LEGAL UPDATE

City of Madison Police Department

Winter 2009 Captain Victor Wahl

Exclusionary Rule

***Herring v. United States*, 129 S.Ct. 695 (2009); Decided January 14, 2009 by the United States Supreme Court.**

In *Herring*, a subject (Herring) appeared at a police facility to retrieve some property from his impounded vehicle. Herring had been involved in previous incidents with the agency, and an officer checked to see if he had any outstanding warrants. A civilian clerk in a neighboring county reported that there was an active arrest warrant for Herring. The officer requested that the clerk fax the warrant as confirmation, then followed Herring as he drove away from the facility. Herring was subsequently pulled over, and arrested for the warrant. A search incident to arrest yielded methamphetamine in Herring's pocket, and a handgun in his vehicle (which Herring – a felon – could not possess).

As the arrest and search were taking place, the civilian clerk checked the files for the warrant but was unable to find it. The clerk was able to determine that the warrant had been taken care of several months earlier, but had not been cancelled from the computer database. The officers were notified of this only after Herring had already been arrested and the search had taken place.

Herring was charged federally for possessing the handgun and methamphetamine. He challenged his arrest, arguing that the arrest had been illegal since the arrest warrant had not been valid. Both the trial court and Eleventh Circuit Court of Appeals upheld Herring's arrest and search, and the case was appealed to the U.S. Supreme Court.

Two issues confronted the court: was Herring's arrest illegal? And – if it was – should the exclusionary rule result in the suppression of the handgun and methamphetamine? The court declined to expressly rule on the first question, but did state:

> When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation.

Nonetheless the *Herring* court – for the purposes of deciding the case only – accepted the premise that the arrest was a Fourth Amendment violation. The issue, then, was whether the exclusionary rule required suppression of the handgun and methamphetamine.

The exclusionary rule, first articulated by the Supreme Court in 1914, stands for the premise that – when applicable – improperly obtained evidence cannot be used at trial. However, "the fact that a Fourth Amendment violation occurred – i.e., that a search or arrest was unreasonable – does not necessarily mean that the exclusionary rule applies." The primary purpose of the rule is to deter police misconduct, and "the benefits of deterrence must outweigh the costs" in any given case.

The court has ruled in a number of instances that certain types of Fourth Amendment violations do not trigger the exclusionary rule (most recently, the knock and announce requirement). The *Herring* court articulated when the exclusionary rule should apply:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to this level.

So, the court concluded that the handgun and methamphetamine should be admissible at Herring's trial.

Neither the *Herring* decision nor other decisions declining to apply the exclusionary rule should be viewed as minimizing the importance of complying with constitutional guidelines. As the court has pointed out, other sanctions – such as civil/ criminal liability and internal discipline – still apply.

Traffic Stops—Frisks

***Arizona v. Johnson*, 129 S.Ct. 781 (2009); Decided January 26, 2009 by the United States Supreme Court**.

The *Johnson* case discussed the authority of officers to stop and frisk a passenger in a motor vehicle stopped for a traffic violation. Officers with a gang task force were on patrol in a neighborhood associated with gang activity. They stopped a vehicle for having a suspended registration. The officers approached the vehicle and noted it had three occupants.

While one officer spoke to the driver, another officer noted that the back-seat passenger (Johnson), appeared nervous. The officer also observed that Johnson was wearing clothing consistent with gang membership, and was carrying a portable police scanner. Johnson told the officer that he did

not have any identification, but admitted that he had served time in prison. The officer asked Johnson to step from the vehicle and, believing that he might be armed, frisked Johnson for weapons. The officer felt a handgun in Johnson's waistband and he was arrested after a short struggle.

Johnson was convicted of illegal firearm possession. He challenged his conviction, arguing that the weapon had been located as the result of an illegal search. An Arizona appeals court agreed, and reversed Johnson's conviction. The case was subsequently appealed to the U.S. Supreme Court.

The *Johnson* court began by revisiting the two requirements for a lawful frisk. First, the subject must have been lawfully detained; this typically means a *Terry* stop based on reasonable suspicion that the person has committed or is committing a crime. Second, the officer must have a reasonable suspicion that the person is armed and dangerous.

The *Johnson* court then went on to review three important rules about police authority during a traffic stop:

- "Once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle."
- "[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."
- "[A] passenger is seized, just as the driver is, from the moment a car stopped by the police comes to a halt on the side of the road."

The court then concluded that Johnson had been lawfully detained at the time of the frisk. The court did not address the issue of whether the officer had sufficient reasonable suspicion that Johnson was armed (as the Arizona appeals court assumed, without deciding, that she did). The court stated:

> A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave…An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

The legal status of passengers in a stopped vehicle has been somewhat unclear previously, though the *Johnson* case seemingly makes clear that a passenger in a lawfully stopped vehicle has been reasonably detained.

Off Duty Action

***State v. Cole*, 2007AP2472-CR (Ct. App. 2008); Decided November 13, 2008 by the Wisconsin Court of Appeals.**

The *Cole* case addressed when the Fourth Amendment applies to off duty actions by law enforcement officers. Cole had been arrested for several domestic crimes, and had been ordered not to have contact with his wife while awaiting trial. He made several phone calls and sent several letters to family members, instructing them to prevent his wife from testifying at his trial. One of the letters was intended for Cole's daughter. However, Cole wrote the incorrect address on the envelope, addressing the letter to 3431 North 49th Street instead of 3431 North 44th Street. Unfortunately for Cole, 3431 North 49th Street was the residence of a detective with the Milwaukee County Sheriff's Department.

The detective—who had been completely uninvolved in Cole's case—returned home one day and began to go through her mail. The detective opened the letter from Cole and began to read it. After reading something about contacting someone not to appear in court, the detective realized the letter was not for her. She observed that Cole was the sender (from the front of the envelope), and subsequently checked CCAP—discovering Cole's open case. The detective then contacted the district attorney prosecuting Cole, giving the attorney the letter.

Cole was subsequently charged with intimidation of a witness. He challenged the detective's opening and reading of the mail, arguing that she was acting in her official capacity, and that the Fourth Amendment therefore applied to her actions [the *Cole* court also considered a second issue related to *Miranda* and a statement Cole made after his arrest; this issue was remanded to the trial court for further consideration].

The *Cole* court started with a discussion of the Fourth Amendment's applicability to off duty officers:

> The Fourth Amendment's protection against unreasonable searches and seizures applies only to governmental action, not to private searches…In deciding whether a search is a private search or a government search, the court is to consider the totality of the circumstances…[government] involvement [in a search] is not measured by the primary occupation of the actor, but by the capacity in which he acts at the time in question; therefore, an off-duty officer acting in a private capacity in making a search does not implicate the Fourth Amendment.

There was some dispute about whether the detective had noticed the names on the envelope (Cole's and the addressee) prior to opening it; the court did not resolve this, and assumed—for purposes of the case—that the detective had seen who the letter was intended for prior to opening it.

The court instead focused on the fact that nothing on the envelope would suggest to the detective that the contents related to a criminal matter. The court then concluded that the Fourth Amendment did not apply: "the activity (the detective) was engaged in when she opened Cole's letter—opening mail that had been delivered to her home—was that of a private citizen…The Fourth Amendment is therefore not applicable."

Search Incident to Arrest

***State v. Denk*, 758 N.W.2d 775 (2008); Decided December 30, 2008 by the Wisconsin Supreme Court.**

In *Denk*, the Wisconsin Supreme Court addressed the permissible scope of a search incident to arrest in a vehicle context. An officer came across a vehicle—occupied by two subjects—on the shoulder of a county road. The officer contacted the occupants, and subsequently smelled burning marijuana coming from the vehicle. The officer asked both subjects to step from the vehicle, which they did. The driver appeared very nervous, and after a few questions admitted to possessing marijuana. The officer arrested him, and a found marijuana and paraphernalia in his pockets.

The officer then walked to the passenger side of the vehicle where the passenger (Denk) was standing. The officer observed a hard black case lying on the ground just underneath the passenger door. Denk stated that it was his eyeglass case and—after being asked to do so by the officer—picked it up and placed it on the car. The officer opened the case and found drug paraphernalia in it. Denk was then arrested; the officer discovered marijuana and methamphetamine on his person.

Denk challenged the legality of the officer's actions, and the case was certified to the Wisconsin Supreme Court.

In *State v. Pallone*, 236 Wis.2d 162 (2000), the court ruled that—in most instances—police may, incident to the arrest of a vehicle occupant, search property in the vehicle belonging to someone other than the one arrested. In *Pallone*, the driver of a truck had been arrested, and officers subsequently searched a duffel bag in the passenger compartment of the truck that belonged to a passenger. The court upheld the search even though the property did not belong to the arrested person.

The *Denk* court examined the facts present during his arrest, and concluded that the search of the eyeglass case was a reasonable search incident to arrest (of the driver). The court, however, made it very clear that their ruling does not extend to searches of passengers themselves: "unarrested passengers cannot themselves be searched based solely on the arrest of the driver."

Protective Sweeps—Searches Incident to Arrest

***State v. Sanders*, 311 Wis.2d 257 (2008); Decided July 9, 2008 by the Wisconsin Supreme Court.**

In *Sanders*, officers responded to a complaint of animal cruelty. The officers contacted several individuals in the back yard of a residence. After some conversation, one of the officers attempted to handcuff one of the subjects (Sanders). Sanders resisted, pulled away, and fled into the residence. Officers pursued Sanders into the residence, where he briefly barricaded himself in a bedroom. After a short time, Sanders exited the room and was taken into custody after a short struggle. Sanders was subsequently escorted from the residence.

At some point, one of the officers discovered and opened a film canister under the bed in the bedroom. The film canister contained cocaine, and Sanders was subsequently charged with possession of cocaine (as a repeater). There was a factual dispute as to when exactly the cocaine was discovered, so the court analyzed the search under two legal theories.

The court first considered whether opening the film canister was justified as part of a protective sweep. The court reviewed the protective sweep doctrine:

> The protective sweep doctrine applies once law enforcement officers are inside an area, including a home. Once inside an area a law enforcement officer may perform a warrantless 'protective sweep,' that is, 'a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others'…a law enforcement officer is justified in performing a warrantless protective sweep when the officer possesses a 'reasonable belief based on specific and articulable facts…that the area swept harbored an individual posing a danger to the officer or others.'

So, while the legal threshold to perform a protective sweep—reasonable suspicion—is low, the protective sweep itself must be limited in scope:

> The protective sweep extends 'to a cursory inspection of those spaces where a person may be found' and may last 'no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.'

The *Sanders* court concluded that searching the film canister could not have been valid part of a protective sweep: "the search of the canister and seizure of its contents were not a part of a search for persons who might pose a danger to law enforcement officers or others…No person could be hiding in the canister." So, while the protective sweep itself may have been justified, opening the film canister went beyond

the scope of a permissible protective sweep.

Also, opening the film canister could not be justified under the plain view doctrine. While the officer may have been justified in looking under the bed as part of the protective sweep (since a person could have been concealed there), opening the canister was a search itself. If the officer had looked under the bed and seen a bag containing suspected illegal drugs, the plain view doctrine would have allowed it to be seized (since it would be immediately apparent that the item was contraband).

Next, the *Sanders* court considered whether the search of the canister might have been reasonable as a search incident to arrest. Officers are allowed to search a person incident to arrest, and are also permitted to search the area within the arrestee's immediate control incident to arrest. The search of the area within an arrestee's immediate control must be contemporaneous with the arrest.

Because Sanders had been removed from the residence, the search was no longer contemporaneous with the arrest, and could not be justified as a search incident to arrest. As a result, Sanders' conviction was reversed.

Note that the Court of Appeals decision in this case had also ordered that Sanders' conviction be reversed, but for entirely different reasons. The Appeals Court decision had focused on the officers' initial entry to the residence, which was justified under the hot pursuit doctrine (chasing Sanders for the criminal misdemeanor offense of obstructing an officer). The Court of Appeals concluded that entry into a residence while in hot pursuit of a misdemeanor suspect is a violation of the Fourth Amendment.

The *Sanders* decision, however, declined to even address this issue, deciding the case on the grounds described above. This leaves the issue of whether an entry made in hot pursuit of a misdemeanor suspect is permissible somewhat unclear. Three justices joined a concurring opinion in *Sanders* arguing that the court should have addressed the issue, and should have ruled that hot pursuit entries for misdemeanor suspects are permitted under the Fourth Amendment.

Another case—*State v. Ferguson*—dealing with the issue of a hot pursuit entry for a misdemeanor offense is currently before the Wisconsin Supreme Court. The Court's membership has changed since *Sanders* was decided, and hopefully the *Ferguson* decision will resolve this question. Oral argument in *Ferguson* took place in December of 2008, so the decision could be released anytime.

Community Caretaker

***State v. Kramer*, 759 N.W.2d 598 (2008); Decided November 6, 2008 by the Wisconsin Supreme Court.**

In *Kramer*, a deputy observed a vehicle parked legally on the side of a county highway. The vehicle's hazard lights were activated, and the deputy pulled behind the vehicle and activated his emergency lights. The deputy approached the vehicle, contacted the driver (Kramer), and asked him if he needed any help. After a short conversation, the deputy observed that Kramer appeared to be intoxicated; he was subsequently arrested for OMVWI.

Kramer challenged his arrest, arguing that the deputy's actions (pulling behind him and activating his emergency lights) constituted a seizure that was not supported by reasonable suspicion or probable cause. The *Kramer* court assumed (without expressly deciding) that the deputy had seized Kramer by pulling in behind him and activating his lights. There was no dispute that the deputy did not have any particularized suspicion that Kramer was involved in illegal activity prior to pulling behind him, so the issue before the court was whether the action was a legitimate community caretaker function.

The primary issue the court considered was to what extent the deputy's subjective motivation was relevant to the analysis. The deputy had testified that in addition to wanting to check Kramer's welfare, he also had concerns about possible illegal activity occurring. Prior court decisions have suggested that any police interest or motivation in criminal law enforcement might invalidate a community caretaker action. The *Kramer* court clarified that this is not the case:

> [I]n a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns.

So, the fact that an officer has some law enforcement interest or motivation does not render a community caretaker action impermissible, as long as the action was objectively reasonable.

The court concluded that the deputy had a reasonable basis for deciding that a motorist may have been in need of assistance when he pulled behind Kramer's vehicle, and that the deputy reasonably performed his community caretaker function.

False 911 Calls

The statute prohibiting false 911 calls has been re-numbered, and is now located at 256.35(10) of the Wisconsin Statutes. It prohibits anyone from dialing 911 to report an emergency, knowing that the fact situation they are reporting does not exist. Such calls are punishable by up to 90 days in jail; second and subsequent offenses are considered a Class H felony.