LEGAL UPDATE

City of Madison Police Department

Spring 2016 Captain Victor Wahl

Curtilage

***State v. Dumstrey*, 366 Wis.2d 64 (2016); Decided January 15, 2016 by the Wisconsin Supreme Court.**

In *Dumstrey*, an off-duty officer observed a vehicle driving erratically. The officer suspected that the driver was impaired, and called for on-duty officers to assist. The off-duty officer followed the vehicle, at one point pulling up next to it, displaying his badge and advising the driver to pull over. The driver (Dumstrey) drove off and the off-duty officer continued to follow. Eventually the car approached an underground parking garage in an apartment complex. The door opened and the car entered. The off-duty officer parked his vehicle under the garage door, preventing it from closing. A short time later on-duty officers arrived, contacted Dumstrey and subsequently arrested him for OMVWI. A blood test showed his B.A.C. to be .178.

Dumstrey challenged his arrest, arguing that the officers had needed a warrant to enter the underground garage, and that the stop and subsequent arrest were therefore invalid. The Wisconsin Supreme Court disagreed, ruling that the entry and arrest were proper.

The main issue the court considered was whether the underground parking garage was part of the curtilage of Dumstrey's residence. Curtilage is generally defined as the area associated with the private activities of a residence, and is typically afforded the same protection as the home under the Fourth Amendment. There are four general factors that courts will examine when determining whether a particular area should be considered curtilage:

- The proximity of the area claimed to be curtilage to the home.
- Whether the area is included within an enclosure surrounding the home.
- The nature of the uses to which the area is put.
- The steps taken by the resident to protect the area from observation by people passing by.

The court weighed these factors and concluded that the parking garage was not curtilage. The court also concluded that Dumstrey had no reasonable expectation of privacy in the parking garage, and that the officers' actions had been reasonable.

The court's decision was based on the specific facts in the case, and the size of the apartment building (30 units) was particularly relevant to the outcome. It is conceivable that a parking garage/structure in a smaller multi-unit dwelling could be afforded more protection. Any assessment of whether an area is considered curtilage will be fairly fact-specific, and courts have generally been hesitant to consider areas curtilage in the context of multi-unit dwellings.

Community Caretaker

***State v. Matalonis*, 2016 WL 514150 (2016); Decided February 10, 2016 by the Wisconsin Supreme Court.**

In *Matalonis*, officers were dispatched to a medical call at an apartment. The officers noted blood on the door, and subsequently spoke with a male subject who appeared to have been battered and was covered in blood. The male indicated that he had been beaten by a group of people outside a bar, though his recollection was hazy. After he was loaded into an ambulance, officers located a blood trail in the snow. The blood trail led to another residence, where additional blood was located on the door. The officers knocked on the door and a male subject—who was out of breath—answered. He indicated that he had been in a fight with his brother (who was the injured party conveyed by ambulance) and that he was cleaning up.

The officers told the individual that they wanted to check the residence to make sure no one else was injured, and he allowed them in. One officer waited with the resident while the other walked through the residence. That officer observed blood throughout the residence, as well as other signs of a physical fight. He also observed marijuana and drug paraphernalia located in plain view.

The officer came upon a locked door, with blood spattered on it. The officers then told the resident that they needed to check behind that door and that they would kick it down if he did not provide the key. Eventually the officers located a key and opened the door, finding a small marijuana growing operation. The resident was arrested and charged; he challenged the officers' actions, arguing that the entry to the locked door had required a warrant.

The Wisconsin Supreme Court eventually heard the case, ruling that the officers' actions were appropriate and justified under their community caretaker function.

A residential search/entry under the community caretaker doctrine will be analyzed based on these factors:

- Were the officers exercising a bona fide community caretaker function?
- Did the public interest outweigh the intrusion upon the

> privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home?

The court first concluded that the officers had been engaged in a bona fide community caretaker function. There was ample indication (an injured party, significant blood, etc.) that someone was in need of assistance, both in the residence and specifically in the locked room. The fact that the officers also had some subjective interest in criminal activity (based on the evidence of drugs) did not invalidate the objective justification for their community caretaking actions.

The court also concluded that the public's interest outweighed the resident's individual constitutional interest. Four factors are weighed in this analysis:

- The degree of the public interest and the exigency of the situation.
- The attendant circumstances surrounding the search, including time, location, the degree of overt authority and force displayed.
- Whether an automobile is involved.
- The availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

The court concluded that "the officers' exercise of the community caretaker function was reasonable because the public interest in the search outweighed (the suspect's) privacy interests."

Texting While Driving

***United States v. Paniagua-Garcia*, 2016 WL 670162 (7th Cir.2016); Decided February 18, 2016 by the Seventh Circuit Court of Appeals.**

Indiana, like Wisconsin, has a statute prohibiting texting while driving. An Indiana officer passed a vehicle and observed that the driver (Paniagua-Garcia) was holding a cellphone in his right hand, that his head was bent toward the phone, and that he "appeared to be texting." The officer stopped the car based only on this apparent violation of the Indiana texting statute. The stop resulted in a search of the vehicle, which yielded five pounds of heroin concealed in the car's spare tire.

Paniagua-Garcia challenged the legality of the traffic stop, alleging that the officer did not have reasonable suspicion based on his observations. He claimed that he had been searching for music at the time the officer made the observation. Subsequent analysis of the phone confirmed that Paniagua-Garcia was not texting at the time.

The Seventh Circuit Court of Appeals concluded that the officer's observations were not sufficient to provide reasonable suspicion for a stop. The court pointed out that the statute was limited to sending texts or emails, and all other uses of cellphones (making phone calls, looking at maps, reading, playing games, etc.) generally remain lawful while driving. And, the appearance of someone performing these lawful uses while driving is generally identical to someone texting or emailing:

> No *fact* perceptible to a police officer glancing into a moving car and observing the driver using a cellphone would enable the officer to determine whether it was a permitted or a forbidden use.

So, the court ruled that the officer did not have a lawful justification for the stop and that the subsequent search was invalid.

While this case involved Indiana law, the statute in question is very similar to Wisconsin's statute prohibiting texting or emailing while driving (§346.89(3)(a)). Wisconsin is within the Seventh Circuit, so officers should not rely on their observations of apparent texting on a cellphone to justify a stop based on Wisconsin's texting while driving statute. Of course, Wisconsin also has a more general statute prohibiting inattentive driving:

> No person while driving a motor vehicle may be engaged or occupied with an activity, other than driving the vehicle, that interferes or reasonably appears to interfere with the person's ability to drive the vehicle safely.

Use or manipulation of a cellphone may provide justification for a stop under this provision, depending on the specific circumstances.

Vehicle Searches

***United States v. Edwards*, 769 F.3d 509 (7th Cir.2014); Decided October 3, 2014 by the Seventh Circuit Court of Appeals.**

Edwards was pulled over a short time after his girlfriend had called 911 to report that he had stolen her vehicle. Edwards was arrested, and a search of the vehicle revealed a sawed-off shotgun underneath the front passenger seat. Edwards admitted the gun was his, and he was charged with several federal gun crimes. He later challenged the arrest, claiming that the search of the vehicle had been improper.

The Seventh Circuit Court of Appeals disagreed, and concluded that the search had been permitted under *Arizona v. Gant*. Recall that *Gant* limited the circumstances under which officers can search a vehicle incident to the arrest of one of its occupants to those times where "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."

Most of the post-*Gant* focus has been on the second

justification. The *Edwards* court concluded that it applied. Edwards had been arrested for OMVWOC (among other things), and the court stated:

> And it was entirely reasonable to believe that evidence of the offense of driving a vehicle without the owner's consent would be found in the (vehicle). Evidence establishing the vehicle's ownership is obviously relevant to that crime… registration and title documents are evidence of ownership and are often kept in a car. That's enough for a valid vehicle search incident to Edward's arrest.

This is in line with how courts have consistently interpreted *Gant*: if the offense of arrest is something for which physical evidence could be relevant, a vehicle search incident to arrest is reasonable.

Note that there were other legal justifications to search Edwards' vehicle, the court simply focused on the *Gant/* search incident to arrest issue.

New Statutes

2015 Act 183
Permits officers to obtain search warrants for first offense OMVWI civil forfeiture investigations. Note: in most situations, MPD officers should continue to process first offense OMVWI cases the same way we have been and not pursue warrants.

2015 Act 253
Allows a judge to include orders related to household pets in certain restraining orders or injunctions. A respondent may be ordered "to refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet." The court can also allow the petitioner/family member (or someone acting on their behalf) to retrieve a household pet.

2015 Act 165
Requires vehicles to operate with headlights on during periods of limited visibility (defined as any time when "objects on a highway are not clearly discernible at 500 feet from the front of a vehicle.").

2015 Act 121
Makes the statute of limitations ten years for 2nd and 3rd degree sexual assault.

2015 Act 109
Requires a minimum three-year term of confinement for someone who possesses a firearm or uses a firearm to commit certain crimes, if they have been previously convicted of committing certain violent felonies.

2015 Act 149
Changed the law regarding switchblades. 941.24 was repealed, so that switchblades and other similar knives (butterfly knives, etc.) are no longer illegal. Also, a CCW permit is no longer required to carry a concealed knife, but someone who is prohibited from possessing a firearm (under 941.29) cannot carry a concealed knife (now prohibited by 941.231). The disorderly conduct statute (947.01) was also modified, clarifying that simply carrying or going armed with a knife (like a firearm) is not a violation of the statute unless "other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply."

2015 Act 78
Changed the statute relating to battery to a judge, prosecutor or law enforcement officer. The statute now reads:

> **940.203 (2)** Whoever intentionally causes bodily harm or threatens to cause bodily harm to the person or family member of any judge, prosecutor, or law enforcement officer under all of the following circumstances is guilty of a class H felony:
>
> **(a)** At the time of the act or threat, the actor knows or should have known that the victim is a judge, prosecutor, or law enforcement officer or a member of the judge's, prosecutor's or law enforcement officer's family.
> **(b)** The act or threat is in response to any action taken by a judge, prosecutor, or law enforcement officer in an official capacity.
> **(c)** There is no consent by the person harmed or threatened.

The statute defines family member as a "parent, spouse, sibling, child, stepchild or foster child." The statute also applies to former law enforcement officers.

These changes are noteworthy. On the one hand, the statute applies to more people (family members, former officers, etc.), threats to harm are expressly prohibited, and it is not necessary that the officer/subject be acting in an official capacity at the time of the threat/act. However, it is now a requirement to prove that the threat/act is "in response" to any official action taken by an officer, judge or prosecutor (though it is not necessary that the victim officer/judge/ prosecutor be the one who took the official action).

2015 Act 207
Modifies the restrictions on strip searches performed at a jail or prison. Note: this does not impact in any way the restrictions or process for MPD officers performing investigatory strip searches.

2015 Act 136
Adds language to 346.37(1)(c) 3.

> Vehicular traffic in the leftmost right-turn lane of a roadway that provides 2 right-turn lanes may make a right turn on a red signal into a lawfully available lane that is 2nd to the rightmost lane for traffic moving to the right.