LEGAL UPDATE

City of Madison Police Department

Fall 2017 Assistant Chief Victor Wahl

Miranda—Interrogation

***State v. Harris*, 374 Wis.2d 271 (2017); Decided April 7, 2017 by the Wisconsin Supreme Court.**

In *Harris*, officers responded to a report of loud noises coming from what was supposed to be a vacant residence. Officers eventually entered the residence to search it, and located an individual (Harris) hiding in a crawl space. Harris had a number of tools near him consistent with someone removing copper piping; he was arrested for burglary.

Harris was booked into jail. Later that day, a detective met him in the jail, contacting him in a common area near the jail's interview rooms. The detective asked Harris, "would you like to give me a statement?" Harris replied, "they caught me man, I got nothing else to say." The detective did not attempt any further interview of Harris, who was subsequently charged with several crimes, including burglary.

Harris sought to suppress his statement to the detective—"they caught me"—arguing that *Miranda* warnings were required. Harris was convicted, and appealed this issue; the case reached the Wisconsin Supreme Court.

Miranda applies only to custodial interrogations (custody + interrogation = *Miranda*). Custody, for purposes of *Miranda*, is generally defined as a "formal arrest or restraint on freedom of movement of the degree associated with formal arrest." Harris had been arrested and booked into jail at the time he made his comment, so he was clearly in custody for *Miranda* purposes (this was not contested).

The issue for the court was whether the detective's question constituted interrogation for purposes of *Miranda*. Interrogation includes both express questioning or its functional equivalent. Interrogation for *Miranda* purposes is generally defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." This is viewed from the suspect's perspective, based on an objective standard: "the test is whether an objective observer would foresee that the officer's conduct or words would elicit an incriminating response."

The *Harris* court concluded that the detective's question, was neither express questioning nor its functional equivalent, and that it therefore was not interrogation for *Miranda* purposes. The court viewed the question as "diagnostic in nature" and not one that an objective observer would view as likely to result in an incriminating response.

OMVWI

A few updates/reviews on OMVWI issues:

Operating/Driving

The OMVWI statute (346.63) begins by stating "no person may drive or operate a motor vehicle" before going on to outline the various prohibitions (operating while intoxicated, with a prohibited B.A.C., etc.). So, the statute applies to both driving and operation. The statute goes on to define both:

> (3) In this section:
> (a) "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.
> (b) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

The meaning of "drive" is clear enough, but applying the statute to operation of a vehicle can be tricky. This was illustrated in a Wisconsin Supreme Court case, *Village of Cross Plains v. Haanstad,* 288 Wis.2d 573 (2006). In *Haanstad*, an officer encountered a vehicle in the parking lot of a bar. The car was running, and a female (Haanstad) was sitting in the driver's seat talking to a male (in the passenger seat). The officer administered field sobriety tests and arrested Haanstad.

The *Haanstad* court ruled that she had not been "operating" the vehicle within the meaning of the statute. The key to the case was a complete lack of evidence (circumstantial or otherwise) that Haanstad had actually manipulated any of the controls (including the ignition key). Instead, the evidence was to the contrary: that her boyfriend had driven the car into the lot and left it running. After he exited, she slid across the car into the driver's seat—without touching or manipulating any of the controls.

So the key in *Haanstad* was that the prosecution did not introduce any evidence to show that she had manipulated the vehicle's controls or make any attempt to contradict her version of events. A subsequent case, *State v. Mertes,* 315 Wis2d 756 (Ct. App. 2008), showed how a different outcome

can be reached. In *Mertes*, officers responded to a late-night report of two subjects asleep in a vehicle next to gas pumps at a convenience store. Officers noted that the engine was off, though the parking lights and interior dash lights were on. When the driver (Mertes) was contacted, he turned and removed the key from the ignition (indicating that it had been in the auxiliary position). Mertes did not admit driving, but indicated he was "coming from Milwaukee and heading back to Milwaukee." He could provide no explanation for how his vehicle ended up at the gas pumps. He was arrested for OMVWI and appealed.

The court upheld Mertes' conviction and rejected his argument. The court indicated that circumstantial evidence can be used to prove vehicle driving or operation:

> Circumstantial evidence of recent operation is exactly what the State relied on in this case. The State's theory at trial was that the individual who drove the vehicle to the gas station was the individual found behind the wheel of the car—Mertes. The State relied on circumstantial evidence—the presence of the vehicle at the gas station, Mertes' presence behind the wheel, his responses during questioning, the unlikelihood of the passenger's ability to have operated the vehicle due to his incoherent condition and the absence of any evidence that the passenger was the driver.

The circumstantial evidence argument was summed up by the state: "vehicles do not simply materialize next to gas pumps at filing stations. They are driven to such locations."

So, sitting in a running vehicle while intoxicated is not enough to support an OMVWI arrest. Instead, some evidence—circumstantial or otherwise—must be put forth to show that the suspect drove or operated the vehicle. The *Haanstad* case was decided the way it was because the only evidence was that the suspect had not driven or operated the vehicle. As the *Mertes* case demonstrates, absent this type of scenario it shouldn't be difficult to establish some evidence of operation in most circumstances.

Serious Injury/Fatality Cases

In *State v. Blackman*, 898 N.W.2d 774 (2017) a vehicle collided with a bicyclist, causing significant injuries to the rider. The investigating deputy did not have probable cause to believe that the driver was under the influence of intoxicants. However, pursuant to §343.305(3)(ar), the deputy read Informing the Accused to the driver, seeking a blood sample. The driver provided a blood sample, which showed a B.A.C. of .10, and he was criminally charged with multiple offenses.

The issue in *Blackman* centered largely on statutory language. §343.305(3)(ar) was enacted to provide officers with additional authority to seek chemical tests after certain accidents. The statute is written to apply to accidents where the officer detects any presence of alcohol or controlled substances (if the accident caused substantial bodily harm), or accidents where the officer has probable cause to believe the driver violated any traffic law (if the accident caused death or great bodily harm). In these situations, the statute allows the officer to read Informing the Accused and seek a blood sample.

The *Blackman* case illustrated a technical problem with this statutory framework. §343.305(3)(ar) permits officers to seek consent for a chemical test (when probable cause for an OMVWI offense is not present) by reading Informing the Accused. That form indicates that refusal to submit the chemical test will result in license revocation and other penalties. However the statute on refusal/revocation would not permit a revocation absent a finding that the arresting officer had probable cause for OMVWI. As a result, the information provided to Blackman—that his license would be revoked and he would be subject to other penalties—was a misrepresentation, rendering his consent involuntary.

So while the court did not rule that §343.305(3)(ar) is unconstitutional, until the legislature fixes the relevant statutes, officers should not rely on §343.305(3)(ar) in accidents involving death or serious injury. When possible, develop/articulate probable cause for OMVWI and proceed with that process. Remember that the fact that a crash occurred, and the nature/mechanics of the crash, are highly relevant to the probable cause determination. If probable cause for OMVWI is not present, it is still permissible to request consent for a blood draw. Do not use Informing the Accused under these circumstances, and remember that all of the typical requirements for a valid consent search apply (voluntariness, etc.).

Recording Officers

It is not uncommon for officers to find themselves being recorded (video and/or audio) while performing their duties. Nationally, these instances have sometimes led to arrests of those doing the recording, typically for offenses similar to Wisconsin's disorderly conduct or resisting/obstructing statutes. Some jurisdictions have even sought to enact laws or ordinances specifically addressing—and prohibiting—recording officers.

A number of these cases have been appealed, resulting in multiple court decisions on the issue. These decisions have all been consistent: citizens have a constitutional right to record on-duty police officers in public.

The most recent case involved an incident in Philadelphia. An individual observed a group of Philadelphia police

officers breaking up a party. He started recording it with his iPhone, from a distance of about fifteen feet from the closest officer. An officer ordered him to leave; he refused and was arrested. The officer seized the iPhone, searched it, and then issued the individual a citation (the offense was "obstructing highway and other public passages"). The citation was eventually dismissed, but the arrestee and another who had a similar encounter sued.

The court, in *Fields v. City of Philadelphia*, 862 F.3d 353 (3rd Cir.2017) ruled that "the public has the…right to record—photograph, film, or audio record—police officers conducting official police activity in public areas."

The 7th Circuit Court of Appeals (the federal circuit that includes Wisconsin) addressed this issue a few years ago in *American Civil Liberties Union v. Alvarez*, 679 F.3d 583 (7th Cir.2012). Illinois's eavesdropping statute prohibited the use of a device to hear or record an oral conversation without the consent of all the parties involved in the conversation. Some interpretations of that law (by Illinois State Courts) over the years led the ACLU to believe that it would be used to prohibit any public recording of police. The *Alvarez* court agreed that recording public police activity implicated the First Amendment and returned the case to the district court (where the ACLU prevailed and the State of Illinois was prevented from using the statute to prevent public recording of police).

So, while courts have consistently found a First Amendment right for civilians to record official police activity taking place in public, decisions have also made it clear that this cannot be viewed as allowing interference with police activity. The *Alvarez* court addressed this point:

> It goes without saying that the police may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations. While an officer surely cannot issue a "move on" order to a person *because* he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs…Nothing we have said here immunizes behavior that obstructs or interferes with effective law enforcement or the protection of public safety.

So, it is not reasonable to arrest someone for simply recording official police activity in a public place. It is also inappropriate to tell someone to stop recording, or to tell them that it in unlawful to do so. However, if someone is interfering with officers or otherwise engaging in illegal behavior (like entering a crime scene, for example), the fact that they are also recording does not excuse their behavior. If the actions are illegal—regardless of whether the person is recording—then appropriate action (up to and including arrest if needed) is permissible.

Hotel/Motel Rooms

Responding to incidents involving hotel/motel rooms can create some interesting legal challenges for officers. The general rule is that "[a] guest in a hotel room enjoys the same constitutional protection against unreasonable searches and seizures as does a tenant of a house." *United States v. Napue*, 834 F.2d 1311 (7th Cir.1987). Therefore, officers will need to justify entry to a hotel/motel room just as if they were entering a private residence. Such entry can be justified by a warrant, exigent circumstances, hot pursuit, consent, etc. Clearly, hotel/motel staff cannot give officers consent to enter or search a room under most circumstances. *Stoner v. California*, 376 U.S. 483 (1964).

If seeking consent to search a hotel/motel room, remember that the limitations of *Georgia v. Randolph*, 547 U.S. 103 (2006) may apply. In *Randolph*, the U.S. Supreme Court ruled that if two parties with joint and equal authority over a premises are present, with one granting police consent to search and one refusing consent to search, the refusal controls and no consent search is permitted.

While hotel/motel guests will generally have a reasonable expectation of privacy while in their rooms, that expectation of privacy will typically terminate after checkout time. In *State v. Rhodes*, 149 Wis2d 722 (Ct. App. 1989), officers entered a hotel room at the request of a hotel manager. Rhodes was alone sleeping in the room, and officers located cocaine and drug paraphernalia in plain view. The room was not registered to Rhodes, it was three hours past checkout time, and no one had paid for an additional day's stay or indicated a desire to stay beyond checkout time. The Court of Appeals held that Rhodes did not have a reasonable expectation of privacy in the room, and the search was upheld. In some cases, however, guests may have an expectation of privacy for a short period past checkout time if there is an indication (based on the guest's continued presence in the room, communication with hotel management or partial payment for a subsequent day's stay) that the guest intends to continue his or her stay.

Officers may be called to hotels or motels and be asked to assist management in removing guests from their rooms (prior to checkout time). Officers will need to ask some questions of hotel/motel management to determine whether this is appropriate. The first question that must be answered is whether the room is being used for a traditional, short-term stay, or whether it is being used as a temporary residence. Many hotels/motels accept temporary residents who remain in their rooms for longer periods than traditional hotel/motel guests. These residents will typically stay in their rooms for a month or more. Two key questions that officers should have

answered when making this determination are:

- Does the guest or resident's registration information indicate that he or she has another permanent address?
- Does the duration of the guest or resident's stay indicate that they are using the room for a residence?

If the officer concludes that the occupant of the room is using the room as a residence, the officer should *not* assist management in removing them from the room/premises. Under those circumstances, officers should only enter the room if they would be justified in entering a private residence under the same circumstances. Management should be referred to the eviction process to remove the resident(s).

If the officer concludes (based on the duration of the guest's stay and the presence of another, permanent address for the guest) that the hotel/motel room is being used for a traditional, short-term stay, they may provide limited assistance to management in removing the occupants under certain circumstances. Officers will need to assess each situation on a case-by-case basis, but removal of hotel guests should be limited to instances where:

- The occupants' actions constitute a threat to the health or welfare of others; or
- The occupant's actions result in property damage, or a significant nuisance to other guests; or
- The occupant's actions clearly violate a portion of the rental agreement.

When evaluating these requests, officers should verify that there is evidence/indication that one of the above circumstances exists. If it is appropriate to assist hotel management in removing a guest/occupant, officers should operate exclusively in a preserve the peace/community caretaker role—standing by to prevent any problems between management and the room's occupants. Officers should minimize their involvement and not act as an agent of hotel/motel management. Officers may not suggest removal to management, or expressly ask management to remove a guest.

If officers are lawfully in a room while assisting hotel/motel management in this manner, and they see contraband in plain view, it may be seized (as long as the officer has access to the contraband, and its incriminating nature is readily apparent). The fact that an individual is being removed from a room does not, by itself, authorize officers to detain, search or frisk them. A detention and frisk may be authorized under *Terry*, however, depending on the circumstances.

Finally, once the room's occupants have been removed, they likely will have no reasonable expectation of privacy in the room (as long as the removal itself was justified). *United States v. Haddad*, 558 F.2d 968 (9th Cir.1977). Officers should then only search the room if expressly asked to do so by management.

Frisks

***State v. Nesbit*, 902 N.W. 266 (Ct. App. 2017); Decided August 9, 2017 by the Wisconsin Court of Appeals.**

Nesbit and a friend were walking along the shoulder of a highway after running out of gas. A state trooper pulled up behind them and contacted them. After a short conversation the trooper advised the two that walking on the highway was illegal, and that he would drive them to the nearest gas station. Before he placed them in his squad, the trooper asked each if they had any weapons. Nesbit became "very deflated" and shook his head slightly. The trooper frisked Nesbit, finding a loaded handgun in his waistband. Nesbit—a convicted felon—was arrested and charged with being a felon in possession of a firearm (and for possession of THC, for marijuana later located on his person). Nesbit challenged his arrest, arguing that the frisk was unreasonable.

A frisk does not automatically follow any *Terry* stop. An officer needs specific reasonable suspicion that an individual he or she has stopped is armed in order to perform a frisk. While the trooper indicated that it was agency policy to frisk everyone being placed in his squad and that he did not have a particular fear for his safety, the court pointed out that the test is an objective one; an officer's subjective reasons for action are not controlling.

The court went on to rule that the frisk was justified. Nesbit's response to being asked whether he was armed, combined with the fact that the trooper was alone and dealing with two individuals, was sufficient to support the frisk. The *Nesbit* decision highlights two key things regarding frisks:

- Each frisk must be justified under the particular circumstances of that incident, and placing someone in a squad car—by itself—is insufficient to justify a frisk. The court stated, "To be clear, we are not announcing a bright-line rule that it is per se reasonable to conduct a frisk for weapons every time an officer escorts a person in his or her squad car."
- Reasonable suspicion to frisk is a low burden, and courts will generally be deferential to officers when reviewing frisks; "Cases addressing this area of law are littered with deference toward law enforcement's safety concerns due to the unusually dangerous nature of the work."