

C.A.L.L.



City Attorney Law Letter
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David Phillips is sworn in as new Deputy City Attorney. Stop by and meet him.

The City of Springdale hires three new Animal Control Officers. Their contact information is found on page 1.





David Phillips Sworn in as New Deputy City Attorney



On September 17, 2013, David Phillips was sworn in as Deputy City Attorney for the City of Springdale. David joined the City Attorney's office after serving as a Deputy Prosecutor for the Arkansas Judicial District 19-East Prosecuting Attorney's Office where he handled felony and misdemeanor criminal cases, asset forfeitures and civil involuntary commitments. He is a graduate of Springdale High School and University of Arkansas where he received a Bachelor Degree in Public Administration. David was commissioned as a Military Police Officer from the Reserve Officers Training Corps at the U of A and served in the Federal Republic of Germany, Belgium, the Panama Canal Zone, and at the Pentagon. He was also deployed to Bosnia where he served as Provost Marshal for the Multi-National Division, North, Task Force Eagle, while in the Army. David earned a Master of Business Administration from Syracuse University. Following his military career, he attended the University of Arkansas School of Law where he earned his Juris Doctorate Degree. You can contact David at dphillips@springdalear.gov.

City of Springdale Has Three New Animal Control Officers

The City of Springdale has three new Animal Control Officers. They are:

Toby Lankford (AC-1)
 tlankford@springdalear.gov
 Mandy Tedford (AC-2)
 mtedford@springdalear.gov
 Eric Cline (AC-3)
 ecline@springdalear.gov

We are all looking forward to working with them!



Arkansas Attorney General Issues Opinion on New Gun Law

On July 8, 2013, the Arkansas Attorney General issued Opinion No. 2013-047. This opinion was prompted after the Arkansas General Assembly passed Act 746 of 2013, which went into effect on August 16, 2013. Act 746 amended Ark. Code Ann. §5-73-120, the carrying a weapon statute. Specifically, Act 746 amended the definition of "journey" to be "beyond the county in which the person lives".

The question posed to the Attorney General was as follows:

Is it your opinion that Act 746 now permits a person to be able to carry a handgun, in plain view or concealed, if they leave their county so long as they do not visit locations that prohibit



carrying a firearm such as the State Capitol grounds, airports, schools, etc.?

In Opinion No. 2013-047, the Attorney General said the answer to the question is “no”. The Opinion stated that a person does not fall within Act 746’s “journey” exception to the statutes relating to the possession and carrying of a handgun simply because the person has left the county in which they live. Put another way, Act 746 does not authorize so-called “open carry.” Many gun rights organizations have sent out emails and statements that Act 746 authorizes “open carry” in the State of Arkansas. The Opinion states that these gun rights organizations are incorrect in their assertion.

The Opinion went on to say that, to the contrary, the journey exception applies only to “travel beyond the county in which a person lives” -- a narrow range of activity inconsistent with the concept of “open carry.” Whether one is “traveling” beyond his or her county, so as to be on a “journey” for purposes of Act 746, will be a question of fact determined initially at the time of police intervention. It was the opinion of the Attorney General that Act 746 does not in itself permit a person to possess a handgun outside of his or her vehicle or other mode of transportation while on a journey outside his or her county of residence. In offering this conclusion, however, he stressed that Act 746 in no way modifies the rights and obligations conferred upon those individuals who have obtained a concealed-handgun permit pursuant to the pertinent provisions of the Arkansas Code.

It is inevitable that law enforcement will contact individuals who have a

misunderstanding of Act 746, and its applicability in their particular circumstance. Having an understanding of Opinion No. 2013-047 will hopefully provide law enforcement with a tool they need when encountering this situation.

Ernest B. Cate
City Attorney



Arkansas Court of Appeals Finds That Evidence Obtained From Springdale Officer's Stop and Search of Defendant and Subsequent Search of Defendant's Home was Properly Admitted Into Evidence

Facts Taken From the Case: On October 11, 2010, Officer Jonathan Knight with the Springdale Police Department was on foot patrol at the Springdale Public Library when an unidentified man approached him and said that he had information relating to drug trafficking. The unidentified man told Officer Knight that Douglas Kirby was a habitual drug user who kept a large amount of narcotics at his residence. The informant also said that Kirby had recently purchased stolen firearms. The informant told Officer Knight that Kirby always carried cocaine for personal use in a metal container with a screw-on cap in the right front pocket of his pants and that Kirby lived on Edmonson Street in Springdale. Finally, the informant described to Officer Knight the truck that Kirby drove.



After receiving the information from the informant, Officer Knight set up surveillance near Kirby's house and observed Kirby go back and forth between the house and the truck described by the informant. While Kirby drove in front of Officer Knight's location, Officer Knight saw that Kirby's truck had side windows that were excessively tinted. Officer Knight stopped Kirby for violating Arkansas' window-tinting restrictions and confirmed that the tint level was in excess of that allowed by state law. Officer Knight received permission from Kirby to search both Kirby's vehicle and Kirby's person for officer safety. During the search of Kirby's person, Officer Knight felt a small metal container in Kirby's right front pocket, and upon retrieving the container Officer Knight saw that it had a screw-on cap. The container contained a white and powdery substance that tested positive for cocaine. Kirby was arrested for possession of controlled substance, and during a subsequent inventory search of Kirby's vehicle Officer Knight found two pieces of red straw that contained a white and powdery residue.

Following Kirby's arrest, Detective Chris Moist of the Springdale Police Department interviewed Kirby. After the interview, Detective Moist requested and obtained a search warrant for Kirby's residence, and a search of Kirby's residence resulted in the seizure of firearms, cocaine, marijuana, various pharmaceuticals, and paraphernalia. In the affidavit in support of the request to obtain the search warrant, Detective Moist detailed the information given to Officer Knight by the unidentified informant as well as the traffic stop of Kirby and the search of his person and vehicle.

Prior to trial, Kirby filed a motion to suppress the items seized from his person, his truck, and his home. Kirby claimed that the traffic stop of his vehicle was invalid due to lack of probable cause. Kirby also argued that the search warrant was invalid because the affidavit submitted in support of the request for warrant failed to establish the reliability of the informant. During the hearing on the motion to suppress, the State produced testimony from many witnesses, including Officer Knight and Detective Moist. Kirby produced testimony from Kenneth Martin, who said that he performed the window tint on Kirby's vehicle and that the window tint on Kirby's vehicle was legal. The trial court ruled that the information from the informant became reliable when it was verified during the stop and search of Kirby, and the trial court also held that the stop of Kirby's vehicle was valid because the tinting of his windows was in excess of the amount allowed by state law. After a jury trial, Kirby was convicted of five counts of possession of various controlled substances, one count of possession of drug paraphernalia, one count of simultaneous possession of drugs and firearms, and one count of felon in possession of a firearm. Kirby was sentenced to 360 months' imprisonment.

Argument and Decision by the Arkansas Court of Appeals: On appeal to the Arkansas Court of Appeals (Court), Kirby argued that the items seized from his person and his vehicle should have been suppressed because the stop of his vehicle was pretextual. The Court recalled Officer Knight's testimony that he stopped Kirby because Kirby's windows were excessively tinted, and that after testing the windows Officer Knight saw that the tinting exceeded the amount allowed by state law. The Court



said that even though Kirby introduced testimony that the window tinting was legal, it is the province of the trial court to determine the credibility of witnesses. The Court said that the trial court credited Officer Knight's testimony that Kirby's windows were excessively tinted, and that Kirby consented to the search of his person and his vehicle. Therefore, the Court held that the trial court did not err by finding that the traffic stop and the subsequent searches of Kirby's person and truck were valid.

For his next argument, Kirby claimed that the search warrant obtained by Detective Moist was invalid since there was no indication from the affidavit in support of the request for the warrant that the informant was reliable. The Court said that the reliability of an informant is determined by a totality-of-the-circumstances analysis that is based on a three-factored approach that the Arkansas Supreme Court set forth in *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998). The Court stated that the three factors are: (1) whether the informant was exposed to possible criminal or civil prosecution if the report is false; (2) whether the report is based on the personal observations of the informant; and (3) whether the officer's personal observations corroborate the informant's observations. Additionally, the Court noted that in the *Frette* case the Supreme Court stated that:

the first factor is satisfied whenever [the informant] gives his or her name to authorities or if the person gives the information to the authorities in person. With regard to the second factor, "an officer may infer that the information is based on the informant's personal observation if the information contains sufficient detail

that 'it [is] apparent that the informant had not been fabricating [the] report out of whole cloth ... [and] the report [is] of the sort which in common experience may be recognized as having been obtained in a reliable way.'" The third and final element may be satisfied if the officer observes the illegal activity or finds the person, the vehicle, and the location as substantially described by the informant.

The Court reasoned that the informant gave the information to Officer Knight in person, and the information contained specific details. Furthermore, Officer Knight investigated Kirby based upon the information provided from the informant and personally verified substantial parts of the information provided by the informant. Finally, the Court said that all of this information was included in the affidavit submitted by Detective Moist. Therefore, based upon the totality of the circumstances, the Court held that the trial court did not err by determining that the affidavit submitted in support of the request for the search warrant sufficiently established the reliability of the informant.

Case: This case was decided by the Arkansas Court of Appeals on June 19, 2013, and was an appeal from the Washington County Circuit Court, Honorable William A. Storey, Judge. The case citation is *Kirby v. State*, 2013 Ark. App. 393.

Taylor Samples
Deputy City Attorney





DNA Sample Taken at Time of Arrest Held Not to be an Unreasonable Search or Seizure

Facts Taken From the Case: In 2003, an unidentified man broke into a woman's home in Salisbury, Maryland, and raped the woman. The police were able to obtain from the victim a sample of the unidentified man's DNA. In 2009, Alonzo King was arrested in Wicomico County, Maryland, and he was charged with first and second degree assault. As part of routine booking procedure for serious offenses, King's DNA sample was taken by applying a cotton swab, known as a buccal swab, to the inside cheeks of his mouth. The DNA was found to match the DNA taken from the 2003 Salisbury rape victim, and King was tried and convicted for the 2003 rape.

The Maryland Court of Appeals ruled that the DNA taken when King was booked for the 2009 assault charge was an unlawful seizure because obtaining and using the cheek swab was an unreasonable search of his person, and it therefore set the rape conviction aside. In reaching this decision, the Maryland Court of Appeals said that a DNA swab was an unreasonable search in violation of the Fourth Amendment because King's expectation of privacy was greater than the State's interest in using King's DNA to identify him. The Supreme Court of the United States granted certiorari and reversed the judgment of the Maryland Court of Appeals.

Argument and Decision by the Supreme Court of the United States: In reversing the judgment of the Maryland Court of Appeals, the Supreme Court of the United States (Court) held that DNA identification of arrestees is a reasonable search that can

be considered part of a routine booking procedure. The Court said that when officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

In its discussion explaining its holding, the Court conceded that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search under the Fourth Amendment. The Court said that the Fourth Amendment dictates that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." However, the Court said that conceding that the Fourth Amendment applies in the context of King's buccal swab is only the beginning point, because the Fourth Amendment's function is to constrain not against all intrusions, but against intrusions that are not justified in the circumstances or that are made in an improper manner. The Court stated that the ultimate measure of the constitutionality of a governmental search is reasonableness.

The Court noted that the Maryland DNA Collection Act provides that in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal swab applied to the inside of the cheeks. Additionally, the Court pointed out that the arrestee is already in valid police custody for a serious offense supported by probable cause, and the DNA collection is not subject to the judgment of officers whose perspective might be colored by their primary involvement in the enterprise of



ferreting out a crime. The Court said that the legitimate government interest served by the Maryland DNA Collection Act is the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody, and the Court said that this is a government interest that is well established. Furthermore, the Court said that it is beyond dispute that probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest.

The Court said that when probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving routine administrative procedures at a police station incident to booking and jailing the suspect. First, the Court said that in every criminal case, it must be known who has been arrested and who is being tried. To that end, the DNA collected from arrestees is an irrefutable identification of the person from whom it was taken. The use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect, or matching tattoos to known gang symbols to reveal a criminal affiliation, or matching the arrestee's fingerprints to those recovered from a crime scene. These data are found in official records, are checked as a routine matter to produce a more comprehensive record of the suspect's complete identity, and finding occurrences of the arrestee's DNA profile in outstanding cases is consistent with this common practice. Second, the Court said that police bear a responsibility for ensuring that the custody of an arrestee does not create inordinate

risks for facility staff, for the existing detainee population, and for a new detainee, and DNA allows officers to know the type of person whom they are detaining and allows officers to make critical choices about how to proceed. Third, the government has a substantial interest in ensuring that persons accused of crimes are available for trial, and a person who is arrested for one offense but knows that he has yet to answer for some past crime may be more inclined to flee the instant charge. Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the arrestee should be released on bail. DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness. Fifth and finally, the identification of an arrestee as the perpetrator of some heinous crime may have the effect of freeing a person wrongfully imprisoned for the same offense. In conclusion, the Court said that because proper processing of arrestees is so important and has consequences for every stage of the criminal process, the Court has recognized that the governmental interests underlying a station-house search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest. Therefore, the Court has been reluctant to circumscribe the authority of the police to conduct reasonable booking searches.

In comparing the government interest served from the DNA swab to the intrusiveness of the swab on the arrestee, the Court said that the intrusion of the cheek swab is minimal. Additionally, the Court said that the



expectations of privacy of an individual who is taken into police custody are diminished. Once a person has been arrested on probable cause for a dangerous offense that may require detention before trial, his expectations of privacy and freedom from police scrutiny are reduced, and DNA identification like that at issue in this case does not require consideration of any unique needs that would be required to justify searching the average citizen. The Court stated that this does not mean that any search is acceptable solely because a person is in custody. For example, invasive surgery or the search of the arrestee's home involve greater intrusions or higher expectations of privacy, and the privacy-related concerns in those cases are weighty enough that the search may require a warrant. By contrast, a buccal swab for DNA performed on an individual who has been arrested on probable cause for a serious offense involves a brief and minimal intrusion of a gentle rub along the inside of the cheek. A brief intrusion of an arrestee's person is subject to the Fourth Amendment, but a swab of this nature does not increase the indignity already attendant to normal incidents of arrest.

Finally, the Court stated that the Maryland DNA Collection Act provides statutory protections that guard against further invasions of privacy. For example, the Act requires that only DNA records that directly relate to the identification of individuals shall be collected and stored, and the Act says that no purpose other than identification is permissible. In conclusion, the Court reversed the decision of the Maryland Court of Appeals because King's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks, and taking King's buccal swab in this context

gives rise to significant state interests in identifying King not only so that the proper name can attach to his charges, but also so that the criminal justice system can make informed decisions concerning pretrial custody.

Note: Arkansas' statute on fingerprinting, DNA sample collection, and photographing can be found at Arkansas Code Annotated Section 12-12-1006. Section (a)(2) of that statute provides that "... a law enforcement official at the receiving criminal detention facility shall take or cause to be taken a DNA sample of a person arrested for: Capital murder, § 5-10-101; Murder in the first degree, § 5-10-102; Kidnapping, § 5-11-102; Rape, § 5-14-103; Sexual assault in the first degree, § 5-14-124; or Sexual assault in the second degree, § 5-14-125."

Case: This case was decided by the Supreme Court of the United States on June 3, 2013, and was an appeal from the Court of Appeals of Maryland. The case citation is *Maryland v. King*, 569 U.S. ____ (2013).

Taylor Samples
Deputy City Attorney



Arkansas Court of Appeals Holds That Probable Cause to Stop Vehicle Existed Where Taillight was Malfunctioning Even Though Defective Equipment Violation was Dismissed by Trial Court

Facts Taken From the Case: Donnie Robinson was arrested for DWI on June 4,



2011. Robinson was also charged with refusing to submit to a chemical test, having a broken windshield, and having a broken taillight. At trial in district court, Robinson was convicted of all four offenses. Robinson appealed his case to Drew County Circuit Court, and he filed a motion to suppress evidence obtained as a result of his traffic stop. Robinson claimed at the suppression hearing that there was no probable cause for the stop. At the suppression hearing, Trooper David Outlaw of the Arkansas State Police testified that he pulled Robinson over on June 4, 2011, after seeing that the passenger taillight on Robinson's truck was broken. Trooper Outlaw said that the taillight was still burning, but it was showing a white light instead of red. On cross-examination, Trooper Outlaw clarified that part of the taillight was not broken and was still showing red. Trooper Outlaw also said that he believed a statute covered broken taillights, but he could not identify the statute.

The circuit court denied Robinson's motion to suppress and found that there was cause to believe that Robinson had committed a traffic offense in violation of Arkansas Code Annotated sections 27-36-215 to 216. After a jury trial, Robinson was acquitted of DWI, but he was found guilty of refusal to submit to a chemical test. The circuit court dismissed the charges of broken windshield and defective equipment. Robinson appealed his conviction for refusal to submit to a chemical test to the Arkansas Court of Appeals.

Decision of Arkansas Court of Appeals: On appeal to the Arkansas Court of Appeals (Court), Robinson argued that there was no probable cause for Trooper Outlaw to

conduct a traffic stop since there is no statute prohibiting a cracked taillight lens. Robinson noted that the statute on taillights, Arkansas Code Annotated section 27-36-215(a), requires only that taillights "emit a red light plainly visible from a distance of five hundred feet (500') to the rear." Robinson said that his case was different from the facts of *Burris v. State*, 330 Ark. 66 (1997) (where the Arkansas Supreme Court held that probable cause to stop existed where the defendant's taillight was partially broken and shining white instead of red) because Robinson's taillight was shining white and red. Robinson urged the Court to adopt the holding of a Texas case that a cracked taillight emitting white light is not a violation.

In response to Robinson's argument, the State claimed that Trooper Outlaw had probable cause to stop Robinson's truck because the broken taillight was cause for Trooper Outlaw to believe that the vehicle had safety defects pursuant to Arkansas Code Annotated section 27-32-101, which reads

(a)(1) No person shall drive or move any vehicle subject to registration on any highway in this state unless the equipment on the vehicle is in good working order and adjustment as required for the vehicle's safe operation and unless the vehicle is in safe mechanical condition as not to endanger the driver, other occupants of the vehicle, or any other person.

(a)(2) Any law enforcement officer having reason to believe that a vehicle may have safety defects shall have cause to stop the vehicle and inspect for safety issues.



The Court affirmed the trial court and held that the trial court did not clearly err in finding that the traffic stop was proper. The Court noted that in *Villanueva v. State*, 2013 Ark. 70, the Supreme Court of Arkansas held that a large windshield crack was the type of safety defect contemplated by section 27-32-101 despite the defendant's argument that no Arkansas law made it illegal to operate a vehicle with a cracked windshield. The Court said that Trooper Outlaw's testimony established that Robinson's vehicle equipment was not in good working order, which provided probable cause for the traffic stop.

Case: This case was decided by the Arkansas Court of Appeals on September 4, 2013, and was an appeal from the Drew County Circuit Court, Honorable Sam Pope, Judge. The case citation is *Robinson v. State*, 2013 Ark. App. 464.

Taylor Samples
Deputy City Attorney



United States Supreme Court Finds that Use of Drug-Sniffing Dog on Porch is an Unreasonable Search

On March 26, 2013, the United States Supreme Court issued its opinion in the case of *Florida v. Jardines*. In that case, the Court was asked to consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the 4th Amendment.

The Facts

This case started in 2006 when Detective Pedraja of the Miami-Dade Police Department received a tip that marijuana was being grown in the home of Joelis Jardines. A month later, the Department and the DEA sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. He watched the home for fifteen minutes and saw no vehicles in the driveway or activity around the home, and could not see inside the house because the blinds were drawn. Detective Pedraja then approached Jardines' home accompanied by Detective Bartelt, a trained canine handler. Detective Bartelt's dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, and would indicate the presence of any of these substances through particular behavioral changes recognizable by his handler.

Detective Bartelt had the dog on a six-foot leash. As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor. After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.

On the basis of what he had learned at the home, Detective Pedraja applied for and received a warrant to search Jardines' residence. When the warrant was executed later that day, Jardines attempted to flee and was arrested. The search revealed marijuana



plants, so Jardines was charged with marijuana trafficking.

At trial, Jardines moved to suppress the marijuana plants on the ground that the canine investigation was an unreasonable search. The trial court granted the motion, and the Florida Third District Court of Appeals reversed. Then, Florida Supreme Court reversed the decision of the Third District Court of Appeals, thereby approving the trial court's decision to suppress. The Florida Supreme Court held that the use of the trained narcotics dog to investigate Jardines' home was a Fourth Amendment search unsupported by probable cause, rendering invalid the search warrant based upon information gathered in that search.

The United States Supreme Court then decided to hear the case, but limited its review to the question of whether the officers' use of the drug-sniffing dog in this situation was a search within the meaning of the 4th Amendment.

Application of the 4th Amendment

In its opinion, the Court recited basic 4th Amendment principles. For example, the 4th Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." When law enforcement obtains information by physically intruding on persons, houses, papers, or effects, a "search" within the meaning of the 4th Amendment has undoubtedly occurred. The Court used these principles when reviewing this case.

The officers were gathering information in an area belonging to Jardines and immediately surrounding his house — the

"curtilage" of the house. The United States Supreme Court has repeatedly held that the "curtilage" of a home enjoys the same 4th Amendment protection as the home itself. A front porch of a house is a classic example of "curtilage", as it is an area to which the activity of the home life extends.

In this case, the officers gathered information by physically entering and occupying the "curtilage", for the purpose of engaging in conduct not explicitly or implicitly permitted or consented to by the homeowner. Since the officers' investigation took place in a constitutionally protected area, the Court then turned to the question of whether it was accomplished through an unlicensed physical intrusion.

In discussing this, the Court recognized that although law enforcement officers need not "shield their eyes" when passing by a home "on public thoroughfares," an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the 4th Amendment's protected areas, such as the curtilage. In this case, it was undisputed that the detectives had all four of their feet (as well as all four of their canine companion's feet) firmly planted on the constitutionally protected extension of Jardines' home. As such, the only question remaining was whether or not Jardines had given his permission for them to do so. The Court determined that he had not.

In determining this, the Court recognized that a police officer not armed with a warrant may approach a home and knock, because that is "no more than any private citizen might do." But introducing a trained police dog to explore the area around the



home in hopes of discovering incriminating evidence is something else. Specifically:

There is no customary invitation to do *that*. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to — well, call the police. The scope of a license — express or implied — is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

The Court determined that the officers learned what they learned only by physically intruding on Jardines' property to gather evidence, and that alone was enough to establish that a search occurred. As such, the Court held that "the government's use of trained police dogs to investigate the home and its immediate surroundings is a "search" within the meaning of the 4th Amendment". And since the search was done without the permission or consent of the property owner, and without a warrant, the search was unreasonable under the 4th Amendment. Accordingly, the Court affirmed the judgment of the Supreme Court of Florida, and granted the motion to suppress.

Ernest B. Cate
City Attorney

"Protective Custody" and "Drunk, Insane, and Disorderly": Dealing With the Suicidal or Those in Mental Danger

Some questions have arisen regarding how officers should handle situations involving persons who may constitute a danger to themselves or others by virtue of a mental disease or defect, or persons who have either attempted, or threatened to attempt, suicide. It is helpful to discuss the "drunk, insane, and disorderly" statute as well.

Drunk, Insane, and Disorderly

The basis for the "drunken, insane, and disorderly persons" statute is found at Ark. Code Ann. §12-11-110. This statute is not a criminal charge. However, it gives an officer the legal authority to arrest and take someone into custody that has not committed a crime, but that should not be left alone. Most often, the person is held until the following morning or until the person can be delivered to some "discreet person who will undertake to restrain and take care" of the person. In other cases, the person is transported to a hospital or other facility for consideration of an immediate confinement.

If the person has committed a crime, and can be arrested for that crime, there is no need to invoke Ark. Code Ann. §12-11-110. In that instance, the officer already has legal authority to take the person into custody because of the crime, and does not need to utilize the "drunk, insane, and disorderly" statute.

No matter the situation, it is vitally important to clearly document in the report



the reasons for taking the person into custody.

Immediate Confinement

Let's start with an example. Officer Jones is dispatched to a call of a possible suicidal subject. Dispatch advises that the subject has stated that she has attempted suicide in the past, and is contemplating suicide today. Upon arrival, Officer Jones makes contact with the subject. He sees on her arms evidence of past suicide attempts and notices that the subject has a couple of superficial scratches on both wrists. She is not holding a weapon, she denies ingesting any substances, and appears calm. However, she does state to Officer Jones that she is considering suicide and that she is ready to "end it all today". The subject lives alone, has no family here, has no religious affiliation, and states that she does not want help from anyone. She refuses medical treatment and refuses Officer Jones' offer to go to the hospital for an evaluation. The subject then tells Officer Jones to leave so that she can "finish the job" of killing herself.

What should Officer Jones do now? What are his options? Should he leave this subject to her own devices? What possible liability, if any, does Officer Jones face?

This particular situation is addressed in Ark. Code Ann. §20-47-210, and is commonly referred to as "immediate confinement", or "emergency hold". This statute sets forth the procedure for immediate confinement and evaluation for emergency situations. Under this statute, whenever a person is a "clear and present danger to himself or others" and immediate confinement appears necessary, a law enforcement agency in the

jurisdiction shall transport that person to a hospital or receiving facility, if there is no other safe means of transportation available.

Thus, in our example, Officer Jones must first determine if the subject is a "clear and present danger to himself or others". Ark. Code Ann. §20-47-207 provides guidance in this determination.

A person is a "clear and present danger to himself" if:

1) The person has inflicted serious bodily injury on himself or has attempted suicide or serious self-injury, and there is a reasonable probability that the conduct will be repeated if admission is not ordered; OR

2) The person has threatened to inflict serious bodily injury on himself, and there is a reasonable probability that the conduct will occur if admission is not ordered; OR

3) The person's recent behavior or behavior history demonstrates that he so lacks the capacity to care for his own welfare that there is a reasonable probability of death, serious bodily injury, or serious physical or mental debilitation if admission is not ordered; OR

4)(i) The person's understanding of the need for treatment is impaired to the point that he is unlikely to participate in treatment voluntarily; (ii) The person needs mental health treatment on a continuing basis to prevent a relapse or harmful deterioration of his or her condition; and (iii) The person's



noncompliance with treatment has been a factor in the individual's placement in a psychiatric hospital, prison, or jail at least two (2) times within the last forty-eight (48) months or has been a factor in the individual's committing one (1) or more acts, attempts, or threats of serious violent behavior within the last forty-eight (48) months;

A person is a "clear and present danger to others" if:

the person has inflicted, attempted to inflict, or threatened to inflict serious bodily harm on another, and there is a reasonable probability that the conduct will occur if admission is not ordered.

In our example, Officer Jones would be reasonable in determining that the subject is a danger to herself because the subject has threatened to inflict serious bodily injury on herself and there is a reasonable probability that such conduct will occur if admission is not ordered.

Once Officer Jones has made this determination, what should be done next? The subject has already indicated that she has no family, and that she knows no one who could provide her safe transportation to the hospital. Furthermore, the subject has stated that she does not want any help and just wants Officer Jones to leave.

At this point, Officer Jones should not leave the subject, as he has already made a determination that she is a danger to herself. Leaving the subject alone at this point could possibly result in a claim of "deliberate indifference" against the department and

Officer Jones in the event that the subject was to later harm herself.

Officer Jones should instead take the subject into custody and transport her to the hospital for immediate confinement and evaluation, pursuant to Ark. Code Ann. §20-47-210. Once the subject arrives at the hospital, a physician must decide whether the subject is acute enough to warrant admission, and it is possible that she may be admitted against her will. However, the physician may find that admission is not warranted. The subject could be released by the hospital if in the judgment of the treatment staff, the receiving facility, or the treating physician the person does not require further mental health treatment.

Upon leaving the hospital, Officer Jones wonders what could happen to him if he was wrong about the subject. What if she wasn't really going to hurt herself? Does Officer Jones have any liability at this point? Can he be sued for taking the subject to the hospital against her will?

Ark. Code Ann. §20-47-227 should give Officer Jones some peace of mind in this regard. This statute provides that "no officer, physician, or other person shall be held civilly liable for his actions pursuant to this subchapter in the absence of proof of bad faith, malice, or gross negligence". Given the facts of our example, it could not be said that Officer Jones acted in bad faith, malice, or gross negligence in taking the subject to the hospital against her will. In fact, in our example, it was more likely that liability would attach if Officer Jones had not taken the subject to the hospital.

When faced with a situation like the one in our example, it is vitally important to



document everything you see and hear from the person with whom you are dealing. Also, offer the person the opportunity to be admitted to the hospital. If the person refuses, ask if there is a family member, friend, or clergy member that can be called to help the person. In other words, take all steps necessary to assist the person. In doing so, you can show that you acted in good faith, without malice, and that you were not grossly negligent should you decide to initiate an involuntary admission of the person against their will. Therefore, no liability would attach even if it was later determined by a physician that no immediate confinement was needed for the person.

Ernest B. Cate
City Attorney



Federal Court Upholds Stop of Vehicle Conducted by Springdale Officer Cody Ross

Facts taken from the case: On January 21, 2013, Officer Cody Ross of Springdale Police Department was patrolling the area around the Springdale airport, a known location for gang activity. While patrolling, he observed Defendant Juan Araiza-Carillo exiting a residence. In the previous months, Officer Ross had observed people who appeared to be gang members at the residence, and a gang had posted a picture of itself in front of the house on Facebook.

According to Officer Ross's testimony, Defendant had left the residence at "kind of a jog" but then stopped when he saw the officer, hesitated and turned back to the

house, but then proceeded to a parked vehicle. Ross described Defendant and a woman later identified as Amy Hernandez, who was also in the vehicle, as having a "deer caught in the headlights look" as if they had been doing something wrong.

Based on Defendant's location and behavior, Officer Ross followed the vehicle and ran its tag number. At this time, Defendant was driving, and Hernandez was a passenger. The registered owner of the vehicle was a Francisco Araiza, but Officer Ross testified dispatch pronounced the name as Ariela Francisco, which he assumed was the name of a Hispanic female.

As Officer Ross was following the vehicle, he observed the vehicle make a turn but fail to signal within 100 feet of the turn, which is violation of Arkansas law. Defendant made a turn into apartment complex. Officer Ross circled the complex, and when he returned to the complex, the vehicle was leaving, but Hernandez was now driving, with Defendant as the passenger. Officer Ross believed Defendant and Hernandez were trying to evade him.

Officer Ross then stopped the vehicle because he thought the parties' behavior was suspicious and because they had switched drivers. Officer Ross mentioned the failure to properly signal, but it was not the reason for the stop, and he did not question the Defendant about it.

Hernandez told Officer Ross they had switched drivers because Defendant had no license. Officer Ross asked Defendant for identification, as he had probable cause to cite Defendant for an improper turn or arrest him for driving without a license. The name on Defendant's ID and Hernandez's driver's



license did not match the name of the registered owner of the vehicle. Officer Ross said Hernandez appeared nervous but Defendant did not. Based on Hernandez's behavior and his observation's prior to the stop, he asked her to step out of the vehicle and began a roadside interview.

Officer Ross said the interview began as "small talk," and then Officer Ross asked her if she had anything illegal in the vehicle. She said "no," but appeared nervous again. Officer Ross then said if she had something illegal, she should just tell him. She admitted that she had a meth pipe in her purse in the vehicle. About five minutes later, Officer Ross asked for consent to search the vehicle, and she gave verbal consent.

Officer Ross did not believe Defendant or Hernandez owned the vehicle, but he assumed Hernandez had authority to consent, as she was driving the vehicle and in control of it.

Defendant had been sitting in the vehicle during this time. Officer Ross asked Defendant if he could search his person. Officer Ross testified that there was a "small language barrier" but that Defendant appeared to understand, and he emptied his pockets. Officer Ross found what appeared to be methamphetamine in the contents, and he then placed Defendant under arrest for possession of a controlled substance.

In the search of the vehicle, Officer Ross found the methamphetamine pipe Hernandez had described and placed her under arrest. He then saw a coke bottle with what appeared to be a counterfeit social security card inside. Officer Ross questioned Hernandez about the social security card.

After the interview, officers obtained a state search warrant for Defendant's residence, which Hernandez identified as the location where Defendant forged documents.

Evidence obtained from Defendant's home pursuant to the warrant led to a five-count indictment of crimes of false-document production in Federal Court.

Motion and Argument: Defendant made a motion to suppress the evidence obtained as the result of the stop, arguing there was not reasonable suspicion for the office to stop the vehicle and that Hernandez did not have authority to consent to the search of the vehicle, as she was not the registered owner of the vehicle.

The Government's response was that the officer had probable cause to stop the vehicle, that he had reasonable suspicion to believe that criminal activity was afoot, and even if there were not probable cause or reasonable suspicion, Hernandez's consent purged any taint of an illegal stop.

The United States Magistrate Judge recommended a denial of Defendant's motion to suppress, which the Federal District Court adopted.

Reasoning of the Magistrate Judge:

Probable cause:

The magistrate judge concluded that the traffic stop was valid, as Officer Ross had probable cause to believe a traffic violation had occurred. In her reasoning, the magistrate cited cases that held that even a minor traffic violation provides probable cause for a traffic stop, that an officer is not



required to act immediately upon acquiring probable cause, and that if the officer has probable cause to believe the traffic violation occurred, the stop is valid no matter the officer's actual motivation for the traffic stop. The delay between the traffic violation and the stop and Officer Ross's motivation in conducting the stop did not negate the validity of the stop.

Reasonable Suspicion:

The magistrate judge concluded that even if there were no probable cause, Officer Ross had reasonable suspicion to conduct the stop. She cited that an investigatory stop without a warrant is only valid if police officers have "a reasonable and articulable suspicion that criminal activity may be afoot" and that there must be specific and articulable facts that give rise to a particularized and objective basis for suspecting legal wrongdoing."

The court must look at the totality of the circumstances and give due deference to the officers' law enforcement experience and training. The magistrate judge concluded that the totality of the circumstances supported the stop of the vehicle based on reasonable suspicion. She listed that Officer Ross testified that the area at issue was a high-crime area and frequented by gang members, there had been numerous drug arrests in the area, the residence Defendant was leaving was associated with suspected gang members, the Defendant stopped dead in his tracks when he saw Officer Ross, that Defendant and Hernandez looked like "a deer in the headlights" when he saw Officer Ross, that the parties were watching Officer Ross as he followed the vehicle, and that the parties appeared to be evading Officer Ross. The magistrate also noted that none of these

circumstances standing alone would have created reasonable suspicion.

Consent:

The magistrate judge concluded that even if there were no probable cause or reasonable suspicion, Hernandez's consent to search the vehicle was valid and would have "purged the taint of any alleged Fourth Amendment violation." Defendant testified that the vehicle had belonged to him; if he had been a mere passenger in the vehicle, he would not have had standing to contest the search of the vehicle after the stop.

The issue in determining whether Hernandez's consent was proper is whether the facts available to the officer would have justified a reasonable officer in believing that Hernandez had authority over the vehicle.

The magistrate judge did not decide whether Defendant was the owner of the vehicle, but said that even if Defendant was the owner, Officer Ross did not have information that gave him reason to believe that Defendant was the owner. Specifically, the name provided by dispatch of the owner of the vehicle was not the same as the name Defendant gave the officer, Hernandez had told Officer Ross that Defendant had no driver's license, and the address given by Hernandez of her and Defendant's residence was not the same as the registered owner. Furthermore, she stated that even though Defendant was not fluent in English, he could have indicated that he was the owner of the vehicle by showing the registration or signaled an objection to the search of the vehicle, but he did not.



The magistrate judge concluded that based on these facts, Officer Ross had no reason to believe that Defendant owned the vehicle. It was reasonable for the officer to believe that that Hernandez, as the driver, had authority to consent to the search of the vehicle, and therefore, the consent obtained was proper.

Case: This case is United States of America v. Juan Araiza-Carrillo No. 13-50047 in the U.S. District Court, Western District of

Arkansas, Fayetteville Division. On July 17, 2013, the United States Magistrate Judge recommended a denial of Defendant's motion to suppress, and on August 7, 2013, the Federal District Court adopted that recommendation.

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