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Edited by Don Kidd

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ARREST: Warrantless Entry of Garage to Arrest for DWI

Stutte v. State, CR-12-1027, 2014 Ark. App. 139, 2/26/14

On July 31, 2011, Corporal Robert Hargus of the Fayetteville Police Department was working as a selective traffic enforcement unit in the Mount Comfort area. There had been some calls reporting loud parties in that area.

Around 1:30 a.m. Sunday morning, Hargus observed Charles Stutte's car exceeding the speed limit and failing to maintain its lane. He saw the car move side to side, crossing onto the broken white line separating the lanes. Hargus then activated his recording device and followed the car. He saw the car twice move left over the double yellow line and subsequently move over the solid white fog line. Hargus testified that there was moderate traffic in the area at the time. Hargus activated his patrol lights, but the car did not pull over and continued on at the same speed. Hargus felt that the car could have safely pulled over because there were large open parking areas in the immediate vicinity.

When the car did not respond to his blue lights, Hargus activated his siren. Again the car did not pull over and continued traveling at the same pace. In a final attempt to get the car stopped, Hargus shined his spot light into the rear view mirrors of the car. Still, it did not pull over. Eventually, the car turned left onto another street, turned into a driveway, and parked in a garage that had just been opened. Hargus had unsuccessfully attempted to stop the car for more than a minute.

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Hargus testified that Stutte got out of his car and began walking towards the rear of the car. Hargus asked him to stop and said that he needed to talk to him. Stutte replied "what," and Hargus repeated his request to come talk to him. Stutte then replied "why" and turned to walk toward the interior door to the house. Hargus said that he stepped inside the garage, grabbed Stutte's right arm, and told him to stop. Hargus said that he smelled a strong odor of intoxicants and observed that Stutte was sweating. Stutte tugged his right arm, used profanities, and tried to walk away. Hargus said at that point he told Stutte that he was under arrest for suspicion of drunk driving. Stutte struggled when Hargus attempted to handcuff him. Stutte was charged with DWI, resisting arrest, violation of the implied-consent law, and careless driving.

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

"A warrantless entry into a private home is presumptively unreasonable. *Norris v. State,* 338 Ark. 397, 993 S.W.2d 918 (1999). The burden is on the State to prove that the warrantless activity was reasonable. On appeal, this court will make an independent determination of the reasonableness of the warrantless arrest based on the totality of the circumstances.

"The United States Supreme Court held in *Payton v. New York*, 445 U.S. 573 (1980), that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. Exigent circumstances are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples include the risk of removal or destruction of evidence, danger to the lives of police officers or others, and the hot pursuit of a suspect. *Steinmetz v. State,* 366 Ark. 222, 225, 234 S.W.3d 302, 304 (2006).

"Stutte argues that Corporal Hargus entered his garage without probable cause or exigent circumstances in order to arrest him for a relatively minor offense. He argues that it was determined in *Norris* that DWI was a minor offense for Fourth Amendment purposes and that Hargus did not even have probable cause to arrest him for DWI prior to entering the garage. Stutte contends that two exigent circumstances alleged by the State below—the destruction of evidence and the danger of Stutte returning to his car—were rejected in *Norris.*

"In *Norris,* a citizen who observed the appellant driving erratically followed him home. The witness reported his observations to the police. Thereafter, the police went to the residence, gained entry, and arrested the appellant for DWI after locating him in his bedroom. The Supreme Court held that the warrantless home arrest was unreasonable under these circumstances. The *Norris* court relied on *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

"In *Welsh*, a witness saw the appellant driving erratically and ultimately driving off the road. The witness observed the driver abandon the car and walk away. He reported the incident to the police, and the police located an address by checking the vehicle registration. The police went to the address, entered the home, found the appellant in his bed, and arrested him for DWI. Thus, the

facts of the *Norris* and *Welsh* cases are clearly and strikingly distinguishable from the case at bar.

"Probable cause to arrest is defined as 'a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that a crime has been committed by the person suspected.' *Hilton v. State*, 80 Ark. App. 401, 405, 96 S.W.3d 757, 760 (2003). Probable cause to arrest does not require the quantum of proof necessary to support a conviction, and in assessing the existence of probable cause, the appellate court's review is liberal rather than strict. We look to the facts within the arresting officer's knowledge—not his stated reasoning—to determine whether those facts are sufficient to permit a person of reasonable caution to believe an offense has been committed. *Banks v. State*, 2010 Ark. App. 383.

"If a person knows that his immediate detention is being attempted by an authorized law enforcement officer, it is the lawful duty of the person to refrain from fleeing, either on foot or means of any vehicle or conveyance. Ark. Code Ann. § 5-54-125(a) (Supp. 2011). Although Stutte was not charged with fleeing, Corporal Hargus's testimony that Stutte ignored his blue lights, siren, and spot light provides probable cause that Stutte committed the offense of fleeing. Fleeing by means of any vehicle is considered a Class A misdemeanor, for which the sentence shall not exceed one year. Ark. Code Ann. § 5-54-125(d)(1)(A); Ark. Code Ann. § 5-4-401(b)(1) (Repl. 2013). However, the fleeing statute provides that a person convicted of fleeing in a vehicle shall serve a minimum time in jail. Ark. Code Ann. § 5-54- 125(d)(1)(B).

"*Welsh* involved first-offense DWI, which in Wisconsin was a noncriminal violation for which no imprisonment was possible. The *Norris* court held that the penalties imposed for first offense DWI in Arkansas were sufficiently similar to those penalties in *Welsh* to conclude that the offense was a relatively minor offense in Fourth Amendment analysis. The *Norris* court noted that while first-offense DWI carries a penalty of imprisonment from one day to one year, the court may order public service in lieu of jail. Ark. Code Ann. § 5-65-111(a)(1)(B).

"Fleeing, on the contrary, requires that the offender serve time in jail. The facts of this case are further distinguishable from *Norris* and *Welsh* because the police here were in hot pursuit of a suspect. Stutte relies on *Butler v. State,* 309 Ark. 211, 829 S.W.2d 412 (1992), in arguing that hot pursuit involving a minor offense does not constitute an exigent circumstance. The offense in *Butler*, however, was disorderly conduct, which our supreme court noted was a Class C misdemeanor. Butler summoned the police to his home and spoke with an officer on his porch before communication 'deteriorated.'

"Butler then re-entered his home and the officer followed, announcing that he was under arrest. Our supreme court held that, under these circumstances, there is no exigent circumstance that would allow the warrantless entry into the home for 'what is concededly, at most, a petty disturbance.' *Id.* at 217, 829 S.W.2d at 415. The circumstances and the offenses involved here clearly distinguish this case from *Butler*. In addition to the traffic offenses and fleeing that Hargus personally observed, he had a reasonable suspicion that Stutte was driving while

intoxicated, which justifies a stop under Rule 3.1 of the Arkansas Rules of Criminal Procedure. *Murrell v. State*, 2011 Ark. App. 311. Hargus testified that Stutte's driving, the time of day, the day of the week, and the previous complaints of parties in the general area formed his suspicion. Furthermore, Stutte had ignored Hargus's efforts to get him to stop. When considering the totality of the circumstances, the State had a strong interest in precipitating Stutte's arrest.

"In reviewing the trial court's denial of a motion to suppress evidence, we make an independent examination based upon the totality of the circumstances and reverse only if the decision is clearly against the preponderance of the evidence. *Hilton v. State*, 80 Ark. App. 401, 96 S.W.3d 757 (2003). We hold that, under the circumstances, the trial court's decision in concluding that the warrantless arrest was reasonable was not clearly against the preponderance of the evidence. We affirm the denial of Stutte's motion to dismiss.

CIVIL LIABILITY:

Entry of Residence Without a Warrant

Morris v. Bowers, CA11, No. 13-10434, 5/21/14

In the early morning of April 19, 2009, a 911 operator in Alabama received an emergency phone call from a highly intoxicated woman, who said that she had been "abandoned" and did not know where she was. She requested that someone be sent to pick her up.

Town of Lexington Police Officer Lee Bradford and Reserve Police Officers Matt Wigginton and Jan Montgomery and Town of Anderson Police Chief Mark Bowers responded to the 911 call and, on arriving at Morris's address, found the woman who made the 911 call standing outside his house. She claimed "vaguely and generally" that she was in danger and that someone had been beating Morris's horses.

The woman made no accusations against Morris.

After placing the woman in a chair on the porch in front of Morris's house, the officers knocked on the front door. Morris was in the house, asleep. His girlfriend woke him, and he went to the front door. While Morris stood inside the threshold, the officers asked him about the woman sitting in the chair. He said that he was unacquainted with her but knew her sister.

When the officers told Morris that the woman said his horses were being abused, he expressed concern and informed the officers that he would put on his boots and check on them. Bradford immediately informed him he was "not going anywhere."

When Morris stepped away toward the interior of the house, Bradford, Wigginton, and Bowers entered the house and followed him. Morris told them to leave—that if they wanted to search the house, they would have to obtain a warrant. Bowers and Wigginton left and stood on the front porch. Bradford stood in the front doorway, holding the door open.

At this point, Lauderdale County Deputy Sheriffs James Distefano and Patrick Davis arrived on the scene and were briefed on what had taken place—that Bradford,

Wigginton, and Bowers had entered Morris's house without a warrant, and that Wigginton and Bowers had stepped back outside when Morris told them to leave. Bradford had refused to leave; he remained in the doorway. When Morris tried to close the door, Bradford shoved him. Morris, retaliating, punched him. With that, Bradford, Bowers, Wigginton, Distefano, and Davis entered the house, brought Morris to the floor and subdued him. While Morris was on the floor, Bowers used a taser on him in "drive stun mode, leaving numerous burn marks on [his] back." Bowers used the taser after Morris was handcuffed and no longer resisting. With Morris in custody, Bowers, Bradford, Wigginton, and Montgomery searched his home and cars.

Morris filed suit under 42 U.S.C. 1983 claiming that police officers' conduct in entering his house without a warrant infringed his rights under Fourth Amendment. The court concluded that the district court properly denied the officers qualified immunity for entering Morris's residence without a warrant or anything remotely approaching reasonable suspicion.

CIVIL LIABILITY: Illegal Detention; Qualified Immunity

Huff v. Reichert, CA7, No. 13-1734, 3/10/14

After attending a Star Trek convention in St. Louis, Missouri, Terrance Huff and Jon Seaton were returning home to Hamilton, Ohio on Sunday, December 4, 2011. Huff was driving and Seaton was in the front passenger seat. The car had Ohio license plates. At 8:10 am, Officer Michael Reichert stopped them on Interstate 55-70 in Collinsville, Illinois. The entire traffic stop is captured on video on Reichert's dashboard camera. That video is in the record. Reichert first asked Huff for his driver's license, insurance, and registration. Huff provided all three documents.

When Reichert asked if the address on his license was current, Huff replied that it is actually his mother's address and then provided his current address in Hamilton, Ohio. Reichert said he was having trouble hearing Huff and asked Huff to exit his car and stand behind it while Seaton remained in the passenger seat. Reichert then asked Seaton about their travels. Next, Reichert explained to Huff why he had pulled him over, stating that Huff crossed halfway over the center line in front of a truck without using a turn signal and then moved back into his own lane. Huff replied that he had had problems with the lid on his drink. Reichert asked Huff about his criminal history, to which Huff replied that he had no outstanding warrants but had been arrested about twenty years earlier. Reichert then called police dispatch, which related that Huff had been arrested for battery with injury and for marijuana cultivation in 2001. Huff had no convictions, though. Seaton had no criminal history.

Reichert requested a backup officer, who later appeared on the scene. Reichert told Huff that he was letting him go with a warning. He gave Huff the warning and they shook hands. The encounter had lasted about sixteen minutes, at this point. Reichert then requested to speak to Seaton. He said Seaton seemed nervous and apprehensive. Reichert mentioned to Huff that the interstate highway had been used by motorists to carry drugs, guns, and large amounts of U.S. currency. He asked if Huff possessed any of those items

in his car, and Huff said no. Reichert then asked if Huff had any objection to Reichert's searching the vehicle; Huff replied that he would "just like to go on his way."

Reichert said that he was concerned about Seaton's demeanor and wanted to walk his drug-sniffing dog around the car. Huff responded "that's fine," but then said, "you pulled me over for swerving, and I know I did not swerve." He also said that he believed he was being "profiled" by Reichert. Huff then asked Reichert if he was free to go. Reichert responded, "not in the car." Reichert then asked Huff for consent to search the car, and Huff responded that he felt he had no choice but to consent. Reichert said he was merely going to have the dog sniff around the car to see if it would alert. Huff said that Reichert could use the dog but could not search the car. Next, Reichert conducted a pat-down search of Huff and Seaton.

Reichert then brought the dog out and circled the car with it. When Reichert and the dog got to the front of the car, Reichert repeatedly said, "show me where it's at! Find it!" The dog then barked. Reichert immediately replied, repeatedly, "that's a good boy!" Reichert admitted in his deposition that he was trained not to say these types of things to his dog during searches. Reichert told Huff that the dog alerted by scratching at the front of the vehicle and then barking.

Reichert then told Huff that he was going to search his car, and Huff responded, "do what you gotta do." Huff stated that, previously, a few individuals who smoke marijuana had ridden in his vehicle, but they had never smoked while in Huff's car. Reichert thoroughly searched the car. After the search, Reichert told Huff that there was marijuana "shake" in his car that needed to be vacuumed out. ("Shake" refers to the loose leaves, seeds, and stems at the bottom of a bag of marijuana.) However, Reichert did not document the presence of drugs in the car nor collect any physical evidence. About fifty minutes after the initial stop, and thirty-four minutes after giving Huff a warning ticket, Reichert told the plaintiffs that they were free to leave.

Plaintiffs filed this § 1983 suit against Reichert and the City of Collinsville, with claims based on the Fourth Amendment. Their federal claims against Reichert allege an unreasonable seizure, false arrest, unreasonable search of their persons, and unreasonable search of the car. Reichert filed a motion for summary judgment based on qualified immunity, which the district court denied. It reasoned that a "raft of disputed material facts exists," and when viewing these facts in the light most favorable to the plaintiffs, they had made out clearly established violations of their rights.

Upon appeal, the Seventh Circuit Court of Appeals affirmed the decision of the district court and ordered the suit to be set for trial.

CIVIL LIABILITY: Medical Malpractice; Deliberate Indifference

Rouster v. Saginaw City
CA6, No. 13-1673, 4/9/14

While being held in Saginaw County Jail on a misdemeanor charge relating to failure to pay court fines, Daniel Rouster succumbed to sepsis and died as a result of a perforated duodenal ulcer. Before

his death, he had complained of stomach pain, engaged in bizarre behaviors indicative of mental-health problems, and displayed signs of agitation.

His estate brought suit under 42 U.S.C. 1983 against the medical staff members who interacted with Rouster during the final 36 hours of his life, alleging that they were deliberately indifferent to his medical needs. Experts agreed that prompt medical attention could have saved his life and that Rouster received substandard care.

The district court entered summary judgment for the defendants. The Sixth Circuit affirmed, reasoning that it could not conclude that the medical staff became aware of Rouster's serious medical need and deliberately refused to provide appropriate care.

CIVIL LIABILITY:

Search of Law Enforcement Officers in Context of Possible Misconduct Allegations

Carter v. City of Milwaukee
CA7, No. 13-2187, 2/29/14

While police officers were executing a search warrant in a Milwaukee apartment, the apartment's resident accused the police of taking around $1750 of his cash. The commanding officer then ordered all officers to remain on the scene while they awaited further direction. This order did not come at a good time for Officer Montell Carter, who had taken a colon cleansing product outside the apartment and now needed to use the restroom, badly. Not wanting to use the apartment's bathroom, Carter told then-Lieutenant Keith Eccher he needed to leave to use the restroom. The lieutenant put his hand up and responded that he needed to search Carter first. The lieutenant then patted Carter down and searched his jacket, boots, and the items he was carrying. The dramatic ending to these events is, in fact, not dramatic at all. The lieutenant did not find the allegedly missing cash or any contraband on Carter, and Carter returned to the police station and used the restroom there.

Carter filed this lawsuit under 42 U.S.C. § 1983 maintaining he was the subject of an unconstitutional seizure and search. The district court rejected the suit by Carter under 42 U.S.C. 1983, alleging illegal search and seizure. The Seventh Circuit affirmed, finding "no reasonable officer in Carter's position would have feared arrest or detention if he did not comply with the search request." The Court of Appeals for the Seventh Circuit concluded that Carter was not seized. As a result, they affirmed the district court's grant of summary judgment in the defendant's favor.

CIVIL LIABILITY:

Seizure of Person; Knock and Talk

Carman v. Carroll, CA3, No. 13-2371, 5/15/14

In July 2009, Pennsylvania State Police Troopers Jeremy Carroll and Brian Roberts were dispatched to the Carmans' residence to search for a man named Michael Zita and a car bearing New Jersey license plates. The troopers were told that Zita had stolen the car, was armed with two loaded handguns, and might have fled to the Carmans' residence. Neither Roberts nor Carroll had been to the Carmans' property before, and neither knew what Zita looked

like. The troopers did not have a warrant to search the Carmans' property nor did they have a warrant to arrest Zita. The Carmans' house sits on a corner lot. The main street runs along the front of the house and a side street runs along the left of the house, as viewed from the front. A clearly marked path leads to the front door.

There is no other marked path to the Carmans' house. A stone parking area is located on the left side of the house, and a shed and carport, which the parties refer to as a "garage," are located in the Carmans' backyard. The Carmans also have a back deck that adjoins their kitchen area. Two sets of stairs lead up to the deck, and a sliding glass door by the deck leads to the kitchen. However, the Carmans testified that visitors use the front entrance when they come to visit.

When the troopers arrived at the Carmans' home, Andrew and Karen Carman were sitting in their kitchen with Karen Carman's sister; they were the only people present at the home. Because there was no parking in front of the Carmans' house, the troopers drove down the side street, passed numerous cars parked along the side of the Carmans' house, and parked their cars at the first available spot, at "the far rear of the property." The troopers then got out of their cars, entered the Carmans' backyard, and headed toward the garage. Carroll purportedly took this route because he saw a light on in the garage and thought someone might be there. He "poked [his] head in" the garage "and said, Pennsylvania State Police," but "there was nobody in there."

Carroll thought the sliding door attached to the back deck of the house "looked like a customary entryway." Thus, after searching the garage and finding no one there, he and Roberts continued walking through the backyard and proceeded to the back deck. As the troopers stepped onto the deck, Andrew Carman came out of the house. Carman was belligerent and aggressively approached the troopers, asking, "Who the f*&@ are you?" Given Carman's behavior, Carroll thought the man he was speaking with might be Zita. Carroll informed him that they were looking for Zita and asked Carman to identify himself. Carman refused to divulge his identity, made a quick turn away from the troopers, and appeared to reach for his waist, bringing his hands outside the troopers' view. Still unsure of Carman's identity, Carroll feared that Carman might be reaching for a weapon. He, therefore, momentarily grabbed Carman's right arm. Upon seeing that Carman was unarmed, he let go. Carman twisted and fell off the deck.

Karen Carman subsequently exited her house and came onto the deck with her sister. The two women were screaming when they approached Roberts. Consequently, Roberts ordered them to stand back and drew his Taser. Karen Carman asked the troopers what was going on, and Carroll explained that they were looking for Zita and asked her if they could search the house for him. She gave her consent and everyone went into the house. The troopers searched the Carmans' house and did not find Zita. The stolen vehicle was not at the Carmans' residence, and the Carmans were not charged with any crimes.

In a suit under 42 U.S.C.1983, the Carmans challenged Carroll's warrantless entry onto

their' property. Carroll argued that he did not violate the Carmans' Fourth Amendment rights because he entered into their curtilage, the area immediately surrounding their home, while executing a legitimate "knock and talk" encounter. The district court denied the Carmans' judgment as a matter of law on their unlawful entry claims; a jury found that Carroll acted reasonably.

The Third Circuit reversed in part. Because Carroll proceeded directly through the back of the property and did not begin his visit at the front door, the "knock and talk" exception to the warrant requirement did not apply. The court affirmed the jury verdict regarding the unlawful seizure claim; there was sufficient support for the jury's finding that Carroll acted reasonably.

CIVIL LIABILITY: Summary Judgment; Contradicted Factual Conclusions

Tolen v. Cotton, No. 13-551, 5/5/14

At 2:00 a.m. on December 31, 2008, Officer John Edwards was patrolling Bellaire, Texas. He saw a black Nissan SUV park in front of a house; Tolan and Cooper emerged. Edwards attempted to enter the license plate number into his squad car computer, but entered an incorrect character that matched a stolen vehicle of the same color and make, which triggered an automatic alert to other police units. Edwards exited his cruiser, drew his gun and ordered the men to the ground.

Accused of having stolen the car, Cooper responded, "That's not true" and Tolan stated, "That's my car." Tolan laid down on the porch of the home where he lived with his parents, who came outside. Tolan's father told Cooper to lie down, then identified Tolan and Cooper (his nephew). Tolan's mother stated that the vehicle belonged to the family. Sergeant Jeffrey Wayne Cotton arrived and drew his pistol. Tolan's mother reiterated that they owned the car. Cotton ordered her to stand against the garage. She responded, "Are you kidding me? We've lived here 15 years."

Tolan, his mother, and Cooper later testified that Cotton grabbed her arm and slammed her against the garage with such force that she fell to the ground. There was photographic evidence of bruises on her arms and back. Cotton testified that he was escorting her to the garage, when she flipped her arm up and told him to get his hands off her. Tolan testified that, seeing his mother being pushed, he rose to his knees. Edwards and Cotton testified that Tolan rose to his feet. All agree that Tolan exclaimed, "Get your f*@^g hands off my mom." Cotton drew his pistol and fired at Tolan, hitting Tolan's chest, collapsing his right lung and piercing his liver. He survived, but suffered an injury that disrupted his budding baseball career and causes him pain on a daily basis. Dismissing a suit under 42 U.S.C. 1983, the district court found that Cotton's use of force was not unreasonable. The Fifth Circuit affirmed.

The Supreme Court vacated, finding in part as follows:

"In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual

conclusions, the court improperly weighed the evidence and resolved disputed issues in favor of the moving party.

"The Court noted factual differences between testimony on behalf of the parties. First, there were differences between Cotton stating the area was dark while testimony indicated that there was a porch light and two flood lights illuminating the area. There was testimony indicating that Tolan's mother was not aggravated and agitated. The Court questioned whether or not Tolan's word were a threat but a plea not to continue an assault on his mother and differing testimony on whether or not Tolan was on his knees at the time of the shooting.

"The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

"Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law."

CIVIL RIGHTS: Warrantless Arrest Based on Incorrect Information

Bechman v. Magil, CA8, No. 13-1142, 3/11/14

Chelsa Bechman filed suit against police officers under 42 U.S.C. 1983 for violating her constitutional rights. The district court denied the officers qualified immunity and the officers filed an interlocutory appeal. The court concluded that the district court correctly determined that no reasonable police officer could actually believe that Bechman's warrantless arrest was lawful, given the information supplied to the officers and the circumstances surrounding the arrest (an outstanding traffic warrant that Bechman had resolved).

The officers arrived at Bechman's door when she was nursing her infant and led her out of her home in handcuffs based on an invalid, recalled arrest warrant for failure to appear to contest a simple traffic violation. After she was given a strip search and body cavity search, Bechman was detained in jail overnight, the first time she had been separated from her infant.

Because the court affirmed the district court's denial of qualified immunity on the grounds of the warrantless arrest, the Court of Appeals for the Eighth Circuit did not address whether the humiliating indignities suffered

by plaintiff as a result of the officers' conduct constituted an independent rationale for a section 1983 claim on unreasonable seizure. Accordingly, the court affirmed the judgment of the district court.

EVIDENCE:
Testimony Regarding Drug Code Words

United States v. Akins
CA5, No. 40515, 3/25/14

In 2008, the Drug Enforcement Agency (DEA) began investigating a drug conspiracy involving the movement and sale of drugs, primarily powder and crack cocaine, from Mexico to Dallas, Texas, and then to Paris, Texas, and Hugo, Oklahoma. The investigation relied heavily on approximately 10,000 wiretapped telephone calls, and recordings of many of these calls provided much of the evidence at trial. Agents initially focused on Stacey Williams, suspected to be a large supplier of cocaine in the Dallas area. Williams introduced his Mexico-based supplier Francisco Trujillo to Rafael "Fel" Carrae Edwards, describing Edwards as his cousin from Paris who bought large quantities of powder cocaine. Edwards was arrested on June 16, 2009, at an apartment in Dallas that Edwards shared with his girlfriend. Agents found crack cocaine in the bedroom where Edwards was sleeping, along with a semi-automatic pistol stuffed under the mattress on Edwards' side of the bed. That same day, law enforcement executed another search warrant at Edwards' residence in Desoto, Texas. Officers found ledgers that contained notations related to drug trafficking. The ledgers also contained multiple references to Tommy Deshone "Shawn" Perkins and his best friend Kendrick Tyshawn Akins. Shawn Perkins and co-defendants Marco Perkins and Shantez Liggins are brothers. Their mother lived on Campbell Street in a house that served as a "home base" for the conspiracy in Paris, Texas. Shawn Perkins would take cocaine purchased from Edwards in Dallas, convert it to crack cocaine, and resell it in Paris with Marco Perkins, Donnell "Scooter" Leshone Walters, and other members of the conspiracy. Wire intercepts between Edwards and Shawn Perkins recorded the two discussing money and cocaine sales, including one call in which Perkins describes the quality of crack cocaine he received from Edwards. Agents also conducted two controlled buys from Shawn Perkins: one involving 14.12 grams of powder cocaine, and another involving 9.8 grams of crack cocaine. Wiretapped calls also suggested that Marco Perkins worked to distribute drugs largely at the direction of his brother Shawn Perkins. The other brother, Liggins, provided crack cocaine to Stacy Lynn Gage, a Hugo, Oklahoma, based distributor who regularly bought cocaine for redistribution from the Paris-based conspiracy.

Stacy Bellamy, a cooperating witness from Paris, Texas, who pleaded guilty to conspiracy to possess with the intent to distribute crack cocaine, testified that he had knowledge of the crack-distribution industry in his hometown. Bellamy testified that Edwards delivered four kilograms of powder cocaine to Shawn Perkins at Perkins' mother's house in Paris and that this happened "two or three times." Bellamy also testified that he knew Shawn Perkins and Akins to be "best friends" and that Akins helped Shawn Perkins in the crack cocaine business. Bellamy claimed to have bought crack cocaine from Shawn Perkins

before starting to buy it from Akins, and that he regularly bought nine ounces of crack from Akins on credit. Another cooperating witness who pleaded guilty to conspiring to sell crack cocaine, Trentargus Holt, claimed that at first he bought powder cocaine from Shawn Perkins and Akins before buying and reselling crack from them.

Hundreds of recordings of wiretapped phone calls between the co-conspirators were introduced at trial to support the testimony of Bellamy, Holt, and others. Although in English, the calls made heavy use of code words and vernacular and were often difficult to parse. The Government called Secret Service Agent Darrell Lyons, one of the lead investigators of this drug distribution conspiracy, as a lay witness to testify about the investigation. In the multiple times he was recalled to the stand, Lyons testified repeatedly about his understanding of the meanings of various code words used in recorded wiretapped conversations. He testified that the meanings he ascribed to those words, generally an amount or type of drug, were based on the knowledge he gained in the course of the investigation as well as his career experience. The Government also called a DEA Group Supervisor, Mark Styron, as an expert witness at trial. In addition to testifying about the role that firearms play in drug distribution organizations, Styron explained his understanding of the meanings of various code words that he claimed were commonly used in the drug distribution business.

The Court of Appeals for the Fifth Circuit concluded that the Federal District Court for the Eastern District of Texas did not abuse its discretion in admitting this testimony.

FORFEITURE: Personal Jurisdiction; Injury; Minimum Contacts

Walden v. Fiore, No. 12-574, 2/25/14

In this case, the United States Supreme Court dealt with a situation where Walden, a Georgia police officer working as a DEA agent at a Georgia airport, searched plaintiffs and seized a large amount of cash. Plaintiffs claim that after they returned to their Nevada residence, Walden helped draft a false probable cause affidavit in support of forfeiture and forwarded it to a Georgia office of the U.S. Attorney. No forfeiture complaint was filed and the funds were returned.

Plaintiffs filed a tort suit in a Nevada District Court. The district court dismissed, finding that the Georgia search and seizure did not establish a basis for personal jurisdiction in Nevada. The Ninth Circuit reversed, reasoning that Walden submitted the affidavit with the knowledge that it would affect persons with significant Nevada connections. The Supreme Court reversed, holding that the district court lacked personal jurisdiction over Walden, stating in part as follows:

"The Due Process Clause limits state authority to bind a nonresident defendant to a judgment of its courts, requiring that the nonresident have 'certain minimum contacts' with the forum state. For a state to exercise jurisdiction consistent with due process, a relationship must arise out of contacts that the defendant himself created with the forum itself, not with persons residing there. The plaintiff cannot be the only link between the defendant and the forum. Walden lacks those 'minimal contacts' with Nevada. None of his conduct occurred in Nevada, and he formed

no jurisdictionally relevant contacts with that forum. Mere injury to a forum resident is not a sufficient connection to the forum. The injury occurred in Nevada simply because that is where plaintiffs chose to be when they desired to use the seized funds."

INTERNET STALKING: Arkansas Statute §5-27-306(a)(2) (Supp. 2009)

Holcomb v. Arkansas

No. CR-13-690, 2014 Ark. 141

Between October 23, 2009, and June 10, 2010, Derek Coy Holcomb engaged in online chats with a person identified on Yahoo internet service as "Amanda," who used the screen name "pageant_gurl43." "Amanda" or "pageant_gurl43" was actually Detective Donald Eversole with the Van Buren Police Department; Detective Eversole set up a profile for a fictional fifteen-year-old girl on an internet-romance chat room. Holcomb and Eversole exchanged 846 instant messages through the chat room. The two exchanged messages about age, sexual experience, residence, and photos of each other, as well as sexually explicit exchanges. After these exchanges, on June 28, 2010, Holcomb was arrested for internet stalking of a child in violation of Ark. Code Ann. § 5-27-306. Holcomb's first trial ended in a hung jury; he was re-tried on March 11, 2013, and the jury found him guilty.

Upon appeal, the Arkansas Supreme Court found, in part, as follows:

> *"The relevant statute, Ark. Code Ann. § 5-27-306(a)(2), provides:*
> *(a) A person commits the offense of internet stalking of a child if the person being twenty-one (21) years of age or older knowingly uses a computer online service, internet service, or local internet bulletin board service to:*
> *(2) Seduce, solicit, lure, or entice an individual that the person believes to be fifteen (15) years of age or younger in an effort to arrange a meeting with the individual for the purpose of engaging in:*
> *(A) Sexual intercourse;*
> *(B) Sexually explicit conduct; or*
> *(C) Deviate sexual activity…*
> *A violation of this subsection is a Class B felony if the person 'attempts to arrange a meeting with a child fifteen (15) years of age or younger,' even if a meeting never takes place,*
> *and it is a Class A felony if an actual meeting with the child does takes place. Ark. Code Ann.§ 5-27-306(b).*

"Holcomb contends that the circuit court erred in denying his motion for directed verdict because the State failed to put forth sufficient evidence that he had seduced, solicited, lured, or enticed Eversole in an 'effort to arrange a meeting' with a person he believed to be fifteen years old. Further, citing to multiple cases from our court of appeals, Holcomb contends that our appellate courts have never upheld a conviction under this statute absent a defendant's specific arrangement to meet with the victim.

"The State responds that the statute does not require a specific arrangement to meet the victim and that the discussions between Holcomb and Eversole were sufficient to show an effort to arrange a meeting for the purpose of sexual activity.

"At issue is whether there is sufficient evidence to demonstrate that Holcomb acted in *an effort to arrange a meeting* with Eversole. In applying our rules of statutory interpretation, we must give the words their ordinary and usually accepted meaning. *Oxford American Dictionary* defines 'effort' as 'determined attempt.' 'Arrange' is defined as 'organize or make plans.' Meeting is defined as 'a coming together of two or more people.' *Oxford American Dictionary* 544, 87 (2001). Applying these ordinary definitions to the statutory language, Holcomb must have made a determined attempt to organize or plan a coming together with Eversole, who he believed was fifteen years old.

"Turning to the facts of Holcomb's case, we review the evidence in the light most favorable to the State. The record contains 846 messages that were exchanged between Eversole and Holcomb between October 23, 2009, and June 10, 2010. The State introduced the transcript of messages exchanged through Detective Eversole and the Arkansas Supreme Court case sets forth several of these lengthy messages in its decision.

"The State asserts that the discussions described in the internet exchanges serve as substantial evidence to support that Holcomb engaged 'in an effort to arrange a meeting' with Eversole and satisfies the statutory requirement of acting 'in an effort to arrange a meeting.' We disagree. These passages do not support that Holcomb made a determined attempt to arrange a meeting with Eversole. A review of the record demonstrates a lack of substantial evidence to support that Holcomb attempted to plan or arrange a meeting with Eversole. This court must strictly construe statutes in favor of the defendant, and the record is simply absent substantial evidence to support that Holcomb acted in an effort to arrange a meeting with a person he believed to be fifteen years old. Although Holcomb's messages pose hypotheticals, they do not demonstrate that he made a determined attempt to plan to meet Eversole. In fact, the record demonstrates that Holcomb declined Eversole's request to meet several times. We hold, therefore, that there was not substantial evidence to find that Holcomb's conduct satisfied the statutory requirements. Thus, the circuit court erred in denying Holcomb's motion for a directed verdict."

SEARCH AND SEIZURE:

Affidavit for Search Warrant; Good Faith

United States v. Augustine

CA10, No. 12-3269, 2/19/14

The Salina/Saline County Drug Task Force in November 2011 began conducting an investigation into drug trafficking activity in Saline County, Kansas. The investigation identified an individual named Kevin Ashcraft as a distributor of methamphetamine in the county. A wiretap on Mr. Ashcraft's telephone allowed investigators to determine that another individual named Lisandro Clara-Fernandez was Mr. Ashcraft's supplier.

A "pen register/telephone ping order" was subsequently acquired for a telephone number being used by Mr. Clara-Fernandez. With this order, investigators began "pinging" Mr. Clara-Fernandez's telephone to track his geographical location. Through a combination of physical surveillance and telephone pinging, investigators established that, in addition to meeting with Mr. Ashcraft,

Mr. Clara-Fernandez had parked his car outside a residence at 904 North Tenth Street on two different occasions—once in front of the residence, and a second time behind the residence where investigators witnessed Mr. Clara-Fernandez conversing with an unidentified white male.

Eventually, investigators arranged for surveillance of a drug transaction between Mr. Ashcraft and Mr. Clara-Fernandez. Upon witnessing the transaction, law enforcement officials arrested Mr. Ashcraft and Mr. Clara-Fernandez. When asked during an interview subsequent to his arrest whether he knew of anyone else in Salina whom Mr. Clara-Fernandez would be supplying with drugs, Mr. Ashcraft replied, "Dennis Augustine on North Tenth Street." Mr. Ashcraft further stated he and Augustine had a mutual acquaintance who had introduced them to Mr. Clara-Fernandez. When asked if Mr. Clara-Fernandez had any reason to visit Augustine's residence, Mr. Ashcraft answered, "Just to drop off to him." A subsequent computer check for 904 North Tenth Street indicated Augustine had active water service at that address.

The affidavit also included information concerning Augustine's criminal history, particularly mentioning Augustine was previously convicted for a drug-related crime in the 1990s. Additionally, it included information regarding the training and experience in drug investigations of the affiant, who was a lieutenant in the Salina Police Department. Finally, the affidavit included statements regarding the affiant's knowledge of certain behaviors common among drug dealers, including their tendency to secrete contraband, proceeds of drug sales and records of their transactions within their residences, and their tendency to possess paraphernalia used in weighing and packaging controlled substances.

The United States District Court denied a motion to quash a warrant to search Augustine's residence and to suppress evidence found in that search that led directly to his arrest based on the good-faith doctrine.

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

"In reviewing the denial of a motion to suppress, this court views the evidence in the light most favorable to the government and upholds the district court's factual findings unless clearly erroneous. *United States v. Danhauer,* 229 F.3d 1002, 1005 (10th Cir. 2000). However, determinations relating to the sufficiency of a search warrant and the applicability of the good-faith exception are conclusions of law which this court reviews *de novo.* Because the district court did not make a decision regarding whether probable cause existed to search Augustine's residence, we begin, like the district court, with the question of the applicability of the good-faith exception to the exclusionary rule.

"Under the good-faith exception to the exclusionary rule, 'if a warrant is not supported by probable cause, the evidence seized pursuant to the warrant need not be suppressed if the executing officer acted with an objective good-faith belief that the warrant was properly issued by a neutral magistrate.' *United States v. Campbell,* 603 F.3d 1218, 1225 (10th Cir. 2010). An executing officer is generally presumed to be acting in good-faith reliance upon a warrant. However,

this presumption is not absolute. There are four situations in which the presumption of good faith and, consequently, the good-faith exception to the exclusionary rule do not apply: (1) when the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his 'reckless disregard of the truth'; (2) when the issuing magistrate wholly abandons the judicial role; (3) when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officer could not reasonably believe it was valid. *Danhauer,* 229 F.3d at 1007 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)).

"Here, Augustine argues the good-faith exception to the exclusionary rule does not apply to the execution of the warrant to search Augustine's residence because 'the affidavit in support of the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'

"Good faith may exist when a minimal nexus between the place to be searched and the suspected criminal activity is established. *United States v.Gonzales*, 399 F.3d 1225, 1231 (10th Cir. 2005). An officer's reliance on a warrant is not reasonable when the underlying documents are 'devoid of factual support.' *Campbell,* 603 F.3d at 1230. However, the 'minimal nexus requirement does not require that hard evidence or personal knowledge of illegal activity link a Defendant's suspected unlawful activity to his home.' On the contrary, an affidavit establishes a sufficient nexus when it describes circumstances which would warrant a person of reasonable caution in the belief that the articles sought are at a particular place.

"In this case, we cannot agree with Augustine that the affidavit was so lacking in indicia of probable cause and so devoid of factual support as to prevent application of the good-faith exception to the exclusionary rule. Indeed, the affidavit readily satisfies the minimal nexus requirement. The information in the affidavit indicated Augustine was receiving drugs from Mr. Clara-Fernandez, whose asserted status as a drug supplier was corroborated by information in the affidavit. The information linking Augustine to Mr. Clara-Fernandez came from Mr. Ashcraft, a known informant, who could be held accountable if his allegations against Augustine proved to be untrue. *Florida v. J.L.,* 529 U.S. 266, 270 (2000) (stating that when the identities of informants are known, their 'reputations can be assessed and they can be held responsible if their allegations turn out to be fabricated'). Mr. Ashcraft made statements against his own penal interest by admitting to drug transactions beyond those of which law enforcement had knowledge, thereby further bolstering his credibility. See *United States v. Allen,* 297 F.3d 790, 794 (8th Cir. 2002) (indicating that an informant's credibility was enhanced because 'his statements were against penal interest').

"Furthermore, the affidavit showed that relevant details provided by Mr. Ashcraft were corroborated by the police. For instance, the affidavit demonstrated that police corroborated Mr. Ashcraft's claim that Augustine lived on North Tenth Street. The

affidavit also showed that police observed Mr. Clara-Fernandez at Augustine's residence on two separate occasions. These factors support the veracity of Mr. Ashcraft's information and thereby strengthen the basis for the affidavit's conclusions. In addition to Mr. Ashcraft's statements, the affidavit included the statement of a veteran law enforcement officer that persons involved in the drug trade often secrete contraband and evidence of drug transactions in their homes. See *United States v. Sanchez,* 555 F.3d 910, 914 (10th Cir. 2009) (stating 'it is merely common sense that a drug supplier will keep evidence of his crimes at his home').

"Taking this information from the affidavit into account, we hold that the affidavit described circumstances that would warrant a person of reasonable caution in the belief that drugs, drug records, or drug paraphernalia would be found in Augustine's residence and established a minimal nexus between Augustine's residence and the drug-related items being sought in the warrant. Since a minimal nexus existed, the good-faith exception to the exclusionary rule was properly applied by the district court."

SEARCH AND SEIZURE:

Affidavits; Informant Information

United States v. Reed

CA7, No. 12-3701, 3/10/14

In this case, a Milwaukee police officer submitted an affidavit and application for a warrant to search for heroin, guns, items affiliated with heroin or guns, and other evidence that could be used to demonstrate control over the premises. He averred that a reliable confidential informant had seen Reed armed and delivering heroin at the home within the prior 72 hours and that he believed the informant to be credible, based on previous dealings. The informant supplied a physical description of Reed and identified Reed through booking photographs. The officer corroborated the information by verifying that Reed had a prior felony conviction for possession with intent to deliver heroin and that Reed was currently on probation.

The district court rejected a challenge to the warrant. Reed was convicted of possession with intent to distribute heroin, possession of a firearm by a felon, and possession of a firearm in furtherance of a drug trafficking crime. The Seventh Circuit affirmed, rejecting arguments that there was no probable cause to issue the warrant.

SEARCH AND SEIZURE:

Affidavits; Staleness

United States v. Carroll

CA7, No. 13-2600, 4/29/14

A 13-year-old girl reported that she had been molested by James Carroll, her father's co-worker, when she was eight years old.

In his affidavit, Detective Spivey outlined his sixteen years of law enforcement experience, including the last seven during which he primarily conducted child pornography and child exploitation investigations. Detective Spivey indicated that through his training and experience he developed a working knowledge and understanding that collectors of child pornography go to great lengths to secure and maintain their

collections. According to Detective Spivey, child pornography collectors value and retain their collections because the images supply sexual gratification, are difficult to obtain, present a threat of prosecution, carry a highly negative stigma, and are used to trade for new images. Detective Spivey explained that it is common to find discarded or outdated computers stored in closets, basements, or attics for long periods of time and that even deleted images may be retrieved years later through a forensic process. In particular, Detective Spivey indicated that in the past he found digitally stored images that were being used for sexual gratification up to five years after the images were created. He also noted that with current technology, images may be copied with the touch of a button between memory sticks and other storage devices with great ease and speed allowing images to be placed on multiple devices within a house. These devices provide a highly mobile source of storage which can easily be removed from a computer or other device and hidden.

The judge found probable cause and issued the warrant. Analysis of Carroll's computer and other digital media found in his residence revealed numerous images of the victim in various states of undress engaged in sexually explicit conduct.

Carroll was ultimately charged with one count of possession of child pornography and six counts of sexual exploitation of the victim for the purpose of producing visual depictions of her. Thereafter, Carroll filed a motion to suppress in which he argued that the information in Detective Spivey's affidavit was stale because it was five years old.

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

"When a judge receives an application for a search warrant, the judge must make 'a practical, common-sense decision about whether the evidence in the record shows a fair probability that contraband or evidence of a crime will be found in a particular place.' *United States v. Miller*, 673 F.3d 688, 692 (7th Cir. 2012). Probable cause is a fluid concept that focuses on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Illinois v. Gates*, 462 U.S. 213, 231 (1983). Determining whether probable cause exists requires a common-sense analysis of the facts available to the judicial officer who issued the warrant. Recency of the information provided to the issuing judge is one factor bearing on the question of probable cause. *United States v. Pappas,* 592 F.3d 799, 803 (7th Cir. 2010). 'When a search is authorized by a warrant, deference is owed to the issuing judge's conclusion that there is probable cause.' *United States v. Sutton*, 742 F.3d 770, 773 (7th Cir. 2014). Courts should defer to the issuing judge's initial probable cause finding if there is substantial evidence in the record that supports his decision.

"In his affidavit, Detective Spivey stated that the victim revealed that, five years earlier, Carroll had molested her, showed her pictures on his digital camera of young children in partial states of undress, and photographed her bare genitals while she was ostensibly sleeping. The issue before this Court is whether this information was too stale to create a fair probability that evidence of child pornography or sexual exploitation of a child would be found on a computer or

other digital storage devices within Carroll's residence at the time the search warrant was issued. In evaluating this issue, we recognize that a staleness inquiry must be grounded in an understanding of both the behavior of child pornography collectors and of modern technology. See *Seiver*, 692 F.3d.

"In this case, the warrant affidavit adequately addressed these considerations by explaining why Carroll may have retained the images of the victim on his computer or other digital storage devices, and how these images, even if deleted, may still be recoverable because they were not yet overwritten. Detective Spivey's affidavit made clear that he had learned through training and experience that collectors of child pornography hoard their images for long periods of time because of the great personal value the images have for sexual gratification, the difficulty in obtaining the images as a result of their illegality, and their value to other collectors such that the images may be traded for new images. This 'hoarding' habit among collectors of child pornography is well established in this Court's precedent. See, e.g., *United States v. Watzman,* 486 F.3d 1004, 1008 (7th Cir. 2007) (endorsing the observation that child pornography is hoarded); *United States v. Hall*, 142 F.3d 988, 995 (7th Cir. 1998) (holding that child pornographers' tendency to maintain their collections for long periods of time was part of a showing demonstrating more than a fair probability that evidence of criminal activity would be discovered).

"The facts presented to the issuing judge demonstrate a likelihood of retention that was greater than could be expected in the normal child pornography case. Not only was Carroll the producer of the child pornography sought, but the images were of the bare genitals of the victim, whom he had personally molested. While pornographic images of anonymous children could be replaced with images of other anonymous children, Carroll's images of the eight-year-old victim were irreplaceable to him. Under these circumstances, it was fair for the issuing judge to infer that Carroll would highly value the images of the victim and retain them on some type of digital media for a very long time.

"In *Seiver,* this Court recognized that even after a computer file is deleted it remains in the computer until it is overwritten, which allows computer experts to routinely extract deleted files from hard drives. 692 F.3d at 776. This Court noted that staleness is highly relevant to the legality of a search for a perishable or consumable object, like cocaine, but rarely relevant when it is a computer file.

"The information before the issuing judge was that Carroll was a professional photographer in 2007 who utilized a digital camera. Thus, it was a fair inference that he used a computer in 2007 to augment and store the digital photographs that he took. In any event, the point in time that is relevant to the probable cause evaluation is when the warrant is issued. The warrant affidavit included information that Carroll was a professional photographer in 2012 and at that time carried his digital camera between his home and his office and used his camera in conjunction with a desktop computer at his office, as well as with thumb drives and memory sticks. It was therefore fair to infer that Carroll had a computer or other digital storage devices in his residence at the time the search warrant was issued in 2012. Moreover,

the memory sticks and thumb drives are a means of storing electronic images. They cannot display images without the use of other equipment. Therefore, it was also fair to infer that Carroll used these thumb drives and memory sticks to transfer images to another computer or digital storage device within his residence.

"We conclude that the information in Detective Spivey's affidavit was sufficient to establish a fair probability that the computer or other digital storage devices within Carroll's residence would contain evidence of child pornography or sexual exploitation of a child, despite the fact that the photographs were taken approximately five years earlier. Therefore, we hold that there is a substantial basis in the record to support the decision to issue the search warrant for Carroll's residence."

SEARCH AND SEIZURE: Consent

Fernandez v. California, No. 12-7822, 2/25/14

In this case, the United States Supreme Court again dealt with the issue of consent searches. After a bystander stated that Fernandez had committed a violent robbery minutes before police responded, the police saw Fernandez run into an apartment building. They heard screams coming from an apartment and knocked on the door, which was answered by Roxanne Rojas, who was battered and bleeding. When the officers asked her to step out of the apartment so that they could conduct a protective sweep, Fernandez came to the door and objected. Suspecting that he had assaulted Rojas, the officers removed him and placed him under arrest. He was then identified as the perpetrator in the earlier robbery and taken to the police station. An officer returned to the apartment and, after obtaining Rojas's oral and written consent, searched and found items linking Fernandez to the robbery.

The trial court denied a motion to suppress that evidence and he was convicted. The California Court of Appeal and the U.S. Supreme Court affirmed, finding in part as follows:

"Consent searches are permissible warrantless searches and are clearly reasonable when the consent comes from the sole occupant of the premises. When multiple occupants are involved, the rule extends to the search of the premises or effects of an absent, non-consenting occupant if 'the consent of one who possesses common authority over the premises or effects' is obtained. When a physically present inhabitant refuses to consent, that refusal is dispositive as to him, regardless of the consent of a fellow occupant. In this case, the police had reasonable grounds for removal of Fernandez, so he was in the same position as an occupant absent for any other reason. He had been absent for some time when Rojas consented to the search and the fact that he objected to the presence of the police when he first came to the door did not render the search unconstitutional.

"While consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search, we recognized a narrow exception to this rule in *Georgia v. Randolph*, 547 U.S 103 (2006). In that case, police officers responded to the Randolph's home after receiving a report of a domestic dispute. When the officers arrived, Janet Randolph informed the officers that her

estranged husband, Scott Randolph, was a cocaine user and that there were 'items of drug evidence' in the house. The officers first asked Scott for consent to search, but he 'unequivocally refused.' The officers then turned to Janet, and she consented to the search, which produced evidence that was later used to convict Scott for possession of cocaine.

"This Court held that Janet Randolph's consent was insufficient under the circumstances to justify the warrantless search. The Court reiterated the proposition that a person who shares a residence with others assumes the risk that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. But the Court held that 'a *physically present inhabitant's* express refusal of consent to a police search of his home is dispositive as to him, regardless of the consent of a fellow occupant.'

"The Court's opinion went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present. Again and again, the opinion of the Court stressed this controlling factor. See page 106 in *Randolph* ('present at the scene'); page 108 ('physically present'); page 109 ('a co-tenant who is present'); at 109 ('physically present'); page 114 ('a present and objecting co-tenant'); page 119 (a co-tenant 'standing at the door and expressly refusing consent'); page 120 ('a physically present resident'), page 121 ('a physically present fellow tenant objects'); ('A potential defendant with self-interest in objecting is at the door and objects'); page 122 ('A physically present inhabitant's express refusal of consent to a police search is dispositive as to him'). The Court's opinion could hardly have been clearer on this point, and the separate opinion filed by JUSTICE BREYER, whose vote was decisive, was equally unambiguous. See page 126 (concurring) ('The Court's opinion does not apply where the objector is not present and objecting.')

"Fernandez argues strenuously that his expansive interpretation of *Randolph* would not hamper law enforcement because in most cases where officers have probable cause to arrest a physically present objector they also have probable cause to search the premises that the objector does not want them to enter, but this argument misunderstands the constitutional status of consent searches. A warrantless consent search is reasonable and thus consistent with the Fourth Amendment irrespective of the availability of a warrant. Even with modern technological advances, the warrant procedure imposes burdens on the officers who wish to search, the magistrate who must review the warrant application, and the party willing to give consent. When a warrantless search is justified, requiring the police to obtain a warrant may unjustifiably interfere with legitimate law enforcement strategies. Such a requirement may also impose an unmerited burden on the person who consents to an immediate search, since the warrant application procedure entails delay. Putting the exception the Court adopted in *Randolph* to one side, the lawful occupant of a house or apartment should have the right to invite the police to enter the dwelling and conduct a search. Any other rule would trample on the rights of the occupant who is willing to consent. Such an occupant may want the police to search in order to dispel 'suspicion raised by sharing quarters with a criminal.' 547 U. S., at 116; see

also *Schneckloth*, 412 U. S., at 243 (evidence obtained pursuant to a consent search 'may insure that a wholly innocent person is not wrongly charged with a criminal offense'). And an occupant may want the police to conduct a thorough search so that any dangerous contraband can be found and removed. In this case, for example, the search resulted in the discovery and removal of a sawed-off shotgun to which Rojas' 4-year-old son had access.

"Denying someone in Rojas' position the right to allow the police to enter *her* home would also show disrespect for her independence. Having beaten Rojas, Fernandez would bar her from controlling access to her own home until such time as he chose to relent. The Fourth Amendment does not give him that power.

"The judgment of the California Court of Appeal is affirmed."

SEARCH AND SEIZURE:

Consent; Common Authority

United States v. Peyton

DCCA, No. 10-3099, 3/21/14

Davon Peyton and his 85-year-old great-great-grandmother, Martha Hicks, shared a small, one-bedroom apartment in Washington, D.C. Both were named as residents on the lease. Hicks used the bedroom, and Peyton kept his bed and belongings in the living room.

The police received a tip that Peyton was using the apartment to deal drugs. Four officers, including one who had participated in an earlier warrant search, returned to the apartment on July 14, this time without a warrant. The officers knew Peyton had recently been arrested yet again (the record is not clear why) and would not be there. They hoped that Hicks would consent to the search. When the police knocked on the door, Peyton's girlfriend, Tyra Harvey, answered. They asked to speak with Hicks, and Harvey told them that she was in the bedroom. While two officers waited just inside the entryway, two others entered the bedroom through its open door only a few steps away and found Hicks sitting on the bed.

The officers told Hicks that they believed there might be drugs in the apartment and wanted her permission to conduct a search. They presented Hicks with a consent form, which she signed, that stated she was freely agreeing to let the police search the entire apartment. The search began in the living room. According to one of the officers, as they came near Peyton's bed, Hicks told them that that part of the living room was "the area where Peyton keeps his personal property." One of the officers saw a closed shoebox next to Peyton's bed and picked it up. When he opened the shoebox, he smelled marijuana. Inside the shoebox, he found more than 25 grams of marijuana, 70 grams of crack cocaine, and $4000 in cash. The officers then searched the adjoining kitchen, where they discovered two plates and a razor blade covered with a white residue in the cabinets.

Peyton challenged this search on the ground that "Ms. Hicks, his great-great grandmother did not have common authority over the area to be searched." The Court of Appeals for D.C. agreed with Peyton that Hicks could not lawfully permit the police to search his closed shoebox, finding in part as follows:

"At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Silverman v.United States*, 365 U.S. 505, 511 (1961). A warrantless search is the quintessential intrusion and is presumptively unreasonable. The government can rebut that presumption by showing that the police, despite lacking a warrant, were permitted to undertake the search by someone with authority. See *Illinois v. Rodriguez,* 497 U.S. 177, 181 (1990). Such consent need not come from the target of the search. It may come from a third party who possesses common authority over the premises or effects sought to be inspected. *United States v. Matlock,* 415 U.S. 164, 171 (1974).

"'Common authority' does not refer to some kind of 'technical property interest.' *Georgia v. Randolph*, 547 U.S. 103, 110 (2006). It arises simply from mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. *Matlock,* 415 U.S. at 171 n.7. Even a person who does not *actually* use the property can authorize a search if it is reasonable for the police to believe she uses it. See *Rodriguez,* 497 U.S. at 186. Such apparent authority is sufficient to sustain a search because the Fourth Amendment requires only that officers' factual determinations in such situations always be reasonable, not that they always be correct.

"The fact that a person has common authority over a house, an apartment, or a particular room, does not mean that she can authorize a search of anything and everything within that area. As we held in *Donovan v. A.A. Beiro Construction Co.,* 'While authority to consent to search of a common area extends to most objects in plain view, it does not automatically extend to the interiors of every enclosed space within the area.' 746 F.2d 894, 901-02 (D.C. Cir. 1984); see also *United States v. Karo,* 468 U.S. 705, 725 (1984)) ('A homeowner's consent to a search of the home may not be effective consent to a search of a closed object inside the home.') This principle flows logically from the way people live in shared spaces. Two may agree to share a room, such that neither could object to the other allowing a third party to enter, but they often retain private interior spaces—a closet, a footlocker, a dresser drawer—that they do not let the other use and that they do not assume the other will allow a third party to inspect. See *United States v. Davis,* 332 F.3d 1163, 1169 n.4 (9th Cir. 2003) ('By staying in a shared house, one does not assume the risk that a housemate will snoop under one's bed, much less permit others to do so.')

"At first, this limitation on the scope of common authority might seem to put the police in a bind. Must an officer, having determined that a person has common authority over an apartment, separately confirm her authority over every closed container in the apartment before relying on her consent to conduct a search? No, for in many instances the person's common authority over the larger area (say, the living room) will make it reasonable for the police to believe that she shares use of its closed containers (say, the drawers of the television

stand). She will have apparent authority over those spaces. This is the same point we made in *Donovan,* where we explained how to identify the types of containers over which common authority appears to extend: 'The rule has to be one of reason that assesses the critical circumstances indicating the presence or absence of a discrete expectation of privacy with respect to the particular object: whether it is secured, whether it is commonly used for preserving privacy, etc.' 746 F.2d at 902 (quoting *United States v. Block*, 590 F.2d 535, 541 n.8 (4th Cir. 1978)); see also *United States v. Basinski,* 226 F.3d 829, 834-35 (7th Cir. 2000) (using similar factors in analyzing apparent authority over closed containers).

"Standing alone, these circumstances might suggest that the shoebox was not a private space and that it was reasonable for the police to believe that Hicks's authority over the living room also encompassed the shoebox. But these were *not* the only circumstances the police were aware of. They knew that Hicks and Peyton both lived in the small apartment, and they were thus on notice that some spaces in the apartment might be used exclusively by Peyton. Indeed, the officer who opened the shoebox had been inside the apartment during the earlier warrant search and knew that Peyton's bed was in the living room. But most critically, according to the sworn account of that very officer, Hicks told the police that Peyton kept his 'personal property' in the area around the bed, where the shoebox was found. In light of this clear statement that there was an area of the room that was not hers, it was not reasonable for the police to believe that Hicks shared use of the closed shoebox. Hicks lacked authority to consent to its search.

"There is nothing in the Supreme Court's recent decision in *Fernandez v. California*, 134 S. Ct. 1126 (2014), that is inconsistent with our ruling. That holding has no bearing on our case, which does not involve an objecting cotenant. Our case concerns the scope of a cotenant's common authority, an issue not addressed in *Fernandez* for a simple reason: Fernandez never disputed that Rojas had the necessary common authority."

SEARCH AND SEIZURE:
Containers in an Open Field
United States v. Douglas
CA8, No. 13-1231, 3/11/14

Mercedes Adams, a rural resident in the town of Aurora, Minnesota, called 911 to report hearing gunshots from a neighboring property. Minutes later, another caller reported hearing multiple gunshots. Two shots can be heard on the second call. Officers from three different law enforcement agencies responded: Deputy Kim Hanegmon of the St. Louis County Sheriff's Office, Officer Kevin Greene of the Hoyt Lakes Police Department, and Lieutenant Ty Techar of the Gilbert Police Department.

When Deputy Hanegmon arrived at Adams's address, Adams reported the shots sounded as though they were coming from a nearby property that had been vacant since the residence burned down several years before. Adams reported seeing two vehicles traveling together toward the property. While speaking with Adams, Deputy Hanegmon heard gunshots.

All three officers headed toward the property Adams identified. The officers later learned

the heavily treed property was owned by Douglas's aunt and uncle, who lived in North Carolina. As the officers neared the property, they observed a bonfire through the trees in a grassy clearing near where the house once stood. Remaining in their vehicles for safety, the officers drove down an overgrown grass driveway through the trees to where the fire was burning.

When they reached the bonfire, the officers found two vehicles roughly matching the description Adams had given. The officers also found a ten-year-old boy and three adult males, including Douglas, a thirty-three-year-old man Deputy Hanegmon knew from prior encounters. Douglas immediately asked the officers to leave, though he readily admitted he did not own the property. Douglas explained his aunt and uncle had given him permission to use the property and asked him to make sure the property was safe and posted with "No Trespassing" signs.

Advising Douglas of the report of gunshots, Deputy Hanegmon asked Douglas where the gun was. Douglas denied having a gun and again demanded that the officers leave because they did not have a search warrant. Douglas even called his aunt, who told Deputy Hanegmon "she wants me to tell you to leave." The other two adult men at the scene also denied the existence of a gun. The officers placed the men in separate patrol cars to secure the scene and ensure everyone's safety.

Officer Greene performed a protective sweep around the fire, noting beer cans, a bottle of vodka, an empty box of ammunition, and several recently fired shell casings. Officer Greene also found two teenage females hiding behind one of the vehicles. The young women acted scared and smelled of alcohol, despite being underage. Like the men, the women initially denied any knowledge of a gun. Deputy Hanegmon placed the women in her patrol car for safety. After additional questioning, the women admitted to Deputy Hanegmon that Douglas had been firing a shotgun just before the police arrived, but stated they did not know where the shotgun was.

While at the scene, the officers learned Douglas was on probation and that the terms of his probation prohibited him from possessing drugs, alcohol, firearms, and ammunition. When Douglas declined to take a breath test as required by the terms of his probation, the officers placed him under arrest for violating his probation.

After Douglas's arrest, Officer Greene continued to try to locate the shotgun the young women described. Deputy Hanegmon and Officer Greene testified they were concerned a shotgun in an open area presented a public-safety risk. The officers were also concerned there might be other people on the property hidden by the darkness with access to the shotgun.

As Officer Greene searched the thick brush at the edge of the woods, he saw a rusted-out refrigerator frame lying on the ground approximately twenty to twenty-five yards from the fire. Grass and weeds were growing through the refrigerator, which was lying on its back without any doors. As he approached the refrigerator, Officer Greene noticed a shiny black plastic bag with the corner sticking out of a compartment partially covered by a board. Officer Greene moved the

board two to five inches and touched the bag, feeling what he believed to be a gun stock. Officer Greene notified Deputy Hanegmon he thought he had found the missing gun.

Deputy Hanegmon contacted St. Louis County Investigator Mark Steel, who directed her to seize the object. After taking photographs, Deputy Hanegmon removed the plastic bag from the refrigerator and unwrapped it, revealing a "sawedoff" shotgun. None of the officers attempted to obtain a warrant during their investigation. At the suppression hearing, Deputy Hanegmon and Officer Greene stated the officers could have secured the scene and obtained a warrant, but did not.

Police later learned the registered owner of the shotgun was the stepfather of one of the other men at the scene. Douglas has consistently denied any ownership or possessory interest in the bag or the shotgun. Indeed, Douglas denied ever having fired or otherwise possessed the shotgun.

On February 10, 2012, a jury convicted Douglas of being a felon in possession of a firearm after hearing trial testimony from witnesses who saw Douglas fire the shotgun. The district court entered judgment and sentenced Douglas to 240 months imprisonment. Douglas timely appealed his conviction.

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

"In denying Douglas's motion to suppress, the district court determined the open-fields doctrine was relevant to determining whether Douglas had a reasonable expectation of privacy in a plastic bag that 'was visible to anyone standing near the refrigerator in the open field,' even if the doctrine in and of itself, did not authorize the warrantless search of the plastic bag. *United States v. Stallings*, 28 F.3d 58, 60 n.3 (8th Cir. 1994) (explaining the open-fields doctrine was 'not completely dispositive where the real question is not the officers' authority to be upon and search the field but instead their authority to search the zipped tote bag found in the field). Under the open-fields doctrine, 'an individual may not legitimately demand privacy for activities conducted out of doors in fields' because 'an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.' *Oliver*, 466 U.S. at 178, 181; accord *Hester v. United States*, 265 U.S. 57, 59 (1924) (The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields.)

"The district court aptly analogized Douglas's Fourth Amendment claim to *Stallings*, in which we determined a criminal defendant did not have a reasonable expectation of privacy in a closed tote bag left in a neighbor's open field. *Stallings*, 28 F.3d at 60-61. The tote bag bore no indicia of ownership, and the defendant took no steps to keep the bag private. Because the defendant 'put on no evidence of his possession or control of the bag, his historical use of the tote bag, or his ability or attempts to regulate access to it,' we decided the defendant 'failed to establish a subjective expectation of privacy.'

"With respect to objective reasonableness, we explained that even if we were to assume the defendant had a subjective expectation of privacy society would not be prepared

to accept that expectation as objectively reasonable. (quoting *California v. Greenwood*, 486 U.S. 35, 39-40 (1988) (holding that the defendants did not have an objectively reasonable expectation of privacy in trash placed at the curb in plastic garbage bags)). We reasoned any expectation of privacy the defendant had was not objectively reasonable because animals, children, scavengers, snoops, and other members of the public' had access to the tote bag.

"The district court conducted the same analysis and reached the same conclusions here: Douglas failed to demonstrate a subjective expectation of privacy, and even if he had, his expectation was not objectively reasonable. In rejecting Douglas's asserted privacy interest, the district court concluded the placement of the plastic bag in the refrigerator was of little moment given the condition and location of the refrigerator, which had no back or front and was rusted through.

"The district court found persuasive the reasoning from *United States v. Ramapuram*, 632 F.2d 1149, 1155 (4th Cir. 1980), in which the Fourth Circuit concluded a defendant had no reasonable expectation of privacy in the concealed interior of the unlocked trunk of a junker car left in an open field on his father's farm because whatever expectation of privacy attends a closed but unsecured effect generally is diminished where the effect itself is placed in an area totally without the protection of the Fourth Amendment such as in an open field.

"The district court emphasized the gun was placed in a plastic bag (as noted, the type of bag typically used to carry trash), and the plastic bag was placed in a rusted out, abandoned refrigerator, where the plastic bag was visible to anyone who approached the refrigerator in the open field, just like the tote bag hidden in the 'thick underbrush' in *Stallings*. Noting the plastic bag, like the bag in *Stallings*, did not bear any indication that it belonged to Douglas, the district court concluded Douglas failed to adduce any evidence that he owned, possessed, controlled, or used the bag or ever attempted to regulate access to it, beyond generically demanding that the officers leave Douglas's aunt and uncle's property.

"Douglas challenges the analogy to *Stallings*. Douglas maintains he had a reasonable expectation of privacy in the contents of the plastic bag hidden in the rusted-out refrigerator because Douglas was the authorized caretaker of his aunt and uncle's property and repeatedly asked the officers to stop searching for the shotgun and leave. In Douglas's view, his aunt and uncle's permission to use their property gave Douglas a legitimate expectation of privacy in all areas of the land, and items found therein, that were not open fields. In essence, Douglas asserts a blanket expectation of privacy in everything on his aunt and uncle's property—regardless of his actual interest in, or connection to, the places searched and the object seized.

"Douglas urges too broad a gauge for measurement of Fourth Amendment rights. *Rakas v. Illinois,* 439 U.S. 128, 142 (1978). That Douglas was legitimately on the premises' in the sense that he was ostensibly on his aunt and uncle's property with their permission, though relevant, is not determinative of whether he had a legitimate expectation of

privacy in the particular areas searched and the object seized. *Rakas,* 439 U.S. at 148. Even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect *to particular items* located on the premises. *Oliver,* 466 U.S. Cir. 2008) (deciding that a defendant had no legitimate expectation of privacy in a closed black bag and its contents left in the thick scrub brush outside the curtilage of the defendant's property). If a defendant fails to prove a sufficiently close connection to the relevant places or objects searched he has no standing to claim that they were searched or seized illegally. *United States v. Barragan,* 379 F.3d 524, 529-30 (8th Cir. 2004).

"Douglas failed to adduce any evidence establishing a close personal connection to the plastic bag, the shotgun, or even the refrigerator—such as it was. Douglas takes issue with the district court's determination that the rusted-out refrigerator was abandoned, but Douglas did not present any evidence about who owned, possessed, or used the refrigerator either as a working refrigerator or a make-shift storage space, much less that Douglas himself had ever done so. Douglas presumes his aunt and uncle owned the refrigerator and speculates they might put it to use at some point in the future. But that is pure conjecture. The refrigerator could have just as easily been unlawfully abandoned on the property by a stranger who did not want to pay to take it to the garbage dump.

"In any event, there is nothing in the record to establish Douglas had any connection at all to the refrigerator as it lay on his aunt and uncle's property. To the extent Douglas's aunt and uncle had an expectation of privacy in the discarded refrigerator on their land, see *United States v. Biondich,* 652 F.2d 743, 745 (8th Cir. 1981), Douglas cannot vicariously assert their rights.

"The same is true of Douglas's asserted expectation of privacy in the plastic bag and the shotgun itself—which firearm was registered to the stepfather of one of the other men at the scene. See, e.g., *United States v. Randolph*, 628 F.3d 1022, 1026 (8th Cir. 2011). Douglas did not adduce any evidence that he had any interest—ownership, possessory, or otherwise—in the plastic bag in which the shotgun was found. To the contrary, rather than present evidence to establish a personal connection to the areas searched and the item seized, Douglas consistently disavowed any ownership or possessory interest in the bag or the shotgun, even going so far as to deny any knowledge of them. Because Douglas has consistently disavowed any ownership interest in the bag containing the shotgun, he is precluded from claiming that the bag was searched and its contents seized in violation of his constitutional rights. *United States v. Washington,* 197 F.3d 1214, 1216 (8th Cir. 1999). The district court did not err in denying Douglas's motion to suppress."

SEARCH AND SEIZURE:

Law Enforcement as Community Caretaker

United States v. Harris

CA8, No. 12-3247, 4/4/14

Tyrone Harris conditionally pleaded guilty to being a felon in possession of a firearm. On appeal, he challenged the district court's denial of his motions to suppress. The government argued that the police had a reasonable suspicion that Harris

was violating several of Missouri's gun laws and contended that, in any event, the police acted reasonably under the community caretaker doctrine.

In this instance, officers responded to a call about a gun falling out of the pocket of a man sleeping outside of a bus station. Unlike most typical Fourth Amendment encounters, the governmental interest in vindicating the officers' actions here was not encompassed in the enforcement of criminal statutes but, instead, in the officers' obligation to help those in danger and to protect property.

Under the circumstances, the officers' decision to handcuff defendant until they could safely awaken him and obtain more information was reasonable. Finally, the scope and duration of the intrusion were also reasonable. Accordingly, the court affirmed the district court's denial of defendant's motion to suppress.

SEARCH AND SEIZURE:

Standing to Object to Search

United States v. Dutieville

CA3, No. 13-2266, 2/26/14

On June 8, 2012, United States Customs and Border Protection officers intercepted a UPS package containing heroin at John F. Kennedy International Airport. The mailing address handwritten on the package was Mrs. APARNA BEENA, NO. 18 Walnut St. Union Town PA 15401." The electronic manifest indicated that the address was "59 Millview Dr., Uniontown, PA 15401. When the handwritten address and the electronic address conflict, UPS delivers the package to the electronic address.

Law enforcement agents repackaged the heroin in a new box. The new box listed the Millview address instead of the Walnut address and contained a beeper that would indicate when the package was opened. On this information, the agents obtained an anticipatory search warrant for the Millview address, the residence of Portia Newell, the mother of Antoine Cortez-Dutrieville's child. The warrant extended to the contents of the package and a list of materials commonly associated with drug trafficking. The search warrant was to be executed once the package was accepted and taken inside the home.

On June 13, 2012, an undercover agent delivered the package to Dutrieville. Two minutes later the beeper activated. Agents approached the home, announced their presence, and, after receiving no response, entered the home. They took Dutrieville into custody and searched the home.

In the rear bedroom, agents found the heroin underneath a blanket. In the master bedroom, they found the empty package, the beeper, Dutrieville's cell phone, and Dutrieville's overnight bag, which contained personal items and 45 unused stamp bags (which are often used to package heroin). The agents also found digital scales and other drug paraphernalia in the living room.

Dutrieville eventually admitted that he had been staying at the home with Newell's consent for three days. The District Court found that Dutrieville brought his overnight bag with him at the inception of his stay. He also admitted that he was the subject of a Protection From Abuse Order (the "protection order"), which provided, among other things, that: (1) Dutrieville was not to contact Newell

except to make child custody arrangements; (2) Dutrieville was "completely evicted and excluded from" Newell's residence; (3) Dutrieville had "no right or privilege to enter or be present on the premises of [Newell]"; (4) the protection order would remain in effect until October 7, 2013; (5) Newell's consent could not override the express terms of the order; and (6) Dutrieville could be arrested without a warrant for violating the terms of the order.

Dutrieville appealed the denial of his motion to suppress evidence seized from the home of the mother of his child. The District Court denied the motion, holding that Dutrieville was prohibited from entering the home as a result of a protection order and thus lacked standing to challenge the search. The Court of Appeals for the Third Circuit affirmed, finding in part as follows:

"Though most overnight guests have an objectively reasonable expectation of privacy, Dutrieville was not like most overnight guests. The key distinction is that the protection order prohibited Dutrieville from entering the home and from having any contact with Newell. Pursuant to Pennsylvania law, Dutrieville's mere presence in the home violated the order and exposed him to criminal liability. See 23 Pa. Cons. Stat. § 6114(a). Importantly, Newell's consent could not override the terms of the protection order. Consequently, like a trespasser, a squatter, or any individual who 'occupies a piece of property unlawfully,' Dutrieville's presence in the home was 'wrongful,' and therefore any expectation of privacy he may have had was not one that society is prepared to recognize as reasonable. See *Rakas v. Illinois,* 439 U.S. 128, 143 n.12 (1978)."

SEARCH AND SEIZURE:
Stop and Frisk; 911 Call Regarding Individual Carrying a Firearm

United States v. Woods
CA8, No. 12-3924, 4/1/14

At approximately 8:30 p.m. on August 20, 2011, Officers Bailey, Jamieson and Dimartino responded to a report of a suspicious person armed with a gun at a bus stop near 12th Street and Grand Avenue in Kansas City, Missouri. An individual called 911 and relayed that he saw a man with a gun on his person while riding the bus. The caller described the individual as a black male wearing a black hat, tan pants and a white t-shirt. Officer Bailey arrived at the scene a few minutes before Officers Jamieson and Dimartino and observed a black man wearing a dark colored hat leaving the bus stop on foot. Upon arriving, Officers Jamieson and Dimartino noticed two individuals sitting at the end of the bus stop who also matched the description given. The individuals identified by Officers Jamieson and Dimartino watched the officers intently, but Officer Bailey radioed that he was approaching another man, so the two officers provided him back-up. Officer Bailey approached the man leaving the bus stop from behind and commanded him to turn around. When the man did not respond, Officer Bailey took the man to the ground and frisked him for weapons. Officers Bailey and Dimartino then recognized the man as an intoxicated homeless man, whom they had dealt with before. Based on their previous encounters, the officers did not believe him to be the individual with the gun, and abandoned that lead.

Officer Jamieson then contacted the 911 caller by phone for further information. The caller, who was still in the area watching the officers' actions, advised Officer Jamieson that the officers had stopped the wrong person. The caller insisted that the man he saw on the bus with a gun was one of the two men sitting at the end of the bus stop. The caller noted one of the men had a black hat and the other had a camouflage hat. Specifically, Officer Jamieson testified, "The caller said, 'You have the wrong guy. It's the two guys at the end of the bus stop on the far end and he went on to describe their clothing and their hats.'" The caller told Officer Jamieson that he had seen the butt of a gun on one of the two men, but did not specify which man had the weapon. Officer Jamison relayed this information to the other officers. The officers, again, observed the two men sitting closely together at the bus stop, one wearing a black hat and the other wearing a camouflage hat.

With their weapons drawn, the officers approached the two men sitting next to one another and commanded them to put their hands in the air. Officer Dimartino conducted a frisk of the man in the black hat and located a loaded firearm in his waistband area. Officer Jamieson, then, frisked the man in the camouflage hat, later identified as Woods, and also recovered a firearm in the waistband of his pants. Officer Jamieson testified that she frisked Woods for the officers' safety. They arrested both men.

Woods was indicted as a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Woods filed a motion to suppress the evidence seized during the search of his person on August 20, 2011, namely the firearm. The district court denied the motion to suppress. Woods pleaded guilty, but reserved the right to appeal the denial. Woods now appeals the denial of his motion to suppress.

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

"There is no neat set of legal rules that governs the determination whether the police had reasonable suspicion. *United States v. Gannon,* 531 F.3d 657, 661 (8th Cir. 2008). Rather, we determine reasonable suspicion by examining the totality of the circumstances, taking into consideration the circumstances through the eyes of the officers, because they are trained to cull significance from behavior that would appear innocent to the untrained observer. If, however, the officers conduct an illegal search or detention, in violation of the Fourth Amendment, physical evidence from the search must be excluded as the fruits of the officers' unlawful action. *Cotter,* 701 F.3d at 547.

"Woods contends that the officers lacked reasonable suspicion that criminal activity was afoot and that Woods was armed and dangerous. Woods's arguments, however, ignore our 'totality of the circumstances' approach. The officers, responding to the 911 call, believed that there was a man, wearing tan pants, a white t-shirt, and a black hat, in the area, carrying a gun. Under Missouri law, it is unlawful to knowingly carry a concealed weapon, Considering Missouri law, and based on the call that there was an individual carrying a concealed weapon that had exited the bus, the officers had reason to believe criminal activity was afoot.

"Given Officer Jamieson's second conversation with the caller, wherein the caller redirected the officers to the two men sitting together at the bus stop but stopped short of specifying which one had the gun, the totality of the circumstances as to Woods changed. At that point, the officers had reasonable suspicion to believe that at least one of the two men was armed. The officers approached the two men. Officer Dimartino frisked the man in the black hat and uncovered a fully-loaded handgun in the waistband of his pants. It was at this moment that Officer Jamieson, for her safety and that of the officers, frisked Woods.

"Given that, during Jamieson's phone conversation with the 911 caller, the caller, who was still present on the scene, directed the officers to the two individuals sitting together at the bus stop, without identifying which one he saw carrying the gun, and given that the officers had just recovered a gun on the individual in the black hat, Officer Jamieson had reasonable suspicion to support her frisk of Woods.

"Woods challenges this conclusion, asserting that because he was wearing a camouflage hat, rather than a black hat, the caller's information did not provide the officer with reasonable suspicion to support the officer's frisk and the officer could not base her reasonable suspicion on the mere fact that he was seated next to the man in the black hat at the bus stop. But, given the totality of the circumstances, Woods's arguments do not negate the officer's reasonable suspicion that she should conduct a minimally invasive frisk of Woods. See *United States v. Menard*, 95 F.3d 9, 11 (8th Cir. 1996) (noting that our circuit rejected the 'automatic companion' approach, which allows officers to automatically search all companions of an arrestee, but companionship can be one relevant factor to be considered in our totality of the circumstances approach). Accordingly, Woods's argument fails."

"Certainly, the facts of our case differ from those in *Florida v. J.L.,* where the Supreme Court held that an anonymous tip lacking indicia of reliability does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm. 529 U.S. 266, 273-74 (2000). In J.L., the police received an anonymous tip that a young black man, who was wearing a plaid shirt and standing at a particular bus stop, was carrying a firearm. In its holding, the Court reasoned that the tip lacked the 'moderate indicia of reliability,' because while the tip provided a description of the individual's appearance and location, it did not show how the tipster had knowledge of the concealed criminal activity. In contrast to J.L., the caller here indicated that, while riding the bus, he saw a gun on the person of the man described, demonstrating how the tipster had knowledge of the concealed criminal activity. Additionally, when Officer Jamieson recontacted the 911 caller, the caller indicated that he was still in the vicinity and was watching the officers. It was at that time the caller directed the officers to Woods and the other man in the black cap seated at the bus stop. Thus, given the facts of this case, the additional information provided the moderate indicia of reliability necessary to support the officers' reasonable suspicion."

SEARCH AND SEIZURE:

Stop and Frisk; 911 Call; Drunk Driving

Navaretta v. California, No. 12-9490, 4/22/14

On August 23, 2008, a Mendocino County 911 dispatch team for the California Highway Patrol (CHP) received a call from another CHP dispatcher in neighboring Humboldt County. The Humboldt County dispatcher relayed a tip from a 911 caller, which the Mendocino County team recorded as follows: "Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David94925. Ran the reporting party off the roadway and was last seen approximately five minutes ago."

The Mendocino County team then broadcast that information to CHP officers at 3:47 p.m. A CHP officer heading northbound toward the reported vehicle responded to the broadcast. At 4:00 p.m., the officer passed the truck near mile marker 69. At about 4:05 p.m., after making a U-turn, he pulled the truck over. A second officer, who had separately responded to the broadcast, also arrived on the scene. As the two officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The officers arrested the driver, Lorenzo Prado Navarette.

Upon review, the United States Supreme Court found, in part, as follows:

"The initial question in this case is whether the 911 call was sufficiently reliable to credit the allegation that petitioners' truck ran the caller off the roadway. Even assuming for present purposes that the 911 call was anonymous, we conclude that the call bore adequate indicia of reliability for the officer to credit the caller's account. The officer was therefore justified in proceeding from the premise that the truck had, in fact, caused the caller's car to be dangerously diverted from the highway. By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability.

"There is also reason to think that the 911 caller in this case was telling the truth. Police confirmed the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call). That timeline of events suggests that the caller reported the incident soon after she was run off the road. That sort of contemporaneous report has long been treated as especially reliable. In evidence law, we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.

"Another indicator of veracity is the caller's use of the 911 emergency system. A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity. As this case illustrates, 911 calls can be recorded, which provides victims with an opportunity to identify the false tipster's voice and subject him to prosecution. The 911 system also permits law enforcement to verify important information about the caller. None of this is to suggest that tips in 911 calls are *per se* reliable. Given the foregoing technological

and regulatory developments, however, a reasonable officer could conclude that a false tipster would think twice before using such a system. The caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call.

"We must therefore determine whether the 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness. We conclude that the behavior alleged by the 911 caller, 'viewed from the stand point of an objectively reasonable police officer, amounts to reasonable suspicion' of drunk driving. Under that commonsense approach, we can appropriately recognize certain driving behaviors as sound indicia of drunk driving. See, e.g., *People v. Wells*, 38 Cal. 4th 1078, 1081, 136 P. 3d 810, 811 (2006) ("'weaving all over the roadway'"); *State v. Prendergast,* 103 Haw. 451, 452–453, 83 P. 3d 714, 715–716 (2004) ('crossing over the center line' on a highway and 'almost causing several head-on collisions'); *State v. Golotta,* 178 N. J. 205, 209, 837 A. 2d 359, 361 (2003) (driving 'all over the road' and 'weaving back and forth.')

"Indeed, the accumulated experience of thousands of officers suggests that these sorts of erratic behaviors are strongly correlated with drunk driving. Of course, not all traffic infractions imply intoxication. Unconfirmed reports of driving without a seatbelt or slightly over the speed limit, for example, are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect. But a reliable tip alleging the dangerous behaviors discussed above generally would justify a traffic stop on suspicion of drunk driving.

"The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues. As a result, we cannot say that the officer acted unreasonably under these circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving.

"Navarette's attempts to second-guess the officer's reasonable suspicion of drunk driving are unavailing. It is true that the reported behavior might also be explained by, for example, a driver responding to an unruly child or other distraction. But we have consistently recognized that reasonable suspicion 'need not rule out the possibility of innocent conduct.' *United States v. Arvizu*, 534 U. S. 266, 277 (2002). Nor did the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, dispel the reasonable suspicion of drunk driving. It is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time. Extended observation of an allegedly drunk driver might eventually dispel a reasonable suspicion of intoxication, but the 5-minute period in this case hardly sufficed in that regard. Of course, an officer

who already has such a reasonable suspicion need not surveil a vehicle at length in order to personally observe suspicious driving. See *Adams v. Williams,* 407 U. S., at 147 (repudiating the argument that 'reasonable cause for an investigative stop can only be based on the officer's personal observation'). Once reasonable suspicion of drunk driving arises, 'the reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.' *Sokolow*, 490 U. S., at 11. This would be a particularly inappropriate context to depart from that settled rule, because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.

"Under the totality of the circumstances, we find the indicia of reliability in this case sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road. That made it reasonable under the circumstances for the officer to execute a traffic stop."

SEARCH AND SEIZURE:

Traffic Stop; Following Too Close

United States v. Peters
CA7, No. 12-3830, 2/27/14

This case involves a traffic stop involving two automobiles where ultimately drugs were located by police officer assigned to a multi-jurisdictional task force that patrolled Interstate 70 in Hancock and Marion Counties in Indiana. One of the issues in this case was based on the stop of the second vehicle for following too close.

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

"The only question, then, is whether the court clearly erred when it credited Deputy Ernstes' testimony that there was less than two seconds' braking time between the Scion and the Denali. According to Peters, the deputy's testimony was too vague and conclusory regarding the distance between the two vehicles to satisfy the government's burden on a probable cause determination. In particular, Peters complains that the deputy did not explain how he measured the distance from the front bumper of the Scion to the rear bumper of the Denali. Nor did the deputy specify how he measured the speed of the two vehicles.

"The district court's fact-findings were adequately supported by the record. At the suppression hearing, Deputy Ernstes testified that he was driving behind the cars when he noticed that the Denali slowed its speed and the Scion moved closer to the back of the Denali. He was then asked how close the Scion came to the Denali as the two traveled in tandem on the interstate. He replied:

> *The front bumper of the Scion and the rear bumper of the Denali—and we're traveling at speeds around 60, 64 miles an hour at this time, around 60, between that range. And it got less than—for the majority of the time, it was between 50 and 75 feet. But, it was, a short period of time, shorter than that.*

"When asked how he determined a safe following distance, Deputy Ernstes testified that he used the two-second rule described in the *Indiana Driver's Manual.* That manual provides a table of distances that a vehicle

travels in one second at particular speeds. For example, the deputy testified that a vehicle traveling fifty-five miles per hour would traverse 80.7 feet in one second, and a vehicle traveling sixty five miles per hour would cover 95.3 feet in one second. Under the two-second rule, a car traveling fifty five miles per hour should therefore allow approximately 160 feet of braking distance; a car traveling sixty-five miles per hour should stay approximately 190 feet behind any vehicle in front of it. Thus, even using the slowest speed that Deputy Ernstes described (sixty miles per hour) and the longest distance he observed between the cars (seventy-five feet), the Scion was following the Denali too closely under Indiana law.

"As for the adequacy of Deputy Ernstes' estimates of the distance between the vehicles and the speed of the Scion, the deputy testified that he had been a police officer for fifteen years with significant training and experience in traffic enforcement, among other things. The district court found Deputy Ernstes to be credible and credited his testimony. We must therefore defer to those findings of fact unless they are clearly erroneous. *Garcia-Garcia*, 633 F.3d at 614.

"Perhaps the deputy could have confirmed his estimate of the car's speed with radar. Or he could have compared the speed of the Scion to the speed of his own vehicle as he followed the Scion. He could have counted 'one Mississippi, two Mississippi' to judge the distance between the Scion and the Denali. Perhaps he did all of those things but neither the government nor the defendant asked him to explain how he determined the car's speed and trailing distance, and the defendant did not object to this testimony as lacking foundation. In any case, none of those things were necessary for the court to credit his truthful testimony that, as an experienced police officer, he judged the distance to be too short for cars moving so quickly. Nor is there anything vague or conclusory in testimony that a car was traveling between sixty and sixty-four miles per hour, fifty to seventy-five feet behind another vehicle.

"On the contrary, that testimony was very specific. In short, the district court committed no error in crediting the testimony of an experienced police officer that, after observing two cars traveling in tandem for a period of time, he credibly believed that the trailing car was approximately seventy-five feet behind the lead car at a speed of approximately sixty miles per hour. If an officer knowing these facts could reasonably conclude that this combination of speed and distance violated Indiana law, which is all that is necessary to support probable cause. The government thus met its burden of establishing probable cause sufficient to justify the traffic stop."

SEARCH AND SEIZURE: Traffic Stop; Probable Cause; Broken Tail Light

Robinson v. State

No. CR-13-843, 2014 Ark. 101, 3/6/14

After a traffic stop, Trooper David Outlaw of the Arkansas State Police arrested Donnie R. Robinson and charged him with driving while intoxicated (DWI), refusing to submit to a chemical test, having a broken windshield, and having a broken taillight. He was convicted in district court of DWI, refusal to submit, having a broken windshield, and having defective equipment. He appealed to the circuit court

and filed a motion to suppress, alleging that there was no probable cause for the initial traffic stop and requesting that the court suppress evidence obtained as a result of the stop.

During a hearing on Robinson's motion to suppress, Trooper Outlaw testified that while traveling west on Highway 278, he encountered Robinson's Ford pickup truck. According to Trooper Outlaw, he observed that the passenger taillight was busted, so he stopped Robinson for that offense. Trooper Outlaw testified that, while he could not remember the exact statute that governed taillights, he was aware of a statute that addressed defective taillights. During cross-examination, Trooper Outlaw agreed that Robinson's taillight showed both white and red light and "part wasn't broken."

The circuit court denied Robinson's motion to suppress, finding that Trooper Outlaw had cause to believe that Robinson had committed a traffic offense in violation of Arkansas Code Annotated sections 27-36-215 and -216 and, thus, there was reasonable cause for the traffic stop. After a trial, a jury convicted Robinson of refusal to submit to a chemical test, but found him not guilty of DWI.

The circuit court dismissed the broken windshield and defective-equipment charges. The court sentenced Robinson to twelve months' suspended imposition of sentence. On appeal, Robinson challenges the circuit court's conclusion that Trooper Outlaw had probable cause to stop his vehicle. Specifically, Robinson maintains that because there is no Arkansas statute prohibiting a cracked taillight, Trooper Outlaw did not have probable cause to stop his vehicle.

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

"On a petition for review, this court reviews the case as if the appeal had originally been filed in this court. *Thompson v. State,* 342 Ark. 365, 368, 28 S.W.3d 290, 292 (2000). Our standard of review for a trial court's decision to grant or deny a motion to suppress requires us to make an independent determination based on the totality of the circumstances, to review findings of historical facts for clear error, and to determine whether those facts give rise to reasonable suspicion or probable cause, while giving due weight to inferences drawn by the trial court. *Holsombach v. State,* 368 Ark. 415, 421, 246 S.W.3d 871, 876 (2007).

"The issue before this court is whether a partially broken taillight that displays both white light and red light creates probable cause to initiate a traffic stop. Arkansas Code Annotated sections 27-36-215 and 27-36-216 (Repl. 2008) set out the requirements for taillights, brake lights, and signal lights in Arkansas. Specifically, section 27-36-215 requires any motor vehicle registered in this state and manufactured or assembled after June 11, 1959, to be equipped with at least two (2) tail lamps mounted on the rear which, when lighted as required, 'shall emit a red light plainly visible from a distance of five hundred feet (500') to the rear.' Ark. Code Ann. § 27-36-215(a)(1)–(3). This statute does not contemplate a taillight that displays a white light in addition to a red light. Moreover, section 27-36-216 provides that no stop lamp or other signal lamp shall project a glaring light. Ark. Code Ann. § 27-36-216(e).

"Apart from the requirements of sections 27-36-215 and 27-36-216, this court has a long line

of precedent affirming that a defective taillight or brake light is sufficient to support a finding of probable cause to initiate a traffic stop. *Malone v. State,* 364 Ark. 256, 217 S.W.3d 810 (2005) (holding that there was nothing illegal about the initial traffic stop, which was based on a defective taillight); *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004) (holding that there was nothing inherently unconstitutional or invalid about the initial traffic stop where the officer observed that the left taillight and brake light of the appellant's vehicle was not functioning, in violation of Ark. Code Ann. § 27-36-216(a) & (b)); *State v. Harmon,* 353 Ark. 568, 113 S.W.3d 75 (2003) (holding that a pretextual traffic stop of appellant, whom the police officer suspected of engaging in illegal drug activity, on the basis that appellant had a broken brake light, did not violate our constitution's prohibition against unreasonable searches and seizures); *Burris v. State,* 330 Ark. 66, 72, 954 S.W.2d 209, 212 (1997) (holding that probable cause to initiate a traffic stop exists where the lens of a trailer's left taillight was partially broken causing it to shine white instead of red); *Enzor v. State*, 262 Ark. 545, 559 S.W.2d 148 (1977) (holding that a traffic stop was lawful and justified when the officer observed that one of the four brake lights on the appellant's vehicle was not operative)1; *Hileman v. State,* 259 Ark. 567, 535 S.W.2d 56 (1976) (holding that it cannot be said that the officer stopped the vehicle without probable cause when brake lights were not working).

"Furthermore, we have repeatedly held that the degree of proof sufficient to sustain a finding of probable cause is less than that required to sustain a criminal conviction. *Baxter v. State,* 324 Ark. 440, 922 S.W.2d 682 (1996). In order to make a valid traffic stop, a police officer must have probable cause to believe that a traffic law has been violated. *Laime v. State,* 347 Ark. 142, 60 S.W.3d 464 (2001). Probable cause is defined as 'facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected.' *Burks v. State,* 362 Ark. 558, 559–60, 210 S.W.3d 62, 64 (2005). In assessing the existence of probable cause, our review is liberal rather than strict. *Brunson v. State,* 327 Ark. 567, 940 S.W.2d 440 (1997). Whether the defendant is actually guilty of the traffic violation is for a jury or a court to decide, and not an officer on the scene. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998) (citing *Burris*, 330 Ark. 66, 954 S.W.2d 209 (1997)).

"Thus, Robinson's argument that Trooper Outlaw could not have developed probable cause to initiate a traffic stop because Robinson did not violate any statute is unavailing. Trooper Outlaw testified that the red lens on Robinson's taillight was broken in such a way that it emitted both white light and red light. Consequently, a person of reasonable caution could believe that Robinson had violated either the red-light requirements set out in section 27-36-215 or the prohibition against glaring lights found in section 27-36-216. However, this court need not decide whether such a crack results in a violation of one or either of these statutes because probable cause requires only that facts or circumstances within a police officer's knowledge be sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. *Travis,* 331 Ark. 7, 959 S.W.2d 32. In the present case, the fact that Robinson's taillight was visibly broken is sufficient probable cause

to believe that he may have committed a traffic violation. Thus, the circuit court correctly concluded that there was probable cause for Officer Outlaw to stop Robinson."

SEARCH AND SEIZURE:
Traffic Stop; Reasonable Suspicion
United States v. Martins
CA8, No. 13-1073, 4/16/14

Carlos Martins appealed the district court's order denying his post-trial motion to suppress evidence obtained as the result of a traffic stop. The government had instituted a civil in rem forfeiture lawsuit against the $45,000.00 found in his vehicle but Martins was not charged with any crime. The arresting officer had pulled claimant's vehicle over for violation of Nebraska Revised Statute Sec., 60-399(2), which provided that license plates be plainly visible, but the officer was clear in his trial testimony that he was able to read "Utah" while still traveling a safe distance behind the vehicle on the highway. The court concluded that Martins driving a vehicle with out-of-state license plates and exiting from the highway at an unlikely exit for cross-country travelers did not provide the officer with the requisite level of suspicion to stop Martins; and therefore, the initial traffic stop violated claimant's Fourth Amendment rights and any evidence obtained as a result should have been suppressed. Accordingly, the court reversed the judgment of the district court.

SEARCH AND SEIZURE:
Traffic Stop; Speeding; Drug Sniff; Subsequent Contact With Defendant
United States v. Hodlerman
CA8, No. 13-1317, 2/27/14

On May 8, 2012, David Holleman was driving a white Chevrolet truck on Interstate 80 through Iowa. An Iowa State Patrol trooper observed Holleman traveling at seventy-three miles per hour (in excess of the posted speed limit of seventy miles per hour) and following too closely behind another vehicle. The trooper initiated a routine traffic stop to issue him a warning ticket. While questioning Holleman during the course of the traffic stop, the trooper became suspicious of Holleman's behavior.

For example, Holleman opened the passenger-side window of the truck just one inch when the trooper approached the truck, refused to roll the window down any farther at the trooper's request, and slid his license, registration and insurance card through the one-inch opening in the window.

Approximately seven minutes into the traffic stop, the trooper asked Holleman for permission to search the truck and to walk a drug dog around the truck. Holleman declined to give permission. The trooper nonetheless deployed his drug dog while Holleman waited in the patrol car. The trooper's drug dog did not successfully sniff the truck, however, because it was distracted by the smell of a dead animal in the ditch. The trooper then issued a warning ticket to Holleman and told him he was free to leave.

Feeling as if the traffic stop did not "go the way a normal traffic stop should go," the trooper called ahead to a Drug Enforcement Administration (DEA) Task Force officer and described Holleman's truck and travel route. The DEA officer located Holleman's truck and followed the truck until Holleman parked in a hotel parking lot. The DEA officer then called local law enforcement and located an officer with a drug dog.

While Holleman's truck was parked in the hotel parking lot, a local law enforcement officer deployed his drug dog, Henri, to sniff Holleman's truck. The handling officer first directed Henri to conduct a "free air sniff" of several vehicles located in another part of the parking lot. In all, Henri sniffed four vehicles before reaching Holleman's truck. Henri did not alert, indicate, or otherwise change his behavior when sniffing the first four vehicles. When Henri finally reached the passenger side of Holleman's truck, however, he stopped dead in his tracks and began to really detail the area between the bed of the truck and the cab of the truck.

The handling officer characterized Henri's reaction as an "alert." The officer then pulled Henri away from Holleman's truck and directed him to sniff the vehicle parked next to Holleman's truck. Henri did not alert, indicate, or otherwise change his behavior while sniffing that vehicle. The handling officer then took Henri back to Holleman's truck and directed him to sniff the truck again. On this second sniff, Henri "stopped and detailed the same area as the first time." Based on Henri's two alerts to Holleman's truck, law enforcement obtained a search warrant. While executing the search warrant, officers found approximately 250 pounds of marijuana hidden inside two arc welders located in the bed of the truck.

Holleman claimed the initial stop of his vehicle violated the Fourth Amendment and therefore tainted the subsequent search of his vehicle. He also claimed infirmities in the search warrant application invalidated the search warrant, Henri's drug sniff did not provide probable cause for the search, and the automobile exception to the search warrant requirement did not apply under the circumstances present in this case.

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

"Holleman first contends the initial stop of his truck on Interstate 80 was not supported by probable cause. The district court, however, found credible the trooper's testimony that Holleman was driving seventy-three miles per hour in an area where the posted speed limit was seventy miles per hour. Holleman has not shown the district court's fact finding to be clearly erroneous, and the fact that Holleman was driving in excess of the posted speed limit was reason enough to support the initial stop. See, e.g., *United States v. Coleman,* 700 F.3d 329, 334 (8th Cir. 2012) ('A traffic violation, no matter how minor, provides an officer with probable cause to stop the driver.)

"Holleman also claims the trooper unreasonably extended the length of the initial stop to conduct the first drug dog sniff. Holleman argues this unreasonable extension of the initial stop violated the Fourth Amendment, and this alleged constitutional violation was a 'but-for' cause of Henri's subsequent drug sniff and the search of the vehicle. See *United States v. Peralez,* 526

F.3d 1115, 1121 (8th Cir. 2008) ('Only if the constitutional violation was at least a but-for cause of obtaining the evidence is suppression of evidence the appropriate remedy.' (*United States v. Olivera- Mendez*, 484 F.3d 505, 511 (8th Cir. 2007))). This argument fails. The trooper was already suspicious of Holleman's behavior when he employed his drug dog during the initial traffic stop. The trooper's suspicions—already present at the time he deployed his drug dog—were the but-for cause of his follow-up contact with the DEA officer. Thus, any alleged unreasonable extension of the first traffic stop was not the but-for cause of the second drug dog sniff or the search of Holleman's truck. The district court therefore did not err in denying the request to suppress evidence on the grounds that an unreasonable extension of the first traffic stop tainted the subsequent investigation.

"Holleman contends Henri's drug sniff did not provide probable cause to search his vehicle. He argues Henri only 'alerted' to the possible presence of drugs without actually 'indicating' the presence of drugs, and that a mere 'alert' is insufficient to support probable cause for a search. Holleman relies primarily on *United States v. Jacobs,* 986 F.2d 1231 (8th Cir. 1993). Jacobs involved a drug dog who showed 'interest' in a package by pushing it around with his nose and scratching it twice.

"We held a warrant application which said a drug dog merely showed 'interest' in a package would not be supported by probable cause. Holleman argues Henri's two 'alerts' were the equivalent of the 'interest' shown by the drug dog in Jacobs. We disagree. The whole point of Jacobs was the distinction between a drug dog's mere 'interest' and a dog giving a 'full alert' to a package. Some courts have held a trained drug dog's 'alert, as opposed to the more conclusive 'indication,' is enough to establish probable cause. See *United States v. Parada,* 577 F.3d 1275, 1282 (10th Cir. 2009) ('Thus, the general rule we have followed is that a dog's alert to the presence of contraband is sufficient to provide probable cause.')

"We decline to adopt the stricter rule urged by Mr. Parada, which would require the dog to give a final indication before probable cause is established.); see also *United States v. Clayton,* 374 F. App'x 497, 502 (5th Cir. 2010) (Our Fourth Amendment jurisprudence does not require drug dogs to abide by a specific and consistent code in signaling their sniffing of drugs to their handlers. So long as officers are able to articulate specific, reasonable examples of the dog's behavior that signaled the presence of illegal narcotics, this Court will not engage itself in the evaluation of whether that dog should have used alternative means to indicate the presence of the drugs.). Here, Henri's handling officer explained the dog's failure to give a full "indication" may have been because Henri was so overwhelmed by the odor of marijuana that he had difficulty pinpointing the strongest source of the odor. More to the point, the handling officer testified Henri gave two definitive 'alerts' to the side of Holleman's truck. As a result, we are not concerned about Henri's failure to give a full indication, and do not find Holleman's reliance upon Jacobs persuasive.

"In *Florida v. Harris*, __ U.S. __, 133 S. Ct. 1050 (2013), the Supreme Court discussed the framework courts should use to determine whether a drug dog sniff is reliable enough to give police officers probable cause to conduct

a search. The appropriate inquiry is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test. The Supreme Court said more emphasis should be placed on a dog's performance in controlled settings than its performance in the field.

> *The decision below treats records of a dog's field performance as the gold standard in evidence, when in most cases they have relatively limited import. Errors may abound in such records. If a dog on patrol fails to alert to a car containing drugs, the mistake usually will go undetected because the officer will not initiate a search. Conversely (and more relevant here), if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all. The dog may have detected substances that were too well hidden or present in quantities too small for the officer to locate. Or the dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person.*

"The Supreme Court also said evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert.

"Here, the record showed Henri and his handler were first certified through the Northern Michigan K-9 school as a narcotics detection team in October 2009. Henri and his handler thereafter successfully completed annual re-certifications between the time of their initial certification and the search of Holleman's vehicle. In addition, to the extent actual field performance is still relevant, the record shows Henri's 'in-field' accuracy record was 57%. In *United States v. Donnelly*, 475 F.3d 946 (8th Cir. 2007), we affirmed the denial of a suppression motion despite the fact that the drug dog involved there had an even lower 54% 'in-field' accuracy rating.

"Finally, the totality of the facts involved in this case include the Trooper's suspicions about Holleman during the initial traffic stop on Interstate 80. The district court summarized the Trooper's suspicions as follows:

> *(1) Defendant failed to open the passenger side window more than one inch when Trooper Clyde first approached Defendant's truck; (2) Defendant provided a hesitant answer regarding where he was going; (3) Defendant had a Washington state license plate and stated that he was driving the arc welders in his truck to Washington D.C. but curiously stated that he was dropping off only one of the two arc welders in D.C. and that the other arc welder belonged to him; (4) Defendant's stated occupation—video producer—was inconsistent with the arc welders; and (5) Trooper Clyde believed that Defendant was displaying nervous energy and was breathing heavily.*

"Considering all the facts surrounding Henri's alerts, viewed through the lens of common sense, we conclude those facts would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. *Florida v. Harris*, 133 S. Ct. at 1058. We are thus satisfied Henri's sniffs were 'up to snuff.'

"Holleman also argues certain infirmities in the application used to obtain the search

warrant for his truck invalidated the search warrant itself. In response, the government argues the search of Holleman's truck fell within the automobile exception to the search warrant requirement, and thus the search did not violate the Fourth Amendment so long as it was supported by probable cause.

"We agree any infirmities in the search warrant application are irrelevant so long as the search of the vehicle fell within the automobile exception to the search warrant requirement. See *United States v. Martinez,* 78 F.3d 399, 401 (8th Cir. 1996) (concluding a search may be authorized under the automobile exception even when law enforcement obtains a search warrant later determined to be invalid).

"To determine whether the automobile exception to the search warrant requirement applies, Holleman's truck must have been 'readily capable' of 'being used on the highways' and must have been 'found stationary in a place not regularly used for residential purposes.' *California v. Carney*, 471 U.S. 386, 392 (1985). Holleman does not contend his truck was incapable of being used on the highways, so the first prong of the test is not at issue. The sole issue is whether the truck's location in a hotel parking lot put it in a place not regularly used for residential purposes. In *United States v. Reed*, 733 F.2d 492 (8th Cir. 1984), we held a defendant did not have a reasonable expectation of privacy in a 'fenced but open back parking lot' of a business. In *United States v. Roby,* 122 F.3d 1120 (8th Cir. 1997), we held a drug dog sniff in a hotel hallway did not violate the Fourth Amendment. The government argues a hotel parking lot should not be considered a place regularly used for residential purposes if the protections of the Fourth Amendment do not extend even to the hallway of a hotel (or to the parking lot of a business).

"Other circuits have specifically addressed whether a hotel parking lot should be considered 'residential' for purposes of the automobile exception to the search warrant requirement, and have concluded not. See *United States v. Washburn,* 383 F.3d 638, 641-42 (7th Cir. 2004) ('We have always rejected the notion that a hotel occupant enjoys the same expectation of privacy in his car in the parking lot of the hotel as he does in the room itself; the hotel parking lot is readily accessible to the public and not generally thought of as a place normally used as a residence.' *United States v. Diaz,* 25 F.3d 392, 396-97 (6th Cir. 1994) (concluding motel guests have no reasonable expectation of privacy in a motel's parking lot); *United States v. Ludwig,* 10 F.3d 1523, 1526-27 (10th Cir. 1993) (concluding a drug sniff of a vehicle parked in a hotel parking lot did not violate the Fourth Amendment); *United States v. Foxworth,* 8 F.3d 540, 545 (7th Cir. 1993) (stating a hotel parking lot is 'readily accessible to the public and not generally thought of as a place normally used as a residence.')

"Holleman contends these cases have been called into doubt by the Supreme Court's recent decision in *Florida v. Jardines*, __ U.S. __, 133 S. Ct. 1409 (2013). Jardines involved a drug dog sniff which occurred on the front porch of someone's residence. The Supreme Court found law enforcement officers' entry into the home's curtilage constituted a physical intrusion into a constitutionally protected area, proceeded to examine whether law enforcement officers had a license to enter such an area, and determined they did not.

Holleman claims a hotel parking lot is like the front porch of someone's home, and thus a police officer's license to be in such an area is limited. Holleman argues the limited license of a police officer to be in the quasi-residential area of a hotel parking lot does not include the right to bring a trained drug dog into the area to conduct a drug sniff. We decline to address whether Jardines casts doubt on those cases which hold a hotel parking lot is a place not regularly used for residential purposes.

"We affirm the decision of the district court."

SEARCH AND SEIZURE:

Traffic Stop; Totality of the Circumstances

United States v. Noonan

CA8, No. 13-1731, 3/20/14

Early on the morning of March 25, 2012, shortly after the local bars closed at 2:00 a.m., Deputy Sheriff Joseph Kennedy observed and followed a black Cadillac operated by Noonan as it moved west on Highway 20 outside of Dubuque, Iowa, in a manner that aroused Deputy Kennedy's suspicion. Though he observed no equipment or traffic violation, Deputy Kennedy stopped the Cadillac after it made a second left turn off Highway 20. Noonan was cooperative and not obviously impaired, but Deputy Kennedy learned from a computer check of Noonan's driver's license that he had a valid arrest warrant out of Clayton County for manufacturing of methamphetamine. Kennedy returned to Noonan's car, placed him under arrest, and handcuffed him. A pat-down search uncovered a methamphetamine pipe in Noonan's front pocket. Deputy Kennedy put Noonan in his patrol car and then retrieved and opened a black backpack found on the floor inside the Cadillac, discovering several items used to manufacture methamphetamine, including an aspirin bottle containing pseudoephedrine, bottles of ether and sulfuric acid, and a mason jar containing a "white ashy substance" and emitting a strong ammonia odor.

After he was indicted, Noonan moved to suppress the evidence recovered from the Cadillac, arguing that Deputy Kennedy lacked reasonable suspicion to make the initial stop.

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

"Applying *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968), we have held that an officer may 'briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity.' *United States v. Winters,* 491 F.3d 918, 921 (8th Cir. 2007).

"In *United States v. Arvizu*, the Supreme Court re-emphasized that it is 'the totality of the circumstances' that determines whether an officer has reasonable suspicion to make a Terry investigative stop. 534 U.S. 266, 275 (2002). As we explained in *United States v. Stewart:*

> *…factors that individually may be consistent with innocent behavior, when taken together, can give rise to reasonable suspicion, even though some persons exhibiting those factors will be innocent. "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.*

631 F.3d 453, 457 (8th Cir. 2011), quoting *Arvizu*. Here, after an evidentiary suppression hearing at which Deputy Kennedy testified and was cross examined at length, the district court carefully marshaled the facts as found by the Magistrate Judge and applied the Arvizu standard:

> *Deputy Kennedy observed Defendant traveling westbound on Highway 20 in Dubuque, Iowa, at approximately 2:30 a.m.; (2) Defendant was traveling fifteen miles per hour under the speed limit; (3) when Deputy Kennedy, who was traveling eastbound on Highway 20, turned his marked patrol car around and caught up with the Defendant, Defendant slowed down even further, signaled a lane change and got behind Deputy Kennedy's patrol car in the lefthand lane; (4) Defendant then made a lawful lefthand turn onto Mile Hill Lane, a street Deputy Kennedy knew was occupied by businesses, including a mini-storage facility; (5) Deputy Kennedy was aware of a "rash of storage shed burglaries" in the Dubuque area, although he did not know whether the mini-storage facility on Mile Hill Lane had been burglarized; (6) Deputy Kennedy observed Defendant make a u-turn on Mile Hill Lane and reenter Highway 20 traveling in the same direction that he had been previously traveling; and (7) when Deputy Kennedy turned around again to catch up with Defendant's vehicle, Defendant made another left hand turn onto North Cascade Road. Although some of these facts, when viewed in isolation, may be consistent with innocent conduct, Deputy Kennedy could reasonably believe that further investigation was warranted under the totality of the circumstances.*

"Because local bars had recently closed, Deputy Kennedy was concerned that the car's unusually slow speed meant the driver was impaired; in his experience, 'people who are impaired on alcohol and drugs have a tendency to kind of over-think things. Because the driver of the Cadillac seemed to be driving evasively, Deputy Kennedy was also concerned that the driver might be involved in another robbery of a storage facility. Together, the overly-cautious driving, time of night, evasive maneuvers, and rash of recent burglaries gave Deputy Kennedy reasonable suspicion for an investigative stop of Noonan's vehicle. The denial of Noonan's motion to suppress the physical evidence found after the stop of his car is affirmed."

EDITOR'S NOTE: This issue of the CJI Legal Briefs contains numerous court decisions that impact law enforcement officers in the performance of their duties. Law enforcement personnel should review three recent U.S. Supreme Court decisions—Tolen v. Cotton (Civil Liability); Fernandez v. California (Consent Searches); and Navaretta v. California (911 Calls). In addition, the decision of the Arkansas Supreme Court in Stutte v. State should be discussed with your legal advisor. Accolades have to be given to Detective Kurt P. Spivey of the Indianapolis Metropolitan Police Department for his work in United States v. Carroll where he obtained a conviction for possession of child pornography and six counts of sexual exploitation of the victim based on information that was five years old. In this case the Court of Appeals for the Seventh Circuit upheld the search warrant affidavit notwithstanding its challenge as containing "stale information."