LEGAL UPDATE

City of Madison Police Department

Spring 2018 Assistant Chief Victor Wahl

Traffic Stops

***State v. Smith*, 379 Wis.2d 86 (2018); Decided January 9, 2018 by the Wisconsin Supreme Court.**

The *Smith* case started with a simple traffic stop. The officer—MPD's own Sergeant Bernie Gonzalez—was monitoring an area where shots had been fired the previous evening. He observed a vehicle drive slowly through the area, stop in the roadway and then drop someone off before driving away. Sergeant Gonzalez ran the vehicle's license plate, and learned that the registered owner (a female) had a suspended driver's license.

Sergeant Gonzalez performed a traffic stop and approached the vehicle. When he was about 5-10 feet away, he recognized that the driver (Smith) appeared to be a male. As Sergeant Gonzalez attempted to contact the driver, Smith indicated that the driver's side door and window were inoperable. Sergeant Gonzalez moved to the passenger side, and opened the door to speak with Smith. Smith was intoxicated and subsequently arrested for OMVWI. Smith sought to suppress all evidence from the stop, and the case reached the Wisconsin Supreme Court.

Smith first argued that any reasonable suspicion justifying the stop had dissipated early in the encounter and that there was no lawful basis to continue the stop beyond that point. In *State v. Newer*, 306 Wis.2d 193 (Ct. App. 2007) the Court of Appeals ruled that reasonable suspicion for a traffic stop generally exists if a vehicle's registered owner does not have a valid driving status. And while there were other circumstances present that could have provided reasonable suspicion, the *Smith* court limited its analysis to this issue (assuming that the only reasonable suspicion justifying the stop was the fact that the registered owner of the vehicle did not have a valid driver's license). The court rejected Smith's argument.

The duration of a traffic stop is limited to whatever time is necessary to complete the tasks reasonably associated with the stop. This includes "ordinary inquiries" typically associated with a traffic stop: identifying the driver, checking the driver's license status, verifying proof of insurance, checking the vehicle's registration, etc. If the reason for the stop is traffic-related, then the duration of the stop is typically limited to the time needed to make these inquiries and issue a citation or warning. If additional reasonable suspicion develops during this time, then the stop can be extended. *Smith* makes it clear, however, that in the context of a traffic stop, officers are entitled to make these "ordinary inquiries," even if the reasonable suspicion justifying the stop has dissipated. So it was permissible for Sergeant Gonzalez to continue with the traffic stop even after recognizing that the driver was not likely to be the registered owner.

Smith also argued that it was impermissible for Sergeant Gonzalez to open the passenger door (there was some dispute about the timing of the door being opened and whether Smith assisted or not; the court assumed for purposes of the case that Sergeant Gonzalez had opened it). The court pointed out that officers have "the right to a face-to-face encounter with a driver during a lawful traffic stop." This is reflected in the authority to order a driver out of a vehicle during a stop (*Pennsylvania v. Mimms*, 434 U.S. 106 (1977)). The court concluded it was reasonable for Sergeant Gonzalez to open the door and rejected Smith's claims.

School Legal Issues—Review

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the U.S. Supreme Court ruled that the Fourth Amendment applies to public school officials. Officers are often called upon to conduct investigations in public schools, and are often asked to assist school officials with searches. What standards apply to officers in these situations?

The *T.L.O.* court observed that public school students do not give up all constitutional protections while at school, but that they do have reduced Fourth Amendment protections. This reduced protection is based on an individual's status as a student in a school setting. So, adult students still have reduced privacy expectations in a school setting, while minors outside a school setting are not subject to the reduced protections that students in a school setting are.

While stating "school officials must adhere to the requirements of the Fourth Amendment," the *T.L.O.* court recognized the very different roles and abilities of school officials (as opposed to law enforcement). So, the *T.L.O.* decision stated that school officials do not need a warrant or probable cause to justify a search of a student. Instead, public school officials may perform searches if they have a reasonable suspicion that a student has violated a law or

school rule, and that the search will yield evidence of that violation. This burden – reasonable suspicion – is a low one.

Law enforcement officers are generally required to have probable cause or a warrant prior to performing a full-scale search of a person. However, the Wisconsin Supreme Court has ruled that if an officer is performing a search of a student at the request of, or in conjunction with, school officials, the lower burden of reasonable suspicion applies. *State v. Angelia D.B.,* 211 Wis.2d 140 (1997). Searches initiated by police without the involvement of school officials – even of students on school grounds – will be governed by the usual standards for police searches (the reduced reasonable suspicion standard will not apply).

School officials' authority to perform searches clearly applies to students on school property during the school day, but will generally also apply to other school settings that may not be on school property (athletic events, field trips, dances, etc.).

The scope of a search performed by a school official – or by an officer acting at the request of a school official – must be reasonable. So, a search for a stolen textbook would be limited to locations where the book could be concealed (likely including bags, purses, etc., but excluding pockets, shoes, etc.). The *T.L.O.* court described a reasonable search as being "when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

This reasonable suspicion standard also applies to students' vehicles parked on the school premises. The normal probable cause standard applies to vehicles parked off school premises. *State v. Schloegel*, 319 Wis. 2d 741 (Ct. App. 2009). The scope of a vehicle search in this context must also be reasonable.

Consent searches of students may also be performed by school officials or officers. Consent must be given freely and voluntarily, and the student must have authority over the item or location being searched. Consent must be clearly given, and the scope of the search being requested must be clearly articulated (and described in a report). Expect that courts will closely scrutinize any search based on the consent of a minor.

In most situations, public school students will have no reasonable expectation of privacy in their lockers. *Isiah B. v. State*, 176 Wis. 2d 639 (1993). This presumes that the school district has a written policy retaining ownership and control of school lockers and has communicated this to students (which is the case in the Madison Metropolitan School District). As a result, school officials can legally search students' lockers without any individualized suspicion. Officers may also assist school officials in performing these searches, if requested.

School officials are generally not required to provide a student with *Miranda* warnings prior to questioning (unless the school official is acting as an agent of police). However, if an officer is conducting a custodial interrogation of a student in a school setting *Miranda* is required. Remember that the definition of "custody" (for *Miranda* purposes) is a formal arrest, or the degree of restraint typically associated with a formal arrest. So, some situations in which officers interrogate students in a school setting will be considered custodial for *Miranda* purposes. A *Miranda* waiver must be obtained prior to questioning in these circumstances, and the questioning will need to be audio recorded.

Federal Firearms Laws

While a number of Wisconsin statutes apply to firearms in a variety of contexts, there are also a number of federal firearms statutes. Some of these have a broader application or more significant penalties than state laws. A few examples:

Possession of a Firearm

Federal law prohibits certain categories of people from possessing firearms. Many of the categories overlap with or are similar to state law restrictions: convicted felons, certain mental health adjudications, etc. However, federal law prohibits two categories of people from possessing firearms that Wisconsin law does not address:

First, federal law prohibits anyone convicted of a misdemeanor crime of domestic violence from possessing a firearm. The prohibition applies to domestic related convictions that include the use or attempted use of physical force, or the threatened use of a deadly weapon.

Also, federal law prohibits an unlawful user of a controlled substance or someone addicted to a controlled substance from possessing a firearm. This is generally defined as:

> A person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person

seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year. For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.

Possession of Ammunition

All of the categories of people prohibited from possessing a firearm under federal law are also prohibited from possessing ammunition.

Obliterated Serial Number

Federal law prohibits possession of a firearm with an obliterated serial number.

Possession of a Firearm in Furtherance of Certain Crimes

It is a separate federal crime to possess a firearm in furtherance of a federal crime of violence or drug trafficking crime. This primarily applies to robberies and delivery or possession with intent to deliver controlled substance cases. Certain mandatory minimum sentences apply depending on whether the firearm was simply possessed, was brandished or was fired during the incident.

Understand that the United States Attorney's Office is not obligated to pursue any of these charges, and prosecution decisions will be based on a variety of factors (particularly the criminal history of the offender). Also, the federal system operates differently than Wisconsin's system, and MPD officers do not have authority to arrest someone for a federal crime. If an investigation shows that a federal prosecution may be appropriate, consider making an arrest for a state charge (if applicable). Your district detective lieutenant or investigative services lieutenant can contact the US Attorney's office to explore federal prosecution. A thorough and well-documented investigation on the front end will help this process. Clearly articulate where the firearm was located, the type of firearm (caliber and manufacturer), whether it was loaded, how accessible it was to the suspect, and the proximity of the weapon to other evidence (particularly evidence of drug trafficking). If you are able, also try to get a statement from the suspect articulating that they knowingly possessed the firearm and why they had it.

Asset Forfeiture

A recent change in Wisconsin state law impacts civil asset forfeiture in some significant ways. These changes will limit the ability of law enforcement agencies in Wisconsin to utilize asset forfeiture proceedings in State court, or to work with Federal agencies to share forfeitures processed through federal court. A few aspects of the law change relating to forfeitures under state law:

Conviction required—no state law forfeiture can take place unless a person has been convicted of the criminal offense that was the basis for the seizure of the item or property. This requirement can be waived by a judge during forfeiture proceedings under certain circumstances:

- The defendant has fled the jurisdiction
- The defendant has died
- The defendant was deported
- The defendant was granted immunity in exchange for testifying or otherwise assisting law enforcement
- The property is contraband
- The property was been unclaimed for at least 9 months

The criminal charge must generally be issued within 6 months of the property seizure. The court can grant extensions if probable cause exists and the additional time is warranted. If 6 months pass with no criminal charge and no extension, the seized property must be returned.

The court must order property to be returned within 30 days of an acquittal or dismissal of criminal charges that were the basis for the forfeiture.

Forfeiture proceedings—the law outlining state court forfeiture proceedings has also changed. One modification is to the burden of proof needed to support forfeiture, which has been changed to clear and convincing evidence.

Privilege—the new law specifies that the defendant or convicted offender may invoke the right against self-incrimination or the marital privilege during the forfeiture proceedings. The court is allowed to draw an adverse inference from the invocation.

Innocent property owner—the law expressly states that the property of an innocent owner may not be forfeited. The law outlines a specific process for persons alleging they are innocent owners to seek return of their property.

Drug possession—seizure of a vehicle under state law is no longer permitted for simple possession of most types of

drugs (even for felony offenses). Schedule I or II opiates are the only exception.

Pretrial hearing—the law also modified the process to seek a court order to have seized property returned. This hearing can take place prior to trial, and applies to any seized property (not just property seized in contemplation of forfeiture). The court is required to return property under any of these circumstances:

- If it is likely that the final judgment will require the property to be returned and the property is not reasonably needed for evidence or other investigatory reasons.
- If all proceedings and investigations in which the property might be required have been completed.
- If the property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding, the property is not likely to be needed for payment of victim compensation, restitution, or fines, and the property is not reasonably needed as evidence or for other investigatory reasons.

If the property is ordered to be returned, the court must direct the owner not to sell, transfer or otherwise encumber it until the final forfeiture proceedings are complete.

Proportionality—the new law prohibits the forfeiture of property if the reviewing court finds that it would be grossly disproportional to the crime for which the property was seized. Four factors are outlined for consideration:

- The seriousness of the offense
- The purpose of the statute authorizing the forfeiture
- The maximum fine for the offense
- The harm that actually resulted from the defendant's conduct

Attorney fees—a person who seeks the return of property subject to forfeiture may be awarded reasonable attorney fees if the court finds that the forfeiting agency or prosecuting attorney has "arbitrarily and capriciously" pursued the forfeiture action.

Disposition of forfeited property—the new law makes some changes to how property must be disposed of once it has been forfeited through the court:

Money: for a drug-related seizure of money, the agency may retain up to 50% to cover forfeiture expenses, The remaining amount must be deposited to the state school fund. The agency must provide the State with an itemized report showing actual forfeiture expenses. Money seized in non-drug cases must all be deposited into the state school fund.

Vehicles: the agency may retain the vehicle for official use for up to one year. At that point, the agency can sell the vehicle and dispose of the proceeds as described above (retaining up to 50% for actual expenses and depositing the remainder in the State school fund). Or, the agency can retain the vehicle for continued official use, in which case they need to deposit 30% of the value of the vehicle into the State school fund.

Other property: other property that is forfeited must be sold. The agency may retain up to 50% of the proceeds for actual forfeiture expenses, with the remainder going to the State school fund.

Federal forfeitures—it has generally been advantageous for state and local agencies to partner with federal agencies and process civil forfeitures through the federal court system. The changes to Wisconsin's state forfeiture laws also impact the ability of state and local law enforcement agencies to work with federal agencies in this way.

First, the law only allows a Wisconsin law enforcement agency to accept any federal forfeiture proceeds if there is a criminal conviction (in the state or federal system) for the crime that was the basis for the seizure. As with state forfeitures, there are several exceptions to the conviction requirement:

- The defendant has fled the jurisdiction
- The defendant has died
- The defendant was deported
- The defendant was granted immunity in exchange for testifying or otherwise assisting law enforcement
- The property was been unclaimed for at least 9 months

Also, the state or local agency accepting federal forfeiture proceeds must prepare an itemized report of actual forfeiture expenses. The report must be submitted to the State Department of Administration.