LEGAL UPDATE

City of Madison

Fall 2006 Lieutenant Victor Wahl

Compelled Statements

***State v. Brockdorf*, 717 N.W.2d 657 (Wis. 2006); Decided June 28, 2006 by the Wisconsin Supreme Court.**

In *Brockdorf*, the Wisconsin Supreme Court analyzed when a statement made by a police officer should be considered constitutionally compelled, and therefore inadmissible. Brockdorf, an officer with the Milwaukee Police Department, and her partner arrested a suspect for retail theft at a Kohl's department store in Milwaukee. The officers placed the suspect in their squad, and drove to a nearby restaurant. Brockdorf went inside to place a takeout order, while her partner remained with the suspect. While Brockdorf was in the restaurant, her partner removed the retail theft suspect from the squad, punched him repeatedly in the head, then placed him back in the squad. When Brockdorf returned, her partner told her that the suspect had attempted to kick out the squad window. They returned to Kohl's and called for a sergeant, later telling the sergeant that the altercation had occurred at Kohl's.

A citizen complained about the incident at the restaurant, and Milwaukee PD initiated a criminal investigation. Detectives first spoke to Brockdorf about the incident at her residence. Several weeks later, they interviewed her again in the internal affairs office. The parties disputed exactly what happened prior to the interview, but it was agreed that the detectives did not provide any type of "*Garrity*" warnings to Brockdorf prior to the interview.

Brockdorf admitted that she had been untruthful during the first interview, and she was subsequently criminally charged with obstructing. She sought to have her second statement suppressed, arguing that it was a compelled statement and could not be used against her criminally under *Garrity*.

A review of *Garrity* and related case law is in order. In 1967, the U.S. Supreme Court decided the case of *Garrity v. New Jersey*, 385 U.S. 493 (1967). The case involved an investigation into police corruption. A New Jersey statute provided that any public employee who refused to answer questions under certain circumstances would automatically lose his or her job. Garrity (who was a Police Chief), was interviewed as part of the investigation, and was faced with the dilemma of answering questions (and therefore incriminating himself) or refusing to answer (and therefore losing his job). The U.S. Supreme Court concluded that forcing a public employee to make that choice ("between self-incrimination or job forfeiture") was unconstitutional. Therefore, Garrity's statements could not be used against him in any criminal proceedings.

Several years later, in *Gardner v. Broderick*, 392 U.S. 273 (1968), the U.S. Supreme Court heard an appeal from a New York City police officer who had been terminated for failing to answer questions as part of an investigation. The officer had been asked to waive his "immunity," (meaning that any statements he made would be admissible in a criminal proceeding) and advised that he would be fired if he did not do so. The court, in a logical extension of *Garrity*, ruled that the officer's termination was unconstitutional.

The *Gardner* court also ruled that had the officer refused to answer questions specifically related to his job performance, and had he been advised that the statements would not be admissible in a criminal prosecution, termination would have been permissible. This portion of the *Gardner* decision has resulted in the so-called "*Garrity* warning," where a public employer orders an employee to answer questions. Because the employer is advising the employee that the responses will not be used to prosecute the employee, the employee must answer. If the employee still declines to answer, the employer may discipline or terminate them.

So, *Garrity* and *Gardner* establish the rule that a police officer cannot be compelled to provide a statement that will be used against him or her in a criminal proceeding. However, an officer can be compelled to answer questions directly related to his or her duties, but the responses will not be admissible in a criminal prosecution of the officer. If the officer refuses to answer questions under these circumstances, termination is a constitutional result.

One of the most difficult questions to answer under the *Garrity* line of cases is what, exactly, qualifies as a compelled statement? Is any questioning by a supervisor sufficient to make a statement constitutionally compelled? What about the completion of police reports? The *Brockdorf* case provided some clarity in this area.

The Wisconsin Supreme Court rejected Brockdorf's argument, and concluded that her statement was not constitutionally compelled (and was therefore admissible). The court articulated the following test for determining whether a officer's statement will be considered compelled and subject to suppression:

> [I]n order for statements to be considered sufficiently compelled such that *Garrity* immunity attaches, a police officer must subjectively believe he or she will be fired for asserting the privilege against self-incrimination, and that belief must be objectively reasonable.

The court also stated:

> [A]n express threat of job termination or a statute, regulation, rule or policy in effect at the time of the questioning which provides for an officer's termination for failing to answer the questions posed, will be a sufficient circumstance to constitute coercion in almost any conceivable situation.

The *Brockdorf* decision is notable in several respects:

- It focuses on termination as being the only possible sanction sufficient to make a statement compelled. While other courts have concluded that penalties short of termination—any severe administrative punishment—might qualify, the *Brockdorf* case suggests that termination is the key component (which was the case in *Garrity*).

- *Brockdorf* makes it clear that the question of whether an officer's statement is constitutionally compelled is ultimately an objective one: was the penalty for refusing to answer job forfeiture or wasn't it? Officers cannot "invoke *Garrity*" or immunize their statements (by, for example, including the boilerplate *Garrity* language provided in the front of the WPPA calendar in a police report).

- Some clear evidence demonstrating the penalty for refusing to answer will need to be shown for a statement to be considered constitutionally compelled. As the case points out, this evidence can be in the form of a specific policy or statute, or a direct threat/order to an officer (providing for termination for failing to answer questions). Absent this type of direct evidence, it is not clear what will qualify to demonstrate a sufficient threat of job loss (for failing to answer questions).

- A public employer is clearly not required to provide *Garrity* warnings prior to every employee disciplinary interview. *Herek v. Police and Fire Commission, Village of Menomonee Falls*, 226 Wis. 504 (Ct. App. 1999). There are many circumstances under which a public employer will choose to seek a voluntary statement from an employee. These statements would be admissible at any criminal proceeding against the employee, but the employee could not be terminated for failing to answer questions.

If a statement is deemed to have been compelled (under penalty of job forfeiture), it is inadmissible in a criminal prosecution of the employee who made the statement. A compelled statement will, however, be admissible in a criminal prosecution of someone other than the employee who provided the statement.

Compelled statements may, of course, also be used in internal disciplinary proceedings, and may be used in civil lawsuits against the officer or employer. Also, *Garrity* will likely not protect false statements from use in criminal proceedings (for perjury, obstructing, etc.): "*Garrity*-insulated statements regarding past events under investigation must be truthful to avoid future prosecution for such crimes as perjury and obstruction of justice. *Garrity* protection is not a license to lie or commit perjury." *United States v. Veal*, 153 F.3d 1233 (11th Cir.1998); *United States v. DeVitt*, 499 F.2d 135 (7th Cir.1974). It is also likely that a compelled statement—like a statement taken in violation of *Miranda*—could be introduced at a criminal trial for impeachment purposes.

Hotel/Motel Rooms

A number of officers have inquired about actions officers may take when conducting investigations of individuals in hotel or motel rooms. 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).

While hotel/motel guests will clearly have a reasonable expectation of privacy while in their rooms, that expectation of privacy will generally terminate after checkout time. In *State v. Rhodes*, 439 N.W.2d 630 (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 or partial payment for a subsequent day's stay) that the guest intends to continue his or her stay.

Often, officers will 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 Madison 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 at least a month. 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.

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 assist 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 assisting hotel management in these cases, officers should operate in a community caretaker role—standing by to prevent any problems between management and the room's occupants. Officers should utilize the least intrusive means necessary to render their assistance, and should 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.

Search Warrants—Knock & Announce

***Hudson v. Michigan*, 126 S.Ct. 2159 (2006); Decided June 15, 2006 by the United States Supreme Court**

In *Hudson*, Michigan police executed a search warrant for drugs. The officers had not obtained authorization for a no-knock entry. When officers executed the warrant, they knocked and announced their presence, then entered after waiting only a short time (3-5 seconds). A search of the residence yielded crack cocaine and a handgun. The suspect (Hudson) sought suppression of the evidence, arguing that the officers executing the warrant violated the knock and announce requirement. The trial court agreed that the entry was a violation of the knock and announce requirement (the 3-5 second delay being an unreasonably short wait), and ordered the evidence suppressed.

Recall that an underlying requirement of any police action analyzed under the Fourth Amendment is reasonableness. This reasonableness requirement also applies to the execution of search warrants. In 1995, The U.S. Supreme Court ruled that whether police knock and announce their presence and authority before entering a dwelling (to execute a search warrant) is a factor to be considered in determining the reasonableness of the search: "the method of an officer's entry into a dwelling is among the factors to be considered in assessing the reasonableness of a search or seizure." *Wilson v. Arkansas*, 514 U.S. 927 (1995).

The *Wilson* decision did not rule that the knock and announce requirement was absolute, rather, the court recognized that under some circumstances failing to knock and announce might be reasonable: "although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." The *Wilson* court initially left it to lower courts to determine under what circumstances unannounced entries would be reasonable, and—when a no-knock entry is not permissible—how long officers must wait after knocking and announcing before making entry.

In 1997, The U.S. Supreme Court, in *Richards v. Wisconsin*, 117 S.Ct. 1416 (1997), provided some guidance on when officers are authorized to make unannounced entries. The *Richards* decision stated:

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the

> individual privacy interests affected by no-knock entries… This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.

Since the *Wilson* and *Richards* decisions, police and courts have struggled with these two issues. When, exactly, are officers relieved from complying with the knock and announce requirement? And, when the knock and announce rule applies, how long, exactly, must officers wait before entering? Courts have decided dozens of cases on these two issues, providing some additional guidance to officers executing search warrants. The decisions—particularly those addressing how long officers must wait to enter after knocking and announcing—have been very fact-specific, focusing on wait times (measured in seconds), the time of day the warrant is executed, the size of the dwelling being entered, etc. These decisions have sometimes been very difficult for officers to apply.

A more recent series of cases has focused on the remedy for entries made in violation of the knock and announce requirement. The U.S. Supreme Court faced this issue in the *Hudson* case. The State of Michigan—conceding that the officers' entry was in violation of the knock and announce rule—argued that suppression of the evidence was not an appropriate remedy.

The *Hudson* court agreed with the State of Michigan, concluding that violation of the knock and announce rule does not require suppression of seized evidence. The court's decision focused on the fact that the primary reason for the exclusionary rule—deterrence of police misconduct—can now be effectively addressed through other means, namely civil suits and internal discipline.

Hudson should **not** be construed as eliminating the knock and announce requirement. Personnel planning and executing search warrants still need to seek authorization for no-knock entries (when appropriate), and still need to comply with the knock and announce requirement when a no-knock entry is not appropriate. Failure to comply can result in internal discipline or civil litigation.

Miranda—Invocation

***State v. Kramer*, 006 WI APP 133 (2006); Decided June 8, 2006 by the Wisconsin Court of Appeals**

Kramer threatened a municipal forestry crew who were seeking to trim some trees in front of his property. Kramer threatened to kill one of the workers if they trimmed any of the trees, and one of the workers observed him pacing in his driveway with a gun. The workers called 911 and a deputy responded. As the deputy pulled up, Kramer shot and killed him with a rifle.

Responding officers set up a perimeter around Kramer's property and began negotiating with him. During the negotiations, Kramer asked for an attorney. When Kramer exited his residence to pick up a phone he fired several shots at an officer. As he attempted to flee he was taken into custody.

Kramer was subsequently interrogated. He was provided with his *Miranda* warnings and waived his rights prior to the questioning. Kramer later sought to have his statements suppressed, arguing that he had invoked his right to counsel by asking for an attorney during the standoff.

The *Kramer* court rejected this argument. *Miranda* rights only apply to custodial interrogations, and the *Kramer* decision recognized the general rule that a suspect cannot anticipatorily invoke his or her *Miranda* rights: "unless a defendant is in custody, he or she may not invoke the right to counsel under *Miranda*."

Miranda—Waiver

***State v. Backstrom*, 2006 WI APP 114 (2006); Decided May 9, 2006 by the Wisconsin Court of Appeals.**

Backstrom was arrested for having sexual contact with a thirteen year-old girl. Investigating officers interviewed Backstrom after his arrest. They advised him of his *Miranda* rights prior to the interview, and Backstrom made a valid waiver of his rights. Backstrom was booked into jail after the interview.

The following day—twenty-one hours after the first interview—the prosecutor assigned to the case met with Backstrom (officers were also present). The prosecutor did not formally re-advise Backstrom of his *Miranda* rights prior to speaking with him. Instead, she simply asked him if he recalled being advised of his *Miranda* rights the previous day. Backstrom replied that he had, and the prosecutor went on to explain to him that those rights still applied, that he did not have to speak with her if he didn't want to, and that he had the right to have an attorney present. Backstrom replied that he understood and agreed to speak with the prosecutor.

Backstrom later sought to have his second statement (to the prosecutor) suppressed, since it had not been preceded by formal *Miranda* warnings. The Court of Appeals rejected Backstrom's argument. The court stated, "when *Miranda* rights are properly administered, it is not necessary to re-administer the *Miranda* warnings at a subsequent interrogation if it is undisputed that the defendant understood his rights." Because Backstrom was properly advised of his *Miranda* rights prior to his first interview, and because he was informally reminded of those rights before the second interview, the second statement was admissible.