

***Miller v. Arkansas: Criminals Beware!* Arkansas Uses an Objective Approach in Evaluating Pretextual Traffic Stops**

In *Miller v. Arkansas*,¹ the Arkansas Court of Appeals had to decide whether an officer's subjective intent would make an otherwise legitimate traffic stop and ensuing search pretextual.² In December 1991, a confidential informant told Arkansas state police officer Roger Ahlf that Roger Miller was a cocaine dealer and was driving a black van on a suspended driver's license.³ After verifying this information, Officer Ahlf stopped Miller for driving on a suspended license.⁴ Ahlf then frisked Miller for weapons. During the frisk, the officer found an address book that contained less than 1.5 grams of marijuana residue.⁵ The officer took Miller into custody and upon searching his van found a plastic bag of cocaine.⁶ In a pretrial motion, Miller moved to suppress the evidence claiming his arrest was pretextual.⁷ At the suppression hearing, the officer admitted that he normally did not work traffic duty and stopped Miller only in the hope of finding drugs.⁸ The trial court denied Miller's motion, holding that although the officer may have had additional motives, the evidence did not establish that he would not have arrested Miller absent the interest in searching for drugs.⁹ After the trial court denied the motion, Miller entered a conditional plea of guilty.¹⁰ Miller appealed to the Arkansas Court of Appeals, claiming

1. 44 Ark. App. 112, 868 S.W.2d 510 (1993).

2. *Id.* at 112-13, 868 S.W.2d at 510.

3. *Id.*

4. *Id.* Ahlf was working with a narcotics investigator for the Searcy Regional Drug Task Force. *Id.*

5. *Id.* at 113, 868 S.W.2d at 511.

6. *Id.*

7. *Id.*, 868 S.W.2d at 510.

8. *Id.* Actually, the officer stated he wrote only two or three tickets per year. *Id.*

9. *Id.*, 868 S.W.2d at 511.

10. *Id.* at 112, 868 S.W.2d at 510. Miller entered the plea of guilty under ARK. R. CRIM. P. 24.3(b). The trial court subsequently sentenced Miller to twenty-five years in prison with a ten year suspended sentence on the drug charge, and fined him five hundred dollars on the suspended license charge. 44 Ark. App. at 113, 868 S.W.2d at 510.

that the trial court erred in not suppressing the evidence obtained at the arrest.¹¹ The court of appeals affirmed the lower court, holding that a court is to test police searches under an objective standard without regard to the subjective intent of the officer involved.¹²

To better understand the court of appeals position, a consideration of the evolution of the law of pretextual arrests is beneficial. "A pretext arrest only arises when the surrounding circumstances show that the arrest is only a sham being used as an excuse for making a search for evidence of a different and more serious offense for which no probable cause to arrest exists."¹³ When first confronted with this issue, the Supreme Court held "an arrest may not be used as a pretext to search for evidence."¹⁴ Further, the Court in *United States v. Rabinowitz*¹⁵ forbade general exploratory searches with or without a search warrant.¹⁶ In *Rabinowitz*, government officers went to the defendant's place of business, and arrested him pursuant to an arrest warrant.¹⁷ Over the defendant's objection, the officers searched his desk, safe, and file cabinets, and found incriminating evidence.¹⁸ The trial court denied the defendant's motions to suppress the evidence, and subsequently convicted him.¹⁹ The court of appeals reversed, and the Supreme Court reversed the court of appeals.²⁰ The Court held that the validity of searches made incident to an arrest without a warrant are dependent on the validity of the initial arrest.²¹ The Court elaborated that to determine whether a search made after an otherwise lawful arrest is legal, a court is to look at the facts and circumstances of each

11. 44 Ark. App. at 113, 868 S.W.2d at 510.

12. *Id.* at 115, 868 S.W.2d at 511. The Supreme Court denied certiorari. 114 S. Ct. 2137 (1994).

13. *Brown v. State*, 442 N.E.2d 1109 (Ind. 1982).

14. *United States v. Lefkowitz*, 285 U.S. 452, 466 (1932). The Court found the Fourth Amendment forbids searches that are unreasonable, and further stated that the determination of when to search should be left to those persons issuing search warrants, not officers. *Id.* at 464.

15. 339 U.S. 56 (1950).

16. *Id.* at 62. See also *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *United States v. Lefkowitz*, 285 U.S. 452 (1932).

17. 339 U.S. at 58. The warrant was issued after government officials received information that the defendant was making forged and altered stamps. *Id.*

18. *Id.* at 59. The officers found stamps that the defendant used to make his forgeries. *Id.*

19. *Id.*

20. *Id.* The Court granted certiorari "to determine the validity of the search because of the question's importance in the administration of the law of search and seizure." *Id.*

21. *Id.* at 60. In *Rabinowitz* there was a warrant; however, if there had not been a warrant the arrest would still have been lawful because of probable cause. *Id.*

particular case.²² The Court reasoned that since the officers had probable cause to search, the search was not a general exploratory search; therefore, the officers validly obtained the evidence used to convict the defendant.²³ Along with the Supreme Court, other courts have also addressed this issue.²⁴ In *Taglavore v. United States*,²⁵ the Ninth Circuit found that although a person arrested may be searched incident to a valid arrest, the search must be incident to the arrest and not vice versa.²⁶ “[When] the arrest is only a sham or a front being used as an excuse for making a search, the arrest itself and the ensuing search are illegal.”²⁷ The Fifth Circuit has expanded this concept by holding the lawfulness of an arrest does not always make a search legitimate.²⁸ Instead, the search must be related to the nature and purpose of the arrest.²⁹ Subsequently, in *United States v. Robinson*³⁰ Justice Rehnquist, writing for the majority, set forth two distinct exceptions to the warrant requirement of the Fourth Amendment: first, a search may be made of a person by virtue of being arrested; and second, a search may be made of the area within the control of the person arrested.³¹ Justice Rehnquist quoted then Judge Cardozo of the New York Court of Appeals:

The basic principle is this: Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation (citations omitted). Search of a person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.³²

22. *Id.* at 66.

23. *Id.* at 63. The primary reason for upholding the admissibility of the evidence was that the search and seizure were incident to a valid arrest. *Id.* at 64.

24. *United States v. Taglavore*, 291 F.2d 262, 267 (9th Cir. 1961); *McKnight v. United States*, 183 F.2d 977, 978 (D.C. Cir. 1950).

25. 291 F.2d 262 (9th Cir. 1961). Police arrested the defendant pursuant to warrants for minor traffic violations, not for the narcotics violation for which he was convicted. *Id.*

26. *Id.* at 264-65. The court allowed the searches “to facilitate discovery of various elements and evidence of the crime for which the accused is being arrested, and also to remove weapons.” *Id.* at 265.

27. *Id. Accord* *Worthington v. United States*, 166 F.2d 557 (6th Cir. 1948); *Henderson v. United States* 12 F.2d 528 (4th Cir. 1926).

28. *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968).

29. *See id.*

30. 414 U.S. 218 (1973).

31. *Id.* at 224. The Court found these two exceptions to make such searches reasonable under the Fourth Amendment. *Id.* at 226.

32. *Id.* at 232 (quoting *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923)).

Later, in *Scott v. United States*,³³ the Supreme Court held that to evaluate alleged violations of the Fourth Amendment, courts must objectively assess the "officer's actions in light of the facts and circumstances then known to him."³⁴ "The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action."³⁵ The Court reasoned that subjective intent alone cannot make lawful conduct illegal or unconstitutional.³⁶ Since then, the Court has expanded this reasoning to include the use of an objective standard stating, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."³⁷ The United States appellate courts have followed the Supreme Court's lead in establishing an objective standard.³⁸ Moreover, many state courts have adopted the objective analysis expressed in *Scott*.³⁹ Finally, courts are employing a "but for" approach in objectively analyzing pretextual arrests; that is, "would the arrest not have occurred but for the other, typically more

33. 436 U.S. 128 (1978).

34. *Id.* at 137. *See also* *Terry v. Ohio*, 392 U.S. 1 (1968) (facts are judged against an objective standard).

35. 436 U.S. at 138. The defendants moved to suppress tape recordings made pursuant to the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. § 2518 (1988). Government agents intercepted their calls and implicated the defendants in a narcotics conspiracy. 436 U.S. at 138.

36. 436 U.S. at 136.

37. *Horton v. California*, 496 U.S. 128, 138 (1990). A California policeman obtained a search warrant to search for robbery proceeds at the defendant's home, but upon executing the warrant, the officer found only the weapons used in the robbery, not the proceeds. Horton moved to suppress the evidence because the officer's intention was allegedly to find weapons, not the proceeds. *Id.*

38. *See, e.g.*, *United States v. Trigg*, 925 F.2d 1064 (7th Cir. 1991) (Fourth Amendment analysis requires application of an objective standard); *United States v. Rivera*, 906 F.2d 319 (7th Cir. 1990) (an officer's subjective intent is irrelevant); *United States v. Rivera*, 867 F.2d 1261 (10th Cir. 1989) (objective analysis of facts and circumstances, rather than subjective intent of officer involved); *United States v. Meyers*, 990 F.2d 1083 (8th Cir. 1993) (allegedly pretextual traffic stops should be reviewed under an objective reasonableness standard).

39. *See, e.g.*, *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986); *State v. Garcia*, 461 N.W.2d 460 (Iowa 1990); *State v. Olson*, 482 N.W.2d 212 (Minn. 1992).

serious, crime."⁴⁰ A court must determine if the officer would nonetheless have made the arrest without the covert motive.⁴¹

In *Miller*, the Arkansas Court of Appeals used the objective approach to evaluate whether the search was pretextual.⁴² Following Arkansas Supreme Court precedent, the court applied a "but for" approach.⁴³ The court found that as long as the overt motive was legitimate, and the arrest would have occurred without the ulterior motive, the arrest was acceptable since there was no conduct to deter through the Fourth Amendment exclusionary rule.⁴⁴ The court expressed Arkansas' approval of the Supreme Court's decisions establishing an objective standard.⁴⁵ The court also followed Professor La Fave's reasoning that, "[i]f the police stop X's car for minor offense A, and they 'subjectively hoped to discover contraband during the stop' so as to establish serious offense B, the stop is nonetheless lawful if 'a reasonable officer would have made the stop in the absence of the invalid purpose.'"⁴⁶ The court concluded that officer Ahlf primarily stopped Miller to search for drugs.⁴⁷ The arrest, however, was not "tainted" if officer Ahlf could have carried out the arrest without the improper motive.⁴⁸ Because the test is objective—whether a reasonable officer would have made the stop—the court deferred to the trial court's finding that the arrest would nonetheless have occurred.⁴⁹ Furthermore, the court reasoned that the Constitution does not prohibit an officer from arresting a person who commits a crime outside the area of the officer's specialty.⁵⁰

The Arkansas Supreme Court has spoken on this issue and the Arkansas Court of Appeals' decision merely solidifies this position.⁵¹

40. *Hines v. State*, 289 Ark. 50, 55, 709 S.W.2d 65, 68 (1986); see also *Ray v. State*, 304 Ark. 489, 803 S.W.2d 894 (1991).

41. The *Hines* court cites to 1 WAYNE R. LA FAVE, CRIMINAL PROCEDURE § 3.1(d), at 144, in support of its approach because if the arrest would nevertheless have occurred, there is no conduct to deter through the Fourth Amendment exclusionary rule.

42. 44 Ark. App. at 115, 868 S.W.2d at 512.

43. *Id.* at 114, 868 S.W.2d at 511. The court was following *Hines v. State* 289 Ark. 50, 709 S.W.2d 65 (1986). See *supra* note 42 and accompanying text.

44. 44 Ark. App. at 114-15, 868 S.W.2d at 511.

45. *Id.* at 115, 868 S.W.2d at 512. See *Scott v. United States*, 436 U.S. 128 (1978), discussed *supra* notes 33-36, and *Horton v. California*, 496 U.S. 128 (1990), discussed *supra* note 37.

46. 44 Ark. App. at 114-15, 868 S.W.2d at 511 (quoting 1 WAYNE R. LA FAVE, SEARCH AND SEIZURE § 1.4 (Supp. 1994)).

47. *Id.* at 116, 868 S.W.2d at 512.

48. *Id.*

49. *Id.*

50. *Id.*

51. See generally *Miller v. Arkansas*, 44 Ark. App. 112, 868 S.W.2d 510 (1993).

As a result, the court of appeals' decision has no legal implications, except that Arkansas lower courts must follow the precedent. However, this court of appeals decision does speak to a greater societal concern: controlling seemingly overzealous officers. Officers have tremendous discretion in making searches; for example, an officer can, as a secondary motivation, make an arrest to enable a search, the subject of the primary motivation.⁵² Much like the officer in the instant case, an officer could stop a person for a minor violation to effectuate a search that was the officer's primary stimulus. This could possibly violate that person's constitutional rights if no probable cause existed for the search.⁵³ The potential for abuse in such a situation, however, is tempered since the officer must act in a reasonable manner.⁵⁴ Moreover, the objective standard demands that a court view the officer's actions in light of what a reasonable officer would do, with the courts not approving every stop.⁵⁵ For instance, one court disregarded the subjective intent of an officer and nonetheless found his conduct unreasonable and therefore pretextual.⁵⁶ Thus, as in the instant case, one must decide which alternative is preferable. One alternative would allow an officer to stop someone for a minor violation to search for evidence of a more serious crime.⁵⁷ For example, the court approved officer Ahlf stopping Miller for having a suspended license although his subjective motivation was to search for drugs. Since an officer, such as Ahlf, must act in a reasonable manner, a citizen's constitutional rights are protected.⁵⁸ The other alternative would deny an officer this opportunity. For example, an officer would be unable to stop someone for a suspended license if that officer subjectively hoped to find drugs. As a result, a court would exclude evidence such as that obtained by officer Ahlf.⁵⁹ Consequently, a person like Miller, who drives around

52. *Id.*

53. *See, e.g., Miller v. Arkansas*, as discussed above, in which the officer involved admitted he stopped the defendant solely to search for drugs. 44 Ark. App. 112, 868 S.W.2d 510 (1993); *see also supra* notes and accompanying text.

54. *See generally* *United States v. Meyers*, 990 F.2d 1083 (8th Cir. 1993); *Miller v. Arkansas*, 44 Ark. App. 112, 868 S.W.2d 510 (1993); *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986).

55. *See Maine v. Haskell*, 645 A.2d 619 (Me. 1994).

56. *Id.* at 621. In *Haskell*, an officer stopped a person for driving fifty-nine miles-per-hour in a fifty-five mile-per-hour zone hoping to find the driver operating under the influence of alcohol. Subsequently, the officer arrested the driver for operating under the influence after he failed field sobriety tests. The Maine court found the officer's conduct arbitrary and unreasonable, and therefore pretextual. *Id.* at 620-21.

57. *See generally* *Miller v. Arkansas*, 44 Ark. App. 112, 868 S.W.2d 510 (1993).

58. *Id.*

59. *Id.*

with large amounts of drugs, could enjoy some immunity. Fortunately, the court of appeals had the wisdom to choose the first alternative. Furthermore, the majority of courts considering this issue have approved the former alternative and not the latter.⁶⁰

JASON WATSON

60. *See, e.g.*, *Moore v. McDonald*, 30 F.3d 616 (5th Cir. 1994); *Bradway v. Gonzales*, 26 F.3d 313 (2d Cir. 1994); *United States v. Jeffus*, 22 F.3d 554 (4th Cir. 1994); *United States v. McCully*, 21 F.3d 712 (6th Cir. 1994); *United States v. Mitchell*, 951 F.2d 1291 (D.C. Cir. 1991); *United States v. Fiaca*, 929 F.2d 285 (7th Cir. 1991); *United States v. Rivera*, 867 F.2d 1261 (10th Cir. 1989); *United States v. Bates*, 840 F.2d 858 (11th Cir. 1988); *United States v. Hawkins*, 811 F.2d 210 (3d Cir. 1987); *State v. Haskell*, 645 A.2d 619 (Me. 1994); *State v. Chapin*, 879 P.2d 300 (Wash. App. 1994); *State v. Mease*, 842 S.W.2d 98 (Mo. 1992); *State v. Olson*, 482 N.W.2d 212 (Minn. 1992); *State v. Garcia*, 461 N.W.2d 460 (Iowa 1990). *See also supra* note 38 and accompanying text.

