LEGAL UPDATE

City of Madison

Spring 2007 Lieutenant Victor Wahl

School Searches

In 1985, the U.S. Supreme Court ruled that the Fourth Amendment applies to public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Officers are often called upon to conduct investigations in public schools, and are often asked to assist school officials with searches. What standards apply to officers in these situations?

The *T.L.O.* court observed that public school students do not give up all constitutional protections while at school, but that they do have reduced Fourth Amendment protections. This reduced protection is based on an individual's status as a student in a school setting. So, adult students still have reduced privacy expectations in a school setting, while minors outside a school setting are not subject to the reduced protections that students in a school setting are.

While ruling that, "school officials must adhere to the requirements of the Fourth Amendment," the *T.L.O.* court recognized the very different roles and abilities of school officials (as opposed to law enforcement). So, the *T.L.O.* decision stated that school officials do not need a warrant or probable cause to justify a search of a student. Instead, public school officials may perform searches if they have a reasonable suspicion that a student has violated a law or school rule, and that the search will yield evidence of that violation. This burden – reasonable suspicion – is a low one.

Law enforcement officers are generally required to have probable cause or a warrant prior to performing a full-scale search of a person. However, the Wisconsin Supreme Court has ruled that if an officer is performing a search of a student at the request of, or in conjunction with, school officials, the lower burden of reasonable suspicion applies. *State v. Angelia D.B.*, 211 Wis.2d 140 (1997). Searches initiated by police without the involvement of school officials – even of students on school grounds – will be governed by the usual standards that apply to police searches (the reduced reasonable suspicion standard will not apply).

This reasonable suspicion standard also applies to students' vehicles parked on the school premises. The normal probable cause standard applies to vehicles parked off school premises.

School officials' authority to perform searches clearly applies to students on school property during the school day, but will also apply to other school settings that may not be on school property (athletic events, field trips, dances, etc.).

The scope of a search performed by a school official – or by an officer acting at the request of a school official – must be reasonable. So, a search for a stolen textbook would be limited to locations where the book could be concealed (likely including bags, purses, etc., but excluding pockets, shoes, etc.). The *T.L.O.* court described a reasonable search as being "when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Consent searches of students may also be performed by school officials or officers. Consent must be given freely and voluntarily, and the student must have authority over the item or location being searched. Consent must be clearly given, and the scope of the search being requested must be clearly articulated (and described in a report). Expect that courts will closely scrutinize any search based on the consent of a minor.

In most situations, public school students will have no reasonable expectation of privacy in their lockers. *Isiah B. v. State*, 176 Wis. 2d 639 (1993). This presumes that the school district has a written policy retaining ownership and control of school lockers and has communicated this to students (which is the case in the Madison Metropolitan School District). As a result, school officials can legally search students' lockers without any individualized suspicion. Officers may also assist school officials in performing these searches, if requested.

School officials are not required to provide a student with *Miranda* warnings prior to questioning (unless the school official is acting as an agent of police). However, if an officer is conducting a custodial interrogation of a student in a school setting *Miranda* is required. Remember that the definition of "custody" (for *Miranda* purposes) is a formal arrest, or the degree of restraint typically associated with a formal arrest. It is likely that many situations in which officers typically interrogate students in a school setting will be considered custodial for *Miranda* purposes. A *Miranda* waiver must be obtained prior to questioning in these circumstances, and the questioning will need to be audio recorded.

The Wisconsin Attorney General's Office has published a more detailed overview of legal issues relevant to public schools. It is available at:

http://www.doj.state.wi.us/docs/SafeSchoolManual.pdf

Vehicle Searches

***State v. Bruski*, No. 05-1516, (2007); Decided February 22, 2007 by the Wisconsin Supreme Court.**

[Thanks to Officer Matt Tye for submitting this summary]

This case came to the Wisconsin Supreme Court after the defendant, Bruski, appealed a Wisconsin Court of Appeals decision reversing a suppression order from the Douglas County Circuit Court.

City of Superior Police responded at around 8 a.m. to an occupied suspicious vehicle parked behind a residence. Upon arrival, officers discovered Bruski passed out in the drivers seat, the vehicle was not running. When Bruski did wake up he stated he was waiting for a friend, but made no admission to operating the vehicle. Officers contacted the registered owner, Smith, who did not know Bruski, but suggested that perhaps her daughter, Jessica, had loaned the vehicle to Bruski. Smith responded to the scene, where Bruski stated he knew Jessica, but was unable to provide Jessica's last name. Jessica could not be located.

Smith wished to take possession of her vehicle, but did not have the keys. Bruski was asked by officers to step out of the vehicle. Smith and the officers asked Bruski for the keys to the vehicle; Bruski denied having the keys. Officers began searching for the keys inside the vehicle without asking Smith or Bruski. Neither party objected to the search. An officer opened a "hard and opaque travel case" that was on the floor of the front passenger seat. This action was visible to Bruski who again said nothing. The keys were not in the case, but marijuana, plastic baggies, a digital scale and notebook were located inside. Smith was baffled by the travel case and Bruski was arrested. A search of Bruski incident to arrest revealed the keys in his pocket along with a knife and methamphetamine. The circuit court suppressed the contents of the case, ruling that Bruski had "a reasonable expectation of privacy" to the case and police were not given consent to search the case. The items found on Bruski incident to arrest were also suppressed as being fruits of an illegal search. As stated above, the Wisconsin Court of Appeals reversed.

The Wisconsin Supreme Court examined Bruski's Fourth Amendment claim by determining if he had standing. Standing exists if an individual has a reasonable expectation of privacy in the area, place or thing that is searched/seized. In any context (not just vehicle searches), someone wishing to challenge a police search or seizure must demonstrate that they have standing, otherwise they cannot challenge the police action. The defendant bears the burden of proving that he or she had a reasonable expectation of privacy. *State v. Whitrock*, 161 Wis.2d 960, 972, 468 N.W.2d 696 (1991). A two-prong test (subjective and objective) is used to assess whether someone has a reasonable expectation of privacy:

- Whether the defendant had an actual expectation of privacy (subjective) in the area, place or thing searched; and
- Whether the defendant's belief is something society is willing to recognize as reasonable (objectively).

The court first found that Bruski did not have an actual (subjective) expectation of privacy. Bruski stated he did not know how he came to be in the car and said nothing when the police entered the vehicle to search for the keys. The court went on to hold that even if Bruski had a subjective expectation of privacy, this expectation of privacy would be unreasonable, thus failing the second part of the test. In analyzing the objective portion of the test the court listed a number of factors to consider:

- Whether the defendant had a property interest in the premises
- Whether the defendant was lawfully on the premises
- Whether the defendant had complete dominion and control over the premises
- Whether the defendant took precautions to maintain privacy
- Whether the property was put to some private use
- Whether the claim of privacy is consistent with historical notions of privacy

State v. Fillayaw, 104 Wis.2d 700, 711 n. 6, 312 N.W.2d 795 (1981). This list is not all-inclusive and courts will look to the totality of the circumstances. In *Bruski*, the court found that Bruski had no property interest in the vehicle and had no ability to control access to the vehicle. The court also stated that as a matter of historical perspective, "a non-owner driver does not have a reasonable expectation of privacy in the interior of a vehicle".

The court went on to address Bruski's argument that he had a reasonable expectation of privacy in his travel case, even if he did not have a reasonable expectation of privacy in Smith's vehicle. The court refused to adopt a bright line rule that would bar an individual from having reasonable expectation of privacy in personal property found in a vehicle in which he or she lacks a reasonable expectation of privacy. Instead the court decided to look at the facts of the specific case based on the same six guidelines listed above. Bruski left a travel case in a vehicle that he did not own and in a vehicle that he had not established a connection. There is no evidence from Bruski's conduct that he thought he had an expectation of privacy in the case and the totality of the circumstances make an expectation of privacy in the case unreasonable. Because Bruski failed to demonstrate standing, he could not challenge the search.

Justice Bradley wrote a dissent in this case that was joined by Chief Justice Abrahamson. The dissent, which appears troubling for the police, has no problem with the search of the vehicle but states that Bruski had a reasonable expectation of privacy in the travel case that is not diminished because he is asleep in a car that does not belong to him.

Frisks

***State v. Johnson*, 2007 WI 32 (2007); decided March 21, 2007 by the Wisconsin Supreme Court.**

In *Johnson*, two Racine officers stopped a vehicle for a minor traffic violation. As the officers approached the car, they observed the driver lean forward, as if he was reaching under the seat. It was dark, but the area was illuminated by street lamps. The officers contacted the driver (Johnson), who provided them with his license and other vehicle paperwork. Johnson was then asked to step from the car, and one of the officers advised him that they were going to pat him down for weapons.

During the pat down, Johnson (who stated he had a bad leg) fell down. The officers helped him up and attempted to resume the pat down, but Johnson fell again. The officers then had Johnson sit on the curb, and advised him that they were going to search his vehicle. During the search, the officers discovered a bag of marijuana under the driver's seat. They subsequently placed Johnson under arrest and attempted to search him incident to arrest. Johnson resisted, but once he was controlled the officers discovered crack cocaine in his pocket.

Johnson was convicted of possession of cocaine with intent to deliver, and challenged his conviction. The key issue was whether the officers had reasonable suspicion that Johnson was armed, justifying the frisk of his person and vehicle [the court concluded that Johnson had not consented to the search].

Recall that an officer, during an investigative stop, may conduct a frisk only if he/she has a reasonable suspicion that the person is armed. The reasonable suspicion must be based on specific and articulable facts, and not on unparticularized suspicion or a hunch. In the context of a traffic stop, this authority to perform a frisk extends to the passenger compartment of a vehicle. If an officer has reasonable suspicion to justify a frisk of a driver/passenger, the officer is then authorized to perform a frisk (sometimes referred to in the vehicle context as a protective search) of the vehicle. This protective search is limited to the passenger compartment, and is further limited to places where a weapon could be concealed.

Wisconsin Courts have ruled on numerous frisk cases over the years. In doing so, they have articulated a variety of factors that officers can rely on to justify a frisk, including:

- If the stop takes place late at night
- If the stop takes place in a high crime area
- If the suspect appears nervous
- If the suspect is not cooperative
- If a suspect vehicle does not pull over immediately
- If a suspect driver attempts to walk away from his/her vehicle after stopping
- If the suspect appears to be under the influence of alcohol or drugs
- If the officer has an objective reason to place the suspect in his/her squad

Note that none of these factors, alone, will typically be sufficient to justify a frisk. They are simply circumstances that courts have concluded officers can rely on to justify a frisk. Many other factors not listed can also reasonably be considered (including the severity of the offense being investigated and whether weapons are involved as well as the officer's knowledge of the suspect and his/her history of resistance, being armed, etc.).

In *Johnson*, the officers relied on a single factor: the movement by Johnson (leaning forward as if he was reaching under the seat) as they approached the vehicle. The court stated that, in some situations, a single factor may give rise to reasonable suspicion justifying a frisk. However, the court concluded that Johnson's movement was not sufficient to give the officers reasonable suspicion that he was armed.

The court did go on to state that a suspect's physical movement can be a factor officers rely on to justify a frisk:

> Depending on the totality of the circumstances in a given case, a surreptitious movement by a suspect in a vehicle immediately after a traffic stop could be a substantial factor in establishing that officers had reason to believe that the suspect was dangerous and had access to weapons.

However, because there were no other suspicious factors the officers articulated about Johnson (he was cooperative, he did not appear nervous, etc.), his movement was not sufficient to justify a frisk.

Finally, a footnote to the *Johnson* decision points out that the officers did not ask Johnson to explain the movement he had observed. The court stated that "a suspect's answer to such a question and demeanor while answering could provide information that is relevant to whether a protective search is reasonable."

Show-Ups

As a reminder, the Wisconsin Supreme Court, in *State v. Dubose*, 285 Wis.2d 143 (2005), significantly changed the way in which officers must handle one-on-one in person identifications (show-ups). The court concluded that police are not allowed to perform show-ups if they have probable cause to arrest the suspect they have in custody.

Under this rule, officers should only consider performing a show-up if they do not have probable cause to arrest the suspect. When officers develop probable cause to arrest a suspect without an eyewitness identification, the suspect should be arrested and a subsequent in-person or photo

lineup should be performed. If officers do not have probable cause to arrest a suspect, a show-up may be performed. If officers conduct a show-up when it is not necessary, the suspect identification will be suppressed.

Probable cause to arrest the suspect (for the offense being investigated) can arise in a variety of ways:

- Locating evidence of the crime (weapons, stolen items/ currency, etc.) on or near the suspect.
- Locating distinctive items of clothing that tie the suspect to the crime.
- Proximity of the stop to the scene of the crime (time and location).

During a recent armed robbery investigation where officers had stopped a suspect, one of the officers went to the scene of the robbery and viewed the store surveillance video. The officer then responded to the scene of the stop and was able to confirm the suspect's involvement in the robbery. This is an excellent way to obtain probable cause and avoid the need for a show-up.

The *Dubose* court did not provide guidance for one type of scenario: a suspect is stopped, and the officers develop probable cause to arrest him/her for a crime unrelated to the reason for the stop (such as a warrant, or obstructing). Until the courts provide clarification in this area, a good rule of thumb is to base your decision on the severity of the offense you have probable cause for. So, if you are investigating a serious (felony) offense (like a robbery), stop a suspect, and have probable cause to arrest him/her for a minor (bailable) offense, it is probably still reasonable to perform a show-up for the serious offense (since otherwise the suspect would likely be able to bail out of jail before a photo or in-person lineup could be performed). The more serious the crime being investigated, the more reasonable this approach will likely seem to courts.

The *Dubose* court suggested that if some type of other exigent circumstances exist—that make the use of an in-person or photo lineup unavailable—a show-up may be performed. It is not clear what type of situation will qualify under this exception.

Remember that even when a show-up is permissible, officers must take steps to reduce suggestiveness:

- Obtain and document a complete description of the suspect from the witness, separately from other witnesses if possible. Don't simply document what the witness says; ask questions. Note that physical description is not limited to height, eye and hair color, and clothing description. It also includes posture, gait, hairline, skin texture, alertness, facial expression, eye movement, degree of agitation or calmness, and many other physical characteristics that people actually see, but often don't volunteer. Also, document thoroughly the witness's opportunity to see the suspect and the conditions in which this occurred.
- Always separate witnesses and do not allow witnesses to see whether another witness identified the suspect.
- Never tell a witness before an identification that the police have a suspect. In fact, you should convey to the witness that the person may or may not be the perpetrator; that they should not feel in any way compelled to make an identification; and that the investigation will continue whether or not they positively identify this suspect.
- It is also important that police not confirm a witness's positive identification. That is, after an identification is made, police should never tell the witness that s/he made the correct choice, or provide information to the witness that corroborates the identification (e.g. "He had the $20 you reported stolen in his pocket.")
- Document the identification and the witness's degree of certainty. Ask the witness if there is anything in particular about the person identified that informed their identification of that person as the perpetrator. Try to quote the witness's statements about these things.
- If there are additional potential witnesses, instruct the witness not to discuss their identification with those persons.
- If possible, do not show the suspect handcuffed or in a squad car. If handcuffed, take measures to conceal this fact from the witness.
- If there are multiple suspects, only show one suspect at a time to the victim/witness.
- Document the process with in-car video.

What if there are multiple victims/witnesses, and the circumstances indicate that a show-up is permissible? If the first victim/witness positively identifies the suspect, then you clearly have established PC to make an arrest. You should not do further show-ups with the other victims/witnesses; instead, allow them to do other identification procedures (photo or in-person lineup) later.

The *Dubose* decision reflected a significant change to the way MPD officers have traditionally handled show-ups, and officers must take care to adhere to the case's "necessity" requirement. There continue to be cases of officers reverting to pre-*Dubose* techniques and performing show-ups when probable cause exists to make an arrest. These identifications are likely to be suppressed. The *Dubose* case also took a narrow view of what type of show-up is not impermissibly suggestive, and officers performing a show-up must be careful to ensure that the procedure is performed in a manner consistent with the above guidelines, and to adequately document the identification (including the use of in-car video).

Mayhem

In *State v. Quintana*, 2006AP499-CR (Ct. App. 2007), the Wisconsin Court of Appeals reviewed a case where a subject had been charged with Mayhem (§940.21). The Mayhem statute states, "Whoever, with intent to disable or disfigure another, cuts or mutilates the tongue, eye, ear, nose, lip, limb or other bodily member of another is guilty of a Class C felony."

Quintana had struck his ex-wife in the forehead with a claw hammer several times. The issue before the court was whether the Mayhem statute applied to the forehead. The court concluded that it did: "we hold the mayhem statute covers cutting or mutilation to the forehead."

Temporary License Plates

In *State v. Lord*, 2006 WI 122 (2006), the Wisconsin Supreme Court ruled that the display of a Wisconsin temporary license plate—alone—is not a valid reason for an officer to perform a traffic stop: "a law enforcement officer cannot infer wrongful conduct based solely on the display of a temporary license plate."

Hit and Run

In *State v. Harmon*, 2005AP2480 (Ct. App. 2006), the Wisconsin Court of Appeals examined the Hit & Run statute (§346.67(1)). The statute sets forth requirements for drivers involved in an accident. Harmon argued that "accident" (and the statute) are limited to unintentional incidents.

The Court of Appeals rejected Harmon's argument:

> We conclude that the meaning of "accident" in Wis. Stat. §346.67(1) is not limited to unintentional acts or events. Instead, the only reasonable meaning…is the broad meaning of "an unexpected, undesirable event."

Accidents—Hit and Run

In *State v. Dartez*, 2006AP1845 (Ct. App. 2007), the Wisconsin Court of Appeals again examined the Hit and Run statute (§346.67(1)). Dartez had lost control of her vehicle, left the roadway and crashed into the bedroom of a private residence. She then feld the scene without rendering aid or identifying herself. She was charged with a violation of §346.67(1). Dartez claimed that the accident occurred on private property (not open to the public) so that the statute did not apply.

The court rejected Dartez's argument, concluding that since she lost control of her vehicle on a roadway, the incident was still considered an accident (even though the actual collision was on private property):

> We conclude that when, as here, a vehicle is involved in a collision, the term "accident" in Wis. Stat. §346.67(1) includes, at a minimum, an operator's loss of control of the vehicle that results in the collision. Because Dartez's loss of control of the vehicle occurred on the highway, even though the resulting collision occurred off the highway, we conlcude she was "involved in an accident""upon a highway" within the meaning of §346.67(1) and Wis. Stat. §346.02(1).

LEGAL RESOURCES

There are a number of websites that offer free access to legal information or legal research. For anyone interested in staying up to date on legal issues, these websites offer access to a tremendous amount of information:

Wisconsin State Court System [All Wisconsin Supreme Court and Court of Appeals decisions are posted on this website the morning they are released. Recent cases may be searched for by date, party name or keyword.]

www.courts.state.wi.us

Wisconsin State Legislature [Offers access to current Wisconsin statutes, as well as to current administrative code provisions. Newly enacted or modified statutes are posted on this site shortly after they are signed into law .]

www.legis.state.wi.us

Wisconsin State Bar Association [Another option for searching Wisconsin case law. This site also allows access to administrative law decisions as well as links to a number of other legal research/resource sites.]

www.wisbar.org

Labor Relations Information System [Focuses on legal issues related to personnel, employment and discipline.]

www.lris.com

United States Supreme Court [Official site of the U.S. Supreme Court, allows rapid access to recent cases as well as access to oral argument transcripts (in some cases).]

www.supremecourtus.gov

Seventh Circuit Court of Appeals [Official site of the 7th Circuit Court of Appeals, which is the Federal Appeals Court that has jurisdiction over Wisconsin, Illinois and Indiana.]

www.ca7.uscourts.gov

Findlaw Home Page [very comprehensive site offering access to a tremendous amount of State and Federal law.

www.findlaw.com

Americans for Effective Law Enforcement [Offers a variety of legal outlines, as well as updates on current national legal trends.]

www.aele.org