LEGAL UPDATE

City of Madison

Summer 2007 Lieutenant Victor Wahl

Hot Pursuit

***State v. Sanders*, 2006AP2060-CR (Ct. App. 2007); Decided June 6, 2007 by the Wisconsin Court of Appeals**

In *Sanders*, two Racine police officers were dispatched to a residence to investigate a possible case of animal cruelty. The officers contacted an individual (Sanders) in the back yard of a residence. The officers noted that Sanders was holding some folded up US Currency as well as a small canister that was consistent with an item used to conceal controlled substances.

Sanders refused to identify himself, and the officers eventually decided to handcuff him. He pulled away as they did so, and ran towards the residence. The officers chased Sanders into the dwelling, and the officers followed. He barricaded himself in a bedroom for a short time before he was taken into custody. The officers located a number of individually packaged baggies of cocaine in the room where Sanders was arrested.

The misdemeanor crime of obstructing an officer is not enough to justify a warrantless entry

Sanders was charged with a variety of offenses. He sought to suppress the evidence the officers had located in the residence, arguing that their warrantless entry was unlawful. Sander's claim was that because the offense that the officers were pursuing him for—obstructing an officer—is a minor one, a warrantless entry could not have been reasonable.

It is well established that when analyzing the reasonableness of a warrantless entry (in any context—hot pursuit, to prevent the destruction of evidence, etc.), the severity of the underlying offense will be a key issue. Courts will be more likely to view a warrantless entry for a severe offense as reasonable, and warrantless entries for minor offenses are not permitted. What has not always been clear is where the line is drawn: how minor must an offense be for a warrantless entry to be per se unreasonable?

While there are a number of U.S. Supreme Court decisions suggesting that the line is drawn between criminal and non-criminal offenses, the Wisconsin Court of Appeals in *Sanders* drew the line differently, concluding that a warrantless entry for misdemeanor obstructing an officer is not reasonable.

The *Sanders* court stated:

> [T]he issue in this case is whether the crime supporting the entry is sufficiently serious to justify a warrantless entry into a residence…the underlying offense in this case, obstructing an officer, will not support a warrantless entry.

The *Sanders* court also rejected the State's argument that the officers' entry could be justified by probable cause to arrest Sanders for drug possession. The court concluded that while the officers' observations may have supplied them with a reasonable suspicion that Sanders was involved in drug activity, they certainly did not have probable cause that he was involved in drug activity. This conclusion also led the court to reject the State's argument that the warrantless entry was permitted to prevent the possible destruction of evidence.

While the *Sanders* court did not expressly rule that a warrantless entry for any misdemeanor is unreasonable, the decision strongly suggests as much. This decision reflects a change, and officers will need to modify their decision making accordingly.

One of the judges wrote a separate opinion, all but encouraging the State to appeal the case to the Wisconsin Supreme Court. It seems likely that such a review will take place. However, officers will have to comply with the *Sanders* decision until any potential review takes place.

Vehicle Stops—Passengers

***Brendlin v. California*, 127 S.Ct. 2400 (2007); Decided June 18, 2007 by the United States Supreme Court.**

In *Brendlin*, a California police officer observed a vehicle with expired registration tags. The officer later observed the same vehicle displaying the appropriate registration tag, but decided to stop it anyway. During the stop, officers contacted the passenger in the vehicle, locating marijuana and methamphetamine. The passenger—Brendlin—was arrested as a result of the stop and search.

Brendlin sought to have the evidence located in the vehicle suppressed, arguing that it was located as a result of an unlawful seizure. The California Supreme Court determined that the officer had no reasonable basis to stop the vehicle, but concluded that a passenger in a vehicle stopped pursuant to a routine traffic stop is not seized as a constitutional matter (absent additional circumstances).

The case was appealed to the U.S. Supreme Court, and the California decision was unanimously reversed. The *Brendlin*

court first reviewed the law regarding detentions:

> A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, "by means of physical force or show of authority," terminates or restrains his freedom of movement…a seizure occurs if "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."…when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decilne the officers' requests or otherwise terminate the encounter.

The court also pointed out one of its prior decisions speaking to the authority of officers to control passengers during routine traffic stops:

> In *Maryland v. Wilson*, 519 U.S. 408 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk.

The *Brendlin* court concluded that when police stop a vehicle, the passengers are "seized" under the Fourth Amendment, and therefore can challenge the legality of the stop.

Employee First Amendment Rights

To what extent can a public employer control the speech of public employees? While public employees do not lose all First Amendment rights by virtue of their employment, public employers have a fair amount of latitude when regulating the speech of public employees.

The U.S. Supreme Court has a long-established test for determining whether speech made by a public employee can be lawfully regulated. An employee can show that his/her speech is constitutionally protected if:

1) The employee spoke as a citizen on a matter of public concern; and
2) The interest of the employee as a citizen in commenting upon the matter of public concern outweighed the interest of the employer in promoting efficiency of the public services it provides through its employees.

This two-part test is commonly referred to as the *Connick-Pickering* test, after the two U.S. Supreme Court decisions behind it.

The first part of the test analyzes what the public employee is speaking about. A public employee's speech about a matter unrelated to his/her employment (supporting/opposing a political candidate, for example) would likely be protected, while speech directly related to his/her employment (like disclosing an ongoing criminal investigation) would likely not be.

The U.S. Supreme Court recently narrowed this aspect of the *Connick-Pickering* test. In *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) the court concluded that speech made pursuant to a public employee's job duties are not protected under the First Amendment:

> We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline.

The *Garcetti* case has been interpreted fairly broadly over the last year, and has been relied on in a number of cases rejecting employee First Amendment claims.

Even if a public employee is found to have been speaking as a citizen on a matter of public concern, then the public employer can still regulate the speech if the interests of the public employee as a citizen commenting on matters of public concern are outweighed by the interests of the public employer in promoting the efficiency of the public services it provides through its employees. Courts have identified a number of factors that will be examined in performing this balancing test:

- Whether the speech creates problems in maintaining discipline and harmony among co-workers
- Whether the employment relationship is one in which personal loyalty and confidence are necessary
- Whether the speech impedes the employee's ability to perform his/her responsibilities
- The time, place and manner of the speech
- The context within which the underlying dispute has arisen
- Whether the speaker should be regarded as a member of the general public

So, for a public employee's speech to be protected by the First Amendment, the employee first needs to demonstrate that he/she was speaking as a citizen on a matter of public concern. Even if this is the case, the employee will have to demonstrate that his/her interest in speaking on the matter of public concern outweighs the interest of his/her employer.

Application of this *Connick-Pickering* test by courts has been inconsistent over the years. The cases are very fact-specific, making it difficult for public employees to have a good concept of what type of speech will be protected. In cases involving law enforcement officers, courts have generally found that that the public employer's interest in regulating speech outweighs the employee's interests.

What has been fairly clear, at least since the *Garcetti*

decision, is that any speech made pursuant to the official duties of a public employee will not be afforded First Amendment protections. A recent example of this was seen in *Sigsworth v. City of Aurora*, No. 05-4143 (7th Cir. 2006). In *Sigsworth*, an officer working on a multi-jurisdictional drug task force suspected that a fellow officer was tipping off drug suspects about ongoing investigations. The officer reported his concerns to his superior, who directed him to remain silent about the issue. The officer was subsequently removed from the task force and denied a promotion.

The court rejected the officer's First Amendment claim, based largely on the *Garcetti* decision:

> Because (the officer's) speech was part of the tasks he was employed to perform, he spoke not as a citizen but as a public employee, and that speech is not entitled to protection by the First Amendment.

So, while police officers and other public employees do not give up all First Amendment rights by virtue of their employment, courts have clearly limited the scope of protections afforded public employee speech.

Vehicle Pursuits

***Scott v. Harris*, 127 S.Ct. 1769 (2007); Decided April 30, 2007 by the United States Supreme Court.**

In *Harris*, a Georgia county deputy attempted to stop a vehicle for speeding (73 miles per hour in a 55 mile per hour zone). The vehicle refused to stop, and instead accelerated. A pursuit ensued, at speeds up to 85 miles per hour. At one point the suspect vehicle pulled into the parking lot of a shopping center, and was nearly boxed in by squads. The suspect (Harris) managed to evade capture, colliding with one of the squads before exiting the lot.

The vehicle continued out of the lot and onto a two-lane highway. About six minutes—and ten miles—into the chase, the primary pursuing deputy attempted to execute a PIT maneuver on the suspect vehicle. The deputy's squad made contact with Harris' vehicle, causing it to leave the roadway, skid down an embankment and overturn. Harris was rendered a quadriplegic as a result of the crash.

Harris sued the deputy, alleging that ramming his vehicle was an excessive use of force. The deputy sought summary judgment (arguing that he was entitled to qualified immunity and that the case should be dismissed). Both the Federal trial court and Court of Appeals rejected the argument, with the Eleventh Circuit Court of Appeals concluding that the ramming technique was unreasonable.

Deputy Scott appealed the case to the U.S. Supreme Court. The Court, in an 8-1 decision, overruled the lower courts and concluded that the deputy's actions were constitutional. The court stated:

> A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

An interesting aspect of this case was the extent that the video of the pursuit—recorded from Deputy Scott's in-car camera—played. The Court referred to the video in the decision, and it appears clear that the video played a role in persuading the court that the manner in which Harris was driving put the public in danger. The video was even posted on the official U.S. Supreme Court website with the decision.

The *Harris* decision does not change MPD pursuit policy or impact MPD pursuit operations. Under MPD policy, the intentional ramming of a fleeing vehicle is only permissible if deadly force is justified.

Video of the pursuit can be viewed at:

www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb

Package Searches

***State v. Sloan*, 2006AP1271-CR (Ct. App. 2007); Decided May 15, 2007 by the Wisconsin Court of Appeals.**

In *Sloan*, a UPS employee opened a package believed to be suspicious, finding what appeared to be marijuana. The UPS employee contacted police, and an officer responded. The officer also checked the package and subsequently performed a field test on the suspect marijuana. This resulted in the issuance of a search warrant for a residence, and eventual criminal charges against Sloan.

Sloan sought to suppress the results of the officer's search and field test. Clearly, the actions of the UPS employee constituted a private search and did not implicate the Fourth Amendment. The question for the court was whether the officer's actions were reasonable.

The *Sloan* court pointed out that in this context, the officer was entitled—without a warrant—to replicate the search conducted by the UPS employee. The court went on to conclude that performing the field test was also reasonable:

> [T]he Fourth Amendment was not violated by (the officer's) conducting the field test to determine whether the material was, or was not, marijuana. We conclude that (the officer) properly replicated the search already conducted by UPS employees and…did not move into an unreasonable search when he did the field test.