

SPD Conference 2015- Litigating 4th Amendment Issues in OWI Cases

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Seizure

- Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569.
- Traffic stops are considered seizures and thus must be reasonable to pass constitutional muster. *Popke*, 317 Wis. 2d 118, ¶11; *Whren v. United States*, 517 U.S. 806, 809-10 (1996).
- If the seizure is unreasonable and therefore unconstitutional, then evidence obtained as a result is generally inadmissible. *State v. Harris*, 206 Wis. 2d 243, 263, 557 N.W.2d 245 (1996).
- A good faith exception to this rule applies in limited circumstances such as where the police have relied in good faith on either a warrant issued by a detached and neutral magistrate or on well-settled law that was subsequently overturned. *State v. Dearborn*, 2010 WI 84, ¶44, 327 Wis. 2d 252, 786 N.W.2d 97; *State v. Eason*, 2001 WI 98, ¶3, 245 Wis. 2d 206, 629 N.W.2d 625.
- Concluded the officer “seized [the defendant] by activating his red and blue emergency lights.” *State v. Kramer*, 311 Wis. 2d 468, 473, 750 N.W.2d 941 (Ct. App. 2008) aff’d, *State v. Kramer*, 315 Wis. 2d 414, 750 N.W.2d 941 (2008).
- “The parties do not dispute that the seizure requirement has been met” where the officer activated his red and blue emergency lights on his approach of a vehicle parked roadside. *State v. Truax*, 318 Wis. 2d 113, 120, 767 N.W.2d 369 (Ct. App. 2009).
- “It is difficult to imagine a situation where a reasonable person would feel free to leave in response to an officer stopping and activating red-and-blue emergency lights behind the person’s vehicle.” *State v. Gottschalk*, 2013 WI App 55, ¶ 9, 347 Wis. 2d 551, 830 N.W.2d 723 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)).
- *State v. Ellenbecker*, 159 Wis. 2d 91, 464 N.W.2d 427 (Ct. App. 1990), held that a request for a driver's license from a driver whose vehicle was disabled, and a status check on the license, did not transform a lawful "motorist assist" into an unlawful seizure.

Stop

- Probable cause is never required for a traffic stop. “reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops.” *State v. Houghton*, 2015 WI 79, 7/14/14. *Slip Op.* ¶30.

Stop Based on Impaired Driving

- If a stop is made for a specific traffic violation, and the officer extends or expands the scope of the detention to conduct an investigation into impaired driving, the officer must have a reasonable suspicion to believe that the defendant is, in fact driving while impaired. *State v. Betow*, 226 Wis. 2d 90,94, 98, 593 N.W.2d 499 (Ct.App. 1999).
- If an officer conducts a traffic stop because he suspects impaired driving, then the officer must have a reasonable suspicion to believe that the defendant is, in fact, driving while impaired. *State v. Post*, 301 Wis. 2d 1; 733 N.W.2d634 (2007); *Terry v. Ohio*, 392 U.S. 1,, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

- When an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial. *County of Sauk v. Leon*, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). “When an officer is not aware of [impaired] driving, then other factors suggesting impairment must be more substantial. For example, speeding or a significant lane violation at bar time provides a far different context than is presented here.” *Id.* at ¶ 20.
- *State v. Gonzalez*, 354 Wis. 2d 625, 848 N.W.2d 905 (Ct. App. 2014) “I begin my analysis by repeating the point made by a standard jury instruction: ‘Not every person who has consumed alcoholic beverages is under the influence.’” (internal quotation omitted) (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)).

Preliminary Breath Tests

- If an officer administers a PBT, it must be supported by probable cause to believe that the defendant is driving while impaired. *County of Jefferson v. Renz*, 231 Wis. 2d 293; 603 N.W.2d 541 (1999).
- “The fact that the legislature removed the penalty for refusing to take a PBT is further evidence that the legislature intended the PBT to be a preliminary, investigative test.” *County of Jefferson v. Renz*, 231 Wis. 2d 293 at 314, 603 N.W.2d 541 (1999).
- “In the evidentiary gap between reasonable suspicion and probable cause for arrest, a voluntarily taken PBT can furnish the necessary evidence to remove an impaired driver from the road.” *State v. Fischer*, 2010 WI 6, ¶32, 322 Wis. 2d 265, 778 N.W.2d 629.

Investigatory Detention

- In executing a valid investigative stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer needs to reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990).
- The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution require investigatory detentions to be supported by the law enforcement officer’s reasonable suspicion that a person is or was violating the law. *State v. Colstad*, 260 Wis. 2d 406, 413–14, 659 N.W.2d 394 (Ct. App. 2003).
 - A request that a driver perform standardized field sobriety tests (“SFST’s”) constitutes a greater invasion of liberty than an initial police stop or encounter, and must be *separately* justified by specific, articulable facts showing a reasonable basis for the request. *Colstad*, 260 Wis. 2d at 420.
 - The validity of the expansion is tested in the same manner, and under the same criteria as the initial stop. *Id.*
- “A police stop exceeding the time needed to handle the [traffic] matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.” *Cf. Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015).
- An officer exceeds the scope of a permissible investigative stop when he: (1) moves the suspect outside the vicinity of the stop; and (2) lacks a reasonable purpose for doing so. *State v. Quartana*, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (ct. App. 1997).

- Although police moved Blatterman beyond the “vicinity” of the traffic stop (moved ten miles) and therefore exceeded the permissible scope of the stop, the detention of Blatterman was nonetheless reasonable because police had probable cause to arrest him for OWI and, in the alternative, the detention was justified under the community caretaker doctrine. *State v. Blatterman*, 2015 WI 46, 5/5/15.
- Despite illegal detention, seizure is valid if consent is given by suspect. *State v. Patrick Hogan*, 2015 WI 76, 7/10/15, affirming a court of appeals per curiam decision, 2013AP430-CR.
 - It was an illegal extension of stop because there was not reasonable suspicion for field sobriety testing. Defendant passed four field sobriety tests, and the officer told him he was free to leave. Sixteen seconds after he was told that he could leave, the officer re-approached the vehicle and asked to search the car. The officer’s squad car lights were still flashing, and Hogan consented. Seizure was upheld due to Hogan’s consent. *State v. Patrick Hogan*, 2015 WI 76, 7/10/15, affirming a court of appeals per curiam decision, 2013AP430-CR.
- “We conclude the officer had the requisite reasonable suspicion to stop Williams’s vehicle to determine if he was the suspect in a domestic abuse incident. We also conclude that, because the initial detention was lawful, the officer could properly ask Williams his name and for identification even if she had already decided he was not the suspect.” *State v. Williams*, 2002 WI App 306 (2002).

Probable Cause for Arrest

- An officer must have probable cause to arrest someone and take a defendant into custody. Wis. Stats. §968.07. Wisconsin has adopted a totality of the circumstances test for whether probable cause to arrest exists in a drunk driving case. No bright line test. *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 300 (Ct.App. 1986).
- "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Lange*, 317 Wis. 2d 383, 391–92, 766 N.W.2d 551 (2009); *State v. Secrist*, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999); *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993).
- Determination of probable cause requires a finding that guilt is more than a mere possibility. *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 619, 184 N.W.2d 836 (1971).
- “It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not.” *State v. Koch*. (quoting *State v. Paszek*, 50 Wis. 2d 619, 624-25, 184 N.W.2d 836 (1971)).
- In a determination of whether probable cause to arrest existed for purposes of a motion to suppress evidence, the state is required to make a substantially greater showing than that required for a refusal hearing. While a refusal hearing requires the state to make only a “plausibility” showing of probable cause (similar to that at a felony preliminary hearing), the probable cause determination in a motion hearing requires the court to consider the weight and credibility of the state’s evidence, and resolve any conflicts in testimony based on considered fact-finding. *State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325 (Ct.App. 1994).

- Wisconsin has no requirement that police must perform field sobriety tests in order to determine whether probable cause exists that a person is operating a vehicle under the influence of alcohol. See *State v. Lange*, 2009 WI 49, ¶43, 317 Wis. 2d 383, 766 N.W.2d 551.
- Prior OWI convictions can be factored into the probable cause to arrest determination. *State v. Blatterman*, 2015 WI 46, 5/5/15; citing *State v. Goss*, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918.

Search Incident to Arrest

- “Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.” *AZ v. Gant*, 556 U.S. 332 (2009).
- Under *Chimel*, police may search incident to arrest only the space within an arrestee’s “immediate control,” meaning “the area from within which he might gain possession of a weapon or destructible evidence.” 395 U. S., at 763. *Chimel v. California*, 395 U. S. 752 (1969).
- *Belton* does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle. *New York v. Belton*, 453 U. S. 454 (1981).

Search Incident to Arrest- Blood

- Reasonable suspicion is needed to collect blood to preserve evidence of a crime. *State v. Seibel*, 163 Wis.2d 164, 471 N.W.2d 226, cert. denied, 502 U.S. 986 (1991)
 - In *Seibel*, a motorcyclist crossed over the highway's center line and crashed into another vehicle, causing a fatal accident. The officers at the scene noticed a "very strong" odor of intoxicants from the motorcyclists with whom Seibel was traveling. At the hospital to which Seibel was taken, he "exhibited a belligerence and lack of contact with reality" and another officer smelled an intoxicant on the defendant. *Id.* at 182, 471 N.W.2d at 234. An officer at the hospital directed a staff person to draw Seibel's blood to test for intoxicants and Seibel was subsequently charged with negligent homicide. At issue in the case was whether the police needed probable cause or the lesser standard of reasonable suspicion to believe that Seibel's blood contained evidence of a crime in order to draw a blood sample. The supreme court of Wisconsin held that the proper standard was reasonable suspicion, *id.* at 179, 471 N.W.2d at 233, and that the facts in the case constituted a reasonable suspicion sufficient to justify drawing Seibel's blood. *Id.* at 183, 471 N.W.2d at 235.

Mistake of Law v. Mistake of Fact

- *State v. Houghton*, 2015 WI 79, 7/14/14, held:
 - Pretextual stops... are not per se unreasonable under the 4th Amendment”;
 - Probable cause is never required for a traffic stop;
 - The officer “misunderstood” multiple provisions of Ch. 346, but his mistakes were “objectively reasonable;”

- Article I § II of Wisconsin's Constitution extends no further than the 4th Amendment. *Slip Op.* ¶¶ 4, 5, 6, 50.
- *Houghton* overruled:
 - *State v. Brown*, holding that a seizure based on a mistake of law violated the 4th Amendment, and
 - *State v. Longcore*, 226 Wis. 2d 1, 594 N.W. 2d, holding that a traffic stop may not be predicated on an officer's mistake of law.

Good Faith Exception

- "The good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court," *State v. Deerborn*, 2010 WI 84.
 - "[The Supreme Court of Wisconsin] now accept *Gant's* interpretation of the United States Constitution and adopt its holding as the proper interpretation of the Wisconsin Constitution's protection against unreasonable searches and seizures. Thus, the search of *Deerborn's* truck violated his constitutional rights. However, we decline to apply the remedy of exclusion for the constitutional violation. We hold that the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." *Id.*
- Although there were no exigent circumstances to justify a warrantless blood draw, the arresting officer acted in good faith. *State v. Reese*, 2014 WI App 27.
 - The Court held that "probable cause existed to arrest *Reese* and that even though under the United States Supreme Court's recent opinion in *Missouri v. McNeely*, 133 S. Ct. 1552, 133 S. Ct. 1552 (2013), the facts do not establish exigent circumstances justifying a warrantless blood draw, the blood draw should not be suppressed because the arresting officer acted in good faith reliance on established Wisconsin Supreme Court precedent at the time the blood draw was conducted." *State v. Reese*, 2014 WI App 27.
- "Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Davis v. United States*, 564 U.S. ____ (2011).

Community Caretaker Doctrine

- An officer's conduct falls within the scope of the community caretaker exception if: (1) a seizure within the meaning of the fourth amendment has occurred; (2) the police conduct was bona fide community caretaker activity; and (3) the public need and interest outweigh the intrusion upon the privacy of the individual. *State v. Kramer*, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598.
- In evaluating whether a community caretaker function is bona fide, the court examines the totality of the circumstances as they existed at the time of the challenged police conduct. This is an objective reasonableness standard. *Kramer*, 315 Wis. 2d 414, ¶30.

Refusal

- A refusal to perform a field sobriety test is not protected by the Fifth Amendment to the United States Constitution and, therefore, the refusal may be used to establish probable cause to arrest for driving while under the influence of an intoxicant. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 106 (Ct. App. 1994).
- A deficient breath sample can be evidence of a refusal. *State v Zivcic*, 229 Wis. 2d 119, 598 N.W.2d 565 (Ct. App. 1999)
 - “If there are not two samples or the sequence is not followed, then there is no “test” within the meaning of the statute. If there is no “test” within the meaning of the statute, then there are no test results available to be admitted into evidence. The person who fails to give a complete breath test is considered to have refused consent.” *Zivcic* citing *State v. Grade*, 165 Wis.2d 143, 477 N.W.2d 317 (Ct.App.1991).

McNeely Issues In Wisconsin- Warrantless Searches---

Pre- *Missouri v. McNeely*, 133 S. Ct. 1552, 133 S. Ct. 1552 (2013)

- The Supreme Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer “might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.” *Schmerber v. California*, 384 U. S. 757 at 770 (1966) (internal quotation marks omitted).
- “The presence of one presumptively valid chemical sample of the defendant’s breath does not extinguish the exigent circumstances justifying a warrantless blood draw. The nature of the evidence sought—that is, the rapid dissipation of alcohol from the bloodstream—not the existence of other evidence, determines the exigency.” *State v. Faust*, 2004 WI 99,P3 (Wis. 2004).
- A warrantless blood sample is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk driving related violation or crime; (2) there is a clear indication that the blood draw will produce evidence of intoxication; (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner; and (4) the arrestee presents no reasonable objection to a blood draw. *State v. Bohling*, 173 Wis. 2d at 53.

Missouri v. McNeely, 133 S. Ct. 1552, 133 S. Ct. 1552 (2013)

- The natural dissipation of blood does **not** constitute a **per se** exigency that justifies a warrantless blood draw. *McNeely*, 133 S. Ct. at 1563.
 - “In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.” *Missouri v. McNeely*, 133 S. Ct. 1552, 133 S. Ct. 1552 (2013)

Post- *Missouri v. McNeely*, 133 S. Ct. 1552, 133 S. Ct. 1552 (2013)

- “We accept, as we must, McNeely’s totality of the circumstances test for the purpose of determining whether exigent circumstances are present so as to justify warrantless

investigatory blood draws in cases involving ‘drunk-driving related violation[s] or crime[s]’” *State v. Kennedy*, 2014 WI 132.

- “A warrantless investigatory blood draw is lawful so long as exigent circumstances exist and: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw. *State v. Bohling*, 173 Wis. 2d at 53. This four factor test is rooted in *Schmerber* and was not overruled by *McNeely*. See *Schmerber*, 384 U.S. at 769-71; *McNeely*, 133 S. Ct. at 1560.” *State v. Kennedy*, 2014 WI 132
- “While probable cause to search for evidence of a drunk driving related violation or crime is sufficient to satisfy the first two factors of *Bohling*, the converse is not necessarily true. The fact of an arrest, or probable cause to arrest, for a drunk-driving related violation or crime alone will not permit an investigatory blood draw. Rather, there must also be a clear indication that the blood draw will produce evidence of intoxication. *State v. Erickson*, 2003 WI App 43, ¶18, 260 Wis. 2d 279, 659 N.W.2d 407” *State v. Kennedy*, 2014 WI 132
- Although there were no exigent circumstances to justify a warrantless blood draw, the arresting officer acted in good faith. *State v. Reese*, 2014 WI App 27.
 - The Court held that “probable cause existed to arrest Reese and that even though under the United States Supreme Court’s recent opinion in *Missouri v. McNeely*, 133 S. Ct. 1552, 133 S. Ct. 1552 (2013), the facts do not establish exigent circumstances justifying a warrantless blood draw, the blood draw should not be suppressed because the arresting officer acted in good faith reliance on established Wisconsin Supreme Court precedent at the time the blood draw was conducted.” *State v. Reese*, 2014 WI App 27.
- *State v. Foster*, 2014 WI 131
 - holds “that the good faith exception to the exclusionary rule applies because the police conducted the search and seizure of Foster’s blood in objectively reasonable reliance on the clear and settled precedent of *State v. Bohling*, 173 Wis. 2d 529 (1993).”
- Arrest is not a prerequisite, because there was probable cause to believe suspect drove intoxicated – even though a field sobriety test was not performed – and exigent circumstances justified the warrantless blood draw. *State v. Tullberg*, 2014 WI 134
 - “We conclude that, under the totality of the circumstances, the draw of Tullberg’s blood was justified by exigent circumstances,” *State v. Tullberg*, 2014 WI 134

Additional notes re: McNeely.

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