

**PRETRIAL  
EVIDENTIARY  
MOTIONS**

# **Why Pretrial Motions are Important**

- **Exclude Evidence That Hurts Your Case**
  - **Drugs**
  - **Guns**
  - **Incriminating items found in client's possession, auto, or house. (ie: stolen property)**
  - **Client's "Confession"**
  - **Client's Identification by police or witness**

# **Why Pretrial Motions are Important**

- **Tactical Advantage**
  - **Opportunity to Cross Examine Witnesses**
  - **Additional Discovery**
  - **Negotiations**

# **WORKING ON THE MOTION**

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- **Client's Version of the Incident**
  - **Client will help Identify Issues**
  - **Client will help Investigation**
  - **Client will help Identify Witnesses**

# **WORKING ON THE MOTION**

- **Investigation**
  - **Interview Witnesses**
  - **Visit the Scene**
    - **Where was Client**
    - **Could Police/Witness see what they allegedly saw**

# **WORKING ON THE MOTION**

- **Writing the Motion**
  - Law
  - Facts
  - Beware

# **IDENTIFYING ISSUES**

- **Do I have an Issue?**
- **Does Client have Standing?**

# Identifying Issues

- **Spotting Issues**
  - **Read Police Reports**
    - **Client's Version**
    - **Police Version**
  - **Listen to Audio Recordings**
  - **Review any Videotapes**

# Identifying Issues

- **Evidence to Suppress**
  - **Did police recover evidence?**
  - **Evidence Inculpatory**
  - **How did the police obtain the physical evidence?**

# Standing

- **Did client have an expectation of privacy?**
  - **Complete dominion and control**
  - **Right to exclude others**
  - **Precautions consistent w/ privacy.**
  - **Property put to private use.**
  - **Historical notions of privacy.**

# Standing

- **Did search involve client's home?**
  - **House and Curtilage**
  - **Garage is Curtilage**
  - **Police Cannot invade curtilage to smell THC.**
  - **Garbage if shared driveway**
  - **Garbage if public sidewalk**

# Standing

- **Home**

- Multi unit apartment tenant basement is decided on case by case basis.
- Stairway- case by case basis. Privacy interest when stairway regulated by a deadbolt.
- Overnight guest has standing
- Guest merely present with consent of household has no standing
- Guest had standing when firmly rooted relationship with host and property.

# Standing

- **Search Client**
  - Yes
- **Abandoned Property-**
  - No if discards during lawful police action.
  - Yes if discard during unlawful police conduct.

# Standing

- **Auto**

- All occupants of the vehicle can challenge the stop.
- Passengers cannot challenge questioning of driver.
- No privacy in abandoned vehicle/property.
- No violation if use drug sniffing dog to sniff the airspace.

# **POLICE STOP, SEARCH, SEIZURE, ARREST**

- **Terry Stop**

- ***“reasonable suspicion”*** that the person has, is or is about to commit a crime.

- **Applies to stopping of a person or an auto.**

# Terry Stop

- **Reasonable Suspicion**
  - **greater than a mere hunch, but less than probable cause.**
  - **Police officer must point to articulable facts, which taken with rational inferences, warrant an intrusion.**

# Terry Stop

- **Reasonable Suspicion**
  - **Factors Court Can Consider:**
    - **Unprovoked flight.**
    - **Apparent drug transaction in know drug area.**
    - **Officers can ask all occupants in auto for identification.**
    - **Passenger declining to answer DOES NOT rise to any reasonable suspicion of wrong doing.**

# Terry Stop

- **Furtive Movements only= no reasonable suspicion**
- **Furtive Gestures contribute to reasonable suspicion for a stop.**
- **Pretextual Stops Are permitted if legal basis for stop**

# Terry Seizure

- **Reasonable Belief not free to leave**
  - **Officer actions:**
    - **activating sirens**
    - **commanding persons to stop**
    - **displaying weapons**
    - **blocking travel**
    - **restrict a person's movement.**
    - **Stopping an automobile and detaining occupants, even briefly.**

# Terry Seizure

- A reasonable seizure can turn unreasonable seizure if it extends the stop beyond the time necessary to fulfill the purpose the stop.
- An officer does not transform a traffic stop into an unlawful one, if after the reason for the stop is complete, the officer asks to search the car.
- Police did exceed the scope of a routine traffic stop when continued to detain the vehicle after driver said no drugs in vehicle and could not search it.

# Detentions

- **Detention**

- If the stop is based on reasonable suspicions, the police can detain client long enough to investigate reasonable suspicion.
- The stop must be temporary and last only long enough to investigate the purpose of the stop.

# Terry Pat Down

- **A police may do a pat down for weapons when the have “reasonable belief” that the client may have a weapon.**

# **Terry Pat Down**

- **Reasonable Suspicion**
  - **Police officers point to specific and articulable facts**
  - **rational inferences that can be drawn from those facts**
  - **support the officer's belief that the individual may be armed**
  - **May present a risk of harm to the officer or to others.**

# Factors Considered

- **Failure to immediately stop for officers in routine traffic stop**
- **nervousness in excess of most traffic suspects**
- **alcohol and drug intoxication.**
- **high crime area; large fluffy coat in in the winter.**
- **Area known for gang, drug, and gun activity combined with the smell of marijuana**
- **suspicion of drug dealing of itself would not constitute circumstances justifying a protective search.**

# **Factors Considered**

- **Furtive movements taken with other factors.**
- **Furtive movements alone are not enough for a pat down for weapons.**
- **Fleeing from police after vehicle pulled over.**
- **Failure to follow police officer's commands.**
- **Time of day/night.**
- **Lighting.**

# Terry Frisk

- **Terry Frisk of Auto**
  - **Officers can do a Terry Frisk of an auto if police stop a vehicle and have reasonable suspicion to believe the vehicle may contain weapons.**
  - **Totality of the Circumstances.**

# The Arrest

- **Probable cause:**
  - **facts and circumstances known to the police officer and the facts are of reasonable trustworthiness that a prudent man would believe an offense has been committed and probably committed by the client.**
  - **Probable cause for arrest is the same probable cause required to issue a criminal complaint.**
  - **Burden on the State to demonstrate probable cause for a warrantless arrest.**

# The Arrest

- **Non-criminal traffic or ordinance violations.**
- **Officer's good faith yet mistaken belief that probable cause for arrest exists is still an invalid arrest.**
- **Police can rely on collective information in possession of the department**
  - **The police must communicate the data to the arresting officer otherwise the collective theory does not apply.**

# **What is an Arrest**

- **Reasonable Person believes in custody**
  - **Degree of Restraint**
  - **Circumstances of Situation**
  - **Verbal and Non-Verbal  
Communication by Police**

# **Arrest Triggers**

- **Ability of Police to Search Client**
- **Ability of Police to Search Auto**
- **Ability of Police to Search Home or Room**

# **Search Incident to Arrest**

- **Search of Person**
  - **Allows officers to search anything on the person after a lawful arrest.**
  - **Whether or not the individual is later charged with the original probable cause related offense.**

# **Search of Auto**

- Probable cause = contraband in vehicle can search because the vehicle is easily mobile.**
- Limited by the nature of the item.**
- No Search if vehicle is not within an arrestee's immediate presence.**

# **Search Incident to Arrest**

- **Search of Auto after Arrest of Person**

- **Belton Rule:**

- **Custodial Arrest of Auto Occupant**
    - **Contemporaneous Search**
    - **Interior of Auto**

# Search Incident to Arrest

- **US v. Gant**: Police may search a vehicle incident if:
  - 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

# **Search Incident to Arrest**

- **Search of Home incident to an Arrest**
  - **Limited to room or area under client's control.**
  - **Limited to area in client may be able to gain possession of weapon or destructible evidence.**

## S/I Arrest of Home

- **Cannot** search residence after arrest if arrestee has been removed from residence after arrest because defendant could not have gotten possession of weapon or destructible evidence.
- **Can** search residence incident to an arrest allowed if defendant is in home and handcuffed because could still have access to weapon or evidence

- **Protective sweep if reasonable belief based on specific and articulable facts and inferences that the area may harbor an individual posing a danger to officers or others.**

# OWI Issues

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"You're driving home? Don't you think you might have had too many drinks?"

# OWI STOP ISSUES

- **Equipment Violations**
- **Traffic Violations**
- **Fog Lines**
  - **Totality of the Circumstances**
    - *State v. Allen*, 226 Wis. 2d 66 (Ct. App. 1999)
  - **Would a reasonable officer believe suspect was driving while Intoxicated.**

- **Anonymous Caller**
  - **Did person give Identifying Information**
  - **Did Officer observe any basis for stop**
- **Known Caller**
  - **Does person give name**
  - **Identifying Information**
  - **Totality of the Circumstances**

# **FIELD SOBRIETY TESTS**

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**“This is just a routine, sir - step out of the car and do the hokey-pokey.”**

# Field Sobriety Tests

- **Person admit to drinking**
- **Officer's Observations.**
- **Officer conduct them as trained.**
  - Manuel**

# Preliminary Breath Tests

- Probable Cause
  - Less than arrest more than reasonable suspicion.
  - County of Jefferson v. Renz*
  - Wis. Stat. § 343.303
- Attack Fields

# **Consent Searches**

- **Police can search your client, client's vehicle, client's home, or any other property if there is valid consent to search.**
- **State has burden to prove by clear and convincing evidence that consent was freely and voluntarily given.**

# Consent

- **Investigative Detention- consent not freely given if during an unlawful police detention.**
  - **Person felt free to leave**
  - **Officers w/in scope of investigation**

# Home Searches

- **Consent**
- **Search warrant**
- **Probable Cause AND Exigent circumstances**

# Home Search

- **Consent**

- **Consent to enter must be freely and voluntarily given.**
- **State has the Burden by clear and convincing evidence.**
  - **Police must ask for consent to search in order for consent to be given.**
  - **Police can ask to search one's property without any grounds to believe person has committed a crime.**

# Who Can Consent

- **Co-equal rights?**
  - **Two persons with equal rights to use or occupancy of the premises.**
  - **Police cannot search premises when one occupant with common authority over premises gives consent and the co-occupant is present and objects.**

# Consent

- **Minor Children?**
  - **Must look at child's age, intelligence and maturity, and scope of search and seizure.**
  - **Teenage can probably given consent to search common areas of common use.**

# **Third Party Consent**

- **Actual Authority v. Apparent Authority**
  - **A third party can give consent if party has actual authority over property.**
  - **Consent can still be valid even if no actual authority if officers have reasonable grounds to believe the consenter had apparent authority.**
  - **Did the police make a sufficient inquiry of third party to rely on the consent.**

# Search Warrant

- **Police making misrepresentations as to existence of warrant made consent invalid because it was procured by outright and material lie.**
- **Law enforcement cannot threaten to obtain warrant where probable cause does not exist to obtain warrant.**

# Search Warrant

- **Must particularly describe the items police are authorized to search for.**
- **Requires police to announce their presence, purpose and identity and allow occupants a chance to let police into the residence (unless no knock granted.)**
- **Invalid if based on illegally obtained evidence.**
- **Invalid if based on false statements or omissions and made in an intentional or reckless disregard for the truth.**

# Search Warrant

- **Good Faith Exception- Evidence seized in reasonable, good-faith reliance on a search warrant is admissible even if warrant subsequently held to be defective.**
- **In WI- State must show that the process used in obtaining a search warrant includes a significant investigation and review by police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney.**

# Search Warrant

- Defendant bears burden of challenging probable cause in the search warrant.
- Staleness- look to ongoing criminal activity to determine if probable cause for warrant is stale.
- Court of Appeals, State v. Michael King- particularity of address and staleness.

# Probable Cause

- **Probable Cause and Exigent Circumstances**
- **Exigent Circumstances**
- **Flight from police in a drug trafficking area may constitute reasonable suspicion to conduct a Terry stop but it does not rise to the level of probable cause for a warrantless search.**

# **Exigent Circumstances**

- **Hot Pursuit**

- **applies only to felonies and does not justify entry for a misdemeanor.**

# Community Caretaker

- **Police function must be totally divorced from the detection, investigation, or acquisition of evidence relating to a crime.**
- **Three Step Test-**
  - **whether a search or seizure has taken place**
  - **If Fourth Amendment implicated, whether “the police conduct was bona fide community caretaker activity;” and**
  - **if bona fide community caretaker activity, “whether the public need and interest outweigh the intrusion upon the privacy of the individual.”**

# **Exigent Circumstances**

- **Destruction of Evidence-**
  - **Test is whether the facts support**
  - **At the moment of entry**
  - **evidence would be destroyed before a warrant could be obtained.**

# **Exigent Circumstances**

- **Crime in Progress**
  - **Warrantless entry into a home is permitted if crime in progress.**

# Emergency Doctrine

- **Police can enter a home w/o a warrant when the officer reasonably believes that a person is in need of aid.**
- **Objective Test: Whether a police officer under the circumstances known to the officer at the time of the entry reasonably believes that delay in procuring a warrant would gravely endanger life.**
- **Also look at attempts made by police to investigate or secure information prior to the warrantless entry.**

# Identification Motion

- **Out of Court Show-ups**
  - State v. Dubose- high suggestive, not **necessary** if police have probable cause to arrest
  - Exigent circumstances are an important factor to determine reasonableness of show up.
  - Be careful of police officer show up.

# Identification

- **Photo Arrays**
- **Lineups**
- **Photo Array and Lineup Procedures:**
  - **Person administering does not know identity of suspect.**
  - **Photos sequentially rather than simultaneously.**
  - **Confidence level of identification.**
  - **Documenting the lineup.**

# Confessions

- **Custodial Interrogations-**
  - **Interrogation by law enforcement officer or agent of law enforcement agency,**
  - **Of a person suspected of a crime,**
  - **Questioning of a person in custody,**
  - **Subject to Miranda Warnings.**
  - **During which the officer/agent asks questions likely to elicit an incriminating response.**

# Confessions

- **Sec. 968.073 (2)**
  - **Police of State to make an audio or video recording of a custodial interrogation of a person suspected of committing a felony unless good cause is shown for not make the recording during the interrogation.**

# Exceptions to Recording

- **Misdemeanor offense- although many misdemeanor interrogations are being recorded.**
- **Suspect refuse to cooperate.**
- **Routine processing.**
- **Good faith malfunction of equipment.**
- **Spontaneous statement and not in response to questioning.**
- **Exigent circumstances.**
- **Investigator does not know investigating a felony.**

# Remedy

- **Jury Instruction**
  - **Police to make audio/video recording of confession,**
  - **Jury may consider the absence in evaluating the evidence relating to the interrogation and statement given to the officer/agent.**

# **Voluntariness**

- **Factors**
  - **Age**
  - **Whether police advised of rights.**
  - **Request for an attorney and police response to request.**
  - **Physical and mental condition of suspect**
  - **Delay before court appearance**
  - **Sleep deprivation, intoxication**
  - **Experience with the police**
  - **Threats/physical abuse**
  - **Relay interrogators**
  - **Promises of leniency**

# Statement

- **Miranda Warnings, Right to Counsel**
  - **Warnings need to be given if questioning by a law enforcement agent designed to elicit an incriminating response.**
  - **Police must establish the suspect understood rights and knowingly and voluntarily waived rights.**
  - **Assertion of counsel requires police to stop questioning.**
  - **Only suspect can assert right to counsel.**
  - **Suspect can reinitiate conversation thus waiving right to counsel.**
  - **Equivocal request for counsel are insufficient to invoke right to counsel. (example: do you think I need an attorney?)**

# Statement

- **Miranda Rights violated, Prosecutor can use statement in rebuttal if client testified inconsistent with statement.**
- **Right to counsel invoked before Miranda Warnings given, invocation triggers the Edwards bar on interrogation absent client reinitiating communication w/ police.**

Montejo v. Louisiana

Overruled

MI v. Jackson

- if a law enforcement officer goes to see a represented client, reads them Miranda rights and the client waives those rights and answers questions, the statement will not be suppressed.

# **Fruit of Poisonous Tree**

- Courts have suppressed physical evidence obtained as a result of Miranda violation.**
- Courts have suppressed physical evidence and statements after a 4<sup>th</sup> Amendment violation.**

- **Inventory Searches-**
  - **Vehicle Impoundment**
    - **Not for purpose of investigation**
    - **Follows police policy and procedures**
    - **Protect property and police department**
- **Inevitable Discovery**
- **Probation Searches**

- **Attenuation Doctrine-**
  - 1) the temporal proximity of the official misconduct and seizure of evidence
  - 2) the presence of intervening circumstances, and
  - 3) the purpose and flagrancy of the official misconduct