LEGAL UPDATE

WINTER 2022

STATE AND FEDERAL COURT SYSTEMS

The case law in our department's legal updates will most often come from two court systems; the Wisconsin state court system and the Federal court system. Most decisions here are mandatory authority–decisions that Wisconsin courts have to follow. Some may be persuasive authority–decisions that our courts may follow but are not required to.

The Wisconsin Court System has three levels.

- The circuit court is the county-level trial court. Circuit court decisions are persuasive authority.
- The Wisconsin Court of Appeals is our intermediate appellate court. It is required to decide all cases properly appealed to it, however only published decisions are mandatory authority for our state.
- The Wisconsin Supreme Court is the state's top appellate court. It chooses the appeals it wants to accept and its decisions are mandatory authority for our state.

The Federal Court System also has three levels.

- The U.S. District Courts are the federal trial courts. The Eastern District courts are in Milwaukee and Green Bay while the Western District court is in Madison. District court decisions are persuasive authority.
- The U.S. Circuit Courts of Appeal are the federal intermediate appellate courts. The United States is divided into circuits that cover geographic areas. They are required to hear all cases properly appealed to them. Only decisions from the Seventh Circuit are mandatory authority in Wisconsin while the decisions of the other circuits are persuasive authority.
- The Supreme Court of the United States is the country's top appellate court. It accepts only 1% of the cases appealed to it. All of its decisions are mandatory authority for the entire country.

DID YOU KNOW?

- In 2021 there were 23, 652 Criminal/Traffic cases filed in Dane County Circuit Court.
- Wisconsin circuit courts are divided into branches, with at least one branch in each county.
- Dane County has 17 branches, and 6 of these branches are in the criminal division, 7 of these branches are in the civil division, and 4 of these branches are in the juvenile division.

ARREST AND CHARGING DECISIONS-A BLAST FROM THE PAST

"Do you want to press charges?" is a question frequently asked of victims by officers. What impact the victim's answer should have on decision making, however, is often misunderstood. There has been a misconception by some that a victim's unwillingness to "press charges," or to "pursue a complaint" ends the arrest decision-making process (with no arrest or prosecution), and precludes officers from making an arrest. This is not the accurate. Several reminders regarding this issue:

- Victims do not "press charges." Officers do not press charges either—we request them once we have arrested or cited someone, but only the State of Wisconsin—through the District Attorney's Office— has the authority to file criminal charges.
- A victim's statement that they do not want to "press charges," or that they are unwilling to pursue a complaint never precludes officers from making an arrest, nor does it preclude the District Attorney's Office from filing charges.
- Officers may want to inform victims that charging decisions are made by the District Attorney's Office – and not by the victim – to relieve the victim of the perceived responsibility of charging someone with a crime.
- A victim's desire to pursue or not to pursue a complaint can be one factor used by an officer when deciding whether to make an arrest, but it need not be the deciding factor.
- Wanting to "press charges," or a willingness to pursue a complaint, is not an element of any criminal offense.

Officers are not precluded from inquiring into a victim's wishes regarding criminal prosecution in some instances, and in some cases the investigating officer may base the arrest decision largely on theses wishes. Once probable cause is established, however, the final decision to arrest is ours (not the victim's), and the decision to file formal criminal charges is the District Attorney's Office (not the victim's).

Remember that while non-consent is an element of many offenses, it is not synonymous with a willingness to pursue a complaint. If non-consent is established, an arrest can still be made even if the victim states they are not willing to pursue a complaint.

Summary by Sergeant Becker

RESOURCES FOR VICTIMS IN DANE COUNTY

Dane County Victim Witness Unit- 608.266.9003
Crime Response Program (24/7)- 608.376.0164
DAIS 24 Hour Crisis Line- 608.251.4445
DAIS Legal Advocacy- 608.251.1237
Rainbow Project- 608.255.7356
Centro Hispano Family Advocacy- 608.255.3018
Centro Hispano Legal Services- 608.255.3018
Joining Forces for Families- 608.242.6388
Respite Center- 608.244.5700
Safe Harbor- 608.661.9787
Disability Rights Legal Services- 608.267.0214
Rape Crisis- 608.251.7273
Project Respect- 608.283.6435
UW Health Services Hotline- 608.265.5600

EXIGENT HOME ENTRY-DOMESTIC DISTURBANCES

United States v. Emmanuel Sanders **(8th Circuit Court of Appeals; 2022)****

An 11 year old contacts her grandmother and reports that her mother (LaFrancois) and her mother's boyfriend (Sanders) are "fighting really bad" and that "they needed someone to come." The grandmother contacts 911 and passes on the information provided by the 11 year old, and advises of the presence of two other minors (ages 7 and 1) in the home. Officers can see the 11 year old through a window upon arrival. The 11 year old's actions appear "excited." When officers knock, LaFrancois comes to the door. She is upset and has visible injuries to her face and neck. Officers make it clear that they need to speak with Sanders. LaFrancois does not want them to enter, and she offers to get Sanders and bring him outside. LaFrancois also warns officers not to tell Sanders that it was the child that called. When LaFrancois opens the door to get Sanders, officers hear crying from inside. The officers then make entry.

Officers locate Sanders just inside the door, and discover the source of the crying is the 1 year old. Sanders is non-compliant with officers, and is told to sit on the couch. The investigation reveals that Sanders brandished a gun during the disturbance- the gun was later located under the couch cushions where Sanders had been told to sit by officers. Sanders was arrested for drug and firearm offenses. He then filed a motion to suppress, arguing that his 4th Amendment rights were violated when officers entered his residence without a warrant.

<u>HOLDING</u>

The 8th Circuit reiterated SCOTUS' reasoning in *Brigham City v. Stuart* that "an officer may enter a home without a warrant if he has an objectively reasonable basis to believe that entry is necessary 'to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" In this case, the Court considered the following factors:

- Grandmother places a 911 call based off of information provided by an eye-witness
- Upon arrival, officers observe the eleven year old gesturing excitedly
- LaFrancois' initial statement that she's okay is clearly contradicted by her physical state
- LaFrancois did not want officers to go inside
- LaFrancois was concerned about her daughter being revealed as the caller
- Officers hear a child crying from inside the residence

The Court found officers' entry to be reasonable, stating "although the presence of a domestic violence suspect in a home with children cannot alone justify a warrantless entry, here the officers were confronted with 'facts indicating that the suspect was a threat to the children or others.'".

Summary by Sergeant Sherrick

**Although we at MPD operate under the jurisdiction of the 7th Circuit, the legal reasoning and review of 4th Amendment case law in this opinion is worth visiting.

SEIZURES AND THE RIGHT TO COUNSEL

In 2020, Court of Appeals of Wisconsin decided issues relating to the seizure of evidence and the right to counsel. The Court concluded:

- The wife of a homicide suspect had actual authority to consent to the warrantless seizure of clothing belonging to her husband
- Police inappropriately seized clothing from the suspect that hospital staff had collected
- The right to counsel must be clearly and unambiguously invoked and will not be implied based on the subject's mental state or characteristics.

***State v. Abbott*, 392 Wis.2d 232 (2020)**

Keith Abbott was convicted of killing his mistress, Kristen Miller. At the time of the homicide, he was still living with his estranged wife, Ermelinda Cruz. Abbott was living in the basement, but Cruz still had access to the entire house, including the areas where Abbott was living. One day, Abbott returned home early in the morning and told Cruz that he thought he killed Miller. Cruz called the police but did not share the information about the potential homicide. Abbot was exhibiting signs of being in a mental health crisis-officers found him on the living room floor shaking and he would not answer questions. Medics responded and removed two sweatshirts Abbott had been wearing so they could assess him. Abbott was transported to the hospital-the sweatshirts were left on the floor.

Hospital staff communicated to police that Abbot had suspicious injuries and that they observed troubling spots on his clothing. Officers back at the residence interviewed Cruz who told them about Abbott's affair with Miller, that Miller had been blackmailing Abbott, and that Abbott had been missing for two days and may have killed Miller. Officers asked Cruz if they could take Abbott's sweatshirts, which were still on the living room floor.At the hospital, staff provided police with a patient bag containing Abbott's clothes that had been removed. Abbott's sweatshirts and other clothing was tested, and Miller's blood was found on all of the clothing. Miller's body was eventually found, and Abbot was later charged and convicted of homicide.

<u>SEIZURE</u>

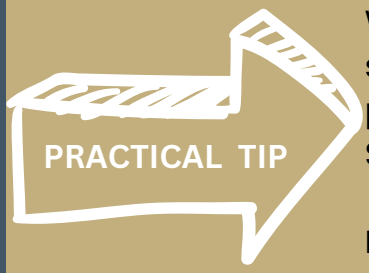
On appeal, Abbott argued that evidence from his sweatshirts should be suppressed because they were inappropriately seized. The Court reviewed the doctrines of actual authority and apparent authority. The Court noted a third party may consent to the seizure of an item if the third party has common authority over it, either actual or apparent. **Apparent authority** exits when "information available to the police officers at the time of the search or seizure would justify a reasonable belief that the party consenting had the authority to do so." **Actual authority** exits when a third party has joint access or control over an individual's property such that the individual assumes the risk of any intrusion or interferences with the property.

The Court concluded that Cruz had actual authority over the sweatshirts and appropriately gave consent to seize them. Though estranged, Cruz and Abbott were still married and cohabiting, Cruz still had full access to the basement where Abbott was living, and Abbott made no effort to protect or secure any of his property.

The sweatshirts located in Cruz's living room were not locked or secured in any way, and they were clearly items of marital property that spouses traditionally have common access to.

Abbott argued evidence obtained from the clothing seized at the hospital should be suppressed. The Court agreed. The Court noted that when a private party, like hospital security, searches a subject's property, law enforcement may similarly search the property because the private search already negated the subject's privacy interests (assuming the private search was NOT completed at the request of law enforcement). However, the law enforcement search must not exceed the scope of the private search. Here, seizure of Abbott's patient bag far exceeded the scope of the hospital search of the clothing, stating police needed a warrant to seize the clothing.

The Court also determined that plain view did not apply because at the time the patient bag was seized, officers did not articulate probable cause to believe that the items contained any evidentiary value. The test for a seizure based on plain view is that the item must be (1) in plain view; (2) the officer must have prior justification for being in a position to see the item in plain view; and (3) the officer must have probable cause to believe the item contains evidence of criminal activity.



When an officer seizes items (clothes, shoes, purses, bags) from a suspect at the hospital, the officer must be able to articulate probable cause that the items contain evidence AT THE TIME OF THE SEIZURE.

Here, factors that suggested probable cause existed at the time of the seizure included that hospital staff believed that Abbott's clothing contained blood, Cruz and Abbott's brothers believed he did something bad, and Miller was missing. These factors would most likely would have supported a seizure based on plain view, however, the State did not introduce evidence at trial suggesting that the officer that seized the patient bag was aware of any of these facts.

RIGHT TO COUNSEL

After Miller's body was found, Abbott was arrested and interrogated. Prior to the interrogation, officers read Abbott his Miranda rights. Abbott was ambiguous about wanting an attorney present, so questioning continued. During the questioning, officers repeatedly asked Abbott if he wanted an attorney. Abbott said things like, "I don't want to get in trouble with my attorney," "Ask my attorney if it's okay," and "My attorney said to have him here." During the interrogation, Abbott was physically shaking, exhibited ticks, and gave nonsensical and childish answers. Abbott had also recently been hospitalized for mental health treatment. Abbott argued that based on his statements and mental condition, officers should have ceased questioning.

Custody+Interrogation = MIRANDA

Abbott did not challenge that he made a valid waiver, but argued that he invoked his right to counsel during questioning. Abbott also argued that based on his statements and mental condition, officers should have ceased questioning. The Court noted that a suspect must unambiguously invoke the right to counsel. This did not happen here. Abbott's statements about his attorney were deemed to be ambiguous. Lastly, the Court also ruled that a suspect's personal characteristics or mental condition do not relax the requirement that the right to counsel must be unambiguously and unequivocally invoked.

Summary by Officer Vandervest

OOH THAT SMELL...THE ODOR OF MARIJUANA AND PC

***State v. Moore* (Wisconsin Court of Appeals, 2022)**

An officer initiates a traffic stop on Moore's vehicle for speeding. Upon making her approach to the vehicle, the officer detects an odor of what she believes to be unburnt or raw marijuana emanating from the vehicle. A PC search of the vehicle reveals little more than shake. A PC search of Moore's person reveals two small baggies secreted in his waistline; one contains cocaine, the other fentanyl. Moore was arrested for possession. Moore moved to suppress the evidence found on him, arguing that it was a warrantless search. The Circuit Court suppressed the evidence, citing a lack of PC at the time of the search. The Court of Appeals affirmed the Circuit Court's suppression order. The Court in *Moore* conceded that "The odor of marijuana, alone, may provide probable cause to arrest when the odor is "unmistakable" to a person with relevant training or experience **and** the odor is linked to a specific person." However, in *Moore,* the State did not elicit testimony or any other evidence that either officer had any training or experience relating to the odor of marijuana, that the odor of marijuana was "unmistakable," or that officers had the training and experience to determine that it was an unmistakable odor.

<u>MARIJUANA AND MPD</u>

While, generally, we'd like to rely on our friendly ADA to introduce our training and experience in court, this is where we can get ahead with superlative report writing. A nice Training and Experience sub-header in our reports, especially certain call types (OMVWI, Drug Investigations), can go a long way towards establishing you as the rock star that you are. MPD's enforcement of marijuana related drug-laws has changed over the last few years, but consuming marijuana in a motor vehicle which is in operation is still fair game. In terms of raw marijuana - as in this case – be mindful of our SOP and local ordinances, and consider alternate approaches to probable cause. Ultimately, this is not a game changer. Odor is odor. Just make sure that you can articulate why it's unmistakable, especially if you're relying only on odor to take further investigative steps.

Summary by Sergeant Sherrick

Wondering about the PC search and it's legality? A search incident to a subsequent arrest is lawful if PC to arrest exists prior to the search. While we cannot perform PC searches of people, per se, we can search prior to the custodial arrest if we have PC to arrest. Just be attentive to the officer safety considerations inherent in such actions.

CRIME SCENE SEARCHES

There is no “crime scene exception” to the Fourth Amendment. Any search of a crime scene, even pursuant to a homicide investigation, must still be justified by a warrant or by an exception to the warrant requirement. The United States Supreme Court affirmed this in *Mincey v. Arizona*, 437 US 385 (1978) and reaffirmed this in *Flippo v. West Virginia*, 528 US 11 (1999),

***Mincey v. Arizona* (1978)**

In 1974, Officer Headricks of the Tucson Narcotics Squad arranged to purchase a quantity of heroin from Rufus Mincey. Later, Officer Headricks (accompanied by other plainclothes officers) knocked on the door of Mincey's apartment. Mincey’s acquaintance, John Hodgman, opened the door. Officer Headricks slipped inside and quickly went to the bedroom. As the other officers entered the apartment, despite Hodgman’s attempts to stop them, the sound of gunfire came from the bedroom. Officer Headricks emerged from the bedroom and collapsed on the floor; he died a few hours later. The other officers found Mincey lying on the floor of his bedroom, wounded and semiconscious; he was transported to a hospital. Soon after the shooting, two homicide detectives arrived at the apartment and took charge of the investigation. Their search lasted for four days, during which officers searched, photographed and diagrammed the entire apartment. They did not, however, obtain a warrant. The Supreme Court of Arizona held that the warrantless search of Mincey’s apartment was constitutional because it was a search of a murder scene.

The US Supreme Court held that the extensive, warrantless search of Mincey’s apartment was unreasonable and unconstitutional under the fourth amendment. Writing for the majority, Justice Stewart wrote that warrantless searches were per se unreasonable with a few specific exceptions, and rejected Arizona’s argument that the search of a homicide scene was one of these exceptions. The justices further rejected Arizona’s contention that Mincey forfeited his right to privacy in his home by shooting Officer Headricks

***Flippo v. West Virginia* (1999)**

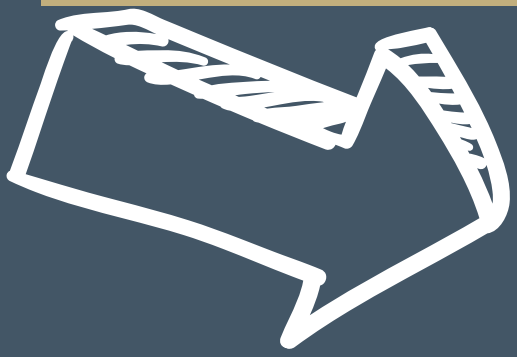
In 1996, James Flippo called 911 to report that he and his wife had been attacked while camping in[PM1] a West Virginia state park. Inside Flippo's cabin, officer's found his wife, with fatal head wounds. During their search, officers found and opened a closed briefcase, in which they discovered photographs and negatives that incriminated Flippo.

After he was indicted for murder, Flippo moved to suppress the photographs and negatives on the grounds that the police had obtained no warrant, and that no exception to the warrant requirement of the fourth amendment had justified the search and seizure. The Circuit Court denied the motion to suppress on the ground that the officers, having secured the homicide crime scene for investigative purposes, had been within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area.

The question in *Filppo*, which denied a motion to suppress evidence on the grounds that the police were entitled to make a thorough search of any crime scene and the objects found there, conflict with the U.S. Supreme Court's decision in *Mincey v. Arizona*? The answer is yes. The US Supreme Court held that the Circuit Court's "position squarely conflicts with *Mincey v. Arizona* where we rejected the contention that there is a 'murder scene exception' to the warrant clause of the fourth amendment".

Additionally, the Supreme Court stated, "We noted that police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises, however, a warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement…we (reject) the contention that there is a 'murder scene exception' to the warrant clause of the fourth amendment."

Summary by Sergeant Becker



Nothing in either ruling above prevents officers from conducting a protective sweep. A protective sweep of the residence may be conducted once officers have lawfully entered if a **reasonable suspicion exists that a person or person(s) are in the residence** and **pose a threat to officers**. The sweep is limited to places where a person could be concealed. The MPD "Crime Scene Response" and "Searches" SOPs speak to protective sweeps.

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

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