C.A.L.L.

City Attorney Law Letter

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DWI!

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

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

Civil Rights; Illegal Arrest and Excessive Force
Nieters v. Holtan, 83 F.4th 1099 (8th Cir. 2023)

In a George Floyd-related protest, officers were pursuing a violent group that splintered off from the main element at the capital. A dispersal order had been announced five times prior to the encounter. Officer Holtan saw Nieters with this group and simultaneously told him to get on the ground, tackled and pepper sprayed him. Nieters claimed to be a reporter and claimed to have not heard the earlier dispersal announcements. Nieters was charged with one count of failure to disperse under Iowa statutes. The charge was later dropped due to insufficient evidence.

Nieters sued the officer and others under 42 USC 1982 alleging an illegal arrest and excessive force. "At the time of Nieters's arrest, "it [was] clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment." Nieters v. Holtan, 83 F.4th 1099, 1106 (8th Cir. 2023). The trial court held that Nieters could not be placed at the scene of the dispersal announcement and therefore may not have heard it. So no probable cause existed to make an arrest. The Court then examined whether Holtan had arguable probable cause. "To hold arguable probable cause existed, we would need to conclude Officer Holtan mistakenly arrested Nieters believing the arrest was based in probable cause, and the mistake was objectively reasonable." Id. at 1107. Since Nieters was standing by himself and taking photographs in an area apart from where the dispersal order was read, even the low threshold of arguable probable cause could not be attained. People have a "clearly established right to watch police-citizen interactions at a distance and without interfering." Id. at 1108 (quoting Chestnut v. Wallace, 947 F.3d 1085, 1090 (8th Cir. 2020)).

"Thus, "[f]orce may be objectively unreasonable when a plaintiff does not resist, lacks an opportunity to comply with requests before force is exercised, or does not pose an immediate safety threat." Nieters v. Holtan at 1108, (quoting Wilson v. Lamp, 901 F.3d 981, 989 (8th Cir. 2018). Here, in addition to the arrest itself being held unreasonable, Nieters was given no opportunity to comply. "Nieters was a non-violent alleged misdemeanant who was not given time to comply with the order to get on the ground prior to Officer Holtan's use of force. Id. at 1109.

The arrest and subsequent use of force were held to be unconstitutional. Qualified immunity was denied.

Review by
David D. Phillips
Deputy City Attorney

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Civil Rights and Illegal Seizure
Meier v. City of St. Louis, 78 F.4th 1052 (8th Cir. 2023)

The St. Louis Metro Police Department (SLMPD) had a policy of impounding and retaining vehicles the owners or possessors of which were wanted for questioning in on-going investigations. The police allowed officers whose agencies were affiliated with the Regional Justice Information Service to place a "wanted" report in the information system and for SLMPD to direct private towing services to "hold" vehicles until released by the entering police agency.

Mary R. Meier was the co-owner of a truck believed to have been involved in a hit-and-run traffic accident. Her truck was being driven by the co-owner, her son, who was arrested on separate and unrelated charges. Contemporaneously with the arrest, the contract towing service, Doc's Towing, removed the vehicle to their impound lot and retained the vehicle awaiting permission from the police to release it.

The next day, Meier went to the towing company and sought release of her vehicle. She was denied her vehicle. She made repeated demands over the course of several days. After Meier hired an attorney, the police ultimately released the vehicle from impound.

Meier sued the City and the towing service for deprivation of property rights on due process grounds. At trial, the jury found that the actions of the towing service were "fairly attributable to the state" and that they were therefore state actors. The jury held that the City policy caused a constitutional deprivation of a property right and that Meier experienced harm as a result.

On appeal, the City disputed the finding that this was an official policy. However, evidence at trial indicated that the practice was routine and many officers had ordered vehicle impoundment. Testimony also revealed that some vehicles were held even when not the suspect of an investigation.

The City of St. Louis was held liable and ordered to pay actual and compensatory damages.

Review by
David D. Phillips
Deputy City Attorney

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Pepper Spray and the First Amendment.
Mian v. City of St. Louis

Heather De Mian was filming a protest when Officer William Olsten pepper sprayed the crowd. Mian v. City of St. Louis, No. 22-3000, 2023 U.S. App. LEXIS 30516, at *1 (8th Cir. Nov. 16, 2023). De Mian was part of the crowd that was rioting following recent anti-police protests. Police employed chemical irritants to disperse the crowd that formed as other demonstrators were being arrested.

The video introduced as evidence of police actions to counter the riots also captured De Mian's taunting. She was in a motorized wheel chair at the time. The officer employing teargas sprayed in an arch that ended near De Mian. De Mian sued the City of St. Louis and the officer alleging that they infringed her right to free speech under the First Amendment of the US Constitution.

Qualified immunity Protects law enforcement officers from liability for civil damages so long as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." Blazek v. City of Iowa City, 2014 U.S. App. LEXIS 15008, 5-6 (8th Cir. Iowa Aug. 5, 2014). Qualified immunity is granted to police officers acting in their official capacity unless "(1) the facts demonstrate the deprivation of a constitutional or statutory right, and (2) the right was clearly established at the time of the deprivation." Mian at *4.

To show retaliation under a 42 U.S.C. § 1983 First Amendment claim, a plaintiff must demonstrate that "(1) she engaged in protected expression, (2) [police] took an adverse action that would chill a person of ordinary firmness from continuing the activity, and (3) there was a but-for causal connection between [the officer's] retaliatory animus and her injury." Mian v. City of St. Louis, No. 22-3000, 2023 U.S. App. LEXIS 30516, at *4 (8th Cir. Nov. 16, 2023).

Here, the Court held that the officer did nothing to "single out" De Mian. She was dealt with as part of a crowd. A related case, Green v. City of St. Louis, 52 F.4th 734, 737 (8th Cir. 2022), came out differently as the officer there sprayed Green after she had left the protest and was heading for her car. In De Mian, the illegal action was on-going.

Qualified immunity was affirmed.

Review by
David D. Phillips
Deputy City Attorney

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Lethal Force – Swift and Continuous Progression
Ching v. City of Minneapolis

Travis Jordan was shot and killed by City of Minneapolis Police during a suicidal episode in which he threatened police with a knife and continued to advance upon one officer. Jordan was shot seven times by the officer. Police were called to the house by Jordan's mother who related his suicidal behavior. The entire encounter lasted a total of about two seconds. Three bullets struck Jordan while he was standing, four hit while he was on the ground. The suit filed by the Trusty alleged excessive force. The specific allegation was that the shots fired while Jordan was on the ground were unreasonable.

The lower court held that "Walsh had sufficient time and situational awareness to adjust his aim downward after Jordan fell to the ground and, based on this determination, concluded a reasonable jury could find Walsh had time to reassess the threat posed by Jordan." Ching v. City of Minneapolis, 73 F.4th 617, 620 (8th Cir. 2023). The City appealed on the issue of qualified immunity.

All excessive force cases are evaluated based on the totality of circumstances. No two are exactly alike. But existing caselaw must address the focal act or acts in dispute to a sufficiently clear level so as to give law enforcement officers notice of any illegal behavior. Here, the appeals Court noted that "all shots were fired in quick succession with inadequate time or opportunity for a reasonable officer to assess whether the immediate threat had passed. Id. at 621. The court described the incident as occurring in a "swift and continuous progression." Id. As such, officers could "reasonably believe Jordan presented a sufficient threat to justify the use of deadly force" and less than 2 seconds is insufficient time to reassess the initial decision.

The shooting was held to be reasonable under the circumstances and qualified immunity was granted.

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David D. Phillips
Deputy City Attorney

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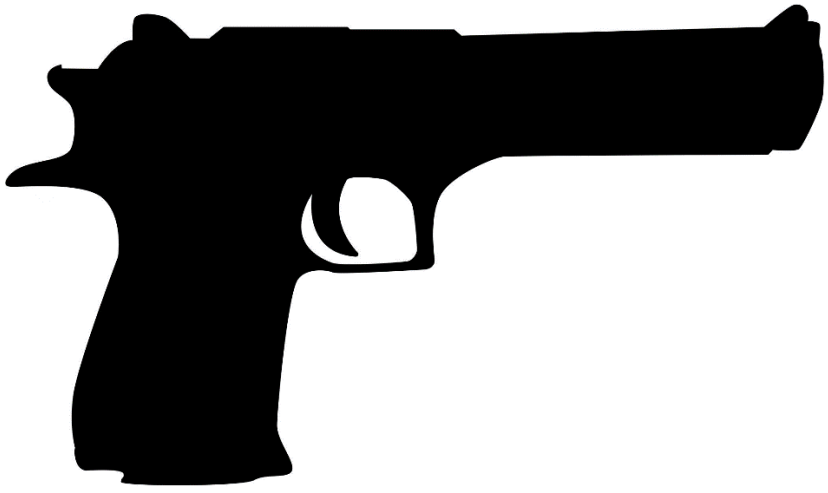


Driving or Boating While Intoxicated, A.C.A. 5-65-103
The Basics

The decision to charge someone with the offense of Driving or Boating While Intoxicated, a violation of Arkansas Code, Annotated, section 5-65-103, must be based on several foundational prerequisites. This article is a review of evidence sufficiency and introduction of evidence at trial. We have the 2015 legislature to thank for the fact that our DWI and BWI laws were then combined into the same statue. This article does not cover probable cause for the traffic stop and does not go into depth about implications of Miranda v Arizona in suspect interrogation. For purposes of this article, the abbreviation "DWI" will be used instead of "DBWI."

Driving

Under the statute, this element can be proven by either observed driving or "Actual Control of Vehicle." The Court automation system Virtual Justice lists ACV as a different charge. Contrary to popular belief, ACV is actually the same statute as DWI but is an alternative means of proving the charge.

Vehicle operation. The term "driving" is not defined in statutory law. Basically, if the vehicle can be shown to be running, it is operating or driving, as movement is not a requirement for driving. An automobile at a stop light waiting for the green light is still driving, though it is not moving.

A violation of the DWI statute does not require operation on a highway or public road. DWI is a recognized and enumerated exception to the "highway requirement" that must be proven for most traffic offenses. See A.C.A. 27-49-102 for how the highway requirement applies to other offenses.

Driving, operating or controlling a vehicle may be proved by either direct or by compelling circumstantial evidence. Azbill v. State, 285 Ark. 98 (1985). Where the arresting officer personally observed the vehicle being driven and obtained probable cause of DWI through personal observation, this element is not likely to be contested. But where the officer is called to a traffic accident or to a suspicious driver call after the fact, some evidence must be obtained to convince a skeptical judge or jury that the suspect was indeed the driver and was driving. The best way is to identify a cooperative witness and the very best witness of all, short of the officer, is the suspect. As part of your investigation, make sure you ask the suspect if the suspect was driving.

Time Line. Per A.C.A. 5-65-206, the offense must be proven to have taken place within four hours of any testing. This is foundational. If the time-line cannot be proven, the results of any chemical testing cannot be admitted. This is known in legal terms as "convergence." All the elements have to have converged in time and circumstance to sustain a conviction. Showing that someone was driving on one day and then drunk on another day cannot prove the case. By statute in Arkansas, there is no convergence after four hours. While any relevant circumstantial evidence may be introduced in Court to prove timing, the totality of evidence must cause the finder of fact to accept, beyond a reasonable doubt, when the alleged driving took place.

The best evidence of when the driving took place may come from the same source as the evidence of driving itself - the suspect. Never overlook the utility of suspect interrogation. Perhaps there are witnesses. If so, get names and contact information per ARCrP Rule 3.5.

Some Officers have used, or attempted to use engine block heat dissipation as an indicator of the timeline. If you have a good basis of knowledge in such matters, it may be persuasive. But some type of circumstantial evidence must be obtained to prove the timeline.

Actual Control.
"Key in the ignition" is the bright-line rule for ACV cases. This goes to "authority to manage" as articulated in Rogers v. State, 94 Ark. App. 47 (Ark. App. 2006). However, the Rogers case was based on expert testimony about technology that is largely now antiquated. The Rogers case involved a Cadillac Escalade manufactured prior to 2004 that could be remotely started, but could only be driven away once an actual key was inserted into the ignition. Though many cars still use traditional ignition key technology today, an ever increasing percentage now have "push-to-start" ignitions, which allow full vehicle operation once a transmitting "fob" is in or near the vehicle. I would encourage law enforcement officers to consider the presence of an enabling key fob to serve as being comparable to the "key in the ignition" standard.

Reporting Parties. As previously stated, witnesses to the event can be helpful in a variety of ways. But even when the reporting party is anonymous, an initial traffic stop can be justified. In the case of Frette v. City of Springdale, 331 Ark. 103 (2011), the Arkansas Supreme Court held that, where the information is from a known caller, the information is considered to be reliable. In the US Supreme Court case of Navarette v. California, an anonymous caller alleged that a vehicle had run her off the road. The call included a vehicle description and location. The Court in that case concluded that the anonymous caller had "reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway." Navarette v. California, 572 U.S. 393, 403, 134 S. Ct. 1683, 1691 (2014). Under that ruling, a sufficiently described vehicle at a specified location could serve as corroboration and justify an investigative stop in an allegation of DWI where specific examples of dangerous driving are also provided. Always note in your reports whether the caller was known or anonymous.

Intoxication

To prove intoxication, the State must show by compelling evidence that the vehicle driver, operator or controller EITHER was "intoxicated" OR had an "alcohol concentration in the person's breath or blood … eight hundredths (0.08) or more based upon the definition of alcohol concentration in § 5-65-204." A.C.A. § 5-65-103. The statute further defines "intoxicated" as "influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself or herself or another person…" A.C.A. § 5-65-102. To prove this, the arresting officer must show a

substantial impact, either through examples of observed dangerous driving, or by recognized objective testing, or preferably by both.

Field Sobriety Testing. The National Highway Traffic Safety Administration and International Association of Chiefs of Police jointly publish FST standards and procedures. Results of FST can be admitted at trial. An officer can testify about notoriously held facts, such as the recognized implications of clues and indicators and levels of intoxication, where the officer can satisfy the Court that the officer has sufficient training and experience to reliably convey the information. It is widely held and taught that the presence of a certain number of clues indicates a probability of intoxication. It is very common in DWI trials for defense attorneys to challenge the arresting officer's knowledge and application of the testing protocols.

Review video of FST to ensure your narrative harmonizes with the captured images. If clues are observed that are not readily apparent in the images displayed in video recordings, explain why in your reports.

Rights Warning DWI Versus Miranda Warning. Where a testing sample is sought for State analysis, whether the sample is blood, breath, urine or saliva, the suspect must be fully informed of the Arkansas Statement of Rights regarding DWI chemical testing. Each agency has its own form and they vary in composition slightly. But each form is designed to warn a DWI suspect of the effect of the implied consent laws of the State of Arkansas. This warning is provided before Miranda warnings. Custodial interrogation should not take place until after the DWI rights warning have been provided and any testing are samples obtained. Otherwise, the investigating law enforcement officer runs the risk of creating "inherent confusion" Carroll v. State, 309 Ark. 158, (1992).

Portable Breath Test. The Portable Breath Test (PBT) device readings have so far not been admissible at trial because the devices themselves have not been certified by a state agency. To say that they are universally not admissible is not, however, correct. PBT readings may be admitted at a suppression hearing as evidence of the Officer's state of mind and to support probable cause for arrest. Additionally, the existence of a PBT sample may be acknowledged, without comment on the number result, as evidence in the case-in-chief if the Defendant is charged with Violation of Implied Consent to show consciousness of guilt. As with any evidence, admission or suppression is at the discretion of the Court.

State Test: Blood, Breath, Urine, Saliva. Each substance sought by law enforcement for examination has its own unique procedure for collection. Each procedure is outlined in Arkansas Regulations for Alcohol Testing, Fifth Revision, January 24, 2013. To preserve the results for admission at trial, the law enforcement officer must show substantial compliance with all state regulations for collection. A.C.A. 5-65-203(b)(1)(A). Goode v. State, 303 Ark. 609 (1990).

Foundational requirements must be met for any testing results to be admitted into evidence at trial. In summary, for blood, two grey-top vials with anticoagulant coating must be obtained by a physician, nurse or phlebotomist under the guidance or supervision of a physician, who need not be physically present at extraction (Gavin v. State, 309 Ark. 158 (1992)) and the subject must affirmatively express consent (Dortch v. State, 2018 Ark. 135 (2018)) or a warrant must be

obtained for blood collection. For urine collection, the sample must be taken approximately one-half hour after the suspect's bladder was fully purged. Breath samples are taken per operating instructions in the Intoximeter EC/IR II Senior Operator Training Manual, Revised March 2014.

Second Test. For any testing, the suspect must be offered a Second Test, if so desired. The second test offer must be made in writing and acknowledged in writing by the suspect. Ark. Code Ann. § 5-65-204. If no second test is offered in writing, the testing results are inadmissible at trial, even if the test was otherwise properly performed. If a second test is requested, law enforcement must make reasonable efforts to assist the suspect in obtaining a second test. See McEntire v. State, 305 Ark. 470 (1991). This notice and assistance is only required if the first test sample or samples are successfully obtained. Id. Always ensure that the Arkansas DWI Rights Warning form is fully competed, to include the second test offer section.

Presumptions. Arkansas Code, Annotated, section 5-65-206. Where a sample of blood, breath, saliva or urine are collected and analyzed, a result equal to or greater than 0.08 percent weight/volume creates the rebuttable presumption of intoxication. Please note that I said "intoxication" and not "impairment." Impairment is a different legal term of art which has a different meaning. Do not confuse the two terms.

EC/IR-II Intoximeter. This device was fielded in the mid to late 2000's and is the principle system in Northwest Arkansas for breath analysis. It has an accuracy level of +.003 to -.007, according to the Intoximeter EC/IR II Senior Operator Training Manual, Revised March 2014. This bias means it is skewed in favor of the tested subject. But that standard is a generic standard and has nothing to do with individual machine accuracy or specific sample accuracy. Initial system testing in 2010 by the Office of Alcohol Testing, Arkansas Department of Health revealed a system-wide reliability of ±.003. Deposition, Laura Bailey, State v. Smith, et. al., 12/7/2010.

A twenty-minute observation period is necessary to complete a breath test. This is an internal parameter of the EC-IR II, and is a recognized foundational requirement under existing case law. During this period of time, the subject must not have exhibited any acts or conditions that might invalidate the test. If such conduct is observed, such as trying to force a burp, do not test the individual. Where multiple unsuccessful attempts are made, cease testing. In either case, consider charging the subject with a violation of the Arkansas Implied Consent Law.

Admissibility of partial results. The EC-IR II requires 2 complete samples to arrive at a successful result. Where only one sample is provided, the result is considered incomplete. Courts are usually reluctant to admit only one sample. Even if admitted into evidence, a single sample would not qualify for a presumption of intoxication. However, the degree of resistance to the test may be admissible to show consciousness of guilt. Be specific in your report narratives as to how the individual was failing to cooperate with conditions of the test.

ASCL and/or ADH. Two agencies in the State of Arkansas are certified to conduct chemical testing on properly collected samples and provide results which would qualify for a presumption of guilt, should the results fall within the specified ranges. They are the Arkansas State Crime

Lab (ASCL) and the Arkansas Department of Health Office of Alcohol Testing. The later agency can only test for alcohol. The ASCL can test for alcohol and commonly encountered narcotics. The ASCL will usually provide concentrations for alcohol with the initial report but usually do not perform quantitative analysis on other substances unless requested. Ensure your request specifies "concentrations" on any substances you specifically want analyzed. Concentrations are only available for a short time after the initial testing as any remaining samples are disposed of, sometimes as quickly as 90 days after the initial test.

Alcohol v. Narcotics and Leeka v. State. The Arkansas Supreme Court case of Leeka v. State, 2015 Ark. 183 (2015) held that a mental state of purposely, knowingly or recklessly must be proven in all DWI cases. The State legislature convened to correct this oversight, but likely due to extensive lobbying, only took care of the Alcohol piece. Today, to prove a case of DWI where drugs are the suspected intoxicant, the additional element of mental state must be proven. The evidentiary threshold for this is rather low and almost any evidence will suffice, such as the purposeful act of driving the car. Where any navigation can be shown, such as driving from point to point, the element is met. But no further interpreting case law exists on this element and all examples at this point are speculative.

Drugs and the DRE (The elusive third element). The state must show that the intoxication is the result of ingestion of either alcohol or a controlled substance or both. Where alcohol is not suspected, some means of determining what substance or type of substance must be employed. Admissions of drug use can be helpful. Narcotics or residue on the person or in the vehicle may also help in this determination. Where employed, the Drug Recognition Expert may be able to provide an opinion on the class of narcotics suspected and the degree to which symptoms are noted. But the DRE cannot render an opinion on the ultimate question of intoxication. Voluntary blood tests submitted to ASCL and resulting in no detected substances will be exculpatory.

Hospital Tests. In some cases, suspects wind up in the hospital and blood samples are tested by a hospital lab. The results of these tests may be obtained by subpoena, as the Healthcare Insurance Portability and Accountability Act, also known as HIPAA, does not prevent disclosure in a "Judicial Process." 42 U.S.C. § 1320d-7(b) (1998) But the information may not be dispositive at trial.

The hospital test does not qualify for a presumption, as, aside from the ASCL and the Office of Alcohol Testing, no local or regional hospital is certified by the State to perform such forensic tests. Additionally, that type of testing is not always performed. Finally, it is an unwritten rule that physicians will not testify in District Court. Therefore, only the unsubstantiated record could be admitted. That evidence, by itself, is not compelling.

When seeking blood evidence, always seek a State blood test from the ASCL, by consent, if possible. Even where the suspect refuses, that refusal, though not independently incriminating, may be used as evidence of consciousness of guilt at trial.

Notorious Facts, Judicial Notice and Officer Testimony

Notorious Facts and Judicial Notice. Testing standards from recognized publications can be offered on judicial notice, but the Court is not required to acknowledge such facts. Not all regulatory facts are notoriously known and the Court is not required to recognize a fact as notorious. Such facts include reliability of testing devices, testing techniques, testing procedures and machinery specifications. But, where an officer testifies to a fact that contradicts a fact at judicial notice or notorious awareness, it is up to the Court as to which version of that fact will be accepted in that case.

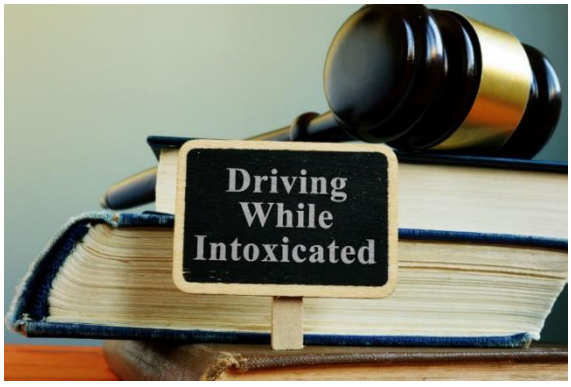
Officer Testimony. Officer testimony in Court is normally the glue that binds all evidence together in a DWI case. Case law has held that Courtroom testimony can overcome other case deficiencies. Yarbrough v. State, 370 Ark. 31, 40, 257 S.W.3d 50, 57 (2007). Officers testifying in any case must be highly knowledgeable of the facts of that case and be objective in their presentation. During testimony, state your observations and the methods used to arrive at any reasonable conclusions you made. If invited by counsel to speculate on different, hypothetical facts, remember that your initial conclusions were based on observed facts, not speculation. Authoritative, knowledgeable and genuine testimony offered without equivocation will always be persuasive and will have the ring of truth.

Conclusion.

Law Enforcement Officers make or break DWI cases. Gathering the evidence in a manner so as to preserve it all for trial is an Officer responsibility, as is overall case organization and preparation. Prosecutors merely present the admissible portions of the file on trial day. The focus is on the police, not on the attorneys.

Where any criminal case, to include DWI, obviously fails for want of probable cause, a prosecutor has a duty under Arkansas Rules of Professional Conduct, Rule 3.8., Special Responsibilities of a Prosecutor, to not prosecute the case. In extreme cases where an arrest is made and probable cause is shockingly absent, the Law Enforcement Officer could be found liable under A.C.A. 5-53-131, Malicious Prosecution, Class A misdemeanor.

Where compelling evidence is properly obtained and preserved, cases will often be settled by plea without any requirement of the Officer's presence in Court on that case. A strong case file full of admissible evidence promotes effective plea bargaining to avoid trials and facilitates the proper verdict in the trials that are demanded.



David D. Phillips
Deputy City Attorney

December 12, 2023

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City Attorney Law Letter

AKA "CALL"

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