LEGAL UPDATE

City of Madison

Summer 2004 Lieutenant Victor Wahl

Requiring Identification from Detained Subjects

***Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, Et Al.*, No. 03-5554 (2004); Decided June 21, 2004 by the United States Supreme Court.**

***Henes v. Morrissey*, 194 Wis. 2d 339 (1995); Decided June 27, 1995 by the Wisconsin Supreme Court.**

In *Hiibel*, a sheriff's deputy in Humboldt County, Nevada, responded to a report of a fight. When the deputy arrived, he contacted an individual (Hiibel) standing outside of a truck that was occupied by a female. Hiibel appeared to be intoxicated, and the deputy asked him for identification. Hiibel refused the deputy's request, and denied any wrongdoing. He then began to taunt the deputy, placing his hands behind his back and telling him to take him to jail. The deputy requested identification more than 10 times, and eventually told him that he would be arrested if he did not comply. Hiibel again refused to identify himself and was arrested.

Hiibel was charged with "willfully resisting, delaying, or obstructing a public officer" (analogous to Wisconsin's resisting/obstructing statute—946.41). Nevada has a statute that outlines the authority of an officer when executing an investigatory detention (similar to Wisconsin's 968.24). The statute provides, in part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing, or is about to commit a crime.
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> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

Hiibel was convicted and fined $250. He appealed his conviction, arguing that Nevada's statute—requiring lawfully detained subjects to identify themselves—was unconstitutional. Hiibel's case reached the U.S. Supreme Court who, in a 5-4 vote, rejected Hiibel's argument and upheld his conviction. The *Hiibel* court stated:

> The principles of Terry permit a State to require a suspect to disclose his name in the course of a Terry stop…A state law requiring a suspect to disclose his name in the course of a valid Terry stop is consistent with Fourth Amendment Prohibitions against unreasonable searches and seizures.

The *Hiibel* court also rejected Hiibel's argument that the Nevada statute ran afoul of the Fifth Amendment.

What impact, if any, does the *Hiibel* decision have on police officers in Wisconsin? Barring any legislative action, the answer is none. While there seems to be a parallel between the Nevada statutes at issue in *Hiibel* and Wisconsin's similar statutes (946.41 and 968.24), a Wisconsin Supreme Court decision interpreting these statutes forecloses this result.

In *Henes v. Morrissey*, Oconto County deputies stopped an individual they suspected had been operating a stolen vehicle. The individual would not identify himself, and the deputies arrested him for obstructing (946.41). The Wisconsin Supreme Court ruled that the obstructing statute did not apply to a simple failure to provide identity:

> We do not equate the failure to identify oneself with the act of giving false information…mere silence, standing alone, is insufficient to constitute obstruction under the statute… without more than mere silence, there is no obstruction.

The *Henes* decision was not based on constitutional principles, but was rather a matter of statutory interpretation. Had the *Henes* court ruled that an obstructing arrest for failing to provide identification was unconstitutional, the *Hiibel* decision would have been much more significant to Wisconsin law enforcement. However, Wisconsin law currently does not allow officers to arrest citizens simply for failing to identify themselves. If the legislature amends the obstructing statute to expressly criminalize this conduct, the *Hiibel* decision makes it clear that the statute will be constitutional. Absent some legislative action, however, officers are not able to make arrest simply based on a suspect's failure to identify themselves.

Miranda—Multiple Statements

***Oregon v. Elstad*, 470 U. S. 298 (1985); Decided March 4, 1985 by the United States Supreme Court.**

***Missouri v. Seibert*, No. 02-1371 (2004); Decided June 28, 2004 by the United States Supreme Court.**

The *Elstad* and *Seibert* cases address the question of whether taking a statement in violation of Miranda renders any subsequent statement inadmissible (even if preceded by a valid Miranda waiver). In *Elstad*, officers arrested an individual (Elstad) at his residence for burglary. The officer engaged in a brief interaction with Elstad at the time of the

arrest, asking him a few questions that connected him to the burglary. No Miranda warnings were provided at the time. Elstad was conveyed to a police facility, where he was interviewed by a detective about an hour later. The detective first provided Miranda warnings to Elstad, and Elstad waived his rights. Elstad then provided a full confession. He was subsequently convicted of burglary and sentenced to five years in prison.

Elstad challenged his conviction, claiming that his initial statements (obtained in violation of Miranda) rendered his subsequent confession invalid. The U.S. Supreme Court rejected this argument, ruling that Elstad's second statement was admissible. The court stated:

> It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

The *Elstad* decision stood for the proposition that a subsequent statement (after Miranda) made after an earlier Miranda violation is admissible if both statements were voluntary and the subsequent statement was given after a valid Miranda rights waiver.

In *Seibert*, a woman (Seibert) was arrested for an arson in which someone died. After her arrest, Seibert was taken to an interview room where an officer questioned her about the arson for 30-40 minutes without providing Miranda warnings. During this interview, Seibert admitted setting the fire, and admitted that she intended for the victim to die in the fire. After Seibert made this admission, she was given a short break. The officer then resumed the interview, turning on a tape recorder and providing Seibert with her Miranda warnings. She signed a written waiver of her rights, and the officer again asked her about the fire, referring to the admission that Seibert had already made. Seibert repeated her admissions, and was subsequently convicted of homicide.

Seibert appealed her conviction, arguing that the officer's conduct—intentionally interviewing her without providing Miranda warnings—rendered her subsequent post-Miranda statements inadmissible. The investigating officer admitted that the interview technique he used (a two-stage interview) was a deliberate strategy, and that it was used regularly by his department. The State of Missouri argued that the post-warning statements were admissible, based on the ruling in *Elstad*.

The *Seibert* court ruled that Seibert's second (post-Miranda) statement was improperly obtained and therefore inadmissible. The court did not overrule *Elstad*, but instead articulated principles for similar cases (admissibility of post-Miranda statements obtained after an unwarned confession):

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

The *Seibert* court went on to point out several facts that distinguished it from *Elstad*, and that will be relevant when determining whether Miranda warnings provided after a period of unwarned questioning will be sufficient:

- The completeness and detail of the questions and answers in the first round of interrogation
- The overlapping content of the two statements
- The timing and setting of the first and second statements
- The continuity of police personnel involved in the two statements
- The degree to which the interrogator's questions treated the second round as continuous with the first
- Whether the suspect was advised that the first statement could not be used

So, it remains clear that under circumstances like those present in *Elstad*, a second statement (post-Miranda) will be admissible, and that under circumstances like those present in *Seibert*, a second statement (post-Miranda) will not be admissible. When assessing the many possible variations of two-statement (involving two rounds of interrogation, one warned one unwarned) scenarios, courts will use the above factors to determine whether the Miranda warnings could function effectively and whether the second statement will be admissible.

Search Incident to Arrest—Vehicles

***Thornton v. United States*, No. 03-5165 (2004); Decided May 24, 2004 by the United States Supreme Court.**

In *Thornton*, an officer observed a vehicle driving suspiciously, and determined that the license plates on the vehicle were registered to another vehicle. The officer attempted to get behind the vehicle to perform a traffic stop, but the driver (Thornton) pulled into a parking lot, parked, and exited the vehicle before the stop could be made. The officer pulled up and contacted Thornton as he was walking away from the vehicle. The officer subsequently performed

a consent search of Thornton, discovering a small amount of marijuana. Thornton was arrested and placed in the officer's squad. The officer then searched Thornton's vehicle, locating a handgun under the driver's seat. Thornton was charged with several felonies for possessing the handgun (due to his criminal history).

Thornton appealed his conviction, arguing that the search of his vehicle was unconstitutional. Recall that officers are authorized to perform searches of subjects that have been arrested. This search incident to arrest is not limited to the arrested person, but extends to the area within the arrestee's immediate control. In the context of arrests from vehicles, courts have ruled that a search incident to arrest extends to the passenger compartment of the vehicle out of which the arrest was made. Thornton argued that this authority (to search the passenger compartment of a vehicle incident to the arrest of the driver or an occupant) applies only to situations where the police initiate contact with the arrestee while he is still an occupant of the vehicle.

The Supreme Court rejected Thornton's argument, ruling that officers have the authority to "search the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants'." Since Thornton was a recent occupant of his vehicle, the officer was authorized to search it incident to Thornton's arrest.

The obvious question, then, is just how recently must an arrestee have occupied a vehicle for a search of the vehicle (incident to arrest) to be permissible? The *Thornton* court did not elaborate on this point, simply stating, "so long as an arrestee is the sort of 'recent occupant' of a vehicle such as (Thornton) was here, officers may search that vehicle incident to the arrest." However, the *Thornton* decision should be viewed narrowly, and not as giving officers much more authority than currently possessed. In *Thornton*, the officer observed Thornton exit the vehicle and initiated contact with him while he was fairly close to the vehicle (the decision did not specify how close he was, but indicated that Thornton was in "close proximity" to the vehicle). The decision also suggests that its holding will be limited ("the arrest of a suspect who is next to a vehicle present identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.").

Civil Suits—Police Officer Plaintiffs

***Cole v. Hubanks*, No. 02-1416 (2004); Decided June 11, 2004 by the Wisconsin Supreme Court.**

In *Cole*, a Milwaukee police officer (Cole) was on patrol when she came upon a large dog wandering in the street. The dog did not display any evidence of viciousness, so Cole knelt down and called the dog towards her. The dog—weighing about 90 pounds—approached Cole and then lunged at her without warning. The dog knocked Cole over and bit her on the face and neck. Her injuries required 30 stitches.

Cole brought suit against the dog's owners, Aubrey and Yvonne Hubanks. The trial court dismissed the suit, concluding that it was barred by a principle of law known as "The Firefighters Rule." Cole appealed the dismissal of her suit.

The firefighters rule, first adopted by Wisconsin courts in *Hass v. Chicago & North Western Railway Company*, 48 Wis. 2d 321 (1970), precludes lawsuits by firefighters under certain circumstances. In *Hass*, a firefighter who was injured fighting a fire was precluded from suing the person who started the fire, even though the fire was started negligently. The court concluded that public policy dictated that the suit be barred; otherwise persons who negligently start fires would not summon help to extinguish the fire and the fire could spread. As a result, the firefighter in *Hass* was precluded from bringing suit.

The firefighters rule is not absolute. Since *Hass*, Wisconsin courts have allowed suits by firefighters injured fighting fires under certain circumstances. For example, if a firefighter fighting a fire is injured by the explosion of a defective product, a suit will not be barred. However, the court has extended the firefighters rule to EMT's, barring a suit by an EMT who was injured extracting an injured person from a vehicle involved in an accident.

The question in *Cole* was whether the firefighters rule also applies to police officers, thus barring Cole's lawsuit. The court concluded that under the circumstances present in Cole's case, the firefighters rule did not apply, and that she was able to proceed with her lawsuit. The court pointed out the differences between police officers and firefighters in reaching its decision:

> There are many differences between firefighters and police officers. For example, firefighters know they are exposed to danger when they are called to fight a fire…By contrast, police officers usually are out on patrol from the start of their shift until its end. Their efforts are not directed to one hazard, but rather they are often required to address varied circumstances, the responses to which may not always be apparent simply from the fact that they are police officers. Furthermore, firefighters and EMT's receive specialized training in fighting fires and in moving injured people at the scene of an accident, on a regular basis. While capturing stray dogs can fall within police officers' duties on occasion, the receive no specialized training to do so and it appears not to be a central focus of their day's activities.

It is important to note that the *Cole* court did not rule that the firefighters rule will never preclude an officer from proceeding with a lawsuit—the decision concentrated on the specific facts of Cole's case. However, it appears that in most instances where officers are injured due to negligence,

the firefighters rule will not bar them from proceeding with a civil law suit.

Miranda—Physical Evidence

***United States v. Patane,* No. 02-1183 (2004); Decided June 28, 2004 by the United States Supreme Court.**

In *Patane*, officers responded to a suspect's (Patane's) apartment to arrest him for a restraining order violation. The officers had also received information from an ATF agent that Patane (a convicted felon) was in possession of a handgun. After arresting Patane in his residence, the officers attempted to provide him with his Miranda rights but Patane interrupted them. The officers, however, still asked Patane several questions, including questions about the handgun. Patane eventually admitted possession of the handgun, and gave the officers consent to retrieve it. He was subsequently charged with being a felon in possession of a firearm.

Patane sought to have the firearm suppressed, arguing that since it was only located as a result of his statements—which were obtained in violation of Miranda—suppression was required.

The Wisconsin Supreme Court, in *State v. Knapp*, 00-2590 (2003) addressed the same issue last year (discussed in a previous legal update). The *Knapp* court ruled that physical evidence obtained as a result of an "intentional" Miranda violation was inadmissible. The *Knapp* court did not rule what the outcome would be if the Miranda violation was "negligent," nor did the decision offer any guidance as to what types of Miranda violations would be considered "negligent" as opposed to "intentional."

The U.S. Supreme Court rejected Patane's argument, and ruled that the handgun was admissible. The court first pointed out that Miranda is designed to protect citizens from self-incrimination. The court went on to state:

> The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is not justification for extending the *Miranda* rule to this context. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police to not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule…does not apply.

Note that physical evidence obtained as a result of an involuntary statement (such as one obtained by way of physical threats) will likely not be admissible.

Two days after the *Patane* decision was released, the U.S. Supreme Court vacated the *Knapp* decision and directed the Wisconsin Supreme Court to reconsider it in light of *Patane*.

Sexual Assault of Children—Age Misrepresentation

***State v. Jadowski,* No. 03-1493 (2004); Decided June 10, 2004 by the Wisconsin Supreme Court.**

Jadowski was charged with having sexual intercourse with a person below the age of 16, in violation of 948.02(2). At trial, Jadowski sought to introduce evidence that the victim fraudulently induced him to believe she was an adult (telling him that she was 19 years of age, possessing an apparent state-issued ID showing her to be 19, etc.). The trial court ruled that Jadowski could introduce the evidence, and the State appealed the trial court's decision.

The Wisconsin Supreme Court concluded that subjects prosecuted for 948.02(2) are precluded from raising a defense based on the victim's intentional misrepresentation of his or her age. As a result, "neither evidence regarding the defendant's belief about the victim's age nor evidence regarding the cause of or reasonableness of that belief is relevant." Accordingly, "evidence of the defendant's belief about the victim's age or the victim's intentional misrepresentation of her age is inadmissible" at trial.

Statutory Changes

Lie Detector Tests—Sexual Assault Victims
§968.265 is a new statute:

968.265 Lie detector tests; sexual assault victims.

(1) In this section, "lie detector" has the meaning given in s. 111.37(1)(b).

(2) If a person reports to a law enforcement officer that he or she was the victim of an offense under s. 940.22(2), 940.225, or 948.02(1) or (2), no law enforcement officer may in connection with the report order, request, or suggest that the person submit to a test using a lie detector, or provide the person information regarding tests using lie detectors unless the person requests information regarding tests using lie detectors.

(3) If a person reports to a district attorney that he or she was the victim of an offense under s. 940.22(2), 940.225, or 948.02 (1) or (2), no district attorney may do any of the following in connection with the report:

(a) Order that the person submit to a test using a lie detector.

(b) Suggest or request that the person submit to a test using a lie detector without first providing the person with notice and an explanation of his or her right not to submit to such a test.

Worthless Checks
§943.24(2) has been amended in part:

943.24(2) Whoever issues any single check or other order for payment of more than $2,500 or whoever within a 90-day period issues more than one check or other order amounting in the aggregate to more than $2,500 which, at the time of issuance, the person intends shall not be paid is guilty of a Class I felony.