LEGAL UPDATE

City of Madison Police Department

Fall 2008 Captain Victor Wahl

Traffic Stops

***State v. Arias*, 752 N.W.2d 748 (2008); Decided July 9, 2008 by the Wisconsin Supreme Court.**

In *Arias*, the Wisconsin Supreme Court re-visited the topic of traffic stops, and the extent to which an officer is permitted to investigate drug activity during a routine traffic stop. An officer observed a subject—Arias—exit a grocery store and place three 12-packs of beer into a vehicle. The officer knew that the vehicle was owned by a minor, so he followed it as it left and stopped it. The officer spoke to the driver (a female minor, the vehicle owner), explained why he had stopped her, and returned to his squad with her driver's license. A short time later her returned to the vehicle and administered a P.B.T. to the driver (the test registered zero). The officer then asked the driver if there were any drugs in the vehicle (she replied that there was not).

At that point the officer returned to his squad and retrieved his K9, who sniffed the exterior of the vehicle. The K9 alerted on the vehicle; the officer subsequently removed the two subjects from the vehicle and searched it, finding cocaine. Arias (the passenger) was criminally charged, and challenged the officer's actions.

The first issue the court considered was whether the dog sniff of the vehicle's exterior was lawful. The U.S. Supreme Court has clearly stated that a dog sniff of the exterior of a vehicle is not a search within the meaning of the Fourth Amendment. Arias, however, challenged the dog sniff under the Wisconsin Constitution—not the U.S. Constitution.

Recall that for year the Wisconsin Supreme Court had interpreted the Wisconsin Constitution (as it relates to police search & seizure) identically to the U.S. Constitution. However, a few years ago the court changed course, and concluded that in some instances, the Wisconsin Constitution provides more restrictions on officers than the Fourth Amendment. This trend raised the potential of a slew of challenges to well-established police practices under the Wisconsin Constitution. The *Arias* case is one such example.

The *Arias* court, however, declined to undertake such a departure from federal constitutional law. The court stated, "we conclude that a dog sniff around the outside perimeter of a vehicle located in a public place is not a search under the Wisconsin Constitution." So, the general rule regarding dog sniffs remains: a dog sniff is not a search, so long as the dog and handler are lawfully present where the sniff takes place. Dogs can be used to sniff objects, buildings, etc., but should not be used to sniff people.

The other issue the *Arias* court reviewed was the duration of the stop. A *Terry* stop must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1 (1968). When analyzing the scope of *Terry* stop, a court will assess whether the stop "lasted no longer than is necessary to effectuate the purpose of the stop…and whether the investigative means used in the continued seizure are the least intrusive means reasonably necessary to verify or dispel the officer's suspicion."

Generally, officers are permitted to ask any investigative questions during a stop, regardless of whether the questions are related to the justification for the stop. The *Arias* court stated, "no seizure occurs when law enforcement asks a question without a reasonable suspicion justifying the question so long as an answer is not compelled."

So, the critical aspect regarding the scope of a *Terry* stop is typically that of duration; whenever an officer effects a *Terry* stop, the duration of the stop must be reasonable. The *Arias* court pointed out, "there remains no hard-and-fast time limit for when a detention has become too long and therefore becomes unreasonable." Instead, a court will analyze each case based on the totality of the circumstances. Some of the key issues that will be examined include the nature of the offense justifying the stop, whether the officer(s) acted diligently in investigating the incident during the stop, and whether the suspect's lack of cooperation made it more difficult for the officer(s) to conduct the investigation. "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491 (1983). The *Arias* court also injected a balancing test into this determination, weighing the severity of the interference to an individual's liberty against the nature of the public's interest served by the action.

The *Arias* court concluded that the minimal intrusion caused by the dog sniff (which they estimated to be 78 seconds) was reasonable, and that the subsequent vehicle search was lawful.

A few factors are important to understanding the applicability of the *Arias* case. First, the officer had not concluded the traffic stop. In other similar cases, officers have finished their traffic stop (issuing a citation or warning—clearly ending any legal justification to prolong

the detention) and then moved to a K9 sniff while continuing to detain the suspect. Courts in those cases have found the prolonged detentions to be unreasonable. Second, the subjects in the *Arias* case did not ask if they could leave or expressly refuse consent to search. Finally, the action taken—the K9 sniff—was very brief. Once the K9 alerted—providing probable cause that contraband was present—an extended detention was clearly justified.

So, officers wishing to investigate criminal activity in the context of a routine traffic stop (being mindful of MPD policy) continue to have two options for doing so:

Perform all investigative steps during the period of time necessary to conduct the traffic stop: This means that an officer will conduct any additional investigative steps (such as requesting consent to search or having a K9 sniff the vehicle's exterior) during that time period when the detention—based on the traffic violation—is justified. The *Arias* court provided officers with slightly more leeway under these circumstances. However, the decision should be viewed narrowly, and officers should make every effort to limit any additional investigative activities to those which can be completed during the time period justified by the original reason for the detention.

Conclude the traffic stop prior to asking for consent or performing additional investigative steps: This strategy was discussed in *State v. Williams*, 255 Wis.2d 1 (2002). In *Williams*, a state trooper effected a traffic stop on a vehicle he suspected of being involved in drug trafficking (though he did not have reasonable suspicion of drug activity—only of a traffic violation). The trooper finished the traffic stop, issued the driver (Williams) a written warning, and said, "good, we'll let you get on your way then." As Williams turned to walk back to his vehicle, the trooper re-initiated contact with him, asking about drugs and weapons. This conversation led to the trooper receiving consent to search Williams' vehicle (the search yielded a handgun and heroin).

The Wisconsin Supreme Court concluded that the traffic stop had ended (when the trooper issued the written warning), and that based on the totality of the circumstances Williams was no longer being detained when the trooper questioned him about drugs and weapons.

The critical issue when utilizing this technique will be the manner in which the traffic stop is concluded (converting the encounter to a consensual one). The trooper in the *Williams* case made it clear through his words and actions that the traffic stop was over. More recently, the Wisconsin Court of Appeals reviewed a similar situation in *State v. Jones*, 278 Wis.2d 774 (Ct. App. 2005). In *Jones*, the officer did not expressly advise the driver that he was free to go or that the traffic stop was complete. The *Jones* court concluded that this was insufficient to terminate the detention or convey to the driver that he was no longer detained. The court stated:

> We therefore read *Williams* to require some verbal or physical demonstration by the officer, or some other equivalent facts, which clearly convey to the person that the traffic matter is concluded and that the person should be on his or her way.

So, an officer choosing to proceed using this technique simply needs to clearly conclude the traffic stop, then transition to a consensual encounter. While it is not expressly required that you tell the driver that they are "free to go," or something similar, you must act in a way that a reasonable person would feel free to leave.

Finally, note that if an officer acquires reasonable suspicion of criminal activity—beyond the traffic offense—the permissible duration of a *Terry* stop will typically be longer, and officers will generally have more flexibility during the stop.

Probation Searches

***State v. Jones*, 2007AP1989-CR (Ct. App. 2008); Decided September 25, 2008 by the Wisconsin Court of Appeals.**

The *Jones* case involved a search of a home by a parole agent, accompanied by police officers. An officer passed on information to a parole agent that a subject under parole supervision was possibly involved in sexual activity with an underage female. The agent decided to do a home search of the individual (Jones).

The agent, accompanied by several officers, went to Jones' residence. Jones answered the door without a shirt, was asked to put one on, and entered his bedroom to do so. When he exited the bedroom, Jones pulled the door shut—causing it to lock. Jones was taken into custody at that point.

After some discussions, a locksmith was called to open the bedroom door. Officers entered to secure the bedroom, then exited and allowed the agent to enter and perform the search. The search yielded evidence of Jones' relationship with the underage female. The evidence was turned over to police the next day, and Jones was charged with second-degree sexual assault of a child.

Jones challenged the search of his room on several grounds. He first argued that the search was a police search, rather than a probation search, and that a search warrant was required. A probation/parole agent may search the residence of a probationer without a search warrant, as long as the agent has reasonable grounds to believe there is contraband present. Jones argued that the search was actually a police search, so that the lower reasonable grounds standard did not apply and that probable cause (and a search warrant) were required. Jones relied on several factors when making this argument:

- The police accompanied the agent to perform the search
- The police were conducting a separate criminal investigation
- The information leading to the home search was provided by the police
- Officers attempted to open Jones' bedroom door after he closed it
- Officers suggested that a locksmith be used open the door
- Police paid for the locksmith
- Evidence seized was subsequently turned over to police

Jones argued that these factors made the search a police search, and that a search warrant—based on probable cause—was required. The *Jones* court rejected this contention, stating: " cooperation between a probation officer and law enforcement does not transform a probation search into a police search." The court also specifically refuted a number of Jones' assertions:

- "A probation search is…not transformed into a police search because the information leading to the search was provided by law enforcement."
- "Nor is a probationary search transformed into a police search due to the existence of a concurrent investigation."
- "[T]he transfer of the times seized to law enforcement following the search does not change the nature of the search itself."

The court readily concluded that the search was a probation search, and that neither a search warrant nor probable cause were required.

Jones also argued that the manner through which entry was gained to his bedroom—use of a locksmith—rendered the search unreasonable. Wisconsin Administrative Code places some restrictions on when and how probation or parole agents can perform home searches. One such limitation is that agents "may not forcibly enter a locked premises to search it if the client whose living quarters or property it is is not present." Jones argued that the use of a locksmith constituted a forcible entry, and that suppression of the evidence was required.

The *Jones* court concluded the definition of forcible entry in the Administrative Code only applies if property was damaged. Since use of the locksmith did not cause any damage to Jones' property, the court concluded that it was not a forcible entry and that it was not prohibited by Administrative Code.

Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act—more commonly known as HIPAA—established a set of national standards for the protection of health care information. HIPAA applies to "covered entities," primarily health plans and healthcare providers; and to "protected health information." Basically, a covered entity may only use or disclose protected health information to the extent it is: a) authorized by HIPAA; or b) authorized in writing by the individual who is the subject of the protected health information.

The HIPAA statute is very long and complicated, with most of the details applying to healthcare providers, insurance providers, etc. However, HIPAA does impact law enforcement, and the extent to which providers can or will release medical information to law enforcement. HIPAA outlines a number of situations where covered entities may disclose protected health information to law enforcement officials for law enforcement purposes:

As required by law: A covered entity may disclose protected health information if required by law. This includes disclosures required by a warrant or subpoena, and also applies to required reporting by statute. Statutes 48.981(2) (mandatory reporting of suspected child abuse) and 225.40 (mandatory reporting of certain wounds and burn injuries) fall under this exception.

Identification/location purposes: A covered entity may disclose protected health information in response to a law enforcement request for the purpose of identifying or locating a suspect, fugitive, material witness or missing person. The type of information that can be released under this exception is limited.

Victims of a crime: A covered entity may disclose protected health information in response to a law enforcement request related to a subject who is a victim of a crime. The victim must agree to the disclosure or be unable to provide consent due to incapacitation or other emergency circumstance (with certain conditions).

Death: A covered entity may disclose protected health information about the death of an individual to law enforcement if the entity believes the death was caused by criminal conduct.

Crime on premises: A covered entity may disclose protected health information that is believed in good faith to constitute evidence of criminal activity that occurred on the premises of the covered entity.

Reporting crime in emergencies: A covered entity providing emergency medical care off premises may disclose protected health information to law enforcement if it appears necessary to alert law enforcement to the commission and nature of a crime; the location of a crime or victim; or the identity, description or location of the suspect.

Medical information cannot be released by a medical provider or covered entity to law enforcement if it does not fall under one of these exceptions. With the exception of the first category (disclosures required by law), HIPAA permits—but does not require—disclosure under these circumstances. So, healthcare providers and other covered entities may choose not to disclose medical information, even under circumstances where HIPAA permits it. A court order is generally the only way to compel a healthcare provider or other covered entity to disclose information.