4th Amendment Update
2017 Municipal Attorney Institute
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4th Amendment Cases

State v. Iverson
Decided by the Wisconsin Supreme Court 11/25/2015

Issue:
The Wisconsin Supreme Court held that it is permissible, within the 4th amendment, to stop a vehicle with reasonable suspicion or probable cause of non-traffic, non-criminal violation. Specifically, the court endorsed a state trooper stop of a vehicle, because a passenger threw a cigarette butt out the car window.

Facts:
A Trooper observed a silver jeep being driven somewhat erratically, though the trooper did not feel he had the requisite reasonable suspicion to make a traffic stop. While continuing to observe the jeep, the trooper observed a cigarette butt being thrown from the jeep's passenger side, and further observed the butt hit the ground and scattering ashes on the road. The trooper stopped the vehicle because of the observed littering violation. Ultimately the driver was arrested for O.W.I.

The Circuit Court Holding:
The Circuit Court granted the defendant's motion to suppress the evidence of his intoxication, because the court believed the stop was pretextual, and therefore unlawful. The trial court believed the officer did not make the stop because of the alleged littering, but rather was motivated by a hunch that the jeep's driver was impaired.

The Court of Appeals Holding:
The court of appeals, perhaps recognizing the flawed reasoning of the trial court (pretextual stops are permissible so long as the expressed reason for the stop is lawful) decided for the defendant on new grounds. The court of appeals held that the trooper was not authorized to make a traffic stop for a non-traffic, non-criminal violation. The state appealed this holding to the Wisconsin Supreme Court.

The Wisconsin Supreme Court:
The Wisconsin Supreme Court ruled with the state and reversed the court of appeals, which had affirmed the trial court. The high court held that the OWI evidence was improperly suppressed and returned the matter to the trial court for

prosecution. The court held that throwing a cigarette butt out a car window constitutes littering. The court also held that a trooper has the statutory authority to enforce littering laws. Most significantly, the Wisconsin Supreme Court rejected the court of appeals contention that the police cannot make a traffic stop to enforce a non-criminal, non-traffic forfeiture violation.

What does this mean for Wisconsin police?
Actually, this ruling means business as usual. The police have been trained to make traffic stops upon observing any kind of infraction, criminal or non- criminal, traffic or otherwise, so long as they are authorized to enforce the infraction observed. It was the court of appeals holding that was potentially revolutionary; that holding can now be safely ignored.

Key Reminder Points:
The opinion in this case reminds us of several key points.

1) Pretextual vehicle stops are permissible. There is little doubt that in this case the trooper was more concerned with a possible O.W.I. than with the littering. This is fine, because the trooper clearly observed the littering, and this is a valid reason for a stop, even if it was not the primary one.
2) Here, the trooper had probable cause of a littering violation; this case reminds us that a vehicle stop is also valid if the officer only has reasonable suspicion of an infraction.
3) Discarding a cigarette butt constitutes littering.
4) A passenger littering is as sufficient a reason for a stop, as if the driver committed the infraction.
5) The 4th amendment is not violated by a traffic stop for a minor non-traffic infraction- a violation is a violation.

United States v. Paniagua-Garcia
Decided by the US Court of Appeals- 7th Circuit 2/18/2016

Issue:
This case involved a traffic stop for texting while driving. The court held that the police did not properly stop a vehicle, because while they observed the driver holding a cell phone with his head bent towards the phone in a manner suggesting texting, there are too many other lawful uses of the phone to reasonably believe the subject is performing the one illegal function. While this case occurred in Indiana, it did occur in Wisconsin's circuit and Indiana's no texting while driving law is similar to Wisconsin's.

Facts:
An officer, in the course of passing a vehicle, observed the defendant holding a cell phone in his right hand and bending over it in a manner suggesting texting. The officer pulled over the vehicle because he felt the defendant was driving and texting. The defendant denied texting and an examination of the cell phone revealed that the defendant had not been texting, but was instead searching for music. The officer asked Garcia for consent to search the car, and the search uncovered five pounds of heroin concealed in the spare tire in the car's trunk.

The Defendant's Argument:
The defendant argued that he had been illegally stopped since the officer did not have either probable cause or reasonable suspicion to believe that he was violating the no texting while driving law.

The Court's Holding:
The court agreed with the defendant and held that the traffic stop was unlawful. The court reasoned that there were just too many lawful uses of a cell phone, to reasonably conclude the defendant was doing the one unlawful function. The court felt it was right to be worried about texting and driving, but chided Indiana for having only one prohibited use of a cell phone while on the road.

Rodriquez v. UNITED STATES
Decided by the United States Supreme Court (April 21, 2015)

Issue:
This case involved the use of a dog sniff, without reasonable suspicion, during a traffic stop. The United States Supreme Court held that a traffic stop cannot be extended for any period of time, no matter how slight, to accommodate a "fishing expedition" canine sniff of a vehicle. This case effectively overrules our Supreme Court holding in State v. Arias, which allowed the police to extend an existing traffic stop a short period time to allow for a dog sniff to take place.

Facts:
A K-9 officer stopped the defendant for driving on the highway shoulder, a violation of Nebraska law. The officer conducted the traffic stop and after attending to everything associated with the stop, he asked Rodriquez for permission to walk his dog around the defendant's vehicle. When the defendant refused the officer detained him until a second officer arrived. When the second officer arrived, a canine sniff was performed and the canine alerted to the presence of drugs in the vehicle. Seven or eight minutes elapsed from the time the police issued the defendant a warning until the dog alerted.

The Defendant's Argument:
The defendant argued that the police unreasonably extended a traffic stop to investigate a matter that was unconnected to the stop, and did so without reasonable suspicion.

The State's Argument:
The state argued that the delay and the intrusion were minimal and therefore the dog sniff was permissible.

The United States Supreme Court Holding
The Supreme Court agreed with the defendant and found that the defendant had been unconstitutionally detained to accommodate a dog sniff, without reasonable suspicion, for a dog sniff had no connection to the original traffic stop. This case has great impact in Wisconsin as it overruled State v. Arias, and by implication State v House; two cases that allowed the police to extend a traffic stop for an unrelated dog sniff and without reasonable suspicion.

Synopsis of this Significant Holding:

1) State v. Arias is clearly dead law- there can be no wait, no matter how slight, during traffic stop to accommodate a "fishing expedition" dog sniff. The police must stay on task in executing their traffic stop mission.
2) There is no bonus rule- in other words a police officer cannot claim that a normal traffic stop takes 8 minutes, and that he/she rushed it so it only took 6 minutes and therefore has earned a two minute coupon to go fishing.
3) The opinion provides virtually no wiggle room- this is evident by the forcefulness of its language and by the desperate laments of the dissents.
4) We have a virtual bright line rule- no canine sniffs, without reasonable suspicion, during a traffic stop. When I say there is a virtual bright line rule that there is no dog sniffing without reasonable suspicion during a traffic stop, I am speaking from a practical standpoint and not from a constitutional one. The court is not against the sniff without suspicion per se, they are against the delay such olfactory gymnastics inevitably cause. So, if a drug interdiction is set up in advance, so that a dog arrives during a traffic stop and does its thing while the stopping officer is staying on task, then I think that will work. The key is that at all times one officer is working purposely and exclusively on the traffic stop mission.
5) So, it is possible, though unlikely, that a dog sniff can properly occur during the stop, if it can be showed that there was no delay to accommodate the sniff. This would require a fact situation similar to Illinois v. Caballes where another officer hears of the stop and goes to it with a dog while the stopping officer remains on task, never delayed. I suppose it is arguable that an officer could call for a dog while pulling over the suspect, claiming a multi task that is not a delay.
6) The key is to avoid any situation where the stopping officer is sitting around or stalling just to accommodate a dog sniff.

7) This is a decision of constitutional import so it is immediately effective and is likely to have retroactive applicability with those cases in the pipeline. But, good faith (police acting under Arias) should save these cases under State v. Dearborn and the recently decided State v. Scull.

The Good News

1) I guess clarity is a good thing.
2) The court makes it clear that the police asking for licenses, insurance, doing criminal history checks, are permissible because they are part of the traffic stop mission, as they are designed for safety purposes, which is part and parcel of any police contact.

The Vague

1) The repartee issue. No problem with a quick query or so about where a person is coming from or going to, and about weapons, as that can be finessed to be under the "mission tent". Questions about drugs or the popular "anything illegal in the car gambit" are more awkward but again these are lighting quick, don't really delay things, particularly if the officer asks these questions while engaging in "mission activity".

The Unchanged

1) The law remains unchanged that if the police have reasonable suspicion they can detain a subject a reasonable time waiting for a canine. With reasonable suspicion, the Rodriquez concerns are gone.

2) The "Badger stop" routine is unaffected by Rodriquez. So, you can ask for consent to search a car, after you first end the traffic stop. This is set up as a consensual encounter and not as part of a 4th amendment seizure. Therefore, this process is unaffected by *Rodriquez.*

United States v. Whitaker
Decided by the US Court of Appeals (7th Circuit) 4/12/2016

Issue:
The application of the *Jardines* doctrine to dog sniffing in apartment complexes. The 7th Circuit held that the *Jardines* requirement for a warrant prior to a dog sniff of a home extends to a dog sniff of an apartment home.

Facts:
A police officer met with a confidential informant about drug dealing at an apartment complex. Soon thereafter the police met with the apartment building manager and learned that the suspect apartment was leased to the defendant. The

property manager escorted the police to the underground parking garage, where the officer observed the defendant's vehicle, a black Cadillac Escalade.

A month later the same confidential informant notified the police in a text message that there was a lot of heroin in the apartment. The property manager signed a consent form, authorizing a canine search in the apartment complex. Shortly after that the police responded to the apartment building with a canine, "Hunter". Hunter first alerted on the Escalade parked in the space for apartment 204, though a later search of the Escalade found no drugs. The officers then took Hunter to the second floor of the apartment building and into its locked hallway, where there were at least 6 to 8 apartments. Hunter took a quick walk through the hallway to get used to any people or animal smells. During the first pass Hunter showed an extreme interest in Apartment 204 but did not alert. Hunter then alerted to apartment 208, not the targeted apartment. On a repeat sniff Hunter did alert to apartment 204. The police then got a search warrant based in part on Hunter's alert, and found drugs in Apartment 204.

The Defendant's Argument:
The defendant argued, among other things, that the evidence should have been suppressed since Hunter had engaged in a warrantless dog sniff of his apartment home exterior.

The State's Argument:
The state argued that *Jardines* should not be applicable in a communal hallway in an apartment complex.

The 7th Circuit Holding:
The Court agreed with the defendant and found that *Jardines* was applicable. First, the court reviewed *Jardines* and felt that the root of the opinion was the Supreme Court's concern about homeowners being at the mercy of technology that can discern all human activity in the home. The court reasoned that a drug-sniffing dog is a sophisticated sensing device not available to the general public. So, the court noted that Hunter detected something that otherwise would have been unknowable without entering the apartment.
The Court concluded that while the defendant did not have a reasonable expectation of complete privacy in an apartment hallway, this lack of privacy does not mean that the defendant had no reasonable expectation of privacy against persons in his hallway snooping into his apartment using sensitive devices not available to the general public. The court found that the police should have had a dog sniff warrant before introducing Hunter to the communal hallway by the defendant's apartment.

The Bottom Line

This is a significant case. It means that the police should not engage in apartment hallway dog sniffs unless they have a warrant. My recommendation is that the police

consider a two pronged warrant. The first part of the search warrant, asking for authorization for a dog sniff; this portion would not require the same probable cause necessary to get a search warrant for the home itself. The second portion would be an anticipatory search warrant for the apartment, based in part on the dog alerting pursuant to the authorized dog sniff.

State v. Branovan (Unpublished but persuasive)
Decided by Court of Appeals- District II, 10/5/16

This contains an interesting discussion as to when or when not a traffic stop is unduly delayed to accommodate a non-reasonable suspicion dog sniff.

In this case a police officer observed a driver and a passenger, not wearing a seatbelt. Before making the stop the officer notified his canine officer and asked him to respond, because he thought the driver was wearing a hat with a marijuana leaf on it. The officer made the traffic stop and while he stayed on task processing the traffic stop, the K-9 officer arrived. While waiting for information about the driver, the stopping officer talked to the K-9 officer, and while the stopping officer remained on task, the sniff was performed and evidence was found.

Two important aspects of this case. 1) Any delays to get a K-9 officer involved, prior to the seizure are of no import in a 4th amendment analysis. 2) Talking to a canine officer while legitimately waiting for information in pursuit of a traffic stop, does not amount to an unlawful extension of the traffic stop.

State of Wisconsin v. Lewis O. Floyd Jr.
Decided by the Court of Appeals, July 6, 2016

Issue:
The court looked at whether there was proper reasonable suspicion to extend a traffic stop and whether there was consent for a search of the person. The court held that, though a close call, there was reasonable suspicion to extend the stop; further the court held that the stop was not actually extended. The court also held that the defendant consented to a search of his person.

Facts:
Around 6:45 pm the police stopped the defendant's vehicle because of suspended registration. Upon contact the defendant advised the police that he did not have a driver's license or insurance, but did have an identification card showing that he was from Kenosha. The officer observed that there were air fresheners in every vent of the vehicle as well as hanging off the rear view window. Because of the amount of air fresheners in the vehicle, the officer suspected drug activity. The officer also knew that the stop occurred in a high crime area where there had been a large degree of drug and gang activity, and further observed that the vehicle's windows were tinted.

After making all of these observations the officer returned to his squad to prepare three citations related to the suspended registration, lack of insurance and a driver's license and contacted dispatch to request back up. The deputy returned to the defendant and asked him to exit the vehicle, to insure that the defendant would not drive away. As the defendant exited the vehicle the officer asked the defendant if he had any weapons to which the defendant said that he did not. The deputy then asked if he could be searched for safety and the defendant agreed. The search revealed drugs.

The Defendant's Argument:

The defendant argued the officer impermissibly extended his traffic stop and that he had not consented to the search of his person. The defendant also argued that the stop could not have been extended because the police did not have reasonable suspicion of drug activity and thus should have been limited completely to staying on the traffic stop mission.

The Court Holding:

Though calling it a close call, the court felt that the police had the requisite reasonable suspicion to investigate a possible drug violation. The court cited the extensive presence of the air fresheners, the high crime area, and the tinted windows; holding in the aggregate that these factors constituted reasonable suspicion.

The court also held that even if the police did not have reasonable suspicion of drug activity, the police did not impermissibly extend the traffic stop. The court reasoned that the defendant could not lawfully drive away, and asking the defendant to exit the vehicle was per se lawful.

The court held that the police request for consent to search was produced in a relatively non-coercive ambiance; there were no weapons brandished and no handcuffing and there was nothing in the record to suggest the defendant did not understand or appreciate the officer's request.

Note:

This was a close call on reasonable suspicion. An air freshener or two by itself would not have been enough. Here though there were many. Tinted windows and being in a high crime area by itself is not enough, but here it is combined with all the air fresheners.

This case also reminds us that the police are entitled to have subjects exit the car in any traffic stop. Also, a traffic stop is necessarily longer when the defendant is not lawfully allowed to drive. But the rule remains that in cases without reasonable suspicion the police cannot extend the traffic stop to accommodate a "fishing expedition".

Birchfield v. North Dakota (OWI and Blood Draws)
Decided by the United States Supreme Court, June 23rd, 2016

Introduction

The United States Supreme Court ruled that it violates the 4th Amendment to provide criminal penalties to motorists who refuse a blood test, though it is permissible to do so if a driver refuses a breath test. The distinction between blood and breath was made because the Court opined that a blood test is more intrusive. The opinion was generated by a consolidation of cases in two states, Minnesota and North Dakota, both of which have statutes that criminalize refusals. Since Wisconsin does not criminalize refusals, this case and its substantial discussions of the issues do not relate to us.

Here are the case's key points:

- **The case is only relevant to states that criminalize refusals.** The Court specifically endorsed implied consent statutes, like ours, that don't criminalize refusals. It wrote:
  "Our prior opinions [e.g. *McNeely*] have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences [such as Wisconsin's Implied Consent law] on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, **and nothing we say here should be read to cast doubt on them.**" (Emphasis added)
- The decision reaffirms *McNeely,* requiring search warrants for blood in the event of a refusal, unless exigent circumstances exist.
- It does not clarify our current confusion of how to handle an unconscious driver. This issue is pending with the Wisconsin Supreme Court, and until it is resolved, our recommendation is to ignore our statute permitting a warrantless blood draw of an unconscious driver, and to instead get a warrant.

Practical Points

- There is no need to change the Informing the Accused form or to change implied consent procedures as a result of this decision. As has been the case since *McNeely*, when someone refuses the breath or blood test, officers should seek a warrant for blood, unless exigent circumstances exist.
- Even though the case holds that a police officer can get a breath test under a search incident to arrest theory without going through implied consent, the police should still continue to handle breath as they currently do: go through Implied Consent and if you get a refusal you have the option to seek a warrant for blood.
- For the unconscious driver, seek a search warrant for blood.

ULTIMATE BOTTOM LINE
No change in Wisconsin. Business as Usual.

State v. Weathersby
Decided by the Court of Appeals- September 20, 2016

Though unpublished and a per curiam decision, this case serves as a good teaching tool on the relationship between the activation of the emergency lights and seizure. The case reminds us that the activation of the lights can by itself constitute a seizure **BUT** also brings home the point that nobody is seized until they are aware they are being seized. In this case though the lights were on the defendant did not see them, and by the time the defendant noticed the lights the police had developed reasonable suspicion.

State of Wisconsin v. Richard L. Weber
Decided by the Wisconsin Supreme Court, November 29, 2016

Issue:
The court looked at the hot pursuit doctrine for making a warrantless entry into a home. A divided court determined that there was a constitutional basis for the home entry- three of the justices relied on hot pursuit and one relied on a consent theory. A majority of the justices (5) held that "hot pursuit" is a stand-alone doctrine that does not require a showing of danger or the imminent possibility of the destruction of evidence. The state won with this math: 3 justices found probable cause and the exigency of hot pursuit, and one judge found no probable cause and therefore no hot pursuit, but nevertheless found consent.

Facts:
The officer observed the defendant driving with a defective high- mounted break lamp. (All hands concede there was a valid basis for a traffic stop) The officer activated his vehicle's emergency lights in an attempt to conduct a traffic stop. The defendant did not stop his vehicle and instead drove about 100 feet, turned into a driveway, and pulled into an attached garage. The officer followed the defendant's vehicle and parked about 15 to 20 feet behind it, but outside of the garage. The defendant and the officer exited their vehicles at the same time. The defendant began to move towards a door of the attached house inside the garage. As the Deputy ran towards the garage he told the defendant to stop and that he needed to speak to him. The defendant did not stop but instead continued up the steps to the house. The officer entered the garage (the curtilage) and physically stopped the defendant. Eventually the defendant was arrested for drunk driving- tenth offense

The Defendant's Argument:

The defendant argued the police made an unlawful warrantless entry into his garage and therefore all the evidence that flowed from the intrusion, including all the OWI evidence should be suppressed.

The State's Argument:
The state argued that the entry was justified under the "hot pursuit" doctrine. The state reasoned that the police had probable cause for two potentially jailable offenses, fleeing from an officer, and obstruction. Therefore the police were entitled to enter into the garage to chase after the defendant.

The Supreme Court Holding:
The Majority
4 judges felt that the warrantless entry into the garage was appropriate. Three judges felt the police had probable cause for two jailable offenses- fleeing and obstruction, and one felt while there was no probable cause the defendant by his actions was in effect inviting the police to make the traffic stop. So the Supreme Court denied the defendant's motion to suppress and held that all the OWI evidence against the defendant was admissible.

Another majority but not determinative
Four justices found that there was no hot pursuit as there was no probable cause. The reasoning was that there was little distance between the activation of the lights and the stop to justify fleeing, and little time between the stop and the police command to constitute obstruction. Also one of the justices was squeamish about using the flight as both the evidence of hot pursuit and the jailable offense. Nevertheless the state won the case because one of these four judges found consent.

Another important majority for future cases
Five of the justices found that "hot pursuit" is a stand-alone exigent circumstance that does not require an additional showing that hot pursuit was necessary because of danger or the fear of the destruction of evidence.

Key Points
1) Hot pursuit plus probable cause of a jailable offense is a justification for a warrantless entry into a home. But this is not a bright line rule as it is modified, like most 4th amendment activity by reasonableness.
2) Hot pursuit is a stand-alone exigency

Cautionary Notes
The probable cause in this case was quite thin. It would have been easier if the record had been clearer as to the distances involved. Obviously, the greater the distance between the attempt to stop and the stop, the more likely there is PC of fleeing or obstruction. It is unclear how comfortable the majority of the court is with using the fleeing as the jailable offense, particularly when the offense that triggered the fleeing was so minor and the distances involved so small. If the underlying charge had been a misdemeanor, and not an improper brake light, this case would have been easily resolved in the state's favor.
Also, while one of the justices found consent, I do not believe this a viable theory in this instance. The justice reasoned that the defendant by his behavior was inviting the officer to make the traffic stop in his home. To me, the better way to look at this

is to conclude that the defendant by his actions was prompting hot pursuit and thus forfeiting his privacy interest in the home he retreated into.

Best part of Case:
It reinforces the notion that hot pursuit is a stand-alone exigency and that hot pursuit can be triggered by pursuit and probable cause of a jailable offense. And of course a 10th offense drunk driving conviction is affirmed.

United States v. Paxton
Decided by the United States Court of Appeals-7th Cir. 2/17/2017

Issue: Whether a subject has a reasonable expectation of privacy in private conversations occurring in a police squad. The US Court of Appeals makes it clearer than ever before that even if a person has a subjective expectation of privacy as to his conversation in a police squad, it is not a privacy expectation that society finds reasonable.

Facts:
Five defendants were arrested, as part of a sting operation, when they were preparing to execute a planned robbery of what was a fictitious narcotics "stash" house. The defendants had been recruited to join this scheme by an undercover agent posing as a drug courier seeking to rob a Mexican drug cartel.

Two of the defendants, including Paxton, were arrested outside of a Chicago restaurant. They were placed into a police transport van that was clearly marked as a police vehicle. The van's interior was divided into three compartments by two solid steel walls with small double plexiglass viewing windows. After the two defendants were loaded into the van, task force officers drove the van a short distance to a warehouse, where three other arrested defendants were picked up and placed in the van. All five of the defendants were handcuffed. None of the defendants were given their Miranda warnings before being placed into the van. The van was then driven to the ATF Chicago field office.

During the drive the defendants conversed quietly; unbeknownst to them, two recording devices (one audio, and one audiovisual) had been hidden in the rear compartment of the van to capture their conversation. Paxton made a number of incriminating statements, which were memorialized by the recording devices.

Defendant's Argument
Paxton argued that he had an expectation of privacy in the conversations he had with his co-defendants in the police van. He argued that the layout of the van seemingly encouraged private conversations.

The United States Court of Appeals Holding:
The court held that whatever Paxton's subjective expectation of privacy might be, society would not deem it reasonable for a person to feel a privacy right in any conversation occurring in a police vehicle. The court held this would be true in either a police van configured as the one in this case, or a typical police squad. The court further reasoned that clearly labeled police vehicles are usually brimming with electronics; as such they should put people on notice as to the possibility of eavesdropping equipment being on board. The court further opined that even police vehicles without demonstrative electronics, should by their very nature as a crime-fighting vehicle, give no reason for an occupant to feel any sense of privacy.

The Bottom Line:
This case makes clear what has been consistently hinted at; police surreptitious recordings of squad car activity and conversations do not violate either the 4th amendment or state wiretap laws as an occupant does not have a reasonable expectation of privacy in a police squad. While it still might be a prudent practice to put a warning sign as to the possibility of recording in the police vehicle, it would seem this case would not make it a requirement.