

United States Supreme Court Clarifies When Police May Search a Vehicle Incident to Arrest

Facts Taken From the Opinion: On August 25, 1999, acting on an anonymous tip that the residence at 2524 North Walnut Avenue was being used to sell drugs, Tucson, Arizona police officers Griffith and Reed knocked on the front door and asked to speak to the owner. Rodney Joseph Gant answered the door and, after identifying himself, stated that he expected the owner to return later. The officers left the residence and conducted a records check, which revealed that Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license.

When the officers returned to the house that evening, they found a man near the back of the house and a woman in a car parked in front of it. After a third officer arrived, they arrested the man for providing a false name and the woman for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived. The officers recognized his car as it entered the driveway, and Officer Griffith confirmed that Gant was the driver by shining a flashlight into the car as it drove by him. Gant parked at the end of the driveway, got out of his car, and shut the door. Griffith, who was about 30 feet away, called to Gant, and they approached each other, meeting 10-to-12 feet from Gant's car. Griffith immediately arrested Gant and handcuffed him.

Because the other arrestees were secured in the only patrol cars at the scene, Griffith called for backup. When two more officers arrived, they locked Gant in the backseat of

their vehicle. After Gant had been handcuffed and placed in the back of a patrol car, two officers searched his car. One of them found a gun, and the other discovered a bag of cocaine in the pocket of a jacket on the backseat.

Gant was charged with two offenses—possession of a narcotic drug for sale and possession of drug paraphernalia (*i.e.*, the plastic bag in which the cocaine was found). He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. Among other things, Gant argued that *Belton* did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. When asked at the suppression hearing why the search was conducted, Officer Griffith responded: "Because the law says we can do it."

The trial court rejected the State's contention that the officers had probable cause to search Gant's car for contraband when the search began, but it denied the motion to suppress. Relying on the fact that the police saw Gant commit the crime of driving without a license and apprehended him only shortly after he exited his car, the court held that the search was permissible as a search incident to arrest. A jury found Gant guilty on both drug counts, and he was sentenced to a 3- year term of imprisonment.

The Arizona Supreme Court concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment. The court's opinion discussed at length the U.S. Supreme Court's decision in *New York v. Belton*, 453 U.S. 454 (1981), which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous

incident of an arrest of the vehicle's recent occupant. The court distinguished *Belton* as a case concerning the permissible scope of a vehicle search incident to arrest and concluded that it did not answer "the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure." The case was appealed to the United States Supreme Court, who granted certiorari.

Decision by United States Supreme Court: The United States Supreme Court, in their opinion, reviewed some of their previous case decisions. In *Chimel v. California*, 395 U.S. 752 (1969), the court held that a search incident to arrest may only include "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Ibid.* That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.

In *Belton*, the Court considered *Chimel's* application to the automobile context. A lone police officer in that case stopped a speeding car in which Belton was one of four occupants. While asking for the driver's license and registration, the officer smelled burnt marijuana and observed an envelope on the car floor marked "Supergold"—a name he associated with marijuana. Thus having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees, the officer " 'split them up into four separate areas of the Thruway . . . so they would not

be in physical touching area of each other' " and searched the vehicle, including the pocket of a jacket on the backseat, in which he found cocaine. 453 U. S., at 456.

In *Belton*, the United States Supreme Court held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers therein. *Belton*, 453 U. S., at 460. That holding was based in large part on our assumption "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach.' " *Ibid.*

The United States Supreme Court then noted that their opinion in *Belton* had been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. The Court noted that this reading may be attributable to Justice Brennan's dissent in *Belton*, in which he characterized the Court's holding as resting on the "fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car." 453 U. S., at 466. Under the majority's approach, he argued, "the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car" before conducting the search. *Id.*, at 468.

The Court then noted that since they had decided *Belton*, Courts of Appeals have given different answers to the question whether a vehicle must be within an arrestee's reach to justify a vehicle search incident to arrest, but Justice Brennan's reading of the Court's opinion has predominated. As Justice O'Connor

observed in *Thornton*, “lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*.” *Thornton v. United States* (citation omitted). The Court noted that some courts have upheld searches under *Belton* “even when . . . the handcuffed arrestee has already left the scene.”

The Court, after discussing *Belton* and *Chimel*, opined that to read *Belton* as authorizing a vehicle search incident to every recent occupant’s arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with the Court’s statement in *Belton* that it “in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.” Citation omitted. Accordingly, the Court rejected this reading of *Belton* and held that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

The Court also concluded that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” *Thornton*, citation omitted. The Court noted that in many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.

The Court held that neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant’s car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas *Belton* and *Thornton* were arrested for drug offenses, Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant’s car. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable. The Court therefore affirmed the decision of the Arizona Supreme Court.

Note From City Attorney: This case was a 5 – 4 decision of the United States Supreme Court. This decision holds that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, the Court opined, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Rules 12.1 and 12.4 of the Arkansas Rules of Criminal Procedures are set out below and must be read in conjunction with the U.S. Supreme Court's case in *Gant*.

Rule 12.1 of the Arkansas Rules of Criminal Procedure sets out the permissible purposes for a search incident to a lawful arrest.

An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only:

- (a) to protect the officer, the accused, or others;
- (b) to prevent the escape of the accused;
- (c) to furnish appropriate custodial care if the accused is jailed; or
- (d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.

Rule 12.4 of the Arkansas Rules of Criminal Procedure states:

- (a) If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search.
- (b) The search of a vehicle pursuant to this rule shall only be made contemporaneously with the arrest or

as soon thereafter as is reasonably practicable.

Please note that this case is limited to a search incident to an arrest. It does not in any way affect the other exceptions to the warrant requirement, such as the right to search a vehicle if the officer has probable cause to believe the vehicle contains contraband or fruits of the crime (Carroll Doctrine) or a case in which officers are conducting an inventory pursuant to department policy.

Case: This case was decided by the United States Supreme Court on April 21, 2009. The case cite is *Arizona v. Gant*, 556 U.S. ____ (2009).

Jeff Harper
City Attorney

Arkansas Supreme Court Decides Case in which Fort Smith Officers Executing a Search Warrant at a Residence Opened a Locked Safe Within the Residence Even Though the Safe was not Mentioned in Search Warrant

Facts Taken From Opinion: Detective Wayne Barnett of the Fort Smith Police Department received information from a confidential informant that Shane Patton Stites (Appellee) was involved in the use and sale of methamphetamine at his home. The informant agreed to cooperate with police by making a controlled buy from Appellee. When the informant went to Appellee's house, however, Appellee told him to leave and come back later. The informant reported to Detective Barnett that,

while inside Appellee's house, he saw a glass pipe with burnt residue, which is commonly used to smoke methamphetamine, and two small caliber handguns under the coffee table in the living room. Detective Barnett then obtained a search warrant to search Appellee's home for "drug paraphernalia, methamphetamine and firearms."

The police promptly executed the warrant and found twenty-one pieces of evidence, including a revolver, drugs, drug paraphernalia, and \$435 in cash on Appellee's person. The second handgun mentioned by the informant was never found. During the search, the police discovered a locked safe inside a small closet in the entry hall by the front door and adjacent to the living room. The informant had not reported seeing a safe in the house, and the officers did not know there was a safe until it was discovered during the search. The safe was twelve-by-eighteen inches and large enough to contain drugs, drug paraphernalia and firearms. A locksmith was summoned to the scene to open the safe. Once the safe was opened, the officers discovered crystalline substance, methamphetamine, and a Honeywell lock box that contained a crystalline and vegetable residue.

Appellee was charged with possession of methamphetamine with intent to deliver, possession of marijuana with intent to deliver, possession of drug paraphernalia, simultaneous possession of drugs and firearms, and maintaining a premises for drug activities. He then filed a motion to suppress, asserting, among other things, that the evidence seized from the locked safe found inside his residence should be suppressed because neither the affidavit for the search warrant nor the warrant itself mentioned a safe, and thus, the search of the safe exceeded the scope of the search

authorized by the warrant. Detective Barnett testified during the suppression hearing that he thought the warrant to search the house authorized him to open the safe if it was capable of holding the items that were the subject of the search warrant; and, had he thought that he did not have authority to open the safe, he would have seized the safe and procured a second warrant to open it, albeit with the same information used to obtain the first one. The circuit court issued an order granting Appellee's motion to suppress the evidence discovered inside the locked safe. The State then filed an interlocutory appeal to the Arkansas Supreme Court.

Argument and Decision by Arkansas Supreme Court: The State argued that the issue to be decided in this case was whether Ark. R. Crim. P. 13.3(d) authorizes officers to open a closed container, in this case a safe, during the execution of a search warrant when the container is capable of holding the items that are the subject of the warrant. Appellee, on the other hand, argued that this appeal involved only the application of Rule 13.3(d) to the particular and discrete facts in the instant case. He suggested that the State's appeal necessarily turns on whether the facts support the circuit court's finding that the search of the locked safe exceeded what was authorized by the warrant; that is, whether the circuit court acted within its discretion after making an evidentiary decision based on the facts.

The Court noted that pursuant to Rule 13.3(d), the scope of a search shall be "only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein." Ark. R. Crim. P. 13.3(d). In ruling on Appellee's motion to suppress, the circuit court ruled that the evidence found inside the safe during the execution of a search warrant at Appellee's residence should be suppressed because the

safe was locked and the officers had an opportunity to take the safe out of the home and obtain a second search warrant. Thus, the Court noted the issue on appeal is whether Rule 13.3(d) authorizes police officers to open a locked container during a lawful search of a premises when the officers believe that it is necessary to discover things specified in the warrant. In other words, the State's appeal presents a legal question regarding the scope of search warrants and whether the circuit court misinterpreted Rule 13.3(d) and thus applied a flawed interpretation of the rule to suppress the drugs seized from the safe.

The Court noted that the State's appeal presents an issue that has heretofore never been decided by this court: whether police officers can search a container during a lawful search of a premises when the officers believe that a search of the container is necessary to discover the things specified in the warrant. The Court noted that they have held in the context of a warrantless search of an automobile, a search of containers found inside a vehicle was justified where probable cause justified the search of the vehicle and the containers could contain the suspected contraband. *McDaniel v. State*, 337 Ark. 431, 990 S.W.2d 515 (1999). The Court also noted that in upholding the seizure of a safe discovered during the execution of a search warrant for stolen goods in a premises, the Arkansas Court of Appeals noted that "the safe was found while the officers were still conducting their search for the television and the television could have been concealed inside the safe." *Campbell v. State*, 27 Ark.App. 82, 87, 766 S.W.2d 940, 943 (1989). While a second warrant was obtained to open the safe in *Campbell*, the court of appeals did not decide whether the second warrant was necessary in order for the officers to conduct a lawful search of the safe.

Likewise, the United States Supreme Court has not directly addressed the scope of a warrant to search a premises. However, in *United States v. Ross* 456 U.S. 798 (1982), a case involving the warrantless search of containers found inside a vehicle, the Supreme Court discussed the principles that govern the lawful search of containers:

A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. [footnote omitted] Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. . . . When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand. [footnote omitted]

Id., at 820-21, 822-23.

The Court then noted that the issue on appeal has, however, been addressed by the United States Eighth Circuit Court of Appeals. In *U.S. v. Wright*, 704 F.2d 420 (8th Cir. 1983), the police found a locked safe not specified in the warrant during a search of defendant's home and forced the

defendant to open it. Citing *United States v. Ross, supra.*, the Eighth Circuit held that the warrant obtained by the police officers permitted them to search the safe. *Id.* Similarly, in *United States v. Johnson*, 709 F.2d 515 (8th Cir. 1983), the police removed a floor safe during a search of Johnson's bedroom and later opened it at the police station without Johnson's consent. In addressing Johnson's argument that the police had no authority to remove and open the safe, the Eighth Circuit interpreted the Supreme Court's decision in *Ross* as holding in dicta that "A search warrant authorizing the search of defined premises also authorizes the search of containers found on that premises which reasonably might conceal items listed in the warrant." *United States v. Johnson*, 709 F.2d at 516. The *Johnson* court held that the police were authorized to open the safe under the warrant at the time of search, and they did not need a second warrant to complete the search of the safe at the police station. *Id.*

However, in this case, Appellee suggested that the Arkansas Constitution gives citizens greater protection against unreasonable search and seizures in their homes than it does when they drive on public roadways. While the search-and-seizure language of Article 2, § 15 of the Arkansas Constitution is very similar to the words of the Fourth Amendment, our constitution, state statutes and criminal rules have clearly embraced a heightened privacy protection for citizens in their homes against unreasonable searches and seizures. *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004). The Court recognized that they lack authority to extend the protections of the Fourth Amendment beyond the holdings of the United States Supreme Court, but do have the authority to impose greater restrictions on police activities "based upon our own state law." *Id.* The Court noted that in the *Brown* case, they held that, although the Supreme Court

has held that the Fourth Amendment does not require knowledge of the right to refuse consent as a prerequisite to a showing of voluntary consent, the failure of a law enforcement officer to advise a defendant that he or she has the right to refuse consent to the search violates his or her rights as guaranteed by Article 2, § 15 of the Arkansas Constitution. *State v. Brown, supra.*

The Court held that although it is clear that they may deviate from federal precedent in providing greater protection against unreasonable search and seizures, they do so only when such a deviation is justified.

The Court then noted that unlike the *Brown* case, which involved a warrantless search of a home by the police, the officers in this case had a valid warrant to search the defendant's home. In other words, the officers were lawfully present on the premises. Thus, the Court held that the facts here do not trigger the heightened protection against unlawful intrusion into a citizen's home that the Court has adopted in *State v. Brown, supra.* The Court held that to require the police to obtain a warrant in order to search every closed container found during the course of a search would impose an unreasonable burden on the police and make it virtually impossible for them to execute a search warrant in many instances. The Arkansas Supreme Court therefore held that, when a legitimate search is under way, and when its purpose and its limits have been precisely defined, police officers need not obtain a second warrant to search containers found during a premises search.

The Court held that a lawful search of a vehicle or a home does not, however, warrant a search of every part of the vehicle or home. Pursuant to Ark. R. Crim. P. 13.3(d), the scope of search shall be only such as is authorized by the warrant and is

reasonably necessary to discover the persons or things specified therein. Rule 13.3(d). In *Ross*, the Supreme Court recognized this limitation even in the case of a warrantless search of a vehicle:

The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the truck of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id., at 824. The Supreme Court elaborated further in *California v. Acevedo*, 500 U.S. 565 (1991), when it held that its prior rule governing the search of containers (a container could not be opened without a separate warrant) was outmoded. *Id.* The Court concluded, “The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.” *Id.* at 580. Similarly, in *McDaniel v. State*, 337 Ark. 431, 990 S.W.2d 515, we stated that the scope of the search must be appropriate for the items to be found. In that case, because the officers smelled the odor of marijuana emanating from the truck, the scope of the search could lawfully include containers within the vehicle that could contain marijuana. *Id.*

The Court held that in the instant case, there is no dispute that the search for the items specified in the warrant was ongoing when the police opened the safe. At that time, they had found some of the items listed in the warrant. Moreover, the safe was large enough to contain drugs, drug paraphernalia and the second handgun described by the informant. The fact that the officers had already discovered some drugs and drug paraphernalia did not preclude them from continuing to search for drugs and drug paraphernalia and the second handgun. To hold otherwise would lead to an absurd result -- the search would have to cease upon the initial discovery of any drugs or drug paraphernalia. The Court held it was therefore reasonably necessary for the police to search the safe. Thus, the Court concluded that the officers’ search of the safe was within the scope of the search authorized by the warrant, and the circuit court erred in ruling that the safe could not be opened without a second warrant. The Arkansas Supreme Court therefore reversed and remanded the case.

Note From City Attorney: This is the first time this exact issue has been addressed by the Arkansas Supreme Court. This case decision makes it clear that if officers are executing a search warrant, they may search any locked container located in an area in which they are authorized to search, provided the locked container could hold the items that are subject to search and seizure under the warrant. In this case, because the gun, drugs or paraphernalia could have been contained in the locked safe, the search is valid, even though the locked safe was not mentioned in the search warrant. However, if officers are aware that certain items are located in a locked safe because of information they have before the search warrant is signed by the judge, I would recommend putting this information in the affidavit and mention it in the search

warrant. Officers in this Fort Smith case had no idea about the locked safe, but came across it while they were conducting the search inside the residence.

Case: This case was decided by the Arkansas Supreme Court on March 19, 2009, and was an appeal from the Sebastian County Circuit Court. The case cite is *State v. Stites*, CR 08-1186 (Ark. 3-19-2009).

Jeff Harper
City Attorney

No Seatbelt: Now a Primary Offense!!!

Ark. Code Ann. §27-37-701, *et seq.*, contains the statutes pertaining to the mandatory use of seatbelts. Specifically, Ark. Code Ann. §27-37-702(a) provides that:

Each driver and front seat passenger in any motor vehicle operated on a street or highway in this state shall wear a properly adjusted and fastened seat belt properly secured to the vehicle.

Since its inception in 1991, a violation of the Arkansas seatbelt law has been a secondary offense. In fact, Ark. Code Ann. §27-37-704 specifically provided that no vehicle could be stopped solely for the purpose of determining compliance with the Arkansas seatbelt law.

However, on March 4, 2009, Arkansas Governor Mike Beebe signed Act 308 of 2009 into law. This Act begins a new era in seatbelt enforcement in the State of Arkansas in that this Act deletes the provisions of Ark. Code Ann. §27-37-704 effective June 30, 2009. As a result, beginning June 30, 2009, a violation of the

Arkansas seatbelt law will be a *primary offense*. In other words, a vehicle may lawfully be stopped solely because the officer has probable cause that the Arkansas seatbelt law is being violated.

Ernest Cate
Senior Deputy City Attorney

Acts Affecting Law Enforcement that Contain an Emergency Clause

The 2009 Arkansas General Assembly passed several Acts that affect law enforcement. A number of these Acts contained emergency clauses, meaning that they go into effect earlier than the other Acts. Please note all of the listed Acts are already in effect. (The seatbelt as a primary offense law is covered elsewhere in this CALL). The following are the remaining acts containing an emergency clause of which law enforcement needs to be aware.

Violation of an Order of Protection

The Legislature passed Act 331 which amends Arkansas Code Annotated § 5-53-134. This law went into effect March 10, 2009. This Act states that the petitioner (the person who asked the court for a protection order), can't be arrested for violating the order of protection, only the respondent can be arrested. This Act also makes a violation of an order of protection a Class D felony if:

(A) Committed within 5 years of a prior conviction for violation of an order of protection;

(B) The order of protection was issued after a hearing of which the person received

actual notice and at which the person had an opportunity to participate; and

(C) Another offense, felony or misdemeanor, was committed along with the violation of order of protection

Maximum Weight Allowed is Increased on the Front or Steering Axle of a Vehicle

The Legislature increased the maximum weight allowed under Arkansas Code Annotated § 27-35-203 (c)(2) from 20,000 pounds to 24,000 pounds under Act 493. This law went into effect March 19, 2009.

Temporary Cardboard Buyer's Tags

Act 756 changes various aspects of law regarding motor vehicle dealers. Most notable for law enforcement is a change to Arkansas Code Annotated §27-14-1705 which adds that a temporary cardboard buyers tag can now also be used for a demonstration vehicle for test driving purposes for up to seventy-two (72) hours, and a loaner vehicle to allow for repairs for up to fourteen (14) days. However, a temporary cardboard buyer's tag cannot be placed on work or service vehicles owned by a dealer, manufacturer, or transporter. Misuse of temporary cardboard buyer's tags is considered a violation under Arkansas Code Annotated §5-1-108. This law went into effect April 1, 2009.

Acts Concerning Juveniles

There are numerous changes to the juvenile code in Act 956. The most notable are an amendment to Arkansas Code Annotated §3-3-203 regarding purchase or possession of alcohol by a minor. The act changes the statute in that any person eighteen years or

older, but under twenty-one (21) years of age, that possess or attempts to purchase alcohol is guilty of a violation and a fine not less than \$100 and not more than \$500. The same violation and fine applies for an adult that purchases alcohol for a person under twenty-one. As before, the arrested person must surrender their driver's license, permit or other evidence of driving privilege to the law enforcement officer.

A person under eighteen who possesses alcohol, or attempts to buy alcohol is to be handled under the Juvenile Code by issuing a citation to appear for a juvenile intake. Additionally, an officer should forward the license to a juvenile intake officer of a person under eighteen who is in possession of alcohol or attempts to purchase alcohol or is in possession of a fraudulent or altered I.D.

Act 956 also changes definitions of the Juvenile Code in Arkansas Code Annotated §9-27-303. The Act should be consulted for a full list of changes but of note are changes to the definition of "Sexual Abuse" (applicable when it is a person ten (10) years of age or older to a person younger than eighteen (18) years of age), to include:

- 1) "forcing or encouraging the watching or pornography";
- 2) "forcing, permitting or encouraging the watching of live sexual activity";
- 3) "forcing listening to a phone sex line";
- 4) or an act of voyeurism.

Voyeurism is defined in Act 956 as, "looking for the purpose of sexual arousal or gratification into a private location or place in which a juvenile may reasonably be expected to be nude or partially nude. This definition does not apply to delinquency actions."

This Act went into effect April 6, 2009.

Amber Roe
Deputy City Attorney

The City's 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. To assist in answering these questions, a review of the City's fireworks ordinance is helpful. This review will also ensure that the ordinance will be 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 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.

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

Ernest Cate
Senior Deputy City Attorney

**United States Supreme Court
Decides Case Involving Issue of
Whether Police are Forbidden to
Question a Defendant Who Has
Been Appointed Counsel at
Arraignment Proceedings**

Facts Taken From the Opinion: Petitioner Jesse Montejo was arrested on September 6, 2002, in connection with the robbery and murder of Lewis Ferrari, who had been found dead in his own home one day earlier. Suspicion quickly focused on Jerry Moore, a disgruntled former employee of Ferrari’s dry

cleaning business. Police sought to question Jesse Jay Montejo, who was a known associate of Moore.

Montejo waived his rights under *Miranda v. Arizona*, 384 U. S. 436 (1966), and was interrogated at the sheriff’s office by police detectives through the late afternoon and evening of September 6 and the early morning of September 7. During the interrogation, Montejo repeatedly changed his account of the crime, at first claiming that he had only driven Moore to the victim’s home, and ultimately admitting that he had shot and killed Ferrari in the course of a botched burglary. These police interrogations were videotaped.

On September 10, Montejo was brought before a judge for what is known in Louisiana as a “72-hour hearing”—a preliminary hearing required under state law. Although the proceedings were not transcribed, the minute record indicates what transpired: “The defendant being charged with First Degree Murder, Court ordered N[o] Bond set in this matter. Further, Court ordered the Office of Indigent Defender be appointed to represent the defendant.”

Later that same day, two police detectives visited Montejo back at the prison and requested that he accompany them on an excursion to locate the murder weapon (which Montejo had earlier indicated he had thrown into a lake). After some back-and-forth, the substance of which remains in dispute, Montejo was again read his *Miranda* rights and agreed to go along; during the excursion, he wrote an inculpatory letter of apology to the victim’s widow. Only upon their return did Montejo finally meet his court-appointed attorney, who was quite upset that the detectives had interrogated his client in his absence.

At trial, the letter of apology was admitted over defense objection. The jury convicted Montejo of first-degree murder, and he was sentenced to death.

The Louisiana Supreme Court affirmed the conviction and sentence. The court rejected Montejo's argument that under the rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), the letter should have been suppressed. *Jackson* held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S., at 636.

Under the rule adopted by the Louisiana Supreme Court, a criminal defendant must request counsel, or otherwise "assert" his Sixth Amendment right at the preliminary hearing before the *Jackson* protection are triggered. The case was appealed to the United States Supreme Court.

Decision by U.S. Supreme Court: In a 5 – 4 ruling, the United States Supreme Court overturned the *Michigan v. Jackson* rule that prohibited police officers from interrogating suspects once they invoked a right to counsel at an arraignment or similar proceeding. The Court noted that under *Miranda v. Arizona*, 384 U.S. 436, 474 (1966), any suspect subject to custodial interrogation has the right to have a lawyer present if he so request, and to be advised of that right. Further, under *Edwards v. Arizona*, 451 U.S. 477, 484 (1981), the prophylactic protection of the *Miranda* right when such a defendant "has invoked his right to have counsel present," interrogation must stop. In *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990), under the prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present "whether or not the

accused has consulted with his attorney." The Court held that these three layers of prophylaxis are sufficient and under these three cases, a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. The Court held that if that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached.

The Court noted that their holding means that the Louisiana Supreme Court correctly rejected Montejo's claim under *Jackson*, but the Court held that Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*. If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it. Even if Montejo subsequently agreed to waive his rights, that waiver would have been invalid had it followed an "unequivocal election of the right." The Court therefore vacated the judgment of the Louisiana Supreme Court and remanded the case for further proceedings no inconsistent with their opinion.

Note From City Attorney: This case makes the same rule under the previous Fifth Amendment decisions (*Miranda*, *Edwards*, and *Minnick*) apply to a defendant that has already been arraigned. If *Miranda* rights are read to a defendant, and the defendant asserts his right to an attorney under *Miranda*, no further interrogation

shall occur unless it is initiated by the defendant. This is the rule whether it is before arraignment or after arraignment.

Case: This case was decided by the United States Supreme Court on May 26, 2009. The case cite is *Louisiana v. Montejo*, 556 U.S. ____ (2009).

Jeff Harper
City Attorney

**Arkansas Supreme Court
Overrules Court of Appeals
Regarding Out-of-State License
Plate Law**

A new Arkansas Supreme Court case, *Martin Hinojosa v State* CR 08-1336, overrules an Arkansas Court of Appeals case that was the subject of an article in the January 1, 2009 CALL, (page 10). The facts of the case are as follows; On January 27, 2007 Sergeant Kyle Drown of the Arkansas State Police pulled over Martin Hinojosa's vehicle in Pope County. Sergeant Drown pulled over the vehicle because the vehicles license plate cover obscured "Arizona," the state from which the plate was issued, a violation of Arkansas Code Annotated §27-14-716. During the stop Sergeant Drown asked Hinojosa if he had anything illegal in his vehicle and Hinojosa replied that he had about three hundred pounds of marijuana. Hinojosa was charged with possession of a controlled substance with intent to deliver.

At trial Hinojosa filed a motion to suppress the marijuana, arguing that the stop was unlawful because the license plate cover did not violate Arkansas or Arizona state law and therefore the marijuana should be suppressed as fruit of the poisonous tree. The trial court denied the motion to suppress

and Hinojosa was found guilty of possession with intent to deliver and sentenced to 108 months in the Department of Corrections. Hinojosa then appealed to the Arkansas Court of Appeals. The Court of Appeals reversed the circuit court and suppressed the marijuana concluding that the officer did not have probable cause to stop Hinojosa's vehicle because Ark. Code Ann. §27-14-704 only requires that the registration numbers be conspicuously displayed.

The State then petitioned the Arkansas Supreme Court to review the case. Upon Supreme Court review Hinojosa argued that Sgt. Drown did not have probable cause to stop him because Ark. Code Ann. §27-14-716 doesn't prohibit the obscuring of the state name on a license plate, and that the traffic stop was unlawful because it was based on the officers mistake of law that §27-14-716 was applicable to out-of-state residents. Arkansas Code Annotated §27-14-716 states as follows:

Display of license plates generally.

(a)(1) License plates issued for a motor vehicle other than a motorcycle shall be attached thereto, one (1) in the front and the other in the rear.

(2)(A) When one (1) plate is issued, it shall be attached to the rear.

(B) License plates for trucks of one (1) ton capacity or larger may be displayed either on the front or rear of the vehicle.

(C) The license plate issued for a motorcycle required to be registered under this chapter shall be attached to the rear thereof.

(b) Every license plate shall, at all times, be securely fastened in a

horizontal position to the vehicle for which it is issued so as to prevent the plate from swinging and at a height of not less than twelve inches (12") from the ground, measuring from the bottom of such plate, in a place and position to be clearly visible and shall be maintained free from foreign materials and in a condition to be clearly legible.

(c) Placing any type of cover over a license plate which makes the license plate more difficult to read or which reduces the reflective properties of the license plate is prohibited.

The Arkansas Supreme Court stated that, "the language in §27-14-716 prohibits obscuring the license plate. Nothing in the language of the statute restricts its applicability to the registration numbers alone. It is undisputed that Hinojosa's license plate frame obscured "Arizona" from the license plate; therefore, the license plate was not "clearly visible" or "clearly legible" as required by §27-14-716(b), and the frame made "the license plate more difficult to read as prohibited by §27-14-716(c)." Therefore the court held that Sgt. Drown had probable cause to stop the vehicle.

Hinojosa then argued that even if §27-14-716 does prohibit a license plate frame that obscures a state name, the statute does not apply to Hinojosa because his vehicle was registered in another state. The Court stated that it was notable that Sgt Drown had testified that the license plate name must be clearly visible for law enforcement to identify vehicles that are the subject of NCIC BOLOS and denied Hinojosa's argument. The Court stated that according to prior case law, §27-14-716 is applicable to **all vehicles** traveling on Arkansas roads be they residents of Arkansas or of other states.

The Arkansas Supreme Court then affirmed the circuit court ruling and reversed the Court of Appeals thereby reinstating Hinojosa's sentence of 108 months in the Department of Corrections.

Case: This case was decided by the Supreme Court of Arkansas on May 21, 2009. The case cite is *Hinojosa v. State*, CR 08-1336 (Ark. 5-21-2009).

Amber Roe
Deputy City Attorney

8th Circuit Upholds Protective Sweep of Home on a Fugitive Warrant

Facts Taken From Opinion: After investigation and surveillance, United States Marshals and Dallas police officers executed an Arkansas Fugitive arrest warrant at Fred A. Green's [Green] residence in a Dallas suburb. Officers secured four other men upon entering the home and then the officers spread out to conduct a protective sweep and search for Green. Deputy Marshal Thomas Kinsella [Deputy Kinsella] entered a large pantry in the kitchen and saw in plain view a duffel bag with a clear plastic bag with a white powdery substance in it. The duffel bag was seized and contained 486 grams of cocaine, 145 grams of methamphetamine, and digital scales.

Police Officer Kurt Hibbits [Officer Hibbits] found Green in the garage attached to the home. Other officers conducted a protective sweep of the home. Several items were seized during the sweep, including: a MAC-10 9mm machine gun with two magazines, a Derringer .410 caliber pistol, and \$13,664 in cash found on top of a six foot dresser in the master bedroom, an SKS .308 caliber rifle

found in a large bedroom closet, and 229 rounds of 9mm ammunition for the MAC-10 and nine rounds of .410 ammunition for the Derringer.

A jury convicted Green of possession with intent to distribute cocaine, conspiracy to distribute cocaine, possession of a machine gun in furtherance of drug trafficking, and being a felon in possession of a firearm. He was sentenced to 548 months in prison. Green appealed the conviction; arguing that the evidence found during the protective sweep should have been suppressed because officers exceeded the scope of the sweep.

Argument and Decision by Court:

Although the Fourth Amendment "permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 337 (1990); to be "properly limited" a protective sweep must be "a quick and limited search of the premises...conducted to protect the safety of police officers of others [and] narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* At 327.

When an officer arrests a suspected drug trafficker in one room of a multi-room residence, it is permissible that the officer or officers should conduct a *Buie* sweep out of concern that other individuals could be hiding and may resort to violence to prevent being arrested. *United States v. Cash*, 378 F.3d 745, 749 (8th Cir. 2004). During a protective sweep, officers may seize any item in plain view if its incriminating character is "immediately apparent." *Horton v. California*, 496 U.S. 128, 136 (1990).

In this case, Green argued that the evidence found on top of the dresser should be suppressed because Officer Hibbets had to stand on a chair to view the top of the dresser and locate the guns and cash. The dresser was 71" high, 68" wide, and 13" deep at the top. Officer Hibbets testified that he could not see the top of the dresser from the floor and that it was big enough to hide a person, he thought. Green disagreed. The Court found that the officers had to act quickly and decisively to minimize the risk of ambush. *See Buie*, 494 U.S. at 333 and the Court noted that officers must be allowed to verify that potential hiding spaces are empty, and, if, during that action, incriminating items come into plain view, they may be seized.

Conceding that the upstairs closet was large enough to conceal a person, Green argued that the State failed to prove the SKS rifle was in plain view because Officer Hibbets could not testify at to where, exactly, it was located; instead Officer Hibbets relied on another officer's statement that the rifle was in plain view. However, in suppression hearings, the Court "may rely on hearsay evidence." *United States v. Thompson*, 533 F.3d 964, 969 (8th Cir. 2008).

As far as the drugs in the pantry, Green argued that the drug evidence must be suppressed because they resemble other items in a pantry such as flour. The Supreme Court has clarified that "immediately apparent" in this Fourth Amendment context means that the police have probable cause to believe an item is incriminating. *Skokos v. Rhoades*, 440 F.3d 957, 961 (8th Cir. 2006). Deputy Kinsella testified that he has served over five hundred arrest warrants, knew that Green's arrest warrant was for drug-related offenses, and could recognize cocaine and methamphetamine, though not with certainty. The Court agreed that Deputy Kinsella had probable cause to seize the

duffel bag when he observed what he thought was contraband in the form of drugs in plain view. Therefore, the suppression of the drugs and other evidence was properly denied at District Court.

Case Citation: This case was an appeal from the United States District Court for the Eastern District of Arkansas to the United States Court of Appeals for the Eighth Circuit. The citation is *U.S. v. Green*, No. 08-1680 (8th Cir. 3-26-2009).

Brooke Lockhart
Deputy City Attorney

8th Circuit Upholds Stop and Search of Vehicle Coming From Target Residence of a Search Warrant

Facts Taken From Opinion: On October 3, 2006, Sheriff's Investigator Joe Benak obtained a warrant to search 7510 Trumble Avenue, Omaha, Nebraska, a single family dwelling, for controlled substances, drug paraphernalia, and evidence of drug crimes. The warrant expressly included "the person of William J. Baber...any vehicles registered to William J. Baber...and/or curtilage located at 7510 Trumble Avenue." The warrant authorized a no-knock entry because "the presence of a rifle at the residence could present danger" to the executing officers.

At 7:45 p.m., officers proceeded to 7510 Trumble Avenue in three vehicles to execute the warrant. As they turned onto Trumble, they saw a tan Ford Excursion backing down the driveway of the target residence. They had seen this vehicle at the residence before when they were conducting surveillance. Officers blocked the Excursion's ability to

leave and spotlighted the vehicle but could not immediately identify the occupants. Officers approached the vehicle with weapons drawn and ordered the occupants to put the vehicle in park and show their hands, the occupants did not obey the command. Officers realized the front seat occupants were Hispanic males, not William Baber, who is white; but officers could not see if anyone was in the rear of the vehicle. Deputy Jarrett observed both occupants moving their arms and the driver, later identified as Martinez-Cortes, looking towards the middle console and moving as if to hide something between the center console and his right leg. After several more demands by officers, Martinez-Cortes finally put the vehicle in park and showed his hands.

Officers ordered the two out of the vehicle and to lie on the ground where the occupants were handcuffed and asked for identification. Martinez-Cortes provided a Nebraska identification card. The passenger had no identification but gave his name and date of birth.

A routine check of wants and warrants revealed an outstanding misdemeanor warrant for Martinez-Cortes and that his driving privileges had been revoked and suspended. Martinez-Cortes was arrested and a search of the Excursion yielded methamphetamine near the center console of the vehicle, near the driver's side back door and inside a console in the floor. There were 85.7 grams of methamphetamine found. Martinez-Cortes entered a conditional plea of guilty to possession with intent to distribute and appealed the denial of his motion to suppress the drugs.

Argument and Decision by Court: Martinez-Cortes argued that the initial stop of his vehicle was unlawful because he had committed no traffic violation and the

officers had no reason to suspect criminal activity. He also argued that the detention was unreasonably extended and that the resulting arrest and search were unlawful.

In making reasonable suspicion determinations, reviewing courts look at "the 'totality of circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). The Court concluded that there were three valid reasons for the stop in this case.

First, the search warrant not only included the residence but also vehicles and curtilage. The officers saw the Excursion backing out of the driveway and, since that particular vehicle had been at the residence before, it was possible it was registered to Baber. Therefore, officers had reason to believe the warrant authorized search of the vehicle.

Second, it was reasonable to stop the vehicle to determine if an occupant of 7510 Trumble Avenue was in the vehicle. The warrant authorized the searching of the "person" of William Baber. Thus, arriving officers had reason to stop the vehicle to determine if Baber was riding or hiding in the vehicle. The Supreme Court has squarely held "that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705 (1981).

And finally, the Court reasoned that stopping the Excursion was justified by the interest in protecting the safety of officers. The officers had sufficient evidence that firearms were on the premises to convince a magistrate to issue a no-knock warrant. The Court also argued that had officers allowed the Excursion to drive away, the officers

faced the risk that the occupants would warn those in the house of the officers' presence, putting the officers in even more danger.

In addition, the risk to officer safety was magnified when the occupants did not obey the officers' first commands, and when Martinez-Cortes moved his arm as if to hide something. These furtive actions gave officers probable cause to believe that there was criminal activity afoot. Therefore the drug evidence should not be suppressed.

Case Citation: This case was an appeal from the United States District Court for the District of Nebraska to the United States Court of Appeals for the Eighth Circuit. The citation is *U.S. v. Martinez-Cortes*, No. 08-1706 (8th Cir. May 22, 2009).

Brooke Lockhart
Deputy City Attorney

8th Circuit Finds No *Miranda* Violation in Home Interview of Suspect

Facts Taken From Opinion: On June 15, 2004, a state search warrant was issued authorizing Bentonville police officers to search Jimmie Jay Lawson's [Lawson] home for evidence of possession of child pornography. Police seized two computers from the home and F.B.I. forensic analysis revealed child pornography on the computers.

On June 22, 2004, F.B.I. Special Agent Scott Ledford [Ledford] and Bentonville Police Department Detective Mark Jordan [Jordan] went to Lawson's home to interview him. Ledford testified that he advised Lawson that he was there to interview Lawson about the images found

on his computers. Ledford also testified that he informed Lawson that he was not required to answer his questions and that, no matter what Lawson said during the interview, it was not his intent to arrest Lawson at that time. The interview lasted less than an hour. Lawson did not indicate he wanted to end the interview and his freedom of movement was not restricted. During the interview, Lawson admitted downloading the child pornography.

Lawson conditionally pled guilty to knowingly possessing a computer containing child pornography and preserved his right to appeal the district court's denial of his motion to suppress his statements. Lawson was sentenced to 63 months' imprisonment.

Argument and Decision by Court: On appeal, Lawson argued that he did not recall Ledford advising him that he did not have to answer questions and he claimed he wouldn't have answered questions if he had known he had the right to refuse to do so. Lawson also testified that although Ledford stated he would not arrest Lawson, Lawson did not believe him. Lawson also claimed that even though the officers were not rude and did not verbally or physically threaten him, he did not feel free to leave.

Lawson argued that his statements should have been suppressed because he was not advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The State argued that *Miranda* warnings were not necessary because Lawson was not in custody during the interview. *Miranda* "[w]arnings are required when interrogation is 'initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *United States v. New*, 491 F.3d 369, 373 (8th Cir. 2007). The Court noted "the ultimate inquiry is simply whether there is a formal arrest or restraint

on freedom of movement of the degree associated with formal arrest." *Id.*

In looking at the totality of the circumstances in this case, the Court found that Ledford advised Lawson that he did not have to answer questions, that Lawson was not going to be arrested and that Lawson's movement was not restricted in any way. In addition, Lawson was in his own home, was not physically or verbally threatened and was interviewed for less than an hour. Therefore, the Court reasoned that Lawson was **not** in custody and his statements should not be suppressed.

Case Citation: This case was an appeal from the United States District Court for the Western District of Arkansas. The case citation is: *U.S. v. Lawson*, No. 08-2173 (8th Cir. Apr. 29, 2009).

Brooke Lockhart
Deputy City Attorney

Arkansas Court of Appeals Reverses Circuit Court and Holds Evidence Should Have Been Suppressed

Facts Taken From the Opinion: Officer Kyle Jones of the Nashville, Arkansas Police Department testified that on the night of February 23, 2007, he was in uniform and patrolling in a marked unit. At approximately 9:45 p.m., Jones drove past a closed gas station, a Shell Superstop, where he observed two vehicles parked on the parking lot. Jones turned his patrol car around to "check them out."

Jones stated that there were no signs of criminal activity, no moving violations, nor any apparent mechanical difficulty or

defective equipment on either vehicle. Jones agreed that he was not aware of any reported criminal activity in that area that night, nor did he suspect it at the time. Jones explained that this was why he did not engage his police lights when he came back to the parking lot.

Although Jones thought it suspicious that one car “shot” out of the parking lot, Jones did not believe it suspicious enough to follow that car. Instead, Jones approached the remaining car, which was then moving around the building, and observed the car stop. Jones pulled his patrol car up along the passenger side. Jones asked the occupants of the vehicle what they were doing. The men responded that they were discussing a dog house and offered to show the officer text messages to prove it. Jones told them he did not want to see the messages.

Jones asked their names. The passenger said his name was Maverick Canaday. Jones recognized the name as associated with drug-buy investigations, but a computerized check revealed no outstanding warrants and a valid driver’s license. By this time, Jones was out of the patrol car speaking to the men, who remained in their vehicle. Jones asked the driver (Orlando L. Dosia, appellant) his name, to which appellant gave his name and date of birth, but said he did not have a valid driver’s license. Appellant’s license was determined to be suspended. Jones described Maverick as “shaking, very nervous,” and appellant as “a little nervous.”

As Jones waited for the computer check to come back, another officer (Officer Clinton Tedford) arrived to assist. Tedford told appellant to get out of his vehicle, and Jones asked appellant what was in the bag under appellant’s feet in the floorboard. Appellant offered to let Jones retrieve it. Instead, Jones told appellant to retrieve it. At that point, appellant placed his hands on the top of the

car. Tedford then grabbed the bag and smelled it; the bag smelled strongly of marijuana and felt as if it held a substantial amount of the drug. Appellant was arrested, and upon search incident to arrest, more drugs and \$1907 in cash were found.

The trial judge, when asked to rule on the motion to suppress prior to trial, found that the officers were “doing what they should have been doing in checking things out” but that appellant was “in the wrong place at the wrong time.” The judge thus denied the motion to suppress. Appellant was convicted for possession with intent to deliver cocaine, methamphetamine, and marijuana after a jury trial in Howard County Circuit Court. Appellant then appealed to the Arkansas Court of Appeals the Circuit Court’s denial of his motion to suppress, contending that he was subjected to an unlawful encounter by police, resulting in a search that led to “fruits of the poisonous tree.” Appellant contended that the trial court clearly erred in denying his motion to suppress.

Decision by Arkansas Court of Appeals:

The Arkansas Court of Appeals held there was no question that upon learning that appellant was driving on a suspended license, the officers were entitled to detain appellant. The Court noted it was the encounter up to the moment that appellant was asked for his name, date of birth, and driver’s license that was at issue in this case. The Court held that the issue before them is whether the encounter was impermissible under the Arkansas Rules of Criminal Procedure and Constitution. If so, then the motion to suppress was erroneously denied, requiring the case to be reversed and remanded.

The Court first disposed of any reliance on Ark. R. Crim. P. 3.1, which permits an officer to stop and detain a person who is reasonably suspected of having committed,

committing, or being about to commit a felony or misdemeanor involving danger of injury or property damage. The Court held that those requirements were simply not present here, by Officer Jones's candid admission. However, the Court noted that there is a less intrusive interaction permitted between police and citizens, outlined in Ark. R. Crim. P. 2.2 that provides in relevant part:

A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

(b) . . . Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law enforcement officer.

The Arkansas Court of Appeals noted that the Arkansas Supreme Court has clarified that an encounter under Ark. R. Crim. P. 2.2 is permissible only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime. *Stewart v. State*, 332 Ark. 138 (1998); *Hammons v. State*, 327 Ark. 520 (1997); *State v. McFadden*, 327 Ark. 16, (1997). In *Stewart v. State*, the Arkansas Court of Appeals explained the three types of encounters between the police and private citizens:

The first and least intrusive category is when an officer merely approaches an individual on a street and asks if he is willing to answer some questions. Because the encounter is in a public place and is consensual, it does not constitute a "seizure" within the

meaning of the fourth amendment. The second police encounter is when the officer may justifiably restrain an individual for a short period of time if they have an "articulable suspicion" that the person has committed or is about to commit a crime. The initially consensual encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. The final category is the full-scale arrest, which must be based on probable cause.

Stewart v. State, 332 Ark. at 144; *see also Frette v. City of Springdale*, 331 Ark. 103 (1998).

The Arkansas Court of Appeals in this case noted that it is Rule 2.2 that provides authority for a police officer to act in a non-seizure encounter, referring to the first category of police/citizen encounters. *See State v. McFadden, supra. See also Thompson v. State*, 303 Ark. 407 (1990).

There is nothing in the constitution that prevents officers from addressing questions to an individual. *Baxter v. State*, 274 Ark. 539 (1982). However, the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existing circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom. *Id.* What must be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances of the encounter. *Id.* Rule 2.2 authorizes police action provided that the approach does not rise to the level of a "seizure" and provided that the information and cooperation sought is in aid of the investigation or prevention of crime. *State v. McFadden, supra.*

The Court held that the police officer in this case was not investigating a nearby crime or a tip from an informant at the time of the encounter. The Court held that under these circumstances, "we cannot say that the encounter was permissible under Rule 2.2." The Court further held that while not necessary to their disposition of the case, reasonable persons under the same circumstances would not have felt free to leave the encounter, particularly when the requests for identification and computer verification checks were commenced.

The State argued that the encounter was justified under a general community care-taking approach by the officer. However, the Court noted that this "community care-taking" argument was never presented to the trial court. Regardless, the Court of Appeals held that cases cited by the State for that proposition support such care-taking approaches if a driver appears to be in distress or injured, *Blakemore v. State*, 25 Ark. App. 335 (1988), or if there is abandoned property in a dangerous or high-crime area, *Adams v. State*, 26 Ark. App. 15 (1988). Such an initial approach was approved in *Swan v. State*, 94 Ark. App. 115 (2006), where an officer on routine patrol approached a vehicle at approximately 4:00 a.m. in a parking lot on the back side of a motel specifically to check on the three occupant's well-being. The officer in *Swan* also testified that upon approach, he observed Swan moving in a manner suggesting he was concealing an object in the seat. The Court held that the evidence to suggest that community care-taking was the reason for the initial encounter in *Blakemore*, *Adams*, and *Swan* is not present in this case.

Finding that the initial encounter and resulting detention were impermissible, the Arkansas Court of Appeals reversed the trial court's denial of the motion to suppress and

held it was clearly against the preponderance of the evidence.

Case: This case was decided by the Arkansas Court of Appeals on May 27, 2009 and is an appeal from the Howard County Circuit Court. The case cite is *Dosia v. State*, ___ Ark. ___ (5-27-2009).

Jeff Harper
City Attorney

Vehicle Forfeiture: Zachary Colt Carter v. State of Arkansas

Zachary Carter and a group of his friends used Carter's vehicle when they burglarized an unfinished hotel. Zachary confessed to the crime and the Fayetteville Police Department seized Zachary's Chevrolet Trailblazer. The vehicle was co-owned by Zachary Carter and his mother, Sherron Carter. Zachary Carter pled guilty to theft and burglary in connection to the crime and he and his mother moved to get their Trailblazer back. The State quickly responded seeking forfeiture of the vehicle. The Carters' argued that they were denied due process because they had not received notice of the forfeiture proceeding.

The Court stated that the State's response to the Carters' motion to return the Trailblazer, (the State's response was served more than a month before the forfeiture hearing), was adequate notification. The Court then explained the various types of forfeiture cases. In drug-related forfeitures the prosecuting attorney must file a complaint to start forfeiture proceedings. See Arkansas Code Annotated §5-64-505. But no such complaint is necessary in forfeitures of vehicles used in committing thefts and burglaries. The State is merely required to

file something notifying the owners of the forfeiture request and asking the court for action. Arkansas Code Annotated §5-5-201 et seq. is the applicable statute in forfeiture cases involving vehicles used in the commission of a theft, burglary, robbery, arson or attempted theft, burglary, robbery or arson. Ark. Code Ann. §5-5-201 states as follows:

**Forfeiture requirement —
Exceptions.**

(a) Upon conviction, any conveyance, including an aircraft, motor vehicle, or vessel, that is used in the commission of a burglary, robbery, theft, or arson, or an attempt to commit a burglary, robbery, theft, or arson, is subject to forfeiture as provided in this subchapter.

(b) However:

(1) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this subchapter unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to the commission or attempt to commit the offense;

(2) No conveyance is subject to forfeiture under this subchapter by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without his or her knowledge or consent and without the knowledge or consent of any person having possession, care, or control of the conveyance with the owner's permission; and

(3) A forfeiture of a conveyance encumbered by a security interest is subject to the security interest of the secured party if the secured party neither had knowledge of nor consented to the use of the conveyance in the commission or attempt to commit the offense.

The statute relating to the seizure of forfeitable items is Ark. Code Ann. §5-5-502 which states as follows:

Seizure of conveyances.

(a) A conveyance subject to forfeiture under this subchapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the conveyance upon a petition filed by the prosecuting attorney of the judicial district.

(b) Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant; or

(2) Any law enforcement agent has probable cause to believe that the conveyance was used in the commission of a burglary, robbery, theft, or arson, or an attempt to commit a burglary, robbery, theft, or arson.

The Carter's then argued that Zachary's mother, Sherron Carter's rights as the Trailblazer's co-owner were unfairly compromised by the forfeiture. However, the Court stated that "Zachary Colt Carter or Sherron M. Carter" held title to the Trailblazer. Therefore either party could transfer title and deprive the other. The

Court held that Zachary's actions divested his mother's interest in the Trailblazer as surely as if he had sold it.

Case: This case was decided by the Arkansas Court of Appeals on April 29, 2009. The case cite is *Carter v. State*, CA 08-1322 (Ark. App. 4-29-2009).

Amber Roe
Deputy City Attorney

**Police Department Awards –
2009 Recipients**

The Springdale City Attorney's Office wishes to congratulate the Police Department employees listed below for the awards they received at the 2009 Awards Banquet.

Distinguished Service Award
Officer Matt Cheshier
Jana Bewley

Meritorious Service Award
Sgt. Josh Kirmer
Officer Kevin Proctor
Detective Michael Hendrix

City Attorney Justice Award
Detective Robert Hendrix
Detective Michael Hendrix

**Washington County Prosecutor's
Office Award**
Detective Al Barrios

Life Saving Award
Detective Robert Hendrix

**Civilian Employee of the Year-Helen
Bowman Award**
Jennyfer Quijada

**Dispatcher of the Year-James H.
Melekian Award**
Crystal Stilwell

Auxiliary Officer of the Year
Loren Sharp

Field Training Officer Excellence Award
Officer Brian Treat

Supervisory Excellence Award
Sgt. Josh Kirmer

**Officer of the Year-Craig Chastain
Award**
Officer Gene Johnson

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