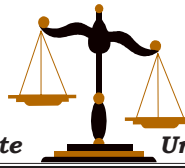




CJI Legal Briefs

Criminal Justice Institute



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CIVIL LIABILITY:

Domestic Violence; Restraining Orders

Town of Castle Rock v. Gonzales, No. 04-278, 6/27/05

In *Town of Castle Rock v. Gonzales*, Jessica Gonzales filed an action in Federal District Court alleging that the Town of Castle Rock, Colorado, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution when its police officers, acting pursuant to official policy or custom, failed to respond properly to her repeated reports that her estranged husband was violating the terms of a restraining order.

The restraining order had been issued by a state trial court several weeks earlier in conjunction with her divorce proceedings. The original form order, issued on May 21, 1999, and served on her husband on June 4, 1999, commanded him not to “molest or disturb the peace of Jessica Gonzales or of any child,” and to remain at least 100 yards from the family home at all times. The bottom of the pre-printed form noted that the reverse side contained “**IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS.**” The preprinted text on the back of the form included the following “warning”:

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"A knowing violation of a restraining order is a crime...A violation will also constitute contempt of court. You may be arrested without notice if a law enforcement officer has probable cause to believe that you have knowingly violated this order."

The preprinted text on the back of the form also included a **"NOTICE TO LAW ENFORCEMENT OFFICIALS,"** which read in part:

"You shall use every reasonable means to enforce this restraining order. You shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order and the restrained person has been properly served with a copy of this order or has received actual notice of the existence of this order."

On June 4, 1999, the state trial court modified the terms of the restraining order and made it permanent. The modified order gave Gonzales' husband the right to spend time with his three daughters (ages 10, 9, and 7) on alternate weekends, two weeks during the summer, and, upon reasonable notice, a mid-week dinner visit arranged by the parties. The modified order also allowed him to visit the home to collect the children for such parenting time.

According to the complaint, at about 5:00 or 5:30 p.m. on Tuesday, June 22, 1999, Gonzales'

husband took the three daughters while they were playing outside the family home. No advance arrangements had been made for him to see the daughters that evening. When Gonzales noticed the children were missing, she suspected her husband had taken them. At about 7:30 p.m., she called the Castle Rock Police Department, which dispatched two officers. When the officers arrived, she showed them a copy of the Temporary Restraining Order (TRO) and requested that it be enforced and the three children be returned to her immediately. The officers stated that there was nothing they could do about the TRO and suggested that Gonzales call the police department again if the three children did not return home by 10:00 p.m.

At approximately 8:30 p.m., Gonzales talked to her husband on his cellular telephone. He told her he had the three children at an amusement park in Denver. She called the police again and asked them to have someone check for her husband or his vehicle at the amusement park and put out an all points bulletin for her husband, but the officer with whom she spoke refused to do so, again telling her to wait until 10:00 p.m. and see if her husband returned the girls.

At approximately 10:10 p.m., Gonzales called the police and said her children were still missing, but she was now told to wait until midnight. She called at midnight and told the dispatcher her children were still missing. She went to her husband's apartment and, finding nobody there, called the police at 12:10 a.m. She was told to wait for an officer to arrive. When none came, she went to the police station at 12:50 a.m. and submitted an incident report. The officer who took the report made no reasonable effort to enforce the TRO or

locate the three children. Instead, he went to dinner.

At approximately 3:20 a.m., Gonzales' husband arrived at the police station and opened fire with a semi-automatic handgun he had purchased earlier that evening. Police shot back, killing him. Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered.

On the basis of the foregoing allegations, Jessica Gonzales brought an action under 42 U.S.C. § 1983, claiming that the town violated the Due Process Clause because its police department had an official policy or custom of failing to respond properly to complaints of restraining order violations and tolerated the non-enforcement of restraining orders by its police officers. The complaint also alleged that the town's actions were taken either willfully, recklessly, or with such gross negligence as to indicate wanton disregard and deliberate indifference to Gonzales' civil rights.

Before answering the complaint, the Town of Castle Rock filed a motion to dismiss. The District Court granted the motion, concluding that, whether construed as making a substantive due process or procedural due process claim, Gonzales' complaint failed to state a claim upon which relief could be granted.

A panel of the Court of Appeals affirmed the rejection of a substantive due process claim, but found that Gonzales had alleged a procedural due process claim. On rehearing by the full court there was a conclusion that Gonzales had a protected property interest in the enforcement of the terms of her restraining order and that the town had deprived her of

due process because the police never heard nor seriously entertained her request to enforce and protect her interests in the restraining order. The United States Supreme Court granted certiorari, finding as follows:

"...the Fourteenth Amendment to the United States Constitution provides that a State shall not 'deprive any person of life, liberty, or property without due process of law.' In 42 U. S. C. §1983, Congress has created a federal cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.' Gonzales claims the benefit of this provision on the ground that she had a property interest in police enforcement of the restraining order against her husband, and the town deprived her of this property without due process by having a policy that tolerated non-enforcement of restraining orders.

"The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit.' To have a property interest in a benefit, a person must have a legitimate claim of entitlement to it.

"Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. The Court of Appeals in this case determined that Colorado law created an entitlement to enforcement of the restraining order because the court-issued restraining order specifically dictated that its terms must be enforced and a state statute commanded enforcement of the order when certain objective conditions were met (probable cause to believe that the order had been violated and that the object of the order had received notice of its existence). Gonzales contends that we are obliged to give

deference to the Tenth Circuit's analysis of Colorado law on whether she had an entitlement to enforcement of the restraining order.

"We will not, of course, defer to the Tenth Circuit on the ultimate issue: whether what Colorado law has given Gonzales constitutes a property interest for purposes of the Fourteenth Amendment. That determination, despite its state law underpinnings, is ultimately one of federal constitutional law. Although the underlying substantive interest is created by an independent source such as state law, *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause.

"Resolution of the federal issue begins, however, with a determination of what it is that state law provides. In the context of the present case, the central state law question is whether Colorado law gave Gonzales a right to police enforcement of the restraining order. It is on this point that Gonzales' call for deference to the Tenth Circuit is relevant.

"We have said that a presumption of deference is given the views of a federal court as to the law of a State within its jurisdiction. That presumption can be overcome, however, and we think deference inappropriate here. The Tenth Circuit's opinion, which reversed the Colorado District Judge, did not draw upon a deep well of state-specific expertise, but consisted primarily of quoting language from the restraining order, the statutory text, and a state legislative hearing transcript. These texts, moreover, say nothing distinctive to Colorado, but use mandatory language that appears in many state and federal statutes.

"The critical language in the restraining order came not from any part of the order itself, but from the preprinted notice to law enforcement personnel that appeared on the back of the order. That notice effectively restated the statutory provision describing 'peace officer duties' related to the crime of violation of a restraining order. At the time of the conduct at issue in this case, that provision read as follows:

(a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such order. *A peace officer shall use every reasonable means to enforce a restraining order.*

(b) *A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:*

(I) The restrained person has violated or attempted to violate any provision of a restraining order; and

(II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b), a peace officer shall assume that the information received from the registry is accurate. *A peace officer shall enforce a valid restraining order whether or not there is a record of the restraining order in the registry.*

"The Court of Appeals concluded that this statutory provision—especially taken in

conjunction with a statement from its legislative history, and with another statute restricting criminal and civil liability for officers making arrests—established the Colorado Legislature’s clear intent to alter the fact that the police were not enforcing domestic abuse restraining orders, and thus its intent that the recipient of a domestic abuse restraining order have an entitlement to its enforcement. Any other result, it said, ‘would render domestic abuse restraining orders utterly valueless.’

“This last statement is sheer hyperbole. Whether or not Gonzales had a right to enforce the restraining order, it rendered certain otherwise lawful conduct by her husband both criminal and in contempt of court. The creation of grounds on which he could be arrested, criminally prosecuted, and held in contempt was hardly ‘valueless’—even if the prospect of those sanctions ultimately failed to prevent him from committing three murders and a suicide.

“We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.

“In each and every state there are long standing statutes that, by their terms, seem to preclude non-enforcement by the police. However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally. They clearly do not mean that a police officer may not lawfully decline to make an arrest. As to third parties in these states, the full enforcement statutes simply have no

effect, and their significance is further diminished.

“In the specific context of domestic violence, mandatory arrest statutes have been found in some States to be more mandatory than traditional mandatory arrest statutes. Even in the domestic violence context, however, it is unclear how the mandatory arrest paradigm applies to cases in which the offender is not present to be arrested. Much of the impetus for mandatory arrest statutes and policies derived from the idea that it is better for police officers to arrest the aggressor in a domestic-violence incident than to attempt to mediate the dispute or merely to ask the offender to leave the scene. Those other options are only available, of course, when the offender is present at the scene.

“Even if the statute could be said to have made enforcement of restraining orders ‘mandatory’ because of the domestic violence context of the underlying statute, that would not necessarily mean that state law gave Gonzales an entitlement to *enforcement* of the mandate. Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people. The serving of public rather than private ends is the normal course of the criminal law because criminal acts, besides the injury they do to individuals, strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity. This principle underlies, for example, a Colorado district attorney’s discretion to prosecute a domestic assault, even though the victim withdraws her charge. See *People v. Cunefare*, 102 P. 3d 302, 311–312 (Colo. 2004).

“We conclude, therefore, that Gonzales did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband. It is accordingly unnecessary to address the Court of Appeals’ determination that the town’s custom or policy prevented the police from giving her due process when they deprived her of that alleged interest.

“In light of today’s decision and that in *DeShaney v. Winnebago County Dept. of Social Services* (another case with undeniable tragic facts) the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its substantive manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as a source of tort law.

“This does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 (the original source of §1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.”



DRUG ENFORCEMENT:
Medical Marijuana

Gonzales v. Raich, No. 03-1454, 6/6/05

California’s Compassionate Use Act authorizes limited marijuana use for medicinal purposes. Angel McClary Raich and Diane Monson are California residents who both use doctor-recommended marijuana for serious medical conditions. After federal DEA agents seized and destroyed all six of Monson’s cannabis plants, McClary Raich and Monson brought an action seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. These individuals claim that enforcing the Act against them would violate the Commerce Clause and other constitutional provisions. The District Court denied their motion for a preliminary injunction, but the Ninth Circuit Court of Appeals reversed, finding that they had demonstrated a strong likelihood of success on the claim that the Act is an unconstitutional exercise of Congress’ Commerce Clause authority as applied to the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient’s physician pursuant to valid California state law.

The U.S. Supreme Court reversed and held that Congress’ Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana notwithstanding the attempt by California to legalize medical marijuana under the California Compassionate Use Act.

FAMILY AND MEDICAL LEAVE ACT:
Abuse of Sick Leave

Callison v. City of Philadelphia,
 CA3, No. 04-2941, 4/19/05

In *Callison v. City of Philadelphia*, the U.S. Court of Appeals for the Third Circuit dealt with a City of Philadelphia employee manual that contained the following requirement for all employees on sick leave:

During regular working hours, when an employee is home on sick leave, the employee must notify the appropriate authority or designee when leaving home and upon return. An employee is to remain at home except for personal needs related to the reason for being on sick leave.

David W. Callison, while on approved Family and Medical Leave Act (FMLA) leave for three months, was determined to not have been at home on several dates and had failed to notify the city. In accordance with the policy, Callison received suspensions, respectively, for his failure to notify the hotline that he was leaving his home. The suspensions were served by Callison when he returned to work from his FMLA leave.

Callison argues that the FMLA anti-abuse and eligibility provisions conflict with the City's call-in requirement in its sick leave policy and therefore the requirement should not have applied to him while he was on leave. He asserts that once an employee is pre-approved for FMLA leave, he/she should be left alone.

The FMLA is meant to prohibit employers from retaliating against employees who

exercise their rights, refusing to authorize leave, manipulating positions to avoid application of the Act, or discriminatorily applying policies to discourage employees from taking leave. In the instant case, the City did not engage in any of these prohibited acts. The City provided Callison with the entitlements set forth in the FMLA (e.g., a twelve-week leave and reinstatement after taking medical leave).

The City's internal call-in policy neither conflicts with nor diminishes the protections guaranteed by the FMLA. Accordingly, Callison was required to comply with the policy and the City did not abrogate his FMLA rights by placing him on suspension for the violations.

JAILS AND PRISONS:
Supermax Security Facilities

Wilkinson v. Austin, No. 04-495, 6/13/05

In *Wilkinson v. Austin*, the United States Supreme Court dealt with the assignment of prison inmates to Supermax facilities. Supermax prisons are maximum security facilities with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population. Their use has increased in recent years, in part as a response to the rise in prison gangs and prison violence.

Ohio opened its only Supermax facility, the Ohio State Penitentiary (OSP), after a riot in one of its maximum security prisons. In the OSP almost every aspect of an inmate's life is controlled and monitored. Incarceration there is synonymous with extreme isolation.

Opportunities for visitation are rare and are always conducted through glass walls. Inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact. Placement at OSP is for an indefinite period, limited only by an inmate's sentence. Inmates otherwise eligible for parole lose their eligibility while incarcerated at OSP.

When OSP first became operational, no official policy governing placement there was in effect, and the procedures used to assign inmates to the facility were inconsistent and undefined, resulting in haphazard and erroneous placements. In an effort to establish guidelines for the selection and classification of OSP inmates, Ohio issued its Policy 111-07. Relevant here are two versions of the policy—the “Old Policy” and the “New Policy.” Because assignment problems persisted after the Old Policy took effect, Ohio promulgated the New Policy to provide more guidance regarding the factors to be considered in placement decisions and to afford inmates more procedural protection against erroneous placement.

Under the New Policy, a prison official conducts a classification review either (1) upon entry into the prison system if the inmate was convicted of certain offenses, (e.g., organized crime), or (2) during the incarceration if the inmate engages in specified conduct, (e.g., leads a prison gang). The New Policy also provides for a three-tier review process after a recommendation that an inmate be placed in OSP. Among other things, the inmate must receive notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal at a hearing, although he may not call witnesses. In addition, the inmate is invited to submit objections prior to the final level of review. Although a subsequent

reviewer may overturn an affirmative recommendation for OSP placement at any level, the reverse is not true; if one reviewer declines to recommend OSP placement, the process terminates. Ohio also provides for a placement review within 30 days of an inmate's initial assignment to OSP, and annual review thereafter.

A class of current and former Ohio State Prison inmates filed this suit for equitable relief under 42 U. S. C. §1983, alleging Ohio State Penitentiary policies on assignment to Supermax facilities violated the Fourteenth Amendment's Due Process Clause. The Federal District Court decided the Ohio State Prison policy was inadequate to meet procedural due process requirements. The court therefore ordered modifications to the policy, including both substantive modifications narrowing the grounds that Ohio could consider in recommending assignment to its Supermax and various specific procedural modifications. The Sixth Circuit affirmed the District Court's conclusion that the inmates had a liberty interest in avoiding Supermax placement and upheld the lower court's procedural modifications in their entirety, but set aside the far-reaching substantive modifications on the ground they exceeded the District Court's authority.

The United States Supreme Court affirmed in part, reversed in part, and remanded the case back for additional court action. The United States Supreme Court held that the procedures by which Ohio's new policy classifies prisoners for placement at its Supermax facility provide prisoners with sufficient protection to comply with the Due Process Clause. In reaching this decision, the Court discussed at length the constitutionally protected liberty interest in

avoiding assignment to a Supermax facility, inmate due process considerations, and the problem prison management faces in being able to ensure the safety of officer and prison personnel, the safety of the public, and the safety of individual prisoners.

SEARCH AND SEIZURE:

Air Traveler Screening

United States v. Marquez,
CA9, No. 04-30243, 6/7/05

On the afternoon of October 3, 2002, Sergio Ramon Marquez attempted to board a domestic flight to Anchorage from Seattle. After checking in for his flight, he proceeded to the TSA security checkpoint where he was diverted to Checkpoint B, the “selectee lane.” A passenger chosen for the selectee lane is subjected to more thorough search procedures, regardless of whether or not the x-ray luggage scan reveals something suspicious or the walkthrough magnetometer sounds an alarm. The primary additional procedure involves a full-body wand with a handheld magnetometer that uses technology similar to, but more sensitive than, the walkthrough magnetometer. According to testimony, a passenger is randomly selected for the selectee lane either by the airlines at the time of check-in or by TSA employees stationed at the security checkpoint entrance when the passenger presents his or her identification and boarding pass. It is not clear whether Marquez was selected by his airline or by the TSA employee who checked his identification and boarding pass before he entered the security line. For purposes of the constitutional analysis it is immaterial because there was no showing that the decision was

supported by any articulable reason other than completely random selection.

Once in line, Marquez took off his coat and shoes and placed them on the x-ray scanner conveyor belt along with his carry-on luggage. He walked through the magnetometer and was instructed to sit down in the screening area. At this point, TSA screener Petersen, who was in charge of wand the passengers in the selectee lane when Marquez passed through, retrieved Marquez’s personal items from the x-ray belt. Petersen then approached Marquez and began to scan his person with the handheld magnetometer, screening Marquez’s feet first, then having him stand up to screen the rest of his body.

Thus far, the wand had not indicated the presence of anything suspicious. However, the wand “alarmed” when it passed over Marquez’s right hip. Petersen testified that he understood TSA policy to require him to determine the cause of the alarm. Thus, Petersen informed Marquez that he had to touch Marquez’s hip in order to ascertain what had triggered the alarm. Marquez denied Petersen permission to touch his hip, and swatted Petersen’s hand away when he tried to touch the area. Nonetheless, Petersen felt a “hard brick type of thing” and, on the basis of his experiences in the military and his TSA training, Petersen feared that the object might be C-4 explosives.

After swatting Petersen’s hand away, Marquez continued to protest Petersen’s subsequent attempts to determine the source of the alarm, telling Petersen that the wand must have been triggered by a metal rivet on his pants, and that there was no need to look any further. Petersen persisted as well, telling Marquez that

he needed to determine what set off the wand, and Marquez continued to refuse, repeating that it was “[just] a rivet.”

Petersen called for his supervisor. Marquez was becoming increasingly agitated, and, upon arrival, the supervisor recommended that he “[c]alm down a little bit” because they had “to get through this if [Marquez] wanted to fly.” Both Petersen and his supervisor again attempted to obtain Marquez’s permission to continue with the wand and determine the source of the alarm, but Marquez refused. Ultimately, after entering a private screening room and in response to the supervisor’s repeated requests to determine what caused the wand to alarm, Marquez quickly pulled down his pants, revealing “bricks of stuff in his crotch area...with a pair of [spandex leggings] over the top.” Port of Seattle Police were summoned, and an agent from the Drug Enforcement Agency (“DEA”) also responded. The officers searched and questioned Marquez and then retrieved four wrapped bricks of cocaine from his person.

Marquez was charged with one count of possession with intent to distribute over 500 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1). Marquez moved to suppress the evidence, arguing that the additional screening procedures were unreasonable because they

“In *United States v. Marquez*, the Ninth Circuit Court of Appeals held that members of the Transportation Safety Administration do not violate the Fourth Amendment rights of those air travelers whom they randomly select to be scanned for weapons and explosives with a handheld magnetometer after they have passed through the walk-through metal detector.”

were not based on individualized suspicion of wrongdoing. The district court denied the motion to suppress, concluding that the additional screening in the selectee lane was reasonable. Marquez entered into a conditional plea agreement with the Government and was sentenced to 60 months in prison. He filed an appeal with the Ninth Circuit Court of Appeals.

In *United States v. Marquez*, the Ninth Circuit Court of Appeals held that members of

the Transportation Safety Administration do not violate the Fourth Amendment rights of those air travelers whom they randomly select to be scanned for weapons and explosives with a handheld magnetometer after they have passed through the walk-through metal detector.

In this particular case, there was no question as to whether or not the selection was random or whether the purpose of the scan was anything other than a search for weapons or explosives, notwithstanding that a brick of cocaine was located in the search.

SEARCH AND SEIZURE:
Automobile Impoundment Policy

United States v. Petty,
CA8, No. 03-3388, 5/18/04

In the early morning hours of August 19, 2002, Officer James Helton of the Kansas City, Missouri, police department saw Jerry Petty drop a bag in an area known for narcotics activity and prostitution. An officer retrieved the bag, and it contained crack cocaine. Petty was arrested. While searching Petty incident to his arrest, officers found over \$2,000 in cash and an Enterprise Leasing car key.

While detaining Petty, officers observed a female walking toward an adjacent parking lot. The officers questioned the female, who stated that she had come to the area with Petty in a white car. The officers located a white car in the parking lot. The lot belonged to a business that was closed, but the district court found that the car was not parked illegally. Enterprise Leasing owned the car, and the unidentified female claimed no interest in it. After taking Petty into custody, the officers decided to impound the car. Before towing the vehicle, it was police department procedure to create an inventory of its contents. During the inventory search, the police found two stolen .38 caliber revolvers which were loaded.

Jerry Petty was charged with unlawful possession of a firearm as a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1). In *United States v. Petty*, Petty moved to suppress the handguns on the ground that the car was impounded in violation of the Fourth Amendment.

At the suppression hearing, Officer Helton testified that when a suspect with a car at the scene is taken into custody, it was department policy either to “tow the vehicle, release it to another subject, or leave it there.” He further testified that the decision to impound the car was made, at least in part, because it was owned by Enterprise Leasing, not by Petty. Officer Helton explained that “what we do is we tow it to our tow lot, and then Enterprise will come back and recover the vehicle.”

“The officer testified that he ruled out the option of releasing the car to another subject because the female companion had no interest in the vehicle. He stated that after consulting with a police sergeant, he declined to leave the car in the parking lot, reasoning that the car “was on a private lot, that you can’t leave a car abandoned...because we’re responsible for it,” and that the car “did not belong there.” He explained that police earlier had caused the only other non-business vehicle in the parking lot to exit by directing the sleeping driver to move on. On cross examination, Officer Helton acknowledged that part of his motivation in towing the car was to find out whether there were more drugs or cash inside, saying, “That’s part of our investigation.”

The Eighth Circuit Court of Appeals stated that impoundment of a vehicle for the safety of the property and the public is a valid community caretaking function of the police. They found as follows:

“Police may take protective custody of a vehicle when they have arrested its occupants, even if it is lawfully parked and poses no public safety hazard. *United States v. Martin*, 982 F.2d 1236, 1240 (8th Cir. 1993). Despite these well-established principles, Petty argues that the

seizure was invalid because the government failed to present evidence of a standardized impoundment policy to guide the exercise of police discretion.

“Petty’s argument is based on *Colorado v. Bertine*, 479 U.S. 367, 375 (1987), wherein the Supreme Court held that police may exercise discretion to impound a vehicle, ‘so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.’ Some degree of standardized criteria or established routine must regulate these police actions, which may be conducted without the safeguards of a warrant or probable cause, to ensure that impoundments and inventory searches are not merely a ruse for general rummaging in order to discover incriminating evidence. See *Florida v. Wells*, 495 U.S. 1, 4 (1990).

“The requirement that discretion be fettered, however, has never meant that a decision to impound or inventory must be made in a totally mechanical fashion. *Wells*, 495 U.S. at 4. As with an inventory search, an impoundment policy may allow some latitude and exercise of judgment by a police officer when those decisions are based on concerns related to the purposes of an impoundment. It is not feasible for a police department to develop a policy that provides clear-cut guidance in every potential impoundment situation, and the absence of such mechanistic rules does not necessarily make an impoundment unconstitutional.

“The district court found that it is standard police policy to tow a vehicle when there is no one available to drive it, and Officer Helton testified that the police were responsible for

impounding a vehicle that was abandoned. It would have been simpler for the government to present the police department’s written impoundment policy, but testimony can be sufficient to establish police procedures, *United States v. Lowe*, 9 F.3d 43, 46 (8th Cir. 1993), and we find no clear error in the district court’s finding that the department had a standard policy.

“To be sure, under the procedures described in this case, the officer must exercise some judgment to determine whether a driver is available or a vehicle is abandoned in a particular instance, but we believe the proffered criteria are sufficiently standardized to satisfy the reasonableness requirement of the Fourth Amendment. So long as the officer’s residual judgment is exercised based on legitimate concerns related to the purposes of an impoundment, his decision to impound a particular vehicle does not run afoul of the Constitution.

“The police had a sufficient basis to conclude that the rental car should be impounded pursuant to their standard policy, and that exercise of the community caretaking function was warranted. There was no driver available, because Petty had been arrested, and his female companion wanted nothing to do with the car. The car was left unattended at 1:30 a.m. in an area known for narcotics and prostitution. The business that owned the parking lot was closed, and there was no reason for officers to believe that Petty (who had just been arrested for possession of crack cocaine) was connected to the business. The vehicle was owned by Enterprise Leasing, not by Petty, so the police appropriately were concerned with protecting the property of the rental company from damage or theft. It was

not unreasonable for the police, having just arrested the party who leased the vehicle, to feel that they were responsible for safeguarding the car until it could be retrieved by the owner.

“Petty argues that the impoundment was nevertheless tainted by the officer’s investigatory motive. That an officer suspects he might uncover evidence in a vehicle, however, does not preclude the police from towing a vehicle and inventorying the contents, as long as the impoundment is otherwise valid. *United States v. Garner*, 181 F.3d 988, 991-92 (8th Cir. 1999). Indeed, police ‘may keep their eyes open for potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime,’ *United States v. Marshall*, 986 F.2d 1171, 1176 (8th Cir. 1993), and the same rule applies to an impoundment that precedes an inventory.”

SEARCH AND SEIZURE:

Consensual Encounters

Stevens v. State, Ark. Ct. App.
No. CACR 04-919, 5/25/05

Officer Randall Robinson of the Little Rock Police Department was on patrol at about 2:45 a.m. on December 12, 2003, and was parked in a lot adjacent to the Exxon store on the corner of Asher and 36th Street. Officer Robinson stated that there had been numerous prior complaints from the Exxon clerk pertaining to people loitering in the parking lot after leaving nearby clubs.

Officer Robinson observed a car enter and stop in one of the car wash stalls on the Exxon property. Officer Robinson stated that there

was not much traffic and that there were plenty of open parking spaces in front of the store. Officer Robinson watched the vehicle for eight to ten minutes and observed no activity. He then decided to make contact with the driver to “check on the condition of the subject.”

Officer Robinson activated his blue lights and pulled up to the car-wash stall. Myeshia Stevens was in the driver’s seat and a woman named Anquetta Thompson was in the passenger’s seat. Officer Robinson knocked on the driver’s side window, and Stevens lowered the window. Officer Robinson asked Stevens why she was there, and she replied that she was getting ready to purchase some items from the store. As Officer Robinson talked to Stevens, he smelled a strong odor of marijuana coming from the vehicle. He informed Stevens of this fact and asked her to step out of the car so he could conduct a pat-down search.

After Stevens exited the vehicle, Officer Robinson asked her if she had any drugs or weapons. Stevens advised that she had a blunt (marijuana wrapped within a cigar), and retrieved it from her front pocket and handed it to Officer Robinson. Another patrol unit arrived to offer assistance, and a female officer conducted a pat-down search of both Stevens and Thompson, but found no contraband. Stevens was arrested and placed in the back of Officer Robinson’s patrol car.

Officer Tom Dillon testified that he assisted Officer Robinson in conducting an inventory search of the vehicle because they were going to have it towed. During the search, Officer Dillon found a small bag under the driver’s seat that contained marijuana, a set of scales, some money, and Ms. Stevens’ driver’s license.

Officer Dillon found another bag in the back seat behind the driver's seat that contained several baggies of suspected marijuana.

Officer Robinson acknowledged on cross-examination that, prior to this occasion, he had never met Stevens or Thompson, and had no warrants for their arrest or knowledge of any suspected criminal activity "other than what the clerk had advised in the store."

Stevens' argument is that the searches and seizures of her person and vehicle were unlawful. She contends that Officer Robinson lacked authority to initiate the encounter, and thus that all of the evidence seized as a result of the encounter was fruit of the poisonous tree and should have been suppressed.

The Arkansas Court of Appeals stated that not all personal intercourse between policemen and citizens involves "seizures" of persons under the fourth amendment. A "seizure" occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. The Arkansas Court of Appeals disagreed with the State's argument that the initial contact by Officer Robinson did not constitute a seizure under the Fourth Amendment because the officer in this case activated his blue lights before making the contact. The Court stated as follows:

"Police-citizen encounters have been classified into three categories. See *U.S. v. Hernandez*, 854 F.2d 295 (8th Cir. 1988). The first and least intrusive category is when an officer merely approaches an individual on a street and asks if he is willing to answer some question. Because the encounter is in a public place and is consensual, it does not constitute a 'seizure' within the meaning of the fourth amendment.

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

"A person has been seized within the meaning of the Fourth Amendment only if, in view of all circumstances surrounding the incident, a reasonable person would believe he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544 (1980); *Jefferson v. State*, 349 Ark. 236, 76 S.W.3d 850 (2002). If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed. *Florida v. Royer*, 460 U.S. 491 (1983); *Jefferson v. State*, *supra*. The Supreme Court has held that so long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual, and no reasonable suspicion is required. See *California v. Hodari D.*, 499 U.S. 621 (1991).

"In the present case, Ms. Stevens was seized at the time that Officer Robinson knocked on her window after approaching and stopping in his patrol unit with blue lights flashing. This is because there was a sufficient show of authority to compel a reasonable person to believe that she was not free to disregard the officer and go about her business or leave the scene. The encounter was not consensual and Officer Robinson lacked any reasonable suspicion, and thus the subsequent seizure of all of the evidence was illegal."

For the foregoing reasons, it was held that the trial court erred in denying Ms. Stevens' motion to suppress. The Arkansas Court of Appeals remanded the case with directions that all the seized evidence be suppressed.

SEARCH AND SEIZURE:
**Constructive Possession;
 Trailer Loaded With Marijuana**
McKenzie v. State, CR03775, 5/12/05

On September 23, 2001, Officer Greg Toland of the Arkansas Highway Police was working at a weigh station in Crawford County. Toland pulled Kevin McKenzie over for a random inspection of his truck. When McKenzie showed Toland his log book, Toland noticed that McKenzie was two hours over his permissible drive hours. Toland also saw that McKenzie's bill of lading indicated that only two pallets had been picked up in California, which Toland thought unusual. Toland asked for consent to search the vehicle, which McKenzie granted.

McKenzie provided Toland with the key to open the trailer. When Toland and McKenzie opened the trailer, Toland noticed it was warmer than it should be, given that the bills of lading indicated that McKenzie was carrying lemons and grapefruit, which should have been stored at a temperature between thirty-seven and forty-five degrees, according to the loading sheet. After noticing the temperature, Toland saw that somebody had been on top of the load of produce, "like they had been crawling from the back to the front," and the boxes were "mashed down." Toland shone his flashlight underneath the pallets; at the very front, far end of the truck, he saw some green

and black material that turned out to be duffel bags. Toland said that there was a "space on the left hand side, where you could see all the way down," and at the front, there was a stack of empty pallets.

Toland called for back-up, because McKenzie had a passenger in the cab of his truck. When Officer Jeff Smith of the Crawford County Sheriff's Department arrived, the two proceeded to the front of the trailer and started taking pallets off the top of the duffel bags; then they opened the bags and found 334.4 pounds of marijuana.

In *McKenzie v. State*, the issue before the Arkansas Supreme Court was whether evidence reflected that Kevin McKenzie, the driver of a tractor-trailer rig, was in constructive possession of the marijuana found inside the trailer.

The Arkansas Supreme Court has stated that, in constructive possession cases, the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession of a controlled substance if the location of the contraband was such that it could be said to be under the dominion and control of the accused. *George v. State*, 356 Ark. 345, 147 S.W.3d 691 (2004). Constructive possession may be established by circumstantial evidence. When seeking to prove constructive possession, the State must establish that the defendant exercised care, control, and management over the contraband. This control can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991).

This was the first case in which the Arkansas Supreme Court addressed the issue of constructive possession in the context of a driver of an eighteen-wheel tractor-trailer.

The Court stated that the State's evidence showed that McKenzie had the only key to a locked trailer, and the fact that the trailer was locked was very unusual, as it only contained produce. In addition, the pallets appeared to have had someone crawl over them. As McKenzie was the only person with a key to the trailer, the jury could reasonably have concluded that McKenzie was the person who crawled on the fruit to reach the contraband at the far end of the trailer. Further, McKenzie's testimony that he did not oversee the loading of the trailer was contradicted by the State's evidence that it was an established industry practice for the driver of a truck to observe the loading of his trailer. A defendant's improbable explanation of suspicious circumstances may be admissible as proof of guilt. See *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003); *Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997). In sum, the Court concluded in this constructive possession case that the State proved other factors linking McKenzie to the contraband, and rejected his challenge to the sufficiency of the evidence.

SEARCH AND SEIZURE:
**Drug Sniff Where Officers
 Legally Present on Premises**

United States v. Brock,
 CA7, No. 03-2279, 8/2/05

On April 9, 2002, a team of federal and state law enforcement officers executed a federal search warrant at David Brock's residence,

3375 Payton Avenue in Indianapolis, Indiana. The officers conducted a thorough search of the home and, over several hours, recovered evidence including cocaine, methamphetamine, marijuana, \$35,000 in cash, numerous loaded firearms, and ammunition. Brock was not present during the search, but three individuals were found in the home who identified themselves as Reginald Godsey, Kelly Knox, and Steven Hayden. Indianapolis police officer David Miller placed handcuffs on these individuals, and after informing them of their Miranda rights, proceeded to question them. Godsey told police that he lived next door at 3381 Payton Avenue, and that he watched over both houses. He gave the police a key to 3381 and consented to a search of the common areas of that residence.

Godsey also informed police that Brock rented a room at 3381, which he used as a "stash house." According to Godsey, Brock transported methamphetamine between 3381 and 3375 using a silver suitcase and was storing 16 to 17 pounds of methamphetamine inside a safe in his room at 3381. Police had recovered a silver suitcase during the search of 3375.

After receiving this information from Godsey, Officer Miller returned to the office to prepare an affidavit and obtain a search warrant for the entire 3381 residence. Other officers entered 3381 through the rear door using Godsey's key. The house at 3381 Payton Avenue consisted of a kitchen, a living room, and three separate locked bedrooms. The police found a shotgun in plain view in the living room. Godsey provided a key to his bedroom and authorized police to search it. Officers found in Godsey's room a small amount of narcotics consistent with personal use. Another bedroom in the southwest corner of the

residence had a pile of clothes directly in front of the locked door and a sign on the door stating: “**Stay Out. David.**”

Officer Ron Mills, a canine officer with the Indianapolis police department, was called to 3381 with Yoba, his drug sniffing dog, to corroborate the presence of narcotics. The dog alerted to the presence of narcotics while sniffing just outside Brock’s locked bedroom.

Officer Miller prepared an affidavit in which he detailed all of the evidence recovered from 3375, including utility bills for the 3381 residence in Brock’s name. Miller also included in the affidavit the information provided by Godsey as well as the dog’s alert to the southwest bedroom of 3381. Based on that evidence, a judge issued a search warrant authorizing a search of 3381 and seizure of “Methamphetamine, Cocaine, and extract of Coca, Marijuana, Cannabis, all monies, papers, records, documents, electronic information, or any other documentation which indicates or tends to indicate a violation or a conspiracy to violate the Indiana Controlled Substance Act.”

When Officer Miller returned with the search warrant, police forcibly entered the southwest bedroom. They recovered several firearms from inside a closet, an ammunition box labeled “David Brock,” and a safe, which the officers forcibly opened to find seventeen pounds of methamphetamine and one pound of cocaine. Godsey, along with other individuals, all denied ownership of the drugs and weapons seized from both residences. They were released and were not charged in connection with this case.

Brock was indicted on six counts: two counts of possession with intent to distribute 500

grams or more of methamphetamine, two counts of possession with intent to distribute cocaine, and two counts of being a felon in possession of numerous firearms and ammunition.

Brock contends that the canine sniff outside his locked bedroom door constituted an illegal warrantless search, and that the warrant to search 3381, which was issued in reliance on that sniff, violated the federal and Indiana Constitutions. The government argues that the dog sniff was not a search at all because the police were lawfully present inside Brock’s residence with Godsey’s consent, and Brock possessed no reasonable expectation that his drugs would go undetected.

At oral argument, the government relied primarily on the Supreme Court’s recent decision in *Illinois v. Caballes*, 125 S. Ct. 834 (2005). The Court held in *Caballes* that a dog sniff of a vehicle during a traffic stop, conducted absent reasonable suspicion of illegal drug activity, did not violate the Fourth Amendment because it did not implicate any legitimate privacy interest. The Court explained that, because there is no legitimate interest in possessing contraband, the use of a well-trained narcotics detection dog that only reveals the possession of narcotics compromises no legitimate privacy interest and does not violate the Fourth Amendment.

Brock relies on the Court’s decision in *Kyllo v. United States*, 533 U.S. 27 (2001), which held that the use of a thermal-imaging device to detect relative amounts of heat within a private home was a Fourth Amendment search and must be supported by probable cause and a warrant. In *Kyllo*, the Court held that where the government uses a device that is not in

general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant. The U.S. Seventh Circuit Court of Appeals found as follows:

“Kyllo does not support Brock’s position. The Kyllo Court did reaffirm the important privacy interest in one’s home. However, as the Court subsequently explained in Caballes, it was essential to Kyllo’s holding that the imaging device was capable of detecting not only illegal activity inside the home, but also lawful activity. As the Court emphasized, an expectation of privacy regarding lawful activity is categorically distinguishable from one’s hopes or expectations concerning the non-detection of contraband in the trunk of his car.

“Based on this reasoning, we hold that the dog sniff inside Brock’s residence was not a Fourth Amendment search because it detected only the presence of contraband and did not provide any information about lawful activity over which Brock had a legitimate expectation of privacy. This conclusion is consistent with previous decisions of this Court, as well as those

“Critical to our holding that the dog sniff in this case was not a Fourth Amendment search is the fact that police were lawfully present inside the common areas of the residence with the consent of Brock’s roommate. While Brock contends that he had a legitimate expectation that the contents of his locked bedroom would remain private, he does not contest in any meaningful way Godsey’s authority to allow police inside the common areas of their shared home.”

passengers exiting bus from distance of four to five feet was not a Fourth Amendment search); United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997) (defendant’s reasonable expectation of privacy in his hotel room did not extend to hallway outside his room, and no warrant was needed to bring trained dog to conduct a narcotics sniff in hallway); United States v. Lingenfelter, 997 F.2d 632, 638 (9th Cir. 1993) (canine sniff of a commercial warehouse was not a search because defendant “could have no legitimate expectation that a narcotics canine would not detect the odor of marijuana”); United States v. Colyer, 878 F.2d 469, 477 (D.C. Cir. 1989) (dog sniff of a sleeper car from train’s public corridor was not a search

of the majority of our sister circuits, which have held that canine sniffs used only to detect the presence of contraband are not Fourth Amendment searches. See United States v. Vasquez, 909 F.2d 235, 238 (7th Cir. 1990) (canine sniff of a private garage from a public alley was not a warrantless search). Accord United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998) (where canine team was lawfully present inside a home, the canine sniff itself was not a Fourth Amendment search); United States v. Reyes, 349 F.3d 219, 224 (5th Cir. 2003) (dog sniff of

because it was not overly intrusive and did not expose non-contraband items that otherwise would remain hidden from view).

“Whatever subjective expectation Brock might have had that his possession of narcotics would remain private, that expectation is not one that society is prepared to consider reasonable.

“Critical to our holding that the dog sniff in this case was not a Fourth Amendment search is the fact that police were lawfully present inside the common areas of the residence with the consent of Brock’s roommate. While Brock contends that he had a legitimate expectation that the contents of his locked bedroom would remain private, he does not contest in any meaningful way Godsey’s authority to allow police inside the common areas of their shared home. It is well settled that a third party with common authority over a home may consent to a search, obviating the need for a search warrant. *United States v. Matlock*, 415 U.S. 164, 171 (1974); *United States v. Aghedo*, 159 F.3d 308, 310 (7th Cir. 1997). Third-party consents to search shared property are based on a “reduced expectation of privacy in the premises or things shared with another.” *United States v. Ladell*, 127 F.3d 622, 624 (7th Cir. 1997). When someone shares an apartment or a home with another individual, he ordinarily assumes the risk that a co-tenant might consent to a search, at least to all common areas and those areas to which the other has access. Once Godsey authorized the police to explore the common areas of 3381, the entry of a narcotics-sniffing dog into that space did not infringe on any legitimate privacy interest. Everything behind Brock’s locked bedroom door remained undetected except the narcotics, which Brock had no right to possess in the first place.

“The dog sniff from the common area of defendant’s residence, where police were present by consent, did not violate defendant’s Fourth Amendment rights, and the district court did not err in denying Brock’s motion to suppress.”

SEARCH AND SEIZURE:
**Knock and Talk;
Probable Cause to Refuse to
Allow Occupant to Reenter Premises**

Hester v. State, CR04-875, 5/19/05

A confidential informant told Little Rock Police Detective Greg Siegler that Jimmy Hester was manufacturing methamphetamine at Hester’s residence located at 4330 Highway 165 in North Little Rock. The informant told Siegler that he observed glassware and several chemicals inside the residence on January 27, 2002, and that two empty apartments located directly behind the residence contained components and chemicals to manufacture methamphetamine.

Acting on this information, Siegler and other Little Rock police officers, along with members of the Pulaski County Sheriff’s Department Narcotics Detail and members of the North Little Rock Police Department, went to Hester’s residence on January 29, 2002, at approximately 11:30 a.m. Siegler stated that while at the residence, detectives smelled a strong chemical odor coming from the residence and the two vacant apartments at the rear of the house. Siegler and other officers knocked on the front door of the residence, and Hester answered. The officers requested Hester’s consent to search the residence, and Hester refused. After Hester refused consent

to search, the scene was secured, and Hester was not allowed to go back into his home for some four hours while the police obtained a search warrant.

Kim Moore was also at the residence. When Hester answered the door, Moore exited the residence and began talking to Detective Ken Blankenship of the Little Rock Police Department. According to Siegler, Moore told Blankenship that she had arrived at Hester's residence earlier in the day and that she and Hester had smoked methamphetamine while they were inside the home. Siegler also stated that Moore said she saw inside the house approximately one-half gram of methamphetamine, numerous pieces of drug paraphernalia, and a large chemical can.

Based on this information, District Judge Lee Munson issued a search warrant that authorized a search of the "residence, curtilage and vehicles located at 4330 Hwy. 165, 4330 Hwy. 165, Apartment 'A,' and 4330 Hwy. 165, Apartment 'B,' North Little Rock, Pulaski County, Arkansas, and occupied by Jimmy Hester." Siegler and other law enforcement officers executed the warrant at approximately 3:30 p.m., on January 29, 2002. They seized methamphetamine, pseudoephedrine, and various items of drug paraphernalia.

On appeal, Hester argues that the circuit court erred in denying his motion to suppress evidence found pursuant to a search warrant because the knock-and-talk procedure employed by the police resulted in an illegal seizure of his person in violation of his rights under the Fourth Amendment of the United States Constitution and Article 2, § 15 of the Arkansas Constitution. Alternatively, he argues that the knock-and-talk procedure used by the

police should be declared unconstitutional *per se* under Article 2, § 15 of the Arkansas Constitution.

Upon review, the Arkansas Supreme Court found as follows:

"In Arkansas, 'knock and talk' is a label for a procedure that is defined as follows:

Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof whether the questioner be a pollster, a salesman, or an officer of the law.

"During a knock-and-talk, a police officer may approach a person's residence to ask questions related to an investigation without probable cause or reasonable suspicion. See *McDonald v. State*, 354 Ark. 216, 223-24, 119 S.W.3d 41, 46 (2003). As a general rule, where consent is freely and voluntarily given, the knock-and-talk procedure has been upheld as a consensual encounter and a valid means to request consent to search a house. See *Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582 (2002)...

"Here, acting on a tip from a confidential informant, officers went to question Hester about the manufacturing of methamphetamine, and Hester denied consent to search. However, the officers were able to speak to Moore, who confirmed that there was methamphetamine and drug paraphernalia inside the residence. The tip from the informant, coupled with the

information from Moore, gave the police probable cause to believe that Hester's residence contained evidence of a crime. The officers in this case had a good reason to fear that unless restrained, Hester would destroy evidence. They reasonably might have thought that Hester observed Moore speaking to the officers, and that he was aware that Moore allowed the officers to search her vehicle and accompany her to her home in order to conduct a search there. The officers reasonably could have concluded that Hester, suspecting an imminent search, would get rid of the methamphetamine and drug paraphernalia if given the opportunity.

"Further, the police officers made efforts to reconcile their law enforcement needs with the demands of personal privacy. Hester's residence was not searched until the officers obtained a search warrant. The restraint, denying Hester entry to his residence, was imposed for a limited period of time. Moreover, there is nothing to suggest that police officers in the instant case did not act with diligence in obtaining the warrant.

"In sum, the police officers in this case had probable cause to believe that a home contained contraband, which was evidence of a crime. They reasonably believed that the home's resident, if left free of any restraint, would destroy that evidence. And they imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests. In our view, the restraint met the Fourth Amendment demands."

SEARCH AND SEIZURE:

Vehicle Stop;

Continued Detention; Canine Sniff

Lilley v. State, No. CR 04-1382, 5/26/05

In *Lilley v. State*, the Arkansas Supreme Court dealt with an appeal of James Jesse Lilley, who contends that when a traffic stop is over, reasonable suspicion is required to detain a person and his vehicle further to conduct a canine sniff. In this case, Lilly claims that the police officer who arrested him lacked the necessary reasonable suspicion to detain him and his vehicle further.

On December 4, 2002, Officer Mike Bowman of the Van Buren Police Department was traveling eastbound on Interstate 40, when he observed Lilley's car drive off the road three times. He pulled Lilley over. After doing so, Officer Bowman talked to him through the passenger window and smelled a strong odor of air freshener. Officer Bowman also saw that Lilley was drinking energy drinks which he testified were "to keep [Lilley] awake." He asked for and obtained Lilley's driver's license and vehicle paperwork and then asked Lilley to accompany him back to his patrol car. Officer Bowman testified that since it was raining, he was going to issue Lilley a written warning. While in the patrol car, Officer Bowman ran the usual warrant checks and talked with Lilley, who told him that he was on his way to Chesapeake, Virginia, to visit his mother whom he had not seen in a couple of years. Lilley told Officer Bowman that he was from California and that he worked as a farmer, which Officer Bowman testified "struck [him] as odd."

A one-way car rental agreement from California to Virginia was included in the paperwork which Lilley gave to Officer Bowman. The agreement showed that the vehicle had been rented to William Haller, who was not present, but it also listed Lilley as an additional driver. Lilley said that he planned to drive back to California after a ten-day vacation and further explained that Haller had rented the vehicle for him because Lilley did not have a credit card. After Officer Bowman completed writing Lilley's warning, he handed everything back to Lilley.

At that point, Officer Bowman asked Lilley if he had anything illegal in the vehicle. He testified that he asked Lilley this based on his smell of the air freshener, the rental car whose renter was not in the vehicle, the one-way travel, and Lilley's nervousness. Officer Bowman said that Lilley's nervousness "got worse," and he asked Lilley whether he had any guns or dead bodies in his vehicle. Lilley responded, "No," while keeping eye contact. However, when Officer Bowman asked whether Lilley had any marijuana in his vehicle, Lilley looked away and said, "No," in a softer tone. Officer Bowman asked Lilley if he had any cocaine or methamphetamine in his car, and Lilley responded, "No," while looking back up.

Officer Bowman next asked Lilley for consent to search his vehicle, and Lilley refused. Officer Bowman responded that he was going to run his drug dog around the vehicle. The dog had been in the back seat of the patrol car during the stop. Before Officer Bowman conducted the canine sniff, a second police officer arrived on the scene and sat with Lilley in Officer Bowman's patrol car. The drug dog alerted to

Lilley's trunk, and three duffel bags containing marijuana were found and seized.

The Arkansas Supreme Court noted that Officer Bowman's initial vehicular stop was legal. The Court, however, viewed the stop as completed after the warning and vehicle documentation was handed to Lilley by Officer Bowman.

The State of Arkansas contended that Lilley was not detained by Officer Bowman when the police officer continued to ask him questions following the return of his paperwork, because a reasonable person would have felt free to leave. The State's position is that Lilley was only detained when Officer Bowman decided to run the drug dog around Lilley's car. The Arkansas Supreme Court disagreed with the State's theory of the case stating that a person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. *See Jefferson v. State*, 349 Ark. 236, 76 S.W.3d 850 (2002). The Court stated as follows:

"In the instant case, Officer Bowman testified that he asked Lilley to come back with him to his patrol car. The testimony further reveals that while sitting in the patrol car with Lilley, Officer Bowman did a criminal history check. All the while, Officer Bowman's drug dog was present in the back seat of the police vehicle. At no point was Lilley told that he was free to go. Moreover, Officer Bowman, after handing over his paperwork to Lilley, immediately launched into additional questions about whether Lilley had anything illegal in his vehicle. Under these facts, taken as a whole,

we cannot say that a reasonable person would have believed he was free to leave.

“The next question is whether Officer Bowman had already formed a reasonable suspicion at the conclusion of the valid traffic stop that Lilley was committing, had committed, or was about to commit a felony or misdemeanor under Rule 3.1, in order to further detain him, ask him questions, and conduct a canine sniff of his car.

“The State urges that the following facts mandate a conclusion that under a totality-of-the-circumstances analysis, Officer Bowman possessed a reasonable suspicion to continue to detain Lilley for purposes of conducting a canine sniff: (1) that Lilley was nervous and shaking, despite the heat being on in both his vehicle and Officer Bowman’s vehicle; (2) that Lilley’s rental agreement was for one-way travel, despite the fact that he planned to return to California; (3) that the vehicular rental was made in another person’s name, and (4) that the car smelled strongly of air freshener. While this court has observed that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion, (See *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 [2003] and § 16-81-203[1]) this court has also held that nervousness alone does not constitute reasonable suspicion of criminal activity and grounds for detention. Despite the fact that Lilley was shaking, he did not exhibit any additional signs of nervousness, such as an inability to maintain eye contact with Officer Bowman or evasiveness, prior to the conclusion of the traffic stop. Accordingly, his nervousness, without any other questionable circumstances, would not constitute reasonable suspicion.

“Nor does there appear to be anything inherently suspicious about using a rental car rented by a third party, even when combined with the nervousness of the suspect. Certainly, the Eighth Circuit Court of Appeals agrees with that conclusion. See *United States v. Beck*, 140 F.3d 1129 (8th Cir. 1998)

“In the case at hand, Lilley explained to the police officer that his friend had rented the car for him because he did not have a credit card, and the rental agreement did not contradict that fact as it showed Lilley as an additional driver. While the State further points to the fact that the rental was for a one-way trip, we do not believe that there is anything inherently suspicious about that fact either. Lilley explained to Officer Bowman that he was going home to Virginia to visit his mother but did intend to return to California at a later date. The State cites this court to *United States v. Sokolow*, 490 U.S. 1 (1989), for the proposition that unusual travel plans can support a finding of reasonable suspicion, but the *Sokolow* Court reached that conclusion based on a number of factors, including: (1) that Sokolow traveled under an alias; (2) that he paid \$2,100 for two round-trip tickets from a roll of \$20 bills; and (3) that he stayed in Miami for only forty-eight hours, even though the trip from Honolulu to Miami took twenty hours. Facts such as those in *Sokolow* are more supportive of reasonable suspicion than those in the instant case.

“As a final factor, the strong scent of air freshener might also be considered an innocent act, yet one that when found in conjunction with other factors may constitute reasonable suspicion. On this point, we agree with the jurisprudence of the Eighth Circuit Court of Appeals. In *United States v. Foley*, 206 F.3d 802 (8th Cir. 2000), which the State cites and relies

on, the Eighth Circuit Court of Appeals cited to the presence of a ‘masking odor’ as one of the factors which led that court to affirm a finding of reasonable suspicion. But in that case, in addition to Foley’s nervousness, there was his inability to recall the name of his purported daughter-in-law and a vast divergence between his story and his driver’s story regarding their travel accommodations. *See also United States v. Barry*, 394 F.3d 1070 (8th Cir. 2005) (officer had reasonable suspicion to detain where he saw mist inside the vehicle and smelled air freshener and marijuana); *United States v. Fuse*, 391 F.3d 924 (8th Cir. 2004) (officer had reasonable suspicion to extend stop where there was (1) a strong odor of air freshener; (2) Fuse had a prior arrest; (3) the car did not belong to Fuse or his passenger; (4) Fuse and his passenger were traveling from California; (5) Fuse had an unusual explanation for traveling to Kansas City; (6) Fuse and his passenger continued to be unusually nervous even after being advised that only a warning citation was being issued; and (7) the officer observed a mobile telephone and ‘NoDoz’ in the car). We note in this regard that the Tenth Circuit has held that the scent of a masking agent alone is insufficient to establish reasonable suspicion. *See United States v. Villa-Chaparro*, 115 F.3d 797 (10th Cir. 1997) (also holding that when coupled with other indicia of criminal activity, the presence of air freshener supports a reasonably brief inquiry).

“While the State is correct that several of the factors on which it relies have been used by courts to support a finding of reasonable suspicion, those factors have been relied on in conjunction with other, more serious behavior, such as no proof of car ownership, a prior arrest, inconsistent stories with other travelers, or unusual travel plans. In this case, our focal

point must be at the time the traffic stop was concluded. We are unwilling to condone a dog sniff following the conclusion of a traffic stop merely because someone is traveling through Arkansas in a rental car which smells of air freshener and that person appears nervous after being stopped by police officers. We agree with the Eighth Circuit that ‘it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.’ *United States v. Beck*, 140 F.3d at 1137.”

In this case, the Arkansas Supreme Court looked to the totality of the circumstances relied on by the State at the conclusion of the traffic stop. The Arkansas Supreme Court felt these factors only included: (1) a one-way rental, (2) a rental in another person’s name, (3) nervousness, and (4) the presence of air freshener. The Arkansas Supreme Court held that these factors did not give Officer Bowman reasonable suspicion to detain Lilley further for a canine sniff of his car, after the traffic stop was concluded.

**SEXUAL HARASSMENT:
Hostile Work Environment**

Wright v. Sims, CA8, No. 04-2766, 8/2/05

In *Wright v. Sims*, Brigitte Wright brought this action under section 1983 for sexual harassment, alleging hostile work environment and constructive discharge against Sheriff Tony E. Sims.

Wright is a Canadian citizen with permanent resident status in the United States. From September 2000 to October 2002, she worked

in the Rolette County, North Dakota Sheriff's Department as an office deputy. During that time, Sims was the Sheriff of Rolette County. He was an elected official and was Wright's supervisor.

Use of vulgar, sexist language at the Sheriff's Office was a daily occurrence. During her employment, men in the office called Wright a "big-breasted Canadian secretary," a "dizzy bitch," and "Canadian bacon." Wright was offended and embarrassed by this name calling. Sims admits to this name calling and admits he did it in front of others. On one occasion, Sims referred to Wright as "Canadian bacon" at a Peace Officer's Association meeting, and all in attendance heard the comment. Sims also repeatedly made comments about a "potty cam" when Wright returned from the restroom. These comments embarrassed Wright to the point that she began using the restroom intended for female inmates. In another incident, Sims told Wright he could use a "blow job" after hearing her explain that some police training she had received allowed her to knock somebody out with one blow.

Sims made other comments to Wright about rubbing her "tits with toilet paper" and referred to her vagina as a "snapper." Sims also stroked his mustache while telling Wright he was "clearing off her seat." Sims admits to making this comment to other women in the office several times. Sims also made comments to Wright about lesbian activity. Without belaboring the point, Sims made numerous other unwelcome comments of a sexual nature that would be offensive to any reasonable person. Sims admits to making most of these comments. Wright claims she protested such activity, but her objections were ignored.

In December 2001, Wright passed Correctional Officer basic training. Wright attended training at the police academy and learned that sexual harassment included unwanted comments that were sexual in nature. Wright did not report the offensive statements immediately after her training for fear of retaliation.

In January 2002, Wright discussed the situation with Rolette County Commissioner Eldon Moors, who told her there was nothing he could do about it. In March 2002, Wright reported the situation to Rolette County States Attorney Mary O'Donnell. Wright alleges that the county did nothing to remedy the situation.

On March 29, 2002, Dr. Mallory Leon examined Wright and diagnosed her with high blood pressure, anxiety, and depression. Her physician prescribed Celexa, for depression, Xanax for anxiety and panic attacks, and Lotensin for high blood pressure.

On April 1, 2002, Wright gave notice to Rolette County alleging that Sims' behavior created a hostile work environment. Rolette County hired Attorney Pat Morley to investigate the claim. Wright was placed on paid leave during the investigation. The investigation was completed on or about June 27, 2002. Morley concluded that the comments, though inappropriate, were not unwelcome.

Wright's administrative leave was terminated, and Wright returned to work on July 29, 2002. On October 25, 2002, Wright quit her job, claiming constructive discharge.

Upon review, the U.S. Eighth Circuit Court of Appeals found as follows:

“Sims contends that his behavior cannot constitute sexual harassment because there is no allegation that he touched Wright or made sexual advances toward her. Our case law does not support this contention. *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 964 (8th Cir. 1993) (sexual harassment ‘can obviously result from conduct other than sexual advances’ and the employee need not be ‘touched offensively’); see *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1267 (8th Cir. 1997) (summary judgment for employer reversed when plaintiff pled harasser made sexist comments on marriage, pregnancy, and plaintiff’s appearance, and called her a ‘babe,’ but alleged no physical conduct nor sexual advances). Further, 29 C.F.R. § 1604.11 states, ‘Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when...such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.’ Thus, verbal harassment of a sexual nature which creates an offensive working environment fits the regulation’s definition of sexual harassment.

“To determine whether the harassment affected a term, condition, or privilege of employment, we consider ‘the frequency of the behavior, its severity, whether physical threats are involved, and whether the behavior interferes with plaintiff’s performance on the job.’ *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1026 (8th Cir. 2004). ‘Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.’ *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151.

“In order to affect the term, condition, or privilege of employment, the harassment must be sufficiently severe or pervasive to create an objectively hostile work environment, and in addition, must be subjectively perceived by the plaintiff as abusive. *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1047 (8th Cir. 2005).

“We find that the facts as alleged show the violation of Wright’s constitutional rights under the Equal Protection Clause. Wright is a member of a protected group and alleges that Sims, her supervisor, harassed her in a highly sexualized way. He targeted Wright and made extremely vulgar, sexual comments about her, sometimes in front of her colleagues. Wright alleges that the harassment, which took place over a two-year period, offended and embarrassed her. Neither simple teasing and offhand comments, nor sporadic use of abusive language, gender-related jokes, and occasional teasing, amount to discriminatory changes in the terms and conditions of employment or actionable harassment. However, Sims’ behavior was more serious than simple teasing, and it was not sporadic, nor isolated. The effect of the harassment was so serious that Wright ultimately sought medical treatment for depression, high blood pressure, and anxiety caused by the harassment. Wright also alleges that she complained to Sims and to the county and that nothing was done to stop the behavior. These facts, if proven to be true, support a claim for sexual harassment.

“Sims contends there can be no sexual harassment under section 1983 unless there is physical touching or a request for sexual favors, and therefore the right to be free of behavior such as his was not clearly established.

We believe this is an erroneous view of the law. Taking the facts in the light most favorable to Wright, Sims' behavior constituted gender discrimination. A reasonable officer would have known that it was illegal to subject Wright to such treatment in the workplace. Therefore, Sims is not entitled to qualified immunity or summary judgment on the hostile work environment claim."

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