LEGAL UPDATE

City of Madison Police Department

Summer 2011 Captain Victor Wahl

Exigent Circumstances

***Kentucky v. King*, 131 S.Ct. 1849 (2011); Decided May 16, 2011 by the United States Supreme Court.**

The *King* case addressed the issue of police-created exigent circumstances. Officers observed a controlled drug purchase, and watched the suspect moving towards an apartment. Uniformed officers moved in to effect an arrest, but the suspect had entered an apartment before they were able to make contact, and surveillance personnel could not see what apartment the suspect had entered. As the uniformed officers approached a group of apartments that the suspect had approached, they smelled marijuana coming from one of them. As a result, they approached the door to that apartment and began knocking loudly. The officers later testified that they knocked as loudly as they could, and announced "police" and "this is the police." At that point the officers heard movement from inside the apartment indicating to them that evidence was about to be destroyed. The officers made entry, located three subjects in the apartment and observed marijuana and powder cocaine in plain view. The suspect from the original drug purchase had actually entered a different apartment, and was located a short time later.

One of the residents was charged with several drug-related offenses, and challenged the legality of the officers' entry.

To make a warrantless entry as part of a criminal investigation, officers need to have probable cause (to arrest or search) and the presence of exigent circumstances. The two primary types of exigency are hot pursuit (a warrantless entry may be permissible if officers are in hot pursuit of a fleeing suspect) and the destruction of evidence (a warrantless entry may be permissible to prevent the imminent destruction of evidence.). The trial court concluded that the officers had probable cause (based on the marijuana odor) and exigent circumstances (based on what they heard from inside the apartment), and that the entry was therefore lawful. The suspect appealed, and the Kentucky Supreme Court ruled that the police had impermissibly created the exigency, and that the entry was therefore unlawful.

A number of courts, both Federal and State, have recognized a "police-created exigency" doctrine, concluding that a warrantless entry will not be permissible if the exigency is created by the actions of law enforcement. However, these courts have articulated a number of different tests for determining whether law enforcement actions have created exigency. These tests have been inconsistent and difficult to apply.

The U.S. Supreme Court accepted the case, and reversed the Kentucky Supreme Court's decision. The court also dispensed with the variety of standards articulated by lower courts in favor of a very simple test. If the conduct of police prior to a warrantless entry was lawful, and did not violate the Fourth Amendment or threaten to do so, then the exigent circumstances rule will apply. Because the officers had not violated the Fourth Amendment or threatened to do so (by pounding on the front door and identifying themselves) they did not create the exigency and their entry was lawful.

Curtilage

***State v. Davis*, 2011 WL 1546421 (Wis. App.); Decided April 26, 2011 by the Wisconsin Court of Appeals.**

In *Davis*, a subject filed a complaint alleging that his property had been stolen by a forest service employee. A deputy went to the subject's residence and provided a statement form for him to complete, advising that he would return the following day to retrieve it. The next day the deputy returned and knocked on the front door to Davis's residence, receiving no response. The deputy noted that the overhead garage door was open, and called into the garage for Davis, still receiving no response. The deputy then proceeded to walk into the open garage, where he noted a small foyer with another entrance to the residence at the back of the garage. The deputy walked to the foyer at the rear of the garage, illuminating the area with his flashlight. The deputy then observed a rifle leaning against the wall. Davis finally came to the door and asked the deputy to leave several times.

The deputy later learned that Davis was a convicted felon. A search warrant was obtained based on the deputy's observation of the rifle. A search of the residence yielded multiple firearms, and Davis was charged with twelve counts of being a felon in possession of a firearm. Davis moved to suppress all evidence discovered in the search, alleging the initial entry into the open garage was unlawful.

The protections of the Fourth Amendment extend beyond a physical residence, to the "curtilage." Curtilage is defined as the "area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of

life…the extent of the curtilage depends upon the nature of the premises, and might be interpreted more liberally in the case of a rural single-owner home, as opposed to an urban apartment." All parties agreed that the garage was properly considered as part of the curtilage: "it is difficult to imagine a scenario where the typical attached garage could be considered not curtilage."

The issue, then, was whether it was permissible for the deputy to enter the garage. The court made it clear that law enforcement is not always prohibited from entering the curtilage:

> Police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public and in doing so are free to keep their eyes open…if police use normal means of access to and from the house for some legitimate purpose, it is not a Fourth Amendment search for police to see from that vantage point something in the dwelling…regarding protected areas in residential premises, a sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made.

The State argued that since Davis's overhead garage door was open, he had provided implied permission for entry. The *Davis* court disagreed:

> As a general matter, it is unacceptable for a member of the public to enter a home's attached garage uninvited…this premise is true regardless of whether an overhead or entry door is open…generally, an attached garage will never be impliedly open to public, i.e., police entry…there may be an exception to that general rule if, in a given circumstance, it reasonably appears that entry into the attached garage is the least intrusive means of attempting contact with persons inside the home.

Because the search warrant was based entirely on the deputy's observations from inside the garage, the court ruled that the evidence be suppressed.

GPS Tracking Devices

***United States v. Cuevas-Perez,* 640 F.3d 272 (7th Cir.2011); Decided April 28, 2011 by the 7th Circuit Court of Appeals.**

The *Cuevas-Perez* decision reviewed the authority of police to place and utilize GPS tracking devices on vehicles without a search warrant. I.C.E. agents working with local police suspected Cuevas-Perez of distributing illegal drugs. They eventually attached a GPS tracking unit to his vehicle while it was located in a public place (without obtaining a warrant). The device was programmed to send the case detective a text message update on the vehicle's location every four minutes.

Shortly after the device was installed, the vehicle was tracked as it drove from Arizona to Illinois. Cuevas-Perez was eventually stopped for a traffic violation. A drug dog alerted on his vehicle, and a search yielded heroin concealed in the vehicle. Cuevas-Perez challenged his conviction, arguing that GPS tracking device required a warrant.

The U.S. Supreme Court has clearly ruled that no warrant is required to observe someone driving on a public roadway: "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Accordingly, federal courts have ruled fairly consistently that the use of a GPS device to track public movements is not a search: "GPS tracking is not a search…GPS surveillance utilizes technology to substitute 'for an activity, namely following a car on a public street, that is unequivocally not a search within the meaning of the Fourth Amendment."

Cuevas-Perez's primary argument was that the GPS device provided real-time updates on his location every few minutes (unlike earlier devices that needed to retrieved and downloaded). The court disagreed: "real-time information is exactly the kind of information that drivers make available by traversing public roads." The court rejected Cuevas-Perez's arguments and concluded that the warrantless use of the GPS device had been reasonable.

Last year, the Wisconsin Supreme Court declined to specifically address their view on warrantless GPS device use. And while the *Cuevas-Perez* decision included some interesting points of view articulated in a concurring opinion and a dissenting opinion, the court's holding—that use of a GPS tracking device to monitor a vehicle's movement on public roads does not require a warrant—stands. A few reminders on placing and using GPS devices:

- If the vehicle that the device will be used on is located in a place not accessible to the public, a warrant is required.
- If the attachment of the device requires opening the vehicle (trunk, hood, etc.) or hardwiring the device to the vehicle, obtaining a warrant is advisable.
- If the vehicle is located in a place accessible to the public, and the device is self-contained and simply attached to the vehicle, a warrant is likely not required. If it is a close call on whether the vehicle location will be considered accessible to the public, obtaining a warrant is advisable.
- A warrant is required to track a vehicle in places not open to public surveillance.