

by April 2, 2007, and a hearing *to settle the burden issue* on April 11, 2007, 1:30 P.M. The Court indicated it would set the *substantive* issue of suppression for hearing after resolving the burden issue on April 11.

Factual Background

Defendant was stopped by BPD Officer Glen McClintock at approximately 1:40 A.M. in Bartlesville, OK for traveling 36 mph in a 30 mph zone.¹ McClintock testified he was contemporaneously advised by BPD dispatch that a warrant might be outstanding for Defendant while he was writing a speeding citation.² He placed Defendant under arrest for the warrant.³ McClintock testified he searched the vehicle as a [a] search incident to lawful arrest, and [b] an inventory search.⁴ McClintock *equated* his "search incident to arrest" with his "inventory of the vehicle", denied a distinction between the two characterizations, and testified that Defendant was in the patrol car when McClintock initiated his search of the vehicle.⁵ He allegedly recovered a "roach" in the vehicle's ashtray.⁶

The alleged arrest warrant on the basis of which McClintock arrested Defendant [issued March 30, 2006], *and the recall* of that warrant [issued March 23, 2006], were admitted into evidence at the preliminary hearing as State's Exhibits 5 and 6, respectively.⁷ [See attached *Exhibits A and B.*] McClintock testified that Defendant's attorney, the Hon.

¹ Preliminary hearing transcript, page 2, lines 1-5. [Hereafter, PH 1, at 1-5].

² PH 3, at 1-10.

³ PH, 3, at 13

⁴ PH 12, at 17 – PH 13, at 15.

⁵ PH 12 at 20 - 13 at 1-15 and PH 9 at 15-23.

⁶ PH 3, line 14 – PH 4, line 1.

⁷ PH 5, 2-11. While so bizarre as to suggest a scrivener's error here, the dates are accurate. It appears that the magistrate who issued both the recall and the warrant, Hon. Kyra Williams, granted a DHS request for a bench warrant on or about March 17, 2006 for failure to appear. It appears Defendant's counsel, Hon. Russ Vaclaw, explained to Williams on March 23 that he had misinformed Defendant as to the date of the March 17 hearing, so Williams signed the recall on March 23, 2006. However, the practice in Washington County child support cases appears to involve a delegation of warrant drafting to OK DHS staff, and apparently that staff failed to present its written warrant to Williams for entry until March 30, 2006. Apparently, Williams forgot she had recalled the warrant on March 23 when she signed the warrant on March 30. All of the information in this footnote, it must be conceded, is asserted on information and belief.

Russ Vaclaw, appeared at the jail in the early morning hours of June 4, 2007 with the recall and warrant and explained that they *are* related and that the warrant was not then outstanding.⁸ Further, the magistrate that executed the *Order Finding Probable Cause* on June 4, 2006, the Hon. Curtis L. DeLapp, handwrote across the bottom of that order "was arrested on JFP case - when warrant had already been recalled". [See attached *Exhibit C*]. Further still, the docket sheet in the case in which the warrant and recall had been issued, JFP-1993-262 [Washington County], expressly reflects the fact that this warrant and recall "match" and the warrant "(ALREADY HAD BEEN RECALLED BY JUDGE WILLIAMS ON 3-23-06)". [See attached *Exhibit D*]. Nonetheless, the State contends the warrant and the recall are unrelated.⁹

Legal Authority for this Motion

¶5 The defendant's claim is that the warrantless search of his pickup truck was unreasonable and that the trial court erred in overruling his motion to suppress the fruits of that search. In response, the Attorney General's brief asserts that the search was justified because the defendant waived his right to be free from unreasonable searches by consenting to the search of the truck, and that the trial court correctly overruled the motion to suppress because the defendant failed to prove the lack of a valid consent.

¶6 The most fundamental of all principles in this area of law is that the warrantless search is "per se unreasonable under the Fourth Amendment." *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576 (1971); *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576, 585 (1967); *Trupiano v. United States*, 334 U.S. 699, 705, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948); *Norton v. State, Okl.Cr.*, 501 P.2d 877 (1972). **Therefore, once a defendant establishes that evidence was seized as the result of a search without a warrant, the burden shifts to the State to show that the search is reasonable because it falls within the "few specifically established and well delineated exceptions" to the Fourth Amendment requirement that a search have the prior approval of a judge or magistrate.** *Coolidge v. New Hampshire*, supra; *Katz v. United States*, supra; *Norton v. State*, supra; *Sam v. State, Okl.Cr.*, 500 P.2d 291, 295 (1972); *Edwards v. State*, 83 Okl.Cr. 340, 177 P.2d 143, 147 (1947). **It is clear that "the burden is on those seeking the exemption to show the need for it"** *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59, 64 (1951) and

⁸ PH, 11 at 12 and 5 at 13-20.

⁹ PH 5 at 21-25 and 6 at 1-4.

"it is fundamental that a waiver must be proved by the party alleging it" Edwards v. State, 83 Okl.Cr. 340, 177 P.2d 143, 146 (1947).

Case v. State, 1974 OK CR 27 [emphases added].

Furthermore,

We agree with the Court of Appeals that the seizure was made in violation of the Fourth Amendment and on [342 U.S. 48, 51] motion of respondent its fruits should have been excluded as evidence on his trial.

The Fourth Amendment 2 prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both "houses" and "effects." Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. See *Weeks v. United States*, 232 U.S. 383 (1914); *Agnello v. United States*, 269 U.S. 20 (1925). **Only where incident to a valid arrest, *United States v. Rabinowitz*, 339 U.S. 56 (1950), or in "exceptional circumstances," *Johnson v. United States*, 333 U.S. 10 (1948), may an exemption lie, and then the burden is on those seeking the exemption to show the need for it, *McDonald v. United States*, 335 U.S. 451, 456 (1948).** In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended. *Johnson v. United States*, *supra*. Officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure.

United States v. Jeffers, 342 U.S. 48 [1951] [emphases added].

Conclusion

The arresting officer McClintock is on the record on the issue of the basis of his search: he testified under oath that he had no search warrant. Defendant shows with the exhibits hereto that he did not even have an arrest warrant. Defendant satisfies his burden under *Case* - "...once a defendant establishes that evidence was seized as the result of a search without a warrant....", *supra* - by reference to this testimony. Accordingly, the burden is on the plaintiff to show a *valid* arrest or the exceptional circumstances meriting an exception to the warrant requirements of the state and federal Constitutions. If the plaintiff fails to show law and facts that merit this warrantless search, the evidence allegedly seized must be excluded.

Table of Authorities

1. *Katz v. United States*, 389 U.S. 347 [1967].
2. *Coolidge v. New Hampshire*, 403 U.S. 443 [1971].
3. *Mapp v. Ohio*, 367 U.S. 643, 645 [1961].
4. *Knowles v. Iowa*, 525 U.S. 113 [1998].
5. *Norton v. State*, 1972 OK CR 261.
6. *Case v. State*, 1974 OK CR 27.
7. *McGaughey v. State*, 2001 OK CR 33.

Respectfully submitted,


G. Donald Haslam, Jr., OBA #17873

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Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that on March 26, 2007 a true and exact copy of the foregoing was delivered to the office of the Washington County District Attorney.

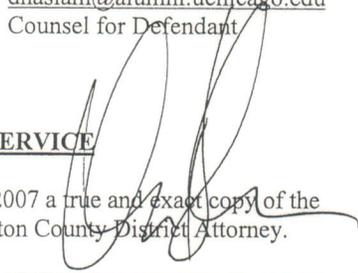

G. Donald Haslam, Jr.

Exhibit A

IN THE DISTRICT COURT OF WASHINGTON COUNTY
STATE OF OKLAHOMA

4/5/06

STATE OF OKLAHOMA EX REL., DHS,
Plaintiff,

Case No. JFP-93262
IV-D No. 53419001

v.

KENYATTA CARTER,
Defendant,

BENCH WARRANT

STATE OF OKLAHOMA, COUNTY OF WASHINGTON, ss:

To any law enforcement official in the State of Oklahoma:
Kenyatta Carter, Defendant, having been on the 17 day of March, 2006, duly charged in the
District Court of Washington County with **FAILURE TO APPEAR AND/OR FAILURE TO
PAY CHILD SUPPORT AS ORDERED.**

You are therefore commanded to arrest the above named Defendant
Kenyatta Carter (1607 S. Elm Ave., Bartlesville, OK, 74003, SSN: 558-19-0699 DOB:
8/17/1970, B/M) and bring him before that Court in accordance with the Judgment of the Court
and keep in the custody of the Sheriff of Washington County, Oklahoma, until further order of
the Court.

Given under my hand, with the seal of said Court affixed this 30th day of
March, 2006.

By order of the Court

To be Served Day or Night

Bond - \$ 12,000.00 Cash only, to be applied to child support.

Kyra F. Williams
JUDGE OF THE DISTRICT COURT

Martha Mersch, Court Clerk
COURT CLERK
By: Shalene Weising
Deputy

STATE OF OKLAHOMA, COUNTY OF _____, ss:
Received this Writ on the _____ day of _____, 20____,
and served the same by arresting the within named Defendant, _____
on this _____ day of _____, 20____.

Serving Attachments
\$ _____
Mileage
\$ _____

Sheriff _____
By: _____
Deputy

I, Martha Mersch, Court Clerk for Washington County, Oklahoma
hereby certify that the foregoing is a true, correct and full copy of
the instrument herewith set out as appears of record in the Court
Clerk's Office in Washington County, Oklahoma this

31 day of March, 2006

By: Shalene Weising
Martha Mersch
COURT CLERK

Exhibit B

OFFICE OF ADMINISTRATIVE HEARINGS: CHILD SUPPORT ENFORCEMENT DIVISION
DEPARTMENT OF HUMAN SERVICES
STATE OF OKLAHOMA

DISTRICT COURT
WASHINGTON COUNTY, OK
FILED

2006 MAR 23 P 3:13

STATE OF OKLAHOMA EX. REL., DHS)
)
Petitioner/Plaintiff,)
)
vs.)
)
KENYATTA CARTER)
)
Respondent/Defendant)

MARTHA MERSCH
COURT CLERK
Case No.: JFP-93-262
OAH NO.: 00-15087-74 DEPUTY
OK IV-D No.: 000053419001

ORDER TO RECALL BENCH WARRANT

Now on this 23rd day of March, 2006 this matter comes on pursuant to agreement the Department of Human Services, Child Support Enforcement Division that the Bench Warrant against Kenyatta Carter shall be recalled. AND the Court upon reviewing the file and being fully advised in the premises FINDS AND IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

The Bench Warrant issued by Department of Human Services, Child Support Enforcement Division against Kenyatta Carter be and is hereby recalled.

IT IS FURTHER ORDERED ADJUDGED AND DECREED by the Court the Respondent/Defendant, Kenyatta Carter, be and is hereby ordered to appear on the 21st day of April, 2006 before the undersigned Judge.

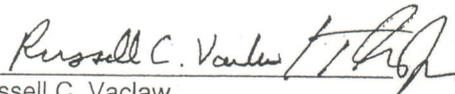


Judge of the District Court

CERTIFICATE OF SERVICE

I, Russell C. Vaclaw, do hereby certify that on the 23 day of March, 2006, I Faxed a true and correct copy of the above and foregoing instrument thereon to:

Cindy Pickerill
Child Support Enforcement
Facsimile #: 918-337-0873



Russell C. Vaclaw

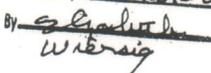
I, Martha Mersch, Court Clerk for Washington County, Oklahoma hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears of record in the Court Clerk's Office in Washington County, Oklahoma this
23 day of March 2006
By  Martha Mersch
COURT CLERK

Exhibit C

IN THE DISTRICT COURT IN AND FOR WASHINGTON COUNTY, OKLAHOMA
STATE OF OKLAHOMA

DISTRICT COURT
WASHINGTON COUNTY, OK
FILED

Kenyatta Carter
NAME OF ARRESTED PERSON

DATE OF BIRTH 8/17/70

No PC- 06-262 2006 JUN -5 A 9:14

MARTHA MERSCH
COURT CLERK
Janet
DEPUTY

ORDER FINDING PROBABLE CAUSE

NOW this 4th day of June, 2006, this undersigned Judge commenced a probable cause hearing for the above-named arrested person at 4:19 o'clock P.M. The arrested person appeared in person. No one appeared for the Washington County District Attorney's office.

This Judge reviewed the notarized Affidavit of Probable Cause of Glen McLintock of BPD, attached hereto.

No further evidence was presented.
 Additional sworn testimony was taken from _____, summarized as follows:

Having considered the evidence presented, this Judge finds there is probable cause to believe the arrested person committed the offense (s) of Fleeing a Law Enforcement Officer - 2nd 63 O.S. 2-402

He/She is to be detained. Bond is set : \$ ~~500~~ 500.00.
 Personal Recognizance
[Signature]
Judge of the District Court

Was arrested on JTP case - when warrant had already been recorded.

Martha Mersch, Court Clerk for Washington County, Oklahoma hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears of record in the Court Clerk's Office in Washington County, Oklahoma this 20 day of June 2006.
Janet
Deputy
MARTHA MERSCH
COURT CLERK

Exhibit D

Case No.	STYLE OF CASE	NATURE OF ACTION	ATTORNEYS
JFP-1993-00262	STATE OF OKLAHOMA EX REL CARMELIA HUDSON PLAINTIFF KENYATTA CARTER DEFENDANT	REQUEST TO DOCKET ADMINISTRATIVE ORDER	CINDY A PICKERILL CHILD SUPPORT ENFORCEMENT PO BOX 208 PAWHUSKA, OK 74056-208 SELBY CONNOR MADDUX & JANER 416 E 5TH STREET P. O. DRAWER Z BARTLESVILLE, OK 74005-5025 ROBERT C FRIES,

Judge: KYRA WILLIAMS Case Information: CHILD SUPPORT
Comments: 3-31-06 BENCH WARRANT MATCHES WITH 3-23-06 RECALL PER DHS/CS

Date	Entries	Book	Page	Fees	Cat.
6-21-1993	PETITION				
6-21-1993	PATERNITY SHOW CAUSE ORDER ISSD				
7-19-1993	ORDER				
2-13-2004	DOCKET SHEET SCANNED				
2-13-2004	REQUEST TO DOCKET ADMINISTRATIVE ORDER				
2-13-2004	ORDER OF MODIFICATION				
0-19-2005	REQUEST TO DOCKET ADMINISTRATIVE ORDER				
0-19-2005	ADMINISTRATIVE ENFORCEMENT ORDER				
1-09-2005	APPLICATION FOR CONTEMPT CITATION			\$20.00	CF
				\$10.00	CAMA
				\$1.00	RV
				\$10.00	OCIS
	10% OF CAMA Oklahoma Court Information System Fee - Effective 07/01/04				
1-09-2005	CITATION FOR CONTEMPT - DUCES TECUM SUBPOENA-CIVIL ISSD RETD TO DHS FOR SERVICE (2-17-06 9:00AM)				
2-01-2005	CITATION FOR CONTEMPT - DUCES TECUM SUBPOENA-CIVIL AFFIDAVIT OF SERVICE RETD CERTIFIED MAIL RECEIPT NO SIGNATURE NO DATE				
2-12-2005	ALIAS CITATION FOR CONTEMPT - DUCES TECUM SUBPOENA-CIVIL ISSD RETD TO DHS FOR SERVICE (3-17-05 9:00AM)				
11-17-2006	ALIAS CITATION FOR CONTEMPT - DUCES TECUM SUBPOENA-CIVIL AFFIDAVIT OF SERVICE RETD CERTIFIED MAIL RECEIPT SIGNED KENYATTA CARTER DATED 12-24-05 (3-17-06 9:00AM)				
12-17-2006	CM:WILLIAMS-PICKERILL-DEFT DOES NOT APPEAR (NO SERVICE). DEFT ORDERED BACK FOR MARCH 17, 2006 AT 9:00AM.				
12-17-2006	COURT MINUTE FILED				
13-17-2006	CM:WILLIAMS-PICKERILL-DEFT FAILS TO APPEAR. \$11,757.00 ARREARS. DEFT FOUND GUILTY OF CONTEMPT BY DEFAULT. BENCH WARRANT AUTHORIZED-\$12,000.00 CASH ONLY, TO BE APPLIED TO CHILD SUPPORT.				
13-17-2006	COURT MINUTE FILED				
13-23-2006	ORDER TO RECALL BENCH WARRANT				
13-31-2006	BENCH WARRANT ISSUED (CHILD SUPPORT)			\$50.00	SHF
14-21-2006	CM:WILLIAMS-PICKERILL-DEFT WITH ATTY R VACLAW. DEFT PLEADS NOT GUILTY, WAIVES JURY TRIAL. PARTIES ORDERED BACK FOR PRETRIAL MAY 19, 2006 AT 9:00AM.				
14-21-2006	COURT MINUTE FILED				
15-19-2006	CM:WILLIAMS-PICKERILL NOT PRESENT-DEFT WITH ATTY R VACLAW. DEFT TO PAY \$350.51 CURRENT PLUS \$100.00 ARREARS PER MONTH. ALSO RESPONSIBLE FOR CURRENT COURT COSTS OF \$91.00.				
15-19-2006	COURT MINUTE FILED				
15-19-2006	JOURNAL ENTRY				
16-05-2006	BENCH WARRANT EXECUTED 6-4-06 (ALREADY BEEN RECALLED BY JUDGE WILLIAMS ON 3-23-06)				
11-22-2007	SUBSTITUTION OF COUNSEL (R FRIES FOR R VACLAW FOR DEFT)				
				Total Fees	\$91.00
				Total Unassigned	

I, Martha Mersch, Court Clerk for Washington County, Oklahoma hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears of record in the Court Clerk's Office in Washington County, Oklahoma this 20th day of January 2007.
Martha Mersch
COURT CLERK