Search and Seizure Issues in Traffic Cases

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1. Objectives of Presentation

2. Seizure of a Person, Generally
    a. What is a seizure?
        i. Physical touching or restraint by the police.
        ii. Submission to some display of authority by the police. *California v. Hodari D.*, 499 U.S. 621.
        iii. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968).
        iv. A seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).
        v. Distinguish: person who flees and never submits is not seized.
        vi. Distinguish: voluntary encounter.
    b. Do not confuse Fourth Amendment caselaw on seizures with *Miranda* caselaw on when someone is "in custody". Very similar, but technically distinct concepts.

3. Types of Seizures
    a. A warrantless seizure must be justified by a specific level of evidence.
    b. Traffic Stop
        i. If a *crime* is suspected, this is handled exactly the same as a *Terry* stop.
            1. Reasonable suspicion that a person is or was (or was about to be) violating the law.
            2. Must be grounded in specific articulable facts and reasonable inferences from those facts.
            3. An "inchoate and unparticularized suspicion or 'hunch' will not suffice."
            4. An objective standard based on what a reasonable police officer in that position would believe.
            5. One decent summary of the standard: *State v. Guzy*, 139 Wis. 2d 663, 407 N.W.2d 548 (1987).
        ii. Issue: is there any differentiation between a traffic stop for a suspected crime versus for a suspected traffic violation?
            1. Wisconsin caselaw seemed to vary between requiring probable cause and reasonable suspicion for a stop for a non-criminal traffic

violation; some opinions just addressed both standards rather than resolving it.

2. *State v. Houghton* in 2015 explicitly addressed this issue and held that "an officer's reasonable suspicion that a motorist is violating or has violated a traffic law is sufficient for the officer to initiate a stop of the offending vehicle." 2015 WI 79, 364 Wis. 2d 234, 868 N.W. 143.
    a. (It's also a terrible case about an officer's "mistake of law.")
3. This would seem to be settled now. Watch out for older cases that use probable cause as the standard.

iii. What can an officer do during a "stop"?

1. Can order the driver out of the vehicle. Does not need any specific reason for this. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560.
2. Can relocate the suspect within "the vicinity" of the stop. Wis. Stat. § 968.24, *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997).
3. Can do a pat-down for weapons—but <u>only</u> if the officer has "reason to believe that he is dealing with an armed and dangerous individual." *Terry v. Ohio*.
    a. "Officer safety" and "department policy" are not sufficient reasons for a pat-down during a *Terry* stop.
4. Can pursue the "mission" of the stop. This means that the scope and duration of the stop must be tailored to the underlying justification. The stop must last no longer than reasonably should be required to address the purpose of the initial stop. The least intrusive means of addressing the officer's suspicions should be employed. It is appropriate to consider whether the police acted diligently in pursuing their investigation. *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).
    a. Can run a drug dog around the car only if it's within the window of time that is reasonably required to complete the original mission.
5. According to SCOW, the officer can also ask for ID and pursue the "ordinary inquiries" even after the original "mission" of the stop has been resolved. *State v. Smith*, 2018 WI 2, 905 N.W.2d 353.

c. Expanded Stop

i. Example: asking a driver to submit to FSTs after a stop for speeding.
ii. The scope of the stop extends beyond the original mission.
iii. This is still a *Terry* stop, but it's functionally a second *Terry* stop. It is still a reasonable suspicion standard, but the expanded stop must be justified

by expanded reasonable suspicion, and the scope of the expanded stop is now tied to the new mission.

iv. "If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop." *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999).

v. What can an officer do during an expanded stop?
   1. Essentially, the same types of things one could do during any other *Terry* stop.
   2. Must be tied to purpose for expanded stop.
   3. Watch for anything that might convert the stop to a premature arrest.

vi. Expansion for FSTs:
   1. Some "helpful" unpublished decisions:
      a. *County of Sauk v. Leon*, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929.
      b. *State v. Meye*, 2010 WI App 120, 329 Wis. 2d 272, 789 N.W.2d 755
      c. *State v. Gonzalez*, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905.
   2. Things that will be unhelpful:
      a. Any bad driving.
      b. "bar time"
      c. Any observations consistent with impairment as opposed to consumption of alcohol.

d. Probable Cause to Administer PBT

i. Specific to impaired driving cases; created by Wis. Stat. § 343.303.

ii. The standard is "probable cause <u>to believe</u>" that the person has violated the OWI laws.

iii. The SCOW held that this language indicates a lesser level of probable cause than that needed to justify an arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999).

iv. Hard to tell if there's any real distinction between PC to PBT and PC to arrest.

v. In *Renz*, the defendant failed the W&T, OLS, and finger to nose tests, and admitted to drinking three beers. The decision seems to suggest that it's a close call.

vi. Practice tip: this only comes up when a PBT has been requested and either the results of the PBT or the refusal to take the PBT weigh into the arrest

decision. In such a situation, you should move to suppress both the PBT for a lack of "probable cause to believe" and then the subsequent arrest for lack of probable cause.

e. Probable Cause to Arrest
    i. How is an arrest defined?
        1. Under the totality of circumstances, including any communications by police officers.
            a. However, what is communicated by the police is not dispositive in either direction.
        2. Objective test: "whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody' given the degree of restraint under the circumstances." *State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991).
        3. The use of force, handcuffs, or drawing of weapons does not necessarily transform a *Terry* stop into an arrest.
    ii. What does it mean to be under arrest?
        1. Can be searched incident to arrest.
        2. *Miranda* applies, so look out for any pre-warning interrogation. (Although beware slightly different caselaw).
        3. Subject to prosecution for escape.
        4. Triggers certain aspects of implied consent law, such as obligation to provide a sample.
    iii. What standard is required?
        1. Probable cause: "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Paszek*, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971).
        2. Horrible example: *State v. Lange*, 2009 WI 49, 317 Wis. 2d 383, 766 N.W.2d 551. PC to arrest found after single vehicle accident based on observed erratic driving, the time of night, the fact that the defendant had a prior OWI, the fact that the officers were experienced, and the fact that there were limited options for further investigation short of arrest.

4. Community Caretaker Searches and Seizures
    a. Can be either a search or seizure.
    b. Three prong main test:
        i. Was there a Fourth-Amendment event (*i.e.*, a search or a seizure)?
        ii. Were the police exercising a bona fide community caretaker function?
        iii. Does the public interest outweigh the intrusion? Which requires consideration of four sub-factors:
            1. The degree of the public interest and the exigency of the situation [which is really two factors];

2. The attendant circumstances surrounding the event, such as time, location, and the degree of authority or force used;
3. Whether an automobile was involved;
4. The availability of alternative means of dealing with the situation.

c. The appellate courts have pretty consistently approved the reliance on invented emergencies to justify searches and seizures.
   i. "[A]n unarticulated concern about the possibility of an overdose can always be later invoked by a court when officers arrive at what they think is a 'drug house' and the inhabitants fail to respond to the officers' knock. If that unarticulated concern now permits officers to enter the home without a warrant and without probable cause, then it is unclear what constraints remain on warrantless home searches when there is a suspicion of drug activity." *State v. Pinkard*, 2010 WI 81, ¶ 92 (A. W. Bradley, J., dissenting).
   ii. Same logic has been applied to people asleep in a vehicle.
   iii. Prosser was opposed; "[This] broad, ever-expanding version of the exception risks transforming a shield for evidence encountered incidental to community caretaking into an investigatory sword." *State v. Matalonis*, 2016 WI 7, ¶ 112 (Prosser, J., dissenting.)

d. The big fallacy in community caretaker caselaw:
   i. See A.W. Bradley's dissent in *Pinkard*. In a borderline situation, the question is not whether government agents <u>can</u> enter a home without a warrant to see if medical assistance is needed. They <u>can</u> do that. The question is whether any evidence they may incidentally encounter while doing so should be usable in a criminal prosecution. Most of the caselaw fails to appreciate that there is—or should be—a gap between these conceptual spaces.

5. Searches, Generally
   a. What is a search?
      i. A search is a government intrusion into something in which a person has a privacy interest that society recognizes as reasonable. *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).
      ii. If you don't have a privacy interest, there's no search.
      iii. If you abandon your privacy interest, there's no search.
      iv. If the privacy interest belongs to another, you may not have standing to challenge an illegal search.
   b. What justifies a search?
      i. A warrant; or
      ii. An exception to the warrant requirement.
         1. The touchstone of the Fourth Amendment is reasonableness—the constitution only protects us from "unreasonable searches and seizures."

2. But a warrantless search is *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz*.

6. Common Exceptions to the Warrant Requirement
    a. Exigent Circumstances, generally.
        i. Don't have to get a warrant when the need for the search is urgent and there is insufficient time to get a warrant.
            1. Always have to address the ability to get the warrant—how long would it take? Very easy in most places today.
        ii. Recognized sub-categories include:
            1. Hot pursuit.
            2. Threat to public safety.
            3. A risk that evidence will be destroyed.
            4. Likelihood that suspect will flee.
        iii. *Always* need probable cause *in addition to* the exigency.
    b. Exigency—dissipation of alcohol in the blood.
        i. Used to be a *per se* exception for all OWI cases. Now it is not. *Missouri v. McNeely*.
        ii. It can still be an exception—but need a showing that the delay necessary to obtain a warrant would result in "significantly undermining the efficacy of the search." *State v. Tullberg*, 2014 WI 134.
            1. This requires consideration of both the time necessary to obtain a warrant and of whether that period of time would significantly undermine the blood test.
    c. The Automobile Exception
        i. A type of exigent circumstances, but if the search is of an automobile, the police only need probable cause combined with "a very slight showing of exigency". *See State v. Wisumierski*, 106 Wis. 2d 722 (1982).
        ii. Don't forget to look at the logical underpinnings of this doctrine. It relies on the fact that a car is mobile, and that a car can be easily driven away while the police get a warrant. It's really questionable whether this doctrine should apply to a situation where the vehicle is immobile or where the police could maintain custody of it while a warrant is obtained.
        iii. The doctrine also relies on a lowered expectation of privacy because traveling in an automobile exposes passengers and items in the vehicle to public view. *State v. Pallone*, 2000 WI 77.
    d. Search Incident to Arrest
        i. *Arizona v. Gant*, 556 U.S. 332 (2009).
        ii. Justification: "officer safety" and protection of evidence that could be destroyed.
        iii. Scope: the area within the arrestee's immediate control—the area within which he or she might gain possession of a weapon or destructible evidence.

1. "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*.

iv. Weird exception: Even if the arrestee cannot access the vehicle, can still search the vehicle "incident to arrest" when it is "reasonable to believe" that evidence "relevant to the crime of arrest" would be found in the vehicle.

1. Is this really a search-incident, or is it just the automobile exception? *Gant* specifically says it's a search-incident, but that is completely contrary to the reasoning of the rest of the opinion.
2. Precise definition of "reasonable to believe" is unclear. Less than probable cause?
3. Is it reasonable to search for empty containers for every OWI arrest? In other words, does the reasonable belief have to be particularized? What about going into glove boxes, purses, etc.?
4. These questions appear to have been settled by *State v. Coffee*, but a PFR is pending and SCOW may weigh in.

e. Plain View

i. Encompasses "view" as well as other senses—plain smell, plain feel, etc.

ii. Three requirements:

1. Prior justification for observing what the officer observed. (Lawful initial contact / lawfully present.)
2. The evidence is in plain view.
3. The officer has probable cause to believe that the observed item is evidence of a crime or contraband, considering the item in and of itself in addition to other facts known to the officer at the time. *State v. Guy*, 172 Wis. 2d 86 (1992).

f. Consent

i. There must be some type of actual consent—words or actions. "Consent in fact."

ii. If there was "consent in fact," there must be a finding that the consent was freely and voluntarily given. *State v. Blackman*, 2017 WI 77.

1. Distinguish voluntary consent from acquiescence to police authority. *State v. Johnson*, 2007 WI 32.

iii. Consent does *not* require or depend on probable cause to search, which means that it is subject to different limitations in scope.

iv. Consent may be limited in scope, and police must abide by that limitation. *State v. Matejka*, 2001 WI 5.

v. The scope of consent may be modified at any time.

vi. Consent may be withdrawn at any time, and any search must cease. *State v. Wantland*, 355 Wis. 2d 135.

7. Examples Common to OWI Cases
    a. Search of a person.
        i. If a person is searched prior to arrest, it's probably a *Terry* pat-down. Need particularized reasonable suspicion that the person is armed. If no particularized suspicion, the pat-down is likely unlawful.
            1. Note: see if the circumstances of the pat-down are such that it converts the seizure into an arrest.
            2. Note: a pat down is limited to looking for weapons, so excessive digging in pockets or into small containers exceeds the scope of a pat-down.
        ii. If the police rely on consent, look carefully for the exact conversation. Was the officer *asking* for consent or was this acquiescence?
            1. Note: scope is determined by the consent. If it's limited to weapons, it's limited to weapons. If the person consents to a full search, it's a full search.
        iii. After arrest, it's a search incident to arrest. Scope is broader, but it is limited to the person's body and anything that the person can reach—after being arrested. If the arrest is valid, the search-incident is typically going to be valid too.
    b. Search of car.
        i. If it's after arrest, see *Gant*—is there reason to believe that evidence relevant to the crime of arrest will be found in the vehicle?
        ii. At any time, can rely on probable cause plus the automobile exception.
            1. Note: maybe not if the vehicle is immobile.
        iii. Plain view.
            1. Can look in the windows or through open door. Can use flashlights, etc.
        iv. Odor: the unmistakable odor of marijuana provides probable cause to search. *State v. Hughes*, 2000 WI 24; *State v. Secrist*, 224 Wis. 2d 201.
            1. It does need to be somehow localized.
            2. It does need to be "unmistakable." Good luck with that.
            3. CBD / Hemp issues?
        v. Consent.
            1. Again, look at consent versus acquiescence.
            2. Look at voluntariness.
            3. Look at scope issues.
                a. Example: "Do you want me to get your purse / cell phone / keys out of your car for you?" This does not imply authorization for a full search of the car. Although it could lead to things that are in plain view being noticed once the cop is lawfully inside the car.

vi. Inventory searches / inevitable discovery when car is towed or impounded.
    1. Look for actual policies and procedures.

c. Chemical testing, generally.
    i. Yes, breath / blood tests are searches. This doesn't start with *Birchfield*, but it's the most convenient cite. *Birchfield v. North Dakota*, 136 S. Ct. 2160.
        1. Per *State v. Randall*, chemical analysis of blood is not a search. Seems inconsistent with federal caselaw, including *Skinner v. Railway Labor Executives' Association.*
    ii. You must get your head out of the implied consent law. The implied consent law has nothing to do with the constitutionality of a search. If you haven't, read *State v. Padley*, 2014 WI App 65, and Justice Kelly's opinion in *State v. Brar*, 2017 WI 73.
d. Search of breath.
    i. Breath tests can be administered as a search incident to arrest. See *Birchfield*.
e. Search of blood.
    i. If consent is the justification, all the standard Fourth-Amendment jurisprudence applies.
        1. Voluntariness / coercion. See *Blackman*.
        2. Conditionality / scope—usually not an issue, but check for what the client's exact words are. If someone says, "you may test my blood *for alcohol*," I would argue that is an express limitation on the scope of the search.
        3. Withdrawal or modification of consent.
        4. "Implied consent." We can't get a majority of SCOW to sign onto the same opinion on these cases, but it *seems* that we have four justices that have, at various times, signed onto opinions holding that the State cannot show constitutionally valid consent merely by relying on the language in § 343.305 saying that citizens are "deemed" to have consented to searches.
    ii. Exigent circumstances.
        1. There is no *per se* exigency, but exigency can still be found on a case-by-case basis. Look for injuries (chaotic scene), lack of police personnel, or behavior by the accused that would either delay or prevent the application for a warrant.
        2. Tip: if you're challenging a blood draw on other grounds, it's good to get out in front of this argument in your questioning of the officer. Establish that the officer is trained in getting warrants on OWI cases, that there's a system in place, and approximate how long the process normally takes.

8. Pleading Requirements.