LEGAL UPDATE

City of Madison Police Department

Summer 2015 Captain Victor Wahl

Traffic Stops—K9 Sniffs

***Rodriguez v. United States*, 135 S.Ct. 1609 (2015); Decided April 21, 2015 by the United States Supreme Court.**

Rodriguez was stopped for a traffic violation (driving on the highway shoulder). The officer—a K9 handler—spoke to Rodriguez, collected his license, registration and proof of insurance, then returned to his squad. After requesting a second officer, the K9 officer ran a records check on Rodriguez, then completed a written warning for driving on the shoulder of the road.

The officer returned to the vehicle, gave Rodriguez his documents back and issued him the written warning (though he did not release Rodriguez or tell him he could leave). He then asked for consent to walk around the vehicle with his K9; Rodriguez declined. The officer then instructed Rodriguez to exit the vehicle and stand near the squad. After the second officer arrived, the K9 officer sniffed the exterior of the vehicle. The K9 alerted, and a search yielded a large bag of methamphetamine. About eight minutes had elapsed from the time the officer gave Rodriguez the warning until the time that the K9 alerted.

Rodriguez challenged the search of his vehicle, claiming that the justification to detain him ended when the officer issued him the written warning, and that the K9 sniff was therefore unreasonable. The case reached the U.S. Supreme Court, and the court agreed with Rodriguez.

The court pointed out that the duration of a traffic stop is limited to the time needed "to address the traffic violation that warranted the stop." So:

> Because addressing the (traffic) infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose…authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.

These tasks include checking the driver's license, checking the vehicle registration, running the driver for warrants, completing a citation/warning, etc.

Prior court decisions had made it clear that a K9 sniff or questioning about things unrelated to the traffic violation were permissible as long as they did not "measurably extend the duration of the stop." Rodriguez was clearly detained beyond the time needed for the officer to carry out tasks related to the traffic offense. As a result, the court concluded that his detention was unreasonably extended and that the K9 sniff was unreasonable.

So, officers wishing to investigate criminal activity in the context of a routine traffic stop (being mindful of MPD policy & procedure) continue to have two options:

Perform all investigative steps during the period of time necessary to conduct the traffic stop: In light of the *Rodriguez* decision, this means that in almost all situations one officer will need to be diligently working on tasks related to the traffic stop, while a second officer engages in any additional investigative steps (asking for consent, performing a K9 sniff, etc.). Once the first officer completes the tasks related to the original stop, the justification for the detention ends.

The *Rodriguez* decision made it clear that standard traffic stop activities—like running the driver (for DL status and warrants), checking the vehicle registration and completing a citation/warning—are tasks reasonably related to a traffic stop. The court also indicated that reasonable steps taken to ensure officer safety—such as ordering the driver or occupant out of the vehicle—are also reasonably related to the traffic stop.

Conclude the traffic stop prior to asking for consent or performing additional investigative steps: This requires a clean break at the end of the traffic stop, making it clear that the detention is over and that the driver is free to go. The officer can then seek to transition to a consensual encounter.

The critical issue when utilizing this technique is the manner in which the traffic stop is concluded (converting the encounter to a consensual one). While it is not expressly required that the driver be told that they are "free to go," or something similar, it must be clear that a reasonable person would feel free to leave. The encounter at that point must be purely consensual.

Finally, note that the *Rodriguez* case applies to situations where the only reasonable suspicion is for a traffic violation. If the original stop is based on reasonable suspicion of drug or other criminal activity, or if the officer acquires reasonable suspicion of drug or other criminal activity during the stop, then the permissible duration of the stop will typically be longer. The duration of the stop must be reasonable, and officers must still be diligent in investigating the criminal activity that they have reasonable suspicion for. However, investigating a criminal or drug offense will typically take more time than a simple traffic stop, so the permissible duration of the stop will typically be longer (and will likely include the time needed to request and wait a reasonable time for a K9).

Child Custody Issues

Disputes surrounding child custody are very common, and officers are frequently called to intervene as a result. A common scenario involves unmarried parents with no formal court ordered custody agreement in place. Please remember that these are not civil disputes. §948.31 (Interference with custody by parent or others) specifically addresses these situations:

> (2) Whoever causes a child to leave, takes a child away or withholds a child for more than 12 hours from the child's parents or, in the case of a nonmarital child whose parents do not subsequently intermarry under s.767.803, from the child's mother or, if he has been granted legal custody, the child's father, without the consent of the parents, the mother or the father with legal custody, is guilty of a Class I felony. This subsection is not applicable if legal custody has been granted by court order to the person taking or withholding the child.

So the statute, in effect, gives the mother default authority over the child if the parents are unmarried and in the absence of a court ordered custody arrangement. There are some exceptions in the statute, such as a reasonable belief that there is a threat of physical harm or sexual abuse to the child.

Arrest may or may not be the appropriate disposition in these cases, but officers should investigate them with an awareness of 948.31.

Use of Force

The U.S. Supreme Court decided several interesting police use-of-force cases in the last term:

***Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015)**

Kingsley was in a county jail, awaiting trial. He refused to comply with a number of orders given by deputies, and they eventually entered his cell to remove him. A physical altercation ensued, and an ECD was deployed. Kingsley subsequently sued the deputies, alleging an excessive use of force.

The main point in the case was what legal standard should apply to judging the deputies' use of force. Officers are most familiar with the "objective reasonableness" standard as originally articulated in *Graham v. Connor*. This standard applies to the application of force when effecting an arrest or detention. It is an objective test, and the subjective mindset/ intent of the officer(s) involved is not relevant.

However, different constitutional standards have applied to other situations, depending on the legal status of the person against whom force is applied. Force used against a confined inmate—convicted of a crime—is judged not by the objective reasonableness standard, but rather by the 8th Amendment's prohibition against cruel and unusual punishment (and it is quite different than the objective reasonableness test). Kingsley was a pretrial detainee; one who has been arrested and is confined, but has not been convicted. Courts have historically applied a distinct standard to pretrial detainees (based on the 14th Amendment's Due Process clause). Both of these standards require an examination/determination of the officer(s) subjective mindset/intent.

The *Kingsley* court concluded that the standard of objective reasonableness should apply to force used against a pretrial detainee. So, the same evaluation of a force application during an arrest/detention—based on *Graham v. Connor*—will now also apply to force applied to a pretrial detainee.

Remember that *Graham v. Connor* articulated three specific factors relevant to evaluating objective reasonableness:

- The severity of the crime at issue;
- Whether the suspect poses an immediate threat to the safety of the officers or others;
- Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

The *Kingsley* court outlined a number of additional factors for consideration:

- The relationship between the need for the use of force and the amount of force used.
- The extent of the (suspect)'s injury.
- Any effort made by the officer to temper or to limit the amount of force.
- The severity of the security problem at issue.
- The threat reasonably perceived by the officer.
- Whether the (suspect) was actively resisting.

The court made it clear that this list is not exclusive, but only intended to "illustrate the types of objective circumstances potentially relevant to a determination of excessive force." While these factors are all consistent with current training and practice, this appears to be the Court's first effort to expand on the three factors outlined in *Graham*.

***Plumhoff v. Richard*, 134 S.Ct 2012 (2015)**

This case started with a vehicle pursuit. The pursuit reached speeds in excess of 100 miles per hour, and involved extremely dangerous driving by the suspect. The suspect vehicle spun out in a parking lot and struck one of the squads, then came to a stop (pinned up against the squad). The officers exited their vehicles to attempt and contact the driver, however the suspect vehicle began spinning its tires and trying to move. During the subsequent encounter the officers fired 15 shots as the suspect vehicle tried to push away from the squads. The vehicle did eventually get free, and crashed a short distance away, The driver and passenger both died, from a combination of gunshot wounds and injuries suffered in the crash.

The estate of the driver sued the officers, alleging excessive force. The Supreme Court, consistent with a prior ruling in *Scott v. Harris*, 550 U.S. 372 (2007), concluded that the officers' use of deadly force had been constitutional.

The more interesting aspect of the *Plumhoff* decision involved the number of shots fired by the officers (15). The estate alleged that even if the use of deadly force had been permissible, that the officers had acted unreasonably in firing as many shots as they had. The court rejected this argument:

> It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat as ended.

While this is consistent with the policy and training of police agencies across the country, it is the first time the U.S. Supreme Court has addressed this specific issue.

***City and County of San Francisco v. Sheehan,* 135 S.Ct. 1765 (2015).**

This case involved police response to a group home for people with mental illness. One of the residents had threatened to kill a staff member with a knife. Officers responded, and determined that the resident needed to be taken into custody for mental health evaluation and treatment. The encounter eventually resulted in officers shooting the resident after she approached them with a knife. She survived, and sued the officers.

A component of the lawsuit was an assertion that the Americans with Disabilities Act (ADA) applied to the actions of the officers in attempting to take Sheehan into custody. Sheehan argued that it did, and the lower courts agreed, concluding that the "reasonable accommodations" required by the ADA extended to police efforts to take someone into custody.

Unfortunately, the Supreme Court did not answer the question of whether the ADA applies to police activities (due to some procedural issues with the case). The Court did conclude that the officers were entitled to qualified immunity for their actions, however. Federal courts are split on the issue of whether the ADA applies to the actions of police officers attempting to take a mentally ill subject into custody. The Seventh Circuit (which includes Wisconsin) has not ruled on the issue.

Reasonable Suspicion

***Heien v. North Carolina,* 134 S.Ct. 1872 (2014); decided December 15, 2014 by the United States Supreme Court**.

In *Heien*, an officer made a traffic stop for a broken tail light. During the course of the stop, the officer noted some suspicious behavior. This eventually led to a consent search and the discovery of cocaine. Heien challenged the stop, arguing that North Carolina law actually only required vehicles to have one rear stop light. The case eventually reached the U.S. Supreme Court.

The issue before the *Heien* court was whether a stop or arrest can be permissible if an officer has made a mistake of law. Clearly, as the Court pointed out, a reasonable factual mistake does not make a stop/arrest/search unreasonable:

> An officer might, for example, stop a motorist for traveling alone in a high-occupancy vehicle lane, only to discover upon approaching the car that two children are slumped over asleep in the back seat. The driver has not violated the law, but neither has the officer violated the Fourth Amendment.

The law on this is and has been fairly clear. Less clear is the result if the officer's mistake is a legal one. The officer in *Heien* believed that North Carolina law required two rear stop lights, but the North Carolina Court of Appeals concluded that only one was required. Was the stop still reasonable even though the officer was mistaken on the applicable law?

The Supreme Court said yes: a reasonable mistake of law does not render an officer's actions unreasonable:

> Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason...why this same result should be acceptable when reached by way of a reasonable mistake of act, but not when reached by way of a similarly reasonable mistake of law.

It is critical to recognize that the mistake of law must be reasonable. The North Carolina law in question was worded ambiguously, and several relevant statutes seemed to be in conflict; so it was very reasonable to misunderstand them. Simply not knowing the law, or misunderstanding clear legal principles will not be deemed reasonable ("an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty bound to enforce"). The concurring opinion characterized the standard this way:

> If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not.

The Wisconsin Supreme Court recently applied *Heien* in *State v. Houghton*. In *Houghton* an officer observed a driver operating with an air freshener hanging from the rear view mirror and a GPS device on the dashboard. The stop eventually resulted in a search and the discovery of marijuana. The officer indicated that his belief was that Wisconsin law (346.88(3)(b)) prohibited the presence of <u>any</u> object in front of the windshield of a vehicle. The driver argued that this interpretation was incorrect, and that the fruits of the stop should be suppressed.

The statute in question (346.88(3)) reads in part:

> **(b)** No person shall drive any motor vehicle upon a highway with any object so placed or suspended in or upon the vehicle so as to obstruct the driver's clear view through the front windshield.

The *Houghton* court concluded that the statute did not have as broad a meaning as the officer thought:

> We conclude that Wis.Stat. 346.88(3)(b) - which requires that an object "obstruct" a driver's clear view to be a violation—does not mean that *every* object in a driver's clear view is a violation. Rather we interpret subsection (3) (b) as requiring a *material* obstruction—even if minor—in order to be considered a violation of the statute.

But while the officer's interpretation of the statute was mistaken, it was reasonable. As a result, the court concluded that the stop and subsequent search were valid.

New Statutes

2015 Act 22

This act removed Wisconsin's 48-hour waiting period for handgun purchases.

2015 Act 23

This act clarified the law regarding active but off-duty law enforcement personnel going armed in school zones (948.605). The following are now exceptions to the prohibition of a firearm in a school zone:

1m. A person who possesses the firearm in accordance with 18 USC 922 (q) (2) (B) (i), (iv), (v), (vi), or (vii).
1r. Except if the person is in or on the grounds of a school, a licensee, as defined in s. 175.60 (1) (d), or an out−of−state licensee, as defined in s. 175.60 (1) (g).
2d. A person who is employed in this state by a public agency as a law enforcement officer and to whom s. 941.23 (1) (g) 2. to 5. and (2) (b) 1. to 3. applies.
2f. A qualified out−of−state law enforcement officer to whom s. 941.23 (2) (b) 1. to 3. applies.
2h. A former officer to whom s. 941.23 (2) (c) 1. to 7. applies.
2m. A state−certified commission warden acting in his or her official capacity.
3. A person possessing a gun that is not loaded and is any of the following:
a. Encased.
b. In a locked firearms rack that is on a motor vehicle.
3m. A person who is legally hunting in a school forest if the school board has decided that hunting may be allowed in the school forest under s. 120.13 (38).

2015 Act 27

This act applies to lighting underneath motorcycles:

> **347.07 (3)** A motorcycle may be equipped with a lighting device that illuminates the ground directly beneath the motorcycle if all of the following apply:
> **(a)** The lighting device is not visible to approaching vehicles.
> **(b)** The lighting device does not display a red, blue, or amber light
> **(c)** The lighting device does not display a flashing, oscillating, or rotating light.

2015 Act 30

This act makes it a crime to falsely claim military service or honors for the purpose of receiving a tangible benefit.

> **946.78 False statement regarding military service.**
> **(1)** In this section:
> (a) "Military" means the U.S. armed forces, the state defense force, the national guard of any state, or any other reserve component of the U.S. armed forces.
> (b) "Tangible benefit" includes financial remuneration, an effect on the outcome of a criminal or civil court proceeding, an effect on an election, and any benefit relating to service in the military that is provided by a federal, state, or local governmental unit or agency.
> **(2)** Except as provided in sub. (3), whoever knowingly and with the intent to receive a tangible benefit falsely claims any of the following is guilty of a Class A misdemeanor:
> (a) That he or she is or was a service member in the military.
> (b) That he or she has been awarded a Congressional Medal of Honor, a Distinguished Service Cross, a Navy Cross, an Air Force Cross, a Silver Star, a Bronze Star, a Purple Heart, a Combat Infantryman's Badge, a Combat Action Badge, a Combat Medical Badge, a Combat Action Ribbon, a Combat Action Medal, or a Special Operations Identifier or Special Qualification or Skill Identifier, as authorized by Congress or pursuant to federal law for the U.S. armed forces.
> **(3)** Any person violating sub. (2) with the intent to commit or aid or abet the commission of a crime other than a crime under this section is guilty of a Class H felony.

2015 Act 45

This act makes it a crime to use GPS devices under certain circumstances:

> **940.315 Global positioning devices. (1)** Whoever does any of the following is guilty of a Class A misdemeanor:
> (a) Places a global positioning device or a device equipped with global positioning technology on a vehicle owned or leased by another person without that person's consent.
> (b) Intentionally obtains information regarding another person's movement or location generated by a global positioning device or a device equipped with global positioning technology that has been placed without that person's consent.
> **(2)** This section does not apply to a motor vehicle manufacturer or a person, acting within the scope of his or her employment, who installs an in−vehicle communication or telematics system, to a device installed by or with the permission of the vehicle owner for automobile insurance rating, underwriting, or claims handling purposes, to a law enforcement officer acting in his or her official capacity, to a parent or guardian acting to track the movement or location of his or her minor child or his or her ward, to a lienholder or agent of a lienholder acting to track the movement or location of a motor vehicle in order to repossess the motor vehicle, or to an employer or business owner acting to track the movement or location of a motor vehicle owned, leased, or assigned for use by the employer or business owner.