LEGAL UPDATE

City of Madison Police Department

Summer 2008 Captain Victor Wahl

Miranda—Invocation

***State v. Hambly*, 745 N.W.2d 48 (2008); Decided February 7, 2008 by the Wisconsin Supreme Court.**

Hambly was arrested for drug violations. As he was being walked to a squad car, he told the arresting officer that he wanted to speak with an attorney. The officer told Hambly that he would have an opportunity to call an attorney from the station. One officer waited in the squad with Hambly while another searched Hambly's vehicle. During this time, Hambly told the officer he did not understand why he was under arrest. When the officer informed Hambly that he had sold cocaine to an informant, Hambly indicated that he wanted to speak to him.

The officer then read Hambly his *Miranda* rights; Hambly indicated that he understood his rights and wished to speak with the officer. The officer removed Hambly's handcuffs and moved him to the front seat of the squad. Hambly then read and signed a *Miranda* waiver form. The officer then interviewed Hambly for about an hour; during the interview Hambly admitted selling cocaine.

Hambly challenged the admissibility of his statements to the officer, claiming that he had invoked his right to counsel (while being walked to the squad car).

A *Miranda* refresher: *Miranda* warnings are required prior to any custodial interrogation. If a suspect waives his or her rights, questioning is permitted. If a suspect unambiguously invokes his or her rights (to counsel or silence), the police must scrupulously honor the invocation and cease questioning. If the suspect invoked his or her right to counsel, police questioning is only permitted if the suspect re-initiates communication with the police (and makes a subsequent waiver of *Miranda* rights). If the suspect invoked his or her right to silence, there are limited circumstances under which police are permitted to re-initiate contact with the suspect.

The first issue in *Hambly* was whether his statement while being walked to the squad car served as an unambiguous invocation of his right to counsel. *Miranda* applies only to custodial interrogation, and it is clear that "a person who is not in custody cannot anticipatorily invoke a Fifth Amendment *Miranda* right to counsel or right to remain silent." The *Hambly* court was presented with the question of whether a suspect in custody—but who was not being interviewed and had not been read *Miranda* rights—could invoke his or her rights to counsel/silence.

The court considered two competing views: first, that a suspect in custody can only invoke his or her rights to counsel/silence in response to imminent or impending interrogation; or, second, that a suspect in custody can invoke his or her rights to counsel/silence at any time they are in custody.

The justices in the *Hambly* decision were evenly split on this question, with three justices concluding that a suspect can invoke his or her rights at any point while in custody, and three justices concluding that the court did not need to establish such a standard (one justice did not participate in the case).

So, the safest course of action is to assume **that a suspect who is in custody can invoke his or her *Miranda* rights (to counsel or silence) at any time he or she is in custody.** This applies even if the suspect has not been provided with *Miranda* warnings or questioning is not imminent.

The next issue was whether the officer's statements to Hambly (in request to Hambly's question about why he had been arrested) constituted interrogation. Interrogation includes express questioning or its "functional equivalent," and can be defined by asking whether an objective observer would conclude that the officer's conduct or words would be likely to elicit an incriminating response. The *Hambly* court concluded that the officer's statements (a simple response to Hambly's question) did not constitute interrogation.

The final issue before the *Hambly* court was whether Hambly had re-initiated communication with the officer. The court pointed out that:

> [I]nquiries or statements…relating to routine incidents of the custodial relationship would not be sufficient to constitute "initiation," but that questions or statements that under the totality of the circumstances evinced a willingness and a desire for generalized discussion about the investigation would.

The court also pointed out that the fact that his "re-initiation" of communication with police took place shortly after he invoked his rights was not the only relevant factor:

> Whether a suspect "initiates" communication or dialogue does not depend solely on the time elapsing between the invocation of the right to counsel and the suspect's beginning an exchange with law enforcement, although the lapse of time is a factor to consider.

The court went on to conclude that Hambly had re-initiated

communication with the officer, and that he subsequently made a valid waiver of his *Miranda* rights. As a result, his statement was ruled to be admissible.

Key points to take from the *Hambly* case:

- A suspect in custody can likely invoke his or her right to counsel or silence at any time—regardless of whether he or she is being questioned or if questioning is imminent.

- A suspect who has invoked his or her right to counsel can only be questioned by police if the suspect re-initiates communication with officers. Such re-initiation can occur a short time period after the invocation.

Search Warrants

***State v. Pender*, 2008 WI App 47 (2008); Decided February 19, 2008 by the Wisconsin Court of Appeals.**

In *Pender*, officers executed a search warrant at a residence for items that had been offered for sale on eBay. The suspect—Pender—had accepted payment for items but never delivered them. Officers seized a number of items listed in the warrant, and also recorded serial numbers of electronic devices not listed in the warrant. They also took photos of book titles in Pender's library.

Pender was charged with several criminal counts; he sought to have the evidence seized during the execution of the warrant suppressed, arguing that the officers had exceeded the scope of the warrant.

Officers executing a search warrant are limited to searching areas that could contain items listed in the search warrant. So, for example, an officer executing a search warrant for a stolen television would be limited to searching areas of a dwelling where the television could be. The scope of the search is limited by the items being searched for.

If officers exceed the scope of a search warrant, the typical remedy is to suppress only items seized outside the scope of the warrant. However, if the search is conducted in "flagrant disregard" of the limitations of the warrant, all items seized—including items listed in the warrant—can be suppressed. Pender argued that the officers searching his residence had acted in flagrant disregard of the warrant, and that all items seized should therefore be suppressed.

The Court of Appeals disagreed, concluding that the officers' actions beyond the scope of the warrant (moving items not listed in the warrant to photograph them,) were not so serious as to require suppression of all items seized. The court pointed out that:

> [B]lanket suppression is an extraordinary remedy, used only when the violations of the warrant's requirements are so extreme that the search essentially is transformed into an impermissible general search.

Moving items not listed in the search warrant to document their serial numbers was clearly beyond the scope of the warrant. However, because the officers did not act in "flagrant disregard" of the warrant, the seized items (all named in the warrant) were not suppressed.

Clearly, the manner in which a search warrant is drafted will impact the permissible scope of the search. Being as broad as possible—within the limits of the probable cause supporting the warrant—when listing items to be searched for will provide more flexibility when conducting the search.

Also note that officers executing a search warrant can seize items not listed in the warrant that are in plain view. There are three requirements for a plain view seizure:

- The officer must be lawfully in the position where he or she is making the observation.

- It must be immediately apparent to the officer that what he or she is looking at is contraband (the officer's observations must provide probable cause).

- The officer must have lawful right of access to the evidence.

So, for example, while executing a search warrant for a stolen television, if an officer observes contraband in plain view (like drug paraphernalia sitting on a table, for example) the item may be seized. But if it is not immediately apparent that the item is contraband, further searching/inspection (like moving an item to check a serial number) is not permissible.

Search Incident to Arrest

***State v. Littlejohn*, 2008 WI App 45 (2008); Decided January 10, 2008 by the Wisconsin Court of Appeals.**

Two officers observed Littlejohn driving a vehicle in a suspicious manner. The officers followed him for a short period, until he pulled into a parking lot. As the officers pulled in behind him, Littlejohn exited his vehicle and locked it. He began walking away from the car and was contacted by the officers. They determined that Littlejohn's driver's license was revoked, and he was handcuffed and arrested. After Littlejohn was placed in a squad, an officer searched the passenger compartment of his vehicle, finding apparent marijuana and cocaine.

Littlejohn was charged with several drug offenses, and challenged the search of his vehicle.

Recall that anytime an officer makes an arrest, a search of the arrestee and the arrestee's area of "immediate control" is justified. This search authority has been extended to the passenger compartment of an automobile:

> [W]hen (an officer) has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile…(police) may also examine the contents of any containers found within the passenger compartment…whether the container is open or closed.

The search of a passenger compartment incident to the arrest of an occupant must be contemporaneous with the arrest, meaning that the search begins promptly after the arrest and that the arrested person remains at the scene.

Littlejohn argued that the search of his vehicle was invalid because he had exited his vehicle prior to the time he was arrested, and because his vehicle had been locked. The Court of Appeals rejected both arguments.

In *Thornton v. United States*, 541 U.S. 615 (2004), the U.S. Supreme Court ruled that officers have the authority to search the passenger compartment of a vehicle incident to a lawful arrest of an "occupant" or a "recent occupant." It is not necessary that the arrested person be in the vehicle at the time police initiate contact with him or her. The propriety of the search will turn on the arrested person's "temporal or spatial relationship to the car" at the time of arrest. So, how long the person has been out of the vehicle and how far away from the vehicle the person is at the time of arrest—or at the time police initiate contact—will be considered. While courts have not provided clear guidance on what the outer limit of this authority is, cases where searches of a vehicle's passenger compartment incident to the arrest of an occupant have had a few similarities:

- The officers observe the suspect exit the vehicle, make contact almost immediately and arrest follows.
- The suspect is within close physical proximity of the vehicle at the time officers initiate contact.

The *Littlejohn* court concluded that the temporal and spatial relationship of Littlejohn was sufficient to justify the search.

The court also rejected Littlejohn's argument that the fact he had locked his vehicle upon exiting rendered the search invalid:

> We perceive no reason…to distinguish between a locked glove compartment and a locked passenger compartment.

So, the court concluded that the search of Littlejohn's vehicle was reasonable, and that the evidence seized was admissible.

Interviews—Honesty Testing Devices

***State v. Davis*; 2008 WI 71 (2008); Decided June 26, 2008 by the Wisconsin Supreme Court.**

The *Davis* case involved the permissible relationship between honesty testing devices and police interviews. Davis was a suspect in the sexual assault of a child. After being interviewed in his home, Davis agreed to voluntarily come to the police station and submit to a voice stress analysis. Davis initially waited with the primary investigating detective in an interview room, before being escorted to another room by the detective conducting the voice stress analysis. During the test, Davis was asked questions about the crime. After the test, the detective administering the test concluded that Davis was being deceptive; several other officers—including the primary detective—concurred.

Both detectives again spoke with Davis in the second room. Davis was asked if he wanted to speak with the primary detective, and he responded affirmatively. The second detective announced that he was done with the voice stress analysis test, and the primary detective escorted Davis back to the original interview room. There, he interviewed Davis further and obtained incriminating statements from Davis.

Davis was charged with first-degree sexual assault of a child. He sought to have his statements suppressed, arguing that the statement was involuntary and was privileged. The Wisconsin Supreme Court rejected both arguments, and concluded that the statement was admissible.

§905.065 of the Wisconsin Statutes, states that any oral or written communications obtained during or any results of an examination using an honesty testing device is privileged. This means that the results of an honesty testing device examination, or any statements obtained during such an examination, are generally inadmissible.

Wisconsin courts have ruled on §905.065 over the years, and concluded that statements related to the use of honesty testing devices if the statement and the use of the honesty testing device are discrete events:

> [S]tatements made during honesty testing are generally excluded, but if those statements are given at an interview that is totally discrete from the honesty testing…and the statement was given voluntarily, then the statement is admissible. However, if the statements and examination are not totally discrete events but instead are considered one event, then the statements must be excluded…

The following factors will be analyzed to make this determination:

- Whether the defendant was told the honesty testing device examination was over.
- Whether any time passed between the honesty testing device examination and the statement.
- Whether the officer conducting the honesty testing device examination differed from the officer who took the statement.
- Whether the location where the honesty testing device examination was conducted differed from where the statement was taken.
- Whether the honesty testing device examination was referred to when obtaining the statement.

A court will look to these five factors when determining whether a statement that was related to an honesty testing examination (polygraph, voice stress analysis, etc.) will be admissible. The *Davis* court concluded that the voice stress analysis test and his subsequent statement were two discrete events, and that the statement was not privileged.

The court also considered Davis's claim that his statement was involuntary. The court pointed out:

> A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.

Courts will assess the voluntariness of a statement by looking at the totality of the circumstances, considering the personal characteristics of the defendant (age, education, intelligence, prior experience with law enforcement, etc.) and the "possible pressures" imposed by law enforcement (the general conditions under which the statement was taken, the length of the interview, whether any psychological pressure was used, and whether any inducements, threats, methods or strategies were utilized in order to elicit the statement). Some level of improper police behavior is necessary for a statement to be considered involuntary, though the susceptibility of the defendant to police tactics (based on age, education, etc.) is relevant to the degree of such behavior required for a finding of involuntariness.

The *Davis* court concluded that his statement had been voluntary. While the overall circumstances of the interview were non-coercive, the key issue to the court was that the detective did not refer to the voice stress analysis test or its result during the interview.

Since Davis's statement was voluntary, and was a discrete event from the voice stress analysis test he had been administered, it was ruled to be admissible.

Bank Records—Reasonable Expectations of Privacy

***State v. Popenhagen*, 2008 WI 55 (2008); Decided June 4, 2008 by the Wisconsin Supreme Court.**

[Thanks to Detective Matt Tye for submitting this summary of *State v. Popenhagen*]

In *Popenhagen*, the Wisconsin Supreme Court granted a defendant's motion to suppress both bank documents and the incriminating statements that the defendant made after being confronted with the documents. The documents were obtained by the police pursuant to a subpoena issued without a showing of probable cause in violation of Wis. Stat. section 968.135.

As part of the investigation of an employee theft of approximately $29,000 the police sought bank records through subpoenas. An officer from the Minocqua Police Department filled out an affidavit in support of the request for a subpoena for documents. Neither the police nor the Oneida County District Attorney's Office included any affidavit showing probable cause in the application to the circuit court for the subpoenas. Furthermore, the circuit court issued the subpoenas without recording a finding of probable cause. The subpoenas in this case were sought by the Oneida County District Attorney's Office pursuant to Wis. Stat sections 805.07 and 885.01. In short, sections 805.07 and 885.01 provide for subpoenas when a court proceeding is pending. Section 968.135 provides for subpoenas being issued prior to a pending court proceeding, but 968.135 requires a showing of probable cause. The State did not dispute that the subpoenas were sought under the wrong statute and that a showing of probable cause was required, but disputed that suppression was the appropriate remedy.

The State contended that the defendant lacked standing to challenge subpoenas issued to her banks. The State also argued that suppression of the bank documents was not an appropriate remedy under section 968.135, and that suppression of the defendant's incriminating statements as evidence was not an appropriate remedy for a violation of section 968.135. The Wisconsin Supreme Court disagreed with the State on all three issues.

The court found that the defendant had standing to challenge the subpoenas issued to her banks. The court held that section 968.135 "protects the interests of persons whose documents are sought in addition to protecting the interests of the person on whom the subpoena is served." This language by the court suggests that the defendant had some ownership rights in the documents at issue. It is clear that the bank or whatever entity is being served the subpoena should have some forum to challenge the subpoena. It is not as clear how the court's extension of the protections of

section 968.135 would be applied. Do the records maintained by phone companies belong to the phone company or to the subscriber? And if the entity being served the subpoena complies with the subpoena, when does the "person whose documents are sought" challenge the subpoena? This aspect of the court's decision poses potential issues for investigators. Clearly in this case there were errors made by the investigators and the District Attorney's office; the state conceded as much. If a defendant can have standing to challenge documents released by subpoena, does this same right extend to a defendant challenging a court's finding of probable cause in issuing the subpoena? Furthermore, if a business releases documents to an investigator without a subpoena, could these documents ultimately be suppressed because they were not sought by subpoena. If the person whose documents are being sought has a right to challenge a subpoena, it would seem logical that they could challenge documents released without a subpoena.

In discussing whether or not suppression was the appropriate remedy the court held that the legislature need not expressly set forth suppression as a remedy for violating a particular statute. The court pointed out that even the State conceded that section 968.135 was violated. Furthermore, the court stated that if suppression of documents obtained by a subpoena not complying with probable cause requirements was not allowed, the safeguards of 968.135—namely that probable cause be shown to the circuit court—would be meaningless.

The final issue discussed by the court was the suppression of the incriminating statements made by the defendant when confronted by the police with the bank documents. The court held that suppressing incriminating statements derived directly from documents obtained in violation of section 968.135 is necessary to protect a person fully from the State's acquiring documents without complying with the statute.

Justice David Prosser wrote a concurring opinion arguing that the majority opinion was too broad. He asserted there was no showing of bad faith on the part of law enforcement and that procedural errors do not require such drastic measures as suppression. Justice Prosser wrote that he was dissenting in part because the proper remedy is to "permit the judge—when the error is discovered—to quash the subpoena and require the State to subsequently seek the documents through a properly enforced subpoena."

Justice Patience Roggensack wrote in a dissenting opinion that the court has no authority to suppress the bank records or the statements made by the defendant. Justice Roggensack articulated that section 968.135 does not authorize suppression of the bank records and that the defendant has no privacy rights in the bank records under the U.S. or Wisconsin Constitution.

A final issue to consider is how subpoenas are documented. In this case an affidavit that was supposedly filled out by the police could not be located. According to the Dane County District Attorney's Office, best practices require that the original subpoena and documents received be placed in evidence with copies attached to the original reports.

Statutory Changes

A few relevant statutory changes:

939.22 (10) "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; <u>any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood</u>; any electric weapon, as defined in s. 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

[This provision adds language to the definition of dangerous weapon to include items used to impede breathing or circulation.]

939.22(23) "Petechia" means a minute colored spot that appears on the skin, eye, eyelid, or mucous membrane of a person as a result of a localized hemorrhage or rupture to a blood vessel or capillary.

939.22(38) "Substantial bodily harm" means bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a <u>petechia</u>; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.

[These statutes define Petechia and include it in the list of injuries that are considered substantial bodily harm.]

940.235 Strangulation and suffocation. (1) Whoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person is guilty of a Class H felony.

[This statute creates a new crime.]