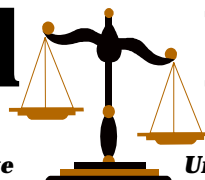




CJI Legal Briefs



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DRIVING WHILE INTOXICATED – SUFFICIENCY OF EVIDENCE TO SUPPORT A CONVICTION

In *Johnson v. State*, CR98-1250, 4/8/99, James I. Johnson argues that there was insufficient evidence of intoxication to support a conviction for DWI. Specifically, he asserts that the only evidence of intoxication was the testimony by Trooper Lemon and the jailer at the Cleburne County Detention Center that Mr. Johnson “had an odor of alcohol about him.”

Arkansas State Trooper Dudley Lemon testified that he observed Mr. Johnson driving erratically and left of the center line and proceeded to pull him over. When Mr. Johnson exited his truck, Trooper Lemon smelled the odor of alcohol about Mr. Johnson’s person and noticed that his eyes were “quite” bloodshot. He also noticed that Mr. Johnson was unable to support himself or stand upright without leaning against the truck and that his speech was very slow and deliberate, as though he was trying to prevent slurring. According to Trooper Lemon, Mr. Johnson attempted to stand at one point, but fell back to his left. Trooper Lemon demonstrated the one-leg stand field sobriety test and then asked Mr. Johnson if he would have any problems performing the test. Mr. Johnson responded by saying “Dudley, don’t do this to me.” Trooper Lemon proceeded to arrest Mr. Johnson for DWI because Mr. Johnson “had ingested enough alcohol that it had affected his driving abilities and his judgment to such an extent that he very well could cause injury to himself or other persons.” Trooper Lemon reviewed his credentials as a certified law enforcement officer, including 22 years with the Arkansas State Police and at least 200 to 300 DWI arrests. Trooper Lemon also testified that Mr. Johnson was offered two more opportunities to perform a field sobriety test at the Cleburne County Detention Center, but his only response was to request an attorney.

Mr. Johnson’s testimony contradicted that of Trooper Lemon on

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several points. Mr. Johnson asserted that he had not consumed any alcohol at the time of his arrest. He further testified that Trooper Lemon offered him only one opportunity to take a field sobriety test and that the offer occurred after he was arrested. Finally, in explanation of his statement "Dudley, don't do this to me," Mr. Johnson stated that he was in a hurry to get to the golf course he managed, where a golf tournament was scheduled that evening.

In affirming the conviction of DWI, the Arkansas Supreme Court stated that observations of police officers with regard to the smell of alcohol and actions consistent with intoxication can constitute competent evidence to support a DWI charge. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996); *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992). Opinion testimony regarding intoxication is admissible. *Johnson*, supra; *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984).

Viewing the evidence in the light most favorable to the State, the evidence was sufficient to support the trial court's finding that Mr. Johnson was intoxicated. Trooper Lemon testified that Mr. Johnson was driving erratically and left of center and smelled of alcohol. He further testified that Mr. Johnson was unable to stand upright without support, was unsteady on his feet and had bloodshot eyes. The evidence also established that Mr. Johnson refused to submit to breath or field sobriety tests. The refusal to be tested is admissible evidence on the issue of intoxication and may indicate the defendant's fear of the re-

sults of the test and the consciousness of guilt. *Medlock v. State*, 332 Ark. 106, 964 S.W.2d 196 (1998). Finally, Mr. Johnson's statement "Dudley, don't do this to me," could be construed as inculpatory. While Mr. Johnson argues that his testimony refuted Trooper Lemon's testimony regarding intoxication, it is well-settled that it is the province of the fact-finder to determine the weight of evidence and the credibility of witnesses. *Johnson*, supra; *Jones v. State*, 305 Ark. 95, 805 S.W.2d 642 (1991).

EVIDENCE – EXCITED UTTERANCE

In *Henry v. State*, CR 98-569, 4/22/99, Bobby Don Henry brings this appeal from his first-degree murder conviction for which he received a sentence of life imprisonment. On December 15, 1996, Henry shot Larry Williams at Henry's house while Henry's wife, Regina, and son, Roman, were present. After the shooting, Regina and Roman ran to the neighbors', Ava and Jim Snows', house, exclaiming that Henry had killed Williams. The Snows allowed Regina to make a 911 call; as a result, law officers came to the Henry house to investigate. Henry was subsequently arrested and charged with capital murder. Before and at trial, Henry raised insanity and self-defense claims, which the jury rejected upon finding Henry guilty of first-degree murder.

Henry first submits that the trial court erred when it allowed the State to introduce the entire 911 tape that contained Regina's

call following Henry's shooting of Williams. At trial, Henry objected to the tape as being irrelevant, but, if relevant, argued the tape was more prejudicial than probative because Regina's voice sounded "hysterical."

The Arkansas Supreme Court stated that the 911 tape at issue here contains relevant evidence. Regina made an excited utterance admissible under A.R.E. Rule 803(2) that she and her son had just witnessed Henry's killing of Williams. The Arkansas Supreme Court has long held that all of the circumstances connected with a particular crime may be shown, even if these circumstances constitute a separate crime. *Regalado v. State*, 331 Ark. 326, 961 S.W.2d 739 (1998); *Collins v. State*, 304 Ark. 587, 804 S.W.2d 680 (1991); see also Arkansas Rules of Evidence, Rule 803(1). In short, Regina, in her excitement and while still under the stress of it, described the startling shooting event that she had just witnessed. In addition, Regina's conversations with others on the tape merely completed the picture and explained where the shooting took place and the dangers she and others might confront following the crime.

Henry further states that, by examining Regina at trial, the State could have proven its case in a much less prejudicial manner than introducing what he labels "the highly prejudicial 911 tape." In this case the tape describes only the shooting with which Henry was charged and the circumstances—none criminal—that followed the shooting event. A second reason for rejecting Henry's arguments is the fact that the con-

versations on the tape were relevant evidence that described the crime. The Arkansas Supreme Court has repeatedly held that the State was entitled to prove its case as conclusively as it could. *Jarrett v. State*, 336 Ark. 526, ____ S.W.2d ____ (1999); *Harris v. State*, 265 Ark. 517, 580 S.W.2d 453 (1979); *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503 (1978).

Henry claimed self-defense and the defense of insanity. Obviously that portion of the 911 tape where Regina referred to Henry being “crazy” was not prejudicial to him since it was consistent with Henry’s insanity defense. In addition, Regina’s expressed fears on the tape that she and others could be in danger tended to strengthen the State’s case that Henry was fully armed and acted with premeditation and deliberation when he shot Williams. This proof, along with Regina’s and Roman’s versions that Williams had no gun, tended to show that Henry did not act in self-defense as he claims. Thus, while relevant evidence may be excluded under A.R.E. Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, that is not the situation here. The trial court did not abuse its discretion in admitting the 911 tape into evidence.



FEDERAL RULES OF EVIDENCE; EXPERT TESTIMONY ON “TECHNICAL” AND OTHER “SPECIALIZED” KNOWLEDGE

In *Kumho Tire Company, Ltd. v. Carmichael*, No. 97-1709, 3/23/99, the United States Supreme Court dealt with the question of whether Federal Rule of Evidence 702 applies only to “scientific” testimony or all expert testimony. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court focused upon the admissibility of scientific expert testimony. The Court pointed out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence “assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” The Court also discussed certain more specific factors, such as testing, peer review, error rates, and “acceptability” in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific “theory or technique.”

In this case the Court was required to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. The Court concluded that *Daubert*’s general holding—setting forth the trial judge’s general “gatekeeping” obligation—applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical”

and “other specialized” knowledge. (See Fed. Rule Evid. 702.) The Court also concluded that a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony’s reliability. But, as the Court stated in *Daubert*, the test of reliability is “flexible,” and *Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. See *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997) (courts of appeals are to apply “abuse of discretion” standard when reviewing district court’s reliability determination). Applying these standards, the Court determined that the District Court’s decision in this case—not to admit certain expert testimony—was within its discretion and therefore lawful.

FIFTH AMENDMENT

In *Mitchell v. United States*, No. 97-7541, 4/5/99, the United States Supreme Court was faced with two questions relating to a criminal defendant’s Fifth Amendment privilege against self-incrimination. The first is whether, in the federal criminal system, a guilty plea waives the privilege in the sentencing phase of the case. The Court held the plea is not a waiver of the privilege at sentencing. The second question is whether, in determining facts

about the crime which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence. The Court held a sentencing court may not draw the adverse inference.

The United States Supreme Court reasoned that, in the federal criminal system, a guilty plea does not waive the self-incrimination privilege at sentencing. The well-established rule that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details is justified by the fact that a witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the statements' trustworthiness and diminishing the factual inquiry's integrity. The privilege is waived for matters to which the witness testifies, and the waiver's scope is determined by the scope of relevant cross-examination. *Brown v. United States*, 356 U.S. 148, 154. The concerns justifying cross-examination at trial are absent at a plea colloquy, which protects the defendant from an unintelligent or involuntary plea. There is no convincing reason why the narrow inquiry at this stage should entail an extensive waiver of the privilege. A defendant who takes the stand cannot reasonably claim immunity on the matter which he himself has put in dispute, but the defendant who pleads guilty takes matters out of dispute, leaving little danger that the court will be misled by selective disclosure. Treating a guilty plea as a waiver of the privilege would be a grave encroachment on defendants' rights. It

would allow prosecutors to indict without specifying a drug quantity, obtain a guilty plea, and then put the defendant on the stand at sentencing to fill in the quantity. To enlist a defendant as an instrument of his or her own condemnation would undermine the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power.

Before sentencing, a defendant may have a legitimate fear of adverse consequences from further testimony, and any effort to compel that testimony at sentencing "clearly would contravene the Fifth Amendment." The Fifth Amendment prevents a person from being compelled in any criminal case to be a witness against himself. To maintain that sentencing proceedings are not part of "any criminal case" is contrary to the Federal Rules of Criminal Procedure and to common sense. A sentencing court may not draw an adverse inference from a defendant's silence in determining facts relating to the circumstances and details of the crime. The normal rule in a criminal case permits no negative inference from a defendant's failure to testify. See *Griffin v. California*, 380 U.S. 609, 614. A sentencing hearing is part of the criminal case, and the concerns mandating the rule against negative inferences at trial apply with equal force at sentencing. There is little doubt that the rule against adverse inferences has become an essential feature of the nation's legal tradition, teaching that the government must prove its allegations while respecting the

defendant's individual rights. The Court expresses no opinion on the questions whether silence bears upon the determination of lack of remorse, or upon acceptance of responsibility for the offense for purposes of a downward adjustment under the United States Sentencing Guidelines.

**FORFEITURE –
AUTHORITY FOR
DISPOSITION OF SEIZED
PROPERTY VESTED IN THE
CIRCUIT COURT**

*In The Matter of \$ 3,166,199,
Arkansas Highway Police v.
Crittenden County Prosecuting
Attorney's Office*, No. 98-957,
3/18/99, is a dispute between state and local authorities over the proper jurisdiction for forfeiture proceedings. The case required the Arkansas Supreme Court to interpret Ark. Code Ann. § 5-64-505 (Repl. 1997).

At approximately 8 p.m. on March 7, 1998, Roberto V. Zamarripa, a truck driver, stopped at the Lehi Weigh Station on Interstate 40 in Crittenden County for a routine check by the Arkansas Highway Police ("AHP"). Upon entering the cab and sleeper section of the truck, Officer J.R. Smith, the searching officer, discovered alcohol, multiple log books with entry violations, and several suitcases. When Officer Smith opened the suitcases, he discovered currency in the amount of \$3,166,199. AHP immediately notified its headquarters, which contacted Ray Davis, the liaison officer for the Little Rock office of the Drug Enforcement Agency (DEA). Davis "adopted" the sei-

zure, pursuant to federal forfeiture law, sometime between 8:30 p.m. to 10 p.m. and agreed with the AHP that the DEA would process the money.

At approximately 10:20 p.m. to 10:30 p.m., Deputy Prosecuting Attorney James C. Hale, Jr. arrived on the scene with his son, James C. Hale, III, who handles the contract with Crittenden County to pursue state forfeiture actions. The Hales arranged for the funds to be kept in a Marion bank overnight. The Hales directed AHP on proper preservation and chain-of-custody concerns regarding the seized contraband. After giving these directions, the Hales left the scene and AHP transported the money and deposited it in the Marion bank that night. The following day, a Sunday, bank employees counted the money under the supervision of AHP. A "shake test" was also conducted to determine if drugs were present on the money.

On Monday, March 9, 1998, Hale Jr. filed a notice of seizure of forfeiture against Zamarripa, the truck driver, for an "uncontested" forfeiture proceeding in Crittenden County Circuit Court. At approximately the same time, AHP retrieved the money from the bank in Marion and transported it to Little Rock to place in AHP's vault. Sometime between March 10, 1998, and March 16, 1998, the DEA took physical custody of the money, completing its paperwork confirming the initiation of DEA forfeiture proceedings.

On March 18, 1998, the Crittenden County Circuit Court entered an order directing AHP to deposit the money in a bank to be wired to the Crittenden County Prosecuting Attorney's drug-asset

account. AHP contested this order.

One of the issues before the Arkansas Supreme Court was whether or not the Crittenden County Prosecuting Attorney's Office was the "seizing law enforcement agency" within the meaning of the Arkansas forfeiture statute. The Arkansas Supreme Court stated that the AHP was the seizing law enforcement agency as that term is used in Ark. Code Ann. § 5-64-505 (Repl. 1997). Though not specifically defined in the statute, it is apparent from the context that police rather than prosecutors are contemplated by the term. It is undisputed that AHP, for its role in the seizure, is entitled to some portion of the money pursuant to Ark. Code Ann. § 5-64-505(k)(2)(iii). The amount will be impacted by pending litigation in the courts.

The Arkansas Supreme Court then stated that the crucial issue before this court is the interpretation of our forfeiture statute, § 5-64-505. The Arkansas statute provides in pertinent part:

(d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the director or seizing law enforcement agency subject only to the orders and decrees of the circuit court having jurisdiction over the property seized.

The most critical point on appeal concerns whether AHP's seizure of the money on the night of March 7, 1998, and subsequent DEA adoption resulted in a federal seizure or state seizure. AHP contends it resulted in a federal seizure. The Crittenden County

Prosecuting Attorney's Office contends that due to the "turnover" nature of our statute, a state seizure occurred and that the money remains under the jurisdiction of the circuit court.

The Arkansas Supreme Court then stated that this statute vests authority for disposition of seized property in the circuit court. Absent an order of the appropriate circuit court, transfer of seized property by the seizing law enforcement agency is invalid. The Arkansas Supreme Court then affirmed the Crittenden County Court's attempted exercise of jurisdiction over the seized property pursuant to § 5-64-505.

JAILS AND PRISONS

In *Smith v. Moody*, CA8, No. 99-1427, 3/3/99 [Unpublished], Steven Lee Smith filed a 42 U.S.C. § 1983 civil action against Justin Moody of the Clay County, Arkansas, Detention Center. The Eighth Circuit Court of Appeals concluded that dismissal of the action was warranted because Smith failed to allege any physical injury in his complaint. The Court stated that under 42 U.S.C. § 1983 a federal civil action cannot be brought by a prisoner for emotional injury without a showing of physical injury.

PORTABLE BREATH TESTS

In *United States v. Iron Cloud*, CA8, No. 98-2430, 3/19/99, the Eighth Circuit Court of Appeals held that a portable breath

test (PBT) was not reliable as anything more than a screening test to be used by law enforcement for a probable cause determination on the issue of intoxication.

**SEARCH AND SEIZURE –
AFFIDAVIT FOR SEARCH
WARRANT DESCRIBING
LAW ENFORCEMENT
OFFICER’S INFERENCES
OR DEDUCTIONS FROM
EXPERIENCE**

In *United States v. Johnson*, CA8, No. 98-1868, 10/22/98, Johnson was sentenced to 70 months imprisonment, five years supervised release, and a special assessment of \$ 100.00 for conspiracy to distribute, and possession with intent, to distribute methamphetamine. Johnson argues that the district court erred in denying her motion to suppress certain evidence seized pursuant to a search warrant from an Express Mail package.

On May 31, 1996, United States Postal Inspection Officer G.G. Vajgert intercepted and detained an Express Mail package sent by Johnson from the Los Angeles, California, International Airport on May 30, 1996. The package fit the characteristics of an Express Mail/ Narcotics Profile developed to detect the use of Express Mail service for drug trafficking. The return and destination labels were hand-written, the package was mailed from one individual (Johnson) to another individual at the same address, the package was mailed from a narcotics “source” state (California) and the return address zip code was

different from the accepting zip code. The package was presented to a drug dog. The drug dog “alerted” to the package, indicating that the package contained a controlled substance.

Vajgert applied for a search warrant to search the package on the basis of this information. A federal magistrate judge issued the search warrant. Vajgert opened the package and discovered and seized 3.8 ounces of methamphetamine. After further investigation, the officers arrested Johnson. The indictment charged her with conspiracy and distribution of methamphetamine. Johnson moved to suppress the methamphetamine on the grounds that there was no reasonable suspicion of criminal activity to intercept and detain the Express Mail package and there was no probable cause to support the issuance of the search warrant. The magistrate judge found that there was reasonable suspicion of criminal activity to support the interception and detention of the package. The magistrate judge also found that there was probable cause to support the issuance of a search warrant. The district court adopted the recommendations of the magistrate judge. Johnson entered a conditional guilty plea to the conspiracy count and appealed the denial of the motion to suppress.

The Eighth Circuit Court of Appeals stated that the record lacks a description of Inspector Vajgert’s inferences or deductions from his experience. These might indicate that the factors in the Express Mail/Narcotics profile are consistent with characteristics of packages found to contain contraband, and that the package in question might contain contraband. The

inspector did not testify at the suppression hearing, and his affidavit did no more than state that he had eight years of experience as a postal inspector along with some training courses and that the package in question met the Express Mail/Narcotics Profile. The Supreme Court has made it particularly clear that “based on the whole picture, the detaining officers must have a particularized and objective basis for suspecting a particular package of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). In this case, there was no articulation of how the officer’s experience bore upon his appraisal of the package in light of the profile. Law enforcement officers are permitted to draw inferences and deductions that might well elude an untrained person. Nevertheless, those inferences and deductions must be explained. Specifically, the Fourth Amendment requires an officer to explain why the officer’s knowledge of particular criminal practices gives special significance to the apparently innocent facts observed.

The Court stated that they knew nothing of Inspector Vajgert’s experience with handling packages that match the profile, his assessment of which combinations of profile characteristics are indicative of criminal activity, or whether that assessment is well-founded in light of the inspector’s experience. The government has not provided a basis for Inspector Vajgert’s suspicion, that is, the use of his experience in articulating a particularized and objective basis for the search. Nor has the government proven that the inspector’s suspicion was objectively reasonable. All the Court has is the un-

adorned, unexplained Express Mail/Narcotics Profile.

The Court stated that this case was in stark contrast to *United States v. Dennis*, 115 F.3d 524 (7th Cir. 1997), because the court in *Dennis* did not rely upon the profile alone. The officer in *Dennis* explained that based upon his particular experience as an investigator, the profile factors were consistent with the characteristics of packages found to contain contraband. Because of the high cost of Express Mail, explained the officer, only about five percent of such mail is personal correspondence. Moreover, because of the speed and reliability of Express Mail, as well as a free telephone tracking service, drug traffickers frequently use the service to send personal correspondence containing contraband. The officer therefore concluded that personal correspondence sent via Express Mail is likely to contain illegal drugs. Under these circumstances (including the other factors in the profile), the court held that the postal inspector's suspicion "was reasonable and justified detaining the Express Mail package."

In *United States v. Dennis*, supra, Judge Ripple's dissent correctly stressed that the use of the profile in a decision to detain the mail "must be an exercise of defensible professional law enforcement judgment before it can justify detention of a package." The presence of several profile characteristics "without any particularized assessment of their meaning" gives no legitimate basis for detention. The record before this Court presents no such assessment, leaving a profile whose character-

istics appear as consistent with innocence as with criminal activity.

None of the particularized facts relied upon by the government was inherently suspicious and each can be readily characterized as conduct typical of a broad category of innocent people. For example, a business or vacation traveler may address labels by hand, using his or her address or the destination address as the return address, and mail packages from airport postal stations. California is a "source" state for narcotics. However, it is also the most populous state in the country, as well as one of the most frequently visited states, for business and pleasure, facts which undermine the significance of its role as a "source" state as an articulable basis for reasonable suspicion of criminal activity. See *United States v. Beck*, 140 F.3d at 1137-38.

Characteristics consistent with innocent use of the mail can, when taken together, give rise to reasonable suspicion. See *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (combination of innocent travel factors). However, these particularized facts, none of which is inherently suspicious, do not constitute reasonable suspicion of criminal activity, even considered together, for intercepting and detaining the package sent by Johnson. The record does not contain any particularized assessment of their significance for purposes of determining reasonable suspicion. Accordingly, the decision of the district court denial of the motion to suppress was reversed and the case was remanded.

**SEARCH AND SEIZURE –
CORROBORATED
ANONYMOUS TIP
PROVIDES BASIS FOR
STOP**

In *United States v. Cason*, CA8, No. 98-3714, 3/18/99 [Unpublished], Minneapolis police received an anonymous tip about the delivery of crack cocaine to Minneapolis from Chicago. The tipster identified the two men making the delivery as Clemmie Genero Cason and Billy Smith, described their physical characteristics and gave the address where the crack would be delivered. The tipster said the men would be driving a 1997 black Saab 900 rented from a certain company with a certain license number, and reported when Cason and Smith had left Chicago and when they should arrive in Minneapolis. Police checked the license number provided by the tipster and learned the license was for the car named, the car was owned by the specified rental company and the car had been rented by Cason in Chicago. Police also discovered a Billy Smith had given the delivery address as his own during a contact with law enforcement officers.

Around the time of the car's expected arrival, police set up surveillance near the freeway exit that would normally be used by someone traveling from Chicago to the delivery address. When the officers saw a black Saab traveling towards the place of delivery, they followed the car. After confirming the license number was the one given by the tipster, they stopped the Saab. An officer approached the driver's side window and saw

two men matching the tipster's descriptions. At the officer's request, the driver, Billy Smith, got out of the car. Because Smith said he did not have a valid driver's license, the officer arrested Smith for driving without a license. In a pat search, the officer felt lumps in Smith's pants pocket. As the officer believed based on his experience, the lumps turned out to be small plastic bags of marijuana. The officer searched the car incident to Smith's arrest and found crack cocaine in the car's hatchback area. The car's passenger, Cason, was charged with conspiracy to distribute and to possess with intent to distribute crack cocaine and aiding and abetting possession with intent to distribute crack cocaine.

Cason asserts the officers lacked a basis for stopping the Saab or for searching it. The Eight Circuit Court of Appeals disagreed. The Court stated that under the totality of the circumstances, the investigative stop did not violate the Fourth Amendment. See *United States v. Johnson*, 64 F.3d 1120, 1124-25 (8th Cir. 1995). Based on the detailed, anonymous tip that the police had extensively corroborated, the police had a reasonable, articulable suspicion that a drug crime was being committed when they stopped the Saab. After stopping the car, officers had probable cause to arrest Smith for driving without a license. See *United States v. Caldwell*, 97 F.3d 1063, 1067 (8th Cir. 1996). The officers could then properly search the passenger compartment of the car, including the hatchback area where the crack cocaine was found, incident to Smith's arrest

SEARCH AND SEIZURE – NIGHTTIME SEARCHES

In *Fouse v. State*, No. CR98-891, 3/18/99, the Arkansas Supreme Court discussed nighttime searches. Rule 13.1(b) of the Arkansas Rules of Criminal Procedure provides the requirements for a valid application for a search warrant and the totality-of-the-circumstances approach to be taken in determining whether reasonable cause exists for the search.

Nighttime searches are treated differently under Arkansas criminal rules and require that the judicial officer find reasonable cause that at least one of three listed exigent circumstances exists. Rule 13.2(c) provides:

“Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:

(i) the place to be searched is difficult of speedy access; or

(ii) the objects to be seized are in danger of imminent removal; or

(iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy; the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty

(60) days from the date of issuance.”

The Arkansas Supreme Court stated that they had invalidated nighttime search warrants on several occasions when facts supporting one or more exigent circumstances have been found wanting. See, e.g., *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991); *State v. Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991); *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990); *State v. Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980). In *Richardson v. State*, supra, the court held that a nighttime search warrant based on a conclusory statement in the police detectives affidavit that pornographic photographs and other evidence were in danger of being removed was issued in error. In holding that the police detectives' language about removal was conclusory, the court said: “We have consistently held that a factual basis supporting a nighttime search is required as a prerequisite to the issuance of a warrant authorizing a nighttime search.... We have held conclusory language unsupported by facts is insufficient to justify a nighttime search.... Given that there was nothing to give reasonable cause to believe the items specified in the search warrant would be disposed of, removed, or hidden before the next morning, issuance of the nighttime search warrant was in error.” Id. at 518-519, 863 S.W.2d at 576.

Likewise, in *Garner v. State*, supra, the police officers' affidavit in support of the search warrant for drugs stated that the dwelling to be searched was located 12.5

miles from the courthouse; a person arrested for possession of drugs had stated that he bought the drugs from the appellant; the sheriff's office had received information in the past 60 days that several purchases of marijuana had been made from the appellant; and a person arrested for possession of marijuana stated that he had observed a quantity of marijuana on the appellant's property. The judge issued a nighttime search warrant and checked two boxes on the warrant: "the place to be searched is difficult of speedy access" and "the warrant can only be safely or successfully executed at night time or under circumstances the occurrence of which is difficult to predict with accuracy." In reversing the trial court's denial of appellant's motion to suppress, the court said: Conclusory statements do not suffice to establish the requisite factual basis for reasonable cause.... The Court held that the two statements 'checked' were conclusory and unsupported by sufficient facts and, accordingly, did not establish reasonable cause for a nighttime search. Without sufficient factual premises, it was impossible for the municipal judge to make an intelligent finding of reasonable cause to justify a nighttime search." *Id.* at 357-358, 820 S.W.2d at 449.

The Arkansas Supreme Court has also upheld the issuance and execution of a nighttime search warrant, when facts evidencing an exigent circumstance were present. See, e.g., *Langford v. State*, supra; *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996). In *Langford v. State*, for example, the affidavit given in support of the nighttime search warrant con-

tained four exigent circumstances: (1) there were drugs currently located at the appellant's residence that were packaged and maintained in a manner that their destruction or removal could be easily accomplished; (2) the appellant had threatened one of the informants in the case with a weapon, and was believed to be armed and dangerous, making the element of surprise inherent with a nighttime search essential for the safety of the officers executing the warrant; (3) the affiant had information that the appellant would be leaving on September 29, 1993, thus giving rise to the belief that the drugs would be removed; and (4) the residence was located on a hill overlooking the road, making speedy access impossible. The court held that these statements contained in the affidavit presented a sufficient factual basis to support the trial court's decision to deny suppression of the evidence seized in the nighttime search.

Similarly, in *Owens v. State*, supra, the affidavit in support of the issuance of a nighttime search warrant stated in part:

Access to the Dean Owens residence can be made only by a one-lane dirt road which is filled with potholes, currently very muddy and the approach of vehicles can be observed from the residence....

Informant information has revealed that Dean and Christie (Judy) Owens have been under the constant influence of methamphetamine for the past six (6) months and have because of this use exhibited characteristics consistent with a fear of being watched and approached by law enforcement authorities at their residence. In-

formation addressed in Paragraph Four of this affidavit supports the possibility of automatic firearm(s) being in the possession of the occupants of the Dean Owens residence. Therefore, safe and speedy access to the Dean Owens residence by authorities can only be obtained under the cover of darkness and during an hour when it would be reasonable to believe that occupants of the residence would be less attentive to approaching officers. Speedy access is necessary both for the protection and safety of approaching officers as well as occupants of the residence and to ensure that objects to be seized are not destroyed or removed in that the residence is equipped with indoor plumbing which could easily facilitate the flushing or washing of methamphetamine out of the residence. *Id.* at 117, 926 S.W.2d at 654. We affirmed the issuance of the nighttime search warrant based on the supporting exigent circumstances set out in the affidavit.

In the case before us, the portion of the affidavit prepared by Detective Oser that touched on imminent removal read as follows:

It has been my experience and I know that the process of manufacturing methamphetamine takes approximately four hours and that the chemicals used to manufacture methamphetamine are volatile and subject to explode or at the least cause a fire and can be a danger to surrounding houses in a residential setting such as this. There is also an imminent danger that the items and hardware used to manufacture methamphetamine may be moved or destroyed and the methamphetamine product may be transported and/or sold.

The Arkansas Supreme Court viewed these comments by Detective Oser as conclusory and as falling more readily within the *Richardson/Garner* line of cases where it held that factual support for a nighttime search had not been forthcoming. The Arkansas Supreme Court did not agree with the trial court that a strong odor of ether detected at the Fouse residence at 9:00 p.m. on December 22, 1997, was a reasonable basis for concluding that methamphetamine was to be removed or sold or both within the next four hours and that a nighttime search was justified. The Court then held that not only was the search warrant deficient under Ark. R. Crim. P. 13.2(c) but that probable cause was lacking to justify a nighttime search.

**SEARCH AND SEIZURE –
STOP AND FRISK OF
OCCUPANT OF VEHICLE;
CONSENT SEARCH**

In *Muhammad v. State*, No. CR 99-31, 4/15/99, Arkansas State Trooper Jeffrey L. Thomas stopped Muhammad's vehicle on Interstate 30 on 3/21/96, outside of Texarkana heading east toward Little Rock. Thomas initiated the stop after observing Muhammad following an 18-wheel tractor-trailer rig too closely. At the suppression hearing, Thomas testified that Muhammad, dressed in slacks and a loose pullover knit shirt, was "nervous," "his lips were trembling," and he stood and sat very erect throughout the encounter. Thomas initially questioned Muhammad about where he was

traveling and Muhammad answered that he was going to Little Rock for his father's birthday. Thomas asked how old his father was, and Muhammad apparently was unable to give an exact age, although he responded that his father was "60 something." Pursuant to standard police procedure, Thomas ran a check through the National Crime Information Computer ("NCIC") and the Interstate Identification Index (III) on Muhammad's license and discovered that Muhammad was a convicted felon currently on parole. Muhammad's prior felonies included convictions for aggravated robbery and possession of illegal drugs.

After Thomas ran the NCIC and III checks, he decided to give Muhammad a warning citation instead of a ticket. Thereafter, Thomas asked Muhammad to get into his cruiser to avoid the road noise and requested permission to search Muhammad's car. Thomas presented Muhammad with a consent form to complete to allow the search. Muhammad signed the form, thus giving his permission for the search. At the suppression hearing, Thomas testified that he based his decision to search the car on Muhammad's nervousness and his prior criminal history. Thomas specifically noted, however, that he did not have probable cause to search Muhammad's car, but that he thought he might find illegal drugs in the car. Thomas then called for back-up so that another Trooper would be present while he conducted the search.

While waiting for the back-up unit, Thomas directed Muhammad to step out of and to the front of Thomas's cruiser, and

assume the position to be frisk-searched. Muhammad did so, and Thomas began a "pat-down" search of Muhammad's outer clothing. Upon reaching Muhammad's belt-line, Thomas felt the corner of some object which Thomas believed to be a firearm. Muhammad attempted to remove Thomas's hand from the object and Thomas then ordered Muhammad to place his hands behind his head. Thomas retrieved the object, which appeared to be a brick of compressed material wrapped in duct tape. Later examination determined it to be illegal drugs. Thomas found no weapon.

On December 18, 1996, Muhammad filed a Motion to Suppress the evidence obtained in the "pat-down" search, contending that the search was unlawful. The Miller County Circuit Court held a suppression hearing on September 9, 1997. Officer Thomas was the sole witness. At the conclusion of the hearing, the circuit judge denied Muhammad's motion to suppress, and Muhammad subsequently entered a conditional guilty plea pending the outcome of his appeal of the denial of his motion to suppress. The trial court entered a judgment and commitment order on September 15, 1997, sentencing Muhammad to 40 years in prison, finding him guilty of manufacture, delivery and possession of a controlled substance. Muhammad appealed to the Arkansas Court of Appeals and the appellate court affirmed the trial court's denial of the motion to suppress in an opinion on December 23, 1998. Thereafter, Muhammad petitioned the Arkansas Supreme Court for review of the Court of

Appeals' decision. In his petition, Muhammad specifically argues that the Court of Appeals' decision is contrary to that court's and the Arkansas Supreme Court's prior decisions regarding "pat-down" searches during traffic stops.

This case involves the interaction of a few basic facts with the Arkansas Rules of Criminal Procedure, Arkansas case law and United States Supreme Court cases regarding the Fourth Amendment's protections against unlawful searches. There is no dispute in this case about the State Trooper's justification for pulling Muhammad over for following the tractor-trailer rig too closely. Clearly, Thomas had the authority to do so. See *Whren v. United States*, 116 S.Ct. 1769 (1996). The crucial issue is whether, after Thomas issued the warning ticket, he had a sufficient basis to conduct the "pat-down" search consistent with the Fourth Amendment.

The Fourth Amendment of the United States Constitution guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." *U.S. Constitution, Amendment 4*. This is a fundamental and precious right that the courts must protect. However, as the United States Supreme Court has indicated, this provision does not forbid all searches and seizures, but only "unreasonable searches and seizures." *Terry v. Ohio*, 392 U.S. 1, 9 (1968), quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960). In *Terry*, a police officer was patrolling downtown Cleveland, Ohio, when he came upon three men standing on a street corner.

The officer testified that he watched the men for some time, and found their actions suspicious. As such, he approached the men on the street and began questioning them. When his inquiries were met with mumbled responses, the officer quickly spun Terry around and began a "pat-down" search of Terry's outside clothing, finding a revolver in a pocket. Ultimately, the officer found another gun on another man's person. He arrested the men after taking them to the station.

In analyzing the search in which the officer initially had no probable cause to arrest the defendants, the United States Supreme Court noted that "a search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation." *Terry*, supra, 392 U.S. at 25-26. In making this statement, the Supreme Court upheld the lawfulness of the search based on the need to allow an officer to search a person if the officer reasonably fears that the suspect is armed and dangerous, and such a search is necessary to protect himself and others. The standard used to determine reasonableness in such a situation is "whether a reasonable prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.*, 392 U.S. at 27. In making such a determination, the *Terry* court noted that "specific reasonable inferences" drawn from the facts in light of the officer's experience may be used; however, "inchoate and unparticularized suspicion or 'hunch'" will not suffice.

Since *Terry*, the Arkansas Legislature has enacted statutes and the Arkansas Supreme Court has promulgated rules enforcing *Terry's* teachings to create a working web of flexible responses for stop and search situations in this state. The starting point for this analysis is two Arkansas Rules of Criminal Procedure, Rule 3.1 and Rule 3.4. Rule 3.1 details two situations when a police officer may stop and detain a person who he "reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property...." In connection with Rule 3.1, Rule 3.4 allows that officer to conduct a search of the detained person's outside clothing, a "pat-down" search, for "any weapon or other dangerous thing which may be used against the officer or others." Such a search may only be conducted if the officer "reasonably suspects that the person is armed and presently dangerous to the officer or others." Arkansas Rules of Criminal Procedure, Rule 3.4. "Reasonable suspicion" is defined in Rule 2.1 as:

"A suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion."

Arkansas Rules of Criminal Procedure, Rule 2.1; See also, Ark. Code Ann. § 16-81-202 (1987). The Arkansas Legislature has codified factors to be considered when determining whether an of-

<p>ficer has grounds to “reasonably suspect” a person who has been detained pursuant to Rule 3.1. These grounds include, but are not limited to, the following:</p> <ol style="list-style-type: none"> (1) The demeanor of the suspect; (2) The gait and manner of the suspect; (3) Any knowledge the officer may have of the suspect’s background or character; (4) Whether the suspect is carrying anything, and what he is carrying; (5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors; (6) The time of the day or night the suspect is observed; (7) Any overheard conversation of the suspect; (8) The particular streets and areas involved; (9) Any information received from third persons, whether they are known or unknown; (10) Whether the suspect is consorting with others whose conduct is “reasonably suspect”; (11) The suspect’s proximity to known criminal conduct; (12) Incidence of crime in the immediate neighborhood; (13) The suspect’s apparent effort to conceal an article; 	<p>(14) Apparent effort of the suspect to avoid identification or confrontation by the police.</p> <p>Ark. Code Ann. § 16-81-203 (1987).</p> <p>It should first be noted that a search under Rule 3.4 cannot be lawfully undertaken unless justification for detaining the suspect exists under Rule 3.1. In part, Muhammad argues that after he was given a warning citation, the reason for the stop ended and, unless another situation arose under Rule 3.1, he should have been allowed to leave. Instead, Thomas asked to search his car, and Muhammad agreed, thus extending the amount of time he was allowed to be lawfully detained by his own permission. Had Muhammad refused to allow the search of the car, he should have been released since Thomas himself admitted he did not have probable cause to search. However, to Muhammad’s own detriment, he extended the stop by authorizing the search. See, <i>U.S. v. Beatty</i>, 1999 WL 124071 (8th Cir. 1999).</p> <p>Once Muhammad gave Thomas consent to search his automobile, the attendant circumstances changed significantly. Most notably, the officer’s concern for his physical safety justifiably rose as he prepared to devote his attention to the search of the vehicle and not to the suspect’s conduct. Thomas’s concern for his safety was evident from his testimony at the hearing.</p> <p>The Arkansas Supreme Court concluded that Trooper Thomas’s search of Muhammad after Muhammad’s consent to a vehicle search was reasonable given the totality of the circumstances, which included the changed nature</p>	<p>of the stop once a search was authorized, Muhammad’s persistent nervousness, unusual posture, manner of dress and criminal record that included illegal narcotics and aggravated robbery.</p> <hr/> <p style="text-align: center;">SEARCH AND SEIZURE – VEHICLE SEARCH; SEARCH OF PASSENGER’S PERSONAL BELONGINGS INSIDE AN AUTOMOBILE WHERE PROBABLE CAUSE EXISTS TO SEARCH THE VEHICLE</p> <p>In <i>Wyoming v. Houghton</i>, No. 98-184, 4/5/99, the United States Supreme Court was presented with the question of whether police officers violate the Fourth Amendment when they search a passenger’s personal belongings inside an automobile that they have probable cause to believe contains contraband.</p> <p>In the early morning hours of July 23, 1995, a Wyoming Highway Patrol officer stopped an automobile for speeding and driving with a faulty brake light. There were three passengers in the front seat of the car: David Young (the driver), his girlfriend and Sandra Houghton. While questioning Young, the officer noticed a hypodermic syringe in Young’s shirt pocket. He left the occupants under the supervision of two backup officers as he went to get gloves from his patrol car. Upon his return, he instructed Young to step out of the car and place the syringe on the hood. The officer then asked Young why he had a syringe; with refreshing candor, Young replied that he used it to take drugs.</p> <p>At this point, the backup of-</p>
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ficers ordered the two female passengers out of the car and asked them for identification. Houghton falsely identified herself as “Sandra James” and stated that she did not have any identification. Meanwhile, in light of Young’s admission, the officer searched the passenger compartment of the car for contraband. On the back seat, he found a purse, which Houghton claimed as hers. He removed from the purse a wallet containing respondent’s driver’s license, identifying her properly as Sandra K. Houghton. When the officer asked her why she had lied about her name, she replied: “In case things went bad.”

Continuing his search of the purse, the officer found a brown pouch and a black wallet-type container. Houghton denied that the former was hers and claimed ignorance of how it came to be there; it was found to contain drug paraphernalia and a syringe with 60 ccs of methamphetamine. Houghton admitted ownership of the black container, which was also found to contain drug paraphernalia and a syringe (which Houghton acknowledged was hers) with 10 ccs of methamphetamine. The officer also found fresh needle-track marks on Houghton’s arms. He placed her under arrest.

Houghton was charged with felony possession of methamphetamine. After a hearing, the Wyoming trial court denied her motion to suppress all evidence obtained from the purse as the fruit of a violation of the Fourth and Fourteenth Amendments. The court held the officers had probable cause to search the car for contraband and, by extension, any containers therein that could hold such con-

traband. A jury convicted Houghton as charged. The Wyoming Supreme Court reversed the conviction holding the search of Houghton’s purse violated the Fourth and Fourteenth Amendments. The United States Supreme Court granted certiorari and reversed the holding of the Wyoming Supreme Court.

The United States Supreme Court stated that it is uncontested in the present case that the police officers had probable cause to believe there were illegal drugs in the car. *Carroll v. United States*, 267 U.S. 132 (1925), similarly involved the warrantless search of a car that law enforcement officials had probable cause to believe contained contraband—in that case, bootleg liquor. The Court held that “contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant” where probable cause exists. *Carroll*, supra, at 153.

The Court noted that in *United States v. Ross*, 456 U.S. 798 (1982) they held reasonable the warrantless search of a paper bag and leather pouch found in the trunk of the defendant’s car by officers who had probable cause to believe that the trunk contained drugs. *Ross* summarized its holding as follows: “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” And later United States Supreme Court cases describing *Ross* have characterized it as applying broadly to all containers within a car, without qualification as to ownership. See *California v. Acevedo*, 500 U.S. 565,

572 (1991) where the Court in *Ross* took the critical step of saying that closed containers in cars could be searched without a warrant because of their presence within the automobile.” Also see, *United States v. Johns*, 469 U.S. 478, 479-480 (1985) stating *Ross* “held that if police officers have probable cause to search a lawfully stopped vehicle, they may conduct a warrantless search of any containers found inside that may conceal the object of the search.”

The Court stated that effective law enforcement would be appreciably impaired without the ability to search a passenger’s personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car. As in all car search cases, the “ready mobility” of an automobile creates a risk that the evidence or contraband will be permanently lost while a warrant is obtained. *California v. Carney*, 471 U.S. 386, 390 (1985). In addition, a car passenger may often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing. *Maryland v. Wilson*, 519 U.S. 408, 413-414 (1997). A criminal might be able to hide contraband in a passenger’s belongings as readily as in other containers in the car, see, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 102 (1980)—perhaps even surreptitiously, without the passenger’s knowledge or permission.

To be sure, these factors favoring a search will not always be present, but the balancing of interests must be conducted with an eye to the generality of cases. To require that the investigating officer

have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly permission, is to impose requirements so seldom met that a "passenger's property" rule would dramatically reduce the ability to find and seize contraband and evidence of crime. Of course these requirements would not attach (under the Wyoming Supreme Court's rule) until the police officer knows or has reason to know that the container belongs to a passenger. But once a "passenger's property" exception to car searches became widely known, one would expect passenger-confederates to claim everything as their own. And one would anticipate a bog of litigation—in the form of both civil lawsuits and motions to suppress in criminal trials—involving such questions as whether the officer should have believed a passenger's claim of ownership, whether he should have inferred ownership from various objective factors, whether he had probable cause to believe that the passenger was a confederate, or to believe that the driver might have introduced the contraband into the package with or without the passenger's knowledge. When balancing the competing interests, the Courts determinations of "reasonableness" under the Fourth Amendment must take account of these practical realities. The Court thought they mitigated in favor of the needs of law enforcement and against a personal-privacy interest that is ordinarily weak.

Finally, if the Court were to

invent an exception from the historical practice that Ross accurately described and summarized, it is perplexing why that exception should protect only property belonging to a passenger, rather than (what seems much more logical) property belonging to anyone other than the driver. Surely Houghton's privacy would have been invaded to the same degree whether she was present or absent when her purse was searched. And surely her presence in the car with the driver provided more, rather than less, reason to believe that the two were in league. It may ordinarily be easier to identify the property as belonging to someone other than the driver when the purported owner is present to identify it—but in the many cases (like *Ross* itself) where the car is seized, that identification may occur later, at the station-house; and even at the site of the stop one can readily imagine a package clearly marked with the owner's name and phone number, by which the officer can confirm the driver's denial of ownership. The sensible rule (and the one supported by history and case law) is that such a package may be searched, whether or not its owner is present as a passenger or otherwise, because it may contain the contraband that the officer has reason to believe is in the car.

The United States Supreme Court then held that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search.



SEARCH AND SEIZURE – VEHICLE SEARCH; SMELL OF MARIJUANA AS PROBABLE CAUSE; CONTAINERS

In *McDaniel v. State*, CR 99-166, 5/6/99, the Arkansas Supreme Court was faced with issues arising from the search of locked toolboxes and a briefcase in the bed of a pickup truck which were searched based on an officer's assertion that he smelled marijuana. The Court upheld the validity of the vehicle search and the seizure of the marijuana from the toolbox.

The Arkansas Supreme Court stated that where police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search. The scope of the search 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. *United States v. Ross*, 456 U.S. at 798 (1982).

This rule put to rest several different distinctions between searches of vehicles and the containers they may contain. See, *United States v. Chadwick*, 433 U.S. 1 (1977); *Arkansas v. Sanders*, 422 U.S. 753 (1979). Since *Ross*, the Court has also refined the issue of whether a police officer must obtain a warrant to open a container found in the trunk of a car when the search only extends to that container, and determined that no warrant is necessary should

probable cause exist to believe that the container holds contraband. See, *California v. Acevedo*, 500 U.S. 565 (1991).

Two issues generally appear in search and seizure cases. First, the Court must consider whether there was probable cause to search the vehicle and any containers therein, and second, whether the scope of the search was appropriate for the item to be found. On the first issue, The Arkansas Supreme Court has clearly recognized that “the odor of marijuana coming from a vehicle is sufficient to arouse suspicion and provide probable cause for the search of that vehicle.” *Green v. State*, 334 Ark. 484, 490, 978 S.W. 2d 300, (1998); see also, *Gordon v. State*, 259 Ark. 134, 529 S.W.2d 330, cert. denied, 434 U.S. 929 (1976). This Court has also recognized that the smell of marijuana emanating from a vehicle gives rise to reasonable suspicion to detain the occupants to determine the lawfulness of their conduct, to search the vehicle and to arrest the occupants, depending on the circumstances. *Brunson v. State*, 327 Ark. 567, 571, 940 S.W. 2d 440 (1997), citing *Phillips v. State*, 53 Ark. App. 36, 918 S.W.2d 721 (1996), *Lopez v. State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989), and *Crail v. State*, 309 Ark. 120, 827 S.W.2d 157 (1992)

In the instant case, there is no dispute whether the officers lawfully pulled McDaniel over for a traffic violation. See, *Whren v. United States*, 517 U.S. 806, 135 L.Ed. 2d 89 (1996). Probable cause to search was also present based upon the smell of marijuana. *Green*, supra.. Officer Hartwick testified that, upon approaching

the truck, he smelled a strong odor of marijuana, as if it had just been smoked.

Once probable cause is determined to exist, the second issue, the scope of the search, then arises. The U.S. Supreme Court has given direction on this point. “The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause.” *Ross*, supra, at 823. As the Court pointed out in *Ross*:

A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. 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.

The Court further stated: 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 trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

In *Ross*, the police received a

tip from a reliable source who told them that an individual was selling narcotics from the trunk of his car in a particular location in the District of Columbia. The police officers stopped the car and driver matching the descriptions given by the informant. One of the officers opened the trunk, found a brown paper bag and, after opening the bag, found glassine bags containing heroin. The Court concluded its analysis by stating, “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *Ross*, at 825.

The U.S. Supreme Court elaborated further in *Acevedo*, supra. In that case, the police observed Acevedo leaving an apartment which the police knew contained marijuana. Acevedo left the apartment carrying a brown paper bag which he placed in his trunk. Suspecting that the brown bag contained marijuana, the police stopped Acevedo and searched the trunk for the bag and opened it when they found it. The bag contained marijuana. The Court had previously held that while the bag could be confiscated, a search warrant was necessary to look in the bag. In *Acevedo*, however, the Court determined that such a rule was outmoded, in part based on *Ross*, and held that the bag could be opened without a warrant. 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.” *Acevedo*, at 564. Because a vehicle is readily movable by any person, not just the suspect, exigent cir-

cumstances allow the vehicle to be searched at the scene. *Reyes v. State*, 329 Ark. 539, 548-550, 954 S.W.2d 199, 202-204 (1997). In *United States v. Perkins*, 994 F.2d 1184 (6th Cir. 1993), the appellate court upheld a warrantless search of a white tool box in the bed of Perkins' co-conspirator's pickup truck where authorities found marijuana. Citing *Acevedo*, the court concluded that probable cause to stop and search the vehicle existed, together with exigent circumstances, to support the warrantless search of the toolbox and glove compartment.

The Arkansas Supreme Court stated that they were readily mindful of the priceless value of constitutional liberties. They cannot be lightly infringed upon or they will inevitably be whittled away to worthless. In the instant case, the precedents governing automobile searches make it apparent, for better or worse, that driving citizens and their cargo are less protected than when at home. The facts and the law applicable to the instant case compel a holding that probable cause justified the search of McDaniel's vehicle and that the scope of that search could include containers within the automobile that could contain the suspected, and ultimately discovered, marijuana. The Court affirmed the trial court's denial of McDaniel's motion to suppress.



**SEARCH AND SEIZURE –
WARRANTLESS SEARCH
OF TRAFFIC ACCIDENT
VICTIM'S PURSE NOT
JUSTIFIED**

In *Evans v. State*, CA CR 98-457, 3/3/99, the Poinsett County Circuit Court denied Amelia Evans's motion to suppress the results of an officer's warrantless search of her purse. Evans then entered a conditional plea of guilty to possession of a controlled substance, methamphetamine, pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure. On appeal, Evans argues that the trial court erred by denying her motion to suppress. The Arkansas Court of Appeals agreed and reversed and remanded the case.

At 7:30 a.m. on July 9, 1996, Trooper Darwin Adams of the Arkansas State Police received a dispatch that there was a one-car accident on Highway 63 north of Marked Tree. When Trooper Adams arrived on the scene, ambulance personnel were already helping Evans out of her car, which was on its side. Adams testified that Evans was screaming incoherently and appeared to be suffering from severe injuries.

Because Trooper Adams was unable to speak to Evans, he looked inside her car for something to help in determining her identity. The trooper testified that he saw a purse with a green wallet sitting on top of it on the driver's side floorboard. He opened the wallet and discovered hypodermic needles, a black container with what appeared to be methamphetamine inside, and a clear plastic bag containing a brown powdery

substance. The wallet did not contain any identification; however, he discovered a second wallet containing Evans' driver's license. After learning her identity, he gave Evans' purse and its contents to the ambulance personnel. At the hospital, a nurse discovered the contraband in the purse and gave it to the officer.

Trooper Adams testified that when investigating an accident, he has been trained to first assure the safety of the driver, and then to establish the driver's identity. He explained that he searched Evans' purse to complete his investigation of the accident; he knew that the ambulance personnel were administering aid to Evans. Trooper Adams testified he could have called in the car license number to the dispatcher, which would have produced a current and valid registration; however, he testified that he did not do so. He also testified that he did not inventory the vehicle.

The State contends that the search can be justified under the exigent circumstances present: Evans was injured, and the officer's search was necessary to determine her identity for the purpose of rendering medical treatment and notifying her relatives. In the alternative, the State argues that the officer's search was reasonable in light of his legal duty to investigate and report on all accidents occurring on the state's highway system.

The Arkansas Court of Appeals stated that the medical emergency exception will support a warrantless search of a person's purse or wallet when the person is found in an unconscious or semi-conscious condition and the pur-

pose of the search is to discover evidence of identity and other information that might enhance the prospect of administering appropriate medical assistance to the person.

The State's argument that Trooper Adams was seeking Evans' identity for the purpose of administering medical treatment is not supported by the testimony. Ambulance personnel were already on the scene of the accident when he arrived; they were administering aid to Evans. Moreover, Trooper Adams testified that his

purpose in searching for appellant's driver's license was to complete his investigative report. Given this testimony, the warrantless search cannot be justified as an attempt to secure information in order to provide medical treatment to Evans.

Trooper Adams's search cannot be justified as an attempt to secure information for his required investigative report. The car's license number was available to Trooper Adams; he testified that calling this number in to his dispatcher would have pro-

duced Evans' name and address without looking in her purse. Other alternatives were available to Trooper Adams: he could have accompanied Evans to the hospital and sought information from her there; or he could have sought this information from a nurse or other medical personnel.

The State has not met its burden of justifying Trooper Adams's warrantless search of Evans' purse. Evans' motion to suppress should have been granted.

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