LEGAL UPDATE

City of Madison Police Department

Winter 2013 Captain Victor Wahl

Miranda

Two 2013 cases illustrate key points on *Miranda*, and more specifically on how and when a suspect may invoke his/her *Miranda* rights.

***State v. Lonkoski*, 346 Wis.2d 523 (2013); Decided April 9, 2013 by the Wisconsin Supreme Court**.

In *Lonkoski*, police were investigating the death of a ten-month old girl. After receiving the autopsy results, detectives asked the mother to come to the station for an interview. She did so, and was driven there by the father (Lonkoski). Lonkoski waited in the lobby while detectives initially spoke with the mother. Officer then asked Lonkoski to accompany them to an interview room, where he was questioned. After about twenty minutes, Lonkoski stated, "I want a lawyer." Lonkoski was arrested, and indicated that he wanted to continue speaking with the officers. After a valid *Miranda* waiver, he did so, providing incriminating statements.

The issue before the Wisconsin Supreme Court was whether Lonkoski had been in custody at the time he indicated that he wanted an attorney. Custody, for *Miranda* purposes, is "formal arrest or restraint on freedom of movement of a degree associated with formal arrest." This is an objective test, and is a very fact-specific inquiry.

The court concluded that Lonkoski had not been in custody at the time he asked for an attorney. This conclusion was based on a number of factors:

- Lonkoski had driven to the station voluntarily;
- Lonkoski had voluntarily accompanied the officers to the interview room;
- The detectives expressly notified Lonkoski that he was not under arrest;
- The door to the interview room was unlocked, and was opened frequently during the encounter;
- When Lonkoski was left alone in the interview room the officers asked him if he preferred that the door remain open or closed;
- The duration of the interview to that point was short;
- Lonkoski was not physically restrained in any way.

As a result, the court concluded that Lonkoski had not been in custody at the time he asked for an attorney. Then—the key aspect of the court's decision—the court confirmed that an individual cannot invoke his/her *Miranda* rights unless they are in custody:

> Because his statement about wanting an attorney was not made during a custodial interrogation, *Miranda's* rule requiring that the interrogation cease upon a request for an attorney does not apply, and there is no constitutional violation and no bar to using his subsequent statements.

So, *Miranda* rights cannot be invoked by a person who is not in custody. None of the further analysis that would follow an in-custody *Miranda* invocation (was the invocation scrupulously honored, did the suspect re-initiate questioning, etc.) were necessary and Lonkoski's statements were ruled admissible.

***State v. Uhlenberg*, 348 Wis.2d 44 (Ct. App. 2013); Decided April 3, 2013 by the Wisconsin Court of Appeals.**

In *Uhlenberg*, officers brought a suspect to their station for questioning in a child sexual assault case. Unlike in *Lonkoski*, the suspect was handcuffed and driven to the station in a squad car. He was also left in a locked room and escorted by an officer when he asked to get a drink of water (though he was told that he was not under arrest).

As the officer was about to read Uhlenberg his *Miranda* warnings, Uhlenberg stated, "I am not going to say another word and I want an attorney." The officer continued with the *Miranda* warnings, and Uhlenberg eventually signed the form. The subsequent interrogation eventually yielded incriminating statements.

The Court of Appeals concluded that Uhlenberg had been in custody for *Miranda* purposes while in the interview room. The key issues were:

- Officers had gone to Uhlenberg's residence and told him he "needed" to come to the station with them for questioning;
- Uhlenberg was not given the option to drive himself to the station, but was frisked, handcuffed and put in the backseat of a squad car;
- Once in the interview room, Uhlenberg sat alone for about 15 minutes before officers entered to start the questioning;
- The interview room was locked, and when Uhlenberg asked for a drink of water he was escorted.

Even though the officer hadn't started reading *Miranda* to

Uhlenberg, his invocation of his *Miranda* rights was still valid. Wisconsin courts have ruled that a suspect may invoke his/her *Miranda* rights while in custody, even prior to formal interrogation. Since the officer did not honor Uhlenberg's invocation, his subsequent statements during the interrogation were inadmissible.

Lonkoski and *Uhlenberg* reinforce two important principles:

- A suspect who is not in custody cannot invoke his/her *Miranda* rights.
- A suspect who is in custody can invoke his/her *Miranda* rights even prior to interrogation or being informed of his/her *Miranda* rights.

These cases also illustrate some of the factors courts will examine when determining whether someone who is interviewed in a police facility is in custody for *Miranda* purposes.

Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Portability and Accountability Act—more commonly known as HIPAA—established a set of national standards for the protection of health care information. HIPAA applies to "covered entities," primarily health plans and healthcare providers; and to "protected health information." Basically, a covered entity may only use or disclose protected health information to the extent it is: a) authorized by HIPAA; or b) authorized in writing by the individual who is the subject of the protected health information.

The HIPAA statute is very long and complicated, with most of the details applying to healthcare providers, insurance providers, etc. However, HIPAA does impact law enforcement, and the extent to which providers can or will release medical information to law enforcement. HIPAA outlines a number of situations where covered entities may disclose protected health information to law enforcement officials for law enforcement purposes:

As required by law: A covered entity may disclose protected health information if required by law. This includes disclosures required by a warrant or subpoena, and also applies to required reporting by statute. Statutes 48.981(2) (mandatory reporting of suspected child abuse) and 225.40 (mandatory reporting of certain wounds and burn injuries) fall under this exception.

Identification/location purposes: A covered entity may disclose protected health information in response to a law enforcement request for the purpose of identifying or locating a suspect, fugitive, material witness or missing person. The type of information that can be released under this exception is limited.

Victims of a crime: A covered entity may disclose protected health information in response to a law enforcement request related to a subject who is a victim of a crime. The victim must agree to the disclosure or be unable to provide consent due to incapacitation or other emergency circumstance (with certain conditions).

Death: A covered entity may disclose protected health information about the death of an individual to law enforcement if the entity believes the death was caused by criminal conduct.

Crime on premises: A covered entity may disclose protected health information that is believed in good faith to constitute evidence of criminal activity that occurred on the premises of the covered entity.

Reporting crime in emergencies: A covered entity providing emergency medical care off premises may disclose protected health information to law enforcement if it appears necessary to alert law enforcement to the commission and nature of a crime; the location of a crime or victim; or the identity, description or location of the suspect.

Medical information cannot be released by a medical provider or covered entity to law enforcement if it does not fall under one of these exceptions. With the exception of the first category (disclosures required by law), HIPAA permits—but does not require—disclosure under these circumstances. So, healthcare providers and other covered entities may choose not to disclose medical information, even under circumstances where HIPAA permits it. A court order is generally the only way to compel a healthcare provider or other covered entity to disclose information.

HIPAA can also become an issue in emergency rooms regarding officer presence with patients during health history screening/questioning. If the patient is in custody, or is about to be taken into custody, then officers are able to stay with them at all times. If the patient in custody needs some type of treatment or evaluation that is sensitive, officers should work with medical staff to maintain oversight and control of the subject while minimizing embarrassment, etc.

If the patient is not in custody, then the general presumption is that officers should not be present in the examination room during the health history screening/questioning (which should be relatively brief). However, there are some exceptions to this (the patient poses a safety risk, officers need to be present for evidence

collection, the patient has consented to the officer's presence, etc.). If any of these apply officers should be sure to notify ER personnel.

DNA Collection

***Maryland v. King*, 133 S.Ct. 1958 (2013); Decided June 3, 2013 by the United States Supreme Court.**

In *King*, the Supreme Court addressed the constitutionality of collecting DNA from arrestees. The circumstances leading to the litigation started in 2003, when a suspect broke into a residence and sexually assaulted a woman in Maryland. Investigating officers did not identify a suspect at that time, but did collect physical evidence from the scene that contained the suspect's DNA.

In 2009, a subject (King) was arrested for assault in a case involving a shotgun. By that time, the State of Maryland had enacted a statute that called for DNA collection from all persons arrested for serious offenses. In accordance with this statute, King's DNA was collected by means of a buccal swab. This DNA profile was uploaded to the state's DNA database, and was matched to the DNA sample taken from the 2003 sexual assault. King was eventually convicted for the sexual assault and sentenced to life in prison without the possibility of parole.

King challenged his conviction, arguing that the collection of his DNA at the time of his arrest was an unreasonable seizure. The Maryland appellate court agreed, ruling that the statute permitting DNA collection at the time of arrest was unconstitutional.

The State of Maryland appealed to the U.S. Supreme Court, who (in a 5-4 decision) reversed the Maryland court and ruled that the DNA collection statute was constitutional.

A few weeks after the *King* decision, the law in Wisconsin regarding DNA collection changed significantly. Previously, DNA was collected from those convicted of a felony and from those convicted of a limited number of misdemeanors.

The new law changes this significantly. It requires DNA collection from all individuals arrested for any felony (or the corresponding juvenile offense). The DNA sample may only be submitted to the crime lab for analysis (and comparison with DNA databases) if the arrest was based on a warrant, once a court has made a probable cause determination for a felony at preliminary hearing, or if the subject does not appear for the preliminary hearing.

The new law also requires DNA collection from all individuals convicted of a misdemeanor.

This DNA collection process for arrestees will be the responsibility of county sheriffs. The statute permits the use of reasonable force to collect the DNA in the event that the subject refuses. The law also contains provisions for an arrestee to have their DNA profile removed from the database if the charges against them are dismissed or if they are acquitted.

These changes do not take effect until 2015. It is anticipated that this expanded collection requirement will result in an additional 68,000 DNA profiles being collected and added to the DNA databank annually.

Disorderly Conduct—Open Carry

A reminder that in 2011 the disorderly conduct statute was amended to limit its applicability to the open carry of firearms. The full statute now reads:

> **947.01 Disorderly Conduct. (1)** Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to provoke a disturbance is guilty of a Class B misdemeanor.
> **(2)** Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

The second paragraph is the new section, added in 2011. This limits the scope of the disorderly conduct statute (as well as the City ordinance) with respect to openly carrying firearms. So, when responding to reports of subjects openly carrying firearms, please keep these points in mind:

- In many instances no police intervention is warranted.
- If any type of enforcement action/intervention (a stop or arrest) is based on a disorderly conduct violation, there must be something specific that can be articulated demonstrating that the individual has a criminal or malicious intent. This can be based on the individual's statements or physical actions, but it must be specific and articulable.
- Other statutes or ordinances—such as carrying a firearm in a prohibited area, like a courthouse—might apply.
- A consensual encounter is also an option. Remember to stay within the parameters of a consensual contact if doing so.

These situations are very challenging for officers, requiring the balancing of competing legal issues with potential public safety risks.