LEGAL UPDATE

City of Madison Police Department

Summer 2009 Captain Victor Wahl

Warrantless Entries

***State v. Ferguson,* 767 N.W.2d 187 (2009); Decided June 16, 2009 by the Wisconsin Supreme Court.**

In order to justify a warrantless entry, in the context of a criminal investigation, officers must have probable cause (to arrest or search) and exigent circumstances. Exigent circumstances include: entries made in hot pursuit; preventing the destruction of evidence; a threat to the safety of the suspect or others; or a likelihood that the suspect will flee. Whenever an officer makes a warrantless entry of a residence (based on exigent circumstances), the severity of the underlying offense bears on the reasonableness of the entry. A number of Wisconsin court decisions over the years have sent mixed messages as to how severe the offense must be for a warrantless entry to be valid. Most recently, in 2007, the Wisconsin Court of Appeals ruled that the misdemeanor crime of obstructing an officer was not serious enough to justify a warrantless entry. The Wisconsin Supreme Court recently clarified the law on this issue in *State v. Ferguson*.

In *Ferguson*, officers responded to a report of an attempted burglary. The officers learned that the resident of an upstairs apartment (Ferguson) had pounded on the door of a downstairs apartment, threatening to evict the tenant (though she was neither the property's owner nor manager). The officers made contact with Ferguson through the doorway to her apartment. She began shouting at the officers, and another occupant of the apartment (Ferguson's nephew) attempted to calm her down. Ferguson then shoved her nephew, causing the officers to enter the apartment and separate the two. The officers attempted to arrest Ferguson, who resisted physically. She was subsequently charged with disorderly conduct and resisting/obstructing.

The primary issue before the *Ferguson* court was whether the officers' entry—to arrest Ferguson for disorderly conduct—was lawful. The court first pointed out, "the extent to which law enforcement is permitted to rely on exigent circumstances for a warrantless entry of a home has a relationship to the seriousness of the offense…where the underlying offense for which there is probable cause to arrest is relatively minor, courts should be very hesitant to find exigent circumstances." The court then went on to discuss what distinguishes a minor offense from an offense for which a warrantless entry might be justified.

The *Ferguson* court expressly rejected a felony/misdemeanor distinction, instead stating:

> [C]ourts, in evaluating whether a warrantless entry is justified by exigent circumstances, should consider whether the underlying offense is a jailable or nonjailable offense, rather than whether the legislature has labeled that offense a felony or a misdemeanor.

So, any offense that has jail time as a potential penalty is constitutionally serious enough to justify a warrantless entry (if exigent circumstances are present). In Wisconsin, all crimes (felony and misdemeanor) have jail as a possible penalty. So—if exigent circumstances are present—a warrantless entry for any crime is constitutionally permitted. A warrantless entry for a civil forfeiture is never constitutionally permitted, even if exigent circumstances are present.

Remember that a warrantless entry simply based on probable cause to arrest—with no exigent circumstances—is never permitted, regardless of the severity of the offense. Also, just because a warrantless entry might be constitutionally permitted does not necessarily mean it is a good idea or a wise use of resources. Finally, don't confuse the standards required for warrantless entries in criminal investigations (probable cause to arrest or search plus exigent circumstances) with those required for community caretaker or emergency doctrine entries (to check welfare, render medical aid, etc.).

Miranda

***State v. Grady,* 766 N.W.2d 729 (2009); Decided June 11, 2009 by the Wisconsin Supreme Court.**

In *Grady*, police were investigating a homicide. Initial suspicion focused on the victim's roommate (Ward), though officers also spoke with Grady (an acquaintance of Ward). Grady agreed to voluntarily come to the station to be questioned. He was not handcuffed during the ride to the station or once he arrived. Even though Grady was not in custody, the detective interviewing him provided *Miranda* warnings prior to the interview. Grady indicated that he understood his rights and spoke to the detective for more than two hours.

As this was taking place, Ward—who was being interviewed separately—told officers that Grady had committed the homicide. Grady was then placed under arrest. The detective did not re-administer *Miranda* warnings to Grady, though he did place the *Miranda* rights card on the table and

ask Grady if he understood them.

Grady was then interrogated for several hours; he made a number of statements incriminating himself during the questioning. At the end of questioning, Grady was booked into jail. Later that night, detectives re-interviewed Grady (*Miranda* warnings were provided at that time and Grady waived his rights). Grady made additional incriminating statements during this second interrogation.

Grady was subsequently convicted of homicide. He appealed his conviction, arguing that his statements were obtained in violation of *Miranda* and should have been suppressed. Grady claimed that *Miranda* warnings must be administered after a person is placed in custody, and that any warnings provided prior to custody should be ineffective.

The court rejected Grady's argument, and ruled that his statements were properly admitted. The court concluded that a flexible approach—considering the totality of the circumstances—should be used when assessing whether a suspect's *Miranda* rights have been complied with. The focus of the analysis is "whether the suspect being questioned was sufficiently aware of his or her rights during the custodial interrogation." For situations similar to Grady's—precustodial *Miranda* warnings followed by custodial interrogation—the *Grady* court outlined a number of factors to be considered:

- Whether the same officer or officers conducted the questioning;
- Whether the location of the questioning changed;
- Whether the subject matter of the questioning was consistent;
- Whether a reminder of the *Miranda* rights was given prior to the custodial interrogation;
- Whether the suspect was mentally or emotionally impaired;
- Whether more coercive tactics were used once the suspect was placed in custody;
- The suspect's prior experience with law enforcement;
- How much time elapsed between the *Miranda* warnings and the custodial interrogation.

Based on an analysis of these factors, the court concluded that Grady's *Miranda* rights were not violated: "it is clear that the *Miranda* warnings as administered made Grady sufficiently aware of his rights during questioning."

Strip Searches

The U.S. Supreme Court recently ruled—in *Safford Unified School District v. Redding*, 129 S.Ct. 2633 (2009)—that an assistant principal's strip search of a 13-year-old student was unconstitutional. The assistant principal conducted the search based on reasonable suspicion that the student was in possession of prescription and over-the-counter drugs forbidden by school rules. The court concluded that the level of suspicion possessed by the school official (possession of prescription strength ibuprofen and over-the-counter naproxen; similar to Advil and Aleve) did not match the intrusiveness of the search.

The decision doesn't have much impact locally; in Wisconsin, §948.50 prohibits school officials from conducting strip searches of students. Strip searches conducted by law enforcement officers must comply with §968.255.

Arizona v. Gant Update

Earlier this year, the U.S. Supreme Court—in *Arizona v. Gant*—significantly limited the circumstances in which officers are permitted to search a vehicle incident to the arrest of an occupant. The *Gant* court limited these searches to two situations:

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

The *Gant* decision left a number of questions unanswered. Some cases are now reaching lower courts across the country, providing an early indication of how *Gant* will be interpreted.

***People v. Osborne*, California Court of Appeal:** an officer stopped a subject near a parked vehicle, believing he was stealing. During a pat-down, the officer located a handgun in the suspect's waistband. The suspect was arrested, and the officer searched the vehicle, finding drugs.

The court concluded that the vehicle could be searched incident to the suspect's arrest. The court stated:

> [G]iven the crime for which the officer had probable cause to arrest (illegal possession of a firearm), it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle…although the firearm found on the defendant was loaded, it was reasonable to believe that the vehicle might contain additional items related to the crime of gun possession such as more ammunition or a holster."

The court also stated, "the *Gant* court specifically requires only a "reasonable basis to believe" the vehicle contains relevant evidence, a standard less than full probable cause." So, even though the officer did not express any specific reason to believe additional evidence was in the vehicle, the nature of the offense for which the arrest was made justified the vehicle search.

***United States v. Oliva,* U.S. District Court for the Southern District of Texas:** Officers arrested a female for OMVWI and searched her vehicle. The search yielded marijuana, resulting in an additional charge.

The court upheld the search: "it would be reasonable for officers to search the vehicle for evidence of driving while intoxicated, including open or empty containers."

***United States v. Grote,* U.S. District Court for the Eastern District of Washington:** Officers arrested an individual for OMVWI, and observed a brown paper bag wrapped around a bottle lying on the passenger seat. The officer searched the vehicle.

The court upheld the search: "it was objectively reasonable for (the officer) to search defendant's vehicle for evidence of driving under the influence, including open or empty containers of alcohol."

While these decisions are from lower courts that aren't binding on Wisconsin, they suggest how *Gant* will be interpreted in the long run. The early trend seems to be that the nature of the offense itself may be sufficient to justify the search of the vehicle incident to arrest (an arrest for an offense for which physical evidence is relevant may in itself provide a reason to believe the vehicle contains evidence of the offense). However, until further direction is provided from local courts, officers should continue to use a reasonable suspicion threshold for these searches.

OMVWI – Probable Cause

***State v. Lange*, 766 N.W.2d 551 (2009); Decided June 16, 2009 by the Wisconsin Supreme Court.**

In *Lange*, a Maple Bluff officer observed a vehicle driving on the wrong side of the road, travelling about 15 miles per hour over the speed limit. The officer pulled out and attempted to catch up with the vehicle to stop it. The suspect accelerated away from the officer, reaching a speed of approximately 80 miles per hour. As the officer attempted to close the gap, she observed the vehicle swerve back to the wrong side of the road, then make an abrupt turn to the right. The officer lost sight of the vehicle at that point, but observed a cloud of smoke.

As the officer pulled up, she observed that the vehicle had struck a utility pole. The accident was severe; the vehicle had rolled over, the utility pole had been cut in two (with a portion hanging from wires), and gasoline was leaking from the vehicle., The driver (Lange) had been ejected, was unconscious, and appeared to be seriously injured.

Lange was conveyed by ambulance to an emergency room, where he remained unconscious while being treated. Officers also responded to the emergency room, where Lange was placed under arrest and a legal blood draw was performed. Lange challenged the blood draw, claiming that the officers did not have probable cause to arrest him for OMVWI.

Unlike the majority of OMVWI cases, most common factors demonstrating intoxication were not present in the *Lange* case: no odor of intoxicants, no slurred speech, no failed field sobriety tests, no admission of alcohol consumption, no empty containers, etc. Because of this, Lange argued that his arrest was improper.

The Supreme Court disagreed, concluding that probable cause existed to arrest Lange for OMVWI. The court based this conclusion on several factors:

- The officer observed Lange driving in a "wildly dangerous" manner consistent with impairment, and the Lange had lost control of his vehicle causing it to crash;
- The incident occurred late at night, near bar-time;
- The officers involved had significant history in investigating OVMWI cases;
- Prior to the arrest, the officer confirmed that Lange had a prior conviction for OMVWI;
- The nature of the collision cut off the officers' opportunity for further investigation.

The final factor is likely the most significant, indicating that if a serious crash prevents officers from obtaining indicators typically showing impairment, that is one factor that can be relied on to establish probable cause. This is most likely to be an issue only in cases of serious injury (where no behavior can be observed).

Schools—Questioning & Searches

***State v. Schloegel*, 2009 WI App 85 (Ct. App. 2009); Decided May 13, 2009 by the Wisconsin Court of Appeals.**

In *Schloegel*, school officials at a high school received information that a student was in possession of drugs on school grounds. Two officers (one was a school liaison officer) responded to the office to assist two assistant principals in the investigation. The student (Schloegel) was called to the office, where he consented to searches of his person and bag (no contraband was located). The assistant principals—accompanied by the officers—then escorted

Schloegel to his vehicle, which was parked in the school's parking lot. Schloegel opened the vehicle at the direction of one of the principals. The principal searched the vehicle, finding drugs and cash. One of the officers then asked Schloegel a few questions, and he was placed under arrest.

Schloegel challenged his arrest, claiming that the search of his vehicle was improper, and that the statements he made to the principal should have been suppressed (since no *Miranda* warnings were provided). The Court of Appeals rejected both of Schloegel's arguments.

The officer's questions of Schloegel were clearly interrogation for *Miranda* purposes (as they were designed to elicit an incriminating response), so the issue was whether Schloegel was in custody at the time. Schloegel argued that the circumstances created custody: he had been frisked, his bag had been searched, he had been escorted from the school, and had been forced to turn over his car keys.

The court agreed that Schloegel had not been free to leave at the time he was questioned, but pointed out that this is not the test for *Miranda* custody. Instead, the test for *Miranda* custody is whether the suspect was formally arrested or subject to a level of restraint typically associated with a formal arrest. The court concluded that Schloegel had not been in custody due to a variety of factors: the school officials were in control of the investigation and the officers were simply assisting; the investigation had only lasted about 15 minutes at the time of the questioning; the questioning took place in the parking lot and not in a squad car or police facility; Schloegel was not placed in handcuffs; and, the officer was known to Schloegel (as the liaison officer).

The court also concluded that the search of Schloegel's vehicle was reasonable. School officials do not need probable cause to search a student; they can perform searches of students if the search is based on reasonable suspicion and if the scope of the search is reasonable. This lower standard applies to law enforcement only if they are operating at the request of, or in conjunction with, school officials.

The court ruled that the school officials had reasonable suspicion that Schloegel's vehicle contained contraband. The issue was whether the reasonable suspicion standard applies to a student's vehicle parked in a school lot. The *Schloegel* court concluded that it did: "if a search of a student's vehicle meets the (reasonable suspicion) test…the search is reasonable and constitutional."

So, school officials can search student vehicles parked on school property if they have reasonable suspicion that the vehicle contains contraband and if the scope of the search is reasonable. This applies to officers if they are acting at the request of or in conjunction with school officials, but likely does not apply to student vehicles parked off school property.

GPS Tracking

***State v. Sveum*, 2009 WI App 8 (Ct. App. 2009); Decided May 7, 2009 by the Wisconsin Court of Appeals.**

The *Sveum* case addressed the legal issues surrounding the use of GPS tracking devices. Sveum was a suspect in a stalking case, and officers attached a GPS device to his vehicle to track his movements. Information obtained by the GPS device was used to secure a search warrant to search Sveum's residence, and was also used against him at trial. Sveum argued that the manner in which the tracking information was obtained was impermissible. While officers in the case had obtained a court order to place the GPS device, the *Sveum* court analyzed whether the use of GPS devices even requires a warrant.

The first issue was the placement of the device itself. Officers attached the GPS device (which was battery powered) to the underside of Sveum's vehicle while it was parked in his driveway. The *Sveum* Court concluded that no warrant was required: "we conclude that no Fourth Amendment search or seizure occurs when police attach a GPS device to the outside of a vehicle while it is in a public place." Even though Sveum's vehicle had been parked in his driveway, the trial court had concluded that it was not within the curtilage of his residence (and was therefore in a place accessible to the public).

The next issue was the tracking data obtained from the GPS device. The *Sveum* Court concluded that no warrant was required: "neither a search nor a seizure occurs when the police use a GPS device to track a vehicle while it is visible to the general public."

So, the Fourth Amendment is not implicated if officers place a GPS device on a vehicle located in a public place, and use it to track the vehicle while it is in public view. A warrant or court order might be necessary to attach a GPS device to a vehicle located in a place inaccessible to the public, to hard-wire a GPS device to a vehicle (connecting the device to the vehicle's battery rather than using a battery operated GPS device), or to track a vehicle within a structure if the movement could not have been observed by visual surveillance. In most instances, however, GPS tracking devices can be used without a warrant or court order.

The *Sveum* court encouraged the legislature to place statutory limitations on the use of GPS by police and private citizens.

Seatbelt Enforcement

The legislature recently amended the seatbelt statute to allow officers to stop vehicles for seatbelt violations. The fine remains the same ($10), and the statute still prohibits a physical arrest for a seatbelt violation.