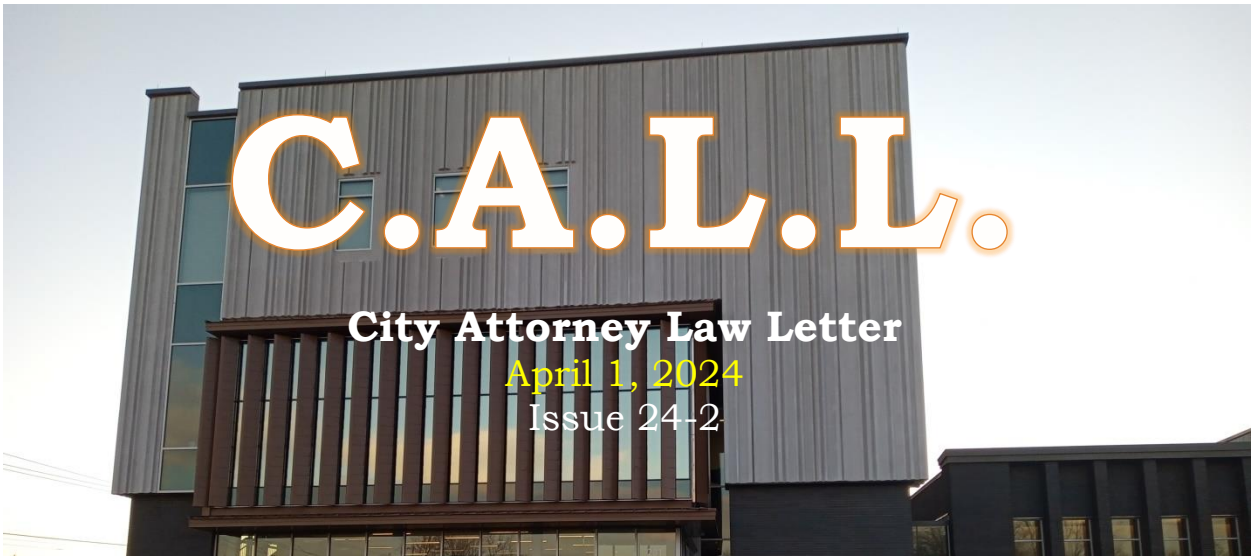
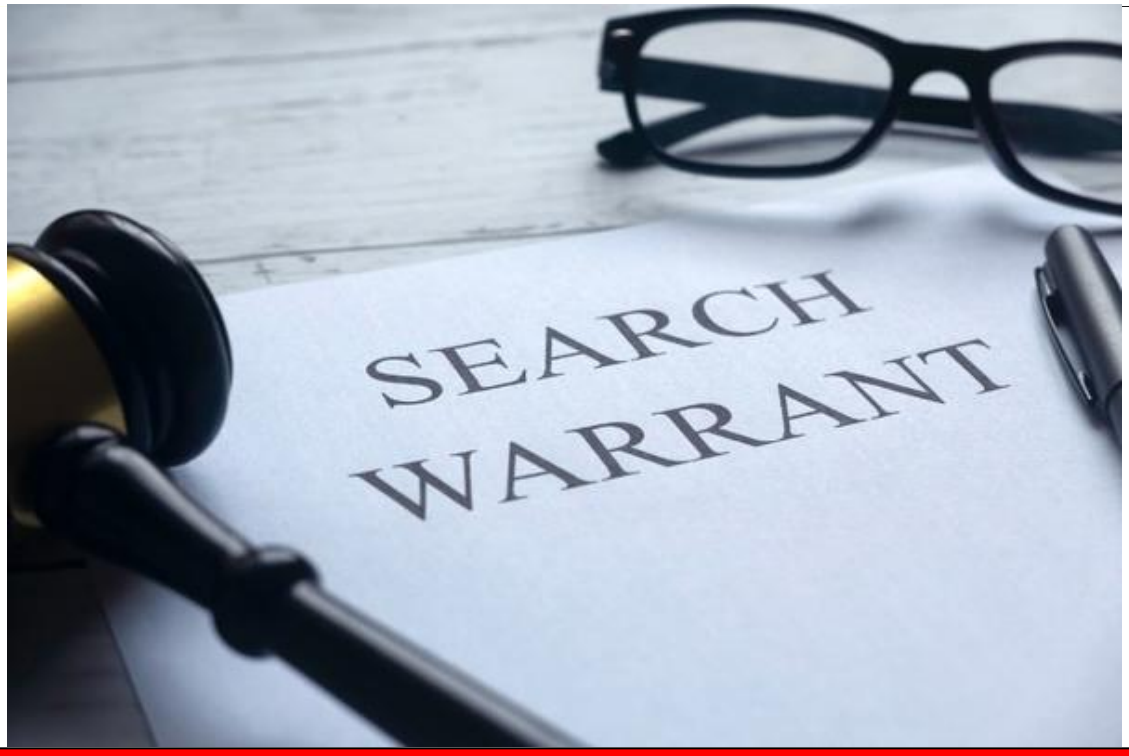


C.A.L.L.

City Attorney Law Letter

April 1, 2024
Issue 24-2



WARRANT SEARCH!

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

Properly Documenting Damage to City Property in Traffic Accidents

According to records, the Springdale Police Department worked between 2,000 and 2,500 traffic accidents in 2023. In many of these accidents, City property is damaged, such as:

-Stop signs, yield signs, speed limit signs

-Street signs (both public and private)

-Trees and shrubbery in medians and round-abouts

-Guardrails on certain streets

-Traffic signal control boxes and associated traffic signal/pedestrian crossing equipment

-Fencing maintained by the City on certain streets/Airport/Parks/other City facilities

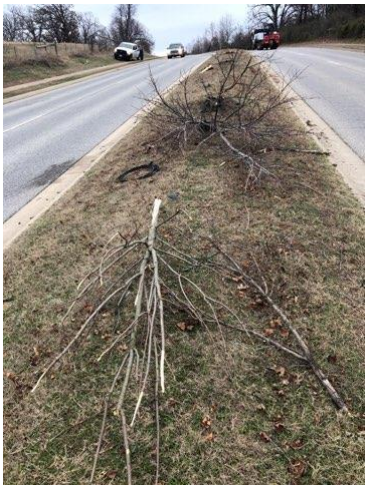
In traffic accidents involving damage to City property, the City Attorney's Office files a claim with the driver's insurance in order to recover the City's costs associated with repairing the damage caused in the accident. The damage can range from $100 to replace a tree or a street sign, to $50,000 or more to replace a traffic signal control box.

As such, it is important that the accident report associated with the accident contains the information regarding the damage to City property. This is indicated on Page 2 of the accident report under "non-vehicular property damage". It is very difficult for the City to obtain reimbursement from an insurance company if damage to City property is not indicated on the accident report. If you are unsure as to the amount of the damage incurred, feel free to contact Springdale Public Works at (479) 750-8135, and someone can give you an estimate of the damage.

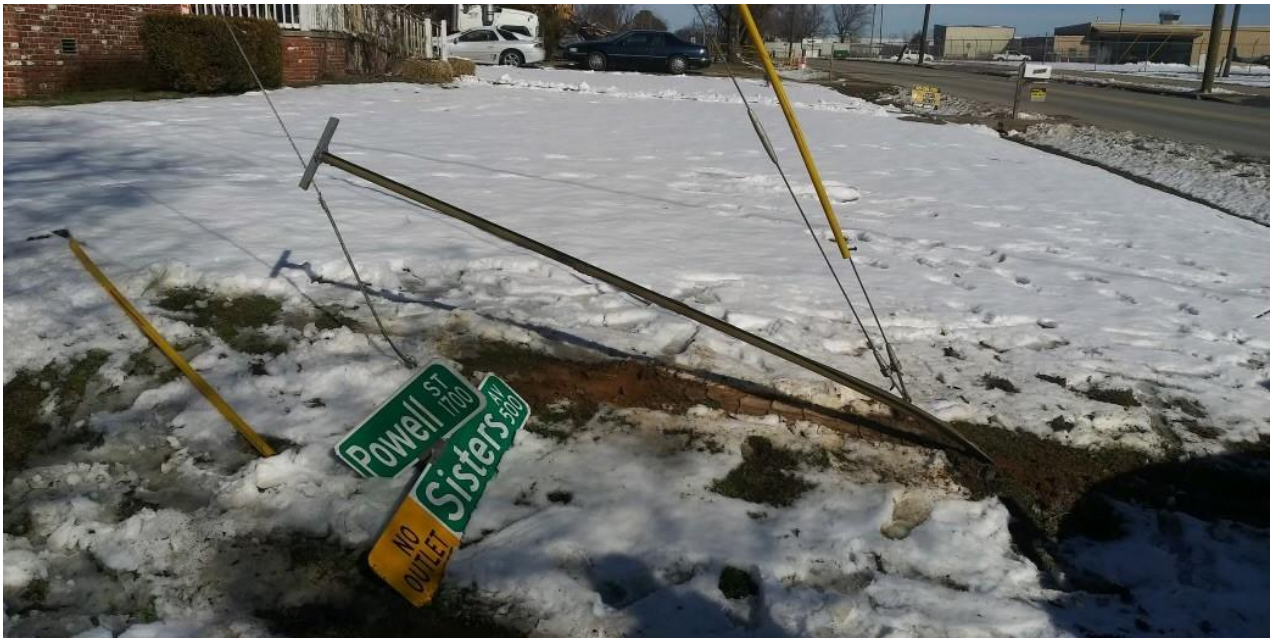
In addition to noting the damage in the accident report, any time there is damage to City property in a traffic accident, it is important that the damage be properly documented. Once notified, Public Works will photograph the damage, as proper documentation is essential in recovering the City's damages in these cases. Insurance companies often will make the City jump through hoops before a claim is paid, so proper documentation in the accident report and photos of the damage are imperative.

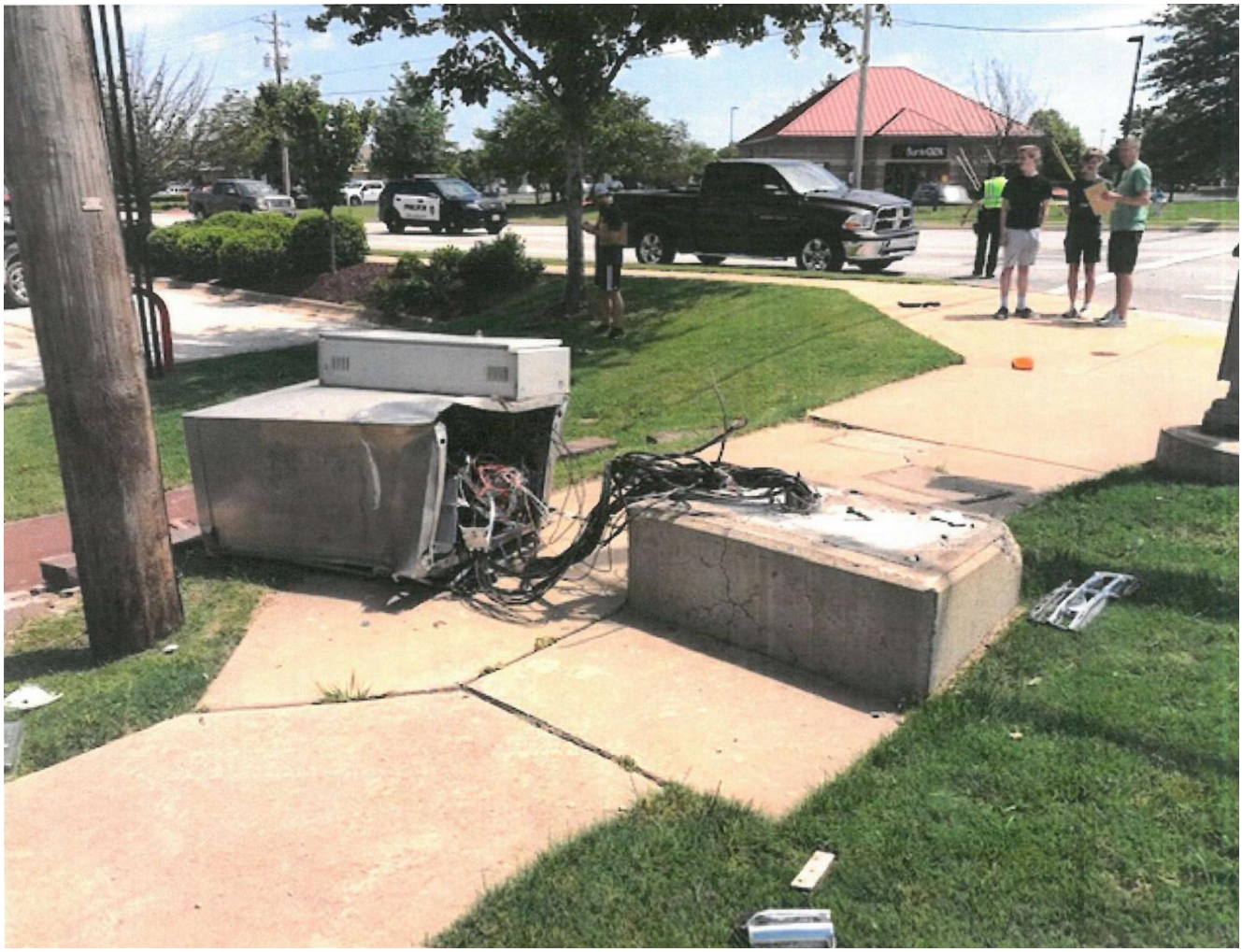
If you should have any questions about this, please let me know.

Review by
Ernest Cate
City Attorney



Top of Document


Powell ST 1700
Sisters AV 500
NO OUTLET



Whitworth v. Kling
Civil Rights - Excessive Force/Canine Bite
"This is really a negligence case."

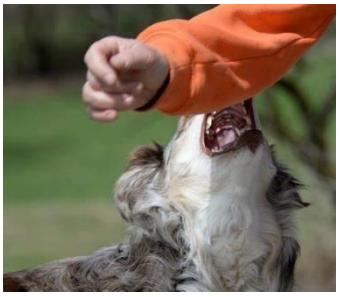
An accidental dog bite leads to a lawsuit against the officer and the city under the Fourth Amendment alleging excessive force.

> Whitworth was visiting Corporal Kling's house while he and Dutch, [*2] his K9, played fetch in the backyard. She and Corporal Kling's fiancée, Rachelle Stewart, left the house through the back door. Seeing Whitworth outside, Corporal Kling told Stewart that they needed to leave because Dutch was out. What happened next took only seconds.
>
> Corporal Kling ordered Dutch to his kennel, and he initially obeyed. But then someone laughed. Dutch turned, eyed Whitworth, and charged. Too far away to collar him, Corporal Kling repeatedly commanded Dutch to disengage. Defiant, Dutch bit Whitworth's arm. Corporal Kling ran to Whitworth's aid and pried the K9 off her, redirected his attention to a tennis ball, and secured him in his kennel. Corporal Kling then tended to Whitworth's wounds and went with her to the hospital.
>
> Whitworth v. Kling, No. 22-3051, 2024 U.S. App. LEXIS 1039, at *1-2 (8th Cir. Jan. 17, 2024)

In filing her civil rights claim under 42 U.S.C. §1983, Whitworth claimed she was "seized" when the bite took place. This allegation is essential in a civil rights case as excessive force can only be claimed where a "seizure" occurs. "A seizure "can take the form of physical force or a show of authority that in some way restrains the liberty of the person."" Whitworth v. Kling, No. 22-3051, 2024 U.S. App. LEXIS 1039, at *3 (quoting Torres v. Madrid, 592 U.S. 306, 311, 141 S. Ct. 989). It "requires the use of force with intent to restrain," id. Simply put, "[a]ccidental force will not qualify." id.

The court examined the circumstances surrounding the bite. "Dutch was playing fetch outside; had no command to bite, apprehend, find, or track Whitworth or anyone else; had a "spontaneous response" to laughter; ignored Corporal Kling's commands to disengage; and was quickly restrained and refocused after the bite." id. at *4. The court held that the incident was accidental and a "seizure" was lacking.

The appellate court quoted the lower court in concluding "This is really a negligence case." Simple negligence is never enough to substantiate a civil rights claim. The State claims were remanded and the civil rights claims were dismissed.



Case Review by David D. Phillips, Deputy City Attorney.

Top of Document

Restraining Order v. Order of Protection v. No Contact Order

Much confusion exists around the differences between a 'No Contact' order, an 'Order of Protection', and a 'Restraining Order'. These terms are often used interchangeably, however, it is very important to understand the differences between them all so that you can determine which course of action is best for you to take.

To start, whenever you investigate a possible violation of any of these orders, it's *very important* that you verify the existence of the actual order before you charge someone. You should never make a charging decision based solely off of an individual's word that an order- of any type- is in effect. It's possible that at one point in time there was an order in place, but the period of protection provided by that order may have since lapsed. So, to put it plainly, always make sure that you: 1) understand which specific order is at play and 2) always confirm that the actual order exists and is still in effect.

Restraining Orders

A violation of a 'Restraining Order' is not a criminal offense. These orders are issued by Circuit Judges in domestic cases- usually regarding divorce. The intent of a 'Restraining Order' is to prevent parties from troubling one another during the proceedings and to prevent either party from disposing of marital property prior to the divorce being finalized. These orders are never issued by the Springdale District Court and are never part of any matter that the Springdale City Attorney's Office would be a part of. So, if an individual reports a violation of a 'Restraining Order' to you, make sure that you communicate to them that this is not a criminal matter and that they should discuss the violation with a domestic relations attorney or the court that oversaw their divorce proceedings.

Orders of Protection

A violation of an 'Order of Protection' (aka a 'Protection Order) is a criminal offense that is punishable by up to one year in jail and up to a $2500 fine (ACA 5-53-134). Unlike a violation of a 'No Contact' order, a second violation of an 'Order of Protection' within five years is a Class D felony. These orders are issued by Circuit Courts in situations that involve domestic violence. A violation of an 'Order of Protection' is prosecuted in the place where the violation occurred. For example, if John violates an order of protection in favor of Jane while she is in Springdale, then the Springdale City Attorney's Office would prosecute John for the alleged violation. It may also be true that the offense could constitute a Class D felony. Turning back to that example, if John had a prior conviction for violating

an ‘Order of Protection’ four years prior to the offense, he would be charged with a Class D felony that would be prosecuted by the Washington County Prosecutor’s Office.

An ‘Order of Protection’ is never issued by the Springdale District Court. That fact distinguishes this type of order from a ‘No Contact Order’. The Springdale City Attorney’s Office routinely prosecutes alleged violations of an ‘Order of Protection’ provided that the alleged offense was not a second offense within the last five years and that it had occurred within Springdale city limits.

If an individual reports a violation of an ‘Order of Protection’ to you, make sure: 1) that an order of protection actually exists and that it is still active; 2) that you determine where the offense occurred; and 3) that you determine whether there was a prior conviction for violation of an order of protection within the last five years.

9.3- No Contact Orders

A violation of a ‘No Contact’ order (aka “9.3 order”) is a criminal offense punishable by up to one year in jail and up to a $2500 fine (ACA 16-85-714). These orders are issued by courts for various offenses, including: domestic offenses, non-domestic battery and assault, harassing communications, harassment, and terroristic threatening. ‘No Contact’ orders are issued *once a person has been charged with a crime* and *prohibit that person from having contact with certain individuals* prior to a trial on those charges. The only person that can be charged for violating a ‘No Contact’ order is the person who was charged with the initial offense. They are usually restrained from contacting the victim- not the other way around. They may also be restrained from going to a certain geographical area or premise, such as the alleged victim’s home or place of work. A ‘No Contact’ order can only be modified or terminated by the court that issued the order.

The court that issues the order is always the court in which an alleged violation would be prosecuted. That point distinguishes this type of violation from a violation of an ‘Order of Protection’. Remember, to determine the appropriate court for a charge of an ‘Order of Protection’ you would look to see where the offense occurred and whether it was a misdemeanor or felony offense. In contrast, a violation of a ‘No Contact’ order is commenced in the court that issued the order. For example, if Springdale District Court issued a 9.3 order in a harassing communications case, any violation of that 9.3 order would be prosecuted in Springdale District Court by the Springdale City Attorney’s Office.

*<u>IMPORTANT NOTE</u>**:** A 'No Contact' order should **ONLY** be issued by you in cases that will come before the Springdale District Court. Any 'No Contact' order that results from a **FELONY or JUVENILE** offense must come for the Circuit Court that has jurisdiction to prosecute those offenses. So, if it's a felony or juvenile offense, **DON'T** issue a 'No Contact' order!*

Lastly, Arkansas Rule of Criminal Procedure 9.5(b) states that: *"A law enforcement officer having reasonable grounds to believe that a released defendant has violated…the terms of an order under Rule 9.3…is authorized to arrest the defendant…when it would be impracticable to secure a warrant."* The Arkansas Attorney General's Office has opined (Op. No. 95-357) that Rule 9.5(b) permits an officer to arrest a person for violating a 'No Contact' order if the officer has 'reasonable grounds to believe' the offense occurred. Practically speaking, unless the offense happened in your presence, a warrantless arrest for this offense should only occur if the offense occurred within a short period of time of the report and if the defendant can be found outside of his home. Otherwise, you should either cite the defendant for the offense or refer a report of the offense to the Springdale City Attorney's Office so that we can create an affidavit in support of an arrest warrant.

<u>Conclusion</u>

The three different orders that are discussed in this article vary in their creation and effect. It is important to understand which order is being alleged to have been violated so that you know which course of action is appropriate for you to take. Feel free to reach out with any questions.

Garrett Harlan
Deputy City Attorney

Top of Document

Civil Rights/Lethal Force – The "Menacing Act" Requirement
Morgan-Tyra v. City of St. Louis

A 911 call about a disturbance results in an officer shooting the suspect. The responding officers and city are sued under 42 U.S.C § 1983 alleging excessive force.

Officer Nikolov of the St. Louis Metro Police responded to a 911 call at a residence. Two roommates were arguing and one, Jennifer Morgan-Tyra, was threatening the other. A third party told Nikolov that he tried to "calm the situation down" and directs officers to another part of the residence. When Nikolov gets there, he sees Morgan-Tyra holding a gun pointed around the corner and screaming swear words. The other person was out of view. Officers told Morgan-Tyra to drop the gun, which she failed to do. Nikolov fired 9 rounds, one or more hitting Morgan-Tyra.

Allegations of excessive force are evaluated under the totality of circumstances. While no two claims are exactly alike, the standard is objective. The court looks at the reasonableness of the decision to use force and compares the facts to those of cases establishing the standard. To put an officer on notice that certain behavior is unreasonable, one or more clear cases must have already been decided on similar facts. Where no such case or cases exist, the officer would have no notice that the questioned conduct violates the constitution.

[O]fficers may use deadly force when there is "probable cause to believe that [a] suspect poses a threat of serious physical harm, either to the officer or to others." Morgan-Tyra v. City of St. Louis, 89 F.4th 1082, 1086 (8th Cir. 2024) (quoting Tennessee v. Garner, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)). The threat must be clearly discernible.

In this case, Officer Nikolov was faced with a highly agitated person shouting and cursing while pointing a gun. She further refused to obey the instructions of officers. Though the target was not visible, Officer Nikolov had good reason to believe that the weapon was directed toward someone else. The court held that, under these facts, the officers' actions were not clearly unreasonable. The Court further held that no similar case would put the officer on notice that this conduct was improper.

The Court also noted that Morgan-Tyra's acts of pointing a weapon and shouting threats would be considered "menacing." "[S]he was wielding [the gun] in a "menacing fashion" and "appear[ed] ready to shoot."" id at 1088 (8th Cir. 2024). "Generally, an individual's mere possession of a firearm is not enough for an officer to have probable cause to believe that an individual poses an immediate threat of death or serious bodily injury; the suspect must also point the firearm at another individual or take similar "menacing action."" Cole v. Hutchins, 959 F.3d 1127, 1132 (8th Cir. 2020).

Qualified immunity was granted to the officers.

Case review by David D. PhillipsDeputy City Attorney.

Top of Document

Search and Seizure/Warrant Search – Leon Good Faith and It's Limits
United States v. Ralston

While conducting a warrant search, officers located a handgun at the residence of Ralston, a convicted felon. Ralston appeals his conviction for possessing a firearm claiming the search, conducted pursuant to a warrant, was unconstitutional.

Investigators were gathering evidence against Ralston's brother, Colton Varty, who was believed to be involved in a theft ring. The two both lived in different dwellings on the same estate. The dwellings, one a trailer house and the other a house, were separated by a dirt road. Officers prepared a warrant to look for stolen goods being stored on the property. They listed both dwellings and other storage sheds on the property as targets of the search.

The Court held that the warrant was over-broad and not based on probable cause. While detailed surveillance was conducted against Varty yielding considerable evidence, no clear connection was shown linking Ralston to the thefts. The Court held that officers should not have relied on the warrant.

Ordinarily, an officer may rely on a warrant as a legitimate basis for a search. This was the holding in the case of United States v. Leon, 468 U.S. 897, 900, 922-23, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). That case recognized the "good faith" exception to minor flaws in an otherwise valid warrant. But that case also noted instances in which good faith cannot be claimed.

> An officer's reliance on a search warrant is objectively unreasonable in four instances:
> (1) when the affidavit or testimony in support of the warrant included a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge; (2) when the judge 'wholly abandoned his judicial role' in issuing the warrant; (3) when the affidavit in support of the warrant was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'; and (4) when the warrant is 'so facially deficient' that the executing officer could not reasonably presume the warrant to be valid.
> United States v. Ralston, 88 F.4th 776, 779 (8th Cir. 2023)

In this case, the Court held that the third instance applied. No reasonable officer could conclude that the warrant was based on probable cause.

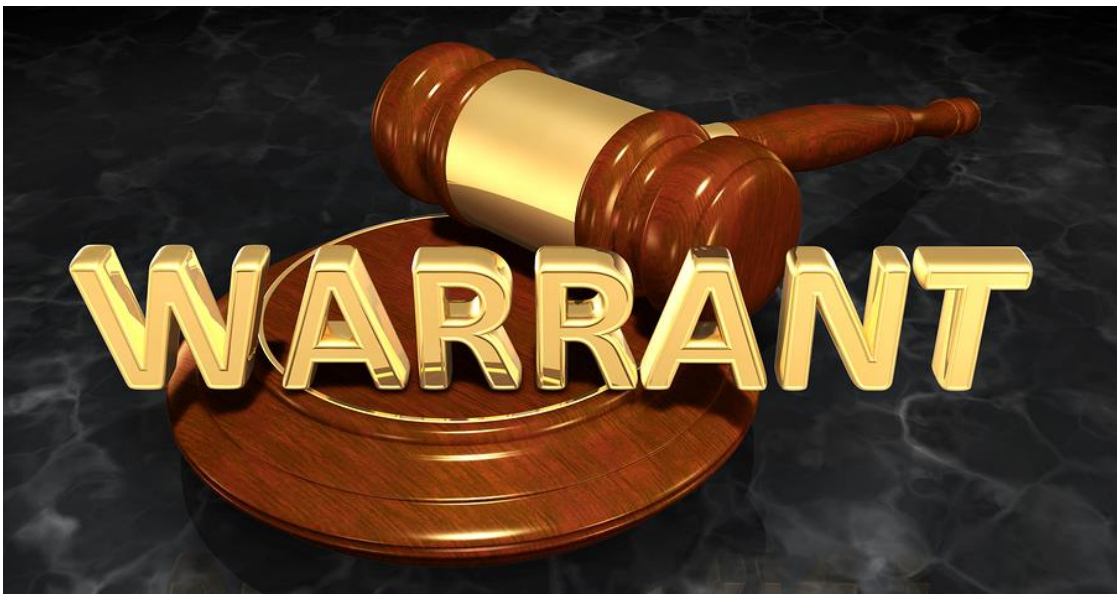
The investigators concluded that Ralston had to be involved due to his family relationship and physical proximity to Varty. But these facts were not persuasive. "[T]here is an absence of facts indicating the two had a relationship beyond neighbors." id. at 779. Despite on-going surveillance and information from informants, the police could not even prove they visited each other. The police merely assumed Ralston was involved without specifying incriminating acts. "More than 30 years ago, the Court stated that mere association with a known or suspected

criminal or the presence in a location known to be involved in criminal activity does not establish probable cause." United States v. Ralston at 781 (quoting United States v. Everroad, 704 F.2d 403, 406 (8th Cir. 1983)).

The court held that no reasonable and trained officer would have relied upon so faulty an affidavit where it failed to specify alleged criminal acts. The conviction was reversed and the case remanded back to District Court for dismissal.

Case Review By David D. Phillips, Deputy City Attorney

Top of Document



TITLE: Arkansas Court of Appeals Holds Probable Cause Existed for Vehicle Search Based Upon Erratic Driving, Odor of Marijuana, and Drug Dog Alert

FACTS TAKEN FROM THE CASE

On September 12, 2019, Preston Whiting was pulled over for speeding. Police Officer Bradley Wilson of the Arkansas County Sheriff's Office turned on his siren after clocking Whiting driving 76 miles an hour in a 55-mile-an-hour zone. Whiting signaled left, missed the turn, and made a sudden turn across the highway and into the ditch on the other side of the road. Whiting then backed up, began travelling north, recrossed the highway, and pulled over where he had started. Based on the erratic driving, Officer Wilson initially believed that Whiting might be intoxicated. Upon making contact with Whiting, Officer Wilson did not smell alcohol or hear Whiting slur his words; however, he did smell a faint odor of marijuana coming from inside Whiting's truck.

Whiting provided his vehicle registration, but could not provide his driver's license or proof of insurance. While Officer Wilson was checking Whiting's vehicle registration, another police officer arrived with a drug dog. When Officer Wilson told Whiting that he was going to search the truck, Whiting admitted there were two firearms inside, but nothing illegal. The drug dog alerted three different times to the driver's-side door. Officer Wilson then searched the truck, which revealed a black bag under the driver's seat containing a bag of methamphetamine, a bag of marijuana, a bag of unknown pills, a glass pipe, cigarillo bags, and a digital scale. Officer Wilson also found a .22-caliber rifle and a 12-gauge shotgun behind the driver's seat. Whiting was charged with possession of methamphetamine with purpose to deliver, possession of drug paraphernalia with purpose to manufacture, possession of a firearm by certain persons, simultaneous possession of drugs and a firearm, possession of drug paraphernalia, and possession of marijuana. Whiting was convicted and sentenced to an aggregate term of twelve years' imprisonment.

ARGUMENT AND DECISION BY THE ARKANSAS COURT OF APPEALS

On appeal to the Arkansas Court of Appeals, Whiting argued that the State did not establish probable cause for the search of his vehicle. The Fourth Amendment to the U.S. Constitution protects against unreasonable searches and seizures by requiring a search warrant based on probable cause; however, an exception allows for the warrantless search of a vehicle based on probable cause. Ark. R. Crim. P. 14.1(a)(i) allows an officer who has "reasonable cause to believe that a moving or readily moveable vehicle is or contains things subject to seizure" to stop, detain

and search the vehicle and seize those things discovered in the course of the search where the vehicle is on a public way. Probable cause to search the vehicle is based on the collective knowledge of police, not just what the officer making the traffic stop knows. The odor of marijuana coming from a vehicle can provide probable cause to search the vehicle, as can a positive alert from a dog trained to detect the odor of illegal drugs. When probable cause is based on a dog's alert, the U.S. Supreme Court has emphasized that probable cause is determined by whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime, not whether the search complies with rigid rules, bright-line tests, or mechanistic inquiries under state law. The Arkansas Supreme Court has held that there are not any specific evidentiary items that will demonstrate, or necessarily refute, a drug dog's reliability.

Whiting claimed that the evidence recovered from his vehicle should have been suppressed because there was no cause for the officer who pulled him over to call for a drug dog; doing so prolonged the stop; and there was no video of the dog sniff. Whiting claimed that the missing video would show that the dog did not alert, so there was no probable cause.

The Arkansas Court of Appeals affirmed the trial court's denial of Whiting's motion to suppress evidence, and Whiting's convictions were therefore upheld. In doing so, the Court noted that even though the drug dog's training and certification was little more than a statement that he was trained and certified to detect narcotics and had successfully completed a recertification course weeks later, that the Court can presume a dog's alert provides probable cause to search, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in location drugs. The drug dog in this case had recently completed such a program. Further, the Court noted that it determines probable cause from all the evidence, which in this case also included Whiting's erratic driving and the smell of marijuana, which can be enough to provide probable cause for a vehicle search on its own.

Case: This case was decided by the Arkansas Court of Appeals on March 13, 2024, and was an appeal from the Arkansas County Circuit Court. The case citation is Whiting v. State, 2024 Ark. App. 176.

By Taylor Samples, Senior Deputy City Attorney

Top of Document

City Attorney Law Letter

AKA "CALL"

Available at:

https://www.springdalear.gov/documents/departments/city-attorney/city-attorney-law-letter-%26-the-municipal-attorney-periodical/city-attorney-law-letter-(c.a.l.l.)/404408