LEGAL UPDATE

FALL 2023

ACT 79 AND THE 4TH AMENDMENT

The intersect between the 4th Amendment and Act 79, which allows for warrantless searches of parolees and persons on extended supervision (ES), can be tricky for officers to navigate. A recent 2020 7th Circuit Case, *US v. Caya*, (7th Cir. 2020), has provided some guidance.

FACTS

Prairie Du Chien officers found Melissa Thomas unconscious in a parked car, and observed a methamphetamine pipe in the vehicle. Thomas later told officers she had used meth, that she and her live-in boyfriend, Dustin Caya, had purchased the meth together, and that she had two kids, a 1 year old and a 14 year old. Thomas told officers the children were at home. Deputies responded to Thomas and Caya's shared home. Caya answered the door and appeared to be under the influence of drugs. Deputies knew Caya was on ES as the result of a felony conviction, and was therefore subject to Act 79. Caya told deputies the children were not home. Concluding they had reasonable suspicions, deputies handcuffed Caya and did a sweep of the home, finding 350g of meth, loaded rifles and handguns, and the 1 year old child.

ARGUMENT

Caya moved to suppress the results of the warrantless search, arguing that Act 79 is unconstitutional because the 4th Amendment requires probable cause to search a person who is on ES. The government argued that Act 79 is constitutional because persons on ES have a lower expectation of privacy.

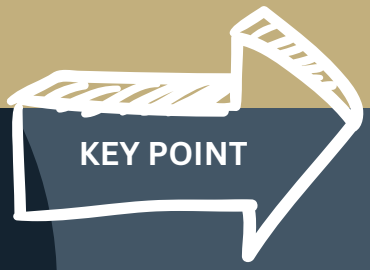
RULING

The Court held that the warrantless Act 79 search of Caya's home was constitutional because an offender on ES has no greater expectation of privacy than a parolee. Criminal offenders on community supervision have significantly diminished expectations of privacy because of the government's strong interest in preventing recidivism. Act 79 only requires law enforcement to have reasonable suspicion for a constitutionally permitted warrantless search.

TAKEAWAY

The Caya decision addresses how Act 79 applies to parolees and persons on extended supervision. It does not discuss whether Act 79 is constitutional as applied to probationers (although State v. Anderson; decided by the Wisconsin Supreme Court and covered in the Spring, 2023 Legal Update does).

Summary by Sergeant Becker



ACT 79 SEARCHES ARE BASED ON REASONABLE SUSPICION. REMEMBER THAT EACH SEARCH IS EVALUATED ON REASONABLENESS GROUNDS.

RETAIL THEFT AND CONTINUOUS OFFENSES

In the 2019 case *State v. Lopez* (385 Wis. 2d 482), the WI Supreme Court concluded the State may charge multiple retail thefts as one continuous offense. In February of 2017, the State filed a criminal complaint against Autumn Lopez and Amy Rodriguez for a series of retail thefts occurring between January 10th and January 25th, 2017. Lopez, who was an employee at a Walmart in Monroe, WI, acted as if she were assisting a customer at a self-checkout register. Lopez would "assist" her co-defendant, Rodriguez, by pretending to scan or void out scanned items. After the voiding or skipped scanning, Rodriguez would exit the store, passing all points of purchase.

Lopez and Rodriguez were charged with 1 count of Felony Retail Theft for items valued at more than $500 but less than $5,000. Lopez and Rodriguez filed motions to dismiss, arguing that the State could only charge 7 misdemeanor counts of retail theft- one for each individual theft. Initially, the Green County Circuit Court sided with Lopez and Rodriguez, holding the State could not aggregate retail thefts under Wis. Stat. §971.36(3). The State then appealed this ruling.

The Court of Appeals reversed the Circuit Court decision, concluding that the State has the authority to charge multiple acts of retail theft as one continuous offense. The Supreme Court ultimately agreed with the Court of Appeals, holding that the State has the authority to charge multiple retail thefts under Wis. Stat. §943.50 as one continuous offense pursuant to Wis. Stat. §971.36(3).

-Summary by PO Hess

MPD SOP PROCEDURES

Municipal Violations

- Any retail theft under $200 unless it involves
  - Any other crime
  - Advanced techniques
  - Repeat offenses

Misdemeanor Violations

- Retail theft is over $200 or involves any of the municipal exceptions

Felony Violations

- Retail theft is over $500

PENALTIES §943.50(4)

Class A Misdemeanor

- $.01 to <$500

Class I Felony

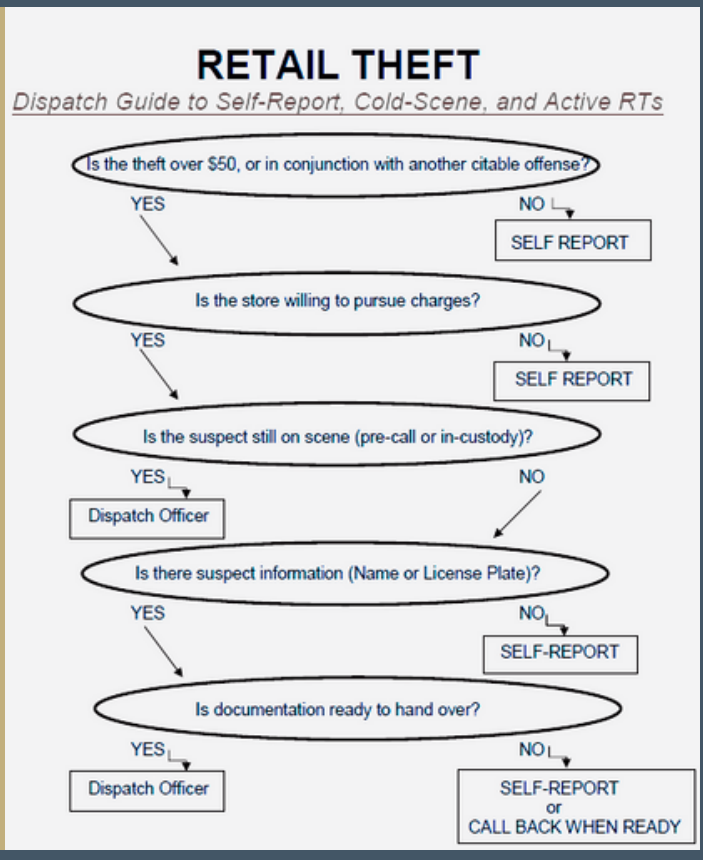
- $500 to <$5,000

Class H Felony

- $5,000 to <$10,000

Class G Felony

- $10,000+



retail theft refresher

ARRESTED OR DETAINED?

The Purpose and Duration of Detentions

It is important to remember that the purpose of an investigative detention is to temporarily seize a person as part of a police investigation. Police may do so with reasonable suspicion (specific, articulable facts) that the person has committed, is committing, or is about to commit a criminal offense or ordinance violation. Investigating officers may find that further investigative steps build probable cause to arrest the detainee for a specific offense, or alternatively, that the investigation dispels an officer's initial reasonable suspicion. If our reasonable suspicion dispels, officers should immediately release the person from the investigative detention. MPD's SOP additionally mandates that, "At some point during the stop the officer shall, in every case, give the person stopped an explanation of the purpose of the stop."

Our Stop and Frisk SOP directs that officers should detain a person only for the length of time necessary to obtain or verify:

- The person's identification
- An account of the person's presence or conduct
- An account of the offense, or
- Otherwise determine if the person should be arrested or released.

In *Rodriguez v. United States*, 575 U.S. 347 (2015), the Supreme Court deemed a traffic stop unconstitutional because officers extended the stop beyond the scope of the initial investigation without any additional justification. In *Rodriguez*, the traffic stop (AKA a detention) was for a traffic offense. Without any articulation of reasonable suspicion that the vehicle may contain contraband, the officer delayed the stop solely to facilitate a K9 sniff of the vehicle. In the same spirit, officers can expect a court will find unconstitutional a detention that extends beyond the time and scope of what is reasonable for confirming or dispelling reasonable suspicion under the totality of case circumstances.

Officers are permitted to move suspects they have detained as long as the movement is made within the "vicinity" of the stop (no more than 4 miles) **and** there is an objective reason for the move, such as a safety concern. A common example of this is an officer who conveys a detained driver to a place where the officer can safely and comfortably perform Standardized Field Sobriety Testing during an intoxicated driver investigation. One caveat here, so read on!

Courts have consistently ruled that conveying a suspect to a police facility (absent subject consent) is an arrest requiring probable cause. "Transportation to and investigative detention at the station house, without probable cause or judicial authorization, together violate the Fourth Amendment." *Hayes v. Florida*, 470 U.S. 811 (1985). In these cases, ask for consent to continue the contact at a district station or consider an alternative location.

"In Custody" Determinations Are For Miranda Purposes

In addition to an officer's determination of a person's status (voluntarily contacted/detained/arrested), an officer must also be mindful of how a reasonable person would perceive the contact ("in custody" or not).

Even if investigating officers subjectively feel that an arrest has not occurred, if officers apply a "restraint on freedom of movement of the degree associated with formal arrest", we should treat the contact as custodial. Why is this important? Because custodial interrogations require the Miranda colloquy in order for incriminating statements to be admissible.

Our courts consider several factors when determining if a reasonable person would have perceived the contact as custodial:

- Whether or not the subject is (or was) physically restrained or in handcuffs (also consider displays of force, like detention of the subject at gunpoint)
- Whether or not the subject is (or was) in an enclosed or locked area (for example, the back of a squad car)
- Whether or not the subject is (or was) moved
- The subject's intellectual, mental or physical condition (age, cognitive disability, mental illness, etc.
- The officer-to-subject ratio

Key Takeaways

- MPD SOP requires officers to attempt to explain the purpose of our detention to a detained subject. Case circumstances (safety considerations, investigative strategy, a subject's cooperativeness) will dictate the timing of this attempt.
- Actions that officers take in order to safely detain or restrain a subject may be completely reasonable, but when the argument is made in court that the Miranda warning should have been given, the court will examine whether officer actions give rise to a custodial situation.
- When the circumstances of detention are "close" or disputably custodial, it is best to err on the side of Mirandizing the detainee.
- Strong communication between officers will ensure that everybody is on the same page about who has what responsibilities and investigative tasks. This can also save us from unreasonably prolonged and unlawful detentions.

-Summary by Sergeant Prado and PO Rabe

ARREST ≠DETAIN

We routinely hear radio traffic, "Make my detained time a 95 time." Please remember that your detention time and arrest time are distinct and different points in time. It is more appropriate to advise, "My detained subject is now 95."

Q A

Q1: True or False

An OWI 4th offense is only a felony if the 4th offense occurred within the last 5 years of the 3rd offense.

Q2: Is the subject in custody? Does Miranda apply?

SCENARIO: A fist-fight breaks out and officers are quick to arrive on scene. The victim points towards the back of a male's head. As the male walks away from officers, the victim says the male displayed what appeared to be a gun. Three officers approach the male, commanding him to stop. When the male stops, officers triangulate around the male. After ordering the male to keep his hands up, officers handcuff and frisk the male. After the frisk, officers seat the male in the back of a squad car. The investigation eventually includes an interview of the male, who is handcuffed and seated in the back seat.

OMVWI AND SEARCH WARRANTS

State v. Green, Decided June 15, 2022 by the Wisconsin Supreme Court

FACTS

On May 25, 2014, Valiant Green decided to have some drinks and work on his vehicle in his driveway. Throughout the morning, Green tested out his workmanship by taking repeated spins around the block. As the day passed and the drinks flowed, Green's 'spins' turned increasingly reckless and the loud vrooms and roars of his engine prompted 911 calls from neighbors. When officers arrived, they found Green in his vehicle in the driveway of his home. Officers developed probable cause to arrest Green for OMVWI and obtained a search warrant for his blood. The resulting alcohol concentration of 0.21 ensured Green's eventual conviction for OMVWI-4th Offense. In the OWI Search Warrant, officers wrote the following for location of the incident: "Green drove or operated at the driveway of his home." The OMVWI statute explicitly says that OMVWI laws do not apply to private parking areas at single-family residences. Even though witnesses saw Green drive on the street near his driveway, officers left that out of the warrant, writing only that Green "drove or operated at the driveway of his home."

QUESTION

Should the court dismiss the case since OWIs don't apply in driveways? Or is "at the driveway" enough to infer that the Green also drove somewhere nearby on the road?

RULING

The Wisconsin Supreme Court ruled in favor of the officers, stating, "reasonable inferences support finding probable cause that Green drove on a public road." As the Court phrased it, the officers' warrant said Green's driving occurred "at his driveway—a location that can be reasonably read to refer to a position on the road adjacent to his driveway." It is worth noting, however, that one of the dissenting justice wrote, "Why would the officer write in the word 'driveway' if that is not precisely where Green was operating his vehicle?"

TAKEAWAY

The officers' lack of thoroughness resulted in nearly 9 years of trials, motion hearings, and appeals court reviews. Be **specific and precise** when listing the location of the driving. Remember, OMVWI laws do not apply to the driveways of single-family homes or apartments/duplexes with three or fewer units.

- Summary by Traffic Specialist Brier

SEARCH INCIDENT TO ARREST- PROPERTY

Arnez Salazar, while drinking at a bar, posted a video of himself online. Officers saw the video, and knew Salazar had an active warrant for traffic offenses. Officers went to the bar, and Salazar was sitting with a black jacket on his chair. On an empty chair to his left was another jacket with a Purple Heart insignia. Salazar was cuffed between the two chairs. Salazar claimed that the black jacket was not his, but the Purple Heart jacket was . Police found a gun and a wallet with Salazar's ID in the black jacket. Salazar was charged with illegally possessing a firearm.

The 7th Circuit ruled that police had conducted a valid search incident to arrest because Salazar could reach the jacket (and gun), and had also abandoned the jacket. Thus, the search was a lawful search incident to Salazar's arrest.

-Summary by Sergeant Sherrick

REASONABLE SUSPICION V. PROBABLE CAUSE- A REVIEW

The term "reasonable suspicion" is not capable of precise definition. It is more than a hunch or mere speculation on the part of an officer, but less than the probable cause necessary for an arrest. With reasonable suspicion, a police officer may stop a person in a public place, after having identified themselves as a law enforcement officer, if they reasonably suspect that a person has committed, is committing, or is about to commit a criminal offense or ordinance violation. Both pedestrians and persons in vehicles may be stopped. Mere "suspicion" alone is never sufficient to authorize an arrest without a warrant.

The terms "probable cause" and "reasonable grounds" are used interchangeably. An arrest (without a warrant) is justified when a police officer, in good faith, believes (1) that a crime has been committed, and (2) that the person in question committed it. The officer's belief must be based on grounds which would allow an ordinarily prudent and cautious person, under the circumstances, to believe likewise. This is a belief which would cause a reasonably prudent person (NOT a legal technician) to act. Moreover, the information which the officer is acting upon may be based, in part, on hearsay. *State v. DiMaggio*, 49 Wis. 2d 565 (1971).

While probable cause for an arrest without a warrant requires that an officer have more than mere suspicion, the officer does not need the same quantum of evidence necessary for conviction. An officer needs only information that would lead a reasonable officer to believe that guilt is more than a possibility. For probable cause to exist, "There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not."

-Summary by PO M. Johnson

ANSWERS

Q1: FALSE. All 4th offense OWIs are felony offenses as of October 2020. An OWI 4th conviction is a Class H felony, punishable between 60 days in jail and 6 years in prison.

Q2: The subject is in custody, thus Miranda applies when speaking to the suspect. In this scenario, factors that indicate the detainment is custodial include the subject being placed into handcuffs, three officers approaching the subject in a tactical manner, and moving the male to a secured squad car where he remains handcuffed. The male should be read his Miranda rights verbatim prior to any questioning as this would be a custodial interrogation. **Remember: Custody+Interrogation= Miranda.**

QUESTIONS OR FEEDBACK ABOUT THE LEGAL UPDATE? PLEASE EMAIL **PDCONLAW** WITH ANY QUESTIONS, CONCERNS, OR IDEAS FOR FUTURE TRAINING TOPICS.

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