LEGAL UPDATE

City of Madison

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Traffic Stops—Scope & Duration

Officers will often use traffic stops as a strategy to investigate other crimes. This is generally permissible, but the rules officers must follow during traffic stops of this nature can be tricky, and failure to comply with them may result in the suppression of any physical evidence discovered.

The typical circumstances under which these issues arise is when an officer suspects someone of being involved in criminal activity, but the circumstances do not rise to the level of reasonable suspicion. During the course of investigating or observing the suspect, a traffic violation is observed and the officer effects a traffic stop. The U.S. Supreme Court has made it clear that making a traffic stop under these circumstances is permissible, even if the officer is motivated by a desire to investigate criminal activity not related to the traffic stop. *Whren v. United States*, 517 U.S. 806 (1996). As long as the stop was justified by reasonable suspicion (of a traffic violation), the stop itself is permissible.

Where things get tricky is after the stop. How long can the officer detain the driver? Can the driver be asked for consent to search his/her vehicle? Can a K9 be used to sniff the exterior of the vehicle? As we will see, the timing of these actions is critical. Also, recall that MPD policy requires that an officer have an articulable reason for seeking consent to search. This reason does not need to rise to the level of reasonable suspicion, but some articulable reason (documented in your report) must exist. The same is also true of K9 sniffs.

The key to handling traffic stops of this nature properly is in understanding the permissible duration of a stop. A *Terry* stop must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1 (1968). The critical aspect regarding the scope of a *Terry* stop is that of duration; whenever an officer effects a *Terry* stop, the duration of the stop must be reasonable. There is no bright-line rule outlining the permissible duration of a stop. Instead, a court will analyze each case based on the totality of the circumstances. Some of the key issues that will be examined include the nature of the offense justifying the stop, whether the officer(s) acted diligently in investigating the incident during the stop, and whether the suspect's lack of cooperation made it more difficult for the officer(s) to conduct the investigation. "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491 (1983).

Based on these factors, the duration of a traffic stop (based purely on reasonable suspicion of a traffic violation) will generally be limited to the time necessary to conduct an "investigation" into the traffic offense (checking the driver's DL status, checking the vehicle registration, completing a citation or warning, etc.). A variety of factors could impact this duration in any given case (difficulty identifying a driver, slow response from TIME, etc.). In this context, courts have consistently concluded that the point at which an officer issues a citation or warning is the point at which the justification for the stop ends.

So, officers wishing to investigate criminal activity in the context of a routine traffic stop (being mindful of MPD policy) basically have two options for doing so:

Perform all investigative steps during the period of time necessary to conduct the traffic stop: This means that an officer will conduct any additional investigative steps (such as requesting consent to search or having a K9 sniff the vehicle's exterior) during that time period when the detention—based on the traffic violation—is justified. However, these actions cannot prolong the duration of the stop. The Wisconsin Court of Appeals discussed this in *State v. Gaulrapp*, 207 Wis.2d 598 (Ct. App.1996):

> When there is justification for a Terry stop, it is the extension of the stop past the point reasonably justified by the initial stop, not the nature of the questions asked, that violates the Fourth Amendment.

Understand that it may be difficult to show that additional investigative steps (like asking for consent to search) did not prolong a detention in many cases. The easiest way to demonstrate this will be for one officer to be processing the traffic portion of the stop (running data, completing the citation, etc.) while another performs the additional investigative steps (such as asking for consent to search). Officers should limit their requests for consent to search to one (avoiding repeated requests), and should be prepared to articulate that any additional investigative steps were performed during the time necessary to complete the traffic stop (and no longer).

Once the traffic stop has been completed—and this has clearly occurred once the officer issues a citation, gives a warning, or advises the driver that he/she will not be cited—no further detention of the subject is permitted (unless additional reasonable suspicion of criminal activity has

developed). Any investigative steps taken during a prolonged detention of this type—including a consent search or a K9 sniff—will be deemed invalid (occurring during an unlawful detention). *State v. Gammons*, 241 Wis.2d 296 (Ct. App. 2001).

Also understand that Wisconsin Courts have issued some confusing, and even conflicting, cases regarding the permissible scope of a *Terry* stop. While there is no question that the duration of a *Terry* stop must be reasonable, some Wisconsin decisions have sought to limit the nature of what officers may ask during a stop. *State v. Malone*, 274 Wis.2d 540 (2004). The U.S. Supreme Court has subsequently made it clear that police questioning is not a seizure, and that the duration of a detention—not the nature of the questions asked during the detention—is the only relevant inquiry. *Muehler v. Mena*, 125 S.Ct. 1465 (2005). It is not clear how Wisconsin Courts might rule on this issue now, however.

So, while this strategy remains an option, it is not without drawbacks. It can be difficult to show that the duration of a detention was not extended by taking additional investigative steps, and it is not clear how Wisconsin Courts might view this tactic in the future. The second strategy for these types of stops/investigations is likely the preferred one:

Conclude the traffic stop prior to asking for consent or performing additional investigative steps: This strategy was discussed in *State v. Williams*, 255 Wis.2d 1 (2002). In *Williams*, a state trooper effected a traffic stop on a vehicle he suspected of being involved in drug trafficking (though he did not have reasonable suspicion of drug activity—only of a traffic violation). The trooper finished the traffic stop, issued the driver (Williams) a written warning, and said, "good, we'll let you get on your way then." As Williams turned to walk back to his vehicle, the trooper re-initiated contact with him, asking about drugs and weapons. This conversation led to the trooper receiving consent to search Williams' vehicle (the search yielded a handgun and heroin).

The Wisconsin Supreme Court concluded that the traffic stop had ended (when the trooper issued the written warning), and that based on the totality of the circumstances Williams was no longer being detained when the trooper questioned him about drugs and weapons.

The advantage of this strategy is that neither the duration nor the scope of the detention is an issue. As long as there is a clear end to the traffic stop/detention, the remainder of the encounter—when the additional questioning and request for consent to search occur—is a consensual encounter (and not a detention).

The critical issue when utilizing this technique will be the manner in which the traffic stop is concluded (converting the encounter to a consensual one). The trooper in the *Williams* case made it clear through his words and actions that the traffic stop was over. More recently, the Wisconsin Court of Appeals reviewed a similar situation in *State v. Jones*, 278 Wis.2d 774 (Ct. App. 2005). In *Jones*, the officer did not expressly advise the driver that he was free to go or that the traffic stop was complete. The *Jones* court concluded that this was insufficient to terminate the detention or convey to the driver that he was no longer detained. The court stated:

> We therefore read *Williams* to require some verbal or physical demonstration by the officer, or some other equivalent facts, which clearly convey to the person that the traffic matter is concluded and that the person should be on his or her way.

So, an officer choosing to proceed using this technique simply needs to clearly conclude the traffic stop, then transition to a consensual encounter. While it is not expressly required that you tell the driver that they are "free to go," or something similar, you must act in a way that a reasonable person would feel free to leave.

So, officers seeking to investigate other criminal activity (primarily through a request for consent to search) when effecting a traffic stop based only on a traffic violation have two options: perform the additional investigative steps in a manner that does not prolong the duration of the stop; or conclude the traffic stop and transition to a consensual encounter prior to seeking consent to search. While both are currently viable options, the latter is likely the preferred method.

Finally, note that this analysis applies to those cases where an officer only has reasonable suspicion for a traffic offense. If reasonable suspicion of criminal activity—beyond the traffic offense—exists, the permissible duration of a *Terry* stop will typically be longer, and officers will generally have more flexibility during the stop.

Frisks

***State v. Triplett*, 2004AP2032 (Ct. App. 2005); Decided November 9, 2005 by the Wisconsin Court of Appeals.**

In the *Triplett* case, a group of Milwaukee PD officers responded to a residence to investigate complaints about drug activity. During the course of the investigation, an officer suspected that Triplett—who had been encountered inside the residence—was possibly armed. The officer conducted a patdown of Triplett as a result of this. During the patdown, the officer had difficulty checking Triplett's waist area. Triplett was very large (5' 11", 245 pounds) and his stomach hung over his waistband. He was also wearing a winter coat that hung slightly below the waist.

The officer then "tugged on Triplett's belt loops and gave the waistband a few shakes." This caused a clear plastic bag to drop from the bottom of Triplett's pants leg. The bag contained several individual packages of cocaine base, and Triplett was arrested as a result.

Triplett challenged his eventual conviction, arguing that the officer's actions (pulling his belt loops and shaking the waistband) exceeded the permissible scope of a Terry frisk. He did not challenge the grounds for the frisk itself.

The Wisconsin Court of Appeals rejected Triplett's argument, concluding that the officer acted reasonably. The *Triplett* court pointed out that the original *Terry* decision did not specifically articulate the permissible scope of a frisk in all circumstances, leaving those details to be determined on a case-by-case basis.

The *Triplett* court went on to articulate a few general conclusions about *Terry* frisks:

- Generally, a frisk should be confined to what is minimally necessary to determine whether a subject is armed.
- That will typically be limited to a pat-down of the outer clothing of a suspect.
- When a frisk is legally justified, an officer is not simply entitled to a frisk, but to an effective frisk.

The final point is the most critical one. The court stated:

> [A]n officer is entitled not just to a patdown but to an *effective* patdown in which he or she can reasonably ascertain whether the subject of the patdown has a weapon; where an effective patdown is not possible, the officer may take other action reasonably necessary to discover a weapon.

Since the officer was not able through a simple patdown to determine whether Triplett was armed, the Court concluded that it was reasonable for him to take the additional steps he did (tugging the belt loops and shaking the waistband). This logic could also apply to other situations where a traditional frisk is not sufficient to determine whether someone is armed.

Controlled Substances— Possession With Intent to Deliver

***State v. Pinkard*, 2004AP2755 (Ct. App. 2005); Decided September 7, 2005, by the Wisconsin Court of Appeals.**

As officers were stopping a vehicle in which Pinkard was a passenger, they observed him throw something out the window. The officers recovered a bag containing twenty-two individual bags of cocaine. Pinkard was arrested, and claimed that he was "holding" the drugs for someone else (to whom he was going to return them). Pinkard was convicted of possession of cocaine with intent to deliver. The trial court specifically found that Pinkard intended to return the cocaine to the person who had given it to him, and his conviction was based on this conclusion.

Pinkard challenged his conviction, claiming that in order to be convicted for possessing a controlled substance with intent to deliver, he must have possessed the intent to deliver it to someone other than the person who gave it to him (a third person).

The Court of Appeals rejected Pinkard's argument:

> Whether Pinkard had delivered the drugs to the original owner for distribution to buyers, or to a third party for distribution to buyers, the ultimate conduct would have been the same: delivering drugs for use by others, a crime the legislature intended to punish…we conclude that Pinkard's intent to return the cocaine to the person who gave it to him constitutes intent to deliver.

Crimes Against Children

***State v. Hughes*, 702 N.W.2d 87 (Ct. App. 2005); Decided June 14, 2005 by the Wisconsin Court of Appeals.**

The *Hughes* case dealt with the statutory definition of a person responsible for a child's welfare. A woman asked Etter Hughes to care for her one-year-old child because she was being evicted from her apartment. Etter asked her seventeen-year-old daughter, Marketta, to assist her in caring for the child.

About two weeks later, Etter noticed that the child was acting strangely. She called 911, but the child died before paramedics arrived. Investigation showed that Marketta struck the child repeatedly during the two-week period. At one point, she admitted to spinning the child around by one of his arms until she heard a popping noise in his arm. Both Etter and Marketta noted that the child appeared injured during this period, but no medical attention was sought prior to the 911 call.

Marketta pled guilty to a variety of charges, including child neglect. She subsequently appealed her conviction, claiming that she could not be a person responsible for the welfare of the child, which is an element of the child neglect statute.

The term "person who is responsible for a child" is defined in the definitions section of chapter 948. Marketta argued that she did not fall into any category outlined in the statute, and that her age also precluded her from being considered a person responsible for a child's welfare. The *Hughes* court disagreed, concluding that Marketta's conviction was proper:

> We conclude that the plain language of the statute makes clear that a seventeen-year-old employed by a parent to care for the parent's child can be a person responsible for the welfare of the child…Marketta freely chose to assume responsibility for the welfare of (the child) at her mother's request. Thus, Marketta became a voluntary caretaker of (the child) and, as such, she was a person responsible for his welfare.