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ARKANSAS CIVIL SERVICE COMMISSIONS:

Freedom to Abolish

City of Pine Bluff v. Southern States Police Benevolent Association, Inc.,
No. 07-811, 5/29/08

The Arkansas Supreme Court held that because the Pine Bluff City Council was free to establish its civil service commission by majority vote, it is free to abolish its civil service commission by majority vote as well.

CIVIL LIABILITY: Arrest Outside Officer's Jurisdiction

Rose v. City of Mulberry, CA8, No. 07-1645, 7/9/08

In *Rose v. City of Mulberry*, Thomas Matthew Rose sued the city of Mulberry, Arkansas, under 42 U.S.C. § 1983 for violating his Fourth Amendment right to be free from unreasonable searches and seizures. The case is as follows:

On August 1, 2005, Rose was passing through Mulberry on Interstate Highway 40. Mulberry police officer Robert Limbocker stopped him for driving twenty-two miles per hour over the speed limit. Rose denied Limbocker's request to search his vehicle. Two other officers arrived with a police dog, which did not alert on Rose's vehicle. Police dispatch notified Limbocker that there was an outstanding California warrant on Rose, though California apparently did not want him extradited.

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Limbocker arrested Rose for reckless driving and impounded his vehicle, whereupon the other officers departed. Limbocker then searched Rose's vehicle and found no contraband. Limbocker took Rose to the Van Buren, Arkansas jail from which he was released on bond after having been in custody for approximately two-and-one half hours. The charges against him were subsequently dismissed.

Rose's suit is based on his claim that because Limbocker was without jurisdiction to arrest him on Interstate 40, the stop and subsequent search violated the Fourth Amendment. Upon review, the Eighth Circuit Court of Appeals found, in part, as follows:

"At the time of Rose's arrest, Arkansas law provided that municipal police are prohibited from patrolling limited access highways except as may be authorized by the director [of the Department of Arkansas State Police]. Ark. Code Ann. § 12-8- 106(h)(1) (2005). Mulberry had not received such permission. (Indeed, its request for such permission was specifically denied).

"Limbocker had probable cause to detain and arrest Rose because he witnessed Rose commit a traffic violation. See *Whren v. United States*, 517 U.S. 806, (1996). Thus, the determinative issue is whether an arrest by a city police officer outside of his jurisdiction but made with probable cause violates the Fourth Amendment as a matter of law.

"The Supreme Court recently held that a police officer who makes an arrest that is based on probable cause but who is prohibited by state law from doing so does not violate the Fourth Amendment. *Virginia v. Moore*, 128 S. Ct. 1598, 1607 (2008); *CJI Legal Briefs*, Volume 13, Issue

2 (Summer), Page 1. The Court held that although a state may provide more protection from warrantless arrests than the federal Constitution, that enhanced protection does not govern the scope of the protections afforded by the Fourth Amendment. The Court concluded that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections.

"Limbocker lacked the authority under Arkansas law to make traffic stops and arrests on the Interstate. Nevertheless, because he had probable cause to arrest for the offense of reckless driving committed in his presence, no Fourth Amendment violation occurred."

**CIVIL LIABILITY:
Failure to Protect Informant**
Matican v. City of New York,
CA2, No. 06-1983, 4/23/08

Robert Matican purchased crack cocaine from a drug dealer he knew as "Mike," who had supplied him with drugs on a number of prior occasions. Undercover NYPD officers then arrested Matican and took him to a precinct house in Bayside, Queens. While Matican was in a holding cell, Sergeant Chris Zimmerman approached him and offered to make the arrest "go away" if Matican would agree to help the officers arrest Mike. Matican was interested in the offer but expressed concern for his safety if Mike made bail. Matican testified that Zimmerman responded, "Don't worry, Robert, we will look after you. We will protect you." Matican agreed to cooperate based on Zimmerman's promise.

According to Matican, Zimmerman then instructed Matican to arrange a drug buy with Mike the following evening in front of the Bayside Jewish Center, a frequent location for prior drug transactions between Matican and Mike. The police would be waiting with two cars and four officers in each car. When Mike executed his customary illegal U-turn in front of the Jewish Center, Matican would identify the car from the safety of a darkened athletic field across the street, and the police would pull over Mike as if for a routine traffic stop. Lieutenant John Schneider asked Matican what quantity of drugs Mike would be carrying; when Matican replied that Mike would have 20 or 30 bags of crack, Schneider replied, "If he has that many bags, he is not going to even make bail." After the plan was formulated, the officers released Matican with a desk appearance ticket.

The following evening, Matican met the officers at the prearranged location and paged Mike to arrange a large drug buy. Mike arrived and Matican identified his car, as planned. According to Matican, the officers then cut Mike off with two police vehicles, pulled him from the driver's seat, and pinned him against his car. The officers searched Mike's person and car, discovered drugs, and arrested him. Matican remained hidden and unseen in the darkened field.

Mike, whose real name was Steven Delvalle, was found to be in possession of 16 bags of crack cocaine, two bags of marijuana, and about \$2,000 in cash. Delvalle was charged with two counts of criminal possession of a controlled substance, as well as various moving violations. A criminal check performed at the precinct revealed that Delvalle had six prior arrests, including arrests for possession of a handgun and assault with a box cutter. On September

28, 2001, Delvalle was released on bail. Matican was not informed of Delvalle's arrest history, his release, or his real name, and he alleges that had he known these facts, he would have moved to California to live with his brother.

Matican never contacted Delvalle again after the sting operation. He acknowledges that he discussed his participation in the sting with his parents and a close friend, and that at least one other person knew about his role. Subsequently, Delvalle approached Matican on a street in Queens. Delvalle said, "You ratted me. Why did you rat me?" He slashed Matican's face twice with a box cutter, then fled. Delvalle was arrested several days later; he eventually pled guilty to one count of attempted assault and one count of attempted criminal possession of a controlled substance, and was sentenced to eight years in prison.

Matican filed suit stating causes of action under 42 U.S.C. § 1983. The defendants (Captain Julio C. Ordonez, Lieutenant John Schneider, and Sergeant Chris Zimmerman) moved for summary judgment on all claims. The district court granted summary judgment on the § 1983 claims and this appeal followed. Matican asserts a claim under 42 U.S.C. § 1983 that the officers violated his right to substantive due process under the Fourteenth Amendment by failing to protect him from Delvalle's assault; and a § 1983 claim against the City for failing to train its officers to protect confidential informants from harm. Upon review, the Second Circuit Court of Appeals found, in part, as follows:

"These two claims depend on a single threshold question: *Did the officers' actions violate Matican's constitutional rights?* If they did not, then the City cannot be liable to Matican under § 1983, regardless of whether the officers acted pursuant

to a municipal policy or custom. The threshold question is whether the officers' conduct infringed Matican's constitutional rights.

"Among the liberties protected by the Due Process Clause of the Fourteenth Amendment is 'a right to be free from...unjustified intrusions on personal security.' *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). But in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Supreme Court observed that 'nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.' As a result, the Court held that the Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

"There are two exceptions to this general principle. First, the state or its agents may owe a constitutional obligation to the victim of private violence if the state had a special relationship with the victim. Second, the state may owe such an obligation if its agents in some way had assisted in creating or increasing the danger to the victim. Even if Matican's claim falls within one of these two exceptions, and the officers' behavior violated a constitutional obligation, Matican faces a further hurdle: he must show that the officers' behavior was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). This requirement screens out all but the most significant constitutional violations, 'lest the Constitution be reduced to nothing more than tort law.'

"The special relationship exception grows from the *DeShaney* Court's observation that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals. The Court gave, as examples, the obligations of states to incarcerated prisoners and involuntarily committed mental patients, and concluded that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. Under these limited circumstances, the state may owe the incarcerated person an affirmative duty to protect against harms to his liberties inflicted by third parties. But the duty arises solely from the State's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization, or other similar restraint of personal liberty.

"The relationship between the defendants and Matican does not resemble those that have been found to lie within the bounds of the special relationship exception. Matican freely agreed to serve as a confidential informant in exchange for more lenient treatment. He was not in custody at the time of the sting or of Delvalle's assault. The State did not render him unable to care for himself. That he was in custody when he agreed to become a confidential informant is of no moment: he does not allege that he was coerced, and his former incarceration did not exacerbate his injury.

"We therefore join several of our sister circuits in holding that a noncustodial relationship between a confidential informant and police, absent more, is not a special relationship. Accord *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71

(1st Cir. 2005); *Dykema v. Skoumal*, 261 F.3d 701 (7th Cir. 2001); *Butera v. District of Columbia*, 235 F.3d 637, 648 (D.C. Cir. 2001); *Summar v. Bennett*, 157 F.3d 1054, 1059 (6th Cir. 1998).

“The state-created danger exception arises when officers assist in creating or increasing the danger that the victim faced at the hands of a third party.

“In applying the state-created danger principle, we have sought to tread a fine line between conduct that is ‘passive’ and that which is ‘affirmative’ (and therefore covered by the exception). Thus, we have found state-created dangers where police officers told skinheads that they would not prevent them from beating up protesters in a park; where police officers gave a handgun to a retired officer who then shot a fleeing robber; where a prison guard told inmates that it was ‘open season’ on a prisoner, and the inmates beat up the prisoner; and where police officials encouraged an off-duty colleague to drink excessively, after which he killed three pedestrians in a car accident. By contrast, we held that no state-created danger existed where a police officer failed to intervene to prevent a colleague from shooting during an incarceration.

“Matican’s allegation that the officers failed to learn about, or inform him of, Delvalle’s violent criminal history or his release on bail fall on the passive side of the line. Under *DeShaney*, allegations that the defendant officers merely stood by and did nothing are insufficient to state a constitutional violation. This is so notwithstanding Matican’s assertion

“We therefore join several of our sister circuits in holding that a noncustodial relationship between a confidential informant and police, absent more, is not a special relationship.”

that the officers promised to protect him. See *DeShaney*, 489 U.S. at 200 (“The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent

to help him”). By contrast, Matican’s allegation that the officers planned the sting in a manner that would lead Delvalle to learn about Matican’s involvement is sufficiently affirmative to qualify as a state-created danger. See *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir. 2006) (finding that, where a police officer informed assailant that the victim had filed a report against him, and the assailant then shot the victim, the officer ‘affirmatively created an actual, particularized danger’ to the victim).

“Matican’s allegations of affirmative conduct by the officers, even if true, do not shock the contemporary conscience. In designing the sting, the officers here had two serious competing obligations: Matican’s safety and their own. They could reasonably have concluded that the arrest of a potentially violent drug dealer demanded the use of overwhelming force, even if that show of force might jeopardize the informant’s identity in the future. We are loath to dictate to the police how best to protect themselves and the public, especially when our ruling could be taken to require officers to use riskier methods than their professional judgment demands.

“Because the officers were obliged to protect their own safety as well as Matican’s, their design of the sting in this case does not shock the conscience. Matican therefore suffered

no violation of his rights under the Due Process Clause and no constitutional violation occurred.”

CIVIL LIABILITY:

Mistaken Shooting of an Arrestee

Torres v. City of Madera,
CA9, No. 05-16762, 5/5/08

In the process of responding to a loud music complaint, Madera City police officers arrested two individuals—Erica Mejia and Everardo Torres—handcuffed them, and placed them in the back of a patrol car. After the two were in the patrol car for approximately thirty to forty-five minutes (during which time Everardo had fallen asleep), Mejia was removed from the car and her handcuffs were readjusted. At this time, Everardo awoke and started yelling and began kicking the back window of the patrol car. In response, Officer Noriega approached Everardo’s side of the patrol car. At least one witness saw Officer Noriega say something as she approached, which Officer Noriega described as “yelling at [Everardo] to stop or he was going to be tased.” Officer Noriega then opened the patrol car door and reached down with her right hand to her right side, where she had a Glock semiautomatic pistol in a holster in her officer belt and, immediately below, a Taser M26 stun gun in a thigh holster. She unholstered a weapon, pointed the weapon’s laser at Everardo’s center mass, and pulled the trigger of her similarly-sized-and-weighted Glock, mortally wounding Everardo.

Melchor and Maria Torres, individually and as Administrators of the Estate of their son, Everardo, sought damages from Officer Noriega and the City of Madera Police Department under 42 U.S.C. § 1983 for violation of Everardo’s Fourth Amendment right to be free from

unreasonable seizures. Officer Noriega and Madera moved for summary judgment on this claim, and the district court granted this motion, concluding that a Fourth Amendment seizure occurs only when there is a governmental termination of freedom of movement *through means intentionally* applied, and that the means or instrumentality at issue is the intent to seize Everardo with the [Taser] versus the Glock and not the general intent to seize Everardo by shooting something.

Upon review, the Court of Appeals for the Ninth Circuit stated:

“...Officer Noriega’s conduct violated Everardo’s constitutional rights if Everardo was seized and Officer Noriega’s conduct in the course of the seizure was unreasonable. See *Brower v. County of Inyo*, 489 U.S. 593, 596, 599 (1989). A seizure is a governmental termination of freedom of movement through means intentionally applied, and occurs whenever an officer restrains the individual’s freedom to walk away. The City of Madera argues that Everardo was not ‘seized’ by the firing of the Glock because the Glock was not a ‘means intentionally applied.’

“The Ninth Circuit employs a ‘continuing seizure’ rule, which provides that once a seizure has occurred, it continues throughout the time the arrestee is in the custody of the arresting officers. Because Everardo was handcuffed and placed in the back of the patrol car, where he remained when Officer Noriega fired, Everardo remained ‘in the custody of the arresting officers,’ and the officers’ conduct continued to be governed by the Fourth Amendment.

“Even though Everardo was ‘seized’ within the meaning of the Fourth Amendment, Officer Noriega can only be liable under Section

1983 if her conduct was unreasonable. The reasonableness of a particular use of force is judged ‘from the perspective of a reasonable officer on the scene,’ and ‘in light of the facts and circumstances confronting them.’ *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

“There is no question that Officer Noriega intended to draw her Taser but mistakenly drew her Glock. Faced with almost precisely the same situation in another case, the Fourth Circuit concluded that the relevant inquiry was whether the officer’s mistake in using the Glock rather than the Taser was objectively unreasonable. *Henry v. Purnell*, 501 F.3d at 384.

“We agree that this is the appropriate inquiry. The Supreme Court has applied a reasonableness analysis to honest mistakes of fact in a variety of situations. See *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). Although Everardo was already ‘seized’ at the time of the shooting, it is Officer Noriega’s mistaken use of her Glock—not the preceding acts of placing Everardo under arrest and handcuffing him—that the district court must examine for reasonableness.

“The Fourth Circuit Court of Appeals in *Henry* concluded, and we agree, that five factors were relevant to the reasonableness determination: (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant’s conduct heightened the officer’s sense of danger; and (5) whether the defendant’s conduct caused the officer to act with undue haste and inconsistently with that training. *Henry v. Purnell*, 501 F.3d at 383

“While these factors are relevant to the determination of whether Officer Noriega acted reasonably, we also stress that ‘the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments.’ *Graham*, 490 U.S. at 396-97. This case is remanded to the district court to determine whether Noriega’s conduct was unreasonable under *Graham v. Connor*, 490 U.S. 386, (1989).”

DEATH PENALTY: **Child Rape**

Kennedy v. Louisiana, No. 07-343, 6/25/08

The United States Supreme Court held that the Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim’s death. The Court concluded, in its independent judgment, that the death penalty is not a proportional punishment for the crime of child rape.

DWI:

Actual Physical Control of a Motor Vehicle

Collins v. State, CACR 08-61, 6/18/08,

[Unpublished]

Lonoke County Sheriff Deputy Randy Couch was dispatched on December 24, 2006, to a one-car motor-vehicle accident on Bowen Road. When Deputy Couch arrived on the scene at 9:40 p.m., he observed a green Chevrolet pick-up truck parked with its front and rear right tires in a ditch. Deputy Couch first drove by the vehicle and saw Billy Collins inside sitting behind the steering wheel.

The deputy testified that the vehicle was running and that he saw exhaust fumes. Deputy Couch asked Collins if he was okay, to which Collins answered "yes." Deputy Couch then pulled past Collins, parked the patrol vehicle, and approached the driver's side door of the truck. The deputy asked Collins what had happened, and Collins stated that someone had run him off the road. Deputy Couch smelled alcohol and observed that Collins had bloodshot eyes. The deputy then asked Collins if he had been drinking, and Collins

responded that he had consumed a couple of beers. The deputy asked Collins to exit the vehicle, at which time Collins turned off the truck and placed his keys in the pocket of his coat. Several field-sobriety tests were administered, which Collins failed.

Deputy Couch placed Collins under arrest for suspicion of driving while intoxicated. Deputy Couch transported Collins to the Carlisle Police Department to test his blood alcohol content using a BAC DataMaster machine. The results reflected that Collins' BAC was 0.15. Collins requested a second test, and the results were 0.16. Collins then requested a third test, so the deputy transported Collins to Baptist Hospital in Little Rock. Deputy Couch testified that he did not see the results of the third test.

“Arkansas Code Annotated section 5-65-103 (Repl. 2005) provides that it is unlawful and punishable for any person who is intoxicated to operate or be in actual control of a motor vehicle. The statute does not require law enforcement officers to actually witness an intoxicated person driving or exercising control of a vehicle. *Springston v. State*, 61 Ark. App. 3. The State may prove by circumstantial evidence that a person operated or was in actual physical control of the vehicle.”

On cross examination, Deputy Couch testified that his report failed to mention that Collins's truck was running or that Collins placed his keys in his pocket. The deputy also testified that Collins's truck was stuck in the ditch and that he did not know what time the truck became stuck. Finally, the deputy testified that while it was possible that Collins's truck was not running, he believed it was.

Collins testified that he had been employed as a truck driver for twenty-four to twenty-five years and was very

familiar with trucking laws and had served on various commissions created to make truck driving safer. He testified that he never drove after drinking alcohol. According to Collins, on Christmas Eve 2006 between 5:00 to 5:30 p.m., his pick-up truck "got off the road just a little bit." He testified that it was not an accident; rather, his truck was just stuck. He then left his truck, went home, and cooked a turkey. Somewhere between 8:00 and 9:00 p.m., he decided to go for a walk because he had diabetes and needed exercise. Before he left for his walk, within a thirty-minute period, he drank a couple of beers, some egg nog with vodka, and some cough medicine.

After his walk, he decided to walk to his truck to retrieve his "remote." He entered the truck

because it began to rain. When asked how long he had been sitting in his truck prior to the deputy's arrival, Collins's testimony varied. He first testified that he had only been sitting there for one minute prior to the deputy's arrival, but later testified that he had been sitting in the truck for only ten seconds.

Collins testified that he told the deputy "what I was doing and what had happened." Collins told the deputy that he had consumed some cough medicine around 8:35 p.m., after the truck had gotten stuck. Collins denied that his truck was running when the deputy approached it. Collins testified that his keys were in his pocket. He conceded that he took three blood-alcohol-content tests and that the results of the third test taken at Baptist were the same as the results from the two tests taken in Carlisle.

Upon review, the Arkansas Court of Appeals found, in part, as follows:

"Arkansas Code Annotated section 5-65-103 (Repl. 2005) provides that it is unlawful and punishable for any person who is intoxicated to operate or be in actual control of a motor vehicle. The statute does not require law enforcement officers to actually witness an intoxicated person driving or exercising control of a vehicle. *Springston v. State*, 61 Ark. App. 3. The State may prove by circumstantial evidence that a person operated or was in actual physical control of the vehicle.

"Collins does not argue that there was insufficient evidence of his intoxication. Rather, he argues that there was insufficient proof that he was in actual control of his vehicle. He argues that the only evidence showing that he was in control of the vehicle was the deputy's testimony that Collins was behind the wheel of the truck. He

submits that the deputy admitted that it was possible that the engine was not running and that the keys were not in the ignition.

"When viewing the evidence in the light most favorable to the State, considering only the evidence that tends to support the conviction, we hold that substantial evidence supports it. First, Deputy Couch testified that when he approached Collins, Collins was awake, sitting inside the truck behind the steering wheel. Deputy Couch testified that the engine was running and that he saw exhaust fumes coming from the rear of the truck. It was the deputy's testimony that when he asked Collins to exit the truck, Collins turned off the truck and placed the keys in his pocket. Finally, according to Deputy Couch, when he asked Collins what happened, Collins replied that someone had run him off the road.

"We liken these facts to the facts in *Deshazier v. State*, 26 Ark. App. 193, 761 S.W.2d 952 (1998). There, a sheriff's officer responded to an accident. Upon arriving at the scene, the officer found the defendant asleep, seated behind the steering wheel of his vehicle, which was in a ditch. The deputy knocked on the defendant's window and the defendant immediately exited the vehicle. The officer noticed the odor of alcohol on the defendant and placed him under arrest for driving while intoxicated. The defendant was taken to the county jail, given a breathalyzer test, and registered 0.14. *Deshazier*, 26 Ark. App. at 194, 761 S.W.2d at 953.

"At trial, the defendant admitted having driven his car into the ditch and having attempted to get it out. The defendant told the investigating officer that he had been run off the road and into the ditch by another driver. He testified that he began drinking after the accident because he

was upset. The trial court chose not to believe his testimony and found him guilty of driving while intoxicated. *Id.* at 195, 761 S.W.2d at 953. On appeal, our court affirmed, citing to *Altes v. State*, 286 Ark. 94, 689 S.W.2d 541 (1985), stating that the trial court found the defendant's version of events to be false, and holding that there was substantial circumstantial evidence supporting the trial court's conviction. *Deshazier*, 26 Ark. App. at 195, 761 S.W.2d at 954.

"In the case at bar and in *Deshazier*, a sheriff's officer found the defendants sitting behind the steering wheel of a motor vehicle. Both officers smelled alcohol. There was evidence in both cases that the defendants admitted having driven their vehicles into the ditch after someone ran them off the road. Both defendants failed alcohol tests, and both testified they began drinking after the accident.

"These facts were sufficient to uphold the conviction in *Deshazier*, and likewise, are sufficient here. Moreover, we note that there are additional facts in the instant case that further support the conviction. For example, Collins was awake as he sat behind the steering wheel. Also, the deputy testified that Collins' vehicle was running, that he saw exhaust fumes, and that when Collins exited the truck, he removed the keys from the ignition and placed them in his pocket."

The Arkansas Court of Appeals held there was substantial evidence to support Collins's DWI conviction.

DWI: Assistance in Obtaining Additional Chemical Tests

Moore v. State, CACR 07-1083, 5/7/08
[Unpublished]

Dr. Diana Moore was convicted in a jury trial for one count of driving while intoxicated, first-offense, and two counts of second-degree endangering the welfare of a minor. She was fined \$1000 for the DWI and was sentenced for the three offenses to consecutive sentences totaling fifty days in the county jail. She appeals the convictions, contending that the trial court erred by refusing to exclude the results of a breathalyzer test introduced by the State.

Upon review, the Arkansas Court of Appeals found, in part, as follows:

"The charges against Dr. Moore, an optometrist, arose from a traffic stop initiated by Arkansas State Trooper Terral Harsson at 7:50 p.m. on October 22, 2005, when he observed an oncoming car with a headlight out. Moore was driving the car, and her two minor children were in the back seat. After smelling alcohol, observing Moore, and administering field sobriety tests to her, Harsson arrested her for driving while intoxicated. He transported her to jail for a BAC Datamaster breath test, which produced a reading of .09. Moore requested an additional test upon being informed of the right to do so.

"Harsson immediately took her to the White River Medical Center, the nearest facility available at that time of night. Moore slipped and fell while walking up a grassy incline from the patrol car to the hospital entrance, Harsson helped her up, and her blood was drawn

inside the hospital without further incident. The blood-test results were sent to Moore four weeks later.”

Breathalyzer Test Results

“The admission of breathalyzer results is addressed by Ark. Code Ann. § 5-65-204(e) (Repl. 2005), which provides:

(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.

(2) The law enforcement officer shall advise the person in writing of the right provided in subdivision (e)(1) of this section and that if the person chooses to have an additional chemical test and the person is found not guilty, the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test.

(3) The refusal or failure of a law enforcement officer to advise a person of the right provided in subdivision (e)(1) of this section and to permit and assist the person to obtain a chemical test under subdivision (e)(1) of this section precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.

“The statutory provision for assistance does not extend to transporting the accused to another locale when there is no showing that facilities at the place of arrest are inadequate to perform the necessary tests, nor does case law require an officer to structure proposals or options for the arrestee to pursue. *Weatherford v. State*, 286 Ark. 376, 692 S.W.2d 605 (1985); *Reynolds v. State*, 96 Ark. App. 360, 241 S.W.3d 765 (2006).

“When a defendant moves to exclude admission of a test pursuant to this statute, the State bears the burden of proving by a preponderance of the evidence that the defendant was advised of her right to have an additional test performed and that she was assisted in obtaining a test. *Lampkin v. State*, 81 Ark. App. 434, 105 S.W.3d 363 (2003). Substantial compliance with the statutory provision about the advice that must be given is all that is required, and the officer need provide only such assistance in obtaining an additional test as is reasonable under the circumstances presented. Whether the assistance provided was reasonable under the circumstances is ordinarily a fact question for the trial court to decide. On appeal, the question to be decided is whether the trial court’s finding of reasonable assistance to obtain another test is clearly against the preponderance of the evidence.

“Moore filed a pretrial motion seeking suppression of the breathalyzer test results on the basis of the officer’s noncompliance with her statutory right to an independent test. Moore testified at a hearing that she asked for a ‘split sample’ of the blood in the hospital and asked to see that the sample was secure and properly marked, but Harsson ‘confiscated’ it and did not allow her to view it. Harsson testified that he followed the procedures of his field training in completing appropriate paperwork, which included a statement that the sample was requested by the subject rather than law enforcement, and in sending the sealed sample by certified mail to the Arkansas Department of Health for analysis. He stated that he had never done this any other way.

“The trial court held that under the circumstances of the case the officer had provided reasonable assistance. The court concluded that there was

substantial compliance with the governing statute, and the motion to suppress was denied. Moore asserts on appeal that the statute's purpose is to permit an arrestee 'to choose her own second test' and that the State does not have the statutory right to decide who will conduct it. She argues that Harsson's refusal to permit testing by a person of her own choice was not in substantial compliance" with the statute.

"In *Hudson v. State*, 43 Ark. App. 190, 863 S.W.2d 323 (1993), the hospital to which appellant was transported was unable to perform his requested urine test, but he presented no evidence that any other facility in the area could have done so; we upheld the trial court's finding that the level of assistance offered by the officer was reasonable under the circumstances. In *Fiegel v. City of Cabot*, 27 Ark. App. 146, 767 S.W.2d 539 (1989), the only officer on duty refused to offer transportation to a hospital, which would have left the city without police protection; he provided appellant an opportunity to call a qualified person to draw blood at the station or have someone pick him up and take him elsewhere for a test, thus acting reasonably under the circumstances in assisting appellant's attempt to obtain an additional test. In *Lampkin v. State*, supra, we viewed

"Arkansas Rule of Evidence 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. If some reasonable basis exists from which it can be said the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony."

the lack of an offer to transport appellant for an additional test as an insignificant fact in the absence of evidence that he had chosen a facility and requested to be transported there.

"Moore testified that she could have gone to Newport and that she would have asked particular doctors whom she trusted professionally to draw her blood, but there is no evidence in the record that she indeed asked to be taken to a particular facility or qualified person. Trooper Harsson determined Moore to be under the influence of alcohol, she requested a second test, he transported her immediately to the only

facility in the county that he knew to be open, and the blood sample was drawn there. We hold that the trial court's finding that the assistance offered was reasonable under these circumstances is not clearly against the preponderance of the evidence.

"Additionally, because the independent test that Moore requested was indeed administered, there is no merit to her claim that she was deprived of her right to exculpatory evidence and a defense."

**FORFEITURE: Prompt Post-Seizure
Probable Cause Hearing**

Perez v. City of Chicago,
CA7, No. 07-1599, 5/2/08

The Chicago Police Department, acting under the Illinois Drug Asset Forfeiture Procedure Act (DAFPA), seized property belonging to the plaintiffs. In response, the plaintiffs filed this case, under 42 U.S.C. § 1983, claiming that when property is seized under DAFPA, due process requires that they be given a prompt, postseizure, probable cause hearing, even though the DAFPA does not require any such hearing.

Upon review, the Seventh Circuit Court of Appeals found, in part, as follows:

“The Illinois Drug Asset Forfeiture Act permits the seizure of vehicles, aircraft, and vessels along with money involved in certain drug crimes. The property may be seized by a law enforcement officer without a warrant where there is probable cause to believe it was involved in a drug crime and is, accordingly, subject to forfeiture. When property is seized, forfeiture proceedings must be instituted. As relevant here, the law enforcement agency that seizes the property—in this case, the Chicago police department—must, within 52 days, notify the state’s attorney of the seizure and the circumstances giving rise to the seizure. Once the state’s attorney receives notice of the seizure, he must do one of two things, depending on the value of the property seized. If it is worth more than \$20,000, he must file judicial-in-rem forfeiture proceedings within 45 days. If the non-real property is worth less than \$20,000, she must notify the owner, within 45 days, regarding a possible forfeiture. The owner then

has 45 days in which to file a verified claim to the property with the state’s attorney. If a claim is filed and bond is posted, the state’s attorney must file judicial-in-rem forfeiture proceedings within 45 days. Thus, under this statutory scheme, for property worth more than \$20,000, 97 days can elapse between the seizure of the property and the filing of judicial forfeiture proceedings. For property worth less than \$20,000, it could be a maximum of 187 days.

“The claim here is that because so much time can elapse before forfeiture proceedings are started, it violates due process not to have a postseizure/preforfeiture hearing of some type. The examination of this issue by the Court of Appeals caused them to conclude that given the length of time which can result between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required.

“The hearing should be prompt but need not be formal. We leave it to the district court to determine the notice requirement and what a claimant must do to activate the process. We do not envision lengthy evidentiary battles which would duplicate the final forfeiture hearing. The point is to protect the rights of both an innocent owner and anyone else who has been deprived of property and, in the case of an automobile or personal property other than cash, to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending.”

INITIAL APPEARANCE:

Right to Counsel

Rothgery v. Gillespie County,
No. 07-440, 6/23/08

The United States Supreme Court stated that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. See *Brewer v. Williams*, 430 U.S. 387 (1977); *Michigan v. Jackson*, 475 U.S. 625 (1986). The question here is whether attachment of the right also requires that a public prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct. The Court held that it does not.

Although Walter Rothgery has never been convicted of a felony, a criminal background check disclosed an erroneous record that he had been, and on July 15, 2002, Texas police officers relied on this record to arrest him as a felon in possession of a firearm. The officers lacked a warrant, and so promptly brought Rothgery before a magistrate judge, as required by Texas Criminal Procedure. Texas law has no formal label for this initial appearance before a magistrate which is sometimes called the "article 15.17 hearing." This hearing combines the Fourth Amendment's required probable-cause determination with the setting of bail, and is the point at which the arrestee is formally apprised of the accusation against him.

Rothgery's article 15.17 hearing followed routine. The arresting officer submitted a sworn "Affidavit Of Probable Cause" that described the facts supporting the arrest and charged that Rothgery committed the offense

of unlawful possession of a firearm by a felon. After reviewing the affidavit, the magistrate judge determined that probable cause existed for the arrest. The magistrate judge informed Rothgery of the accusation, set his bail at \$5,000, and committed him to jail, from which he was released after posting a surety bond. The bond, which the Gillespie County deputy sheriff signed, stated that Rothgery stands charged by complaint duly filed with the offense of a felony, to wit: Unlawful Possession of a Firearm by a Felon. The release was conditioned on the defendant's personal appearance in trial court for any and all subsequent proceedings that may be had relative to the said charge in the course of the criminal action based on said charge.

Rothgery had no money for a lawyer and made several oral and written requests for appointed counsel, which went unheeded. The following January, he was indicted by a Texas grand jury for unlawful possession of a firearm by a felon, resulting in rearrest the next day, and an order increasing bail to \$15,000. When he could not post it, he was put in jail and remained there for three weeks.

On January 23, 2003, six months after the article 15.17 hearing, Rothgery was finally assigned a lawyer, who promptly obtained a bail reduction (so Rothgery could get out of jail), and assembled the paperwork confirming that Rothgery had never been convicted of a felony. Counsel relayed this information to the district attorney, who in turn filed a motion to dismiss the indictment, which was granted.

Rothgery then brought this 42 U. S. C. §1983 action against respondent Gillespie County, claiming that if the County had provided a lawyer within a reasonable time after the

article 15.17 hearing, he would not have been indicted, rearrested, or jailed for three weeks. The County's failure is said to be owing to its unwritten policy of denying appointed counsel to indigent defendants out on bond until at least the entry of an information or indictment. Rothgery sees this policy as violating his Sixth Amendment right to counsel.

The District Court granted summary judgment to the County and the Court of Appeals affirmed. The Court of Appeals felt itself bound by Circuit precedent to the effect that the Sixth Amendment right to counsel did not attach at the article 15.17 hearing, because the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate on July 16, 2002, and there is also no indication that the officer who filed the probable cause affidavit at Rothgery's appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor.

The United States Supreme Court granted certiorari. The Court stated that they were not deciding whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this. They merely reaffirmed what they have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Because the Fifth Circuit came to a different conclusion on this threshold issue, its judgment is vacated, and the case is

remanded for further proceedings consistent with this opinion.

SEARCH AND SEIZURE:

Affidavit Omission; Franks Hearing

United States v. Tate, CA4, No. 07-4026, 5/6/08

On December 16, 2005, Agent Charles Manners of the Baltimore City Police Department applied for and obtained a search warrant for Tate's residence at 709 North Longwood Street in Baltimore, Maryland. The warrant authorized a search for and seizure of drugs and related paraphernalia, as well as guns and other specified items.

To obtain the search warrant, Agent Manners submitted an affidavit to a Baltimore City Circuit Court judge, which contained three substantive sections. First, the affidavit contained a short description of Agent Manners' general knowledge of drug activity in the 700 block of North Longwood Street and at Tate's residence in particular. Second, it recited the results of criminal records check on Tate, which revealed numerous past drug and other criminal incidents in which Tate had been involved. And third — the portion that is at issue in this case — it described a trash investigation that Agent Manners conducted at Tate's residence the day before. On this subject, the affidavit stated in full:

On December 15, 2005, your affiant conducted a trash investigation from 709 North Longwood Street. During the trash investigation, your affiant retrieved (2) two black trash bags, which were easily accessible from the rear yard of 709 North Longwood Street. Recovered from one trash bag was (7) seven zip lock bags containing plant residue

suspected marijuana and a piece of printed mail listing 709 North Longwood Street as the address of residence. Furthermore, located in the trash bag were cigar tobacco and hollowed out cigar shells. Your affiant [through] training and experience knows that marijuana users often hollow out cigar shells, discard the cigar tobacco and fill the cigar shell with marijuana, a controlled dangerous substance of a schedule I category. (Emphasis added).

Based on Agent Manners' affidavit, the state judge issued the search warrant for Tate's residence.

Upon executing the warrant, police officers recovered a firearm from Tate's bedroom, and Tate was charged with possession of a firearm after having been convicted of a felony. Tate plead guilty to the charge, and the district court sentenced him to 78-months' imprisonment.

As a part of his plea, Tate reserved his right to appeal the district court's denial of his motion to suppress and to have a *Franks* hearing challenging Agent Manners' affidavit in support of the search warrant.

In his motion, Tate asserted that Agent Manners wrote his affidavit with the purpose of intentionally misleading the state judge who issued the search warrant, by deliberately *omitting* facts about the location of the trash. Tate claimed that his trash had not been abandoned and that Agent Manners' investigation must have been conducted within Tate's fenced backyard in an unconstitutional manner. The district court denied Tate's request for a *Franks* hearing and his motion to suppress. Upon appeal, the Fourth District Court of Appeals found, in part, as follows:

"*Franks v. Delaware* held that under limited and carefully circumscribed circumstances, a defendant may challenge an affidavit offered to procure a search warrant against the defendant. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

"Tate contends specifically that, in describing an investigation of trash bags that 'were easily accessible from the rear yard of 709 North Longwood Street,' Agent Manners intentionally or recklessly omitted material facts and that with the inclusion of the omitted facts, the affidavit would not have supported a finding of probable cause. He asserts that the facts omitted were that Agent Manners trespassed to obtain Tate's trash and seized the trash when it had not been abandoned, in violation of *California v. Greenwood*, 486 U.S. 35 (1988).

"In this case, Tate made a showing that clearly described the nature of Agent Manners' omissions; he gave reasons for why he considered the omissions to be deliberately deceptive and material; and he proffered evidence in support of his position, including affidavits. The question remains whether his showing was substantively sufficient to entitle him to a *Franks* hearing.

"Tate's showing reduces to the claim that in order for Agent Manners to have investigated Tate's trash, which provided the essential basis for demonstrating probable cause, Agent

Manners would have had to jump the fence which enclosed Tate's backyard, trespass on Tate's property, and search trash that was stored in a container that had not been abandoned for pick-up. He supports these claims with the following proffered facts: (1) the trash investigation took place, according to Agent Manners, on a Thursday; (2) the trash was not to be picked up until the following Saturday; (3) on non-trash-pick-up days, the practice followed at Tate's residence was to store trash in a trash container near the rear steps of the house which was not accessible from public areas without trespassing; (4) the backyard of Tate's residence, in which the trash container was kept on non-trash-pick-up days, was fenced with a gate that was always locked; (5) Agent Manners stated in a similar affidavit to obtain a search warrant offered in another case two months earlier that he had seized 'two trash bags easily accessible from the rear yard' and that the trash bags were found in 'a typical location for trash pick-ups and consistent to the location of neighbors;' (6) in the affidavit in this case, the language was similar but did not include the last clause that the bags were found in 'a typical location for trash pick-ups and consistent to the location of neighbors;' and (7) the result of Agent Manners' trash search was necessary to a showing of probable cause in this case.

"The information obtained from the trash search—the marijuana residue—was essential to a finding of probable cause to search Tate's residence. In addition, that if Tate's facts are true, the inclusion of the allegedly omitted information—that Agent Manners illegally searched Tate's trash—would have defeated probable cause. If the trash investigation was conducted illegally, the facts derived from it would have to be stricken from the affidavit. Without the facts drawn from the trash

investigation, the remaining contents of the affidavit would not have supported a finding of probable cause.

"The Court of Appeals for the Fourth Circuit held that Tate has carried his burden of making a substantial *preliminary* showing that Agent Manners knowingly and intentionally, or with reckless disregard for the truth, omitted a material statement in the affidavit he offered in support of the warrant to search Tate's residence. The Court added—indeed it emphasized—that it would not express an opinion with regard to whether Tate would prevail at the evidentiary hearing, where he faces a higher burden of proof and will be required to prove his allegations by a preponderance of the evidence. The Court noted that the extent of the holding here is (1) that the alleged omission in this case is the type that can constitute a 'false statement' under *Franks*; (2) that the evidence of a false statement by omission and intent to mislead submitted by Tate meets the 'substantial preliminary showing' requirement of *Franks*; and (3) that the facts omitted, if included, would defeat probable cause for the search of Tate's residence.

SEARCH AND SEIZURE:

Border Searches

United States v. Arnold,
CA9, No. 06-50581, 4/21/08

In *United States v. Arnold*, the Court of Appeals for the Ninth Circuit was faced with the issue of whether customs officers at Los Angeles International Airport may examine the electronic contents of a passenger's laptop computer without reasonable suspicion. The Court found that reasonable suspicion is not needed for customs officials to search

a laptop or other personal electronic storage devices at the border.

The Supreme Court has stated that the authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity. By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry. *Torres v. Puerto Rico*, 442 U.S. 465, 472-73 (1979). Further, in *United States v. Flores-Montano*, 541 U.S. 149 (2004), the United States Supreme Court held that the Government has authority to conduct suspicionless inspections at the border, which includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank.

SEARCH AND SEIZURE:
Consent Searches;
Consent From a Co-Tenant When
Suspect Away From Premises

United States v. Groves,
 CA7, No. 07-1217, 6/27/08

On July 5, 2004, South Bend, Indiana police officers responded to a report of gun shots from a resident of the house across the street from Daniel Groves' apartment. When questioned by the responding officers, Groves admitted to living at the address in question, to being a convicted felon and to shooting off fireworks, but denied having a gun. He vigorously denied the officers' request to search his apartment. This request to search was reiterated after the officers found three spent shotgun shells on the ground and again Groves unequivocally refused to consent. Corporal James Taylor, one of the officers who responded to the 911 call on July 5, asked Task

Force Agent Lucas Battani of the South Bend Police Department to investigate the incident.

Agent Battani applied for a warrant to search Groves' apartment, but a federal magistrate denied the application. In the early afternoon of July 21, 2004, at a time they knew Groves was scheduled to be at work but his girlfriend was likely to be present, Agent Battani, along with two other law enforcement officers, went to Groves' apartment. Shaunta Foster, Groves' girlfriend, answered the door and stepped outside to speak with the three officers. Ultimately, Foster signed a consent form and the agents searched the apartment, recovering five .22 caliber bullets from a drawer in Groves' nightstand. Groves was arrested and charged with being a felon in possession of a firearm and being a felon in possession of ammunition. Groves moved to suppress the ammunition found during the July 21 search, arguing that Foster had neither the actual nor the apparent authority to consent to the search. Foster asserted that she told Battani that she did not live at Groves' apartment but was a frequent visitor.

Upon review, the Seventh Circuit Court of Appeals found, in part, as follows:

"This Court has enumerated several factors which, although by no means a complete list, can inform a determination of actual or apparent authority. We reiterate those factors here, as well as our admonition that this is certainly not an exhaustive list and we do not mean to suggest that this should be used as a checklist of factors in determining actual or apparent authority. Rather, it is offered to show the types of facts that should and could be considered in evaluating the issue of authority to consent to a search.

- (1) possession of a key to the premises;
- (2) a person's admission that she lives at the residence in question;
- (3) possession of a driver's license listing the residence as the driver's legal address;
- (4) receiving mail and bills at that residence;
- (5) keeping clothing at the residence;
- (6) having one's children reside at that address;
- (7) keeping personal belongings such as a diary or a pet at that residence;
- (8) performing household chores at the home;
- (9) being on the lease for the premises and/or paying rent; and
- (10) being allowed into the home when the owner is not present.

"In this case the telephone for the residence was registered in Foster's name and paid for by her. Foster had registered her daughter for school using Groves' address. Foster also kept personal belongings including clothing, mail, bills, and even a private stash of marijuana at Groves' apartment. She had a key and unlimited access to the premises. Moreover, Foster regularly cleaned the apartment. We can find no reason to disturb the district court's factual findings which, in turn, support its legal conclusion that Foster possessed the actual authority to consent to a search of Groves' apartment.

"Groves also contends that even if Foster possessed the authority which allowed her to consent to the search of the apartment, she did not possess the authority, actual or apparent, to allow a search of the nightstand drawer in which the incriminating evidence was found.

"In this case, the officers told Foster that they were searching for a weapon and/or ammunition, objects that easily could have been concealed in a nightstand drawer. Foster told Battani that there were no limits on where she could go in the apartment, and that she cleaned the entire apartment on a regular basis. In addition, Foster told the agents that although she did not use the nightstand from which the ammunition was recovered for her own belongings, she did clean it. Groves has no privacy claim for an unlocked, unmarked nightstand drawer in a room he shared with Foster. Foster's valid consent to a search of the apartment included consent to search the nightstands in the bedroom.

"In *Georgia v. Randolph*, 547 U.S. 103 (2006) the Supreme Court held that 'a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to police by another resident.' In drawing this admittedly formalistic line requiring the objecting party to be *physically present* and objecting *at the door*, the Supreme Court affirmed its prior decisions which permitted co-inhabitants of a dwelling to consent to a search under other circumstances, explaining that:

so long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand.

"There is no dispute that Groves was not physically present when Foster consented to the search. The officers playing no active role

in securing Groves' absence, and Groves was not objecting at the door, as *Randolph* requires. Indeed, a few weeks had passed since he had refused the officers' first attempts to obtain his consent. Moreover, that the government agents waited until Groves was at work to seek Foster's consent did not undermine the validity of the search because they had no active role in securing Groves' absence. *Randolph* does not render Foster's consent invalid.

"The Court of Appeals for the Seventh Circuit found Groves' Motion to Suppress to have been correctly denied and the judgment of the district court was affirmed."

Editor's Note: Also see *United States v. Reed*, CA7, No. 07-2077, 8/20/08, which reached an identical decision on a similar set of facts.

SEARCH AND SEIZURE:

Probable Cause;

Observations from an Adjacent Property

Dayberry v. State,

CACR 07-1301, 6/4/08, [Unpublished]

On May 24, 2007, Norma Dayberry pleaded guilty to manufacturing marijuana, reserving her right to appeal from the denial of her motion to suppress under Ark. R. Crim. P. 24.3. In *Dayberry v. State*, she challenges the trial court's decision to deny her motion, contending that the police obtained a search warrant only after conducting an illegal search of her property.

According to the affidavit in support of the search warrant, David Burnett of the Stone County Sheriff's Office received a tip that Dayberry was growing marijuana behind her residence. He went behind her residence and

saw marijuana plants growing in and near a drainage ditch on her property. He went to the property ten days later and again saw the marijuana plants. Burnett stated in the affidavit that the plants would be visible to anyone mowing or caring for the area near the plants.

In the hearing, Burnett admitted that he went to her residence solely based on the information he received. He testified that he did not step onto Dayberry's property; rather, he went upon her neighbor's driveway and saw marijuana plants from there. He noted that the plants were not in a ditch, as he stated in his affidavit; they were in an area that was two feet deep. Burnett acknowledged that his affidavit did not mention that he went onto his neighbor's driveway, but he testified that he did not see the need to state that fact. He denied stepping onto Dayberry's property prior to obtaining the search warrant.

In upholding the search, the Arkansas Court of Appeals stated:

"Dayberry asserts that the marijuana plants could not be seen from the street and she argues that Burnett did not have a right to go into her neighbor's yard and look across the fence onto her curtilage. While one's residence and curtilage have been consistently held to be areas that may be free from government intrusion, those things that a person knowingly exposes to the public are not subject to Fourth Amendment protection. See *McDonald v. State*, 354 Ark. 216, 119 S.W.3d 41 (2003). Here, Burnett did not intrude onto Dayberry's property by walking onto her neighbor's property, and he did not violate Dayberry's Fourth Amendment rights by looking over the fence and observing what was in plain view in her backyard."

SEARCH AND SEIZURE:
Probable Cause; Trash Covers

United States v. Allebach,
 CA8, No. 07-2916, 5/21/08

After receiving citizen complaints of frequent short-term traffic at Michael Allebach's residence, police officers picked up trash bags at Allebach's residence after they had been placed on the curb for pickup. During a search of the bags at the police station, officers found two plastic bags with white residue, two corners torn from plastic bags, Brillo pads, a film canister with white residue, and documents bearing Allebach's name and address. The white residue on the plastic bags tested positive for cocaine.

Officers included this information in the application for a search warrant to search Allebach's residence, and a magistrate judge approved the warrant application. During the search, officers found 30.39 grams of powder cocaine, 3.29 grams of crack cocaine, powder and crack cocaine paraphernalia, and items used to manufacture powder cocaine into crack cocaine. Following the search, Allebach waived his rights and admitted to officers he manufactured crack cocaine. Allebach said that he had been using cocaine for about a year and a half, that he obtained cocaine from three sources, and that he converted the powder cocaine into crack cocaine.

Allebach moved to suppress the fruits of the search of his residence, arguing that the trash contents were insufficient to establish probable cause.

The United States Court of Appeals for the Eighth Circuit had little hesitancy in concluding

a reasonable magistrate would conclude the materials found in the trash—two plastic bags with cocaine residue, two corners torn from plastic bags, Brillo pads, a film canister with white residue—were sufficient to establish probable cause that cocaine was being possessed and consumed in Allebach's residence. See *United States v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003) (holding marijuana seeds and stems found in the garbage were "sufficient *stand-alone* evidence to establish probable cause"). The warrant was properly issued, and the district court did not err in denying Allebach's motion to suppress the evidence.

SEARCH AND SEIZURE:
Reasonable Suspicion; Reliability of Tips

United States v. Torres
 CA3, No. 07-1669, 7/23/08

On February 22, 2005, at 2:59 p.m., the Philadelphia Police Department received a 911 call which included the following information:

CALLER: Heading to Philadelphia, Pennsylvania heading North on Broad at South Street. You got a guy with a BMW-742 or 5I. License plate F Frank Victor Able 7726. Flashed a gun at the Hess station at a Bum [sic] trying to sell roses.

DISPATCHER: Heading North bound, you said?

CALLER: No, negative, he is now turned on South Street you got a cop right in front of him and I'm in back of him.

DISPATCHER: Alright give me the description of the male. Is he Black, White, or Hispanic, Sir?

CALLER: He is Hispanic, 745I Silver BMW, Frank Victor Able 7726 at 13 N. South heading towards the Delaware. You got a cop right in front of him and he is following the cop. I'm behind him in a green cab. He's right in front of me. He has a 45, he had it in the console between the seats. He [took] it out and waved it at the bum selling roses at the Hess station. Your cop just turned right on 12th.

DISPATCHER: All right, Sir.

CALLER: All right and he still, I'm behind him. I'm still on South Street just past 12th, approaching 11th. I'm in a green Avenguard cab.

DISPATCHER: Okay, we got the job put out sir. All right, a Hispanic male that's all you have?

CALLER: He's at a red light now at 10th, I'm right behind him.

DISPATCHER: Sir, do not follow him, sir, the Police will be there as soon as possible. He's heading Eastbound on South Street. Someone will be there, sir.

CALLER: All right. Remember, he's got a 45 looks like a Glock in the center console. I was pumping gas at [sic] adjacent pump when he waved it at the bum. All right.

DISPATCHER: All right, Thanks.

CALLER: Your [sic] welcome, I'm going to peel off.

At 3:02 p.m. — only three minutes after the 911 call was initiated — dispatch radioed officers on patrol and told them that a Hispanic male driving a silver BMW 745i with license plate

FVA-7726 was driving eastbound on South Street, and that the driver had a gun.

Immediately upon receiving the report, officers in the field asked whether the dispatcher "got a complainant" for it; the dispatcher informed them that "no complainant is showing." Within minutes, plainclothes officers observed a BMW 745i matching the dispatcher's description and with license plate FVA-7726 pass them on South Street, approximately twelve blocks from where the taxi driver had initially reported it. Pursuant to department policy, the plainclothes officers relayed the information to uniformed police officers. By 3:07 p.m., uniformed officers spotted the vehicle, stopped it, and found that its driver — Defendant Johnny Torres, a Hispanic male — had a fully-loaded 9 millimeter handgun with one round in the chamber stowed in the pocket of the driver's side door.

A grand jury indicted Torres on one count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Torres filed a motion to suppress the weapon and ammunition, arguing that the tip from the taxi driver did not supply reasonable suspicion for the stop. The District Court found that the 911 call did not provide police with reasonable suspicion to effectuate the traffic stop and, accordingly, suppressed the evidence gathered after the stop. The Third Circuit Court of Appeals reversed, declaring that the totality of the circumstances amounted to reasonable suspicion. They found, in part, as follows:

"...when officers are told to investigate a situation by a police dispatcher, the court must look beyond the specific facts known to the officers on the scene to the facts known to the dispatcher. The legality of a seizure based solely on statements issued by fellow officers

depends on whether the officers who *issued* the statements possessed the requisite basis to seize the suspect. In other words, the knowledge of the dispatcher is imputed to the officers in the field when determining the reasonableness of a *Terry* stop.

“In this case, the Government concedes that the unidentified taxi driver’s tip was ‘the only information’ known by the police when they seized Torres. When the Government relies upon a tip from an unidentified informant as the basis for reasonable suspicion, assessing the reasonableness of a *Terry* stop becomes more intricate. See *Adams v. Williams*, 407 U.S. 143, (1972) (noting the reliability problems of anonymous telephone tips and distinguishing anonymous tips from tips given by a known informant whose reputation can be assessed and whose information is immediately verifiable at the scene). The Supreme Court has made clear that an informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge’ are highly relevant in determining the value of his report. *Alabama v. White*, 496 U.S. 325, (1990) (quoting *Illinois v. Gates*, 462 U.S. 213, 230 (1983)). The honesty of the caller, the reliability of his information, and the basis of his knowledge are ‘closely intertwined issues that may usefully illuminate the commonsense, practical question’ of whether there is reasonable suspicion to support a *Terry* stop.

“The Supreme Court has made clear that an informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge’ are highly relevant in determining the value of his report... The honesty of the caller, the reliability of his information, and the basis of his knowledge are ‘closely intertwined issues that may usefully illuminate the commonsense, practical question’ of whether there is reasonable suspicion to support a *Terry* stop.”

“This Court has identified the specific aspects of tips which indicate their reliability:

(1) The tip information was relayed from the informant to the officer in a face-to-face interaction such that the officer had an opportunity to appraise the witness’s credibility through observation.

(2) The person providing the tip can be held responsible if the allegations turn out to be fabricated.

(3) The content of the tip is not information that

would be available to any observer...

(4) The person providing the information has recently witnessed the alleged criminal activity.

(5) The tip predicts what will follow, as this provides police the means to test the informant’s knowledge or credibility...

“Other factors can bolster what would otherwise be an insufficient tip, such as the presence of a suspect in a high crime area, a suspect’s presence on a street at a late hour, a suspect’s nervous, evasive behavior, or flight from police, and a suspect’s behavior that conforms to police officers’ specialized knowledge of criminal activity. Ultimately, the Court must ask whether the unknown caller’s tip ‘possessed sufficient

indicia of reliability, when considering the *totality of the circumstances*, for us to conclude that the officers possessed an objectively reasonable suspicion sufficient to justify a *Terry* stop.’

“Considering the totality of the circumstances present in this case, we agree with the Government that the tip at issue possessed sufficient indicia of reliability to justify the stop of Torres’s vehicle. First, the tipster was an eyewitness who had recently witnessed the alleged criminal activity. Additionally, the content of the tip was relatively detailed and was given to the 911 dispatcher in play-by-play fashion as the taxi driver was pursuing the man whom he had seen brandishing a weapon moments before. The tipster provided a description of the vehicle—including make, model, and license plate number—while contemporaneously describing the movement of the vehicle. The tipster also stated that he was driving a green cab and freely stated not only the name of his cab company, but also the fact that a police car was in front of the perpetrator. Finally, the tipster described in some detail the brandishing episode by noting the Hess station and explaining what he was doing when he saw the firearm, the make of it, where he saw it within the assailant’s car, the make, model, color, and license plate number of the car, the assailant’s race, what the victim was doing when the assault occurred, and the threatening conduct itself. This information was credibly available to the tipster and it accurately predicted what would follow (i.e., that an Hispanic man would be driving a silver BMW 745i with license plate FVA-7726 near the location provided by the tipster).

“The aforementioned facts distinguish this tip from the anonymous one at issue in *Florida v.*

J.L., 529 U.S. 266 (2000). In *J.L.*, the Supreme Court held that an anonymous call to police about a gun-toting man at a bus stop did not supply reasonable suspicion to support a *Terry* stop, where there was no indication that the anonymous caller had observed the crime and where the description of the gunman was vague enough to describe any number of men. Here, although the taxi driver never gave his name (he was not asked to do so), he did volunteer that he was driving a green taxicab from a specified company. This information, which identified the informant’s employer, further supported the reliability of the tip. See *United States v. Fernandez-Castillo*, 324 F.3d 1114, 1118-19 (9th Cir. 2003) (holding that a tip from an unnamed employee of the Montana Department of Transportation was not anonymous because the tip narrowed the likely class of informants, even though the tip was not corroborated before an officer relied on it to support a *Terry* stop); see also *Edwards v. Cabrera*, 58 F.3d 290, 294 (7th Cir. 1995) (holding that a tip from an unnamed city bus driver ‘was not anonymous’ and supported full probable cause, reasoning: while the police did not know his name, we can presume his identity was and is easily ascertainable by the officers. The officers also knew his occupation. These characteristics permit certain inferences regarding his reliability).

“Finally, we note that the tipster neither attempted to, nor had any reason to, conceal his identity; the dispatcher simply neglected to ask him his name. As one of our sister circuits has stated: we do not fault the officers’ choice to forgo extensive credibility checking in order to quickly respond. The business of policemen and firemen is to *act*, not speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the

judicial process. Moreover, the informant's straightforward and thorough description makes his tip even more trustworthy than other tips which have been found sufficiently reliable to support a *Terry* stop. See, e.g., *United States v. Copening*, 506 F.3d 1241, 1247 (10th Cir. 2007) (finding that an anonymous telephone call supported a *Terry* stop where the informant witnessed a man with a pistol outside a convenience store, provided the license number of the car the suspect drove, and gave a detailed account of the suspect's direction of travel as he followed the suspect in his own car, even though the caller refused to give the dispatcher his name); see also *United States v. McBride*, 801 F.2d 1045, 1048 (8th Cir. 1986) (finding that a telephone tip from an anonymous caller stating that a man had just left his house with four ounces of heroin and was driving a small silver foreign car bearing a particular license number in a particular direction supported a *Terry* stop, even though police did not spot the car until four hours later at a location approximately eight blocks from the intersection identified by the caller).

"To be sure, not all of the indicia of reliability we have identified are present here. Nevertheless, although an anonymous tip without *any* indicia of reliability cannot justify a *Terry* stop, a tip need not bear all of the indicia—or even any particular indicium—to supply reasonable suspicion.

"Here, the informant provided a detailed account of the crime he had witnessed seconds earlier, gave a clear account of the weapon and the vehicle used by Torres, and specified his own occupation, the kind and color of the car he was driving, and the name of his employer. The veracity and detail of this information were enhanced by the fact that the informant

continued to follow Torres, providing a stream of information meant to assist officers in the field. Thus, the totality of the circumstances leads us to conclude that the taxi driver was an unidentified informant who could be found if his tip proved false rather than an anonymous (i.e., unidentifiable) tipster who could lead the police astray without fear of accountability.

"Accordingly, we hold that the officers had reasonable articulable suspicion sufficient to justify a *Terry* stop and that the District Court erred in suppressing the fruits of that stop."

SEARCH AND SEIZURE:

Vehicle Stops;

Collective Knowledge of Law Enforcement

United States v. Thompson,
CA8, No. 07-3475, 7/21/08,

On February 19, 2007, the St. Louis County Multi-Jurisdictional Drug Task Force (Task Force) received information about possible drug activity at the Best Western Motel in Kirkwood, Missouri. Based upon this information, officers with the task force established surveillance of a room at the motel which was rented by Barry Collins. A teal Chevrolet Uplander rented in the name of Michael Johnson (Michael) was parked outside the room. A silver Oldsmobile 98 was parked beside the Uplander. While conducting surveillance, Task Force Detective Quinn Turner looked inside the Uplander and noticed a black covering over what appeared to be numerous bulky objects in the rear of the vehicle. Detective Turner noted that this was similar to the way several large bundles of marijuana were stored in a vehicle in a case he worked in January of 2007, which also involved a vehicle rented to a Michael Johnson.

Approximately 30 minutes after he began surveillance at the motel, Detective Turner observed Thompson, Earl Thomas Marshall, and Collins come outside, look in the windows of the Uplander and then leave in the Oldsmobile. Detective Turner continued surveillance of the motel and the Uplander. He observed the three men return in the Oldsmobile about 30 minutes later and saw them reenter the motel. Shortly after they returned, the three men again left in the Oldsmobile. Detective Turner did not follow the Oldsmobile. Instead, he continued surveillance of the motel and the Uplander. When the Oldsmobile returned to the motel parking lot the second time, only Thompson was inside the vehicle. Thompson parked the Oldsmobile beside the Uplander, and again went inside the motel. When Thompson next exited the motel, he was talking with Valerie Ann Weber. Detective Turner then saw Thompson put a bag inside the Oldsmobile and Weber put a bag inside the Uplander. Thompson and Weber were then joined by Kendra Walton and Jacqueline Johnson (Jacqueline) who also exited the motel. Weber and Walton got in the Uplander and Thompson and Jacqueline got in the Oldsmobile. The two vehicles then exited the lot and started to travel on Highway 44. Prior to the Oldsmobile and the Uplander exiting the motel parking lot, Detective Turner had continuously observed the Uplander and knew that no items had been removed from the vehicle. Task Force investigators then requested that local law enforcement assist them by stopping the vehicles for further investigation.

When the vehicles entered the city of St. Louis, a city police officer who was in a marked patrol car observed the Oldsmobile cross the center line, thus failing to maintain a single lane of traffic in violation of the Missouri traffic laws. The city officer stopped the Oldsmobile for the

offense. Task Force Detective Joseph Hollocher, who had assisted Detective Turner in conducting the surveillance at the motel, heard about the stop of the Oldsmobile on the police radio and arrived at the scene of the stop within one minute of the initial traffic stop. When Detective Hollocher arrived, Thompson and Jacqueline were standing at the rear of the Oldsmobile. When Detective Hollocher asked Thompson where he was coming from, Thompson told him that he was in St. Louis for a family reunion and stated that Jacqueline was his cousin.

The Uplander was stopped by other law enforcement personnel, including Detective Turner. While Detective Hollocher was talking with Thompson, he was contacted by Detective Turner who reported to him that during the stop of the Uplander, a large quantity of marijuana was discovered in the back of that vehicle. At that point, Detective Hollocher placed Thompson and Jacqueline under arrest. Immediately thereafter, Thompson gave Detective Hollocher consent to search the Oldsmobile. Shortly after the search began, Thompson agreed to allow the officers to move the vehicle in order to continue the search at the Drug Enforcement Agency (DEA) office for safety reasons. No items were seized prior to the Oldsmobile being moved. After the Oldsmobile was moved to the DEA office, an empty safe, a bundle of cash and personal items belonging to Jacqueline, Weber, Walton, Collins, and Marshall were found in the trunk of the Oldsmobile. None of the items seized from the Oldsmobile appeared to belong to Thompson.

Thompson, Jacqueline, Walton, and Weber were indicted on March 8, 2007, for conspiracy to distribute more than 50 kilograms of marijuana. See 21 U.S.C. §§ 841(a)(1), 846. Adopting the report and recommendation of

the magistrate judge, the district court denied Thompson's motion to suppress evidence and statements against him. Following the denial of his motion to suppress, Thompson proceeded to trial where he was convicted.

The district court sentenced him to 96 months in prison. Thompson appeals the denial of his motion to suppress and his conviction. Thompson argues that the district court erred, in part, by denying his motion to suppress physical evidence seized as a result of the traffic stop. Thompson alleges that his vehicle was illegally stopped and that he was arrested without probable cause. He objects to the fact that police did not see the traffic violation and instead relied on the report of the city officer.

Upon review, the Eighth Circuit Court of Appeals found, in part, as follows:

"It is well established that a traffic violation—however minor—creates probable cause to stop the driver of a vehicle. *United States v. Lyons*, 486 F.3d 367, 371 (8th Cir. 2007). The collective knowledge of law enforcement officers conducting an investigation is sufficient to provide reasonable suspicion, and the collective knowledge can be imputed to the individual officer who initiated the traffic stop when there

"It is well established that a traffic violation—however minor—creates probable cause to stop the driver of a vehicle... The collective knowledge of law enforcement officers conducting an investigation is sufficient to provide reasonable suspicion, and the collective knowledge can be imputed to the individual officer who initiated the traffic stop when there is some communication between the officers."

is some communication between the officers. See *United States v. Williams*, 429 F.3d 767, 771-72 (8th Cir. 2005) (collective knowledge doctrine sufficient to impute knowledge of other officers on team to an officer who received a radio request from the team to stop the vehicle.) Despite the fact that the vehicles were under surveillance as part of a narcotics investigation at the time the traffic violation and resulting traffic stop occurred, the traffic violation nonetheless gave law enforcement probable cause to conduct the

traffic stop. See *Whren v. United States*, 517 U.S. 806, 813 (1996) ('Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis.')

SEARCH AND SEIZURE:

Vehicle Stops;

Collective Knowledge of Law Enforcement

United States v. Chavez,

CA10, No. 07-2008, 7/29/08

DEA Agent Jeff Maudlin and Task Force Officer James Mowduk had confirmed that Patrolman Arcenio Chavez, a canine officer with the New Mexico State Police would be on duty the next day. Chavez was informed him that the DEA task force wanted him to perform a traffic stop. Mowduk provided

Patrolman Chavez with the “plate number, the vehicle description, the number of occupants,” and a description of the white pick-up truck that the DEA wanted him to stop. TFO Mowduk also advised the patrolman that he would have to develop his own probable cause for stopping the vehicle because the occupants were wearing seat-belts and appeared to be observing traffic laws. Lastly, in response to Patrolman Chavez’s queries, TFO Mowduk stated that the white pickup was carrying “coke” and that he didn’t know whether the occupants were armed.

Patrolman Chavez (no relation to subject Chavez) was waiting on the median of I-40 east of Albuquerque. He eventually located the white pick-up, and engaged his emergency equipment. After the white pick-up truck pulled over, a charade of sorts took place. Patrolman Chavez pretended that he had stopped Mr. Chavez for failing to turn on his headlights in a safety corridor—a failure that the patrolman in fact believed at the time of the stop was an infraction of New Mexico’s regulations. As such, he followed his routine traffic stop procedure, asking first for Mr. Chavez’s license, registration, and proof of insurance. Patrolman Chavez filled out a citation for the headlight infraction and for Mr. Chavez’s failure to provide proof of insurance. After asking Mr. Chavez and Mr. Moreno routine questions about their travel plans, Patrolman Chavez returned Mr. Chavez’s license and registration and stated that Mr. Chavez and Mr. Moreno were free to leave.

Before Mr. Chavez could drive off, however, Patrolman Chavez asked Mr. Chavez if he would answer some more questions. During this colloquy, the patrolman asked for permission to search the truck. Mr. Chavez queried what would happen if he did not consent; Patrolman Chavez

responded that he would have Chica sniff the truck before letting them go. Eventually, Mr. Chavez consented to the search, and both Mr. Chavez and Mr. Moreno signed standardized consent forms that were written in both English and Spanish. During the subsequent search, Patrolman Chavez discovered a packet of a substance that was later confirmed to be cocaine in a bucket of nails on the truck’s bed. He then arrested both Mr. Chavez and Mr. Moreno.

The DEA task force opted to involve Patrolman Chavez—and to request that he develop his own rationale for stopping the truck—to maintain the secrecy of its investigation. Agent Maudlin testified that Patrolman Chavez was given minimal information to protect the integrity of the DEA investigation and the identity of a Confidential Source. By having a New Mexico State Police officer pull Mr. Moreno over, the DEA task force hoped to convince the traffickers that the stop was a random occurrence.

Mr. Chavez asserts that Patrolman Chavez unlawfully stopped and searched him because the information constituting probable cause was never provided to Patrolman Chavez, rendering Patrolman Chavez’s reliance on the instructions to stop and search the truck unreasonable.

Upon review, the Tenth Circuit Court of Appeals found, in part, as follows:

“This case involves a decision of whether a police officer may rely on the instructions of another law enforcement agency or officer to initiate a traffic stop and then conduct a search pursuant to the ‘automobile exception.’ This question implicates the ‘fellow officer’ rule, also known as the ‘collective knowledge’ doctrine. This doctrine can be conceptualized using two categories: ‘horizontal’ collective knowledge

and 'vertical' collective knowledge. The first category subsumes situations where a number of individual law enforcement officers have pieces of the probable cause puzzle, but no single officer possesses information sufficient for probable cause. See *United States v. Shareef*, 100 F.3d 1491, 1503-05 (10th Cir. 1996). In such situations, the court must consider whether the individual officers have communicated the information they possess individually, thereby pooling their collective knowledge to meet the probable cause threshold. This case, on the other hand, implicates the second category; it is a situation where one officer *has* probable cause and instructs another officer to act, but does not communicate the corpus of information known to the first officer that would justify the action.

"The DEA task force agents had probable cause to believe Mr. Chavez's vehicle contained contraband. The issue is whether the DEA task force's probable cause could be imputed to Patrolman Chavez. It could. Patrolman Chavez, acting on the strength of the DEA task force's information, was objectively justified in initiating the stop and in searching the truck

"We conclude that Patrolman Chavez acted on the strength of the DEA's probable cause when he stopped and searched Mr. Chavez's truck. He merely supplied a cover story (the putative headlight infraction) that would mask the basis for his alternative probable cause (the drug trafficking). Disguising the stop as a 'traffic stop' was a valid law enforcement tactic calculated to ensure an officer's safety, safeguard the Confidential Sources' identity and the integrity of the DEA investigation."

SEARCH AND SEIZURE:

Vehicle Stops; Dog Sniffs

United States v. Farrior,
CA4, No. 07-4498, 8/5/08

On April 16, 2006, Sergeant Anderson of the Pulaski, Virginia Police Department received a tip that a green car with New York licence plates was involved in drug trafficking in the Highland Terrace area in Pulaski. Pulaski police officers located the vehicle in the Highland Terrace area that night, but it was unoccupied. On April 21, 2006, at approximately 1:15 a.m., Officer Morris of the Pulaski Police Department observed the same green car parked at the end of Maple Street, an area known for drug trafficking. Again, the vehicle was unoccupied. Officer Morris relayed this information to Sergeant Anderson who advised him that this was the same vehicle about which Anderson had received the tip a week earlier. Thereafter, Officer Morris parked his patrol cruiser on a nearby street to wait for the driver of the green car to return. Approximately five minutes later, Officer Morris observed the green car pass by him and noticed that the tag light was inoperable on the car. He decided to stop the car because of the inoperable tag light.

Shortly after the stop, Sergeant Anderson learned that Officer Morris had stopped the green car and that the driver was Farrior. Anderson contacted the police dispatcher to obtain Farrior's criminal history and to request that a canine unit arrive on the scene. Anderson then proceeded to the scene. In response to Sergeant Anderson's request, Officer Dowdy, an officer with a drug-sniff dog, also made his way to the scene.

After contacting Sergeant Anderson, Officer Morris requested Farior's driver's license and car registration and returned to his patrol cruiser to check their validity. Both proved to be valid, and Officer Morris returned to Farior's car. According to Officer Morris, who had just completed his field training months before the incident, he was not familiar with the process for giving warning tickets for inoperable tag light violations. Consequently, rather than issuing Farior a traffic citation, Officer Morris returned Farior's license and registration and orally warned him that he needed to have his tag light fixed. At this point, Officer Morris told Farior that he was free to go. Before Farior pulled away, however, Officer Morris asked Farior if he would mind stepping out of the car to talk. Farior responded that he was willing to talk from inside his car. Given Farior's willingness to speak with him, Officer Morris advised Farior that the Pulaski Police Department was having problems in the area with drug-related crimes and asked Farior if he had any drugs or weapons, to which Farior replied that he did not. Officer Morris then asked Farior if he could search Farior's car, and Farior agreed. Farior exited his car and Officer Morris searched Farior for weapons. Finding no weapons on Farior's person, Officer Morris then searched the interior of Farior's car.

While Officer Morris was searching the inside of Farior's car, Sergeant Anderson arrived on the scene. As Officer Morris concluded his search, finding nothing suspicious, Sergeant Anderson, Officer Morris's superior, realized that a ticket had not been issued so he instructed Officer Morris to issue Farior a written warning for the inoperable tag light. Officer Morris once again took Farior's license and registration back to his patrol cruiser to write the warning ticket. Officer Morris completed the ticket and was

explaining it to Farior when Officer Dowdy and the drug dog arrived.

Upon arriving, Officer Dowdy was advised by Sergeant Anderson that Farior had consented to a vehicle search. In response, Dowdy had his drug dog sniff the outside of the car, and it alerted to the presence of drugs in the trunk. Officer Dowdy then had the dog sniff the inside of the car, and this time it alerted to the console area. Because of this alert, Sergeant Anderson and Officer Dowdy searched the inside of Farior's car again, this time noticing that the carpeting and consoles had been altered. At that point, Sergeant Anderson searched Farior's trunk and found a black bag with a razor and some white powdery residue.

Sergeant Anderson informed Farior that the drug dog had indicated the presence of drugs in the car and asked Farior to remove his boots. Farior at first refused, but Sergeant Anderson told him that he had no choice but to comply. Accordingly, Farior kicked off his boots, and inside one of the boots Sergeant Anderson found 5.5 grams of crack cocaine and \$2,720.

The officers arrested Farior and issued him *Miranda* warnings. Farior admitted that the cocaine was his, but stated that he had come to Pulaski to buy, not to sell cocaine. Farior stated that the money in his boot was money that he had earned as a bus driver in Connecticut. Less than one month later, on May 10, 2006, police officers in Roanoke, responding to a call that someone had been shot, found a wounded Farior leaning against a car. Farior, who had been shot three times, was taken to the hospital. As part of their investigation of the shooting, the police located Farior's rental car one block from the scene of the shooting and had it towed. On May 12, 2006, after obtaining a search warrant

for the vehicle, the police searched the vehicle and found 469.5 grams of crack cocaine in the trunk of the car, hidden inside Farrior's boot. On May 30, 2006, as Farrior was being discharged from the hospital, he was arrested by U.S. Drug Enforcement Administration agents.

On June 1, 2006, a federal grand jury sitting in the Western District of Virginia returned a two-count indictment charging Farrior with possession with intent to distribute an unspecified quantity of crack cocaine and possession with intent to distribute 50 grams or more of crack cocaine.

Farrior timely appealed his convictions and sentence. Upon review, the Court of Appeals for the Fourth Circuit found, in part, as follows:

"...that the Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Following the Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), the law has become well-established that during a routine traffic stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation without running afoul of the Fourth Amendment. Any further investigatory detention, however, is beyond the scope of the *Terry* stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime or the individual consents to the further detention. The Supreme Court has held that a drug-dog sniff is not a 'search' as that term is used in the Fourth Amendment. *United States v. Place*, 462 U.S. 696 (1983). In order to perform that sniff, however, there must be a seizure of the vehicle and, therefore the person, requiring either consent to be detained or reasonable suspicion.

"Also see *United States v. Torres-Ramos*, CA6, No. 06-3580, 8/7/08, the where the Court of Appeals for the Sixth Circuit stated that a police officer may legally stop a car when he has probable cause to believe that a civil traffic violation has occurred. *United States v. Sandford*, 476 F.3d 391, 394 (6th Cir. 2007). In this case, it is not contested that the officer had probable cause to stop the van for speeding, a civil infraction. Thus, the officer's subjective intent for executing the stop is irrelevant. See *Whren v. United States*, 517 U.S. 806 (1996); (Police officers may stop vehicles for any infraction, no matter how slight, even if the officer's real purpose was a hope that narcotics or other contraband would be found as a result of the stop.). However, once the purpose of the traffic stop is completed, a police officer may not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention. *United States v. Blair*, 524 F.3d 740, 752 (6th Cir. 2008). Thus, in order to detain the motorists beyond the purpose of the original traffic violation, which was to issue a speeding ticket, the officer must have had a reasonable and articulable suspicion that criminal activity was afoot. Otherwise, the continued detention constituted an illegal seizure of the vehicles occupants. See *Terry v. Ohio*, 392 U.S. 1, 18 (1968)."

SEARCH AND SEIZURE: Vehicle Stops; Impeding Traffic

United States v. Valadez-Valadez
CA10, No. 06-2341, 5/12/08

On April the 7th, 2006, Officer Lance Pepper, a New Mexico State Police officer, was patrolling in the vicinity of Tierra Amarilla in Rio Arriba County, New Mexico. Officer Pepper turned onto Highway 64 east,

heading towards Taos. Shortly after coming or entering Highway 64 east after he had been patrolling in the vicinity of Tierra Amarilla, he came upon a black Chevrolet pickup truck with a camper shell on the back of it.

Officer Pepper testified that the speed limit in that area is 55 miles an hour and that the black Chevrolet pickup truck was traveling approximately 45 miles per hour, ten miles below the speed limit. Officer Pepper testified he followed the vehicle several miles and then determined to initiate a stop for impeding traffic based on New Mexico Statute 66-7-305, which states that, "A person shall not drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or to be in compliance with the law."

Officer Pepper testified that the highway conditions that morning were dry—that is, the conditions on the road—that it was light, it was clear, and the weather was otherwise in good conditions. Officer Pepper testified that the purpose of the stop was because he considered it to be an unsafe condition on that particular road, Highway 64, for a vehicle to be going ten miles below the speed limit because of the curves on that road and the potential to have a vehicle rear-ended. His intentions were to issue a verbal warning to the driver to pick up the speed and drive the speed limit.

In the truck were 21 passengers, including some who were unlawfully in this country. Mr. Valadez-Valadez was indicted in the United States District Court for the District of New Mexico for transporting illegal aliens.

Contending that the stop of his pickup truck violated the Fourth Amendment, he filed a

motion to suppress the evidence obtained during the stop. Upon review, the Court of Appeals for the Tenth Circuit found, in part, as follows:

"New Mexico Statute § 66-7-305(A), states:

A person shall not drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or to be in compliance with law.

"...the obvious candidate for the victim of Mr. Valadez-Valadez's allegedly impeding traffic would be Pepper himself. After all, he had driven behind Mr. Valadez-Valadez for several miles before another vehicle pulled up behind him and then had driven several more miles before stopping the pickup. But Pepper never asserted that he could not have passed Mr. Valadez-Valadez during this lengthy stretch, nor did he provide information showing that he could not have. On the contrary, he testified that oncoming traffic was light—all he could say was that he encountered at least three vehicles while following Mr. Valadez-Valadez. And even though there were 'multiple blind curves' along the highway, he did not say that it lacked intervals where passing would have been proper, making it unnecessary for Mr. Valadez-Valadez to pull over. Indeed, Pepper testified that passing was permitted at the very location where he stopped Mr. Valadez-Valadez and that his concern was that the road about a mile ahead becomes a mountain pass where 'there are not a whole lot of passing zones for a good distance.' This testimony, rather than implying that there had been few passing zones on the road as he had been following Mr. Valadez-Valadez, suggests the contrary. Moreover, Pepper's concern about the difficulty in passing on the stretch of road a mile ahead could not justify

the stop of Mr. Valadez-Valadez. Mr. Valadez-Valadez may have pulled to the side of the road before the mountain pass to let others go by, or he may have driven the speed limit on the pass to avoid backing up traffic. Vehicles cannot be stopped on 'reasonable suspicion' that the driver will commit a traffic infraction in the future.

"Perhaps the vehicle behind Pepper was impeded in its travels. But the record does not support a finding that Mr. Valadez-Valadez was responsible. The driver of that vehicle may have lawfully been able to pass Pepper and then Mr. Valadez-Valadez. That the driver decided not to pass Pepper hardly shows that he could not have lawfully done so. It would be a brave driver who would pass a police vehicle on a road with infrequent speed-limit signs."

The Court was also unpersuaded by Pepper's explanation that he was concerned that a slow-moving vehicle on the highway could be rear-ended by a vehicle rounding a curve at a high rate of speed. "Surely, the offender would not have been Mr. Valadez-Valadez but, rather, the speeding car that hit Mr. Valadez-Valadez's truck. One reason for lowering the speed limit on curves is to try to ensure that drivers can stop in time when encountering an unexpected obstacle at the far end of the curve. Even a reasonably cautious driver might nevertheless collide with an animal, a disabled vehicle, or a vehicle driving very slowly that could not be seen when entering the curve. But a vehicle going within 10 m.p.h. of the speed limit should not pose a danger. To

"The Court of Appeals for the Tenth Circuit stated they were joining what appears to be a consensus of courts that driving at a speed moderately below the speed limit does not, without more, constitute obstructing or impeding traffic."

adopt Pepper's theory of what constitutes impeding traffic would be to require all vehicles to travel at the speed limit on a winding road, whatever the volume of traffic."

The Court of Appeals for the Tenth Circuit stated they were joining what appears to be a consensus of courts that

driving at a speed moderately below the speed limit does not, without more, constitute obstructing or impeding traffic. They then cited cases from numerous jurisdictions: *State v. Bacher*, 867 N.E.2d 864, (Ohio Ct. App. 2007) (defendant driving 42 m.p.h. in 65 m.p.h. zone; no reasonable suspicion that defendant was impeding traffic); *State v. Whelchel*, 604 S.E.2d 200, 202 (Ga. Ct. App. 2004) (defendant, traveling 10 m.p.h. below posted speed limit in passing lane, failed to yield to vehicles behind him; no reasonable suspicion to stop defendant for impeding traffic); *Richardson v. State*, 39 S.W.3d 634, 638-39 (Tex. App. 2000) (defendant traveling 20 m.p.h. below speed limit; no reasonable suspicion that defendant was impeding traffic); *Salter v. N.D. Dep't of Transp.*, 505 N.W.2d 111, 114 (N.D. 1993) (defendant driving 30-35 m.p.h. in 50 m.p.h. no-passing zone of unstated length; no reasonable suspicion that defendant was impeding traffic); *People v. Brand*, 390 N.E.2d 65, 67-68 (Ill. App. Ct. 1979) (defendant traveling at 20 m.p.h. in 45 m.p.h. zone on suburban road; no reasonable suspicion that defendant was blocking or impeding traffic); *People v. Parisi*, 222 N.W.2d 757, 759 (Mich. 1974) (defendant traveling 25 m.p.h. in 35 m.p.h. and 45 m.p.h. zones; no interference with traffic so no justification for

stop); cf. *Com. v. Robbins*, 657 A.2d 1003, 1004–05 (Pa. Super. Ct. 1995) (valid stop for impeding traffic when defendant traveling 17 m.p.h. in 35 m.p.h. no-passing zone and 17-20 vehicles backed up behind defendant).

The Court, viewing the totality of the circumstances, concluded that Officer Pepper did not have reasonable suspicion to stop Mr. Valadez-Valadez for violating N.M. Stat. Ann. § 66-7-305(A). Therefore, the evidence seized through the stop and subsequent detention should have been suppressed.

SEARCH AND SEIZURE:

Vehicle Stops; Reasonable Suspicion and Length of Detention

United States v. Payne

CA8, No. 07-3142, 7/25/08

On November 25, 2008, at 4:30 a.m., Officers Luke Lewis and Jeff Crow of the Independence, Missouri Police Department were responding to a residential alarm call on a dead-end street in an area known for prowlers, vandalism, and stolen autos. After concluding that the alarm had been accidentally tripped, the officers left the residence. Shortly thereafter, Officer Lewis observed a vehicle traveling toward the dead-end, and observed no license plate on the vehicle. As the vehicle passed, Lewis turned his spotlight on the vehicle and one of the occupants covered his face. Lewis became suspicious of the vehicle because of the time of day, the occupants' conduct, and the area's reputation for criminal activity. After thirty seconds, the vehicle reached the dead-end, turned around, and proceeded in the opposite direction down the street. Lewis followed the vehicle based upon his suspicion and his belief that the vehicle did not have a license plate.

Lewis stopped the vehicle and initiated contact with Payne, its driver. In addition to Payne, there were three other occupants of the vehicle, one of which was the vehicle's owner. Officer Lewis asked Payne for his driver's license and registration. Payne provided the registration and stated his name, social security number, and birth date, but did not have his driver's license with him. Lewis then contacted the dispatcher and learned that Payne was known to be armed and dangerous and that he had a Missouri Uniform Law Enforcement System ("MULES") hit. Although the MULES system shut down before all the information was relayed, Lewis knew that a hit means that the suspect has a prior conviction, the suspect is on probation or parole, or that the suspect has an outstanding warrant. Lewis assumed that Payne had a warrant out for his arrest. Lewis returned to Payne's vehicle and asked him to step out of the vehicle. As Payne exited the vehicle, Lewis observed a spring-loaded collapsible baton between the driver's door and the driver's seat and two 9mm magazines near the front edge of the driver's seat, leading him to believe that Payne might be armed and presently dangerous.

After Payne exited the vehicle, Lewis conducted a pat-down search, which revealed that Payne was wearing a shoulder holster designed to carry a handgun. Thereafter, Lewis returned to the vehicle, moved the driver's seat forward, and observed an unlatched gun case on the floor behind the driver's seat. Lewis opened the gun case, which contained two loaded semiautomatic handguns.

Payne was placed under arrest for being a felon in possession of a firearm and issued a citation for improper display of a license plate because the vehicle's front license plate was attached with wire to the passenger side of the grille.

Payne was subsequently convicted of being a felon in possession of a firearm in violation. He appeals from the district court's denial of his motion to suppress, arguing that the traffic stop was not supported by reasonable suspicion or probable cause and that the encounter was extended beyond what was reasonably necessary.

Payne argues that the initial stop of the vehicle violated the Fourth Amendment because Lewis did not have reasonable suspicion or probable cause. The Eighth Circuit Court of Appeals disagrees, finding as follows:

"Because a vehicle stop constitutes a seizure under the Fourth Amendment, an officer must have at least articulable and reasonable suspicion that the vehicle or its occupants are involved in illegal activity before conducting a traffic stop.

"The observation of even a minor violation provides probable cause for a traffic stop, even if the traffic violation is a pretext for other investigation. When Officer Lewis pulled over the vehicle Payne was driving, he believed that the vehicle did not have a front license plate, in violation of state and local law. See *United States v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994) (en banc) ('Any traffic violation, however minor, provides probable cause for a traffic stop.') Because the vehicle actually did have a front license plate, Lewis's probable cause calculation was based on a mistake of fact. We conclude, however, that the mistake of fact was objectively reasonable. See *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005) (The validity of a stop depends on whether the officer's actions were objectively reasonable in the circumstances, and in mistake cases the question is simply whether the mistake, whether of law or of fact, was an objectively reasonable one.). The vehicle's front

license plate was not centered on the vehicle's front bumper in the usual manner and it was dark outside, making it difficult for Lewis to fully scan the vehicle for a front license plate. See *United States v. Flores-Sandoval*, 366 F.3d 961, (8th Cir. 2004) (officer's mistaken belief that vehicle did not have front license plate was objectively reasonable under the circumstances).

"Accordingly, the initial stop of the vehicle was supported by probable cause and therefore did not violate the Fourth Amendment. Payne argues that even if the initial stop of the vehicle was proper, he was detained and questioned longer than what was reasonably necessary because the entire traffic stop took approximately thirty-nine minutes and because Lewis did not immediately verify whether the vehicle had a front license plate. We disagree.

"After stopping a vehicle, an officer has the authority to ask the driver what his or her destination and purpose is, check the driver's license and registration, or request that the driver step out of the vehicle. *United States v. Linkous*, 285 F.3d 716, 719 (8th Cir. 2002).

"A traffic stop can last as long as reasonably necessary to conduct this routine investigation, conduct a criminal history search, and issue a citation. If this routine investigation raises the officer's suspicions and the officer has reasonable, articulable suspicion, the officer may expand the scope of the investigation. *United States v. Allegree*, 175 F.3d 648, 650 (8th Cir. 1999).

"Officer Lewis's lawful stop entitled him to ask Payne for his license and registration. Lewis contacted the dispatcher with the information Payne provided and was informed that Payne was known to be armed and dangerous. See

United States v. Jones, 269 F.3d 919 (8th Cir. 2001) (officer may conduct computer inquiries to confirm the validity of the driver's license and registration and may conduct computer searches to determine a driver's criminal history). Even without this information, though it certainly added to Lewis's suspicion, he was entitled to ask Payne to step out of the vehicle. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). As Payne exited the vehicle, Lewis observed the spring-loaded collapsible baton and two pistol magazines in plain view near the driver seat. See *United States v. Bynum*, 508 F.3d 1134, 1137 (8th Cir. 2007) ('Neither probable cause nor reasonable suspicion is necessary for an officer to look through a window (or open door) of a vehicle so long as he or she has a right to be in close proximity to the vehicle.') This observation gave Lewis reasonable justification to suspect that Payne was armed and that he posed a serious and present danger to Lewis's safety, entitling him to conduct a pat-down search of Payne which ultimately led to the discovery of the gun case and the weapons contained therein.

"We conclude that the traffic stop did not last longer than reasonably necessary. Officer Lewis did not exceed the proper scope of the traffic stop, and he conducted each step of the investigation without undue delay."

SECOND AMENDMENT:

Right to Keep and Bear Arms

District of Columbia v. Heller,
No. 07-290, 6/26/08

The United States Supreme Court held that the Second Amendment of the United States Constitution protects an individual right to possess a firearm unconnected

with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. The Court noted the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

TREATIES:

Vienna Convention on Consular Relations

The Summer 2008 issue of the *CJI Legal Briefs*, discussed the case of *Medellin v. Texas*, No. 06-984, 3/25/08, where the United States Supreme Court stated that the International Court of Justice's *Avena* decision did not constitute directly enforceable federal law which preempts state law in state courts. An Editor's Note recommends that law enforcement officers advise arrested foreign nationals of their right to consult with consular officials and they should advise the appropriate consular mission of such an arrest. This is based on the decision in *Jogi v. Voges*, CA7, No. 01-1657, 3/12/07, where the Seventh Circuit Court of Appeals held that an alien arrested in this country has an individual right to sue government officials under 42 U.S.C. § 1983 for failing to advise him of his consular-notification right. The Ninth Circuit Court of Appeals had reached a different conclusion in *Cornejo v. San Diego County*, 504 F.3d 822 (2007).

In *Mora v. New York*, CA2, No. 06-0341, 4/24/08, Ricardo A. De Los Santos Mora, a foreign national, alleged that officers of the Flushing Queens Police Department violated Article 36 of the Vienna Convention on Consular Relations (“Vienna Convention”) by failing to notify him that he could contact his consulate after having been arrested. The Second Circuit Court of Appeals concluded that failure by the officers to inform a detained alien of the prospect of consular notification and access, pursuant to Article 36 of the Vienna Convention on Consular Relations cannot form the basis for a suit under the Alien Tort Statute (28 U.S.C. § 1915A), 18 U.S.C. § 1983, or directly under the Vienna Convention. The Eleventh Circuit Court of Appeals reached the same result in *Gandara v. Bennett*, CA11, No. 06-16088, 5/22/08, also holding that there was no right to sue law enforcement for their failure to inform foreign nationals of their rights under Article 36 of the Vienna Convention.

While there is now a split of authority between the Federal circuits, the recommended practice is and will continue to be to advise foreign nationals of their right to consult with consular officials and advise the appropriate consular mission of such an arrest.

For your additional information, Jose Medellin, who confessed to and was convicted of participating in the rape and murders of Jennifer Ertman, 14, and Elizabeth Pena, 16, of Houston, Texas, in 1993, was executed Tuesday, August 5, 2008, after a four-hour delay while the U.S. Supreme Court rejected a final appeal based on the alleged denial of his right to contact the Mexican Consulate for legal assistance under the Vienna Convention treaty.