LEGAL UPDATE

City of Madison Police Department

Fall 2014 Captain Victor Wahl

Cell Phones

***Riley v. California,* 134 S.Ct. 2473 (2014); Decided June 25, 2014 by the United States Supreme Court**.

In *Riley*, the Supreme Court analyzed whether a search incident to arrest extends to a cell phone in the possession of the arrested person at the time of arrest. The decision actually addressed two separate cases, one involving an arrest for a weapons violation, the other involving an arrest for drug offenses. In both cases, the arresting officers accessed information located electronically within cell phones seized from the arrested persons at the time of arrest. And in both instances the officers located incriminating information within the phones (leading to additional criminal charges in one case and a search warrant in the other).

Lower courts had been inconsistent in rulings on the authority of police to extend a search incident to arrest to a cell phone. In *Riley*, the U.S. Supreme Court resolved the issue and ruled that a search incident to arrest does **not** extend to a cellular phone.

The court's decision relied on two primary issues in reaching this conclusion. The first is the massive volume of data that a modern smart phone can store ("millions of pages of text, thousands of pictures, or hundreds of videos"). This distinguishes cell phone data from the physical items a person would typically carry: "Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read…"

The second issue for the court was the fact that much of the data accessible through a smart phone is not physically located on the phone, but is retrieved from a remote location. This makes it very difficult for an officer to know if data they are viewing is physically stored on the phone or not.

So what options do officers have when recovering a cell phone from an arrested person? If it is believed that the phone contains relevant evidence/information, the arrested person can always be asked for consent to review the phone's contents. If there is probable cause to believe the phone contains evidence, the phone can be seized. Obtain a search warrant to perform a search/analysis of the phone's contents. If the phone is going to be seized, the court made it clear that officers can take steps to ensure the phone cannot be remotely accessed (to erase data). It is permissible to turn the phone off or remove the battery. The phone can also be placed in a Faraday bag, to insulate it from external signals.

Finally, the court made it clear that in some situations exigent circumstances might justify a warrantless examination of data on a cell phone. While this will not apply to generalized concerns (that the phone might be remotely wiped, etc.) it might apply under situations where we typically apply exigent circumstances:

> There is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone.

Any search done based on this justification needs to be justified by specific facts of the particular case, and not on generalized concerns/assertions about data on the phone.

Juvenile Interviews

***State v. Joel I.-N.,* 2014 Wisc. App. LEXIS 816 (2014); Decided October 7, 2014 by the Wisconsin Court of Appeals.**

This case involved a statement obtained from a juvenile in the back of an ambulance. Officers had responded to an armed robbery in which a female had been robbed by a group of teenagers. One of the suspects had held a knife to the woman's neck, and all had subsequently fled on foot. Responding officers utilized a K9 to assist in their search; the dog tracked to a large tent in a backyard. Officers gave verbal commands into the tent, with no response, then sent the dog in. The K9 engaged one of the suspects (a juvenile), biting him in the leg and pulling him out of the tent. The suspect was handcuffed and placed under arrest.

Because of the injury caused by the dog bite, the juvenile suspect was conveyed to a hospital by ambulance. An officer rode in the back of the ambulance, and made the decision to question the suspect during the conveyance.

The officer provided *Miranda* warnings to the suspect, and the suspect waived his rights, indicating that he wanted to "cooperate." During questioning, the suspect admitted to being involved in the robbery, and provided information about the other suspects (who were still at large). The officer did not record the interview.

The juvenile suspect challenged the admissibility of his statement. His main argument was that the officer was required to record it.

Wisconsin law (§938.31(3)) states that any statement made by a juvenile during a custodial interrogation is inadmissible unless it has been recorded. The juvenile in *Joel I.-N.* was clearly in custody (he had been arrested and handcuffed) and was clearly being interrogated, so the only question for the court was whether one of the exceptions to the recording requirement outlined in §938.31 applied. There are five general exceptions:

- The juvenile refused to respond or cooperate in the custodial interrogation if it was recorded.
- The statement was made in response to a question asked as part of routine processing.
- The officer made a good faith effort to record the interrogation but the equipment did not function properly, malfunctioned, or stopped operating.
- The statement was made spontaneously and not in response to a question.
- Exigent public safety circumstances existed that prevented recording or made recording the statement infeasible.

The exception at issue was exigent public safety circumstances. The court pointed out that the since the statute did not provide much guidance, they would view it similar to the public safety exception to *Miranda*, and examine cases addressing that doctrine for guidance.

The court concluded that the exigent public safety exception applied, basing the decision on these factors:

- The other suspects involved in the robbery were still at large;
- At least one of the suspects had been armed with a knife and used it in a dangerous and threatening manner;
- The knife had not been recovered;
- The suspect in custody had been located running through backyards in the community;
- Only an hour had passed since the robbery took place.

The court also concluded that recording the statement had been "infeasible." The ambulance was not equipped with recording equipment, nor was it reasonable to expect that the hospital would. The officer believed it would be a lengthy amount of time before the suspect would make it to the police station where recording equipment was available. The court concluded that the risk to the community and the delay that would be required to wait for recording equipment made recording the statement infeasible, and therefore admissible.

Note that an important component of the statutory exception and the court's decision is that recording the statement must be "infeasible" for the unrecorded statement to be admissible. The court's decision examined the availability of recording equipment and the expected delay in reaching it. There was no discussion of utilizing portable recording equipment, but the availability of a portable recording device would likely bear on this analysis. So, if a portable recording device is available or could be obtained in a reasonably short time frame, officers should make efforts to obtain one and record questioning under similar circumstances.

Consensual Contacts

***County of Grant v. Vogt,* 850 N.W.2d 253 (2014); Decided July 18, 2014 by the Wisconsin Supreme Court**.

The *Vogt* case addressed the issue of whether an individual has been "seized" under the Fourth Amendment. The facts in *Vogt* were fairly simple: a deputy observed a vehicle pull into a parking lot next to a park and boat landing. The park was closed due to the time of day (it was about 1am), but the parking lot itself was open. The deputy did not observe any traffic violations, but thought it was unusual for the vehicle to be in the lot at that time of day on that day of the year (Christmas morning).

The deputy pulled into the lot, and parked his squad behind the vehicle, slightly off to the driver's side. The squad's headlights were on, but the emergency lights were not activated. The deputy approached the vehicle, which was running, knocked on the window and motioned for the driver (Vogt) to roll it down. Vogt rolled the window down, and the deputy asked him what he was doing. As they spoke, the deputy noted that Vogt's speech was slurred and that he smelled of intoxicants. Vogt was subsequently arrested for OMVWI. He challenged his conviction, arguing that the initial encounter with the deputy had been a detention that was unsupported by reasonable suspicion or probable cause.

A seizure must be justified by reasonable suspicion or probable cause. A seizure of a person occurs when an officer "by means of physical force or show of authority, has

in some way restrained the liberty of a citizen." The legal test for determining whether such a seizure has occurred is to determine "whether a reasonable person would believe that he was not free to leave." Any behavior on the part of the police that "would communicate to a reasonable person that he is not at liberty to ignore the police presence and go about his business" will transform the encounter into a stop, requiring reasonable suspicion.

The *Vogt* court concluded that a reasonable person would have felt free to leave under the circumstances, and that the initial encounter with the deputy was therefore a consensual contact (not requiring reasonable suspicion or probable cause). The court stated:

> Although we acknowledge that this is a close case, we conclude that a law enforcement officer's knock on a car window does not by itself constitute a show of authority sufficient to give rise to the belief in a reasonable person that the person is not free to leave.

As soon as the deputy noted the odor of alcohol and slurred speech, reasonable suspicion existed to detain Vogt and investigate further.

Note that analysis of cases like this will be very fact-specific, and any minor change in the facts in *Vogt* might have resulted in a different outcome. So, what you say/do, and how well you document it in your report is critical. For example, in *Vogt* there was not a clear record of what the deputy said to Vogt as he knocked on the window. But it is likely that if he had phrased his comment as a command or direction ("roll down your window") it might have pushed the encounter into a Fourth Amendment seizure. Phrasing the comment as a question ("could you roll your window down?") is more likely to support a finding that the encounter was a consensual contact.

Another key issue is squad placement. While the deputy parked his squad behind Vogt's vehicle, there was plenty of room in the lot for Vogt to pull forward and drive away. Squad placement that blocks a vehicle in will clearly be construed as a seizure.

Castle Doctrine

***State v. Chew,* 2014 Wisc. App. LEXIS 798 (2014); Decided October 1, 2014 by the Wisconsin Court of Appeals.**

The *Chew* case addressed the scope of Wisconsin's "castle doctrine" statute. Chew lived with his girlfriend in an apartment. Late one night, two friends accompanied the girlfriend as she went to the apartment to get clothing for her son. The two friends waited outside, but subsequently heard arguing inside the apartment. The friends entered the apartment (though it was unclear whether they had permission to do so). They then attacked Chew and a physical confrontation ensued. During the attack, Chew produced a gun and fired on the two attackers, hitting each of them in the leg. The two men fled the apartment and ran out into a parking lot. Chew followed them out of the apartment and fired additional shots at the fleeing subjects. The shots missed, but struck a nearby building and vehicle.

Chew was arrested and charged with recklessly endangering safety, specifically for the shots fired at the suspects as they fled (not for the shots fired inside the apartment). Chew claimed that the "castle doctrine" protected his conduct.

The statute (§939.48(1m)(ar) presumes that the use of deadly force in self defense is reasonable under certain circumstances, including if:

> The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The main issue in *Chew* was whether this section applied to the shots fired at the fleeing subjects in the apartment building parking lot. The court looked to the statutory definition of "dwelling" for an answer:

> "Dwelling" means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements.

While this is a fairly broad definition, the *Chew* court noted that this it does not include a parking lot. As a result, the court concluded that Chew's use of deadly force was not protected by the statute:

> Under the castle doctrine, one who is attacked in his or her home can use force against the intruder to defend himself or herself…but (the) use of deadly force at issue here occurred after the attack…when the men who had been in his apartment were fleeing across a parking lot. The castle doctrine does not justify continued use of deadly force against an intruder when that intruder is no longer in the actor's dwelling.

This was a narrow decision, focused on the definition of dwelling and these particular facts. Note that the definition of dwelling—while excluding a parking lot—otherwise is fairly broad, and includes most aspects of a single residential lot.

Curtilage / Trespass

***State v. Popp,* 2014 Wisc. App. LEXIS 791 (2014); Decided September 30, 2014 by the Wisconsin Court of Appeals**.

The *Popp* case started with an anonymous tip about some residents of a trailer who were manufacturing psilocybin mushrooms. The caller indicated that there were multiple Tupperware bins inside a particular trailer containing psilocybin mushrooms. Investigating officers determined that the residents of the trailer in question had previously been suspected of operating a methamphetamine lab in the same trailer.

Officers responded to the trailer and encountered one of the residents outside, who appeared extremely nervous as they spoke to him. The officers eventually asked the resident for consent to enter and search the trailer, and he declined. While one officer continued to speak with the resident, others walked around the exterior of the trailer. The officers walked around all sides of the trailer (only one of which had the front door/main entrance). The officers looked into several windows, observing things that they could not have seen from the road; they climbed a small staircase to access one of the windows. The officers observed a number of things indicative of drug activity through these observations. They told the resident that they would seek a search warrant and allowed him to leave while they did so.

The officers obtained a search warrant, based on the anonymous tip and their observations through the windows. The search of the trailer yielded a lab for the creation of psilocybin mushrooms as well as mushrooms in various stages of growth. Both residents were charged criminally as a result.

The residents challenged the police search, with the primary issue being whether the officers' observations through the windows had constituted an illegal search, and therefore could not be considered part of the search warrant application.

The *Popp* court concluded that the search had been unreasonable, as the officers were not permitted to look into the windows in the manner that they had. The court took some time to articulate the relevant tests to determine whether a Fourth Amendment intrusion/search has taken place, pointing out that the law has evolved into distinct but related methods:

- The first is the familiar "reasonable expectation of privacy" test. If police intrude on a place or thing that someone has a subjective expectation of privacy in, and that expectation is objectively reasonable, then a Fourth Amendment intrusion (a search) has occurred.

- The second is the recently revived "trespass/physical intrusion" test. This focuses on whether police have engaged in an unauthorized physical penetration into a constitutionally protected area.

A Fourth Amendment claim can be based on either theory, so officers must be aware of both and take both into consideration prior to acting.

The *Popp* court utilized the trespass/physical intrusion theory and concluded that the officers' actions had constituted a Fourth Amendment search. The officers walked through the yard and onto the back porch, areas clearly part of the trailer property. Since the observations made through the windows were part of an illegal search, they could not be considered as part of the warrant application and the search warrant (and subsequent search) were ruled to be invalid. [note that the court also concluded that the anonymous tip was insufficient to provide probable cause for the search warrant].

A few points on applying the trespass/physical intrusion test:

The trespass/physical intrusion test is limited to "constitutionally protected areas." These are generally defined as "persons, houses, papers and effects." The curtilage of a residence is generally provided the same protection as the residence itself, and any "warrantless trespass onto curtilage is presumptively a Fourth Amendment violation even if there is no reasonable expectation of privacy there."

However, officers are still permitted to go to a front/main door and attempt to contact a resident (even entering the curtilage): "a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." Courts have concluded that homeowners have implicitly invited others to come to the main entrance to knock on the door, and that police can do the same. There could be circumstances (fencing, signage, etc.) where this is not the case.

Finally, areas not connected with a personal residence (parking lots, yards, common areas, etc.) have historically not been viewed in the same way as the curtilage, and it is unclear how the trespass/physical intrusion test might apply to them. However, since they have generally not been viewed as "constitutionally protected" it is probably safe to treat these areas as they have been under the reasonable expectation of privacy test.