LEGAL UPDATE

SPRING 2024

NEW PATROL YEAR, NEW LEGAL UPDATE

As a new patrol year is upon us, we hope you continue to find this legal update useful and full of helpful, practical tips. Whether you are brand new on the streets or have been policing for 25 years, it is important to stay up-to-date and current in constitutional law and how it shapes and impacts what we do every day.

AN HONEST MISTAKE

In the Fall 2023 Legal Update, we discussed what constitutes probable cause. What happens if a suspect challenges their arrest and sues an officer on grounds that the officer did not actually have probable cause? In other words, what do Courts look to when a suspect alleges their Fourth Amendment rights were violated and they were unreasonably searched or seized?

The U.S. Supreme Court said it is inevitable that law enforcement officials will in some cases reasonably—but mistakenly—conclude that probable cause is present. In such cases, officers have qualified immunity and should not be held personally liable. *Anderson v. Creighton*, 483 US 635 (1987). Courts call this "arguable probable cause." Arguable probable cause exists where reasonable officers in the same circumstances and possessing the same knowledge could have believed that probable cause existed to arrest. Even where an officer mistakenly arrests a suspect believing it is based in probable cause, there is arguable probable cause if the mistake is objectively reasonable. *Borgman v. Kedley*, 646 F.3d 518 (2011).

Importantly, in evaluating probable cause, an officer may not unreasonably disregard certain pieces of evidence by choosing to ignore information that has been offered to them or electing not to obtain easily discoverable facts that might tend to exculpate a suspect. For example, when an arresting detective was told the arm tattoos of his arrestee did not match the tattoos in a suspect photograph, and when the detective did not check the tattoos of the handcuffed suspect standing in front of him, the Court ruled the detective unreasonably disregarded evidence the suspect did not commit the crime. *Cozzi v. City of Birmingham*, 892 F.3d 1288 (2018). In such cases where there was easily available information that would have shown there was no probable cause to make the arrest—where reasonable officers in the same circumstances and possessing the same knowledge as the officer could not have believed that probable cause existed to arrest the suspect—the Courts have ruled officers were not entitled to qualified immunity.

If an officer mistakenly, but **reasonably**, believes that they had probable cause for an arrest, Courts will find they had "arguable probable cause" and the officer will be immune to civil liability.

- Summary by PO M. Johnson

KNOCK, KNOCK, KNOCKING ON A SUSPECT'S DOOR

Sparing v. Village of Olympia, 77 F.Supp.2d 891 (7th Cir.1999)

FACTS

Officers, with probable cause to arrest to Eugene Sparing, went to his residence to arrest him. Sparing answered the officers' knock, but remained inside the doorway and behind a screen door. Officers told Sparing he was under arrest as Sparing began walking back into his house. An officer opened the screen door, took a few steps into the house, and placed Sparing under arrest.

QUESTION

This case addresses the question of the "doorway arrest," and if police can effectuate an arrest by grabbing a suspect from behind a secondary door, such as a screen door or storm door.

RULING

The Court began by examining the holdings of *US v. Santana,* 427 US 38 (1976)-highlighted in the 2023 Summer Legal Update-and *US v. Berkowitz*, 927 F.2d 1376 (7th Cir.1991). *Santana* held an individual voluntarily standing behind an open doorway is, for Fourth Amendment purposes, in a public place. *Berkowitz* held a person answering a knock at the door does not surrender their expectation of privacy, and highlighted the long-standing rule that officers may not enter a residence to effect an arrest without a warrant, consent, or the presence of exigent circumstances. But what about if the suspect answers officers' knock at the door, and is told by the officers that they are under arrest from outside the residence through an open doorway?

An individual retains the right to be free from physical intrusion into the home by police officers without a warrant seeking to effectuate an arrest, but the right could be waived in that circumstance by acquiescence (rather than consent) to a slight entry. Thus, if police go to an individual's home without a warrant, knock on the door, announce from outside the home the individual is under arrest when they open the door, and the individual acquiesces to a slight entry to complete the arrest, the entry is reasonable under the Fourth Amendment.

TAKEAWAY

Here, Sparing did not surrender any reasonable expectations of privacy in his home. Because Sparing was still behind the closed screen door, the entry was **invalid.** Without a warrant (or exception to the warrant requirement), this particular arrest could only be completed if Sparing opened his screen door and stepped outside of his home, or acquiesced to a slight entry to complete the arrest.

-Summary by Sergeant N. Becker

Q1: What do the following letters mean when looking a case up on CCAP? CF, CM, CV, PA, CT, TR?

LAWYERS, GUNS, AND DV CONVICTIONS

In 1993, Daniel Doubek broke into his estranged wife's trailer, waving a 2x4 board and shouting threats. He was convicted of Disorderly Conduct in violation of Wis. Stat. §947.01(1), a misdemeanor offense. In 2016, Doubek applied for and received a CCW license from the Wisconsin Department of Justice (DOJ). In 2019, DOJ conducted an audit and determined that Doubek was prohibited from possessing a CCW license based on his 1993 Disorderly Conduct misdemeanor conviction.

DOJ's position was that Doubek's conviction constituted a disqualifying "misdemeanor crime of domestic violence" under the Domestic Violence Offender Gun Ban, also known as the "Lautenberg Amendment", codified in federal law 18 U.S.C. §922(g)(9). Because Wisconsin law provides that an individual who is prohibited from possessing a firearm under federal law may not hold a CCW license, DOJ revoked Doubek's CCW license and notified him via letter of the decision. He later received a second letter stating he could no longer legally possess firearms. Doubek petitioned for judicial review.

The Wisconsin Supreme Court held that DOJ improperly revoked Doubek's CCW license based on its incorrect position that he was prohibited from possessing firearms under federal law. Interpreting the federal statute, the Supreme Court found that a Disorderly Conduct conviction in Wisconsin is not equivalent to a "misdemeanor crime of domestic violence" because there are non-violent types of Disorderly Conduct listed within the statute.

Disorderly Conduct is defined as "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." While Doubek was convicted of misdemeanor Disorderly Conduct, the federal statute prohibiting the possession of a firearm also requires the misdemeanor the individual is convicted of have either a "physical force" element or involve the use of a deadly weapon. Disorderly Conduct does not have, as a necessary element of the crime, the actual or attempted use of physical force or the threatened use of a deadly weapon. Thus, while one could be convicted of Disorderly Conduct for conduct involving the use or attempted use of physical force, or the threatened use of a deadly weapon, the statute does not make such conduct an element of the crime that must always be proven.

A Disorderly Conduct conviction under Wisconsin law does not qualify as a misdemeanor crime of domestic violence under federal law. Therefore, a Disorderly Conduct conviction does not prohibit someone from possessing a firearm or holding a CCW license, even if the Disorderly Conduct conviction was the result of domestic violence. Based on the ruling in this case, unless otherwise disqualified from possessing a firearm, individuals who have committed domestic violence and were then convicted of Disorderly Conduct because of that violent crime are currently permitted to possess firearms.

- Summary by Sergeant N. Becker

Wisconsin AG Josh Kaul recently announced new legislation to ensure those convicted of violent offenses related to domestic violence are unable to legally purchase or possess firearms in Wisconsin. The bill would separate "violent" conduct from the other types of disorderly conduct and reorganizes the statute defining domestic abuse so the court record indicates the exact nature of the relationship between those involved. The bill still has several steps to go before it passes the legislature and makes it to the governor's desk.

WHO LET THE K9S OUT

State v. Theobald, Decided November 22, 2023 District II Court of Appeals (unpublished)

FACTS

A Sheboygan Police Officer conducted a traffic stop on Colin Theobald for an equipment violation. Theobald was the driver and sole occupant in the car. The officer knew Theobald had drug history and requested a K9. As the officer was working on a warning for the violation, the K9 officer had Theobald step out and conducted a sniff of the exterior of the vehicle. The K9 alerted to the driver's side door. No drugs were located during the subsequent search of the vehicle. Officers then searched Theobald's person, locating a small baggie containing methamphetamine and a pill bottle with five distinct controlled substances inside.

HOLDING

Acknowledging probable cause to search the vehicle, the Court note there is a "significant difference between searching a vehicle and arresting and searching a person," noting that there is a "lesser expectation of privacy in a vehicle." Other courts across the US have "rejected the argument that a K9 alert on an empty vehicle provides probable cause to search former occupants." Here, the Court rejected both the argument the search of Theobald was a probable cause search as well as the argument the search of Theobald was valid as a search incident to arrest.

DISCUSSION

Looking at this through a search incident to arrest lens, consider the difference between PC to arrest and PC to search. For an arrest, PC is a set of facts and circumstances that would lead a reasonable officer to believe a SPECIFIC CRIME is being/has been/will be committed by a specific person. However, for searches it's PC that SEIZABLE PROPERTY will be located. This can be evidence or contraband- AKA a bigger, much less specific target.

If we remove the idea of a PC search from the table (because again, there is no Carroll Doctrine for persons) we are left to explore the Search Incident to Arrest angle. What are we arresting for? Possession of *just any* Drugs? Unlike the Disorderly Conduct catchall, there is no drug-equivalent catchall. Drug charges require specificity. In the absence of specificity, our PC sounds a lot like reasonable suspicion- you're pinning your investigation on hopes the court will utilize a specific definition of PC that is, in fact, less specific. Furthermore, you're hoping the court will distinguish between PC to arrest when the driver is outside of the vehicle for a K9 alert (with possible outcomes of: drugs are in the vehicle, drugs are on the person, both, or neither) and inside of the vehicle for a K9 alert (with possible outcomes of: drugs are in the vehicle, drugs are on the person, both or neither). While hope is a great campaign slogan, it's not a great (or legal) investigative strategy. Would it be different if the K9 alerted to the vehicle with Theobald still in it? The Court doesn't say one way or another.

TAKEAWAY

A warrantless search is presumptively invalid. We must be cognizant that law enforcement has limited options as to when we can legally search a person (Warrant, Consent, Reasonable Suspicion Frisk, Search Incident to Arrest and Act 79). There is no Carroll Doctrine for persons.

-Summary by Sergeant D. Sherrick

I SWEAR

Portage County Sheriff's Office Sgt. Brown stopped Jeffrey Moeser for suspected OWI., subsequently arresting him. Sgt. Brown took Moeser to a hospital for a blood draw. Moeser refused consent for the blood draw and Sgt. Brown sought a search warrant. Sgt. Brown completed the search warrant affidavit that had language including, "Being first duly sworn on oath, deposes and says," and "I have personal knowledge that the contents of this affidavit are true and that any observations or conclusions of fellow officers referenced in this affidavit are truthful and reliable." Sgt. Brown's signature was immediately above the jurat that read, "Subscribed and sworn to before me." Lt. Wills notarized the affidavit and affixed his notary seal. A judicial officer signed the search warrant. Sgt. Brown did not make an oral oath or affirmation, nor did he make an oath or affirmation before the judicial officer. In a motion to suppress, Moeser argued the warrant for the blood draw was deficient because the officer was not placed under "oath or affirmation" when he signed the affidavit.

So does a warrant, where a law enforcement officer did not follow a prescribed oral script and specific procedure, violate the U.S. Constitution's and Wisconsin Constitution's requirement? The Wisconsin Supreme Court reviewed the constitutions, historical language and practices, case law, and statutes and found that the "oath or affirmation" requirement was met in this case as the "purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth" and the officer in this case was so impressed. The Wisconsin Supreme Court said the "oath and affirmation" requirement is one of substance and not form, noting that the language in the search warrant (such as "the contents of this affidavit are true." and "being first duly sworn on oath, deposes and says,"), Sgt. Brown's signature above the jurat, and Lt. Wills' notarization that further showed the seriousness of the event satisfied the requirement. The dissent strongly noted that Sgt. Brown's affidavit text was untruthful – that Sgt. Brown was "first duly sworn on oath." Moreover, that if the text read "I swear or affirm that the contents of this affidavit are true" or if Sgt. Brown made an oral oath before a notary, then it would likely be a non-issue before the court.

"Say what you mean and mean what you say". While the decision was 5-3, it is suggested that an affiant or complainant of a search warrant be mindful of the language that is in the search warrant for the types of wording/phrasing that would make the drafter aware of the obligation to tell the truth. However, a much stronger position as noted by the dissent and recommended here would be to make it a part of your regular procedure to, at a minimum, state orally to the judge or notary "I swear or affirm that everything is true and correct to the best of my belief and knowledge."

-Summary by Det. C. Nelson

Q2: True or False- A suspect has an open case but has been deemed incompetent by the court, thus suspending the open case. You have contact with this suspect and develop probable cause for bail jumping for violating a condition in the open case. You can arrest that suspect for bail jumping.

Q3: True or False- If you locate a syringe on a heroin user, you can charge them with possession of drug paraphernalia.

BECAUSE THEY GOT HIGH...AGAIN

Wis. Stat. §961.48 allows an enhancer to be added to both felony and misdemeanor offenses for second and subsequent drug offenses. Second or subsequent offenses relate to **any** prior drug conviction. If the first conviction is for possession of cocaine, and you arrest someone for possession of marijuana, the marijuana case qualifies as a second or subsequent offense, making the possession of marijuana charge a felony.

The possession laws outlined in Chapter 961 refer not only to drug possession, but also to possession of drug paraphernalia. A drug paraphernalia conviction equates to a first conviction. With a drug paraphernalia conviction, any subsequent possession of a controlled substance charge may be charged at the felony level. However, a second drug paraphernalia charge on top of a first drug paraphernalia conviction **does not** become a felony. In other words, if you have a drug paraphernalia conviction, a second/subsequent drug possession charge gets enhanced to a felony. BUT, if you have a drug paraphernalia conviction and then a second drug paraphernalia charge, YOU CANNOT ADD THE ENHANCER.

- Summary by PO M. Johnson

Drug paraphernalia conviction + Second/subsequent drug charge = FELONY

Drug conviction + Second/subsequent drug charge = FELONY

Drug paraphernalia conviction + drug paraphernalia charge = MISDEMEANOR

ANSWERS

Q1: CF means criminal felony. CM means criminal misdemeanor. CV is civil. PA means paternity. CT is criminal traffic. TR is non-criminal traffic. The only case types for which bail jumping can be charged are CF, CM, and CT.

Q2: False. When a defendant is found incompetent, the trial court must suspend the criminal proceedings. While the case is suspended, the suspension applies to bail conditions. Thus, a bail jumping charge is not allowed as bail conditions are suspended.

Q3: False. Drug paraphernalia excludes hypodermic syringes and needles. Wis. Stat. 961.571(1)(b)1.

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

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