LEGAL UPDATE

City of Madison Police Department

Spring 2014 Captain Victor Wahl

Consent Searches

***Fernandez v. California,* 123 S.Ct. 1126 (2014); Decided February 25, 2014 by the United States Supreme Court**.

In *Fernandez*, police were investigating a robbery. They observed a suspect enter an apartment, and later heard sounds of fighting coming from inside. The officers knocked on the door and were met by a female who looked as if she had been in a physical altercation. While the officers spoke to the female, a male subject (Fernandez) appeared at the door and began shouting at the officers, telling them to leave and that he did not want them in the apartment. Fernandez stepped outside and was taken into custody. The original robbery victim identified Fernandez and he was arrested.

About an hour later officers returned to the apartment, and obtained consent from the female resident to search the premises. The search yielded evidence that incriminated Fernandez.

Fernandez sought to have the evidence suppressed, arguing that since he had expressly refused consent to the officers, the female's consent was invalid. His argument was based on the court's decision in *Georgia v. Randolph*, 547 U.S. 103 (2006). In *Randolph,* the Court ruled that if two parties with joint and equal authority over a premises are present, with one granting police consent to search and one refusing consent to search, the refusal controls and no consent search is permitted.

The Supreme Court rejected Fernandez's arguments, and concluded that the consent search of his residence was reasonable. Two issues were highlighted in the Court's ruling:

- Why is the co-tenant withholding consent absent? Fernandez argued that since he was only absent from the residence because the police had removed him, he should still be able to withhold consent. The court rejected this: "we hold that an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason."

- What about the initial consent refusal while Fernandez was present? Fernandez also argued that since he was present at the scene when he initially refused consent, that refusal should continue to be controlling even after he left the scene. The Court also rejected this, pointing out the impracticality of establishing this as a rule.

The *Fernandez* court clearly limited the scope of *Georgia v. Randolph* to those instances where both parties are physically present. As long as officers do not remove one party from the premises improperly, he/she will not be able to override the consent of the other party.

Anonymous Tips

***Prado Navarette et al v. California,* 188 L. Ed. 2d 680 (2014); Decided April 22, 2014 by the United States Supreme Court**.

The *Prado* case involved an anonymous tip and the degree to which a tip might provide reasonable suspicion to justify a *Terry* stop. A driver called 911 and reported that a vehicle had run them off the road. The caller did not leave a name, but did provide a specific description of the suspect vehicle (including the license plate). An officer responded, and observed the suspect vehicle driving in the area (at a location consistent with when the call had been received). The officer did not observe any driving violations, but stopped the vehicle after following it for about 5 minutes. As officers approached the vehicle they smelled marijuana. A subsequent search of the vehicle yielded 30 pounds of marijuana.

The suspect challenged the arrest, arguing that the anonymous tip did not provide officers with reasonable suspicion justifying the traffic stop.

Courts have struggled with the degree of reliability that should be afforded to an anonymous tip, and have concluded that a bare-bones anonymous tip does not provide reasonable suspicion. While conceding that this case was a close case, the U.S. Supreme Court ruled that the anonymous tip in this case had been sufficient to provide the officers with reasonable suspicion justifying the traffic stop.

This case and others have outlined a variety of factors that will demonstrate reliability for an anonymous tip. These include:

- Whether the tipster exposed him/herself to being identified. Even if they did not provide their name, an anonymous tipster might expose themselves to being

identified, which supports a finding of reliability. This has been demonstrated by the tipster calling 911 (which conveys some identification information) or by following a speeding/reckless/impaired driver while waiting for officers to arrive.

- Whether the tipster explains how they know the information they are reporting. This will often be clear, as the tipster will expressly be reporting what they have seen. But if it is not clear, a court may view the tip as being unreliable.

- Whether officers are able to corroborate anything that the tipster has reported.

- Whether the tipster's report predicts future behavior (which is a strong indicator of reliability).

Officers relying on anonymous tips to effect an investigative stop should be aware of these factors and take them into consideration before taking action. Ideally, officers will obtain reasonable suspicion from their own observations and not have to rely on the anonymous tip to support their actions.

Frisks / Traffic Stops

***Huff v. Reichert,* 744 F.3d 999 (7th Cir. 2014); Decided March 10, 2014 by the Seventh Circuit Court of Appeals**.

The *Huff* case involved two subjects who were pulled over for a minor traffic violation while returning from a Star Trek convention. The officer identified the vehicle's occupants and asked the driver to step from the vehicle. After some routine questioning and data checks, the officer told the driver he would let him go with a warning for the traffic violation. The officer shook hands with the driver and then asked to speak with the passenger (this was about 16 minutes after the stop).

The officer proceeded to speak with the passenger, determining that he was nervous and apprehensive. The driver subsequently asked if he was free to go, and the officer responded, "not in the car." The driver declined to give the officer consent to search the vehicle, and the officer requested that a K9 respond. The officer also performed pat-downs of both the driver and passenger. The K9 alerted on the vehicle, and a subsequent search did not yield any contraband. The officer then told the two that they were free to go (about 50 minutes after the stop).

The driver and passenger sued the officer, alleging a number of Fourth Amendment violations. While the decision touched on a number of issues, it highlighted a number of key points:

- The officer frisked the driver and passenger 27 minutes into the stop. The officer articulated only vague justification for the frisk, and did not highlight any contributing factors/behavior that had occurred during the stop. Courts are reluctant to support a frisk if they think it is a ruse to search for evidence and not based on legitimate safety concerns: "if there were a compelling need to pat down the (the subject), presumably (the officer) would not have waited more than twenty-seven minutes to do so." This is consistent with how other courts have analyzed frisks, being more likely to support them when they happen at the beginning of an encounter, rather than near the end, or as an "afterthought."

- The duration of an investigative detention must be reasonably related to the reason for the stop. While this will vary depending on the circumstances of the particular case, once this time period has elapsed no further detention is permitted, and extending the stop beyond this point is not permitted.

- If you want to transition from a *Terry* stop/detention to a consensual encounter, there must be a clear indication to the subject that the detention is over and that they are free to leave. From that point on (unless new reasonable suspicion develops), the encounter must be viewed as a consensual contact (nothing must communicate to the person that they are not free to leave or terminate the encounter).

New Statutes

A number of new statutes have recently been enacted and will impact police.

Act 348

This Act mandates that certain procedures be followed by agencies investigating officer-involved deaths. MPD has instituted a change in procedures to comply with the law, and will be fine-tuning this process in the future. Key provisions of the Act:

> **175.47 Review of deaths involving officers. (1)** In this section:
> (c) "Officer−involved death" means a death of an individual that results directly from an action or an omission of a law enforcement officer while the law enforcement officer is on duty or while the law enforcement officer is off duty but performing activities that are within the scope of his or her law enforcement duties.
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> **(2)** Each law enforcement agency shall have a written policy regarding the investigation of officer−involved deaths that involve a law enforcement officer employed by the law enforcement agency.

(3) (a) Each policy under sub. (2) must require an investigation conducted by at least two investigators, one of whom is the lead investigator and neither of whom is employed by a law enforcement agency that employs a law enforcement officer involved in the officer−involved death.

(b) If the officer−involved death being investigated is traffic−related, the policy under sub. (2) must require the investigation to use a crash reconstruction unit from a law enforcement agency that does not employ a law enforcement officer involved in the officer−involved death being investigated, except that a policy for a state law enforcement agency may allow an investigation involving a law enforcement officer employed by that state law enforcement agency to use a crash reconstruction unit from the same state law enforcement agency.

(c) Each policy under sub. (2) may allow an internal investigation into the officer−involved death if the internal investigation does not interfere with the investigation conducted under par. (a).

(5) (a) The investigators conducting the investigation under sub. (3) (a) shall, in an expeditious manner, provide a complete report to the district attorney of the county in which the officer−involved death occurred.

(b) If the district attorney determines there is no basis to prosecute the law enforcement officer involved in the officer−involved death, the investigators conducting the investigation under sub. (3) (a) shall release the report.

Act 307

This removes voluntary intoxication as a criminal defense, and modified the circumstances under which involuntary intoxication is a defense.

939.42 Intoxication. An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:

(1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.

(2) Negatives the existence of a state of mind essential to the crime.

Act 194

This Act provides immunity from prosecution for a number of offenses for those who provide certain types of assistance after an overdose:

961.443 Immunity from criminal prosecution; possession.
(1) DEFINITIONS. In this section, "aider" means a person who does any of the following:

(a) Brings another person to an emergency room, hospital, fire station, or other health care facility if the other person is, or the person believes him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(b) Summons a law enforcement officer, ambulance, emergency medical technician, or other health care provider, to assist another person if the other person is, or the person believes him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(c) Dials the telephone number "911" or, in an area in which the telephone number "911" is not available, the number for an emergency medical service provider, to obtain assistance for another person if the other person is, or the person believes him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(2) IMMUNITY FROM CRIMINAL PROSECUTION. An aider is immune from prosecution under s. 961.573, for the possession of drug paraphernalia, and under s. 961.41 (3g) for the possession of a controlled substance or a controlled substance analog, under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

Act 254

This Act changes the law on harboring or aiding felons. The prior law contained an exemption so that it could not be enforced against certain family members of the felon being harbored/aided (spouse, parent, etc.). The new law removes that exemption so the statute can be enforced against family members.

946.47 Harboring or aiding felons. (1) Whoever does either of the following may be penalized as provided in sub. (2m):

(a) With intent to prevent the apprehension of a felon, harbors or aids him or her; or

(b) With intent to prevent the apprehension, prosecution or conviction of a felon, destroys, alters, hides, or disguises physical evidence or places false evidence.

(2) As used in this section "felon" means either of the following:

(a) A person who commits an act within the jurisdiction of this state which constitutes a felony under the law of this state; or

(b) A person who commits an act within the jurisdiction of another state which is punishable by imprisonment for one year or more in a state prison or penitentiary under the law of that state and would, if committed in this state, constitute a felony under the law of this state.

Act 375

This Act requires law enforcement to obtain a search warrant prior to tracking or identifying the location of a communications device (which includes mobile phones). A tracking warrant issued under the new statute (§968.373) cannot extend beyond 30 days unless extended by a judge. The statute also contains to exceptions:

- If the customer/subscriber provides consent.
- If there is an emergency involving danger of death or serious physical injury and tracking the device is relevant to preventing death/injury or mitigating the injury.

Act 350

This made several changes to the Inattentive Driving statute (note that these changes are not effective until August 1, 2014):

346.89 Inattentive driving. (1) No person while driving a motor vehicle may be engaged or occupied with an activity, other than driving the vehicle, that interferes or reasonably appears to interfere with the person's ability to drive the vehicle safely.

(3) (a) No person may drive, as defined in s. 343.305 (1) (b), any motor vehicle while composing or sending an electronic text message or an electronic mail message.

(b) This subsection does not apply to any of the following:

1. The operator of an authorized emergency vehicle.
2. The use of any device whose primary function is transmitting and receiving emergency alert messages and messages related to the operation of the vehicle or an accessory that is integrated into the electrical system of a vehicle, including a global positioning system device.
3. An amateur radio operator who holds a valid amateur radio operator's license issued by the federal communications commission when he or she is using dedicated amateur radio 2−way radio communication equipment and observing proper amateur radio operating procedures.
4. The use of a voice−operated or hands−free device if the driver of the motor vehicle does not use his or her hands to operate the device, except to activate or deactivate a feature or function of the device.

(4) Subject to sub. (3), no person who holds a probationary license issued under s. 343.085, or an instruction permit issued under s. 343.07, may drive, as defined in s. 343.305 (1) (b), any motor vehicle while using a cellular or other wireless telephone, except to report an emergency.

(5) Subject to subs. (3) and (6), no person while driving a motor vehicle, other than an authorized emergency vehicle, a commercial motor vehicle described in s. 340.01 (8), or a tow truck, may operate or be in a position to directly observe any electronic device located within the vehicle that is activated and that is providing entertainment primarily by visual means. This subsection does not prohibit a person from using a cellular telephone for purposes of verbal communication.

(6) Subsection (5) does not apply to any of the following:

(a) Any global positioning system device.

(b) The display by any device of information related to the operation, navigation, condition, radio, or safety of the vehicle or that is intended to be used to enhance the driver's view forward, behind, or to the sides of a motor vehicle.

(c) The display by any device of information related to traffic, road, or weather conditions.

(d) Any device in a vehicle that permits the vehicle driver to monitor vehicle occupants seated rearward of the driver.

(e) Any device installed or mounted, either permanently or temporarily, in the vehicle that, with respect to the vehicle operator, functions as provided in par. (a), (b), (c), or (d) while simultaneously providing entertainment visible only from passenger seats of the vehicle.

Act 208

This Act prohibits—in most instances—an employer from requesting or requiring an employee or applicant to disclose access information, grant access, or allow observation of a personal internet account as a condition of employment. This does not impact an employer's ability to conduct misconduct investigations, or to access employer-provided accounts/devices. The biggest impact will likely be on hiring practices, as employers can no longer require applicants to provide access to their social media pages as part of a hiring process.

Act 213

This Act creates several statutes applying to drones. It creates limitations on use of drones by law enforcement, prohibits use of drones by non-law enforcement personnel, and prohibits the use of a drone that carries a weapon.

175.55 Use of drones restricted. (1) In this section:

(a) "Drone" means a powered, aerial vehicle that carries or is equipped with a device that, in analog, digital, or other form, gathers, records, or transmits a sound or image, that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, and can fly autonomously or be piloted remotely. A drone may be expendable or recoverable.

(b) "Wisconsin law enforcement agency" has the meaning given in s. 165.77 (1) (c) and includes the department of justice and a tribal law enforcement agency.

(2) No Wisconsin law enforcement agency may use a drone to gather evidence or other information in a criminal investigation from or at a place or location where an individual has a reasonable expectation of privacy without first obtaining a search warrant under s. 968.12. This subsection does not apply to the use of a drone in a public place or to assist in an active search and rescue operation, to locate an escaped prisoner, to surveil a place or location for the purpose of executing an arrest warrant, or if a law enforcement officer has reasonable suspicion to believe that the use of a drone is necessary to prevent imminent danger to an individual or to prevent imminent destruction of evidence.

941.292 Possession of a weaponized drone. (1) In this section, "drone" means a powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, and can fly autonomously or be piloted remotely. A drone may be expendable or recoverable.

(2) Whoever operates any weaponized drone is guilty of a Class H felony. This subsection does not apply to a member of the U.S. armed forces or national guard acting in his or her official capacity.

942.10 Use of a drone. Whoever uses a drone, as defined in s. 175.55 (1) (a), with the intent to photograph, record, or otherwise observe another individual in a place or location where the individual has a reasonable expectation of privacy is guilty of Class A misdemeanor. This section does not apply to a law enforcement officer authorized to use a drone pursuant to s. 175.55 (2).