

Eighth Circuit Affirms Conviction in Drug Case Involving Little Rock Police Department.

Facts Taken From Opinion: Law enforcement's initial interest in Kenneth Nolen (appellant) was prompted by a call to the Akron, Ohio Police Department on January 31, 2006 by an individual named Carita Hale. To this end, Angela Lewis, a detective in the Akron, Ohio Police Department, testified that she "received a phone call ... from a female stating that she was Carita Hale" and that Hale disclosed "very specific information on drug-related crimes starting in Arkansas and coming back to Akron...." A subsequent memorandum authored by Detective Lewis summarized the information that Hale provided.

According to this memorandum, Hale alleged that Conici Clark would be flying from Cleveland, Ohio to Little Rock, Arkansas on January 31, 2006. Upon her arrival in Little Rock, Clark would be picked up in a red Ford Explorer by two males known only as "Calvin" (later identified as Calvin Blair) and "Kitney" (later identified as Nolen). Thereafter, Clark, with Blair and Nolen as her passengers, was to drive the Explorer back to Ohio. The Explorer would allegedly contain 10 kilos of cocaine, 3 bundles of ecstasy, and 20 pounds of marijuana. According to Hale, in exchange for driving the vehicle back to Ohio, Clark was to receive one pound of marijuana.

Because Hale had not previously served as an informant, Lewis took steps to confirm Hale's identity. In this regard, Lewis used Hale's "jail file" to confirm that the social security number provided by Hale in fact matched Hale's actual social security number. Additionally, Lewis questioned

Hale ostensibly using the information in Hale's "jail file" "[t]o make sure that she was who she said she was...." Satisfied that Hale "was who she said she was," Lewis began to corroborate the information that Hale provided.

First, Lewis, along with other officers, went to the Akron Greyhound bus station and confirmed Hale's assertion that at 3:25 p.m., Clark would be taking a bus from Akron to Cleveland. Subsequently, officers also confirmed Hale's claim that Clark would take a flight departing from Cleveland at 5:35 p.m., which after a layover, would arrive in Little Rock at 10:00 p.m. Because the information provided by Hale had so far proven accurate, Lewis's supervisor, Mike Caprez, relayed Hale's tips to Roger Case, a task force officer with the Little Rock district office of the Drug Enforcement Administration (DEA). Case took over the investigation from there.

Impressed with the specificity of the information relayed by Caprez, Case concocted an "operations plan," under which Clark would be placed under surveillance upon her arrival at the Little Rock airport. On account of this surveillance, officers observed that when Clark departed the airport, "she ... entered a vehicle almost exactly matching the description" of the vehicle that, according to Hale, "was supposed be picking her up." Thereafter, officers observed the vehicle, a red Ford Expedition (as opposed to an Explorer), travel in an erratic fashion, during which time it went at an extremely high rate of speed, made a number of circles around a residential block, stopped unexpectedly in odd places, and drove down a dead-end alley. After taking this roundabout route, the vehicle eventually arrived at the StudioPlus Hotel, where officers continued their surveillance.

While keeping watch at the hotel, officers observed the vehicle leave a number of times during the evening. Although officers attempted to watch the vehicle on these occasions, it continued to be driven in an erratic fashion, which made surveillance difficult. Finally, "early in the morning hours," officers observed three individuals enter the vehicle – eventually identified as Clark, Blair, and Nolen – and depart from the hotel. After officers observed the vehicle travel for a long enough distance to satisfy themselves that it was on its way to Ohio, Officer Case requested that a member of the Arkansas State Police pull the vehicle over.

Trooper Trenton Behnke stopped the vehicle at 4:15 a.m. According to Behnke, he stopped the vehicle after following it for about a mile as it was going 90 miles per hour in a 65 miles per hour zone. Upon approaching the vehicle, Behnke learned that the vehicle's driver was Nolen and requested "his driver's license, registration, and insurance." Thereafter, the stop was taken over by the DEA and the Little Rock Police Department's narcotics division, which searched the vehicle.

Among the officers who assisted in the vehicle's search was Chris Littleton. According to Littleton, he searched underneath a "bench seat" where "he found a white pillowcase that contained an off-white, rock-like substance and also green vegetable matter." The "off-white, rock-like substance" was later identified to be 278.0 grams of crack cocaine, while the "green vegetable matter" was later identified to be 125.4 grams of marijuana. Both Officers Case and Littleton testified that based on their experiences, each of these amounts exceeded what would normally be associated with personal use, and was instead consistent with distribution. Thereafter, each of the vehicle's three

occupants – Clark, Nolen, and Blair – were taken into police custody and indicted on three counts: (I) conspiracy to possess crack cocaine and marijuana with the intent to distribute, (II) possession of crack cocaine with the intent to distribute, and (III) possession of marijuana with the intent to distribute.

Shortly after his arrest, Blair signed a statement that asserted the crack cocaine and marijuana found in the vehicle were his alone, and that he had placed the drugs in the vehicle without any assistance from Clark or Nolen. Blair later recanted this statement, however, and reached a plea agreement with the government. Pursuant to this agreement, Blair testified on the government's behalf at Clark and Nolen's trial. According to Blair's trial testimony, Nolen and Clark were with him when he purchased the drugs and were responsible for placing the drugs in the vehicle. Blair asserted that "most of" the marijuana was for Clark. As for the crack cocaine, however, Blair somewhat ambiguously testified that although it was for him alone, he was going to sell it with Nolen's help, from which Nolen would profit.

Hale also testified on the government's behalf. According to Hale, the plan to acquire the drugs was initially hatched by Blair and Nolen, who eventually convinced Clark to be a part of the crime. For her part, Clark was to be the driver, because neither Blair nor Nolen had a driver's license. Hale also testified that "marijuana was the main drug that [she] heard discussed" in relation to the trio's plans. She was not sure, however, about the plan as it related to crack cocaine. Nor was Hale sure about the quantities of drugs that were being sought, only that "it was a large amount."

Clark took the stand in her own defense. According to Clark, she knew nothing about the drugs, and only went to Little Rock after the individual who was to drive Blair and Nolen back to Ohio decided to stay in Little Rock. Clark nevertheless recounted that while she was at the hotel with Nolen and Blair, she heard discussions concerning marijuana and surmised that the drug was in the hotel room, although she did not observe what quantity was possessed. According to Clark, she never observed any crack cocaine.

Following the close of testimony, Nolen moved for a judgment of acquittal; this motion was denied. Thereafter, the case went to the jury, which found Nolen guilty of each of the charges against him. Clark, meanwhile, was found guilty in relation to the marijuana charges, but not guilty in relation to the crack cocaine charges. Nolen then appealed his case to the Eighth U.S. Circuit Court of Appeals.

On appeal, Nolen raised two central arguments: (1) the district court erred in denying his motion to suppress, and (2) the jury's verdict was not supported by sufficient evidence, and therefore the district court erred in denying his motion for acquittal.

Decision by Eighth Circuit:

Issue 1 – Motion to Suppress: On the issue of the motion to suppress, the Court on appeal noted that "the warrantless search of a vehicle is constitutional pursuant to the 'automobile exception' ... if law enforcement ha[s] probable cause to believe the vehicle contain[s] contraband or other evidence of a crime before the search beg[ins]." *United States v. Wells*, 347 F.3d 280, 287 (8th Cir. 2003). "Probable cause exists when, given the totality of the

circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place." *United States v. Fladten*, 230 F.3d 1083, 1085 (8th Cir. 2000). The government argued that probable cause was established in large part based on the information provided by Hale.

The Eighth Circuit noted that in the Supreme Court case of *Illinois v. Gates*, 462 U.S. 213, 232 (1983), "[i]nformants' tips doubtless come in many shapes and sizes from many different types of persons" and "may vary greatly in their value and reliability." (Quotation omitted). As such, "[o]ne simple rule will not cover every situation." *Id.* (quotation omitted). Instead, when determining whether an informant's tip supports a finding of probable cause, the Supreme Court has directed courts to engage in "a totality-of-the-circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip...." *Id.* at 2324.

In undertaking this analysis, the Supreme Court has recognized a distinction between "a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated," *Florida v. J.L.*, 529 U.S. 266, 270 (2000), and an anonymous informant, who cannot so easily be held responsible. This distinction is important, because although a tip received from a known informant will more readily support a finding of probable cause, a tip received from an anonymous informant requires "[s]omething more," usually in terms of independent police corroboration, before probable cause may arise.

The Court also noted that in addition there is also a distinction between the two types of known informants: reliable informants and

unproven informants. Reliable informants are individuals who have "a track record of supplying reliable information" to law enforcement officers. *United States v. Williams*, 10 F.3d 590, 593 (8th Cir. 1993). Unproven informants are individuals without a track record of supplying information to law enforcement officers. "Though less reliable than informants with a proven record, unproven informants are more reliable than anonymous tipsters because the police can hold them responsible for false information." *United States v. Kent*, citation omitted.

The Eighth Circuit turned to this case and found that it is clear that Hale cannot be classified as a reliable informant. It is less clear, however, whether Hale should be classified as an unproven informant or anonymous informant. On the one hand, Hale identified herself to Detective Lewis, independently confirmed her social security number, and left Lewis convinced that she "was who she said she was." On the other hand, there is no indication in the record that Lewis ever had a face-to-face interaction with Hale during which time she could confirm Hale's identity. Accordingly, there remained at least a possibility that Hale was concealing her true identity. "On balance, however, we conclude that Hale should be regarded as an identified, but unproven informant. She identified herself by name, gave her social security number that matched her name, and apparently provided either additional information or spoke with a demeanor that enabled Detective Lewis, an experienced officer, to conclude that she "was who she said she was." Thus, her statement is entitled to some credibility based on the fact that she could be held accountable if she made a false statement to a police officer. Accordingly, the further corroboration needed to elevate her accusations to probable cause is lessened.

In this case, Hale provided a variety of specific, detailed information that was independently corroborated by officers and proved to be accurate. This information included an accurate description of Clark's travel plans from Akron to Little Rock – right down to the precise bus and flight that Clark would use in her travels, a reasonably accurate description of the type of vehicle that would pick-up Clark at the airport, and an accurate description of the brief stay the group would have in Little Rock. The Court held that this information, as corroborated, is sufficient to establish probable cause under the circumstances presented in this case. Hale's information "contained a range of details relating not just to easily obtained fact and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." *Gates*, 462 U.S. at 245.

The Court held that furthermore, in addition to Hale's tips, officers also independently observed suspicious conduct once Clark reached Little Rock. These observations included Nolen's erratic driving after picking-up Clark from the airport, as well as the trio's quick departure from Little Rock in the early morning hours, less than six hours after Clark's arrival. When these observations are coupled with the information provided by Hale, it is clear that "given the totality of the circumstances, a reasonable person could believe there [was] a fair probability that contraband or evidence of a crime would be found in a particular place." *Fladten*, 230 F.3d at 1085. Accordingly, the Court concluded that the officers had probable cause to search the vehicle, and that therefore the district court did not err in denying Nolen's motion to suppress.

Issue 2 – Judgment of Acquittal: Nolen argued that there was insufficient evidence

to support the jury's verdict and that the district court therefore erred in denying his motion for judgment of acquittal. In making this argument, Nolen asserted that the government failed to produce sufficient evidence with respect to the marijuana charges, and that the jury made internally inconsistent findings with respect to the crack cocaine charges faced by both Nolen and Clark. On this issue, the Eighth Circuit Court disagreed.

Having addressed these two issues, and for the reasons set out in the opinion, the judgment of the district court was affirmed. Therefore, Nolen's conviction on the charges was affirmed.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on August 4, 2008. The case cite is *U.S. v. Nolen*, 07-3887 (8th Cir. 8-4-2008).

Jeff Harper
City Attorney



Arkansas Court of Appeals Upholds DWI Conviction; Breathalyzer Performed Within Two Hours Sufficient to Establish BAC at the Time of Offense

The Arkansas Court of Appeals upheld a Driving While Intoxicated conviction against George Hayden who argued that his alcohol level was rising at the time of the offense and peaked at the time the breath test was performed.

The following testimony was elicited at trial.

On May 10, 2006, Arkansas State Trooper Clayton Moss observed a George Hayden cross the center line twice at around 1:00 a.m. in Drew County. Trooper Moss pulled Hayden over and observed that Hayden smelled of intoxicants and had red, watery eyes. Hayden admitted to drinking five or six beers that night stating his last sip was twenty minutes before being pulled over. Hayden also admitted he had a prescription for hydrocodone, and last took a hydrocodone at 11:00 p.m.

Trooper Moss gave Hayden a portable breath test and then performed a horizontal-gaze-nystagmus test, where Hayden exhibited lack of smooth pursuit in both eyes and a distinct nystagmus at maximum deviation in both eyes. Trooper Moss then gave Hayden a second portable breath test and placed him under arrest for driving while intoxicated. Hayden was transported to the station and was given one breath test with no result, then two more breath tests. The first breath test result at 2:01 a.m. was .099 and the second breath test at 2:13 a.m. was .096. Hayden was found guilty of Driving While Intoxicated and ordered to pay a fine, court costs, and attend alcohol classes.

On appeal Hayden argued that the evidence was insufficient at trial for a conviction of driving while intoxicated because it is not known what Hayden's blood-alcohol concentration was at the time of the offense. Hayden argued that the State's case rested on the Trooper's probable-cause determination and the blood-alcohol tests given at 2:01 a.m. and 2:13 a.m. Hayden claimed that means that his alcohol level had peaked from a lower concentration an hour before the test was taken and any conclusion that his alcohol level was .08 or above at the

time or offense would depend on suspicion or conjuncture.

In upholding Hayden's conviction, the Court referred to Arkansas Code Annotated 5-65-206 which states as follows:

5-65-206 Evidence in prosecution.

(a) In any criminal prosecution of a person charged with the offense of driving while intoxicated, the amount of alcohol in the defendant's breath or blood at the time or within four (4) hours of the alleged offense, as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance gives rise to the following:

(1) If there was at that time an alcohol concentration of four-hundredths (0.04) or less in the defendant's blood, urine, breath, or other bodily substance, it is presumed that the defendant was not under the influence of intoxicating liquor; and

(2) If there was at the time an alcohol concentration in excess of four-hundredths (0.04) but less than eight-hundredths (0.08) by weight of alcohol in the defendant's blood, urine, breath, or other bodily substance, this fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

The Court held that "under Ark. Code Ann. § 5-65-206(a)(1), the breathalyzer test done well within two hours of the alleged offense is sufficient to establish appellant's alcohol

concentration in his breath at the time of the offense." The Court then went on to hold that the breathalyzer test was only one factor that the trial court considered. Hayden also did not pass the field-sobriety tests, admitted to taking hydrocodone, and drinking within twenty minutes of the stop. Hayden smelled of alcohol and crossed the center line twice.

Case: This case was decided by the Arkansas Court of Appeals on June 25, 2008. The case cite is *Hayden v. State*, CACR 07-1351 (Ark. App. 6-25-2008).

Amber Roe
Deputy City Attorney



Eighth Circuit Upholds Public Safety Exception to *Miranda*

Facts taken from opinion: On December 1, 2006, two National Park Service Rangers [Rangers] patrolling the Buffalo National River observed a pickup parked at the trail head. The Rangers noticed that the license plate had been expired for more than a year. They then saw Richard Eugene Everman, Jr. [Everman] walking toward them from the trail. Everman explained that he had recently purchased the truck and had not yet renewed the license. At that time, a second man approached from the trail. The Rangers requested identification from both men and learned that both men had criminal records and Everman had an outstanding warrant from Georgia for a probation violation and failure to pay restitution. Upon learning this, the Rangers asked the second man to stand apart from Everman. One Ranger placed Everman, who was within touching distance of the pickup, in handcuffs and began searching him. The other Ranger asked Everman if he had any weapons. Everman

replied he had a pistol in the backpack in the pickup's cab. The Ranger asked for and received Everman's permission to retrieve the pistol and found the gun where Everman said it would be. The Rangers did not give Everman his Miranda warnings until after these events occurred. Everman and his companion remained cooperative throughout this episode.

Everman, although he pleaded guilty to being a felon in possession of a firearm, reserved the right to appeal the denial of his motion to suppress his statement and the firearm on the ground that they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Decision by Eighth Circuit Court: Under the public safety exception to *Miranda*, a suspect's answer may be admitted into evidence if it was obtained in response to a question asked in furtherance of public safety and not designed solely to solicit testimonial evidence, even if *Miranda* warnings had not yet been given. *New York v. Quarles*, 467 U.S. 649, 655 (1984). The standard to be used is whether the "police officers ask questions reasonably prompted by a concern for public safety." *United States v. Liddell*, 517 F. 3d 1007, 1009 (8th Cir. 2008). The public to be protected can include police officers. *Quarles*, 467 U.S. at 658.

In the *Liddell* case, the defendant had been pulled over for a minor traffic violation and a check on his driver's license revealed that he was not permitted to drive in that state. He was handcuffed, searched, and placed in the patrol vehicle while the officers searched the vehicle and found an unloaded pistol. The officers asked him if there was anything else in the car that they needed to know about that could hurt them and Liddell responded, in part, that he knew the gun was

in the car. *Id.* In holding the statement was admissible under the public safety exception, the court stated:

Our prior cases recognized that the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search.

In evaluating Everman's argument, the Court determined that the facts fell within the prior case holdings. The Rangers were in a remote area with two known criminals. That Everman and his associate were cooperative is irrelevant, for arresting officers are not required to assume that their encounter with suspects will remain peaceful.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on June 11, 2008, and was an appeal from the United States District Court for the Western District of Arkansas. The case cite is *U.S. v. Everman*, 07-2632 (8th Cir. 6-11-2008).

Brooke Lockhart
Deputy City Attorney



Review of Consent to Search Vehicle; *U.S. v. Misael Benitez*

On April 11, 2006 St. Charles, Missouri police officer Grant Jansen was parked on

the shoulder of Interstate 70 and observed a Suburban towing a Mercury Cougar speeding. Officer Jansen pulled the vehicle over and approached the driver, Misael Benitez. Officer Jansen had no trouble understanding Benitez whose first language was Spanish, but Officer Jansen suspected criminal activity was afoot because Benitez couldn't provide details concerning who owned the Suburban and how and where he acquired the Cougar. Specifically Benitez told Officer Janzen that he had gone from Indianapolis, Indiana to Denver, Colorado to pick up the Cougar that he had gotten it for free but he didn't remember where in Denver or who had given him the car. Benitez then changed his story to state that his wife sent him to Colorado to pick up car and that he had also picked up new rims and tires in Denver but he couldn't remember the location he had gotten them from or the name of the person he had gotten them from. Officer Jansen inquired whether Benitez was carrying any illegal contraband. Benitez responded, "No, if you want to search, go ahead." Officer Jansen replied that he did want to search and advised him of the right to refuse consent. Benitez stated, "Go ahead. Tear it up." Officer Jansen then called for backup and six or seven officers ultimately arrived.

Officer Jansen retrieved his drug dog, who alerted to the Cougar's glove compartment but which contained nothing. At this point the vehicles had been by the side of the road for approximately thirty minutes so the officers decided to move the vehicles to which Benitez agreed. The vehicles were moved to the nearest exit approximately one-fourth mile away, and then later to a parking lot another one-fourth mile away. The search of the Suburban yielded five packages (5.4 kilograms) of crystal methamphetamine hidden between the grille

and the radiator. At this point an additional thirty to sixty minutes had passed.

At trial Benitez moved to suppress the methamphetamine arguing that the search was unduly prolonged and that his consent had not been knowingly and voluntarily given. The District Court denied the motion and Benitez was found guilty of possessing and conspiracy to possess with intent to distribute methamphetamine in violation of U.S.C. §841(a) and 846. Benitez was sentenced to 135 months and appealed the findings of the trial courts ruling on his motion to suppress and that his consent was knowingly and voluntarily given.

On appeal, the Eighth Circuit addressed both arguments. First the Court addressed the length of the stop and stated that "Benitez's consent was obtained relatively soon after the initial stop, validating the search that occurred after the vehicles had been moved to a less hazardous location." The Court then addressed the issue of Benitez's challenge to the finding that he had knowingly and voluntarily consented to the search of the vehicles. The Court stated that, "Benitez, who was of legal age, did not appear to be under the influence of alcohol or drugs at the time. He was not subjected to any threats or intimidation, no promises or misrepresentations were made to him, and his consent was obtained relatively soon after having been detained." The Court went on to state that the DEA agent who questioned Benitez testified that Benitez had no trouble understanding him when he spoke English and that Benitez's English was free-flowing. Therefore the Court held that Benitez's consent was knowingly and voluntarily given and the District Court's sentence was upheld.

Case: This case was decided by United States Court of Appeals for the Eighth

Circuit on July 15, 2008. The case cite is *U.S. v. Benitez*, 531 F.3d 711 (8th Cir. 2008).

Attorney note: Unlike knock-and-talk situations, Arkansas does not require that an officer notify the driver in consent to search cases of motor vehicles that they have the right to refuse. The Court will look to whether the consent to search was freely and voluntarily given and that there was no actual or implied duress or coercion. See Arkansas Rule of Criminal Procedure 11.1

Amber Roe
Deputy City Attorney



Eighth U.S. Circuit Court of Appeals Rules in Favor of the City of Mulberry, Arkansas in a Civil Rights Action

Facts Taken From Opinion: Thomas Matthew Rose was passing through Mulberry, Arkansas on Interstate Highway 40 on August 1, 2005. Mulberry police officer Robert Limbocker stopped him for driving 22 miles per hour over the speed limit. Rose denied Limbocker's request to search his vehicle. Two other officers arrived with a police dog, which did not alert on Rose's vehicle. Police dispatch notified Limbocker that there was an outstanding California warrant on Rose, though California apparently did not want him extradited. Limbocker arrested Rose for reckless driving and impounded his vehicle, whereupon the other officers departed. Limbocker then searched Rose's vehicle and found no contraband. Limbocker took Rose to the Van Buren, Arkansas jail, from which he was released on bond after having been in custody for approximately two and one-half

hours. The charges against Limbocker were subsequently dismissed.

Rose filed suit, and his claim was that because Limbocker was without jurisdiction to arrest him on Interstate 40, the stop and subsequent search violated the Fourth Amendment. At the time of Rose's arrest, Arkansas law provided that "[m]unicipal police are prohibited from patrolling limited access highways except as may be authorized by the director [of the Department of Arkansas State Police]." Ark. Code Ann. §12-8-106(h)(1)(2005). Mulberry had not received such permission (indeed, its request for such permission was specifically denied).

Rose sued the City of Mulberry, Arkansas under 42 U.S.C. §1983, 1988, for violating his Fourth Amendment right to be free from unreasonable searches and seizures. After getting an adverse jury verdict on his claim, Rose appealed to the Eighth U.S. Circuit Court of Appeals, arguing that the District Court erred in several of its rulings.

Decision by Eighth U.S. Circuit Court of Appeals: The Eighth Circuit noted that Limbocker had probable cause to detain and arrest Rose because he witnessed Rose commit a traffic violation. *See Atwater v. City of Lago Vista*, 532 U.S. 318 354 (2001); *Whren v. United States*, 517 U.S. 806, 819 (1996), *Sherbrooke v. City of Pelican Rapids*, 513 F.3d 809, 813 (8th Cir. 2008). Thus, the determinative issue is whether an arrest by a city police officer outside of his jurisdiction but made with probable cause violates the Fourth Amendment as a matter of law.

The Court further noted that their cases on this issue have been mixed. However, the United States Supreme Court recently held that a police officer who makes an arrest that

is based on probable cause, but who is prohibited by State law from doing so, does not violate the Fourth Amendment. *Virginia v. Moore*, 128 S.Ct. 1598, 1607 (2008). In *Virginia v. Moore*, Moore was arrested for the misdemeanor driving with a suspended license despite the fact that in the circumstances of his case, Virginia law authorized on the issuance of a summons. The Court held that although a State may provide more protection from warrantless arrest than the federal constitution, that enhanced protection does not govern the scope of the protections afforded by the Fourth Amendment. (Also see the C.A.L.L. article on the *Moore* case in the July 1, 2008 edition.)

Based on the *Moore* decision, the Eighth Circuit ruled that Limbocker lacked the authority under Arkansas law to make traffic stops and arrests on the interstate. Nevertheless, because he had probable cause to arrest for the offense of reckless driving committed in his presence, no Fourth Amendment violation occurred, with the result that Rose's cause of action failed as a matter of law.

Because the holding of the Court on this issue rendered moot the other issues raised on appeal, the Eighth Circuit Court did not discuss them. Therefore, the judgment of the District Court for the Western District of Arkansas was affirmed.

Case: This case was decided by the Eighth U.S. Circuit Court of Appeals on July 9, 2008. The case cite is *Rose v. City of Mulberry*, 07-1645 (8th Cir. 7-9-2008).

Jeff Harper
City Attorney

Traffic Stop of Vehicle Was Constitutional, Eighth Circuit Holds

Facts taken from opinion: Brady Ray Long [Long] and Peggy Albers [Albers] were associates in selling methamphetamine. Long and Albers planned to make a sale to a reseller, Vickie Munroe [Munroe] on the night of October 27, 2004. Earlier that day, Long and Albers met at People Brokers, a business that Long co-owned, where they packaged their methamphetamine.

Lake Ozark police officer Dale Heiser [Heiser] was patrolling around People Brokers at midnight. Law enforcement believed this business was the site of methamphetamine sales. Heiser noticed a vehicle headed in the direction of People Brokers, so he pulled over and waited. About five minutes later, Heiser saw the same vehicle returning. Finding this to be suspicious activity in that area at that time of night, Heiser followed the vehicle. The vehicle, driven by Long, crossed the center yellow line and slowly veered back to the fog line. Long also turned on his left blinker at a point at which no exit existed and then turned the blinker off. Heiser pulled the vehicle over to check on the driver's sobriety.

Heiser asked Long if he had been drinking, took Long's license and insurance card, and asked Long to step out of the vehicle for sobriety tests, which Long completed successfully. Heiser noticed Long's hands were shaking and he was perspiring and he appeared noticeably more nervous than the normal person Heiser pulled over. Heiser asked Long for consent to search the vehicle. Long replied it wasn't his vehicle. Heiser explained that his control over the vehicle authorized him to consent to a



search and again asked for consent, which Long then granted. As part of his officer-safety pat-down procedure, Heiser asked whether Long had anything in his pockets. Long immediately stuck his hand in his pocket and as he withdrew his hand at Heiser's order to withdraw it, a small piece of paper fell to the ground. Having seen drugs stored in many types of items like paper, Heiser examined the piece of paper and found methamphetamine. Heiser arrested Long for methamphetamine possession. A search of the vehicle revealed a cooler containing fifteen bags of methamphetamine and several thousand dollars.

Long pleaded guilty to possession with intent to distribute methamphetamine and conspiracy to distribute methamphetamine and was sentenced to 246 months of imprisonment. Long appealed the district court's denial of his motion to suppress the evidence.

Decision by Eighth Circuit Court: Long argued the initial stop of the vehicle was illegal because Heiser lacked reasonable suspicion that Long was involved in any illegal activity. Reasonable suspicion requires more than a general hunch, but only that "police articulate some minimal, objective justification for an investigatory stop." *United States v. Fuse*, 391 F. 3d 924, 929 (8th Cir. 2004). The Court determined that due to Long's erratic driving, Heiser had reasonable suspicion that Long was an impaired driver. Further, the Court noted that the traffic violation that Heiser witnessed gave him probable cause to stop the vehicle. *United States v. Chatman*, 119 F. 3d 1335, 1339-40 (8th Cir. 1997). Crossing the yellow center line constitutes a

violation of Missouri law that allows an officer to stop the motorist to issue a citation.

Next, Long argued that even if the initial stop was valid, it was unconstitutionally extended because Heiser asked for consent to search the car after finding no evidence of intoxication or other impairment. Generally, a stop should last no longer than is necessary to confirm or dispel the officer's suspicions. *United States v. Jones*, 269 F.3d 919, 924 (8th Cir. 2001). Whether the length of the detention is reasonable depends of the facts of each case. *United States v. Olivera-Mendez*, 484 F. 3d 505, 509-10 (8th Cir. 2008). Asking for consent to search does not violate the Fourth Amendment in the absence of coercive or otherwise unusual circumstances. *United States v. Yang*, 345 F.3d 650, 654 (8th Cir. 2008).

At the time Heiser asked for consent, he had neither run a check on Long's license nor written any citation for the center line violation, so the legitimate purposes for the stop had not yet ceased. The Court ruled Heiser's request for consent to search was made during a reasonable period of detention and no Fourth Amendment violation occurred.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on July 15, 2008, and was an appeal from the United States District Court for the Western District of Missouri. The case cite is *U.S. v. Long*, 07-1842 (8th Cir. 7-15-2008).

Brooke Lockhart
Deputy City Attorney



Springdale City Council Passes Ordinance Prohibiting Selling or Giving Away Animals in a Commercial or Industrial Zone

Attached is a copy of Ordinance No. 4236, which was passed by Springdale City Council on August 26, 2008. The ordinance amends Springdale's animal ordinance to prohibit selling, distributing, or giving away animals from public property or from commercially or industrially zoned lands. This means that persons are unable to set up a temporary open-air enterprise to give away or sell animals, including dogs, within the City of Springdale in commercial and industrial zones. Previously, a person could obtain a permit to set up a temporary open-air enterprise to sell animals, but under this ordinance, that is no longer the case in commercial and industrial zones.

If you should have any questions, please contact me.

Jeff Harper
City Attorney



Election Day – Tuesday, November 4, 2008

As most of you know, Election Day will be coming up Tuesday, November 4, 2008. In years past, questions have arisen on what kind of campaigning can be done close to the polls. In anticipation of Election Day, you should familiarize yourself with the following from Ark. Code Ann. §7-1-103(9)(A):

“no person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever in the building or within one hundred feet (100') of the primary exterior entrance used by voters to the building containing the polling place on election day.”

Arkansas clarified the 100 foot zone when they changed the law to show that the 100 feet is measured from the primary exterior entrance of the building where people do the voting. Violating this provision is a Class A misdemeanor.

Jeff Harper
City Attorney



Congratulations to SPD Officers for Completing Legal Survival Skills for Rookies Class

In 2008, our office, in cooperation with SPD, has conducted two one-week classes entitled, "Legal Survival Skills for Rookies." The first class was April 21-25, and the second class was July 28-August 1. Congratulations to all the officers who completed the class. Their pictures are set out on the following page.

April, 2008 – Legal Survival Skills for Rookies Class



Front Row: Ashley Booth; Kyle Naish; Byron Johncox; Rick Frisby; Overton Myer Hessler; John Scott
Back Row: Kris Arthur; Michael Lisenbee; Derek Wright; Dustin Treat; Blake Reed

July, 2008 – Legal Survival Skills for Rookies Class



Front Row: Matt Stever; Robert Brock; Allie Rhodes; Benaiah Townsend;
Christopher Shirrel; Josh Chessier
Back Row: Hank Brockmeyer; Cary Bostain; Eric Evans; Scott Williams; Charles Parret