



C.A.L.L.

City Attorney Law Letter

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Arkansas Court of Appeals Upholds DWI Conviction Involving Arrest by Rogers, Arkansas Police Officer

Facts Taken From the Opinion: Officer John Alexander testified that he was on duty the evening of December 19, 2008. He explained that, at approximately 9:46 p.m., his attention was drawn to a GMC Sonoma vehicle, which was traveling northbound on South Eighth Street in Rogers, Arkansas. He stated that the vehicle was driving approximately ten miles below the speed limit and that it was drifting within its lane. He testified that he learned at the law-enforcement training academy that extremely slow driving and drifting are indications of a possibly intoxicated driver.

Officer Alexander explained that he started to follow the vehicle and pulled up behind it to “run” the vehicle’s tag. He stated that it came back with “no return.” He said that he told the dispatcher that it was an Indian Nations tag from Muskogee and that the dispatcher told him when they ran the tag out of Oklahoma, it came back with two returns, one out of the state and one out of Indian Nations, and that there was no return from either in this case.

Officer Alexander testified that he was not able to see the decal on the tag clearly enough to determine if it was a valid year; that he made the traffic stop and talked to Charles Kenneth Murrell, Jr. (appellant) about the tag; that appellant had an expired vehicle registration with him but not a current one; that the license sticker did say 2009, showing that it was valid at the time; however, when he tried to run the tag, he was unable to get any type of return off the tag number out of Oklahoma. He said that appellant told him the car belonged to

his father-in-law. Officer Alexander acknowledged that he could see the 2009 sticker clearly in the courtroom, but stated that he could not read it that night and that he was not familiar with the colors of Oklahoma tags.

Following the initial hearing, the submission of briefs, and a follow-up hearing, the trial court denied appellant’s motion to suppress, concluding that the officer had probable cause to stop the vehicle because of an apparent invalid license tag. At a hearing on June 16, 2010, appellant agreed with the asserted factual basis for his guilty plea, which included the following facts: after Officer Alexander stopped the car, he noticed appellant was extremely loud and slurring his words a little bit; he smelled of intoxicants; and he failed the field sobriety tests administered to him by Officer Alexander. The trial court accepted appellant’s conditional plea, and appellant appealed his case to the Arkansas Court of Appeals.

Decision by Court of Appeals: The Court noted that in *Reeves v. State*, 20 Ark. App. 17 (1987), the Court explained:

“The Fourth Amendment to the Constitution 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” That protection extends to persons driving down the street. If the police stop a vehicle and detain its occupants, a seizure has occurred. Whenever practicable, the police are required to obtain advance judicial approval of searches and seizures through the warrant procedure. That process turns on the question of “probable cause.” However, it has been held that,

consistent with the Fourth Amendment, the police may stop persons on the street or in their vehicles in the absence of either a warrant or probable cause under limited circumstances. *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Hensley*, 469 U.S. 221 (1985); and *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). One of those limited circumstances involves cases such as the present one—the investigatory stop.

In determining whether an investigatory stop has been made consistent with the mandates of the Fourth Amendment, the Court balances the nature and quality of the intrusion against the importance of the governmental interests alleged to justify that intrusion. *Van Patten v. State*, 16 Ark. App. 83 (1985). Where felonies or crimes involving a threat to public safety are concerned, the government's interest in solving the crime and promptly detaining the suspect outweighs the individual's right to be free from a brief stop and detention. That policy has been codified in Rule 3.1 of the Arkansas Rules of Criminal Procedure[.]

Rule 3.1 of the Arkansas Rules of Criminal Procedure provides:

"Stopping and detention of person: time limit.

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

reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense."

The Court of Appeals noted that on *Wright v. State*, 327 Ark. 558 (1997), the Arkansas Supreme Court explained, "While this court has not been called upon to decide if a possible DWI offense falls within the language of Rule 3.1, our Court of Appeals has held, and we believe correctly, that a DWI violation carries with it the danger of forcible injury to others." Consequently, while "reasonable suspicion" to stop and detain under Rule 3.1 is limited to the two listed situations—a felony or a misdemeanor involving the danger of forcible injury to persons or appropriation of/damage to property—our courts have determined that a possible DWI offense falls within the ambit of the rule. *Id.*

The Court held that here, Officer Alexander testified about appellant weaving within his lane and driving under the speed limit and then explained how his observations of appellant's driving fit within his academy training about signs of driving while intoxicated. Even though it is clear that weaving within one's own lane alone will not support reasonable suspicion of DWI, *Barrientos v. State*, 72 Ark. App. 376 (2001), the Court concluded that the officer's testimony went beyond that—particularly tying the weaving and the low-speed driving into his academy DWI

training. In reviewing the totality of the circumstances in this case, the Arkansas Court of Appeals held that on the basis of this testimony alone, the officer established a sufficient basis for concluding that he had reasonable suspicion to believe that appellant was driving while intoxicated, thereby justifying the stop under Rule 3.1 to further investigate. Moreover, because the Court determined that this testimony from Officer Alexander is sufficient in establishing reasonable suspicion to stop appellant's vehicle, they found it unnecessary to address appellant's challenges to the trial court's decision, which the trial court based on probable cause. "We can affirm a trial court when the right result is reached, if an alternative basis exists for the trial court's decision." See *Cain v State*, 2010 Ark. App. 30, ___ S.W.3d ___.

Therefore the Arkansas Court of Appeals affirmed the conviction and held that Officer Alexander had reasonable suspicion to stop the appellant because of his suspicion that appellant was driving while intoxicated.

Case: This case was decided by the Arkansas Court of Appeals on April 27, 2011 and is an appeal from the Benton County Circuit Court, Honorable David Clinger, Judge. The case cite is 2011 Ark. App. 311.

Note From City Attorney: In affirming this conviction, the Arkansas Court of Appeals concluded that the officer's testimony, tying the weaving and the low speed driving into his academy DWI training established a sufficient basis for concluding that there was reasonable suspicion to believe that the appellant was driving while intoxicated, thereby justifying a reasonable suspicion stop under Rule 3.1. This Court has previously held that weaving

within one's lane alone will not support reasonable suspicion, but in this case there was more than one factor and the officer tied the two factors into his academy training as he testified that he was trained that extremely slow driving and drifting are indications of a possibly intoxicated driver.

Jeff Harper
City Attorney

Note From Fourth Judicial District Prosecutor: I think the crux of this case was that the officer was able to articulate that one driving factor, coupled with another one, along with his training, gave him reasonable suspicion. I think that if the factors can be tied specifically to training . . . either at the academy, in-house or other type training and the officer can articulate how the training ties into the officer's observations, that should give reasonable suspicion.

John Threet
Fourth Judicial District Prosecutor

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**Arkansas General Assembly  
Passes Drug Law Making  
Synthetic Marijuana a Schedule  
VI Drug and the Act Contains an  
Emergency Clause**

The 2011 Arkansas General Assembly passed several laws which affect law enforcement. These laws will be the subject of three separate training sessions our office will conduct with the Springdale Police Department in July. The laws without an emergency clause will not go into effect until July 27, 2011. However, Act 751, which is an Act regarding substances in Schedule I and Schedule VI, contained an

emergency clause and therefore is in effect at this time.

Act 751 makes the synthetic equivalent of the cannabis plant a Schedule VI drug, the same as marijuana, and therefore regular possession of synthetic marijuana or any other substances set out in the Act is a misdemeanor. Because this law passed with an emergency clause and is in effect at this time, the City of Springdale has repealed our K-2 ordinance, as it is now superseded by State law.

A copy of Act 751 is attached to the back of this edition of C.A.L.L..

Jeff Harper  
City Attorney



**The City Fireworks Ordinance:  
A Refresher**

Every year about this time, people start asking questions regarding the city's fireworks ordinance. Most of these people will rely on what advice is given to them by the Police Department. In addition, the Police Department inevitably receives a substantial number of calls regarding fireworks issues in the city from the end of June through the first part of July of any year. To assist in answering these questions and responding to these calls, a review of the City's fireworks ordinance is helpful. This review will also ensure that the ordinance is properly enforced. The primary City ordinance on fireworks is found at Section 46-56 of the Code of Ordinances for the City of Springdale.

Selling Fireworks - Section 46-56(a)

Prior to 2003, the selling of fireworks within the city limits was strictly prohibited by ordinance. However, in 2003, the Springdale City Council amended the fireworks ordinance to allow the selling of fireworks within the city limits. Now, in order to sell fireworks in the City, a permit to sell fireworks must be obtained from the City Clerk. Before a location can obtain a permit to sell fireworks, certain requirements must be met. Then, once a permit has been issued, the ordinance places several restrictions on the selling of fireworks within the city limits. Specifically:

-No fireworks shall be sold or stored within a permanent structure of the city.

-No fireworks stand shall be located except in a C-2, C-5, or A-1 zone, provided the A-1 property has frontage on a federal or state highway.

-Fireworks may only be sold between June 28th and July 5th.

-All locations where fireworks are sold must comply with all fire codes and must be inspected by the fire marshal prior to the sale of fireworks.

-No person selling fireworks within the city shall be allowed to sell any fireworks which travels on a stick, as these are prohibited to be discharged within the city.

-No fireworks stand shall be located within 250 feet of a fuel dispensing facility.

-All fireworks stands must have at least a 50 foot setback from the street/highway.

-No person under the age of 16 shall be allowed to purchase fireworks in the city.

-All locations where fireworks are sold within the city shall post a sign, visible to the public, which states, "The discharge of bottle rockets or fireworks that travel on a stick are prohibited in the City of Springdale."

Prohibited Fireworks – Section 46-56 (b)

It is a violation of the City's fireworks ordinance for anyone to discharge (or sell) bottle rockets within the city limits of Springdale, even during the time when other fireworks are allowed to be discharged. However, the mere possession of bottle rockets is not prohibited.

Permitted Locations/Times – Section 46-56 (c)

Section (c) of the ordinance sets forth when legal fireworks may be discharged within the city limits. The ordinance provides that **legal fireworks may be discharged on private property between the hours of 8:00 a.m. and 10:00 p.m. beginning on July 1st and ending on July 4th.** Therefore, anyone discharging fireworks after 10:00 p.m. on the night of the 4th would be in violation of the City's fireworks ordinance.

To be in compliance with the ordinance, the owner of the private property where the fireworks are being discharged must consent to this activity. Furthermore, the ordinance requires that all persons under the age of 16 who are participating in the discharge of fireworks must be supervised by a person of at least 21 years of age.

The City also has an ordinance which prohibits fireworks in a city park, unless the person has obtained written approval from the park director.

Public Display of Fireworks

Section (b)(2) of the ordinance sets forth the requirements for obtaining a permit for a public display of fireworks. The city may issue permits for a public display of fireworks if certain requirements are met. Once a permit is issued, any such public display shall be conducted by a competent operator approved by the fire chief and shall be located and discharged in such a manner as to not be hazardous to any property or dangerous to any person. In addition, **a person or entity may discharge fireworks pursuant to a permit for the public display of fireworks only between the hours of 8:00 a.m. and 11:00 p.m. from July 1st through July 4th of any year.** There are two situations when the city may issue a permit to allow a public display of fireworks on a day not falling between July 1st and July 4th of any year. First, the city can issue a permit for a public display of fireworks at a professional sporting event in a P-1 zone between the hours of 6:00 p.m. and 11:00 p.m. from April 1st through September 30th of any year, provided that the property adjacent to the P-1 zone is commercial or agricultural. Second, the city can issue a permit for a public display of fireworks for the purpose of allowing small test firing to determine the feasibility of a discharge site for future public display, provided no salute shells are discharged and provided that any such test firings shall occur between the hours of 6:00 p.m. and 10:00 p.m. between April 1st and June 30th of any year.

Fireworks Calls in the Year 2010

The Police Department answered 174 fireworks calls from June 29, 2010, through July 6, 2010. That is an average of 21.75 calls per day for this eight day period. The Police Department received 105 of these

calls from July 1, 2010, through July 4, 2010, when it is legal to shoot fireworks within the city.

I hope this review proves helpful. Have a safe and happy 4<sup>th</sup> of July.

Jonathan D. Nelson  
Deputy City Attorney

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**United States Supreme Court
Decides Case Involving Exigent
Circumstances in a Kentucky
Case**

Facts Taken From the Opinion: This case concerns the search of an apartment in Lexington, Kentucky. Police officers set up a controlled buy of crack cocaine outside an apartment complex. Undercover Officer Gibbons watched the deal take place from an unmarked car in a nearby parking lot. After the deal occurred, Gibbons radioed uniformed officers to move in on the suspect. He told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and he urged them to “hurry up and get there” before the suspect entered an apartment.

In response to the radio alert, the uniformed officers drove into the nearby parking lot, left their vehicles, and ran to the breezeway. Just as they entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana. At the end of the breezeway, the officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered. Gibbons had radioed that the suspect was running into the apartment on the right, but the officers did not hear this statement because they had already left their

vehicles. Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment.

Officer Steven Cobb, one of the uniformed officers who approached the door, testified that the officers banged on the left apartment door “as loud as [they] could” and announced, ““This is the police”” or ““Police, police, police.”” Cobb said that “[a]s soon as [the officers] started banging on the door,” they “could hear people inside moving,” and “[i]t sounded as [though] things were being moved inside the apartment.” These noises, Cobb testified, led the officers to believe that drug related evidence was about to be destroyed.

At that point, the officers announced that they “were going to make entry inside the apartment.” Cobb then kicked in the door, the officers entered the apartment, and they found three people in the front room: Hollis King (respondent), respondent’s girlfriend, and a guest who was smoking marijuana. The officers performed a protective sweep of the apartment during which they saw marijuana and powder cocaine in plain view. In a subsequent search, they also discovered crack cocaine, cash, and drug paraphernalia. Police eventually entered the apartment on the right. Inside, they found the suspected drug dealer who was the initial target of their investigation.

Respondent was convicted in Fayette County Circuit Court and then appealed his case. The Kentucky Court of Appeals affirmed. Then, the Supreme Court of Kentucky reversed. The Court observed there was “certainly some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed.” But the court did not answer that question. Instead,

it “assume[d] for the purpose of argument that exigent circumstances existed.”

To determine whether police impermissibly created the exigency, the Supreme Court of Kentucky announced a two-part test. First, the court held, police cannot “deliberately creat[e] the exigent circumstances with the bad faith intent to avoid the warrant requirement.” Second, even absent bad faith, the court concluded, police may not rely on exigent circumstances if “it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances.” Although the court found no evidence of bad faith, it held that exigent circumstances could not justify the search because it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence. The case was appealed to the United States Supreme Court.

Decision by the United States Supreme Court: The United States Supreme Court held that assuming an emergency existed here, there was no evidence that the officers violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment. However, the Court held that any questions about whether an exigency existed here is better addressed by the Kentucky Supreme Court on remand. The Supreme Court held that assuming an exigency did exist, the officers’ conduct—banging on the door and announcing their presence—was entirely consistent with the Fourth Amendment. The Court held that the respondent had pointed to no evidence supporting his argument that the officers made any sort of “demand” to enter the apartment, much less a demand that amounts to a threat to violate the Fourth Amendment. The Court noted that if there is contradictory evidence that has not been brought to this

Court’s attention, the state court may elect to address that matter on remand. The Court held that the record makes clear that the officers’ announcement that they were going to enter the apartment was made after the exigency arose. Therefore, the judgment of the Kentucky Supreme Court was reversed and remanded.

Case: This case was decided by the United States Supreme Court on May 16, 2011. The case cite is *Kentucky v. King*, 563 U.S. ____ (2011).

Jeff Harper
City Attorney



Constructive Possession Found by Court of Appeals Where Suspect Rented Vehicle

Facts: On June 4, 2009, Trooper Victor Coleman [Trooper Coleman] of the Arkansas State Police clocked a Dodge Ram traveling on Interstate 40 at seventy-five miles per hour in a seventy mile per hour zone. Testimony also revealed that Trooper Coleman had received a tip from the Drug Enforcement Agency that there would be narcotics in the vehicle. Trooper Coleman pulled the truck over and as he approached he smelled marijuana coming from the vehicle. Trooper Coleman asked the driver, Dewquan Marquis Johns [Johns] to get out of the truck and take a seat in the squad car. Johns informed Trooper Coleman that he had rented the truck and he and his passenger were coming from Helena.

Trooper Coleman then walked to the passenger, Michael Sturd [Sturd] and talked to Sturd about smelling marijuana in the truck. Trooper Coleman asked Sturd to exit

the vehicle and then Trooper Coleman searched the truck based on the odor of marijuana. Based on his experience, Trooper Coleman knew marijuana could be hidden in the spare-tire area, so he went to the rear of the vehicle, crawled under and located the "air breather" from the engine compartment placed over the top of the spare tire. Believing there to be drugs in the engine compartment, Trooper Coleman went to the engine, opened the air filter and found two bags of marijuana. Trooper Coleman placed both suspects in custody and returned to search the vehicle further and found a 9mm handgun strapped to the battery of the car. Sturd admitted smoking marijuana before he left. Trooper Coleman patted down Sturd and found a small quantity of marijuana in Sturd's shoe. Trooper Coleman arrested both suspects for possession of marijuana and simultaneous possession of drugs and a firearm.

At trial, no definitive fingerprints on the gun could be linked to either suspect. Johns testified that he wondered why he was being pulled over because he was only going 74 miles per hour and that he did not know the drugs and gun were in the vehicle. Johns denied smoking marijuana and hypothesized that Sturd had put the gun and drugs there the previous night when he asked to put something in the truck and Johns gave him the keys. Johns was convicted of one count of simultaneous possession of drugs and a firearm and one count of possession of a controlled substance with intent to deliver.

Argument and Discussion: On appeal, Johns argued that the evidence failed to prove that he constructively possessed the marijuana or the firearm. Constructive possession may be imputed when the contraband is found in a place that is either accessible to the defendant and subject to his exclusive dominion and control, or subject

to the joint dominion and control by the defendant and another. *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976); *Boston v. State*, 69 Ark. App. 155, 12 S.W.3d 245 (2000).

The Arkansas Supreme Court outlined the analysis to determine if constructive possession had been established by determining:

Other factors to be considered in cases involving automobiles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest. *Plotts v. State*, 297 Ark. 66, 69, 759 S.W.2d 793, 795 (1988) quoting *Mings v. State*, 318 Ark. 201, 207, 884 S.W.2d 596, 600 (1994). See also *Malone v. State*, 364 Ark. 256, 217 S.W.3d 810 (2005).

The State must show more than the fact that Johns occupied a vehicle in which contraband was found; there must be some other factor linking Johns to the contraband. The State demonstrated that Johns exercised dominion and control over the vehicle, as he was the individual in whose name the truck had been rented. Also, Johns testified that nobody else drove the truck or had keys to it and that no one could get under the hood of the truck while it was locked. Moreover, Trooper Coleman testified that the odor of marijuana was strong enough to smell from the outside of the vehicle, thus giving rise to an inference that the odor could have been

smelled inside the vehicle such that anyone in the truck would have known that the vehicle contained contraband. See *Malone*, 364 Ark. at 262. Based on this evidence, the Court concluded that there was sufficient evidence of constructive possession for the jury to reach a guilty verdict.

Note: However, this case was reversed and remanded back to the lower court for further proceedings based on whether Sturd's prior testimony from a prior trial could be used in the current trial. The basis for finding that Johns constructively possessed the contraband still stands.

Case citation: This case was decided by the Arkansas Court of Appeals on March 16, 2011. The case was from Lonoke County Circuit Court, Honorable Barbara Elmore, Judge. The case citation is *Johns v. State*, 2011 Ark. App. 217.

Brooke Lockhart
Deputy City Attorney

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**Arkansas Court of Appeals Upholds Aggravated Assault and Battery Second Degree Convictions in Faulkner County Case Where Dog Owner Said "Get Him"**

**Facts Taken From the Case:** In July of 2009, Officer Matthew Lichty responded to a neighborhood in reference to a complaint about loose dogs. While waiting on Animal Welfare, a motorcycle driven by Tyler Banks sped past Officer Lichty. Officer Lichty motioned for Banks to come to him, but Banks instead drove his motorcycle to the end of the subdivision where he parked and went inside his home. Officer Lichty

attempted to make contact with someone inside Banks' home, but no one would answer the door. Officer Lichty's supervisor then instructed him to have the motorcycle towed.

As Officer Lichty was about to leave, Banks exited his residence, approached Lichty and another officer named Sarah Ault, and told them that the motorcycle was not his. Banks then saw a notice from Animal Welfare posted on his residence door, and he began yelling profanities. Officer Ault went to address Banks on his porch, and after arguing with him, she returned to her car.

At this point, Officer Lichty once again was about to get into his vehicle and leave. However, he stopped because Banks opened his garage door and started cursing loudly. Banks held the garage door open with one hand while he was holding a pit bull on a leash with his other hand. Officer Lichty was concerned because of the number of families in the neighborhood. Officer Lichty said to Banks, "Alright, that's enough; you're under arrest", and he began walking quickly toward Banks' driveway. Officer Lichty tried to pull open the garage door while Banks was trying to slam it shut. After the second time Officer Lichty pulled open the door, the pit bull came from the garage, and Banks yelled "Get him." The dog then bit officer Lichty's leg (thereby causing discoloration but not penetration of the skin), and Officer Lichty dropped the garage door on the dog. Officer Lichty raised the garage door a third time whereupon Banks again yelled "Get him." Officer Ault then tazed Banks and placed him under arrest.

Officer Lichty received medical treatment for strain on his back from opening the door and for the dog bite. It was also later learned through testimony that Banks had previously informed one of his neighbors that Banks

had an unfriendly pit bull and that the neighbor should be cautious when around the dog. Banks was charged with and convicted of second-degree battery, aggravated assault, fleeing, and disorderly conduct, and he was sentenced to 120 days in county jail followed by five year's probation. He appealed his case to the Arkansas Court of Appeals.

**Argument and Decision by the Court of Appeals:** Banks' first argument on appeal concerned the aggravated assault conviction. Banks said that the evidence did not compel the trial court to find that Banks acted "purposely" with respect to his pit bull responding aggressively. To prove that Banks committed aggravated assault, the Court of Appeals said the State had to show two things: first, that under circumstances manifesting extreme indifference to the value of human life, Banks purposely engaged in conduct that created a substantial danger of death or serious physical injury to another person; and second, that the conduct, not the intended result, was undertaken purposefully. Finally, the Court of Appeals noted that a person acts purposely with respect to his conduct or as a result of his conduct when it is the person's "conscious object" to engage in conduct of that nature or to cause the result.

In holding that the State made the requisite showing on the aggravated assault charge, the Court of Appeals noted that there was evidence that Banks knew that one of his dogs could hurt others and that Banks twice told the dog to "get him." By instructing the dog to "get him", the court said that Banks intentionally engaged in conduct that put the officer at risk of being bitten. The court reasoned that a reasonable person could conclude that the dog would respond to his owner and act aggressively, thereby putting

the officer at risk of death or serious physical injury.

Banks' second argument on appeal concerned the second-degree battery conviction. Banks argued that the State offered insufficient evidence to show that he knew or had reason to believe that his pit bull would attack upon command, and that the State was required to present proof that he "acted consistently with certain circumstances that the dog would actually cause injury to Officer Lichty."

To show that Banks committed battery in the second degree, the Court of Appeals said the State had to show that Banks knowingly, without legal justification, caused physical injury to a person he knew to be a law enforcement officer acting in the line of duty. Also, the Court of Appeals noted that a person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause the result.

In holding that the evidence was sufficient to support the second-degree battery conviction, the Court of Appeals stated that there was evidence that Banks knew his dog was aggressive. Also, Banks had control of the dog when he opened his garage and started yelling profanities. The court noted that a reasonable person could conclude that the dog would attack and cause injury when told by its owner to "get him", and that the trial court could presume that Banks intended the natural and probable consequence of telling the dog to attack another person. Therefore, the Arkansas Court of Appeals affirmed the convictions.

**Case:** This case was decided by the Arkansas Court of Appeals on March 30, 2011, and was an appeal from the Faulkner County Circuit Court, Honorable Charles E.

Clawson, Jr., Judge. The case citation is *Banks v. State*, 2011 Ark. App. 249.

Taylor Samples  
Deputy City Attorney



### **An Overview of Orders of Protection, Restraining Orders, and 9.3 No Contact Orders**

Confusion sometimes exists regarding the difference between orders of protection, restraining orders, and 9.3 no contact orders. Specifically, there seems to be confusion regarding when to charge a suspect with a violation of one of these orders. Each of these three different orders originate in specific situations, serve unique purposes, and require separate enforcement procedures. Therefore, it is important for an officer to have a basic understanding of the purposes of and differences between these orders, who issues them, where they may be enforced, and what action can (or cannot) be taken upon a violation of one of these orders.

#### **I. Which Order am I Dealing with?**

When an officer is faced with the decision to charge a suspect with a violation of one of these orders, it is crucial for the officer to first determine exactly which type of order is in existence. Of course, it is possible for there to be more than one order in existence at the same time, in which case there may be two separate violations. It is important for the officer to ascertain which order exists because the officer's action will depend on which type of order is in effect.

To the average citizen, the terms "protection order," "restraining order," and "no contact

order" are used interchangeably. Therefore, if a citizen contacts an officer regarding a violation of one of these orders, it is imperative that the officer not assume that the citizen is referring to the correct order. If a citizen tells the officer that he or she has a restraining order against a suspect, there could, in fact, be a restraining order. It is also possible, however, that it is actually a protection order that exists, or vice versa. In addition, if a particular suspect happens to have a parole officer, an officer should not assume that the parole officer will use the correct terminology. The parole officer may state that the suspect has an order of protection against him or her when, in fact, the suspect is actually subject to a no contact order. Similarly, an officer should not assume that a fellow officer has already verified the correct order when he or she mentions that a suspect has violated one of these orders. An officer should ask whether his or her fellow officer has already verified the order. There are many things occurring in the field, and it can be easy for two officers to assume that the other officer verified the order in question.

If possible, an officer should request that the citizen present a copy of the order because an officer can tell which type of order is in effect by reading it. If the citizen does not have a copy of the order, an officer can check in-house to see whether there is a no contact order, and the officer can also run an ACIC to see if there is an order of protection. Even if a citizen provides the officer with a copy of one of these orders, it is advisable for the officer to check in-house and to run an ACIC to determine whether there are any additional orders in existence. An officer should never take someone's "word for it" that a no contact order or order of protection actually exists, and the officer should always verify the existence of these orders before making an arrest.

Once an officer determines which type of order he or she is faced with, the officer can then apply the following rules and guidelines.

## **II. Orders of Protection**

### **A. Who issues them and why.**

A Circuit Judge issues orders of protection or "protection orders." These orders are issued in situations involving family or household members, as defined under Arkansas law, and the person seeking the order of protection has petitioned the Circuit Court stating that they are afraid that the family or household member will cause them physical harm. The City Attorney's Office does not issue orders of protection. In addition, the Springdale District Court does not issue orders of protection. If someone is interested in obtaining an order of protection, they can be referred directly to the Circuit Clerk or directed to contact the City Attorney's Office and we can provide them with the information they need.

### **B. How long does this order last?**

It is not uncommon for someone to first obtain a temporary order of protection. The temporary order usually remains in effect until the Circuit Judge has conducted a trial and decided whether or not to issue a final or permanent order of protection. A final or permanent order of protection will state the expiration date in the order, but final orders of protection are typically valid for five (5) years from the date of issuance. For enforcement purposes, there is no difference between a temporary order of protection and a final or permanent order of protection.

### **C. What does this order typically prohibit?**

Though the terms of a specific order of protection may vary, a typical order of protection will prohibit a person from the following: (1) committing any criminal act against the victim(s) including, but not limited to, acts of violence or domestic abuse, harassment, harassing communications, stalking, or terroristic threatening; (2) initiating any contact with the victim(s) including, but not limited to, physical presence, telephonic, electronic, oral, written, visual, or video; (3) initiating any contact with the victim(s) through the use of a third party; and (4) from being at the victim's residence and the immediate vicinity thereof. It is also not uncommon for an order of protection to prohibit a person from being at a victim's workplace or school.

### **D. Who does this order protect?**

An order of protection protects any person listed as a victim in the order, which is typically the plaintiff or petitioner. It is possible for two people to have an order of protection against each other at the same time.

### **E. Who can violate this order?**

The only person who can violate an order of protection is the person who is prohibited from doing certain things in the order. The order typically refers to this person as the defendant or respondent.

### **F. Is a violation of this order a crime?**

Yes. The violation of an order of protection is a Class A Misdemeanor (*see* Ark. Code Ann. § 5-53-134). Therefore, if someone alleges a violation of a protection order, the officer should treat it as a criminal offense and not as a civil matter.

**G. Can an officer make an arrest for a violation without a warrant?**

Yes. The statute provides that:

A law enforcement officer may arrest and take into custody without a warrant any person who the law enforcement officer has probable cause to believe is subject to an order of protection issued pursuant to the laws of this state and who the officer has probable cause to believe has violated the terms of the order, even if the violation did not take place in the presence of the law enforcement officer.

Ark. Code Ann. § 5-53-134(c) (emphasis added).

In other words, if someone alleges a violation of an order of protection, an officer may make an arrest without a warrant if the officer has probable cause to believe that the person violated the order of protection, even if the violation did not occur in the officer's presence. Before making an arrest, however, the officer should first verify that the order has been served on the person alleged to have violated the order, as an order of protection cannot be enforced until it has been served. This information can usually be obtained from an ACIC printout.

**H. When will the Springdale District Court have jurisdiction of a violation?**

The Springdale District Court will have jurisdiction of a violation of an order of protection only when the violation occurs in the City of Springdale. When the violation occurs in the City of Springdale, the charge will go through Springdale District Court

even if the order of protection was issued by a Judge in another jurisdiction.

For example, if an officer arrests someone in Springdale for violating an order of protection issued out of Sebastian County, the prosecution of the offense of violating the order of protection would take place in Springdale District Court, and not in Sebastian County. The reason for this is because the violation of an order of protection is a crime and is not treated as a contempt of court. For this reason, jurisdiction is determined by where the crime occurred and not by the location of the court that issued the order.

**III. Restraining Orders**

**A. Who issues them and why.**

A Circuit Judge issues restraining orders, usually in the context of a pending divorce. These orders are intended to keep the parties from bothering each other and are intended to maintain the *status quo* with regard to property, among other things, until a divorce case is final. The City Attorney's Office does not issue restraining orders. In addition, the Springdale District Court does not issue restraining orders.

**B. How long does this order last?**

A restraining order typically stays in effect until the divorce case is final.

**C. What does this order typically prohibit?**

The purpose of a restraining order is to maintain the *status quo* with regard to property, among other things, until the divorce case is final. Typically, this order will prohibit the parties from using certain accounts or property, from traveling a

certain distance with children, and may also prohibit the parties from being in certain areas or from being within a certain distance of each other.

**D. Who and what does this order protect?**

A restraining order protects the persons and/or property listed in the order. It is possible to have a mutual restraining order where both parties to a divorce may be restrained from doing certain things.

**E. Who can violate this order?**

The only person who can violate a restraining order is the person who is listed in the order and is prohibited from doing certain things in the order.

**F. Is a violation of this order a crime?**

No. A violation of a restraining order is not a criminal offense. If an officer encounters a situation involving only a violation of a restraining order, the officer should tell the person it is a civil matter that is enforced by the Judge who issued the restraining order. The officer should not send them to the City Attorney's office to have charges filed for violating the restraining order.

**G. Can an officer make an arrest for a violation?**

No. A violation of a restraining order is a civil matter only.

**H. When will the Springdale District Court have jurisdiction of a violation?**

Never.

**IV. 9.3 No Contact Orders**

**A. Who issues them and why.**

Any judicial officer presiding over a criminal matter, for example a Circuit Judge or District Judge, can issue a 9.3 no contact order. The 9.3 no contact order, commonly referred to as a "no contact order" or a "9.3 order," originates when a defendant pleads not guilty at arraignment. After the not guilty plea, the Judge, as a condition of the defendant's pretrial release, orders the defendant to have no contact with certain individuals prior to trial, which typically includes the victim, the victim's immediate family, and any witnesses who may testify for the victim in the case. When issuing a no contact order, the Judge is trying to ensure that no additional problems arise during the pendency of the criminal case. The City Attorney's Office does not issue no contact orders. In addition, a person cannot "apply" for a no contact order. Only a judicial officer presiding over a criminal matter can issue a no contact order, and the judicial officer can only enter a no contact order after a defendant enters a plea of not guilty at arraignment.

**B. How long does this order last?**

A no contact order lasts until the conclusion of the criminal case, at which time the no contact order will expire. A Judge may also lift a no contact order during the pendency of a criminal case, at which time the no contact order will expire. A Judge will typically lift a no contact order only after a victim makes this request in open court or in writing and only after the prosecutor agrees with or does not object to the victim's request.

**C. What does this order typically prohibit?**

A no contact order prohibits a defendant from having any contact, including but not limited to in person contact or telephone contact, with certain individuals prior to trial, which typically includes the victim, the victim's immediate family, and any witnesses who may testify for the victim in the case. Often times in domestic cases, this will prevent a defendant from contacting his or her children if the children reside with the victim or if the children witnessed the alleged crime. In addition, in domestic cases, this often times means a defendant must obtain alternate living arrangements until the conclusion of the trial. If this seems harsh, keep in mind that the no contact order is a condition of the defendant's pretrial release, and the alternative would be to keep the defendant in jail until the conclusion of the trial.

**D. Who does this order protect?**

A no contact order typically protects the victim, the victim's immediate family, and any witnesses who may testify for the victim in the case.

**E. Who can violate this order?**

The only person who can violate a no contact order is the defendant in the underlying criminal case. A defendant can violate a no contact order by calling or otherwise contacting the victim, the victim's immediate family, or any witness who may testify for the victim in the case. Remember, the no contact order means that the defendant has been ordered to have no contact with specific individuals. It does not mean that these specific individuals have been ordered to have no contact with the defendant. Thus, an officer may not arrest these specific individuals for a violation of a no contact order. The only person who may be arrested and charged with contempt of

court for violating a no contact order is the defendant who has been ordered by the court to have no contact with specific individuals.

**F. Is a violation of this order a crime?**

Yes. A violation of a 9.3 no contact order constitutes a contempt of court and is an unclassified misdemeanor under state law.

**G. Can an officer make an arrest for a violation without a warrant?**

Yes. Rule 9.5(b) of the Arkansas Rules of Criminal Procedure provides that "a law enforcement officer having reasonable grounds to believe that a released defendant has violated the...terms of an order under Rule 9.3 is authorized to arrest the defendant...when it would be impracticable to secure a warrant." Attorney General's Opinion #95-357 further provides that an officer having reasonable grounds to believe that a violation of a 9.3 no contact order has taken place may make an arrest without a warrant. However, an officer should make an arrest without a warrant for a violation of a no contact order only if the violation has taken place within the last several hours and if the defendant can be located outside his home. Otherwise, the officer should take a report and refer the victim to the City Attorney's Office for follow up. Obviously, if the violation of a no contact order occurs in an officer's presence, that officer may make an arrest.

**H. When will the Springdale District Court have jurisdiction of a violation?**

The Springdale District Court will have jurisdiction of a violation of a no contact order only when the Springdale District Court issued the no contact order. Because state law treats a violation of a no contact order as a contempt of court, the only court

that would have jurisdiction of a violation of this order is the court which issued the order. The location of the violation is not relevant to the jurisdiction issue.

For example, the Springdale District Court will have jurisdiction of a violation of a no contact order issued by the Springdale District Court, even if the violation of such an order occurred in Little Rock. For comparison, if an officer arrests someone in Springdale for violating a no contact order issued by the Fayetteville District Court, the prosecution of the offense of violating the no contact order would take place in Fayetteville District Court, and not in Springdale. Thus, jurisdiction will not be where the violation occurred but will instead be in the court that actually issued the no contact order.

## V. Conclusion

To the average citizen, the terms "protection order," "restraining order", or "no contact order" can be used interchangeably. Given the differences in these three orders, it is crucial that an officer ascertain exactly which type of order is in existence. An officer should always verify the existence of an order of protection or a no contact order before making an arrest and should never take someone's "word for it" that an order of protection or a no contact order actually exists. Possessing a good understanding of these different orders will prevent misinformation from being given to the general public and will help everyone involved do their jobs more efficiently and competently. In addition, when an officer demonstrates knowledge regarding these issues, that officer bolsters public confidence in the police department and helps to prevent the public from feeling like they are "getting the runaround."

## VI. Review

Please read the following fact pattern and determine (1) who should be charged where with what crimes and (2) whether the officers have the authority to make an arrest on the scene:

Responding to an anonymous call, officers A and B arrive at a bar in Springdale, Arkansas. After diffusing a brawl involving several people, the officers interview the subjects involved. Mr. C tells the officers that he and Mrs. C are in the middle of a divorce, that he has a restraining order against his wife, Mrs. C, and that he has a protection order against Mr. D, who is Mrs. C's current boyfriend. Mrs. C tells the officers that she has a no contact order against Mr. C. Mr. D tells the officers that he has a protection order against Mr. C. Being diligent and responsible, officers A and B have this information checked through dispatch. Dispatch informs officers A and B that the following orders are active: (1) a Pulaski County Circuit Court issued a restraining order against Mrs. C, which prohibits her from being within 500 feet of Mr. C; (2) a Pulaski County Circuit Court issued an order of protection prohibiting Mrs. C from having any contact with Mr. C; (3) a Pulaski County Circuit Court issued an order of protection prohibiting Mr. C from having any contact with Mrs. C; (4) the Springdale District Court issued a 9.3 no contact order prohibiting Mr. C from having any contact with Mrs. C; (5) the Springdale District Court issued a 9.3 no contact order prohibiting Mrs. C from having any contact with Mr. C; (6) the Fayetteville District Court issued a 9.3 no contact order prohibiting Mr. C from having any contact with Mr. D; (7) the Rogers District Court issued a 9.3 no contact order prohibiting Mr. D from having any contact with Mr. C; and (8) a Pulaski County Circuit Court issued an

order of protection prohibiting Mr. D from having any contact with Mrs. C. Mrs. C tells officers A and B that she obtained the protection order against Mr. D four years ago at the urging of Mr. C and that she never meant to enforce this protection order against Mr. D. Officers A and B also learn that Mr. C arrived at the bar in Springdale, Arkansas, at about the same time as Mrs. C and Mr. D, who came to the bar together. Upon seeing each other, Mr. C, Mrs. C, and Mr. D approached each other simultaneously in an aggressive manner.

To find out the correct answer, please email the author at [jnelson@springdalear.gov](mailto:jnelson@springdalear.gov).

If you have any questions, please feel free to contact the City Attorney's Office.

Jonathan D. Nelson  
Deputy City Attorney



**Constructive Possession Upheld When Suspect Was Not at Residence but Wife Consented to Search**

**Facts:** Special Agent Shannon Shepard [Agent Shepard] with the Arkansas State Police received information that marijuana was growing at a residence located on Highway 229 south of Poyen. When Agent Shepard and another officer approached the property, they were deterred by the presence of dogs. Agent Shepard requested a helicopter from the National Guard and upon doing a legal flyover; the sheriff saw marijuana growing in the field near the residence of Jacob Howard Populis [Populis]. Agent Shepard and Agent Eddie Keathly [Agent Keathly] went to the

residence and met Populis's wife, Lisa. Agent Shepard stated he saw marijuana plants growing "right outside the front door" along a fence enclosing the front yard. Agent Shepard stated that it was his understanding that Populis and Lisa were renting the property, although Populis was not there at the time.

Lisa gave her signed consent to search the premises and the agents found leafy stems of what appeared to be marijuana on a night stand in plain view in the bedroom, and saw five marijuana plants growing just outside the trailer along with a path leading from the trailer to a pasture about fifteen or twenty feet from the residence where about 120 additional marijuana plants were found. The agents also noticed evidence of people living there such as men's and women's clothing and toiletries. Lisa was arrested at the time [September 2, 2009] and a warrant was issued for Populis who was arrested later.

Populis was charged with maintaining a drug premises, manufacture of a controlled substance, and being a habitual offender. Populis was convicted of the manufacturing charge and was sentenced as a habitual offender to 30 years in prison. Populis appealed.

**Argument and Discussion:** Populis argued on appeal that the State presented insufficient evidence to connect him with the residence where the contraband was found and seized. *Note:* Populis argued that it was error for his probation officer to testify as to his residence but the court allowed it. Lisa had failed to appear for trial and was to testify as to Populis's residence but the State put the probation officer, April Dorn, on the stand.

When the court reviews the sufficiency of the evidence supporting a conviction, the

court considers all of the evidence introduced at trial, whether correctly or erroneously admitted, and disregards any alleged trial errors. *Camacho-Mendoza v. State*, 2009 Ark. App. 597, 330 S.W.3d 46.

In proving possession of contraband, it is not necessary to prove that the defendant had actual or exclusive possession of the contraband; rather, constructive possession is sufficient to sustain a conviction. *Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d. 822 (2002). Although constructive possession can be implied when the contraband is in the joint control of the accused and another, joint occupancy alone is not sufficient to establish possession. *Id.* In a joint-occupancy situation, the State must prove some additional factor which links the accused to the contraband and demonstrates the accused's knowledge and control of the contraband. *Draper v. State*, 2010 Ark. App. 628. This control and knowledge may be inferred from the circumstances where there are additional factors linking the accused to the contraband, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Abshure, supra.*

In this case evidence was introduced that Populis's wife was present at the residence where the contraband was found, that Populis and his wife were renting the property, that Populis gave a state employee that same address as his residence, that three- to four-foot tall marijuana plants were found growing right outside the front door of the mobile home, that there was a path leading to approximately 120 additional plants in a pasture less than twenty feet from the residence, that marijuana stems were found in plain view on a bedside table inside the home, and that both men's and women's clothing was found in a closet in that

bedroom. In *Wolf v. State*, 10 Ark. App. 379, 664 S.W.2d 882 (1984), the court upheld a conviction for manufacturing marijuana under almost identical facts where even though the defendant was not present at the time of the search, the sheriff had knowledge that the defendant was renting and living on the property, the woman who was living with the defendant was present during the search, and there were several trails leading to the marijuana plants from the house. There was found to be substantial evidence in the *Wolf* case, as in Populis's case, to support the conviction.

**Case citation:** This case was decided by the Arkansas Court of Appeals on May 4, 2011. The case was from Grant County Circuit Court, Honorable Chris E. Williams, Judge. The case citation is *Populis v. State*, 2011 Ark. App. 334.

Brooke Lockhart  
Deputy City Attorney



### **Protective Search of S.U.V. Upheld in 8<sup>th</sup> Circuit Case**

**Facts:** While on patrol at approximately 3:30 a.m. on March 11, 2009, Deputy Andrew Woodward of the Douglas County, Nebraska Sheriff's Office noticed a red sport utility vehicle ("SUV") parked in a Kwik Shop parking lot. According to Deputy Woodward, the area around the convenience store was "a hot spot for a lot of criminal activity." Due to the late hour and the location, Deputy Woodward considered the SUV's presence to be suspicious; the vehicle was parked in a poorly lit area some distance from the Kwik Shop entrance. Deputy Woodward also testified that although the vehicle pulled up to a gas pump, he did not

see anyone exit the vehicle to pump gas. The deputy acknowledged, however, that he left the Kwik Shop area for a brief period of time while the vehicle was parked at the gas pump.

After the SUV departed the Kwik Shop, Deputy Woodward lost sight of the vehicle. On the advice of another deputy, Jason Stehlik, Deputy Woodward searched for the SUV in a nearby neighborhood where, according to Deputy Stehlik, suspects had parked their vehicles after previous robberies at the Kwik Shop. Deputy Woodward soon located the SUV parked outside a house with its engine running. He positioned his cruiser behind the vehicle and illuminated his spotlight. He then approached the SUV and made contact with the man—later identified as Keith B. Stewart—seated in the driver’s seat. Deputy Woodward asked Stewart what he was doing in the area, and, according to Deputy Woodward, Stewart responded that he was meeting a female friend to aid her in “sneaking behind her husband’s back.” Later during the exchange, Stewart referred to his friend’s previously described “husband” as her “boyfriend.” Deputy Woodward also observed that Stewart was “[v]ery nervous[,] . . . very fidgety, couldn’t give . . . straight direct answers,” and refused to maintain eye contact during the interchange. Stewart explained his earlier presence at the Kwik Shop by stating that he had been assisting another friend who was having trouble with her car.

Upon Deputy Woodward’s asking him to provide a form of identification, Stewart “reached into the center console, reached into . . . the under part of his jacket, reached underneath the seat, and then did each one of those several more times.” As a result, the deputy “became very fearful that [Stewart] possibly had a weapon on him” and began to

unholster his service weapon. Stewart eventually located his commercial driver’s license in his rear pocket and provided it to Deputy Woodward without incident. Deputy Woodward then returned to his cruiser, contacted Deputy Stehlik to request back-up, and ran a check on the license. The check indicated that Stewart had a prior felony conviction and “some type of drug history and some type of violent behavior,” although there were no active warrants for his arrest and no problems with his license.

Deputy Stehlik arrived soon after. The two deputies briefly conferred, during which time Deputy Stehlik observed Stewart, still seated in his vehicle, “motioning towards the center console and then underneath the seat several times.” Deputies Woodward and Stehlik then approached the SUV and instructed Stewart to exit the vehicle. Although the video device in Deputy Woodward’s cruiser recorded the interaction, neither Deputy Woodward nor Deputy Stehlik activated his microphone. Deputy Woodward patted Stewart down for weapons, opened Stewart’s coat, and reached into his pockets. Deputy Woodward later testified that Stewart verbally consented to the search of his pockets, although Stewart denies that he gave consent. In one of Stewart’s pockets, Deputy Woodward found an item of drug paraphernalia—a mesh pipe filter. Although the deputies did not intend to arrest Stewart for possessing the filter, [because under Nebraska law possession of drug paraphernalia is an infraction and usually not an arrestable offense] Deputy Stehlik escorted Stewart to one of the cruisers to fill out a field interview card while Deputy Woodward entered Stewart’s SUV and searched the immediate area around the driver’s seat for weapons. Inside the center console, Deputy Woodward located a bag in

which he discovered crack cocaine, a scale, and several bundles of currency.

Based on the drugs seized from the vehicle, a federal grand jury returned a one count indictment charging Stewart with knowingly and intentionally possessing with intent to distribute fifty grams or more of a mixture or substance containing a detectable amount of cocaine base. Stewart entered a plea of not guilty and filed a motion to suppress the crack cocaine, arguing that Deputy Woodward's search of his vehicle violated the Fourth Amendment. A magistrate judge recommended that the motion to suppress be denied, but the district court sustained the motion. *United States v. Stewart*, 675 F. Supp. 2d 973 (D. Neb. 2009). The Government appealed, arguing that the search of Stewart's vehicle was constitutional as a protective search under *Terry v. Ohio*, 392 U.S. 1 (1968), and *Michigan v. Long*, 463 U.S. 1032 (1983).

**Argument and Discussion:** The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Although the Fourth Amendment prevents police officers from seizing a person without a reasonable suspicion of criminal activity, scrutiny under the amendment is not triggered by a consensual encounter between an officer and a citizen. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). A seizure does not occur "simply because a police officer approaches an individual and asks a few questions," *id.*, as long as "a reasonable person would feel free 'to disregard the police and go about his business,'" *id.* (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and request to

examine his or her identification. *Id.* at 435. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 434 (quoting *Terry*, 392 U.S. at 19 n.16).

The district court concluded that Deputy Woodward's initial encounter with Stewart was consensual. Stewart did not meaningfully contest this determination on appeal, and, the Court agreed with the district court's characterization of the initial encounter as consensual. *See United States v. Carpenter*, 462 F.3d 981, 985-86 (8th Cir. 2006). The Court agreed with the district court that the deputies' conduct subsequently triggered Fourth Amendment scrutiny when they directed Stewart to exit his SUV and commenced the protective search. *See United States v. Gray*, 213 F.3d 998, 1000 (8th Cir. 2000) ("A protective frisk is both a search and a seizure for Fourth Amendment purposes.").

The Fourth Amendment inquiry as to whether a protective search was reasonable must focus on the circumstances confronting the officer when he made the decision to search. *United States v. Davis*, 202 F.3d 1060, 1063 (8th Cir. 2000). In this case, the Court evaluated the constitutionality of the deputies' conduct as of the moment they began the protective search. *Cf. id.* at 1062 ("[C]onduct after an investigative stop begins cannot supply the reasonable suspicion needed to justify the stop.").

Protective searches of persons and vehicles both fall within the exception to the warrant requirement outlined in *Terry* and in *Long*. In *Terry*, the Supreme Court held that a law enforcement officer may subject a suspect to a protective search for weapons if he "observes unusual conduct which leads him

reasonably to conclude in light of his experience that criminal activity may be afoot *and* that the persons with whom he is dealing may be armed and presently dangerous.” *Terry*, 392 U.S. at 30 (emphasis added); *see also Davis*, 202 F.3d at 1062. The principle announced in *Terry* has been extended to include vehicle searches. *See Long*, 463 U.S. at 1049. Observing that “roadside encounters between police and suspects are especially hazardous,” the Court in *Long* held, “the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons.” *Id.* It is well settled law that once reasonable suspicion is established, a protective search of a vehicle’s interior is permissible regardless of whether the occupants have been removed from the vehicle. *See id.* at 1052 (“[I]f the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside.”); *see also United States v. Goodwin-Bey*, 584 F.3d 1117, 1120 (8th Cir. 2009) (“In reexamining the search incident to arrest exception to the warrant requirement, *Gant* left [the holding in *Long*] untouched.” (citing *Arizona v. Gant*, 556 U.S. ---, 129 S. Ct. 1710, 1721 (2009))).

In considering the reasonableness of an officer’s suspicion, “we must determine whether the facts *collectively* provide a basis for reasonable suspicion, rather than determine whether each fact separately establishes such a basis.” *United States v. Stachowiak*, 521 F.3d 852, 856 (8th Cir. 2008); *see also United States v. Arvizu*, 534 U.S. 266, 274 (2002). To be reasonable, suspicion must be based on “specific and articulable facts” that are “taken together

with rational inferences from those facts”—that is, something more than an “inchoate and unparticularized suspicion or ‘hunch.’” *Terry*, 392 U.S. at 21, 29; *see also Long*, 463 U.S. at 1049. “The behavior on which reasonable suspicion is grounded . . . need not establish that the suspect is probably guilty of a crime or eliminate innocent interpretations of the circumstances.” *Carpenter*, 462 F.3d at 986. Thus, factors that individually may be consistent with innocent behavior, when taken together, can give rise to reasonable suspicion, even though some persons exhibiting those factors will be innocent. *Id.*; *see also Arvizu*, 534 U.S. at 277. “This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” *Arvizu*, 534 U.S. at 273 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). And, in this Circuit, the critical inquiry is not whether the searching officer actually feared danger, but whether “a hypothetical officer in the same circumstances could reasonably believe the suspect is dangerous.” *United States v. Rowland*, 341 F.3d 774, 783 (8th Cir. 2003).

In this case, the Court concluded that at the time they commenced the protective search the deputies reasonably could suspect that Stewart was engaged in criminal activity and that he was armed and presently dangerous. The deputies were aware that Stewart had a prior felony conviction and some sort of history involving drugs and violent behavior. *See United States v. Winters*, 491 F.3d 918, 922 (8th Cir. 2007) (considering the totality of circumstances, including officer’s knowledge that the suspect was a prior drug offender, in assessing reasonableness of officer’s suspicion). The encounter occurred late at night in a

neighborhood where, according to Deputy Stehlik, suspects had parked their vehicles after previous robberies at the nearby Kwik Shop. Indeed, Stewart had just departed the Kwik Shop parking lot, a location that had suffered “a rash of robberies” and was “a hot spot for a lot of criminal activity.” See *United States v. Bailey*, 417 F.3d 873, 877 (8th Cir. 2005) (“The encounter occurred in [a] neighborhood marked by frequent crimes involving firearms. This was a relevant fact to consider, especially in light of the attempted armed carjacking at an adjacent gas station a few days before.”); *United States v. Abokhai*, 829 F.2d 666, 670 (8th Cir. 1987) (holding that officer’s suspicion of two individuals leaving gas station was reasonably “heightened” due to armed robbery at a nearby gas station several days earlier). Moreover, Stewart’s explanation of his presence at the store was not in harmony with Deputy Woodward’s observations. Whereas Stewart stated that he had visited the Kwik Shop to help a friend who was having trouble with her car, Deputy Woodward did not observe Stewart exit his SUV or make contact with anyone. While the district court minimized the significance of these facts—stressing that Deputy Woodward briefly suspended his surveillance of the store—they “may be considered . . . in the totality of circumstances” and lend some support to the conclusion that the deputies’ suspicion was objectively reasonable. *Carpenter*, 462 F.3d at 987; see also *United States v. Roggeman*, 279 F.3d 573, 579 (8th Cir. 2002).

Also, Stewart's use of the terms "boyfriend" and "husband" is also a discrepancy that may heighten a reasonable officer's suspicion. As well as the actions by Stewart in reaching for his identification and in motioning towards the center console and underneath the seat several times can heighten a reasonable officer's suspicion.

See *Stachowiak*, 521 F. 3d at 854 (holding that driver's act of reaching under seat of car as though "he were either concealing or retrieving something" contributed to reasonableness of officer's suspicion.) The fact that Stewart accompanied Deputy Stehlik to one of the police cruisers while Deputy Woodward conducted the protective search of his vehicle does not alter this result. “[W]here an officer has temporarily removed a suspect from his vehicle, but is not planning to arrest him[,] the officer is permitted to conduct a limited protective search of the vehicle before releasing a suspect to ensure he will not be able to gain immediate control of a weapon.” *Stachowiak*, 521 F.3d at 855.

The Eighth Circuit Court of Appeals held that in view of the totality of the circumstances, the moment the deputies initiated the Fourth Amendment encounter an officer reasonably could suspect that Stewart was presently engaged in criminal activity and that he was armed and dangerous.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on February 1, 2011. The case citation is *United States v. Stewart*, 10-1030 (8<sup>th</sup> Cir. Feb. 1, 2011).

Brooke Lockhart  
Deputy City Attorney



**Sergeant Ed Motsinger  
Receives 2011 City Attorney  
Justice Award**

At the Springdale Police Department awards ceremony, Sergeant Ed Motsinger of the

Criminal Investigation Division of the Springdale Police Department received the 2011 City Attorney Justice Award.



Sgt. Ed Motsinger is a 14 year veteran of the Springdale Police Department and is currently assigned to the Criminal Investigation Division. As an investigator, Sgt. Motsinger has been responsible for the investigation of many cases that have led to successful prosecution. Whether he is investigating a murder case or a city ordinance violation, Sgt. Motsinger always does an outstanding job in having everything in his investigation complete when it is turned over to the prosecutor's office. Justice is much easier achieved for all parties involved when a criminal case is investigated thoroughly and because he epitomizes this principle, Sgt. Motsinger is the recipient of the 2011 City Attorney Justice Award.

Past award winners of the City Attorney Justice Award are:

- 2010 – Corporal Brian Bersi
- 2009 – Detective Michael Hendrix
- 2009 – Detective Robert Hendrix
- 2008 – Sergeant Billy Turnbough
- 2007 – Sergeant Lee Andreadis

Also, congratulations to all of the award winners listed below:

Communications Officer Life Saving Award – Cecil Clifton

Life Saving Award – Dustin Treat

Meritorious Service Award – Morris Irvin and Lester Coger

Washington County Prosecutor's Office Award – Michael Hendrix

Medal of Valor/Life Saving Award – Eric Gregory

Life Saving – Eric Gregory, Overton Hesler and Morris Irvin

Field Training Officer Excellence Award – Eric Evans

Supervisor Excellence Award (Laney Morriss Award) – Derek Hudson

Dispatcher of the Year (James H. Melekian Award) – Teresa Hudson

Civilian Employee of the Year (Helen Bowman Award) – Michelle Reader

Officer of the Year (Craig Chastain Award) – Gene Johnson

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Springdale Passes New Noise Ordinance

On April 26, 2011, Springdale passed Ordinance No. 4496, which was an amendment to the City's noise ordinance. For the officers receiving a hard copy of C.A.L.L., I have attached a copy of the new

noise ordinance. If you should have any questions, or any problems arise, please let me know.

Jeff Harper
City Attorney



Happy 4th of July



C.A.L.L. is a publication of the
City Attorney's Office
201 Spring Street
Springdale, AR 72764
479-750-8173

1 State of Arkansas
2 88th General Assembly
3 Regular Session, 2011
4

As Engrossed: S2/24/11 H3/9/11

A Bill

SENATE BILL 423

5 By: Senators P. Malone, Irvin, G. Baker, Burnett, L. Chesterfield, Crumbly, Fletcher, S. Flowers,
6 Holland, G. Jeffress, J. Jeffress, J. Key, M. Lamoureux, Laverty, Rapert, J. Taylor, R. Thompson,
7 Whitaker

8 By: Representatives Vines, *D. Altes, Branscum, Cheatham, Eubanks, Ingram, Jean, Lindsey, J. Roebuck,*
9 *G. Smith, Steel, Stewart, Westerman, B. Wilkins, Williams*

For An Act To Be Entitled

10
11 AN ACT REGARDING SUBSTANCES IN SCHEDULE I AND
12 SCHEDULE VI; TO DECLARE AN EMERGENCY; AND FOR OTHER
13 PURPOSES.
14

Subtitle

15
16
17 REGARDING SUBSTANCES IN SCHEDULE I AND
18 SCHEDULE VI AND TO DECLARE AN EMERGENCY.
19
20
21

22 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
23

24 SECTION 1. Arkansas Code Title 5, Chapter 64, Subchapter 2 is amended
25 to add a new section to read as follows:

26 5-64-204. Substances in Schedule I.

27 (a) In addition to any substance placed in Schedule I by the Director
28 of the Department of Health under § 5-64-203, any material, compound,
29 mixture, or preparation, whether produced directly or indirectly from a
30 substance of vegetable origin or independently by means of chemical synthesis
31 or by a combination of extraction and chemical synthesis, that contains any
32 quantity of the following substances, or that contains any of the following
33 substances' analogs, salts, isomers, and salts of isomers when the existence
34 of the analogs, salts, isomers, and salts of isomers is possible within the
35 specific chemical designation, with the following chemical structure is
36 included in Schedule I:



1 (1) 4-Methylmethcathinone (Mephedrone);
 2 (2) Methylenedioxypropylone (MDPV);
 3 (3) 3,4-Methylenedioxy-N-methylcathinone (Methylone);
 4 (4) 4-Methoxymethcathinone;
 5 (5) 3-Fluoromethcathinone;
 6 (6) 4-Fluoromethcathinone; or
 7 (7) A compound, unless listed in another schedule or a legend
 8 drug, that is structurally derived from 2-Amino-1-phenyl-1-propanone by
 9 modification or by substitution:

10 (A) In the phenyl ring to any extent with alkyl, alkoxy,
 11 alkylenedioxy, haloalkyl or halide substituents, whether or not further
 12 substituted in the phenyl ring by one (1) or more other univalent
 13 substituents;

14 (B) At the 3-position with an alkyl substituent; or

15 (C) At the nitrogen atom with alkyl or dialkyl groups, or
 16 by inclusion of the nitrogen atom in a cyclic structure.

17 (b) The Director of the Department of Health shall not delete a
 18 controlled substance listed in this section from Schedule I.

19
 20 SECTION 2. Arkansas Code § 5-64-215 is amended to read as follows:

21 5-64-215. Substances in Schedule VI.

22 (a) ~~Any~~ In addition to any substance placed in Schedule VI by the
 23 Director of the Department of Health under § 5-64-214, any material,
 24 compound, mixture, or preparation, whether produced directly or indirectly
 25 from a substance of vegetable origin, or independently by means of chemical
 26 synthesis, or by a combination of extraction and chemical synthesis, that
 27 contains any quantity of the following substances, or that contains any of
 28 their salts, isomers, and salts of isomers when the existence of the salts,
 29 isomers, and salts of isomers is possible within the specific chemical
 30 designation, ~~are~~ is included in Schedule VI:

31 (1) Marijuana;

32 (2) Tetrahydrocannabinols; ~~and~~

33 (3) A synthetic equivalent of ~~the substance;~~

34 (A) contained The substance contained in the Cannabis
 35 plant; or

36 (B) The substance contained in the resinous extractives of

1 the genus Cannabis; ~~;~~ ~~or~~

2 (4) A substance with the chemical structure of:

3 (A) 5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-
4 hydroxycyclohexyl]-phenol or otherwise known by CP-47,497;

5 (B) 5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-
6 phenol or otherwise known by either cannabicyclohexanol or CP-47,497 C8
7 homologue;

8 (C) 1-Butyl-3-(1-naphthoyl)indole or otherwise known by
9 JWH-073;

10 (D) 1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole or
11 otherwise known by JWH-200;

12 (E) 1-Pentyl-3-(1-naphthoyl)indole or otherwise known by
13 JWH-018 and AM678;

14 (F) (4-methoxy-1-naphthalenyl)(1-pentyl-1H-indol-3-yl)-
15 methanone or otherwise known by JWH-081; or

16 (G) 1-(1-pentyl-1H-indol-3-yl)-2-(2-methoxyphenyl)-
17 ethanone or otherwise known by JWH-250;

18 (5) Salvia divinorum or Salvinorin A, which includes all parts
19 of the plant presently classified botanically as Salvia divinorum, whether
20 growing or not, the seeds of the plant, any extract from any part of the
21 plant, and every compound, manufacture, derivative, mixture, or preparation
22 of the plant, its seeds, or its extracts, including salts, isomers, and salts
23 of isomers when the existence of the salts, isomers, and salts of isomers is
24 possible within the specific chemical designation; or

25 (6) a synthetic substance, derivative, or its isomers with:

26 (A) ~~similar~~ Similar chemical structure to any substance
27 described in subdivisions (a)(1)-(4) of this section; ~~and~~ or

28 (B) ~~pharmacological~~ Similar pharmacological activity to
29 any substance described in subdivisions (a)(1)-(4) of this section such as
30 the following:

31 (A)(i) [] 1 cis or trans tetrahydrocannabinol, and
32 its optical isomers;

33 (B)(ii) [] 6 cis or trans tetrahydrocannabinol, and
34 its optical isomers; and

35 (C)(iii) [] 3.4 cis or trans tetrahydrocannabinol,
36 and its optical isomers.

1 (b) However, the Director of the Department of Health shall not delete
2 a controlled substance listed in this section from Schedule VI.

3
4 SECTION 3. EMERGENCY CLAUSE. It is found and determined by the
5 General Assembly of the State of Arkansas that new substances that need
6 immediate scheduling are becoming more prevalent; and that this act is
7 immediately necessary because these new substances pose a risk to the public.
8 Therefore, an emergency is declared to exist and this act being immediately
9 necessary for the preservation of the public peace, health, and safety shall
10 become effective on:

11 (1) The date of its approval by the Governor;

12 (2) If the bill is neither approved nor vetoed by the Governor,
13 the expiration of the period of time during which the Governor may veto the
14 bill; or

15 (3) If the bill is vetoed by the Governor and the veto is
16 overridden, the date the last house overrides the veto.

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18 */s/P. Malone*

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21 **APPROVED: 03/28/2011**
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ORDINANCE NO. 4496

**AN ORDINANCE AMENDING THE NOISE ORDINANCE
OF THE CITY OF SPRINGDALE, ARKANSAS.**

WHEREAS, the City Council for the City of Springdale, Arkansas finds that excessive levels of sound are detrimental to the public health, welfare, safety, and quality of life of the residents and visitors to the City of Springdale, Arkansas;

WHEREAS, the City Council declares it to be necessary to provide for the greater and more effective regulation of excessive sounds by amending the current noise ordinance of the City of Springdale, Arkansas;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL FOR THE CITY OF SPRINDGALE, ARKANSAS, that the Noise Ordinance of the City of Springdale, Arkansas is amended as follows:

Section 1. Sections 42-51 through 42-54 of the Noise Ordinance of the City of Springdale, Arkansas, are deleted in their entirety

Section 2. The following sections (Sec. 42-51 through 42-54) are hereby adopted by the City Council for the City of Springdale, Arkansas as follows:

Sec. 42-51. Definitions. The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

Ambient Sound Level. The total sound pressure in the area of interest including the source of interest.

A-weighting. The electronic filtering in sound level meters that model human frequency sensitivity.

dBA. The A-weighted unit of sound pressure level

Decibel (dB). The unit for measurement for sound pressure level at a specified location.

Emergency. Any occurrence or set of circumstances involving actual or imminent physical trauma or property damage which demands immediate action.

Emergency Work. Any work performed for the purpose of preventing or alleviating the physical trauma or property damage threatened or caused by an emergency.

Noise Disturbance.

1. The creating of any unreasonably loud and disturbing sound of such character, intensity, or duration as to be detrimental to the life or health of an individual, or which annoys or disturbs a reasonable person of normal sensitivities.
2. Owning, keeping, possessing, or harboring any animal or animals that continuously, repeatedly, or persistently, without provocation by the complainant, creates a sound which unreasonably disturbs or interferes with the peace, comfort or repose of persons of ordinary sensibilities.

Sound. A temporal and spatial oscillation in pressure, or other physical quantity in a medium with internal forces that causes compression and rarefaction of that medium, and which propagates at finite speed to distant points.

Sound Amplification Device. Radio, radio receiving set, television, stereo, tape player, cassette player, compact disc player, "boom box," loud speaker, musical instrument, sound amplifier or other devices which produces, reproduces, or amplifies sound.

Sound Level. The weighted sound pressure level obtained by the use of a sound level meter and frequency weighting network, such as (a), (b), or (c) as specified in the American National Standards Institute's specification for sound level meters. If the frequency weighting employed is noted indicated, the A-weighting shall apply.

Sound Level Meter. An instrument which includes a microphone, amplifier, RMS detector, integrator or time averager, or output meter, and weighting network used to measure sound pressure levels.

Sound Pressure Level. 20 multiplied by the logarithm, to the base of 10, of the measured sound pressure divided by the sound pressure associated with the threshold of human hearing, in units of decibels.

Sec. 42-52. Unreasonable or excessive noise prohibited.

Notwithstanding any other provisions of this chapter, and in addition thereto, it shall be unlawful for any person to make, or continue to cause or permit to be made or continued, any noise disturbance.

Sec. 42-53. Measurements.

Sound level measurements shall be made with a sound level meter type-2 or better using the A-weighted scale in conformance with the standards promulgated by the American National Standards Institute.

Sec. 42-54. Limitations by land use category.

1. No person shall operate or cause to be operated, or permit, contract or allow to be operated on premises on public or private property any identifiable source of sound in such a manner as to create a sound level within the use districts in Table 1 below which exceeds the maximum noise levels as set forth in Table 1, which shall be measured for violations at the property line from which the sound is emanating, as well as at the property line of the receiving property. When a sound source can be identified and measured in more than one use district, the sound level limits of the most restrictive use district shall apply at that district boundary. All complaints will be measured with sound level measuring equipment by the responding officer to a complaint.

TABLE 1

Use Districts	Time	Maximum Noise Levels
All residential zones	7:00 a.m. to 11:00 p.m.	65 dB(A)
All residential zones	11:00 p.m. to 7:00 a.m.	60 dB(A)
All commercial zones	7:00 a.m. to 11:00 p.m.	75 dB(A)
All commercial zones	11:00 p.m. to 7:00 a.m.	70 dB(A)
All industrial zones	7:00 a.m. to 11:00 p.m.	85 dB(A)
All industrial zones	11:00 p.m. to 7:00 a.m.	80 dB(A)

2. Construction sites will be considered as an industrial zone for purposes of this ordinance.
3. Nightclubs and restaurants will be considered as commercial zoning for purposes of this ordinance.
4. If the Chief Building Inspector shall determine that the public health and safety necessitates the issuance of an emergency permit allowing the erection, demolition, alteration, or repair of any building or the excavation of any building when such work might exceed sound levels found in Table 1, an emergency permit shall be issued. Such emergency permit shall not exceed 14 days' duration.

Sec. 42-55. Sounds from vehicles.

1. It is unlawful to operate any sound amplification device from within a vehicle so that the sound is plainly audible at a distance of 30 feet or more from the vehicle, whether in a street, a highway, an alley, parking lot or

driveway, whether public or private property, and such is declared to be a noise disturbance in violation of this chapter.

2. A compression release engine brake, or other hydraulically operated device that converts a power producing diesel or gas engine into a power absorbing retarding mechanism with a correspondingly increased amount of noise emission shall not be engaged or used within the city limits of Springdale, except in the case of failure of the service brake system, adverse weather conditions, or other emergency necessitating the compression release engine brake's use.

Sec. 42-56. Penalties.

Any person convicted of violating the provisions of this chapter shall be fined as follows:

1. For the first offense, the person shall be fined not less than \$150.00 or more than \$250.00.
2. For the second offense, the person shall be fined not less than \$500.00 or more than \$1,000.00.
3. For the third offense, the person shall be fined not less than \$2,000.00.

Sec. 42-57. Exceptions to chapter.

The following are exceptions to this chapter and such sounds do not constitute a noise disturbance:

1. Cries for emergency assistance and warning calls;
2. Emergency response vehicles;
3. Events sponsored by the Rodeo of the Ozarks held at Parsons Stadium.
4. Rodeo of the Ozarks parade;
5. Activities conducted on or in municipal facilities which are approved, sponsored or sanctioned by the city, but this does not apply to lessees at Shiloh Square who use an amplification sound device;
6. Activities conducted on or in school facilities which are approved, sponsored or sanctioned by the school;
7. Fire alarms and burglar alarms;
8. Religious worship activities conducted in a permanent structure in a P-1 zone;

9. Fireworks displays authorized by the city.

PASSED AND APPROVED this 26th day of April, 2011.

/s/ Doug Sprouse
Doug Sprouse, Mayor

ATTEST:

/s/ Denise Pearce
Denise Pearce, City Clerk

APPROVED AT TO FORM:

/s/ Jeff C. Harper
Jeff C. Harper, City Attorney