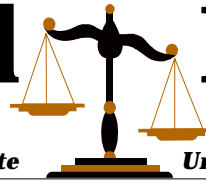




CJI Legal Briefs



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AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 – STATES ENJOY IMMUNITY FROM STATE EMPLOYEE LAWSUITS

In *Kimel v. Florida Board of Regents*, No. 98-791, 1/11/00, the United States Supreme Court dealt with cases from Alabama and Florida where state employees had filed lawsuits against these states under the Age Discrimination in Employment Act of 1967.

By a 5-4 vote, the Court ruled that Congress exceeded its authority when it allowed federal lawsuits against the states under the Age Discrimination in Employment Act of 1967. The Court stated that the law cannot override the 11th Amendment immunity the states enjoy against being sued in federal courts.

CIVIL LIABILITY – NEGLIGENCE OPERATION OF VEHICLE IN POLICE HIGH SPEED PURSUIT

In *City of Caddo Valley v. George*, 99-182, 1/27/00, the Arkansas Supreme Court dealt with an issue involving negligent operation of a police vehicle involved in a high speed pursuit. The following events led to this litigation: Officer John Whittle of the Caddo Valley Police Department heard a BOLO (be on the lookout) report regarding a truck stolen from the parking lot of a gas station in Malvern. When Whittle saw the truck driven by Patrick Sherman pass through Caddo Valley, he flipped on his police vehicle's siren and lights and began pursuit. After hearing Whittle's radio call that he was in pursuit, Sergeant John Kelloms also joined in the chase. As the pursuit reached speeds of somewhere between 75 and 90 miles per hour, the officers heard radio reports from Arkadelphia that police there were in the process of set-

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ting up a roadblock across Highway 67. Sergeant Kelloms told Officer Whittle to back off from the fleeing truck in the hope that they could get Sherman to slow down before reaching town. When Whittle did not back off far enough, Kelloms told him to do so again. Despite Whittle's eventual backing off, Sherman failed to slow down.

Meanwhile, in Arkadelphia, Lieutenant Mike Smith and Officer David Turner had positioned their cars partially across the highway, with one vehicle blocking a portion of the northbound lane and the other blocking part of the southbound lane. There was just enough room between the police vehicles for a car to pass through if it were going at a slow, safe speed. Several cars had made it through before Sherman arrived. Plaintiff Joan George's Jeep was caught between the police cars when Sherman crested the hill just above the roadblock. Lieutenant Smith was standing on the centerline with his pistol drawn, hoping to slow Sherman down. However, Sherman accelerated the stolen vehicle, forcing Smith to jump out of the way, and slammed it into George's car. The impact threw the Jeep off the road and tossed George out of the vehicle and into the ditch.

George filed her complaint in September of 1998, naming as defendants, among others: Sherman, Whittle, and Kelloms. She alleged negligence on the parts of Whittle and Kelloms, claiming that they pursued Sherman at a high rate of speed when they knew, or should have known, that the pursuit was likely to injure innocent victims; that they failed to disengage from the pursuit when they knew, or should

have known, that the Arkadelphia police were setting up a roadblock; and that they failed to end the pursuit when they knew, or should have known, it was no longer prudent to chase Sherman under the conditions.

Whittle and Kelloms denied negligence, and, in addition, they argued that they were immune from liability or damages because they were acting in their official capacities as employees of Caddo Valley. Eventually, they filed a motion for summary judgment on these same grounds. In response, George asserted that the officers were indeed negligent because they were engaged in conduct which gave rise to her injuries. She also pointed out that the officers were protected by tort immunity only to the extent that they had minimum liability insurance as required by Arkansas law. The trial court denied the summary judgment motion, but did permit the City of Caddo Valley to substitute itself as the real party in interest, in place of the two officers.

The case was submitted to the jury, which found that Sherman, Whittle, and Kelloms were all negligent, and that liability should be apportioned 90 percent to Sherman and five percent each to Whittle and Kelloms. At a post trial hearing, the trial court determined that Caddo Valley was jointly and severally liable for the judgment, but limited its liability to \$25,000.00—the amount of the minimum required insurance coverage. George contended that, because there were two police cars involved, she should get twice that amount.

The Arkansas Supreme Court discussed several issues in this case. Caddo Valley's first argument is that the police officers

were immune from suit. Ark. Code Ann. § 21-9-301 (Supp. 1999) provides that it is the "declared . . . public policy of the State of Arkansas that all . . . *municipal corporations . . . shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.* No tort action shall lie against any such political subdivision because of the acts of its agents and employees." (Emphasis added.) The immunity granted to municipalities extends to the city's officials and employees when they are being sued in their official capacities. *Matthews v. Martin*, 280 Ark. 345, 346, 658 S.W.2d 374, 375 (1983). However, that same subchapter of the code also provides that "all political subdivisions shall carry liability insurance on their motor vehicles or shall become self-insurers, individually or collectively, for their vehicles, or both, in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, § 27-19-101 et seq." Ark. Code Ann. § 21-9-303(a) (1996). Under this section, "[t]he combined maximum liability of local government employees . . . and the local government employer in any action involving the use of a motor vehicle within the scope of their employment shall be the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act . . ." Ark. Code Ann. § 21-9-303(b). The minimum amount defined in that act is \$25,000.00 per vehicle insured. Ark. Code Ann. § 27-19-713(b)(2) (Supp. 1999).

The Arkansas Supreme Court stated that there is no indication in § 21-9-303 that the legislature intended to distinguish in any man-

ner the circumstances to which it applied. The Court could see no reason why a person injured by an emergency vehicle should be left without a remedy while persons may seek redress against a municipality for its employees' negligence in the operation of all other vehicles.

It was the officers' failure to exercise ordinary care, once the decision to pursue Sherman was made, that led to the accident; therefore, to the extent of the city's liability coverage, they are not immune from suit and may be found liable for their negligence.

The evidence presented at the trial of this case showed that the two Caddo Valley officers in pursuit knew that a roadblock was being set up in Arkadelphia. Officer Whittle stated that he was approximately 100 feet behind the fleeing vehicle while the suspect was driving at approximately 90 to 100 miles an hour. He was twice told by his superior officer, Kelloms, to back off. This was Whittle's first high-speed pursuit, and he had been given no training or instructions on "what factors to consider when pursuing a high-speed pursuit."

Sergeant Kelloms joined the pursuit after having told Officer Whittle to back off. Testimony of Arkadelphia Police Officer Jackie Woodall revealed that the Caddo Valley officers were only about four or five car lengths behind the stolen truck, which was being driven at an estimated 75 to 80 miles an hour. On cross-examination, Woodall stated that it was only a matter of seconds from the time he heard the radio transmission telling Whittle to back off until the moment of the collision.

The foregoing is substantial evidence from which the jury could have concluded, without resorting to speculation or conjecture, that the Caddo Valley officers were pursuing the suspect too closely at high speeds, and continued to do so after they knew of the presence of the roadblock in Arkadelphia. An ordinarily prudent person, in the same situation, could have foreseen an appreciable risk of harm to others; thus, we hold that there was sufficient evidence of negligence from which the jury could have reasonably found the officers to be at least partially or minimally at fault in the accident with George.

The Arkansas Supreme Court also discussed the question of the proximate causation within the context of Patrick Sherman's actions in fleeing from the police. The Court stated that in this case, there was evidence to establish a causal connection between the actions of the police officers and the injuries to Joan George. But for their actions in continuing to pursue Sherman, the jury could have reasonably found that the accident likely would not have happened. The events occurred in a natural and continuous sequence; thus making the officers' acts a proximate cause of George's injuries. In short, the jury could have easily concluded that the actions of Sherman, while admittedly an intervening cause, were not totally independent of the acts of negligence performed by the Caddo Valley police officers. The questions of proximate cause and the presence of an intervening cause were proper questions for the jury. The Court noted that there was sufficient evidence from which the

jury could have found negligence.

The Arkansas Supreme Court also discussed the issue of damages. The Court stated that because there were two Caddo Valley vehicles involved in the accident, and each officer was found five percent at fault, Caddo Valley, as a joint tortfeasor, would be jointly and severally liable in the amount of \$25,000.00 for each of the city's vehicles. George therefore should recover \$50,000.00 against Caddo Valley.

CIVIL LIABILITY – NO QUALIFIED IMMUNITY FOR DETENTION OF INDIVIDUAL AND THEN PHOTOGRAPHING A TATTOO ON HIS CHEST

In *Pace v. City of Des Moines, Iowa*, CA8, No. 99-1423, Elmer and Linda Pace brought an action against Officer Brian Danner and the City of Des Moines seeking damages under 42 U.S.C. Section 1983 for various acts arising out of a criminal investigation of Mr. Pace conducted by Officer Danner.

In this case, the events in question were precipitated by a report that the Des Moines police received from a woman who claimed to have been attacked by a man with a knife. Based on the victim's description of her assailant, the Des Moines police department suspected Mr. Pace. Officer Danner proceeded to the house where Mr. Pace and his wife maintained both a business and a residence. Officer Danner entered the house through the customer en-

trance, flashed his firearm, told Mr. Pace to step outside, and pushed Mr. Pace against a wall. Officer Danner then ordered Mr. Pace to remove his shirt so that he could photograph the tattoo on Mr. Pace's chest, and Mr. Pace complied. Mr. Pace asserts that this incident constituted an unlawful search and seizure, as Officer Danner lacked probable cause and failed to obtain a warrant prior to seizing and photographing Mr. Pace.

Officer Danner addresses the detention question with the assertion that he had a reasonable suspicion that Mr. Pace was the assailant, entitling him to detain Mr. Pace briefly for an investigative stop. Officer Danner then contends that his subsequent order for the removal of Mr. Pace's shirt was legitimate because Mr. Pace did not have a reasonable expectation of privacy for his upper body. Officer Danner notes that on "two or three" other occasions another officer had seen Mr. Pace in public wearing tank top shirts that partly revealed the tattoo on Mr. Pace's chest, and yet another officer claimed to have seen Mr. Pace wearing tank top shirts "numerous" times over the past several years. Officer Danner suggests that given this behavior, Mr. Pace could not reasonably expect that the surface of his upper body, and in particular his tattoo, could be kept private.

The Eighth Circuit Court of Appeals disagreed with Officer Danner's contention that a reasonable officer could have believed that the photographing was within the permissible limits of an investigative stop. The Court recognized that an officer who has a reasonable suspicion that crime is afoot,

but not probable cause to arrest a person, may conduct an investigative stop, and that this may include questioning and other efforts to identify the person in question. *See United States v. Johnson*, 64 F.3d 1120, 1124 (8th Cir. 1995), *cert. denied*, 516 U.S. 1139 (1996), and *United States v. Jones*, 759 F.2d 633, 642 (8th Cir. 1985), *cert. denied*, 474 U.S. 837 (1985).

If a stop lasts too long, however, or if it is too intrusive, then the stop is converted into an arrest. *United States v. Dixon*, 51 F.3d 1376, 1380 (8th Cir. 1995). In determining whether an officer's conduct goes beyond what is permissible in an investigative stop, the Court is bound to consider the degree of fear and humiliation that the police conduct engenders. *United States v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1113 (1995), quoting *United States v. Lego*, 855 F.2d 542, 545 (8th Cir. 1988); *see also United States v. Hill*, 91 F.3d 1064, 1070 (8th Cir. 1996). In this case, although it may be true that Officer Danner photographed Mr. Pace as quickly as possible, the Court believed that Officer Danner's actions were too intrusive to be considered merely part of an investigative stop. The Court was of the opinion this was a search fully implicating Mr. Pace's fourth amendment rights. It is apparent that being ordered to go outside and to take off one's shirt so that a police officer can take pictures involves much more fear and humiliation than simply being asked questions or being compelled to identify oneself.

The Eighth Circuit Court of Appeals believed that a reasonable officer cognizant of clearly estab-

lished law would realize that such an imposition requires a warrant, something that Officer Danner did not obtain. In these circumstances the Court did not believe that Officer Danner was entitled to qualified immunity for the photographing incident.

CIVIL LIABILITY – QUALIFIED IMMUNITY IN MIRANDA CASES

In *California Attorneys for Criminal Justice v. Butts*, CA9, No. 97-56499, 1/3/00, James McNally and James Bey, California state prisoners, joined in bringing this civil rights action against the cities of Los Angeles and Santa Monica, California, individual police officers and their respective Chiefs of Police. See 42 U.S.C. S 1983. McNally and Bey complain that they were the victims of a policy of the defendant police to defy the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). The alleged policy, set forth in certain training programs and materials, was to continue to interrogate suspects "outside Miranda" despite the suspects' invocation of their right to remain silent and their requests for an attorney.

The district court denied the motions of individual defendant police officers for summary judgment on the basis of qualified immunity. Those officers then appealed challenging the denial of immunity. The Ninth Circuit Court of Appeals affirmed the order of the district court denying qualified immunity.

In a controversial decision the Ninth Circuit Court of Appeals

stated that the issue in this case is limited to whether these officers are entitled to qualified immunity as a matter of law. The Ninth Circuit Court of Appeals concluded that the district court correctly ruled that the defendants were not entitled to qualified immunity. In the Ninth Circuit officers who intentionally violate the rights protected by Miranda must expect to have to defend themselves in civil actions.

**DETAINERS –
INTERSTATE AGREEMENT
ON DETAINERS**

In *New York v. Hill*, No. 98-1299, 1/11/00, New York lodged a detainer against Hill, an Ohio prisoner, under the Interstate Agreement on Detainers (IAD). Hill signed a request for disposition of the detainer pursuant to IAD Article III and was returned to New York to face murder and robbery charges. Article III(a) provides that, upon such a request, the prisoner must be brought to trial within 180 days, provided that for good cause shown. . . the prisoner or his counsel being present, the court . . . may grant any necessary or reasonable continuance. Although Hill’s counsel initially agreed to a trial date set beyond the 180-day period, Hill subsequently moved to dismiss the indictment, arguing that the IAD’s time limit had expired. In denying the motion, the trial court concluded that defense counsel’s explicit agreement to the trial date constituted a waiver or abandonment of respondent’s IAD rights. After respondent was convicted of both charges, the New

York Supreme Court, Appellate Division, affirmed the trial court’s refusal to dismiss for lack of a timely trial. The State Court of Appeals, however, reversed and ordered that the indictment be dismissed; counsel’s agreement to a later trial date, it held, did not waive respondent’s IAD speedy trial rights.

However, the United States Supreme Court held that defense counsel’s agreement to a trial date outside the IAD period bars the defendant from seeking dismissal on the grounds that a trial did not occur within that period.

**DRIVING WHILE
INTOXICATED –
OBSERVATIONS OF LAW
ENFORCEMENT
OFFICERS; REFUSAL TO
BE TESTED ADMISSIBLE
AS EVIDENCE OF GUILT**

In *Hartley v. State*, CA CR 99-416, 12/1/99, the Arkansas Court of Appeals dealt with the appeal of Sylvester Hartley who was convicted in a jury trial of negligent homicide and refusal to submit to a chemical test. On appeal, Hartley argued that the evidence was insufficient to support his conviction for negligent homicide.

The Arkansas Court of Appeals stated there was more than the mere odor of intoxicants to prove the intoxication element of negligent homicide. In addition to the strong odor of intoxicants reported by Dr. Colvin, Sergeant Pickens, Trooper Perry, and Corporal Briggs, the troopers all noted that Hartley struck the Lovelesses’ horse trailer despite the fact that it

was parked well off the roadway. Additionally, Corporal Briggs testified that Hartley had bloodshot eyes. The observations of police officers with regard to the smell of intoxicants and actions consistent with intoxication can constitute competent evidence of intoxication. *Id.* Moreover, Hartley also refused to take a blood test, and the refusal to be tested is admissible evidence on the issue of intoxication and may indicate the defendant’s fear of the results of the test and the consciousness of guilt. *Medlock v. State*, 332 Ark. 106, 964 S.W.2d 196 (1998). Eddie and Barbara Jordan also testified that Hatley was weaving across two lanes of traffic and generally driving in a manner that caused Eddie Jordan to believe that Hatley was “either asleep or intoxicated.” See *Weeks v. State*, 64 Ark. App. 1, 977 S.W.2d 241 (1998). Accordingly, the Arkansas Court of Appeals found there was substantial evidence of intoxication and affirmed the negligent homicide conviction.

**DRUG ENFORCEMENT –
USE OF REAL DRUGS IN
SALE BY LAW
ENFORCEMENT
UNDERCOVER OFFICERS**

In *Pyle v. Arkansas*, No. CR 97-331, 1/13/00, the issue before the Arkansas Supreme Court was the use of real drugs during a reverse buy. The Court stated that the very facts of this case indicate the necessity of using real drugs in undercover operations. According to the testimony of eyewitnesses, both Tunncliff and Pyle sampled the substance to be sold before handing over the cash. If a coun-

terfeit substance had been used, law enforcement officials may well have been placed in danger.

**EVIDENCE –
CONSTITUTIONAL RIGHT
TO PRESENT A DEFENSE**

In *State v. Brown*, (Tennessee), No. E1995-00017-SC-R11-CD, 1/24/00, the Tennessee Supreme Court held that a rape defendant's federal constitutional right to present a defense was violated by the trial judge's exclusion of hearsay evidence. The hearsay evidence consisted of the minor complainant's out-of-court statements to her friends that she had had sexual relations with someone other than the defendant.

**EVIDENCE – HAIR
COMPARISON ANALYSIS
TESTIMONY**

In *Johnson v. Commonwealth*, Ky. No. 96-SC-0577-MR, 12/16/99, the Kentucky Supreme Court held that trial courts in Kentucky may take judicial notice that human hair analysis by microscopic comparison is deemed scientifically reliable.

FORFEITURE

In *United States v. Kennedy*, CA11, No. 98-3455, 1/28/00, the Eleventh Circuit Court of Appeals held that a state court's divorce decree awarding to a defendant's innocent spouse the defendant's interest in tainted property did not

defeat the federal government's criminal forfeiture of the defendant's interest in the property.

**MIRANDA – PUBLIC
SAFETY EXCEPTION**

In *Marshall v. State*, CA CR 99-418, 12/8/99, the Arkansas Court of Appeals dealt with an appeal by one Albert Beasley Marshall. Marshall argued that the trial court erred in denying his motion to suppress his custodial statement, which was made prior to being advised of his *Miranda* rights regarding his disposal of a weapon. The Arkansas Court of Appeals first reviewed the facts of the case.

On January 26, 1999, while Bruce Shealey was in the parking lot of the Holiday Inn Select in Little Rock, a man wearing a red jacket grabbed him from behind and stated, "I got a gun in your back. I want your wallet." When Shealey tried to move, the assailant said, "You don't understand. I have a gun. I'll put a hole in your head." After Shealey saw that he was holding a nine-millimeter or .45 caliber handgun, Shealey gave him his wallet, which contained credit cards. Shealey was released, and he ran between two parked cars. From there, he heard someone say, "Shoot him." About 20 to 30 feet away, Shealey saw a person facing him who was wearing a denim or blue jacket and standing next to a small red truck. Shealey watched his assailant walk toward the red truck. After the truck started toward the parking-lot exit, Shealey ran into the hotel, where he met

Officers Steve Woodall and Steve Graves of the Little Rock Police Department. Shealey reported the robbery to the officers and described the two males and their vehicle.

Woodall and Graves immediately left the hotel in their patrol car in pursuit of a small red truck leaving the parking lot with two occupants. Despite the officers' attempt to stop the assailants by activating the police car's blue lights, the truck sped away. Officers' Hinman and Colclasure joined the pursuit in another vehicle. The truck eventually crashed into a fence near a wooded area adjacent to Henderson Junior High School, and its occupants fled on foot. Woodall and Graves followed on foot and found Frederick Marshall, who was wearing a blue shirt, in the woods and arrested him.

Twenty-five yards from the truck, Hinman saw Albert Marshall, who was wearing a red coat, and ordered him to the ground at gunpoint. The officers immediately asked, "Where's the gun?" Colclasure handcuffed and searched Albert Marshall, and Marshall stated that he had thrown the gun when he got out of the truck. The officers found an empty holster strapped to his ankle and a box of nine-millimeter jacketed hollow-points in his left jacket pocket. Woodall searched the appellant's truck and found Shealey's wallet containing the credit cards. The gun was never found.

The evidence presented at trial established that after the aggravated robbery and theft of property, one man wearing a red jacket and another wearing some type of

blue clothing left in a small red pickup truck. Officers immediately pursued the truck, and after the truck crashed, they pursued the suspects on foot. Both appellants were soon arrested. Albert Marshall was wearing a red jacket, and Fredrick Marshall was wearing a blue shirt. Albert Marshall admitted to throwing a gun away and was found in possession of ammunition and an empty gun holster. The stolen wallet was found in the truck. Based on the foregoing evidence, the Arkansas Court of Appeals concluded that the trial court did not err in finding that there was substantial evidence to support the appellants' convictions for aggravated robbery and theft of property.

Albert Marshall also argues that his statement regarding his disposal of the weapon should have been suppressed because he was in police custody and had not been informed of his *Miranda* rights at the time he gave the statement. The Arkansas Court of Appeals disagreed and concluded that this issue is controlled by *New York v. Quarles*, 467 U.S. 649 (1984).

At the suppression hearing, Officer Maria Colclasure testified that she participated in the pursuit of the red truck involved in the armed robbery at the Holiday Inn Select. After the truck crashed near a wooded area by Henderson Junior High School, the occupants of the truck fled on foot. Colclasure and Officer Hinman apprehended Albert Marshall. While Hinman kept Albert Marshall on the ground at gunpoint, Colclasure handcuffed Albert Marshall and searched him for the weapon that was used during the robbery. Colclasure asked Albert

Marshall what he had done with the gun and whether he had the gun on him. Colclasure testified that she asked Albert Marshall these questions for the officers' safety and to ensure that Albert Marshall did not have the weapon on him or in the immediate area. Albert Marshall told Colclasure that he had thrown the gun out of the truck window just before they crashed. Colclasure further testified that at the time she asked these questions, Albert Marshall was in custody and had not been advised of his *Miranda* rights.

In *Quarles*, a woman approached two police officers and told them that she had just been raped. She gave the police a description of her assailant and stated that he had just entered a supermarket and was carrying a gun. *Id.* at 651-52. One officer entered the supermarket and saw Quarles run toward the rear of the store. *Id.* at 652. The officer stopped Quarles, searched him, and found that he was wearing an empty shoulder holster. After handcuffing Quarles, the officer asked him where the gun was. Quarles nodded toward some empty cartons and told the officers that "the gun is over there." The officer then recovered the weapon, formally placed Quarles under arrest, and informed him of his *Miranda* rights.

The United States Supreme Court noted that while in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court "extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police," the Fifth Amendment "does not prohibit all incriminating admissions." *Id.* at 654. The Court held that "there is

a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence...." *Id.* at 655. The Court observed as follows:

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it. *Id.* at 657.

The Court held as follows: We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers ... in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them. *Id.* at 657-58.

Similarly, aware that a weapon had been used in the aggravated robbery, Colclasure asked Albert Marshall questions regard-

ing the location of the gun. Colclasure testified that she asked these questions for the safety of the officers, as Albert Marshall may still have had the gun on his person or in the immediate area. Also extant were the same concerns as those in *Quarles* regarding public safety, such as the chance that an accomplice or a student or passerby in the immediate vicinity of the junior high school might discover the weapon. Thus, as in *Quarles*, “overriding considerations of public safety justifi[ed] the officer’s failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon.” *Id.* at 651. The Arkansas Court of Appeals then affirmed the conviction.

**INTERSTATE COMMERCE
– DRIVER’S PRIVACY
PROTECTION ACT IS A
VALID EXERCISE OF THE
COMMERCE CLAUSE
POWER BY CONGRESS**

In *Reno v. Condon*, No. 98-1464, 1/12/00, the United States Supreme Court held that the Driver’s Privacy Protection Act of 1994 (DPPA), was a proper exercise of Congress’ authority to regulate interstate commerce under the Commerce Clause of the United States Constitution.

State departments of motor vehicles (DMVs) require drivers and automobile owners to provide personal information, which may include a person’s name, address, telephone number, vehicle description, Social Security number, medical information, and photograph, as a condition of obtaining a driver’s

license or registering an automobile. Finding that many states sell this information to individuals and businesses for significant revenues, Congress enacted the Driver’s Privacy Protection Act of 1994 (DPPA), which establishes a regulatory scheme that restricts the states’ ability to disclose a driver’s personal information without the driver’s consent.

South Carolina and its Attorney General filed this suit, alleging that the DPPA violates the Tenth and Eleventh Amendments to the United States Constitution. Concluding that the DPPA is incompatible with the principles of federalism inherent in the Constitution’s division of power between the states and the federal government, the District Court granted summary judgment for the state and permanently enjoined the DPPA’s enforcement against the state and its officers. The Fourth Circuit affirmed.

The motor vehicle information which the states have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers’ personal, identifying information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation. See *United States v. Lopez*, 514 U.S. 549, 558-559.



JAILS AND PRISONS

In *Ping v. Raleigh*, CA8, No. 98-2739, 1/24/00 [Unpublished] the Eighth Circuit Court of Appeals concluded that a prison’s ban on play-by-mail games—which have the potential to allow inmates to communicate in code with outsiders—is reasonably related to legitimate penological interests, namely, the security of inmates’ locations and identities. See *Turner v. Safley*, 482 U.S. 78 (1987).

**RIGHT TO COUNSEL –
DEFENDANT HAS NO
CONSTITUTIONAL RIGHT
TO SELF-
REPRESENTATION ON
APPEAL**

In *Martinez v. Court of Appeals of California, Fourth Appellate District*, Martinez was accused of converting a client’s money to his own use while employed as a paralegal. Martinez was charged by the State of California with grand theft and the fraudulent appropriation of another’s property. He chose to represent himself at trial before a jury, which acquitted him of theft but convicted him of embezzlement. He then filed a timely notice of appeal, a motion to represent himself, and a waiver of counsel. The California Court of Appeals denied his motion to represent himself. The California Court of Appeals, construing *Faretta v. California*, 522 U.S. 806 (1975) stated that there is no constitutional right to self-representation on direct appeal. In this case the United States

Supreme Court held that a criminal defendant has a constitutional right to conduct his own defense at trial when he voluntarily and intelligently elects to proceed without counsel.

The United States Supreme Court held that neither its decision in *Faretta* nor its reasoning requires a state to recognize a constitutional right to self-representation on direct appeal from a criminal conviction. The states are clearly within their discretion to conclude that the government's interests in ensuring the integrity and efficiency of the appellate process outweigh an invasion of the appellant's interest in self-representation.

The United States Supreme Court noted that their holding does not preclude the states from recognizing a constitutional right to appellate self-representation under their own constitutions.

**SEARCH AND SEIZURE –
AUTOMOBILE SEARCH
BASED ON THE SMELL OF
MARIJUANA**

In *United States v. McCoy*, CA8, No. 99-3483, 1/21/00, the Eighth Circuit Court of Appeals stated that a traffic violation like McCoy's burned-out headlight provided probable cause for a traffic stop. Once McCoy was stopped, the officer was entitled to conduct an investigation reasonably related in scope to the circumstances that initially prompted the stop. This reasonable investigation included asking for McCoy's drivers license and registration, requesting that McCoy sit in the patrol car, and asking McCoy about his destina-

tion and purpose. While seated with McCoy in his patrol car, the officer noticed the odor of burnt marijuana on McCoy. The officer had earlier observed a strong smell of air freshener, a potential masking agent, coming from McCoy's car. Under these circumstances, the Eighth Circuit Court of Appeals concluded the officer had probable cause to search McCoy's vehicle for marijuana. See *United States v. Neumann*, 183 F.3d 753 (8th Cir.) (officer's detection of smell of burnt marijuana gave probable cause to search vehicle), *cert. denied*, 120 S.Ct. 438 (1999); *United States v. Caves*, 890 F.2d 87 (8th Cir. 1989) (odor of illegal drug can be highly probative in establishing probable cause for a search).

**SEARCH AND SEIZURE –
AFFIDAVIT FOR SEARCH
WARRANT CONTAINING
INFORMANT
INFORMATION**

In *United States v. Johnson*, CA8, No. 99-3160, 1/24/00, [Unpublished] the Eighth Circuit Court of Appeals was faced with the issue of whether or not a search warrant that led to the seizure of crack cocaine was defective because the supporting affidavit did not contain enough information to establish the reliability of the informant. The affidavit stated that the informant had provided reliable information in the past, was not on probation, parole or work release, was knowledgeable about the drug trade, and had observed a drug transaction at the site in the prior 48 hours and knew there was more crack there. Law enforcement of-

ficers also took notice of the amount of pedestrian traffic at the location. After considering the affidavit and the totality of the circumstances, the Eighth Circuit Court of Appeals concluded that there was a sufficient showing of probable cause.

**SEARCH AND SEIZURE –
CONSENT SEARCHES**

In *Commonwealth v. Davis*, Pa. Super. Ct., No. 740, 11/14/99, the Pennsylvania Superior Court held that a property manager's authority under a lease to enter an apartment and make inspections and repairs did not include authority to consent to a search of the premises by police.

**SEARCH AND SEIZURE –
NIGHTTIME SEARCH
WARRANTS**

In *Townsend v. State*, CA CR 98-1228, 12/15/99, the Arkansas Court of Appeals stated that David Edward Townsend was charged with the offenses of manufacturing a controlled substance (methamphetamine), possession of drug paraphernalia, and aggravated assault. Pursuant to Rule 24.3 of the Arkansas Rules of Criminal Procedure, he entered a negotiated plea of guilty to the charge of possession of drug paraphernalia, preserving the right to appeal the denial of his motion to suppress evidence, and was sentenced to two years probation. On appeal, Townsend contends that the nighttime search was not justified.

This case turns on the sufficiency of an affidavit submitted to support the issuance of a search warrant. The affidavit is lengthy, consisting of four pages, but the information it contains can be fairly summarized as follows. Detective Dave Mitchell of the 19th Judicial District Drug Task Force applied for the search warrant on May 20, 1997. He stated that a female had been arrested at 2:00 a.m. the previous morning and that a hypodermic syringe had been found on her person. At the police department, she offered to volunteer information concerning illegal drug activity taking place at a residence in Bentonville. The informant stated that a Charles Meadors was manufacturing methamphetamine in the garage of the residence, identified as #7 McIntosh, but that Meadors conducted sales of the drug elsewhere at the Dairy Queen parking lot. The informant further stated that Meadors would dispose of the leftover materials used in the manufacturing process at a dumping site on Rainbow Road located on the left side of a bridge that was under construction. The informant described Meadors's vehicle as being a gray or primered color Camaro and said that a 60's model Ford Mustang would be sitting on the left side of the house.

Detective Mitchell received this information at 9:30 a.m. on May 19. He was unable to locate the informant, so he proceeded to the construction site on Rainbow Road. While searching the left side of the bridge, a road department employee told Mitchell that he had just bulldozed an apparent burn pile. Mitchell inspected the area of the burn pile and found a melted Equate-brand antihistamine bottle,

two coffee filters with possible residue, melted plastic lye bottles, two one-gallon camp fuel cans, and several melted plastic baggies. Mitchell stated that, based on his experience and training, these items were commonly used and were necessary in the process of manufacturing methamphetamine.

Detective Mitchell then traveled to the Meadors residence, accompanied by a police officer, that provided further information disclosed by the informant. They observed a gray Camaro in the driveway and a blue Mustang beside the house, which was as described by the informant.

Mitchell placed phone calls to the informant's parents and her boyfriend and gave them his pager number. The informant later contacted him and an interview was arranged for 9:00 p.m. at the police station. During the interview, the informant stated that Meadors would produce methamphetamine in the residence on a weekly basis. She advised that, within the last week, Meadors had produced a large milk jug of methamphetamine, which was kept in the closet of Meadors' bedroom. The informant told Mitchell that she had once been present during the entire manufacturing process. She described the process of how Equate tablets were broken down into pure ephedrine, to which acetone was added and placed in cookware on the stove. She observed the addition of iodine crystals to the mixture and saw several other chemicals bearing skull and cross bones on the label. The informant also observed bottles of lye and mason jars equipped with coffee filters on top that were used to strain the mixture. She said that

she was present when trash was dumped and burned at the site on Rainbow Road. She was also present when Meadors instructed another man to obtain iodine crystals, which she later learned had been stolen.

During the interview, the informant drew a detailed map of the residence and surrounding premises, showing the location of the methamphetamine lab. She admitted that on occasion she had purchased methamphetamine at the residence. The informant also advised that there were several handguns of unknown caliber in the residence and that a vicious dog was kept in the back yard. She had been in the residence as recently as May 18, when she observed marijuana, pipes used for smoking marijuana, and a set of scales containing a white powdery substance.

The residence was said to be located at the end of a *cul-de-sac*. The house was further described as having three windows on the front side.

Mitchell asked for permission to execute the warrant at night because the location of the residence was such that officers approaching the residence could be easily observed, because there were firearms and a vicious dog at the residence, and because any methamphetamine located at the residence could be disposed of easily.

The Court first addressed Townsend's contention that the affidavit failed to set forth sufficient facts for the execution of the warrant at night. Rule 13.2(c) provides that, before a nighttime warrant is issued, the issuing judicial officer must have 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 use of the word “or” makes it clear that the existence of any one of these factors may justify a nighttime search. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

In this instance, the issuing magistrate authorized the execution of the warrant at night based on all three factors mentioned in Rule 13.2(c), and the trial court upheld the magistrate’s determination in denying the motion to suppress. In reviewing a trial court’s ruling on a motion to suppress because of an alleged insufficiency of the affidavit, the court makes an independent determination based upon the totality of the circumstances and reverses the trial court’s ruling only if it is clearly against the preponderance of the evidence. *Coleman v. State*, 308 Ark. 631, 826 S.W.2d 273 (1992).

It has been consistently held that the affidavit must set out facts showing reasonable cause to believe that circumstances exist which justify a nighttime search. *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990). Conclusory language that is unsupported by facts is not sufficient. *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993). For instance, in *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991), check marks

had been placed beside conclusory statements that mirrored the language found in Rule 13.2. Because the affidavit contained no facts to support those conclusions, the Arkansas Supreme Court reversed the denial of the motion to suppress. The lack of a factual basis was also evident in *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990). There, the affidavit recited only that illegal drugs were present in the appellant’s residence and that marijuana had been purchased there within the past 72 hours. The court considered those facts insufficient to justify the execution of the warrant at night. More recently in *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999), the supreme court determined that neither the strong odor of ether coming from the residence, the affiant’s fear of an explosion, nor his statement that the incriminating evidence might be moved or destroyed provided reasonable cause to believe that the objects to be seized were in danger of imminent removal. The court considered the affiant’s assertions to be conclusory in nature and lacking in factual support.

On the other hand, nighttime searches have been sustained when there are underlying facts to support a finding of exigent circumstances. In *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996), the affidavit contained information that the road leading to the residence was muddy and filled with potholes and that it was situated such that the officers would have to approach the residence on foot for a distance of 250 yards. It was also stated that the occupants had been using methamphetamine for six months and that they feared being watched and approached by

law enforcement authorities. Further, it was suspected that firearms were present in the house based on a recent report of a concerned citizen who had heard automatic gunfire coming from the residence. The affidavit also recited that methamphetamine was sold at the house throughout the night and that removal of the contraband by distribution was likely. In upholding the nighttime search, the supreme court held that the affidavit “presented specific data and fact-based conclusions regarding the difficulty of access, the possible removal of evidence, and the dangers presented to the officers.”

In *Langford v. State*, 332 Ark. 54, 962 S.W.2d 358 (1998), it was stated in the affidavit that the drugs in the residence were packaged in a manner that their destruction or removal could be easily accomplished; that the appellant had threatened an informant with a semi-automatic weapon within the past week and was thus believed to be armed and dangerous, making the element of surprise inherent in a nighttime search essential to the safety of the officers; that the appellant would be leaving the residence the next morning, thus giving rise to the belief that the drugs would be removed; and that the residence was located on a hill overlooking the only road that provided access to the property. Based on this information, the court concluded that there was a sufficient factual basis for a nighttime search.

Also, in *Coleman v. State*, 308 Ark. 631, 826 S.W.2d 273 (1992), it was stated in the affidavit that an informant had purchased cocaine contained in a clear plastic bag the same night that the appli-

cation for the warrant was made and that the drugs located in the house were packaged and maintained in a manner that their destruction or removal could be easily accomplished. There, it was held that there was reasonable cause to believe that the appellant had additional drugs in the residence that were packaged so that they could be easily destroyed or removed. In *Coleman*, the court also discussed the affiant's use of language generated by a word processor's memory bank that the residence was "so situated that the approach of the officers serving the warrant can be readily detected." The court likened the use of this computer-generated phrase to the check-marked language it deemed insufficient in *Garner v. State*, *supra*. The court commented, however, that it was regrettable that the affiant had omitted his knowledge of the residence being located on a *cul-de-sac* with only one way of entering, that the appellant watched for cars approaching the house, and that the appellant had a gun.

In the case at bar, the issuing magistrate knew that the house was located on a *cul-de-sac*, indicating that there was only one way for the police officers to approach the house. The magistrate also knew that there were firearms and a vicious dog present at the house. In addition, the affidavit disclosed that the methamphetamine was being kept in a single container, that leftover materials used in the manufacturing process were disposed of and burned at a distant location, and that sales of the drug were conducted away from the home. The affidavit does not rest on mere conclusions. There are facts which

reveal the difficulty of access, the potential for the removal of evidence, and the dangers the officers would face, which gave cause for legitimate concern for the officers' safety.

The Arkansas Court of Appeals then held that there was a sufficient factual basis to support the execution of a nighttime search.

SEARCH AND SEIZURE – PRETEXTUAL ARREST; INVENTORY SEARCHES

In *State v. Sullivan*, CR-98-732, 2/10/00, the State of Arkansas appealed from a trial court's granting of Sullivan's motion to suppress evidence found in his vehicle after an officer observed him speeding. Sullivan was approached by a Conway police officer, Joe Taylor, for allegedly traveling 40 miles per hour in a 35 mile-per-hour zone on Highway 65 in Conway. Although Officer Taylor did not use his "blue lights" to require Sullivan to stop, Sullivan pulled into a service station and was then informed by Officer Taylor of the reason for the contact.

Sullivan was requested by Officer Taylor to produce registration and proof of insurance. When Sullivan, a now-disabled, previously self-employed roofer, opened his vehicle door to locate the documents requested, Officer Taylor noticed a rusted roofing hatchet that was corroding into the carpet of the vehicle. Sullivan was unable to locate his vehicle registration and proof of insurance. He was then arrested for speeding, having no vehicle registration and no proof of

insurance, and carrying a weapon (the roofing hatchet), as well as having an improper tint on his windshield. Officer Taylor further deemed Sullivan's vehicle to be unsafe because his speedometer was not working properly.

After another officer arrived and placed Sullivan in the back of his police unit, Officer Taylor began an inventory search of Sullivan's automobile. Officer Taylor testified that under the armrest, he found a black bag with what appeared to be methamphetamine inside it. The bag, he claims, contained a Ziploc-type bag with ten individually-wrapped bags of the substance, 27 corners of plastic bags, a small plastic container with suspected marijuana, another Ziploc-type bag with bag corners inside of it, and a plastic container with two bags of suspected methamphetamine. Officer Taylor also stated that a zippered pocket of the same black tote bag contained two bags of suspected methamphetamine, a plastic tube with white powdery residue in it, a wood-handled knife with white powdery residue on the ends, and a red metal plate and a purple plastic straw. Sullivan was then charged with the following offenses: possession of methamphetamine with intent to deliver; attempt to manufacture methamphetamine; possession of drug paraphernalia; unlawful possession of a weapon, the roofing hatchet; and speeding. He was not charged with having no proof of insurance or vehicle registration.

Sullivan moved to suppress evidence seized from his vehicle on the basis that the stop was a pretext to conduct a search. Upon the testimony of the sole witness at the

suppression hearing, who was Officer Joe Taylor, the trial court granted Sullivan's motion to suppress. The issue before the Arkansas Supreme Court was whether the search of Sullivan's vehicle was justified, either as an inventory search or as a search incident to arrest. The Arkansas Supreme Court held that it was not.

Officer Taylor was the sole witness who testified at the hearing on Sullivan's motion to suppress. Taylor testified on direct examination that what he conducted was merely an inventory search as dictated by policy and not a search conducted after a traffic stop predicated on suspicions he had of Sullivan's involvement in drug activity. Taylor did admit on cross-examination that he had been assigned to the narcotics section and that said section had intelligence on Sullivan of which Officer Taylor was aware. Sullivan contends that the very facts and circumstances surrounding the arrest itself prove that it was pretextual in nature. Sullivan asserts that it was made solely for the purpose of searching his vehicle for controlled substances, and that, as a result, he is entitled to an order suppressing any and all evidence seized from his vehicle. Sullivan asserts that the arresting officer had no reasonable basis to believe that the roofing hatchet was to be used as a weapon. We have held that "pretext" is a matter of the arresting officer's intent, which must be determined by the circumstances of the arrest. *Brenk v. State*, 311 Ark. 570, 847 S.W.2d 1 (1993). We held in *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986), and the Court of Appeals followed in *Miller v. State*, 44 Ark. App. 112,

114, 868 S.W.2d 510 (1993):

The Supreme Court has specifically held that "an arrest may not be used as a pretext to search for evidence." *United State v. Lefkowitz*, 285 U.S. 452 (1932). ... Claims of pretextual arrest raise a unique problem in law—deciding whether an ulterior motive prompted an arrest which otherwise would not have occurred. Confusion can be avoided by applying a "but for" approach, that is, would the arrest not have occurred but for the other, typically, the more serious crime. Where the police have a dual motive in making an arrest, what might be termed the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent....

The question then becomes whether Sullivan would have been *arrested* simply for traveling 40 miles per hour in a 35 mile-per-hour zone and possessing a roofing hatchet that had clearly been in his vehicle for quite a long time, given that it was corroding into the carpet. We find that to be doubtful. His vehicle may have been impounded due to his failure to provide proof of insurance and registration. However, Sullivan was never *charged* with having no proof of insurance or vehicle registration. Further, the trial court, when assessing the credibility of Officer Taylor (the sole witness at the hearing), the totality of the circumstances, and the applicable law, agreed with Sullivan that the search and seizure was pretextual and should be suppressed. Clearly, a review of the applicable law illustrates that the issue of pretext necessarily turns on the facts in a given case, and given our standard of

review in these cases, the Arkansas Supreme Court could not say that the trial court's ruling was against the preponderance of the evidence. The ruling of the trial court suppressing the evidence was affirmed.

SEARCH AND SEIZURE – STANDING TO CHALLENGE A SEARCH

In *Simpson v. State*, CR 98-423, 12/16/99, the Arkansas Supreme Court dealt with the appeal of the conviction of Sedric Maurice Simpson on capital murder charges in Dallas County, Arkansas. One of Simpson's arguments was that the trial court in denying his motion to suppress evidence seized from the car he was driving the night of the murders. This argument must fail for the simple reason that Simpson had no standing to challenge the vehicle's search. An individual must have standing to challenge a search on Fourth Amendment grounds because the rights secured by the Fourth Amendment are personal in nature; that is, he must have a legitimate expectation of privacy in the area to be searched. *Stanley v. State*, 330 Ark. 642, 644, 956 S.W.2d 170, 171 (1997) (citing *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997)). This court has repeatedly held that a defendant has no standing to question the search of a vehicle owned by another person. *Stanley*, 327 Ark. at 644, 956 S.W.2d at 171; *see also State v. Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992). In order to establish a legitimate expectation of privacy in an automobile owned by another person, a defendant must

show that he gained possession of the vehicle from the owner or from someone who had authority to grant possession. *Stanley*, 327 Ark. at 644, 956 S.W.2d at 171; *Littlepage v. State*, 314 Ark. 362, 863 S.W.2d 276 (1993).

The car in this case belonged to Simpson's sister, who had loaned it to her mother at the time of the murders. Not only did Simpson fail to show that he gained possession of the car from the owner, he admitted at trial that his mother, who probably would have had authority to grant possession, did not know that he took the car that evening. Indeed, he did not even so much as ask her permission to take it. Because Simpson had neither a property interest nor a possessory one in the vehicle, he had no legitimate expectation of privacy in it. Accordingly, he failed to establish that he had standing to object to the vehicle's search.

SEARCH AND SEIZURE – STOP AND FRISK; ANONYMOUS TIPS

In *United States v. Dupree*, CA8, No. 99-1806, 1/28/00, at approximately 11:45 a.m. on August 15, 1998, Minneapolis police received an anonymous 911 call. The caller reported that six or seven African-American men in their early to late 20's were selling drugs in an alley that runs parallel to Bloomington and Sixteenth Avenues between Lake and Twenty Ninth Streets. The caller said a large man with a cell phone wearing a white t-shirt and dark pants was the possible "main man." The tip was immediately dispatched to

patrol officers on the mobile data computer terminals in their patrol cars. Officers' Radke and Petocnik were on patrol, driving eastbound on Twenty Ninth Street approaching Bloomington Avenue. Being very near the reported drug trafficking, they responded to the dispatch.

Radke and Petocnik arrived at the intersection of Twenty Ninth Street and Bloomington Avenue, some 300 feet from the entrance to the alley, about 30 seconds after receiving the dispatch. They saw a group of five African-American men standing in the intersection. Upon seeing the squad car, two of the men headed south along Bloomington Avenue toward Lake Street, while the other three, including a stocky man in a white T-shirt and blue jeans, began walking in the opposite direction. The officers followed the group of three because it included the one man who appeared to fit the caller's description of the "main man." They pulled alongside the trio and stopped on a bridge just north of Twenty Ninth Street. As the officers exited their patrol car and asked if they could talk to the men, Officer Radke observed one of the three, later identified as Mallet, walk over to the side of the bridge and drop a small object over the railing. Based on the nature of the tip, Officer Radke suspected an attempt to destroy evidence of drug trafficking. He moved quickly to restrain Mallet and the man standing next to him, later identified as Williams, from throwing more evidence off the 50-foot-high bridge.

After seizing Mallet and Williams, Officer Radke instructed them to walk to the patrol car and put their hands on top of the car.

Meanwhile, Officer Petocnik brought the third man, Dupree, to the patrol car and told him to place his hands on the car. As he did so, Dupree placed a duffel bag he was carrying on the hood of the car. While Officer Petocnik stood watch, Officer Radke frisked Mallet and Williams and placed them in the back of the patrol car to protect the safety of the outnumbered officers. Radke next conducted a pat-down search of Dupree. During that search, Officer Petocnik asked Dupree if the blue duffel bag was his. Dupree said yes. Petocnik then asked whether there was "anything in the bag he should know about." When Dupree replied no, Petocnik asked for permission to look inside the duffel. Both officers testified that Dupree consented before the duffel was searched. When a handgun was found in the duffel, the officers arrested Dupree for possession of the weapon. Mallet and Williams were identified and released.

Dupree argues that Officers Radke and Petocnik lacked reasonable suspicion because they stopped the three men solely on the basis of an anonymous tip that a bigger group of African-American men was selling drugs in an alley that the officers never even entered. Dupree further emphasizes that, while the tipster said the "main man" was large and carried a cell phone, Dupree is only five-feet-nine-inches tall and was not carrying a cell phone. Relying on the Supreme Court's decision in *Alabama v. White*, 496 U.S. 325, 328-32 (1990), Dupree contends that the anonymous tip had a low degree of reliability. It, therefore, required substantially more corroboration than Officers Radke and

Petocnik undertook before it could justify an investigative stop of Dupree and his companions.

The Eighth Circuit Court of Appeals rejected this contention because it fails to take into account the relevant circumstances. Immediately after the anonymous tip was dispatched, Officers Radke and Petocnik arrived in the area and saw five men near the alley where the tipster said a somewhat bigger group had been selling drugs. As the officers approached, the group split up. The officers stopped alongside the threesome that included one man dressed like the tipster's "main man" and asked if they could talk. No Fourth Amendment interest is violated when police officers "approach an individual on the street" and "ask him if he is willing to answer some questions." *Florida v. Bostick*, 501 U.S.429, 434 (1991). Thus, the only actions the officers took solely on the basis of the anonymous tip did not violate Dupree's Fourth Amendment rights.

As he approached the group to talk, Officer Radke saw Mallet move quickly to the railing and drop a small object from the bridge to the railroad tracks far below. Based on the tip and his personal knowledge of frequent drug trafficking in that area, Radke reasonably suspected that Mallet was attempting to destroy evidence before talking to the police. Only then did Radke seize Mallet and Williams and begin the investigative stop. Even more than the "headlong flight" that justified a *Terry* stop in *Illinois v. Wardlow*, No. 98-1036, 2000 WL 16315 (U.S. Jan. 12, 2000), Mallet's evasive action in dropping a small object off the bridge before talking to the police

gave Officer Radke reasonable suspicion that criminal activity was afoot, as the anonymous tipster had reported.

In response, Dupree argues that Mallet's conduct did not give the officers reason to stop Dupree. The Eight Circuit Court of Appeals disagreed. The suspects appeared to be traveling in a group. They had split off from a bigger group near the alley where the tipster reported a group was selling drugs. Dupree resembled the tipster's "main man." To paraphrase *Terry*, "it would have been poor police work indeed" if the officers had not included Dupree in their investigative stop. 392 U.S. at 23. In these circumstances, the Eighth Circuit Court of Appeals agreed with the district court that the investigative stop was based upon constitutionally reasonable suspicion and, therefore, did not violate Dupree's Fourth Amendment rights.

**SEARCH AND SEIZURE –
STOP AND FRISK; FLIGHT
FROM LAW
ENFORCEMENT
OFFICERS IN A HIGH
CRIME AREA**

In *Illinois v. Wardlow*, No. 98-1036, 1/12/00, Officers Nolan and Harvey were working as uniformed officers in the special operations section of the Chicago Police Department on September 9, 1995. The officers were driving the last car of a four car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions. The officers were traveling together because they expected to

find a crowd of people in the area, including lookouts and customers.

As the caravan passed 4035 West Van Buren, Officer Nolan observed Wardlow standing next to the building holding an opaque bag. Wardlow looked in the direction of the officers and fled. Nolan and Harvey turned their car southbound, watched him as he ran through the gangway and an alley, and eventually cornered him on the street. Nolan then exited his car and stopped Wardlow. He immediately conducted a protective pat-down search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions. During the frisk, Officer Nolan squeezed the bag respondent was carrying and felt a heavy, hard object similar to the shape of a gun. The officer then opened the bag and discovered a .38-caliber handgun with five live rounds of ammunition. The officers arrested Wardlow.

The Illinois trial court denied Wardlow's motion to suppress, finding the gun was recovered during a lawful stop and frisk. Following a stipulated bench trial, Wardlow was convicted of unlawful use of a weapon by a felon. The Illinois Appellate Court reversed Wardlow's conviction, concluding that the gun should have been suppressed because Officer Nolan did not have reasonable suspicion sufficient to justify an investigative stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). The Illinois Supreme Court agreed. While rejecting the Appellate Court's conclusion that Wardlow was not in a high crime area, the Illinois Supreme Court determined that sudden flight in such an area does not create a

reasonable suspicion justifying a *Terry* stop. Relying on *Florida v. Royer*, 460 U.S. 491 (1983), the court explained that although police have the right to approach individuals and ask questions, the individual has no obligation to respond. The person may decline to answer and simply go on his or her way, and the refusal to respond, alone, does not provide a legitimate basis for an investigative stop. The court then determined that flight may simply be an exercise of this right to “go on one’s way,” and, thus, could not constitute reasonable suspicion justifying a *Terry* stop. The Illinois Supreme Court also rejected the argument that flight combined with the fact that it occurred in a high crime area supported a finding of reasonable suspicion because the “high crime area” factor was not sufficient standing alone to justify a *Terry* stop. Finding no independently suspicious circumstances to support an investigator detention, the court held that the stop and subsequent arrest violated the Fourth Amendment. The United States Supreme Court granted certiorari and reversed.

This case, involving a brief encounter between a citizen and a police officer on a public street, is governed by the analysis first applied in *Terry*. In *Terry*, the United States Supreme Court held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the

Fourth Amendment requires at least a minimal level of objective justification for making the stop. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The officer must be able to articulate more than an “inchoate and unparticularized suspicion or ‘hunch’ ” of criminal activity.

Nolan and Harvey were among eight officers in a four car caravan that was converging on an area known for heavy narcotics trafficking, and the officers anticipated encountering a large number of people in the area, including drug customers and individuals serving as lookouts. It was in this context that Officer Nolan decided to investigate Wardlow after observing him flee. An individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. *Brown v. Texas*, 443 U.S. 47 (1979). But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, the fact that the stop occurred in a “high crime area” is among the relevant contextual considerations in a *Terry* analysis. *Adams v. Williams*, 407 U.S. 143, (1972).

In this case, moreover, it was not merely Wardlow’s presence in an area of heavy narcotics trafficking that aroused the officers’ suspicion but his unprovoked flight upon noticing the police. United States Supreme Court cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. *United States v. Brignoni-*

Ponce, 422 U.S. 873, 885 (1975); *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (*per curiam*); *United States v. Sokolow*, *supra*, at 8-9. Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and cannot reasonably demand scientific certainty from judges or law enforcement officers where none exist. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. See *United States v. Cortez*, 449 U.S. 411, 418 (1981). The Court concluded Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.

The Court stated that such a holding is entirely consistent with the decision in *Florida v. Royer*, 460 U.S. 491 (1983), where it was held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.” *Florida v. Bostick*, 501 U.S. 429, 437 (1991). But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not “going about one’s business”; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the

fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Wardlow argues that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity. This fact is undoubtedly true, but does not establish a violation of the Fourth Amendment. Even in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation. The officer observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring. *Terry*, 392 U.S., at 5-6. All of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. *Terry* recognized that the officers could detain the individuals to resolve the ambiguity.

In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way. But in this case the officers found Wardlow in possession of a handgun, and arrested him for violation of an Illinois firearm statute. No question of the propriety of the ar-

rest itself is before the Court.

The United States Supreme Court then reversed the decision of the Supreme Court of Illinois and remanded the cause for further proceedings not inconsistent with this opinion.

SEARCH AND SEIZURE; STOP AND FRISK – PLAIN FEEL DOCTRINE

In *Bell v. State*, Harold Bell, Jr., appeals from the decision of the Drew County Circuit Court finding him guilty of a Class A misdemeanor possession of marijuana, and sentencing him to one year in jail with a fine of \$500.00. Bell asserts that the trial court erred when it denied his motion to suppress the 0.7 grams of marijuana found in his pocket.

On June 30, 1997, pursuant to an informant's tip, officers of the Drew County Sheriff's Office went to a pool hall in Wilmar, Arkansas, to investigate a report that drugs and alcohol were being sold there. Upon arrival, Officer Rabb approached Bell, who was sitting on the hood of a car near the front of the yard, and asked for identification. Bell stated that he had no identification. Officer Rabb then told Bell to stand up and asked if he had any weapons. Bell said that he was not armed. After noticing a bulge in Bell's left rear pants pocket, Rabb frisked Bell for weapons. Rabb testified that the bulge felt like a plastic bag with what felt like a vegetable-like substance in the pocket. Raab then removed the contents of the appellant's pocket and discovered that it was marijuana. Bell was charged and convicted of misde-

meanor possession of marijuana.

In *Dickerson*, the United States Supreme Court addressed what has been dubbed the "*Plain Feel Doctrine*" and stated:

Consistent with the Federal Constitution's Fourth Amendment, a police officer may seize non-threatening contraband detected during a protective pat-down search of a person. The officer may briefly stop a person based on the officer's reasonable conclusion that criminal activity may be afoot. When the officer is justified in believing that the person is armed and presently dangerous to the officer or to others, the officer may pat the person down. The officer's search is strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others.

The "plain-view" doctrine—under which police officers may seize an object without a warrant if the officers are lawfully in a position from which they view the object, its incriminating character is immediately apparent, and the officers have a lawful right of access to the object—has an application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search.

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. The warrantless seizure of the object, if it is contraband, is justified by the realization that resort to a neutral magistrate under such circumstances would often be im-

practical and would do little to promote the objectives of the Fourth Amendment.

A suspect's privacy interests are not advanced by a categorical rule barring the warrantless seizure of contraband plainly detected through the sense of touch. The sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. While the sense of touch is generally less reliable than the sense of sight, such fact suggests only that officers will less often be able to justify seizures of unseen contraband. The Fourth Amendment's requirement that officers have probable cause to believe that an item is contraband before seizing it ensures against excessively speculative seizures. The seizure of an item whose identity is already known occasions no further invasion of privacy. *Minnesota v. Dickerson*, supra at 366.

In *Dickerson*, the Court suppressed evidence of the respondent's possession of crack cocaine because it was shown that the arresting officer had to manipulate the object in the pocket of the respondent before determining that it was contraband. This manipulation amounted to an illegal search, as the identity of the contraband was not apparent.

The present case is analogous to *Dickerson*. Rabb was justified in frisking the appellant for weapons. When his initial frisk yielded no weapons, the search should have ended. The holding in *Dickerson* does not permit an officer to search a suspect for contraband under the guise of a weapons search. Because it is clear from the facts that Officer Rabb had to manipulate the bulge in

Bell's rear pocket to determine that it was contraband, this type of search is contrary to the permissible scope outlined in *Dickerson*.

**SEARCH AND SEIZURE;
VEHICLE STOPS –
RATIONAL INFERENCES**

In *State v. Kindle* (Vermont), No. 99-041, 1/14/00, the Vermont Supreme Court held that a police officer's observation of a red beam of light emanating from a vehicle provides adequate grounds for stopping the vehicle. While a lower court had dismissed the case on the basis that the officers lacked reasonable suspicion to make the stop, the Vermont Supreme Court felt that the law enforcement officers could rationally infer that someone in the car was aiming a firearm with the help of a laser-sighting device.

**SEARCH AND SEIZURE;
VEHICLE STOPS –
ROADBLOCKS**

In *State v. Smith*, (Ohio), No. 17475, 1/14/00, the Ohio Court of Appeals, Second District, held that suspicionless police roadblocks to check for individuals driving without valid drivers licenses violates neither the Fourth Amendment nor its own state constitution. The Ohio Court of Appeals stated that checking for unlicensed drivers is a sufficiently vital state interest that outweighs the intrusion on drivers' privacy, even in the absence of statistics showing that unlicensed drivers pose a grave threat to public safety or that they are deterred from driving by police roadblocks.

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