LEGAL UPDATE

SUMMER 2023

HOTEL ROOMS AND WARRANTLESS ENTRY

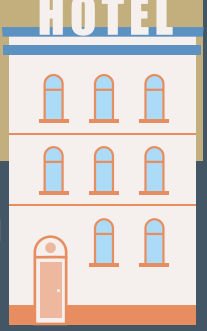
In *State v. Bourgeois*, a 2022 WI Court of Appeals case, the Court examined warrantless entry specifically in regards to hotel rooms. In *Bourgeois*, the West Milwaukee Police Department (WMPD) was dispatched to assist locating and detaining Bourgeois. WMPD was advised that Bourgeois may be in possession of a stolen handgun, suffered from PTSD, and had "drug problems." Officers confirmed that Bourgeois was at local Best Western and obtained a key card from the front desk.

Officers observed a DO NOT DISTURB sign hanging on Bourgeois' door, where no sound is heard from inside. Officers attempted entry with the key card, but the deadbolt is engaged. After knocking and announcing multiple times, they retrieved a master key. Officers utilized the master key to open the door, however the chain lock is engaged. WMPD made visual and verbal contact with Bourgeois, who was on the bed and whose hand were visible. Bourgeois asked officers what they wanted, and ultimately told officers to leave. Eventually Bourgeois got up, turned, and walked in the opposite direction of the door. Citing officer and subject safety concerns, WMPD forced entry, detained Bourgeois, and located a stolen handgun on the bed. WMPD stated it was approximately 30-40 minutes between the time of arrival and forcing entry.

A hotel room can clearly be the object of Fourth Amendment protection as much as a home. *Hoffa v. US,* 385 U.S. 293 (1966). In cases involving warrantless entry of hotel rooms, officers must not only be able to articulate probable cause (to arrest or search), but an inherent exigency that would be defeated by delaying the search in order to procure a warrant. **Any** physical invasion of the structure of the home, by even a fraction of an inch, is too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open a hotel room door.

Here, a generalized "concern" relating to Bourgeois' possession of a firearm, mental health diagnoses, and AODA issues was not enough to satisfy the immediacy requirement justifying a warrantless entry. Something more, such as knowledge of suicidal statements or overt actions by Bourgeois, needed to be present to justify the warrantless entry. Thus, the Court concluded that because involved officers were unable to present a compelling argument as to the necessity of making a warrantless entry in order to preserve life, the Fourth Amendment was violated.

Summary by Sergeant Sherrick



Want to learn even more about Hotel/Motel case law? MPD's Fall-2017 Legal Update (Pages 3-4) is a great place to start!

SINGLE PHOTOGRAPH IDENTIFICATION

Is the use of a single photograph to identify a suspect an inadmissible show-up identification? This question was decided in *State v. Roberson,* 2019 WI 102 (2019), Roberson resolved a "business dispute" by shooting victim CAS in the leg. CAS did not know Roberson's name, and when asked if CAS could identify the shooter from a picture, CAS stated, "Possibly, I mean, I don't know,.... kinda..." Officers located Roberson's Facebook page and showed CAS a photograph of Roberson from this Facebook page. CAS identified Roberson as the shooter. Roberson argued the use of a single photograph to identify him as the shooter violated his due process rights.

The Court ruled that using a single photograph did not violate Roberson's rights. Wisconsin uses a two-part test to analyze out-of-court identifications:

1. Whether the identification procedure was impermissibly suggestive, **and**
2. If it was, whether the identification was nonetheless reliable under the totality of the circumstances.

While the Court assumed the single-photograph presentation was impermissibly suggestive, it concluded that the identification was reliable because CAS had met Roberson repeatedly before the shooting and the identification procedure was documented on videotape.

Summary by Detective Nelson

MPD AND SINGLE PHOTO IDENTIFICATION

MPD's Identification Procedures SOP speaks to single photograph identification.

KNOWN SUSPECT

A single photograph of the suspect can be presented to the victim/witness to confirm the suspect's identity if:

- The officer can establish that the suspect is actually known to the victim/witness AND
- The victim/witness can identify the suspect sufficiently

If such a method is utilized, the photograph should be preserved through property tagging and described within the subsequent report.

UKNOWN SUSPECT

If the victim/witness does not know the suspect, or only knows the suspect by nickname or other partial identifier, a sequential photo array is the preferred method of identification procedure.

In cases where the victim/witness only knows the suspect by a nickname or other partial identifier, a single photograph may still be appropriate if: (1)the officer sufficiently clarifies the extent and nature of the witness' familiarity with the suspect, AND (2) ensures the witness can provide a physical description of the suspect prior to showing a single photograph for identification.

Q1: TRUE or FALSE-You can make a physical arrest of somebody solely for a violation of Safety Belts Required.

Q2: You are dispatched to a disturbance at a store. The clerk provides a physical description and tells you the customer is drunk. The customer leaves prior to your arrival, however, the clerk provides a vehicle description and plate number. You see the vehicle as you arrive in the area. TRUE or FALSE- You cannot initiate a traffic stop of the vehicle if you do not witness a traffic infraction.

DEALING WITH BAGGAGE

As therapists are fond of pointing out, everyone has baggage. The question is how to deal with that baggage, specifically, when can police search an arrestee's bag?

If a bag is on the arrestee's person at the time of arrest, MPD's Arrest, Incarceration, and Bail – Adults SOP dictates that prior to transporting to jail, an officer **shall** search the person to ensure that weapons/contraband are not introduced into the jail. A search incident to arrest extends to items within the arrestee's immediate control at the time of arrest, provided that the search is contemporaneous. *Chimel v. California,* 395 US 752 (1969). Thus, the search of a bag on the arrestee's person/in their immediate control is a search incident to arrest.

Problems arise when the arrestee's belongings are not on their person/in their immediate control at the time of their arrest. If the arrestee's belongings cannot remain at the arrest location, officers take the belongings to the CPD property room for safekeeping. Because these belongings are not on the arrestee/in their immediate control at the time of arrest, these items are not subject to search incident to arrest. The solution? The Inventory Search.

Inventory Search

The MPD Handling of Evidence, Contraband, Found, or Lost Property SOP dictates that officers must follow the procedures outlined in the MPD Packaging Guide, which states that hazardous items, perishable items, contraband, medications, and currency be packaged separately from the bag itself. This can only be accomplished by means of an inventory search.

WHO: Police officers have "both the right and the duty" to take into custody and inventory a suspect's property that would otherwise be left unattended.

WHAT: An inventory search is a well-defined exception to the search warrant requirement of the Fourth Amendment. An inventory search is the search of property lawfully seized and detained in order to ensure that it is harmless, to secure valuable items, and to protect against false claims of loss or damage."

WHEN: If we wait until the suspect has been booked into jail and we arrive at the property room, we may uncover evidence or contraband that would lead to additional charges. Thus, if possible, the inventory search should be performed prior to booking. Performing an inventory search at this time is not problematic because of the "inevitable discovery rule." This rule, established in SCOTUS case *Nix v. Williams,* 467 US 431 (1984), allows evidence that would otherwise be subject to suppression be admissible if the evidence would have been **inevitably and legally** discovered by lawful means. Therefore, "if evidence would have inevitably been discovered during a routine inventory search, it is admissible." *US v. Rhind*, 289 F.3d 690, 694 (11th Cir. 2002).

Summary by Officer M. Johnson

OFFICERS ROUTINELY SEIZE BELONGINGS THAT ARE NOT ON THE ARRESTEE'S PERSON/IN THEIR IMMEDIATE CONTROL AT THE TIME OF THEIR ARREST. OFFICERS HAVE A DUTY TO SEIZE THESE ITEMS FOR SAFEKEEPING, AND BOTH MPD SOP AND CASE LAW DICTATES OFFICERS PERFORM INVENTORY SEARCHES OF THESE ITEMS.

COMMON QUESTION, COMPLEX BREAKDOWN

Were you disturbed? A common question that officers ask during almost every investigation. While this question may be easy to remember and simple to ask, is it always essential that officers ask it? What are the actual elements of Disorderly Conduct (hereinafter DC)? Does Disorderly Conduct apply to private property? When should police list a victim in a Disorderly Conduct arrest? This seemly common question of "Were you disturbed?" may be, in actuality, more complex than you realize.

Plain Language & VAIPBUD

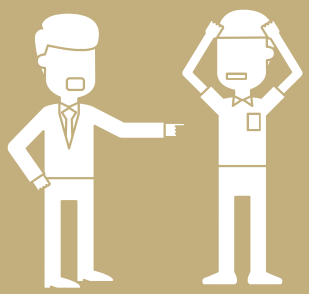
Let's start with the statute itself-Wisconsin State Statute §947.01(1)

Element 1

- Whoever, in a public or private place, engages in [conduct that is]
  - Violent
  - Abusive
  - Indecent
  - Profane
  - Boisterous
  - Unreasonably Loud
  - Otherwise Disorderly

Element 2

- Under circumstances in which the conduct tends to cause or provoke a disturbance



If Element 1's bulleted list seems like a lot to remember, perhaps you could benefit from the acronym, V.A.I.P.B.U.D. Having this acronym handy could prove helpful when writing reports. While you do not need all the sub-elements to cite or arrest a wrong-doer, a report that paints a word picture of all applicable V.A.I.P.B.U.D. factors will be much more compelling for prosecuting attorneys and sentencing judges.

Tending to Cause or Provoke

One clue that DC does not require a discrete victim is the statutory language, specifically Element 2. So long as the behavior occurs "under circumstances in which the conduct tends to cause or provoke a disturbance", the officer has met their standard. Here's one example of "victimless" DC:

- It's 4:30M. You are on routine patrol when you come across a clearly drunk male who is persistently screaming curse words in the middle of the street in a heavily residential neighborhood. There is no reporting party or victim. You spend a minute observing and listening to the male from 50 feet away. He is not directing his profane language at anybody in particular because nobody else appears to be outside at this hour…

A reasonable officer could substantiate a DC charge based upon the time and location of the conduct. Alternatively, the Person Making Unreasonable Noise ordinance violation may be appropriate.

However, if this same inebriated male is chanting curse words to nobody, surrounded by others who are cheering loudly at a crowded house party on Badger game day and nobody seems to mind the male's choice of words… Here, the reasonable officer will NOT be able to substantiate a DC charge because the circumstances don't support that the male's conduct is aberrant or disorderly to those who are reveling all around him.

DC Victims

You may have heard that DC can only be victimless when charging as a forfeiture (municipal citation) but this is not necessarily the case. This belief likely originates from the difference in standard of proof: "beyond a reasonable doubt" in circuit court vs. "clear and convincing evidence" in municipal court. A witness to the disorderly behavior will be extremely helpful in getting the charge prosecuted, but don't forget that you (the officer) may be able to serve as that witness.

One Wisconsin case that discusses victims in DC cases is *State v. Vinje,* 201 Wis.2d 98 (Ct. App. 1996). In this opinion, the Court wrote: "The disorderly conduct statute does not require a victim, but when the disorderly conduct is directed at a person, that person is the victim for the purpose of prosecuting the perpetrator…" In another Wisconsin case, *State v. Zwicker*, 41 Wis.2d 497 (1969), the WI Supreme Court said: "The [Disorderly Conduct] statute does not imply that all conduct which tends to annoy another is disorderly conduct. Only such conduct as unreasonably offends the sense of decency or propriety of the community is included. The statute does not punish a person for conduct which might possibly offend some hypercritical individual." Instead, DC refers to what is objectively disturbing based upon the circumstances.

DC in Private Spaces

Finally, in WI Supreme Court case *State v. Schwebke*, 253 Wis.2d 1 (2002), the Court held that our DC statute "encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well." In this opinion, the court indicated that most domestic disturbances occur only on a private level, yet the conduct is disorderly because it affects the overall safety and order of the community. An example of an objective analysis of DC taking place in a private setting is:

- You respond to an apartment for a domestic. You identify the victim, but they are so numb to violence that the suspect intentionally smashing items against the wall in close proximity to the victim no longer elicits an emotional reaction. When you ask the victim, "Were you disturbed?" they say "no." Physical evidence and an independent witness statement substantiate the physical act occurred mere inches from the victim's head…

Here, the reasonable officer could find probable cause to arrest the aggressor for DC, keeping in mind that a "physical act that may cause the other person reasonably to fear imminent engagement" in an "intentional infliction of physical pain" would qualify as domestic abuse under Wis. Stat. 968.075(1)(a).

Key Takeaways

- Don't limit your options based solely on the inability to locate an identified "disturbed" party. Look to the circumstances to discern whether your suspect caused (or tended to cause or provoke) a breach of the peace.
- Remember that DC is evaluated under an objective (reasonable person) standard, and can occur in either private or public spaces.
- If you do identify a target of the DC (or witness of the DC), be sure to list that person as a victim/witness.
- The DC statute and ordinance language carefully conforms to 1st Amendment case law. While the 1st Amendment protects people's freedom of speech (and behaviors), that freedom is not absolute, and our statutory language prohibits specific types of conduct.

Summary by PO Rabe and Sergeant Prado

THRESHOLD ENTRIES AND HOT PURSUIT

In *US v. Santana,* 427 U.S. 38 (1976), officers developed PC to arrest Santana for drug trafficking, and responded to her residence. As they approached the residence, they saw Santana standing inside the threshold in an open doorway. As officers approached, Santana turned and fled inside. Officers chased Santana inside, apprehending her a few feet inside the doorway. SCOTUS upheld the entry and arrest, noting that Santana, while standing in the doorway of her house, was in a "public place" for purposes of the Fourth Amendment, since she was not in an area where she had any expectation of privacy, and was not merely visible to the public, but was exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. Note, however, that this case, known as the "Santana Rule" will likely not apply to persons standing in their doorway as the result of a knock:

ANSWERS

Q1: False. Violations of §§347.48(1) or 347.48(2) or of any corresponding local ordinance cannot be the sole basis for taking somebody into custody. As far as enforcement goes- cite and release only!

Q2: False. You can stop the vehicle under reasonable suspicion that the suspect, who is driving the vehicle the clerk described in the area of the disturbance, has committed/is committing/will commit a crime. You do not need to witness a separate traffic offense to initiate a traffic stop.

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

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