LEGAL UPDATE

City of Madison

Spring 2004 Lieutenant Victor Wahl

Frisks

***State v. Kyles*, No. 02-1540 (2004); Decided March 2, 2004 by the Wisconsin Supreme Court.**

In *Kyles*, an officer stopped a vehicle for operating without headlights. The stop occurred at about 8:45pm on a fairly busy street. The officer later testified that the area in which the stop occurred was "pretty active," in terms of criminal activity. Kyles was a passenger in the vehicle, and the officer did not have any suspicion that anyone in the vehicle was involved in criminal activity. The officers received consent to search the vehicle, and asked Kyles to exit. Kyles was wearing a "big, down, fluffy" jacket, appropriate for the cold weather that night. When he exited the vehicle he appeared nervous, and placed his hands in his coat pockets. The officer directed Kyles to remove his hands from his pockets, which he did. As Kyles walked to the rear of the car he again placed his hands in his pockets. The officer again directed Kyles to remove his hands from his pockets, and he complied. The officer then conducted a frisk of Kyles, finding marijuana. The frisk occurred about eight seconds after Kyles had exited the car.

Kyles challenged the frisk, arguing that the officer did not have reasonable suspicion that he was armed. Both the trial court and the Court of Appeals agreed, and the State appealed the case to the Wisconsin Supreme Court. The Supreme Court (by a 4-2 vote) agreed with the lower courts and ruled that the circumstances did not create a reasonable suspicion that Kyles was armed.

The first issue addressed by the *Kyles* court was to what extent—if any—an officer's subjective belief about the dangerousness of a suspect he or she is frisking is relevant to the reasonable suspicion determination. The officer who frisked Kyles had testified that he "didn't feel any particular threat" from Kyles before conducting the frisk. The court concluded that a subjective fear is not required:

> An officer's belief that his or her safety or that of others is in danger because the individual may be armed is not a prerequisite to a valid frisk. Because an objective standard is applied to test for reasonable suspicion, a frisk can be valid when an officer does not actually feel threatened by the person frisked or when the record is silent about the officer's subjective fear that the individual is armed an dangerous.

Since the reasonable suspicion analysis requires an objective evaluation of the facts, an officer's subjective perception of danger or fear is not required. However, an officer's subjective perceptions can be relevant to the analysis, and the officer can be asked about them in court.

The court then reviewed the factors articulated by the State in support of the frisk:

- The suspect twice inserted his hands into his pockets after being directed to remove them by the officer.
- The suspect wore a large coat in which a weapon could easily be concealed.
- The suspect appeared nervous.
- The stop occurred at night.
- The area in which the stop occurred was described as being "pretty active" with respect to criminal activity.

The *Kyles* court analyzed the totality of the circumstances, taking the above factors into account, and concluded that the officer did not have reasonable suspicion to justify a frisk.

The State had argued for a bright-line rule that a frisk should be justified any time a suspect places his or her hands in his or her pockets after being directed not to. The *Kyles* court rejected this bright-line rule, but did state that "an individual's failure to obey the direction of an officer to keep his hands in the officer's sight is a significant factor" when analyzing the reasonableness of a frisk. Kyles' actions (twice putting his hands in his pockets) was described by the arresting officer as a "nervous habit," and not as threatening or menacing.

The court also concluded that the size of Kyles' coat (large and fluffy) could be considered as part of the totality of the circumstances, but was not particularly suspicious in this particular case (as it was a cold, winter night). Similarly, a display of unusual nervousness—generally a factor that can be considered in the frisk analysis—was not particularly relevant in Kyles' case (as the officer testified that Kyles was "a little nervous" and that nervousness was common during traffic stops).

Finally, the court addressed the time and location of the frisk. Both the time of a frisk (if late at night) and the location (if in a "high crime" area) will tend to support the reasonableness of a frisk. The frisk of Kyles occurred at 8:45pm, on a busy street, in an area that was described as "pretty active" (in terms of criminal activity). The *Kyles* court considered these factors in its totality of the circumstances analysis, but provided no explanation for the apparent little weight given them (aside from the fact that the State did not emphasize them).

Two justices dissented, and argued—correctly—that prior frisk cases decided by the Wisconsin Supreme Court have

upheld frisks based on less indication of suspicious behavior than was present in Kyles' arrest. It is true that a number of reported Wisconsin decisions have upheld frisks under circumstances similar to those present in the *Kyles* case, or in cases where even less suspicious behavior was present. The majority decision did not address this issue, simply stating, "there was not sufficient articulable, objective information to provide the officer with reasonable suspicion that the defendant was armed an dangerous to the officer or others."

Obstructing

***State v. Reed*, No. 03-1781 (Ct. App. 2004); Decided April 22, 2004 by the Wisconsin Court of Appeals.**

In *Reed*, an officer came across a vehicle pulled onto the side of a highway. When the officer stopped to investigate, he contacted Reed, who was sitting in the passenger seat. As the officer spoke to Reed, he noted Reed's speech to be slurred and that his eyes were glassy and bloodshot. Reed told the officer that he had not been driving, and that another individual had pulled the car to the side of the road (due to the two of them arguing) and had walked away.

Reed refused to perform field sobriety tests and was arrested for OMVWI. Another officer checked the area for the other subject identified by Reed without success. That individual later told officers that he was not with Reed the night of the incident. In addition to the OMVWI charge, Reed was charged with Obstructing an Officer (946.41) based on his false statements.

In *State v. Espinoza*, 250 Wis.2d 804 (Ct. App. 2002), the Wisconsin Court of Appeals ruled that a suspect's simple denial of guilt could not be the basis for an obstructing charge. In *Espinoza*, a theft suspect told the arresting officers that they "had the wrong guy." He was charged with obstructing an officer based on this statement. The *Espinoza* court ruled that a mere denial of guilt—without more—was not sufficient to support an obstructing charge (the "exculpatory denial" exception). Reed argued that the *Espinoza* decision foreclosed an obstructing charge against him.

The *Reed* court first pointed out that had Reed "merely denied driving while intoxicated, *Espinoza* would protect him from an obstruction conviction." However, because Reed provided false information—beyond a simple denial of guilt—to the officer, his obstructing arrest and conviction were appropriate. The court also rejected Reed's argument that, since the officers did not perform any extra work based on his false statements until after he was arrested, his statements did not obstruct them. The court reinforced the irrelevance of this: "Knowingly giving false information to mislead an officer is obstruction as a matter of law; and proof of actually obstructing an officer is unnecessary."

Statutory Changes

Substantial Battery

§939.22(38), which defines substantial bodily harm, has been modified:

> **939.22(38)** "Substantial bodily harm" means bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a temporary loss of consciousness, sight or hearing, a concussion; or a loss or fracture of a tooth.

Endangering Safety by use of a Dangerous Weapon

§941.20 has been amended to provide a more severe penalty if a firearm is pointed at certain public safety workers:

> **941.20(1m)(b)** Whoever intentionally points a firearm at or towards a law enforcement officer, a fire fighter, an emergency medical technician, a first responder, or an ambulance driver who is acting in an official capacity and who the person knows or has reason to know is a law enforcement officer, a fire fighter or an ambulance driver, is guilty of a Class H felony.

Throwing or Discharging Bodily Fluids

§941.375 is a new statute:

> **941.375 Throwing or discharging bodily fluids at public safety worker. (1)** in this section:
>
> (a) "Ambulance" has the meaning specified in s. 146.50(1)(am).
>
> (b) "Public safety worker" means an emergency medical technician licensed under s. 146.50, a first responder certified under s. 146.50(8), a peace officer, a fire fighter, or a person operating or staffing an ambulance.
>
> **(2)** Any person who throws or expels blood, semen, vomit, salive, urine, feces, or other bodily substance at or toward a public safety worker under all of the following circumstances is guilty of a Class I felony:
>
> (a) The person throws or expels the blood, semen, vomit, saliva, urine, feces or other bodily substance with the intent that it come into contact with the public safety worker.
>
> (b) The person throws or expels the blood, semen, voimt, saliva, urine, feces, or other bodily substance with the intent to cause bodily harm to the public safety worker.
>
> (c) The public safety worker does not consent to the blood, semen, vomit, saliva, urine, feces, or other bodily substance being thrown or expelled at or toward him or her.

Methamphetamine Possession

Methamphetamine was removed from the substances included in §946.41(3g)(d), and a new subsection was added, increasing the penalty for possession or attempted possession of methamphetamine:

> **946.41(3g)(g)** *Methamphetamine.* If a person possesses or attempts to possess methamphetamine or a controlled substance analog of methamphetamine, the person is guilty of a Class I felony.

Worthless Checks

Two subsections of §943.24 have been modified:

941.24(3) Any of the following is prima facie evidence that the person at the time he or she issued the check or other order for the payment of money, intended it should not be paid:

***

(b) Proof that, at the time of issuance, the person did not have sufficient funds or credit with the drawee and that the person failed within 5 days after receiving written notice of nonpayment or dishonor to pay the check or other order, delivered by regular mail to either the person's last-known address or the address provided on the check or other order; or

(c) Proof that, when presentment was made within a reasonable time, the person did not have sufficient funds or credit with the drawee and the person failed within 5 days after receiving written notice of nonpayment or dishonor to pay the check or other order, delivered by regular mail to either the person's last-known address or the address provided on the check or other order.

Defrauding

§943.21 has been amended to include gas stations and recreational attractions (in addition to hotels, restaraunts and taxicabs):

943.21 Fraud on hotel or restaurant keeper, recreational attraction, taxicab operator, or gas station. (1m) Whoever does any of the following may be penalized as provided in sub (3):

(a) Having obtained any beverage, food, lodging, ticket or other means of admission, or other service or accomodation at any campground, hotel, motel, boarding or lodging house, restaurant, or recreational attraction, intentionall absconds without paying for it.

***

(d) Having obtained gasoline or diesel fuel from a service station, garage, or other place where gasoline or diesel fuel is sold at retail or offered for sale at retail, intentionally absconds without paying for the gasonline or diesel fuel.

***

(1c) In this section, "recreational attraction" means a public accomodation designed for amusement and includes chair lifts or ski resorts, water parks, theaters, entertainmnet venues, racetracks, swimming pools, trails, golf courses, carnivals, and amusement parks.

***

(2g) If a person has obtained a ticket, another means of admission, or an accomodation or service provided by the recreational attraction, his or her failure or refusal to pay a recreational attraction the established charge for the ticket, other means of admission, or accomodation or service provided by the recreational attraction constitutes prima facie evidence of an intent to abscond without payment.

Stalking

Several modifications have been made to the stalking statute:

940.32 Stalking (1) In this section:

(a) "Course of conduct means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following:

***

6m. Photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.

***

10. Causing any person to engage in any of the acts described in subds. 1. to 9.

***

(d) "Suffer serious emotional distress" means to feel terrified, intimidated, threatened, harassed or tormented.

(2) Whoever meets all of the following criteria is guilty of a class I felony:

(a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.

(b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.

(c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

(2e) Whoever meets all the following criteria is guilty of a Class I felony:

***

(b) The actor knows or should know that the act will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.

(c) The actor's act causes the specific person to suffer serious emotional distress or induces fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

Trash Searches—Expectation of Privacy

***State v. Sigarroa,* No. 03-0703 (2003); Decided December 10, 2003 by the Wisconsin Court of Appeals.**

[Thanks to Officer Matt Tye for submitting this summary]

In *Sigarroa*, a detective went to an apartment complex to conduct a garbage search. The detective was acting upon several anonymous tips that Sigarroa, a resident of an apartment in the complex, was involved in drug dealing. The detective drove into the parking lot of the apartment complex and walked over to the dumpster. There were no gates or barriers preventing access to the dumpster and the lid to the dumpster was open. The detective removed 4 black plastic trash bags knotted at the top. Inside the bags the detective later found marijuana seeds and stems, a note stating there was "weed" in the closet and some unburned "Chore Boy." The dumpster was visible from the road and located 170 feet

from the public street and 53 feet from the apartment building. The entrance to the apartment complex parking lot had a "Private Property" sign posted, which the detective testified he did not see. The detective did not ask for permission from the apartment owner or any of its residents to search the dumpster, nor did the detective have a warrant to search the dumpster. A search warrant—based, in part, upon the evidence discovered in the dumpster—was obtained for Sigarroa's apartment and vehicle. The warrant resulted in the discovery of crack cocaine and drug paraphernalia.

Sigarroa sought to suppress the evidence obtained from the dumpster, claiming that the warrantless search violated his Fourth Amendment right against unreasonable search and seizure. The trial court ruled that, based upon the totality of the circumstances, the search was reasonable. The court focused on the fact that the dumpster was not enclosed and was available for use by the other residents of the apartment . Sigarroa was ultimately convicted of conspiracy to possess cocaine with intent to deliver and maintaining a dwelling used for manufacturing, keeping, or delivering controlled substances. Sigarroa appealed his conviction, again arguing that he had a reasonable expectation of privacy in his trash, and that the police had therefore violated his Fourth Amendment rights by searching it without a warrant.

The State and Sigarroa proposed two different tests for determining the constitutionality of warrantless garbage searches. The State argued that these searches should be analyzed in a two-part test:

- whether the garbage was abandoned, and
- whether the garbage was found within the curtilage or in open fields

In applying this two-part test the State looked to *United States v. Dunn*, 480 U.S. 294, 301 (1987), which stated that a four-pronged analysis is used to determine whether an area is in the curtilage or in open fields:

- the proximity of the area claimed to be in the curtilage of the home,
- whether the area is included within an enclosure surrounding the home,
- the nature and uses to which an area is put, and
- the steps taken by the resident to protect the area from observation by people passing by.

Sigarroa suggested a different test based on *State v. Stevens*, 123 Wis.2d 303, 316, 367 N.W.2d 788 (1985):

- whether the individual by his or her conduct has exhibited an actual, subjective expectation of privacy, and
- whether that expectation is a justifiable one which society will recognize as reasonable.

The Appellate Court ruled that the modern and correct test is the one suggested by Sigarroa. The Court cited *California v. Greenwood*, 486 U.S. 35 (1988), *United States v. Shanks*, 97 F.3d 977, 978-79 (7th Cir. 1996), and *State v. Yakes*, 226 Wis. 2d 425, 433 (Ct.App.1999). In *Greenwood*, the Court ruled that the defendant did not have a reasonable expectation of privacy for garbage left curbside. The Court did not examine whether or not the garbage was within the curtilage, but ruled that there was no reasonable expectation of privacy since the garbage bags on the curb were accessible to animals, children and scavengers. In *Shanks*, the defendant sought Fourth Amendment protection for garbage placed adjacent to a public alley. The *Shanks* Court ruled that "the mere intonation of curtilage does not end the inquiry," and that no reasonable expectation of privacy existed since the garbage was exposed to the public. Finally, in *Yakes*, the Court concluded that there was no reasonable expectation of privacy in a dumpster that was in a commercial area because the area was open to the public and the defendant took no reasonable steps to privatize the area.

The *Sigarroa* Court then applied the *Stevens* test suggested by Sigarroa and listed above. The Court first concluded that Sigarroa did not have an actual demonstrated subjective expectation of privacy for the garbage in the dumpster. The Court based its conclusion on the following:

- the garbage was placed in the dumpster located at the far rear of the property
- the garbage was placed in the dumpster with the full knowledge and expectation that it would be picked up for disposal
- the fence to the property was only on three sides and did not impede access to the property or the dumpster
- although the property had a "Private Property" sign on it and the dumpster had signs on it warning that there should be no playing on or around the dumpster, the signs did not bar observation of the dumpster from the street or impede access to the dumpster
- the dumpster was in an area totally unassociated with notions of privacy

The Court then analyzed whether—had Sigarroa demonstrated an actual subjective expectation of privacy in the dumpster—this would be an expectation of privacy that society would recognize as reasonable. The Court held that society would not recognize a reasonable expectation of privacy when garbage is thrown into a dumpster with the knowledge and expectation that the garbage would be turned over to a third party. The garbage collector is not the only third party one can envision taking control of this garbage, as scavengers and others also have access to the garbage in the dumpster.

This does not establish a bright line rule for determining if someone has an expectation of privacy in his or her trash. The facts of the particular situation would have to be analyzed through the test articulated by the Court to determine if the suspect has a subjective expectation of privacy and if that expectation is one that society would reasonably accept.