LEGAL UPDATE

City of Madison

Spring 2005 Lieutenant Victor Wahl

Obstructing

***State v. Reed*, 2005 WI 53 (2005); Decided April 27, 2005 by the Wisconsin Supreme Court.**

In *Reed*, the Wisconsin Supreme Court again examined the scope of Wisconsin's obstructing statute (946.41). An officer came upon a car parked on the side of a highway, and observed a person (Reed) sitting in the driver's seat. After the officer turned around and pulled behind the vehicle, Reed was sitting in the passenger seat. When the officer spoke to Reed, he noted strong evidence that Reed was intoxicated. Reed told the officer that he had not been driving, because he had been drinking. Reed provided a name of an individual he claimed was driving the vehicle, stating that this person had simply walked off prior to the officer's arrival.

Reed refused to perform field sobriety tests, and was arrested for OMVWI. A backup officer drove both ways on the highway for about five miles and did not locate anyone walking. Later that night, the investigating officer called the person whom Reed had indicated was driving; the person denied that he had been driving or that he had even been with Reed.

Reed was charged with OMVWI and obstructing. He challenged the obstructing charge, arguing that his actions constituted a simple denial of guilt, and that he therefore could not be prosecuted for obstructing.

Reed based his argument on a prior Wisconsin Court of Appeals decision. Recall that one way in which the obstructing statute can be violated is by "knowingly giving (an officer) false information with intent to mislead." In *State v. Espinoza*, 250 Wis.2d 804 (2002), the Court of Appeals adopted the "exculpatory no" exception to this aspect of the obstructing statute. In *Espinoza*, officers detained someone suspected of stealing a tire. When asked about his involvement, the suspect told the officers they had the "wrong guy." They didn't, and Espinoza was ultimately charged with both the theft and with obstructing. The *Espinoza* court overturned the obstructing conviction, ruling that a mere denial of guilt, in and of itself, was an insufficient basis to support an obstructing charge.

The *Espinoza* decision distinguished simple denials of guilt ("I didn't do it"), with other false statements that result in additional work for law enforcement ("running down false leads concerning criminal conduct"). *Espinoza* held that the latter may result in an obstructing charge, the former cannot.

Reed argued that the *Espinoza* case foreclosed any obstructing prosecution of him based on his statements. The State argued that Reed's statements went beyond the "exculpatory no" contemplated in *Espinoza*. The State also argued that *Espinoza* should be overruled.

The Wisconsin Supreme Court agreed with the State, and overruled *Espinoza*, eliminating the "exculpatory no" exception to Wisconsin's obstructing statute. The court stated,

> [T]here is simply no basis to conclude that false denials of guilt that are knowingly made with intent to mislead the officer are somehow lawful…as long as the false statement is made knowingly and with intent to mislead the police, the conduct constitutes obstructing.

The officer must, however, be performing an act in an official capacity, and acting with lawful authority for any obstruction violation to occur.

The *Reed* court also confirmed that an obstructing charge—for providing false information—does not require that an officer is actually hindered in the performance of his or her duties:

> [I]t is well established that obstruction in this context need not focus on whether the police were actually thwarted in their investigation.

The *Reed* court summarized its holding:

> [W]e conclude that there is no exculpatory denial exception in the obstructing statute. The statute criminalizes all false statements knowingly made and with intent to mislead the police. Although the State should have sound reasons for believing that a defendant knowingly made false statements with intent to mislead the police and were not made out of a good-faith attempt to defend against accusations of a crime, we conclude that the latter can never include the former; knowingly providing false information with intent to mislead the police is the antithesis of a good-faith attempt to defend against accusations of criminal wrongdoing.

Understand that while the *Reed* decision eliminates the restrictions placed on enforcement of the obstructing statute that *Espinoza* had created, it should not be read too broadly. While a strict reading of the obstructing statute does not require that a false statement to officers actually result in extra work for the officers, or the officers being hindered in the performance of their duties, the impact of and circumstances surrounding a false statement to officers will have a bearing on whether an arrest or citation is appropriate.

In Person Identification Procedures

[This is a memo distributed by Dane County Deputy District Attorney Judy Schwaemle last year addressing in person identifications]

Any kind of police identification procedure can be suppressed if a court finds that the procedure was so suggestive that it raises a substantial question about the reliability of the identification. A show-up identification is especially susceptible to suppression because it is by definition suggestive. This is because it is a one-on-one identification and the person is in police custody when the identification is made. In order to bolster the reliability of these identifications, law enforcement must take measures to counteract their suggestive aspects.

Courts allow show-up identifications despite their suggestive nature for two main reasons. First, they can be more reliable than other kinds of identification procedures because the witness's memory is fresh. Second, they are sometimes necessary in order to detain someone for further investigation. In other words, without a prompt identification, police would have to release a suspect (or detain someone who is later cleared). For these reasons and despite their suggestive aspects, show-ups can be used.

Given these reasons for permitting show-ups despite their suggestiveness, the elapsed time between the commission of the crime and the identification is an important factor. Courts have not given a maximum time or deadline after which a show-up will be suppressed, and I am reluctant to suggest a firm one here. Clearly, the amount of time elapsed will be weighed along with the exigency of conducting the show-up on a case-by-case basis. In other words, in addition to the time elapsed, a court will also look at whether and how much the show-up was needed to detain the person and further the investigation. (Though not expressly, the court will also consider the seriousness of the crime.)

However, some guidance can be offered. Milwaukee County DA's office advises law enforcement that they should not conduct show-up identifications when longer than one hour has elapsed after the commission of the crime. That is a conservative interpretation of the language courts have used. I believe that this time frame can be lengthened somewhat, depending on the circumstances of the case. In some instances, perhaps as much as four hours after the commission of the crime may be appropriate. But this amount of time would likely require some additional justification in terms of exigency. Most show-ups should occur closer to within a one to two-hour time frame.

In addition to being proximate in time, show-ups must be conducted proximate to the location of the crime. If it's a choice between where the witness is located and where the suspect is stopped, go to where the suspect is stopped. The purpose of this is to limit the length and scope of investigative detention of the suspect.

Finally, officers need to take measures to reduce the suggestiveness of a one-on-one identification of a suspect in police custody. The following practice points should be part of the procedure.

- Get and document a complete description of the suspect from the witness, separately from other witnesses if possible. Don't simply document what the witness says; ask questions. Note that physical description is not limited to height, eye and hair color, and clothing description. It also includes posture, gait, hairline, skin texture, alertness, facial expression, eye movement, degree of agitation or calmness, and many other physical characteristics that people actually see, but often don't volunteer. Also, document thoroughly the witness's opportunity to see the suspect and the conditions in which this occurred.
- Always separate witnesses and do not allow witnesses to see whether another witness identified the suspect.
- Never tell a witness before an identification that the police have a suspect. In fact, you should convey to the witness that the person may or may not be the perpetrator; that they should not feel in any way compelled to make an identification; and that the investigation will continue whether or not they positively identify this suspect.
- It is also important that police not confirm a witness's positive identification. That is, after an identification is made, police should never tell the witness that s/he made the correct choice, or provide information to the witness that corroborates the identification (e.g. "He had the $20 you reported stolen in his pocket.")
- Document the identification and the witness's degree of certainty. Ask the witness if there is anything in particular about the person identified that informed their identification of that person as the perpetrator. Try to quote the witness's statements about these things.
- If there are additional potential witnesses, instruct the witness not to discuss their identification with those persons.

Other Issues Related to Show-ups

A court evaluating the reliability of a show-up will examine a variety of factors, including:

- The opportunity of the witness/victim to view the suspect at the time of the crime
- The witness/victim's degree of attention
- The accuracy of the witness/victim's prior description of the suspect
- The level of certainty demonstrated at the show-up
- The time elapsed between the crime and the show-up

So, it is important for officers' reports to adequately address these issues. Other show-up issues:

- A suspect should never be taken to a police facility for a show-up.
- The right to counsel does not apply to one-on-one identification procedures.
- MPD policy 8-700 governs all aspects of eyewitness identifications, including show-ups.

New MPD technology and its impact on identification procedures.

Individual photos—squad laptops: When, if ever, is it appropriate to pull up a photo on your squad's laptop and display it to a victim/witness for the purpose of identifying a suspect? If the victim/witness knows the suspect, but just doesn't know his/her name (or real name), and you believe you know the suspect's identify, there is no harm in showing the victim/witness a single photo on your laptop (you are only attaching a name to a known face in doing so). It is important to establish how well the victim/witness knows the suspect (how long have they known each other, how often do they see each other, etc.) prior to doing this. If the suspect is not well-known to the victim/witness, or is a stranger, you should not use a single photograph (on your squad laptop or otherwise) for identification purposes.

Documenting show-ups with in-car video: To what extent should show-ups be documented with in-car video systems? When performing a traditional patrol show-up (victim in squad, suspect in front of squad), it is desirable to document the show-up with your in-car video (recording the suspect, not the victim). This footage should be downloaded and documented in your report like any other evidentiary video.

Authority of Private Security Personnel

Officers frequently come into contact with private security personnel, and the question of what authority private security employees possess has been raised. Two important starting points when discussing the authority of private security personnel are the Wisconsin Statutes relating to private security (440.26) and the Wisconsin Administrative Code relating to private security (RL chapter 30). Note that these sections deal primarily with licensing—they do not provide security personnel with any express authority beyond that possessed by a private citizen (the one exception to this rule relates to transporting firearms in vehicles). It is imperative, then, to recognize that private security personnel do not have any authority to use force, or to detain or arrest people beyond that of any private citizen.

Legal rights possessed by private citizens (including security personnel) can be analyzed under the general topics of authority to detain/arrest and authority to use force.

Authority to detain or arrest

Investigative detention – While police officers are able to detain citizens temporarily if they have a reasonable suspicion that the citizen is involved in criminal activity (a *Terry* stop), private security personnel have no such authority. There is no statute, judicial decision or other legal principle that confers this general authority upon any private citizen (including security personnel).

Note, however, that there are several statutes that allow business owners or their employees (including security agents) to "detain" persons that have committed specific offenses:

- §943.49 – Unlawful use of recording device in motion picture theater
- §943.50 – Retail theft
- §943.61 – Theft of library material

The pertinent sections of these statutes are almost identical:

> **§943.50(3)** A merchant, a merchant's adult employee or a merchant's security agent who has reasonable cause for believing that a person has violated this section in his or her presence may detain the person in a reasonable manner for a reasonable length of time to deliver the person to a peace officer, or to his or her parent or guardian in the case of a minor. The detained person must be promptly informed of the purpose for the detention and be permitted to make phone calls, but he or she shall not be interrogated or searched against his will before the arrival of a peace officer who may conduct a lawful interrogation of the accused person. The merchant, merchant's adult employee or merchant's security agent may release the detained person before the arrival of a peace officer or parent or guardian. Any merchant, merchant's adult employee or merchant's security agent who acts in good faith in any act authorized under this section is immune from civil or criminal liability for those acts.

Note, however, that these sections require that the security agent have *reasonable cause* that the person in question has violated the statute. This is the legal equivalent of probable cause, which is a higher standard than reasonable suspicion. Also, the authority conferred by these statutes applies only to the three offenses listed above.

Arrest – While there is no statutory authority for security agents or private citizens to make arrests, judicial decisions in Wisconsin have established the common law concept of a "citizen's arrest." The general rule is that "a citizen's arrest may only be effectuated for a felony or a serious misdemeanor affecting a breach of the peace." When citizens or private security personnel are faced with an offense constituting a felony, the applicability of the rule is easy—if the offense is statutorily considered a felony, a citizen's arrest is appropriate. However, the "misdemeanor affecting a breach of the peace" definition is less clear. There are only two reported Wisconsin cases addressing the issue of what misdemeanors qualify. In *Radloff v. National Food Stores*, 20 Wis.2d 224 (1963) the Wisconsin Supreme Court limited citizen's arrest concept to misdemeanors "which involve, threaten or incite violence" (that case involved a simple theft, which the court ruled was not sufficiently severe to permit a citizen's arrest). More recently, in *Waukesha v. Gorz*, 166 Wis.2d 243 (Ct. App. 1991), the Wisconsin Court of Appeals ruled that the citizen's arrest authority applied to OMVWI: "operating a motor vehicle while intoxicated is an activity which threatens the public security and involves violence. As such, it amounts to a breach of the peace."

The statute that is closest to recognizing the citizen's arrest authority is the privilege statute:

> **§939.45 Privilege.** The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:
> ***
> **(4)** When the actor's conduct is a reasonable accomplishment of a lawful arrest;

While there is no express guidance from the courts—aside from the cases described above—on which misdemeanors a citizen may make an arrest for, the nature of some offenses strongly suggests that they will usually be deemed significant enough for a citizen's arrest to be appropriate:

- §940.19(1) Battery
- §940.22(3m) 4th degree sexual assault
- §941.20(1) Endangering safety by use of a dangerous weapon
- §941.23 Carrying a concealed weapon
- §947.01 Disorderly conduct

Many other misdemeanor offenses may or may not qualify, depending on the particular circumstances of the incident. Note that the citizen's arrest doctrine provides no authority for citizens (including private security personnel) to make arrests for civil forfeiture violations. These include municipal ordinances (such as trespassing, possessing open intoxicants, etc.) and most traffic violations (driving without a license, vehicle equipment violations, etc.).

Authority to use force

Private security personnel have no authority to use force beyond what private citizens have. The self-defense (939.48) and defense of property (939.49) statutes outline this authority. The self-defense statute allows a private citizen to use force only if:

- The citizen believed that there was an actual or imminent unlawful interference with his or her person
- The citizen believed that the amount of force used or threatened was necessary to prevent or terminate the interference
- The citizen's beliefs were reasonable

Force intended or likely to cause death or great bodily harm can only be used if the citizen reasonably believes that such force is necessary to prevent imminent death or great bodily harm.

Private citizens can also threaten or use force in defense of a 3rd person, as long as:

- The citizen believed that there was an actual or imminent unlawful interference with the 3rd person
- The citizen believed that the 3rd person was entitled to threaten or use force in self-defense
- The citizen believed that the amount of force used or threatened was necessary for the protection of the 3rd person
- The citizen's beliefs were reasonable

Someone who provokes an attack through unlawful conduct is generally not able to assert the privilege of self-defense.

An aspect of the self-defense statute of particular importance to private security personnel is the concept of "unlawful interference," and the authority of private security personnel to take action (i.e., arrest or detain). As indicated above, the authority of private security to arrest or detain is quite limited, and is no greater than that afforded any private citizen. An attempt by a private security agent to arrest or detain a citizen under circumstances other than those described above is not expressly permitted by law. Such an action would likely be deemed an "unlawful interference," and force used by the citizen against the security agent might be privileged under the self-defense statute.

A private citizen can use force in defense of his or her property if:

- The citizen believed that someone was unlawfully interfering with his or her property
- The citizen believed that the amount of force threatened or used was necessary to prevent or terminate the interference
- The citizen's beliefs were reasonable

A person may never intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defending property.

A private citizen can also use force in defense of a 3rd person's property if:

- The citizen believed that there was an unlawful interference with the property of the 3rd person
- The citizen believed that the 3rd person was entitled to threaten or use force to defend the property
- The citizen believed that the amount of force threatened or used was necessary for the protection of the 3rd person's property
- The citizen believed that the property belonged to a member of his or her immediate family, to a person whose property he or she had a legal duty to protect, to a merchant who employed him or her, or to a library that employed him or her
- The citizen's beliefs were reasonable

Note that there must be some relationship between the citizen using force and the 3rd person whose property is being defended for the force to be privileged under §939.49.

Use of force – citizen's arrests: As indicated above, the Wisconsin statutes addressing use of force by private citizens are limited to situations involving self-defense, defense of others, or defense of property. The statutes do not address the question of how much force a private citizen can use to effect a citizen's arrest. Unfortunately, the courts have not provided any guidance on this issue either—there are no reported Wisconsin decisions addressing it. However, looking to the self-defense and defense of property statutes (939.48 and 939.49) the merchant detention statutes (943.49 (4), 943.50(3) and 943.61(4)), and the privilege statute (939.45(4)) it appears that a general reasonableness standard will apply when analyzing force used to effect a citizen's arrest.