# LEGAL UPDATE

City of Madison Police Department

Spring 2017 Assistant Chief Victor Wahl


## *Attenuation—Stops*

***Utah v. Strieff*, 136 S.Ct. 2056 (2016); Decided June 20, 2016 by the United States Supreme Court.**

In *Strieff,* a detective was investigating an anonymous tip about drug activity at a private residence. The detective eventually observed the resident (Strieff) leave the residence, and detained him in a nearby parking lot. The detective learned that Strieff was wanted and placed him under arrest. A search incident to arrest yielded methamphetamine and drug paraphernalia. Strieff argued that because he had been detained unlawfully, the subsequent search and discovery of evidence were invalid.

There was no dispute that the detective did not have reasonable suspicion to detain Strieff. Instead, the question was whether the search was sufficiently attenuated from the unconstitutional stop to make the evidence discovered admissible. The *Strieff* decision summarized the attenuation doctrine:

> [E]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.

There are three factors courts will assess when considering whether the attenuation doctrine applies:

- How much time passed between the unconstitutional conduct and the discovery of evidence
- What were the intervening circumstances
- The purpose and flagrancy of the official misconduct

Typically attenuation cases have required that the "intervening circumstances" involve a voluntary act on the part of the suspect (like consenting to a search or providing an incriminating statement).

The court in *Strieff* concluded that the attenuation doctrine applied, so that the evidence discovered during the search incident to arrest was admissible (even though the original stop had been invalid. The court viewed the presence of the arrest warrant as a critical intervening circumstance, and also concluded that the officer's actions in detaining Strieff improperly were "negligent" rather than willful or flagrant.

The *Strieff* decision should be viewed cautiously. While the evidence may have been admissible under the facts of the case, an officer making an unlawful stop could potentially be faced with a civil suit or internal discipline. The court also suggested that a different outcome would have resulted if the original stop was part of a recurrent pattern of police misconduct.

## *Heroin Aider Immunity*

***State v. Williams*, 372 Wis.2d 365; Decided October 19, 2016 by the Wisconsin Court of Appeals.**

In 2013, the legislature enacted §961.443, granting immunity from prosecution for those who provide assistance to overdose victims (under certain circumstances):

**(1) Definitions.** In this section, "aider" means a person who does any of the following:

**(a)** Brings another person to an emergency room, hospital, fire station, or other health care facility if the other person is, or the person believes him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

**(b)** Summons a law enforcement officer, ambulance, emergency medical technician, or other health care provider, to assist another person if the other person is, or the person believes him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

**(c)** Dials the telephone number "911" or, in an area in which the telephone number "911" is not available, the number for an emergency medical service provider, to obtain assistance for another person if the other person is, or the person believes him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(2) **Immunity from criminal prosecution.** An aider is immune from prosecution under s. 961.573 for the possession of drug paraphernalia, under s. 961.41(3g) for the possession of a controlled substance or a controlled substance analog, and under s. 961.69(2) for possession of a masking agent under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

In *Williams*, officers responded to a one-car accident. Responding officers noted that Williams appeared impaired,

and discovered morphine and drug paraphernalia in the vehicle. Williams was charged with multiple felonies, including possession of a controlled substance and bail jumping.

Williams claimed she was entitled to immunity under §961.443, as at the time of the accident she had been taking the passenger—who had overdosed—to a hospital. The trial court judge declined to rule on this issue, determining that it was for the jury to decide it at trial. Williams appealed the decision.

While the intent of §961.443 is clearly to provide immunity under certain circumstances, the statute does not indicate who should decide whether immunity is appropriate and when that decision should be made. The Court of Appeals concluded that the immunity decision should be made by the trial judge, and that the decision should be made prior to trial. The court also concluded that "the defendant should bear the burden of proving by a preponderance of the evidence his/her entitlement to…§961.443 immunity."

Finally, the *Williams* court concluded that §961.443 does not provide immunity from prosecution for bail jumping. The statute lists specific statutes that it provides immunity from, and does not apply to other violations.

## *Domestics*

Two questions regarding the mandatory arrest statute (§968.075) seem to recur:

First, does the mandatory arrest statute apply to adults who only resided together only as juveniles? The current statute defines domestic abuse as applying to "an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common." A review of the statute's history suggests that it was intended to have a broad application. Also, in 1990 the wording of the statute was changed...the original statute included "adult relative" in the list of categories that it applied to. That was removed in 1990.

The strict language of the current statute applies to adults who resided together as juveniles. If the legislature had intended that it not apply to those circumstances, it could have easily said so (and the statute's scope was considered and revised in 1990). So, my view is that the mandatory arrest statute does apply to adults who resided together only as juveniles.

Next, does the 72-hour no contact prohibition still apply even if the original charge was dismissed or amended to a non-criminal or non-domestic offense (before the 72 hour period has ended)? The no contact prohibition is incorporated into the domestic abuse statute, §968.075 (5). It states:

> **(5) Contact prohibition.** (a) 1. Unless there is a waiver under par. (c), during the 72 hours immediately following an arrest for a domestic abuse incident, the arrested person shall avoid the residence of the alleged victim of the domestic abuse incident and, if applicable, any premises temporarily occupied by the alleged victim, and avoid contacting or causing any person, other than law enforcement officers and attorneys for the arrested person and alleged victim, to contact the alleged victim.
> 2. An arrested person who intentionally violates this paragraph may be fined not more than $10,000 or imprisoned for not more than 9 months or both.

This section creates a criminal offense. As long as the original arrest was for a domestic abuse incident (defined elsewhere in §968.075) it does not require that the arrest result in a criminal prosecution. So, officers investigating violations of the 72-hour no contact prohibition should make arrests under the statute regardless of how the original domestic arrest was resolved.

## *In-Car Recording*

***United States v. Paxton*, 848 F.3d 803 (7th Cir.2017); Decided February 17 by the Seventh Circuit Court of Appeals.**

In *Paxton*, several individuals were arrested as they were about to carry out a robbery. The suspects were placed in the rear of a prisoner transport van and conveyed to a police facility. During the drive, the suspects spoke quietly with each other in the back of the van, making several incriminating statements. The statements were captured by a recording device in the van.

The suspect challenged the admissibility of the recorded statements, claiming they possessed a reasonable expectation of privacy while speaking in the van.

Courts have consistently ruled for years that a person has no objectively reasonable expectation of privacy while seated in a marked police vehicle. These cases have typically involved standard marked squad cars, and conversations/statements captured by the vehicle's in-car video system. In these cases, the reason for the person to be seated in the police vehicle (arrested, detained, consensual encounter) has not been relevant.

In *Paxton*, the issue was slightly different, as the suspects were in a prisoner transport van. So, none of the equipment and electronics that would typically be visible to

someone seated in a traditional squad car was visible to the suspects as they were seated in the rear of the van. In fact, the rear of the van was physically separate from the driver's cab. The court concluded that the distinction between a police car and a police van was not significant:

> Regardless of the particular layout, a police vehicle that is readily identifiable by its markings as such, and which is being used to transport detainees in restraints, does not support an objectively reasonable expectation of conversational privacy.

As a result, the recorded statements made in the back of the transport van were deemed admissible.

## *Miranda—Custody*

***State v. Kilgore*, 370 Wis.2d 198 (Ct. App. 2016); Decided May 18, 2016 by the Wisconsin Court of Appeals.**

In *Kilgore*, police were investigating a sexual assault. Detectives obtained a warrant to search a residence as part of the case. SWAT personnel executed the warrant using standard tactics/techniques. As officers entered, the lone occupant (Kilgore) was ordered to the ground at gunpoint. After the residence had been secured, SWAT personnel left the scene and detectives remained to perform the search. Kilgore was instructed to sit in the living room, not handcuffed.

While the search was performed, a detective spoke at length with Kilgore. During the conversation, Kilgore made some incriminating statements. He was later charged with sexual assault, and some of the comments he made were used against him. Kilgore challenged the admission of those statements, arguing that he had been in custody while the warrant was being executed, and that *Miranda* warnings were required.

Kilgore was clearly being detained during the conversation in question, and he asserted that meant that he was also in custody for *Miranda* purposes. The court rejected this, citing the definition of custody for purposes of *Miranda*: "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." The ruling went on to emphasize the distinction between a seizure (a *Terry* stop) and *Miranda* custody:

> If a seizure was synonymous with custody, then *Miranda* warnings would be required during every *Terry* stop, because, in a sense, a person seized during a *Terry* stop, or detained incident to the execution of a search warrant, is not free to leave…A seizure, as compared to custody, is limited in duration and scope, and does not have the same element to coercion. The inability to leave must be considered in that context. Thus, the inability to leave is "not the determinative consideration"…but a "factor" of what is the ultimate question, whether there was a "restraint on freedom of movement of the degree associated with a formal arrest.

This serves as a good reminder that the test for *Miranda* custody is distinct from whether a *Terry* stop/seizure has occurred.

The court concluded that Kilgore had not been in custody at the time he made the incriminating statements. This determination was based on a number of factors:

- Kilgore was in his own living room
- He was not handcuffed
- The tactical team had left the premises
- The focus of the questioning was largely on an acquaintance of Kilgore
- There were no threats or promises of leniency
- The questions were nonaccusatory
- Kilgore was released after the search was completed

This decision should also be viewed cautiously; other cases involving search warrants—but with slightly different facts—have led to findings of *Miranda* custody.

## *OMVWI Blood Draws*

***State v. Kozel*, 373 Wis.2d 1 (2017); Decided January 12, 2017 by the Wisconsin Supreme Court.**

Kozel was arrested for OMVWI, and taken to the local jail for processing. He consented to have his blood drawn, and a trained emergency medical technician (EMT) drew the legal blood sample. Kozel subsequently claimed that the blood test results (.196) were inadmissible, as the EMT did not have legal authority to draw his blood.

The relevant statute (§343.305(5)(b)), indicates that a legal blood draw from an OMVWI suspect may only be performed by "a physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician."

The EMT (a member of the local ambulance service) was authorized by the service's medical director (a physician) to perform legal blood draws, through a standing written order. The medical director did not provide specific direction for Kozel's individual blood draw.

The court concluded that the standing order was sufficient to make the EMT's actions "under direction of a physician," and the blood test results were admissible.