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C.A.L.L.

City Attorney Law Letter

July 1, 2023

Issue 23-3



SPD NEW LAWS CLASSES:

Tuesday, July 18, 2023, 10:00 a.m. & 2:00 p.m., Har-ber High School

Wednesday, July 19, 2023, 10:00 a.m. & 2:00 p.m., Har-ber High School

Stop and Frisk!

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City Attorney Law Letter
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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

TITLE: 8th Circuit Finds Reasonable Suspicion to Conduct Late-Night Stop and Frisk at Salvage Yard

FACTS TAKEN FROM THE CASE

Around 3:00 a.m. on August 30, 2020, the owner of a salvage lot notified the Independence, Missouri, Police Department about a suspicious person on the lot. Officer Ian Storey was dispatched and was given the suspect's description as that of a black male wearing a white t-shirt with blue or black shorts. Officer Storey arrived at the lot and found only Victor Stokes, a white male wearing a white-shirt, on the property. Officer Storey made contact with Stokes and he reported to Officer Stokes that he was waiting there until the morning because he thought his stolen car was on the lot. Officer Storey asked if Stokes had reported the stolen car to the police and Stokes stated that he had not. Based on his experience and the fact he found Stokes's story unreasonable, Officer Storey suspected Stokes was lying.

Officer Storey then decided that a further investigation was necessary to determine whether Stokes had committed a theft or was trespassing, particularly because the property owner was the complainant. After noticing Stokes had "a bunch of things in his pockets," Officer Storey asked Stokes to stand so that he could perform a frisk. Stokes initially refused, but then stood, turned and ran, and was ultimately tased by Officer Storey. After arresting Stokes for interfering with his official duties, Officer Storey performed a search incident to arrest and discovered that Stokes had a sawed-off shotgun and shotgun shells in his shorts. At the time of his arrest, Stokes was a convicted felon on probation. Stokes eventually pled guilty to being a felon in possession of ammunition in violation of federal law. Stokes then appealed his conviction.

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

On appeal, Stokes argued that the district court erred by denying his motion to suppress because: 1) Officer Storey lacked reasonable suspicion to stop him and 2) Officer Storey lacked reasonable suspicion to frisk him.

In making its ruling, the 8th Circuit revisited the justification necessary for an officer to conduct a *Terry* stop and frisk. First, a *Terry* stop requires the officer have "reasonable, articulable suspicion that a person is committing or is about to commit a crime." *U.S. v. Horton*, 611 F.3d 940. Here, in Stokes's case, Officer Storey testified that he conducted the *Terry* stop because of

the following facts: 1) in his experience he arrested people at salvage lots for theft and trespassing “a couple times a week”; 2) the time of night was consistent with his experience that salvage lots experienced thefts regularly between the times of 1am and 7am; 3) Stokes was the only person physically present at the salvage when he responded to the call; 4) Stokes was wearing clothing consistent with the caller’s description; and 5) Stokes response to his inquiry as to why he was at the salvage lot was unreasonable. Thus, based off of the foregoing facts articulated by Officer Storey, the 8th Circuit found that Officer Storey’s decision to stop Stokes was justified.

Next, having concluded that the stop was legal, the 8th Circuit revisited the justification necessary for an officer to conduct a *Terry* frisk. A *Terry* frisk, according to case law, requires that once a suspect has been legally stopped, “an officer who has reason to believe the detained individual may be armed and dangerous may conduct a pat-down search for weapons to ensure officer safety.” *U.S. v. Davis*, 457 F.3d 822. The “officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *U.S. v. Roggeman*, 279 F.3d 577. Here, in Stokes’s case, Officer Storey was alone at the salvage lot in the middle of the night with a suspect who was acting suspiciously and had unusually full pockets. Therefore, the Court concluded that it was reasonable for Officer Storey to fear for his safety and that the *Terry* frisk was justified.

Case: This case was decided by the 8th Circuit Court of Appeals on March 15, 2023, and was an appeal from the U.S. District Court for the W. District of Missouri. The case citation is *No. 22-2110 (8th Cir. Mar. 15, 2023)*.

Case Review by
Deputy City Attorney
Garrett Harlan

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Reasonable Suspicion and the “Mission” of the Stop – The Effect of “Collective Knowledge”

United States v. Rederick, No. 22-1787, 2023 U.S. App. LEXIS 9374 (8th Cir. Apr. 20, 2023)

The Rederick case, recently published, discussed Investigatory Detention and exceptions to the 15-minute rule in dog-sniff scenarios. The Court examined the effect of reasonable suspicion of other crimes in the context of a pretextual stop by police.

Rederick was being investigated by the South Dakota Division of Criminal Investigation for drug trafficking. Agents had evidence from cell phone calls which they shared with Highway Troopers who stopped Rederick for a minor traffic violation, a defective trailer tail light, when he entered the state. A drug dog was summoned to the stop and arrived 22 minutes into the stop and alerted 27 minutes in. A search uncovered methamphetamine in the trunk of the car.

The case involved a traffic stop for a pretextual reason in which law enforcement had been informed of an on-going criminal investigation and its progress. That case recognized the different Fourth amendment implications of when reasonable suspicion develops; before, during or after completion of the “mission of the stop.”

The US Supreme Court case Rodriguez v. United States, 575 U.S. 348, 350 (2015) held that a traffic stop may not be prolonged to perform a dog sniff, absent reasonable suspicion of drug activity. Where reasonable suspicion develops after the reason for the stop is fully dealt with, any prolongation of the stop to attempt to achieve reasonable suspicion is unconstitutional and any evidence collected from that continued investigation is subject to suppression. However, where the reasonable suspicion formed during or existed prior to the stop, the “mission” of the stop transitions from dealing with a traffic violation to investigating drug activity. The waiting time for a responding narcotics detection animal becomes less relevant to the analysis.

The appellate Court in Rederick used the earlier case of United States v. Magallon, 984 F.3d 1263 (8th Cir. 2021) as precedent for analysis. The Court noted in Magallon “[a]n officer's suspicion of criminal activity may reasonably grow over the course of a traffic stop as the circumstances unfold and more suspicious facts are uncovered.” (quoting United States v. Murillo-Salgado, 854 F.3d 407, 415 (8th Cir. 2017)). In Magallon the Court held “[t]hus, when the mission is ongoing throughout law enforcement's interactions with the suspects of a stop, the stop will not be unreasonable when officers diligently pursue the mission and do not cause measurable delay.” Id at 278 (8th Cir. 2021).

The Court in Rederick noted that law enforcement had reasonable suspicions of drug activity before the stop due to the communication with SDDCI. Rederick and associated cases are federal court cases. Arkansas law is the same. The “Imputed” knowledge doctrine was adopted by the Arkansas Supreme Court in Roberson v. State, 54 Ark. App. 230, 234, 925 S.W.2d 820, 823 (1996).

Review by
David D. Phillips,
Deputy City Attorney
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The City Fireworks Ordinance
Code of Ordinances for the City of Springdale
Section 46-56

Every year at about this time numerous questions emerge dealing with fireworks. Most people will rely on advice given to them by the Police Department. In addition, the Police Department inevitably receives a substantial number of calls regarding fireworks issues in the city from the end of June through the first part of July of any year. The primary City ordinance on fireworks is found at Section 46-56 of the Code of Ordinances for the City of Springdale.

Selling Fireworks - Section 46-56(a)

Prior to 2003, fireworks sales within the city limits were strictly prohibited by ordinance. However, in 2003, the Springdale City Council amended the fireworks ordinance to allow that. Now, in order to sell fireworks in the City, a permit to sell fireworks must be obtained from the City Clerk. Before a location can obtain a permit to sell fireworks, certain requirements must be met. Then, once a permit has been issued, the ordinance places several restrictions on the selling of fireworks within the city limits. Specifically:

- No fireworks shall be sold or stored within a permanent structure of the city.
- Fireworks stands shall be located in C-2, C-5, or A-1 zones. The A-1 property must have frontage on a federal or state highway.
- Fireworks may only be sold between June 28th and July 5th.
- All locations where fireworks are sold must comply with all fire codes and must be inspected by the fire marshal prior to the sale of fireworks.
- No person selling fireworks within the city shall be allowed to sell any fireworks which travel on a stick as discharge of these types of fireworks is prohibited within the city.
- No fireworks stand shall be located within 250 feet of a fuel dispensing facility.
- All fireworks stands must have at least a 50 foot setback from the street/highway.
- No person under the age of 16 shall be allowed to purchase fireworks in the city.
- All locations where fireworks are sold within the city shall post a sign, visible to the public, which states, "The discharge of bottle rockets or fireworks that travel on a stick are prohibited in the City of Springdale."

Prohibited Fireworks – Section 46-56 (b)

It is a violation of the City’s fireworks ordinance for anyone to discharge or sell bottle rockets within the city limits of Springdale, even during the time when other fireworks are allowed to be discharged. However, the mere possession of bottle rockets is not prohibited.

Permitted Locations/Times – Section 46-56 (c)

Section (c) of the ordinance sets forth when legal fireworks may be discharged within the city limits. The ordinance provides that legal fireworks may be discharged on private property between the hours of 8:00 a.m. and 10:00 p.m. beginning on July 1st and ending on July 4th. Therefore, anyone discharging fireworks after 10:00 p.m. on the night of the 4th would be in violation of the City’s fireworks ordinance.

To be in compliance with the ordinance, the owner of the private property where the fireworks are being discharged must consent to this activity. Furthermore, the ordinance requires that all persons under the age of 16 who are participating in the discharge of fire-works must be supervised by a person of at least 21 years of age.

Review by Ernest B. Cate, City Attorney
(Reprint from 2021 CALL)

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Ukrainian soldier fires rocket in anticipation of independence

TITLE: Arkansas Court of Appeals Upholds “unconfirmed” Insurance Status as Probable Cause for Stop

FACTS TAKEN FROM THE CASE

On December 15, 2020, Trooper Zach Guest of the Arkansas State Police pulled over a vehicle driven Wynton Erby after he ran the tags of the vehicle and the Arkansas Crime Information Center/National Crime Information Center (ACIC/NCIC) online insurance-verification database reported that the system was unable to verify insurance for the vehicle, and the car’s insurance status came back as “unconfirmed.” While Trooper Guest spoke to the vehicle’s driver, he noticed an odor of marijuana emanating from the vehicle and Erby was subsequently found to have a firearm on his person. Erby admitted to Trooper Guest that he was a felon. Thereafter, Trooper Guest arrested Erby for illegally possessing the firearm.

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

On appeal, Erby argued that the circuit court erred when it found that an “unconfirmed” insurance status return provided probable cause for his traffic stop. He also argued that the ACIC/NCIC database was not reasonably reliable to form the basis for probable cause.

In upholding the circuit court’s decision, the Arkansas Court of Appeals revisited Arkansas Code Annotated section 27-22-104(a)(1)(b) which provides that it is unlawful for a person to operate a motor vehicle within this state unless the motor vehicle and the person’s operation of the motor vehicle are each covered by an insurance policy. Additionally, section 27-22-104(a)(2)(A)(ii) provides that there is a rebuttable presumption that the motor vehicle or its operation is uninsured if the online insurance-verification system fails to show current insurance coverage for the driver or the insured.

Based off of the language of 27-22-104, and relevant case law on this issue, the Arkansas Court of Appeals found that an “unconfirmed” status provides probable cause for a traffic stop.

Case: This case was decided by the Arkansas Court of Appeals on April 12, 2023, and was an appeal from the Garland County Circuit Court. The case citation is *Erby v. State of Arkansas*, 2023 Ark. App. 220.

Review by
Garrett Harlan
Deputy City Attorney

NOISE ORDINANCE EXPLAINED:

Amplified Sound

Warm weather is on its way, and with it will come an increase in the number of noise disturbance calls in our city. Many of these calls involve outdoor karaoke, live bands, or "jumpy houses" in residential areas. While it may seem common sense that having karaoke or a live band in the backyard at 1:00 a.m. would be disturbing to neighbors, there seems to be a lot of people who don't see it that way. In addition, it seems that the calls are increasing for complaints of loud music from bars and event centers as well. The most common noise complaints have to do with noise originating from places like Zabana, Civic Center, Pachenga, and the Metroplex. Some of these places have been disturbing citizens for years, but enforcement has been spotty at best.

To simplify the enforcement of the noise ordinance, the Springdale City Council in 2014 passed an amendment to the noise ordinance to make it easier for the Police Department to enforce the noise ordinance in these situations, and to reduce the reliance on decibel readings in situations involving "amplified sound". Specifically, the ordinance amended section 42-51 of the Code of Ordinances to change the definition of "noise disturbance" to read as follows:

Noise disturbance means:

- (1) The creating of any unreasonably loud and disturbing sound of such character, intensity, or duration as to be detrimental to the life or health of an individual, or which annoys or disturbs a reasonable person of normal sensitivities.
- (2) Owning, keeping, possessing, or harboring any animal or animals that continuously, repeatedly, or persistently, without provocation by the complainant, creates a sound which unreasonably disturbs or interferes with the peace, comfort or repose of persons of ordinary sensibilities.
- (3) The creating of any unreasonably loud and disturbing sound by a sound amplification device of such character, intensity, or duration as to be detrimental to the life or health of an individual, or which annoys or disturbs a reasonable person of normal sensitivities.

The language added in 2014 is found in (3) above. In other words, if noise caused by a "sound amplification device" is of such a character, intensity, or duration that it annoys or disturbs a reasonable person, then it is a violation regardless of the decibel reading. This is an important

point to remember when a noise complaint comes in at 2:00 a.m., and the caller reports that the thumping bass from the music down the street, or from the bar down the road, is keeping the caller awake. If the officer verifies these facts by hearing it from where the complaint is called in from, and can truthfully testify that the noise is of such a character to annoy or disturb a reasonable person, then the officer has probable cause to write a citation for a noise ordinance violation to the person who is causing the noise disturbance.

Certainly, an officer has the discretion whether or not to write a citation once a noise disturbance is confirmed. The officer has the discretion to advise the person causing the noise disturbance to "turn it down or a ticket will be written", or the officer can choose to write a ticket without giving the person that opportunity. I have noticed on many of these calls, that officers are dispatched 2 or 3 times to the same location before the party/music is finally ended for the night. This seems like a lot of needless running back and forth. Hopefully, being armed with an accurate definition of what constitutes a violation of the City's noise ordinance will reduce the need to return to the same location over and over, and will certainly provide the complaining citizens some long-awaited peace and quiet.

Music from Vehicles

There also seems to be an increase in the number of calls regarding noise originating from a vehicle. Certainly, this would also fall within a "sound amplification device" under Section 42-51(3) above. In addition, Section 42-55 of the Code of Ordinances states as follows: (a) It is unlawful to operate any sound amplification device from within a vehicle so that the sound is plainly audible at a distance of 30 feet or more from the vehicle, whether in a street, a highway, an alley, parking lot or driveway, whether public or private property, and such is declared to be a noise disturbance in violation of this chapter. In other words, if a person is sitting in their living room, and the neighbor drives by with the music thumping so loud that it offends the caller, it is a violation. I personally have seen (heard) this over and over near the intersection of Don Tyson Parkway and Old Missouri Road. It seems that it is literally one vehicle after another driving by with loud music or thumping bass, making it impossible for anyone living in the vicinity to enjoy their homes. Many times, officers will hear music or thumping as a vehicle passes them, or while sitting at a traffic signal. This is a violation, and is also a legitimate basis for a traffic stop. There

are obvious safety reasons for a driver not to have the music too loud. After all, what if you were running code and the driver could not hear your siren because the music was too loud? Another common example are vehicles parked at convenience stores or gas pumps. For some unknown reason, many people are fond of leaving their music blaring or thumping while they are pumping gas or make a purchase in the store. If it is of such a character to offend someone, or if it can be heard at a distance of more than 30 feet away, it is a violation. It seems like every time I get gas, I witness such a violation. Hopefully this explanation will provide you with a better understanding of the City's noise ordinance. It can also be a wonderful crime suppression tool, as it provides a basis for a traffic stop, or provides a basis to make contact with an individual. By enforcing the noise ordinance, you may be preventing a more serious offense from taking place. If you have any questions about the City's noise ordinance, please feel free to contact me at any time.

Review by Ernest B. Cate, City Attorney
(Reprint from 2018 CALL)

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City Attorney Law Letter **AKA “CALL”**

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