LEGAL UPDATE

City of Madison Police Department

Spring 2019 Assistant Chief Victor Wahl

GPS Tracking Warrants

***State v. Pinder,* 384 Wis.2d 416 (2018); Decided November 16, 2018 by the Wisconsin Supreme Court.**

In *Pinder*, police were investigating a series of nonresidential burglaries. Officers identified a suspect (Pinder) and the lead detective sought a court order to place a GPS tracking device on Pinder's vehicle. A judge signed the warrant, authorizing officers to access Pinder's vehicle and install the tracking device. The warrant did not require officers to perform the installation within a certain time period, but did require that the tracking device be removed "as soon as practicable after the objectives of the surveillance are accomplished or not later than 60 days" from the day the order was signed.

The GPS tracking device was installed ten days after the warrant was signed. Five days later the lead detective was alerted that Pinder's vehicle had entered his jurisdiction and stopped at a business complex. Officers subsequently responded and determined that a burglary had occurred. Pinder's vehicle was stopped a short time later, and evidence connecting Pinder to the burglary was discovered in the vehicle. He was charged with burglary, convicted and sentenced to five years of confinement. Pinder appealed his conviction, arguing that the warrant authorizing placement of the GPS tracking device on his vehicle was invalid.

Several Wisconsin statutes specify the requirements for obtaining a search warrant and the mechanics of the warrant process. §968.12 outlines the general process for obtaining and processing a search warrant; §968.13 outlines what type of property is subject to seizure pursuant to a warrant; §968.15 requires that a search warrant be executed no more than five days after it has been issued; and §968.17 requires that a search warrant—along with an inventory of any property taken pursuant to it—must be returned to the clerk within 48 hours after it has been executed. Pinder's main argument was that the warrant authorizing the placement of the GPS tracker on his vehicle had not complied with these statutory requirements (it was not "served" for ten days; no return was apparently done; etc.) and that the installation of the GPS device and subsequent tracking were therefore invalid.

The Wisconsin Supreme Court disagreed with Pinder and concluded that the placement of the GPS tracking device had been lawful. The court first recognized that the language in the statutes addressing search warrants is inconsistent with the placement and monitoring of a GPS tracking device. §968.12 defines a search warrant as "an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property." The *Pinder* court noted that this language was not relevant to what a GPS tracking device does—create data, not seize property. The court also recognized that §968.13, outlining the type of property subject to seizure pursuant to a search warrant, clearly is not relevant to the creation of data by a GPS tracking device. The *Pinder* court concluded that Wisconsin's statutory requirements applying to search warrants do not apply to warrants for installation and monitoring of GPS tracking devices:

> [W]e conclude that the plain meaning of Wis. Stat. §§968.12(1) and 968.13 forecloses the argument that GPS warrants must comport with Wisconsin Statutes Chapter 968. Those statutes clearly do not apply to GPS warrants, and therefore GPS warrants are not subject to the requirements of Wis. Stat. §§968.15 or 968.17(1).

The *Pinder* court went on to evaluate the issuance of the GPS tracking warrant under general Fourth Amendment principles. These general principles require that all warrants be issued validly and executed in a reasonable manner. A warrant is valid if three requirements are met:

- It has prior authorization by a neutral, detached magistrate;
- There is a demonstration, under oath, that there is probable cause to believe that evidence sought will aid in a particular conviction for a particular offense;
- There is a particularized description of the place to be searched and items to be seized.

The court concluded that the warrant authorizing placement of the GPS tracker complied with all three of these requirements. The final issue was whether the warrant was executed in a reasonable manner. The court concluded that it was, and Pinder's conviction was upheld.

A few considerations for utilization of GPS tracking devices in light of the *Pinder* decision:

- While the §968.15 requirement to execute a warrant within five days of issuance does not apply to a GPS warrant, the device should be installed as soon as possible after the

warrant is signed. An extended delay between issuance and installation could lead a court to conclude that probable cause had dissipated or that the warrant was not executed in a reasonable manner.

- The warrant should specify the time period that the GPS device may remain installed and be monitored. §968.373 outlines the requirements for obtaining a warrant to track a communication device (this is used to track cell phone locations). It restricts a warrant authorizing tracking of a communications device to 60 days (unless an extension is granted by a judge). While the *Pinder* decision establishes that this statute does not apply to GPS tracking devices, 60 days is probably a good time frame to use (as was the case in *Pinder*). Extensions can be sought if needed.

- §968.373 also requires that a warrant—along with a summary description of the information received—be returned to the Clerk within five days after the records or information are received (which would generally be the end of the tracking period). While no return is required for a GPS tracking device warrant, nothing precludes returning the warrant (with a summary of information received) to the Clerk in a manner consistent with the timeframe outlined in §968.373.

Consent Searches

A few general reminders on consent searches:

An officer may search a person, vehicle or dwelling with the consent of an individual whom the officer reasonably believes has the authority to grant such consent. Three things must be demonstrated for a consent search to valid:

- **Voluntariness** (the subject freely and voluntarily provided consent)
- **Authority** (the subject reasonably appeared to have authority over the place or thing to be searched)
- **Scope** (the scope of the search was consistent with the scope of the consent provided)

Voluntariness—for consent to be legally valid, it must have been given freely and voluntarily. Court will analyze voluntariness based on the totality of the circumstances; factors that may be examined include: whether the encounter occurred in a public place; what the suspect's custodial status was; how many officers were involved in the encounter; whether the officers' physical proximity or tone of voice were overly coercive; whether there was any display of weapons or physical force; whether the suspect was aware of his right to refuse consent; the person's age, intelligence and education, and the extent of the suspect's prior experience with police. Consent to search is not presumed to be involuntary if it was provided by someone in custody or under arrest, though those factors may be relevant to the voluntariness determination. It is not enough to show "acquiescence to a claim of lawful authority"—consent must be given freely and voluntarily.

While it is not necessary to use a written consent form or to inform the subject of his or her right to refuse consent, both will help support a finding of voluntariness. Consent can be demonstrated without express verbalization if it is "given or inferred through gestures or conduct." This is most often applicable when evaluating a simple consent to enter a dwelling (that can be inferred from opening the door and gesturing in, for example), and express verbal consent is always preferred. It is possible for a juvenile to provide voluntary consent to search, though courts will scrutinize such searches closely.

It is not necessary to provide *Miranda* warnings for the sole purpose of asking for consent to search, even if the subject is in custody (though it may be necessary prior to asking questions to determine the subject's authority to grant consent). If a suspect declines to give consent for a search, an officer is not precluded from asking again later. If consent is subsequently given the search can still be valid, though the repeated requests will bear on the evaluation of the voluntariness of the consent.

Authority—valid consent may only be provided by someone with authority and control over the area or thing to be searched. If an officer performs a search based on the consent of someone who he or she reasonably believes has the authority to grant consent the search may be valid even if the individual is later found not to actually have such authority. Officers must make a reasonable attempt to ascertain whether a person has the authority to grant consent in order to reasonably rely on it.

Evaluating and determining authority to provide consent to search can be challenging in a residential setting. Authority to provide consent is not based simply on ownership, but on use, access and control. So a landlord generally cannot provide consent to search a tenant's private dwelling. But someone living in the apartment but not on the lease likely would be able to.

Generally, if two people have joint authority over a particular area to be searched, one party's consent to search will suffice. Officers must establish authority over the exact area to be searched, however. So roommates would be able to provide consent to enter or search common areas, but they would not have authority to provide consent to search or enter a private bedroom of another roommate (unless they have actual authority and control over the room; meaning they regularly enter/use it, etc.).

If two people with shared authority over a certain area are present and one expressly refuses consent to search, no search is permitted (even if the other provides consent). This applies only if the party refusing consent is present and expressly refusing consent. If the co-tenant withholding consent is removed from the scene (due to a lawful arrest, for example) their non-consent no longer has effect.

Scope—the scope of a consent search is limited to the scope of consent provided by the suspect. So, for example, consent to search a vehicle for weapons would not permit searching places/things that could not conceal a weapon (like small containers). In the context of a dwelling, consent to enter doesn't necessarily mean consent to enter every room, or consent to perform a search for evidence (beyond the entry). Officers must demonstrate exactly what the subject consented to (what rooms could be entered, what could be searched for, etc.).

A few other reminders about consent searches:

- The manner in which you phrase a request for consent to search can determine the permissible scope of the search. If the request is broad, and not limited to a specific item (like a weapon), the permissible scope of the search will generally be broad.
- Carefully document the exact wording used when asking for consent, and the exact response from the suspect. This can be critical to evaluating the scope of the consent and whether the consent was provided voluntarily. If possible, use in-car video to capture the encounter.
- Establish the subject's authority to provide consent. Particularly when dealing with dwellings and roommates, ask appropriate questions to establish the subject's authority to provide consent to enter or search a particular room or area.
- When dealing with subjects who have joint authority and one subject is refusing consent—particularly in the context of domestic investigations—remember that the non-consenting subject (who must be present) only impacts authority to enter or search based on consent. Entry may be permitted based on exigent circumstances or some other exception to the warrant requirement, and a non-consenting individual does not impact this.
- Entering a dwelling to arrest or detain a subject—absent a warrant or some other exception to the warrant requirement—also requires consent. Valid consent to enter a dwelling or residence does not necessarily mean consent to enter every room, even if the entry is to arrest or detain (rather than to search for evidence).
- Remember that MPD policy requires that officers have some articulable reason to ask for consent to search, and that consent searches must be documented in a report.

Hate Crimes

While "hate crime" is a common term, it is often used without clear definition or applicability. While Wisconsin Statutes do not term anything as a "hate crime," Wisconsin law does have a penalty enhancer that applies to crimes if certain criteria are met:

> **939.645 Penalty; crimes committed against certain people or property. (1)** If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

If the enhancer applies, the maximum fine and imprisonment for the underlying offense is increased. Officers should be cognizant of the statute's requirements when investigating offenses that it might apply to. Satisfying the requirements of the enhancer is difficult, and obtaining a statement from the suspect is likely to be the most direct and effective way to prove this intent. Please only designate cases as "hate crimes" in Mobile/LERMS if the statutory requirements are met, as this information is reported along with MPD's crime data.

§939.645 was enacted in 1987; most states have similar statutes. These law were somewhat controversial when passed, with some claiming that punishing someone (or providing enhanced punishment) based on motivation violates the First Amendment. In the early 1990's, Wisconsin's law became the national test case for these types of penalty enhancers.

A group of individuals in Kenosha severely battered another, leaving him in a coma for several days. The evidence clearly showed that the group had selected the victim based on his race. One of the attackers was charged with aggravated battery and sentenced to an enhanced penalty based on §939.645. This enhancement extended the suspect's prison term by two years.

The attacker challenged the enhancement of his penalty on First Amendment grounds. The Wisconsin Supreme Court agreed and ruled §939.645 unconstitutional. The case was appealed to the U.S. Supreme Court, however, and the court ruled that the penalty enhancement outlined in §939.645 was constitutional. *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993).