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ARREST: Delay in Serving Warrant

State v. Canada, No. CR-15-1013, 2016 Ark. 318, 9/22/16

Derrick Price died in 2000 as a result of a homicide, and a district judge signed Robert Canada's arrest warrant for the homicide. Canada was incarcerated for separate charges of aggravated robbery and attempted first-degree murder. He subsequently pled guilty to aggravated robbery and forgery.

In 2014, Canada was arrested for residential burglary. The next day, fourteen years after the Price homicide, Canada was arrested for the capital-murder charge. Two days later, the State charged him with capital murder and felon in possession of a firearm. The circuit court dismissed the felony information, concluding that the fourteen-year delay between the arrest warrant being issued and served prejudiced Canada in violation of his due process rights. The State appealed.

Upon review, the Supreme Court of Arkansas noted that appeals by the State are accepted only when the holding would be important to the correct and uniform administration of the criminal law. The Court then dismissed the appeal, concluding that this was not a proper appeal since the State's appeal does not require the interpretation of law or the uniform administration of justice.

CIVIL LIABILITY:
Attack on Officer; Use of Deadly Force
Johnson v. City of Philadelphia
CA3, No. 15-2346, 9/20/16

On April 22, 2012, Philadelphia Police Officer Thomas Dempsey was on solo patrol in a radio car in North Philadelphia, armed with a baton, a taser, and a handgun. Around 2:00 a.m. and again at 5:30, Dempsey received a call that a naked man was standing in North Mascher Street. Dempsey and other officers responded, but found no one.

At 6:00 a.m., a passing motorist informed Dempsey of a naked man at the corner of North Mascher and Nedro Avenue. Dempsey radioed in the information, drove to the intersection, and saw a naked man (Newsuan), standing in front of a residence. Accounts diverge as to what happened next. Ultimately Newsuan, high on PCP, attacked Dempsey, slammed him into multiple cars, and tried to remove Dempsey's handgun. Dempsey shot and killed Newsuan. The district court entered summary judgment, rejecting excessive force claims by Newsuan's estate under 42 U.S.C. 1983.

The Third Circuit affirmed stating "regardless of whether Dempsey unnecessarily initiated a one-on-one confrontation with Newsuan that led to the subsequent fatal altercation, Newsuan's violent attack on officer Dempsey was a superseding cause that severed any causal link between Dempsey's initial actions and his subsequent justified use of lethal force.

CIVIL LIABILITY:
Excessive Force; Handcuffing
Courtright v. City of Battle Creek
CA6, No. 15-1722, 10/14/16

In response to a phone tip that Jeff Courtright had come out of his room at the Traveler's Inn with a gun and threatened to shoot the dog of another resident at the hotel, Craig Wolf and Todd Rathjen were dispatched to the Traveler's Inn. In his complaint, Courtright averred that he "was nowhere near his room when the alleged incident was said to have taken place," that he attempted to tell Wolf that he was not in his room at the time the incident allegedly occurred, but was visiting friends, and that he further attempted to tell Wolf that he did not leave his room with a gun and threaten to shoot any animal. Wolf nevertheless arrested Courtright for felonious assault.

In handcuffing Courtright in the course of the arrest, Wolf and Rathjen forcefully grabbed Courtright's arms and pulled them behind his back, even though Courtright had told the officers that prior rotator cuff injuries and shoulder surgeries precluded him from placing his hands behind his back. Courtright repeatedly complained of pain to the officers after he was handcuffed, but neither officer did anything to alleviate his pain.

Though Courtright was jailed overnight, the prosecutor declined to issue a warrant, and Courtright was released the next day. Subsequently, Courtright sued Wolf, Rathjen, and the City of Battle Creek,

alleging use of excessive force by Wolf and Rathjen in violation of the Fourth Amendment and 42 U.S.C. § 1983.

Upon review, the Court of Appeals for the Sixth Circuit stated, in part, as follows:

"We have held that 'excessively forceful or unduly tight handcuffing is a constitutional violation under the Fourth Amendment' and that 'freedom from excessively forceful or unduly tight handcuffing is a clearly established right for purposes of qualified immunity.' *Baynes v. Cleland*, 799 F.3d 600, 613-14 (6th Cir. 2015); see also *Marvin v. City of Taylor,* 509 F.3d 234, 247 (6th Cir. 2007) ('an excessive force claim can be premised on handcuffing, i.e., the right not to be handcuffed in an objectively unreasonable manner was clearly established'). To plead successfully a claim of excessively forceful handcuffing, the plaintiff must allege physical injury from the handcuffing. When there is no allegation of physical injury, the handcuffing of an individual incident to a lawful arrest is insufficient as a matter of law to state a claim of excessive force under the Fourth Amendment. *Neague v. Cynkar*, 258 F.3d 504, 508 (6th Cir. 2001).

"The extent of the physical injury suffered by the plaintiff need not be severe in order to sustain the excessive-force claim. See *Morrison v. Bd. of Trs*., 583 F.3d 394, 402 (6th Cir. 2009) (the injury required to sustain a successful handcuffing claim is not as demanding as the defendant would suggest.). For example, in *Morrison,* we found that allegations of bruising, wrist marks, and 'attendant pain' suffered by the plaintiff while she was handcuffed were sufficient to allow the plaintiff's excessive-force claim to proceed past summary judgment. In so finding, we cited our decision in *Martin v. Heideman*, 106 F.3d 1308 (6th Cir. 1997), in which we reversed a grant of qualified immunity on a claim of excessively forceful handcuffing where the plaintiff alleged merely that the handcuffing caused numbness and swelling in his hands.

"Here, Courtright's allegations of physical injury from handcuffing are admittedly sparse. Indeed, the thrust of the defendants' argument is that Courtright's factual allegations do not plead physical injury and that the excessive-force claim therefore must be dismissed. The defendants, for example, argue that Courtright's factual allegations are 'nearly identical' to those in *Kahlich v. City of Grosse Pointe Farms,* 120 F. App'x 580 (6th Cir. 2005), in which we upheld a grant of qualified immunity because the plaintiff did not allege physical injury from the handcuffing. However, the plaintiff in Kahlich stated during a deposition that he was not physically injured by virtue of being handcuffed, whereas no such facts exist in Courtright's case. Moreover, Kahlich, as well as all other cases the defendants cite to support the dismissal of the excessive-force claim for failure to plead physical injury, arose at the summary-judgment stage, not at the motion-to-dismiss stage.

"At the motion-to-dismiss stage, we are required to draw all reasonable inferences in favor of Courtright. Courtright pleaded in his complaint that he suffered from

prior rotator-cuff injuries and shoulder surgeries, that he could not put his hands behind his back because of his medical condition, and that he suffered from pain after he was handcuffed behind his back. Viewing the allegations in the complaint in the light most favorable to Courtright, we reasonably may infer that he was handcuffed in a manner that aggravated his prior medical injuries, that he suffered pain from that handcuffing, and that he thus was physically injured by the handcuffing. That Courtright did not allege that he continued to suffer injury after his handcuffs were removed does not preclude the survival of his excessive-force claim.

"Because Courtright alleged a plausible claim that the officers violated his clearly established constitutional rights, we affirm the district court's denial of the motion to dismiss the excessive-force claim."

CIVIL LIABILITY:
Excessive Force; Punching a Resisting Arrestee

Griggs v. Brewer
CA5, No. 16-10221, 10/28/16

Officer Charley Brewer conducted a routine traffic stop of a vehicle driven by Tanner Griggs after Griggs ran a red light around 2:00 a.m. on September 4, 2013. A video and audio recording from Officer Brewer's dashboard camera captured most of the incident. Officer Brewer smelled alcohol and suspected that Griggs might be intoxicated, so he asked Griggs to exit the vehicle and conducted a field sobriety test. After testing Griggs for over fifteen minutes, he arrested Griggs for driving while intoxicated.

The decision to arrest came in the midst of the "one legged stand" part of the sobriety test. Officer Brewer told Griggs, who was attempting to stand on one leg, that he could stop. Griggs did not stop and responded "I'm doing it." Brewer retorted "you're not actually," told him to "put your hands behind your back," and grabbed Griggs's hands to handcuff him. As he did, Griggs lurched to the side and said "no, no." Brewer immediately performed a "takedown" maneuver and threw Griggs face-down onto the nearby grass and landed on top of him.

As Griggs lay on the ground following the take down, Officer Brewer attempted to handcuff him. Brewer's backup officer, Officer Cruce, came to his assistance. Both officers got on top of Griggs and struggled with him, repeatedly ordering him to put his hands behind his back. Brewer punched Griggs with a closed fist to the back of the head in an effort to gain control of his arms; when Griggs pulled his arms back again, Brewer punched him several more times to regain control. The officers finally gained control of Griggs's arms and handcuffed him.

As noted, a police video was entered into evidence. Although the details of the struggle are blurred in the video, the parties' testimony tells the same basic story: the officers punched Griggs when attempting to gain control of his arms; he withdrew his arms again; and the officers

punched him until they gained (and maintained) control of his arms a second time. Once Griggs was handcuffed, the officers hoisted him to his feet and Officer Brewer escorted him to the back of his patrol vehicle. Officer Brewer attempted to get Griggs into the vehicle, then pushed Griggs's head down into the vehicle. After he was pushed into the vehicle, with his legs still hanging out the door, Griggs kicked Officer Brewer in the chest. Officer Brewer responded by quickly climbing on top of Griggs and delivering a closed-fisted punch to the head.
After he was punched the last time, Griggs receded into the car and Officer Brewer was able to close the door. Brewer completed the arrest without further incident. A blood sample taken from Griggs showed that his blood alcohol level was .273, more than three times the legal limit.

Griggs later brought these claims against Officer Brewer in his individual capacity, under 42 U.S.C. § 1983, alleging that Brewer used constitutionally excessive force in effecting the arrest. The district court granted Officer Brewer's motion for summary judgment, holding that he was entitled to qualified immunity on all claims against him. Griggs appeals.

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

"The issue is whether Officer Brewer's punching Griggs several times while he was on the ground, as Brewer attempted to handcuff him, amounted to excessive force. Briefly, recall that after Officer Brewer threw Griggs to the ground, he placed his weight on top of him, and he attempted to handcuff him. Griggs's hands were under his stomach. Brewer then punched Griggs to gain control over his arms. After Brewer gained control, Griggs, ignoring the officers' commands, again pulled away and again tucked his arms back under him. Brewer again punched Griggs until he was able to regain control of his hands to handcuff him.

"In assessing Brewer's conduct under the defense of qualified immunity, we need not determine whether an actual constitutional violation occurred. The question for us is whether Brewer's conduct was unreasonable in the light of clearly established law. In this instance, Griggs points to no authority establishing that it was unreasonable for an officer to use non-deadly punches to gain control of the arms of a drunken, actively resisting suspect. Griggs actively resisted and refused to comply with the officers' clear and audible commands. Although the officers might have used less forceful conduct, there was no settled authority to put Brewer on notice that his use of force in such circumstances violated Griggs's constitutional rights. See *Poole*, 691 F.3d at 627 ("We must evaluate an officer's use of force from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.") We therefore hold that Officer Brewer is entitled to qualified immunity as to the claims stemming from his attempts to handcuff Griggs while Griggs was on the ground.

"The next issue is whether Officer Brewer's punch after Griggs kicked

Brewer amounted to excessive force. Briefly, recall that after Officer Brewer finally handcuffed Griggs, he hoisted Griggs up, escorted him to his patrol vehicle, and pushed him in. Griggs, whose legs were still hanging out the door, delivered a kick to Officer Brewer's chest. Brewer quickly responded by placing his weight on Griggs's legs and delivering a swift punch to Griggs's face. Griggs receded into the vehicle, and Brewer closed the door.

"Griggs argues that the punch was disproportionate to his kick and excessive because he was restrained in handcuffs. He cites case law that punching or otherwise gratuitously harming a restrained suspect constitutes excessive force. See, e.g., *Ramirez*, 716 F.3d at 378. The principle of law may be correct, but it has no application here. Griggs was clearly not subdued and under restraint; if he were, he would not have been able to physically assault Officer Brewer. He still posed a danger to Brewer, as evidenced by the fact that he did, in fact, kick Officer Brewer in the chest.

"Applying the *Graham v. Conner*, 490 U.S. 386 (1986) factors, some use of force to gain control of Griggs was not objectively unreasonable. Under *Graham*, driving while under the influence is a serious crime; the intoxicated Griggs was capable of and evinced erratic behavior; and Griggs had been and continued to demonstrate active resistance during the course of the arrest. And, as it were, the punch was effective for its purpose—Griggs immediately curled up into the back of the police car, and Brewer was able to close the door. In short, the use of force was the sort of 'split-second judgment' in a difficult situation that qualified immunity is designed to protect. See *Graham*, 490 U.S. at 396–97.

"In the light of the evidence, we conclude that no material fact issue exists and that none of Officer Brewer's conduct in effecting Griggs's arrest was objectively unreasonable in the light of clearly established law. Accordingly, the district court did not err in holding that Brewer is entitled to qualified immunity."

CIVIL LIABILITY:
Factors Do Not Justify Use of Deadly Force

A.K.H. v. City of Tustin
CA9, No. 14055184, 9/16/16

At approximately 3:00 p.m. on December 17, 2011, Hilda Ramirez called 911 to report that her ex-boyfriend, Benny Herrera, had jacked her phone. Ramirez stated that she was not hurt, that she did not need paramedics, and that her children were "fine." Initially, Ramirez told the 911 police dispatcher that Herrera stole her phone by just grabbing it from her hand. A short time later, Ramirez modified her story and said that, while the two were arguing about her phone, Herrera did end up hitting her in the head.

Ramirez told the police dispatcher that Herrera had not used a weapon to take her phone, that Herrera did not carry any weapons, and that Herrera had never been violent with her before. Ramirez told the dispatcher that Herrera was

"walking down El Camino Real towards Red Hill." She explained that because he did not have a car and had no friends in the area, Herrera was probably trying to a catch a bus back to his home.

The dispatcher sent out a general call to Tustin police officers. The dispatcher initially reported:

> *A DV [domestic violence] just occurred. The RP [reporting party] states her exboyfriend, Benny Herrera, male Hispanic, 31 years, 5'8", thin build, bald head, black hooded sweatshirt was inside her apartment, took her cell phone, he left. He is now walking on ECR [El Camino Real] towards Red Hill.*

The dispatcher repeated Ramirez's report, saying that Herrera was heading down El Camino Real "to catch the bus" because he had "no access to a vehicle and no friends in the area." After Ramirez modified her story, the dispatcher updated the officers, explaining that "originally the RP claimed that there was no physical violence, now she's claiming that the male subject hit her in the head." The dispatcher reported that Herrera "is not known to carry weapons." She also reported that Herrera was "shown in-house to be a member of the Southside Gang" and that there was possibly a $35,000 traffic warrant out for Herrera's arrest. The dispatcher reported, further, that Herrera was on "parole for 11350," a reference to a state drug possession crime.

Driving a large police SUV, Officer Brian Miali was the first to spot Herrera. As Ramirez had reported, Herrera was walking down El Camino Real. A video taken by Miali's dashboard camera shows Herrera walking on the right shoulder of the road in the same direction as traffic. On Herrera's immediate right was a high wall, preventing him from escaping to the right. As he came up to Herrera, Miali turned on the red lights of his SUV. Herrera put his right hand in his sweatshirt pocket and started alternately to skip, walk, and run backwards facing Miali. As Herrera did so, he moved away from the right shoulder toward the middle of the road. Miali drew his gun and opened his driver's side door while driving forward slowly. Herrera kept ahead of Miali's SUV, sometimes at distances of less than ten or fifteen feet. Using the loudspeaker of his SUV, Miali told Herrera three times to "get down." Herrera did not comply. He stayed on his feet and continued to move down the road at about the same speed as Miali's SUV.

Officer Villarreal was driving on El Camino Real behind Officer Miali. A civilian sedan was directly behind Miali, separating Miali from Villarreal's vehicle. Villarreal testified in his deposition that he did not hear Miali tell Herrera to "get down." The civilian car moved onto the shoulder to the right, and Villarreal moved left into the opposite lane. He drove his patrol car up beside Herrera, and slightly forward of Miali's SUV, in order to "box" Herrera in and cut off his avenue of escape. Villarreal held his gun in his hand. His front passenger window was open. The video taken by Miali's dashboard camera shows that Herrera was already moving to the left, toward

Villarreal's patrol car, as Villareal pulled up beside Herrera. Villareal immediately shouted, "Get your hand out of your pocket." Herrera removed his right hand from his sweatshirt pocket in an arcing motion over his head. Just as Herrera's hand came out of his pocket, Villarreal fired two shots in rapid succession. Villarreal did not give any warning that he would shoot, and Officer Miali later stated that he was not expecting the shots. Both officers admitted that they never saw anything in either of Herrera's hands.

Officer Villarreal testified in his deposition that he shot Herrera because he believed that he had a weapon and he was going to use that weapon on him." Villarreal testified that Herrera's right hand was "concealed" in his sweatshirt pocket." Miali testified in his deposition that "there was something in there that appeared to be heavy." Villarreal testified that Herrera "charged him or shortened the distance or closed the distance at his passenger window very quickly." Villarreal said that probably "three to five seconds" passed between when he commanded Herrera to remove his hands from his pocket and when he shot. The recording from Villarreal's dashboard camera, however, shows that the command and the shots were almost simultaneous, separated by less than a second. The total elapsed time from when Miali first encountered Herrera to when Villarreal shot him was less than a minute.

It is undisputed that Herrera was unarmed. Ramirez had reported to the police dispatcher that Herrera did not carry weapons. The dispatcher had reported to the officers that Herrera "is not known to carry weapons." The only "heavy" object in Herrera's sweatshirt pocket was a cell phone.

Relatives of Herrera filed suit under 42 U.S.C. § 1983 against Officer Villarreal and the City of Tustin alleging that Villarreal used excessive force against Herrera. Villarreal moved for summary judgment based on qualified immunity. The district court denied the motion. Villarreal brought an interlocutory appeal.

Upon review, the Court of Appeals for the Ninth Circuit stated that they analyzed excessive force claims under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388 (1989); *Tennessee v. Garner,* 471 U.S. 1, 7 (1985). They found, in part, as follows:

"The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. To determine the reasonableness of an officer's actions, we balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.

"The government's interests were insufficient to justify the use of deadly force. First, the 'crime at issue,' was a domestic dispute that had ended before the police became involved. We recognize that some domestic disputes can pose a serious danger to police officers and others, but we have held that domestic

disputes do not necessarily justify the use of even intermediate let alone deadly force. The use of force is especially difficult to justify when the domestic dispute is seemingly over by the time the officers begin their investigation. Here, when the officers came upon Herrera, he had left Ramirez's apartment and was walking down a road at some distance from the apartment.

"It is clear in retrospect that Herrera posed no threat to the safety of the officers, as he in fact had no weapon; but the relevant question for purposes of qualified immunity is whether Officer Villarreal could reasonably have believed that Herrera posed such a threat. Viewing the evidence in the light most favorable to Plaintiffs, we conclude that he could not.

"When Officer Miali first arrived on the scene, Herrera was walking on the right-hand shoulder of the road. The officers had little, if any, reason to believe that Herrera was armed. Ramirez had told the police dispatcher that Herrera was not carrying any weapons, and the dispatcher had told the officers that Herrera was 'not known to carry weapons.' When Miali started following Herrera in his SUV, Herrera put his right hand in the pocket of his sweatshirt. He then alternated among skipping, walking, and running, mostly facing backward toward Miali, without displaying a weapon. Villarreal admitted that he never saw a weapon.

"We recognize that the dispatcher had told the officers that Herrera was a member of the 'Southside Gang,' may possibly have had a $35,000 traffic warrant, and was on parole for a drug possession conviction. Further, the officers had been told that Herrera had stolen Ramirez's cell phone and hit her on the head, and had had prior run-ins with law enforcement, including at least one conviction. But the traffic warrant and drug possession conviction were relatively minor crimes, neither of which entailed violence or gun possession, and the dispatcher's information included a statement that Herrera was not known to be armed.

"Third, even if Herrera was 'actively resisting' or 'attempting to evade' an investigatory stop, and even if we equate for present purposes an arrest and an investigatory stop, this factor only slightly favors the government. Herrera did not stop as soon as he saw the red lights on Officer Miali's SUV, and he did not comply with the officer's commands to 'get down.' Herrera, however, never attempted to cross the road and flee, and he continued to move at about the same speed as Officer Miali, while facing him much of the time. Nor did Villareal actually hear Miali tell Herrera to 'get down.' Viewing the evidence in the light most favorable to Herrera, this factor does not weigh heavily in the government's favor in determining whether the amount of force used was justified.

"Finally, and perhaps most important, Officer Villarreal escalated to deadly force very quickly. Villarreal commanded Herrera to take his hand out of his pocket immediately upon driving up beside him. Villarreal then shot Herrera just as he was taking his hand out of his pocket.

Less than a second elapsed between Villarreal commanding Herrera to take his hand from his pocket and Villarreal shooting him. Villarreal neither warned Herrera that he was going to shoot him, nor waited to see if there was anything in Herrera's hand. In total, less than a minute had elapsed between when Miali first came upon Herrera and when Villarreal shot him.

"It has long been clear that a police officer may not seize an unarmed, nondangerous suspect by shooting him dead. *Garner*, 471 U.S. at 11. Viewing the evidence in the light most favorable to the plaintiffs, that is precisely what Officer Villarreal did here. We affirm the district court's denial of qualified immunity and remand for further proceedings consistent with this opinion."

CIVIL LIABILITY: Qualified Immunity; Probable Cause for Arrest

Goodwin v. Conway
CA3, No. 15-2720, 9/13/16

Rashiel K. Goodwin was arrested pursuant to a warrant for allegedly selling heroin to an undercover police officer. He was indicted, but the charges were eventually dropped. Goodwin brought suit under 42 U.S.C. 1983 for false imprisonment and malicious prosecution against the detectives involved in securing his arrest warrant. He claims that they submitted a false warrant application because they knew or should have known that he was in jail at the time of one of the undercover drug deals. He argues that his incarceration was evident from a booking sheet the detectives had when they applied for his arrest warrant. The detectives moved for summary judgment, asserting qualified immunity. The district court denied the motion, holding that there was a genuine dispute as to whether the detectives possessed the booking sheet when they submitted the warrant. At oral argument before the Third Circuit, defense counsel conceded that the detectives were aware of the booking sheet before submitting the warrant application. The court concluded that booking sheet did not preclude a finding of probable cause. The sheet showed the date on which Goodwin was incarcerated. It did not say when he was released and did not trigger a duty to further investigate. The detectives had probable cause when they applied for Goodwin's arrest warrant and are entitled to qualified immunity.

CIVIL LIABILITY: Taser Used on Individual Who Has Ceased Resisting

Watts v. Kubler
CA11, No. 15-15611, 10/12/16

James Clifton Barnes and his aunt, Paula Yount, went to the beach to conduct a baptismal ritual. While in the water, Barnes became agitated. After Barnes was pulled out of the water and, following a struggle, he was handcuffed and pinned on the beach by two law enforcement officers. He was then tased five times, and at least two of those tases occurred after Barnes had ceased resisting.

The district court denied the officer's motion for summary judgment, determining that the officer's use of the Taser gun amounted to an unconstitutional use of excessive force in violation of the Fourth Amendment that was clearly established at the time. The court concluded that the record evidence, construed in favor of plaintiff, demonstrates that Barnes was not a flight risk or a threat to the safety of the officers or the public prior to the conclusion of the tasings.

In this case, the officer's multiple tasings of Barnes, after an arrest had been fully secured and any potential danger or risk of flight eliminated, violated Barnes's clearly established constitutional right to be free from excessive force.

EVIDENCE:

Proof of Facts; Constructive Possession

United States v. Apicelli
CA1, No. 15-2400, 10/7/16

In September 2013, New Hampshire law enforcement officials received information from a Campton town employee named Robert Bain about a potential marijuana grow near Chandler Hill Road and Mason Road. On September 5, state police officers met with Bain near Chandler Hill Road to locate the marijuana plants. The area by Chandler Hill Road and Mason Road was heavily wooded. The officers searched the woods for about an hour before finding two clusters of marijuana plants growing at the edge of the wooded area—about 200-300 meters from the residence at 201 Mason Road. The next day, the officers went back to the grow site and set up a motion-activated video camera. On September 16, the officers checked the camera and viewed footage showing an individual with a red backpack and tan shorts tending the marijuana plants. Through further investigation, the officers concluded that Apicelli was renting the 201 Mason Road residence and that two cars parked in front were registered in Apicelli's name.

Based on this evidence, the officers obtained a warrant to search the house at 201 Mason Road and arrest Apicelli. On September 17, the officers executed the search warrant. Inside the residence, the officers found additional marijuana plants, marijuana drying, and packaged marijuana as well as a red backpack and tan shorts. Apicelli was not present during the search or arrested. Apicelli was subsequently charged with and convicted of one count of manufacturing marijuana.

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

"Given that no marijuana was ever found on Apicelli's person, the Government relied upon the doctrine of constructive possession to link Apicelli to the marijuana found at 201 Mason Road. 'Constructive possession exists when a person knowingly has the power and intention at a given time to exercise dominion and control over an object either directly or through others.' *United States v. García-Carrasquillo*, 483 F.3d 124, 130 (1st Cir. 2007) (quoting *United States v. McLean*, 409 F.3d 492, 501 (1st Cir.

2005)). Nothing prohibits the government from relying entirely on circumstantial evidence to show constructive possession.

"We conclude that the Government's circumstantial evidence was strong enough for a rational jury to conclude beyond a reasonable doubt that the marijuana found in the wooded area and inside the 201 Mason Road residence belonged to Apicelli. First, the Government's evidence led to the reasonable inference that Apicelli lived at 201 Mason Road. In addition to the cars, registered in Apicelli's name observed during the officers' surveillance, the search revealed mail addressed to Apicelli and a debit card bearing Apicelli's name.

"Second, the record also supports the reasonable inference that Apicelli was the only person who lived at 201 Mason Road. The officers did not see any cars parked in front of 201 Mason Road during their investigation besides the two registered to Apicelli. Apicelli's landlord, Rene Dubois, testified that the lease required Apicelli to notify him if any other person lived at the residence for an extended period of time and he received no such notice. Finally, one of the investigating officers, Sgt. Patrick Payer testified that only one person appeared to live in the house. Although Payer acknowledged the residence had two bedrooms, the second bedroom appeared to belong to a child and 'did not look lived in.' Based on this evidence, a jury could infer that Apicelli was the only person who lived there at the time the officers found the marijuana plants and therefore the plants belonged to him.

"Finally, the Government presented evidence linking whoever lived at 201 Mason Road to the marijuana grow at the edge of the woods. In addition to the plants' proximity to the property, the officers found a red backpack and tan shorts like those seen on the surveillance footage inside 201 Mason Road. Notably, the tan shorts were found in the only bedroom in the residence that appeared to belong to an adult. Putting two and two together, a rational jury could conclude that because the clothing seen on the footage was found inside 201 Mason Road and Apicelli was the home's only resident, Apicelli was the person seen on the surveillance footage."

MIRANDA:
Consent to Search

United States v. Calvetti
CA6, No. 15-1526, 9/8/16

The significant issue raised in this case is whether Calvetti's consent to search her residence falls within the ambit of the Fifth Amendment. Upon review, the Sixth Circuit Court of Appeals found, in part, as follows:

"*Miranda* warnings are not independent rights; rather, they are prophylactic rules stemming from the Fifth Amendment privilege against self-incrimination. See *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010). The privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990). In

order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.

"In *United States v. Cooney*, we ruled that the Cooney defendant's signing of a consent to search form after invoking her right to remain silent did not violate the Fifth Amendment because the consent is not evidence of a testimonial or communicative nature. 26 F. App'x 513, 523 (6th Cir. 2002). Giving consent to search is not in itself a testimonial statement because it does not 'relate a factual assertion or disclose information.' See *Muniz*, 496 U.S. at 594. While the Cooney defendant's consent to search led to the disclosure of incriminating documents, that evidence was physical, not testimonial. *Cooney*, 26 F. App'x at 518–19. Consenting to a search is therefore not the type of statement that falls within the protections of the Fifth Amendment. See *Elstad*, 470 U.S. at 304 (The Fifth Amendment, of course, is not concerned with nontestimonial evidence.) This approach is consistent with the majority of our sister circuits. See *United States v. Hidalgo*, 7 F.3d 1566, 1568 (11th Cir. 1993) (A consent to search is not a self-incriminating statement; it is not in itself evidence of a testimonial or communicative nature. We are not alone in our position on this issue as every federal circuit court which has addressed this issue has reached the conclusion that a consent to search is not an incriminating statement. *Cody v. Solem*, 755 F.2d 1323, 1330 (8th Cir. 1985) (Simply put, a consent to search is not an incriminating statement…While the search taken pursuant to that consent disclosed incriminating evidence, this evidence is real and physical, not testimonial.)

"Accordingly, as the majority of our sister circuits have held, a consent to search is not a self-incriminating statement subject to the protection of the Fifth Amendment. The violation of Calvetti's Fifth Amendment right to remain silent provides no basis for suppressing the evidence found in her Dearborn Heights home arising out of her consent to search."

MIRANDA: Free to Leave

Cain v. State; ACA, No. CR-15-802, 2016 Ark. App. 398, 9/14/16

Kevin Fairl Cain was charged in the Circuit Court of Washington County with negligent homicide the day after a truck crashed, burned, and resulted in a fatality. The circuit court denied Cain's motion to suppress statements he made at the scene to Corporal Jason Davis of the Arkansas State Police, in which Cain admitted that he was the driver and had recently consumed alcohol and prescription drugs. Cain argues that his statements were inadmissible because they were custodial and he had not been advised of his *Miranda* rights.

Corporal Davis testified to events that occurred on the evening of August 27, 2014. He received a call about a burning vehicle, drove to the rural crash scene, and arrived around midnight—about an hour after the crash had occurred.

Cain was standing on the roadside with sheriff's deputies and paramedics who were administering medical treatment to him. He had a large laceration on his face. First responders told Davis that Cain had wandered away—"down the road a little"—but had returned on his own to the scene of the crash. Davis turned his attention to Cain after learning that a crash victim, Danielle Bishop, was deceased.

Davis further testified that investigating the crash was his responsibility and that sheriff's deputies simply kept traffic away and secured the area. Davis stated, "I questioned [Cain] and he admitted he was the driver of the vehicle. I also asked him if he had consumed any alcohol and he said he had a few beers." Davis testified that he did not arrest Cain, that Cain was not handcuffed or placed in the patrol car, that "because he was part of a traffic crash he had to stay to give information on the crash," and that he was "detained" while Davis was asking questions and trying to identify the driver. No one from law enforcement accompanied Cain when the decision was made to transport him by ambulance to a hospital, where his blood sample was taken shortly after arrival. Davis testified that a reason for taking the sample, besides there being a requirement to test the blood or urine of a person involved in a fatal accident, was that Davis suspected intoxication. Cain spent the night in the hospital. The next day, after being medically released from the hospital, he was arrested at Davis's request.

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

"…Custody, for purposes of *Miranda*, is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. Determining whether an individual's freedom of movement was curtailed is simply the first step in the analysis; an additional question is whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. Here, although Cain was required to remain at the crash scene, see Ark. Code Ann. § 27-53-101(b)(1) (Repl. 2010) (making it a felony for a driver to leave the scene of an accident in which a personal injury or death has occurred), such compulsion is not akin to the restraint of a formal arrest. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420 (1981) (holding that a motorist detained for a routine traffic stop was not in custody even though it was a crime to drive away without permission); see also, e.g., *In re A.N.C.*, 750 S.E.2d 835, 839–40 (N.C. 2013) (holding that a statutory requirement to remain on the scene was not equivalent to formal arrest for purposes of Miranda).

"We agree with the State that Cain was not entitled to a Miranda warning before the investigating officer asked him if he was the driver at the time of the crash and if he had previously consumed alcohol or other intoxicants. He was questioned in the initial investigation of a fatal traffic accident while standing on the roadside, with other people in public view. He was not restrained or detained, was asked a

minimal number of questions, and was allowed to leave afterward. He was not questioned in an environment presenting the inherently coercive, incommunicado pressures of station-house questioning; nor was he in custody for purposes of *Miranda* merely because of his legal obligation to stay at the scene.

"Cain's statements were not custodial, and *Miranda* warnings were not necessary. The Arkansas Court of Appeals held that the trial court did not clearly err by denying his motion to suppress."

SEARCH AND SEIZURE: Affidavit for Search Warrant; Incorrect Dates

Bathrick v. Arkansas, ACA, No. CR-16-286, 2016 Ark. App. 444, 9/28/16

In this case, the affidavit that was the basis for a warrant indicated that the confidential informant (CI) supplied information on November 4, 2015, and November 5, 2015. These two dates were nine months *after* the date the warrant was issued on February 5, 2015. Clearly, the dates in the affidavit are incorrect.

Upon review, the Court found as follows:

"On this record, we cannot conclude that the affidavit for search warrant set forth facts and circumstances establishing probable cause to believe that things subject to seizure would be found in Mr. Bathrick's house. This is because the affidavit represented that the CI observed these items on November 4, 2015, and that the affiant had interviewed the CI regarding his observations on November 5, 2015, which was nine months after the affidavit was sworn out on February 5, 2015.

"The trial court and the State characterize the inaccurate dates given in the affidavit as a scrivener's error or a misprision. Although the dates were clearly incorrect, the trial court had no basis upon which to determine which dates were intended in place of the incorrect dates in the affidavit. There was no evidence that, when confronted with the erroneous dates in the affidavit, the issuing magistrate took any testimony to clear up the discrepancy. Nor was there any testimony presented at either of the suppression hearings. The trial court's conclusion that the intended dates were the day before and the day of the application for search warrant was mere speculation.

"In *Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983), the Supreme Court held that some mention of time must be included in the affidavit for a search warrant. Time is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant, not that it may have been there weeks or months before. Before a search is ordered it must be shown or be easily discernible when the contraband was seen or the illegal activity occurred. In the present case, it is impossible to ascertain from the affidavit when the CI allegedly observed marijuana in Mr. Bathrick's home, and therefore the affidavit was insufficient to support the issuance of the search warrant.

"In its brief to this court, the State urges that even if the writer's error in the affidavit rendered it defective, we nonetheless can affirm the denial of appellant's motion to suppress based on the good-faith exception to the exclusionary rule as announced by the supreme court in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon,* the United States Supreme Court fashioned a good-faith exception to the requirement of a valid warrant so that suppression of evidence would not be appropriate when a law enforcement officer acted in good-faith reliance on a facially valid warrant. The test for determining when the good faith exception applies is whether it was objectively reasonable for a well-trained police officer to conclude that the search was supported by probable cause.

"The Arkansas Court of Appeals concluded that the good-faith exception does not apply to these facts because there was no testimony by any officer either before the issuing magistrate or at either of the suppression hearings. Instead, the only information presented to the trial court at the suppression hearings was contained in the affidavit itself. This court may go beyond the four corners of an affidavit and consider testimony to determine whether the officers executing the search warrant did so in objective good-faith reliance on the judge's finding of probable cause to issue the search warrant, and we may also consider information known to the executing officers that may or may not have been communicated to the issuing judge. *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998). Here, however, neither the trial court nor this court has evidence from which to determine whether the officers executing the search were acting in good faith. Therefore, the crucial defect in the affidavit could not be saved by the good-faith exception."

SEARCH AND SEIZURE:
Allegation of False Statement

Bragg v. State, ACA, No. CR-15-926, 2016 Ark. App. 378, 9/7/16

Coordinator Robert Braden of the Fourteenth Judicial District Drug Task Force prepared an affidavit and search warrant for Bragg's home, vehicle, and a nearby shed. These locations were searched, and several incriminating items were seized. The State charged Bragg with possession of methamphetamine with intent to deliver, possession of firearms by certain persons, possession of drug paraphernalia, and possession of marijuana. Bragg filed a motion to suppress evidence alleging, among other things, a violation of the United States Supreme Court's holding in *Franks v. Delaware*, 438 U.S. 154 (1978).

Bragg argues that the affiant identified "Anthony Bragg" as the person who categorically did the things alleged in the search-warrant affidavit, yet Robert Williams, the witness, never named "Anthony Bragg" as the person on whom he made the complaint. Bragg contends that inserting the name "Anthony Bragg" in the affidavit was a total disregard for the truth and improper under *Franks v. Delaware*, 438 U.S. 154 (1978). Bragg maintains that if the false information is

set aside, there are no facts to support probable cause.

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

"*Franks* provides the proper analysis for determining whether false material, misleading information, or omissions render an affidavit in support of a search warrant fatally defective. A warrant should be invalidated if a defendant shows by a preponderance of the evidence (1) that the affiant made a false statement knowingly and intentionally, or with reckless disregard for the truth, and (2) that with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause. *State v. Rufus*, 338 Ark. 305, 993 S.W.2d 490 (1999). Similarly, when an officer omits facts from an affidavit, the evidence will be suppressed if the defendant establishes by a preponderance of the evidence that (1) the officer omitted facts knowingly and intentionally, or with reckless disregard, and (2) the affidavit, if supplemented with the omitted information, is insufficient to establish probable cause.

"Quoting from *United States v. Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966), the *Franks* Court said, 'When the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing.' The *Franks* Court further said that this does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

"To uphold the validity of an affidavit made in support of a search warrant, it is not necessary that the affidavit be completely without inaccuracy as long as the inaccuracies are relatively minor when viewed in the context of the totality of the circumstances, including the affidavit taken as a whole and the weight of the testimony of the participants who procured and executed the search warrant. *Moss v. State*, 2011 Ark. App. 14, 380 S.W.3d 479.

"While the affidavit contained a misstatement to the extent that Braden suggested that Williams had provided Bragg's first and last name, Bragg has failed to sustain his burden of showing that Braden added or omitted material knowingly, intentionally, or recklessly, as opposed to making a careless mistake. Cf. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996). In his written statement, Williams identified his maintenance man employed at the State Line RV Park on or about January 23, 2015. According to the stipulations, in speaking with the law-enforcement officers, Williams had initially said that it was 'Anthony, the maintenance man,' and in a later phone conversation with Braden, Williams added that his maintenance man was

a black male. There was no evidence that there was more than one black maintenance man named Anthony working at the RV park around that time. The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized. Ark. R. Crim. P. 13.1. Here, Braden was not required to insert Bragg's full name in the affidavit in order to describe him with particularity.

"Even if Bragg's full name were removed from the affidavit, the remaining information provided a sufficient description that the police, through reasonable effort or inquiry, could have located and identified Bragg as the person to whom Williams had referred. We note that there was little likelihood of a mistake being made in executing the search given that Bragg was known to Braden, as well as several other law-enforcement officers, including one who had previously arrested Bragg at his residence at the RV park.

"Considering the totality of these circumstances and giving proper deference to the trial court's findings, we cannot say that the trial court clearly erred in denying Bragg's motion to suppress."

SEARCH AND SEIZURE:

Cell Telephone; Probable Cause Based Solely On Officer's Opinion

Commonwealth v. White
MSJC, No. SJC-11917, 9/28/16

In this case, the Massachusetts Supreme Judicial Council held that probable cause to search or seize a person's cellular telephone may not be based solely on an officer's opinion or belief that the device is likely to contain evidence of the crime under investigation.

The Court found, in part, as follows:

"The Massachusetts Court stated before police may search or seize any item as evidence, they must have a substantial basis for concluding that 'the item searched or seized contains evidence connected to the crime' under investigation. *Commonwealth v. Escalera*, 462 Mass. 636, 642 (2012). In other words, the government must demonstrate a nexus between the crime alleged and the article to be searched or seized. See *Commonwealth v. Matias,* 440 Mass. 787 (2004). The nexus need not be based on direct observation. It may be found in the type of crime, the nature of the evidence sought, and normal inferences as to where such evidence may be found.

"While police need not make a showing beyond a reasonable doubt, strong reason to suspect is not adequate. *Commonwealth v. Kaupp,* 453 Mass. 102, 111 (2009), quoting *Commonwealth v. Upton,* 394 Mass. 363, 370 (1985). The experience and expertise of a police

officer may be considered as a factor in the nexus determination. *Commonwealth v. West*, 55 Mass. App. Ct. 467, 470 (2002). Nonetheless, where the location of the search or seizure is a computer-like device, such as a cellular telephone, the opinions of the investigating officers do not, alone, furnish the requisite nexus between the criminal activity and the device to be searched or seized.

"Rather, police first must obtain information that establishes the existence of some particularized evidence related to the crime. *Commonwealth v. Dorelas*, 473 Mass. 496, 502 (2016). Only then, if police believe, based on training or experience, that this particularized evidence is likely to be found on the device in question, do they have probable cause to seize or search the device in pursuit of that evidence.

"Here, prior to seizing the defendant's cellular telephone, police had received information that the robbery and homicide under investigation had been committed by several people, that the defendant likely was one of those people, and that he owned a cellular telephone. They also knew from experience that these individuals often use cellular telephones to communicate with each other, and that these devices may contain evidence of such communications. According to their own statements, however, the detectives here did not have any information that a cell phone was used in the crime under investigation, nor did they claim that there existed a particular piece of evidence likely to be found on such a device. In essence, then, their decision to seize the defendant's cellular telephone was made because they had reason to believe that the defendant had participated with others in the commission of a robbery-homicide and their training and experience in cases involving multiple defendants suggested that the device in question was likely to contain evidence relevant to those offenses.

"This, without more, does not satisfy the nexus requirement. Information establishing that a person may be guilty of a crime does not necessarily constitute probable cause to search or seize the person's cellular telephone, even where the police believe, based on their training and experience in similar cases, that the device is likely to contain relevant evidence. This, without more, does not satisfy the nexus requirement.

"Information establishing that a person may be guilty of a crime does not necessarily constitute probable cause to search or seize the person's cellular telephone, even where the police believe, based on their training and experience in similar cases, that the device is likely to contain relevant evidence. *Commonwealth v. Pina*, 453 Mass. 438, (2009). Even where there is probable cause to suspect the defendant of a crime, police may not seize or search his or her cellular telephone to look for evidence unless they have information establishing the existence of particularized evidence likely to be found there."

SEARCH AND SEIZURE:
Consent; Joint Possession
United States v. Wright
CA7, No. 15-3109, 9/23/16

Urbana, Illinois, police officers responded to a domestic dispute. In their report, the officers noted that Leslie Hamilton called Talon Wright a "pedophile" during the altercation at their apartment. No arrests were made.

The following morning, Tim McNaught, who specializes in crimes against children, reviewed the report as a matter of course, and called Hamilton. Hamilton granted permission to search the couple's apartment and computers for evidence of child pornography. McNaught seized a desktop computer from the living room; forensic analysis revealed images of child pornography on the hard drive. Wright was charged with possessing child pornography and sexually exploiting a minor. He moved to suppress the evidence, arguing that Hamilton lacked authority to consent to the warrantless search.

McNaught testified that Hamilton had stated that Wright used his cellphone to visit a website called "Jailbait," which McNaught recognized as featuring pornographic images of underage girls. Hamilton also mentioned seeing a video with a disturbing title on the computer. McNaught testified that he had "previewed" the hard drive by connecting it to his laptop, a standard procedure. Hamilton described the living arrangements at the apartment, which was leased in her name. The district judge denied the motion. Wright pleaded guilty, reserving his right to appeal the denial of suppression.

The Seventh Circuit affirmed stating, "Although Wright owned the computer, Hamilton was a joint user who enjoyed virtually unlimited access to and control over it."

SEARCH AND SEIZURE: Emergency Search; Community Caretaking Function
Corrigan v. District of Columbia
DCCA, No. 15-7098, 11/8/16

Matthew Corrigan is an Army Reservist and an Iraq war veteran who, in February 2010, was also an employee of the U.S. Department of Labor's Bureau of Labor Statistics. On the night of February 2, 2010, suffering from sleep deprivation, he inadvertently phoned the National Suicide Hotline when dialing a number he thought to be a Veterans Crisis Line. When he told the Hotline volunteer that he was a veteran diagnosed with PTSD, she asked whether he had been drinking or using drugs and whether he owned guns. Corrigan assured her that he was only using his prescribed medication and was not under the influence of any illicit drugs or alcohol; he admitted that he owned guns. The volunteer told him to "put [the guns] down," and Corrigan responded, "That's crazy, I don't have them out." Despite Corrigan's assurances that his guns were safely stored, the volunteer repeatedly asked him to tell her "the guns are down." When asked if he intended to hurt himself

or if he intended to "harm others," he responded "no" to both questions. Frustrated, Corrigan eventually hung up and turned off his phone, took his prescribed medication, and went to sleep. The Hotline volunteer proceeded to notify the MPD.

At approximately 11:13 p.m., officers from the MPD Fifth District were dispatched to Corrigan's home for "Attempted Suicide." Certain undisclosed "information" led them "to believe the subject was possibly armed with a shotgun." Corrigan lived at 2408 North Capitol Street, in Northwest D.C., in the basement apartment of a row house that had its own front and back doors. Upon arrival, the officers thought they detected a "strong odor" of natural gas and contacted the gas company, which turned off the gas to the row house. The officers contacted Lieutenant Glover at home and he, in turn, gave orders to declare a "barricade situation," which meant that the ERT also went to Corrigan's home. The MPD Command Information Center advised that Corrigan, a white male, age 32, had no known criminal record and there were no outstanding protective orders against him. An ERT investigator learned that Corrigan was a U.S. Army combat veteran who had served recently during the Iraq war and owned a rifle and several handguns. Additionally, he had recently terminated a romantic relationship and was under psychiatric care for PTSD and depression. He also had a dog.

At 2:00 a.m., the ERT assumed tactical control of the situation. At 2:10 a.m., the MPD began to secure the perimeter around Corrigan's home, including evacuating his neighbors. At 2:30 a.m., Lieutenant Glover arrived on the scene and called on the EOD to respond. According to Lieutenant Glover's testimony, Corrigan's upstairs neighbor, who was his landlady, had told MPD officers that Corrigan occasionally had overnight guests, including an ex-girlfriend. An officer had reached the ex-girlfriend by cell phone, and she said Corrigan was a veteran taking prescribed medication for PTSD, had expertise in IEDs, and trained others in detecting and mitigating IED incidents. She also recalled seeing a green duffel bag containing "military items" in Corrigan's home that she had been told "not to touch" because "they were his guns and military stuff."

Around 3:00 a.m., MPD negotiators attempted to speak with Corrigan by dialing his cell phone number, calling his name over a public address system, and knocking or kicking his front door. The MPD had no indication, however, that Corrigan's failure to answer the door was suspicious. The officers had been told by his landlady and ex-girlfriend that Corrigan was likely sleeping, having taken his prescribed medication; his voicemail message stated "Hi, you've reached Matt, if I'm unavailable, I'm probably asleep." Indeed, his landlady, upon being advised that the reason for the police presence was Corrigan's attempted suicide, had insisted that was "outrageous" and repeatedly told the MPD officers that there was "a big misunderstanding" because she had known Corrigan for two years and had "never felt more comfortable with a

neighbor in [her] life." She had explained to the officers that Corrigan had guns because he was in the military and that his home had electric, not gas, appliances.

Corrigan testified that around 4:00 a.m. he became aware of someone kicking at his front door, and then his back door, and was "terrified," feeling he was being "hunted." He moved from his bedroom to the bathroom where he felt safest and tried to go back to sleep. When he turned on his cell phone at 4:16 a.m., he received a flood of voicemails. He returned the call of the detective who was one of the MPD negotiators. Corrigan initially said he was at another address, because he was scared, but within minutes admitted he was at home. Having noticed the flood light and all the police officers at the front and back of his home, he told the negotiator he was coming outside but needed to put on clothes because of the fallen snow. He described the clothes he would be wearing and that his cell phone would be in his left hand when he came out so the police would not shoot him because they thought he had a gun.

Exiting his home within 20 minutes of first speaking to the negotiator, Corrigan closed and locked his front door so his dog would not get out and no one could enter his home. In order to appear as non-threatening as possible, he knelt on the ground and lay on his back. MPD officers immediately secured his hands with a white "zip-tie," searched his person (on which he had only a military identification card and his cell phone), and took him to a police vehicle where he was told he had not committed any crime and the officers only wanted to talk to him. Eventually, he was taken to a Veterans Hospital where he voluntarily admitted himself for PTSD symptoms triggered by the night's events.

When Corrigan was questioned prior to being removed from the scene by the MPD, he refused to give his house key to an MPD officer or to consent to the MPD entering his home. The officer who had asked for his key told him: "I don't have time to play this constitutional bullshit. We're going to break down your door. You're going to have to pay for a new door." Corrigan responded, "It looks like I'm paying for a new door, then. I'm not giving you consent to go into my place."

After Corrigan was in MPD custody, Lieutenant Glover ordered the ERT, led by Sergeant Pope, to break in Corrigan's home to search for "any human threats that remained or victims." Glover testified that he thought the "sweep" of Corrigan's home was necessary because the officer who spoke to Corrigan's ex-girlfriend had not reported whether he asked her whereabouts or visually confirmed her location; Corrigan's ex-girlfriend or other persons had stayed overnight in his home, so other persons could have been present; a gas leak had been reported and Corrigan had initially "dece[ived]" the police about his location and had told the Hotline volunteer that he did not intend to harm "others," potentially implying that someone else might be inside. As a matter of course, Glover explained, if an ERT unit is called to a scene it goes inside 99.9% of the time, because "[s]tandard protocol" assumes "if there's one [person

inside] there's two, if there's two there's three, if there's three there's four, and exponentially on up."

Upon breaking in Corrigan's home, the ERT encountered only Corrigan's dog; no one was found inside and no dangerous or illegal items were in plain view. Nonetheless, Lieutenant Glover thereafter ordered the EOD, led by Officer Leone, to break in Corrigan's home again to search for "any hazardous materials that could remain on the scene and be dangerous to the public or anybody else in that block or area." In Glover's view, a thorough top-to-bottom warrantless search was necessary because the EOD had not cleared Corrigan's home of any hazardous materials or devices. Glover said he believed such hazards "to be possibly inside" based on Corrigan's ex-girlfriend's reference to a duffel bag containing unspecified "military items."

During the second MPD search, EOD officers cut open every zipped bag, dumped onto the floor the contents of every box and drawer, broke into locked boxes under the bed and in the closet, emptied shelves into piles in each room, and broke into locked boxes containing Corrigan's three firearms. Inside the locked boxes, the EOD found, and seized, an assault rifle, two handguns, a military smoke grenade, a military "whistler" device, fireworks, and ammunition.

Corrigan was charged that day, February 3, 2010, with three counts of possession of an unregistered firearm and seven counts of unlawful possession of ammunition. Later, when he was released from the Veterans Hospital into police custody he was arraigned in the D.C. Superior Court, after spending three days in the central cell block. He was held at D.C. jail until he was released on his own recognizance on February 19. Upon returning home, Corrigan found his home in complete disarray: the police had left the contents of his bureau drawers and shelves scattered on the floor, his electric stove had been left on, and the front door of his home was left unlocked. On April 19, 2012, the D.C. Superior Court judge granted Corrigan's motion to suppress the seized firearms and ammunition, finding that the government could not show facts justifying the warrantless entry and search of his home. Dist. of Columbia v. Corrigan, No. 2010 DCD 2483, Super. Ct. Tr. 10 (Apr. 19, 2012). The District government nolle prossed all the charges.

Meanwhile, on February 1, 2012, Corrigan sued the District of Columbia and individual MPD officers, pursuant to 42 U.S.C. § 1983, alleging that the warrantless entries and searches of his home, and the seizure of his property from his home, violated the Fourth Amendment. The district court, following discovery and dismissal of some officers from the case, initially denied the remaining defendants' motion for summary judgment, but reconsidered and granted summary judgment. It ruled that no Fourth Amendment violation had occurred in view of the exigent circumstances, and that if the community caretaking doctrine applied to a home, it would also justify the searches. The district court ruled there had been no violation of a clearly established right, concluding the officers

were entitled to qualified immunity.

Upon review, the Court of Appeals for the District of Columbia found, in part, as follows:

"…Even assuming, without deciding, that the initial "sweep" of Corrigan's home by the MPD Emergency Response Team (ERT) was justified under the exigent circumstances and emergency aid exceptions to the warrant requirement, the second top-to-bottom search by the Explosive Ordnance Disposal Unit (EOD) after the MPD had been on the scene for several hours was not. The MPD had already secured the area and determined that no one else was inside Corrigan's home and that there were no dangerous or illegal items in plain sight. Corrigan had previously surrendered peacefully to MPD custody. The information the MPD had about Corrigan—a U.S. Army veteran and reservist with no known criminal record—failed to provide an objectively reasonable basis for believing there was an exigent need to break in Corrigan's home a second time to search for 'hazardous materials,' whose presence was based on speculative hunches about vaguely described 'military items' in a green duffel bag. And assuming, without deciding, that the community caretaking exception to the warrant requirement applies to a home, the scope of the second search far exceeded what that exception would allow. In the end, what the MPD would have the court hold is that Corrigan's Army training with improvised explosive devices (IEDs), and the post traumatic stress disorder (PTSD) he suffers as a result of his military service—characteristics shared by countless veterans who have risked their lives for this country—could justify an extensive and destructive warrantless search of every drawer and container in his home. Neither the law nor the factual record can reasonably be read to support that sweeping conclusion.

"Because it was (and is) clearly established that law enforcement officers must have an objectively reasonable basis for believing an exigency justifies a warrantless search of a home, and because no reasonable officer could have concluded such a basis existed for the second more intrusive search, the officers were not entitled to qualified immunity across the board. Accordingly, we reverse the grant of summary judgment in part and remand the case for further proceedings. Upon remand, the district court can address a remaining claim of qualified immunity based on reasonable reliance on a supervisor's order and Corrigan's claim of municipal liability, which the district court did not reach."

SEARCH AND SEIZURE:
Probable Cause; Informant Information

United States v. Thomas
CA7, No. 15-2483, 8/29/16

William Thomas contended that the government violated his due process rights by refusing to turn over information about the confidential informant whose testimony formed the basis for the search warrant on which the police relied.

On June 4, 2013, officers from the Chicago Police Department executed a search warrant at the basement apartment of 905 North Kedvale Avenue, in the Humboldt Park neighborhood of Chicago. The search revealed a nine-millimeter Glock semi-automatic pistol loaded with ten rounds of ammunition, a "BB" gun pistol, a plastic baggie containing roughly 17 grams of heroin, and a digital scale. The officers also discovered documents in Thomas's name.

Thomas promptly moved to suppress the evidence seized during the search. He argued that the warrant authorizing the search was deficient on its face because it was supported by a confidential informant "of unknown background and unknown reliability." According to Thomas, the issuing judge did not know whether the informant was under arrest at the time of his statements, whether information was exchanged for favorable treatment, whether he was a paid informant, how he knew the defendant, whether he used aliases, whether he was a rival gang member, whether he was on probation at the time, his criminal history, and his track record as an informant.

The warrant supporting the search of Thomas's apartment was based on an affidavit signed by Chicago Police Detective Gregory Jacobson. Jacobson's affidavit summarized information provided by a confidential informant. It stated that the informant told Jacobson that he or she had visited the basement apartment of a man nicknamed "Burpy" on May 23, 2013. The informant gave a detailed physical description of Burpy, the approximate location of Burpy's apartment, and identified Burpy as a member of the "Four Corner Hustler" gang. While Burpy and the informant were in Thomas's apartment discussing recent gang conflicts, Burpy took two .40-caliber handguns out of the pockets of some clothing hanging on a rack inside the apartment: one was a blue steel pistol, and another a smaller blue and gray steel "baby" model. Holding the pistols, Burpy said, "I am ready for any of those niggas [sic] who try and take what's mine." He then returned the firearms to the pockets of the clothing on the rack. The informant, who told Jacobson that he or she was experienced with firearms, stated that the ones Burpy had handled were real and noted that both had magazines inserted.

In order to identify Burpy and corroborate the informant's information, the affidavit said, Jacobson queried a law enforcement database for a Burpy living near the location identified by the informant. He showed the informant several police photographs, including one of Thomas. The informant positively identified Thomas as Burpy. Jacobson then reviewed Thomas's criminal history, which included a felony conviction for aggravated vehicular hijacking. He noted that several arrest reports listed Thomas's nickname as "Burpy" or "Burpee." He later drove the informant to the area where he or she had described the conversation as having taken place. The informant identified 904 North Kedvale Avenue as the building where Burpy's basement apartment was located. This address matched Thomas's most recent arrest report.

Eleven days after their first meeting, Jacobson and the informant appeared before Cook County Circuit Judge Sandra G. Ramos. The informant swore to the contents of the affidavit and the judge was told about the informant's detailed criminal history and the circumstances under which the informant came to cooperate with law enforcement. Judge Ramos found probable cause for a search of Thomas's residence, and issued a search warrant. The police performed the search the next day.

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

"The issuing judge found that the search warrant was supported by probable cause, and we have no reason to disturb that conclusion. In evaluating a probable cause determination based on a confidential witness's report, we look at all the circumstances, including [1] the level of detail, [2] the extent of firsthand observation, [3] the degree of corroboration, [4] the time between the events reported and the warrant application, and [5] whether the informant appeared or testified before the magistrate. *United States v. Glover*, 755 F.3d 811, 816 (7th Cir.2014). We do so with great deference to the issuing judge's conclusions. *United States v. Sims*, 551 F.3d 640, 644 (7th Cir. 2008).

"The confidential informant in this case performed strongly on all five points. The informant provided details about Thomas's apartment, that Thomas was a member of the Four Corner Hustler gang, and saw him remove two handguns from items of clothing. The informant described the firearms in detail, noted both had a magazine inserted, and described where they were located in the apartment. The informant stated that, based on his or her experience, they were real handguns.

"The informant also repeated Thomas's statement that he was 'ready for any of those niggas [sic] who try and take what's mine.'

"The informant's information was corroborated: Jacobson found a prior arrest report that noted Thomas's nickname (Burpy), physical description, gang affiliation, age, and residence. The informant selected Thomas from a photo array. The informant identified Thomas's residence on sight; the address was in a law enforcement database.

"Absent an indication that Thomas intended to dispose of it, 11 days is not long enough for information about a gun kept for personal protection to become stale. Cf. *United States v. Harju*, 466 F.3d 602, 608 (7th Cir. 2006) (noting, in applying the good faith exception, that unlike small amounts of drugs or cash, a gun is not likely to have been sold (or consumed) within a three-week period). Finally, the informant appeared before the judge who issued the warrant, and the judge was aware of the informant's detailed criminal history and the circumstances under which the informant came to cooperate with law enforcement.

"The judge was not aware of the exact benefit the informant likely sought from cooperation. It seems likely, however,

that the issuing judge assumed that the informant was getting a similar benefit, even if she did not know exactly what it was. See Molina ex rel. *Molina v. Cooper,* 325 F.3d 963, 970 (7th Cir. 2003) (Courts are aware that informants are frequently facing charges and hoping for deals.). This omission does not undermine the warrant's otherwise ample probable cause."

SEARCH AND SEIZURE:

Roadblocks; Justification

United States v. Arnold
CA8, No. 15-3697, 8/31/16

On March 24, 2014, an Iberia Bank branch in Little Rock was robbed. Detective Bobby Martin in the robbery unit with the Little Rock Police Department testified that Devonta Piggee was developed as a suspect and was arrested for the robbery. Piggee gave a statement to police that the person involved with him was from Pine Bluff and named "Cam." As a part of the Iberia Bank robbery investigation, a detective from the Pine Bluff Police Department was contacted, and he identified "Cam" as Arnold. Seven weeks later, on May 13, 2014, a U.S. Bank in Little Rock was robbed. At this point, the Little Rock Police Department began investigating Keyontae Johnson as a suspect. Officers were aware that Piggee, Johnson, and Arnold were all from Pine Bluff.

Two days after the armed robbery of the U.S. Bank, on May 15, 2014, Detective Martin received an anonymous telephone call. The caller told Detective Martin that Johnson was leaving Pine Bluff, and headed toward Little Rock to commit another bank robbery. The caller stated that Johnson was driving a gray Ford Taurus with a temporary license plate from Dane's Auto Sales. Detective Martin then alerted his squad to this information. Later that day, Detective Martin learned that there had been an armed robbery of a bank in Benton, Arkansas. When Detective Martin notified the Benton Police Department about the anonymous tip, the department confirmed that a gray Ford Taurus had been involved in the armed robbery that morning.

Based on the determination that Johnson probably was involved in the armed robbery and would be returning to Pine Bluff, Little Rock Police Officers searched for the gray Taurus by traveling south on Interstate 530 from Little Rock toward Pine Bluff. Little Rock Police Detective Carrie Mauldin, in an unmarked patrol unit, located the gray Taurus at approximately mile marker 22 of Interstate 530. At this point, Little Rock Detective Grant Humphries, who was also in an unmarked patrol unit, joined Detective Mauldin. The two officers then followed the vehicle as it exited the interstate at mile marker 34. At the same time, law enforcement officers in marked patrol units from other agencies in that vicinity also joined to assist. After exiting Interstate 530 and taking two left turns, the gray Taurus was stopped by a roadblock of marked patrol cars. As it turned out, the roadblock stopped two cars. The other car stopped was a black Honda that had been traveling in front of the gray Taurus.

When Detective Martin arrived on the scene a few minutes after the stop, Johnson had been placed in the back of a patrol car. Detective Martin approached Johnson to verify that the individual in the patrol car matched the photograph he had obtained in the U.S. Bank robbery investigation. When Detective Martin looked into the patrol car, Johnson said something to the effect that the car ahead was involved. The black Honda contained two occupants, a female driver and Arnold, who was seated as a passenger. As part of the Iberia Bank robbery investigation, in which Arnold was identified as "Cam," Detective Martin was aware that there was an outstanding warrant for Arnold's arrest. After Arnold provided identification, he and the female driver were taken into custody. Arnold's vehicle was stopped only five or six minutes before he was identified as a suspect in the Benton bank robbery that had just occurred. All three individuals that had been stopped by the roadblock were then transported to the Little Rock Police Department. Once at the police station, officers discovered that the female driver had more than $3,200 on her person.

Arnold argues that the initial stop violated his Fourth Amendment rights because officers lacked probable cause or reasonable suspicion to make the stop.

Arnold argues that the stop of the vehicle in which he was a passenger was unlawful because the justification for it rested solely on an anonymous telephone call and there was no indication that the caller was reliable.

To support his contention that the initial vehicle stop was unlawful, Arnold cites Supreme Court cases, *Alabama v. White*, 496 U.S. 325, 327-29 (1990) and *Florida v. J.L.*, 529 U.S. 266, 270 (2000), for the proposition that a standalone anonymous tip must possess sufficient indicia of reliability to justify an investigatory stop. It is well settled under Terry that an investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion that the person stopped is involved in criminal activity. *Terry v. Ohio,* 392 U.S. 1, 30 (1968); *United States v. Cortez*, 449 U.S. 411, 417 (1981); *United States v. Wheat*, 278 F.3d 722, 726 (8th Cir. 2001). In *White* and *J.L.*, the Supreme Court applied the reasonable suspicion standard in circumstances where the supporting information known to the officers came from anonymous calls about concealed criminal activity. *White*, 496 U.S. at 332 (information from anonymous tip justified the stop where the tip bore adequate indicia of reliability); *J.L.*, 529 U.S. at 271 (information from anonymous tip did not create reasonable suspicion where the caller provided no information from which the police could form a basis for believing that the tipster had knowledge of any criminal activity).

Arnold's argument misapprehends the correct standard to be applied in this case. Specifically, in certain circumstances, the Supreme Court has upheld brief, suspicionless seizures, such as roadblocks. See *Illinois v. Lidster,* 540 U.S. 419, 424 (2004) (Special law enforcement concerns will sometimes justify highway stops without individualized suspicion.). The

constitutionality of the roadblock turns on reasonableness, not individualized suspicion. Thus, the question is whether the roadblock was reasonable under the Fourth Amendment when at the time of the stop, police did not have individualized suspicion for the car in which Arnold was a passenger.

The roadblock was appropriately tailored to stop the vehicle that Johnson was believed to be driving. At the time of the stop, officers had individualized suspicion that implicated Johnson in two armed bank robberies and that he was fleeing from the second robbery. As it happened, Johnson was following the car in which Arnold was a passenger. Although Arnold's vehicle was not known to be involved in the robbery at the time of the roadblock, officers had reliable information that the bank robber was among the two cars that were stopped. Within five or six minutes of being detained, officers took Arnold into custody based on Johnson's indication that Arnold's vehicle was involved, having previously developed him as a suspect in the Iberia Bank robbery, and the knowledge that he had an outstanding warrant for his arrest. Consequently, the officers' employment of the roadblock was reasonable. The district court properly denied Arnold's motion to suppress.

SEARCH AND SEIZURE:
Scanning of Gift Cards
United States v. Turner
CA5, No. 15-50788, 10/13/16

The Court of Appeals for the Fifth Circuit joined its sister circuits in holding that a law enforcement officer's scanning of the magnetic stripe on the back of a gift card is not a search within the meaning of the Fourth Amendment. The court concluded that society does not recognize as reasonable an expectation of privacy in the information encoded in a lawfully seized gift card's magnetic stripe.

SEARCH AND SEIZURE:
Search Warrant; Photographing Hands
United States v. Merrell
CA8, No. 15-3211, 11/18/16

In 2013, the Department of Homeland Security (DHS) began investigating Travis Guenthner for the production of child pornography. The DHS investigation ultimately uncovered 50,000 photographs and 90 videos of suspected child pornography on Guenthner's various computers and devices. That same year Guenthner pled guilty to five counts of sexual exploitation of minors and two counts of coercion or enticement and was sentenced to life in prison.

Among the child pornography found in Guenthner's possession was a folder containing sexually explicit photographs of the torso region of a prepubescent girl (Minor A). A woman's hands are

visible in some of the images in the folder, sometimes spreading Minor A's genitals apart. Through forensic examinations the investigators determined that these photos were created in 2010.

In 2014, Guenthner told investigators that Roxanne Merrell had sent him the images of Minor A and that she had produced the images at his request. Law enforcement officers then obtained two search warrants, one for Merrell's home and the other for the search of the person of "Roxanne Merrell," specifically body views and photography of her hands.

Merrell contends that the 47 photographs should have been suppressed because they exceeded the scope of the warrant.

The Eighth Circuit Court of Appeals disagrees, finding in part as follows:

"…Although Merrell is correct that the Fourth Amendment requires a warrant to describe particularly 'the things to be seized,' there is no requirement that 'search warrants…include a specification of the precise manner in which they are to be executed.' *Dalia v. United States,* 441 U.S. 238, 255, 257 (1979). We generally leave the details of how best to proceed with the performance of a search authorized by warrant to the judgment of the officers responsible for the search. In this case, the warrant specified that law enforcement could search the person of Roxanne Merrell, specifically body views and photography of her hands. The manner in which the officers carried out the search here did not exceed the scope of the warrant.

"Nor do we agree with Merrell that the photography process exceeded the bounds of reasonableness required by the Fourth Amendment. See *U.S. Const. Amend. IV*; see also *Hummel-Jones v. Strope,* 25 F.3d 647, 650 (8th Cir. 1994) (noting that a valid warrant does not immunize the execution of a search from reasonableness review). The Fourth Amendment reasonableness standard is flexible and intends to balance the private interests of citizens against the countervailing public interests of law enforcement. See *United States v. Bach*, 310 F.3d 1063, 1067 (8th Cir. 2002); see also *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977). Merrell argues that such a balance was exceeded in her case because it was not necessary to take her to the police station or to touch her in order to obtain the photographs. The fact that there may be less intrusive means by which law enforcement officers could conduct a search does not make it necessarily unreasonable, however. *United States v. Williams*, 477 F.3d 974, 976 (8th Cir. 2007). Moreover, the abbreviated physical touching of Merrell was limited to her hands during a twenty minute period. Based on the totality of the circumstances, we conclude that the manner in which law enforcement executed the search warrant here was reasonable."

SEARCH AND SEIZURE:

Stop and Frisk; Plain Feel

United States v. Craddock
CA8, No. 15-3705, 11/8/16

On November 20, 2013, a few minutes before 11:00 a.m., Officer Charles Prichard of the Kansas City Police Department was stopped at a stop sign when he observed a green Pontiac enter the intersection and slow down as if to turn in his direction. Instead, the Pontiac hesitated for a few moments before proceeding straight through the intersection. Finding this behavior suspicious, Officer Prichard called in the Pontiac's license plate number and discovered that the vehicle was stolen. He followed the vehicle but lost sight of it when it turned down a side street. Officer Prichard then proceeded to drive up and down nearby streets looking for the vehicle.

At approximately 11:06 a.m., Officer Prichard noticed a man later identified as Craddock walking down the sidewalk of one of the side streets. Officer Prichard discovered the stolen Pontiac parked on the side of the street shortly after passing Craddock, at which point Prichard turned around in order to relocate Craddock. Driving back up the street, Officer Prichard saw Craddock standing in the front yard of a residence about fifty feet from the stolen Pontiac. Officer Prichard did not notice any other people in the area.

Officer Prichard parked his vehicle and approached Craddock. When Officer Prichard asked Craddock what he was doing, Craddock appeared nervous and said he was going home, but he could not provide Officer Prichard with an address. Believing that Craddock had just exited the stolen Pontiac, Officer Prichard handcuffed Craddock and frisked him for a weapon. The frisk did not reveal a weapon, but Officer Prichard did feel what he believed to be a vehicle key fob in Craddock's pants pocket. Officer Prichard removed the key fob from the pocket and, after noticing that it had a Pontiac emblem, used it to unlock the stolen Pontiac. After opening the door of the vehicle, Officer Prichard saw a handgun on the floor next to the driver's seat. Upon learning that Craddock was a convicted felon, Officer Prichard arrested him for possessing a handgun. Craddock's DNA was later matched to DNA discovered on the vehicle steering wheel, but insufficient DNA was present on the handgun for it to be tested.

Craddock moved to suppress the evidence resulting from the frisk of his person and the removal of the key fob from his pocket.

The Court of Appeals for the Eighth Circuit found, in part, as follows:

"…As an initial matter, Craddock's proximity to the stolen vehicle and his demeanor when Officer Prichard approached him provided the officer with reasonable suspicion to frisk Craddock for weapons. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *United States v. Hanlon*, 401 F.3d 926, 929 (8th Cir. 2005) (When officers encounter suspected car thieves, they

also may reasonably suspect that such individuals might possess weapons.)

"However, in order to seize items other than weapons, the officer conducting a pat-down search must have probable cause to believe the item in plain touch is incriminating evidence. *United States v. Bustos-Torres*, 396 F.3d 935, 944-45 (8th Cir. 2005) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 376 (1993)). The item need not be contraband, but to give rise to probable cause, the incriminating character of the object must be immediately identifiable. *Bustos-Torres*, 396 F.3d at 945; see also *United States v. Cowan*, 674 F.3d 947, 953 (8th Cir. 2012) (A police officer lawfully patting down a suspect's outer clothing' may seize any object whose contour or mass makes its identity immediately apparent as incriminating evidence.) Ultimately, an item's incriminatory nature is immediately apparent if the officer at that moment had probable cause to associate the property with criminal activity, meaning the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime. Probable cause requires only a practical, nontechnical probability that incriminating evidence is involved, but the officer may not manipulate the item in order to ascertain the incriminating character where it is not immediately apparent to him, see *Dickerson*, 508 U.S. at 379.

"In this case, the key fob's incriminating character was not immediately apparent upon plain feel. Officer Prichard testified that he was not able to observe the person driving the car or even identify whether the individual was male or female. Officer Prichard did not observe Craddock exit the vehicle, and Officer Prichard had to turn his patrol car around several times in order to locate Craddock, who did not attempt to flee. While Craddock was relatively close to the stolen vehicle and behaving nervously, circumstances which make this question close, feeling an unidentified key fob in Craddock's pocket did not provide Officer Prichard with probable cause to conclude that the key fob belonged to the stolen Pontiac. Key fobs are extremely common items carried in the pockets of a large portion of the population on a daily basis. As a result, without more information, Officer Prichard could not have reasonably associated the key fob with the stolen Pontiac at that point. See *United States v. Bailey*, 417 F.3d 873, 877 (8th Cir. 2005) (explaining that a hunch is insufficient to provide reasonable suspicion, much less probable cause). It was not until Officer Prichard removed the key fob from Craddock's pocket and observed the Pontiac emblem that he had reason to associate the key fob with the stolen vehicle. Thus, as in *Minnesota v. Dickerson*, the officer required a further search, one not authorized by *Terry* or by any other exception to the warrant requirement to determine the item's incriminating character. Accordingly, the key fob's seizure violated the Fourth Amendment. Accordingly, the officer's seizure of the key fob exceeded the appropriate scope of a *Terry* frisk, and it should have been suppressed."

SEARCH AND SEIZURE:
Stop and Frisk; Plain View; Plain Feel

United States v. Pacheco
CA6, No. 16-3376, 10/28/16

A confidential source met Detective William Best of the Columbus, Ohio, Police Department and stated that two Hispanic men in a silver Lincoln Aviator were moving narcotics from the Chatham Village apartment complex. Best set up surveillance in an unmarked car. Within 45 minutes, Best saw a silver SUV exit Chatham Village. Best followed and saw that it was a silver Lincoln Aviator.

At a well-lit intersection, Best pulled up and observed what he believed were two Hispanic males in the vehicle. Best called Officer Jeremy Phalen and relayed to dispatch, to Phalen, and to his partner, Kenneth Trivette, that he had witnessed the driver fail to properly signal a turn. The Aviator was followed until it was observed to swerve across double-yellow lines. Phalen turned on his emergency lights. The Aviator pulled over. Phalen spoke with the driver, Mario Calderon, who had no valid driver's license. He observed Calderon visibly shaking. Trivette, on the passenger side, noted that Jose Pacheco was not wearing his seatbelt. Trivette asked Pacheco for identification, but Pacheco did not respond, instead rummaging through the glove compartment and glancing around the vehicle.

Concerned about a possible weapon, Trivette asked Pacheco to exit the vehicle. During a pat down, Trivette felt "a large chunk of money on his right cargo pocket" and saw the top of a brick-like object, wrapped in brown paper and tape, protruding out of the top of Pacheco's left cargo pocket. Pacheco had $3,000 in currency and a half-kilogram of brick cocaine in his pockets.

The Sixth Circuit affirmed that, based on the totality of the circumstances, the officer had reasonable suspicion to justify the pat down and that the cocaine and currency were properly seized pursuant to the plain-view and plain-feel doctrines.

SEARCH AND SEIZURE:
Tip Providing Reasonable Suspicion for Police to Conduct Investigation

United States v. Williams
CA9, No. 15-10008, 9/20/16

At 4:40 a.m., a person who identified himself as Tony Jones telephoned a Las Vegas police hotline to report an adult, black male sleeping inside a grey Ford Five Hundred car. Jones reported that the man was "known to sell drugs in the area," did not live in the adjacent apartment complex, and Jones expressed that he "just wanted the person moved out of the area." Jones provided the operator with his phone number and address.

The Las Vegas Metropolitan Police Department (Metro) dispatched two officers on duty in the reported area, Alvin Hubbard and Thomas Keller. Hubbard and Keller were on patrol in a marked Metro patrol car, with Hubbard driving. When Hubbard and Keller arrived at the apartment complex the caller had

identified, they saw a grey Ford Five Hundred car in the parking lot. The Ford had temporary license plates, preventing the officers from securing an initial vehicle check.

The Ford was flanked by a car on either side and a parking curb in front. Hubbard stopped the patrol car behind the grey Ford, blocking its exit. The officers turned on their overhead lights, "take-down" lights, and spotlights, shining them into the Ford's windows. After the officers turned on their lights, a black male, later identified as defendant Tony Williams, sat up in the driver's seat inside the Ford. Williams looked to his left and right, then started his car. Williams momentarily placed the car in reverse and then quickly shifted the car back into park.

By the time Williams started the car, both officers were approaching the Ford on foot. Hubbard approached the car on the driver's side, while Keller approached on the passenger's side with his handgun drawn. Hubbard yelled at Williams through the Ford's closed windows to turn off the engine and exit the vehicle.

Williams complied and got out of the car. Hubbard continued walking towards Williams, until he was within three to four feet of him. Williams, without saying a word, ran. He ran toward the front of the Ford and around the other cars in the parking lot.

Keller ran after Williams on foot, and Hubbard joined the pursuit in the patrol car. The pursuit lasted approximately one minute. Two or three buildings away from the parking lot, Williams fell and did not get up. He remained on the ground where he had fallen with his hands out. Keller approached with his gun drawn and stood over Williams. Hubbard arrived shortly after in the patrol car, observed Williams prone on the ground, performed a protective sweep of his backside, and handcuffed him.

Hubbard then did a pat down of Williams's backside. Hubbard then helped Williams from the ground and brought him to the front of the patrol vehicle. At that point, Hubbard did a pat down of Williams's front. He proceeded to reach into all of Williams's pants' pockets. In the right front pocket, Hubbard found a plastic bag containing crack cocaine. In the left front pocket, Hubbard found $1,165.00.

Hubbard placed Williams in the back of the patrol car and drove back to the parking lot where the Ford was still parked. With Williams handcuffed in the back of the patrol car, Hubbard began searching the Ford. Hubbard discovered that the Ford was not registered to Williams but rather to a company named Rodo. The officers never telephoned the company, nor made a call to Metro dispatch to have the vehicle towed or impounded.

As Hubbard searched the car, he found pots, pans, food, and utensils. In the back seat, he found a purse; when he unzipped it, he found a gun inside. Hubbard placed the purse on the hood of the patrol car and contacted his sergeant, who called for a detective from the firearms unit.

On October 8, 2014, a federal grand jury in Nevada returned an indictment against Williams for being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(a). The grand jury returned a superseding indictment on December 10, 2014, adding charges for violating 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) by possessing a controlled substance with intent to distribute, and 18 U.S.C. § 924(c)(1)(A)(i) by possessing a firearm in furtherance of a drug trafficking offense. Williams moved to suppress the evidence of the crack cocaine and handgun found during the search of Williams and the Ford.

The Court of Appeals for the Ninth Circuit held that police officers had reasonable suspicion to conduct an investigatory stop based on the information they possessed and the reliability of a telephone tip. After the initial stop, the officers developed probable cause to arrest the defendant. The officers conducted a valid search incident to arrest when they searched the defendant's pockets and found crack cocaine. They further held that the officers lawfully searched the defendant's vehicle because, under the totality of the circumstances since they had probable cause to believe that it contained contraband or evidence of drug dealing.

The Court found, in part, as follows:

The Tip

"In assessing the role of telephone tips in investigative stops, the Supreme Court and our court have focused on whether the tips have sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop. *Alabama v. White*, 496 U.S. at 325 (1990); *United States v. Edwards*, 761 F.3d 977, 983 (9th Cir. 2014). In *White*, an anonymous tipster telephoned police to report that the defendant would be leaving a particular apartment at a particular time in a particular vehicle, and that the defendant would be heading towards a specific motel in possession of cocaine. The police went to the identified apartment, saw a vehicle matching the description, and pursued the vehicle as it made its way to the specified motel. Officers stopped the vehicle just short of the motel and discovered marijuana and cocaine inside. The Court held that the anonymous tip exhibited sufficient indicia of reliability to justify the investigatory stop because the anonymous tipster predicted the defendant's future behavior and the officers corroborated the tip through independent police work.

"The Supreme Court further clarified the factors used in assessing the reliability of tips in *Navarette v. California*, 134 S.Ct. 1683 (2014). There, an unidentified 911 caller reported that a truck ran her off the road. A police officer responded to the 911 broadcast, located the truck, and pulled it over. Officers smelled marijuana when they approached the truck and a subsequent search uncovered 30 pounds of marijuana. The Court held that the 911 call had sufficient indicia of reliability to provide the officers with reasonable suspicion that the truck ran the caller off the roadway, reasoning that (1) the tip indicated that the caller had eyewitness knowledge of the incident, lending significant support to the tip's reliability; (2) police corroborated the tip by verifying

the truck's location near where the caller stated the incident occurred; (3) the caller used the 911 system, which identifies and traces callers, thus increasing the tip's veracity by providing some safeguards against making false reports with immunity; and (4) the caller reported a specific and potentially ongoing crime.

"Applying the principles articulated in *White* and *Navarett*e, we hold that officers Hubbard and Keller had reasonable suspicion to stop Williams based on the information they possessed and the tip's reliability. First, the tipster, Tony Jones, telephoned a police hotline and provided his name, address, and phone number. Second, the officers verified the information Jones relayed through independent observation. Jones provided officers with Williams's location and the make of Williams's car. When the officers arrived at the specified parking lot, they found the reported grey Ford Five Hundred with a man inside. Third, Jones provided specific criminal allegations. Jones reported that Williams was sleeping in a car in an adjacent apartment complex, even though Williams did not live there. Jones also reported that Williams was known to sell drugs in the area.

"Fourth, the officers' suspicion was increased when they witnessed Williams's behavior upon arriving at the parking lot. When the officers shone the light on Williams's car, he popped up in the driver's seat and immediately looked left and right. Williams then proceeded to place the car in reverse. The officers testified that this conduct was consistent with someone who intended to flee the scene. Lastly, the incident occurred in a high-crime area around 5:00 a.m. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (Although an individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime, police can consider the "relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation). The officers testified that they were aware of gang activities in the area, and often responded to domestic violence and "party calls" there.

"Williams's reliance on *Florida v. J.L.*, 529 U.S. 266 (2000), is unpersuasive. In *J.L.*, an anonymous caller told police "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." Police went to the bus stop, frisked a young black male in plaid, and seized a gun from his pocket. The Court held that the police lacked reasonable suspicion to stop the suspect, reasoning that the call "provided no predictive information," leaving the "police without means to test the informant's knowledge or credibility." The tip also failed to allege more than an accurate description of a subject's readily observable location and appearance, and did not show how the tipster had knowledge of the alleged "concealed criminal activity.

"By contrast, the tip in this case not only provided an accurate description of the suspect, but it also alleged ongoing, observable criminal activity—trespass.

Jones identified Williams's location, car, and appearance and also stated that Williams was sleeping in a car in an adjacent apartment building's lot, even though Williams did not live there. Unlike the concealed criminal activity alleged in J.L., Jones provided predictive information concerning Williams's activity, which the officers were able to immediately verify when they arrived.

"Even if there were a question as to whether the tip, on its own, provided the officers with the requisite reasonable suspicion to detain Williams, the tip was certainly sufficient to justify further investigation. After receiving the information provided by the tipster, the officers would have been delinquent had they not driven over to the parking lot to investigate the situation. The officers testified at the evidentiary hearing that the reported conduct, if confirmed would be indicative of a potential DUI, as well as loitering or trespassing. When they arrived, the officers faced a potentially dangerous situation. They encountered a possible drug dealer, sitting in a car with temporary license plates, in a dark and deserted parking lot, in a high-crime area, during the early hours of the morning. Accordingly, the officers acted reasonably when they blocked in the driver with their police car, turned on their police lights, and one of the officers drew his gun. These actions led to Williams's subsequent suspicious conduct, which included placing his car in reverse, ignoring the officers' questions, and ultimately darting away on foot.

"Based on the totality of the circumstances surrounding the stop, the officers had reasonable suspicion to briefly detain Williams.

The Arrest

"As explained above, the officers had reasonable suspicion to conduct an investigatory stop: a caller reported that Williams was sleeping in his car outside of an apartment building that Williams did not live in; the caller reported that he knew Williams to be a drug dealer; Williams acted as if he intended to flee when officers approached him; and the conduct occurred in a high-crime area early in the morning. Accordingly, the officers had reasonable suspicion to stop Williams and, pursuant to section 171.123, could approach Williams to ascertain his identity. Instead of speaking with the officers, Williams immediately ran, preventing the officers from discharging their duty under section 171.123 and, accordingly, violating Nevada's obstruction statute.

"In holding that the officers lacked probable cause to arrest Williams, the district court concluded that simply fleeing from an officer, while it establishes reasonable suspicion, does not establish probable cause that the individual violated Nevada's obstruction statute. See *United States v. Smith*, 633 F.3d 889, 893 (9th Cir. 2011) ("A person's 'headlong,' 'unprovoked' flight upon seeing a police officer, when it occurs in a high-crime neighborhood, is sufficient to establish reasonable suspicion that the person is involved in criminal activity.") (quoting

Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000)). The district court, however, ignored the interplay between section 171.123 and Nevada's obstruction statute. The officers did not have probable cause to arrest Williams on the basis of the obstruction statute alone; rather, the officers had probable cause to effectuate an arrest because Williams obstructed officers in their efforts to enforce section 171.123.

The Search

"Because the officers lawfully arrested Williams, the government contends that the officers conducted a valid search incident to arrest when they searched Williams's pockets and found crack cocaine. The Supreme Court and our court have already held that a search incident to a lawful arrest is not limited to simple pat-down of the suspect and can "involve a relatively extensive exploration" of the areas within the arrestee's immediate control. *United States v. Robinson*, 414 U.S. 218, 227 (1973); see also *United States v. Maddox*, 614 F.3d 1046, 1048 (9th Cir. 2010). Those areas include the arrestee's person and the inside pockets of the arrestee's clothing. Here, the officers had probable cause to arrest Williams and performed a valid search incident to arrest of Williams's person—which lawfully extended to the insides of Williams's pockets—after apprehending Williams for obstruction.

The Vehicle Search

"Lastly, the government contends that the officers lawfully searched Williams's vehicle because they had probable cause to believe the Ford contained contraband or evidence of drug dealing.

"Officers may conduct a warrantless search of an automobile, including containers within it, when they have probable cause to believe that the vehicle contains contraband or evidence of criminal activity. *United States v. Ewing*, 638 F.3d 1226, 1231 (9th Cir. 2011); see *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) ("When there is probable cause to search for contraband in a car, it is reasonable for police officers . . . to examine packages and containers without a showing of individualized probable cause for each one"). Probable cause exists when, based on the totality of the circumstances, there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

"Under the totality of the circumstances, the officers had probable cause to believe that evidence of contraband would be found in Williams's vehicle. Before arriving on the scene, the officers received information from Metro dispatch that Williams was sleeping in his car in an unauthorized location and was known to deal drugs in the area. Moreover, the officers approached the vehicle early in the morning—around 5:00 a.m.—and were in a high-crime neighborhood. When officers approached the vehicle, Williams popped up, looked around, and temporarily placed the car in reverse. After Williams got out of the vehicle, he immediately fled the scene. Officers caught Williams after he tripped and fell to the ground. In searching Williams's person after effectuating a lawful arrest, Hubbard found individually wrapped crack cocaine in plastic containers. He also found

$1,165.00 in cash in small denominations. Based on the information the officers had prior to making the arrest—and the contraband they found during the arrest—the officers had probable cause to believe that the vehicle which Williams had only just fled contained further contraband or other evidence of drug dealing.

"Williams argues that because the officers arrested him for "obstructing by running," there is no conceivable evidence related to the obstruction charge that the officers could find in the vehicle. Williams ignores the evidence which emerged as soon as the officers conducted a lawful search incident to arrest: the individually wrapped packages of crack cocaine in his pockets. The crack cocaine provided the officers with the probable cause necessary to arrest Williams for drug possession and drug dealing, two crimes in which a vehicle could reasonably contain further evidence.

SEARCH AND SEIZURE:

Traffic Stop; Cracked Windshield

United States v. Walker
CA8, No. 15-2921, 10/18/16

In the early morning hours of September 30, 2013, James Golgart and Jeremy Foster were on patrol, when Michael John Walker, driving a white BMW with a cracked windshield, passed their squad car. As the BMW passed Golgart and Foster, they could see that its windshield was cracked: Golgart stated that the crack started on the passenger side and "spidered" over to the driver's side of the vehicle in such a manner that it obstructed the driver's view; Foster stated that the windshield was cracked on the passenger side, but that the crack did not extend all the way across the windshield.

The officers followed the BMW for two blocks, during which time it blocked a crosswalk when it stopped at a traffic light. The officers initiated a traffic stop, and approached the BMW. As soon as the windows of the BMW were rolled down, they could both smell "fresh," i.e., unburned, marijuana, an odor they had been trained to detect during their training as police officers. Walker appeared to be very nervous. Golgart then decided to search the BMW, and both Walker and his passenger were secured in the squad car.

During Golgart's search of the passenger compartment of the BMW, he did not find any marijuana, but he did find under the driver's seat a glass pipe and a rock-like substance he believed to be cocaine. At that point, Golgart informed Walker and the passenger that they were under arrest, and continued searching the BMW. In the trunk, Golgart discovered a 12-gauge shotgun, a box of shotgun shells in a bag from the sporting goods store Cabela's, and a high-capacity rifle magazine filled with ammunition. Golgart and Foster subsequently transported Walker and the passenger to the Hennepin County Jail, where jail personnel discovered marijuana in the passenger's anus.

A jury convicted Michael Walker of being a felon in possession of a firearm and ammunition. The magistrate judge recommended denial of Walker's suppression motion, reasoning that—whether or not the crack in the windshield

actually obstructed Walker's vision—the officers' observations regarding the windshield provided a particularized and objective basis to stop the vehicle in order to determine whether there was a violation of Minnesota Statutes § 169.71(a)(1), which provides that a person shall not operate a motor vehicle with a windshield cracked to an extent to limit or obstruct proper vision.

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

"…Under the Fourth Amendment, a traffic stop is reasonable if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred. *United States v. Washington,* 455 F.3d 824, 826 (8th Cir. 2006). Any traffic violation, regardless of its perceived severity, provides an officer with probable cause to stop the driver, but the officer must have an objectively reasonable basis for believing that the driver has committed a violation. Here, the district court accepted as credible Golgart's testimony that he believed, based on his observations, that the crack in the BMW's windshield obstructed the driver's view. *United States v. Frencher*, 503 F.3d 701, 701 (8th Cir. 2007) ('A credibility determination made by a district court after a hearing on the merits of a motion to suppress is virtually unassailable on appeal.') quoting *United States v. Guel-Contreras*, 468 F.3d 517, 521 (8th Cir. 2006). Even if Golgart was mistaken, his observations regarding the severity of the crack provided a reasonable basis for his belief that Walker was violating § 169.71(a)(1). See *United States v. Smart,* 393 F.3d 767, 771 (8th Cir. 2005) (possibility that defendant had not violated traffic law, and subsequent determination that he had not, did not mean that officer's initial suspicion of violation was unreasonable).

SEARCH AND SEIZURE: Traffic Stop; Suspended Driver's License

Prickett v. State
ACA, 2016 Ark. App. 551, 11/16/16

Jimmy Lee Prickett was convicted by a Drew County jury of possession of a controlled substance (methamphetamine), simultaneous possession of drugs and firearms, and possession of a firearm by certain persons with evidence obtained during a traffic stop. He was sentenced to a total of thirty years in the Arkansas Department of Correction. Prior to trial, Prickett filed a motion to suppress evidence found during the traffic stop, which was denied. On appeal, Prickett contends the trial court erred in denying this motion, arguing the evidence was unlawfully obtained because the officer lacked probable cause to make the stop.

At the hearing on Prickett's motion to suppress, Monticello police officer James Slaughter testified he saw Prickett driving a vehicle on July 23, 2015, and pulled him over because he knew Prickett's driver's license was suspended. He testified that, two weeks prior to pulling Prickett over, he had learned by radio traffic that another officer had pulled Prickett over, at which time it was determined that Prickett's driver's license was suspended; Officer Slaughter further stated that on

July 22, the day before he pulled Prickett over, he had seen Prickett driving, confirmed that Prickett's license was still suspended, but was unable to initiate a stop before Prickett pulled into a driveway and entered a house. He testified that, on the day he stopped Prickett, he informed Prickett he was under arrest for driving on a suspended license and then verified that Prickett's license was still suspended.

According to Officer Slaughter, Prickett gave him consent to search the vehicle, and when he opened the door, he saw the handle of a small pistol between the driver's seat and the console, as well as a piece of paper rolled into a straw with white residue in it he believed to be methamphetamine on top of the console. Inside the console, Officer Slaughter found a clear baggie tied into a knot containing a white crystal-like substance that appeared to be methamphetamine, as well as a flashlight with a white residue in the battery compartment.

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

"…In order to make a valid traffic stop, an officer must have probable cause to believe there has been a violation of a traffic law. *Robinson v. State*, 2014 Ark. 101, 431 S.W.3d 877. 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. The degree of proof needed to sustain a finding of probable cause is less than the proof needed to sustain a criminal conviction; in assessing whether probable cause exists, the appellate review is liberal rather than strict. Whether a defendant is actually guilty of the traffic violation is for a jury or court—not the officer on the scene—to determine. Under these parameters, Prickett's argument that Officer Slaughter did not have probable cause to stop him is unavailing.

"It is a misdemeanor for a person to operate a motor vehicle during a period in which his driving privilege is suspended. Ark. Code Ann. § 5-65-105 (Repl. 2016). In the two weeks prior to pulling Prickett over for driving on a suspended license, Officer Slaughter had twice verified Prickett's license was suspended, with the last verification being the day before Prickett was pulled over and arrested. Under our standard of review, we hold that Officer Slaughter had reasonable cause to believe Prickett's license was still suspended one day after he had verified the suspension. A belief that Prickett was still committing a traffic violation by driving on a suspended license was all that was required for Officer Slaughter to have had sufficient probable cause to initiate a traffic stop. *Travis v. State,* 331 Ark. 7, 959 S.W.2d 32 (1998). Because Officer Slaughter had probable cause to stop Prickett, we affirm the circuit court's denial of Prickett's motion to suppress."

SUBSTANTIVE LAW: Maintaining a Drug Premises

Velasco v. State, ACA, No. CR-16-178, 2016 Ark. App. 454, 10/5/16

A Pulaski County jury convicted Miguel Velasco of maintaining a drug premises within 1000 feet of a certified drug-free zone on October 14, 2015. Pulaski County Sheriff's Office Investigator Kenneth Hollis and members of the sheriff's office special weapons and tactics (SWAT) team executed a search-and-seizure warrant at 5006 Opal Lane in Little Rock. Investigator Hollis, the evidence officer, testified that he recovered a Ruger pistol and utility bills in the names of Miguel Velasco, Katherine Velasco and Alaena Buck. Investigator Hollis also found a cigarette pack containing thirty pills on top of the curio cabinet in the living room of the residence, and he recovered suspected methamphetamine and marijuana from under the couch cushions in the living room. A total of $1,390 in cash was found in the master bedroom.

Velasco was at home in the house he shared with his wife and children when the search warrant was executed. Family pictures were on the walls of the room where the drugs and pistol were located, and a large amount of cash was found in the master bedroom.

Our Arkansas Supreme Court has held that knowledge of maintaining a drug premises can be inferred when evidence showed drugs and firearms were stored in a house and when the house had communication radios and a security camera. See *Loggins v. State*, 2010 Ark. 414. Two security cameras were found on the exterior of Velasco's residence and the drugs and pistol were found in his living room. There is sufficient evidence to infer the maintaining of a drug premises by Velasco and to support his conviction without relying on speculation and conjecture.

SUBSTANTIVE LAW: Robbery

Cartwright v. State, ACA, No. CR-15-1059, 2016 Ark. App. 425, 9/21/16

The Arkansas Court of Appeals stated that they have consistently held that a shoplifter, who, after having been discovered trying to steal merchandise, shoves or pushes someone in order to escape, has committed robbery. *Becker v. State*, 298 Ark. 438, 768 S.W.2d 527 (1989); *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984); *White v. State*, 271 Ark. 692, 610 S.W.2d 266 (Ark. App. 1981).