LEGAL UPDATE

City of Madison Police Department

Spring 2011 Captain Victor Wahl

Vehicle Searches

***State v. Smiter*, 793 N.W.2d 920 (Ct. App. 2010); Decided December 28, 2010 by the Wisconsin Court of Appeals.**

***State v. Dearborn*, 327 Wis. 2d 252 (2010); Decided July 15, 2010 by the Wisconsin Supreme Court.**

The *Smiter* and *Dearborn* cases reflect some of the first published decisions from Wisconsin courts interpreting *Arizona v. Gant*. *Gant*, decided by the U.S. Supreme Court in 2009, significantly limited the circumstances under which officers are permitted to search a vehicle incident to the arrest of the driver or an occupant. *Gant* ruled that such a search is only permitted in either of two situations:

- The arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.
- It is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

Most of the litigation on vehicle searches incident to arrest since *Gant* have focused on the second exception.

In *Smiter*, officers observed a vehicle violate several traffic laws and stopped it. As the officers approached the vehicle, they observed the front passenger reach under the seat and throw what appeared to be a cigar out the window. An officer examined the item and found it to contain a substance that appeared to be marijuana. The passenger—Smiter—was removed from the vehicle and arrested. Officers subsequently searched the vehicle and located fifty-three individual packages of cocaine under Smiter's seat.

Smiter was subsequently charged with possession with intent to deliver a controlled substance for the cocaine located under his seat. He challenged the vehicle search, arguing that it was not permitted under *Gant*.

Smiter first argued that since the officers did not smell marijuana in the vehicle they had no reason to believe more drugs would be located within it. The court quickly dispensed with this argument, stating, "a police officer does not need to smell marijuana burning inside a vehicle in order to form a reasonable basis that additional drugs or evidence may be located inside a vehicle."

Smiter's second argument was that since the officers had already seized the marijuana blunt he threw out the window, they had all the evidence necessary to charge him and any further searching was unreasonable. The court viewed this argument as "nonsensical," and made it clear that if a search incident to arrest is permissible under *Gant*, police are not required to stop searching once any evidence is located.

In *Dearborn*, a DNR warden stopped a subject for having a revoked driver's license. The subject—Dearborn—exited the vehicle and locked it. A lengthy physical altercation with the warden ensued, and Dearborn was eventually taken into custody. After the arrest, the truck was unlocked and searched, and a small amount of marijuana was located.

While most of the *Dearborn* decision focused on another issue (good faith), the court concluded that the search of the vehicle was not permitted under *Gant*, since there was no reason to believe that Dearborn's vehicle contained evidence relevant to the offenses for which he had been arrested (driving with a revoked driver's license and resisting an officer).

The *Smiter* and *Dearborn* decisions are consistent with how other jurisdictions have been interpreting *Gant*. Courts have consistently concluded that if the offense of arrest is something for which physical evidence is relevant (OMVWI, drug offenses, etc.) then a vehicle search incident to that arrest will be permissible.

Juvenile Interrogations

***State v. Dionicia M.*, 329 Wis.2d 524 (Ct. App. 2010); Decided August 24, 2010 by the Wisconsin Court of Appeals.**

In *Dionicia*, an officer received a request to locate a truant high school student (fifteen years of age) and return her to school. The officer located the juvenile a short distance from the school, and asked her to get in the back seat of his squad so he could return her to school. The juvenile was not frisked or handcuffed, but the squad doors were locked.

The officer recalled that the juvenile was a suspect in a battery case. During the drive back to school, the officer asked her if she had been involved in the battery, and the juvenile replied that she had been. This conversation was not recorded.

Once they arrived at school, the officer escorted the juvenile into an office, turned on a recording device, read the juvenile her *Miranda* rights and questioned her about the battery.

The juvenile subsequently sought to have her statements suppressed, since they had not been recorded.

In *State v. Jerrell C.J.*, 283 Wis. 2d 145 (2005), the Wisconsin Supreme Court ruled that all custodial interrogations of juveniles must be electronically recorded where feasible. Statements that do not comply with this requirement will not be admissible.

The *Dionicia* court first addressed whether the juvenile was in custody at the time the officer first questioned her about the battery (in the squad car). The court concluded that since she had been placed in the back of a locked squad car, and was being conveyed back to school, that the juvenile was in custody and was subject to custodial interrogation (triggering the recording requirement of *Jerrell C.J.*).

The court then addressed whether it was "feasible" for the officer to have recorded the initial statement. The court concluded that it was feasible, and rejected the argument that the simple lack of a recording device in the vehicle did not make it unfeasible to record a statement: "'Feasible' in this context is not a synonym for 'effortless.'" Because the officer could have simply waited the few minutes until he arrived at the school and had access to a recording device, it was feasible for him to have done so and the recording requirement of *Jerrell C.J.* applied.

Finally, the court considered whether the statement obtained by the officer once they were at the school (which was preceded by *Miranda* warnings and was recorded) was admissible. The Court ruled that it was not, viewing the entire incident as one interrogation:

> We conclude *Jerrell C.J.* does not allow the admission of partially recorded interrogations of juveniles…a major purpose of the *Jerrell C.J.* rule is to avoid involuntary, coerced confessions by documenting the circumstances in which a juvenile has been persuaded to give a statement. This purpose is not served by allowing an officer to turn on the recorder only after a juvenile has been convinced to confess.

Warrantless Entries

***Hanson v. Dane County*, 608 F.3d 335 (7th Cir. 2010); Decided June 15, 2010 by the Seventh Circuit Court of Appeals.**

This case arose from a 911 disconnect call to the Dane County 911 Center. Officers were dispatched after the dispatcher's return call went unanswered. Responding officers entered the residence (without consent) and eventually arrested one of the residents for domestic battery. The charges were eventually dismissed, and the suspect sued the County for a variety of issues. One claim was that the officers did not have grounds to enter his residence and that they should have left as soon as his wife asked them to leave (which was shortly after their entry).

The Seventh Circuit Court of Appeals rejected this argument:

> We think that a 911 call provides probable cause for entry, if a call back goes unanswered. The 911 line is supposed to be used for emergencies only. A lack of an answer on the return of an incomplete emergency call implies that the caller is unable to pick up the phone—because of injury, illness, or a threat of violence…Any of these three possibilities supplies both probable cause and an exigent circumstance that dispenses with the need for a warrant.

Having concluded that the officers' entry was reasonable, the court also concluded that it was reasonable for them to remain in order to investigate whether an emergency existed:

> …officers who have probable cause need not cancel an investigation on request. The fourth amendment does not contain a least-restrictive-alternative rule.

Officers responding to 911 disconnects or other potential emergencies should make entry decisions based on the totality of the circumstances present in any given incident. However, the *Hanson* case demonstrates the latitude courts are likely to give officers who are responding to perceived emergencies.

Firearms Ordinances

Over the years, the City has enacted a number of firearms related ordinances, most located in chapter 25 of the Madison General Ordinances.

In 1995, the State Legislature enacted §66.0409 (Local regulation of firearms). This statute prohibits local bodies of government (cities, towns, villages, counties) from enacting most ordinances related to firearms if the ordinance is more restrictive than state law. The relevant portion states:

> …no political subdivision may enact an ordinance or adopt a resolution that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.

So, while these ordinances remain on the books, most of them (prohibiting the sale of firearms, prohibiting the possession of short-barreled handguns, prohibiting the possession of assault weapons, etc) are unenforceable. Officers should not take enforcement action for these ordinances.

Knock & Talks

***City of Sheboygan v. Cesar*, 330 Wis.2d 760 (Ct. App. 2010); Decided November 24, 2010 by the Wisconsin Court of Appeals.**

In *Cesar*, officers were investigating a hit & run. They went to the address of the suspect vehicle's registered owner—Cesar—to contact him. The officers rang the doorbell and knocked on the door "numerous times" in an attempt to get an answer. They also looked through a window and observed a subject (who was not responding to them). The officers identified themselves and shouted that they wanted to speak with him. One of the officers stated that "it would be in his best interest to come out and just talk and get it over." Cesar then came to the front window and asked the officers what they wanted. After some back and forth between Cesar and the officers, the police indicated that they would stay there until they applied for a search warrant or until Cesar exited.

Cesar eventually exited the residence and spoke to the officers. He admitted to being involved in the accident, and was arrested for hit & run and OMVWI. Cesar challenged his arrest, arguing that he was effectively (and unlawfully) seized within his home. The State argued that Cesar had not been seized, and that the encounter was a consensual contact.

Officers—without reasonable suspicion or probable cause—are always free to engage in consensual encounters with citizens. Typically, the legal test for whether a citizen has been "seized" (moving beyond the scope of a consensual contact) is whether the citizen would feel free to leave. However, in some situations—where the citizen would not want to leave his location—the appropriate inquiry is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." So, a knock & talk or other attempted contact with a citizen at a private residence could move beyond a consensual encounter and become an "in-home seizure" or a "constructive entry" if the citizen would not feel free to decline the officers' requests or to end the encounter.

Previous cases have indeed concluded that under some circumstances an attempted knock & talk could be considered a seizure. In *United States v. Jerez*, 108 F.3d 684 (7th Cir. 1997), the Seventh Circuit Court of Appeals ruled that officers attempting to contact a subject in a hotel room were intrusive enough to render the encounter a seizure. In *Jerez*, the officers pounded on the door for several minutes, late at night. Most significantly, one of the officers shouted into the room, "police, open up the door." The *Jerez* court concluded that the room's occupant had been seized, and that since the officers did not have reasonable suspicion or probable cause, their actions were unreasonable.

The *Cesar* court reached a different conclusion. The court reasoned that there was no evidence that Cesar had been awakened by the police (which the *Jerez* court had deemed to be a significant factor), the encounter did not take place during the early morning hours, there was not a significant police presence or show of authority (only two officers were at the door), and—most importantly—there were no express commands or directions given by the officers (as was the case in *Jerez*). Also, the court indicated that the officers' indication that they would seek a warrant if Cesar did not come out to speak to them was reasonable, since they likely did have grounds to obtain a warrant.

The *Cesar* court viewed the encounter as a "back and forth" in which the officers attempted to persuade Cesar to exit, but did not make any threats to enter his residence and did not at in an overly intrusive or coercive way. The court concluded that Cesar had not been seized during the initial encounter and that the officers' actions were reasonable.

Vehicle Seizures

§973.075 outlines the circumstances under which vehicles and other property involved in criminal activity can be forfeited. While the most familiar situations leading to vehicle, property or cash seizures involve drug cases (also subject to forfeiture under federal law), there are other instances where property or vehicle seizure is an option. The relevant portion of 973.075:

> (b) 1m. Except as provided in subd. 2m., all vehicles, as defined in s. 939.22 (44), which are used in any of the following ways:
> a. To transport any property or weapon used or to be used or received in the commission of any felony.
> b. In the commission of a crime under s. 946.70.
> c. In the commission of a crime in violation of s. 944.30, 944.31, 944.32, 944.33 or 944.34.
> d. In the commission of a crime relating to a submerged cultural resource in violation of s. 44.47.
> e. To cause more than $2,500 worth of criminal damage to cemetery property in violation of s. 943.01 (2) (d) or 943.012.
> f. In the commission of a crime under s. 813.12 (8), 813.122 (11), 813.123 (10), 813.125 (7), 813.128 (2) or 940.32.
> g. In the commission of a crime under s. 943.75 (2) or (2m).

The most pertinent provision is section a., allowing for forfeiture of a vehicle used to transport any property or weapon used or received in the commission of any felony.

Vehicles seized under this statute may be retained by MPD and eventually used for official purposes. Note that the statute does not permit the forfeiture of vehicles if the criminal act in question was done without the owner's knowledge or consent. Supervisory approval is required prior to seizing a vehicle for forfeiture, and a warrant is required if the vehicle is located on private property not accessible to the public. Vehicles seized for forfeiture should be processed in accordance with MPD policy.