LEGAL UPDATE

SPRING 2023

IN HOME ARRESTS AND PROTECTIVE SWEEPS

When making a valid arrest in a home or residence (whether entry was gained by warrant or an exception to the warrant requirement), Law Enforcement Officers may conduct a search incident to the arrest at the time of arrest/contemporaneous to the arrest. These searches are codified in the US Supreme Court case Maryland v. Buie (1990) and are limited by the "Three Zones of Search" rule outlined below;

- **In the room where the arrest has been made:** officers may search in any area or container that is within the arrestee's immediate area of control at the time of the arrest (i.e., reach, grasp, and lunge areas).
- **In areas immediately adjoining the room where the arrest has been made:** As a precautionary matter and without reasonable suspicion or probable cause, officers may look into (not go into) areas immediately adjoining the room where the arrest has been made from which an attack could be launched (i.e., closet or similar spaces/areas).
- **In areas where an associate may be located**: Where officers have reasonable suspicion to believe that an associate of the arrested person or some other third party is present and poses a danger to the officers, police officers may conduct a cursory "walk through" of the home as well (AKA Protective Sweep).

Summary by Sergeant Becker

REVIEW: PROTECTIVE SWEEPS

A "protective sweep" is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers and others." While the legal threshold to perform a protective sweep, reasonable suspicion (based on specific and articulable facts) is low, the protective sweep itself is limited in scope. The protective sweep is a cursory inspection of those spaces where a person may be found, may last no longer than is necessary to dispel the reasonable suspicion of danger, take no longer than it takes to complete the arrest and depart the premises.

Summary by Sergeant Becker

REMEMBER: Any evidence or contraband located in plain view during the protective sweep may be seized without a warrant.

Q1: What are the 3 requirements for the plain view doctrine to apply? Answers on page 6!

POSITIVE K9 ALERTS ON VEHICLE- SEARCHING PASSENGERS

A K9 hit on a car provides probable cause to search a vehicle for drugs pursuant to the Carroll Doctrine. But what about the driver and/or passengers? Passengers **cannot** be automatically searched simply because of a K9 hit. A passenger search must be through one of the mechanisms laid out in MPD's Searches SOP. For example, during a traffic stop this would likely be with consent, incident to arrest, or an Act 79 search.

In the 1999 Wisconsin Supreme Court case, *State v. Secrist*, the Court held that the odor of a controlled substance may provide probable cause to arrest and in turn search an individual when:

- The odor is unmistakably a controlled substance
- Odor may be linked to a specific person or persons
- Police officers can describe their training and experience in recognizing the odor.

However, probable cause diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor.

SUMMARY: If you have a car with multiple passengers and a positive K9 hit, officers **MUST** establish additional information to arrest and search those occupants beyond the positive K9 hit. A sole occupant is easier to link to the odor of drugs which can often lead to an arrest and search of the person.

Summary by Sergeant Lewein

"FOOTING" THE DOOR- A BLAST FROM THE PAST

In *State v. Johnson*, 181 Wis. 2d 470 (1993), officers contacted an individual they suspected of trespassing. The individual did not have any identification, and stated that he would go to a friend's apartment to get it. When the individual entered the friend's apartment, one of the officers placed his foot inside the door (by about six inches) in case the individual tried to shut the door. The officer then leaned into the apartment and observed the individual acting in a suspicious way. The officers subsequently entered the apartment and located a handgun and ten bindles of cocaine.

The Court held that the officer's initial entry—putting his foot in the door—constituted an entry into the apartment. Because the entry into the residence was not justified by a warrant or exception to the warrant requirement (i.e. consent, exigent circumstances, etc.) the arrest was invalid. This case stands for the general proposition that **any** incursion by police through the threshold, no matter how slight, requires a warrant or exception to the warrant requirement.

Summary by Sergeant Becker

Q2: TRUE or FALSE-You can arrest someone for obstructing for simply refusing to ID themselves.

THE FOURTH AMDENDMENT AND ACT 79

State v. Anderson, 2019 WI 97.
Anderson was on probation and an officer had two recent tips from a reliable informant that he was selling drugs in a specific alley. While patrolling an area known for drug trafficking, the officer saw Anderson riding a bicycle. When Anderson saw the officer turn to follow him, he turned into the alley, looked over his shoulder several times, and moved one hand from the handlebar to his pocket. The officer stopped Anderson. Because the officer knew that Anderson was on probation, the officer conducted a full search pursuant to Act 79 and found two bags of crack cocaine, $200 in cash, as well as two cell phones. Anderson argued the officer did not have reasonable suspicion, and thus could not initiate an Act 79 search of his person.

The Court held that the officer knew Anderson was on probation and subject to Act 79. To search a person who is known to be on probation, Act 79 only requires an officer to have reasonable suspicion that a person is committing, is about to commit, or has committed a crime. Reasonable suspicion has to be based on specific and articulable facts, and this case the specific and articulable facts included:

- The officer had previously arrested Anderson for possession with intent to deliver
- The officer had tips from an informant that Anderson was selling drugs again
- Anderson was seen in a high drug trafficking area
- The informant's tips were corroborated when the officer saw Anderson in the alley where the informant said Anderson was selling drugs
- When Anderson saw the officer, Anderson turned down the alley away from the officer, and acted in a way that suggested he was concealing something in his pocket.

Although the officer saw no illegal behavior, the totality of the circumstances gave him reasonable suspicion that Anderson was engaged in criminal activity. The Court concluded that the officer had reasonable suspicion to search Anderson and that the search was upheld.

Summary by Sergeant Becker

WHO	WHEN	WHERE	WHY
• Person on probation for a felony • Person on probation for a misdemeanor violation under Chapters 940, 948, or 961 • Person on parole • Person on extended supervision (ES)	Person's status must be a result of a Wisconsin conviction **AND** the person must have been placed on probation, parole, or ES after December 14, 2013	• Any personal property under the control of the person, including purses and backpacks • Vehicle being driving by the person at the time of the encounter • The residence of the person with limitations (see MPD SOP)	The search must be related to the reasonable suspicion posses by the officer. Any searches performed under Act 79 must be documented in an MPD report, and the DOC must be notified of the search.

Confused about the elements of a crime? A great resource is the Wisconsin Jury Instructions. The WI Jury Instructions are broken down into descriptive categories and the comments discuss special conditions. The WI Criminal Jury Instructions can be found at wilawlibrary.gov/jury/criminal/ or by Googling "Wisconsin Jury Instructions."

STAND BY TO STAND BY: ODOR OF MARIJUANA AND PC

One of the many issues brought up in *Moore* (see Legal Update-Winter, 2022) was that the suspect, Moore, claimed he was smoking a CBD vape. Generally speaking, the odor of CBD is indistinguishable from that of marijuana. If probable cause to search a vehicle hinges on the odor of marijuana being "unmistakable," how do police work around this potential obstacle?

Before *Moore* moves you reconsider your career choice, remember:

1. State v. Moore was an unpublished decision. Thus, we can look to it for guidance but the holding is not binding. The Supreme Court of Wisconsin will be reviewing the decision and issuing (hopefully) clearer guidance in terms of whether "unmistakable odor" is still required. The original standard of "unmistakable odor" originated in a 1999 case, State v. Secrist, and this original standard was created long before the propagation of the Hemp/CBD smoking industry.
2. Always be looking for ways to bolster your case and solidify your legal standing. The "totality of the circumstances" matter and will make for a more compelling case.

Other things to consider:

- What's in Plain View? Is there any evidence of drug use?
- Pre-contact behavior, i.e. driving behavior, behavior consistent with short term traffic, etc.
- If you stop a moving vehicle and detect the odor of what you believe to be burnt marijuana, are you looking at investigating an OMVWI? If not, why not? In light of *Moore*, and our Enforcement of Marijuana Laws SOP, this is a much cleaner way to search cars (think Gant search).
- Location history (high crime area, drug history, etc.) based on your own personal knowledge
- The criminal history of the vehicle occupants
- Is the driver Act 79 eligible?
- Reasonable Suspicion for vehicle frisk?

As it currently stands, *Moore* does not necessitate throwing the proverbial baby out with the bathwater. But stay tuned for Wisconsin Supreme Court guidance on the matter – depending on the outcome, law enforcement officers may have to rethink their approach, and options, with the odor of burnt marijuana moving forward.

Summary by Sergeant Sherrick

Q3: TRUE or FALSE-If a frisk is justified, weapons, drugs, and contraband in "plain feel" may be seized.

THE NEED FOR SPEED: "FAST ID" MOBILE FINGERPRINTING

Not unlike Maverick in the seminal 1986 film Top Gun, many officers are feeling the need for speed, employing Mobile Fingerprint readers such as “FAST ID” to identify subjects. To avoid a potential Danger Zone of misunderstanding, this article will provide an introduction to Mobile ID, examine the legal basis for its use, and set forth a list of scenarios in which Mobile ID can be utilized today.

Mobile Fingerprint Identification Devices go by a variety of names based on brand and region (Fast ID, RapID, Rapid-ID, Themis ID, etc.) Currently, they are being used by hundreds of law enforcement agencies in a number of states, including Georgia, Florida, Illinois, and Wisconsin. They are employed by large cities and large agencies. Federal agencies and the US military also make use of these tools. Many of our neighboring jurisdictions have access to Mobile ID, and the reasons aired over the radio by MPD officers when requesting outside agency assistance with these devices are varied.

“Fast ID” is used throughout Wisconsin and the Wisconsin Department of Justice Identification Manual explains how the devices work. Fast ID uses biometric technology to capture the index fingerprints of a person, encode the fingerprints, and send the results to a standalone server at DOJ. An open search is conducted, and if the fingerprints are located in the database, the following information is returned to the Fast ID device: State Identification Number (SID), Sex, Race, Birth date, and Local Identification Number. If no identification is made, a “NO MATCH” result is returned.

MPD currently does not have a policy on Mobile ID, however, one will be released in 2023. The MPD SOP “Arrest, Incarceration and Bail – Adults” states that a custodial arrest of a person found in violation of a City Ordinance or Traffic Violation is appropriate when a citation has been issued, but the officer cannot positively identify the violator. Mobile ID can therefore be the difference between releasing an individual with a citation and bringing them to jail.

A survey of the policies from other states does not provide clear uniformity on the use of Mobile ID. For instance, the Kansas Bureau of Investigation (KBI) states that the devices can be utilized when an officer has reasonable suspicion that a person is/has been involved in criminal activity and the officer reasonably believes that determining identity will establish or negate that person’s involvement with the criminal activity. However, other departments are more stringent in their requirements. North Carolina’s Apex Police Department requires that a suspect be in custody for a criminal offense in order for Mobile ID to be used. The Seattle Police Department allows use of Mobile ID when PC exists to arrest an individual, when an officer has PC to issue a citation for violation of a city ordinance, when exigency exists (unconscious subject, medical emergency), to identify a deceased individual, or when a person has been taken into protective custody.

Case law clears up some, but not all, of the questions surrounding use of Mobile ID. It is well established that the Fourth Amendment does not bar the fingerprinting of a properly seized person as "fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." See *Davis v. Mississippi*, 394 US 721 (1969).

Thus, so long as the initial seizure of the person is reasonable, as in a lawful arrest, subsequent fingerprinting is permissible. The Supreme Court of the United States has not yet expressly ruled whether or not fingerprints can be taken from an individual when there is no PC for their arrest (i.e. a Terry stop). To date, SCOTUS has merely conceded that "it is arguable" that the requirements of the Fourth Amendment could be met through the "narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause for arrest."

Until the issue of fingerprinting an individual for whom there is no PC to arrest has been expressly addressed by the Wisconsin or United States Supreme Court, it is reasonable for MPD officers to use Mobile ID (or to request that another agency respond with Mobile ID) under circumstances where the ability to obtain a subject's fingerprints has been established by SOP, statute, and/or case law. Under that conservative metric, it is reasonable to use Mobile ID on adults and juveniles under all of the following circumstances:

- With consent
- When PC to arrest for a crime has been established
- When PC to arrest for an ordinance or traffic violation has been established
- When someone is taken into protective custody
- To identify a deceased individual
- Pursuant to a court order or search warrant

Therefore, under the circumstances set forth above, Mobile ID can be a great tool to expeditiously identify a subject.

Summary by PO M. Johnson

ANSWERS

Q1: (1) LEO must be lawfully present; (2) The incriminating nature of the item/contraband/evidence must be immediately apparent; (3) LEO must have a lawful right of access to the item

Q2: False. No law allows officers to arrest for obstruction on a person's refusal to give the person's name. Mere silence is insufficient to constitute obstruction. *Henes v. Morrissey*, 194 Wis. 2d 338 (1995).

Q3: True. A frisk is a **limited**, protective search for concealed weapons or dangerous instruments. However, items of contraband that are immediately apparent may be seized.

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

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