

Search And Seizure Issues in Traffic Cases

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Overview

- Review general Fourth Amendment concepts.
- Discuss seizures.
- Discuss searches.
- Apply to common scenarios encountered in OWI cases.
- Pleading requirements.

“

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fourth Amendment

What is a Seizure / What is a Search?

Seizure

- A seizure of a person is initiated either by (a) physical touching or restraint of the person, or (b) submission to a display of authority by the police. *California v. Hodari D.*
- A state of being—temporal.
- Can also talk about seizure of property / interference with property interest, but in context of traffic stops “seizure” usually means seizure of a person.

Search

- A governmental violation of a privacy interest that society is prepared to recognize as reasonable. *Katz v. United States.*
- An act or course of conduct.

Seizures

What is a Seizure?

- “[W]henever a police officer accosts an individual and restrains his [or her] freedom to walk away, he [or she] has ‘seized’ that person.” *Terry v. Ohio*.
- Would a reasonable person have felt free to leave?
U.S. v. Mendenhall.

Fifth Amendment “Custody”

- A person can be “seized” for Fourth Amendment purposes but **not** be “in custody” for Fifth Amendment *Miranda* purposes.
 - Example: *State v. Gruen*.
- This is **despite** what appears to be a very similar “reasonable person” standard.
- **Do not conflate the caselaw.**

What's not a Seizure?

- A voluntary encounter.
- A person who flees and never submits.

Types of Seizures

- Stop
- Expanded Stop
- Probable Cause to PBT (not really)
- Arrest

Legal Basis for Seizure

- Assuming no warrant, a seizure is only constitutional when justified by a specific level of evidence.
- A statute can't simply create constitutional justification for a seizure.

The Traffic Stop

- Exactly the same standard as a *Terry* stop: reasonable suspicion that the person is, was, or was about to be violating the law.
 - Grounded in specific articulable facts and reasonable inferences.
 - “inchoate and unparticularized suspicion or ‘hunch’ will not suffice.”
 - An objective standard—what would a reasonable police officer believe?
 - One good summary: *State v. Guzy*.

Question

Is there any difference between a stop for a **crime** versus a stop for a **traffic violation**?

Pre-2015 Wisconsin caselaw waffled on whether probable cause was necessary to conduct a traffic stop for a non-criminal violation. You have decisions on both sides, and decisions that just address both standards to be safe.

This was settled in 2015, *State v. Houghton*. Explicitly holds that reasonable suspicion is the standard.

So beware looking at older cases. Reasonable suspicion is always the standard for a traffic stop.

What can be done during a stop?

- Order the driver out for no reason. *Pennsylvania v. Mimms, State v. Floyd*.
- Relocate the driver within the “vicinity” of the stop.
- Conduct a pat-down, but only if there is “reason to believe” that the individual is armed and dangerous.
- Pursue the “mission” of the stop.

The Mission

- Scope and duration are tied to the justification of the stop.
- Limited to what should be required to address the reason for the stop.
- *Least intrusive* means should be used to accomplish mission.
- Officers must act *diligently* in pursuing mission.
- “Ordinary inquiries” may be made. (ID, registration, insurance, safety questions, etc.)
- See *Rodriguez v. United States*.

State v. Frederick Smith (2018)

- Holds that an officer may ask for ID and pursue “ordinary inquiries” even *after* the “mission” of the stop has been resolved.
- Misreading of *Rodriguez*—ordinary inquiries can be *part of* the mission, but an officer shouldn’t be allowed to *continue to detain* someone *only* to pursue the “ordinary inquiries.”
- But that’s the law now.

State v. Wright (2019)

- Supreme Court of Wisconsin – Held that asking about concealed weapons is part of the mission of *every* traffic stop, no matter the circumstances, no matter the reason for the stop.
- Compare to *Terry v. Ohio* – pat-downs limited to when officer has reason to believe person is armed and dangerous.

Expansion of the Stop

- Common example: field sobriety tests.
- Still a *Terry* stop, but conceptually it's a new seizure within / subsequent to the initial seizure.
- Still reasonable suspicion.
- Scope and duration tied to the new mission.

“

“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

The Scope of an Expanded Stop

- Same scope / limitations as would apply in any *Terry* stop.
- What changes is that everything is now tied to the new mission.
- Watch for anything that would convert to a premature arrest.

Expansion for FSTs

- Unhelpful facts:
 - Any “bad driving,” including speeding.
 - “Bar time.”
 - Any observation consistent with impairment (as opposed to mere consumption).
 - 0.02 standard + any indication of alcohol.
 - Smell of THC (need to tie to driver)
- Unpublished cases:
 - *County of Sauk v. Leon, State v. Meye, State v. Gonzalez.*

Probable Cause to Administer PBT

- Not really a seizure, but it fits in the outline here, so too bad.
- Not a constitutional concept—created by § 343.303.
- Standard to administer PBT during an OWI investigation is “probable cause to believe” that the person has violated the OWI laws.

County of Jefferson v. Renz

- The Supreme Court held that § 343.303 refers to a lesser level of probable cause than that needed to justify an arrest.
- Facts: failed W&T, failed OLS, failed finger-to-nose, admitted to drinking three beers.
- Decision suggests that this is a close call.
- Question: is there actually any conceptual space between the *Renz* standard and PC to arrest?

Tip: Framing a PC Motion

- PBT done / then arrested.
- PBT refused / then arrested.
- No PBT offered.
- Watch for comments from officer on whether they did or didn't consider the PBT in their arrest decision—this may change the standard the Court applies.

Arrest

- What is an arrest?
- “[W]hether a reasonable person in the defendant's position would have considered himself or herself to be ‘in custody’ given the degree of restraint[.]” *State v. Swanson*.
- Objective test.
- Use of force, handcuffs, or weapons does not mean it’s an arrest.
- Saying “you’re just being detained” does not mean it’s *not* an arrest.

Immediate Consequences of Arrest

- Can be searched incident to arrest.
- *Miranda* applies (although slight differences in caselaw are a concern, generally if a person is *under arrest* for Fourth Amendment purposes they would be “in custody” for *Miranda*.)
- Can be prosecuted for escape.
- Triggers certain aspects of implied consent law.

“

“[T]hat quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime.” ”

State v. Paszek

Probable cause, defined.

A Reasonable Police Officer

- As we all thought, cops are distinct from people.
- Use this language to your advantage when you can.
 - Inexperienced officer?
 - Officer not following department policies?
 - Emphasize what a *reasonable police officer* would have done differently.
- Example: this officer performed FSTs on a slippery sidewalk in the snow. A reasonable police officer aware of the NHTSA protocols would not have relied on improperly conducted FSTs in determining PC to arrest.

A Terrible Example

- *State v. Lange*. Probable cause to arrest for OWI found based on:
 - Observed reckless driving leading to single-vehicle crash.
 - Time of night.
 - The defendant had a prior OWI.
 - The officers were experienced in investigating OWIs.
 - There were limited options to conduct further investigation due to the driver's injury.

Community Caretaker

- *Or, How I Learned to Stop Worrying and Grant the Government Access to Every Aspect of My Life on Any Pretext Whatsoever.*

Community Caretaker, Continued

- Applies to both searches and seizures.
- Consists of a baroque multi-part, multi-level test.

The Super-Clear and Logical Test That Our Courts Created for Community Caretaker

- I. Was there a Fourth-Amendment event?
- II. Were the police exercising a bona-fide community caretaker function?
- III. Does the public interest outweigh the intrusion? Which requires considering:
 - A. The degree of the public interest and the exigency of the situation.
 - B. The attendant circumstances surrounding the event, including the time, location, and the degree of authority or force used.
 - C. Whether an automobile was involved.
 - D. The availability of other means of dealing with the situation.

“

[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, A.W. Bradley, dissenting.

Any speculation that a person *could* be in danger has *consistently* been found to justify a search or seizure.

Applies to any kind of drug activity, but also a supposedly intoxicated driver who is inside her home, or a person sleeping behind the wheel of a lawfully parked car.

“

[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, Justice Prosser, dissenting.

The Conceptual Problem with C.C.

- The State and the Courts frame these C.C. issues as an either/or proposition—either the cops get to do this, or they potentially leave a person to die of an overdose.
- False dichotomy. It's not a question of whether the police should be allowed to render medical aid.
- The real question is—if the police choose to do what is in effect a search or seizure without probable cause in order to render medical aid, and in the process discover evidence of a crime, *can the evidence be used* in a criminal prosecution?
- If the police would choose to *not* render aid because any evidence they “accidentally” discover would be suppressed, doesn't that demonstrate their actual priority?

Wait, what?

- This year we have had *two* defense wins in the COA on CC issues.
- *State v. Jennerjohn*, 18AP1762, issued 9/24/19.
- *State v. Kettlewell*, 18AP926, issued 9/18/19.
- Maybe we're starting to see a walk-back on how expansive the CC doctrine should be?

Searches

What is a Search?

- A governmental violation of a privacy interest that society is prepared to recognize as reasonable. *Katz v. United States*.

What's not a Search?

- No privacy interest = no search.
- Abandoned privacy interest = no search.
- Another person's privacy interest = standing issues.

What Justifies a Search?

Generally, Probable Cause, PLUS...

- A warrant; OR...
- An exception to the warrant requirement.
- The touchstone of the Fourth Amendment is reasonableness—we only have constitutional protection from “unreasonable” searches and seizures; BUT...
- Warrantless searches are *per se* unreasonable, “subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*.

Common Exceptions

- Exigent Circumstances
- The Automobile Exception
- Search Incident to Arrest
- Plain View
- Consent

Exigent Circumstances

- State must establish that there was an urgent need for the search and insufficient time to obtain a warrant.
 - The logistics of obtaining a warrant are always relevant to this inquiry.
 - Warrants can be obtained so much more quickly today than they could five or ten years ago. Bear that in mind when distinguishing older caselaw.

Exigent Circumstances, Continued

- Recognized sub-categories include:
 - Hot Pursuit
 - Threat to Public Safety
 - The Immanent Destruction of Evidence
 - Preventing Flight of the Suspect

Exigent Circumstances: Dissipation of Alcohol in the Blood

- The rapid dissipation of alcohol in the body used to be considered a *per se* exception to the warrant requirement. Then we had *McNeely*.
- Be aware: blood can still be collected under exigent circumstances as long as the State can demonstrate that the delay involved in getting a warrant would “significantly undermine[] the efficacy of the search.” *State v. Tullberg*.
 - Consider *both* the delay involved *and* whether it would in fact significantly undermine the efficacy. A 30 minute delay with someone who is likely above a 0.08 is not likely to be a problem.

Thoughts on *Mitchell*

- Went up on a question of whether the statute is constitutional, but decided based on Exigent Circumstances.
- Suggestion is that an unconscious suspect will usually meet the exigent circumstances test, but not always.
- Entitled to an evidentiary hearing.
- Burden at hearing?

The Automobile Exception

- Technically falls under exigent circumstances.
- If the location to be searched is an automobile, the police only need probable cause plus “a very slight showing of exigency.”
State v. Wisumierski.
 - Note: Still need PC.
- Relies on:
 - An automobile can be driven away while the police obtain a warrant.
 - A person has a lower expectation of privacy when they travel on a public road, thus exposing the vehicle and its contents to public view.

The Automobile Exception, Continued

- Should this apply when the logical underpinnings of the doctrine are inapplicable?
- For example—what if the car is *not* readily mobile, or the police can prevent it from being unceremoniously driven away? What if the car is on the driver's property, and he or she did *not* expose it to public view?

Search Incident to Arrest

- Does *not* require probable cause, but does require a valid arrest.
- A search incident to arrest is justified by:
 - Officer safety.
 - The protection of evidence that could be destroyed.
- Search must be “substantially contemporaneous” with actual arrest. *Swanson*.
- The permissible scope of a search-incident was restricted in *Arizona v. Gant* to the area that the suspect could reach to gain possession of a weapon or destructible evidence.

“

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.

”

Arizona v. Gant

You don't need to ignore the warrant requirement to prevent a person from reaching something that they can't actually reach.

Gant's vestigial tail.

- The main body of *Gant* seems to apply actual logic to limit a search-incident to the area that the arrestee can physically reach.
- But it then says that the police can search a vehicle, *after* the suspect is removed, when it is “reasonable to believe” that evidence “relevant to the crime of arrest” would be found inside. *And* that this search is...“incident to arrest.”

Gant Tails, Continued

- Is this *really* a search-incident? Or is it just the automobile exception? The opinion specifically refers to it as a search-incident, but that is completely contrary to the logic of the overall opinion—the car is not within reach.
- What does “reasonable to believe” mean? Is it less than probable cause? (Our COA says yes: *State v. Smiter*, 2011 WI App 15.) How can a vehicle search be justified on less than probable cause?
- Does the belief need to be particularized, or is this a *per se* exception in OWI cases?

State v. Mose Coffee

- 2019 WI App 25
- Firmly decides that *any* arrest for an OWI conveys a blanket authorization to search the entire passenger compartment, including any containers small enough to contain medications or drugs.
- No particularized suspicion needed.
- May be reviewed by SCOW, stay tuned.

Plain View

- Encompasses the other senses too.
- Three requirements:
 - Initial observation is lawful.
 - The evidence is in plain view.
 - The officer's observation together with other information available establishes probable cause that the item is evidence of a crime or contraband.
- *State v. Guy*.

Consent

- For legally valid consent to search, there must be:
 - Consent-in-fact: actual consent given by word or action; and
 - A finding that the consent was freely and voluntarily given. *State v. Blackman*.
- Distinguish from acquiescence. *State v. Johnson* (2007).

Scope of Consent

- Most Fourth-Amendment searches are limited by the probable cause possessed by the officers—limited by the mission.
- Probable cause is *not* required for a consent search. Thus the scope of a consent search is defined by the scope of the consent.
- May be of limited scope; police must honor the limitation. *State v. Matejka*.
- Scope may be modified at any time.
- Consent may be withdrawn at any time, and search must cease. *State v. Wantland*.

Common Examples in OWI Cases

Search of a Person

- Prior to Arrest: probably a *Terry* pat-down.
 - Particularized suspicion that armed and dangerous?
 - “Department policy” is not particularized suspicion. It’s actually the opposite.
 - Look for excessive digging in pockets, etc. Only supposed to be looking for weapons.
 - Unlawful pat-down could convert seizure into an arrest—what would a reasonable person believe was happening?

Search of a Person, Continued

- If police rely on a “consent” pat-down—was it actual consent, or acquiescence?
 - Remember, scope is determined by scope of consent. If they just ask to check for weapons then they can only check for weapons.
- If after arrest, search incident.
 - Broad scope—but limited to reach.

Search of a Car

- Post-arrest: see *Gant*, see *Mose Coffee* if it's an OWI.
- At any time: can rely on probable cause plus automobile exception.
 - Maybe not if vehicle is immobile.
- Inventory search / inevitable discovery.
 - Look for actual policies.

Search of a Car, Continued

- Plain view. Can look in through windows or open doors, use flashlight.
- “Unmistakable odor of marijuana” coming from car provides PC all by itself.
 - *State v. Hughes, State v. Secrist*. CBD / hemp issues?
 - Odor does need to be localized and unmistakable.
- Consent:
 - Acquiescence?
 - Voluntariness?
 - Scope issues? (“Get my purse / phone / keys” is not consent to search.)

Chemical Searches, Generally

- Yes, the supply of a breath, blood, or urine sample is a search.
 - *Birchfield* wasn't the first case to recognize this, but you can just cite to *Birchfield*.
- Under *State v. Randall*, blood analysis after an OWI arrest is not a search.
 - Inconsistent with *Skinner v. Railway Labor Executives' Association*.

Breath Tests

- Lesser intrusion on the body, lesser privacy implications.
- Can compel a breath test as a search incident to arrest.
- Can *criminally* penalize a refusal.
- This makes it more difficult to challenge the constitutionality of a breath test.

Blood Tests: Consent

- If constitutionally justified by consent, all standard consent caselaw applies.
 - Voluntariness / coercion. See *Blackman*.
 - Conditionality / scope. Usually not an issue, but look carefully at the language used.
 - “Implied Consent”: *Mitchell, Padley*

Blood Tests: Exigency

- Since *McNeely*, there's no *per se* exigency in a normal OWI case.
- But exigency can be found case-by-case.
- Look for:
 - Injuries.
 - Lack of Personnel.
 - Behavior of Accused.
- Tip: get out in front of exigency if you're challenging blood draw on other grounds.

Pleading Requirements

- *State v. Radder*, 2018 WI App 36.
- The pleading requirements from *Velez* apply to suppression motions, notwithstanding the fact that the State bears the burden of proof on suppression.
- Must allege specific non-conclusory facts that, if true, would entitle the defendant to relief.
- Must be “reasonable possibility” that an evidentiary hearing will establish a factual basis on which the defendant’s motion may prevail.

Pleading Requirements, Continued

- Assert facts, but you don't need an affidavit.
 - I'd rather do an affidavit than argue about it, however.
- Make offers of proof—you don't need to limit yourself to the police report.
- When in doubt, add more facts—this will be your record on appeal if you don't get a hearing.

This is the end.

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