LEGAL UPDATE

City of Madison Police Department

Summer 2010 Captain Victor Wahl

Miranda

***Berghuis v. Thompkins*, No. 08-1470 (2010); Decided June 1, 2010 by the United States Supreme Court.**

In *Thompkins*, police were investigating a shooting in which one person was killed and another injured. Investigation identified Thompkins as a suspect. He was arrested about a year later in another state, and two detectives traveled to the location of his arrest to speak to him.

The detectives presented Thompkins with a written form outlining the *Miranda* warnings. One of the detectives read four of the warnings, then asked Thompkins to read the fifth warning (which he did). Thompkins declined to sign the form indicating that he understood the rights. The detectives then began to question Thompkins. Thompkins was largely silent during the questioning, though he did not indicate that he wanted an attorney or that he did not want to talk with the detectives. After almost three hours, Thompkins made some incriminating statements (though he refused to provide a written confession).

Thompkins was charged with homicide, as well as several other firearms-related offenses. He sought to have his statements suppressed, arguing that he had invoked his right to remain silent during the questioning. The trial court disagreed and allowed the use of Thompkins' statements. He was convicted after a jury trial.

Thompkins appealed his conviction, and after winding its way through lower courts, the case was accepted by the U.S. Supreme Court. The court's analysis focused on two questions:

- Had Thompkins invoked his right to remain silent?
- Had Thompkins waived his *Miranda* rights?

The court first concluded that Thompkins had not invoked his right to remain silent. Prior court decisions have ruled that a suspect's invocation of his/her right to counsel must be unambiguous. The *Thompkins* court held that the same standard applies to invocation of the right to remain silent.

> Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "right to cut off questioning"…Here he did neither, so he did not invoke his right to remain silent.

So, to invoke the right to remain silent—in the context of a custodial interrogation—the suspect must clearly and unambiguously communicate his/her intent.

The court next considered whether Thompkins had waived his right to remain silent. "Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived *Miranda* rights' when making the statement." So, it is not enough to simply show that a suspect did not invoke his or her right to silence (or counsel); it is necessary to show that the suspect waived his or her right to silence (or counsel).

A number of court decisions have held that an express *Miranda* waiver is not required, and that an implied waiver can be made based on the "actions and words of the person interrogated." The *Thompkins* court reaffirmed this rule, stating:

> [A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.

The court concluded that Thompkin's conduct constituted an implied waiver of his right to remain silent, and that his statements were admissible.

A few important points about *Miranda* in light of the *Thompkins* case:

- It is always preferable to obtain an express *Miranda* waiver from a suspect, either verbally or in writing. MPD personnel should continue to use their *Miranda* cards when providing *Miranda* warnings, including the waiver question.
- It is always necessary to demonstrate that the suspect understood his/her *Miranda* rights once they have been explained.
- In all circumstances the waiver and statement must be obtained voluntarily, without coercion.
- It is critical to complete thorough and detailed reports regarding custodial interrogations, particularly with respect to *Miranda*. Clearly indicate how the *Miranda* warnings were provided, demonstrate how the suspect understood the rights, and how he or she waived the rights. Include exact quotes and any other necessary details.

Open Carry—Disorderly Conduct

***Gonzalez v. West Milwaukee*, 2010 WL 1904977 (E.D.Wis); Decided May 11, 2010 by the U.S. Federal District Court for the Eastern District of Wisconsin.**

This is a civil case, involving a subject (Gonzalez) who was arrested twice for entering retail stores while openly carrying a firearm. In both instances, Gonzalez was arrested for disorderly conduct, and prosecutors declined to file charges. Gonzalez sued the officers and their agencies for violating his civil rights.

In the first incident, Gonzalez entered a Menard's store in West Milwaukee with an unconcealed firearm in a holster strapped to his thigh. The store was busy, and there were up to seventy-five employees working at the time. The store manager called 911, and advised that employees were "nervous" and "freaked out" by the presence of Gonzalez. Officers arrived and subsequently contacted Gonzalez in a vehicle in the parking lot and arrested him for disorderly conduct.

In the second incident, Gonzalez entered a Wal-Mart store in Chilton, again with an unconcealed firearm in his holster. The store manager called 911, and explained that she was concerned about safety in the store. A deputy responded and observed that the manager was nervous and visibly upset. The deputy also determined that Gonzalez had been attempting to purchase ammunition, and that an employee was so frightened that he pretended not to have the keys necessary to access the ammunition. Gonzalez was contacted in the store and arrested for disorderly conduct.

Prosecution was declined in both cases, and the firearm was returned to Gonzalez. The district court hearing the civil suit analyzed the incidents in the context of Wisconsin's disorderly conduct statute, and concluded that the officers in both instances had probable cause to arrest Gonzalez:

> No reasonable person would dispute that walking into a retail store openly carrying a firearm is highly disruptive conduct which is virtually certain to create a disturbance. This is so because when employees and shoppers in retail stores see a person carrying a lethal weapon, they are likely to be frightened and possibly even panicky. Many employees and shoppers are likely to think that the person with the gun is either deranged or about to commit a felony or both. Further, it is almost certain that someone will call the police. And when police respond to a "man with a gun" call, they have no idea what the armed individual's intentions are. The volatility inherent in such a situation could easily lead to someone being seriously injured or killed.

The court concluded that the officers' actions were reasonable, and dismissed the civil suits against them.

While this was a civil case, it does demonstrate how one court applied the disorderly conduct statute to open carry situations. The Spring 2009 MPD Legal Update discussed the issue in more detail, but a critical component of these cases will be the ability to demonstrate that the conduct in question caused or was likely to cause a disturbance. If officers determine that a disorderly conduct arrest in an open carry situation is warranted, they should obtain witness statements (as many as possible), articulate their own observations, and describe the context (location, time, etc.) in which the conduct took place.

Child Pornography

***State v. Mercer*, 324 Wis.2d 506 (Ct. App. 2010); Decided March 31, 2010 by the Wisconsin Court of Appeals.**

Mercer was the human resources director for the City of Fon du Lac. The City installed monitoring software on all employees' work computers, originally to decide which computers to upgrade. The monitoring software also had the capability to track how each computer was being used, and the City activated that feature. The software showed that Mercer was regularly using his work computer to access websites featuring child pornography. Mercer was eventually charged with multiple counts of possession of child pornography, and convicted after a jury trial.

Mercer appealed his conviction. He argued that he had never actually possessed any child pornography; he had never downloaded any files, nor was any child pornography stored on his computer's hard drive. The evidence presented simply showed—through use of the tracking software—that Mercer had repeatedly navigated to child pornography sites and that he had attempted to erase his internet history.

The court rejected Mercer's argument, and upheld his conviction. Because Mercer had intentionally sought out the images and had exercised control over them, he had possessed them within the meaning of the statute:

> We conclude that an individual knowingly possesses child pornography when he or she affirmatively pulls up images of child pornography on the internet and views those images knowing that they contain child pornography.

GPS Tracking

***State v. Sveum*, 2010 WI 92 (2010); Decided July 20, 2010 by the Wisconsin Supreme Court.**

In *Sveum*, officers investigating a stalking situation decided to track the suspect's vehicle using a GPS device. A court order was obtained authorizing the installation and monitoring of the device. The device was subsequently installed on the suspect's vehicle (which was parked in a driveway). The device was replaced two times to replenish the battery. The stored data in the GPS devices revealed incriminating information, and Sveum was eventually charged with stalking. Sveum sought to have all the GPS

evidence suppressed, arguing that the installation and monitoring of the device violated the 4th Amendment. The Court of Appeals rejected Sveum's arguments, concluding that the placement and monitoring of the device did not constitute a search under the 4th Amendment. Sveum appealed that decision to the Wisconsin Supreme Court.

The Supreme Court rejected Sveum's argument and upheld his conviction, but relied on a different theory than the Court of Appeals. The Supreme Court chose not to decide the issue of whether attaching and monitoring a GPS device is a search under the 4th Amendment. Instead, the court analyzed whether the court order authorizing the installation and monitoring of the GPS device was a valid warrant. Despite the fact that Wisconsin's statute on search warrants is inconsistent with GPS monitoring in some respects, the *Sveum* court concluded that the court order was a valid warrant, and that the officers had executed it in a reasonable manner.

So, a few points on installation and monitoring of GPS tracking devices:

- If the vehicle that the device will be used on is located in a place not accessible to the public, a warrant is required.
- If the attachment of the device requires opening the vehicle (trunk, hood, etc.) or hardwiring the device to the vehicle, obtaining a warrant is advisable.
- If the vehicle is located in a place accessible to the public, and the device is self-contained and simply attached to the vehicle, a warrant is likely not required. If it is a close call on whether the vehicle location will be considered accessible to the public, obtaining a warrant is advisable.
- A warrant is required to track a vehicle in places not open to public surveillance.

Both *Sveum* courts encouraged the Wisconsin Legislature to enact legislation regarding GPS monitoring.

Sveum was a Madison PD case; Lieutenant Ricksecker—who was a detective at the time—was the primary investigator and obtained the court order.

Employee Text/Email Messages

***Schill v. Wisconsin Rapids School District*, 2010 WI 86 (2010); Decided July 16, 2010 by the Wisconsin Supreme Court.**

***City of Ontario v. Quon*, 130 S.Ct. 2619 (2010); Decided June 17, 2010 by the U.S. Supreme Court.**

Two recent cases addressed the level of privacy that should be afforded to employee electronic messages.

In the *Schill* case, the Wisconsin Rapids School District received a public records request for all emails sent/received by a group of teachers employed by the district. The teachers did not object to the release of their work-related emails, but they did object to the release of purely personal emails. The court, after a lengthy analysis, concluded that employees' personal emails are not subject to release under Wisconsin's Public Records statute.

So, when reviewing public records requests for employee emails, a records custodian will have to determine whether the email is purely personal in nature. If so, then the email cannot be released. If it is partially personal, then the personal content must be redacted prior to release. Three key points:

- MPD Policy and City of Madison APM speak to the appropriate use of City computers and electronic communications; these policies are unaffected by the *Schill* decision.
- The *Schill* decision speaks only to the release of emails under Wisconsin's Public Records statute. It does not impact the capability of an employer to review an employee's electronic communications (see below) or affect other means by which communications might be obtained (such as a subpoena).
- An otherwise personal email could still be subject to release if it has a connection to a government function. An example would be a personal email that violated departmental policy and resulted in an internal investigation. The email would then have a connection to a government function (discipline) and would likely be subject to release.

The *Quon* case addressed the issue of whether an employer is permitted to read communications (text messages) sent on a pager owned by the employer and issued to the employee. Quon was a police sergeant who was issued a two-way pager capable of sending and receiving text messages. The City had a policy reserving the right to monitor all network activity (email, internet use, etc.). The text messages sent through the pager issued to Quon were transmitted and stored exclusively through the private wireless carrier; the messages did not pass through City computers. The City made it clear to employees that text messages sent through the pagers would be treated the same as emails and were subject to auditing.

Quon's text message usage exceeded the monthly limits, and his supervisor told him that he could reimburse the City for the overage rather than having the messages audited. For several months, Quon reimbursed the City for excessive text messages. His supervisor subsequently audited the text messages and noted that many were not work related and that some were sexually explicit. Quon was eventually disciplined as a result; he subsequently claimed that the City's review of his text messages had violated the 4th Amendment.

The Supreme Court has not clearly ruled on what expectation of privacy a public employee has in the workplace, and the court declined to do so in the *Quon* case. The court has made it clear, however, that public employers do have the authority to conduct workplace searches without a warrant under certain circumstances:

> Where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation 'for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.

This standard is lower than the probable cause standard; the justification for the search must be reasonable (reasonable suspicion) and the scope of the search must be reasonable. Lower courts have consistently held that workplace searches motivated by both work-related and criminal investigation purposes are generally permissible under this lower standard.

The *Quon* court did not address whether he had a reasonable expectation of privacy in the text messages that were audited, but concluded that the review was permissible: "because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable."

New Statutes

Resisting/Obstructing—Act 251 added a subsection—paragraph (2r) – to the resisting or obstructing an officer statute:

(1) Except as provided in subs. (2m) and (2r), whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority is guilty of a Class A misdemeanor.

(2r) Whoever violates sub. (1) and causes substantial bodily harm to an officer is guilty of a Class H felony.

OVMWI Testing—Act 163 amended 343.305, expanding the implied consent statute to two additional situations:

> 343.305(3)(ar)1. allows for chemical testing of a driver who has been in an accident that caused substantial bodily harm if an officer detects any presence of alcohol or controlled substances on the driver.
>
> 343.305(3)(ar)2. allows for chemical testing of a driver who has been in an accident that caused the death of or great bodily harm to any person, if an officer has reason to believe that the person violated any state or local traffic law.

Officers proceeding under either of these sections should read the new version of the "Informing the Accused" form to the operator prior to any testing.

U-Turns—Act 97 revised Wisconsin law regarding U-turns:

- It is no longer illegal to make a U-turn at any controlled intersections. U-turns are now permitted at controlled intersections (signals or signs) unless prohibited by signing.
- U-turns may be made at the direction of a traffic officer.
- A vehicle making a U-turn at an intersection must yield to oncoming traffic.
- A U-turn cannot be made at a place where it cannot be done safely or interferes with other traffic.
- A vehicle making a right turn on a red light at a controlled intersection must yield to vehicles making lawful U-turns.

Private Roads—Act 129 authorized municipalities to enter into agreements with owners of private roads within manufactured/mobile home communities, allowing for traffic enforcement on those roads. The City has already entered into an agreement with Highland Manor, on the south side, to allow for traffic enforcement within the development.

Texting and Driving—Act 220 added a subsection to the inattentive driving statute, 346.89:

(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.

Accidents—Act 62 clarified the locations where accident reporting is required (and where hit & run offenses may be enforced):

- Sections 346.67 through 346.70 may be enforced on any premises held open to the public for use of motor vehicles, including premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units. Now, this also applies if the vehicle, by operator intent or lack of control, departs one of these locations immediately prior to an accident.

- Farms and single-family residences are excluded.