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ARKANSAS RULES OF CRIMINAL PROCEDURE: *Rule 6.1 and 7.1*

Contents

- 1 **ARKANSAS RULES OF CRIMINAL PROCEDURE:** Rule 6.1 and 7.1
- 2 **CIVIL LIABILITY:**
Administrative Search Doctrine;
Scope and Extent of Search
- 5 **CIVIL LIABILITY:** Deadly Force;
Shooting at Vehicle
- 9 **CIVIL LIABILITY:** Foreign Nationals
Not Advised of Consular Notification
Rights; Vienna Convention on
Consular Relations
- 9 **DWI ENFORCEMENT:**
Horizontal Gaze Nystagmus Test
- 10 **FEDERAL DNA DATABASE:**
Constitutional Challenges
- 11 **INTERROGATION:**
Spontaneous Statement
- 12 **SEARCH AND SEIZURE:**
Non-Testimonial Evidence Seizure
- 13 **SEARCH AND SEIZURE:**
Reasonable Suspicion;
Thermal Imaging
- 16 **SEARCH AND SEIZURE:** Search
Incidental to Arrest; Cellular Telephone
- 18 **SEARCH AND SEIZURE:**
Special Needs; Airport Screening
- 19 **SEARCH AND SEIZURE:** Terry Stop;
Plain Feel Doctrine
- 23 **SEARCH AND SEIZURE:**
Terry Stop; Time and Proximity
- 24 **SEARCH AND SEIZURE:** Vehicle
Search; Search Incidental to Arrest
- 26 **SEARCH AND SEIZURE:** Vehicle
Stops; Traffic Violation
- 29 **SEARCH AND SEIZURE:** Vehicle
Stops; Length of Detention; Dog Sniff
- 33 **SEARCH AND SEIZURE:** Vehicle
Stops; Reasonable Suspicion;
Continued Detention
- 34 **SUBSTANTIVE LAW:** Battery;
Doctrine of Transferred Intent

On November 8, 2007, the Arkansas Supreme Court Committee on Criminal Practice was asked to study Arkansas Rule of Criminal Procedure 7.1 in light of the decision in *Johnson v. State*, 98 Ark. App. 245, ___ S.W.3d ___ (2007). In *Johnson v. State*, this rule was interpreted as mandating the issuance of a summons rather than an arrest warrant in misdemeanor cases unless the defendant is charged with a violent offense or it appears that the defendant will not respond to a summons. The Committee's research indicates that the intent has always been for the use of a summons to be discretionary although the language of Rule 7.1 may have clouded the issue. The Committee has recommended amendments to Rules 6.1 and 7.1 to clarify the use of a summons.

The Arkansas Supreme Court accepted the Committee's recommendations, adopted the amendments to Rules of Criminal Procedure 6.1 and 7.1 as set out below, and republished these rules. **These amendments shall be effective immediately.** The amendments are intended to overturn *Johnson v. State*, 98 Ark. App. 245, ___ S.W.3d ___ (2007), insofar as that case held that issuance of a summons was mandatory in certain cases.

Rule 6.1. Authority to issue summons.

(a) A judicial officer with the authority to issue an arrest warrant may issue, or authorize the clerk of the court to issue, a criminal

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summons in lieu thereof in any case in which a complaint, information, or indictment is filed or returned against a person not already in custody.

(b) A prosecuting attorney who files an information or approves the filing of a complaint against a person not already in custody may authorize the clerk of a court to issue a criminal summons in lieu of an arrest warrant.

(c) A summons shall not be issued pursuant to this Rule if: (I) the offense, or the manner in which it was committed, involved violence to a person or the risk or threat of imminent serious bodily injury; or (ii) it appears that the person charged would not respond to a summons.

In determining whether the defendant would respond to a summons, appropriate considerations include, but are not limited to:

- (A) the nature and circumstances of the offense charged;
- (B) the weight of the evidence against the person;
- (C) place and length of residence;
- (D) present and past employment;
- (E) family relationship;
- (F) financial circumstances;
- (G) apparent mental condition;
- (H) past criminal record;
- (I) previous record of appearance at court proceedings; and
- (J) any other relevant information.

Rule 7.1. Arrest with a warrant: basis for issuance of arrest warrant.

(a) A judicial officer may issue an arrest warrant for a person who has failed to appear in response to a summons or citation.

(b) In addition, a judicial officer may issue a warrant for the arrest of a person if, from affidavit, recorded testimony, or other information, it appears there is reasonable cause to believe an offense has been committed and the person committed it. A judicial officer may issue a summons in lieu of an arrest warrant as provided in Rule 6.1.

(c) A judicial officer who has determined in accordance with Rule 7.1(b) that an arrest warrant should be issued may authorize the clerk of the court or his deputy to issue the warrant.

**CIVIL LIABILITY:
Administrative Search Doctrine;
Scope and Extent of Search**

Bruce v. Beary, CA11, No. 06-15304, 9/6/07

In January 2001, Zeeshan Shaikh complained to Randall Root of the Auto Theft Unit of the Orange County Sheriff's Department that he had purchased a car from defendant William H. Bruce, III, at his place of business, Wholesale Auto Advantage, Inc., an auto body repair shop and salvage yard. He told Root that the vehicle identification number ("VIN") plate did not match the confidential vehicle identification number ("CVIN") sticker on the car. Root conferred with his supervisor, Kenneth Glantz. The two officers decided to conduct an administrative inspection of the premises, as authorized by Florida Statute § 812.055. The statute permits a warrantless physical inspection of salvage yards and repair shops during normal business hours "for the purpose of locating stolen vehicles...; investigating titling and registration of vehicles...; inspecting vehicles... wrecked or dismantled; or inspecting records required to be kept by such businesses."

On January 15, 2001, at about 10:30 a.m., Root, Glantz, and Edward Kelly led a group of approximately twenty officers to the premises. The officers arrived in unmarked vehicles, and surrounded the entire premises, blocking all exits. Some of the officers were dressed in SWAT uniforms—ballistic vests imprinted with SWAT in big letters, camouflage pants, and black boots. They entered the premises with guns drawn—all were armed with Glock 21 sidearms; some carried Bennelli automatic shotguns. When the officers entered the premises, they ordered the employees to line up along the fence. Vincent Lewis, who was working on a car, felt something touch his back and turned around to find an officer pointing a shotgun at him. The officers patted down and searched the employees. Pockets and purses were searched. The officers took at least Lewis's driver's license.

Judy Bass, the office manager, testified that she gave the officers paperwork showing that the car purchased by the complaining citizen had mismatched VINs because Bruce had purchased the car with the mismatched VINs from a government theft recovery program and was authorized to resell it that way. Root admitted receiving this paperwork during the search, but testified that it had "no bearing on his investigation."

Bruce arrived at the premises about ten minutes after the officers. Kelly told him that the officers were there to do an administrative records check. Another officer asked Bruce if he had the titles to all the cars that he had on the lot. Bruce gave the titles to the officer.

Glantz told Bruce to sit in the lounge while they searched a desk in the hallway. In the desk drawer, containing mostly condiment packets, Root found a VIN plate. Glantz asked Bruce if he

had any more loose VIN plates. Bruce produced a clear baggie from a locked briefcase in the office containing numerous VIN plates and VIN stickers. Glantz asked Bruce if there were any weapons in the briefcase and Bruce said, "No." Kelly opened the briefcase and found twenty thousand dollars in cash, brass knuckles, a stun gun, and a loaded revolver. Root inspected the VIN plates from the briefcase and discovered one that appeared to be counterfeit. He also found a stack of business cards in the desk that advertised replication of factory VIN decals.

Shortly thereafter, Bruce was arrested and charged with possession of loose VIN plates in violation of Fla. Stat. § 319.30(5)(b),⁸ and with operating a "chop shop," in violation of Fla. Stat. § 812.16(2).

At approximately 1:00 p.m., the officers began to thoroughly search the premises. They went through every file, including tax, bookkeeping, and accounting records, and the office computer. They inspected all 150 plus vehicles on the lot—cutting some open with chain saws. These activities—including the detention of at least several employees—continued until after 6:00 p.m.

During their search, the officers discovered two vans owned by Specialty Auto Rentals that had been reported stolen. Ms. Bass testified that she told Root that the vans were not stolen, that they were there for repairs for which the owners never paid, and offered documentation that Bruce had obtained mechanic's liens on the vans. She testified that the officer did not even look at the papers; he just threw them on the ground. Later, further proof of ownership of the vehicles on the premises (some 150 vehicles had been purchased through the bankruptcy court) was offered and rejected.

The officers found two other cars on the lot with suspicious identification. One had no VIN plate and the other had an altered VIN plate and sticker. At approximately 6:00 p.m., Root obtained a search warrant in order, he testified, to seize the records and other items at the premises. Root's supporting affidavit averred that during the course of the administrative inspection, the officers found two vehicles that had been reported stolen and six other vehicles with missing or altered VIN plates. Root also attested that the officers found a briefcase that contained three VIN plates, seven VIN stickers, money, a stun gun, brass knuckles and a revolver, and, in the desk drawer, the business cards.

When Root returned with the warrant, he and Glantz seized essentially all property on the premises—including both business and personal files, tax records, and over 100 vehicle titles and registrations. They took the filing cabinets, copy machine and typewriter. They took the employees' personal tool belts and tools. Root testified that, in all, they seized seven pallets of Bruce's property.

One month later, in February, the Sheriff's Office initiated a forfeiture proceeding as to the property, pursuant to the Florida Contraband Forfeiture Act. After an evidentiary hearing, the Florida circuit court held that they did not have probable cause to seize or retain any of Bruce's property, with the exception of the two vehicles mentioned above for which Bruce could produce no documentation at the hearing. The court ordered Sheriff Beary immediately to return to Bruce all of the remaining 150 plus vehicles, plus all of the various records, titles, VIN plates, and other property seized. In March, the Orange County state attorney dropped all criminal charges against Bruce.

Beary did not, however, return Bruce's property. In May, Bruce and his lawyer at the time went to the Evidence Department of the Orange County Sheriff's Office and requested the return of the property, but Root informed Bruce that the Sheriff's Office would not return all of the property. Some time later, a Sheriff's Office truck delivered some of the items taken during the raid. The truck driver had the officers' inventory list of property taken from the premises, and several boxes of items were marked "do not return." Bruce testified in his deposition in this case that the Sheriff still retains seized items, including car titles, business records, tax files, insurance files, and other financial records.

In January of 2002, the Florida court of appeals affirmed the circuit court's order to return the property. In 2004, Bruce filed this action, pursuant to 42 U.S.C. § 1983, against Sheriff Beary in his official capacity as the Sheriff of Orange County, and officers Randall Root, Kenneth Glantz and Edward Kelly in their individual capacities. Bruce alleges that the administrative inspection of his premises constituted an unreasonable search and seizure and, therefore, violated the Fourth Amendment.

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

"...Such administrative inspections do not offend the Fourth Amendment if they are necessary in order to monitor closely regulated businesses for the purpose of learning whether a particular business is conforming to the statute regulating that business. *New York v. Burger*, 482 U.S. 691, 702-03 (1987). The statute authorizing such inspections is constitutional if the state has a substantial interest in regulating the particular business, the inspection is necessary to further the regulatory scheme,

and the statute's inspection program, in view of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.

"The Court stated that in this case we have a search that extended far beyond the statutory authorization. Not just vehicles were searched; everyone on the Premises was. Not just VIN plates were seized; driver's licenses were also. Not just records were seized; employees were detained for ten hours. We conclude that the scope and conduct of the search in this case had all the hallmarks of a purely criminal investigation. Such an administrative inspection is not reasonable.

"We do not by our holding here today intend to impair Florida law enforcement's statutory authority to conduct administrative inspections of automobile salvage yards. Because administrative searches require no warrant, however, they invest law enforcement with the power to invade the privacy of ordinary citizens. *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998). This power carries with it a vast potential for abuse. Because of this potential for abuse, judicial review must fulfill its constitutional duty to ensure that the Fourth Amendment's requirement for reasonableness in the conduct of such searches is not obliterated by the statutory exception to its requirement for a warrant. Under certain limited circumstances, the Constitution permits warrantless administrative searches. It never permits unreasonable ones.

"The facts in this case, as alleged in Bruce's complaint, supported by evidence in his affidavits and deposition transcripts submitted in opposition to the defendants' motions for summary judgment, taken in the light most

favorable to him, are sufficient to raise genuine issues of material fact for trial as to whether defendants' conduct violated his Fourth Amendment right to be free from unreasonable administrative search and seizure.

"Under the Florida statute, the officers were entitled to visit Bruce's Premises to inspect Bruce's vehicles, titles and registrations and related records. If the evidence at trial supports Bruce's allegations, it is clear that this limited scope of their authorization under the statute was substantially exceeded.

"The Court of Appeals for the Eleventh Circuit held that the facts as alleged herein create a genuine issue of material fact as to whether the administrative inspection in this case was reasonable, as required by the Fourth Amendment. The Court also held that there is a similar issue for trial with respect to the claimed retention of Bruce's property after appeal. Finally, we hold that Bruce has created a triable issue of fact with respect to the existence of a policy of failure to train the officers that, upon resolution, may subject the Sheriff to liability in his official capacity. We also hold that the officers are not entitled to qualified immunity from this lawsuit."

CIVIL LIABILITY:

Deadly Force; Shooting at Vehicle

Hathaway v. Bazany,

CA5, No. 05-50602, 11/1/07

Steven Bazany, an officer with the San Antonio Police Department, was providing security for City Hall on the afternoon of April 1, 2003. The San Antonio City Hall is bounded on the north by West Commerce Street and on the east by Flores Street. West

Commerce Street, the street on which Bazany was stationed, is four lanes wide and open only to west-bound traffic.

While on Commerce Street—and west of the intersection with Flores Street—Bazany was approached by Marc Vargas, an off-duty Bexar County Sheriff's Deputy. Deputy Vargas stopped his vehicle beside Bazany to report a possible gang altercation occurring farther down Commerce Street, east of the intersection of Commerce and Flores. Officer Vargas told Bazany that a silver Mustang was swerving at a blue car while the occupants of the Mustang were hanging out of a window making gang signs and yelling "Sureño," the name of a well-known gang.

Bazany saw the Mustang stopped at the Flores and Commerce traffic light and facing west with its doors open. Two or three males, the occupants of the silver Mustang, were standing over the blue car, yelling and flailing their arms. In order to get a better view, Bazany walked to the third lane from the south curb of Commerce Street, the lane in which the Mustang was stopped on the other side of the intersection. Bazany then walked east, towards the intersection, at which time the men standing over the blue car returned to the Mustang. The Mustang traveled through the intersection, and Bazany motioned for it to pull over to the south curb of Commerce Street and stop. The Mustang did so. Bazany then entered the southernmost lane so that he could approach the Mustang from the driver's side.

Bazany testified that when he reached a point approximately eight to ten feet from the front right corner of the Mustang, the vehicle suddenly accelerated towards him, turning first to the right, then back to the left, and then

finally back towards the center of the roadway as Bazany attempted to get out of the way. When Bazany realized that he was not going to be able to get out of the Mustang's path, he decided to fire his weapon. The Mustang struck Bazany on the left leg, causing him to spin down the side of the vehicle. Bazany did fire his weapon, though he does not know whether he drew and fired before, during, or immediately after he was struck by the Mustang. These events took place, on his account, in the snap of a finger.

The bullet fired by Bazany hit the Mustang's driver, Jon-Eric Hathaway, at a point immediately below Hathaway's lower left shoulder blade, traveled laterally through Hathaway's lungs and heart, and came to rest on the right side of his chest, between his right nipple and armpit. Hathaway died from this wound.

Upon review of the case, the Court of Appeals for the Fifth Circuit found, in part, as follows:

"...the use of deadly force for apprehension is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, (1985). *Garner* defined the circumstances under which the use of deadly force to stop a fleeing suspect is constitutionally reasonable. Specifically,

where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent

escape, and if, where feasible, some warning has been given.

“The reasonableness of an officer’s use of deadly force is therefore determined by the existence of a credible, serious threat to the physical safety of the officer or to those in the vicinity. And, critically, reasonableness in these circumstances ‘must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.’ *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

“Cases addressing suspects fleeing in motor vehicles often focus on the position of the officer relative to the vehicle. For example, in *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005), police fired their weapons at a car that ‘lurched’ toward them, although the officers were not directly in the path of the vehicle and indeed would only have been hit if the car swerved. The car had been involved in a high speed chase, but was at rest prior to the movement that the officers met with deadly force. In finding the shooting justified, the court focused on a number of factors, including the previous hazardous activity of the car. But central to its analysis

“...Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. ”

were the limited time the officers had to respond and ‘the closeness of the officers to the projected path of the vehicle.’ These factors led the court to conclude that the officers were justified in using deadly force.

“The court found, however, that the officers were not justified in firing their weapons at the car after it had passed them and stopped. This finding was based on the court’s view that, after the vehicle had passed the officers, the officers had access to new information regarding the perceived threat and should therefore have changed their response accordingly. Notably, then, the later shots by the officers were found

unjustified because the officers could have actually perceived the passing of the threat. The court’s determination was not based on its own post-hoc judgment about whether the threat had in fact passed.

“Proximity and temporal factors have also been relevant in our own circuit in a case involving a police officer who fired his weapon at a truck that ‘gunned’ its engine and accelerated towards the officer. *Herman v. City of Shannon*, 296 F. Supp. 2d 709, 713 (N.D. Miss. 2003). The truck, pursued by police after failing to comply with a traffic stop, ultimately came to

rest as it was attempting to turn around on a country road. Two patrol cars surrounded it, and the officers exited their patrol cars with their guns drawn. The truck then accelerated towards an officer standing within three feet of the truck. The officer was struck by the truck and fired two shots, injuring a passenger in the truck. The district court found the response to be reasonable, given the officer's limited time to react to an evident threat and our circuit's general acknowledgment that police officers are often required to make instantaneous decisions that should not be second-guessed merely because other options appear plausible in hindsight.

"Bazany's deposition, which, as we have said, is the only personal account of the event, states that he saw the Mustang accelerate towards him, and that the driver, Jon-Eric, had a 'determined look.' And, most crucially, Bazany states that the subsequent sequence of events, in which he realized he could not get out of the way, decided to fire, unholstered his gun, was struck, and fired his weapon, occurred in the snap of a finger, so quickly, in fact, that Bazany cannot remember whether he fired his gun before, during, or after he was struck.

"Nothing offered in evidence seriously disputes the time frame recounted by Bazany. The autopsy report is consistent with any number of theories of the relative locations of Bazany and Jon-Eric because the crucial information regarding Jon-Eric's position in the car at the time of the shooting is apparently unknown to all parties. And simply because the autopsy report does not contradict an offered theory does not mean that the theory can also be reasonably inferred from it, any more than it could be inferred from the bare fact that the bullet that killed Jon-Eric Hathaway came from

Bazany's gun. The autopsy report is at best "a scintilla of evidence" for the theory that Jon-Eric Hathaway was well past Bazany when Bazany fired. No other specific facts in the record support this theory.

Furthermore, Bazany's failure to remember certain details does not amount to a 'well-supported suspicion of mendacity' undermining his credibility. *Thomas v. Great Atlantic and Pacific Tea Co.*, 233 F.3d 326, 331 (5th Cir. 2000). The evidence before us—and the lack of specific facts to the contrary—requires a conclusion that Bazany fired his weapon and was struck by the Mustang in near contemporaneity.

"The only remaining question, then, is whether an officer would be justified in firing his weapon when threatened by a nearby accelerating vehicle, even if, owing to the limited time available to respond, the shot was fired when or immediately after the officer was hit. The evidence indicates that Bazany was in close proximity to a car that he had asked to pull over that then accelerated towards him, making perception of a serious threat reasonable. Given the extremely brief period of time an officer has to react to a perceived threat like this one, it is reasonable to do so with deadly force. See *Graham*, 490 U.S. at 369–97.

"It is this brevity, and the coordinate rapid response that it demanded from Bazany, that is the distinguishing factor in this case. This is not an instance, as in *Waterman*, where an officer fired after the perception of new information indicating the threat was past. Instead, the entirety of the officer's actions were predicated on responding to a serious threat quickly and decisively. That his decision is now subject to second-guessing—even legitimate second-guessing—does not make his actions objectively

unreasonable given the particular circumstances of the shooting. *See Stroik v. Ponseti*, 35 F.3d 155, 158–59 (5th Cir. 1994) (We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes “reasonable” action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure (quoting *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992)). Because Bazany’s actions were objectively reasonable, we conclude that he did not violate Jon-Eric Hathaway’s Fourth Amendment rights.”

CIVIL LIABILITY:

Foreign Nationals Not Advised of Consular Notification Rights; Vienna Convention on Consular Relations

Cornejo v. San Diego County,
CA9, No. 05-56202, 9/24/07

In *Cornejo v. San Diego County*, Ezequiel Nunez Cornejo’s seeks damages and injunctive relief against the County of San Diego, several deputy sheriffs, and various cities within the county on behalf of a class of foreign nationals who were arrested and detained without being advised of their right to have a consular officer notified as required by Article 36. The district court dismissed the action, concluding that Cornejo could not bring a § 1983 claim for violation of the Vienna Convention on Consular Relations because it creates no private rights of action or corresponding remedies.

The issue before the Ninth Circuit Court of Appeals was whether Article 36 creates judicially enforceable rights that may be vindicated in an action brought under 42 U.S.C. § 1983.

The Court of Appeals for the Ninth Circuit stated that Article 36 does not create judicially enforceable rights. Article 36 confers legal rights and obligations on *States* in order to facilitate and promote consular functions. Consular functions include protecting the interests of detained nationals, and for that purpose detainees have the right (if they want) for the consular post to be notified of their situation. In this sense, detained foreign nationals benefit from Article 36’s provisions. But the right to protect nationals belongs to *States* party to the Convention; no private right is unambiguously conferred on individual detainees such that they may pursue it through a civil action under 42 U.S.C. § 1983.

DWI ENFORCEMENT:

Horizontal Gaze Nystagmus Test

Gist v. State, CACR06-1027, 8/29/07,
[Unpublished]

James Harold Gist, Jr., was found guilty of driving while intoxicated (first offense), refusal to submit to a breathalyzer test, and careless and prohibited driving. Gist was sentenced cumulatively to one day in jail, his driver’s license was suspended for six months, and he was fined \$100. In lieu of jail time, he was allowed to complete twenty-four hours of community service within ninety days. Gist argues for reversal, stating the trial court abused its discretion by allowing testimony concerning his performance on the horizontal gaze nystagmus test. The Arkansas Court of Appeals found no error and affirmed the conviction. The case is as follows:

On New Year’s Eve 2004, Corporal Dennis Overton of the Arkansas State Police was on patrol on Highway 7 near the intersection of

Amity Road. While sitting at a service station, he observed Gist's vehicle veer onto the shoulder of the road, do a U-turn, and accelerate at a high rate of speed, squealing his tires and kicking up gravel as he accomplished this maneuver. Overton then initiated a traffic stop. He immediately noticed that Gist's eyes were red and glassy, and he detected the strong odor of intoxicants coming from Gist's person. Overton testified that he conducted four field sobriety tests and that Gist performed satisfactorily only on one of them, the alphabet test. Otherwise, Gist failed the horizontal gaze nystagmus test, the one-leg stand, and the nine-step-and-turn test. Gist also refused a portable breathalyzer, and he refused to take a breathalyzer test at the station. In his testimony at trial, Gist stated that he had consumed three beers and a shot of whiskey in the four hours preceding the stop.

Upon review, the Arkansas Court of Appeals stated: "Gist's argument concerns the objection he raised when Corporal Overton testified that the involuntary jerking of the eye during a horizontal gaze nystagmus test indicated 'a level of intoxication of point one [zero] or above.' Gist contends that the officer's testimony was not admissible under the decision in *Middleton v. State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989). In that case, it was held that there was no evidentiary foundation laid for testimony that a positive gaze nystagmus test indicated an alcohol level in excess of .10. In subsequent decisions, our courts have held that the gaze nystagmus test is a valid indicator of the presence of alcohol, but we have maintained disapproval when the test is used to fix a percentage of blood-alcohol content. *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993); *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992).

"In addressing Gist's objection, the trial court stated, 'Of course, the way I'm gonna hear it is it's a field sobriety test. It's not a breathalyzer type result. I don't ever accept the testimony in that regard. I mean, we know that that's not what it's designed for and that's not what it means.' It is clear to us that the trial court sustained Gist's objection, agreeing with him that the gaze nystagmus test was not to be used to indicate a specific blood-alcohol content. We thus find no error."

FEDERAL DNA DATABASE:

Constitutional Challenges

United States v. Weikert,
CA1, No. 06-1861, 8/9/07

In *United States v. Weikert*, the Court of Appeals for the First Circuit stated that federal law that requires a federal felony offender placed on supervised probation to provide a DNA sample for inclusion in an FBI database does not violate the Fourth Amendment.

Editor's Notes: While all the circuits that have addressed this issue have upheld this statute, they have not agreed upon the legal basis for the validity of the statute. The courts generally recognize, however, that the government's interest in crime prevention outweighs the individual's privacy interest in having his blood drawn.

INTERROGATION:
Spontaneous Statement

Evans v. State, CACR06-1248, 8/29/07

On December 27, 2004, Attorney Bill Webster was standing outside his office when he was shot twice by Allen Evans, who was Webster's former client. Evans was arrested in Florida on December 29, 2004. When he was taken into custody, police were aware that he was wanted in Arkansas for two counts of aggravated battery. Shortly after his arrest, Evans collapsed due to high blood sugar and was taken to the emergency room where he responded to treatment. Detective Tony Scarpati of the Hernando County Florida Sheriff's Office introduced himself to Evans and said, "I just wanted to let you know everybody's going to be okay." Evans said, "That attorney did not die? I must be a bad shot. That son-of-a-b***h didn't die."

Evans contends on appeal that the statements he made in the emergency room should have been suppressed. Evans claims that, under *Miranda v. Arizona*, 384 U.S. 436 (1964), the statement he made to Detective Scarpati in response to Scarpati's comment that everyone was going to be okay was a situation where he was in custody while at the hospital and that he was under the influence of Valium. He contends that he had not been given his *Miranda* warning when Scarpati first spoke with him in the emergency room. Evans argues that Scarpati should have known his comment would elicit an incriminating response. He claims that his responses—"I must be a bad shot" and "That son-of-a-b***h did not die"—should have been suppressed. See *Rhode Island v. Innis*, 446 U.S. 291 (1980) (holding that the term "interrogation" under *Miranda* refers not only to express questioning, but also to

any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect).

The State argues that, under the totality of the circumstances, the trial court's ruling denying the motion to suppress the emergency-room statements was correct by a preponderance of the evidence and should not be disturbed on appeal. The statements made by Evans in the emergency room were spontaneous statements not made in response to any interrogation by police, and therefore, the State claims that they properly were allowed into evidence. See, e.g., *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003) (where defendant's response to police officer's general question "What's up?", which was that he had sexually abused his stepdaughter and he needed help, was admissible in prosecution for incest, despite fact that defendant made the statement before receiving *Miranda* warnings; where the question was general term of salutation and it was not reasonable to view it as designed to elicit an incriminating response, and where the officer was not present to interrogate defendant about allegations of incest, but was simply responding to a disturbance call and concern of defendant's wife that defendant would harm himself).

Upon review, the Arkansas Court of Appeals ruled in favor of the trial court: "Evans made his statements after Scarpati made a very general statement—that everyone was going to be okay—which was not designed to elicit a response. The officer asked no question, direct or implied, that required or suggested a response from Evans. Because no questioning occurred, *Miranda* was not implicated; thus the trial court's ruling was correct."

SEARCH AND SEIZURE:
Non-Testimonial Evidence Seizure
Hoyle v. State, CR 06-1249, 11/15/07

On July 29, 2004, while driving a tractor trailer with a loaded chip hauler attached, Eric Keith Hoyle crossed the center line and struck an oncoming motor home driven by Hilda Dean. Hilda and her grandson Gary Dean, a passenger, were killed in the collision, while a third passenger, Dillon Holbrook, also Dean's grandson, was seriously injured. During the course of investigating the accident, officers believed that Hoyle might have been driving under the influence of drugs or alcohol at the time of the accident. Hoyle, who was transported by ambulance to a local hospital, was presented with a consent form to allow authorities to obtain a blood and urine sample from him. The samples later revealed the presence of amphetamine and methamphetamine in his system.

Hoyle made numerous arguments on appeal, including the failure of the trial court to suppress evidence of his blood alcohol test results. Hoyle argued that the obtaining of samples of his blood and urine constituted an unlawful search and seizure.

In *Hoyle v. State*, Hoyle appeals his Polk County Circuit Court conviction of one count of battery in the first degree and two counts of manslaughter. The Arkansas Supreme Court found, in part, as follows:

"...the Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. It is well settled that the taking of

blood by a law enforcement officer amounts to a Fourth Amendment search and seizure. *Polston v. State*, 360 Ark. 317, 201 S.W.3d 406 (2005); *Haynes v. State*, 354 Ark. 514; 127 S.W.3d 456 (2003); *Russey v. State*, 336 Ark. 401, 985 S.W.2d 316 (1999). See also *Schmerber v. California*, 384 U.S. 757 (1966).

"Pursuant to Ark. R. Crim. P. 12.3(a), a search of an accused's blood stream may be made only:

(i) if there is a strong probability that it will disclose things subject to seizure and related to the offense for which the individual was arrested; and

(ii) if it reasonably appears that the delay consequent upon procurement of a search warrant would probably result in the disappearance or destruction of the objects of the search; and

(iii) if it reasonably appears that the search is otherwise reasonable under the circumstances of the case, including the seriousness of the offense and the nature of the invasion of the individual's person.

"Here, the trial court ruled that there was probable cause warranting the taking of Hoyle's blood and urine samples. Deputy Price testified that he had reason to believe that Hoyle was intoxicated at the time of the accident. According to Price, there was no other legitimate explanation of what would have caused Hoyle to leave his lane of traffic and crash into the motor home. Price also stated that he was familiar with Hoyle, having previously arrested him for possession of methamphetamine. Corporal Adams also testified that he believed Hoyle to be under the influence at the time of the accident based on his reconstruction of the accident.

Adams stated that Hoyle's vehicle caused a head on collision in the wrong lane, there were no skid marks, and based on a witness's statement, Hoyle never applied the brakes before hitting the motor home. Adams also pointed to the fact that there were no other conditions present that seemed to be contributing factors and that Hoyle's demeanor and appearance caused him to suspect Hoyle was under the influence. This evidence complies with the first requirement of Rule 12.3. In addition, if officers had waited to obtain samples from Hoyle, it is quite possible that his blood would have metabolized the methamphetamine, resulting in the destruction of this evidence. Finally, the intrusion caused by the taking of the blood and urine samples was minor and the seriousness of the offense was obvious, considering that the accident involved two fatalities and a third serious injury. Accordingly, there was probable cause supporting the taking of Hoyle's blood and urine samples."

SEARCH AND SEIZURE:

Reasonable Suspicion; Thermal Imaging

United States v. Kattaria,
CA8, No. 06-3903, 10/5/07

On May 6, 2004, Special Agent Michael Perry of the Minnesota Bureau of Criminal Apprehension applied to Ramsey County District Court for a warrant authorizing aerial use of a thermal imaging device to measure heat emitting from the home at 1814 Malvern Street in Lauderdale, Minnesota. Perry's supporting affidavit averred that in late March a cooperating defendant (CD) described Mohammed Kattaria, identified his photo, said they had occasionally smoked marijuana over the past ten years, and knew Kattaria had a criminal history. The CD said that in 2002 he observed a marijuana grow

operation in the basement of the home Kattaria owned at 1814 Malvern.

Perry averred that a criminal records check revealed a 1997 conviction and a 2000 arrest for marijuana offenses. A check of utility company records revealed that electric power consumption at 1814 Malvern ranged from 1890 to 2213 kilowatt hours per month from November 2003 through April 2004, whereas consumption ranged from 63 to 811 kilowatt hours per month at five nearby residences. Finally, Perry averred that he drove by the residence several times, observing drawn blinds and nothing that would draw large amounts of electricity. A District Court judge issued a warrant authorizing a nighttime search for an excess amount of heat emitting from the residence and garage relative to comparable structures in the same neighborhood.

The warrant was executed on May 7, 2004. The experienced thermal imaging operator concluded that the property emitted heat consistent with indoor marijuana grow operations. Perry then applied to Ramsey County District Court for two warrants to conduct physical searches at 1814 Malvern and at another property owned by Kattaria in Falcon Heights, Minnesota. In addition, an investigator applied to Anoka County District Court for a warrant to conduct a physical search at a third home in Lino Lakes, submitting an affidavit based upon information supplied by Special Agent Perry. The supporting affidavits for these warrants included the results of the thermal imaging at 1814 Malvern, the facts set forth in Perry's first affidavit, additional information regarding the CD's reliability, the quantities of marijuana Kattaria possessed when arrested twice in 1997, information regarding Kattaria's wage earnings and expenses purchasing

the properties, electric power consumption data for the Lino Lakes and Falcon Heights properties, and information from a concerned citizen that no one appeared to be living at the Lino Lakes residence or using electricity in the evenings. The three warrant searches yielded 548 marijuana plants, bags of marijuana, and other incriminating evidence.

Kattaria argues that the district court erred in concluding that the warrant to conduct a thermal imaging search was supported by probable cause because there was no statement as to the CD's reliability, the CD's observation of a grow operation in the basement two years earlier was uncorroborated stale information, and Perry's affidavit included inaccurate information such as averring that Kattaria had a prior firearm conviction. He further argues the subsequent warrants lacked probable cause for the same reasons, and because the results of the thermal imaging were unconstitutionally obtained and therefore may not be considered. He concludes that, when stale information, inaccurate information, and information from an unreliable informant are removed, probable cause is lacking to support all four affidavits.

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

"Kattaria's attack on all four warrants assumes that the first warrant to conduct a limited aerial thermal imaging search violated the Fourth Amendment unless supported by traditional probable cause. The Supreme Court first held that a warrant is required before conducting this type of search in *Kyllo v. United States*, 533 U.S. 27 (2001). The Court concluded that, when 'the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable

without physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant.'

"The Court in *Kyllo* did not discuss what showing is constitutionally required to obtain a warrant to conduct a thermal imaging search. But the Court has often discussed this issue in other contexts:

The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, in certain limited circumstances neither is required...Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985); see *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-41 (1985). For example, the Court has upheld administrative warrants as reasonable without a showing of probable cause in various contexts. See *United States v. Lucas*, No. 05-2165, slip opinion at 8-9 (8th Cir. Aug. 23, 2007) (en banc).

"In an analogous investigative context, the traditional requirement of probable cause is relaxed by the well-established Fourth Amendment principle that the police may reasonably make a brief and minimally intrusive investigative stop if they have reasonable suspicion that criminal activity may be afoot. As the Supreme Court explained in *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975):

These cases [Terry v. Ohio, 392 U.S. 1 (1968), and Adams v. Williams, 407 U.S. 143 (1972)] together establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime.

"Factors cited as justifying application of this standard, rather than probable cause, were 'the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives.' 422 U.S. at 881.

"The four dissenters in *Kyllo* argued that using a thermal imaging device to monitor heat emissions from a private residence 'is an entirely reasonable public service,' and 'the countervailing privacy interest is at best trivial.' 533 U.S. at 45. The majority rejected this analytical approach in deciding whether a warrant is constitutionally required. Expressing concern about the potential invasiveness of future technology, the majority drew a bright line, requiring a warrant for the use of non-public technology, regardless of the type of information being gathered from inside the home.

"In our view, the 'practical alternatives' factor provides good reason to shift the analysis when the issue is the quantum of evidence required to obtain a warrant *solely for the purpose of conducting investigative thermal imaging*. Special Agent Perry wished to conduct thermal imaging to investigate a suspected indoor marijuana grow operation. When the thermal imaging

results confirmed the probable presence of an indoor grow operation, Perry applied for three warrants to conduct far more intrusive physical searches of Kattaria's properties. His supporting affidavits included the thermal imaging results from 1814 Malvern and additional facts from Perry's on-going investigation. This is a constitutionally reasonable investigative sequence. It provides important corroboration that criminal activity is likely being conducted in a home *before the homeowner is subjected to a full physical search*. If the same probable cause is required to obtain both kinds of warrants, law enforcement will have little incentive to incur the expense of a minimally intrusive thermal imaging search before conducting a highly intrusive physical search.

"For these reasons, we are inclined to believe that the same Fourth Amendment reasonable suspicion standard that applies to Terry investigative stops should apply to the issuance of a purely investigative warrant to conduct a limited thermal imaging search from well outside the home. (Emphasis by Editor). Applying that standard, the first warrant was clearly valid, taking into account what the CD told Special Agent Perry, Kattaria's criminal history, and, most significantly, utility records showing extremely high relative electric consumption that was not explained by what Perry could observe when he drove by the 1814 Malvern residence several times.

"Alternatively, we agree with the district court that the thermal imaging warrant was supported by probable cause, that is, 'a fair probability that contraband or evidence of a crime will be found in the location to be searched.' *United States v. LaMorie*, 100 F.3d 547, 552 (8th Cir. 1996). To be sure, the CD's information was rather stale when Perry submitted his warrant affidavit in May 2004, particularly the CD observing a grow

operation in the basement two years earlier. But this information served as the impetus for further investigation by Special Agent Perry.

“The check of Kattaria’s criminal history provided some corroboration, and recent utility records provided significant evidence that the CD’s report of illegal drug activity in the home was continuing in nature. ‘The passage of time is less significant when there is cause to suspect continuing criminal activity...Where recent information corroborates otherwise stale information, probable cause may be found.’ *United States v. Ozar*, 50 F.3d 1440, 1446 (8th Cir.), cert. denied, 516 U.S. 871 (1995). Corroboration from facts such as increased electrical usage may compensate for lack of information about an informant’s reliability or the basis of his knowledge. See *United States v. Olson*, 21 F.3d 847, 850 (8th Cir.), cert. denied, 513 U.S. 888 (1994).

“Our duty as a reviewing court ‘is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.’ *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). Like the district court, we conclude that Special Agent Perry’s supporting affidavit provided probable cause to issue the initial thermal imaging warrant. The affidavits supporting the three later warrants, which included the thermal imaging results from 1814 Malvern and additional facts obtained by Perry’s investigation, likewise provided sufficient probable cause to issue warrants authorizing physical searches of Kattaria’s homes.”

Editor’s Note: Other courts that have addressed this issue have concluded that probable cause is required to obtain a search warrant for a thermal imaging scan.

**SEARCH AND SEIZURE:
Search Incidental to Arrest;
Cellular Telephone**

United States v. Finley,
CA5, No. 06-50160, 1/26/07

On August 19, 2005, officers with the Midland, Texas Police Department (“MPD”), working in conjunction with the Drug Enforcement Administration (“DEA”), conducted a controlled purchase of methamphetamine from Mark Brown. Amy Stratton, a cooperating source acting under the direction of the MPD, called Brown to arrange a methamphetamine deal. Stratton and Brown agreed that Stratton would purchase approximately six grams of methamphetamine for \$600. Brown requested that Stratton travel to his residence to buy the narcotics, but at the direction of the police Stratton informed Brown that she was at a truck stop in Midland and that she had no transportation to get to Brown’s home. Brown agreed to meet Stratton at the truck stop. The police drove Stratton to the truck stop and gave her \$600 in marked bills.

Brown asked defendant-appellant Jacob Pierce Finley to drive him to the truck stop, and Finley agreed to do so. Driving his white Southwest Plumbing van—Southwest Plumbing was Finley’s uncle’s company and was also Finley’s employer—Finley picked Brown up at Brown’s residence and drove him to the truck stop. Once they arrived, Stratton approached the van’s passenger side where Brown was sitting. Stratton gave Brown the \$600 in marked bills, and Brown gave Stratton a cigarette package. Tucked inside the clear wrapper surrounding the cigarette package was a plastic bag containing a white crystalline substance; laboratory analysis of this substance later revealed that it was a

3.1-gram mixture containing 1.4 grams of pure methamphetamine.

Finley then drove away from the truck stop; neither he nor Brown ever exited the van while there. MPD officers waiting nearby performed a traffic stop on the van approximately three to five miles from the truck stop. Once Finley and Brown were detained, the police searched the van and found the same marked bills used in the transaction in a trash can located between the driver's and passenger's seats.

The police also found two medicine bottles in the trash can, one with an orange cap and the other with a white cap. In the orange-capped bottle were five small plastic bags, two of which contained a white crystalline substance; laboratory analysis of this substance later revealed that in total it was a 2.6-gram mixture that included 1.5 grams of pure methamphetamine. The white-capped bottle had a label with the name "Finley" on it. In this bottle were a small, homemade, glass smoking pipe with methamphetamine residue in it and a small piece of straw that could be used to snort methamphetamine. Also inside the bottle was a plastic bag containing a white crystalline substance; laboratory analysis of the substance revealed that it was 1.6 grams of dimethyl sulfone, a substance similar in appearance to methamphetamine that methamphetamine dealers commonly use to "cut" or add bulk to pure methamphetamine.

The police arrested Finley and Brown at the scene of the traffic stop. They searched Finley's person and seized a cell phone that was located in his pocket. The phone belonged to Southwest Plumbing and had been issued to Finley for work, but Finley was permitted to use the phone for personal purposes as well.

MPD officers transported Finley and Brown to Brown's residence, where other MPD officers and DEA agents were conducting a search pursuant to a warrant. DEA Special Agent Dean Cook and MPD Sergeant Russell interviewed Finley outside the home. Finley admitted to some past cocaine and methamphetamine use, including some methamphetamine he received from Brown three days prior. He also admitted to getting his friends marijuana from Brown on numerous occasions. But he denied any involvement in the sale of methamphetamine to Stratton.

During the questioning, an MPD officer handed Finley's cell phone to Special Agent Cook. Special Agent Cook searched through the phone's call records and text messages; several of the text messages appeared to him to be related to narcotics use and trafficking. After Special Agent Cook and Sergeant Russell confronted Finley with some of the text messages, Finley averred that most of the messages referred to marijuana, not methamphetamine, and he admitted to distributing marijuana at least once.

The grand jury charged Brown and Finley in a one-count indictment with possession with intent to distribute methamphetamine, aided and abetted by each other, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Brown pleaded "guilty" pursuant to a plea agreement. Finley pleaded "not guilty" and proceeded to a jury trial.

The government argued at trial that Finley knowingly drove Brown to the truck stop so that Brown could sell methamphetamine to Stratton and that Finley therefore aided and abetted Brown's possession with intent to distribute methamphetamine. Finley's defense

was that, even though he in fact aided and abetted Brown, he did not do so knowingly because he did not know that the purpose of the trip to the truck stop was to sell methamphetamine.

Brown testified that during the approximately six-month period prior to his arrest, he was in daily contact with Finley.

Brown also testified that Finley had purchased methamphetamine from him five to ten times and that Finley distributed some of the methamphetamine he bought from Brown. Brown alleged that on August 19, 2005, Finley contacted him to purchase methamphetamine, that Brown told Finley he needed a ride to the truck stop to drop off methamphetamine, and that Finley agreed to give him a ride in exchange for a little extra methamphetamine. According to Brown's testimony, when Finley picked him up he gave Finley 0.3 grams of methamphetamine, which included 0.1 extra grams in exchange for the ride. On cross examination, Brown acknowledged that after his arrest he told MPD officers, inter alia, that he asked Finley to take him to the truck stop to purchase cigarettes.

Finley testified that Brown asked him for a ride to get some cigarettes and that he agreed to take him to the truck stop. He averred that he had not known of the real purpose for the trip until after the drug transaction had occurred.

The jury convicted Finley. On appeal, Finley conceded that the officers' post-arrest seizure of his cell phone from his pocket was lawful, but

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he argues that, since a cell phone is analogous to a closed container, the police had no authority to examine the phone's contents without a warrant.

Since the search was conducted pursuant to a valid custodial arrest, law enforcement officers were therefore permitted to search Finley's cell

phone pursuant to his arrest. The district court correctly denied Finley's motion to suppress the call records and text messages retrieved from his cell phone.

**SEARCH AND SEIZURE:
Special Needs; Airport Screening**

United States v. Aukai,
CA9, No. 04-10226, 8/10/07

In *United States v. Aukai*, the Court of Appeals for the Ninth Circuit stated that airport screening searches, like the one at issue here, are constitutionally reasonable administrative searches because they are “conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings.”

The constitutionality of an airport screening search does not depend on consent, and requiring that a potential passenger be allowed to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world. Such a rule would afford terrorists multiple

opportunities to attempt to penetrate airport security by “electing not to fly” on the cusp of detection until a vulnerable portal is found. This rule would also allow terrorists a low-cost method of detecting systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks. Where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority all that is required is the passenger’s election to attempt entry into the secured area of an airport. Under current TSA regulations and procedures, that election occurs when a prospective passenger walks through the magnetometer or places items on the conveyor belt of the x-ray machine.

**SEARCH AND SEIZURE:
Terry Stop; Plain Feel Doctrine**

United States v. Yamba,
CA3, No. 06-2581, 10/22/07

In *United States v. Yamba*, Vikram Yamba was convicted of seven counts of wire fraud. The evidence against Yamba included several pieces of paper with what appeared to be credit card numbers written on them. These papers were discovered on Yamba’s person during a routine inventory search that took place when he was booked at the police station after having been arrested for possession of marijuana. After unsuccessfully moving to suppress the papers as the fruits of an illegal search, Yamba was found guilty.

On appeal, Yamba challenges his conviction, arguing that the search that turned up the marijuana was illegal and, thus, that the papers discovered at his booking on marijuana-possession charges should have been suppressed. The case is as follows:

Officer Matthew Livingstone asked Vikram Yamba and James Kpakpo to step out of a truck in order to conduct a pat-down search of both of them. When he was frisking Yamba, Livingstone felt a plastic bag in Yamba’s right jacket pocket. Livingstone testified as follows:

As I was conducting the pat-down, along the right side, right coat pocket, I could feel a plastic bag. I noted through training and experience that narcotics are stored and transported in plastic baggies. After a brief second of just feeling it, I could tell that there was a soft spongy-like substance that is consistent with marijuana inside. I then recovered the bag from his pocket and found it contained suspected marijuana.

At the police station during Yamba’s booking, an inventory search of his person revealed several slips of paper with the words ‘credit card’ and lines of numbers alternating down the page. It was later learned that that purchases were being made illegally with these stolen credit card numbers.

Yamba was indicted by a grand jury on seven counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2. On this appeal he challenges only his conviction, arguing that the search that turned up the marijuana was illegal and, thus, that the papers discovered at his booking on marijuana-possession charges should have been suppressed at his trial on the wire fraud charges.

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

“While Officer Livingstone was entitled to stop Yamba under *Terry*, it still leaves the question of whether the pat-down search was properly

conducted. For if it was not, there would be a ripple effect on the criminal case against him, ending in the exclusion of the papers with allegedly stolen credit card numbers as ‘fruits of the poisonous tree.’ *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). Those papers, of course, were found in a routine and legal inventory search upon Yamba’s booking at the police station, *Illinois v. Lafayette*, 462 U.S. 640 (1983), which took place after his arrest—an arrest made possible only by the discovery of marijuana during the *Terry* search.

“In *Terry*, the Supreme Court said that the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. It later expounded on that statement when speaking about *Terry* searches specifically:

The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence... So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.

Adams v. Williams, 407 U.S. 143, 146 (1972). The proper scope of a search becomes critical when police discover something suspicious they were not expecting or intending to find. And in such a case the ‘plain view’ doctrine often governs whether their discovery can be admitted against a defendant. See, e.g., *Arizona v. Hicks*, 480 U.S. 321 (1987).

“As the Supreme Court has said, precedent has ‘come to reflect the rule that if, while lawfully engaged in an activity in a particular

place, police officers perceive a suspicious object, they may seize it immediately’ *Texas v. Brown*, 460 U.S. 730, (1983). The ‘plain view’ doctrine, therefore, is best understood not as an independent exception to the warrant clause, but simply as an extension of whatever the prior justification for an officer’s access to an object may be. So understood, courts have logically extended this concept to permit the admission of evidence discovered with other sensory faculties. See, e.g., *United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006) (‘plain smell’); *United States v. Baranek*, 903 F.2d 1068, 1070–72 (6th Cir. 1990) (‘plain hearing’). In this case, we deal with another application of the ‘plain view’ doctrine: plain feel.

“Unlike ‘plain hearing’ and ‘plain smell,’ which the Supreme Court has not decided, it has put its imprimatur on ‘plain feel.’ In *Minnesota v. Dickerson*, the Court took up the issue of ‘whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by *Terry*,’ and decided that ‘the answer clearly is that they may, so long as the officers’ search stays within the bounds marked by *Terry*.’ 508 U.S. 366, 373 (1993). Since *Dickerson*, our Court has not had the opportunity to examine and apply its teachings in a precedential opinion.

“In *Dickerson*, police officers were patrolling a neighborhood and saw the defendant leaving what was known to them as a ‘crack house.’ When he saw the officers in their patrol car, the defendant abruptly halted and began walking in the opposite direction. He then walked into an alley. This activity aroused the suspicion of the officers, and they decided to investigate further. After ordering the defendant to stop, one of the officers conducted a *Terry* search of the defendant. According to the Court,

the search revealed no weapons, but the officer did take an interest in a small lump in the defendant's nylon jacket. The officer testified later at an evidentiary hearing that, as I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane. At that point the officer reached into the defendant's pocket and retrieved a small plastic bag containing one fifth of one gram of crack cocaine.

"Before addressing the 'plain feel' concept, the Supreme Court first described the 'plain view' doctrine from which it derived:

If police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—i.e., if its incriminating character is not immediately apparent—the plain-view doctrine cannot justify its seizure.

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"Applying this rule, the Supreme Court focused on the trial court's findings regarding what the officer believed about the lump in the defendant's pocket. Specifically, it noted that the officer 'made no claim that he suspected this object to be a weapon.' The officer's own testimony, the Court went on to say, belies any notion that he immediately' recognized the lump as crack cocaine. Rather, the officer determined that the lump was contraband only after squeezing, sliding, and otherwise manipulating the contents of the defendant's pocket—a pocket which the officer

already knew contained no weapon.

"The Court in *Dickerson* stated officer's continued exploration of the defendant's pocket *after having concluded that it contained no weapon* was unrelated to the sole justification of the search under *Terry*: the protection of the police officer and others nearby. It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize and that we have condemned in subsequent cases.

"The proper question under *Dickerson*, therefore, is not the immediacy and certainty with which an officer knows an object to be contraband or the amount of manipulation required to

acquire that knowledge, but rather what the officer believes the object is by the time he concludes that it is not a weapon. That is, a *Terry* search cannot purposely be used to discover contraband, but it is permissible that contraband be confiscated if spontaneously discovered during a properly executed *Terry* search. Moreover, when determining whether the scope of a particular *Terry* search was proper, the areas of focus should be whether the officer had probable cause to believe an object was contraband *before* he knew it not to be a weapon and whether he acquired that knowledge in a manner consistent with a routine frisk.

“Assuming that an officer is authorized to conduct a *Terry* search at all, he is authorized to assure himself that a suspect has no weapons. He is allowed to slide or manipulate an object in a suspect’s pocket, consistent with a routine frisk, until the officer is able reasonably to eliminate the possibility that the object is a weapon. If, before that point, the officer develops probable cause to believe, given his training and experience, that an object is contraband, he may lawfully perform a more intrusive search. If, indeed, he discovers contraband, the officer may seize it, and it will be admissible against the suspect. If, however, the officer ‘goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.’ *Dickerson*, 508 U.S. at 373.

“In making this ruling, we join at least two of our sister courts of appeals that have framed the issue in this way. See *United States v. Mattarolo*, 209 F.3d 1153, 1158 (9th Cir. 2000) and *United States v. Rogers*, 129 F.3d 76, 79 (2d Cir. 1997).

“In our case, Officer Livingstone ‘felt around’ or otherwise ‘manipulated’ the contents of

Yamba’s pocket in the process of checking for weapons when he came across what in his experience could be contraband. It is not key whether Livingstone was certain that the object in Yamba’s pocket was contraband by the time he knew it not to be a weapon; what is key is whether Livingstone had probable cause to believe that it was and this occurred at the same moment or before he determined that Yamba had no gun on his person.

“The record demonstrates that probable cause indeed existed before Livingstone’s search went beyond the bounds of *Terry*. Livingstone testified that, when he felt Yamba’s pocket, he could feel a plastic bag containing a soft, spongy-like substance. Though it is true, as Yamba’s counsel noted in cross-examination, ‘grass or oregano’ might feel similarly soft or spongy, people do not normally go around with those substances in their pockets. Moreover, Officer Livingstone also felt ‘small buds and seeds’ along with the contents of the plastic bag. This detail is more consistent with marijuana than lawn grass or oregano. Based on Livingstone’s experience, he reasonably suspected that Yamba had marijuana in his pocket. His belief was reached quickly and upon minimal manipulation of Yamba’s pocket from the outside, consistent with a routine frisk allowed by *Terry*. And though Livingstone admitted to manipulating the object even after forming the belief that it was not a weapon, he only did so to make sure it was what he knew it to be. In other words, by that point Officer Livingstone *already* had probable cause to conduct a more intrusive search than that authorized by *Terry* alone.

“Consistent with the legal standard set out above, we purposely do not rely on the precision of Officer Livingstone’s testimony that he reached his conclusion within ‘a half second.’

However long it took Livingstone to form that belief, the record indicates that he did so within the bounds of *Terry*, as there is nothing to suggest that he conducted anything beyond a routine frisk until after there was probable cause to search more intrusively.

“The *Terry* search that revealed marijuana in Yamba’s coat pocket was conducted within the bounds set by the Supreme Court. We therefore affirm the District Court’s denial of Yamba’s motion to suppress the later discovered slips of paper and, consequently, his convictions for wire fraud.”

**SEARCH AND SEIZURE:
Terry Stop; Time and Proximity**

United States v. Bolden,
CA5, No. 05-20639, 11/12/07

Officers Pat Siddons and Preston Moore were leaving an apartment when they heard nearby gunshots. Within seconds, a vehicle passed by, and the driver yelled to the officers that people were shooting guns around the corner; neither Simmons nor Moore stopped that vehicle to ask questions; instead they split up to find the shooters. Siddons drove his patrol car around the corner from which he believed the gunshots had come; he encountered a silver Jeep Cherokee that was coming at him at a “relatively fast pace.” He stopped the Jeep. Eric Bolden was the driver. The time between the stop and the shots was less than one minute.

When Siddons exited his car, he observed four people in the Jeep. Not knowing whether they were the perpetrators, Siddons took a defensive position, drew his weapon, and ordered the occupants to hold their hands where he could see them. The occupants did not comply,

so, unsure if they were hiding something or reaching for a weapon, Siddons called for back-up.

Moore, during that time, had gone the other way around the block. Someone yelled to him that people were shooting out of a green Jeep. Moore did not stop to ask questions. He turned the corner and observed Siddons’ position; saw that there were no vehicles but the Jeep in the area; exited his vehicle; drew his gun; and supported Siddons.

As additional officers arrived, Siddons and Moore approached the Jeep. Moore repeatedly told Bolden to keep his hands on the steering wheel, but Bolden kept “dipping his hands between his legs.” Moore believed that Bolden was “going for a gun.” The Jeep’s passengers were ordered out of the vehicle. The officers observed a semi-automatic pistol on the driver’s side floorboard in plain view. Cocaine was also found on the driver’s side floorboard. Four pistols, at least three of which were loaded, were found.

Contending that it violated his Fourth Amendment rights for Siddons to stop the Jeep, Bolden moved to suppress the evidence.

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

“The only question is whether Siddons, ‘in the context of the totality of circumstances confronting’ him, had ‘a reasonable suspicion supported by articulable facts that criminal activity may be afoot’ when he stopped the Jeep, or whether he merely had a hunch or unparticularized suspicion. *United States v. Jaquez*, 421 F.3d 338, 340-41 (5th Cir. 2006). If the former, the stop was constitutional under

Terry v. Ohio, 392 U.S. 1 (1968); if the latter, it was not.

“One important aspect of this case is the amount of time between learning of the shootings and responding, coupled with the proximity between the stop and where the shootings occurred. When an officer sees a solitary vehicle containing more than one person leaving the precise spot where that officer has good reason to believe that multiple persons were shooting less than a minute before, it is more than a ‘hunch’ that those in the vehicle may be involved in the shooting. Granted, Siddons did not know that the shooters were in a Jeep or even a vehicle, but the law does not require that, before stopping the vehicle, Siddons knew with absolute certainty that those in the Jeep were involved in the shooting. His belief need be only ‘reasonable,’ and it was.”

SEARCH AND SEIZURE:

Vehicle Search; Search Incidental to Arrest

United States v. Grooms,
CA8, No. 07-1384, 11/6/07

Early on the morning of January 28, 2005, Joseph Grooms was involved in a verbal altercation with security personnel (“the bouncer”) at America’s Pub, a nightclub in the Westport Entertainment District of Kansas City, Missouri. Grooms told the bouncer he was returning to his truck to get a gun.

Having received a physical description of Grooms, Westport public safety (“WPS”) officers identified Grooms as he drove away in his truck. Because Grooms appeared to be leaving the Westport area, the WPS officers did not attempt to stop him. Grooms, however, returned, and legally parked the truck about one-half block

from the America’s Pub in a valid, unmetered parking spot. As the WPS officers were exiting their vehicles to approach him, Grooms and his passenger exited his truck and shut their doors. Grooms was standing very close to his vehicle, so the WPS officers moved him away from the truck door. Because he had threatened to retrieve a firearm to use on the bouncer, the WPS officers patted him down for weapons and placed him and his passenger in handcuffs. The WPS officers called the Kansas City Missouri Police Department (KCPD) and police officers responded to the scene within minutes.

When the police officers arrived, Grooms was standing next to his truck in handcuffs. The truck was locked and his keys had been taken from him. A KCPD dispatcher confirmed Grooms had an outstanding warrant in Kansas City, Missouri, for a moving violation, and an extraditable warrant in Jackson County from Missouri State Highway Patrol for failure to secure a load. A police officer informed him the officer had a right to search Groom’s vehicle because of his extraditable warrant for arrest. He asked for a private conversation with the officer, during which he explained he had returned to Westport to pick up two girls when he was stopped by WPS. Grooms also told the police officer he had been convicted of manslaughter because he accidentally shot his best friend. He further stated his trunk contained two boxes, which belonged to two males who were occupants in his truck earlier that night. The KCPD officers arrested him on his outstanding warrants.

Prior to the search of the truck, the KCPD officers asked Grooms a few times for his consent to search; Grooms refused. On the dash camera videotape of the incident, an officer can be heard saying to Grooms: “You have an

extraditable warrant that gives me the right to search your car.” Less than eight minutes after their arrival on the scene, the KCPD officers searched Grooms’ truck and found a black, hard plastic case, which appeared to be a gun case. A search of the gun case revealed two handguns. The officers also found a locked gray Sentry lockbox. In the driver’s side door compartment of the vehicle, the officers found Grooms’ key ring containing the key to the lockbox. Upon opening the locked box, the KCPD officers discovered clear plastic bags containing narcotics and a digital scale. When Grooms was searched, the officers discovered he had a large amount of cash on his person.

Grooms was indicted on drug and gun violations. As a result of his motion to suppress the evidence, the Court held an evidentiary hearing. The Magistrate Judge concluded the search was contemporaneous to Grooms’ arrest and justified under *Belton*. He entered a conditional plea to all counts. On appeal, he argued the search was unconstitutional and all resulting evidence should be suppressed. Grooms argues he was not a recent occupant of his vehicle. He also argues the search of his vehicle cannot be justified as a search incident to arrest because the officers were in no danger and there was no likelihood he was going to destroy any evidence since he was handcuffed and could not access his truck.

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

“The Supreme Court held in *Belton* ‘when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.’ 453 U.S. at 460. *Belton* does not

require the officers to demonstrate they were in danger to justify the search of the vehicle, nor are they limited to searching the area within the immediate control of the defendant and from which he might obtain a weapon.

“Officers who have made a lawful custodial arrest may also examine the contents of any containers found within the passenger compartment. See also *United States v. Williams*, 165 F.3d 1193, 1195 (8th Cir. 1999). In *Thornton vs. United States*, the Supreme Court clarified the *Belton* rule and held the rule applies even when the officer first makes contact with the arrestee after the arrestee has exited from the vehicle. 541 U.S. 615, 617, 620-21 (2004). The Supreme Court acknowledged a person’s classification as a ‘recent occupant’ may turn on his spatial and temporal relationship to the car at the time of arrest and search; however, it ‘does not turn on whether he was inside or outside the car at the moment the officer first initiated contact’ with the recent occupant.

“Grooms relies on this statement in *Thornton* and argues he is not a recent occupant because eight minutes is too long after an arrest to conduct a valid search incident to arrest. In *United States v. Hrasky*, however, we found an automobile search which began one hour after the defendant was arrested was a valid search incident to arrest because we found the defendant was a ‘recent occupant.’ 453 F.3d 1099, 1102 (8th Cir. 2006). We noted ‘the determination of whether a search is a contemporaneous incident of arrest involves more than simply a temporal analysis’ and concluded ‘a search need not be conducted immediately upon the heels of an arrest, but sometimes may be conducted well after the arrest, so long as it occurs during a continuous sequence of events.’ We reasoned the search in that case ‘took place at the scene of the arrest,

immediately after the police determined to proceed with a full custodial arrest' and was therefore valid.

"In this case, we find the search of Grooms' vehicle occurred during a continuous sequence of events after his stop. Eight minutes is not a long period of time and some of the delay can be attributed to Grooms' attempts to offer explanations for his prior criminal conviction, for his return to the pub, and for his possession of the two cases. Under *Hrasky*, we find Grooms was a recent occupant of his automobile.

"The district court properly denied Grooms' suppression motion. We hold the search of his automobile was a valid search incident to arrest."

**SEARCH AND SEIZURE:
Vehicle Stops; Traffic Violation**

United States v. Sallis,
CA8, No. 07-1265, 11/2/07

On the morning of December 21, 2005, a black woman entered the Wells Fargo Bank in Hopkins, Minnesota, and wrote a demand note on a deposit slip which stated: "give me the money or I'll shot you Don't try anything stupid Is your life worth It think[.]" The woman passed the note to a teller, the teller gave the woman \$1,359.00, and the woman exited the building.

At 10:02 a.m., Officer James Stromberg of the Minnetonka, Minnesota Police Department received a police radio transmission reporting that the Wells Fargo Bank in Hopkins had just been robbed. The dispatch described the bank robber as a black female wearing black clothes and driving a tan Pontiac Grand Am.

At the time, Stromberg was on patrol near the border between Hopkins and Minnetonka, and he proceeded to the border area to watch for the suspect. At 10:06 a.m., approximately four minutes after the initial robbery report, Stromberg saw a black woman standing outside of a tan or gold Pontiac Grand Am in front of the Brentwood Park Townhomes, located about one-half to three-quarters of a mile from the Wells Fargo Bank. The woman was wearing a coat with a fur-trimmed hood pulled up over her head. Stromberg radioed to dispatch his observations and intention to investigate and then returned to where he had seen the woman and the vehicle. However, by the time Stromberg made it back to the Brentwood Park Townhomes, the car and the woman were gone. Stromberg radioed this information to dispatch and requested a stop of the vehicle.

Meanwhile, Sergeant David Riegert, a Minnetonka police officer, who had also received the dispatches about the bank robbery and driven to the border area of Minnetonka and Hopkins, heard Officer Stromberg's transmission about a possible suspect in a tan Pontiac Grand Am leaving the vicinity of the Brentwood Park Townhomes. While going westbound on Highway 7, Riegert saw a tan Pontiac Grand Am traveling eastbound away from the Brentwood Park Townhomes.

According to Sgt. Riegert, the driver and sole occupant of the car was a black woman, who appeared to have fur lining the hood of her coat. Riegert made a U-turn and followed the Grand Am eastbound on Highway 7. Riegert reached speeds of 80 to 85 miles per hour as he caught up to the vehicle. Then, Riegert observed the vehicle make a U-turn to travel west, whereupon he made a U-turn in the median to follow. Riegert paced the vehicle traveling at rates varying from

60 to 63 miles per hour in a 55 miles per hour speed zone as the vehicle continued westbound and exited onto Highway 169. Shortly after going onto Highway 169, Riegert activated the patrol car's emergency lights to make a stop but did not turn on the siren. Riegert then followed two-car-lengths behind the vehicle for more than one mile until the Grand Am pulled off to the right and stopped, straddling the fog line, partly on the shoulder and partly in the right lane. Riegert waited to approach the car until Officer Stromberg, who had heard Riegert's radio reports and proceeded to the scene, arrived. According to Riegert, he pulled the vehicle over because of the information radioed in by Stromberg and the driver was speeding.

Stromberg arrived at the scene five to six minutes after Riegert made the stop. The officers decided to approach the vehicle in a modified high-risk fashion with their weapons drawn but not raised. Officer Stromberg went to the driver's door and asked the driver for a driver's license. Stromberg recognized the driver as the woman he had seen at the town home complex. The woman was identified as the defendant, Veronica Sallis. Stromberg advised Sallis that she matched the description of the Wells Fargo Bank robbery suspect. Sallis responded that she was coming from the Knollwood Shopping Mall. Upon Stromberg's request, Sallis exited the vehicle, and she was pat searched and her vehicle was searched for weapons. The officers observed a dark knit stocking cap with cut out eye holes in the passenger seat area.

Officer Stromberg noticed the odor of intoxicants on Sallis' breath and that she appeared confused and stumbled over her words during their four- to five-minute conversation. Based on his experience, Stromberg suspected that Sallis was intoxicated. The officers asked Sallis to perform

several field sobriety tests. Sallis failed the heel-to-toe walking test, a one-leg-stand test, and two of the three aspects of the eye-gaze nystagmus test. Sallis also failed a preliminary breath test when she refused to provide an adequate sample. At approximately 10:45 a.m., Sallis was arrested for driving while impaired, and she was handcuffed, searched, and taken to the Minnetonka Police Department. Sallis submitted to a breath test at approximately 11:42 a.m., which registered a .13 blood-alcohol content. Sallis was later transferred to the Hopkins Police Department. There, Federal Bureau of Investigations Special Agent Dave Rapp advised Sallis of her Miranda rights, and Sallis confessed to him that she had robbed the Wells Fargo Bank in Hopkins.

On January 18, 2006, Sallis was charged with one count of bank robbery in violation of 18 U.S.C. § 2113(a). Sallis moved to suppress evidence seized pursuant to the vehicle stop, which she alleged violated the Fourth Amendment because she was not stopped for speeding and police officers did not have a reasonable articulable suspicion of criminal activity when they stopped her vehicle.

The district court, adopting the report and recommendation of the magistrate judge, denied the motion concluding that the vehicle stop did not violate Sallis' Fourth Amendment rights because Officer Riegert had: (1) reasonable suspicion of a traffic violation for speeding and (2) reasonable articulable suspicion that the driver had been involved in a bank robbery in that the vehicle and the driver met the description of the robbery suspect and were observed within close proximity to the crime scene. Sallis thereafter conditionally pled guilty, reserving her right to appeal the denial of her motion to suppress.

At sentencing, the district court, over Sallis' objection, increased Sallis' base offense level by two levels for making a "threat of death" under United States Sentencing Guidelines ("Guidelines") section 2B3.1(b)(2)(F) based on the note Sallis presented to the bank teller during the course of the robbery. *See United States Sentencing Commission, Guidelines Manual, § 2B3.1(b)(2)(F)* (Nov. 2006). The district court imposed a Guidelines sentence of 37 months with a three-year term of supervised release and ordered \$1,359.00 in restitution.

Sallis brought an appeal to the Eight Circuit Court of Appeals. Upon reviewing facts of the case, they found, in part, as follows:

"An officer has probable cause to conduct a traffic stop when he observes even a minor traffic violation. This is true even if a valid traffic stop is a pretext for other investigation. *United States v. Coney*, 456 F.3d 850, 855-56 (8th Cir. 2006); 2)); *see Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that an officer's subjective intentions for conducting a traffic stop 'play no role in ordinary, probable-cause Fourth Amendment analysis'); *United States v. Herrera-Gonzalez*, 474 F.3d 1105, 1109 (8th Cir. 2007) (The constitutional reasonableness of a traffic stop does not depend on the actual motivations of the officer involved, and the subjective intentions of the officer making the stop are irrelevant in determining the validity of

"When police officers have an objectively reasonable basis to believe that a driver is speeding, this court has found probable cause to conduct a traffic stop and has held that the officers' subjective intentions in making the stop did not affect the stop's validity for purposes of the Fourth Amendment."

the stop.); *United States v. Andrews*, 465 F.3d 346, 347 (8th Cir. 2006) (The Fourth Amendment is not violated if an objectively good reason for a traffic stop exists, whatever the actual subjective motive of the officer making the stop may have been.); *United States v. Thomas*, 93 F.3d 479, 485 (8th Cir. 1996) (finding a traffic stop for failing to wear seatbelts is valid 'even if the police would have ignored the

traffic violation but for their suspicion that greater crimes are afoot').

"When police officers have an objectively reasonable basis to believe that a driver is speeding, this court has found probable cause to conduct a traffic stop and has held that the officers' subjective intentions in making the stop did not affect the stop's validity for purposes of the Fourth Amendment. *See United States v. Pereira-Munoz*, 59 F.3d 788, 790-91 (8th Cir. 1995) (rejecting defendant's challenge of vehicular stop for speeding as pretextual because defendant did not dispute that he was speeding and so long as the officer is doing nothing more than he is legally permitted and objectively authorized to do, his actual state of mind is irrelevant for purposes of determining the lawfulness of a stop); *United States v. Stapleton*, 10 F.3d 582, 583-84 (8th Cir. 1993) (holding that police officers had probable cause to stop defendant's automobile once they determined that it was exceeding the speed limit, regardless of whether an unverified anonymous tip that the vehicle was being used to transport crack cocaine was

sufficient, by itself, to establish probable cause and whether officers would ordinarily stop a car exceeding the speed limit by five to ten miles per hour). Because Sallis does not dispute that she was speeding, *Pereira-Munoz* and *Stapleton* establish that Officer Riegert's actual motivation for stopping Sallis's vehicle is not relevant.

"In this case the stop for the traffic violation is supported by the evidence, and, as such, there was probable cause to stop defendant's vehicle. Accordingly, the district court properly denied the motion to suppress."

**SEARCH AND SEIZURE:
Vehicle Stops; Length of Detention;
Dog Sniff**

Omar v. State, CACR06-1321, 9/12/07

Shahid Iman Omar appealed to the Arkansas Court of Appeals to challenge the trial court's denial of his motion to suppress the cocaine and packaging found in the rental car that he was driving on October 1, 2005.

First, he contends that a thirty seven-minute traffic stop, ending with a dog sniff, exceeded the scope and duration permitted by state and federal law, regardless of whether reasonable suspicion justified an investigation of something other than his traffic violation for speeding. Second, he contends that a drug dog's entry into the car through an open window "rendered any alert suspect to establish probable cause" and that the entry itself constituted a search without probable cause.

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

"As part of a valid traffic stop, a police officer may detain the motorist while the officer completes routine tasks related to the traffic violation, such as making computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing of a citation or warning. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). The officer may ask routine questions such as the party's destination, the purpose of the trip, and whether the officer may search the vehicle; the officer then may act on whatever information is volunteered.

"Rule 3.1's alternative time period of 'such time as is reasonable under the circumstances' is not restricted to a specific number of minutes. *Yarbrough v. State*, *supra*. After the routine tasks are completed, continued detention of the driver can become unreasonable unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). Only what the officer knew at the time of the detention enters the analysis of whether the officer had reasonable suspicion to conduct investigative detention; after-acquired knowledge is irrelevant. *Laime*, *supra*.

"After the legitimate purpose for an initial traffic stop has ended, the officer may conduct a canine sniff of the motorist's vehicle if the officer possesses reasonable suspicion that a person is committing, has committed, or is about to commit a felony or a misdemeanor involving danger to persons or property. *Malone v. State*, 364 Ark. 256, 217 S.W.3d 810 (2005), citing Ark. R. Crim. P. 3.1. See also *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (stating that a seizure justified solely by an interest in issuing the driver a warning ticket can become unlawful if prolonged beyond the time reasonably required to complete that mission)."

The Thirty-Seven Minute Detention

"Omar contends that, regardless of whether reasonable suspicion justified an investigation of something other than the traffic violation, the thirty-seven-minute traffic stop exceeded the scope and duration permitted by state and federal law. This detention began at 6:52 p.m. when Officer Jason Aaron of the Arkansas State Police stopped Omar for speeding. It ended at 7:29 p.m. when Sgt. Kyle Drown walked his dog around the car, leading to the discovery of cocaine in a door panel.

"Omar challenges the trial court's findings that, within a few moments of the stop, Officer Aaron developed a reasonable suspicion that a felony was being committed; that the delay beyond fifteen minutes 'was caused by the only canine sniffing dog [being] miles away'; and that the delay was reasonable under the circumstances. He argues that no reasonable suspicion existed to justify the expanded investigation and the continued detention to conduct the canine sniff. Alternatively, he argues that, even if reasonable suspicion existed, the means by which the investigation was conducted were unreasonable in scope and duration.

"Officer Aaron testified that in 2005 he was assigned highway patrol duties in Crawford County, where he 'worked Interstate 40 and 540 for interstate transportation of drugs.' On the evening of October 1, 2005, he turned on his blue lights after clocking a Crown Victoria at seventy-nine miles an hour in a seventy-mile-an-hour zone on I-40 near Alma. A DVD recording of the stop was made.

"Officer Aaron approached the passenger side of the car when it pulled over, and he smelled a strong odor of air freshener coming from within the vehicle. He observed that Omar was the car's

sole occupant; there were fast-food wrappers scattered in the front passenger seat, a new cell phone on the center armrest, a small black bag in the left rear seat, and clothes hanging up in the car. Aaron told Omar that the car had been going seventy-nine and asked to see a driver's license, insurance, and registration.

"Omar's hands were trembling and fumbling through his paperwork. A rental contract showed that the car had been rented at 1:09 p.m. the previous day at Los Angeles International Airport and was to be turned in two days afterward at Baltimore, Maryland. Aaron asked Omar where he had been, and Omar answered that he had come from Los Angeles after flying there to attend a cousin's Saturday wedding. When Aaron pointed out that 'today is Saturday,' Omar said instead that the wedding was Friday, he flew out Friday for the evening wedding, and he rented the car for the return trip because his flight had been rough.

"After running driver's license and criminal checks, Aaron asked Omar if he had ever been arrested; Omar stated that a gun charge was the only thing he had. Five to ten minutes into the traffic stop, Aaron asked several times for permission to search the car and asked if Omar was transporting anything illegal. At 7:00 Omar refused permission to search. Aaron, telling Omar that a drug dog was being requested, telephoned the request to dispatch. At 7:04 Aaron informed Omar that a canine was in route. Aaron asked Omar the specifics about an arrest for murder, and Omar apparently responded that the murder conviction had been overturned. The criminal check had revealed previous charges of attempted murder, accessory to murder, armed robbery, and handgun violation. Aaron asked further questions about the wedding, but Omar was not

able to give specifics such as when or where it took place. He also said that it had been Friday morning and he had not attended the reception, then he said that he went to the first of the reception but left because of his hurry to get home, and he mentioned that he was a working man on a car lot who drove for a living. Aaron asked for the cousin's phone number to verify the truth about the wedding, but Omar was unable to recall the number and asked to get his phone out of the car. At 7:09 Aaron informed Omar that he was being issued a citation for speeding and would be free to go if the dog did not alert. They waited for the only canine available at the time. Around 7:15 Omar signed for the citation; the dog arrived about twenty-five minutes after Omar had been told that he would be free to go absent an alert.

"Aaron testified that, because of the conflicting information of criminal history, he believed that Omar was trying to deceive him. Aaron was becoming suspicious four minutes into the stop, as the stop went on his suspicions of criminal activity rose, and by 7:04 he had a belief of criminal activity, albeit unspecified. He referred in his testimony to Omar's continued nervousness and evasive answers, his itinerary of flying to Los Angeles (described by Aaron as 'a source city') and driving the rental car the long distance to Maryland, and Omar's changing stories about the wedding's day and time. Aaron said that Omar's renting a car did not make sense to him with the hurry to get home by Monday, the costs of car rental around \$400 and \$3-a-gallon gas, and a return by air being much cheaper and quicker. Another basis for Aaron's suspicion was the presence of the cell phone along with the air freshener: drug offenders had told him that new cell phones are given to individuals to help track cross country shipments of narcotics and weapons.

"Sergeant Kyle Drown was in Sebastian County at Fort Chaffee when he received Aaron's request for a canine, but his dog was at Drown's apartment in Van Buren. In order to speed things up, he had his wife bring the dog to the interstate site. The two cars arrived at the same time. Drown took the dog straight to Omar's car to begin the sniff, which quickly resulted in the discovery of the cocaine.

"The genesis for Rule 3.1 is the holding of *Terry v. Ohio*, 392 U.S. 1 (1968), that a police officer can detain a person without violating the Fourth Amendment if the officer has a reasonable suspicion that 'criminal activity may be afoot.' *Laine v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). In assessing whether a detention is too long in duration to be justified as an investigative stop, it is appropriate to examine whether police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. *U.S. v. Sharpe*, 470 U.S. 675, 686 (1985). The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it. Courts must 'consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.' *U.S. v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994) (quoting *Sharpe*, 470 U.S. at 685). 'When police need the assistance of a drug dog in roadside *Terry* stops, it will in general take time to obtain one; local government police forces and the state highway patrol cannot be expected to have drug dogs immediately available to all officers in the field at all times.'

"Here, our totality-of-the-circumstances review includes the following: (1) Omar's itinerary of flying to Los Angeles from Baltimore but

returning by rental car, despite his desire to hurry home; (2) his changing stories about the time and location of the wedding; (3) his admission to only one previous criminal charge, while the criminal check revealed three others; (4) the cell phone and air freshener in his rental car; (5) a small black bag but no wedding clothes visible on the back seat; and (6) his evasive answers and continued nervousness. We conclude from these factors that Officer Aaron had specific, particular, and articulable reasons to extend the detention beyond the initial traffic stop, giving him reasonable suspicion of criminal activity to detain Omar further for a canine sniff of the car.

“Aaron’s suspicions began in the first four minutes of stopping Omar, and they steadily grew. The officer acted diligently to verify his suspicions as quickly as possible. He radioed for the drug dog only about twelve minutes into the stop, but the only available dog was in Van Buren and his handler was at Fort Chaffee. The handler drove from Fort Chaffee and arranged for his wife to bring the dog to him on the interstate near Alma, where Aaron had stopped Omar and was awaiting their arrival. Under the facts of this case, the canine arrived without undue delay and the thirty-seven minute detention was not unreasonable. (*Cf. Bloomfield* finding that a one-hour period was not unreasonable to wait for a drug dog).”

Illegal Search

“As his second point on appeal, Omar contends that the drug dog’s entry into the car through an open window constituted an improper search without probable cause and was not an alert establishing probable cause to search.

“Drown said that Rudy was an aggressive alert dog, which shows an alert by scratching and

biting. Drown also testified that, upon reaching the passenger window, ‘the canine did a head turn, which is an alert, that he’s alerting to the odor of narcotics being present in the vehicle. At that point, he did, what I call, an abnormal response.’ He said that Rudy’s head turn at the door is called an alert, or a change in behavior; that jumping through the window was an abnormal response; but that Rudy was not trained to avoid jumping into a vehicle and was trying to go to the source of the odor. Drown had no doubt that Rudy alerted. Drown searched the inside of the vehicle and he observed tool marks on screw heads of the back passenger door. He pulled the door panel off and observed two wrapped bundles, which were the subject of Omar’s motion to suppress.

“A dog’s ‘instinctive’ entry into a car does not constitute police misconduct requiring suppression of the evidence. *U.S. v. Stone*, 866 F.2d 359 (10th Cir. 1989). In the absence of evidence that police asked a defendant to open the hatchback to enable the dog to jump in and of the handler’s encouraging the dog to jump in, the dog’s instinctive actions did not violate the Fourth Amendment on the dog’s first entry into the car. *U.S. v. McKoy*, No. 06-032, slip op. at 1 (D.D.C. Apr. 19, 2007) (citing *Stone*). We reject Omar’s argument that the drug dog’s entry into the car through an open window constituted an improper search without probable cause and was not an alert establishing probable cause to search. The circuit court’s finding that Rudy was an aggressive alert dog and that the jump through the window was ‘probably the strongest alert’ the court had ever seen was well-supported by the canine handler’s testimony. There was no clear error in the trial court’s finding. Omar’s conviction is affirmed.”

SEARCH AND SEIZURE:
**Vehicle Stops; Reasonable Suspicion;
Continued Detention**

Lieblong v. State, CACR06-1463, 10/3/07,
[Unpublished]

Corporal Dale Donovan of the State Police stopped Robert Lieblong for speeding on Interstate 30 in Little Rock. Lieblong was driving a rented Pontiac Bonneville. When Donovan approached the car, Lieblong appeared nervous. Donovan performed a background check, which revealed that Lieblong had a criminal history involving drugs. Donovan gave Lieblong a warning for speeding and told him that by “giving him a break, it would help him to understand he needs to straighten things up in his life...following what he’s supposed to do as far as the law is concerned.” Donovan testified that Lieblong responded by saying that “he had a lot of problems, and he was still trying to straighten things out...” Donovan perceived that Lieblong became more nervous at this point. Donovan asked for permission to search the car and if Lieblong had any drugs or weapons in the car. Lieblong said that he had no drugs or weapons, but responded ambiguously to the search request, saying that he was on his way to his parents’ house and was running late.

Donovan then asked Lieblong to step out of the car and asked again for permission to search it. Lieblong got out of the car as requested but would not consent to the search. Donovan then gave Lieblong an option: he could wait twenty or thirty minutes for a K-9 unit to arrive and do a dog-sniff, or he could allow Donovan to search the car, which would take only five minutes. Lieblong consented and let Donovan search the car. Donovan found 75.9 grams of meth.

The Arkansas Court of Appeals found as follows:

“The holdings in *Sims* and *Lilley* control this case. Unless Corporal Donovan had a reasonable, articulable suspicion that Lieblong was involved in criminal activity, then his continued detention of Lieblong after he issued the warning violated the Fourth Amendment. *Laiame v. State*, 347 Ark. 142, 155–56, 60 S.W.3d 464, 473–74 (2001).

“In *Sims*, for example, an officer wrote Sims a ticket for having a defective brake light, at which point the purpose of the traffic stop was completed. 356 Ark. at 510, 157 S.W.3d at 532. Although *Sims* continued to appear nervous, was sweating, had prior drug arrests, and made a ‘strange’ statement about having just come from Wal-Mart, the officer had no objective basis for a reasonable suspicion that Sims was involved in criminal activity. Our supreme court therefore suppressed the fruits of the officer’s post-ticket search. 356 Ark. at 514–16, 157 S.W.3d at 535–36. In *Lilley*, the officer likewise did not have reasonable suspicion to detain Lilley after the purpose of the traffic stop ended even though Lilley appeared nervous, the rental car he was driving smelled like air freshener, it was rented in another person’s name, and it was a one-way rental. Again, the court rejected the officer’s search. 362 Ark. at 445–46, 208 S.W.3d at 792.

“At trial, Corporal Donovan acknowledged that the purpose of the traffic stop was completed when he gave Lieblong the warning. At that point, Lieblong was free to go. But Donovan testified that he never told Lieblong that he could leave if he wanted to do so. The State argues that Donovan had reasonable suspicion to detain Lieblong after the traffic stop because

Lieblong was nervous, had a criminal history involving drugs, and made a suspicious statement that he was still trying to straighten his life out. The Arkansas Court of Appeals disagreed.

“Lieblong’s nervousness cannot create a reasonable suspicion of criminal activity. *Sims*, 356 Ark. at 514–15, 157 S.W.3d at 535. Likewise, his prior drug arrests cannot create reasonable suspicion. 356 Ark. at 510, 514–16, 157 S.W.3d at 532, 535–36. Lieblong’s statement—that he was trying to straighten his life out—was ambiguous and ‘could have been merely a nervous attempt at conversation.’ Our precedents are clear, moreover, that all of these circumstances combined do not create adequate grounds for reasonable suspicion. *Lilley*, 362 Ark. at 445–46, 208 S.W.3d at 792; *Sims*, 356 Ark. at 514–15, 157 S.W.3d at 535–36.

“We recognize that Corporal Donovan may have relied ‘on his experience to make inferences and deductions that might well elude an untrained person.’ *Dominguez v. State*, 290 Ark. 428, 439, 720 S.W.2d 703, 708 (1986), quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981). But the officer’s perceptions must still be supported by objective facts. *Dominguez*, 290 Ark. at 439, 720 S.W.2d 708–09. Though the combination of factors may have, as Corporal Donovan said, ‘[thrown] up a red flag’ for him, the objective facts did not support that perception. We hold that the officer did not have a reasonable, articulable suspicion to detain Lieblong after issuing the warning. Therefore, the evidence that Corporal Donovan found during his post-warning search should have been suppressed.”

SUBSTANTIVE LAW:

Battery; Doctrine of Transferred Intent

Johnson v. State, CACR06-1489, 10/3/07

On December 4, 2005, Barry Johnson got into a “tussle” with Marcus Mayweather at Club 25 in Little Rock. Johnson brandished a firearm and fired approximately five shots. Mayweather sustained gun-shot wounds to his elbow and neck. During the gunfight, a stray bullet hit one of the club’s patrons, Britney Tatum, in the leg.

As a result, Johnson was convicted of two counts of first-degree battery. Johnson was charged with first-degree battery pursuant to Arkansas Code Annotated section 5-13-201(a)(8) (Repl. 2006), which required proof that he had the purpose to cause physical injury to another and caused physical injury by means of a firearm. On appeal, he argues that the evidence supporting one of these battery convictions was insufficient because the State failed to prove that it was his “conscious object” to harm Tatum.

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

“The facts demonstrate that Johnson’s malicious purpose was not directed at Tatum. Her injury was collateral to the harm he intended (and successfully) inflicted on Mayweather. But, the fact remains that Johnson did have the ‘conscious object’ to cause harm and did so when he discharged a weapon in a crowded bar. It is immaterial, based on the doctrine of transferred intent, that Tatum was not Johnson’s intended victim. Once the transferred-intent doctrine is applied to the facts of the case, Johnson’s appeal is easily resolved. He meant to cause harm; he did cause harm. As such, his conviction for the first degree battery is affirmed.”