Law Update (mostly pulled from On-Point)

CELL PHONE SEARCHES:
1. SCOW unable to agree on whether cell phone tracking is a search

(this may become moot point, this issue is currently in front of SCOTUS)

State v. Bobby L. Tate, 2014 WI 89, 7/24/14, *affirming* an unpublished court of appeals decision; majority opinion by Justice Roggensack; case activity
State v. Nicolas Subdiaz-Osorio, 2014 WI 87, 7/24/14, *affirming* an unpublished per curiam court of appeals decision; lead opinion by Justice Prosser; case activity
In two decisions consisting of 8 separate opinions spread out across almost 200 pages, the supreme court is unable to muster a majority on the central issue presented: Whether cell phone location tracking is a search under the Fourth Amendment. Instead, in both cases a majority assumes without deciding that cell phone tracking is a search and then affirms the convictions, although on different grounds. If you're looking only for the holdings, here they are: In ***Tate***, a majority holds that the circuit court's "order" that a cell phone service provide information about the cell phone location was reasonable because it met the requirements for a search warrant. In ***Subdiaz-Osorio***, a majority holds that the warrantless acquisition of the cell phone location data was supported by probable cause and exigent circumstances. If you're looking for more information, read on.
Because the decisions are lengthy, we start with a short summary of each case's facts and then provide a breakdown of the opinions in case.
Tate
The police obtained tracking information on a cell phone of a man who, shortly after purchasing the phone, was seen fatally shooting another man. (¶¶3-5). They obtained the information after preparing an affidavit about their investigation and, based on that affidavit, getting a court order authorizing (a) the installation and use of a trap and trace device and a pen register device and (b) the release of information from the cell phone subscriber information. (¶6). The police used cell site information from the phone company and from a "stingray" mobile device that mimics a cell tower, police determined the phone was in an apartment building and found Tate, the cell phone, and other evidence in one of the apartments. (¶¶7-11).

1. Justice Roggensack's majority opinion assumes without deciding that the cell phone tracking constituted a search, as the state conceded the point. (¶¶20, 26). But it concludes the search to obtain the data was reasonable because the court order met the requirements for a warrant (¶¶33-41) and, relying on ***State v. Sveum***, 2010 WI 92, ¶¶69-72, 328 Wis. 2d 369, 787 N.w.2d 317, there was no need for specific statutory authorization for the order—though in any event the order did comply with the "spirit" of §§ 968.12 and 968.135 (¶¶42-50).
2. Chief Justice Abrahamson and Justice Bradley dissent. They believe the court should explicitly address whether obtaining cell phone location data is a search (¶¶52-60); argue that it's a search because people have a subjective expectation of privacy in cell phone location data that society is prepared to recognize as reasonable, relying especially

on ***State v. Brereton***, 2013 WI 17, 345 Wis. 2d 563, 826 N.W.2d 369, and because obtaining the data appears to involve a trespass,***United States v. Jones***, 565 U.S. ___, 132 S. Ct. 945 (2012) (¶¶74-149); and conclude the court order can't validate the collection of the cell phone data because it didn't comply with §§ 968.12 and 968.135 (¶¶150-63).

Subdiaz-Osorio

The defendant stabbed and killed his brother during a fight. (¶¶12-18). After the officers investigating the incident learned Subdiaz-Osorio had left town in a borrowed car, they contacted Wisconsin DOJ, who filed a form with Subdiaz-Osorio's cell phone service provider to locate his cell phone. (¶¶20, 22-23). The company obliged, and told the police they found the phone in Arkansas, where Subdiaz-Osorio was soon apprehended in the car he'd borrowed. (¶25).

1. Justice Prosser's lead opinion assumes without deciding that people have a reasonable expectation of privacy in their cell phone location data, so when police track a phone they are conducting a search. (¶9). While police did not have a court order when they tracked Subdiaz-Osorio's cell phone location, police did have probable cause for a warrant and the exigent circumstances of this case created an exception to the warrant requirement. (¶¶10, 69-81). Thus, the circuit court correctly declined to suppress the cell phone data, and the conviction is affirmed.
2. Justice Bradley concurs only in the mandate. (¶90). While she joins the dissent in concluding there was a search that was not justified by exigent circumstances, she concludes any failure to suppress the cell phone evidence was harmless. (¶¶90-105).
3. Justice Crooks concurs only in the mandate. (¶109). He concludes a warrant is required for cell phone tracking (¶¶112-16), but applies a good-faith exception to the exclusionary rule because there would be no deterrent purpose in excluding the evidence here because the police acted in good faith, given the officers' significant investigation, their reliance on DOJ, and the lack of clearly established law on the status of cell phone tracking. (¶¶126-28).
4. Justice Roggensack, joined by Justice Ziegler, concurs in the mandate, but writes separately because the lead opinion goes too far in discussing whether a search occurred and therefore seems to decide points of law unrelated to its conclusion. (¶¶130-32).
5. Justice Ziegler, joined by Justices Roggensack and Gableman, also concurs in the mandate, but notes the parties and the court have not considered the impact of ***Riley v. California***, 573 U.S. ___, 134 S. Ct. 2473 (2014), which may or may not prove relevant in analyzing cell phone tracking. (¶¶139-43).
6. Chief Justice Abrahamson dissents, incorporating her reasoning from her dissent in ***Tate*** about why cell phone tracking is a search (¶¶164-68) and disputing the conclusion that there were exigent circumstances justifying a warrantless search (¶¶169-208).

Subdiaz-Osorio also claimed his confession should have been suppressed because he invoked the right to counsel, but the lead opinion concludes, without any quibble from the concurrences, that he didn't unequivocally ask for a lawyer. (¶¶28, 82-87). The dissent rejects that conclusion (¶¶209-19), and Justice Bradley agrees, but finds any error in admitting his confession to be harmless (¶¶89, 104-05).

The upshot: Because there's a majority in both cases that assumes the primary legal issue and agrees on a mandate on other grounds, whether there is a reasonable expectation of privacy in the cell phone location data is still an open question. Three justices (the Chief Justice and Justices Crooks and Bradley) believe cell phone tracking constitutes a search. One more (Justice Prosser)

seems sympathetic to this view based on his discussion of the reasonable-expectation-of-privacy test in ***Subdiaz-Osorio*** (¶¶51-68). Convince him, and there's a majority.

On the other hand, at least two justices (Justices Roggensack and Ziegler) seem inclined to look for ways to allow police access to tracking information, at least if one reads anything into the criticisms of Justice Prosser's discussion of consent based on the cell phone service contract (*cf.*¶¶53-63 (Prosser) with ¶¶133-35 (Roggensack)) and the third-party doctrine (*cf.* ¶¶65-68 (Prosser) with ¶¶134-35 (Roggensack)). If you're looking for ammunition in making an argument that there is a reasonable expectation of privacy in the cell phone location data and want to anticipate the counterarguments, the dissent in ***Tate*** (which also addresses the consent and third-party issues (¶¶116-35)) and Justice Prosser's main opinion in ***Subdiaz-Osorio*** are good places to start.

Note that while Justice Prosser seemingly rejects the application of the trespass approach to finding a search in this situation (¶¶48-50), that may in part be due to the lack of information in the record about how the location information was gathered. (***Tate***, ¶¶97, 106 (Abrahamson, dissenting)). Developing those details may strengthen the trespass argument (***id.***, ¶¶93-106)—though if the police used a "stingray," you may not be able to find out how it works because the police don't want that information divulged (***id.***, ¶101).

Finally, a majority in ***Tate*** agreed the search was valid because of the order that complied, at least in "spirit," with §§ 968.12 and 968.135. To the extent an order in a particular both departs from those statutes and is distinguishable from the order in ***Tate***, there is an argument that the search was no good. Soon, though, we will start seeing orders issued under a new statute, § 968.373 (effective April 25, 2014), which the ***Tate*** dissent (¶¶146-48) cites as evidence there's an expectation of privacy in tracking data. That means the next issues to litigate will include what it takes to comply with that statute, and the consequences for non-compliance.

2. SCOTUS: A warrant is required to search a cell phone seized incident to arrest

by ADMIN *on JUNE 25, 2014*

Riley v. California, USSC No. 13-132 (*together with* **United States v. Wurie**, USSC No. 13-212), 2014 WL 2864483 (June 25, 2014), *reversing* People v. Riley, No. D059840 (Cal. App. 4th Dist. 2013) (unpublished) (and *affirming* United States v. Wurie, 728 F.3d 1 (1st Cir. 2013)); Scotusblog case page (which includes links to briefs and commentary) and symposium page (additional opinion commentary)

In a sweeping and significant ruling, a unanimous Supreme Court holds that officers must generally secure a warrant before conducting such a search of a cell phone found on a defendant at the time of his or her arrest.

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life[.]" ... The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant. (Slip op. at 28).

After Riley was arrested for a traffic offense police seized the smart phone he was carrying and twice examined it without a warrant. Data from the phone linked Riley to a previous shooting. The state court held the search of the phone was proper because it was incident to the defendant's arrest. (Slip op. at 1-3). Wurie was arrested after making a suspected drug sale. A "flip" phone seized when he was arrested received repeated calls from a number identified as "my house." Police looked at the phone's call log and found an address. They used that (and other) information to get a warrant for the home, which turned up additional evidence of drug dealing. The First Circuit rejected the claim police could search the phone incident to Wurie's arrest because neither rationale for conducting such a search—protecting arresting officers or preserving destructible evidence—applied. (Slip op. at 3-4).

The search incident to arrest exception to the warrant requirement, as developed in ***Chimel* v. *California***, 395 U. S. 752 (1969), ***United States v. Robinson***, 414 U.S. 218 (1973), and***Arizona v. Gant***, 556 U.S. 332 (2009), allows searches of personal property immediately associated with the arrestee based on a balancing of the relatively minor additional intrusion of the search on the person's privacy (compared to the greater intrusion of being taken into custody) and the weighty governmental interests in officer safety and evidence preservation. (Slip op. at 6-8, 15-16). Acknowledging this balancing of interests supported the search incident to arrest exception in ***Robinson*** (where police opened up a crumpled cigarette pack found in arrestee's pocket), the Court nonetheless rejects "a mechanical application" of ***Robinson*** to support the warrantless search of a cell phone:

… [W]hile ***Robinson***'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, ***Robinson*** concluded that the two risks identified in ***Chimel***—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, ***Robinson*** regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in ***Robinson***. We therefore decline to extend ***Robinson*** to searches of data on cell phones …. (Slip op. at 9-10).

Examining the government interests in more detail, the Court notes that digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape, particularly once an officer has secured the phone. (Slip op. at 10-11). Further, the government's concerns about "remote wiping" or encryption of a phone after arrest (slip op. at 12-13) justify searching the phone to prevent destruction of evidence. There is "little reason to believe that either problem is prevalent" (slip op. at 13), allowing a search of the phone may not prevent the problems, and, at least as to remote wiping, there are practical ways to minimize the risk of that happening (*e.g.*, turning the phone off or securing it in a Faraday bag) (slip op. at 13-14).

Outweighing the government's interests is the significant intrusion on privacy a cell phone search entails. The government's claim that searching a cell phone is "materially indistinguishable" from searching a pocket or personal item (like a wallet or purse) is strongly rejected by the Court:

That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together.

Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. … (Slip op. at 17).

The nature of cell phones as "minicomputers" and the immense amount of data they store or allow access to makes them different "in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." (Slip op. at 17). Before "the digital age," a search of a person was limited by physical realities, so it usually constituted only a narrow intrusion on privacy. But both the storage capacity of cell phones, and the ability of many phones to access data in the "cloud," means people now typically carry a cache of sensitive personal information with them. (Slip op. at 17-22). Thus, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." (Slip op. at 20).

Having rejected the government's argument for extending ***Robinson*** to cell phones, the Court also rejects its "fallback" option of adopting the ***Gant*** rule allowing a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime for which the arrest was made. ***Gant*** relied on "circumstances unique to the vehicle context"—namely, "a reduced expectation of privacy" and "heightened law enforcement needs" when it comes to motor vehicles. 556 U.S., at 343, *citing* ***Thornton v. United States***, 541 U.S. 615, 631 (2004) (Scalia, J., concurring). "For reasons that we have explained, cell phone searches bear neither of those characteristics." (Slip op. at 22-23). In addition, "a ***Gant*** standard would prove no practical limit at all when it comes to cell phone searches." (*Id*.).

In a coda, the Court acknowledges the impact of its holding on police practices, and reminds readers that "[o]ur holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." (Slip op. at 25). That impact will be lessened by the fact that cell and smart phones have also made the process for obtaining a warrant far more efficient. Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" ***Kentucky v. King***, [131 S. Ct. 1849, 1856 (2011)] (quoting ***Mincey v. Arizona***, 437 U.S. 385, 394 (1978)). Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury. [***Id.***]. (Slip op. at 26).

Justice Alito concurs, writing separately only to disagree that a search incident to arrest is founded only on protecting officer safety and preventing evidence destruction, but agrees with that the nature of cell phones "calls for a new balancing of law enforcement and privacy interests." (Concur. at 4).

With the rejection of the search-incident-to-arrest justification for warrantless searches of a cell phone seized during an arrest, the next topics of litigation will include: 1) whether there were exigent circumstances justifying a warrantless search; and 2) whether evidence found in a warrantless search of a phone conducted before ***Riley*** will be admissible under the good-faith exception to the exclusionary rule. Wisconsin has one case addressing the first issue. ***State v. Carroll***, 2010 WI 8, ¶¶33-42, 322 Wis. 2d 299, 778 N.W.2d 1, held that the search of a cell phones image gallery wasn't justified by exigent circumstances—*i.e.*, by a concern the images

would disappear before a warrant could be obtained—though answering an incoming call was. (For more on ***Carroll***, see our post here.)

As to the good-faith exception, warrantless cell phone searches invalidated by ***Riley*** differ from the warrantless searches invalidated by ***Gant*** and ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013).***Gant*** and ***McNeely*** overruled clearly established state court precedent allowing the search, but we have no clearly established precedent allowing the kind of searches governed by ***Riley***, and***Carroll***, 322 Wis. 2d 299, ¶33, held a similar search to be improper. Thus, the good-faith exception recognized for searches conducted in reliance on a case that is later overruled shouldn't apply here, and cases that are not yet final should reap the benefit of Riley's ruling.

Finally, the Court's references to "the digital age" and to cell phones as "minicomputers" may be a basis for arguing that ***Riley*** means computer searches will be subject to different rules than other searches under the Fourth Amendment. The opinion may even show there's support on the Court for the so-called "mosaic" theory that collection and inspection of large amounts of "aggregated personal data constitutes a search that is subject to the Fourth Amendment. Orin Kerr has some initial thoughts on these topics for those of you interested.

3. Exigency – Answering Incoming Call, Lawfully Seized Cell Phone Image Supported

by ADMIN *on JUNE 18, 2010*

State v. Jermichael James Carroll, 2010 WI 8, *affirming* 2008 WI App 161

For Carroll: Michael K. Gould, SPD, Milwaukee Appellate

Issue/Holding: Answering call on lawfully seized cell phone proper, given existence of "probable cause to believe that the cell phone was a tool used in drug trafficking," plus exigent circumstances (danger of evidence destruction), ¶¶35-42.

Probable cause, of course, is typically fact-specific and in that sense the court's discussion (¶¶25-29) is mundane. The impact of this case will be felt relative to exigent circumstances: the court's analytical approach applies at a fairly high level of generality, not merely to other sorts of electronic devices such as pagers, ¶36 (though the court does caution that "cell phones and pagers are not interchangeable," ¶38), but more importantly to devices seized outside of the arrest context, ¶35 n. 7. In other words, the result is *not* dependent on a search-incident rationale.

¶41 The consistent approach taken in these cases is that the courts scrutinized the nature of the evidence obtained, i.e., numeric codes on a pager, stored text messages, and incoming phone calls, and balanced that with an inquiry into whether the agent reasonably believed that the situation required a search to avoid lost evidence. Based on that assessment, it appears that the courts then reserved the exigent circumstances exception for searches directed at the type of evidence that is truly in danger of being lost or destroyed if not immediately seized. That approach is consistent with Wisconsin case law addressing exigent circumstances. See Faust, 274 Wis. 2d 183, ¶12 (stating that the rule for determining whether exigent circumstances are present requires an inquiry into whether the officer reasonably believed that the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence).

¶42 Hence, we are satisfied that exigent circumstances justified Belsha's answering Carroll's cell phone. The fleeting nature of a phone call is apparent; if it is not picked up, the opportunity

to gather evidence is likely to be lost, as there is no guarantee——or likelihood——that the caller would leave a voice mail or otherwise preserve the evidence. Given these narrow circumstances, Belsha had a reasonable belief that he was in danger of losing potential evidence if he ignored the call. Thus, the evidence obtained as a result of answering that phone call was untainted.

TIPSTER:

1. Tip from one student provided reasonable grounds for search of another student

by ADMIN *on SEPTEMBER 4, 2014*
State v. Chase A.T., 2014AP260, District 4, 9/4/14 (1-judge; ineligible for publication); case activity
A student's tip to an assistant principal that a bathroom "smelled like marijuana smoke" and that a student named Chase walked out of the bathroom immediately before the tipster smelled the smoke provided reasonable grounds for the assistant principal to search Chase. In addition, the search of Chase was not excessive in scope. Thus, his motion to suppress was properly denied.
Public school officials conducting searches of students in the school setting are subject to the Fourth Amendment's prohibition against unreasonable searches, but not to the warrant and probable cause requirements. ***State v. Angelia D.B.***, 211 Wis. 2d 140, 149, 564 N.W.2d 682 (1997). A search of a student is reasonable if it is "justified at its inception" and is "reasonably related in scope to the circumstances which justified the interference in the first place.'" ***Id.*** at 151 (quoting ***New Jersey v. T.L.O.***, 469 U.S. 325, 341 (1985)).
The court concludes the search was justified at its inception, rejecting Chase's arguments that the assistant principal could not reasonably act in reliance on the tip because the tipster was not reliable, the content of the tip was too vague, and the assistant principal didn't sufficiently corroborate it. The school's program for rewarding tips didn't affect reliability because there's no evidence the tipster asked for or received a reward, and in any event rewards were given out only after investigation of the tip. (¶¶21-22). And, the tipster was presumably known by the assistant principal, and thus could be held responsible for giving false information. (¶¶21, 23). As to the vagueness of the tip, the allegation of the smell of smoke was admittedly ephemeral, but the identification of "Chase" as the student who left the bathroom was clear; and even if the tipster didn't report seeing Chase possessing or using marijuana, the inference of marijuana use was reasonable from the facts the tipster did report. (¶¶23-27). Finally, corroboration isn't required by the cases, and wasn't necessary in any event given the tipster was known to the assistant principal. (¶¶30-31).
The search—which consisted of having Chase empty his pockets—wasn't excessive in scope, either.
¶35 …. The test is whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." ***T.L.O.***, 469 U.S. at 342 (emphasis added). Here, the assistant principal had reasonable grounds to suspect that Chase T. possessed a controlled substance or related evidence

that could be in one of his pockets, and, thus, ordering Chase T. to empty his pockets was "reasonably related to the objectives of the search." The search was also not "excessively intrusive," as it was limited to having Chase T. empty his own pockets and did not involve any physical contact whatsoever, much less especially intrusive contact, with any part of Chase T.'s body, clothing, or belongings by the assistant principal or the liaison officer who was present.

2. Lorenzo Prado Navarette & Jose Prado Navarette v. California, USSC No. 12-9490, cert. granted 10/1/13

by ADMIN *on OCTOBER 1, 2013*

Question presented:

Does the Fourth Amendment require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle?

Lower court opinion: People v. Lorenzo Prado Navarette, et al., No. A132353, 2012 WL 4842651 (Cal. Ct. App. Oct. 12, 2013) (unpublished)

Docket

Scotusblog page

This is a very significant Fourth Amendment case that could change the law in Wisconsin by limiting ***State v. Rutzinski***, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. In a nutshell, the question is whether there is a greater latitude to act on an anonymous tip about dangerous driving as opposed to other kinds of criminal conduct.

Briefly, the facts of this case are that someone called police dispatch complaining that a silver pickup truck with plate number 8D94925 had run him (or her) off the road and that the truck was heading south on Highway 1. Shortly thereafter two officers spotted the truck, followed it for a time, and then stopped it, even though they observed no erratic or reckless driving. *Cf.* ***Rutzinski***, 241 Wis. 2d 729, ¶7 (officer did not independently observe any erratic driving). The stop led the seizure of four large bags of marijuana.

The legal question posed by this case arises out of the Court's remarks in ***Florida v. J.L.***, 529 U.S. 266, 272-74 (2000). That case held that an anonymous tip about criminal activity could not justify a stop and frisk without some independent corroboration of the reliability of the tipster's claims. The anonymous tip in ***J.L.*** was that a young black man wearing a plaid shirt at a certain bus stop was carrying a gun. The police corroborated the innocent details–the bus stop, a young black man wearing a plaid shirt–but the tip provided no predictive information with which to test the informant's knowledge or credibility. "All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L."–and that was not enough. ***Id.*** at 271. The Court dismissed the argument that because of the dangers posed by guns there should be a "firearms" exception to the usual requirement of tipster reliability:

> …[A]n automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms.

Id. at 271. But the Court didn't stop there. It went on to suggest there might indeed be some situations where we could dispense with a showing the tipster was reliable:

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, see ***Florida* v. *Rodriguez***, 469 U. S. 1 (1984) *(per curiam)*, and schools, see ***New Jersey* v. *T. L. O.***, 469 U. S. 325 (1985), cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.
Id. at 273-74.
Where else is there a diminished expectation of privacy? Why, driving your car on a highway. And what kind of driving is analogous to carrying a bomb? Drunk driving, of course. *Cf*. ***United States v. Wheat***, 278 F.3d 722, 730 (8th Cir. 2001) ("Indeed, a drunk driver is not at all unlike a bomb, and a mobile one at that."). Ergo, a majority of courts–ours included, in ***Rutzinski***–have carved out a kind of OWI (or reckless) driving exception to the anonymous tipster reliability rule, concluding that in light of the danger posed by impaired (or reckless) driving the need for an officer's independent observation of possibly illegal conduct is unnecessary–or at least diminished, *see* ***Rutzinski***, 241 Wis. 2d 729, ¶36 (rejecting a "blanket rule excepting tips alleging drunk driving from the … reliability requirement"). Instead of corroboration of predictive details that show the reliability of the tipster or the basis for his or her knowledge, these cases are satisfied with sufficient identifying information to get the right vehicle, an indication the tipster actually witnessed the bad driving, and a corroboration of the innocent details of the tip. *See* ***People v. Wells***, 136 P.3d 810 (Cal. 2006). (A number of cases taking this approach are collected in our post on ***Rutzinski***). A minority of courts reject this approach, however, and require something more to assure the reliability of the tip, such as independent observations by police corroborating the reckless or erratic driving. *See*, *e.g.*, ***State v. Grayson***, 336 S.W.2d 138, 143-46 (Mo. 2011); ***Nilsen v. State***, 203 P.3d 189, 192 (Okla. Crim. App. 2009); ***Harris v. Commonwealth***, 668 S.E.2d 141 (Va. 2008). The Supreme Court will now tell us which approach is the right one.

DOG SNIFF:

1. TIMING

Dog sniff and search of car were unlawful because officer unreasonably extended the duration of the stop
by ADMIN *on AUGUST 14, 2013*
State v. Kenneth C. House, 2013 WI App 111; case activity
House was stopped for operating with a suspended registration. After running House's license and learning he was on probation for a drug offense, the officer returned House's license and issued him a warning for the suspended registration. The officer then retrieved his police dog who, after sniffing around the vehicle, alerted on the driver and passenger doors. The officer searched the passenger compartment of the car, but found nothing; he then opened the trunk and found marijuana. Under ***State v. Arias***, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748, the sniff

and search of the car were unlawful because they were not reasonably related to the purpose of the stop:

¶7 …[I]n ***Arias***, prolonging an ongoing traffic stop for seventy-eight seconds to conduct a dog sniff was not an unreasonable intrusion when weighed against the public interest in deterring the flow of narcotics. By contrast, in ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), the seizure attendant to the dog sniff "was unreasonable under the totality of the circumstances presented … because Betow's traffic stop for speeding had been concluded when the officer asked if he could search Betow's vehicle." ***Arias***, 311 Wis. 2d 358, ¶43. Similarly, in ***State v. Gammons***, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623, "the reason for the initial seizure had been satisfied, the driver and the two passengers had provided identification, the officer had run computer checks on all three, the officer asked to search the vehicle and the driver had refused." ***Arias***, 311 Wis. 2d 358, ¶46 (citations omitted). The seizure and attendant dog sniff became an unlawful detention when the officer continued to detain the vehicle after the purpose of the traffic stop had concluded. ***Id.***

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¶9 Here, unlike in ***Arias***, the dog sniff attendant to House's seizure occurred *after* Hoell had completed everything related to the initial stop. Hoell ran House's license and conducted the dog sniff after he gave House back his license and issued him a warning. *See* ***State v. Jones***, 2005 WI App 26, ¶22, 278 Wis. 2d 774, 693 N.W.2d 104 (traffic stop ended with the issuance of the warning citation and return of the defendant's and the driver's identification cards).

¶10 Here, the undisputed facts establish that the reasons justifying the initial stop ceased to exist because the purpose of the stop had been resolved…. Therefore, Hoell's continued detention of House to conduct the dog sniff was not reasonably related in scope to the circumstances justifying the stop. Because Hoell gave House no choice in the matter when he conducted the dog sniff, a reasonable person in House's place would not have felt free to leave. ***State v. Williams***, 2002 WI 94, ¶22 n.6, 255 Wis. 2d 1, 646 N.W. 2d 834 (an individual is unlawfully seized if a reasonable person in his or her position would not feel free to leave or to decline the officer's further requests).

The court also notes (¶10 n.2) that the officer decided to have his dog sniff the car after he learned House was on probation for a drug offense, but House's probation status alone doesn't provide reasonable suspicion to broaden the traffic stop. ***Betow***, 226 Wis. 2d at 95 n.2.

2. SNIFF OF HOME

(pulled from Wikipedia)

Florida v. Jardines, 569 U.S. ___ (2013), is a decision by the United States Supreme Court which held that police use of a trained detection dog to sniff for narcotics on the front porch of a private home is a "search" within the meaning of the Fourth Amendment to the United States Constitution, and therefore, withoutconsent, requires both probable cause and a search warrant.

In 2006, police in Miami, Florida received an anonymous tip that a home was being used as a marijuana grow house. They led a drug-sniffing police dog to the front door of the home, and the dog alerted at the front door to the scent of contraband. A search warrant was issued, which led to the arrest of the homeowner.

Twenty-seven U.S. states and the Federal government, among others, had supported Florida's argument that this use of a police dog was an acceptable form of minimally invasive warrantless search.[1][2] In a 5-4 decision, the Court disagreed, despite three previous cases in which the Court had held that a dog sniff was*not* a search when deployed against luggage at an airport, against vehicles in a drug interdiction checkpoint, and against vehicles during routine traffic stops. The Court made clear by this ruling that it considers the deployment of a police dog at the front door of a private residence to be another matter altogether.

3. RELIABILITY OF DOG SNIFF

(pulled from Wikipedia)

Florida v. Harris, 568 U.S. ___ (2013), is a case in which the United States Supreme Court addressed the reliability of a dog sniff by a detection dog trained to identify narcotics, under the specific context of whetherlaw enforcement's assertions that the dog is trained or certified is sufficient to establish probable cause for asearch of a vehicle under the Fourth Amendment to the United States Constitution.[1] To date, the Supreme Court has always considered the dog sniff to be infallible, and as a result, they have maintained that a dog sniff is not a "search" under the Fourth Amendment. *Harris* is the first Supreme Court case to challenge the dog's reliability – backed by data that asserts that on average, up to 80% of a dog's alerts are wrong.[2][3]Harris is opposed by 25 U.S. States, the Federal Government, and two U.S. territories, among others.[4][5]

Oral argument in this case – and that of another dog sniff case, *Florida v. Jardines* – was heard on October 31, 2012. The Court unanimously held that if a bona fide organization has certified a dog after testing his reliability in a controlled setting, or if the dog has recently and successfully completed a training program that evaluated his proficiency, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search, using a "totality-of-the-circumstances" approach.

SEARCH WARRANTS:

Search and seizure — validity of search warrant: staleness of probable cause; overbreadth
by ADMIN *on JULY 26, 2013*

State v. Diane M. Millard, 2012AP2646-CR, District 2, 7/17/13; court of appeals decision (1-judge; ineligible for publication); case activity

A search warrant was supported by probable cause because the two events cited in the warrant request–a controlled heroin buy in January 2011 and a garbage search in July 2011 revealing "a small, circle shaped screen with burnt [THC] residue on it" (¶2)–were not too far apart in time or too distinct in nature:

¶9 Regarding the staleness challenge, the two drug-related events show protracted drug activity. Given these underlying circumstances, the information provided a substantial basis for issuance of the warrant. It was reasonable for the circuit court to infer from the evidence before it that there was long-term drug activity going on. We cannot say that the evidence before the

circuit court was clearly insufficient to support the warrant. We conclude that the circuit court had a substantial basis to believe that controlled substances were located in the Millard residence on the day of issuance, based on the heroin buy and the subsequent refuse-exam marijuana screen, and therefore the decision to issue the warrant was justified.

Nor did this thin gruel of probable cause go stale by the time the warrant was executed. The warrant was issued the day after the THC residue was found and was executed four days after it was issued. (¶¶2-3). This execution was within the five-day time frame in § 968.15(1) and Millard failed to show under ***State v. Edwards***, 98 Wis. 2d 367, 376-77, 297 N.W.2d 12 (1980), that probable cause had dissipated by the time the warrant was executed. (¶¶10-11).

Finally, the seizure of a prescription pill during the execution of the warrant was lawful under ***Myers v. State***, 60 Wis. 2d 248, 261, 208 N.W.2d 311 (1973):

¶14 All four prongs in ***Myers*** are met here. First, the officers discovered the evidence during a lawful search pursuant to a warrant. Second, the evidence provided a connection to criminal activity. Prior to the search there had been heroin and marijuana activity at the house. It was reasonable to believe the lone pill, in a container with no label or prescription, found in a jewelry box with a marijuana pipe, was related to criminal activity. Third, the police discovered the pill in an area searchable pursuant to the warrant because the warrant allowed officers to search the home. Fourth, they found the pill while searching for marijuana and heroin. It was reasonable to look in the jewelry box because this was a location where drugs could be stored.

VEHICLE STOPS:

SCOW: Stop and search of car based on officer's misunderstanding of tail lamp statute violates 4th Amendment

by ADMIN *on JULY 17, 2014*

State v. Antonio D. Brown, 2014 WI 69, 7/16/14, affirming a published court of appeals decision; majority opinion by Justice Bradley; case activity

Another defense victory! Police stopped Brown's car due to an alleged violation of §347.13(1), which prohibits the operation of a vehicle at night unless its tail lamps are in "good working order." In a 4-3 decision, the majority holds that the police here misunderstood the statute, so the stop was illegal. Furthermore, a stop based upon an officer's mistake of law, is unlawful, and the results of the ensuing search must be suppressed. Justice Prosser, dissenting, predicts the majority's interpretation will be "a bonanza for litigants seeking to challenge motor vehicle stops." ¶79.

The stop at issue led to a search of Brown's car and then a charge of possession of a firearm by a felon. Brown moved to suppress the gun arguing that the officers lacked reasonable suspicion and probable cause to stop the car. One of the 3 lights on the rear driver's side was not lit. According to the State, this provided probable cause that the car violated §347.13(1). According to Brown, "good working order" does not require all bulbs in a tail lamp to be lit. The majority sided with Brown:

¶42 In sum, we do not interpret Wis. Stat. § 347.13(1) as requiring every single light bulb in a tail lamp to be lit. The plain language of the statute requires that a tail lamp emit a red light visible from 500 feet behind the vehicle during hours of darkness. This interpretation is further supported by related statutes requiring that the lamps be in proper working condition.

The State conceded that if the officers misinterpreted the law, then the stop would be illegal because a lawful stop cannot be based upon a mistake of law. *See* ***State v. Longcore***, 226 Wis. 2d 1, 593 N.W.2d 412 (Ct. App. 1999). That concession, bolstered by loads of supporting decisions from around the country, sealed the State's fate. *See* cases cited at ¶¶23-25. But it sure didn't cinch a unanimous decision.

Justice Prosser's dissent took issue with the majority's reading of §347.13(1). "The majority opinion significantly dilutes the meaning of 'proper working condition' and 'good working order' in the lighting equipment statutes," he wrote. ¶74. "It has seriously impaired law enforcement's ability to stop vehicles to alert the drivers of equipment defects." ¶78.

¶79 Now that law enforcement officers are precluded from pulling over vehicles with flawed tail lamps if the tail lamps are visible from 500 feet, there is likely to be a bonanza for litigants seeking to challenge motor vehicle stops. The uncertainty in the law will create difficulties for law enforcement and new burdens on circuit courts.

Justice Roggensack (joined by Justice Ziegler) assumed arguendo that the majority's interpretation of §347.13(1) was correct. She rejected the idea that an officer's mistake of law renders the stop illegal–a point the State had conceded.

¶114 . . . I conclude that the legality of a stop depends on whether under the totality of the circumstances a reasonable officer could have believed that a law violation was occurring. *See****Martin***, 411 F.3d at 1001 (a search is valid when "an objectively reasonable police officer could have formed a reasonable suspicion that [a defendant] was committing a . . . violation"). Therefore, "in mistake cases[,] the question is simply whether the mistake, whether of law or of fact, was an objectively reasonable one." ***Smart***, 393 F.3d at 770. I further conclude that under the totality of the circumstances a reasonable officer could have believed that Brown's tail lamp violated § 347.13(1).

As On Point recently reported, SCOTUS just grant certiorari review in a case like this one. *See*our post in ***Heien v. North Carolina*** here. The issue in ***Heien*** is whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop. In these circumstances–where SCOW has just decided a constitutional question that is pending before SCOTUS–one might expect to see the State file a cert. petition. That would be rather awkward in this case due to the State's admission that a traffic stop based upon a mistake of law is unconstitutional.

STRIP SEARCHES:

Suppression of evidence is not a remedy for violation of sec. 968.255 authorizing strip searches
by ADMIN *on MARCH 20, 2014*

State v. Jimmie G. Minett, 2014 WI App 40; case activity

Issue: Whether under ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, suppression of evidence discovered during a strip search may be a remedy for violation of § 968.255?

Holding: "No," said the court of appeals. ***Popenhagen*** simply abrogated case law that prohibited the circuit court from suppressing evidence obtained in violation of a statute when the statute does not expressly require suppression. Slip op. ¶9. It held that "the circuit court has discretion to suppress or allow evidence obtained in violation of a statute that does not

specifically require suppression of evidence obtained contrary to the statute, depending on the facts and circumstances of the case and the objectives of the statute." ***Popenhagen***, ¶64.

Popenhagen involved § 968.135, which provides for the subpoena of certain documents upon of showing of probable cause. The court of appeals saw this statute as fundamentally different from § 968.255, the strip search statute:

¶9 . . . Since the statute in ***Popenhagen*** expressly authorized "[m]otions to the court, including, but not limited to, motions to quash or limit the subpoena," a suppression motion was allowed because "[a] motion to suppress documents obtained by a subpoena issued in violation of [the statute] is … similar in nature" to motions to quash or limit the subpoena. ***Id.***, ¶¶36, 51. The court pointed out that a suppression motion was also "germane to the[] objectives" of the statute in question. ***Id.***, ¶54.

¶10 The same is not true here. Firstly, this statute, unlike the statute in ***Popenhagen***, enumerates specific remedies for its violation: (1) a $1000 fine or imprisonment, Wis. Stat. § 968.255(4), and (2) civil damages or injunctive relief. Thus, unlike in ***Popenhagen***, here there is no evidence that the legislature contemplated any remedies "similar in nature" to a motion to suppress. Secondly, allowing such a motion would not be germane to the objectives of the statute. This is a regulatory statute aimed at controlling law enforcement officers' conduct via criminal penalties. It does not mention probable cause and authorizes no motions to quash or limit the search. So, while, in other cases, a suppression motion might be an appropriate remedy for a violation of the law that took place during a strip search—if, for instance, there was no probable cause for the search—where, as here, there was concededly no violation of any constitutional right but merely of the statute itself, the violation of the statute provides no basis for a suppression motion. *See also* ***Jenkins v. State***, 978 So. 2d 116, 128-30 (Fla. 2008) (holding that absent constitutional violation, where the strip search statute did not expressly authorize suppression as a remedy, suppression was not a remedy).

Popenhagen generated a 54-page decision, including a concurrence by Justice Prosser, a concurrence/dissent by Justice Ziegler and a dissent by Justice Roggensack. Folks interested in suppressing illegally obtained evidence in situations where there has been no constitutional violation and no statute explicitly authorizes suppression might want to study Prosser's and Ziegler's concurrences in particular. They both highlight arguments that might achieve such a result—arguments that the ***Popenhagen*** majority (if forced to) might agree with. For more on strip searches and suppression see our prior post here.

TRUNK SEARCHES:

(summary taken from written brief)

A law enforcement officer may conduct a warrantless search of an automobile, so long as there is probable cause that the vehicle contains drugs or drug paraphernalia. *State v. Jackson*, 2013 WI App 66, ¶ 8. *See United States v. Ross*, 456 U.S. 798, 799–800, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *State v. Friday*, 147 Wis.2d 359, 375–76, 434 N.W.2d 85 (1989). If an officer has probable cause that justifies the search of a vehicle, that probable cause "justifies the search of every part of the vehicle and its contents that may conceal the object of the search."

Jackson, 2013 WI App 66, ¶ 8 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 301, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) (citation and emphasis omitted)). The permitted scope of a warrantless search of a vehicle includes any area of the vehicle that there is probable cause to believe the object of the search may be found. *Jackson*, 2013 WI App 66, ¶ 8 (citing *Houghton*, 526 U.S. at 302, 119 S.Ct. 1297 (citation omitted)).

In *State v. Jackson*, the defendant was stopped by police officers for multiple traffic violations. *Id*. at ¶ 3. When the officer approached the vehicle and began speaking with the defendant, the officer claimed to smell fresh marijuana emitting from inside the car. *Id*. The officer than asked the defendant to exit the vehicle, to which he complied, and then the officer patted down the defendant and began to search the vehicle. *Id*. During his search, the officer discovered a scale, remnants of marijuana, and $1961 in small denominations in the center console. *Id*. The officer states that after the initial discovery of contraband, he began to search the back seat area, where the smell of marijuana was stronger but discovered nothing. *Id*. at ¶ 4. Upon finding nothing in the backseat, the officer searched the trunk and discovered large amounts of marijuana, *some* ***231 grams, or 1 1/2 pounds***. *Id*. (emphasis added).

At the circuit court level, Judge Dugan granted the defendant's motion to suppress the evidence obtained from the trunk, claiming that an officer being a "super sniffer" (smelling fresh marijuana that is in the trunk of a car upon talking to the driver of the vehicle), tests an officer's credibility and does not give an officer probable cause to search the trunk of a vehicle. *Id*. at ¶ 5. During the State's appeal, the appellate court reversed the circuit court's decision, stating that the officer's discovery of contraband in the center console was probable cause for him to search the trunk of the vehicle. *Id*. at ¶ 7.

SILA SEARCHES:

(Pulled from Wikipedia)

Bailey v. United States, (2013), is a United States Supreme Court case concerning search and seizure. A 6-3 decision reversed the weapons conviction of a Long Island man who had been detained when police chased his vehicle after he fled from his house just before it was to be searched. Justice Anthony Kennedywrote the majority opinion, and Antonin Scalia filed a concurrence. Stephen Breyer dissented.
The Second Circuit Court of Appeals had upheld the conviction. It accepted the government's argument that the Court's 1981 holding in *Michigan v. Summers* that persons in the immediate vicinity of a search can be detained while the search was being executed was broad enough to cover the pursuit and detention of a defendant who had left the scene in a vehicle. Kennedy's opinion held that it did not, since once Bailey had driven away none of the law-enforcement interests the earlier holding identified were involved. Scalia said that the only thing that mattered was that the vehicle was no longer in the immediate vicinity, and that balancing tests created confusion. Breyer argued that the police did, in fact, have those interests despite Bailey's departure by vehicle.

Suspect who had left property in vehicle prior to search was no longer in immediate vicinity when detained almost a mile away, thus no interests of law enforcement justified detention; evidence obtained from suspect that supported conviction was thus unconstitutionally obtained. Second Circuit reversed and remanded.