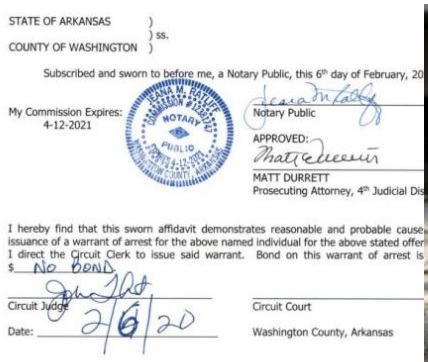
C.A.L.L.

City Attorney Law Letter

January 1, 2022

Issue 22-1



STATE OF ARKANSAS)
) ss.
COUNTY OF WASHINGTON)

Subscribed and sworn to before me, a Notary Public, this 6th day of February, 20

My Commission Expires:
4-12-2021

Notary Public

APPROVED:

MATT DURRETT
Prosecuting Attorney, 4th Judicial Dis

I hereby find that this sworn affidavit demonstrates reasonable and probable cause
issuance of a warrant of arrest for the above named individual for the above stated offer
I direct the Circuit Clerk to issue said warrant. Bond on this warrant of arrest is
$ NO BOND

Circuit Judge

Circuit Court

Date: 2/6/20

Washington County, Arkansas

CAO AND CAO CRIMINAL DIVISION NEW LOCATIONS:

City Attorney's Office – 132 Spring Street (Old IT Building)

Criminal Division – 201 Spring Street, P-113 (New Criminal Justice Building)

Telephone numbers have not changed.

Investigative Detention! DWI Investigation!

In This Issue:

City Attorney Law Letter
Springdale City Attorney's Office
201 Spring Street
Springdale, Arkansas, 72764
Editor – Hon. Ernest B. Cate, City Attorney

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David Dero Phillips, Deputy City Attorney, Ryan Renauro, Deputy City Attorney

Excessive Force – Unreasonable Restraint

Haynes v. Minnehan

Des Moines, IA Officer Minnehan was a member of the "Summer Enforcement Team," which was described as "a proactive policing initiative meant to reduce criminal activity in the areas of the City." The team encountered Haynes, who was driving a nice car in a high crime area. The team observed Haynes converse with a pedestrian for about 15 seconds and hand the pedestrian something. The officers concluded this was a hand-to-hand narcotics buy and stopped Haynes. Haynes did not have his driver's license on him but offered other forms of identification, one of which had his picture. Officers removed Haynes from the car and placed him in handcuffs at roadside for approximately 5 minutes. Throughout the encounter, Haynes was relaxed and cooperative. It turned out that Haynes was going to church in that area and had given a beggar some money.

Qualified immunity was given to the officers by the lower Court, holding that Haynes had no established right to be free from handcuffing. The Court of Appeals reversed that finding. The appellate Court observed that use of handcuffs constitute a "greater than a de minimus intrusion," so their use "requires the [officer] to demonstrate that the facts available to the officer would warrant a man of reasonable caution in [believing] that the action taken was appropriate. Haynes v. Minnehan, No. 20-1777, 2021 U.S. App. LEXIS 28550, at *9 (8th Cir. Sep. 21, 2021). The Court also noted that a lawful Terry stop "may nonetheless violate the Fourth Amendment if it is excessively intrusive in its scope or manner of execution." Id. at *8.

The appellate Court concluded that officers at the scene ignored credible information in making their decision to restrain Haynes in this manner. Specific factors the Court noted in the decision:

> "From the start, the officers outnumbered Haynes, who neither officer described as a large or imposing figure. They experienced no visibility issues. At no point did they seek help (by contacting dispatch). And when unsolicited help arrived (the other cruiser), they sent it away.
>
> "Yet, the officers kept Haynes in the road with his belt unbuckled and his pants unzipped for over five minutes. In handcuffs." Haynes v. Minnehan, at *10-11

Qualified Immunity was denied. All use of force cases are evaluated by the totality of circumstances. This decision should be read in the context of other recent US Eighth Circuit decisions defining the parameters of appropriate levels of restraint in varying investigative circumstances. Wilson v. Lamp, 901 F.3d 981, 985 (8th Cir. 2018), reviewed in CALL Issue 18-4 and Pollreis v. Marzolf, No. 20-1745, 2021 U.S. App. LEXIS 24259, in CALL Issue 21-4 offer additional perspective on settled parameters of police discretion in such cases.

Review by David D. Phillips, Deputy City Attorney

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Warrant Affidavit Good Faith

Wheeler v. City of Searcy

An affidavit for an arrest warrant was presented to a Judge in 2017 by officers investigating a cold case from over twenty years earlier. The affidavit was reviewed by a State Prosecutor before it was sent to the Judge. The affidavit referred to a written statement made in 1995 in which Wheeler was accused of complicity in the earlier suspected murder. The person making the statement had recanted it before the affidavit was prepared. The affidavit made no mention of the recantation. The affidavit also contained a statement that "Certified Cadaver dogs were used successfully in locating the aforementioned evidence." Wheeler v. City of Searcy, No. 20-3292, 2021 U.S. App. LEXIS 29364, at *9 (8th Cir. Sep. 29, 2021). No human body or human remains were ever found in this case.

A bench warrant was issued on the charge of Murder and one other charge and the prosecutor filed a criminal information. Later that year, the case was *nolle pros*. In the Civil Rights section 1983 law suit that followed, there was some dispute over who was responsible for the misleading information in the affidavit. Everyone agreed the officer wrote the affidavit.

The Leon standard of good faith for affidavits does not apply where officers knowingly add misleading information or omit important points. United States v. Leon, 468 U.S. 897, 922-23, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Both defects were present in this case.

The officers claimed that the prosecutor's review of the affidavit prior to submitting it to a judge entitled them to Qualified Immunity under the standard of Messerschmidt v. Millender, 565 U.S. 535, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012). In that case, officers obtained a warrant to seize items that were not probative on the charge. The issue there was an over-broad affidavit. The standard for review in such a case is whether the items sought are "entirely unreasonable." That issue is reviewed in CALL issue 17-4 with the case Kiesling v. Holladay, No. 16-2197, 2017 U.S. App. LEXIS 10271, at *2-4 (8th Cir. June 9, 2017). In summary of the relevant point of that case, probable cause should accompany each item sought in an affidavit, both that the item is where the affiant states and that, if discovered, the item will have some probative value in the case.

But this incident involved an arrest warrant, not a want for search and seizure. Even so, the Court held that the issue of knowingly or recklessly including false or misleading information was different than the issue confronting the Messerschmidt Court. The Court held that the affidavit was false and misleading and that the right to be free of such police behavior was well established in case law at the time the incident occurred.

The sole issue on review was the question of whether the officers "are entitled to qualified immunity because they reasonably relied on the advice of counsel." Wheeler v. City of Searcy, at *20.

Where a false or misleading affidavit results in a warrant, the aggrieved party must show two elements in Federal Court to defeat Qualified Immunity. First, evidence must show that the affidavit was prepared with knowingly false information or with a reckless disregard for the truth. This element can be proved by the content of the affidavit itself. And secondly, the plaintiff must prove "that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause." Wheeler v. City of Searcy, at *23. Here, that was clearly evident.

In the Messerschmidt case, there was no allegation of false information by police. The Court there had a different standard which focused on officer competence. The Court in that case acknowledged that consultation with a prosecutor prior to presentation of the affidavit to a Judge was an indicator of officer competence. But consulting with a prosecutor or even obtaining the Judge's signature does not correct the fatal defects of a knowingly false affidavit.

As the Court found that the two prongs of a false affidavit were satisfied, the question of prosecutorial involvement as a defense was not answered. Qualified Immunity was denied to the Defendant Officers.

https://www.ktlo.com/2017/06/09/prosecutors-wont-seek-death-penalty-in-searcy-cold-case/

Review by David Dero Phillips, Deputy City Attorney.

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Search and Seizure: Windshield Crack = Probable Cause

United States v. Foster

Springdale, Arkansas, Police Officer Stanley Johnson made a traffic stop on a car that had a lengthy crack on its windshield. In a subsequent search of the occupant and vehicle, the driver, Charlie Foster, was found in possession of a firearm and had methamphetamine in his car. This was offense 1-19-001307. He was a felon and had an active warrant. Foster was prosecuted in Federal Court. He challenged the stop as lacking probable cause.

To make a valid traffic stop under Arkansas law, the officer must have either probable cause that a traffic violation is being committed or reasonable suspicion of a more serious offense. "[A]ny traffic violation, no matter how minor, is sufficient to provide an officer with probable cause" to make a traffic stop. United States v. Foster, No. 20-1241, 2021 U.S. App. LEXIS 30346, at *4 (8th Cir. Oct. 12, 2021).

The Arkansas Supreme Court has held that "a windshield with a crack running from roof post to roof post across the driver's field of vision is the type of 'safety defect' contemplated by section 27-32-101(a)(2)(A)." Villanueva v. State, 2013 Ark. 70, 426 S.W.3d 399, 402 (Ark. 2013). Id. at *5." Prior Arkansas Supreme Court cases have also held that the validity of the traffic stop will not be overturned merely due to a lack of a conviction on the suspected charge that served as the basis for the stop. See Travis v. State, 331 Ark. 7; 959 S.W.2d 32; 1998 Ark. LEXIS 5.

Without going into detail, the Court held that requesting passenger information did not impermissibly extend the scope of the stop. The conviction was affirmed.

Review by David Dero Phillips, Deputy City Attorney

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Foster Booking Photo

Driving While Intoxicated Investigation

TITLE: Encountering the Impaired Driver Hours After Driving: Remember to Gather Evidence

Occasionally, a police officer will encounter the situation of investigating a suspected intoxicated driver under circumstances where a number of hours have passed from the time of driving. This situation may present itself because of a traffic accident that is not reported promptly or that takes a while to work. Sometimes, police may not come into contact with the reported driver until the driver is at the hospital, possibly in an injured state and unable to perform field sobriety testing.

In such cases, it is good for the officer to remember that he or she still is in a position to collect valuable evidence that will assist the trier of fact in determining intoxication should the driver be charged. It is imperative that the police officer not lose sight of the fact that while traditional field sobriety testing may be limited in such situations, the officer still is in a position to gather valuable information. Below, we will discuss a few things the officer may consider when such circumstances arise.

First, A.C.A. § 5-65-102, entitled "Implied Consent," makes clear that a person who operates or is in actual physical control of a vehicle is deemed to have given consent to one or more chemical tests of his or her breath, saliva, or urine for the purpose of determining alcohol concentration or controlled substance content if: (a) the person is involved in an accident while operating or in actual physical control of a motor vehicle; (b) at the time of arrest, the officer has probable cause to believe that the person, while operating or in actual physical control of a motor vehicle, is intoxicated or has an alcohol concentration of .08 or more; or (c) the person is arrested for any offense arising from an act alleged to have been committed while the person was driving while intoxicated or while there was an alcohol concentration of .08 or more. A.C.A. § 5-65-102(c) states that a test of the person's blood under this section requires a warrant based upon probable cause that the person was operating or in actual physical control of a vehicle while intoxicated.

From reading A.C.A. § 5-65-102, the police officer learns that the person suspected of intoxicated driving can be asked by the officer to provide a breath or urine sample. If we continue on by reading A.C.A. § 5-65-205, the police officer learns that a person who refuses to provide a breath or urine sample in such circumstances may be charged with refusal to submit to a chemical test (also known as violation of implied consent law), which is a strict liability offense and a violation. Arkansas case law over the years has made clear that the prosecutor may argue to the trier of fact that a person who refuses to provide a breath or urine sample in this situation has a "consciousness of guilt," meaning that the person did not provide a sample because it would have shown substances indicative of impairment (the weight or credence given this argument will be up to each trier of fact, while considering the totality of other evidence).

Since the United States Supreme Court decided the case of Birchfield v. North Dakota in 2016, prosecutors may no longer argue that a person who refuses to provide blood upon request has a guilty conscience. However, a police officer may still ask a person to voluntarily provide blood, but the police officer may under no circumstance indicate that the person is required to do so or will face additional penalties if the person refuses. Of course, as noted in the statute above, the ambitious police officer in such circumstances may always pursue a warrant to obtain a blood sample where there is probable cause of driving while intoxicated or actual physical control of a vehicle while intoxicated.

Having covered A.C.A. § 5-65-102 above, how are those principles affected by cases where a number of hours has passed before the officer is in a position to gather chemical tests? A.C.A. § 5-65-206, called "Evidence in Prosecution-Presumptions," states that it is presumed that a person charged with driving while intoxicated is not intoxicated if the person's alcohol concentration is .04 or less as shown by chemical analysis at the time of or within four hours after the alleged offense. The same statute provides that no presumption exist if at the time of the alleged offense the person's alcohol concentration is more than .04, but less than .08, and that this fact may be considered with other competent evidence. The statute also provides that this section does not limit the introduction of other relevant evidence bearing on intoxication. Previous Arkansas case law provides that the "… statute does not provide an unqualified exclusionary rule of evidence for tests administered more than [four] hours after a person is arrested for driving while intoxicated," and the test is admissible. See Elam v. State, 286 Ark. 174 (1985); and Munn v. State, 257 Ark. 1057 (1975).

What should the officer do who is dealing with the suspected intoxicated driver a number of hours later? For simplicity sake, let's use the example of the suspected intoxicated driver who was taken to the hospital following an accident, and admittance to the hospital for injury is the reason for the delay in police contact.

First, as discussed above, the officer can and should ask for a toxicology sample of breath, urine, or blood. If alcohol is suspected, ask for breath or blood. If drugs are suspected, ask for urine or blood. Remember that the person may be charged with violation of implied consent law should the person refuse to provide a breath or urine sample. Remember that the person may be asked to provide blood, but may not be made to feel compelled to give blood, and may not be charged with violation of implied consent for not giving blood. Remember that a blood sample may be obtained through a warrant should there be probable cause of driving while intoxicated.

Second, if your investigation is on-going and you have not placed the person under arrest (which will be hard to do if they are being treated at the hospital), then talk with the suspect and ask him or her pertinent questions about the accident (Who was driving? how did it occur? What did they have to drink? How much they had to drink?). These answers should in most cases be held admissible in court since the person is not in custody. See Stephens v. State, 898 S.W.2d 435 (Ark. 1995). During the course of your interaction, note whether you smelled

alcohol, noticed blood shot and watery eyes or slurred speech, and whatever other common indicators of intoxication that may be present.

Third, perform whatever field sobriety test that the person may be able to do. Even if the person is confined to a bed, check for horizontal gaze nystagmus. Remember that a police officer need not gain consent for field sobriety testing when the officer has reasonable suspicion of driving while intoxicated. See Tiller v. State, 2014 Ark. App. 431, holding "… there was no Fourth Amendment violation because Officer Boyd's warrantless seizure (commanding Tiller to perform FST) was based on his reasonable suspicion that she had committed the offense of DWI," and "Because Tiller's arrest was supported by probable cause, it was lawful, and consent for FST was not required").

In conclusion, in cases where an officer finds himself or herself confronted with a suspected intoxicated driver hours after the incident has occurred, do not forget that you are still in a position to gather evidence helpful to the trier of fact. The police officer should do whatever he or she can to obtain this evidence. It will be the duty of the prosecutor at a later time to present the evidence and place it in context for the trier of fact. But if no or limited evidence was gathered at the time of the incident, then no evidence may be presented at the time of trial.

Article by Taylor Samples, Senior Deputy City Attorney.

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TITLE: Supreme Court of United States Grants Qualified Immunity to Police Officers in Two Excessive Force Cases

FACTS TAKEN FROM THE CASE

In two separate opinions issued on October 18, 2021, the United States Supreme Court gave qualified immunity to police officers who were sued on excessive force claims. Below are summaries of the cases.

City of Tahlequah, Oklahoma, et al. v. Bond, 595 U.S. ____ (2021)

On August 12, 2016, the ex-wife of Dominic Rollice called 911 to explain that Rollice was in her garage, intoxicated, and would not leave. The caller requested police assistance; otherwise, it was going to get ugly real quick. The caller explained that Rollice did not live at the residence, but he kept tools in her garage. Three police officers responded and were led to the side entrance of the garage by the caller. Officers encountered Rollice and began speaking with him in the doorway. Rollice began fidgeting with something in his hands and appeared nervous. An officer asked to pat down Rollice, who refused. An officer took one step toward Rollice, who took one step back, turned around, and walked toward the back of the garage where the tools were hanging over a workbench. All three officers followed, none being within six feet of Rollice. Officers ordered Rollice to stop, but he refused. Rollice grabbed a hammer, turned around to face the officers, grasped the handle of the hammer with both hands, and pulled it to shoulder level. The officers backed up, drawing their guns. Officers yelled at Rollice to drop the hammer. Rollice stepped to his right and came out from behind a piece of furniture so that he had a clear path to one of the officers. Rollice raised the hammer higher behind his head and stood as though he was about to throw the hammer or charge at officers. Two officers fired their guns, killing Rollice.

Rollice's estate sued the officers, alleging they were liable under 42 U.S.C. Section 1983 for violating his Fourth Amendment right to be free from excessive force. The officers moved for summary judgment, both on the merits and on qualified immunity grounds. The District Court granted their motion, but a panel of the Court of Appeals for the Tenth Circuit reversed, explaining that Tenth Circuit precedent allows an officer to be held liable for a shooting if the officer's reckless or deliberate conduct created a situation requiring deadly force.

The United States Supreme Court reversed the decision of the Tenth Circuit and held that the officers were entitled to qualified immunity. The Court noted that qualified immunity shields officers from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Courts are not to define clearly established law at too high a level of generality; it is not enough that a rule be suggested by then-existed precedent, but the rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation confronted. The Court said that such specificity is especially important in the Fourth Amendment context, where it can be difficult for the officer to determine how the relevant legal doctrine will apply to the factual situation the officer confronts.

In the case at hand, the Court concluded that the Tenth Circuit did not rely upon a single decision that would come close to establishing the officers' conduct was unlawful. The formulation of any rule relied upon by the Tenth Circuit was much too general to bear on whether the officers' particular conduct violated the Fourth Amendment.

Rivas-Villegas v. Cortesluna, 595 U.S. _____ (2021).

Officer Rivas-Villegas responded to a 911 call from a crying 12-year-old girl reporting that a woman and her two children were barricaded in a room for fear that Ramon Cortesluna, the woman's boyfriend, was going to hurt them. After confirming the family had no way to escape, Rivas-Villegas and other officers present commanded Cortesluna outside and onto the ground. Officers saw a knife in Cortesluna's left pocket. Prior to removing the knife from Cortesluna, officers commanded him to put his hands up; Cortesluna disobeyed the command and lowered his hands toward the knife in his pocket. Cortesluna was twice shot with a bean-bag round from a shotgun, after which he raised his hands over his head. While officers were in the process of removing the knife and handcuffing Cortesluna, Officer Rivas-Villegas for no more than eight seconds placed his knee on the left side of Cortesluna's back.

Cortesluna sued the officers under 42 U.S.C. Section 1983, claiming that Officer Rivas-Villegas used excessive force. The district court granted summary judgment in favor of Officer

Rivas-Villegas, but the Court of Appeals for the Ninth Circuit reversed, holding that existing precedent put Officer Rivas-Villegas on notice that his conduct constituted excessive force.

The United States Supreme Court reversed the holding of the Ninth Circuit, and the Supreme Court held that Officer Rivas-Villegas was entitled to qualified immunity. The Court stated that whether an officer has used excessive force depends upon the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The Court quoted Tennessee v. Garner, 471 U.S. 1 (1985), "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." The Court said that in an obvious case, claims of excessive force can be answered without a body of relevant case law. But the Court concluded that the case at hand was not an obvious case; thus, to show a violation of clearly established law, Cortesluna must identify a case that put the police officer on notice that his specific conduct was unlawful. The Court said that Cortesluna failed to do so; neither he nor the Ninth Circuit identified any Supreme Court decision that addresses facts like those presented here.

Reviewed Taylor Samples, Senior Deputy City Attorney

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Warrantless Searches–
Good Faith Exception
Ashby v. State
201 Ark. App. 424
Arkansas Court of Appeals
November 3, 2021

Jamie Ashby was convicted after a bench trial in Lonoke County Circuit Court of possession of methamphetamine or cocaine with intent to deliver, possession of drug paraphernalia, and misdemeanor possession of a Schedule IV or V controlled substance. The circuit court denied Ashby's Motion to Suppress in which she argued that she denied consent for the search that lead to the arrest and that the information upon which the officers relied to search her vehicle was incorrect and the warrantless search was unreasonable. Ashby appealed the denial of her suppression motion.

Facts:

> In January 2020, Lonoke PD pulled over Lisa Ford who was driving Ashby's car. Ford was arrested on an outstanding warrant and Lonoke PD ran Ashby through dispatch, who advised that Ashby had a search waiver on file. The officer asked Ashby if he could search her car and that she had a search waiver on file, she responded "yeah… I mean there's nothing I can do to stop it so…" After searching the car, officers found a bag with drug paraphernalia, a baggie of methamphetamine, two loaded syringes, an elastic-band tourniquet, and pills. As it turned out, Ashby had been on a suspended sentence previously but the suspended sentence ended before she was arrested in January 2020 and the conditions of her suspended sentence had not contained a search waiver. *Ashby v. Arkansas*, 201 Ark. App. 424 (2021) at 1-2.

Law:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]" *U.S. Const. amend. IV*.

When the police obtain evidence in violation of the Fourth Amendment, the exclusionary rule precludes its use in a criminal proceeding. *Weeks v. United States*, 232 U.S. 383 (1914).

The Supreme Court has adopted good-faith exceptions to the exclusionary rule where application of the rule does not advance its remedial purpose [of deterring unlawful police conduct]. *Illinois v. Krull*, 480 U.S. 340, 347 (1987).

The exclusionary rule does not apply when the police conduct a search in "objectively reasonable reliance" because where the police officer's conduct is objectively reasonable, excluding evidence would not further the ends of the exclusionary rule. *Id*.

Analysis:

In this case, the defendant argued that because she did not give consent and because her suspended sentence had expired, the circuit court should have suppressed the evidence discovered in the search that was conducted pursuant to a non-existent search waiver. *Ashby v. Arkansas*, 201 Ark. App. 424 (2021) at 2. The defendant relied on the case of *Bogard v. State* in which Bogard, the wife of a probationer whose term of probation had expired, was charged after probation officers searched her home based on a search waiver on file for her spouse *Bogard v. State*, 88 Ark. App 214, 197 S.W.3d 1 (2004). In *Bogard*, the defendant's conviction was reversed because the Court of Appeals concluded that the officers had not acted in good faith because: (1) the search was conducted by probation officers who should have known Bogard's spouse's probation had expired, (2) there was no evidence as to what information the probation officers relied on in walking through the residence, (3) there was no consent that Bogard had consented to a full search of the residence. *Id*.

The Court of Appeals found that Ashby's reliance on *Bogard* was misplaced and analyzed whether the officers in *Ashby* acted in good faith in relying on dispatched information. *Ashby v. Arkansas*, 201 Ark. App. 424 (2021) at 7. The Court noted several key difference between *Ashby* and *Bogard*, including (1) *Bogard* dealt with the search of a home by probation officers based on the authority to supervise someone other than the defendant, whereas *Ashby* was searched after a legitimate traffic stop relying on information specific to Ashby; (2) nothing suggested that the officers in *Ashby* acted unreasonably or that they had experienced problems with information relayed to them by dispatch in the past. *Id*, at 9.

Lastly, the Court noted that the exclusionary rule serves to deter police misconduct when that misconduct is deliberate, reckless, or grossly negligent and the Court concluded that, while the information the officers had in Ashby was incorrect, it did not rise to misconduct that the exclusionary rule attempts to deter. *Id*. The Court noted that officers asked Ashby about the search waiver and she corrected them saying that she was on a suspended sentence rather than probation but did not correct them by providing any information to show that she did not have a valid search waiver that would permit the search of the vehicle. *Id*. Accordingly, the Court upheld Ashby's conviction. *Id*.

Reviewed Ryan Renauro, Deputy City Attorney

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Animals

LeMay v.Mays

Two Minneapolis Police Department officers respond to a home intrusion alarm. The alarm was false and the company was notified. One of the house occupants greets one of the officers at the front door and informs him of the mistake. The other officer works his way through the back yard and encounters the two household pets, both American Staffordshire Terriers (commonly referred to as pit bulls), Ciroc, a brown-and-white, 60-pound male, and Rocko, a grey-and-white, 130-pound male, and shoots each of them. The animals survive, but are no longer capable of providing "emotional support."

Under the Fourth Amendment of the U.S. Constitution, animals are considered "effects." "Officers must then act reasonably when seizing them." Lemay v. Mays, No. 20-2632, 2021 U.S. App. LEXIS 33758, at *5 (8th Cir. Nov. 15, 2021).

The Court used Andrews v. City of West Branch, 454 F.3d 914, 918 (8th Cir. 2006) as controlling law. In that case the police inadvertently shot a dog after the animal had been contained.

> In Andrews, we held a police officer was not entitled to qualified immunity after shooting a dog he mistook for another problem-causing dog, when the dog he shot was in a fenced backyard with the homeowner, presented no danger to others, and was capable of being captured by non-lethal means.
>
> Lemay v. Mays, at *6

As the Defendant officer could not prove any reasonable threat posed by the animals, Qualified Immunity was denied.

The pictures on the following page were from Minneapolis-area news sites. It is often difficult to obtain images from the various incidents reviewed in CALL. This animal-related case generated considerable publicity, some of it reaching national media outlets. The officer's body-worn camera video was linked to one web site.

Review by David Dero Phillips, Deputy City Attorney.

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https://www.nydailynews.com/news/national/body-cam-footage-shows-shooting-minnesota-dogs-graphic-article-1.3343218

https://www.startribune.com/police-union-one-of-two-dogs-cop-shot-in-mpls-backyard-was-growling-advancing/434119923/