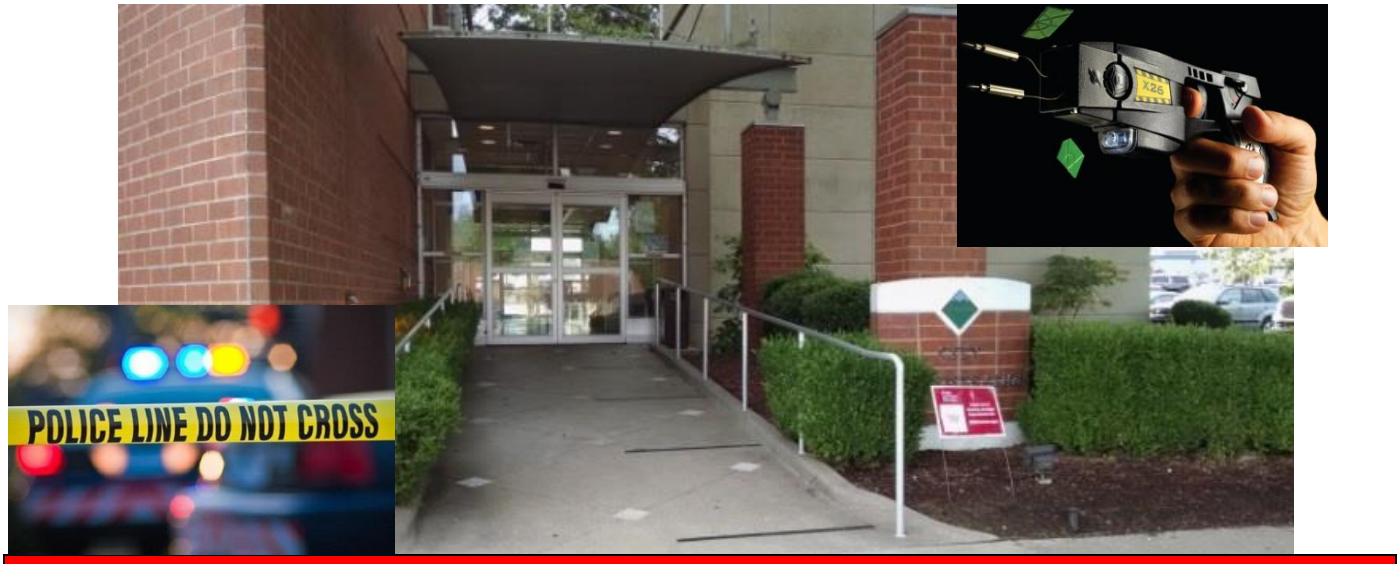
C.A.L.L.

City Attorney Law Letter

January 1, 2021
Issue 21-1



Springdale City Attorney's Office Says Goodbye to Deputy City Attorney Sarah Sparkman After 7 Years of Service

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
Publisher – David Dero Phillips, Deputy City Attorney

Contributing Authors:
Taylor Samples, Senior Deputy City Attorney
David Dero Phillips, Deputy City Attorney
Ryan Renauro, Deputy City Attorney

Deputy City Attorney Change

On November 30, 2020, Deputy City Attorney Sarah Sparkman said her last good-byes to the attorneys and staff of the City Attorney's office and left behind 7 and one half years of dedicated service to the City of Springdale.

Among her many accomplishments - she was a notably talented Domestic Violence litigator. She was able to extract testimonial evidence from uncooperative victims who were frightened and trapped in the cycle of violence.

Ms. Sparkman prosecuted a large number of cases involving charges of Driving While Intoxicated. She also handled a number of appeals in Circuit Court.

Senior Deputy City Attorney Taylor Samples had this to say about Ms. Sparkman; "Sarah was passionate about her work as a prosecutor, and she was a skilled trial attorney. In particular, she had great concern for victims of domestic violence and did an excellent job advocating for those victims. Her service to this office and to the people of this community should not go unrecognized. We are thankful to Sarah for all of her contributions to this office. "

The Springdale City Attorney's Office will miss Sarah and we wish her the best of success in her new endeavor.

Ryan Renauro was hired as Deputy City Attorney. Ryan brings substantial experience in general practice and criminal prosecution with him to the team.

Story by Senior Deputy City Attorney Taylor Samples and Deputy City Attorney David Dero Phillips.

Top of Document

Goffin v. Ashcraft

United States Court of Appeals for the Eighth Circuit

October 15, 2020

An officer fires on a fleeing subject after a pat-down search incident to arrest that reveals nothing. The fleeing suspect recovers from the gunshot wound. The officer and city are sued in Federal Court under Title 18 of the US Code.

Facts.

In September 2012, Goffin's uncle, Tommy Reddick, reported to Officer Ashcraft and Officer Aaron Hines that his home had been burgled—and he suspected Goffin was responsible for stealing two handguns, a box of bullets, and a bottle of painkillers. Reddick told the officers that earlier that day Goffin came to his house and asked for a gun, explaining that he lost his own pistol fleeing from the police. Reddick refused and left the house. When he returned, he saw Goffin was still nearby, arguing with a man in a black pickup truck. Once inside his house, he discovered that someone had snuck in through a back window, broken down a bedroom door, and stolen guns, ammunition, and pills. Reddick warned Officer Ashcraft, "This dude is out of control!" and, "Y'all better be ready to fight when you find him."

When the officers started searching for Goffin, Officer Ashcraft stopped a black truck that looked like the one Reddick had described. The driver, Dewayne Moore, told her that earlier Goffin had asked him for a ride. Moore initially told Goffin no, but Goffin threatened him, saying "take me to the goddamn car wash" and then displayed two guns that matched the descriptions of Reddick's stolen pistols. Frightened, Moore gave Goffin a ride. He too warned Officer Ashcraft about Goffin, telling her that Goffin was drunk and that Moore was scared he would rob him. After the shooting, he recounted to police that Goffin looked like he "was going to do something stupid," like he didn't "give a damn . . . like, I'm going to take you out or whatever."

After Officer Ashcraft interviewed Moore, Officer Hines called her and told her that Goffin was at a nearby body shop. The officers arrived separately but then walked together toward a crowd of people in the parking lot. Officer Ashcraft asked where Goffin was and the owner of the body shop directed them toward the garage. In front of the garage, the officers found Goffin sitting in a car talking on a Bluetooth headset. Both officers approached the vehicle with guns drawn, but before they got there Officer Hines holstered his pistol and drew a taser.

> The officers demanded that Goffin exit with his hands raised, which he did. They then escorted him to the back of the car and Officer Ashcraft claims she saw something "bumping in [Goffin's] right front pocket." Goffin denies anything was in that pocket. At the back of the vehicle, Goffin says that Officer Hines patted him down and "searched every part of [his] body," including feeling for items in his pockets and around his waist. Goffin admits Officer Hines "didn't go into [his] pockets" and did not remove anything from his body.
>
> Officer Hines started to place Goffin in handcuffs, but before he could finish, Goffin pushed off the car and fled toward a group of seven or eight bystanders. With his back to the officers, he raised his right shoulder, which Officer Ashcraft interpreted as a reach for something in his pocket or his waistband. She then shot him once in the back.
>
> The shooting occurred in a "split second." Goffin says he took no more than two steps and Officer Ashcraft agrees he made it only "a very short distance" before she fired. After he was shot, officers discovered that the patdown had missed a loaded 9mm pistol magazine and several loose bullets. The stolen guns were discovered within reach of where Goffin had been sitting in the car, but Goffin did not have a weapon on him.
>
> Goffin v. Ashcraft, 977 F.3d 687, 689-90 (8th Cir. 2020)

Law.

Under the landmark case of Tennessee v. Garner, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), all cases of deadly force are reviewed from the context of the Fourteenth Amendment to the US Constitution. In that analysis, "[a]n officer's actions are justified when they are "objectively reasonable in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation."" Goffin v. Ashcraft, 977 F.3d 687, 691 (8th Cir. 2020). Deadly force is justified where "the suspect poses a threat of serious physical harm to the officer or others. Id. The threat must be immanent and compelling.

Law enforcement officers are entitled to qualified immunity from liability where there is no "clearly established statutory or constitutional rights of which a reasonable person would have known" exist. Id. In other words, the officer's conduct must violate law that has been specifically addressed in statutes or case law.

Analysis.

The Court reviewed several factors to determine if the actions of the officer met the "objectively reasonable" standard. First, Goffin had possessed weapons in past encounters with police.

Second, strong evidence exited that Goffin had stolen two more weapons recently. Third, a relative had warned police that Goffin was "spoiling for a fight"

The Court acknowledged that had those been the only factors, the case would have been easily resolved in favor of the law enforcement officer. However, in this case, the plaintiff Goffin had been searched prior to breaking away from police, and nothing was found.

Goffin was later discovered to have possession of a magazine and some ammo on his person and the stolen firearms in his vehicle. But the later discovery would not factor in to the analysis. The relevant inquiry is the officer's level of knowledge at the moment deadly force is employed.

The Court held that no case from the past was directly on point. Therefore, the officers would not be on notice as to the law in that exact situation.

As of this decision by the US Eighth Circuit Court of Appeals, the mere act of performing a pat-down search does not negate the possibility of employing deadly force on the searched suspect, so long as the over-all use of deadly force is otherwise reasonable under the totality of circumstances.

Review and Analysis by Deputy City Attorney David Dero Phillips

Top of Document

United States v. Thompson
976 F.3d 815
United States Court of Appeals for the Eighth Circuit
October 1, 2020

A confidential informant provides information to law enforcement that leads to a stop and subsequent arrest of a narcotics trafficking suspect - Ryan Thompson. In appealing his conviction, Thompson argues that arresting officers violated the constitutional requirements of Arizona v. Miranda and had inadequate probable cause for the warrants.

Facts.

In early February 2018, a person identified in the record as ABC contacted St. Paul Police Department Officer Shawn Longen with information that Thompson was involved in heroin trafficking and that he also had firearms. More specifically, ABC told Longen the following:

• Thompson drove his car and took bus trips from St. Paul to Chicago to pick up heroin for distribution in St. Paul.

• Thompson had been arrested in Illinois and Minnesota for drug-related crimes.

• Thompson lived at 677 Wells Street and had "a couple of firearms" in the apartment.

• Thompson drove a silver van and a green Nissan Maxima with the license plate AKS 918.

ABC also shared with Longen a video he had taken of Thompson in Thompson's apartment. The video showed stacks of money on a black case, a black handgun, a second firearm, and Thompson sitting on a couch with baggies containing "what appeared to be controlled substances."

Longen followed up on ABC's information by confirming Thompson's age, which ABC had discussed, and checking information about the green Nissan, which he learned was registered to Thompson, although not at the 677 Wells address. He also confirmed that Thompson had been arrested in Illinois and Minnesota for drug-related offenses. When Longen showed an unlabeled photo of Thompson to ABC, ABC identified the person in the photo as Thompson. Longen then began conducting surveillance at 677 Wells, where he saw Thompson driving the green Nissan.

In late February 2018, ABC told Longen that Thompson had recently been stopped by the Wisconsin State Patrol [**3] (WSP). Longen contacted the WSP and verified that Thompson had been stopped while driving the green Nissan and was arrested for possession of marijuana. ABC also gave Longen an audio recording of a conversation he had with Thompson in which Thompson talked about the WSP traffic stop. In the audio, Thompson said that he had marijuana in the car and on his person, and that it would have been "much worse . . . if he would have had the work with him." In this conversation, Thompson also discussed "licks" and "zips," and said he had a "whoop" locked inside the glove box at the time of the stop.

On February 28, 2018, Longen applied for a search warrant to place a GPS tracking device on Thompson's green Nissan. On the same day, Longen also applied for an "order" authorizing "the installation and use of a pen register, trap device, and electronic tracking device to include GPS location and Real Time Tool Data (RTT)" for a cell phone number ending in 0727, a number ABC said Thompson used in connection with drug trafficking and to communicate with ABC.

A state court judge granted the warrant authorizing the GPS tracking device and issued the requested order for the 0727 cell phone number. In the] order, the issuing judge found, "on the basis of the information submitted by the applicant, that there is probable cause to believe that the information likely to be obtained by such installations and use is relevant to ongoing criminal investigation into possible violation(s) by RYAN ISIAH THOMPSON (DOB XX/XX/XXXX) for facilitating the distribution of heroin in the Twin Cities metropolitan area." It further provided that law enforcement:

may install and use a pen register, trap and trace device, and electronic tracking device to include GPS location, and Real Time Tool Data (RTT) . . . [to] track the location and/or movement of the phone for the time period of February 28, 2018 and extending sixty (60) days past the date of this Order; and to provide the following information:

1. Stored Voice Message(s)/Voice mail

2. Stored SMS and MMS data, Text of Text, or other stored messaging data and images;

3. Provide a "Locator Tool which uses Precision Location and GPS, based on Probable Cause";

4. Cell site activations;

. . .

10. An engineering map, showing all cell-site tower locations/addresses, sector and orientations;

11. The physical address/location of all cellular towers in specified market [**5]

ABC continued to provide information throughout March 2018. He updated Longen on Thompson's daily activities and said that Thompson would be making a trip to Chicago soon to pick up heroin. On March 5, 2018, GPS tracking data showed the green Nissan traveling to Chicago, remaining there for approximately 20 minutes, and then returning west toward St. Paul. Based on this information, St. Paul police officers stopped the car. They called for a drug-detection dog, and the dog alerted to the center console. Officers searched but found nothing, and Thompson was allowed to leave.

On March 6, 2018, ABC gave Longen another audio recording. In this 20-30 minute recording, Thompson discussed the March 5 traffic stop. He said he thought he was under investigation and that law enforcement might be monitoring his phones. He suspected that people were informing on him and discussed the need to distance himself from others, including ABC. Thompson also mentioned "letting things cool off" for 90 days because that was the amount of time he thought "they have [] to investigate me," and he talked about how "he picked up on the surveillance vehicles that were following him on I-94." He was worried when the drug-detection dog alerted on the car because he had "a whole hundred" on him. He thought that the reason the officer was unable to feel where he had hidden the heroin was because the officer wore gloves. He also bragged that his product was "the best dope for the cheapest price."

In early March, ABC became a paid informant. Shortly thereafter, he told Longen the reason he was providing information was that he wanted Longen's help in reducing his probation term.

Also in early March, ABC told Longen that Thompson had purchased a newer, silver Nissan Maxima with tinted windows. According to ABC, Thompson decided to leave the green Nissan in Chicago because law enforcement had

already stopped that car twice. ABC also said Thompson had a new cell phone number ending in 3045. Based on this information, Longen applied for a warrant to install a GPS tracking device on the silver Nissan and for an "order" to permit tracking of the 3045 number. On April 2, 2018, a state court judge approved both applications and issued the related warrant and order. The applications for the warrant for the silver Nissan and the order for cell phone number 3045 included information Longen had gathered since February 28, but were otherwise nearly identical to those submitted for the green Nissan and for cell phone number 0727. Longen placed the tracker on the silver Nissan on April 5.

Thompson subsequently made several trips to Chicago. On April 13, GPS tracking showed that Thompson drove to the St. Paul bus station, and surveillance video showed him boarding a Megabus to Chicago. On April 16, Thompson returned to the St. Paul bus station, got into the silver Nissan, and drove away. Tracking information also showed that the silver Nissan traveled to Chicago on April 20 and returned on April 22. On May 3, Thompson took another trip to Chicago on a Megabus. Based on the phone tracking, law enforcement determined that he remained in Chicago for a few days before traveling toward St. Paul.

Officers believed Thompson would be returning to St. Paul with heroin he picked up in Chicago. On May 6, 2018, Longen and other officers set up surveillance at the St. Paul bus station to watch for Thompson's return. Officers saw Thompson exit a Megabus with a sling-style bag and then get into the driver's seat of the silver Nissan. A woman, who had driven the car to the station, moved over to the passenger seat. The two drove away from the station.

Longen decided to stop Thompson's car and asked Officer Whitney to conduct the stop. Longen informed Whitney in advance that Thompson was known to carry firearms and that he was suspected of possessing heroin.

Whitney stopped Thompson minutes after he left the station. Whitney told Thompson he stopped him because his car had tinted windows and no license plates. He then asked Thompson "[w]here you guys comin' from?" Thompson responded that he had just dropped off his young daughter and that he and his passenger, JLJ, were going to get something to eat. Whitney asked Thompson to turn off his engine because he was having trouble hearing him.

Whitney then asked Thompson to "step out" of the car and said "you're not under arrest or anything at this point." He "pat-searched" Thompson for weapons and found none. He did not read Thompson his rights pursuant to Miranda. Whitney

asked Thompson if there was anything illegal in the car, and Thompson responded there was not. Whitney also asked JLJ to "step out" of the car and he explained to Thompson that he was "just gonna run the dog around the car." Thompson objected, saying "this is an illegal search and seizure." Before the dog-sniff, the following exchange took place:

Whitney: But if there's nothin' in the car for you to worry about . . . then it's all good and then you'll be on your way in five seconds.

Thompson: Well, this is what I was gonna to say.

Whitney: Yep.

Thompson: My girls have their guns license.

Whitney: A what?

Thompson: She has a gun license.

Whitney: Okay. Is there a gun in the car?

Thompson: Yeah, but she has a gun license.

. . .

Whitney: Where is that? Where's the gun at?

Thompson: It's in the front seat in her bag.

The drug-detection dog circled the car but did not alert. When Longen arrived, however, he found heroin hidden near the car's center console. Whitney found a firearm in the sling-style bag near the front seat. Thompson was arrested.

Longen then applied for and obtained another search warrant, this time for the residence at 677 Wells. There, officers found a handgun, extended magazines, the black case seen in the video ABC took of Thompson, a bullet-style mixer with a white residue inside it, ammunition, and documents linking Thompson to the apartment.

United States v. Thompson, 976 F.3d 815, 817-20 (8th Cir. 2020)

Law.

Miranda requires that before custodial interrogation, a person be advised of their right to be free from compulsory self-incrimination and to assistance of counsel. Miranda, 384 U.S. at 444. Statements made during custodial interrogation are generally suppressed if no Miranda warnings were provided. United States v. Thompson, 976 F.3d 815, 823-24 (8th Cir. 2020).

Analysis.

A. The Warrant

One of the main arguments advanced by Thompson had to do with probable cause for the underlying warrant and order that allowed tracking devices and technology to be employed against him. This review will not cover that in detail as the Court's analysis focused on laws that have since changed, as well as Minnesota law that is not applicable here. However, the evidence was preserved because of the "Leon good faith exception."

In the case of United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the US Supreme Court held that evidence should be suppressed "only if the affiant-officer could not have harbored an objectively reasonable belief in the existence of probable cause." United States v. Thompson, 976 F.3d 815, 821 (8th Cir. 2020). This means that effectively the only time a warrant signed by a magistrate will be overturned is if key exculpatory information is withheld by law enforcement, or some other form of law enforcement or judicial misconduct can be shown to have influence the issuing of the warrant. The Court reviews such allegations from a "totality of circumstances" perspective based on all information available to law enforcement, even if not presented in the affidavit.

Here, no such misconduct was found. The Court noted that the officers relied on the CI's first-hand observations, though not in the affidavit, they had also seen a video of the contraband and the officers had met the CI in person. These factors established a reasonable bleif in the CI's reliability.

B. Custodial Statements

Thompson argued that he was in custody the entire time and all of his statements should be suppressed. The lower Court had already excluded some statements because of Miranda violations.

The standard for reviewing whether a statement made during investigation at a traffic stop ws first addressed in detail in the case of Berkemer v. McCarty, 468 U.S. 420, 437-38, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). The Court quoted in this case; "[c]ustody occurs either upon formal arrest or under any other circumstances where the suspect is deprived of his freedom of action in any significant way." An ordinary traffic stop does not constitute custody for purposes

of Miranda because "a traffic stop is presumptively temporary and brief" and "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police." United States v. Thompson, 976 F.3d 815, 824 (8th Cir. 2020).

Thompson was in full custody during the later part of the traffic stop, but not initially. In the first few minutes and especially while he was still in his car, he was not in custody for purposes of interrogation. So his statements made to that point were ruled admissible.

When Thompson was asked "[i]s there anything illegal in the car," "[i]s there a gun in the car," and "[w]here's the gun at?" Thompson was in custody. The responses to such questions are admissible, despite the lack of Miranda warnings under the public-safety exception to Miranda as described by the US Supreme Court in New York v. Quarles, 467 U.S. 649, 657, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). There the high Court held that the "need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." Thompson, at 824.

Thompson also made the statement "[m]y girls have their gun license" while in custody. Thompson, at 824. Such utterances are spontaneous admissions or spontaneous utterances. Spontaneous admissions are statements made by a suspect on their own. This topic was addressed by the Court in the case of United States v. Hatten, 68 F.3d 257, 262 (8th Cir. 1995) where the Court held that "[a] voluntary statement made by a suspect, not in response to interrogation, is not barred by the Fifth Amendment and is admissible with or without the giving of Miranda warnings." Any questions or prompting by law enforcement would turn the voluntary admission into an interrogation.

Arkansas law in these topics is the same as the federal law analyzed in this article.

Review and Analysis by Deputy City Attorney David Dero Phillips

Top of Document

Probable Cause – Imputed Knowledge of Traffic Violations

Cribbs v. State
2020 Ark. App 539
Arkansas Court of Appeals
December 2, 2020

A North Little Rock Police Officer initiated a traffic stop based on information relayed to him by another NLRPD Officer in the area. The Circuit Court denied the motion to suppress and the Defendant was found guilty at a bench trial and sentenced by the Court. The Defendant appealed the denial of the suppression of the evidence and the sufficiency of the evidence.*

Facts:

> On September 9, 2016, Officer Elenbaas was patrolling downtown North Little Rock when he saw the Defendant's tan Mercedes driving left of center. He tried to initiate a traffic stop but the Defendant sped away. Officer Elenbaas got the tag number and relayed the information to other NLRPD officers. The Defendant's Mercedes was found at 12:30 a.m. on September 10, 2016 at a dead end with the engine was running and two people in the vehicle: Cribbs in the driver's seat, and a passenger, Portia Wine, in the rear passenger seat. They were ordered out of the car and Wine told the officers that she had a baggie of capsules in her vagina and she gave it to him, and advised that there was marijuana in the back-seat passenger-side-door compartment. Wine and Cribbs were arrested and when officers patted Cribbs down, they found three pills in the left front pocket of Cribbs's pants. An inventory search of Cribbs's vehicle was conducted after his arrest and officers found two prescription medicine bottles in the trunk. Id. At 4-5.
>
> On September 15, 2016, North Little Rock Police Officer Jeffrey Elenbaas was surveilling a house known for narcotics activity. He watched a silver Impala at the house he was surveilling pull out of the yard, travel down 34th Street, and turn southbound onto Chandler Street without using a turn signal. Officer Elenbaas noticed that that Officer Davidson was closer to the Impala, so he radioed Davidson and relayed the traffic violation. Officer Davidson tried to initiate a traffic stop based on Officer Elenbaas' information but the car sped away. Officer Davidson chased the defendant but discontinued the chase in a residential neighborhood. Officer Davidson found the defendant's car had stopped after it crashed. When Officer Davidson arrived at the scene, he observed the Defendant, Cribbs, in the driver seat and observed 117 capsules in the Defendant's mouth. Cribbs v. State, 2020 Ark. App 539 at *1-3.

Law.

The Defendant challenged the probable cause for the traffic stop at a suppression hearing claiming that Officer Davidson, who initiated a traffic stop based on information and observations from Officer Elenbaas, did not have probable cause to initiate a stop because he did not have first-hand knowledge of the traffic violation. Cribbs v. State. 2020 Ark App. 539 at 6.

The Arkansas Court of Appeals in Rounds v. State held that an officer lacked reasonable suspicion for detention when the officer had heard from another officer that the subject might have had an active warrant and the officer failed to confirm that warrant. Rounds v. State, 2018 Ark. App. 267, 550 S.W.3d 403, at 406. The Court found that the officer lacked reasonable suspicion that the subject was involved in criminal activity and the evidence should have been suppressed. Id. At 10-11. 550 S.W.3d at 409.

The Court applied the collective-knowledge doctrine approved by the Arkansas Supreme Court finding similarities of the imputed knowledge of one officer to another when determining whether there is sufficient probable cause to arrest and/or search a suspect.

Probable cause is to be evaluated from the collective information of the police department and not merely on the personal knowledge of the arresting officer. Johnson v. State, 249 Ark. 208, 211, 458 S.W.2d 409, 411 (1970)

The common-knowledge doctrine has been applied in the context of a traffic stop as well. *See* United States v. Thompson, 533 F.3d 964 (8th Cir. 2008).

Analysis.

In this case, an officer initiated a traffic stop based solely on information provided by another officer and without any first-hand knowledge of a traffic violation. Prior cases analyzing reasonable suspicion under Rule 3.1 focused on knowledge of the arresting or detaining officer as to whether or not that officer had reasonable suspicion for criminal activity.

The facts in Cribbs distinguished this case from prior cases in that Officer Elenbaas relayed information to another officer that he had actually witnessed a traffic violation and knew it to be true because he had observed it.

The Court addressed the question of whether this information could be imputed to another officer and held that the collective-knowledge doctrine applies. Probable cause is to be evaluated from collective information from the police department and not simply on the personal knowledge of the arresting officer. When one officer makes a determination that sufficient probable cause exists to make an arrest, that determination can be imputed to other officers. For the same reason, when one officer makes a determination that probable cause exists to initiate a traffic stop, the determination can also be imputed to other officers.

The Court relied on Federal case law from the Eighth Circuit as well which has applied the common-knowledge doctrine in the context of traffic stops finding that collective knowledge can be imputed to the officer initiating the traffic stop when there is communication between the officer with knowledge and the officer initiating the stop.

The relevant factors the Court found in this instance were that the officers were (1) working together on the same special unit, (2) working in the same vicinity, and (3) they were in

communication with each other regarding the observations of the first officer. Because these factors were present, the knowledge of one officer could be imputed to another.

* The Defendant also challenged the sufficiency of the evidence of his conviction, the Court affirmed.

Reviewed by Ryan Renauro.

Top of Document

Forrest v. State

TITLE: **Arkansas Court of Appeals Holds Admissible Blood Sample Previously Drawn For Medical Purposes and Later Obtained Through Search Warrant**

FACTS TAKEN FROM THE CASE

A Miller County jury convicted appellant Forrest Stewart of negligent homicide and sentenced him to serve twenty years in prison and to pay a $15,000 fine. On appeal, he argues that the circuit court clearly erred in denying his motion to suppress seized blood samples.

In the early morning hours of November 2, 2017, appellant was driving northbound on Highway 67 in Hope, Arkansas, when his vehicle traveled approximately seven feet into the southbound lane, hitting the southbound vehicle driven by James Crowe. Mr. Crowe was pronounced dead at the scene. Stewart was trapped in his vehicle and screaming for help. He was cussing, uncooperative, and combative before and after being removed from his vehicle. He was transported by ambulance and treated for multiple injuries at Wadley Regional Medical Center (Wadley), in Texarkana, Texas, which is located in Bowie County. He arrived at 8:00 a.m., blood was drawn at 8:10 a.m., and the first medication was administered at 8:17 a.m.

Arkansas state troopers Dale Young and Jamie Gravier traveled to Wadley to secure a blood sample from Stewart because the accident involved a fatality. Trooper Young called Jeffrey Sams of the Miller County Prosecuting Attorney's Office to request assistance for a letter of preservation for the lab at Wadley until Texas law enforcement could assist in obtaining a search warrant. Trooper Gravier contacted Lance Hall of the Bowie County (Texas) Prosecuting Attorney's Office for assistance in obtaining an affidavit and warrant. Trooper Gravier met with Mr. Hall, who prepared the affidavit and the search warrant, and accompanied him to see a Texas judge, who signed the search warrant. Mr. Hall, along with Trooper Gravier, returned to Wadley, presented the search warrant to the lab, and retrieved previously drawn samples from the lab. Mr. Hall turned the samples over to Trooper Gravier, who turned them over to special agent J.D. Jones at the Arkansas State Police Headquarters in Hope. Trooper Gravier also retrieved Mr. Crowe's blood sample from the funeral home and delivered it to Special Agent Jones. The samples were submitted to the Arkansas State Crime Laboratory, and appellant's blood tested positive for methamphetamine.

On March 7, 2018, appellant was charged with negligent homicide, a Class B felony, arising out of the motor-vehicle accident in which Mr. Crowe was killed. The charge was later amended to add an alternative charge of misdemeanor negligent homicide. Appellant filed a motion to suppress the blood collected from him at Wadley, which was denied in a letter order. Following a three-day jury trial in July 2019, appellant was convicted of negligent homicide, a Class B felony, and sentenced to twenty years' imprisonment, along with a $15,000 fine. Appellant timely appealed.

HOLDING AND REASONING FROM ARKANSAS COURT OF APPEALS

Stewart contended that the circuit court clearly erred in denying his motion to suppress his blood samples. The Fourth Amendment provides that "[t]he 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. A BAC test is a search and thus normally requires a warrant. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). A warrantless search of a person is reasonable only if it falls within a recognized exception to the warrant requirement. *Dortch v. State*, 2018 Ark. 135, 544 S.W.3d 518 (citing *Missouri v. McNeely*, 569 U.S. 141 (2013)). When an officer relies in "good-faith" on a search warrant that is later determined to be unsupported by probable cause, any evidence discovered by reason of that search will not be suppressed. *Crain v. State*, 78 Ark. App. 153, 157, 79 S.W.3d 406, 409 (2002) (citing *United States v. Leon*, 468 U.S. 897 (1984)).

Stewart filed a motion to suppress the evidence obtained through the search warrant on the basis that the "search" or collection of his blood was done in contravention of the Fourth Amendment and other applicable law. Specifically, he contended that there was not probable cause for the warrant; no Texas officers were involved in the investigation of the Arkansas accident; no Arkansas officer appeared in a court in either state; the warrant authorized the seizure of one vial of blood rather than the four vials of blood and two vials of urine obtained; the warrant was not returned within three days of its issuance; the blood was not independently drawn per the search warrant; the blood collected had already been drawn before the issuance of the warrant; and appellant never gave consent to law enforcement to obtain his blood or urine. He argued that the warrant did not comply with *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), and *Dortch*, 2018 Ark. 135, 544 S.W.3d 518, and suggested that a second blood draw

was required as opposed to obtaining previously drawn blood samples. The circuit court denied the motion in a letter order.

Stewart claimed that the circuit court's decision is clearly erroneous because *Birchfield* and *Dortch* "make it clear, a blood draw per the search warrant has to occur, not just the collection of blood already in existence that had been drawn earlier having nothing to do with the search warrant." The Arkansas Court of Appeals disagreed with Stewart's argument. It said that neither *Birchfield* nor *Dortch* involved situations where blood previously drawn for medical purposes could be obtained without the need for a second draw, and neither addressed whether a search warrant is required to obtain a blood sample already taken for purposes of medical treatment. Rather, *Birchfield* addressed the issue of "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." 136 S. Ct. at 2172. The Court concluded that the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving but does not permit warrantless blood tests incident to arrest for drunk driving. *Id.* at 2184. The Court reasoned that a breath test is a permissible search incident to arrest because it does not implicate significant privacy concerns. *Id.* To the contrary, the Court explained that a warrantless blood test could not be justified as a search incident to arrest, explaining that unlike breath tests, blood tests require an intrusive piercing of the skin and "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Id.* at 2178. Additionally, the Court concluded "that motorists cannot be deemed to have consented to submit to a blood test [by virtue of an implied-consent statute] on pain of committing a criminal offense." *Id.* at 2186.

The Court noted that the Arkansas Supreme Court in *Dortch* addressed the issue of whether the Arkansas implied-consent laws impose criminal penalties upon persons who refuse to submit to a blood test and violate the Fourth Amendment. *Dortch*, 2018 Ark. 135, at 15, 544 S.W.3d at 527. On the basis of *Birchfield*, our supreme court held that the refusal to submit to a blood test pursuant to Arkansas Code Annotated section 5-65-202 would result in the imposition of criminal penalties and that as applied to Dortch, section 5-65-202 was unconstitutional. *Dortch*, 2018 Ark. 135, at 17, 544 S.W.3d at 528. Both Ark. Code Ann. §§ 5-65-202 and 5-65-208 were amended in 2017 to require a warrant to test a person's blood based on probable cause

that the person was operating a motor vehicle while intoxicated. Arkansas Code Annotated section 5-65-208(a) provides:

> (a) When the driver of a motor vehicle or operator of a motorboat on the waters of this state is involved in an accident resulting in loss of human life, when there is reason to believe death may result, or when a person sustains serious physical injury, a chemical test of the driver's or operator's breath, saliva, or urine shall be administered to the driver or operator, even if he or she is fatally injured, to determine the presence of and percentage of alcohol concentration or the presence of a controlled substance, or both, in the driver's or operator's body.

A test of a person's blood pursuant to Ark. Code Ann. § 5-65-208 requires a warrant. *See* Ark. Code Ann. § 5-65-208(d).

The Court noted that in this case the Arkansas State Police sought the assistance of the Bowie County, Texas, prosecutor's office to obtain a search warrant for appellant's blood samples located at Wadley in Texas. The affidavit provided that a fatal motor-vehicle accident occurred in Arkansas; the investigation of the accident determined that appellant was driving approximately five feet in the wrong lane of traffic striking the vehicle driven by Mr. Crowe; appellant was transported to Wadley in Texarkana, Texas; during the investigation it was discovered from members of appellant's family that he was under the influence of numerous prescribed medications; Wadley secured vials of appellant's blood during the regular course of business; appellant was transferred to surgery for broken bones; and the Arkansas State Police, along with the Miller County Prosecutor's Office, presented a preservation letter to preserve the extra blood for analysis. The warrant was signed by a Texas judge; the warrant provided that probable cause existed and directed the affiant to seize from Wadley one vial of blood taken from Forrest Stewart "since the arrival of Forrest Stewart until the issuance" of the search warrant.

Stewart argued that the circuit court's order denying his motion to suppress contained a legal error. The circuit court's letter order denying the motion to suppress provided in part:

While this exact legal and factual issue has not been decided by the Arkansas Supreme Court, the vast majority of states have concluded that a defendant does not have an expectation of privacy once a blood has been drawn for medical purposes. *See Rodriquez v. State of Texas*, 469 S.W.3d 626 (2015); *State of Texas v. Hardy*, 963 S.W.2d 516 (1997); *Michigan v. Perlos et al*, 436 Mich. 305, 462 N.W.2d 310 (1990); *Commonwealth of Pennsylvania v. West*, 2003 PA Super 380, 834

A.2d 625 (2003); *Hannoy v. State of Indiana*, 189 N.E.2d 977 (2003); *State of New Hampshire v. Davis*, 161 N.H. 292, 12 A.3d 1271 (2010) and *State of Rhode Island v. Guido*, 698 A.2d 729. There has been no testimony nor implication that the blood samples taken by the hospital were prompted or motivated by state action. The evidence shows clearly that a serious motor vehicle wreck had occurred and that the defendant was sent by ambulance for treatment at the local hospital and a valid search warrant based on probable cause was issued by a judge.

The Court reasoned that the search warrant directed law enforcement to seize the previously drawn blood sample and to transfer it to the Arkansas State Police for submission to the state crime lab for analysis. Stewart failed to cite any language in *Birchfield* or *Dortch* that supports his argument that a second blood draw was required. It defies common sense to have a second blood draw under these facts because it would have been after appellant had been treated for his injuries and would have required a second "intrusive piercing of the skin." In conclusion, we affirm the circuit court's denial of appellant's motion to suppress.

Case: This case was decided by the Arkansas Court of Appeals on November 18, 2020, and was an appeal from the Miller County Circuit Court. The case citation is *Forrest v. State*, 2020 Ark. App. 515.

Review and Analysis by Senior Deputy City Attorney Taylor Samples

Top of Document