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ARREST: Pretextual Arrests

Echols v. State, CR-14-326, 2015 Ark. App. 304, 5/6/15

First Security Bank was robbed on September 6, 2012, by a man wearing a camouflage t-shirt, blue jeans with a white object hanging out of the right rear pocket, and a black mask over his face. The robber wielded what appeared to be a black handgun, and he was seen leaving in a white Hyundai Sonata.

On September 8, 2012, the Benton Police Department received a report from an AT&T phone store in Bryant of suspicious behavior involving a man making unusually large purchases with cash. The police spotted a white Hyundai Sonata leaving the AT&T parking lot that day and stopped the car for an illegal lane change and failure to wear a seat belt.

The driver of the Hyundai was Terry Echols, and he consented to a search of the vehicle. During the search, the police discovered certain items of clothing matching that worn by the robber at First Security Bank in the trunk of the car, including jeans, the shoes worn in the robbery, and a black mask. A twenty-dollar bill was found in Terry Echols's wallet that was confirmed to have been stolen from the bank, and money recovered from the AT&T store was also found to have been stolen from the bank.

Upon questioning, Terry Echols told the police that the car belonged to his mother but that his brother, Bruce Echols, drove it all the time. Terry advised that he was borrowing the vehicle

from Bruce that day, that he was aware of the robbery but was not involved, and that he had received money from Bruce and used it to buy items from the AT&T store.

Based on Terry's statements, the police developed Bruce Echols as a suspect in the robbery. The police arrested Bruce on September 8, 2012, on a pre-existing arrest warrant dated August 20, 2012, for failure to appear in district court on the misdemeanor charge of second-degree terroristic threatening. Bruce was arrested at his mobile home in Benton, where he and Terry lived together.

After being arrested, Bruce was transported to the police station, where he waived his *Miranda* rights and was interrogated by officers about the robbery. During the first couple of hours of the investigation, Bruce denied any involvement in the robbery. However, he subsequently confessed, in some detail, to committing the robbery. Bruce told the officers about a black, hand-made object that was made to look like a gun, and he indicated that he had used the object in committing the robbery. Bruce led the police to a cemetery where he had ditched the black object, and the police recovered it as evidence.

During the early stages of the interrogation, before Bruce had admitted to the robbery, the police obtained a warrant to search his home. During the search, the police seized several items of contraband from Bruce's bedroom, including a First Security Bank bag and $8114 in cash, some of which was still in bands.

Bruce Echols was subsequently arrested and charged with four counts of aggravated robbery. Prior to trial, Bruce Echols filed a motion to suppress evidence, wherein he alleged that his arrest was illegal, pretextual, and unsupported by probable cause.

At the suppression hearing, Officer Brian Bigelow gave testimony about the traffic stop of Terry Echols, which led the police to develop Bruce Echols as a suspect. Officer Bigelow testified that he was familiar with Bruce Echols from past dealings, and that he knew there was an active warrant out for him. According to Officer Bigelow, he had seen the arrest warrant in the warrant cabinet on the day before Terry was stopped and Bruce was arrested. Officer Bigelow went to Bruce's home on September 8, 2012, informed Bruce that he had an arrest warrant, and arrested him.

On cross-examination, Officer Bigelow stated that he did not attempt to serve the arrest warrant on the previous day because he was busy with another warrant. Officer Bigelow further testified that he went to Bruce's house to pick him up on the misdemeanor warrant, but that he also knew Bruce was a robbery suspect at that point.

At the conclusion of the suppression hearing, the trial court denied Bruce's motion to suppress. Bruce's custodial confession and the physical evidence linking him to the crime were introduced at the subsequent jury trial, and the jury found Bruce guilty of committing the bank robbery.

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

"The threshold issue in this case is whether the arrest of Bruce Echols was pretextual. Bruce argues that it was and, that as a result

of his pretextual arrest, the fruits of his arrest should have been suppressed.

"In *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002), the Arkansas supreme court held that under the protections afforded by Article 2, section 15, of the Arkansas Constitution, pretextual arrests—arrests that would not have occurred *but for* an ulterior investigative motive—are unreasonable police conduct warranting application of the exclusionary rule. The police officer in *Sullivan* suspected that the appellant was involved in narcotics, but had no probable cause to arrest for any drug violation, and after conducting a traffic stop the officer arrested the appellant for multiple minor offenses including speeding, failure to produce registration and insurance, and possessing a weapon (a roofing hatchet). A subsequent inventory search of the vehicle uncovered narcotics. The crucial question as announced by our supreme court was whether the arresting officer would have affected the arrest but for his suspicion that Sullivan was involved in narcotics. The trial court answered this question in the negative, finding the arrest to be pretextual and suppressing the fruits of the arrest on that basis, and the Supreme Court affirmed.

"Under the facts of this case the trial court found that Bruce's arrest was not pretextual, and on review we cannot say that this was error. In *State v. Sullivan*, 348 Ark. 647, 654, 74 S.W.3d 215, 220 (2002), the Supreme Court wrote:

> *Claims of pretextual arrest raise a unique problem in the law—deciding whether an ulterior motive prompted an arrest which otherwise would not have occurred. Confusion can be avoided by applying a "but for" approach, that is, would the arrest not have occurred but for the other, typically the more serious, crime. Where the police have a dual motive in making an arrest, what might be termed the covert motive is not tainted by the overt motive, even though the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent.*

"When testimony is presented that an arrest on an unrelated warrant would have occurred in any event, no pretext can be found. See *Hines v. State*, 289 Ark. 50 1986); *see also Stephens v. State*, 342 Ark. 151 (2000) (holding that there was no pretextual arrest when officers approached Stephens with an outstanding arrest warrant).

"In the case at bar, it is undisputed that Bruce Echols had an outstanding arrest warrant for failure to appear on a second-degree terroristic threatening charge prior to the commission of the bank robbery. Officer Bigelow observed this arrest warrant in the warrant cabinet on the day before Bruce Echols was arrested. When questioned about why he did not serve the warrant on the day he saw it in the cabinet, Officer Bigelow stated, 'I did not have the ability at that time' because he was busy getting another warrant for another officer to serve. When asked whether he would have served the arrest warrant on Bruce Echols but for the fact that he knew about the robbery, Officer Bigelow replied, 'If I knew where he was, sure.' When questioned further about what prompted him to arrest Bruce, Officer Bigelow testified, 'When I knew he was a person of interest, that's one of the reasons I went to the house, yes, and I knew we had a reason to pick him up anyway.' Officer Bigelow also stated, I

went out there to pick him up on a warrant if we can make contact with him and take him down to detectives and allow them to speak with him about the robbery.

"Based on the totality of these circumstances, leaving credibility determinations to the trial court and according due weight to inferences drawn by the trial court, we hold that the trial court's decision that the arrest was not pretextual was not clearly against the preponderance of the evidence.

"Based on the testimony of Officer Bigelow, the trial court could reasonably conclude that, even had Bruce Echols not been suspected of the robbery, he nonetheless would have been arrested on the outstanding misdemeanor warrant. Because there was testimony from which the trial court could find that there was a dual motive in making the arrest, we uphold its determination that the arrest did not amount to unreasonable police conduct."

CIVIL LIABILITY: Americans with Disabilities Act; Qualified Immunity

City and County of San Francisco v. Sheehan, No. 13-1412, 5/18/15

Teresa Sheehan lived in a group home for individuals with mental illness. After Sheehan began acting erratically and threatened to kill her social worker, the City and County of San Francisco (San Francisco) dispatched police officers Kimberly Reynolds and Kathrine Holder to help escort Sheehan to a facility for temporary evaluation and treatment. When the officers first entered Sheehan's room, she grabbed a knife and threatened to kill them. They retreated and closed the door. Concerned about what Sheehan might do behind the closed door, and without considering if they could accommodate her disability, the officers reentered her room. Sheehan, knife in hand, again confronted them. After pepper spray proved ineffective, the officers shot Sheehan multiple times.

Sheehan later sued the City and County of San Francisco for, among other things, violating Title II of the Americans with Disabilities Act of 1990 (ADA) by arresting her without accommodating her disability. See 42 U. S. C. §12132. She also sued Reynolds and Holder in their personal capacities under 42 U. S. C. §1983, claiming that they violated her Fourth Amendment rights.

The District Court granted summary judgment because it concluded that officers making an arrest are not required to determine whether their actions would comply with the ADA before protecting themselves and others, and also that Reynolds and Holder did not violate the Constitution. Vacating in part, the Ninth Circuit held that the ADA applied and that a jury must decide whether San Francisco should have accommodated Sheehan. The court also held that Reynolds and Holder are not entitled to qualified immunity because it is clearly established that, absent an objective need for immediate entry, officers cannot forcibly enter the home of an armed, mentally ill person who has been acting irrationally and has threatened anyone who enters.

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

"The question whether §12132 requires law enforcement officers to provide

accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody, is dismissed as improvidently granted. Certiorari was granted on the understanding that San Francisco would argue that Title II of the ADA does not apply when an officer faces an armed and dangerous individual. Instead, San Francisco merely argues that Sheehan was not 'qualified' for an accommodation, because she posed a direct threat to the health or safety of others, which threat could not be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services. This argument was not passed on by the court below. The decision to dismiss this question as improvidently granted, moreover, is reinforced by the parties' failure to address the related question whether a public entity can be vicariously liable for damages under Title II for an arrest made by its police officers.

"Reynolds and Holder are entitled to qualified immunity from liability for the injuries suffered by Sheehan. Public officials are immune from suit under 42 U. S. C. §1983 unless they have 'violated a statutory or constitutional right that was clearly established at the time of the challenged conduct,' an exacting standard that gives government officials breathing room to make reasonable but mistaken judgments. The officers did not violate the Fourth Amendment when they opened Sheehan's door the first time, and there is no doubt that they could have opened her door the second time without violating her rights had Sheehan not been disabled. Their use of force was also reasonable. The only question therefore is whether they violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempt to accommodate her disability. Because any such Fourth Amendment right, even assuming it exists, was not clearly established, Reynolds and Holder are entitled to qualified immunity. Likewise, an alleged failure on the part of the officers to follow their training does not itself negate qualified immunity where it would otherwise be warranted."

CIVIL LIABILITY:
Qualified Immunity; Nonfeasance

Grider v. Bowling, CA8, No. 14-2869, 5/11/15

Duke Grider, his wife Kami Grider, and his son were at a Taco Bell when an argument occurred between Grider and another patron. The police were called, and the Griders crossed the street to eat their food in their vehicle. Officer Bowling was the first officer to arrive. Officer Bowling approached Grider, who was wearing a knife on his hip, and asked Grider to exit his vehicle; Grider declined. Officer Bowling forcibly removed Grider, placed Grider on the ground with his knee on Grider's back, and handcuffed Grider.

While Grider was held on the ground by Officer Bowling, Officer Eric Reece arrived in his vehicle. Officer Reece ran toward Officer Bowling and Grider and kicked Grider in the head. Officers Bowling and Reece did not communicate before the kick and Officer Bowling did not act to prevent the kick. Grider suffered contusions and abrasions on his face, and the kick caused neck pain and restriction of movement which persisted at least two years. Kami Grider suffered emotional distress and problems with her pregnancy. Officer James Dougherty arrived

at the scene sometime after Grider was handcuffed and the kick had occurred. Grider had an open fifth of whiskey in his vehicle which the officers poured out at the scene.

The Griders filed the present civil rights suit alleging various violations of their constitutional rights and of state law, including excessive force, unlawful arrest, and unlawful seizure. The suit named as defendants the City of Springfield, Police Chief Paul Williams, and the three officers present at the scene: Bowling, Reece, and Dougherty. The defendants moved for summary judgment, arguing they were entitled to qualified immunity. The district court's order allowed the Griders' Fourth Amendment claim for excessive force against Officers Bowling and Reece to proceed.

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

"The sole question presented in this appeal is whether the district court erred in denying qualified immunity to Officer Bowling on the Griders' excessive force claim.

"In this case, Grider alleges no injuries occurred from Officer Bowling's actions and Grider's account of the incident does not demonstrate Officer Bowling's use of force was excessive, particularly in light of Grider's refusal to exit his vehicle voluntarily and his possession of a knife. We determine as a matter of law Officer Bowling did not use excessive force removing Grider from his vehicle and placing him on the ground, without injury, in these circumstances.

"Grider does allege injuries from Officer Reece kicking him in the face. However, liability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed. Section 1983 does not sanction tort by association. An officer may be held liable only for his or her own use of excessive force. Because Officer Bowling was not involved in the allegedly unconstitutional acts of Officer Reece, Officer Bowling could not have violated Grider's constitutional rights based on Officer Reece's use of excessive force.

"Grider argues Officer Bowling is liable based on his duty to protect Grider from Officer Reece because Officer Bowling had a reasonable opportunity to intervene. It is clearly established that 'an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment.' *Nance v. Sammis,* 586 F.3d 604, 612 (8th Cir. 2009). An officer can be liable for nonfeasance, 'where the officer is aware of the abuse and the duration of the episode is sufficient to permit an inference of tacit collaboration.' *Krout v. Goemmer*, 583 F.3d 557, 565 (8th Cir. 2009); see also *Jennings v. Davis*, 476 F.2d 1271, 1275 (8th Cir. 1973) (requiring an officer to 'have had the duty, opportunity, or the ability to intervene'). Grider does not put forward any evidence showing Officer Bowling was aware of the kick before it occurred or had the opportunity to take action to deescalate the situation.

"We find relevant Grider's testimony that Officer Reece said nothing before he kicked Grider. We also find relevant Grider's testimony that there was only one kick. We determine as a matter of law, Officer Bowling cannot be liable for nonfeasance under the circumstances of this case."

DWI: Proof of a Culpable Mens Rea Required

Leeka v. State, No. CR-14-798
2015 Ark. 183, 4/30/15

On August 5, 2013, Springdale police officer Thomas Gregory responded to a call regarding a possible intoxicated driver. Gregory observed Leeka's vehicle driving recklessly, swerving, and running a red light. After initiating a traffic stop of Leeka, Gregory approached Leeka's window. The report notes that "the driver looked extremely confused and very lethargic." Gregory inquired if Leeka had been drinking or taking any prescription drugs, and Leeka replied that he had taken an allergy medication and a prescription pain medication. Gregory then asked Leeka to step out of the vehicle, and while attempting to exit the vehicle, Leeka lost his balance and fell against the car. Gregory reported that Leeka was very unsteady on his feet and continued to lose his balance.

Ultimately, Gregory placed Leeka under arrest for DWI. Once at the police station, Leeka agreed to submit to breath and blood tests for intoxicating substances. In addition to the police report, the parties also stipulated to the results of Leeka's breathalyzer test, which reported a 0.00 alcohol level, and the toxicology report from his blood analysis, which showed only the presence of the drug zolpidem, a sleep medication more commonly known by its brand name, Ambien. The toxicology report showed no other intoxicants.

The parties also stipulated to a medical-opinion letter issued by Dr. Simon, in which she stated her opinion that Leeka "experienced a complex sleep behavior… namely sleep-driving, which is a known adverse reaction to Ambien." The stipulated facts also stated, "It is the State of Arkansas/ City of Springdale's position that a violation of ACA 5-65-103 *Driving While Intoxicated* is a strict liability crime, where it is Leeka's position that a mental state is required."

On the day following the filing of the stipulated facts, the circuit court issued a letter opinion in which it found that no culpable mental state was required for the DWI offense and ruled that the stipulated facts provided sufficient evidence to demonstrate that Leeka had violated the DWI act. Thereafter, the court held a sentencing hearing, at which it sentenced Leeka to one day in jail, a $300 fine, and court costs. Leeka filed the instant appeal.

Leeka claims that the circuit court erred in ruling that the Omnibus DWI Act of 1983 does not require proof of a culpable mens rea. The Arkansas Supreme Court agreed that the circuit court erred in concluding that the DWI statute did not require a culpable mental state, and reversed and remanded.

Editor's Note: *In response to the ruling in the foregoing case, Arkansas Governor Asa Hutchinson signed into law a bill passed in the 2015 special legislative session to fix the state's driving while intoxicated law. Prosecutors do not have to prove intent on an alcohol- related DWI violation. This bill was passed to prevent the State of Arkansas from losing more than $50 million in federal highway funds.*

FELON POSSESSING FIREARMS:
Transfer or Sale

Henderson v. United States
No. 13-1487, 5/18/15

After being charged with the felony offense of distributing marijuana, Henderson was required, as a condition of bail, to turn over firearms that he lawfully owned. Henderson pleaded guilty, and, as a felon, was prohibited under 18 U.S.C. 922(g) from possessing any firearms. Henderson asked the FBI, which had custody of his firearms, to transfer them to his friend. The agency refused. The district court reasoned that Henderson's requested transfer would give him constructive possession of the firearms. The Eleventh Circuit affirmed.

The unanimous Supreme Court vacated the judgment. The United States Supreme Court stated that a court-ordered transfer of a felon's lawfully owned firearms from government custody to a third party is not barred by section 922(g) if the court is satisfied that the recipient will not give the felon control over the firearms, so that he could either use them or direct their use. The government's view conflated possession, which section 922(g) prohibits, with an owner's right to alienate his property, which it does not. The Court stated that a felon may select a firearms dealer or third party to sell his guns; a court, with proper assurances from the recipient, may also grant a felon's request to transfer his guns to a person who expects to maintain custody of them.

MIRANDA: Capacity to Understand the *Miranda* Rights

Thompson v. State
CR-14-763, 2015 Ark. App. 275, 4/29/15

On March 7, 2012, Mario D. Thompson was interviewed by Detective Malachi Samuels of the Fayetteville Police Department. In that interview, Thompson agreed that "something inappropriate" had happened between him and J.C., a minor. In November 2013, Thompson filed a motion to suppress this statement, arguing that, due to his mental disability, he could not understand his *Miranda* rights and the consequences of waiving them, so his statement was involuntary and inadmissible.

A hearing on the motion was held in March 2014. Detective Samuels testified that he advised Thompson of his *Miranda* rights by reading them out loud while Thompson followed along. Samuels stated that Thompson responded to his questions and appeared to understand what was being said. Samuels explained that he had Thompson read aloud the last paragraph on the Miranda rights form, which stated: *"I have read the statement of my rights and I understand what my rights are. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."* Samuels said that Thompson appeared to understand what that paragraph meant and that Thompson initialed each of his rights on the form and signed and dated it at the bottom. Samuels agreed that, to the best of his knowledge, Thompson's statement was given freely and voluntarily. On cross-examination, Samuels described Thompson as "slower intellectually than others" but still capable

of understanding what is being asked. On redirect, Samuels testified that he did not coerce or threaten Thompson in any way and reiterated that Thompson had read aloud the last paragraph on the *Miranda* rights form and agreed with that statement.

Thompson argued that under Ark. Code Ann. § 5-4-618 (Repl. 2013), an IQ of 65 or below creates a presumption of mental retardation, and the mental evaluations performed after his arrest rated his IQ in a range from 53 to 64. He asserted that the presumption "had not been and cannot be rebutted" and that he was "effectively unable to intelligently, knowingly waive any right that he has." Thus, he argued, his statement should be suppressed.

The State responded that Thompson had already been found competent to stand trial, that he performed poorly on the mental evaluations because he did not try, and that Detective Samuels had done a good job of explaining to Thompson his rights and giving him ample opportunity to ask questions. The State asserted that Thompson "does understand what is going on" and requested that the motion to suppress be denied. The court took the matter under advisement and, at a later hearing in May 2014, denied the motion to suppress, stating that "the State met its burden on that issue." The State later introduced an audio recording of the interview, as well as the transcript, during its case-in-chief.

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

"A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily. *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007). In *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003), our supreme court clarified the appropriate standard of review for cases involving a circuit court's ruling on the voluntariness of a confession—we make an independent determination based upon the totality of the circumstances. We review the circuit court's findings of fact for clear error, and the ultimate question of whether the confession was voluntary is subject to an independent, or de novo, determination by the appellate court. *Clark v. State,* 374 Ark. 292, 287 S.W.3d 567 (2008).

"To determine whether a waiver of *Miranda* rights is voluntary, knowing, and intelligent, we look to see if the statement was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Flanagan v. State,* 368 Ark. 143, 243 S.W.3d 866 (2006). To make this determination, we review the totality of the circumstances surrounding the waiver including the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or physical punishment; and statements made by the interrogating officers and the vulnerability of the defendant. We will reverse a circuit court's ruling on this issue only if it is clearly against the preponderance of the evidence. Evaluating the credibility of witnesses who testify at a suppression hearing about the circumstances surrounding an appellant's custodial confession is for the circuit court to determine, and this court defers to the circuit court in matters of credibility. *Shields v. State,* 357 Ark. 283, 166 S.W.3d 28 (2004).

"As mentioned, Thompson argues that because of his mental retardation, he lacked the capacity to understand or waive his *Miranda* rights when interviewed by Detective Samuels, so all his statements were involuntary and inadmissible. But our Supreme Court has held that while mental capacity is a factor we consider, it alone is not sufficient to suppress a confession. *Misskelley v. State,* 323 Ark. 449, 915 S.W.2d 702 (1996). Likewise, a low score on an intelligence-quotient test does not mean that a suspect is incapable of voluntarily making a confession or waiving his right.

"In reviewing the totality of the circumstances, we also note that Thompson was twenty-four years old when he gave his statement and had a high-school education. Detective Samuels testified that Thompson appeared to understand his rights and gave his statement after voluntarily waiving those rights. Thompson also signed, dated, and initialed the *Miranda* rights form and never indicated that he did not understand his rights. Based on these points, and our deference to the circuit court in matters of credibility, we hold that the denial of the motion to suppress was not clearly against the preponderance of the evidence."

MIRANDA: Invoking Reference to a Family Member

United States v. Hufstetler
CA1, No. 14-1393, 3/20/15

Daniel Hufstetler confessed to robbing a federal credit union and was convicted for this crime. Prior to trial, he twice moved to suppress his confession, arguing that it was coerced in violation of his Fifth Amendment rights. Specifically, he argued that his girlfriend was also in police custody for the robbery at the time of his interrogation and a significant portion of his interview dealt with the impact that his cooperation would have on her prospects for release. He claimed the officers' references to his girlfriend during the interrogation overpowered his will. The district court denied the motions. The First Circuit affirmed, holding that, under the circumstances of this case, the officers did not act impermissibly and Hufstetler voluntarily chose to confess. The court found, in part, as follows:

"Hufstetler's case turns on whether the officers' references to his girlfriend during the interrogation were inappropriate and, if so, whether such statements overpowered his will. As he sees it, his interrogators immediately sensed his concern for Craig and then repeatedly referenced her incarceration in order to force his hand. It was only after the officers successfully convinced Hufstetler that Craig's freedom hinged on his willingness to talk, he says, that he finally confessed. He thus insists that the officers infringed upon his constitutional rights.

"Over time, there have been several developments in the law applicable to addressing the propriety of utilizing a suspect's family member during an interrogation, as Hufstetler alleges occurred here. Admittedly, the applicability of the decision in any one case to another can be difficult given the fact-intensive nature of the totality-of-the-circumstances inquiry. As a body though, the cases do provide guideposts to aid us in determining whether police conduct in this context crosses the line.

"One cluster of cases implies that the use of a family member uniquely tugs at a suspect's emotions and thus can have an undue impact. Particularly notable here are two Supreme Court decisions. The first, *Lynumn,* involved officers informing a defendant that her failure to cooperate would result in her losing financial aid for, and custody of, her children. 372 U.S. at 534. The Court noted that the defendant had no reason to question the officers' capacity to carry out those threats. Accordingly, the court deemed the tactics improper and ordered the confession suppressed.

"A few months later in *Haynes v. Washington,* 373 U.S. 503 (1963), the Court reiterated this point. There, interviewing officers repeatedly told a suspect that he would be unable to call or see his wife until he wrote out a confession. Those threats occurred over a number of days and the defendant gave in only after consistent denials of his requests to call his wife, and the conditioning of such outside contact upon his accession to police demands. The Court deemed this improper and, when weighed against the defendant's susceptibility to coercive tactics, found the confession to be involuntary.

"Hufstetler points us to a number of cases from the Ninth Circuit which he believes best capture the import of those Supreme Court opinions. The first is *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981). In that case, the Ninth Circuit evaluated an interrogation in which the suspect was told that she had 'a lot at stake' with respect to her child. The court used the occasion to broadly state that it is impermissible to 'deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit cooperation.' In 2011, that court restated this proposition in *Brown v. Horell,* 644 F.3d 969 (9th Cir. 2011)—a case that Hufstetler largely clings to here. The Ninth Circuit reviewed an interrogation during which an officer noted that the suspect's ability to see or be with his child was entirely contingent on his cooperation with the police. They expressly conditioned the suspect's ability to be with his child on his compliance with her questioning. The court classified such threats as coercive.

"At a minimum, these cases illustrate that we must be on alert when an officer utilizes a family member as a tool during an interrogation. Nonetheless, cases from this circuit provide examples of situations where the discussion of a family member was deemed acceptable. The parties emphasize two. The first is *United States v. Jackson,* 918 F.2d 236 (1st Cir. 1990). There, a defendant was arrested for gun and drug offenses offenses but only admitted to possessing the drugs. In an effort to entice the suspect to talk, the investigating officer informed him that his sister was under arrest for the gun violation, and thus his confession could assist her. On appeal, Jackson argued that the use of the sister in that way was unduly coercive, but we concluded that the statement was neither a direct threat nor promise. Moreover, we found that there was no evidence that an especially close relationship existed between Jackson and his sister, or that Jackson was unusually susceptible to psychological coercion on that account or any other. Accordingly, we affirmed the district court's decision that the confession was voluntary.

"Recently, we reached a similar result in *United States v. Jacques,* 744 F.3d 804 (1st Cir.

2014). In that case, interrogating officers remarked on the failing health of Jacques's elderly father, suggesting that continued resistance might deprive Jacques of crucial years with his family. In response to an involuntariness challenge, we stated that 'statements that a defendant's refusal to cooperate may lead to an extended separation from his or her loved ones may contribute to a finding that the defendant's confession was coerced. However, the mere fact that a defendant is placed under some psychological pressure by agents does not necessarily render a confession involuntary.' We ultimately concluded that the subsequent confession was voluntary because there was only a single reference to the family member, the suspect's demeanor during the interrogation did not manifest any notable psychological or emotional anxiety, and there was no evidence that he was particularly susceptible to coercion.

"Thus, while *Lynumn* and subsequent cases counsel us to be particularly cognizant of the risk of coercion when reviewing interrogations where officers invoke references to a family member, our cases also emphasize that discussion of a family member, on its own, is not per se coercive. Instead, we must closely examine the specific manner in which the officer discussed the relative and weigh such references against the defendant's susceptibility to coercion.

"Hufstetler accuses the officers of making improper threats or promises. To flesh out this argument, he cites portions of the transcript which, in his view, show the officers conditioning Craig's release on his willingness to confess. Most notably, he quotes: 'I certainly don't want to see those kids be without their mother;' 'There's obviously different outcomes for her depending on what it is in the details;' and, 'You can save her a buck by saying that you didn't tell her what you were gonna go do, but you're not doing that.' He thus believes that the officers deliberately preyed on his emotions to force a confession from him.

"After carefully reviewing the transcript and listening to the interrogation, we can discern no improper threat or promise. At the outset, we note that the officers had probable cause to hold Craig. In such a circumstance where the referenced relative is both a family member and a co-suspect, probable cause for holding that individual helps to place the officers' statements in context. "Without more, an officer's truthful description of the family member's predicament is permissible since it merely constitutes an attempt to both accurately depict the situation to the suspect and to elicit more information about the family member's culpability. See, e.g., *United States v. Jones*, 32 F.3d 1512, 1517 (11th Cir. 1994) (finding a confession voluntary where agents had probable cause to suspect Jones's girlfriend, informed him that she would be prosecuted if she was involved, and never told him that his girlfriend would not be prosecuted if he cooperated); *Allen v. McCotter,* 804 F.2d 1362, 1363 (5th Cir. 1986) (denying an involuntariness claim where officers told the suspect that because his wife was directly involved in the robbery, charges could be filed against her"); see also *Thompson v. Haley*, 255 F.3d 1292, (11th Cir. 2001); *United States v. Kime*, 99 F.3d 870, (8th Cir. 1996); *United States v. Ortiz*, 943 F. Supp. 2d 447, 456-58 (S.D.N.Y. 2013) (where an officer's threat to arrest a suspect's elderly aunt without any probable cause was deemed improper);

United States v. Andrews, 847 F. Supp. 2d 236, (D. Mass. 2012) (finding police conduct impermissible where officers sought to make a suspect believe that they would arrest his elderly mother for the alleged crime).

"In context, it is difficult to view the officers' actions, in their totality, as improper. The officers' statements were undoubtedly difficult for Hufstetler to swallow, and the officers were clearly aware that Hufstetler was in a rough spot. But, they never lied, exaggerated the situation, or conditioned either individual's release on Hufstetler's willingness to speak. Instead, they told Hufstetler that Craig was a suspect and unless new information came to light to discount her culpability she would continue to be criminally liable. We take no issue with the officers' utilization of this indisputably true fact to both gain more information about Craig and to elicit more intelligence about Hufstetler's own actions.

"Equally relevant, the officers also emphasized that they could not, and would not, promise Hufstetler anything in exchange for his confession. For example, Special Agent Hanlon stated bluntly that 'I don't have the power or the authority…nor does the detective, to go down and un-arrest Craig right now.' Detective Plourde reiterated that by saying 'I can't make you any promises before you tell me what actually happened. Thus, even if the references to Craig were impolitic, an objectively reasonable individual in Hufstetler's shoes could not have construed the statements as constituting a promise or threat.

"Ultimately, this record reflects little more than officers, faced with two criminal suspects, attempting to sift out each individual's role. Though Craig was undoubtedly significant to Hufstetler, the officers never utilized her in a manner which would have converted their acceptable references into impermissible ones. The dynamics of the interrogation in this case lead us to conclude that Hufstetler voluntarily chose to confess."

SEARCH AND SEIZURE: Arrest of Individual in Third Party's Residence; Protective Sweep

United States v. Hollis
CA11, No. 13-13780, 3/12/15

Officers were searching for Shedrick Hollis based on an outstanding Georgia arrest warrant for a parole violation. Law enforcement learned that Hollis could be found in an apartment the officers suspected to be a drug house. After surrounding the apartment, the officers saw Hollis through a window, broke through the door, and arrested him, and other officers conducted a protective sweep of the apartment. During that sweep, the officers discovered marijuana and firearms in plain view. After he was indicted on charges, Hollis moved to suppress the drugs and firearms found in the apartment. The district court denied his motion. Hollis was convicted on all counts. The issue this appeal presented for the Eleventh Circuit's review centered on whether the subject of an arrest warrant could challenge the use of evidence found in plain view during a protective sweep in a third party's residence. Because the evidence was discovered in plain view during a protective sweep incident to a valid arrest, the Eleventh

Circuit Court of Appeals affirmed the district court's denial of Hollis' suppression motion.

SEARCH AND SEIZURE: Arson Crime Scene

State v. Brashers, No. CR 14-934
2015 Ark. 236, 5/28/1

On June 20, 2011, at approximately 9:00 p.m. in Batesville, a fire destroyed a commercial structure that housed three businesses. Those businesses were Pioneer Pizza, which was operated by Christopher Brashers; a dental office; and a pharmacy. Batesville firefighters extinguished the fire, but hot spots and steam remained the following day on June 21, 2011. The structure sustained heavy damage.

For public-safety reasons, firefighters and police officers secured the scene. Firefighters salvaged items and overhauled the property throughout June 22, 2011. Officer Sharp testified that he took photographs, sketched diagrams of the three businesses, and documented his findings at the scene. On June 23, 2011, Officer Sharp met with fire investigators from insurance companies that held coverage on the three businesses. The investigators inspected each building, determined that the fire originated in the middle room of Pioneer Pizza, and removed debris and certain items, including an exhaust fan and lights, from the scene.

As the investigators conducted their business, Officer Sharp photographed their findings. Officer Sharp did not obtain a search warrant, nor did he have Brashers' consent to search his business. Officer Sharp testified that he worked the scene to learn fire-investigation techniques and to determine the origin of the fire for the fire chief. The investigators found evidence of an accelerant on the scene.

The State charged Christopher Brashers with one count of arson. Brashers filed a motion to suppress evidence seized in a warrantless search of Brashers' burned building that was conducted three days after the fire during an insurance company investigation. He asserted that law enforcement officers did not have probable cause to search the building without a search warrant, and therefore, the search was invalid.

The circuit court granted Brashers' motion to suppress, finding that certain evidence and photographs taken from the burned premises during the warrantless search violated the Fourth Amendment. The State brought this interlocutory appeal arguing that the circuit court erred as a matter of law in interpreting *Michigan v. Tyler*, 436 U.S. 499 (1978), by resolving the issue of a warrantless search using agency principles and in ruling that insurance investigators acted as agents of a law-enforcement agency. The

Arkansas Supreme Court dismissed the appeal holding that this court lacks subject-matter jurisdiction because the circuit court's order was a mixed question of law and fact; accordingly, the correct and uniform administration of criminal law does not require this court's review pursuant, as the appeal did not involve the interpretation of the law or the uniform administration of justice.

Editor's Note: *In **Michigan v. Tyler**, the United States Supreme Court held that an entry to fight a fire requires no warrant, and that, once in the building, officials may remain there for a*

reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime.

SEARCH AND SEIZURE:

Barricade of Motorists

United States v. Paetsch
CA10, No. 13-1169, 4/8/15

On June 2, 2012, at about 3:47 p.m., Christian Paetsch walked into a Wells Fargo Bank in Aurora, Colorado, wearing gloves, a bee-keeper's mask, and dark clothes that concealed him from head to toe. In one hand Paetsch held an air horn, and in the other, a handgun. After blasting the air horn, he yelled for everyone to get down on the floor. He then snatched stacks of money from the teller's drawer, stuffed them into his coat pockets, and fled.

Unknown to Paetsch, one of the stacks of money contained a Global Positioning System (GPS) tracking device. Seconds after Paetsch had stolen the money from the teller drawer, the tracker began transmitting a silent signal to the Aurora Police Department, which allowed police to follow the tracker's street location on a computer monitor. Using these tools, police could locate the tracker to about a 60-foot diameter. Soon after the money left the bank, dispatchers began radioing the tracker's location to police officers in the field.

About five minutes after the robbery, dispatch reported that the tracker had stopped about a half-mile from the bank. Three minutes later, dispatch reported that the tracker was again moving, this time at speeds of 30 to 40 miles per hour, which likely meant that the currency, the tracker, and the bank robber were traveling in a car. Soon after this, dispatchers reported that the tracker was moving eastbound on Iliff Avenue toward Buckley Road and then that it had stopped at the intersection.

At 4:01 p.m., about 14 minutes after the bank robbery, Officer Kristopher McDowell arrived at the intersection and saw traffic stopped at a red light. Dispatch told him that the tracker was still stopped there. Before the light turned green, under pressure to make a quick decision, Officer McDowell blocked the traffic with his patrol car and signaled with his arms and hands that the cars must remain stopped. Within minutes, several patrol cars arrived and barricaded the motorists from leaving in either direction. Using a public address system, police ordered the motorists to raise their hands, outside their car windows if possible, and not to move. In all, the officers stopped a group of 20 cars containing 29 people.

At 4:08 p.m., seven minutes after Officer McDowell had stopped traffic, Lieutenant Christen Lertch arrived and took charge. He confronted a difficult situation. First, the police had little information about the bank robber's physical appearance. They knew only that one of the bank tellers thought the robber was male based on his voice, guessing

that he was a Caucasian in his 20s or 30s. Second, the police had no information about what kind of car the bank robber was driving. Third, although the police knew that the bank robber was likely in one of those 20 cars, they could not say which particular car because the GPS could pinpoint the tracker's location only to a 60-foot diameter.

Lt. Lertch told dispatch to have officers working with "Safe Streets," an FBI task-force, get a homing beacon to the scene as soon as possible. These beacons allow police to pinpoint a tracker's location to a 10-foot diameter. Dispatch notified Lt. Lertch that task-force officers were already coming with the beacon and would arrive within 20 to 30 minutes. Thirty minutes later, Lt. Lertch requested an update, and, after checking, dispatch told him it would be another 20 to 30 minutes. Frustrated, he then demanded to speak with the FBI Task-Force Officer, T.J. Acierno, a deputy sheriff working on the FBI's "Safe Streets" program, impressing upon him with strong language the need for him to arrive as soon as possible.

Because it was a Saturday, Officer Acierno had begun the day off-duty. When he learned of the bank robbery, he was at home on the northwest side of Denver, about 25 miles from the barricade. To assist, Officer Acierno first needed to drive about 13 miles to an FBI office north of downtown Denver to get the beacon and then another 16 miles to get to Lt. Lertch on the southwest side of the city. He was delayed, first because he realized on the way that he had forgotten his keys to the FBI office and needed to return home to get them, and second because his siren broke along the way.

At about 4:30 p.m., before Acierno arrived with the beacon, police officers removed occupants from three of the cars toward the back of the group of 20. In two of those cars, officers had noticed the solo occupants behaving suspiciously. An officer saw a man in a car (a sports utility vehicle) shifting in his seat, repeatedly looking around, and failing to keep his hands outside his car as ordered. Officers removed the man from his car. He was the bank robber, Christian Paetsch. To remove Paetsch from his car, a team of four officers approached it from the rear, with weapons drawn. They ordered Paetsch out of his car and on the ground. Paetsch complied. Officers approached him, handcuffed him, and sat him on a curb away from the cars. The officers used the same procedure to remove the other motorist who had acted suspiciously. They removed the occupants of a third car for tactical reasons.

At about 4:55 p.m., Officer Acierno finally arrived with the beacon. Despite his training, it soon became evident that he was unable to use the beacon correctly to locate the GPS tracker. Even so, he did get a weak signal from one of the 20 cars, specifically from Paetsch's car. Because he could not use the beacon to its full capabilities, Officer Acierno called Patrick Williams, a Colorado state trooper also working as a "Safe Streets" task-force officer. Officer Williams was interviewing witnesses at the bank. Officer Acierno requested help with the handheld beacon, and Officer Williams began making his way to the barricade. No one told Lt. Lertch that Officer Williams was coming.

Meanwhile, at a standstill after Officer Acierno's disappointing performance with the beacon, Lt. Lertch ordered that his officers

remove all occupants from the remaining 17 cars—again they did so using weapons and ballistic shields. Officers treated adults traveling without children as suspects and handcuffed them. At least in some cases, officers at close range fixed their firearms on the heads and bodies of the people removed from their cars. After ensuring that none were armed, officers sat them on the curb.

By 5:25 p.m., the officers had cleared out every car. Then they did a "secondary search," peering through car windows to ensure that nobody was hiding. During this secondary search, an officer saw through Paetsch's car window a $2,000 "money band"—a slip of colored paper that banks use to wrap stacks of money. Upon being informed of this, Lt. Lertch and several other officers came over to see the money band.

Shortly after this, Officer Williams arrived. An expert in using handheld beacons, he set its functions correctly and quickly got a very strong signal from inside Paetsch's car. Officers then arrested Paetsch and put him in the back of a police car. A search of his car revealed more incriminating evidence: $22,956 in cash, two handguns, boxes of ammunition, a mask, a wig, a pair of gloves, an empty air horn package, two fake license plates, and, of course, the GPS tracker embedded within a stack of money.

At 5:38 p.m., the police allowed the detained motorists to return to their cars but kept them there another 30 minutes to allow crime-scene investigators to gather information. In total, the police detained the innocent motorists from 4:01 to 6:19 p.m.

Paetsch filed a motion to suppress the physical evidence seized from his car which the district court denied. Under the Fourth Amendment, Paetsch challenges the denial of his motion to suppress physical evidence seized from his car. He argues that the barricade was unreasonable at its inception, unreasonable in its duration, and unreasonable in the means used to carry it out. Specifically, he contends under *Indianapolis v. Edmond* that the group seizure was not "appropriately tailored." And, under the balancing test set forth in *Brown v. Texas*, he argues that the barricade did not advance the public interest to a sufficient degree when weighed against its resulting interference with individual liberty.

Upon review, the 10th Circuit Court of Appeals found, in part, as follows:

"We conclude that the stop was constitutional at its inception because it was in fact 'appropriately tailored' to catch a fleeing, armed bank robber. We also conclude that the gravity of the public concern in apprehending the armed bank robber and the likelihood of advancing the public interest justified the intrusion on individual liberty—at least until police developed individualized reasonable suspicion of Paetsch. After that point, we have no reason to evaluate the reasonableness of the barricade seizure.

"Generally, a seizure made without individualized suspicion of wrongdoing is unreasonable. *City of Indianapolis v. Edmond,* 531 U.S. 32, 37 (2000) (holding that a roadway checkpoint randomly stopping motorists without individualized reasonable suspicion for the primary purpose of general crime control—interdicting illegal drugs—

violated the Fourth Amendment). A traffic stop is a 'seizure within the meaning of the Fourth Amendment.' *Delaware v. Prouse,* 440 U.S. 648, 653 (1979). Because roadblocks and checkpoints seize people without individualized reasonable suspicion, they would violate the Fourth Amendment if subject to that general rule. And, even here, where police had GPS information showing that the tracker (and likely the bank robber) were in one of the 20 cars, police initially lacked reasonable, articulable suspicion of any *particular* person.

"But the touchstone of the Fourth Amendment is reasonableness, not individualized suspicion. *Samson v. California*, 547 U.S. 843, (2006). Accordingly, the Supreme Court has carved out exceptions to the general rule where the primary purpose of a group seizure went beyond ordinary crime control. *See Edmond*, 531 U.S. at 37–38. For example, the Court has upheld a border patrol roadblock designed to intercept illegal aliens. *United States v. Martinez-Fuerte*, 428 U.S. 543, (1976). And it has upheld a sobriety checkpoint aimed at removing drunk drivers from the road to protect public safety. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, (1990). In those situations, the Court has not required individualized reasonable suspicion, instead favoring a group level balance of interests, weighing the public interest against intrusions on individuals' liberty.

"In *Indianapolis v. Edmond*, the Court explained that 'there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control.' 531 U.S. at 44. As one example, the Court noted, 'the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.'

"The Court distinguished the exigencies in those scenarios from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction. Here, the police knew far more than that an armed bank robber was fleeing on a likely route: they knew that the stolen money (and likely the armed criminal who stole it) sat in a car idling at that very intersection. And, because the police barricaded only the 20 cars possibly containing the bank robber, their barricade was appropriately tailored to achieve its constitutional purpose—to catch a dangerous criminal who is likely to flee by way of a particular route.

"Courts analyzing roadblocks have balanced those interests under three factors the Supreme Court announced in *Brown v. Texas:* the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. Paetsch himself admits that there was a grave public concern animating the dragnet stop.

"Not only was the barricade effective, but police knew it would be effective before setting it up. Here police had reliable information that they had penned the bank robber at the traffic intersection. See *Palacios v. Burge*, 589 F.3d 556, 559, 564 (2d Cir. 2009) (holding a group seizure lacking individualized suspicion valid under the Fourth Amendment partly because the police

'were armed with reliable information that the perpetrators were among the group of individuals'). Further, the officers knew that they had access to a handheld beacon that would pinpoint the tracker and thus, most likely, the bank robber. We conclude that the decision to barricade the 20 cars reasonably advanced the public interest.

"The roadblock cases instruct us to weigh the first two *Brown* factors against the third—the severity of the interference with individual liberty. Here, police seized 29 people. When officers developed individualized suspicion of Paetsch, they had detained the innocent people in their cars for 29 minutes. While we sympathize with the innocent motorists caught in the barricade resulting from Paetsch's armed bank robbery, we conclude that these intrusions on individual liberty do not tip the scale in Paetsch's favor.

"Officers set up the barricade to catch a fleeing, armed bank robber, and they knew they had access to a handheld beacon that could pinpoint him among the 29 people detained. Within the 30 minutes originally estimated for the beacon to arrive, police developed individualized reasonable suspicion of Paetsch. For the first 30 minutes of the barricade, until police obtained individualized reasonable suspicion of Paetsch, we conclude that the first two *Brown* factors—the gravity of the public concern and the degree to which the seizure advanced the public interest—outweighed the third—the severity of the interference with individual liberty. As such, we conclude that the barricade did not violate Paetsch's Fourth Amendment rights."

SEARCH AND SEIZURE:

Blood-Alcohol Test; Seizure by Warrant

Metzner v. State, No. CR-14-865, 2015 Ark. 222, 5/21/15

The circuit court found Ernie Metzer guilty of driving while intoxicated, second offense, and of violating the implied-consent law. He appealed, arguing that the circuit court erred in denying his motion to suppress the results of a blood-alcohol test taken pursuant to a search warrant. Specifically, he contended that the implied-consent statutes prohibit the issuance of a warrant to obtain a chemical test.

In this case, the court had to decide whether the Arkansas laws prohibited an officer from obtaining a warrant once an accused declined the test requested by the officer under the implied-consent law. The Arkansas Supreme Court affirmed Metzer's conviction and sentence, holding that "the laws of Arkansas do not prohibit an officer from obtaining a warrant once an accused declines the test requested by the officer under the implied-consent law." The Court stated that to "interpret the statute to afford DWI suspects more protection than other criminal defendants produces an absurd result that is contrary to the plain language of the statute."

SEARCH AND SEIZURE:

Detention After Completion of Traffic Stop

Rodriguez v. United States
No. 13-9972, 4/21/15

Upon review of *Rodriguez v. United States,* the U.S. Supreme Court found as follows:

"In *Illinois v. Caballes*, 543 U. S. 405 (2005), this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation.

"Just after midnight on March 27, 2012, police officer Morgan Struble observed a Mercury Mountaineer veer slowly onto the shoulder of Nebraska State Highway 275 for one or two seconds and then jerk back onto the road, and on that basis, Struble pulled the Mountaineer over at 12:06 a.m. Struble is a K–9 officer with the Valley Police Department in Nebraska, and his dog Floyd was in his patrol car that night. Two men were in the Mountaineer: the driver, Dennys Rodriguez, and a front-seat passenger, Scott Pollman.

"Struble approached the Mountaineer on the passenger's side. After Rodriguez identified himself, Struble asked him why he had driven onto the shoulder. Rodriguez replied that he had swerved to avoid a pothole. Struble then gathered Rodriguez's license, registration, and proof of insurance, and asked Rodriguez to accompany him to the patrol car. Rodriguez asked if he was required to do so, and Struble answered that he was not. Rodriguez decided to wait in his own vehicle.

"After running a records check on Rodriguez, Struble returned to the Mountaineer. Struble asked passenger Pollman for his driver's license and began to question him about where the two men were coming from and where they were going. Pollman replied that they had traveled to Omaha, Nebraska, to look at a Ford Mustang that was for sale and that they were returning to Norfolk, Nebraska. Struble returned again to his patrol car, where he completed a records check on Pollman, and called for a second officer. Struble then began writing a warning ticket for Rodriguez for driving on the shoulder of the road.

"Struble returned to Rodriguez's vehicle a third time to issue the written warning. By 12:27 or 12:28 a.m., Struble had finished explaining the warning to Rodriguez, and had given back to Rodriguez and Pollman the documents obtained from them. As Struble later testified, at that point, Rodriguez and Pollman 'had all their documents back and a copy of the written warning. I got all the reasons for the stop out of the way; took care of all the business.'

"Nevertheless, Struble did not consider Rodriguez 'free to leave.' Although justification for the traffic stop was 'out of the way,' Struble asked for permission to walk his dog around Rodriguez's vehicle. Rodriguez said no. Struble then instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer. Rodriguez complied. At 12:33 a.m., a deputy sheriff arrived. Struble retrieved his dog and led him twice around the Mountaineer. The dog alerted to the presence of drugs halfway through Struble's second pass. All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine.

"Rodriguez was indicted in the United States District Court for the District of Nebraska on one count of possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U. S. C. §§841(a)(1) and (b)(1). He moved to suppress the evidence seized from his car on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.

"After receiving evidence, a Magistrate Judge recommended that the motion be denied. The Magistrate Judge found no probable cause to search the vehicle independent of the dog alert. (Apart from 'information given by the dog, Officer Struble had nothing other than a rather large hunch.') He further found that no reasonable suspicion supported the detention once Struble issued the written warning. He concluded, however, that under Eighth Circuit precedent, extension of the stop by 'seven to eight minutes' for the dog sniff was only a *de minimis intrusion* on Rodriguez's Fourth Amendment rights and was therefore permissible.

"The District Court adopted the Magistrate Judge's factual findings and legal conclusions and denied Rodriguez's motion to suppress. The court noted that, in the Eighth Circuit, 'dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only a minimal intrusions.' (quoting *United States v. Alexander*, 448 F. 3d 1014, 1016 (CA8 2006)). The court thus agreed with the Magistrate Judge that the '7 to 10 minutes' added to the stop by the dog sniff 'was not of constitutional significance.' Impelled by that decision, Rodriguez entered a conditional guilty plea and was sentenced to five years in prison."

"The Eighth Circuit affirmed, stating 'The seven- or eight-minute delay in this case resembled delays that the court had previously ranked as permissible.' 741 F. 3d 905, 907 (2014). The Court of Appeals thus ruled that the delay here constituted an acceptable '*de minimis* intrusion on Rodriguez's personal liberty.' Given that ruling, the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez's detention after issuing the written warning.

"We granted certiorari to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff.

"A seizure for a traffic violation justifies a police investigation of that violation. A

relatively brief encounter, a routine traffic stop is 'more analogous to a so-called *Terry* stop…than to a formal arrest.' Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. An officer may conduct certain unrelated checks during an otherwise lawful traffic stop. But he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.

"Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.

"A dog sniff, by contrast, is a measure aimed at detecting evidence of ordinary criminal wrongdoing. *Indianapolis v. Edmond,* 531 U. S. 32 –41 (2000). Candidly, the Government acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission. In advancing its de minimis rule, the Eighth Circuit relied heavily on our decision in *Pennsylvania v. Mimms,* 434 U. S. 106 (1977) (*per curiam*). See *United States v. $404,905.00 in U. S. Currency*, 182 F. 3d 643, 649 (CA8 1999).In *Mimms,* we reasoned that the government's 'legitimate and weighty' interest in officer safety outweighs the 'de minimis' additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. 434 U. S., at 110–111. See also *Maryland v. Wilson,* 519 U. S. 408 –415 (1997) (passengers may be required to exit vehicle stopped for traffic violation). The Eighth Circuit, echoed in Justice Thomas's dissent, believed that the imposition here similarly could be offset by the Government's 'strong interest in interdicting the flow of illegal drugs along the nation's highways.' *$404,905.00 in U. S. Currency,* 182 F. 3d, at 649.

"Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are especially fraught with danger to police officers, so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. On-scene investigation into other crimes, however, detours from that mission. Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular.

"As we said in *Illinois v. Caballes*, 543 U.S. 405, and reiterate today, a traffic stop prolonged beyond that point is unlawful. The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff prolongs—adds time to—the stop.

"The Magistrate Judge found that detention for the dog sniff in this case was not independently supported by individualized suspicion, and the District Court adopted the Magistrate Judge's findings. The Court of Appeals, however, did not review that determination. The question whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation, therefore, remains open for Eighth Circuit consideration on remand.

"For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion."

SEARCH AND SEIZURE:

Emergency Search; Blood Draw

State of Colorado v. Ackerman
2015 Co 27, 4/20/15

At around 1 a.m. on November 18, 2013, an off-duty Colorado State University police officer who lived in the Dry Creek neighborhood of Fort Collins called the police to report a noise complaint. He told the police that a man and a woman were riding around on an all-terrain vehicle (ATV) and that alcohol was involved. He said that the man was driving the ATV. Officer Braun arrived on the scene and attempted to make contact with the ATV. Upon noticing the officer, the driver of the ATV sped off in another direction. The vehicle hit a roundabout, rolled, and ejected the driver and passenger. Both the man, who was identified as Ackerman, and the woman sustained serious injuries. Ackerman was transported to the Medical Center of the Rockies, while the woman went to Poudre Valley Hospital.

Officer Tower, who is the supervisor of the traffic unit and coordinates the Collision Reconstruction and Scene Handling (CRASH) team, was notified about the accident around 1:30 a.m. He asked Sergeant Clow, who was already at the scene, for his assessment and learned that Ackerman and the woman were seriously injured and transported to different hospitals. Officer Tower then directed an officer to go to each hospital. Officer Nace went to Poudre Valley Hospital, where the woman was pronounced dead on arrival. Officer Beaumont traveled to the Medical Center of the Rockies to "monitor [Ackerman's] situation."

Because the accident resulted in serious bodily injury and death, and included the driver eluding an officer, Officer Tower enacted "critical-incident protocol." The protocol dictated that the police perform both criminal and internal investigations. The internal investigation required performing interviews to ensure no police wrongdoing. Officer Tower arrived on the scene around 2:20 a.m. and received a "walk-through" from Sergeant Clow. He testified that he then explained the situation to Officer Jurkofsky, who arrived soon after, and requested that Officer Jurkofsky gather information and begin writing an affidavit for a warrant to

order blood drawn from Ackerman. While Officer Jurkofsky gathered information, Officer Beaumont called from the hospital and informed the investigators at the scene that Ackerman was unconscious and was in preparation for a computerized axial tomography (CAT) scan and "possibly surgery." After discussing the status of the investigation and the possibility of obtaining a warrant, Officer Tower determined that he could not get a warrant before Ackerman became unavailable. As a result, he ordered Officer Beaumont to obtain a blood draw, which hospital personnel performed around 3:30 a.m.

After the first blood draw, Officer Jurkofsky continued to gather information to complete the affidavit for the warrant, which the police submitted to a magistrate via an electronic, expedited warrant system. A magistrate signed the warrant at 4:37 a.m., which authorized two additional blood draws to be carried out so that the three total blood draws were each an hour apart. Ackerman, though, was in surgery at the time, which delayed the blood draws. The two additional blood draws were not performed until 5:18 and 6:25 a.m. Following the police's investigation, Ackerman was charged with vehicular homicide, vehicular eluding involving death, driving under the influence, driving under the influence per se, and reckless driving. Ackerman pleaded not guilty on all counts and moved to suppress the results from the three blood draws.

At the suppression hearing, the trial court found that the police had probable cause to proceed with the first blood draw. It noted that there was alcohol involved in a fatal accident, that Ackerman was the driver of the ATV, and that a blood test would produce evidence of Ackerman's intoxication level. Nevertheless, the trial court found that no exigent circumstances existed that made obtaining a warrant impractical. It reasoned that Officer Tower had "sufficient time to get a warrant" through the expedited warrant system because there were approximately two hours between the accident and the first blood draw and an hour between the officer's arrival on the scene and the first blood draw. It stated that the police's failure to obtain this warrant was due to "a breakdown in procedures" and "didn't really have anything to do with the surgery." Thus, the court granted the motion to suppress the results from the first blood draw. As to the second and third blood draws, the trial court, after reviewing the affidavit for probable cause for a search warrant, found that the totality of the circumstances supported a finding of probable cause that Ackerman committed a crime and denied the motion to suppress the results from those blood draws.

The State filed an appeal on the issue of whether the facts of the case constituted exigent circumstances. The Supreme Court held that under the specific facts of this case, exigent circumstances existed: "Police were still investigating the scene of the crime of vehicular homicide and driving under the influence and were not finished preparing the affidavit for a warrant they learned that the hospital personnel were taking the unconscious and injured defendant for the medical procedures that could alter his blood-alcohol content. Under the totality of the circumstances, these exigent circumstances made it impractical for the police to obtain a search warrant and justified the blood draw."

Accordingly, the Court reversed the trial court's suppression order and remanded the case for further proceedings.

SEARCH AND SEIZURE:

Private Person Search; Notification of Police

State of New Jersey v. Wright
No. A-64-13, 5/19/15

James and her three young children lived in an apartment on the first floor of a two-family home in Asbury Park. Ricky Wright, James' boyfriend and the father of her youngest child, stayed at the apartment about three to four nights per week. On Sunday evening, March 29, 2009, James called her landlord, Alfred Santillo, and reported a major water leak in the kitchen ceiling. Santillo told James to shut off the main water valve and said that he would stop by with a plumber the next morning to fix the leak.

Santillo and the plumber, Nicholas Alexo, arrived at the apartment before noon on Monday. Because no one was home, Santillo called James, who did not answer her phone. After waiting about a half hour, Santillo let himself into the apartment, as he had done on prior occasions. Santillo and Alexo saw water and sewage leaking from the kitchen ceiling. Because the water pipes in the kitchen led to the back of the apartment, Alexo went to the rear bedroom to check for other leaks. Alexo saw a small bag of marijuana on top of a nightstand. Inside an open drawer of the nightstand, he also saw a small box that he believed contained powder or crack cocaine. Alexo called Santillo into the bedroom and showed him the items. They then called the police.

Officer Carl Christie responded shortly before 1 p.m. He spoke with Santillo and Alexo, who explained what happened and what they had seen. Christie entered the apartment without a search warrant. Along with Santillo and Alexo, he saw the leak in the kitchen and then went to the rear bedroom. Christie noticed a small nightstand with marijuana on it and, in an open drawer of the nightstand, he saw an open cardboard box with bags of cocaine inside. Christie also spotted a small scale in the same drawer. Neither Santillo nor Alexo had told him about the scale.

Christie then called for back-up while Alexo and Santillo tried to repair the leak. A number of officers responded, including Officer Lorenzo Pettway of the narcotics unit. At this point, six officers were on the scene.

Christie briefed Pettway and told him about the drugs in the bedroom. Santillo and Alexo also told Pettway what had taken place. Pettway got James phone number from Santillo and called her. He relayed that James' landlord had found some items in her apartment and asked her to return so that he could retrieve them. James arrived about fifteen to twenty minutes later.

Pettway and James then spoke outside the apartment. Pettway explained that drugs had been found inside and asked for consent to remove them and search the apartment for additional narcotics. Pettway testified that James agreed and signed a consent to search form.

During the search that followed, the officers found the following items in addition to the drugs and scale that Christie had observed: a handgun loaded with hollow-point bullets—

inside a partially opened red and black book bag; a little less than one hundred bullets of different caliber sizes— inside a black camera bag; a box of baking soda and sandwich bags, commonly used to cut and package cocaine; and a Pyrex plate and measuring cup, both of which had some powder residue that appeared to be cocaine.

After the search, the police arrested James. Wright arrived as they were leaving the apartment, and the police arrested him as well. Wright had returned to the apartment in response to an earlier call from James and the police.

Wright moved to suppress the evidence. After review, the New Jersey Supreme Court held that the third-party intervention or private search doctrine does not exempt law enforcement's initial search of James' home from the warrant requirement.

"Absent exigency or some other exception to the warrant requirement, the police must get a warrant to enter a private home and conduct a search, even if a private actor has already searched the area and notified law enforcement. The proper course under the State and Federal Constitutions is the simplest and most direct one. If private parties tell the police about unlawful activities inside a person's home, the police can use that information to establish probable cause and seek a search warrant. In the time it takes to get the warrant, police officers can secure the apartment or home from the outside, for a reasonable period of time, if reasonably necessary to avoid any tampering with or destruction of evidence."

SEARCH AND SEIZURE:

Stop and Frisk; Basis for Frisk

United States v. Hurd
CA8, No. 14-2872, 5/8/15

Minneapolis Officers Martin and Englund were patrolling an area that had high levels of narcotics transactions. They saw a car stopped in the middle of the road with Hurd standing next to the driver's window. Based on the high-crime location, the darkness, the cold temperature, and the absence of buildings on the block, Martin suspected a narcotics transaction. Martin stopped the squad car behind the other car. Hurd approached the squad car with his hands in his jacket pockets. The officers exited their vehicle and ordered Hurd to remove his hands from his pockets. Hurd initially complied, but then put them back in his pocket and continued to approach the officers. The officers grabbed Hurd and placed him over the hood of the squad car. Hurd still refused to take his hands out of his pockets. Martin reached into the pocket and felt the butt of a handgun. The officers removed a loaded, cocked .45-calibur pistol.

Hurd was charged as a felon in possession of a firearm. He moved to suppress the evidence, arguing that the officers had no reason to conduct a Terry stop. The district court denied the motion, noting that a protective frisk for officer safety purposes was appropriate under the circumstances. The Eighth Circuit affirmed.

SEARCH AND SEIZURE:
Stop and Frisk; Seizure

United States v. Gross
CADC, No. 13-3102, 4/21/15

Officers in a Washington, D.C. Gun Recovery Unit were in an unmarked car, wearing vests that said "police." Gross was walking the sidewalk. Officer Bagshaw slowed the car and shined a flashlight, saying "Hey, it is the police, how are you doing? Do you have a gun?" Gross stopped, but did not answer. Bagshaw stopped the car and asked, "Can I see your waistband?" Not speaking, Gross lifted his jacket to show his left side. Bagshaw began to move the car. Officer Katz asked Bagshaw to stop, opened his door and asked, while stepping out, "Hey man, can I check you out for a gun?" Gross ran. Katz gave chase, saw Gross patting his right side, and smelled PCP. Katz apprehended Gross, performed a frisk, and recovered a handgun from Gross's waistband.

Denying a motion to suppress, the court reasoned that no seizure occurred until after Gross fled because nothing would have indicated to a reasonable person that he lacked freedom to disregard the questions and walk away. Gross's flight and other behavior, provided reasonable grounds to detain him and conduct a pat-down frisk. Gross was convicted and the District of Columbia Circuit affirmed. Given the totality of the circumstances and precedents involving comparable interactions, Bagshaw's questioning did not effect a Fourth Amendment seizure. Once he attempted to flee, officers had authority to stop him and conduct the frisk.

SEARCH AND SEIZURE:
Parolee's Signed Agreement to Consent to Searches

United States v. White
CA7, No. 13-2943, 3/25/15

While Jason White was on parole from an Illinois state prison sentence, police suspected that he was involved in a shooting and had a warrant to arrest him. Before the police found White, they located his gym bag that he had left in his cousin's car. Without a search warrant, but relying on a condition of his parole that required White to agree to searches of his property, the police opened the bag and found a gun.

White was convicted of being a felon in possession of a firearm after the court denied his motion to suppress evidence of the gun on the ground that neither he nor his cousin had consented to the search of the bag. The Seventh Circuit affirmed. The search of the property of a suspected parole violator who had agreed in writing to consent to property searches and whom the police could not locate was reasonable.

SEARCH AND SEIZURE: Satellite-Based Monitoring of a Recidivist Sex Offender

Grady v. North Carolina, No. 14-593, 3/30/15

Torrey Dale Grady was convicted in North Carolina of a second degree sexual offense in 1997 and of taking indecent liberties with a child in 2006. After he served his sentence, the state held a hearing to determine whether he should be subjected to satellite-based monitoring (SBM) as a recidivist sex offender, N. C. Gen. Stat.

14–208.40(a)(1), 14– 208.40B. Grady argued that the program, under which he would be forced to wear tracking devices at all times, would violate his Fourth Amendment rights. The North Carolina State courts rejected his arguments.

The Supreme Court held that the state conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements. Although the North Carolina monitoring program is civil in nature, the government's purpose in collecting information does not control whether the method of collection constitutes a search. The Fourth Amendment prohibits only unreasonable searches. The case was remanded to allow North Carolina courts to examine whether the monitoring program is reasonable, when properly viewed as a search.

SEARCH AND SEIZURE:

Search Warrant; Child Pornography; Items to be Seized

United States v. Reichling
CA7, No. 14-2941, 3/27/15

In this case, the issue before the Seventh Circuit Court of Appeals was whether a largely online relationship between Reichling and a minor victim established probable cause to seize digital and non-digital storage devices—including a VHS tape—found at Reichling's residences.

At issue is the August 20, 2013, affidavit used to support search warrants of Reichling's parents' home in Darlington, Wisconsin, and a trailer on an adjacent property. The affidavit, signed by a sergeant with the Darlington Police Department, sets forth the following facts: a 14-year-old female victim and an individual who claimed to be the victim's age and named "Nathan Solman" began an online Facebook relationship in July 2010; between August 2010 and July 2012, the victim sent "Nathan Solman" in excess of 300 "naked pictures of herself in varied sexual positions" from her cell phone; and when she tried to stop sending such pictures, "Nathan Solman" threatened to show the pictures he already possessed to others if she stopped. The internet protocol address associated with the Facebook account of "Nathan Solman" was linked to the residence of Reichling's parents in Darlington, Wisconsin.

According to the search warrant affidavit, in July 2012, the victim met "Nathan Solman" for the first time in the backyard of her residence and he appeared to be much older than the victim, with a physical description resembling Reichling. The victim reported that this encounter lasted only a few minutes because her stepfather came outside and "Nathan Solman" quickly left the area. The affidavit also quotes a series of unwanted, threatening, and harassing text messages sent to the victim from March 2013 through June 2013. These text messages included details indicating that the sender knew the victim and was watching her. According to the affidavit, phone records showed that these text messages were sent from a cellular telephone number registered to Reichling.

Through information gathered from various sources, the affidavit indicates that Reichling either lived in his parent's residence or in a trailer on an adjacent property owned by Reichling's brother. According to the

affidavit, Reichling was a registered sex offender, having been convicted of second-degree sexual assault of a 17-year-old female in Green County, Wisconsin, in 1993. Reichling was discharged from probation for this offense on April 1, 2010, approximately four months before "Nathan Solman" began his Facebook relationship with the victim described above.

On the basis of this affidavit, a Wisconsin circuit court judge issued one search warrant for Reichling's parents' residence and one warrant for the adjacent trailer, with both warrants authorizing the seizure of the following: "images, photographs, videotapes or other recordings or visual depictions representing the possible exploitation, sexual assault and/or enticement of children"; "all computers and computer hardware devices," including desktops, laptops, cell phones, and any type of camera; and "internal and peripheral digital/electronic storage devices," including "hard drives," "thumb or flash drives," and "video tapes."

Based upon items seized pursuant to these warrants, a federal grand jury returned an indictment charging Reichling with two counts of producing child pornography, one count of receiving child pornography, and one count of possession of child pornography.

Reichling argues that, even if probable cause existed to search for images on *digital* storage devices—computers, external hard drives, thumb drives and the like—the affidavit did not establish probable cause to search for *non-digital* storage devices, such as the VHS videotape which formed the basis of count one of the indictment.

Upon review, the U.S. Supreme Court found, in part, as follows:

"A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. *United States v. Ross,* 456 U.S. 798, 820–21 (1982). The search warrant affidavit in this case established probable cause to believe images of the victim (likely constituting child pornography), Facebook messages, and text messages would be found in Reichling's parents' residence and the adjacent trailer. Given the large number of images at issue, the duration of Reichling's interest in the victim, and the way various storage media work together—as well as 'an understanding of both the behavior of child pornography collectors and of modern technology,' *Carroll*, 750 F.3d at 704—it was reasonable for the issuing judge to authorize the police to conduct 'separate acts of entry or opening,' including searching any computers and other storage devices 'in which the images might be found.' *Ross,* 456 U.S. at 820–21. In short, the affidavit was sufficient to show a fair probability that the storage devices identified in the warrants would contain evidence of child pornography—or, as stated in the warrants, 'exploitation of children.'

"While the law requires judges to be neutral, the law does not require judges to pretend they are babes in the woods. In evaluating search warrant applications, judges may

consider what is or should be common knowledge. When the warrants here were issued in August 2013, it was or should have been common knowledge to judges (like other members of the public) that images sent via cell phones or Facebook accounts may be readily transferred to other storage devices, such as those identified in the warrants. It may have been prudent for the agent preparing the search warrant affidavit to have included this fact in the affidavit itself, but we do not think it was required. The affidavit also did not specifically assert that 'Nathan Solman'—an apparent collector of child pornography—likely would have maintained some or all of the over 300 images he coaxed and coerced from his victim between August 2010 and July 2012, so that the images probably would be found during an August 2013 search. Again, while such an assertion may have been prudent, we do not think it was necessary to make the warrants valid. See *United States v. Newsom*, 402 F.3d 780, 783 (7th Cir. 2005) (Although the affidavit before the judge did not explain specifically that collectors of child pornography tend to hold onto their stash for long periods of time, it was clear from the context that the police believed that Newsom probably still had the year-old images or something similar on his computer.); cf. *Seiver*, 692 F.3d at 777–78 (noting that it is common knowledge that even "deleted" computer files are often recoverable). These are examples of an issuing judge being permitted to draw reasonable inferences concerning where the evidence referred to in the affidavit is likely to be kept, taking into account the nature of the evidence and the offense.

"The search warrant affidavit in this case established probable cause to believe images of the victim (likely constituting child pornography), Facebook messages, and text messages would be found in Reichling's parents' residence and the adjacent trailer. Given the large number of images at issue, the duration of Reichling's interest in the victim, and the way various storage media work together—as well as an understanding of both the behavior of child pornography collectors and of modern technology—it was reasonable for the issuing judge to authorize the police to conduct separate acts of entry or opening, including searching any computers and other storage devices in which the images might be found. In short, the affidavit was sufficient to show a fair probability that the storage devices identified in the warrants would contain evidence of child pornography—or, as stated in the warrants, 'exploitation of children.'

"With respect to the non-digital storage media identified in the warrants (e.g., 'video tapes'), Reichling adopts too narrow a view of the facts. First, Reichling asserts that it is categorically impossible to transfer digital files, such as those sent from a cell phone, onto non-digital storage media, such as VHS videotapes. At oral argument, government counsel disputed this assertion, citing a computer program which allows such a transfer. A quick internet search reveals that, apart from computer programs, there are plenty of VHS-DVD combo recorders on the market that allow users to internally dub [i.e., copy] VHS tapes to DVD [i.e., digital storage media] and vice versa.

"And even if the warrants were invalid because the affidavit failed to support a finding of probable cause, we agree with the government that the district court's denial

of Reichling's suppression motions was proper nonetheless by application of the good-faith exception to the exclusionary rule. The affidavit included enough detail that a reasonable officer might rely on the judge's issuance of a warrant based upon it. While we do not endorse this affidavit as a model for other officers to follow, this is not one of those unusual cases in which exclusion will further the purposes of the exclusionary rule."

SEARCH AND SEIZURE: Standing to Object; Entry of Premises for a Legitimate Law Enforcement Purpose

United States v. Bearden
CA8, No. 14-1659, 3/17/15

Officer Billy Simpson and Detective Ken Minica of the Polk County, Arkansas, Sheriff's Department both testified that on March 21, 2012, they were attempting to locate an address in rural Polk County as part of an unrelated investigation into identity theft. The area was sparsely populated and heavily wooded, making it difficult to see houses from the road. Unable to locate the address, the officers decided to contact people at nearby residences for assistance.

The officers located a house later identified as Anthony Bearden's, but they did not enter the property because of a closed gate on the driveway. The officers left a business card at another residence when no one answered their knock. Then, the officers saw and drove down another driveway through a wooded area. Both officers testified they did not open a gate to access the property. At the end of the driveway was a house, and the driveway looped around the house.

Approaching from the north, the officers did not see a door to the residence, so they continued on the circular drive to the south side of the house, where they parked behind a vehicle. On the south side, they saw a door and a carport. Both officers testified they believed this was the front entrance of the house.

At this point, the officers saw co-defendant Charles White walking through a fenced-in area toward them. They also noticed a metal shop building on the property. When they got out of their car, both officers smelled a strong odor of "green marijuana." Officer Simpson spoke with White and showed him a picture of the person they were looking for. White said he did not know his neighbors but knew a young couple lived on the adjoining parcel of property. After talking with White, the officers left the property. On their way out, they noticed a surveillance camera on a post near the driveway. Detective Minica also noticed a surveillance camera on the west side of the shop building.

Officer Simpson and Detective Minica returned to White's property later that day with additional officers to investigate the marijuana smell. Officer Simpson testified the marijuana smell "was even stronger" than it had been earlier in the day; Detective Minica testified the smell was "overwhelming." The officers attempted to make contact with White, but no one answered at his front door. The officers decided to apply for a search warrant. Officer Simpson, Detective Minica and Combined Ozarks Multijurisdictional Enforcement Team (COMET) Drug Task Officer (TFO) Greg Tiller remained at the property to secure it. After about thirty minutes, the officers observed a man on an

all-terrain vehicle (ATV) who was approaching from the east through the timber and from behind an outbuilding.

The officers stopped the man, who identified himself with a Missouri driving permit as Anthony Bearden. TFO Tiller told Bearden they were getting a search warrant for White's property. Bearden told TFO Tiller he rented the adjoining property from White and was returning the ATV to White. Bearden wore a large Bowie-style knife on his belt. TFO Tiller took the knife and handcuffed Bearden. TFO Tiller testified Bearden was cooperative. Bearden then allowed TFO Tiller to search his pockets, where TFO Tiller found a piece of paper with directions about water and fertilizer, "relevant to the growing of something," an empty gallon-sized zip-top bag, and a set of keys that included a key to the metal outbuilding. TFO Tiller testified Bearden smelled strongly of mothballs. TFO Tiller placed Bearden in the back of a squad car until he could figure out exactly what he wanted to do with him.

TFO Tiller spoke with Bearden while Bearden was sitting in the back of the car. TFO Tiller asked him if he had "anything illegal at his residence," to which Bearden responded that he had "personal use marijuana." At TFO Tiller's request, Bearden agreed to allow the officers to search his property. TFO Tiller and another officer drove Bearden to his driveway, where Bearden gave them permission to open the gate and drive up the driveway. Once on Bearden's property, TFO Tiller smelled the strong odor of mothballs, as well as the odor of green marijuana. TFO Tiller testified Bearden volunteered that he had seen numerous marijuana plants in the metal storage shed near his house and in the metal shed near White's house. Inside his own house, Bearden showed the officers where some personal use marijuana was located in a closet, and officers found additional marijuana and marijuana paraphernalia.

TFO Tiller relayed the information about the odor of green marijuana, as well as Bearden's statements about marijuana, to TFO Carpenter, who had left to seek a search warrant for White's property. TFO Carpenter told TFO Tiller he would seek a search warrant for Bearden's property as well. TFO Tiller then recited to Bearden the *Miranda* warnings and spoke with him again about the sheds. At some point, Bearden told TFO Tiller he was on probation. During the search of Bearden's property, the officers found over 800 marijuana plants in the shed. During the search of White's property, the officers found hundreds of marijuana plants growing in the shop building.

Co-defendant White presented two witnesses at the suppression hearing. Chris Sprague, a neighbor who lived across the road from White, testified that White had a gate on his driveway that "was closed as always" when officers arrived and that they had to open the gate to arrive at White's house. Sprague also testified that a sign on the gate read "No Trespassing." George Rush, a longtime friend who often visited White, also testified that White had a gate on his driveway that was always closed, though unlocked, and a sign that read "No Trespassing, Keep Out."

Following the evidentiary hearing, the magistrate judge recommended granting Bearden's motion to suppress the statements he made before he was Mirandized but recommended denying the remainder

of White's and Bearden's motions. The magistrate judge specifically found the officers' testimony was more credible than the testimony of White's witnesses and found that the gate at the end of White's driveway was open both times the officers drove up White's driveway. The district court adopted the magistrate judge's report and recommendation.

Bearden entered a conditional guilty but preserved his right to appeal the denial of his motions to suppress.

Upon appeal, Bearden asserted the district court erred in finding that the officers lawfully entered White's property and, thus, in denying his motion to suppress any evidence seized from White's property. The government argued that Bearden lacked standing to challenge the search of White's property.

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

"Bearden presented no evidence to show he asserted a subjective expectation of privacy in White's property. Instead, officers testified that when they questioned Charles White during their visit to the property, he denied knowing Bearden personally and Bearden described White only as his landlord. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Rakas v. Illinois,* 439 U.S. 128 (1978). Bearden points to nothing in the record to support the conclusion that he held a reasonable expectation of privacy in White's property. Bearden lacked standing to challenge the officers' entry onto White's property and the resulting seizure of evidence from that property.

"Bearden also asserts he has standing to challenge the officers' entry onto White's property because the purportedly unlawful entry led directly to his own seizure and interrogation and to the search of his own property. The magistrate judge made a factual finding, based on the officers' testimony, that the gate was open and the district court adopted that finding. Bearden offers nothing to convince us that this finding was clearly erroneous.

"Bearden next argues the officers acted in violation of the Fourth Amendment when they drove up White's driveway and entered his curtilage without a warrant or a showing of exigent circumstances. The Fourth Amendment protects not only residences against unreasonable searches and seizures, but also the curtilage surrounding the residence. *United States v. Wells,* 648 F.3d 671, (8th Cir. 2011). The government does not dispute that the officers entered the curtilage of White's home but asserts the officers' entry onto the curtilage was constitutionally reasonable. 'Where a legitimate law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the Fourth Amendment, provided that the intrusion upon one's privacy is limited.' *United States v. Weston*, 443 F.3d 661, (8th Cir. 2006).

"When the officers first entered White's curtilage, they were investigating criminal activity wholly unrelated to White or Bearden and drove up White's driveway only to obtain assistance in locating an address. Both officers

testified they believed the south side of the house, which had a door and carport, was the front of the house. Bearden has offered no evidence to suggest otherwise. The officers approached the house during the day and White met them in the driveway before they had a chance to knock on the door. No Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors—such as driveways, walkways, or similar passageways.

"Once Officer Simpson and Detective Minica discovered evidence of criminal activity, based on the strong odor of marijuana, they were permitted to return to the property for a legitimate law enforcement objective. *United States v. Robbins*, 682 F.3d 1111, (8th Cir. 2012). We have held that police entry through an unlocked gate on a driveway to approach the front door of a residence for a 'knock-and-talk' is a reasonable, limited intrusion for legitimate law enforcement objectives. Under these circumstances, the officers permissibly re-entered White's property for a legitimate law enforcement purpose and neither consent nor exigent circumstances were necessary to justify the return visit.

"Bearden next argues he was detained illegally because the officers did not have a reasonable, articulable suspicion that he was engaged in criminal activity to justify the custodial detention.

"When Bearden arrived on White's property, officers were in the process of requesting a search warrant for the property, which they believed was being used to cultivate marijuana. Bearden arrived from the back of the property, where officers suspected the marijuana operation was located. Bearden smelled strongly of moth balls and had a large Bowie knife hanging on his belt. See *United States v. Lego*, 855 F.2d 542, 545 (8th Cir. 1988) (upholding justification for continued detention based on knife officer found and removed from case on defendant's belt). During a routine pat down search which Bearden allowed, TFO Tiller discovered a suspicious note regarding fertilizer, indicating Bearden might be involved in the suspected grow operation. He also told the officers that he was returning a vehicle belonging to White, his landlord, and that he lived next door, which directly contradicted White's statement to officers that he did not know his neighbors. Bearden does not contest these facts on appeal. The district court properly concluded that the officers had a reasonable, articulable suspicion that Bearden was involved in criminal activity, and his detention was justified.

"Bearden further contests the district court's conclusion that he freely consented to the search of his home. The government bears the burden of proving voluntary consent by a preponderance of the evidence. Bearden asserts his consent was not voluntary because it was given after he was approached by three armed officers, placed in custody, and not advised of the *Miranda* warnings. Whether consent was voluntarily given turns on a variety of factors, including a defendant's age, intelligence, and education; whether he cooperates with police; his knowledge of his right to refuse consent; and his familiarity with arrests and the legal system. *United States v. Escobar*, 389 F.3d 781, (8th Cir. 2004). Also relevant is the environment in which consent was given and whether the police threatened, intimidated, punished, or falsely promised something to the defendant; whether the

defendant was in custody or under arrest when consent was given and, if so, how long he had been detained; and whether consent occurred in a public or secluded area. *United States v. Smith*, 260 F.3d 922, (8th Cir. 2001).

"Admittedly, a few facts weigh in Bearden's favor: He was handcuffed at the time and had been for at least fifteen minutes, he had not yet been read the Miranda warnings, and his consent was given in a secluded wooded area. But he offers no evidence to counter the officers' testimony that he was not threatened, punished, intimidated, or promised anything for his consent and that he had been cooperative with officers from the first contact. In addition, during the suppression hearing, the government presented evidence that Bearden had four prior felony convictions, suggesting his familiarity with legal procedure, the Miranda warnings, and his right to refuse consent. Given the evidence presented at the hearing, the district court's finding that Bearden volunteered his consent to search his house was not clearly erroneous.

"The Court affirmed the district court's denial of Bearden's motions to suppress and upheld his sentence."

SEARCH AND SEIZURE:

Stop and Frisk; Basis for Stop

United States v. Cotton
CA8, No. 14-1428, 4/6/15

Cotton was attempting to enter an apartment complex in a violent area, plagued with narcotic activity, robberies, and shootings. Police officers saw an individual throw keys off a balcony to Cotton and an unidentified male, waiting below. The property manager had instructed residents not to throw their keys to people. One officer was aware of that security provision. After the keys hit the ground, an officer yelled that Cotton and the unidentified male were not allowed to take the keys. The unidentified male grabbed the keys and walked quickly toward a door; as he was unlocking the door, the officer yelled "stop." The unidentified male finished unlocking the door, entered the complex, and pulled the door shut.

Cotton did not move during this interaction. An officer approached Cotton, who appeared nervous and, according to the officer, reached for his waistband. Believing Cotton was reaching for a weapon, an officer grabbed Cotton's arms and handcuffed him. During a pat-down, a pistol was found in Cotton's waistband. Cotton was charged with being a felon in possession of a firearm.

The district court denied a motion to suppress. The Eighth Circuit affirmed: The officers conducted a constitutionally permissible seizure.

SEARCH AND SEIZURE:

Traffic Stop; Drug Detection Dog

United States v. Winters
CA6, No. 13-6349, 3/31/15

An officer stopped a rental car, in which Winters was the passenger, for speeding. The occupants' nervous behavior, inconsistent, implausible travel plans, and suspicious rental arrangement led the officer to believe that they might be trafficking contraband.

After he issued a warning ticket, the officer extended the stop for four minutes to retrieve his drug-detection dog from his cruiser, deploying his dog 24 minutes after the stop was initiated. The dog alerted to narcotics. Searching the vehicle, the officer discovered heroin in Winters' bag on the seat.

Winters was charged with possession with intent to distribute heroin. He entered a conditional guilty plea, reserving his right to appeal denial of his suppression motion. The Sixth Circuit affirmed, rejecting arguments that the officer unreasonably extended the stop and that the 2013 Supreme Court decision, *Florida v. Jardines*, established that a dog sniff must be justified by probable cause, not mere reasonable suspicion.

"Under the totality of the circumstances, the officer had reasonable, articulable suspicion of criminal activity that justified extending the stop. The *Jardines* decision is premised on special protections accorded to the home and does not alter the analysis for traffic stops. The officer was entitled to reasonably rely on binding precedent, that the use of a drug-detection dog during a lawful traffic stop does not require probable cause."