

# C.A.L.L.

January 1, 2014

City Attorney Law Letter

Issue 14-01

## Arkansas and Eight U.S. Circuit Court of Appeals Cases

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## Reminder: Be Careful Before Ever Deciding to Arrest a Suspect Out of the Home for DWI

This article is a brief excerpt of a much more comprehensive article that was first published in the July 1, 2012 edition of C.A.L.L. The article should serve as a reminder to be very careful before ever arresting a suspect out of the residence for DWI. The full article can be found on page 1.

## An Overview of the Elements of Misdemeanor Assault and Battery

This article provides an overview on the elements of misdemeanor assault and battery, hopefully it will provide you with some guidance when you have to make the sometimes difficult decision on what the appropriate charge should be. The full article can be found on Page 7.

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## **Reminder: Be Careful Before Ever Deciding to Arrest a Suspect out of the Home for DWI**

The following article on arresting a suspect out of the home for DWI is a brief excerpt of a much more comprehensive article that was first published in the July 1, 2012, edition of C.A.L.L. The entire article focuses on the complex issue of when an officer can enter a residence to arrest a suspect, and it was put together by then Springdale City Attorney Jeff Harper, with help from Fourth Judicial District Prosecutor John Threet. The brief excerpt included below should serve as a reminder to be very careful before ever arresting a suspect out of the residence for DWI. For an overview of the many other situations that a police officer may encounter when deciding whether it is proper to enter a residence to search or seize, please refer to the July 1, 2012, edition of C.A.L.L. so that you can read the entire article.

Taylor Samples  
Deputy City Attorney

**Arrest out of the home without a warrant?** The United States Supreme Court has noted that, "with few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27 (2001). The United States Supreme Court wrote in *Payton v. New York*, 445 U.S. 573 (1980), the following: "The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow

without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance of the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."

The language from the *Payton* decision was cited by the Arkansas Supreme Court when they decided the case of *Holmes v. State*, 374 Ark. 530 (2002). After quoting language from *Payton*, the Arkansas Supreme Court noted that they have held repeatedly that warrantless searches in private homes are presumptively unreasonable. *McFerrin v. State*, 344 Ark. 671 (2001); *Norris v. State*, 338 Ark. 397 (1999); *Williams v. State*, 327 Ark. 213 (1997). The court further held that the burden is on the state to prove that the warrantless activity was reasonable. *Warford v. State*, 330 Ark. 8 (1997).

The bottom line is that an arrest out of a home without a warrant is presumed to be unreasonable unless there is consent to enter the home, or there are exigent circumstances.

In a Springdale case, *Norris v. State*, 338 Ark. 397 (1999), *Norris* (appellant) was arrested for DWI out of his residence. Appellant was allegedly seen driving erratically by another driver. The citizen followed appellant to his home and called police. Based on the citizen's information, the officer approached appellant's home, where he was admitted into the house by the appellant's visiting mother-in-law. When the officer asked for the appellant, the mother-in-law went to appellant's bedroom to retrieve him. The officer followed her. In the bedroom, the officer questioned appellant,



administered field sobriety tests, and arrested appellant for the offense of DWI #1. The appellant asserted on appeal that the police had no authority to enter his home to make a warrantless arrest for a minor offense and no valid consent was given to allow police to enter appellant's home to make a warrantless arrest. The Arkansas Supreme Court agreed with the defendant and held that a DWI first offense did not create exigent circumstances such that a warrantless arrest can be made out of the home.

The State also contended that because the appellant's blood-alcohol content decreases with the passage of time, it is therefore equivalent to "destruction of evidence" and that determining the blood-alcohol content is, then, an "exigent circumstance" that justifies a warrantless entry into appellant's home. The Court held in this case, because they considered DWI #1 a minor offense, a warrantless arrest cannot be upheld simply because evidence of the offender's blood alcohol level might have dissipated while the police obtained a warrant.

The Court also looked at consent to enter the home. The Court noted that they have suggested that so long as a searching police officer reasonably believes that a person giving consent had authority to do so, the consent is valid, notwithstanding a later determination that the consenter had no such authority. *Grant v. State*, 267 Ark. 50 (1979). The Court then looked to the scope of the consent in this case and noted that the mother-in-law had asked the officer to step inside the house because the family dog was making a disturbance but that she never asked or verbally consented to the officer coming any farther into the house, and specifically, not down the hall and into appellant's bedroom. The Court noted that testimony was undisputed. Further, the

officer's testimony made it clear that while his initial entry into the house was in response to the mother-in-law's initial invitation to step inside, that entry was distinct and separate from his decision to follow her out of the living room, down the hall, and into appellant's bedroom. The officer never asserted that he perceived the initial invitation as anything more than entry inside the front door or that he relied on that invitation in any way as a basis for going into the interior of appellant's home. Therefore, the Court held that the officer did not have consent to go back into the bedroom and make the initial contact with the suspect.

Now that we have gone over the basics of consent and exigent circumstances, let's take some scenarios on making an arrest out of a residence without a warrant.

**Scenario #1:** Let's now take the *Norris* case described above, and change the facts slightly. Springdale Police receive a call of a drunk driver. The person making the call is following the vehicle and describing the vehicle driving all over the road, including driving northbound in the southbound lane at times. The driver, however, makes it home and the complaining witness waits on the officer, who arrives 5 minutes later. The officer knocks on the door. A lady answers the door and states that, after the officer asks, that her husband has just arrived home in the vehicle, which is now sitting in the driveway. The officer asks how long he has been home, and she said about five minutes. She then tells the officer that he is now in bed. The officer then asks consent to enter the residence to search for the suspect (her husband), and the officer tells the wife that she has the right to refuse consent to allow him in the home to search for her husband. The wife agrees to allow the officer to come in the house and search for her husband. She



advises the officer to follow her and takes the officer to a bedroom where the officer makes contact with the suspect. After interviewing the suspect, the officer determines that he is intoxicated and has not been drinking since he came home. *Can an arrest be made?* It is my opinion that an arrest can be made because the officer has entered the house lawfully, under proper consent. In the *Norris* case the officer had consent to step in the door, but did not ask consent to go back in the bedroom and the court held he did not have consent to go back and search for the suspect. **Also, I recommend you get consent in writing before conducting a search of the dwelling if possible. By doing it this way, it takes away the argument that defendant was never advised of his right to refuse consent (which is required under Arkansas Rule of Criminal Procedure 11.1).**

**Scenario #2:** Let's take this same case and assume the wife refuses to let the officer in, but says she will bring the suspect to the front door to talk to him. The officer is never able to enter the house under consent. He then talks with the suspect, determines that he is intoxicated and asks if he will voluntarily go in and take a blood test, but the suspect refuses. The officer gets his ticket book, writes a ticket for DWI and hands it to the suspect. Again, this is proper because no arrest has been made out of the home. This is the approach that has been taken by Springdale police officers since the *Norris* case was decided. I do not ever remember a case in which the defendant was found not guilty on DWI charges when a ticket was written at the home. A few suspects have even voluntarily gone with the officer down to the station to take a test and have then been taken back to the home after the breath test was administered.

**Note From City Attorney:** This article is intended to provide a guideline for Springdale officers on the complicated issue of making an arrest out of the home. Case law helps to give officers what factors should be considered in deciding whether to make an entry without a warrant, or whether to make an entry when you have an arrest warrant but not a search warrant. Of course, it will always come down to the facts that you have at the time you make the decision. I hope this article helps Springdale officers who are making that decision. *C.A.L.L.* is intended to provide legal guidance for Springdale police officers. As always, I recommend officers from other jurisdictions consult their legal counsel concerning this issue.



### **Arkansas Court of Appeals Affirms Trial Court's Denial of Motion to Suppress Since Both Probable Cause and Reasonable Suspicion of Impaired Driving Existed**

**Facts Taken From the Case:** Off-duty Hot Springs Police Officer Fred Thornton was driving on Central Avenue between 4:30 and 5:00 a.m. When Officer Thornton came to a stop light at an intersection, he observed a dark-colored Mercedes-Benz SUV stopped about three car lengths back from the normal stopping place at the stop light. After the light turned green and Officer Thornton proceeded, the Mercedes stayed in place for at least fifteen seconds. When the Mercedes began to move, Officer Thornton saw in his rearview mirror that the Mercedes was weaving between the left and right lanes and was driving at such a speed that Officer Thornton was concerned that the Mercedes



would hit his vehicle from behind at the next red light. The Mercedes then turned behind Officer Thornton.

Concerned that the driver of the Mercedes might be intoxicated, Officer Thornton contacted Officer Frederick Stang and advised Officer Stang that he should be on the lookout for a dark Mercedes SUV near the Exchange/Prospect area moving in a westerly direction. There was little traffic at that time of morning, and about a minute later, Officer Stang saw a dark Mercedes SUV cross both lanes of traffic and onto the shoulder in a left turn onto Hobson Avenue, a two-lane one-way street. Officer Stang was concerned that the driver could not keep the vehicle in the proper lane for the turn or keep it on the roadway. Officer Stang followed the Mercedes for another couple of blocks, and during this time he observed the Mercedes make a wide right turn onto Fifth Street, where the Mercedes crossed over to the left side onto the wrong side of the street. At this point, Officer Stang initiated a traffic stop and subsequently arrested Robert Cassinelli for DWI.

Cassinelli testified that his girlfriend was driving during the period of time that Officer Thornton saw his vehicle, and Cassinelli stated that he did not commit any traffic offenses after dropping her off. Cassinelli also testified that he used his turn signals, that there was no other traffic, and that it was prudent for him to stay in the middle of the street to avoid parked cars. Cassinelli denied making an improper wide right turn on Fifth Street.

At the hearing on his motion to suppress, Cassinelli claimed that no probable cause existed for a traffic stop and that he was not guilty of any traffic violation. Both Cassinelli and the State asserted that the moving violation at issue as observed by Officer Stang would be determined by

applying A.C.A. § 27-51-401, entitled "Turning at intersections," and the State argued that the observations of off-duty Officer Thornton and Officer Cassinelli would support a finding of reasonable suspicion of driving while intoxicated sufficient to justify an investigatory stop of the Mercedes.

The trial court denied Cassinelli's motion to suppress and found that off-duty Officer Thornton's observations of improper driving alone would justify the stop on a basis of reasonable suspicion of impairment, and that Officer Stang also witnessed two additional actions that justified the traffic stop on the basis of reasonable suspicion of impairment. Cassinelli then appealed the trial court's denial of his motion to suppress to the Arkansas Court of Appeals.

**Argument and Decision by the Arkansas Court of Appeals:** On appeal to the Arkansas Court of Appeals (Court), Cassinelli argued that the trial court clearly erred in denying his motion to suppress because the police lacked probable cause to stop his vehicle. In setting forth the law on probable cause, the Court said that a police officer must have probable cause to believe that the driver of a vehicle has violated a traffic law before the officer may initiate a traffic stop. Additionally, the Court said that 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. Furthermore, the Court stated that it applies a liberal review in assessing the existence of probable cause, and whether an 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. Finally, the Court said that so



long as an officer observes a traffic violation that would lawfully permit him to stop a vehicle, the stop will not be invalidated on pretext grounds, even if the officer wanted to follow the driver until a traffic violation occurred.

The Arkansas Court of Appeals affirmed the trial court's denial of Cassinelli's motion to suppress. The Court reasoned that whether Cassinelli was actually guilty of violating the statute on making turns at intersections was not the issue, but that the issue was whether there were facts or circumstances known to Officer Stang that were sufficient to permit a person of reasonable caution to believe that the driver committed the moving violation of making an improper turn, sufficient to support stopping the vehicle. The Court held that the trial court would have been correct to deny the motion to suppress solely on the basis that Officer Stang had probable cause to believe that Cassinelli had committed a moving violation. Finally, the Court stated that the trial court was not clearly erroneous in finding that there existed reasonable suspicion of impaired driving.

**Case:** This case was decided by the Arkansas Court of Appeals on October 2, 2013, and was an appeal from the Garland County Circuit Court, Honorable John Homer Wright, Judge. The case citation is *Cassinelli v. State*, 2013 Ark. App. 553.

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**8th U.S. Circuit Court of Appeals Holds that Evidence is**

## **Admissible Following Terry Detention and Sweep of Vehicle**

**Facts Taken From the Case:** At 12:45 a.m. on April 17, 2012, Officers Aram Normandin and Josh Downs of the Omaha Police Department were patrolling 24-hour businesses in response to robberies in the area. While patrolling, the officers saw a vehicle with tinted windows parked at the far corner of a grocery store parking lot. Officer Normandin saw that the occupants of the car were ducked down, so he and Officer Downs decided to get out of their patrol car to see what was going on. As the officers approached the vehicle, the person in the driver's seat of the vehicle sat up and reached under his seat with both hands.

Officers Normandin and Downs pointed their weapons at the occupants of the parked car and ordered them to show their hands. The driver, Shawn Morgan, initially kept his hands under his seat but then complied with a second command to raise his hands. The officers then removed Morgan and the other two occupants from the car, and by that time, two more officers had arrived on scene.

After removing the three occupants from the car, the officers handcuffed all three and seated them on a curb away from the car. Officer Normandin testified that he was concerned that a weapon was under Morgan's seat, so Officer Normandin immediately searched the vehicle. When Officer Normandin reached under the driver's seat of the vehicle, he felt a lockbox that was large enough to conceal a handgun. Officer Normandin removed the lockbox from the car and asked Morgan, "What is this", to which Morgan replied, "There's meth in there, and I'm a dealer." After



hearing Morgan's response, the officers advised Morgan of his *Miranda* rights. Officer Normandin opened the lockbox and discovered methamphetamine along with a container holding a white powdery substance. Morgan then told the officers that he was a drug dealer from Fremont, Nebraska, and that the methamphetamine in the lockbox was for a drug deal in Omaha. Officer Normandin asked Morgan about the white powdery substance, and Morgan replied that it was cocaine. The substances in the lockbox field-tested positive for methamphetamine and cocaine, and Morgan was then placed under arrest.

A grand jury indicted Morgan for possession with intent to distribute five grams or more of methamphetamine. Morgan moved to suppress evidence that was seized from his person and his vehicle, and statements he made after police officers read him *Miranda* rights. The United States District Court for the District of Nebraska suppressed the physical evidence and Morgan's post-warning statement to police officers and concluded that the officers exceeded the permissible scope of an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968). The district court also held that Morgan's unlawful arrest led directly to the seizure of the physical evidence and the making of the inculpatory statements. The United States government appealed this decision to the Eighth U.S. Circuit Court of Appeals.

**Argument and Decision by the Eighth U.S. Circuit Court of Appeals:** In setting forth the applicable law, the Eighth U.S. Circuit Court of Appeals (Court) said a police officer may detain a person for investigation without probable cause to arrest when the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. See *U.S. v. Sokolow*, 490 U.S. 1 (1989), quoting *Terry*

*v. Ohio*. Additionally, the Court said that the question of whether reasonable suspicion exists is determined by viewing the totality of the circumstances, and that once reasonable suspicion is established, police officers may conduct a protective search of a vehicle's interior, regardless of whether the occupants have been removed from the vehicle, because a suspect who is not placed under arrest will be permitted to reenter his car and will then have access to any weapons inside. See *Michigan v. Long*, 463 U.S. 1032, 1052 (1983). Finally, the Court stated that the 2009 United States Supreme Court case of *Arizona v. Gant*, 556 U.S. 332, clarified an officer's authority to search a vehicle incident to arrest after the arrestee has been secured, and the Supreme Court's decision in *Arizona v. Gant* also expressly recognized the continuing validity of *Michigan v. Long* and identified protective searches of a vehicle based on reasonable suspicion of dangerousness as an established exception to the warrant requirement.

In applying the above law to the facts as presented in the case against Morgan, the Court held that police officers had reasonable suspicion to detain Morgan under the authority granted in *Terry v. Ohio*. The Court reasoned that officers Normandin and Downs were patrolling an area where there had been recent robberies of 24-hour businesses and noticed a vehicle with tinted windows that was parked far away from the entrance of a 24-hour grocery store. The Court noted that it was late at night; that the occupants of the vehicle attempted to conceal themselves; that Morgan made furtive gestures under his seat with both hands; and that Morgan refused to remove his hands from under the seat when Officer Normandin first ordered him to do so. The Court concluded that these factors, taken together, amounted to reasonable suspicion that Morgan was engaged in criminal



activity and a reasonable belief that Morgan was dangerous.

Additionally, the Court held that Morgan's furtive gestures under his seat as the officers approached the vehicle gave them reason to believe that there was a weapon in the vehicle that Morgan might access when the *Terry* stop ended and Morgan was allowed to return to the vehicle. This objectively reasonable concern for officer safety justified Officer Normandin's immediate protective sweep under the driver's seat of the vehicle. The Court said that because reasonable suspicion was established, the officers' search of the vehicle's interior was permitted even though the occupants had been removed from the vehicle, and Officer Normandin was authorized to search the lockbox he found in the vehicle, which was large enough to conceal a weapon, because a valid search under *Michigan v. Long* extends to closed containers found in the vehicle's passenger compartment.

Finally, the Court examined the question of whether the *Terry* investigatory detention lasted for an unreasonably long time or if officers used unreasonable force, thereby turning the investigatory detention into an arrest. The Court held that the limits of a *Terry* stop were not exceeded when Morgan was removed from the vehicle and handcuffed, and when Officer Normandin conducted a protective sweep of the vehicle. The Court stated that the officers had established reasonable suspicion and had reason to believe that Morgan was dangerous, and Officer Normandin searched the vehicle for weapons immediately after securing Morgan. Also, the Court said that the officers did not use unreasonable force and did not hold Morgan for an unreasonably long time. The Court said that it is reasonable for officers to fear for their

safety, even when a suspect is secured, because the suspect will be permitted to return to his vehicle and to access any weapons inside at the end of the investigation. In conclusion, the Court said that the officers were acting in a swiftly developing situation and were authorized to take reasonable steps to protect their safety during and immediately after the *Terry* stop.

For the above reasons, the Court reversed the order of the district court suppressing physical evidence and statements (except the government did not challenge the district court's suppression of Morgan's statement made prior to being read *Miranda*, therefore the district court was not reversed on that ruling) and remanded the case for further proceedings.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on September 10, 2013, and was an appeal from the United States District Court for the District of Nebraska. The case citation is *U.S. v. Morgan*, \_\_\_ F.3d \_\_\_ (2013).

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## **An Overview of the Elements of Misdemeanor Assault and Battery**

This article provides an overview on the elements of misdemeanor assault and battery. It will hopefully provide you with some guidance when you have to make the sometimes difficult decision on what the appropriate charge should be.



### **Assault in the First Degree**

Assault in the first degree is a Class A misdemeanor and is found at A.C.A. § 5-13-205. It is defined as recklessly engaging in conduct that creates a substantial risk of death or serious physical injury to another person, or purposely impeding or preventing the respiration of another person or the circulation of another person's blood by applying pressure on the throat or neck or by blocking the nose or mouth of the other person.

Out of all the misdemeanor assault offenses, assault in the first degree is the one that we see charged least often. It seems to usually be charged under the context of the second part of the statute when a suspect chokes the victim or impedes her respiration.

First degree assault on a family or household member is also a Class A misdemeanor and is found at A.C.A. § 5-26-307. It is defined as recklessly engaging in conduct that creates a substantial risk of death or serious physical injury to a family or household member. For whatever reason, assault on a family or household member found at A.C.A. § 5-26-307 does not contain the same provision as regular assault in the first degree found at A.C.A. § 5-13-205 about purposely impeding or preventing the respiration of another person or the circulation of another person's blood by applying pressure on the throat or neck or by blocking the nose or mouth of the other person. However, please keep in mind that both aggravated assault found at A.C.A. § 5-13-204 and aggravated assault on a family or family or household member found at A.C.A. § 5-26-306, both of which are Class D felonies, expressly prohibit a person from, under circumstances manifesting extreme indifference to the value of human life, purposely impeding or preventing the

respiration of either another person (under regular aggravated assault) or a family or household member (under domestic aggravated assault) or the circulation of that person's blood by applying pressure on the throat or neck or by blocking the nose or mouth of that person.

### **Assault in the Second Degree**

Second and third degree assault are charged more frequently than assault in the first degree. Generally speaking, this is because the conduct that is reported to officers more frequently satisfies the elements of second and third degree assault than first degree assault.

Assault in the second degree is a Class B misdemeanor and is defined at A.C.A. § 5-13-206 as recklessly engaging in conduct that creates a substantial risk of physical injury to another person. Second degree assault on a family or household member is found at A.C.A. § 5-26-308. It is also a Class B misdemeanor, and it has the same definition as regular assault in the second degree, except that it should be charged when committed on a family or household member as defined under A.C.A. § 5-26-302.

Assault in the second degree should be charged when the suspect does an act that could have injured another person but that did not. For example, if husband slaps wife in the face, but police observe no physical injury (which is discussed below in the battery third degree section) to wife as a result of the slap, then the correct charge is domestic assault in the second degree. Or if Neighbor A pushes Neighbor B into a mailbox, but no injury is observed to Neighbor B's back as a result of hitting the mailbox, then the correct charge is assault in the second degree. Many times, assault in



the second degree is the correct charge when an officer would have charged battery in the third degree but was unable to do so because of lack of physical injury to the victim.

### **Assault in the Third Degree**

Assault in the third degree is a Class C misdemeanor and is defined at A.C.A. § 5-13-207 as purposely creating apprehension of imminent physical injury to another person. Third degree assault on a family or household member is found at A.C.A. § 5-26-309. It is also a Class C misdemeanor, and it has the same definition as regular assault in the third degree, except that it should be charged when committed on a family or household member as defined under A.C.A. § 5-26-302.

Assault in the third degree is often times charged when there is no physical injury observed on the victim (which often results in a battery third degree charge) and there is no physical contact without injury done by the suspect to the victim (which often results in an assault second degree charge, as discussed above). Another way to think about whether it is proper to charge assault in the third degree is to ask yourself the following question: did the suspect's purposeful conduct scare the victim, and was it reasonable for the victim to be scared? If the answer to both of these questions is yes, and if there is no injury or other reported physical contact such as pushing or slapping, then the correct charge will most likely be assault in the third degree.

It is not a crime to have an argument with another person. Before third degree assault is charged, there is usually an act of physical contact that is threatened to be done on the victim by the suspect. For example, if during the course of a heated argument, the

suspect raises his fist as though he is going to hit the victim, and if this act scares the victim, then the suspect has committed assault in the third degree. This is an example of physical contact that is threatened to be done on the victim that scared the victim. However, the physical contact is not always threatened to be done directly on the victim. For example, wife, who has been arguing with husband, locks herself in the bathroom to get away from husband; while wife is locked in the bathroom, husband kicks the door in while screaming at wife, and this scares wife because husband has hit her in the past. Husband has committed domestic assault in the third degree. Another example may be that husband and wife are arguing, and while arguing, husband, who is standing close to wife, punches a hole in the wall; wife calls the police and tells the police officer that she was scared since husband has hit her before, and this is how he acted on the prior occasion. Husband has committed the offense of domestic assault in the third degree.

Finally, it is most often times vital that the victim tell the police officer that the suspect's actions scared the victim before the suspect can be charged with assault in the third degree. Otherwise, it is difficult to show that the victim felt apprehension of imminent physical injury. However, where the facts as reported are of a very serious nature, then the apprehension of imminent physical injury may be able to be inferred without specifically being stated. For example, in the Arkansas Court of Appeals case of *Robinson v. State*, 2011 Ark. App. 380, the defendant was convicted of assault in the third degree on her next door neighbor after she pulled a four-inch knife on her neighbor and asked her son to go get her machete so that she could do something to the neighbor. The defendant argued to the



Arkansas Court of Appeals that she was wrongfully convicted since the neighbor never stated the defendant's actions caused her to feel apprehension of physical injury. In upholding the defendant's conviction, the Arkansas Court of Appeals said that such exacting testimony of requiring the neighbor to say that she felt apprehension of physical injury was unnecessary in light of the other evidence. Many assault third degree cases or domestic assault third degree cases will not present facts of such a serious nature, so remember to always ask the victim in an assault or domestic assault third degree case how the suspect's actions made him or her feel.

### **Battery in the Third Degree**

Battery in the third degree is a Class A misdemeanor, and it is defined at A.C.A. § 5-13-203 as purposely or recklessly causing physical injury to another person, or as negligently causing physical injury to another person by means of a deadly weapon, or by purposely causing stupor, unconsciousness, or physical or mental impairment or injury to another person by administering to the other person, without the other person's consent, any drug or other substance. Domestic battering in the third degree is found at A.C.A. § 5-26-305. It is a Class A misdemeanor under most circumstances, and it for the most part has the same definition as regular battery in the third degree, except that it should be charged when committed on a family or household member as defined under A.C.A. § 5-26-302. Please keep in mind that there are instances when domestic battering in the third degree found at A.C.A. § 5-26-305 can be charged as a felony, such as if committed against a pregnant victim or if the person has one other domestic battery or domestic aggravated assault conviction within the last five years or two within the last ten years.

Please consult the statute if you are uncertain of whether you should charge the domestic battering in the third degree offense as a felony.

Before a person can be charged with third degree battery, the victim must have suffered physical injury at the hands of the suspect. Physical injury is defined at A.C.A. § 5-1-102 (14) as the impairment of physical condition, or the infliction of substantial pain, or the infliction of bruising, swelling, or a visible mark associated with physical trauma. Under the wording of A.C.A. § 5-1-102 (14), it is not necessary for the victim to have bruising, swelling, or a visible mark before the suspect can be charged with battery in the third degree, so long as the suspect inflicted upon the victim substantial pain or the impairment of physical condition. However, it is my opinion that a third degree battery charge would be difficult to prove without the presence of bruising, swelling, or a visible mark, and I am not aware of any published cases where a third degree battery conviction has been upheld without the presence of marks on the victim.

The classic example of a battery or domestic battery in the third degree scenario is when the suspect punches the victim, pushes the victim down, or does some other purposeful or reckless physical act to the victim that leaves bruises, swelling, or marks. As stated above, the key question to ask is whether physical injury appears. If the suspect punches or pushes the victim, yet no physical injury occurs, then the correct charge will often be second degree assault (as discussed above). Please remember that if you charge a suspect with battery in the third degree to always describe in your police report the injury that you observed to the victim.

**Hypothetical Situation**

Father has been home drinking alcohol all day and has trouble standing. Son arrives home from work and sits in the kitchen with Mother to see what is for dinner. Father comes into the kitchen and begins yelling at Son in an attempt to provoke a fight. Son remains seated until he sees Father push Mother two times, at which time Son stands between Father and Mother. Father then pushes Son, who then punches Father in the nose before calling the police. Neither Mother or Son say that they were scared of Father, and both say that Father was so intoxicated that he had trouble balancing.

What is the correct charge on Father? There is no injury, so Father cannot be charged with domestic battery in the third degree. Would the correct charge be domestic assault in the third degree or domestic assault in the second degree? In this instance, domestic assault in the third degree would be difficult to prove since neither Mother nor Son said that they were scared of Father. In this case, should the police decide to charge Father, then the correct charge would most likely be domestic assault in the second degree for Father pushing Mother and Son. Remember that under the second degree assault and third degree battery statutes, how the suspect's conduct made the victim feel is not an essential element that must be met in order to prove the charge.

In conclusion, it is not always easy to determine the correct charge in the context of misdemeanor assault and battery. The above discussion will hopefully help you think about and understand many of the issues you will face or have already face

when deciding what the appropriate charge may be.

Taylor Samples  
Deputy City Attorney

**Officer Given Immunity, But Jailer Not Given Immunity in Death of Detainee**

On September 20, 2013, the United States Court of Appeals for the 8<sup>th</sup> Circuit issued its opinion in the case of *Thompson v. King, et al.* This case began on December 18, 2008, when Stephen Furr, a Saline County Sheriff's Deputy, stopped a vehicle in which Johnny Dale Thompson was a passenger. During the traffic stop, it was discovered that Thompson had a warrant for his arrest, so he was taken into custody. While searching Thompson, Furr found an empty Xanax prescription bottle. The bottle indicated that Thompson had been prescribed 60 Xanax pills two days earlier. While en route to the jail, Thompson slept but was easily awakened by Officer Furr upon arriving at the jail. Once at the jail, Thompson appeared to be slurring slightly, and admitted to taking some medication. Officer Furr then completed his paperwork and turned Thompson over to jailer Ulenzen King for booking.

Officer King noted that Thompson appeared intoxicated. Thompson asked for a chair to sit down, then leaned forward in the chair but did not fall to the floor. During the booking process, Officer King had to slap the counter to awaken Thompson. Officer King asked Thompson several medical



questions, including if he had ingested any medication and how much. Thompson stated that he suffered from seizures and had taken Dilantin but would not tell Officer King how many pills he had ingested. Due to Thompson's intoxication level, Officer King wrote, "Too Intox to Sign" on Thompson's booking sheet. At approximately 7:42 P.M., Thompson was placed in a cell. At one point, another detainee observed Thompson's intoxicated condition and informed Officer King that Thompson needed help, but Officer King ignored the warning. At 9:09 P.M., Officer King and another officer entered Thompson's cell and discovered him cool to the touch, not breathing, and non-responsive. Thompson was taken to the hospital and pronounced dead at 9:30 P.M.

Thompson's mother, Elaine Thompson, filed suit against Saline County and several Saline County officers individually, alleging federal constitutional claims under 42 U.S.C. § 1983 and state law claims under the Arkansas Civil Rights Act and Arkansas' wrongful death law. The defendants moved for summary judgment, asserting qualified immunity. The district court concluded that Saline County and each individually named defendant, except for Officers Furr and King, were entitled to qualified immunity. Accordingly, the district court granted summary judgment and dismissed most of Thompson's claims but preserved the federal and state law claims against Officers Furr and King. Officers Furr and King appealed, arguing that the district court erred in concluding they were not entitled to qualified immunity in the death of Thompson.

### **Qualified Immunity Standard**

When an officer asserts qualified immunity in response to a §1983 action, the Court

conducts a two-pronged analysis: (1) whether the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) whether the right was clearly established at the time of the deprivation. As to prong one of this analysis, Thompson alleged that Deputy Furr and jailer King violated her son's substantive due process rights because they were deliberately indifferent to his serious medical needs.

A plaintiff claiming deliberate indifference must establish both objective and subjective components. The objective component requires a plaintiff to demonstrate an objectively serious medical need. The subjective component requires a plaintiff to show that the defendant actually knew of, but deliberately disregarded, such need. On appeal, Furr and King challenged the district court's conclusions on the subjective component. As such, the 8<sup>th</sup> Circuit's review only addressed whether Deputy Furr and jailer King actually knew Thompson presented a serious medical need but deliberately disregarded it.

In order to demonstrate that a defendant actually knew of, but deliberately disregarded, a serious medical need, the plaintiff must establish a mental state akin to criminal recklessness: disregarding a known risk to the inmate's health. This standard requires a showing more than negligence, more than gross negligence, but less than purposefully causing or knowingly bringing about a substantial risk of serious harm to the inmate. It is not enough merely to find that a reasonable person would have known about the risk, or that the officer should have known about the risk. Even acting unreasonably in response to a known risk is not sufficient to prove deliberate indifference. However, if a response to a known risk is obviously inadequate, this may lead to an inference that the officer



recognized the inappropriateness of his conduct.

#### **Analysis of Deputy Furr's Conduct**

Using these standards, the Court first examined the conduct of Deputy Furr. The Court noted that Thompson had presented no external injuries and nothing indicated that his breathing was abnormal. Thompson was conscious during the initial encounter, answered Officer Furr's questions, and followed instructions. Although Thompson exhibited signs of intoxication by falling asleep in the patrol car and slightly slurring his words, Officer Furr easily awakened him and his symptoms hardly distinguished him from the multitude of drug and alcohol abusers the police deal with on a daily basis. The Court stated that an officer does not lose the protections of qualified immunity merely because the officer does not react to all symptoms that accompany intoxication. Therefore, the Court concluded that in light of Thompson's relatively innocuous behavior, there was not much to be made of the fact that Officer Furr discovered an empty Xanax pill bottle coupled with Thompson's indication that he had taken "a little" of his medication. Accordingly, within the confines of the circumstances Officer Furr encountered, the Court concluded he did not have subjective knowledge that Thompson required medical attention. It followed from this conclusion that Officer Furr was not deliberately indifferent to Thompson's medical needs and was, therefore, entitled to qualified immunity.

#### **Analysis of Jailer King's Conduct**

Using the standards of immunity as outlined above, the Court found that jailer King had to slam his hand on the counter to keep Thompson from passing out and was well-

aware that Thompson exhibited a heightened intoxicated state. In fact, jailer King even wrote "Too Intox To Sign" on the booking sheet. Furthermore, in the incident report, jailer King admitted that he believed Thompson's intoxication stemmed from prescription seizure medication but could not confirm how much medication he had ingested. Not only did Thompson have noticeable symptoms of severe intoxication while being booked, a fellow detainee also later warned jailer King that Thompson needed help while in the jail cell. That fellow detainee stated that anyone witnessing Thompson's condition at the jail would have recognized he needed medical attention. Jailer King did nothing in response. When these circumstances are viewed in combination, the Court concluded that a reasonable jury could find jailer King had subjective knowledge of a serious medical need and deliberately disregarded that need.

Because the first prong of the qualified immunity test had been cleared by the Plaintiff due to jailer King's deliberate disregard to Thompson's serious medical need, the Court then moved to the second prong of the qualified immunity analysis: "whether the right was clearly established at the time of the deprivation." In determining whether a right is clearly established, the Court looks at whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

The Supreme Court has declared that it is unconstitutional for jail officials to act deliberately indifferent to an inmate's serious medical needs. And the courts have recognized that a reasonable officer would know that it is unlawful to delay medical treatment for a detainee exhibiting obvious signs of medical distress. Given this precedent, a reasonable officer would have



known that a constitutional violation occurs by deliberately disregarding Thompson's serious medical needs in the circumstances jailer King confronted. Therefore, because the constitutional right was clearly established, the 8<sup>th</sup> Circuit held that the district court properly denied jailer King qualified immunity.

**Note From City Attorney:** This case illustrates why the Springdale Police Department has written policies pertaining to the issues presented in this case. It also illustrates what can happen if these policies are not strictly adhered to.

Ernest Cate  
City Attorney



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And  
Happy New Year!*

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