10-Eight

In Service for Arkansas Law Enforcement

Arkansas Attorney General Mike Beebe

Volume12 Number 2 August 2004

Dear Ten-Eight Reader:

I look forward to seeing each of you at our 2004 Law Enforcement Summit, which will be held in Little Rock on October 12th of this year. The Summit will focus on crimes against children, with special emphasis on Internet crimes and child-fatality investigations. Details are included in this issue of *10-8*.

While every crime is a matter for law enforcement to act upon, perhaps the most disturbing of all criminal activities is that which preys on innocent young lives. I urge you to attend our statewide Summit, with training instruction presented by nationally recognized consultants from the Office for Juvenile Justice and Delinquency Prevention and the National Center for Missing and Exploited Children. I hope to see you there.

Sincerely,

Mike Beebe

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Constructive Possession of METH LABS in Residences

by Brent Gasper, Assistant Attorney General

Recently, the Arkansas Court of Appeals highlighted concerns regarding the constructive possession of methamphetamine labs in cases in which the suspect jointly occupies a residence that contains a meth lab. While it might seem to be common sense to reason that if a person is living in a residence with an operating methamphetamine lab, he or she can be said to "possess" it, the law requires additional evidence linking the meth lab to that person.

The case of Cooper v. State is illustrative of the type of cases requiring additional evidence linking a joint occupant of a residence to an operating meth lab. Police, acting on a tip from a confidential informant, approached a house and immediately noticed a strong, chemical smell. Consent to search was given by the owner, as well as by Cooper, an individual who was living in a room of the house. Additionally, Cooper possessed small amounts of marijuana and methamphetamine. The police continued to search the house and discovered a large, operating methamphetamine lab behind a locked basement door.

The Court of Appeals concluded that, despite the facts that Cooper lived in the house, was in possession of methamphetamine, and the strong, chemical smell, there was not enough evidence to link Cooper to the operating lab in the basement. There was no evidence that Cooper had a key to the locked basement, no evidence of his fingerprints on any of the various supplies, and no statement by any person implicating him in the crime.

After the Cooper decision, it will be incumbent on law enforcement when investigating methamphetamine labs to be very diligent in collecting evidence not only of the crime itself, but also evidence that will link a potential defendant to the actual manufacturing process, not simply showing that he was present at – or even living at – a residence containing an operating lab or that he was in possession of the finished product.

Helpers' Highlight

Officer Billy Jack Gurley, Magnolia Police Department & Officer Tim Phillips, Baxter County Sheriff's Office

by Alicia Banks, Prevention and Education Instructor

We proudly salute Officer Billy Jack Gurley of the Magnolia Police Department. Eager to become a police officer from the time he was 11 years old, Officer Gurley realized his dream in 1995. His career with the Magnolia Police Department began in 2000.

Officer Gurley has served Magnolia's community as a School Resource Officer since 2002. His extensive contributions to students in Magnolia include his active participation in several administrative organizations. Among them are the Discipline Committee, the Threat-Assessment Committee, and the No-Child-Left-Behind Committee.

Officer Gurley also serves children in his role as a Charter Board Member of the Columbia County Juvenile Court. In addition to his legal and academic service to area youth, Officer Gurley engages children in educational activities in his position as the Post Commander of the Magnolia Police Explorers, in affiliation with the Boy Scouts and Girl Scouts of America's "Learning for Life" program.

"I have the pleasure of working with a great group of kids from all walks of life," Officer Gurley stated. "I can think of no greater honor than being a police officer, but the combination of being a police officer and working with youth is the best of both worlds."

We also salute Sergeant Tim Phillips of the Baxter County Sheriff's Office (BCSO). Sergeant Phillips began riding with Izard County deputies at the age of 16. In 1987, Phillips began his own career with the Mountain Home Police Department (MHPD).

In 1991, as a charter member of the Fraternal Order of Police Lodge, he received the Outstanding Member of the Year Award. For 14 years, he served as a certified instructor, a senior breathalyzer operator, and a criminal investigator. In 2001, Sergeant Phillips joined the BCSO and served as the corporal and sergeant for the evening-shift-patrol division.

Currently, Sergeant Phillips serves in many capacities at the BCSO including the following: Supervisor in the Support Services Division; Chief Security Officer for the BCSO court system; Senior Operator in charge of Datamaster Operations; Metro Officer, Instructor; Crime Prevention and Public Information Officer; Special Response Team member; and Sheriffs' Association State Honor Guard member. Sergeant Phillips secured the first walk-through metal detector for Baxter County's Court Complex. In 2003, he was inducted into the American Police Hall of Fame for his distinguished service to the BCSO.

Sergeant Phillips is also a gifted professional artist. Even before joining the BCSO's force, he created the design for the shoulder patches of their uniforms. He also has designed the graphics for the MHPD's patrol cars, the MHPD's uniform shoulder patches, the Mountain Home Fire Department's shirt and shoulder patches, the official sign that is posted outside the MHPD, the Mountain Home city flag, and logos for several Arkansas agencies and corporations. Sergeant Phillips also has created commissioned artwork for country-music legends Buck Owens and Roy Clark.

In addition to his official duties, Sergeant Phillips takes time to volunteer his services to area youth. He organized the BCSO's first "Christmas Wish List" event, in conjunction with the Baxter County Department of Human Services. During the holidays, he dresses as Santa as he delivers toys to area children and gift cards to their parents. He also presents Internet Safety workshops to area Girl Scouts and presents "Living History" sessions to students in local elementary schools and to Boy Scouts at Camp Spencer. These interactive lessons honor regional Native American history and culture. Sergeant Phillips also is active in the local D.A.R.E. program.

Sergeant Phillips is truly a multi-talented asset to the citizens of Arkansas. We thank him for sharing his exceptional skills as he protects and serves our State.

2004 Law-Enforcement Summit

Hosted By Attorney General Mike Beebe

How To Register

Attorney General Mike Beebe is hosting a one-day statewide Law-Enforcement Summit on Tuesday, October 12, 2004. The Summit will be held at the Clear Channel Metroplex Event Center, located at 10800 Colonel Glenn Road in Little Rock. The Summit's focus is on crimes against children, with special emphasis on Internet crimes and child-fatality investigations. As part of the conference, Attorney General Beebe will present awards honoring law-enforcement officers who have shown extraordinary valor in the line of duty.

The Summit is open to all law-enforcement officials, prosecuting attorneys, and criminal-justice personnel. The registration fee is $25 per person. Training materials, lunch, and morning refreshments are included in the fee. Registration will begin at 8:00 a.m. and the Summit will conclude at 4:30 p.m.

The training will be conducted by nationally recognized consultants for the Office for Juvenile Justice and Delinquency Prevention and the National Center for Missing and Exploited Children. Course credit has been applied for through the Arkansas Law-Enforcement Training Academy and the Arkansas Bar Association.

Individuals who would like to register for this training opportunity should complete and return the form below by Friday, September 24, 2004. Make checks payable to the Office of the Attorney General. Registrants will receive confirmation forms containing more specific details closer to the event. Seating is limited and will be filled upon receipt of registration forms. If you have questions, call 1-800-448-3014 or (501) 682-1020.

Registration Form

Name and Rank _____

Agency _____

Mailing Address _____

_____

Phone/ Fax/ E-mail _____

Registration Fee — $25 | Registration Deadline — Friday, September 24, 2004 | Make checks payable to — Office of the Attorney General

Send form and registration fee to: Office of Attorney General Mike Beebe

Attention: Community Relations Division | 323 Center Street, Suite 1100 | Little Rock, AR 72201

Phone: 1-800-448-3014 or (501) 682-1020 | Fax: (501) 682-6704

VIENNA Convention PROTECTIONS

BY JEFFREY WEBER,
ASSISTANT ATTORNEY GENERAL

The investigation, detention, or prosecution of persons who are citizens of another country places unique responsibilities on lawenforcement officials. Like all suspects and defendants, foreign nationals are entitled to various protections of the United States Constitution. Some law-enforcement officers may be unaware, however, that most foreign nationals also are entitled to protection provided by treaty.

In 1963, the United States signed the Vienna Convention on Consular Relations (VCCR). Article 36 of the VCCR provides that, when a foreign national is taken into custody, he be notified without delay of his right to contact his consulate. It also mandates that, at the request of the foreign national, law-enforcement officers must inform the consulate that one of its citizens is in custody, and forward any communications from the foreign national to the consulate. The VCCR gives jurisdiction to the International Court of Justice (ICJ) to resolve any disputes arising under its provisions.

It has become apparent that a large number of law-enforcement officers in the United States, including in Arkansas, are unaware of the provisions of the VCCR, and this has led to controversies in several cases. In January 2003, the Mexican government filed a complaint in the ICJ in which it requested the ICJ to order the United States to vacate the convictions of 54 Mexican nationals on death row in several states, including one in Arkansas. The basis for the complaint was that in none of the 54 cases were the Mexican nationals informed of their right to contact their consulate prior to being questioned by police or tried by the courts. In March 2004, the ICJ issued an order requiring the United States to reconsider the convictions and sentences of all but one of the Mexican nationals listed in the complaint.

The Supremacy Clause of the United States Constitution provides that, in addition to the Constitution and laws of the United States, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." It continues that "the judges of every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Thus, by our own Constitution, the provisions of the VCCR are the supreme law of the land, and they must be followed.

In addition, there are practical considerations that make complying with the VCCR desirable. First, by satisfying our obligations under the VCCR, we ensure that attacks on convictions and sentences of foreign nationals who commit crimes in the United States will be less likely to succeed. Second, if we disregard our obligations, we may cause other countries to become less vigilant in ensuring that our citizens receive the protections of the VCCR if they are placed in custody abroad. By informing foreign nationals of their rights under the VCCR, law-enforcement officers are helping to ensure that any resulting convictions and sentences are ultimately affirmed, while also protecting American citizens who are in other countries.

Further information about the Vienna Convention on Consular Affairs is available in Attorney General Beebe's forthcoming Law Enforcement Officer's Pocket Manual (2004 update) and at the United States Department of State's Web site: www.state.gov.

Recent Notable Arkansas Criminal Appellate Decisions

Search and Seizure

BY LAURA SHUE, ASSISTANT ATTORNEY GENERAL

MANN V. STATE, CR 03-1460 (ARK. 4-29-2004) — **APRIL 29, 2004**

Law enforcement was aware of a mailed package that contained 18 grams of methamphetamine and controlled its delivery. The subsequent warrantless entry into a private residence to retrieve the package was presumptively unreasonable under the Fourth Amendment. While probable cause and exigent circumstances at the time of entry are an exception to the warrant requirement, this particular exigency was effectively created by law enforcement's chosen strategy in this case.

WALLEY V. STATE, 353 ARK. 586, 112 S.W.3D 349 (2003) — **JUNE 12, 2003**

The initial search, which provided probable cause to obtain a search warrant of the home, was conducted in the common area outside Walley's residence where no warrant was needed. Walley's expectation of privacy was limited to his residence, as he shared the curtilage with the renter of the home's garage. An officer noticed the distinctive odor of a meth lab, and this contributed to the finding of probable cause for the search warrant. The State also established that Walley constructively possessed the contraband by showing that he exercised care, control, and management over it and that he knew the items were contraband.

KNOCK & TALK

By Michael Mosley | Prosecutor Coordinator's Office | *State of Arkansas v. Brown and Williams*, Ark. 3/25/04

The Arkansas Supreme Court recently held that police officers conducting a knock and talk must advise persons of the right to refuse consent to the search of a dwelling in order for that consent to be valid. On the morning of August 23, 2002, three DTF agents approached the home of Jaye Brown and Michael Williams. The agents had received information from two anonymous sources indicating that drug activity was taking place at the home. The sources also provided information that a small child resided there and had become ill due to drug manufacturing.

The officers went to the home to conduct a knock and talk. Upon approaching the home, they noticed the smell of a "strong and familiar chemical odor." When Brown came to the door, one agent explained that they had information that someone was either growing marijuana there or that other drug activity was taking place. The agents obtained Brown's written consent to search. The consent form used did not explain, however, that Brown had the right to refuse consent. A search ensued, and agents found evidence of methamphetamine use and methamphetamine precursors. The agents also discovered that a child was present in the home.

A subsequent search, pursuant to a warrant, produced additional evidence of methamphetamine manufacture and marijuana growth. Brown and Williams were charged with drug-related offenses. Each filed a motion to suppress the evidence seized, arguing that the search was invalid under Article 2, §15 of the Arkansas Constitution. The circuit court agreed and held that officers conducting knock and talks must advise suspects of the right to refuse consent to a search. The court also held that the use of deception in stating the purpose of a requested search would render a suspect's consent uninformed and invalid.

On the Attorney General's appeal, the Arkansas Supreme Court affirmed the circuit court's decision. In reaching only the question regarding the right to refuse consent, the Court noted that the Arkansas Constitution provides greater protection against unreasonable searches and seizures than does the federal Constitution in certain respects. The Court held that citizens of Arkansas have a heightened right of privacy in their homes and, in order to protect this right, officers conducting knock and talks must advise them of their right to refuse consent. While the Court stopped short of requiring it, written consent will be the best practice and is recommended. A sample consent form can be found in the forthcoming Law Enforcement Officer's Pocket Manual (2004 update) from the Attorney General's Office.

LAUDERDALE V. STATE, 82 ARK. APP. 474, 120 S.W.3D 106 (2003) — **JUNE 18, 2003**

A search of a bag near a couch where both suspects were seated and handcuffed was illegal pursuant to Ark. Crim. P. Rule 12.5. The information from this illegal search was used in an affidavit for a search warrant. The appellate court used a two-part test to determine whether the inclusion of illegally-obtained information in the affidavit precluded the application of the independent-source doctrine. First, the appellate court examined the search warrant by taking out the offending information from the affidavit and determined whether the affidavit nevertheless supported its issuance. Second, the appellate court tried to examine the motivation of the officer who obtained the warrant to determine whether the motivation to obtain the warrant came as a result of discovering the tainted information. Here, the first part was satisfied, but the trial court had not addressed the second part dealing with the officer's motivation. Therefore, the case was reversed and remanded for further proceedings.

WHISENANT V. STATE, CA CR 01-1418 (ARK. APP. 2-11-2004) — **FEBRUARY 11, 2004**

An officer requested assistance in obtaining identification on Whisenant, and then observed Whisenant's boyfriend take her purse and search it. In addition, her boyfriend was intending to assist law-enforcement efforts when he searched the purse, as there was no evidence presented that he had his own purpose for finding her identification. The warrantless search of her purse violated the Fourth Amendment because her boyfriend was an agent of the police.

JACKSON V. STATE, CA CR 03-730 (ARK. APP. 4-14-2004) — **APRIL 14, 2004**

Jackson's initial detention at the bus station was illegal pursuant to either Ark. R. Crim. P. 3.1 or 2.2. Jackson's conduct, which the officers used as justification for their approach and detention, did not give rise to a reasonable suspicion that he was committing, or about to commit, a crime. In addition, the officers were not investigating a specific crime when they stopped him.

STATE V. HARMON, 353 ARK. 568, 113 S.W.3D 75 (2003) — **JUNE 12, 2003**

An officer may make a pretextual traffic stop. The distinction between a pretextual stop and a pretextual arrest, like the arrest in *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002), is based on the heightened intrusiveness associated with an arrest. In this case, despite the fact that the officer admitted that the reason he stopped Harmon was, in part, because he believed he had committed a drug violation, no violation of the Arkansas Constitution occurred, and the Court concluded that the evidence found after a consensual search was admissible at trial.

Arkansas Supreme Court Limits Canine Sniffs

During Traffic Stops Under State Court Criminal Procedure Rule 3.1

BY DAVID RAUPP, SENIOR ASSISTANT ATTORNEY GENERAL

In 2001, Officers Beverly Alexander and Daniel Willey stopped Billy Sims on Interstate 55 for a defective brake light. A criminal-history check revealed that Sims and his passenger had drug arrests, although no additional information was available. Officer Alexander wrote Sims a warning ticket as to the brake light, and Officer Willey asked Sims if he had anything illegal in the vehicle and if he would consent to a search of it. When Sims responded that he had nothing illegal and had no time for a search, Willey decided to detain Sims briefly to run a canine sniff. The detention was approximately two minutes, and an alert led to a search, which uncovered 13 grams of cocaine. Sims conditionally pleaded guilty to a drug offense and appealed the denial of his motion to suppress evidence.

On appeal, the Arkansas Supreme Court reversed. Although federal law does not prohibit brief detentions like the one Sims endured for purposes of a canine sniff, the Court concluded that Arkansas Rule of Criminal Procedure 3.1 does prohibit them, in the absence of reasonable suspicion to believe a felony or serious misdemeanor has taken place or is about to take place. Because the circuit court had concluded that the officers did not have reasonable suspicion to detain Sims, the Supreme Court held that Sims' detention for a canine sniff of his vehicle after he was issued a warning ticket violated Rule 3.1. While the Court acknowledged that the United States Supreme Court has held that a canine sniff is not itself a search, the question answered here was whether the detention of Sims to conduct that sniff was reasonable, which, under state law, it was not.

Consequently, a canine sniff at a traffic stop must either be conducted while a vehicle is otherwise properly detained, or any detention after the stop must be supported by reasonable suspicion to satisfy Rule 3.1—that a felony or "a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property" has been committed or is about to be committed. In the absence of such suspicion, state law prohibits conducting a canine sniff after a traffic stop has concluded.

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