessed the vehicle leave. Officer Harness followed the car and initiated a stop when he was instructed to do so. Officer Harness said the appellant gave the name Gerald Owens when initially approached. He stated that it took appellant some time to give his age and date of birth, which Officer Harness considered to be indicative of

someone being untruthful about his identity. Appellant was arrested for obstructing governmental operations. A canine unit was called and alerted the vehicle to drugs. After searching the vehicle, drugs later identified as methamphetamine were found.

Officer Kevin Bounds testified that he was called to back up Officer Harness. He stated that he performed a narcotics search of the vehicle. According to Officer Bounds, his canine partner, Bruno, alerted on the passenger side of the vehicle. When the vehicle was opened, Bruno went to the driver's seat, indicating "where the smell is the strongest." Officer Bounds gave three possibilities for Bruno's alerting on the driver's seat: (1) someone had smoked narcotics in the vehicle and the odor was trapped in the fabric of the seat; (2) narcotics were in the vehicle, under the seat, or inside the seat cushion; or (3) drugs were either on the passenger or the driver. Detective Claudia Felts of BNTF testified that she located narcotics on Howard after Howard informed her that appellant told Howard to hide the drugs.

A Miller County jury found appellant guilty of possession of a Schedule II controlled substance with intent to deliver, and appellant was sentenced as a habitual offender to 101 years' imprisonment. Appellant appealed his case to the Arkansas Court of Appeals.

**Argument, Applicable Law, and Decision by the Arkansas Court of Appeals:**

Owens appealed to the Arkansas Court of Appeals and argued, among other things, that the trial court erred by denying his motion to suppress evidence. Owens claimed that officers lacked reasonable suspicion to conduct a traffic stop of his vehicle.

The Arkansas Court of Appeals first set forth the applicable law contained in Arkansas Rule of Criminal Procedure 3.1:

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

Also, the Court said that reasonable suspicion is "suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." Furthermore, the Court stated that when determining whether reasonable suspicion exists it makes an objective inquiry giving due weight "... to the specific reasonable inferences an officer is entitled to derive from the situation in light of his experience as a police officer." Finally, the Court noted that Arkansas Code Annotated § 16-81-203, entitled "Grounds to Reasonably Suspect," provides fourteen factors for the trial court to consider in determining the presence of reasonable suspicion, and this includes information received from third persons, whether they are known or unknown (see Note From Deputy City Attorney contained at the bottom of this article for a list of the fourteen factors).

The Court held that reasonable suspicion existed for Officer Harness to stop Owens'

vehicle, and the trial court thus did not err by denying Owens' motion to suppress. The Court went on to recite the relevant facts surrounding the stop of Owens' vehicle. Detectives acted on a tip from a CI, who told detectives that Owens was going to deliver methamphetamine to the CI at an E-Z mart located on Highway 71. Detective Keller had used the CI before and considered the CI to be reliable. Detective Keller set up surveillance at the E-Z Mart and saw a car matching the description of the CI, only to learn that he and the suspect were at the wrong E-Z Mart location. After the CI called the suspect and asked him to go to another nearby E-Z Mart, Detective Keller saw the suspect's vehicle leave and travel toward the new E-Z Mart location. At this point, the decision was made to stop the suspect's vehicle. The Court concluded that given the totality of the circumstances, reasonable suspicion existed to stop Owens' vehicle.

**Note From Deputy City Attorney:** A.C.A. § 16-81-203 states that the following are among the factors to be considered in determining if the officer has grounds to reasonably suspect: (1) demeanor of the suspect; (2) gait and manner of the suspect; (3) any knowledge the officer may have of the suspect's background or character; (4) whether the suspect is carrying anything, and what he or she is carrying; (5) the manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors; (6) the time of day or night; (7) any overheard conversations of the suspect; (8) the particular streets and areas involved; (9) any information received from third persons, whether they are known or unknown; (10) whether the suspect is consorting with others whose conduct is reasonably suspect; (11) the suspect's proximity to known criminal conduct; (12) the incidence of crime in the immediate neighborhood; (13) the suspect's

apparent effort to conceal an article; and (14) the apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.

**Case:** This case was decided by the Arkansas Court of Appeals on December 7, 2011, and was an appeal from the Miller County Circuit Court, Honorable Joe E. Griffin, Judge. The case citation is *Owens v. State*, 2011 Ark. App. 763.

Taylor Samples  
Deputy City Attorney

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**Arkansas Court of Appeals  
Affirms DWI Conviction in Case  
in Which State Trooper Stopped  
the Driver Because he Failed to  
Give a Signal When Making a  
Turn**

**Facts Taken From the Opinion:** Arkansas State Trooper Josh Heckel testified at a hearing on a motion to suppress that on January 30, 2010, he saw Scott C. Mitchell (appellant) turn left from Papa Go Road onto Old Bear Road without using his signal in Garland County, Arkansas. Heckel did not immediately pull appellant over because the road was too narrow to do so safely. Instead, Heckel turned left onto Highway 270 and pulled over onto the shoulder. When appellant passed, he stopped appellant for not using his turn signal; there were no other violations. Trooper Heckel noticed the smell of intoxicants on appellant's breath, performed field-sobriety tests, and arrested appellant for DWI. During cross-examination, Heckel agreed that it is approximately half a mile from the intersection where appellant failed to use his turn signal to Highway 270, where he pulled appellant over. He saw in his rear and side

mirrors that appellant did not use his turn signal at the intersection. Heckel stated that, while he did not recall whether there was any other traffic in the area, there were no vehicles between his and appellant's.

Appellant testified at the hearing that he did not see Trooper Heckel at the intersection of Papa Go and Old Bear Roads. The first time he saw Heckel was when he was going over the bridge on Highway 270 and the blue lights were flashing. Appellant believed that he used his turn signal, but he was not sure. In response to questioning by the court, appellant stated that it was possible that Heckel had a reason to believe he was intoxicated because he may have seen his Jeep, which had distinctive markings, parked at the Water-n-Hole bar that afternoon.

In a one-page order entered on December 8, 2010, the Circuit Court denied appellant's motion to suppress. Appellant then filed a motion for reconsideration or clarification, to which the State responded. The Circuit Court entered a letter order denying appellant's motion to suppress and making specific findings of fact. Appellant later entered into a conditional plea agreement under Arkansas Rule of Criminal Procedure 24.3, reserving the right to appeal the denial of his motion to suppress.

#### **Decision by Arkansas Court of Appeals:**

The Court noted that in order for a police officer to make a traffic stop, he must have probable cause to believe that the vehicle has violated a traffic law. *Sims v. State*, 356 Ark. 507 (2004). 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. *Id.* Probable cause is defined as "facts or circumstances within a police officer's knowledge that are sufficient to permit a

person of reasonable caution to believe that an offense has been committed by the person suspected." *Hinojosa v. State*, 2009 Ark. 301, at 6.

In this case, Trooper Heckel believed that appellant violated the following traffic law:

Signals required for turning, stopping, changing lanes, or decreasing speed.

(a) No person shall turn a vehicle from a direct course upon a highway unless and until the movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by the movement or after giving an appropriate signal in the manner provided in subsection (b) of this section in the event any other vehicle may be affected by the movement.

(b) A signal of intention to change lanes or to turn right or left shall be given continuously during not less than the last one hundred feet (100') traveled by the vehicle before changing lanes or turning.

Ark. Code Ann. § 27-51-403 (Repl. 2010). Appellant argued that, since the evidence was uncontroverted that there was no other traffic in the immediate vicinity, he could not have violated the turn-signal statute. He contended that Trooper Heckel, who was in front of him and had already made the turn, could not have been "affected by [his] movement."

The appellant cited case law from other jurisdictions that have interpreted similar traffic laws. Those cases have interpreted the "may be affected" language to mean that a turn signal is not required if other traffic is not present. Similarly, our statute has been

interpreted to mean that other traffic must be present before the obligation to signal arises, with subsection (b) prescribing the manner of signaling if signaling is required by subsections (a) or (c). See Op. Ark. Att’y Gen. No. 142 (2010). The Arkansas Court of Appeals agreed with that interpretation.

The Court then held that a review of the circuit court’s letter opinion revealed that it misinterpreted the statute. The court wrote that while appellant cited Arkansas Code Annotated section 27-51-403(a), he “neglect[ed] to cite [section] 27-51-403(b) which is also law in this state. It requires ‘[a] signal of intention to turn right or left shall be given continuously during not less than the last one hundred feet (100’) traveled by the vehicle before turning.’” The court apparently believed that subsection (b) operated independently to require a signal for every turn or lane change. However, the court also found that appellant violated subsection (a) because the trooper’s vehicle was in fact affected by the direction of appellant’s turn.

The Court held that they did not need to decide whether appellant was required to use a turn signal when the only vehicle around was in front of him. 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 which the officer believed to have occurred. *Hinojosa v. State*, 2009 Ark. 301, at 6. Thus, the issue is whether there were facts or circumstances known to Trooper Heckel that were sufficient to permit a person of reasonable caution to believe that appellant committed a violation of section 27-51-403. Here, the Court held, it is a close enough question whether a vehicle that was in front of appellant “may be affected by the movement” of appellant’s vehicle that a person of reasonable caution might believe that a turn-signal offense had occurred.

Accordingly, the circuit court’s denial of the motion to suppress was not clearly against the preponderance of the evidence, and therefore the Court of Appeals affirmed the judgment of the circuit court.

**Note From City Attorney:** The Attorney General's Opinion mentioned in this case was requested by John Threet, Fourth Judicial District Prosecutor, because this same issue was brought up in a Springdale case in 2010. The Attorney General opined that the statute's history plainly shows the legislature's intent that the obligation to signal only arises if others may be affected by the lane change. See Op. Ark. Att’y Gen. No. 2010-142. See also a discussion of the opinion in the April 1, 2011 edition of *C.A.L.L.*, page 19.

After this opinion, John Threet, in a memo, noted that any other vehicle which may be affected could include a law enforcement officer on the roadway. As noted in the April 1, 2011 *C.A.L.L.* article, if you cite someone for violation of § 27-51-403 for changing lanes without signaling, you must be able to show from the facts of the case that the motorist who failed to signal a lane change was in such a situation that another vehicle may have been affected. This means in your narrative you should set out approximately how far other vehicles on the roadway were from the vehicle whose driver changed lanes without signaling.

**Case:** This case was decided by the Arkansas Court of Appeals on February 8, 2012, and was an appeal from the Garland County Circuit Court, Honorable Marcia R. Hearnberger, Judge. The case cite is *Mitchell v. State*, 2012 Ark. App. 128.

Jeff Harper  
City Attorney

## **Arkansas Court of Appeals Affirms Conviction in Carroll County Case**

**Facts Taken From the Opinion:** Officer Chris Jones of the Carroll County Sheriff's Department testified that he was on duty at 2:20 a.m. on December 6, 2010, when he observed a vehicle traveling on Highway 103 with a broken tail light. Officer Jones also received information from another officer via radio that the vehicle had passed him on the highway and failed to dim its lights. Officer Jones initiated his blue lights and stopped the vehicle for these violations.

Officer Jones testified that after he made the stop he approached the driver's side of the car. Abner Dale Johnson was driving and a woman named Ms. Scofield was riding as a passenger. Officer Jones indicated that he was familiar with Mr. Johnson because he had stopped him several times before, and that he had stopped him within the past month for the same broken tail light. According to Officer Jones, Mr. Johnson was talkative and "easy to get along with" the previous times he stopped him, but on this occasion he exhibited completely different behavior. Officer Jones testified that while he made contact with Mr. Johnson at the driver's side door, Mr. Johnson looked straight ahead and would not make eye contact. Officer Jones said that "his hands were shaking, and his whole demeanor had changed." Officer Jones identified himself and, after going back and speaking with another officer, he asked Mr. Johnson for identification, registration, and insurance. Mr. Johnson handed Officer Jones identification, and Officer Jones ran a check and found that his driver's license was valid. Upon request, Ms. Scofield also produced a valid driver's license. After that, Officer Jones asked dispatch for outstanding warrants but evidently found none. Officer Jones testified

that he did not remember if there had been any convictions, but he knew that Mr. Johnson had prior drug problems. Officer Jones believed that past drug abuse had caused Mr. Johnson to have a heart attack. He further testified that Ms. Scofield had a history with drugs and had been arrested within the past couple of months for possession of a controlled substance. Officer Jones said that there had been reports of drug activity along Highway 103, although he acknowledged that he was not there that night because of drugs in the area and that there was probably drug activity along every road in the county.

Officer Jones asked Mr. Johnson to step out of the car, and Mr. Johnson complied but did not make eye contact and was violently shaking. Officer Jones acknowledged that it was very cold that night (about fifteen to twenty degrees) but said that Mr. Johnson appeared nervous and looked more nervous the more they talked. Officer Jones asked both passengers what they were doing that night, and they both responded that they were out riding country roads. Officer Jones thought it very strange to be riding back roads when it was below freezing. He testified that Mr. Johnson and Ms. Scofield gave stories that were inconsistent, but he could not remember what the inconsistencies were. Officer Jones asked if there was anything illegal in the car, and Mr. Johnson said not to his knowledge. Officer Jones asked for consent to look inside the car but Mr. Johnson refused.

At 2:33 a.m., which was thirteen minutes into the stop, Officer Jones called Officer Zimmerman, a canine officer, and requested a canine sniff of appellant's car. At that point Officer Jones had not determined whether he was going to ticket Mr. Johnson, and he said he probably would have just issued a warning had no other incriminating evidence been found. Officer Jones stated, "I

felt like I needed more because of what was there.”

Officer Zimmerman testified that he was not working that night and that when he received the call from Officer Jones he was at home. After getting dressed and getting the dog, Officer Zimmerman left his house about five minutes later. He arrived at the scene at 2:52 a.m., which was thirty-two minutes after the initial stop. After he arrived, Officer Zimmerman conducted a canine sniff, and the canine alerted to drugs in the vehicle, resulting in Mr. Johnson’s arrest.

Abner Dale Johnson entered a conditional plea of guilty to possession of methamphetamine, possession of drug paraphernalia, driving while intoxicated, refusal to submit to a chemical test, and having a broken tail light for which he received three year's probation. Upon entering the conditional plea, Mr. Johnson reserved in writing the right to appeal and challenged the trial court's denial of his motion to suppress evidence.

On appeal, Mr. Johnson argued that his motion to suppress the incriminating evidence should have been granted because the police officer illegally detained him after the legitimate purpose of the traffic stop had ended in violation of Rule 3.1 of the Arkansas Rules of Criminal Procedure.

**Argument and Decision by Arkansas Court of Appeals:** On appeal, Mr. Johnson argued that his motion to suppress should have been granted because the legitimate purpose of the stop had ended and his continued detention was unlawful under Ark. R. Crim. P. 3.1 and the Fourth Amendment of the United States Constitution. Rule 3.1 provides:

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer’s presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Mr. Johnson submitted that the purpose of the traffic stop had ended at 2:33 a.m. and that there was no reasonable suspicion for his detention beyond that time. Because the canine sniff detecting the drugs occurred nineteen minutes after that, Mr. Johnson argued that the incriminating evidence was illegally obtained and should have been suppressed.

The Arkansas Court of Appeals noted that in this case, the initial stop of Mr. Johnson’s car was legal, and he did not contest that issue on appeal. The Court noted that our supreme court has stated that a law-enforcement officer, as part of a valid traffic stop, may detain a traffic offender while completing certain routine tasks, such as computerized checks of the vehicle’s registration and the driver’s license and criminal history, and the writing up of a citation or warning. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). During this

process, the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered. *Id.* However, after these routine checks are completed, unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot, continued detention of the driver can become unreasonable. *Id.* In *Sims*, the supreme court held that the legitimate purpose of the traffic stop ended after the officer handed back the driver's license and registration along with a warning ticket.

We agree with Mr. Johnson's assertion that the purpose of the traffic stop was over thirteen minutes after the stop when Officer Jones called for the canine officer. This is because, at that time, Officer Jones had completed the routine tasks associated with the stop and, absent reasonable suspicion, the officer was required to issue a citation or warning if necessary and discontinue the detention. However, the Court concluded that Officer Jones had reasonable suspicion to detain Mr. Johnson pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure.

In holding that there was reasonable suspicion for Mr. Johnson's continued detention, the Court was guided by the supreme court's recent decision in *Menne v. State*, 2012 Ark. 37, (see page 5 of *C.A.L.L.*) In that case, the supreme court held that the factors that combined to give the officer reasonable suspicion that Ms. Menne was engaged in criminal activity were (1) one month earlier, he had stopped the same vehicle and arrested Ms. Menne's passenger for DWI and possession of marijuana; (2) during a criminal history check, the officer discovered that Ms. Menne had previously been arrested; (3) the officer had information from a local police department

that Ms. Menne was suspected of drug dealing; (4) Ms. Menne was nervous; and (5) the time of night. The supreme court stated that while one of these factors may not have been enough to lead to reasonable suspicion, viewing the totality of the circumstances, the trial court did not err in denying the suppression motion. Arkansas Code Annotated section 16-81-203 specifically mentions the demeanor of the suspect, knowledge of the suspect's background and character, time of night, and information received from third parties as factors to be considered by law-enforcement officers to determine grounds for reasonable suspicion.

The Court found in the present case, during the legitimate purpose of the traffic stop, Officer Jones observed that Mr. Johnson exhibited completely different behavior than during previous encounters, refusing to make eye contact and exhibiting increased nervousness the longer they talked. The stop occurred at 2:20 a.m., and there were inconsistencies in Mr. Johnson's and his passenger's versions of what they were doing that morning. Officer Jones testified that he knew that Mr. Johnson had prior drug problems, and that he believed Mr. Johnson's previous drug abuse had resulted in a heart attack. Finally, the officer had knowledge that Mr. Johnson's passenger had a history with drugs and had recently been arrested for possession of a controlled substance. Viewing the totality of the circumstances, the Court held that these factors combined to provide reasonable suspicion to continue the detention after the original purpose of the stop was complete.

Mr. Johnson argued in the alternative that, even if there was a sufficient basis for his continued detention, it exceeded the scope of Rule 3.1 because that rule provides that a suspect may be detained for fifteen minutes. In this case, Officer Jones detained Mr.

Johnson for nineteen minutes from the time the canine was requested until the canine officer arrived, in addition to the thirteen minutes he conducted the traffic stop.

The Court held that they did not agree that the length of the detention violated Rule 3.1. According to the plain language of the rule, the alternative time period allowed the officer to detain appellant for “such time as [was] reasonable under the circumstances” and was not restricted to a specific number of minutes. *Yarbrough, supra*. In *Omar v. State*, 99 Ark. App. 436 (2007), the Court of Appeals held that the canine arrived without undue delay and that a thirty seven-minute detention was not unreasonable. Similarly, the circumstances of this case demonstrated that the canine officer gave prompt attention to Officer Jones’s request and arrived without undue delay just nineteen minutes later. Therefore, the Court held that the duration of the detention was reasonable under the circumstances. The Court of Appeals therefore affirmed the trial court’s denial of Mr. Johnson’s motion to suppress the evidence seized as a result of his detention and the canine sniff of his truck, because that ruling is not clearly against the preponderance of the evidence. The conviction was affirmed.

**Case:** This case was decided by the Arkansas Court of Appeals on February 22, 2012 and was an appeal from the Carroll County Circuit Court, Eastern District, Honorable Gerald K. Crow, Judge. The case cite is *Johnson v. State*, 2012 Ark. App. 167.

Jeff Harper  
City Attorney

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### **In Civil Rights Case, United States Supreme Court Rules for California Police Officers who Entered Private Residence Without a Warrant**

**Facts Taken From the Opinion:** Petitioners, Sergeant Darin Ryburn and Officer Edmundo Zepeda, along with two other officers from the Burbank, California Police Department, responded to a call from Bellarmine-Jefferson High School in Burbank, California. When the officers arrived at the school, the principal informed them that a student, Vincent Huff, was rumored to have written a letter threatening to “shoot up” the school. The principal reported that many parents, after hearing the rumor, had decided to keep their children at home. The principal expressed concern for the safety of her students and requested that the officers investigate the threat.

In the course of conducting interviews with the principal and two of Vincent’s classmates, the officers learned that Vincent had been absent from school for two days and that he was frequently subjected to bullying. The officers additionally learned that one of Vincent’s classmates believed that Vincent was capable of carrying out the alleged threat. The officers found Vincent’s absences from school and his history of being subjected to bullying as cause for concern. The officers had received training on targeted school violence and were aware that these characteristics are common among perpetrators of school shootings.

The officers decided to continue the investigation by interviewing Vincent. When the officers arrived at Vincent’s house, Officer Zepeda knocked on the door

and announced several times that the officers were with the Burbank Police Department. No one answered the door or otherwise responded to Officer Zepeda's knocks. Sergeant Ryburn then called the home telephone. The officers could hear the phone ringing inside the house, but no one answered.

Sergeant Ryburn next tried calling the cell phone of Vincent's mother, Mrs. Huff. When Mrs. Huff answered the phone, Sergeant Ryburn identified himself and inquired about her location. Mrs. Huff informed Sergeant Ryburn that she was inside the house. Sergeant Ryburn then inquired about Vincent's location, and Mrs. Huff informed him that Vincent was inside with her. Sergeant Ryburn told Mrs. Huff that he and the other officers were outside and requested to speak with her, but Mrs. Huff hung up the phone.

One or two minutes later, Mrs. Huff and Vincent walked out of the house and stood on the front steps. Officer Zepeda advised Vincent that he and the other officers were there to discuss the threats. Vincent, apparently aware of the rumor that was circulating at his school, responded, "I can't believe you're here for that." Sergeant Ryburn asked Mrs. Huff if they could continue the discussion inside the house, but she refused. In Sergeant Ryburn's experience as a juvenile bureau sergeant, it was "extremely unusual" for a parent to decline an officer's request to interview a juvenile inside. Sergeant Ryburn also found it odd that Mrs. Huff never asked the officers the reason for their visit.

After Mrs. Huff declined Sergeant Ryburn's request to continue the discussion inside, Sergeant Ryburn asked her if there were any guns in the house. Mrs. Huff responded by "immediately turn[ing] around and r[unning] into the house." Sergeant Ryburn, who was

"scared because [he] didn't know what was in that house" and had "seen too many officers killed," entered the house behind her. Vincent entered the house behind Sergeant Ryburn, and Officer Zepeda entered after Vincent. Officer Zepeda was concerned about "officer safety" and did not want Sergeant Ryburn to enter the house alone. The two remaining officers, who had been standing out of earshot while Sergeant Ryburn and Officer Zepeda talked to Vincent and Mrs. Huff, entered the house last, on the assumption that Mrs. Huff had given Sergeant Ryburn and Officer Zepeda permission to enter.

Upon entering the house, the officers remained in the living room with Mrs. Huff and Vincent. Eventually, Vincent's father entered the room and challenged the officers' authority to be there. The officers remained inside the house for a total of 5 to 10 minutes. During that time, the officers talked to Mr. Huff and Vincent. They did not conduct any search of Mr. Huff, Mrs. Huff, or Vincent, or any of their property. The officers ultimately concluded that the rumor about Vincent was false, and they reported their conclusion to the school.

The Huffs brought this action against the officers under California law, 42 U. S. C. §1983. The complaint alleged that the officers violated the Huffs' Fourth Amendment rights by entering their home without a warrant. Following a 2-day bench trial, the District Court entered judgment in favor of the officers. The District Court resolved conflicting testimony regarding Mrs. Huff's response to Sergeant Ryburn's inquiry about guns by finding that Mrs. Huff "immediately turned around and ran into the house." The District Court concluded that the officers were entitled to qualified immunity because Mrs. Huff's odd behavior, combined with the information the officers gathered at the school, could have

led reasonable officers to believe “that there could be weapons inside the house, and that family members or the officers themselves were in danger.” The District Court noted that “[w]ithin a very short period of time, the officers were confronted with facts and circumstances giving rise to grave concern about the nature of the danger they were confronting.” With respect to this kind of “rapidly evolving incident,” the District Court explained, courts should be especially reluctant “to fault the police for not obtaining a warrant.” The District Court's decision was appealed to the Ninth U.S. Circuit Court of Appeals.

A divided panel of the Ninth Circuit affirmed the District Court as to the two officers who entered the house on the assumption that Mrs. Huff had consented, but reversed as to petitioners. The majority upheld the District Court's findings of fact, but disagreed with the District Court's conclusion that petitioners were entitled to qualified immunity. The majority acknowledged that police officers are allowed to enter a home without a warrant if they reasonably believe that immediate entry is necessary to protect themselves or others from serious harm, even if the officers lack probable cause to believe that a crime has been or is about to be committed. But the majority determined that, in this case, “any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable” given that “[Mrs. Huff] merely asserted her right to end her conversation with the officers and returned to her home.” The case was appealed to the United States Supreme Court.

**Decision by United States Supreme Court:** The United States Supreme Court noted that there was a dissent to the Ninth Circuit majority by Judge Rawlinson. She (Judge Rawlinson) explained that “the

discrete incident that precipitated the entry in this case was Mrs. Huff's response to the question regarding whether there were guns in the house.” She faulted the majority for “recit[ing] a sanitized account of this event” that differed markedly from the District Court's findings of fact, which the majority had conceded must be credited. Judge Rawlinson looked to “cases that specifically address the scenario where officer safety concerns prompted the entry” and concluded that, under the rationale articulated in those cases, “a police officer could have reasonably believed that he was justified in making a warrantless entry to ensure that no one inside the house had a gun after Mrs. Huff ran into the house without answering the question of whether anyone had a weapon.”

The United States Supreme Court held that Judge Rawlinson's analysis of the qualified immunity issue was correct. No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, the Court noted that some of their opinions read as pointing to the opposite direction.

In *Brigham City v. Stuart*, 547 U. S. 398, 400 (2006), the Court held that officers may enter a residence without a warrant when they have “an objectively reasonable basis for believing that an occupant is . . . imminently threatened with [serious injury].” The Court explained that “‘[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.’” (quoting *Mincey v. Arizona*, 437 U. S. 385, 392 (1978)). In addition, in *Georgia v. Randolph*, 547 U. S. 103, 118 (2006), the Court stated that “it would be silly to suggest that the police would commit a tort by entering [a residence] . . . to determine whether violence . . . is about to (or soon will) occur.”

A reasonable police officer could read these decisions to mean that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence. In this case, the District Court concluded that petitioners had such an objectively reasonable basis for reaching such a conclusion. The District Court wrote:

“[T]he officers testified that a number of factors led them to be concerned for their own safety and for the safety of other persons in the residence: the unusual behavior of the parents in not answering the door or the telephone; the fact that Mrs. Huff did not inquire about the reason for their visit or express concern that they were investigating her son; the fact that she hung up the telephone on the officer; the fact that she refused to tell them whether there were guns in the house; and finally, the fact that she ran back into the house while being questioned. That behavior, combined with the information obtained at the school—that Vincent was a student who was a victim of bullying, who had been absent from school for two days, and who had threatened to ‘shoot up’ the school—led the officers to believe that there could be weapons inside the house, and that family members or the officers themselves were in danger.”

This belief, the District Court held, was “objectively reasonable,” particularly since the situation was “rapidly evolving” and the officers had to make quick decisions.

The Court held that confronted with the facts found by the District Court, reasonable officers in the position of petitioners could have come to the conclusion that there was an imminent threat to their safety and to the

safety of others. The Ninth Circuit’s contrary conclusion was flawed for numerous reasons, including the reason that the panel majority did not heed the District Court’s wise admonition that judges should be cautious about second-guessing a police officer’s assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent. But the Court noted that they have instructed that reasonableness “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” and that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Graham v. Connor*, 490 U. S. 386–397 (1989). Judged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, petitioners’ belief that entry was necessary to avoid injury to themselves or others was imminently reasonable.

In sum, reasonable police officers in petitioners’ position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent. And a reasonable officer could have come to such a conclusion based on the facts as found by the District Court.

Therefore, the United States Supreme Court reversed the judgment of the Ninth Circuit, and the case was remanded for the entry of judgment in favor of petitioners.

**Case:** This was a per curiam opinion by the United States Supreme Court decided on January 23, 2012. The case cite is *Ryburn v. Huff*, 565 U.S. \_\_\_\_ (2012).

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**United States Supreme Court Holds Officers are Entitled to Qualified Immunity in Case in Which Los Angeles County Deputy Sheriff Obtained a Search Warrant for a Residence**

**Facts Taken From the Case:** Shelly Kelly decided to break off her romantic relationship with Jerry Ray Bowen and move out of her apartment, to which Bowen had a key. Kelly feared an attack from Bowen, who had previously assaulted her and had been convicted of multiple violent felonies. She therefore asked officers from the Los Angeles County Sheriff’s Department to accompany her while she gathered her things. Deputies from the Sheriff’s Department came to assist Kelly but were called away to respond to an emergency before the move was complete. As soon as the officers left, an enraged Bowen appeared at the bottom of the stairs to the apartment, yelling “I told you never to call the cops on me bitch!” Bowen then ran up the stairs to Kelly, grabbed her by her shirt, and tried to throw her over the railing of the second-story landing. When Kelly successfully resisted, Bowen bit her on the shoulder and attempted to drag her inside the apartment by her hair. Kelly again managed to escape Bowen’s grasp, and ran to her car. By that time, Bowen had retrieved a black sawed-off shotgun with a pistol grip. He ran in front of Kelly’s car, pointed the shotgun at her, and told Kelly

that if she tried to leave he would kill her. Kelly leaned over, fully depressed the gas pedal, and sped away. Bowen fired at the car a total of five times, blowing out the car’s left front tire in the process, but Kelly managed to escape.

Kelly quickly located police officers and reported the assault. She told the police what had happened—that Bowen had attacked her after becoming “angry because she had called the Sheriff’s Department”—and she mentioned that Bowen was “an active member of the ‘Mona Park Crips,’ ” a local street gang. Kelly also provided the officers with photographs of Bowen.

Detective Curt Messerschmidt was assigned to investigate the incident. Messerschmidt met with Kelly to obtain details of the assault and information about Bowen. Kelly described the attack and informed Messerschmidt that she thought Bowen was staying at his foster mother’s home at 2234 East 120th Street. Kelly also informed Messerschmidt of Bowen’s previous assaults on her and of his gang ties.

Messerschmidt then conducted a background check on Bowen by consulting police records, California Department of Motor Vehicles records, and the “cal-gang” database. Based on this research, Messerschmidt confirmed Bowen’s connection to the 2234 East 120th Street address. He also confirmed that Bowen was an “active” member of the Mona Park Crips and a “secondary” member of the Dodge City Crips. Finally, Messerschmidt learned that Bowen had been arrested and convicted for numerous violent and firearm-related offenses. Indeed, at the time of the investigation, Bowen’s “rapsheet” spanned over 17 printed pages, and indicated that he had been arrested at least 31 times. Nine of these arrests were for firearms offenses and six were for violent crimes, including three

arrests for assault with a deadly weapon (firearm).

Detective Messerschmidt prepared two warrants: one to authorize Bowen's arrest and one to authorize the search of 2234 East 120th Street. An attachment to the search warrant described the property that would be the object of the search:

"All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it [sic] to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

"Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to 'Mona Park Crips', including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the

persons being sought in this warrant, affiliation or membership with the 'Mona Park Crips' street gang."

Two affidavits accompanied Detective Messerschmidt's warrant applications. The first affidavit described Messerschmidt's extensive law enforcement experience, including that he had served as a peace officer for 14 years, that he was then assigned to a "specialized unit" "investigating gang related crimes and arresting gang members for various violations of the law," that he had been involved in "hundreds of gang related incidents, contacts, and or arrests" during his time on the force, and that he had "received specialized training in the field of gang related crimes" and training in "gang related shootings."

The second affidavit — expressly incorporated into the search warrant — explained why Messerschmidt believed there was sufficient probable cause to support the warrant. That affidavit described the facts of the incident involving Kelly and Bowen in great detail, including the weapon used in the assault. The affidavit recounted that Kelly had identified Bowen as the assailant and that she thought Bowen might be found at 2234 East 120th Street. It also reported that Messerschmidt had "conducted an extensive background search on the suspect by utilizing departmental records, state computer records, and other police agency records," and that from that information he had concluded that Bowen resided at 2234 East 120th Street.

The affidavit requested that the search warrant be endorsed for night service because "information provided by the victim and the cal-gang data base" indicated that Bowen had "gang ties to the Mona Park Crip gang" and that "night service would provide an added element of safety to the

community as well as for the deputy personnel serving the warrant.” The affidavit concluded by noting that Messerschmidt “believe[d] that the items sought” would be in Bowen’s possession and that “recovery of the weapon could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of further crimes being committed.”

Detective Messerschmidt submitted the warrants to his supervisors — Sergeant Lawrence and Lieutenant Ornales — for review. Deputy District Attorney Janet Wilson also reviewed the materials and initialed the search warrant, indicating that she agreed with Messerschmidt’s assessment of probable cause. Finally, Messerschmidt submitted the warrants to a magistrate. The magistrate approved the warrants and authorized night service.

The search warrant was served two days later by a team of officers that included Messerschmidt and Lawrence. Sheriff’s deputies forced open the front door of 2234 East 120th Street and encountered Augusta Millender — a woman in her seventies — and Millender’s daughter and grandson. As instructed by the police, the Millenders went outside while the residence was secured but remained in the living room while the search was conducted. Bowen was not found in the residence. The search did, however, result in the seizure of Augusta Millender’s shotgun, a California Social Services letter addressed to Bowen, and a box of .45-caliber ammunition.

Bowen was arrested two weeks later after Messerschmidt found him hiding under a bed in a motel room.

The Millenders filed suit in Federal District Court against the County of Los Angeles, the sheriff’s department, the sheriff, and a number of individual officers, including

Messerschmidt and Lawrence. The complaint alleged, as relevant here, that the search warrant was invalid under the Fourth Amendment. It sought damages from Messerschmidt and Lawrence, among others.

The parties filed cross motions for summary judgment on the validity of the search warrant. The District Court found the warrant defective in two respects. The District Court concluded that the warrant’s authorization to search for firearms was unconstitutionally overbroad because the “crime specified here was a physical assault with a very specific weapon”—a black sawed-off shotgun with a pistol grip—negating any need to “search for all firearms.” The court also found the warrant overbroad with respect to the search for gang-related materials, because there “was no evidence that the crime at issue was gang-related.” As a result, the District Court granted summary judgment to the Millenders on their constitutional challenges to the firearm and gang material aspects of the search warrant. The District Court also rejected the officers’ claim that they were entitled to qualified immunity from damages.

Messerschmidt and Lawrence appealed, and a divided panel of the Court of Appeals for the Ninth Circuit reversed the District Court’s denial of qualified immunity. The court held that the officers were entitled to qualified immunity because “they reasonably relied on the approval of the warrant by a deputy district attorney and a judge.”

The Court of Appeals granted rehearing en banc and affirmed the District Court’s denial of qualified immunity. The en banc court concluded that the warrant’s authorization was unconstitutionally overbroad because the affidavit and the warrant failed to

“establish[ ] probable cause that the broad categories of firearms, firearm-related material, and gang-related material described in the warrant were contraband or evidence of a crime.” In the en banc court’s view, “the deputies had probable cause to search for a single, identified weapon . . . . They had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant.” In addition, “[b]ecause the deputies failed to establish any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence [was] likewise invalid.” Concluding that “a reasonable officer in the deputies’ position would have been well aware of this deficiency,” the en banc court held that the officers were not entitled to qualified immunity. The case was appealed to the United States Supreme Court, who granted certiorari.

**Decision of the United States Supreme Court:** The United States Supreme Court, in their opinion, noted that the validity of the warrant is not before them. The question instead is whether Messerschmidt and Lawrence are entitled to immunity from damages, even assuming that the warrant should not have been issued.

“The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments,” and “protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Ashcroft v. al-Kidd*, 563 U.S. \_\_\_, \_\_\_ (2011) (slip op., at 12) (quoting

*Malley v. Briggs*, 475 U.S. 335, 341 (1986)). “[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action, assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.”

The Court held that where the alleged Fourth Amendment violation involved a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in “objective good faith.” *United States v. Leon*, 468 U.S. 897–923 (1984). Nonetheless, under our precedents, the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness. Rather, we have recognized an exception allowing suit when “it is obvious that no reasonably competent officer would have concluded that a warrant should issue.” *Malley v. Briggs*, 475 U.S., at 341. The “shield of immunity” otherwise conferred by the warrant, will be lost, for example, where the warrant was “based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Leon*, 468 U.S., at 923.

The United States Supreme Court held this case does not fall within the narrow exception. It would not be entirely unreasonable for an officer to believe that there was probable cause to search for all firearms and firearm-related materials. Under the circumstances set forth in the warrant, an officer could reasonably conclude there was a “fair probability” that the sawed-off shotgun was not the only firearm Bowen owned, *Illinois v. Gates*, 462 U.S. 213, 238 (1983), and that Bowen’s

sawed-off shotgun was illegal. Given Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that Bowen owned other illegal guns. An officer also could reasonably believe that seizure of the firearms was necessary to prevent further assaults on Kelly. California law allows a magistrate to issue a search warrant for items "in the possession of any person with the intent to use them as a means of committing a public offense," Cal. Penal Code Ann. §1524(a)(3) (West 2011), and the warrant application submitted by the officers specifically referenced this provision as a basis for the search.

In regarding the warrant's authorization to search for gang-related materials, the Court found a reasonable officer could view Bowen's attack as motivated not by the souring of his romantic relationship with Kelly but instead by a desire to prevent her from disclosing details of his gang activity to the police. It would therefore not be unreasonable — based on the facts set out in the affidavit — for an officer to believe that evidence regarding Bowen's gang affiliation would prove helpful in prosecuting him for the attack on Kelly, in supporting additional, related charges against Bowen for the assault, or in impeaching Bowen or rebutting his defenses. Moreover, even if this were merely a domestic dispute, a reasonable officer could still conclude that gang paraphernalia found at the Millenders' residence could demonstrate Bowen's control over the premises or his connection to other evidence found there.

The Court further held that the fact that the officers sought and obtained approval of the

warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause. A contrary conclusion would mean not only that Messerschmidt and Lawrence were "plainly incompetent," in concluding that the warrant was supported by probable cause, but that their supervisor, the deputy district attorney, and the magistrate were as well.

The Court further held that the court below erred in relying on *Groh v. Ramirez*, 540 U.S. 551 (2004). There, officers who carried out a warrant-approved search were not entitled to qualified immunity because the warrant failed to describe the items to be seized and "even a cursory reading of the warrant would have revealed the defect. Here, in contrast, any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the supporting affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all the items listed in the warrant. Unlike in *Groh*, any error here would not be one that "just a simple glance" would have revealed. Therefore, the United States Supreme Court reversed the decision of the Ninth U.S. Circuit Court of Appeals, and held the officers were entitled to qualified immunity.

**Case:** This case was decided by the United States Supreme Court on February 22, 2012. The case cite is *Messerschmidt v. Millender*, 565 U.S. \_\_\_\_ (2012).

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