LEGAL UPDATE

City of Madison Police Department

Summer 2016 Captain Victor Wahl

K9 Sniffs

***United States v. Whitaker*, No 14-3290 (2016); Decided April 12, 2016 by the 7th Circuit Court of Appeals.**

In 2013, the U.S. Supreme Court ruled on the appropriateness of bringing a drug-sniffing dog onto the front porch of a single-family residence to detect the odor of narcotics. The court (*Florida v. Jardines*) ruled that doing so was a search, requiring a warrant or some other exception to the warrant requirement.

In *Whitaker*, the Seventh Circuit Court of Appeals examined a related issue: whether police can bring a drug-sniffing dog into the common hallway of a multi-unit dwelling to detect the odor of narcotics. The case involved a report of drug dealing taking place from an apartment. Officers secured permission from the property manager to bring a K9 into the common areas of the building. The dog alerted on the apartment in question, and a search warrant was obtained. Officers discovered cocaine, heroin, marijuana and a handgun during the search.

The *Whitaker* court concluded that the *Jardines* holding extended to multi-unit apartments, and that the dog-sniff was a search.

The underlying premise of the *Jardines* case was that officers (and the K9) had been intruding on the home's curtilage when they performed the dog-sniff. Prior cases (in other contexts) have consistently concluded that common hallways in multi-unit apartment buildings are not considered curtilage. The *Whitaker* court, however, still concluded that the dog-sniff was improper. The court focused on the capabilities of the dog, equating them to other specialized tools (like thermal imagers):

> It is true that Whitaker did not have a reasonable expectation of complete privacy in his apartment hallway...Whitaker's lack of a reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public.

The *Whitaker* decision seems poorly reasoned in a number of ways, and the U.S. Attorney's Office is exploring avenues to re-visit the case (either by asking the full Seventh Circuit to re-hear the case or by appealing it to the U.S. Supreme Court). In the meantime, however, the case is binding and will impact MPD operations:

- Officers should not be performing K9 sniffs in the common hallways of apartment buildings without a warrant. Officers can consider seeking an anticipatory warrant to perform a drug sniff in this context. There may, however, be circumstances where exigent circumstances might permit use of an explosives detection K9 in an apartment building common hallway without a warrant.
- The general ability of officers to enter and be present in common hallways is not impacted—the use of "a sophisticated sensing device not available to the general public" is what will trigger the standard outlined in *Whitaker*.
- The *Whitaker* decision focused on the perceived intrusion to a home. It is appears that a similar situation in a non-residential setting might be viewed differently.

Moving Suspects / Witnesses

A number of recent cases have highlighted the issue of when officers can move individuals from one place to another in the context of a criminal investigation. Most of the circumstances where this becomes an issue involve criminal suspects, so a review of the types of police/citizen encounters should address any uncertainty.

There are three general categories of police/citizen encounters, and knowing which category you are in will tell you what authority you have over the individual. The first category is a consensual contact. This requires no suspicion whatsoever, but the encounter must be completely consensual. This means that no force may be used, and that the citizen must "feel free to decline the officers' requests or otherwise terminate the encounter." Officers engaging in a consensual contact cannot do anything to suggest or imply that the individual is not free to leave, and ideally will expressly notify the individual that they are free to go. Any frisk or search must be based on consent and the subject can end the encounter at any time.

If an officer is engaging in a consensual contact, the individual can only be moved from one place to another (including to a police facility) if they expressly consent to it. Officers cannot compel the individual to go from one place to another; the consent of the individual drives the entire encounter in all respects.

Officers can certainly ask individuals to come to a police facility or accompany them to a police facility, and as long as the individual consents the movement is appropriate.

While at the station, it is important that the encounter remain consensual, and that the individual have the ability to end the encounter.

The second category of police/citizen encounters is a *Terry* stop, or investigative detention. A stop requires that officers have a reasonable suspicion, based on specific and articulable facts, that the person is committing, has committed, or is about to commit a crime. A stop is not based on consent; it is a detention. Accordingly, reasonable force may be used to effect a stop. A frisk for weapons is also permitted if officers possess a reasonable suspicion that the individual is armed.

The permissible scope of a stop is not unlimited. For example, the duration of a stop must be reasonable. While there is no specific time limit that will apply to all stops, officers must be acting expediently in carrying out their investigation during the stop and there must be a legitimate, investigative need that exists for the duration of the stop.

Another limitation on the scope of a stop is movement of the detained suspect. Officers' authority to move a suspect is extremely limited. Movement can only be made within the vicinity of the original stop, and there must be an objective reason to do so. One example would be moving a suspected drunk driver a short distance to perform field sobriety tests in a safe/dry location. **It is not permitted to move a detained suspect from the scene of a stop to a police facility, unless the suspect consents to the movement.**

The third category of police/citizen encounters is an arrest, requiring probable cause. A valid arrest provides officers with much broader authority to search the arrested person and move them (to a jail, to a police facility, to a hospital, etc.) as is reasonably needed.

A consensual contact can transform into a detention or arrest at any time if officers develop reasonable suspicion or probable cause, and a stop can transform into an arrest if officers develop probable cause.

Sometimes similar issues arise with those who have witnessed or are believed to have witnessed crimes. In almost every instance, interactions with witnesses should be viewed as purely consensual contacts. So, the scope, duration and nature of an encounter with a witness must be based on their consent. This includes any movement of the witness (to a police facility or some other location), and the duration and scope of the encounter after the movement has occurred. Again, the consent of the individual drives the entire encounter in all respects.

Wisconsin law (§969.01(3)) contains a provision for a court to require bail or issue a warrant for a material witness. This is limited to felony cases, however, and there must be a strong showing that the individual will not appear in response to a subpoena.

Some cases—though none in Wisconsin—have recognized limited authority for officers to detain witnesses at or near the scene of an incident. These cases typically involve serious felony crimes and a strong indication that the persons detained had *witnessed* the crime. These encounters carry no authority beyond a typical *Terry* stop (the individual cannot be compelled to identify themselves or be moved from the location of the stop; the duration of the stop must be limited; etc.). Officers should only consider this in extreme situations, involving serious felony crimes where there is a clear indication that the individual was an eyewitness and there are no reasonable alternatives.

Crime Alerts/Hit & Run

In 2013, the legislature enacted a statute *requiring* law enforcement to utilize the state crime alert network when investigating a missing adult at risk (a "Silver Alert"). The statute was recently amended to include certain hit & run offenses:

175.51 Reports of missing adults at risk and of hit–and–run incidents. (1m) (a) In this subsection, "adult at risk" means an adult who has a developmental disability, who suffers from Alzheimer's disease or dementia, or who suffers from or could, without access to medication, suffer from cognitive impairment if the impairment would likely render the adult incapable of getting to a familiar location without assistance.

(b) If a law enforcement agency receives a report of a missing adult at risk, the law enforcement agency shall use the form under s. 165.785(2m)(a)1. to disseminate the report using the integrated crime alert network.

(2m) If a law enforcement agency receives a report of a violation of s. 346.67 or 346.70(1), the law enforcement agency shall disseminate the report through the integrated crime alert network if the law enforcement agency determines that all of the following conditions are met.

(a) A person has been killed due to the accident that is related to the violation.

(b) The law enforcement agency has additional information that could help identify the person who has allegedly committed the violation or the vehicle involved in the violation.

(c) An alert could help avert further harm or aid in apprehending the person who allegedly committed the violation.

Stolen Property & Pawn Shops

If stolen property is recovered from a pawn shop, that property must eventually be returned to the original owner. However, remember that if property recovered from a pawn shop was acquired by fraud (by using a stolen credit card, for example) then the property belongs to the pawn shop, and should be returned to the pawn shop once it is no longer needed for evidentiary purposes.