LEGAL UPDATE

SUMMER 2024

IN THE PRIVACY OF YOUR OWN HOME

State v. Christen, 958 N.W.2d 746

FACTS

On February 3, 2018, Madison police officers responded to 211 King St. in reference to a person with a gun. Mitchell Christen and his friends were drinking in a private residence when Christen armed himself with a gun during an argument. Officers could smell the odor of intoxicants emanating from Christen and his eyes were glassy and bloodshot. Christen told officers, "It's my gun, I was in my apartment." Christen BAC at the DCJ was 0.15. Christen was charged with Going Armed While Intoxicated contrary to Wis. Stat. §941.20(1)(b). Christen argued this statute violated his 2nd Amendment right to bear arms as he was in his own residence during this incident.

HOLDING

While there is the right to possess and carry weapons, the right secured by the 2nd Amendment is not unlimited. Wis. Stat. §941.20(1)(b) does not completely dispossess a lawful firearm from ownership- it merely limits the circumstances under which the lawful owner may use or carry the firearm, specifically, while intoxicated. The Court recognized Wisconsin has a long tradition of criminalizing and carrying a firearm while intoxicated.

Christen inferred that consuming intoxicants in his own home makes this statutes unconstitutional. In a 6-1 decision, the WI Supreme Court rejected this argument. If a subject possess a firearm in their home and does not ingest intoxicants, this statute is not implicated. If a subject were to ingest intoxicants, in their home, and possess firearms, in their home, that is not in and of itself prohibited. It is when the subject reaches the point of intoxication that this statute is implicated. When an intoxicated person carries or uses a gun, either at home or outside the home, the impairment of cognitive functions and motor skills can result in harm, even if the firearm is unloaded. Accordingly, this statute further the important governmental interest of protecting the public.

TAKEAWAY

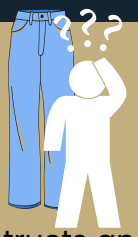
There is a real risk from the combination of intoxication and firearms related to public safety, preventing gun violence, protecting human life, and protecting people from the harm of firearms and alcohol. Thus, Wis. Stat. §941.20(1)(b) limits the circumstances under which the lawful firearm owner may use or carry the firearm, specifically while intoxicated, even in the privacy of their own home.

-Summary by PO Chelsea Wetjen

TIP: Ask the suspect to provide an EC/IR Breath Sample (same as for an OMVWI) and/or a legal blood draw. If the subject refuses, obtain a blood draw warrant. Remember, while PBTs are a good guidepost for where a subject may be in regards to intoxication level, a PBT result is not admissible at trial and is not sufficient to obtain a conviction. Curious about the warrant procedure? This will be covered in the Fall 2024 Legal Update!

§939.22(42): "Under the influence of an intoxicant" means the actor's ability to operate... or handle a firearm or airgun is materially impaired because of their consumption of (1) alcoholic beverages, (2) a hazardous inhalant, (3) a controlled substance or controlled substance analog (4) any combination of an alcoholic beverage, hazardous inhalant, controlled substance analog, or (5) an alcoholic beverage and any other drug.

THESE AREN'T EVEN MY PANTS!



As officers of the law, we encounter a high degree of untruthiness in our daily comings and goings. But when can police issue obstruction charges for these untruths?

People (Usually) Don't Have to Talk to the Police

Most of the time, people do not have to talk to the police. If, during a Terry stop, an officer instructs an individual to identify themselves, that person does not have to comply or answer questions. "Mere silence, standing alone, is insufficient to constitute obstruction." While an individual may be detained for a reasonable amount of time during investigation, if there is no further information to develop probable cause, the officer **must** allow the person to go. One exception to this general rule applies to drivers: During a traffic stop on a public roadway, a driver cannot refuse to identify themselves**.**

If You Talk to the Police, You Cannot Lie

If someone does choose to talk to the police, whether they are a suspect, arrestee, or a witness, they **must** tell the truth. Failure to do so constitutes Obstruction. Both State statute and City ordinance state that obstructs includes, without limitation: knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of their duty.

The Lie Does Not Need to Hinder the Officer's Investigation

The Wisconsin Appellate Court rejected the argument that a lie must prevent or hamper an officer in their investigation, stating "proof of knowingly giving false information with intent to mislead constitutes an obstruction as a matter of law. No other proof is needed." The Wisconsin Supreme Court confirmed this saying, "The focus is clearly on what the defendant intended to do by knowingly making false statements, not on the eventual outcome. If the intent was to purposefully deceive, or if the defendant was aware that making the false statement was practically certain to deceive, the statute is satisfied. Whether the police were thwarted, therefore, is immaterial."

False Denials of Guilt: Obstruction and the "Exculpatory No"

Until recently, officers could not charge obstruction when an individual made a simple denial of guilt that was false. Such a denial, referred to in lawyer-speak as an "exculpatory no," sounded something like this (in a scenario involving a hypothetical battery investigation):

> Officer: "Did you punch Mr. Smith in the face?"
> Suspect: "No."

In State v. Reed, 2005 WI 53 (Wis. 2005), officers found a man sitting in the driver's seat of his vehicle. He smelled of alcohol and told the officer that he had not been driving because he had been drinking. When it was established that he lied to officers and had been driving, he argued that offering a simple denial of guilt was not obstruction. The Wisconsin Supreme Court disagreed with him, ruling that the "exculpatory no" is obstruction, and charges on those grounds are appropriate. Therefore, it is best practice to charge obstruction for an "exculpatory no" when there is already probable cause to arrest for the underlying offense. There is not, however, a bright line rule and the totality of the circumstances will matter.

KEY POINT

People usually don't have to talk to the police. But if they do, they must be truthful. Even if a person tells a lie that does not actually hinder an investigation, this still constitutes obstruction and charges may be appropriate. Check out **Probable Cause: Ordinance Violation v. State Charge** below regarding the burden of proof for a state or municipal obstructing conviction.

- Summary by PO Matt Johnson

Q1: True or False- During a routine traffic stop on a public roadway, a passenger can refuse to identify themselves.

THRESHOLD ENTRIES- PART FOUR

Three legal update articles have discussed some variation of "threshold entries" during the past year: Footing the Door (Spring 2023), Threshold Entries and Hot Pursuit (Summer 2023), and Knock, Knock, Knocking on a Suspect's Door (Spring 2024). While not strictly a threshold case, *Washington v. Chrisman*, 455 US 1 (1982), dealt with entering a residence after an arrest was made.

FACTS

In 1978, PO Daugherty arrested a student, Carl Overdahl, at Washington State University for underage alcohol possession after observing Overdahl carrying a bottle of gin on the sidewalk. Overdahl indicated he had identification in his dorm room and offered to get it. PO Daugherty allowed Overdahl to go up to his room, telling Overdahl he would accompany him at all times and in all places once inside the room. Although Overdahl briefly hesitated at the doorway, Overdahl ultimately entered his room, with PO Daugherty following closely behind. Once inside, PO Daugherty observed Overdahl's roommate, Chrisman, had marijuana seeds and a pipe on his desk in plain view. Chrisman was subsequently arrested and charged with possession of more than 40 grams of marijuana and possession of LSD.

QUESTION

Did the officer's seizure of the drugs violate Chrisman's "reasonable expectation of privacy" as guaranteed by the Fourth Amendment?

RULING

The U.S. Supreme Court held the officer had the right to remain at Overdahl's elbow at all times. It is not "unreasonable" under the Fourth Amendment for a police officer to monitor the movements of an arrested person following the arrest. Regardless of where the officer was positioned with respect to the room's threshold when he observed the contraband, and regardless of whether he may have hesitated briefly at the doorway before entering the room, he did not abandon his right to be in the room with Overdahl whenever he considered it essential. In short, the officer had obtained lawful access to an individual's area of privacy through consent of the arrestee, Overdahl. Additionally, the Court held that the "plain view" exception to the Fourth Amendment warrant requirement permitted law enforcement officers to seize clearly incriminating evidence discovered "in a place where the officer has a right to be."

TAKEAWAY

It is permissible for an officer to accompany an arrested person at all times. Following an arrest, police officers have the right to remain literally and continuously at an arrested person's elbow to monitor the person's movements as the officer's judgement dictates. In this case, the officer did not abandon his right to be in the dorm room because he (the officer) considered it essential. Additionally, the Fourth Amendment did not prohibit the seizure of the contraband discovered in plain view in the room.

-Summary by Sgt. Nate Becker

THE PLAIN VIEW DOCTRINE: A QUICK REVIEW

There are three requirements that must be met for the Plain View Doctrine to apply.

- The officer must be **lawfully present,**
- The **incriminating nature** of the item, contraband, or evidence must be **immediately apparent,** AND
- The officer must have a **lawful right of access** to the item.

PROBABLE CAUSE: ORDINANCE VIOLATION V. STATE CHARGE

We have all heard an officer say, "I have enough PC for a muni citation, but not enough PC for a state charge." So the question arises: Do we really have two separate standards for probable cause? Simply put – NO!

Wisconsin Stat. §968.07, Arrest by a Law Enforcement Officer, supports warrantless arrests when "There are reasonable grounds* to believe that the person is committing or has committed a crime." In 1979, the Wisconsin Court of Appeals affirmed the practice of making physical arrests on municipal ordinance violations when statutory counterparts to the ordinance existed (City of Madison v. Two Crow, 276 NW 2d 359 (1979)).

Ultimately, there is nothing in State Statute, existing case law, or our SOPs that draws a distinction between the probable cause required to arrest for Ordinance Violations versus State Charges. Although the exact definition of probable cause varies by case and court, a recurring theme is that an officer is aware of certain facts and circumstances that would lead a prudent officer to believe that a particular suspect committed a specific crime.

What distinctions can we draw between the two, then? Ultimately, nothing on the front end. The procedures, consequences, burden of proof for conviction, and, frankly, even the likelihood of prosecution will vary depending on if you go municipal ordinance versus state charge, but again, the probable cause standard for cite and/or arrest remain the exact same. Still skeptical? Let's examine the ordinance/statutory language for two commonly used offenses, Disorderly Conduct and Battery.

Charge	State Statute	City Ordinance
Disorderly Conduct	**§947.01** Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor	**§24.02 (1)** In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance.
Battery	**§940.19(1)** Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.	**§24.05** It shall be unlawful to cause bodily harm to another by an act down with intent to cause bodily harm to that person or another without the consent of the person harmed.

Probable cause is probable cause. Whether it's an ordinance violation or a criminal charge, you either (arguably) have it, or you don't. The only difference is the burden of proof required to find the person guilty at trial. In order to be found guilty of an ordinance violation, the City must show the evidence against the suspect is clear, satisfactory, and convincing. In order to be found guilty of a criminal charge, the State must show proof beyond a reasonable doubt.

-Summary by Sgt. Dan Sherrick

*From the Arrest, Incarceration, and Bail – Adults MPD SOP: ""Reasonable grounds" and "probable cause" are used interchangeably and justify an arrest without a warrant when: an officer in good faith believes that a crime has been committed; that the person in question committed it; and when the officer's belief is based on grounds which would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. Mere "suspicion" alone is never sufficient to authorize an arrest without a warrant."

Q2: Reasonable Suspicion is defined as _____ and _____ facts that would lead a _____ officer to suspect a _____ has been committed, is being committed, or is about to be committed.

THE GUN IS MINE?

There are numerous circumstances in which officers must prove a suspect "possessed" a firearm in order to request charges such as Felon in Possession of a Firearm or Going Armed While Under the Influence. In the 2024 case of *US v. White*, the United States Court of Appeals for the Seventh Circuit discussed the factors needed to prove constructive possession of a firearm.

FACTS

Shamone White was arrested after a vehicle he was a passenger in was pulled over. Behind the front passenger's seat, the police found two bags, one of which White admitted to owning. That bag contained cash and cannabis, while the other bag, which White denied ownership of, contained a firearm, ammunition, scales with cannabis residue, and other items. The same brand of cigarettes was found both in White's pocket and in the second bag containing the firearm. White was convicted by a jury of possession with intent to distribute marijuana, possessing a firearm in furtherance of a drug trafficking crime, and possessing a firearm as a felon.

QUESTION

White appealed his firearm convictions, arguing the prosecution presented inadequate evidence to establish possession. He also argued the Court incorrectly instructed the jury, allowing them to find him guilty based solely on his admission he touched the gun a week before his arrest.

RULING

The Court found the evidence was sufficient for each conviction. The Court explained that possession can be either actual or constructive. To prove constructive possession, the prosecution had to show more than a defendant's "mere proximity" to the firearm. But "'proximity coupled with evidence of some other factor—including connection with an impermissible item, proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise" was enough to sustain a guilty verdict.

The Court determined a reasonable jury could infer White constructively possessed the firearm due to: (1) its proximity to him in the vehicle, (2) the presence of scales with drug residue in the same bag, (3)the fact the contents of the two bags collectively formed a complete set of drug trafficking tools, (4) the absence of evidence tying the vehicle's other occupant to the drugs or other contents of the second bag, and (5) the fact the cigarette brand found in the second bag was the same as the brand found on White. The Court also found that White's admission to having previously touched the gun did not mislead the jury.

TAKEAWAY

In order to establish at trial that a suspect constructively possessed a firearm, note the proximity of the firearm to the suspect and consider the above factors in establishing the connection between the suspect and the firearm. **This is a higher threshold than what is required to establish probable cause to arrest someone for active possession**, but thinking in terms of proximity plus these additional factors sets you up for success.

- Summary by PO Matt Johnson

FIREARM STATUTES

- 940.24- Injury by Negligent Handling of Dangerous Weapons
- 941.20- Endangering Safety by Use of Dangerous Weapon
- 941.23- Carrying a Concealed Weapon
- 941.235- Carrying Firearm in Public Building
- 941.237- Carrying Handgun where Alcohol Beverages Sold
- 941.26-Machine Guns and Other Weapons
- 941.28- Possession of Short Barreled Shotgun/Rifle
- 941.29- Felon in Possession of Firearm
- 941.2905- Straw Purchasing of Firearms
- 948.60- Possession of Dangers Weapon by Person <18

THIRD TIME'S THE INTERROGATIVE CHARM

Wesley v. Hepp, Decided January 5, 2024 by the 7th Circuit Court of Appeals

On February 5, 2014, Johnnie Wesley was arrested in connection to Milwaukee homicide. On the morning of February 6th, detectives attempted to interrogate Wesley three times over an approximately 26-hour period. Detectives waited 9 hours between the Attempt #1 and Attempt #2, and 17 hours between Attempt #2 and Attempt #3. Wesley invoked his right to silence on Attempt #1 and Attempt #2. Wesley agreed to talk to detectives on Attempt #3, making incriminating statements. Wesley then tried to suppress his statements from Attempt #3, arguing his right to remain silent was not "scrupulously honored".

The 7th Circuit reviewed the case after the Wisconsin Court of Appeals upheld the denial of the motion to suppress the third interrogation. The Court applied Wisconsin law, which provides five factors to consider: (1) Whether the original interrogation was promptly terminated; (2) Whether the interrogation resumed only after the passage of a significant period of time; (3) Whether the suspect was given complete Miranda warnings at the outset of the second interrogation; (4) Whether a different officer resumed the questioning; and (5) Whether the second interrogation was limited to a crime that was not the subject of the earlier interrogation.

In this case, the Court found it compelling that "most factors favored the State." The Court considered whether the intent of the officers was to "seek to undermine Wesley's right to remain silent." The Court also considered whether Wesley unequivocally invoked his rights during the third interrogation by making the following statements: (1) "Ain't nothing to talk about doe" (2) "I ain't got shit to say about no homicide," and (3) "Can I go back to my cell now?"

The Court explained police do not need to assume a statement is invoking a right when there is "another possible inference based on the plain, ordinary meaning of the statement." The Court found the suspect's first two statements made after Miranda could be reasonably construed as exculpatory rather than an invocation of rights. The Court found the third statement could reasonably be interpreted as a mere question as to whether the interrogation had ended. On both issues, the 7th Circuit affirmed the Wisconsin Court of Appeals holding denying Wesley's motion to suppress statements made in the third interrogations in this case.

- Summary by Det. Nick Meredith

ANSWERS

Q1: True. There is no legal requirement for a passenger to ID themselves unless you have reasonable suspicion the passenger has committed a crime, is committing a crime, or will commit a crime.

Q2: Reasonable Suspicion is defined as **SPECIFIC** and **ARTICULABLE** facts that would lead a **REASONABLE** officer to suspect a **CRIME** has been committed, is being committed, or is about to be committed.

QUESTIONS OR FEEDBACK ABOUT THE LEGAL UPDATE? PLEASE EMAIL **PDCONLAW** WITH ANY QUESTIONS, CONCERNS, OR IDEAS FOR FUTURE TRAINING TOPICS.

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