# LEGAL UPDATE

City of Madison Police Department

Fall 2012 Captain Victor Wahl


## *Extended Supervision Conditions/Battery to PO*

***State v. Rowan*, 341 Wis. 2d 281 (2012); Decided June 8, 2012 by the Wisconsin Supreme Court.**

In *Rowan*, an officer observed a subject (Rowan) run a stop sign and strike a pole. As officers and first responders assisted, Rowan—who was intoxicated—cursed them and reached toward the floor of her vehicle, where a handgun was subsequently located. After Rowan was conveyed to a hospital, she continued to resist: cursing, spitting and grabbing medical staff. Rowan made threats towards the officers, medical staff and their families. She also physically resisted officers, seriously injuring an officer's hand.

Rowan was ultimately convicted of multiple offenses, including battery to a law enforcement officer. Her sentence included imprisonment followed by extended supervision. The court imposed a number of conditions to the extended supervision, including a condition that her "person or her residence or her vehicle is subject to search for a firearm at any time by any law enforcement officer without probable cause or reasonable suspicion."

Rowan appealed her conviction, challenging this condition to her extended supervision, and also challenging her conviction for battery to a law enforcement officer. The case reached the Wisconsin Supreme Court.

The Court first addressed the search condition of Rowan's extended supervision. Probation conditions will be deemed constitutional if they are not overly broad, and if they are reasonably related to the person's rehabilitation. The *Rowan* court concluded that both of these conditions were satisfied, and that the condition was reasonable. The nature of Rowan's offense was relevant to this determination (as her conduct included aggressive and threatening behavior involving a firearm), as was the scope of the search condition (being limited to firearms).

Rowan next challenged her conviction for battery to a law enforcement officer. One element of this offense is that the officer be acting in an official capacity. Rowan argued that the officer was not employed to assist hospital personnel, and that therefore she was not acting in an official capacity at the time she was injured. The court rejected this argument. The officer had been dispatched to the hospital to assist other officers in restraining a combative suspect who was under arrest. Part of this treatment included a non-consensual blood draw, also related to the criminal investigation for OMVWI. So, the court concluded that the officer had been acting in an official capacity at the time of the injury.

Remember that the search condition applied to Rowan was specifically imposed by a judge due to the facts of her case, and it isn't likely that this will be a common occurrence. Also, even with the condition in place, any search performed pursuant to it must be done in a reasonable manner.

## *Computer Searches*

***United States v. Seiver*, 2012 U.S. App. LEXIS 18185 (2012); Decided August 28, 2012 by the Seventh Circuit Court of Appeals.**

*Seiver* involved a child pornography investigation. Law enforcement officers determined that a number of images containing child pornography had been downloaded from an image-sharing website to the suspect's home computer. The information the officers had obtained showed that the suspect had downloaded the images seven months earlier. They subsequently obtained a search warrant for the suspect's home and computer. The search yielded multiple images depicting child pornography.

Seiver challenged the issuance of the search warrant, claiming that any facts establishing probable cause to search his computer were "stale" at the time the warrant was obtained (seven months later). His primary argument was that there was no evidence that he was a collector of child pornography who could be assumed to retain illegal pornographic images indefinitely.

The *Seiver* court rejected the relevance of this issue, stating, "the concern with 'staleness' versus freshness and 'collecting' versus destroying reflects a misunderstanding of computer technology." The court pointed out that deleting a file does not necessarily remove it from a computer's hard drive, and that even overwritten deleted files can be recovered (fully or partially).

The court stated:

> "Staleness" is highly relevant to the legality of a search for a perishable or consumable object, like cocaine, but rarely relevant when it is a computer file. Computers and computer equipment are "not the type of evidence that rapidly dissipates or degrades"…No doubt after a *very* long time, the likelihood that the defendant still has the computer, and if he does that

> the file hasn't been overwritten, or if he's sold it that the current owner can be identified, drops to a level at which probable cause to search the suspect's home for the computer can no longer be established. But seven months is too short a period to reduce the probability that a computer search will be fruitful to a level at which probable cause has evaporated.

The court also rejected the notion that a search warrant affidavit for child pornography (or other computer evidence) must include language about recovering deleted files (though it likely isn't a bad idea to do so).

So, while "staleness" remains relevant to a probable cause determination, the *Seiver* decision demonstrates that it will be analyzed very differently in the context of evidence located on a computer hard drive.

## *Consent Searches*

***United States v. Saucedo*, 688 F.3d 863 (7th Cir.2012); Decided August 6, 2012 by the Seventh Circuit Court of Appeals.**

In *Saucedo*, an Illinois State Trooper stopped a tractor-trailer for a registration violation. The trooper checked the driver's criminal history and noted that he had a significant criminal background, including convictions for drug distribution. The trooper asked the driver (Saucedo) if he had any drugs in the truck or trailer, and Saucedo stated that the trooper could "open it." The trooper then specifically asked Saucedo if he could search the truck and trailer for drugs and weapons, and Saucedo replied, "yes."

While searching the sleeper portion of the truck, the trooper observed what appeared to be an alteration. He used a screwdriver to remove one screw, and discovered a hidden compartment. Further search required the removal of a television and three screws. The hidden compartment contained 10 kilograms of cocaine. Saucedo challenged the search of the hidden compartment, claiming that it went beyond the scope of the general consent he had provided to the trooper.

Any search based on consent must remain within the scope of the consent given. The court pointed out, "where someone with actual or apparent authority consents to a general search, law enforcement may search anywhere within the general area where the sought-after item could be concealed." The court also stated:

> A reasonable person would have understood that by consenting to a search of his tractor and trailer for drugs, Saucedo agreed to permit a search of any compartments or containers therein that might contain drugs, including the hidden compartment where the cocaine was ultimately found.

Note that it was relevant that the search did not cause any damage, nor did it dismantle any functional part of the tractor (as "the compartment had no function other than to conceal drugs"); prior cases have ruled that dismantling door panels was beyond the scope of a general consent to search.

Saucedo also claimed that the search was invalid because he did not have the opportunity to object to the scope of it (as he was seated in a squad car and out of view during the search). The court rejected this, pointing out that no prior rulings had ever required this in the context of a vehicle search, and that Saucedo had done nothing to limit or withdraw the scope of the broad consent he had provided.

So, the *Saucedo* court concluded that the search was reasonable and his conviction was upheld. A few key points:

- The manner in which you phrase a request for consent to search will determine the permissible scope of the search. Be as broad as possible, and don't limit the scope by indicating you are only looking for a specific item (like a weapon).
- Carefully document the exact wording you use when asking for consent, and the exact response from the suspect. Use exact quotes in your report. The exact wording of the trooper's request and the suspect's response were known in this case. If only a general indication of consent had been documented in the trooper's report, the case likely would have had a different outcome. A dispute over a single word can make the difference in how a court views a consensual encounter, so it is critical to document exact quotes in your report.
- It was relevant to the *Saucedo* court that nothing was damaged during the search of the hidden compartment, and that the compartment did not serve any functional purpose in the vehicle's operation. Had the search caused damage, or been in an area related to operation of the vehicle, the outcome may have been different.
- Finally, remember that MPD policy requires that officers have some articulable reason to ask someone for consent to search, and that any consent searches must be documented in a report.

## *Private Searches*

***Rann v. Atchison*, 689 F.3d 832 (7th Cir.2012); Decided August 3, 2012 by the Seventh Circuit Court of Appeals.**

In *Rann*, officers were investigating allegations that a subject (Rann) had sexually assaulted his daughter and step-daughter, and that he was in possession of child pornography. During the course of the investigation, family members provided a digital camera memory card and a computer zip drive to officers (without being asked or directed to do so by police). The devices contained incriminating images used at trial. Rann challenged the viewing of the images on the devices by police.

A search performed by a citizen will be considered a private

search if it is not done at the direction, control or suggestion of law enforcement. The *Rann* court outlined the general rules applying to private searches:

> Long-established precedent holds that the Fourth Amendment does not apply to private searches…When a private party provides police with evidence obtained in the course of a private search, the police need not stop her or avert their eyes…Rather, the question becomes whether the police subsequently exceed the scope of the private search.

The issue in *Rann* was the application of these principals to digital storage devices. The court concluded that the officers' actions were reasonable, stating, "a search of any material on a computer disk is valid if the private party who conducted the initial search had viewed at least one file on the disk."

# *Admissibility of Statements*

***State v. Spaeth*, 819 N.W.2d 769 (2012); Decided July 13, 2012 by the Wisconsin Supreme Court.**

*Spaeth* addresses the interplay between a statement compelled from a probationer and a subsequent police interview. Spaeth was on probation for a sex offense, and was called into his agent's office to take a polygraph examination. During the test Spaeth showed signs of deception. Spaeth subsequently made some admissions to his agent, suggesting that he had violated his rules of supervision and possibly committed additional criminal acts. The agent called police, who took Spaeth into custody on a probation hold. The agent also shared the results of the polygraph and Spaeth's subsequent statements to the officers. He was subsequently provided with *Miranda* warnings (which he waived) and interviewed. Spaeth incriminated himself during the interview, and was later criminally charged with several offenses (his probation was also revoked).

Spaeth challenged his conviction, arguing that the polygraph examination (and statements to his agent) had been compelled, and that his subsequent statements to police were therefore inadmissible.

First, note that the government can compel people to provide statements in some circumstances. One example is a public employer ordering an employee to provide a statement as part of a disciplinary investigation. Whether a statement will be considered compelled typically depends on the penalty for the person if they refuse to cooperate. In Spaeth's case, had he not cooperated with the polygraph examination he faced possible sanctions, including revocation of his probation. Probation agents clearly have the authority to compel probationers to provide statements in some circumstances, and the court concluded that Spaeth had been compelled to take the polygraph examination.

If the government compels a statement, neither the statement nor anything derived from it can be used in a criminal prosecution. This is extremely broad protection, similar to a judicial grant of immunity:

> Immunity must prohibit the prosecutorial authorities from using the compelled testimony in any respect. This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an investigatory lead, and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

If the government wishes to criminally prosecute someone for something disclosed in a compelled statement, they must show that any evidence introduced is "wholly independent" of the compelled statement. This is a very difficult burden to meet.

Since Spaeth's statements to his agent had been compelled, nothing derived from them could be used in his criminal prosecution. And since the officers only interviewed Spaeth about the criminal conduct because of the information provided to them by Spaeth's agent (originating from his compelled statement), these statements were clearly derived from the compelled statement and were inadmissible:

> The State cannot compel a probationer to provide this kind of incriminating testimonial evidence, which may be used against him in the noncriminal revocation proceeding…and then use that information again, directly or indirectly, to prosecute the probationer criminally. The State must decide whether to take the impermissible step of forcing a probationer to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent…because forcing that choice will bar future use of the incriminating evidence in a criminal prosecution.

A few points:

- Not every statement made by a probationer to their agent will be considered compelled: "probationers do not receive immunity for information volunteered during a routine interview with a probation officer."
- A compelled statement made by a probationer to their agent can be used for purposes related to their supervision, including administering sanctions and revocation.
- Had the police learned of the criminal conduct from other, independent sources (like the victims) and not the agent, they would have been free to interview Spaeth and use his statements in a prosecution (as long as the agent did not share anything from the compelled interview with them.
- Officers and detectives should take steps to ensure that probation agents sharing information with them do not share anything derived from a compelled statement.
- Agents should only compel statements from probationers after careful consideration.