

CRIMINAL LAW UPDATE

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Inside This Issue

Nebraska Appellate Court Decisions

Nervous?! It's Not Enough <i>State v. Tierney</i>	1
Police Officer Protection: The Limits of a Terry Search <i>State v. Gutierrez</i>	2

Nebraska Supreme Court Decisions

Are the Passenger's Personal Belongings Fair Game? <i>State v. Ray</i>	4
Removed Clothing: Within the Arrestee's Immediate Control? <i>State v. Roberts</i>	5

United States Supreme Court Decisions

Warrants While You Wait: A Seizure or Reasonable Restraint <i>Illinois v. McArthur</i>	7
Thermal Searches: Get a Warrant <i>Kyllo v. United States</i>	8
No Seatbelt! You're Coming with Me <i>Atwater v. City of Lago Vista</i>	9

Federal Courts

Was He in Custody? The Fine Line of Restraint <i>United States v. Hanson</i>	12
Excuse Me, Did You Ask for a Lawyer? <i>Dormire v. Wilkinson</i>	13
Can a Consensual Conversation Be a Seizure <i>United States v. Favela</i>	14
Consent: Voluntariness; Detention for Parking Violation; Exploitation of the De- tention for Questioning About Drugs <i>United States v. Park-Swallow</i>	16
Consensual Encounter: Frisk; Officer's "Uneasiness" About the Situation <i>United States v. Burton</i>	16
Search Warrant: Execution; Knock and Announce Rule; Five Second Wait; Jus- tification; Exigent Circumstances <i>United States v. Granville</i>	17
Standing: Rental Car; Authorized Driver <i>United States v. Walker</i>	17
Civil Liability: Arrest for Giving a Police Officer the Finger; "Fighting Words;" Qualified Immunity <i>Nichols v. Chacon</i>	17

Other Items of Interest

Keys to a Successful Pat-down Search	3
New Blood Alcohol Limit	6
How Does <i>Atwater</i> Apply to Nebraska Law?	9
New Drug Courts	11
Tips for Testifying	14
DNA Testing Act	15
Lancaster County Attorney Organizational Chart	18
"Former Death-row Inmate Jeremy Sheets Grinned as He Was Released From Prison"	19

NEBRASKA APPELLATE COURTS

POLICE PAT-DOWNS

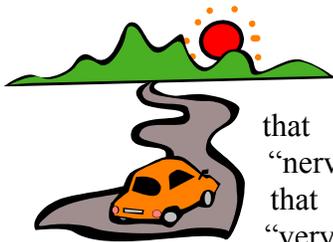
Nervous?! It's Not Enough!

State v. Tierney, 7 Neb. Ct. App. 469, 584 N.W.2d 461 (1998)

Factual Background

On December 5, 1996, a state trooper was dispatched to a gravel road outside of Pleasant Dale, Nebraska. The State Patrol had received a call informing them that a car had been parked alongside the road for approximately five hours, and that the occupant may be having a medical emergency. Upon arrival, the trooper observed a vehicle parked, not running, on the right-hand side of the road, with Derrick Tierney in the driver's seat.

The trooper approached the car and began conversing with Tierney, the car's only occupant. Tierney told the trooper that he wasn't feeling well and that he was parked there until he felt better, at which time he



would continue to Lincoln. The trooper testified that Tierney appeared "nervous, uneasy," and that his pupils were "very dilated." Based on these observations and his prior training, the trooper believed Tierney was either under the influence or had a medical problem.

The trooper then asked Tierney to accompany him back to the patrol car. After run-

ning a radio check on Tierney, his license and his car, the trooper received notice that Tierney had no outstanding violations and his car was not stolen. However, Tierney did have prior drug convictions.

When the trooper asked if Tierney had any weapons or drugs in the car, Tierney replied in the negative. Again the trooper testified that Tierney appeared very nervous and unable to sit in a seated position for very long. The officer also testified that Tierney "appeared to be lost, and sometimes his attention appeared to be divided during certain questions." Furthermore, Tierney gave inconsistent answers to the trooper's questions about his destination.



The trooper then asked for and received consent to search Tierney's vehicle. Before beginning a search of the vehicle, the trooper decided to conduct a pat-down search of Tierney. The trooper testified that he did so for safety reasons, given Tierney's "manner" and the trooper's inability to see Tierney during the search. However, the trooper also admitted that he had not seen anything that made him think that Tierney might have been carrying any kind of weapon.

As the trooper conducted a pat-down search, Tierney thrust his hand into his pocket, resulting in a wrestling match and the discovery of methamphetamine.

Court of Appeals Analysis

The Court of Appeals analyzed the pat-down search as follows: 1) "The sole justification of a pat-down search for weapons is the protection of the officer and other person's nearby." 2) "When conducting a pat-down search for weapons, an officer must have a reasonable suspicion that the individual he or she is searching is armed

and dangerous.” 3) Tierney’s acting nervous was insufficient to create reasonable suspicion that he was armed and dangerous, as was required to justify the pat-down search.



Though the investigation was completed upon receipt of the radio check, Tierney voluntarily consented to the subsequent car search. However, one’s consent to a vehicle search does not also grant consent to a pat-down search of one’s person.

Tierney’s consent to search was limited to a search of his vehicle. Therefore, the pat-down could only be justified by a reasonable suspicion that Tierney was armed and dangerous. The trooper’s only reason specific to Tierney, was that he was “acting very nervous.” The Appeals Court reasoned that “nervousness alone is not sufficient to justify further detention; only in combination with other suspicious circumstances may it contribute to a finding of reasonable, articulable suspicion.” Consequently, the drugs discovered during the pat-down were illegally seized, and therefore suppressed as evidence in court.

Police Officer Protection: The Limits of a *Terry* Search

State v. Gutierrez, 9 Neb. Ct. App. 325, 611 N.W.2d 853 (2000)

Factual Background

On April 3, 1998, an officer of the South Sioux City Police Department observed a gray Chevrolet Celebrity pull up next to a white Chevrolet Blazer in the parking lot of an apartment complex. According to police information, this apartment complex was the location of drug activity.

After the officer drove around the block and past the complex entrance a second time, the Celebrity pulled out of the complex following the officer. In his rear-view mirror, the officer saw the Celebrity stop at a stop sign and make a right hand turn without signaling.

Based on his observance of the traffic infraction, the officer initiated a stop of the vehicle. During the two blocks that it took the vehicle to pull over, the officer observed the driver of the vehicle “making some type of movement that appeared that he was trying to conceal something underneath the seat in which he was seated on.” While the officer “walked toward the vehicle, he could see the male passenger ‘bent over and appeared to be placing something under . . . his left leg.’ Based on [the officer’s] training and experience, this movement caused [the officer] concern because the passenger could be ‘attempting to conceal a weapon or some other type of contraband.’”

The officer approached the vehicle and asked the passenger (later identified as Gutierrez) for identification. Gutierrez’, with hands and knees shaking, indicated that he did not have any. The officer asked Gutierrez to exit the vehicle. The officer then “conducted a pat-down search because he felt that the passenger ‘had probably concealed something under the seat, and for my safety in dealing with him, since I was the only officer at the scene initially, I wanted to make sure that that wasn’t going to be the last traffic stop that I made.’” Once a second officer arrived on the scene, the officer “conducted a ‘more thorough pat search’ of Gutierrez’s person. He did a more thorough pat search at this time because he felt ‘safer with the backup officer there.’ The pat down consisted of searching over Gutierrez’ clothing. [The officer] patted Gutierrez’s arms, underneath



his arms, and his waistband. When patting the waistband, [the officer] discovered a pouch on the belt.” In the pouch, the officer found three four-pointed throwing stars. The officer then placed Gutierrez under arrest for possession of a concealed weapon.

After arresting Gutierrez, the officer searched his person and his vehicle. On Gutierrez’ person, the officer found a white baggie containing a rock of methamphetamine, a black digital scale, a package of “zigzag rolling papers,” shotgun shells, and \$4,180 in cash.

Court of Appeals Analysis

“It is well established that pursuant to [Terry v. Ohio] an officer is entitled, for the protection of himself or herself and others in the area, to conduct a carefully limited search of the outer clothing of a person

stopped on Terry grounds to discover weapons which might be used to assault the officer. However, if the pat-down search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid and its fruits will be suppressed. A ‘second pass’ to palpate the subject’s clothing for drugs is improper in the context of a Terry stop.” The Court of Appeals concluded “that the pat-down searches conducted by [the officer] in the present case were reasonable and proper under the totality of the circumstances.” Because the officer’s “pat-down search remained on the outside of Gutierrez’ clothing and was limited to searching for weapons,” his “pat-down search did not expand to an impermissible search for drugs or other contraband.”



KEYS TO A SUCCESSFUL PAT-DOWN SEARCH



A pat down search can be considered “successful” in two different, though sometimes coinciding, instances. First, a pat-down search is successful if it protects the officer from unknown weapons on the individual’s person. Second, it is successful if the evidence obtained from the search can be used in a court of law. While an officer must feel free to do a pat-down search for his own safety, he must realize when the evidence can or cannot be used. As the above case, *Tierney*, explained, “an officer must have a reasonable suspicion that the individual he or she is searching is armed and dangerous.” If a court determines that there was a lack of “reasonable suspicion” then any evidence found as a result of the search will be suppressed.

One possible instance where officer safety is jeopardized is when a traffic offender is placed in the back of the patrol car during a routine traffic stop. In *U.S. v. Glenn*, 152 F.3d 1047 (8th Cir. 1998), State Trooper John Thompson did just this after pulling a car over for a cracked windshield and a broken taillight. The Eight Circuit Court held that “An officer’s decision to place a traffic offender in the back of a patrol car does not justify a pat-down search that the circumstances would not otherwise allow.” It does not matter what the officer finds as a result of the search; the ends do not justify the means.

An officer should do a pat-down search of the individual getting into the patrol car if he or she feels it is necessary for his or her personal safety. But without other circumstances that would lead a reasonable person to believe the individual is armed and dangerous, any drug paraphernalia or weapons found on the person will be suppressed in court.

What about consent? If an officer is performing a routine traffic stop and wishes to place the individual in the patrol car, he should ask the individual for permission to do a pat down search. Just a quick “Do you mind if I pat you down before you get in the car?” is enough to allow any resulting evidence to be used against the individual in court.

NEBRASKA SUPREME COURT

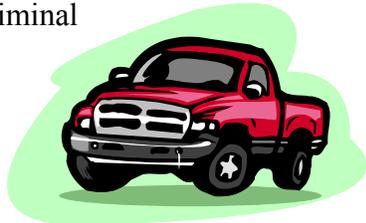
SEARCH AND SEIZURE

Are the Passengers' Personal Belongings Fair Game?

State v. Ray, 260 Neb. 868, 620 N.W.2d 83 (2000)

Factual Background

On November 4, 1997, Nebraska State Patrol Trooper Tumbleson observed a pickup cross the center line several times and fail to stop at a stop sign. Upon conducting a vehicle stop, Tumbleson made contact with the driver, Almery, and one passenger, Ray. A criminal



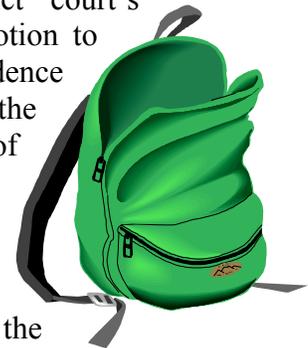
history check revealed an outstanding

warrant for Almery. Tumbleson arrested Almery and placed him in the patrol car.

Tumbleson returned to the pickup and approached Ray, asking him to exit the vehicle in order for the vehicle to be searched. Tumbleson then performed a pat-down search of Ray, and found what Tumbleson believed to be a marijuana pipe and two film canisters of marijuana. After issuing Ray a citation for possession of marijuana and drug paraphernalia, Tumbleson began searching the vehicle. Ray responded affirmatively when Tumbleson asked him if a

black knapsack which he had found on the passenger-side floorboard of the vehicle belonged to Ray. The knapsack contained a mirror, a snorting tube, and a razor. Subsequent tests of the items contained in the knapsack revealed the presence of cocaine on the snorting tube.

The district court suppressed evidence found as a result of the pat-down search on Ray's person, but did not suppress the evidence found from the vehicle search. Ray appealed the district court's overruling of his motion to suppress the evidence obtained from the warrantless search of the vehicle. The Nebraska Court of Appeals and the Nebraska Supreme Court affirmed the district court's decision.



Supreme Court Analysis

The Nebraska Supreme Court's analysis is as follows: 1) "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 2) The officer may also examine the contents of any containers (open or closed) found within the passenger compartment. 3) The officer "may inspect passengers' personal belongings found in the passenger compartment of the motor vehicle," even when the passenger has not been arrested.

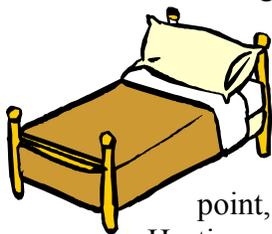
The search of Ray's knapsack meets the requirements of a lawful search incident to arrest. The fact that he was a passenger does not exclude his belongings from the search.

Removed Clothing: Within the Arrestee's Immediate Control?

State v. Roberts, 261 Neb. 403, 623 N.W.2d 298 (2001)

Factual Background

On April 9, 1998, Randy Overton called the Adams County Sheriff's Department and requested that officers come to remove a man from the apartment where he was staying. Officer Konen, an Adams County deputy sheriff, responded to the dispatch call. Officers Wagner and Garcia from the Hastings Police Department arrived as backup assistance. When the officers entered the apartment, Overton and another man, Roberts, were arguing over the apartment keys and Roberts' belongings.



Officers Konen and Wagner then accompanied Roberts into the bedroom so he could gather his belongings. "At this point, Wagner radioed the Hastings communications center to determine whether there were any outstanding warrants on either Overton or Roberts. Upon requesting such information, Wagner was advised that there was an outstanding Adams County warrant for Roberts' arrest. Konen then informed Roberts that he was under arrest."

Before Roberts was handcuffed, Roberts asked Konen if he could remove his outer layer of clothing. Konen gave Roberts permission to remove the nylon jacket and running pants that Roberts was wearing over his blue jeans and shirt. When Roberts dropped the jacket and pants, Konen heard a "thud-type sound." Konen then asked Roberts what was in the clothing. Roberts replied that it was a cassette tape. After handcuff-

ing Roberts, Konen removed Roberts from the apartment.

"While Konen was escorting Roberts out, Wagner, who had been in the bedroom the entire time, searched the jacket Roberts had just removed because he thought it was suspicious that Roberts had asked to remove some of his clothing. . . In the pocket of the pants, Wagner found a marijuana pipe, a syringe, and what appeared to be an 'eightball' of methamphetamine." Wagner testified that his search began "almost immediately" after Roberts was escorted out of the apartment bedroom, after "probably less than a minute" had elapsed.

The "eightball" tested positive for amphetamine and methamphetamine. Roberts was charged with possession of a controlled substance. Prior to his trial, Roberts filed a motion to suppress the evidence found in his running pants and jacket.

Supreme Court Analysis

Roberts argues that the evidence found in the pocket of his running pants was seized in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. "Specifically, Roberts asserts that the search of his jacket and running pants was constitutionally unreasonable because Wagner, the officer who found the methamphetamine, was not the officer who actually arrested Roberts. Alternatively, Roberts contends that the search was unreasonable because Wagner did not have a search warrant or permission to search the clothing and was essentially conducting a 'fishing expedition.'"



On Roberts' first assertion, the court stated that the "three officers who responded to Overton's call for assistance jointly possessed the authority to conduct whatever search was constitutionally permitted under these circumstances." The

three officers met outside the apartment and then entered the apartment together. Both Wagner and Konen were present in the room when Roberts was placed under arrest. The Nebraska Supreme Court held that “[a]n officer, who is present at the scene of the arrest for purposes of assisting in it, if necessary, is an ‘arresting officer’ . . . even though a different officer actually placed his hand upon the defendant and informs him that he is under arrest.” Therefore, Wagner was authorized to conduct the search incident to a lawful arrest on Roberts.

Roberts next argues that the search was made without a warrant and that the search of his removed clothing was essentially a “fishing expedition.” The State correctly asserts that Wagner’s search of Roberts’ jacket and running pants was a constitutionally permissible search as a search incident to a lawful arrest. The court stated, “[t]here is no factual dispute in this case that Roberts was lawfully arrested, based on the outstanding Adams County arrest warrant. This arrest provides the justification for the search.” The analysis then turns on the issue of whether the search of Roberts’ jacket and pants fell within the permissible scope of a search incident to a lawful arrest. The court defined permissible scope, stating: “an arresting officer may search the arrestee’s person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may also search the area *within the arrestee’s immediate control*.” The United States Supreme Court, in *Chimel v. California*, 395 U.S. 752, (1969), construed the phrase “within his immediate control” to mean “the area from which he might gain possession of a weapon or destructible evidence.” The court noted that the “justification for a search incident to a lawful arrest is absent if ‘a search is remote in time or place from the arrest.’” In the present case, Roberts was

wearing the clothing in question at the time of the arrest. “The clothing was under his control when he intentionally removed it after being placed under arrest. The search itself took place in the same room where the arrest occurred.”

“Considering the ‘total atmosphere’ of the facts and circumstances of this case, [the court] determine[d] that Roberts’ jacket and running pants were within the area of Roberts’ immediate control . . .” The court further held that “the search of Roberts’ removed clothing within minutes of his arrest was sufficiently contemporaneous to comport with the Fourth Amendment.” Therefore, Wagner’s search of Roberts’ jacket and running pants did not violate his Fourth Amendment rights.

NEW BLOOD ALCOHOL LIMIT

On March 1, 2001, the governor signed into law a .08 blood-alcohol limit for those operating motor vehicles or motorboats. The original blood alcohol content of .10 was the legal threshold for drunken driving in Nebraska; however, as of September 1, 2001, the new threshold of .08 will take effect. This change was brought about after Congress passed a measure encouraging states to adopt the .08 standard by the year 2004.



UNITED STATES SUPREME COURT

SEARCH AND SEIZURE

Warrants While You Wait: A Seizure or Reasonable Restraint?

Illinois v. McArthur, 121 S.Ct. 946 (2001)

Factual Background

On April 2, 1997, Tera McArthur asked two police officers to accompany her to her trailer house. She was moving belongings out of the house where her husband, Charles, was present and needed the officers to keep the peace. Tera went inside while the officers remained outside. After collecting her possessions, Tera emerged from the house and told the officers that “Chuck had dope in there.” She also said that she had seen Charles slide it under the couch. One of the officers then knocked on the door, told Charles what Tera had said, and asked to search the house. Charles denied permission to search the house.



After being denied permission to search the house, one officer and Tera left to get a search warrant. The other officer told Charles that he could not reenter the house unless a police officer accompanied him. After this warning, Charles reentered the trailer two or three times to get cigarettes and to make phone calls. During the times

that Charles was in the trailer, the officer stood just inside the door to observe Charles’ activities.

Approximately two hours after the officers’ initial arrival at the trailer, Tera and the other officer returned with the search warrant. Upon searching the trailer, the officers found a marijuana pipe, a box for marijuana, and a small amount of marijuana. After the officers arrested Charles, the state charged him with possessing drug paraphernalia and marijuana.



Charles McArthur made a motion to suppress the pipe, box, and marijuana on the grounds that they were the product of an “unlawful police seizure” that violated the Fourth Amendment. He claims that the police officer’s refusal to let him reenter the trailer unaccompanied was an unlawful seizure that prevented him from being able to destroy the marijuana.

Supreme Court Analysis

The Fourth Amendment states that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const., Amdt. 4. The central requirement of the Fourth Amendment is the reasonableness of the search or seizure. The reasonableness of a warrantless seizure should be determined by balancing the privacy interests of the individual and law enforcement-related concerns.

“First, the police had probable cause to believe that McArthur’s trailer home contained evidence of a crime and contraband.” Not only were the police able to speak with

Tera and roughly assess her credibility, but the police also knew that she had been able to view her husband's behavior firsthand.

"Second, the police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant." The officer may have reasonably believed that McArthur realized his wife knew of the marijuana stash and that she had spoken to the officers about it. Suspecting an imminent search, he would destroy the evidence immediately.

"Third, the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy. They neither searched the trailer nor arrested McArthur before obtaining a warrant. Rather, they imposed a significantly less restrictive restraint, preventing McArthur only from entering the trailer unaccompanied."

"Fourth, the police imposed the restraint for a limited period of time, namely two hours[;] . . . this time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant."

"Given the nature of the intrusion and the law enforcement interest at stake, this brief seizure of the premises was permissible."

Thermal Searches: Get a Warrant

Kyllo v. United States, No. 99-8508 (2001)

Factual Background

Agent William Elliot of the United States Department of Interior suspected that marijuana was being grown in Danny Kyllo's triplex in Florence, Oregon. On January 16, 1992, at 3:20 in the morning, Agent Elliot and another agent used a Agema Thermovision 210 thermal imager to scan Kyllo's home. Thermal imagers detect infrared ra-

diation which is not visible to the naked eye. The radiation is translated into images based on relative warmth. The scan of the home revealed that Kyllo's portion of the triplex was substantially warmer than the neighboring residents' homes. Agent Elliot concluded that Kyllo was using halide lights to grow marijuana in his house.

"Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of [Kyllo's] home, and the agents found an indoor growing operation involving more than 100 plants." Following the search of the home, Kyllo was indicted on one count of manufacturing marijuana. During the following trial, Kyllo's motion to suppress the evidence seized from his home was unsuccessful. Kyllo claimed that the use of the thermal imaging was a violation of his Fourth Amendment protection against unlawful searches. Kyllo appealed the use of the evidence to the Supreme Court of the United States.

Supreme Court Analysis

The Supreme Court began its analysis by stating that other than a few narrow exceptions, a warrantless search of a home is unreasonable and unconstitutional. However, the question of whether or not a Fourth Amendment "search" has occurred is not as easily decided.

While visual surveillance and aerial surveillance of homes and their surrounding areas had not been deemed "searches" in the past, the Court recognized that a citizen's privacy is affected by the advance of technology. In this case, the Court's main objective was to set limits on technology's invasion of the privacy interest of citizens. The Supreme Court determined:



“that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search—at least where (as here) the technology in question is not in general public use.” The Supreme Court appears to use a two-part reasoning in its decision. If the technology allows you to see things you could not have otherwise seen without being in the house itself, or if the technology is not readily available to the general public, then a “search” has occurred.

The Supreme Court also recognized that “while the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.” The Court feared that alternative approaches “would leave the homeowner at the mercy of the advancing technology—including imaging technology that could discern all human activity in the home.”

The thermal imaging scan of Kyllo’s home was an unconstitutional search. Therefore, a warrant is required before police officers may use imaging technology to scan a citizen’s house.

Practical Application

While the warrant requirement is important, it does not require drastic changes for police officers. “Police detective Larry Wilson of Plano, TX, an expert in thermal imaging technology, said he and other law enforcement officers will ‘still conduct business as usual. . . . Either way they decide is fine with me,’ Wilson added. ‘The clarity is there as far as the Supreme Court is concerned. . . . Now we just add one more step in our investigations.’” Edward Walsh, “High-Tech Devices Require a Warrant,” *Washington Post*, June 12, 2001.

PROBABLE CAUSE AND ARREST

No Seatbelt! You’re Coming with Me

Atwater v. City of Lago Vista, 121 S.Ct.
1536 (2001)

Factual Background

Texas statutes require those in the front seat of a passenger vehicle to wear a safety belt and the driver of a passenger vehicle to secure any small children riding in the front. Violation of either of these laws is a misdemeanor punishable with a fine not less than \$25 and not more than \$50. Texas law authorizes the officer to arrest or issue a citation to any person violating the seatbelt laws.

In March 1997, Gail Atwater was driving her pickup truck in Lago Vista, Texas, with her 3-year-old son and 5-year-old daughter in the front seat. None of the three were wearing a safety belt.



Lago Vista police officer Bart Turek observed the seatbelt violations and pulled Atwater over. Officer Turek approached the vehicle and noted that Atwater was not wearing her seatbelt, had failed to fasten her children in seat belts, was driving without a license, and failed to provide proof of insurance.

Turek then handcuffed Atwater, placed her in the police car, and drove her to the local police station. At the police station, Atwater was required to remove her shoes, jewelry, and eyeglasses, and to empty her pockets. Atwater’s picture was taken and she was

placed in a cell for approximately one hour before she appeared before a magistrate and then released on \$310 bond.

“Atwater was charged with driving without her seatbelt fastened, failure to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance.” After pleading no contest to the misdemeanor seatbelt offense and paying her \$50 fine, the other charges were dismissed.



Atwater then sued the City of Lago Vista, the police chief, and the arresting officer. Atwater argued that the Fourth Amendment forbids peace officers from warrantless arrests for misdemeanors other than those

amounting to a breach of the peace and that only jailable offenses should have the potential of resulting in warrantless arrests.

Supreme Court Analysis

The Supreme Court of the United States rejected Atwater’s arguments, stating: **“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”**

Probable cause clearly existed for Officer Turek to believe that Atwater had committed a crime in his presence. While this arrest may have been humiliating for Atwater, it was not executed in an “extraordinary manner” that would violate the Fourth Amendment.

HOW DOES *ATWATER* APPLY TO NEBRASKA LAW?

Although the Supreme Court of the United States permitted an arrest for a seatbelt violation in Texas, the *Atwater* case does not change the arrestable offenses in Nebraska. Nebraska statute’s set objective standards for what offenses an officer may arrest for and without this statutory basis the arrest is invalid.

State v. Sassen, 240 Neb. 773 (1992), is still the applicable law for Nebraska. In this case, officers pulled over a car with no front license plate, a dealer license plate placed over a regular license plate on the rear, and snow covering the entire back window. Upon contact with the occupants of the vehicle, the officers learned that the driver, Sassen, had no license and, in fact, did not own the car. The officers then asked the driver to get out of the vehicle. As Sassen was getting out of the car, she threw a syringe onto the floor of the car. After examining the syringe, the officers arrested Sassen for possession of drug paraphernalia. Incident to the arrest, the officers searched Sassen and found methamphetamine.

Sassen’s counsel argued that the arrest was illegal because the officers arrested Sassen for the infraction, possession of drug paraphernalia. Neb. Rev. Stat. (Reissue 1995) §29-435 states: “Except as provided in section 29-427, for any offense classified as an infraction, a citation shall be issued in lieu of arrest.”

The Nebraska Supreme Court found that the arrest for the infraction had two independent bases for being valid. First, the officers had reasonable cause to arrest Sassen for three Class III misdemeanors. “The officers need not state the specific crime for which a defendant is arrested in order to effectuate a valid arrest.” Because there was probable cause for an arrest due to the lack of a driver’s license, lack of a front license plate, and a snow-covered back window; arresting for an infraction was permissible. The fact that the officers arrested Sassen for an infraction was irrelevant, so long as the officers had probable cause to arrest her for something. Second, the officer could arrest for the infraction because it fell under an exception to the §29-435 citation requirement. Neb. Rev. Stat. (Reissue 1995) §29-427 allows “Any peace officer having grounds for making an arrest [to] take the accused into custody . . . when the officer has reasonable grounds to believe that . . . such action is necessary in order to carry out legitimate investigative functions.” Because the officer was arresting Sassen to carry out a legitimate investigative function, the arrest for an infraction was valid.

While the United States Supreme Court’s decision is important for legitimizing arrests for minor violations, it will not affect Nebraska’s law enforcement procedures.

NEW DRUG COURTS

In a cooperative effort, local judges, law enforcement, the County Attorney, and the Public Defender have established two drug courts in an attempt to rehabilitate addicts charged with non-violent crimes.

County Attorney Gary Lacey said the programs emphasize intensive treatment combined with frequent drug testing. He encouraged attorneys representing clients who could benefit from treatment to contact the respective coordinators of the drug courts.

He said one court will deal with juvenile offenders while the other will concentrate on adults. Judge Toni Thorson is leading the juvenile drug court effort, while Judge Karen Flowers will preside over the adult court.

These are not diversion programs. Offenders will have to admit and confront their addictions. They have to take advantage of the support offered, Judge Flowers said.

Lacey said that in order for an offender to be eligible for the program, the offender must:

- ◆ have a verified addiction to a controlled substance (or drugs and/or alcohol if you are a juvenile).
- ◆ be charged with a non-violent felony (or law violation if you are a juvenile).
- ◆ not be subject to the habitual criminal statute. (This does not apply to juveniles.)
- ◆ not be charged with a weapons violation.
- ◆ not be charged with delivering, selling, or manufacturing a controlled substance.
- ◆ not be on parole or probation.
- ◆ not be currently enrolled in the drug court program.
- ◆ not be charged with or have a history of sexual assault.

Lacey said that once eligibility has been determined and after consulting with counsel, the offender will enter a formal plea admitting the offense charged. The judge will find the defendant guilty and defer sentencing pending the outcome of the treatment program.

The defendant is informed of the conditions of release including attending counseling, finding employment (or attending school, if a juvenile), he said.

Participants in both drug court programs must report to the judge every week to inform the court of the progress which has been made during the previous week. Prior to the court session, the judge meets with the treatment providers, the prosecutor, and the defense lawyer to gather information concerning the progress of treatment.

Judge Flowers said: In court I will discuss with each defendant the progress made during the past week. I will offer encouragement and praise where it is earned. I will assess the defendant's attitude. This program will not be easy. But I think it offers offenders the best chance to be successful.

She said persons under treatment will be subject to urinalysis for the presence of controlled substances and alcohol. Persons found to have drugs in their urine are subject to graduated sanctions including spending time in jail.

When a participant has completed the program--which can be up to two years in length--a graduation ceremony will be conducted. The prosecutor will move to set aside the conviction and the case will be dismissed. Those who fail to meet the requirements of graduation, will be sentenced for the crime for which they have been convicted.

The coordinator of the juvenile programs is Scott Carlson. Priscella Guerra-Back is coordinator of the adult program. Both have offices in the Law Enforcement and Justice Center, 575 South 10th Street.



FEDERAL COURTS

8TH CIRCUIT CONFESSIONS

Was He in Custody? The Fine Line of Restraint

U.S. v. Hanson, 237 F.3d 961 (8th Cir. 2001)

Factual Background

On December 10, 1998, the Fargo Office of the Bureau of Alcohol, Tobacco, and Firearms received an anonymous letter stating that Hanson had been seen cleaning blood off the sidewalk near an abortion clinic on the morning of April 5, 1998. The abortion clinic had been the location of an attempted arson on April 4, 1998.

About eight months after the attempted arson, two federal agents went to Hanson's residence and explained that



they were investigating the recent vandalism at the abortion clinic. The agents asked Hanson to come with them to see some photos of the clinic; however, the agents did not tell Hanson that he was the prime suspect in their investigation of the arson attempt. Hanson agreed to accompany the agents, and he rode in the locked back seat of the agents' government vehicle. Hanson was then taken to the federal building where

he was questioned in a six feet by eight feet interrogation room for approximately two hours.

At the outset of the questioning, the agents sat across the table from Hanson and informed him that he was a suspect in the attempted arson investigation, that he was not under arrest, and that he was free to leave. The agents also offered

to drive Hanson home. The agents then threatened



time in federal prison if Hanson did not cooperate. After Hanson confessed to the crime the agents asked Hanson to write a sworn statement. Only after Hanson's agreement to reduce his confession to writing did the agents read him the *Miranda* warnings.

Eighth Circuit Analysis

The Eighth Circuit distinguished Hanson's situation from the Supreme Court decision in *Oregon v. Mathiason*, 429 U.S. 492 (1977), which required officers to administer *Miranda* warnings "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" In *Mathiason*, an officer left his card at a burglary suspect's home twenty-five days after the crime. The officer also left a note asking Mathiason to call the officer to "discuss something with [him]." The next day, Mathiason voluntarily called the officer and agreed to come to the state patrol office and meet with the officer. Later that day, Mathiason walked to the state patrol office and met the officer in the hallway. The officer informed Mathiason that he was not under arrest. After taking Mathiason to a closed room, the officer advised him that he was a suspect in the burglary and falsely told Mathiason that his fingerprints were found

at the scene. Not more than five minutes later, Mathiason confessed to taking the property. At this point, the officer advised him of his *Miranda* rights and taped the confession.

“The Supreme Court determined that Mathiason was not in custody when he confessed to the burglary because his ‘**freedom to depart**’ was not restricted in any way. ‘He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2 - hour interview [Mathiason] did in fact leave the police station without hinderance.’”

In this case, Hanson did not initiate the contact. Rather, the agents appeared at Hanson’s door and asked him to accompany them to their field station. After travelling to the field station in the locked back seat of a government vehicle, Hanson was placed in an isolated office and informed that he was a suspect in the arson case. Though he was told that he was free to go, Hanson was dependent upon the agents to find his way back home. Hanson was placed in an intimidating environment before he was advised of the true reason he was brought to the station.

The Eighth Circuit Court determined “**that there was a restraint on Hanson’s freedom of movement**” during the three hours he spent with the agents and that a “**reasonable person in Hanson’s position would not have believed that he was free to leave the field office unhindered by the agents. . . . Hanson was in custody when the agents questioned him and . . . he should have received the *Miranda* warnings. Accordingly, Hanson’s confession must be suppressed and his conviction is reversed.**”

WOULD A REASONABLE PERSON
BELIEVE HE WAS FREE TO GO?
IF NOT, READ THE MIRANDA WARNING.

Excuse Me, Did You Ask for a Lawyer?

Dormire v. Wilkinson, 249 F.3d 801 (8th Cir. 2001)

Factual Background

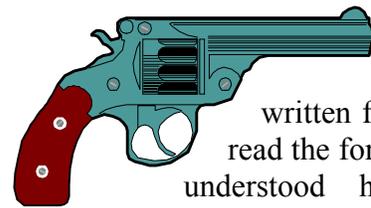
Raymond Wilkinson was arrested in connection with four armed robberies in Pemiscot County, Missouri. After receiving a description from the victims, Pemiscot County Sheriff’s Deputy Rodney Ivie spotted Wilkinson’s car and followed him as he left the area. Ivie stopped Wilkinson, arrested him, and read him his *Miranda* rights. Ivie then searched Wilkinson’s car and discovered a handgun under the driver’s seat. Wilkinson was then transported to the sheriff’s office.

Upon arrival at the sheriff’s office, Ivie again read Wilkinson his rights from a written form. Wilkinson read the form, stated that he understood his rights, but refused to sign the waiver portion of the form. Wilkinson then asked Ivie if he could call his girlfriend, and Ivie told him that he could not. “Wilkinson then asked ‘Could I call my lawyer?’ Ivie answered ‘yes’ to that question.” Wilkinson did not say anything further about wanting a lawyer, and Ivie proceeded to ask questions about the robberies. Wilkinson initially denied any involvement, but later admitted to the robberies and signed a written form which contained his statements.

At a hearing before his trial, Wilkinson moved to suppress his statements to Ivie on the basis that his confession had been obtained in violation of his *Miranda* rights.

Supreme Court Analysis

Upon review, the Court noted that governing law allows questioning to “proceed unless a suspect ‘clearly’ and ‘unambigu-



ously' makes known his desire to have counsel present."

The Court concluded that Wilkinson's question, "Could I call my lawyer?" was not such a clear and unambiguous request for counsel considering he had previously asked to contact his girlfriend.

"Ivie could have reasonably believed in these circumstances that Wilkinson was merely inquiring whether he had the right to a call a lawyer, rather than believing that Wilkinson was actually requesting counsel. Indeed, Ivie did not prevent Wilkinson from calling an attorney, and



he told him affirmatively that he had the right to call one. Supreme Court precedent does not require the cessation of questioning 'if a

suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel."

A suspect in custody must articulate his desire to have counsel present clearly and unambiguously. Thus, Wilkinson's question was not an unambiguous request for counsel, and Ivie was not required to stop his questioning.

TIPS FOR TESTIFYING

WATCH FOR A NEW LINK TO BE ADDED TO THE COUNTY ATTORNEY WEB PAGE. AN ARTICLE THAT WILL GIVE HELPFUL INFORMATION TO OFFICERS WHO WILL BE TESTIFYING IN COURT WILL SOON BE AVAILABLE ON THE WEB SITE.

THE ADDRESS IS:

<http://www.ci.lincoln.ne.us/cnty/attorn/index.htm>

SEARCH AND SEIZURE

Can a Consensual Conversation be a Seizure?

U.S. v. Favela, 247 F.3d 838 (8th Cir. 2001)

Factual Background

Favela arrived at the Kansas City Airport via a flight from California. Task Force Officers Morgan and Callaway watched Favela for about ten minutes as she walked back and forth between boarding gates, the gift shop, and the restroom. When Morgan and Callaway approached Favela, Morgan showed Favela his badge and asked if he could speak with her. Both officers were dressed in plain clothes and did not display their weapons.

"Morgan asked [Favela] if she had illegal narcotics or a large sum of currency in her possession. Favela responded that she did not. Morgan then asked if he could search Favela and her bag. Favela consented and handed her clear plastic bag to Morgan. While Callaway searched the bag, finding no drugs or other contraband, Morgan asked Favela to pull her loose-fitting shirt tight around her stomach area. . . . When Favela complied, Morgan and Callaway observed a bulge in the upper middle portion of her stomach area. Morgan pointed to the bulge and inquired what it was. Favela sighed, shrugged her shoulders, and looked at the floor. Morgan asked if he could touch the bulge. Favela nodded affirmatively. After feeling two hard bulges he believed to be illegal drugs, Morgan placed Favela under arrest. A search incident to the arrest uncovered 1.2 kilograms of methamphetamine

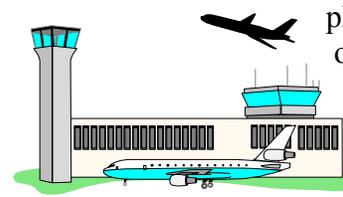
taped to Favela's body. The entire encounter lasted approximately five minutes."

Favela argued that the evidence found as a result of the search should be suppressed because her initial encounter with the officers was a Fourth Amendment seizure. Favela claims that the officers had no reasonable suspicion justifying the investigative stop.

Eighth Circuit Analysis

The court held that **no Fourth Amendment seizure existed because "a reasonable person would have believed she was free to end the consensual conversation and leave."** "Morgan and Callaway were both standing in front of Favela, dressed in plain clothes and not displaying weapons. She was not surrounded, and there is no evidence that the distance between them was unusually close or threatening for conduct-

ing a conversation in a busy public airport. Officer Morgan properly identified himself and asked in a non-coercive manner if Favela was willing to talk. Favela was not



physically touched or restrained, she was not told she must cooperate, and she was not asked or told to accompany the officers to a different location." Because there was no Fourth Amendment seizure, there is no need to decide if there was reasonable suspicion to conduct the stop.

Because there was no Fourth Amendment seizure when the officers initially spoke with Favela, the evidence found as a result of the search was admissible.

DNA Testing Act



On September 1, 2001, the DNA Testing Act will go into effect in Nebraska. The Nebraska Legislature passed this act in order to give wrongfully convicted persons the opportunity to establish their innocence through modern forms of DNA testing. Because of the multiple postconviction exonerations that have resulted from modern DNA testing in the past ten years, the legislature desires to provide DNA testing for those cases where the DNA may have had significant probative value to a finder of fact.

The statute allows any person in custody, at any time after a conviction, to file a motion for DNA testing of material that meets all of the following three criteria: 1) is related to the investigation or prosecution that resulted in a conviction, 2) is in the possession or control of the state or in the care of others whose possession would safeguard the integrity of the biological material, and 3) was not previously subjected to DNA testing or should be retested with more modern DNA techniques.

After the convicted person has filed the motion, the county attorney is required to submit an inventory of all evidence used in the case to the person or his counsel, and the court. If the court believes that the three criteria in the statute are adequately met, then it will order DNA testing of the biological material(s) in question. For those convicted person who cannot afford counsel or the DNA testing procedures, the State will pay such costs.

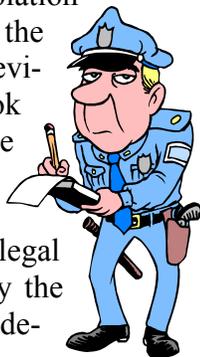
CASES OUTSIDE THE 8TH CIRCUIT

Note: The following summaries were taken from Case Commentaries & Briefs, published by the National District Attorney's Association.

Consent: Voluntariness; Detention for Parking Violation; Exploitation of the Detention for Questioning About Drugs

U.S. v. Park-Swallow, 105 F.Supp.2d 1211 (D.Kan. 2000)

A defendant was unlawfully detained under the Fourth Amendment when a police officer questioned her about whether there were any drugs or firearms in her vehicle and whether he could search the vehicle, where the defendant's original detention was based on a mere parking violation and open beer can in the vehicle and there was no evidence that the officer took steps to ensure that the encounter was consensual or that he had reasonable suspicion of additional illegal activity which would justify the extension of the initial detention.



“ . . . In his testimony, Officer Haulmark essentially admitted that he was not inclined to ticket the defendant for the parking viola-

tion or for the open container violation. Rather, he exploited the situation by accusing the defendant of a parking violation and making requests consistent with the ticketing process in an apparent effort to gain information of other possible criminal activity. When he learned of the recent narcotics arrest, Officer Haulmark exploited the fact that the defendant had been seized and requested the defendant to reveal if the car contained any illegal items and to give him permission to search it.”



The court ruled that defendant's consent to search her vehicle was not voluntary where it was given while she was unlawfully detained.

Consensual Encounter: Frisk; Officer's "Uneasiness" About the Situation

U.S. v. Burton, 228 F.3d 524 (4th Cir. 2000)

A police officer's concern for his own safety, as well as the safety of his fellow officers, did not justify his decision to reach inside defendant's coat during what was conceded to be a routine police-citizen encounter, in which, at the time the officers approached defendant and began asking him questions, they had no reason to suspect that he was engaged in criminal activity. It appeared that as the officers approached defendant, all he did was to continue standing as he was and refused to answer questions or to comply with their requests that he remove his hand from his coat pocket.

The court said a police frisk must be based on reasonable suspicion of danger, not “uneasiness.” “. . . in the absence of reasonable suspicion, an officer may not frisk a citizen merely because he feels uneasy about his safety. . . .”

Search Warrant: Execution; Knock and Announce Rule; Five Second Wait; Justification; Exigent Circumstances

United States v. Granville, 222 F.3d 1214 (9th Cir. 2000)

A five second wait before a police officer forced his way into defendant's apartment, after knocking and announcing a search, did not provide defendant with a reasonable opportunity to ascertain who was at the door and to respond to the request for admittance. The Ninth Circuit ruled that this violated the federal knock and announce statute, 18 U.S.C. § 3109, especially in view of the fact that the warrant was executed early in the morning when it was likely the occupants of the apartment would be asleep and would not be able to respond in so short a time. Officer safety was rejected as a justification for the short wait.

“. . . [Officer safety is not] served by endorsing forcible entry after only five seconds. That point is vividly demonstrated in this case. Here, Granville and his girlfriend claim that they were sleeping when the officers broke down the door. Granville stated that he thought his apartment was being broken into and responded with gun fire.”



The court also rejected an exigent circumstances justification for the short wait. “. . . The government fails to cite any specific facts, and we can find none in the record, that suggest Granville posed a threat to the officers. The government simply relies on generalizations and stereotypes that apply to all drug dealers.”

Standing: Rental Car; Authorized Driver

U.S. v. Walker, 237 F.3d 845 (7th Cir. 2001)

A person listed on a car rental agreement as an authorized driver has a protected Fourth Amendment interest in the vehicle and may challenge a search of the rental vehicle.

“Today, we adopt the rule that a person listed on a rental agreement as an authorized driver has a protected

Fourth Amendment interest in the vehicle. We arrive



at this conclusion by applying the two-pronged objective and subjective expectation-of-privacy test. A person listed as an approved driver on a rental agreement has an objective expectation of privacy in the vehicle due to his possessory and property interest in the vehicle. Given Walker's obvious subjective expectation of privacy, we find that Walker, an approved driver on the rental contract, may challenge the search warrant issued for the rented [automobile]. . . .”

Civil Liability: Arrest for Giving a Police Officer the Finger; “Fighting Words;” Qualified Immunity

Nichols v. Chacon, 110 F.Supp.2d 1099 (W.D.Ark. 2000)

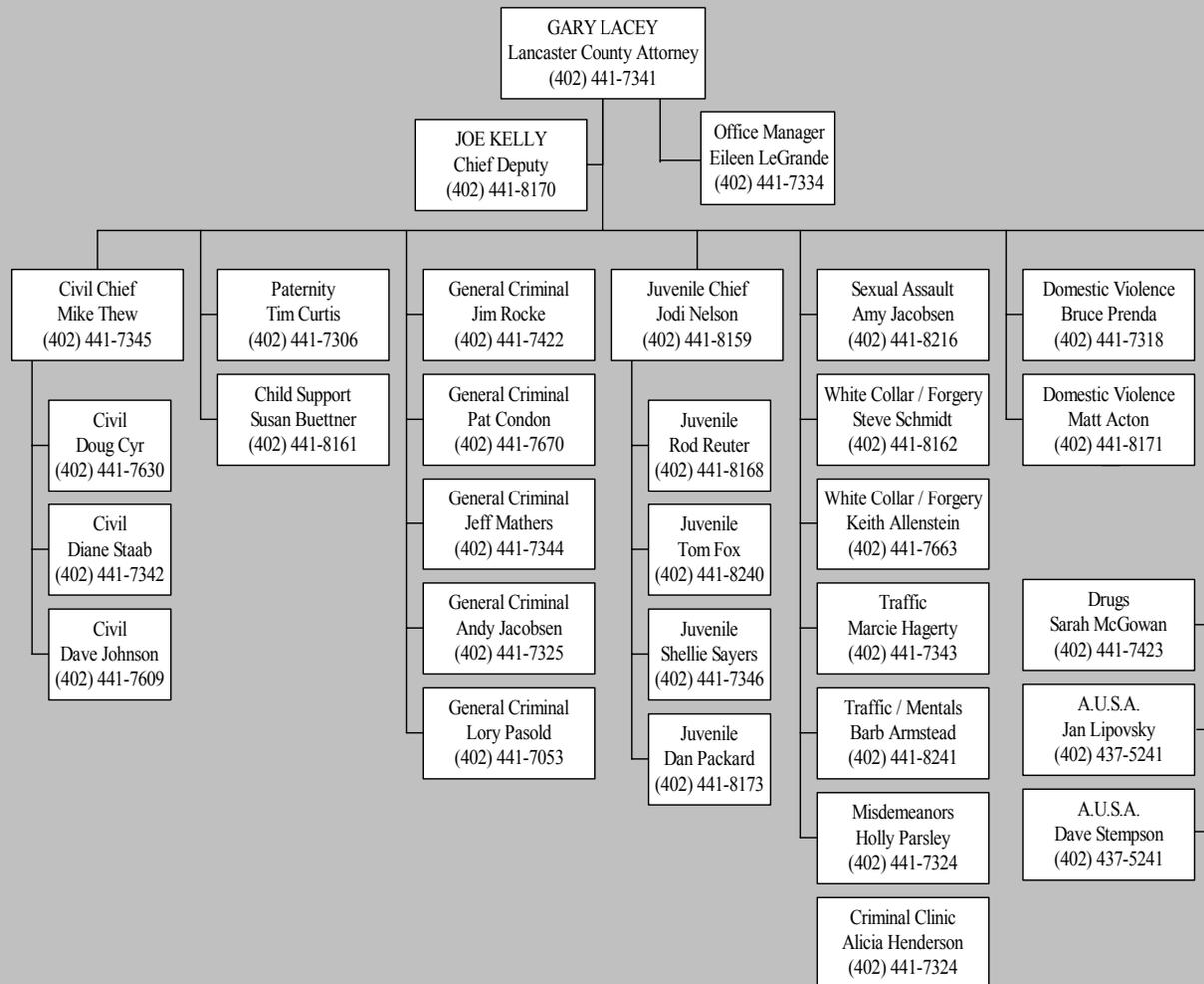
An arrestee's display of his middle finger in an upward gesture, commonly referred to as “flipping someone off,” “the bird,” or “giving someone the finger,” did not constitute “fighting words” and, thus, was protected as free speech under the First Amendment in a civil rights action brought

under 42 U.S.C. § 1983. The court ruled that the arresting officer was not entitled to qualified immunity in the lawsuit. It said the arrestee-plaintiff's gesture was clearly established as protected free speech at the time when officer issued a ticket to the arrestee for disorderly conduct.

"While we agree the gesture utilized by Nichols was crude, insensitive, offensive, and disturbing to Chacon's sensibilities, it was not obscene under the relevant Supreme Court precedent, did not constitute 'fighting words,' and was protected as 'free speech'

under the First Amendment to the United States Constitution. We also believe that this right was clearly established on August 6th of 1998 when Chacon arrested Nichols. Accordingly, we hold as a matter of law that Chacon is not entitled to qualified immunity and that his arrest of Nichols violated Nichols' First and Fourth Amendment rights."

LANCASTER COUNTY ATTORNEY ORGANIZATIONAL CHART



The Lancaster County Attorney's office has reorganized several of its departments. The above diagram shows the current assignments of the attorneys in each department.

“FORMER DEATH-ROW INMATE JEREMY SHEETS GRINNED AS HE WAS RELEASED FROM PRISON”

State v. Sheets, 260 Neb. 325, 618 N.W.2d 117 (2001)

On September 23, 1992, Kenyatta Bush, a 17-year-old high school senior, disappeared from North High School in Omaha. Her body was found 10 days later in a ditch in Washington County, Nebraska. A pathologist determined that Bush had died from lacerations to her neck and that she had also been sexually assaulted. In September of 1997, accomplice Adam Barnett was questioned and implicated Jeremy Sheets in the murder. Upon his arrest, Barnett denied having any involvement in the murder and stated that Sheets had raped and killed Bush. Barnett later pled to the reduced charge of second degree murder and gave a tape-recorded confession to the Omaha police. In his confession, Barnett provided statements that the murder was racially motivated. He “expressed concern about his safety in prison when inmates found out he did not stop Sheets from killing Bush because she was black.” On November 13, 1996, Barnett committed suicide in his Washington County jail cell.

The crucial factor in the State’s case against Sheets was the admissibility of the taped confession of Adam Barnett. At trial, the jury was allowed to hear Barnett’s confession over Sheets’ objections. In 1997, Jeremy Sheets was convicted on one count of murder in the first degree and one count of using a knife to commit a felony. He was sentenced to death on the charge of murder in the first degree. Sheets appealed, contending that the Douglas County District Court had erred in admitting the taped confession.



The primary issue under review was whether the admission of Barnett’s taped confession violated Sheets’ Sixth Amendment right “to be confronted with the witnesses against him.” The Confrontation Clause reflects that “live confrontation and cross-examination of witnesses in the courtroom is the key to finding the truth in a criminal trial.” The court noted that the “confession of an accomplice that incriminates a criminal defendant is deemed to be inherently unreliable.” The burden is on the State to prove that the accomplice’s (Barnett) statements are reliable and trustworthy. The court held that because Barnett’s statements were made in police custody, such statements were unreliable. The court further determined “that the State did not meet its burden to prove that statements in Barnett’s taped confession had the particularized guarantees of trustworthiness necessary to overcome Sheets’ right to confrontation.” Thus, the Nebraska Supreme Court threw out the taped confession on the basis that Sheets’ confrontation rights were violated. In May of 2001, the U.S. Supreme Court refused to hear the State’s appeal of the Nebraska Supreme Court’s decision.

Without Barnett’s taped confession, prosecutors said they did not have enough evidence to proceed with a new trial. On June 12, 2001, Sheets was released from the Nebraska State Penitentiary. He was the first person released from Nebraska’s death row in 88 years.

--The source of this information was an AP article, “Sheets Released from Death Row, Prison Sentence,” on the *Lincoln Journal Star* web site: http://www.journalstar.com/nebraska?story_id=3507, Wednesday, June 27.