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C.A.L.L.

City Attorney Law Letter

October 1, 2022
Issue 22-4

CAO AND CAO CRIMINAL DIVISION TEMPORARY 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.

Excessive Force! DWI!

In This Issue:

City Attorney Law Letter
Springdale City Attorney's Office
201 Spring Street
Springdale, Arkansas, 72764
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Basic Reminders on the Difference in DWI/DUI/ACV, and The Appropriate Court/Charge for Alcohol and Traffic Offenses Involving Juveniles

Please keep in mind the following:

1 – Remember that if a person under 21 years of age checks .08 or higher, the correct charge is DWI, not DUI. DUI applies when the person is underage and checks between .02 and under .08. For details, reference A.C.A. Sections 5-65-103 and 5-65-303.

2 – Remember that if an adult (someone 21 or over) provides alcohol to someone who is over 18 years of age, but under 21 years of age, the correct charge is furnishing alcohol to a minor, not contributing to the delinquency of a minor. For details, reference A.C.A. Sections 3-3-201, 3-3-202, 5-27-209, 5-25-101.

3 – Remember that juvenile traffic charges (including DUI and DWI) always stay in Springdale District Court, even if they have associated felony charges. Conversely, traffic charges on an adult go with the associated felony charges to Washington County.

4 – Remember that the charges of minor in possession of alcohol and possession open container of alcohol involving a juvenile (someone under 18) are both criminal charges and should always go to juvenile court, not to Springdale District Court. However, both of these charges involving someone aged 18 or older should always stay in Springdale District Court.

5 – Remember that before a person can be charged with actual control of a vehicle in cases involving a traditional turn-key-to-start vehicle, the keys must be in the ignition. If there is evidence of driving not witnessed by the police (such as a witness saw the driving, or driving is depicted on gas station video), then the correct charge is driving while intoxicated, not actual control of a vehicle, and the officer should at the moment of investigation (not at a later time) gather a written statement from the witness who observed the driving, or the video from the gas station that depicts the driving. For reference, see Rodgers v. State, 94 Ark. App. 47 (2006).

Should you have a question about a particular scenario, feel free to contact one of the attorneys in our office.

Information Provided By
Taylor Samples, Senior Deputy City Attorney

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Domestic Violence Evidence and Investigations;
The Duty to Investigate and Probable Cause

You receive a call and go to the scene. A distraught "victim" tells you what happened, as that person saw it. The scene is dynamic and unstable as other people there are making it difficult to get a story and gather evidence. How do you proceed?

Investigations take many forms. No two are exactly alike. The victim statement starts the investigation. But if that is all that you have, an arrest, or even a charge may not be appropriate. A criminal charge must be based on probable cause. That means that, based on available evidence, a reasonable person would agree that it is more than likely that a specific person committed a specific crime.

The decision to make an arrest lies solely with the arresting officer. Arrests must be based on probable cause. But that low threshold assumes additional investigation will take place to make the case more solid. Corroborating evidence needs to be added to the case file to get a conviction. The evidence must be compelling. Simply having the story of one person and nothing else does not rise to the level of probable cause, much less the higher standard of beyond reasonable doubt.

Beyond reasonable doubt simply means that there is no other reasonable explanation for what happened other than the suspect's guilt. This is the level at which Courts will find guilt and convict. Short of that is a "Not Guilty" verdict.

In cases of domestic violence, A.C.A. § 16-81-113, Warrantless arrest for domestic abuse — Definitions, directs how the investigation must be performed and states the preferred outcome, where probable cause exists.

Sub-section (a)(1) states that, as an exception to the warrant requirement for misdemeanors, an arrest may be made without a warrant, where probable cause exists. It also states that a physical arrest is the preferred outcome in such a case. Sub-section (a)(2) requires the investigating officer to determine the predominate aggressor and prescribes how to do this. Please note that where no predominate aggressor can be determined, this sub-section does not apply and no arrest may be made unless another exception applies. Sub-section (a)(3) establishes time limitations within which a warrantless arrest may be made.

> "[T]he law enforcement officer shall arrest the person who was the predominant aggressor with or without a warrant *if the law enforcement officer has probable cause to believe the person has committed the act of domestic abuse* within the preceding four (4) hours, or within the preceding twelve (12) hours for cases involving physical injury as defined in § 5-1-102, even if the incident did not take place in the presence of the law enforcement officer."
> A.C.A. § 16-81-113(a)(3)(A). (Emphasis added).

Please note that the domestic violence exception to the warrant requirement *only* applies to the predominate aggressor. A dual arrest in a case where no predominate aggressor has been identified would be inappropriate.

The statute directs investigating law enforcement officers to consider specific evidence in making the determination of who the predominate aggressor is. But the statute does not specifically address the greater issue of probable cause. Corroboration is a necessary ingredient in probable cause.

An observable physical injury can, to a small degree, corroborate a claim of domestic abuse. This must be documented. Body-worn cameras are poor quality images, with cameras frequently covered or pointed the wrong way, and often will not by themselves document an offense. High-quality digital images should be taken of any injury or associated damage from the incident.

Investigate attendant circumstances. In a recent case, the victim claimed the suspect rammed into the house with her car. The investigating officer's report made no mention of whether any damage had occurred to either the house or car, nor did the report mention the officer even checked. If one party is obviously lying, evidence of deceit by one party can be as helpful as corroborating evidence in resolving the case.

If both parties in a domestic incident are present at the scene and available to investigating officers, the decision not to make an arrest generally will not be questioned by the City Attorney's Office. The investigating officers had access to the best evidence.

One person's account of an incident, by itself, does not rise to probable cause. Some independent circumstance must corroborate the story in order to get to the level of probable cause. An officer that makes an arrest merely on the uncorroborated story of an alleged victim runs the risk of dragging the city into a meritorious lawsuit. And that officer's name will be at the top of the list of Defendants.

The City Attorney's Office will aggressively pursue convictions in cases of domestic violence in which the case can be proven beyond reasonable doubt. Only the investigative efforts of Law Enforcement can make this happen.

Information Provided By
David D. Phillips, Deputy City Attorney

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McDaniel v. Neal
Excessive Force and Officer Notice

Officers go to Wal-Mart to arrest a shoplifter who was detained in the loss prevention office. While there, the individual attempts to flee but is grabbed by both officers. As part of the unbroken stream of events, one officer puts McDaniel in a bear hug, then picks up McDaniel and body-slams him to the ground. "Neal lifted McDaniel high enough and with enough force for his feet to fly up in the air before throwing him down on the [*8] ground." McDaniel v. Neal, No. 21-2467, 2022 U.S. App. LEXIS 22545, *7-8 (8th Cir. Aug. 15, 2022). McDaniel suffers broken bones, a skull fracture and a brain injury.

Qualified Immunity (QI) is granted to both officers. The US Eighth Circuit holds that the officers were not on notice that the precise behavior was prohibited at the time of the incident.

This rather short opinion is notable for two reasons. The lesser reason is that it lists many significant excessive force cases and reviews their applicability in determining the reasonability of an act by law enforcement. But the main significance of McDaniel is the overall implications in future excessive force claims and analysis.

First, a brief summary of significant cases that figured into their analysis, with notes about cases that have been reviewed in past editions of the City Attorney Law Letter (CALL).

Chambers v. Pennycook, 641 F.3d 898 (8th Cir. 2011). This case held, among other things, that the *de minimis* injury rule would no longer bar claims in the Eight Circuit. Prior to this case, a claim could be dismissed if only *de minimis* injury or minor injury were shown. The reasoning was that if only minor injury were shown, only minor force was used. "But it is logically possible to prove an excessive use of force that caused only a minor injury, and a rule that forecloses a constitutional claim in that circumstance focuses on the wrong question." Chambers v. Pennycook, at, 906.

Kelsay v. Ernst, 933 F.3d 975, 979 (8th Cir. 2019) (*en banc*). This case was reviewed in the fourth quarter, 2018 CALL. In this case, a deputy picked up a much smaller female detainee, lifted her up and threw her to the ground causing substantial injury. Those facts were similar to the case at bar. In Kelsay, QI was granted on *en banc* review, but the Chief Judge wrote a scathing dissent which suggested that the standard may change.

Ehlers v. City of Rapid City, 846 F.3d 1002, 1008 (8th Cir. 2017), reviewed in fourth quarter, 2017 CALL. Here, the arm bar takedown maneuver, also known as the spin takedown, was affirmed as a reasonable means of restraint on a resisting subject and available to law enforcement.

Jackson v. Stair, 944 F.3d 704 (8th Cir. 2019) reviewed in the fourth quarter, 2019 CALL. This case represented a departure from a totality of the circumstances, reasonable officer review and movement to examining each discrete act by law enforcement for reasonability. This was a Taser case in which the officer used two rapid-fire five-second bursts of Taser energy to subdue a suspect. Previously, analysis would focus mainly on the deployment of the Taser overall. But in Jackson v. Stair, the Court made a separate finding for each Taser activation. The Court held that the first five-second burst was reasonable, but the second deployment was excessive.

The Court in McDaniel used the standard of Lombardo v. City of St. Louis as quoted in Kingsley v. Hendrickson, 576 U.S. 389, 402, 135 S. Ct. 2466, 2476 (2015).

> In assessing a claim of excessive force, courts ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." … [T]he inquiry "requires careful attention to the facts and circumstances of each particular case." Those circumstances include "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff 's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting."
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> Lombardo v. City of St. Louis, 141 S. Ct. 2239, 2241 (2021) (cleaned up, citations omitted).

While this standard goes back to Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865 (1989), it is being applied differently in recent cases. Beginning in Jackson v. Stair it is now a template for examining individual and discrete acts during arrest by arresting officers.

By applying the existing standard in the same way it was used in Jackson v. Stair, the conclusion changes from a fleeing suspect getting injured due to his flight, to a person being injured due to a body slam inflicted by the officer. The standard is no longer overall reasonableness but now a need to justify each movement.

The case of McDaniel v. Neal represents the greater scrutiny applied to law enforcement use of force. It also puts officers on notice that substantially disproportionate applications of force may be held to be unreasonable.

Review by David D. Phillips,
Deputy City Attorney

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Lankford v. City of Plumerville
No. 21-1639, 2022 U.S. App. LEXIS 21223 (8th Cir. Aug. 2, 2022)
A Road Block as Deadly Force

A fleeing motorcyclist approaches speeds in excess of 100 miles per hour with officers in pursuit and heads toward the center of a small town. The chief of police uses his SUV to block the road and the motorcycle collides with the SUV. While the biker survives, the officer's action is reviewed under the standard for deadly force.

"Lankford's motorcycle hit the side of Duvall's SUV, hurling Lankford from his motorcycle and severely injuring him. Lankford testified he used alcohol and marijuana that day and was possibly intoxicated during the chase." Lankford v. City of Plumerville, No. 21-1639, 2022 U.S. App. LEXIS 21223, at *3-4 (8th Cir. Aug. 2, 2022)

Morrilton officers testified that lethal force was unnecessary. "I advised both [Morrilton] officers that if they found themselves in a situation like that not to block the roadway and to let the motorcycle pass, unless it was a deadly force situation," Assistant Chief Trent Anderson wrote in his after-action review of the incident according to a story published in Thenewspaper.com, https://www.thenewspaper.com/news/70/7027.asp.

However, the Court held that the chief was reasonable in his acts.

> "Duvall received a call from dispatch requesting his help with a high-speed pursuit of a motorcycle traveling around 100 miles per hour coming toward Plumerville on Highway 64, which goes through the heart of Plumerville. Duvall also knew he was the last line of defense between Lankford and downtown Plumerville."
>
> Lankford v. City of Plumerville, at *7.

Accordingly, certain kinds of deadly force may be more reasonable than others under the same facts. Here, Duvall's use of a roadblock, even if perpendicular to the road, was a reasonable use of deadly force. Id. at *9.

Review by David D. Phillips,
Deputy City Attorney

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Dumond v. State

TITLE: Arkansas Court of Appeals Suppresses Evidence Discovered Subsequent to Canine Sniff, Concluding Purpose of Traffic Stop was Over

FACTS TAKEN FROM THE CASE

On December 9, 2019, Deputy Scott Norton pulled over Marilyn Dumond's vehicle for speeding. Dumond was in the passenger seat, and her husband was driving. The husband had no license but was driving because Dumond did not see well at night. Deputy Norton took their information back to his patrol car and wrote the traffic ticket while waiting on dispatch to get him information about the Dumonds. Dispatch advised that both Dumonds had prior drug history. Norton finished writing the ticket, but instead of taking the ticket to the Dumonds, Deputy Norton decided that he wanted to question the Dumonds and run his K-9 around their car.

Deputy Norton returned to the Dumonds' vehicle and asked if there was anything illegal in the car, which the Dumonds denied. Deputy Norton had the Dumonds step out of the car, and Marilyn Dumond tossed something into the ditch (which Deputy Norton did not see at the time). Deputy Norton took the drug dog around the car, and the dog alerted when he opened the driver-side door. As he walked to the other side of the car, Deputy Norton noticed a container in the ditch. Deputy Norton opened the container and discovered a crystal-like substance, syringes, a spoon, and a plastic sack. Norton arrested the Dumonds, later reviewed his dash cam footage, and at that time learned that Marilyn had thrown the container as she stumbled out of the car.

Marilyn Dumond moved to suppress the evidence, claiming that Deputy Norton did not have reasonable suspicion to extend the traffic stop to conduct the canine free-air sniff, and that any evidence discovered therefrom should be suppressed. The State countered that Norton could perform a free-air sniff because the Dumonds were not stopped for an unreasonable amount of time, and the K-9 was already with Norton. The Circuit Court denied the motion to suppress, explaining there was no evidence the traffic stop lasted more than fifteen minutes, and noting that the citation was not delivered to the Dumonds, meaning the traffic stop was ongoing.

ARGUMENT AND DECISION BY THE ARKANSAS COURT OF APPEALS

On appeal to the Arkansas Court of Appeals, Marilyn Dumond claimed that the trial court erred in denying her motion to suppress because Deputy Norton unconstitutionally extended the traffic stop beyond its original purpose. The Court said it was presented with two intertwined

issues: whether the traffic stop was complete before Deputy Norton ran the K-9 for a free air sniff; and whether Deputy Norton had reasonable suspicion to continue to detain the Dumonds if the traffic stop was, in fact, complete.

The Court said that an officer may detain a traffic offender while the officer completes certain routine tasks as part of a traffic stop, such as checking on registration, driver's license, criminal history, and writing up a citation or warning. During this process, the officer may ask the motorist routine questions, such as the motorist's destination, the purpose of the trip, or whether the officer may search the vehicle, and the officer may act on whatever information is volunteered. However, once the purpose of the traffic stop is completed, the officer may not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated reasonable suspicion to justify a further detention. The use of a drug dog during a routine stop does not constitute an illegal search under the federal constitution. If police have reasonable suspicion to detain a vehicle, no separate suspicion is required to conduct a canine sniff; the distinction is that police may not extend the traffic stop to do so.

The Court pointed to prior decisions in Mickens v. State, 2020 Ark. App. 280 (holding it was okay for a second officer to run a dog while the first officer was still in the process of writing a citation), Jackson v. State, 2013 Ark. 201 (holding it was acceptable for the officer to deploy his dog while waiting on ACIC returns), and State v. Thompson, 2010 Ark. 294 (where it was implicitly acceptable for an officer to show up and run a drug dog while another officer was giving the driver field sobriety tests), to give examples of cases where the purpose of the stops was still ongoing; that is, the officers were still in the process of handling business associated with the traffic violations, during which time the dogs were deployed to conduct free air sniffs. The Court compared the above holdings with holdings from Sims v. State, 356 Ark. 507, and Rodriguez v. United States, 575 U.S. 348, cases where the officers had finished writing citations, handed the tickets and information back to the drivers, and only then began to inquire about drugs in the cars and deploying the dogs. The Court stated that in the former cases the traffic stops were not prolonged, but in the latter they were.

Using the above as context, the Arkansas Court of Appeals held that when Deputy Norton in this case finished writing the ticket and had no other business pertaining to the traffic stop itself, the traffic stop was concluded, and reasonable suspicion was required to continue

detaining the Dumonds. The Court said that it must then next determine if reasonable suspicion existed. The Court quoted the definition of reasonable suspicion found in Ark. R. Crim. Proc. 2.1. The Court said that whether reasonable suspicion exists depends on whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person may be involved in criminal activity. The Court noted the fourteen factors to consider in determining reasonable suspicion that are set forth in the commentary to Ark. R. Crim. Proc. 2.1. The Court said that reasonable suspicion to further detain must be developed before the legitimate purpose of the traffic stop has ended.

The Court noted that Deputy Norton testified that the only reason he continued to detain the Dumonds was because of the report from dispatch about their prior drug history. The Court noted that prior criminal history, standing alone, is not sufficient to establish reasonable suspicion. Applying the above law to these facts, the Court held that the stop was concluded before Deputy Norton deployed his K-9, and Deputy Norton did not have reasonable suspicion to continue the stop. The denial of the motion to suppress was reversed, and Dumond's conviction and sentence were reversed.

Note From Deputy City Attorney: There was a dissenting opinion which discussed, among other things, holdings from Illinois v. Caballes, 543 U.S. 405 (where the U.S. Supreme Court concluded that a drug-dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment), and Miller v. State, 81 Ark. App. 401 (where the Ark. Court of Appeals held that a canine sniff of the exterior of the vehicle does not amount to a Fourth Amendment search, and a motorist's detention may be briefly extended for a canine sniff of the vehicle in the absence of reasonable suspicion without violating the Fourth Amendment when an officer has a police dog at his immediate disposal). Also, as of the time the above case was summarized for C.A.L.L., the Arkansas Attorney General has filed a request for rehearing of the decision to the Arkansas Supreme Court.

Case: This case was decided by the Arkansas Court of Appeals on June 1, 2022, and was an appeal from the Grant County Circuit Court. The case citation is Dumond v. State, 2022 Ark. App. 292.

Review by Taylor Samples, Senior Deputy City Attorney

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TITLE: 8th Circuit Upholds Officer Terry Stop and Frisk
U.S. V. Redmond

FACTS TAKEN FROM THE CASE

On November 26, 2019, the front desk worker of a Motel 6 in Iowa called 911 to report shots fired behind the motel at around 1:00 a.m. The area around the motel was known to officers as a high-traffic, high risk area that typically had a lot of criminal activity. Officer Smith was in the area and responded to the call on the radio. After arriving on scene, an employee of the Motel 6 directed him to the area of the alleged shots. At approximately the same time, Sergeant Martin also arrived at the Motel 6 and spoke to an Uber driver. The Uber driver said that fireworks had been thrown from a car window as the car left the area and suggested that the fireworks were the basis of the call, not gunshots.

Around that same time, Officer Smith parked and began walking through the dark motel parking lot where he saw two individuals in a parked car with its engine running. Smith approached the driver and asked him to roll down the window, at which point Smith could smell marijuana coming from inside the car and saw that both occupants were holding bottles of beer. After the occupants initially denied hearing shots fired, the passenger suggested that the sound was fireworks. Smith asked both occupants for identification, but only the driver complied. The passenger, later identified as Redman, refused to provide identification and stated that he was not being detained and was leaving. Although Smith told him to remain in the car and called for assistance, Redman exited the car. Sergeant Martin arrived and began speaking with Redman, who told Martin that he was not detained and could leave. As Redman began to walk away, Smith advised Martin that he had told Redman to "stay here." As Redman unlocked a motel room door, Martin called out to and quickly approached him, grabbing the back of Redman's jacket when he turned the door handle. Redman nevertheless began to enter the room, at which point Martin and another officer brought him to the ground and handcuffed him in the doorway. Martin thereafter found a loaded Glock Model 42 .380 semi-automatic firearm in Redman's coat pocket. Redman was charged with felon in possession of a firearm.

Prior to trial, Redman moved to suppress the evidence obtained during the encounter and argued that Martin had illegally seized the weapon. The trial court disagreed with Redman and

found that Martin was justified in seizing Redman, in part, because it was a proper *Terry* stop conducted for officer safety.

ARGUMENT, APPLICABLE LAW, AND DECISION BY THE ARKANSAS COURT OF APPEALS

On appeal, Redman again argued that Martin had illegally seized him, and the evidence that resulted from the illegal seizure should be suppressed. Redman stipulated that he was not seized until Martin physically grabbed his jacket.

In making its ruling, the 8th Circuit Court of Appeals revisited the standard to justify a *Terry* stop. Specifically, it restated that officers "may conduct brief investigatory stops of individuals if they have a reasonable articulable suspicion of criminal activity." *US v. Griffith*. "A *Terry* stop is justified when a police officer is able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *US v. Slater*. The court looks to "the totality of the circumstances in every case to see if the officer conducting the search had a particularized and objective basis for suspecting legal wrongdoing. This analysis looks at such facts as the time of day or night, location of the suspect parties, and the parties' behavior when they become aware of the officer's presence." *US v. Bailey*. During a *Terry* stop, an officer may "take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop," including frisking a person for weapons if the officer has "articulable suspicion that the person is armed and dangerous." *US v. Hensley.*

In this case, the Court found that Martin had reasonable articulable suspicion to detain Redman because Martin was investigating an early-morning report of shots fired near 1:00 a.m. in a high-crime area. Also, Martin knew that Redman was one of only two people present in the dark parking lot that was the alleged location of the shots fired; that Smith was a parole officer and had called for help; and that Redman had refused to identify himself and walked away against Smith's instructions to stay in the car. Finally, Martin saw Redman attempting to enter a locked motel room, raising safety concerns. Given these circumstances, Martin had reasonable

suspicion that Redman may have been involved in a shots fired incident, which justified his decision to seize Redman and to perform a limited search to determine if Redman was armed.

Case: This case was decided by the 8th Circuit Court of Appeals on July 12, 2022, and was an appeal from the US District Court for the Northern District of Iowa- Cedar Rapids.

Review by Garrett Harlan, Deputy City Attorney

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City Attorney Law Letter

AKA "CALL"

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