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City Attorney Law Letter

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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.

USE OF FORCE!

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

Contributing Authors: Taylor Samples, Senior Deputy City Attorney,
David Dero Phillips, Deputy City Attorney, Garrett Harlan, Deputy City Attorney

The City Attorney Law Letter is a not-for-profit educational publication summarizing case law and statutes affecting law enforcement in the City of Springdale, Arkansas. Views and opinions expressed in this publication are those of the individual authors and not necessarily those held by the City of Springdale, and may not necessarily constitute settled law. Please direct correspondence regarding this publication to:

Editor, CALL, 201 Spring Street, Springdale, AR 72764

Dreith v. City of St. Louis
Retaliatory Use of Force – Peaceful Protest

Alison Dreith was involved in the demonstrations in Saint Louis. Officers were trying to relocate people from the Police academy by bus and were blocked by protestors, to include Dreith. The crowd was ordered to disperse. A Bicycle Response Team arrived to assist and wedged through the crowd. During the encounter, Dreith was sprayed with a chemical irritant. She was not arrested.

It is settled law that law enforcement officers may use force to place suspects under arrest. Officers may use force on non-compliant subjects. This assumes that the non-compliance deals with a *potentially* arrestable offense. Whether an arrest is made or not is not dispositive in a use of force case. But the alleged underlying behavior must be criminal in nature.

Dreith sued The City on a Civil Rights claim of retaliatory force. She claimed she was subjected to chemical irritants due to her participation in protected First Amendment activities involving peaceful protest. Her version of the story was that she was merely observing her friends peacefully protest. The police said the crowd was throwing rocks and bottles and when the BRT arrived, she grabbed one of the bikes. Both parties agreed that Dreith did not move away from the disturbance but Dreith claimed she did not hear the command to disperse.

The Officers claimed qualified immunity based on their reasonable belief that Dreith was not complying with lawful commands. “Qualified immunity shields government officials from suit in a § 1983 action unless their conduct violates a clearly established statutory or constitutional right of which a reasonable official would have known.” Dreith v. City of St. Louis, 55 F.4th 1145, 1148 (8th Cir. 2022). However, qualified immunity is not applied where there is a genuine dispute of material fact. The divergent stories, neither of which could be clearly established, prevented the federal District Court from making a factual determination.

Qualified immunity was denied. The case could go to a jury.

Review by
David D. Phillips
Deputy City Attorney

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Mulbah v. Jansen
Civil Rights and Traffic Stops

Sheck Mulbah was stopped for speeding by Cody Jansen, a South Dakota Highway Patrol trooper. The trooper used a hand-held Radar device and as part of the stop performed a consent search and found nothing. Mulbah was then given a warning and released without citation.

Mulbah sued the agency under 42 U.S.C. 1983 claiming the stop itself, the length of the stop and the search were all unlawful. Mulbah argued he was not speeding and shouldn't have been stopped.

The Defendant officer argued that, even if Mulbah was not speeding, Jansen had arguable probable cause to stop him. An officer has arguable probable cause if the facts available to the officer at the time of the conduct would reasonably be objectively interpreted as probable cause, even if one or more facts later prove to be false. Here, the trooper said he could reasonably rely on this Radar reading.

The trial court did not make a factual determination on either argument. As a result, the Court of Appeals could not review the case. Qualified immunity was denied and appeal was not possible. The case is Mulbah v. Jansen, 55 F.4th 1164 (8th Cir. 2022).

Review by
David D. Phillips
Deputy City Attorney



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Moody v. State

TITLE: Arkansas Court of Appeals Affirms DWI Conviction Where no FSTs Performed, Accident Occurred, and Driver Refused Breath Test

FACTS TAKEN FROM THE CASE

Just after midnight on April 6, 2019, Justin Moody had a traffic accident while driving his van westbound on I-40 between Mayflower and Conway. Several witnesses testified that Moody was driving erratically and at a high rate of speed. Witnesses described Moody as driving at a high rate of speed, swerving onto the shoulder, and passing vehicles on the shoulder between the far-left lane and a concrete barrier. Moody eventually struck the back of a vehicle, propelling that vehicle into a concrete barrier on the right side of the interstate, causing the vehicle to spin across the interstate and into another concrete barrier. Following the accident, Moody tried to drive away and almost hit the driver of the other vehicle. Moody then veered left and collided with a barrier, coming to a stop. As a result of the wreck, one of the drivers of the other vehicles suffered a fractured right femur and left ankle that had to be surgically repaired.

Arkansas State Trooper Kenya Campbell was dispatched to the scene and saw Moody leaning against the passenger side of his van. Moody said that he was doing good and did not need to be checked out by paramedics. Moody told Trooper Campbell that he was “trying to get back onto 12” and was trying to get to Maumelle, and Moody said that he had not been drinking. Trooper Campbell twice asked Moody who he wanted to retrieve his vehicle, and Moody did not respond. When Trooper Campbell asked Moody if he could hear her, he replied, “I can hear you, I’m going to run into town now.” Trooper Campbell testified that she arrested Moody for DWI on the basis of several different factors, which included: strong odor of intoxicants, narratives of poor driving provided by eye witnesses, and Moody’s inability to explain what had happened or where he was going.

During transport to the jail, Moody fell asleep before waking up and complaining that his handcuffs were too tight and having difficulty breathing. Once at the jail, medical personnel evaluated Moody, who told them that he was fine. Once inside the station, Trooper Campbell went over the consent form with Moody and asked him to take a breath test. Moody refused to take the test, which was indicated on the form to have occurred at 2:20 a.m.

Moody testified on his own behalf and stated that he had borrowed the van from a friend about a month prior because his car was broken down. Moody said that during that month, he had

experienced numerous mechanical problems with the van and had installed a new starter. Moody said that the engine sometimes revved when the van was started, and that the steering would rock back and forth when the van reached a certain speed. Moody said that he had seen his friend lose control of the van due to mechanical issue. Moody denied having anything to drink on the night of the accident. He said that on the night of the accident while driving on the interstate, the van surged; the engine revved; and the steering wheel was rocking. Moody described the van as a runaway vehicle that he was navigating in and out of traffic trying to make sure he didn't hit anyone. Moody said that Officer Campbell's testimony about a strong odor of alcohol may have been due to the cologne he was wearing. Moody did not remember his head being hit or being injured in the accident, but said he did become dizzy and didn't know what was going on while being transported in the patrol car. Moody said that while at the jail, he was falling over and asked to speak with a nurse, and he did not remember what happened after that. Moody said that he did not refuse to take the breath test.

Following a jury trial, Moody was convicted of DWI, first-degree battery, and refusal to submit to a breath test.

ARGUMENT AND DECISION BY THE COURT OF APPEALS

On appeal to the Arkansas Court of Appeals, Moody claimed that there was insufficient evidence to support his DWI conviction, arguing there was no substantial evidence of intoxication. Moody claimed that he was not drinking that night, and that his erratic driving was caused by the van's mechanical malfunctions. Moody argued that after the accident, his speech was not slurred, his eyes were not glass, and he was seen on the dashcam video walking normally to the patrol car. Moody claimed that the Officer did not smell alcohol on his breath, but instead smelled cologne.

The Court disagreed with Moody and affirmed his conviction for DWI. The Court noted that in addition to the smell of alcohol, there was ample testimony about Moody's driving, which included speeding up on cars, narrowly missing them, and passing one car on the shoulder. The Court pointed-out that immediately following the accident, Moody exited the van, then got back inside the van and attempted to speed away before crashing into a metal barrier. The Court, citing Dorsey v. State, 2020 Ark. 316, said that the Arkansas Supreme Court has held that flight, or attempted flight, from the scene of a crime may be considered as proof of consciousness of guilt. The Court noted that witnesses at the scene testified that Moody was unsteady on his feet and

appeared to be intoxicated, and Moody gave Officer Campbell nonsensical answers to her questions about what he was doing and where he was going. The Court noted that the Supreme Court in Lockhart v. State, 2017 Ark. 13, held that opinion testimony regarding intoxication is admissible. Finally, the Court pointed-out that there was evidence that Moody refused to submit to a breathalyzer test, and that the Supreme Court has recognized that refusal to submit to a chemical text can be properly admitted as circumstantial evidence showing a knowledge or consciousness of guilt, and that such evidence possesses independent relevance bearing on the issue of intoxication.

The Court also affirmed Moody’s convictions for first degree battery and refusal to submit to a chemical test. In addressing Moody’s conviction for refusal to submit to a chemical test, the Court noted that Officer Campbell had reasonable suspicion of Moody’s intoxication, but that this was not needed under these facts since Moody’s implied consent to a chemical test was triggered under section 5-65-202(a)(2) because Moody was involved in an accident. Also, Moody claimed there was not substantial evidence that he refused a breath test because his alleged refusal was not videotaped, and he did not sign the statement-of-rights form. The Court disagreed and said this was purely a matter of credibility for the jury to determine. Officer Campbell testified that she went over the statement-of-rights form with Moody and that Moody refused to take the breath test upon request; and Moody testified that he did not refuse to take the breath test. The Court said that this conflicting evidence was for the jury to resolve.

Case: This case was decided by the Arkansas Court of Appeals on January 25, 2023, and was an appeal from the Faulkner County Circuit Court. The case citation is Moody v. State, 2023 Ark. App. 23.

Case Review by
Senior Deputy City Attorney
Taylor Samples

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Arkansas Court of Appeals Upholds Checkpoint That Followed Established Department Procedure

FACTS

On July 3, 2015, Arkansas State Police Trooper Buster Rinks conducted a sobriety checkpoint pursuant to ASP policy in Searcy County, Arkansas, with the assistance of two Searcy County Sheriff's deputies. The plan, which was put in place and approved by Rinks' supervisor prior to the beginning of the checkpoint, was that, from 11:00 p.m. on July 3 through 12:30 a.m. on July 4, traffic would be stopped from all three directions at the intersection of Arkansas State Highways 14 and 27.

According to the plan, the following procedures were to be followed: vehicle lights were to be visible from all directions; a safe zone was to be established with proper placement of vehicles considering the terrain; officers were to be in uniform; blue lights were to be activated on designated units; and reflective vests and flashlights were to be used as needed. The plan also required that every vehicle that came through the checkpoint be stopped and told that it was an ASP sobriety checkpoint, and it required that the officer request and review each driver's license and registration. The officers were to check for alcohol or drug-impaired drivers and any other obvious violations of either the Arkansas criminal and traffic code. At the end of the officer's interaction with the driver, pursuant to the plan, the officer was required to thank the driver for being cooperative during the checkpoint. Pursuant to the plan, Trooper Rinks had minimal control of the checkpoint and could not alter the plan himself. Rinks did not have any control over when the checkpoint started but could stop it earlier if the circumstances warranted (*i.e.* no traffic and was a waste of resources to continue).

At around 11:10 p.m. on July 3, a white Chevy truck approached the checkpoint making an "awful racket" and smoking from the rear of the vehicle. Upon its stop, Rinks made contact with the driver, Rogers, and as a courtesy told him that he may have a problem with his truck and that he might want to check and see if something was caught underneath his truck. Rogers, of his own volition, stepped out of the driver's seat, walked around to the back, and looked underneath the rear of the truck. As Rogers was looking at the truck, Rinks saw that there was a bulge in Roger's sock and, based on Rinks' training and experience, it appeared to be a meth pipe. Rinks asked Rogers if it was a meth pipe, and Rogers admitted that it was and removed the pipe from his sock and gave it to Trooper Rinks. Rogers was subsequently arrested and placed in handcuffs. Because

Rogers was the sole occupant of his vehicle, it was necessary that his truck be towed; which required that its contents be inventoried. As such, an inventory of his truck was performed and a clear baggie containing methamphetamine was uncovered. Rogers was ultimately charged with possession of a controlled substance and possession of drug paraphernalia.

Prior to a trial on those charges in circuit court, Rogers argued that both the bag of meth and the pipe collected at the roadblock should be suppressed because the sobriety checkpoint had been operated in a manner that was unconstitutional and that his Fourth Amendment right had been violated. The trial court denied his argument and Rogers appealed the trial court's decision to the Arkansas Court of Appeals.

ARGUMENT, APPLICABLE LAW, AND DECISION

On appeal, Rogers argued that the sobriety checkpoint was unconstitutional because it was not conducted pursuant to the preapproved plan and because the field officers were given too much discretion.

Under Arkansas law, a Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint. *Partee v. State*, 2010 Ark. App. 805. In order for a checkpoint to satisfy the Fourth Amendment, the State must present evidence to show that the checkpoint was carried out pursuant to a previously established objective and neutral plan that was designed by supervising officers in order to limit the discretion of the field officers. *Whalen v. State*, 2016 Ark. 343. In *Whalen*, the Arkansas Supreme Court identified two factors that are crucial in determining whether a field officer's discretion was properly limited: (1) was the decision to set up the roadblock made by the officer or officers actually operating the checkpoint; and (2) were the officers on the scene able to decide for themselves the procedures to be used in operating the roadblock.

Upon review of this case, the Court noted that Trooper Rinks testified to the following: the plan was in place prior to the initiation of the checkpoint; traffic was being stopped from all three directions at the intersection of Arkansas State Highways 14 and 27; blue lights were visible from all directions; every vehicle that came through the checkpoint would be stopped; and that all drivers would be told that they were being stopped because it was a sobriety checkpoint and that each would be asked for their driver's license. Rinks testified that he had no discretion on the time the checkpoint began or how it was going to be conducted with respect to who would be stopped and what information would be relayed to each vehicle stopped.

Based on the forgoing facts testified to by Trooper Rinks, the Arkansas Court of Appeals denied Rogers's appeal and held that the roadblock was valid because it was conducted pursuant to the ASP's policy, which properly limited the operating officer's discretion during the sobriety checkpoint.

Case: This case was decided by the Arkansas Court of Appeals on February 15, 2023, and was an appeal from the Searcy County Circuit Court. The case citation is *Jeffrey Rogers v. State of Arkansas*, 2023 Ark. App. 72.

Review by
Garrett Harlan
Deputy City Attorney



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TITLE: Arkansas Court of Appeals Holds Evidence Admissible That Was Discovered During Search of Jacket Made Contemporaneous to Arrest

FACTS TAKEN FROM THE CASE

On February 19, 2020, Nashville Police Officer Jarrett Rogers performed a routine traffic stop of a vehicle. Following the stop, Officer Rogers learned that the passenger of the vehicle, Christopher Dougan, had an outstanding warrant for his arrest in Texas. Officer Rogers located Dougan at a friend's apartment and took him into custody for the outstanding warrant. While walking to Officer Rogers' patrol car, Dougan asked to retrieve his money from the apartment. Officer Rogers told Dougan that he could not go back inside the apartment because he was under arrest, and Officer Rogers offered to get Dougan's money for him. Dougan agreed, and the occupants of the apartment handed Officer Rogers a jacket that Dougan confirmed was his. Officer Rogers looked through the coat to locate Dougan's money, and Officer Rogers found money, Dougan's identification, and a glass pipe wrapped in a paper towel and a black bag containing methamphetamine. Dougan was later convicted by a Howard County Circuit Court jury of possession of methamphetamine and possession of drug paraphernalia.

ARGUMENT AND DECISION BY THE ARKANSAS COURT OF APPEALS

Dougan appealed his case to the Arkansas Court of Appeals. First, he claimed that there was not sufficient evidence to convict him. The Court noted that under Arkansas law, possession may be established by proof of actual possession or constructive possession. Actual possession occurs when a defendant has actual physical possession of contraband. To prove constructive possession, the State must establish that the defendant exercised care, control, and management over the contraband. The Court held that there was sufficient evidence that Dougan constructively possessed the jacket. The Court noted that in addition to the illegal contraband found in the jacket, Dougan's money and identification were inside the pockets, and Dougan confirmed the jacket was his.

Next, Dougan claimed that the circuit court erred in denying his motion to suppress the contraband found in the jacket because it was obtained through an illegal search and seizure. The Court said that an officer making a lawful arrest is permitted to conduct a search without a warrant of a person or his property to protect the officer, to prevent the accused's escape, or to obtain evidence of the commission of an offense for which the accused is arrested or to seize contraband

or fruits of the crime. In addition, a search incident to arrest may be made whether or not there is probable cause to believe the person arrested may have a weapon or is about to destroy evidence. A search incident to arrest must be made substantially contemporaneous with the arrest and not remote in time and place; the search may be made only of the area within the immediate control of the person arrested, which is the area from within which he might gain possession of a weapon or destructible evidence.

The Court held that Officer Rogers performed a permissible search incident to arrest. The Court noted that a search is valid as incident to a lawful arrest even if conducted before the actual arrest as long as the arrest and search are substantially contemporaneous, and probable cause to arrest existed prior to the search. The Court said that Officer Rogers had probable cause to arrest Dougan due to the outstanding warrant in Texas, and he also had the authority to conduct a search incident to that arrest. Once the jacket came into Officer Rogers' possession, he was well within his right to conduct a search incident to arrest, as an officer may conduct a search without a warrant of an accused's property in order to protect the officer's safety. The officer may then seize the contraband, the fruits of the crime, and any other things criminally possessed that are discovered during a proper search incident to arrest. Once Officer Rogers discovered the contraband inside the jacket, he was allowed to seize them and use them as evidence without regard to whether they were connected with the offense for which Dougan was initially arrested.

Case: This case was decided by the Arkansas Court of Appeals on February 15, 2023, and was an appeal from the Howard County Circuit Court. The case citation is Dougan v. State, 2023 Ark. App. 75.

Case Review by
Senior Deputy City Attorney
Taylor Samples



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Authenticating Social Media Evidence

United States v. Perez

No. 22-1740, 2023 U.S. App. LEXIS 5371 (8th Cir. Mar. 7, 2023)

Vincent Michael Perez was convicted of Child Pornography charges in a trial by jury. The evidence on which the jury relied consisted mainly of screen captures, an IP address and emails, some of which contained photographs. Perez appealed the conviction claiming the government had not properly introduced the evidence, specifically that there was no authentication. The US Eighth Circuit held that the evidence was properly authenticated and reviewed the standard for authentication under Federal Rules of Evidence, Rule 901.

"To authenticate evidence, a party must clear only a low bar." United States v. Lamm, 5 F.4th 942, 947 (8th Cir. 2021) (quotation omitted). Under the Federal Rules of Evidence, to authenticate an item of evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). "Sufficient evidence may include [*5] the testimony of a witness with knowledge, or 'the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.'" Lamm, 5 F.4th at 946 (quoting Fed. R. Evid. 901(b)(4)).

United States v. Perez, No. 22-1740, 2023 U.S. App. LEXIS 5371, at *4 (8th Cir. Mar. 7, 2023)

The Court noted that social media presents a special challenge for authentication due to the ease with which it may be falsified. But circumstantial evidence may overcome that difficulty. The Court noted the steps taken by law enforcement to prove that Perez was indeed the author of the prohibited content.

In this case, to authenticate [*6] the MeWe records, the government needed to produce sufficient evidence linking Perez to the account at issue. See Fed. R. Evid. 901(a); Lamm, 5 F.4th at 947-48. The government did so. First, the government tied Perez to a Vast Broadband account and Google email address. The subscriber information for these accounts matched Perez's personal biographical information, such as his first and last name, home address, date of birth, and phone number. The government then tied Perez to a specific IP address, which was associated with both the Vast Broadband and Google accounts. Finally, the government put forth evidence linking Perez to the MeWe account, including evidence showing that (a) the user of "tatted up meskin perez" referred to himself as "Vinny," (b) the account was created using Perez's Google email address, (c) the account was regularly accessed by the IP address associated with Perez's Vast Broadband account, and (d) the account contained numerous personal photographs of Perez, including at least one photograph depicting Perez's genitalia.

Taken together, this circumstantial evidence provided a sufficient basis for the district court to permit the jury to decide whether the MeWe account belonged to Perez. See United States v. Recio, 884 F.3d 230, 237 (4th Cir. 2018) (finding [*7] the defendant's Facebook account authenticated where "(1) the user name associated with the account was 'Larry Recio,' (2) one of the four email addresses associated with the account was 'larryrecio20@yahoo.com,' (3) more than one hundred photos of Recio were posted to the account, and (4) one of the photos posted to the user's timeline was accompanied by the text 'Happy Birthday Larry Recio'").

United States v. Perez, No. 22-1740, 2023 U.S. App. LEXIS 5371, at *5-7 (8th Cir. Mar. 7, 2023)

The Arkansas rule for authentication is the same as the federal rule. Evidence is authentic when the trier of fact is confident that it is what it purports to be.

Authentication of a document is a condition precedent to admissibility. Davis v. State, 350 Ark. 22, 86 S.W.3d 872 (2002). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Ark. R. Evid. 901(a). Rule 901 further provides that the testimony of a witness with knowledge that a matter is what it is claimed to be is sufficient to authenticate evidence and also that appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can be used to authenticate evidence.

Ark. R. Evid. 901(b)(1) & (4) as quoted in Brown v. State, 2019 Ark. App. 154 *; 573 S.W.3d 536 **; 2019 Ark. App. LEXIS 164.

In Brown v. State, a case involving the alleged rape of a teenage juvenile by her father, the State presented only a text string and witness testimony of having received the text, but no other connection to the Defendant. The text string included words that could be considered an admission of guilt. After being found guilty at trial, the conviction was overturned on appeal. The Arkansas appellate court noted that in another case, Gulley v. State, 2012 Ark. 368, 423 S.W.3d 569, the Arkansas Supreme Court added the provision that "other evidence linking [the Defendant] to the texts" would be necessary beyond merely identifying the phone number as that belonging to the Defendant. Id. In the Gulley case, the Court held that "circumstantial evidence, which tends to corroborate the identity of the sender, is also required." Id., quoting Commonwealth v. Koch, 2011 PA Super 201, 39 A.3d 996 (Pa. Super. 2011).

Review by
Deputy City Attorney
David D. Phillips



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