LEGAL UPDATE

City of Madison Police Department

Spring 2020 Acting Chief Victor Wahl

Hot Pursuit

***State v. Ionescu,* 389 Wis.2d 586 (2019); Decided November 13, 2019 by the Wisconsin Court of Appeals.**

In *Ionescu*, officers responded to a late-night report of a burglary in progress. The homeowner reported that he had heard noises in his garage and discovered an individual going through his vehicle (in the garage). The suspect fled on foot, and the homeowner pointed out the direction of travel taken by the suspect. The officer observed footprints in the grass, because of dew on the ground.

The officer utilized a K9 to track the suspect, starting at the last point he was seen fleeing. The K9 officer tracked through a residential area, at times noting footprints in the dew consistent with what he had observed in the victim's yard. After tracking for 20-30 minutes, the K9 led the officer onto a property where a mobile home was located (the officer also noted matching footprints in the grass). The dog—as well as the footprints—tracked directly to the door of the mobile home.

Officers knocked on the door to the mobile home, but received no answer. They proceeded to the front door of the residence located on the same property and knocked on the door, eventually making contact with Ionescu's mother. Officers determined that she had ownership and authority over the mobile home, and she consented to their entry. Officers entered the mobile home where they located Ionescu and a watch stolen from the victim's vehicle. He was charged with burglary, and challenged the officers' actions.

Ionescu claimed that the officers violated the Fourth Amendment by entering the curtilage of the property with a trained K9. The curtilage is generally defined as "the area immediately surrounding and associated with the home," and there was no dispute that the officers had entered the curtilage during the K9 track. Generally, officers are not able to search/enter the curtilage without a warrant or pursuant to an exception to the warrant requirement. The court concluded that the officers were in hot pursuit during the K9 track and that their actions were reasonable.

To justify a warrantless search or entry in the context of a criminal investigation, officers must have probable cause (to arrest or search) and exigent circumstances. Hot pursuit is one of several categories of situations that can qualify as exigent circumstances. The basic ingredient of the exigency of hot pursuit is "immediate or continuous pursuit of a suspect from the scene of a crime."

Ionescu argued that the officers' actions did not qualify as hot pursuit, as the entry to the curtilage occurred about 30-40 minutes after the burglary and they never actually saw Ionescu flee from the scene. The court disagreed: "Tracking a suspect's footprints and scent in the dark is necessarily a time-consuming task, and the amount of time will of course depend on how far the suspect has fled." The court also pointed out that it is not necessary that an officer "personally observe the crime or fleeing suspect" for hot pursuit to exist. The officers started the K9 track minutes after the suspect fled from the garage. They proceeded to engage in an immediate and continuous pursuit, leading them onto the curtilage of Ionescu's property. The court concluded that this qualified as hot pursuit, and that the officers' actions were reasonable.

Two reminders about hot pursuit entries/searches. First, an officer must have probable cause (to arrest or search) before any warrantless action is possible pursuant to exigent circumstances. In Ionescu, the court concluded that the information available to the officers (victim pointing out the direction of the suspect's flight; visible footprints; K9 track; etc.) provided them with probable cause. Other situations—particularly where a suspect has fled prior to police arrival—may not provide probable cause.

Also, remember that a hot pursuit entry (or any action taken pursuant to exigent circumstances) requires probable cause for a criminal offense. Warrantless entries for noncriminal/ordinance offenses are not permitted.

Miranda

***State v. Halverson,* 389 Wis.2d 554 (2019); Decided November 13, 2019 by the Wisconsin Court of Appeals.**

The issue in *Halverson* was whether an incarcerated subject (convicted and serving a sentence) is in per se custody for *Miranda* purposes. Halverson was serving a sentence at a state correctional facility. An officer was investigating an allegation that Halverson had stolen and destroyed some documents from another inmate. Halverson had been transferred to another facility, and the officer attempted to speak to him by phone. Staff

contacted Halverson, he called the officer back and was questioned over the phone. During the short (3-4 minute) conversation Halverson admitted taking the documents and destroying them. He was later charged with theft and criminal damage to property.

Halverson sought to suppress the contents of his phone conversation with the officer, arguing that it was a custodial interrogation and that he should have been informed of his *Miranda* rights. In 1991, the Wisconsin Supreme Court ruled that "a person who is incarcerated is *per se* in custody for purposes of *Miranda*." *State v. Jackson* 223 Wis.2d 331 (1999). However, the United States Supreme Court took a different view in *Howes v. Fields*, 132 S.Ct. 1181 (2012). The *Howes* decision clearly rejected the notion that all questioning of an incarcerated prisoner is custodial. Instead, the circumstances of any questioning of a prisoner must be evaluated to determine whether it is custodial:

> When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted.

The *Halverson* court concluded that *Howes* had overruled Wisconsin's per se custody rule for questioning prisoners. Instead, the totality of the circumstances surrounding the questioning must be evaluated to determine whether the encounter was custodial. Since an inmate obviously lacks freedom of movement while incarcerated, the main issue will be whether the environment that the questioning took place in "presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." The court concluded that Halverson experienced nothing beyond the "standard conditions of confinement and associated restrictions on freedom" experienced by all inmates: he had been asked (not required) to call the officer back; he was not handcuffed when moving through the facility; and he was alone in a room for the call itself.

An important factor in the *Howes* case was that the officers told the suspect that he did not need to speak with them and could return to his cell at any time, and repeated this multiple times during the questioning. While the officer did not advise Halverson of this, the fact that the conversation took place on the phone made it less of an issue for the court.

The *Halverson* court concluded that the short phone conversation with the officer did not constitute custodial interrogation and that his statements were admissible.

Remember that the holdings in *Howes* and *Halverson* are focused on inmates—those who have been convicted of a crime and are serving their sentence. Individuals who are incarcerated awaiting trial or for other reasons should be considered in custody for *Miranda* purposes. If seeking to interview an incarcerated inmate without *Miranda*, officers will need to make it clear that the inmate is not obligated to speak to them and can return to his/her cell at any time; and will need to ensure that the environment in which the interview takes place is consistent with (and no more coercive than) the inmate's day-to-day confinement. If in doubt, or if this information is not readily available, providing *Miranda* is the safest option.

Arrest / Charging Decisions

"Do you want to press charges?" is a question frequently asked of victims by officers. What impact the victim's answer should have on decision making, however, is often misunderstood. There has been a misconception by some that a victim's unwillingness to "press charges," or to "pursue a complaint" ends the arrest decision-making process (with no arrest or prosecution), and precludes officers from making an arrest. This is not the case. Several reminders regarding this issue:

- Victims do not "press charges." Officers do not press charges either—we request them once we have arrested or cited someone, but only the State of Wisconsin—through the District Attorney's Office—has the authority to file criminal charges.
- Wanting to "press charges," or a willingness to pursue a complaint, is not an element of *any* criminal offense.
- A victim's statement that they do not want to "press charges," or that they are unwilling to pursue a complaint *never* precludes officers from making an arrest, nor does it preclude the District Attorney's Office from filing charges.
- While officers can ask victims whether they are interested in pursuing a complaint, there is no requirement to do so.
- A victim's desire to pursue or not to pursue a complaint can be one factor used by an officer when deciding whether to make an arrest, but it need not be the deciding factor.
- Officers may want to inform victims that charging decisions are made by the District Attorney's Office – and not by the victim – to relieve the victim of the perceived responsibility of charging someone with a crime.

Clearly, officers are not precluded from inquiring into a victim's wishes regarding criminal prosecution, and in some cases the investigating officer may base his or her arrest decision largely on theses wishes. Once probable cause is established, however, the final decision to arrest is ours (not

the victim's), and the decision to file formal criminal charges is the District Attorney's Office (not the victim's).

Finally, remember that while non-consent is an element of many offenses, it is not synonymous with a willingness to pursue a complaint. If non-consent is established, an arrest can still be made even if the victim states they are not willing to pursue a complaint.

Recording Officers

It is not uncommon for officers to find themselves being recorded (video and/or audio) while performing their duties. Nationally, these instances have sometimes led to arrests of those doing the recording, typically for offenses similar to Wisconsin's disorderly conduct or resisting/ obstructing statutes. Some jurisdictions have even sought to enact laws or ordinances specifically addressing—and prohibiting—recording officers.

A number of these cases have been appealed, resulting in multiple court decisions on the issue. These decisions have all been consistent: citizens have a constitutional right to record on-duty police officers in public.

The most recent case involved an incident in Philadelphia. An individual observed a group of Philadelphia police officers breaking up a party. He started recording the encounter with his iPhone, from a distance of about fifteen feet from the closest officer. An officer ordered him to leave; he refused and was arrested. The officer seized the iPhone, searched it, and then issued the individual a citation (the offense was "obstructing highway and other public passages"). The citation was eventually dismissed, but the arrestee and another who had a similar encounter sued.

The court, in *Fields v. City of Philadelphia*, 862 F.3d 353 (3rd Cir.2017) ruled that "the public has the…right to record—photograph, film, or audio record—police officers conducting official police activity in public areas."

The 7th Circuit Court of Appeals (the federal circuit that includes Wisconsin) addressed this issue a few years ago in *American Civil Liberties Union v. Alvarez*, 679 F.3d 583 (7th Cir.2012). Illinois' eavesdropping statute prohibited the use of a device to hear or record an oral conversation without the consent of all the parties involved in the conversation. Some interpretations of that law (by Illinois State Courts) over the years led the ACLU to believe that it would be used to prohibit any public recording of police. The *Alvarez* court agreed that recording public police activity implicated the First Amendment and returned the case to the district court (where the ACLU prevailed and the State of Illinois was prevented from using the statute to prevent public recording of police).

So, while courts have consistently found a First Amendment right for civilians to record official police activity taking place in public, decisions have also made it clear that this cannot be viewed as allowing interference with police activity. The *Alvarez* court addressed this point:

> It goes without saying that the police may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations. While an officer surely cannot issue a "move on" order to a person *because* he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs…Nothing we have said here immunizes behavior that obstructs or interferes with effective law enforcement or the protection of public safety.

So, it is not reasonable to arrest someone for simply recording official police activity in a public place. It is also inappropriate to tell someone to stop recording, or to tell them that it in unlawful to do so. However, if someone is interfering with officers or otherwise engaging in illegal behavior (like entering a crime scene, for example), the fact that they are also recording does not excuse their behavior. If the actions are illegal—regardless of whether the person is recording—then appropriate action (up to and including arrest if needed) is permissible.

Traffic Stops

***Kansas v. Glover*, 140 S.Ct. 1183 (2020); Decided April 6, 2020 by the United States Supreme Court.**

In *Glover*, an officer ran the license plates of a vehicle, learning that the registered owner's driving status was revoked. The officer stopped the vehicle based on this fact alone, and arrested the driver for a driving without a license as a habitual violator. The driver argued that the officer did not have reasonable suspicion to support the stop.

The *Glover* court concluded that it is generally reasonable for an officer to assume that the driver of a vehicle is the registered owner. And if the officer knows that the registered owner does not have a valid license, reasonable suspicion for a stop exists. However, if the officer is aware of some fact demonstrating that the driver is not the registered owner (the observed driver is not the same race/ sex as the registered owner, for example) then that would negate the reasonable suspicion.

The *Glover* decision is consistent with a 2007 Wisconsin Court of Appeals case, *State v. Newer*, 306 Wis.2d 193 (Ct. App. 2007), so this principle is not new to Wisconsin.