# LEGAL UPDATE

City of Madison Police Department

Winter 2008 Lieutenant Victor Wahl


## *Search Incident to Arrest*

***State v. Marten-Hoye*, 2006AP1104-CR (Ct. App. 2008); Decided January 24, 2008 by the Wisconsin Court of Appeals.**

In *Marten-Hoye*, an MPD officer contacted a female on State Street for a possible curfew violation. After verifying that the female (Marten-Hoye) was not in violation, she was released. As Marten-Hoye walked away, she began shouting obscenities and waving her arms. These actions drew a crowd. The officer re-approached Marten-Hoye, told her she was under arrest for disorderly conduct, placed her in handcuffs, and told her she would be released with a city ordinance citation if she cooperated. Another officer began completing a citation as the first officer searched Marten-Hoye. The officer discovered cocaine on her, and she was eventually charged with a drug offense as well as with disorderly conduct.

Marten-Hoye challenged the officers' actions, claiming that they lacked probable cause to arrest her for disorderly conduct, and that she had not been formally arrested—making the search invalid.

The Court of Appeals, focusing on Marten-Hoye's second argument, concluded that she had not been arrested at the time of the search, and that the search itself was therefore invalid.

The test for whether a person has been arrested in Wisconsin is an objective one:

> Whether a reasonable person in the defendant's position would have considered himself or herself to be "in custody" given the degree of restraint under the circumstances. The circumstances of the situation including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test.

While this test was the primary focus of the court's analysis, the U.S. Supreme Court's decision in *Knowles v. Iowa*, 525. U.S. 113 (1998) also played a part. In *Knowles*, the U.S. Supreme Court ruled that the search incident to arrest doctrine does not permit searches incident to a citation. The case involved a traffic stop, where the officer searched the offending driver's vehicle based only on the issuance of a traffic citation (without an arrest). The *Knowles* court ruled that the search was invalid.

The *Marten-Hoye* court reviewed a number of cases cited by the parties in support of their positions, but stated, "the police conduct in this case is not addressed squarely under any controlling precedent." The court went on to conclude that Marten-Hoye had not actually been arrested:

> [N]o case establishes a bright-line rule as to when an arrest has been effected…Here, the record reveals conflicting circumstances: (the officer) told Marten-Hoye she was under arrest, but also that she would be issued a citation for a municipal ordinance violation and would be free to go. She placed Marten-Hoye in handcuffs but did not place her in a squad car, instead conducting the entire interaction in public. While (the officer) searched Marten-Hoye, another officer was writing out the citation that would have ended in Marten-Hoye's release.

The court went on to state, "we conclude that a reasonable person in Marten-Hoye's position would not have believed he or she was 'in custody' given the circumstances present here."

The *Marten-Hoye* case (a 2-1 decision, with one judge dissenting and concluding that the search was valid), is a little puzzling. While it appears the court was expressing its disapproval of conducting a search incident to arrest that results in the suspect's release with the issuance of a citation (rather than a conveyance to jail), the ruling did not address that issue. Instead, the court reached the odd conclusion that a person who has been handcuffed and advised they are under arrest would not feel as if they were under arrest.

The Attorney General's office is considering appealing the *Marten-Hoye* case to the Wisconsin Supreme Court. In the meantime, however, remember that MPD policy allows a person to be searched incident to arrest under the following circumstances:

- Incident to a custodial arrest authorized by MPD policy (meaning the arrested person will be conveyed to jail, detox, a district station, etc.).

- If the person has been arrested for a violation of state statute (non-traffic; must be a criminal offense or trespassing), and the arresting officer subsequently elects to release the arrested person and issue a municipal or misdemeanor citation.

Remember that under either category, an arrest must take place—the simple issuance of a citation without an arrest is insufficient to ever justify a search incident to arrest. The arrest must be a formal arrest, and it must be clear to the person that he/she has been arrested and is in custody.

The second category is designed for the many times when an officer makes an arrest but subsequently determines that release with a citation is appropriate. A formal arrest—prior to the decision to release with a citation—is still necessary.

Officers should be cognizant of the *Marten-Hoye* decision when making arrests under these circumstances in order to comply with the court's holding. A few suggestions:

- Clearly inform the subject that he/she is under arrest.
- Do not suggest to the arrested person that he/she might be released with a citation; make the decision on the arrested person's disposition only after the arrest and search have occurred.
- Handcuff the arrested person, if appropriate.
- Place the arrested person in a squad, if appropriate.

Finally, remember that if officers are dealing with situations that do not involve a formal arrest, they still have the options of obtaining consent to search the person (provided that they have a valid reason to seek the consent, per MPD policy) or perform a frisk (provided that they have reasonable suspicion that the person is armed).

# *Bomb Scares*

***State v. Robert T.*, No 2006AP2206 (Ct. App.); Decided January 15, 2008 by the Wisconsin Court of Appeals.**

In *Robert T.*, police received a 911 call from a pay phone in a high school that a bomb was in the school. Police responded and subsequently reviewed school surveillance video, which showed a student (Robert T.) making the phone call. The student admitted to making the call, and was charged with a violation of Wis. Stat. 947.015 ("Bomb Scares").

The student subsequently sought to have the charges dismissed, arguing that the statute was overbroad and in violation of the First Amendment. The trial court agreed and dismissed the charges. The State appealed.

The student argued that the statute is overbroad and that it impermissibly infringes on protected free speech. The court recognized that a statute cannot be overbroad; meaning that the government cannot ban unprotected speech "if a substantial amount of protected speech is prohibited or chilled in the process." The court also recognized that the government can prohibit all "true threats:"

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm…it is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered.

The court concluded that the Bomb Scares statute was not overbroad, that it applied to true threats, and that Robert T.'s actions were in violation of the statute.

# *Frisks*

***State v. Alexander*, No. 2007AP403-CR (Ct. App. 2007); Decided December 18, 2007 by the Wisconsin Court of Appeals.**

In *Alexander*, two Milwaukee PD officers were present in an area due to recent reports of shots being fired (in a high-crime area). The officers observed a vehicle commit a traffic violation, pulled behind it and attempted to pull it over. The vehicle did not stop immediately, but continued driving. As it did so, the officers saw that the vehicle was occupied by three subjects, and that the three were "making furtive movement as though each was giving something, or receiving something from the other." One of the subjects was observed to lean forward towards the glove compartment, and another lifted themselves up as if to allow one of the others to place something in the seat. The vehicle eventually stopped, and the officers requested backup.

The officers had all the occupants exit the vehicle and frisked each of them. The officers observed items (air freshener, the vehicle owner's manual, etc.) on the driver's seat that are typically kept in the glove compartment. The officers proceeded to open the glove compartment, where they discovered a handgun, as well as marijuana and cocaine. One of the occupants was criminally charged; he challenged the officers' actions.

Recall that during an investigative stop, officers can perform a frisk (a limited pat-down of the clothing of a person to determine whether the person is armed) if the officer has reasonable suspicion that the person is armed. The "frisk" can also be extended to the interior of a vehicle if an officer stops a vehicle and has reasonable suspicion that an occupant is armed. A "frisk" of a vehicle is limited to anywhere in the passenger compartment where a weapon could reasonably be concealed.

Wisconsin courts have ruled on many frisk cases over the years; sometimes finding reasonable suspicion to support a frisk and sometimes not. The *Alexander* court recognized this, stating, "these cases are fact-intensive and must be decided on a 'case-by-case basis, evaluating the totality of the circumstances.'" The court concluded that the officers did have reasonable suspicion that the subjects were armed, and that their actions were reasonable.

In light of the fact-specific nature of these cases, and the differing results reached in the varying cases, two points from the *Alexander* case are worth noting.

First, the officers provided detailed information (in reports and testimony) to support their actions. Rather than simply stating that the area was "high-crime," an officer provided specific details about the crime in the area to support his conclusion. Also, rather than simply asserting that the

vehicle occupants had engaged in "furtive" movements, the officer provided detailed testimony about the precise nature of the movements and why the officer viewed them as suspicious. This detail was critical to the outcome of the case.

The second factor was the timing of the frisk—immediately after the stop. The *Alexander* court stated:

> There seems to be a common factor in some of these cases, where the courts have concluded that the officers did not have justifiable basis for conducting a protective sweep (frisk)—that factor being when the protective search takes place *after* the traffic investigation has been completed…As noted, such was not the case here—the facts and circumstances demonstrate that the officers' primary concern was indeed weapons and safety, as evidenced by the fact that the protective search was the first thing the officers did. The protective search was not an afterthought, but the first concern.

Courts will be sensitive to the possibility of officers using a frisk as a ruse in order to locate evidence when officers are not truly motivated by safety concerns. The timing of the frisk will be a critical factor in this analysis.

# *Service Animals*

MPD officers have recently been called to businesses regarding individuals with animals whom they claimed to be "service animals." Many disabled people legitimately use service animals to assist them in their everyday tasks. However, officers have been frustrated when dealing with individuals with no apparent disability who have an animal that may or may not be a true service animal. Unfortunately, the Americans with Disabilities Act (ADA) is less than clear on what is required under these circumstances.

If officers are dispatched to resolve disputes between businesses and persons with animals (claimed to be service animals), they may ask the person if the animal is a service animal and what tasks it is trained to perform. Officers should not ask what the person's disability is, however, and cannot require that he/she produce any proof that the animal is, in fact, a service animal. Generally, if a person states that they have a disability and that their animal is a service animal, they (and the animal) have to be allowed into businesses open to the public (and must be allowed to go anywhere that customers are normally allowed to go). Officers should not assist businesses in removing persons with service animals simply because of the animal (even if there is no evidence that the animal is actually a service animal).

However, if the animal creates a direct threat to the health or safety of others, a business may have them removed (and officers may assist as appropriate). It is also permissible for a business to have a person with a service animal removed for some reason unrelated to the animal. For example, if a business's basis for seeking the removal of an individual is unrelated to the service animal, then officers may provide assistance (assuming that the basis for removal is a reasonable one).

The following summary for businesses was provided by the U.S. Department of Justice.

**1. Q: What are the laws that apply to my business?**

A: Under the Americans with Disabilities Act (ADA), privately owned businesses that serve the public, such as restaurants, hotels, retail stores, taxicabs, theaters, concert halls, and sports facilities, are prohibited from discriminating against individuals with disabilities. The ADA requires these businesses to allow people with disabilities to bring their service animals onto business premises in whatever areas customers are generally allowed.

**2. Q: What is a service animal?**

A: The ADA defines a service animal as <u>any</u> guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. If they meet this definition, animals are considered service animals under the ADA regardless of whether they have been licensed or certified by a state or local government.

Service animals perform some of the functions and tasks that the individual with a disability cannot perform for him or herself. Guide dogs are one type of service animal, used by some individuals who are blind. This is the type of service animal with which most people are familiar. But there are service animals that assist persons with other kinds of disabilities in their day-to-day activities. Some examples include:

- Alerting persons with hearing impairments to sounds.
- Pulling wheelchairs or carrying and picking up things for persons with mobility impairments.
- Assisting persons with mobility impairments with balance.

A service animal is <u>not</u> a pet.

**3. Q: How can I tell if an animal is really a service animal and not just a pet?**

A: Some, but not all, service animals wear special collars and harnesses. Some, but not all, are licensed or certified and have identification papers. If you are not certain that an animal is a service animal, you may ask the person who has the animal if it is a service animal required because of a disability. However, an individual who is going to a restaurant or theater is not likely to be carrying documentation of his or her medical condition or disability. Therefore, such documentation generally may not be required as a condition for providing service to an individual accompanied by a service animal. Although a number of states have programs to certify service animals, you may not insist on proof of state certification before permitting the service animal to accompany the person with a disability.

**4. Q: What must I do when an individual with a service animal comes to my business?**

A: The service animal must be permitted to accompany the individual with a disability to all areas of the facility where customers are normally allowed to go. An individual with a service animal may not be segregated from other customers.

**5. Q: I have always had a clearly posted "no pets" policy at my establishment. Do I still have to allow service animals in?**

A: Yes. A service animal is not a pet. The ADA requires you to modify your "no pets" policy to allow the use of a service animal by a person with a disability. This does not mean you must abandon your "no pets" policy altogether but simply that you must make an exception to your general rule for service animals.

**6. Q: My county health department has told me that only a guide dog has to be admitted. If I follow those regulations, am I violating the ADA?**

A: Yes, if you refuse to admit any other type of service animal on the basis of local health department regulations or other state or local laws. The ADA provides greater protection for individuals with disabilities and so it takes priority over the local or state laws or regulations.

**7. Q: Can I charge a maintenance or cleaning fee for customers who bring service animals into my business?**

A: No. Neither a deposit nor a surcharge may be imposed on an individual with a disability as a condition to allowing a service animal to accompany the individual with a disability, even if deposits are routinely required for pets. However, a public accommodation may charge its customers with disabilities if a service animal causes damage so long as it is the regular practice of the entity to charge non-disabled customers for the same types of damages. For example, a hotel can charge a guest with a disability for the cost of repairing or cleaning furniture damaged by a service animal if it is the hotel's policy to charge when non-disabled guests cause such damage.

**8. Q: I operate a private taxicab and I don't want animals in my taxi; they smell, shed hair and sometimes have "accidents." Am I violating the ADA if I refuse to pick up someone with a service animal?**

A: Yes. Taxicab companies may not refuse to provide services to individuals with disabilities. Private taxicab companies are also prohibited from charging higher fares or fees for transporting individuals with disabilities and their service animals than they charge to other persons for the same or equivalent service.

**9. Q: Am I responsible for the animal while the person with a disability is in my business?**

A: No. The care or supervision of a service animal is solely the responsibility of his or her owner. You are not required to provide care or food or a special location for the animal.

**10. Q: What if a service animal barks or growls at other people, or otherwise acts out of control?**

A: You may exclude any animal, including a service animal, from your facility when that animal's behavior poses a direct threat to the health or safety of others. For example, any service animal that displays vicious behavior towards other guests or customers may be excluded. You may not make assumptions, however, about how a particular animal is likely to behave based on your past experience with other animals. Each situation must be considered individually.

Although a public accommodation may exclude any service animal that is out of control, it should give the individual with a disability who uses the service animal the option of continuing to enjoy its goods and services without having the service animal on the premises.

**11. Q: Can I exclude an animal that doesn't really seem dangerous but is disruptive to my business?**

A: There may be a few circumstances when a public accommodation is not required to accommodate a service animal--that is, when doing so would result in a fundamental alteration to the nature of the business. Generally, this is not likely to occur in restaurants, hotels, retail stores, theaters, concert halls, and sports facilities. But when it does, for example, when a dog barks during a movie, the animal can be excluded.

# *Show-ups*

***State v. Nawrocki*, No. 2006 AP2502-CR (Ct. App. 2008); Decided January 31, 2008 by the Wisconsin Court of Appeals.**

The *Nawrocki* case is the latest in a series of revisions to Wisconsin law addressing showup identifications in the field. Milwaukee PD officers responded to an report of a robbery. Officers searched the area for the suspects, and observed two individuals who matched the general descriptions. An officer approached the two and ordered them to stop. One suspect stopped, while the other—Nawrocki—continued walking. Nawrocki was eventually detained, though he was somewhat uncooperative and created a disturbance in the process. The officers performed a showup, and the victim positively identified Nawrocki as having been involved in the robbery. Nawrocki moved to suppress the results of the showup identification.

***A showup is not permitted if you have probable cause to arrest the detained subject for <u>any</u> offense***

Recall that the Wisconsin Supreme Court, in *State v. Dubose*, 285 Wis.2d 143 (2005), significantly changed the way in which officers must handle one-on-one in person identifications (showups). The *Dubose* court concluded that police are not allowed to perform a showup unless it is "necessary." The *Nawrocki* court stated:

> A showup is "necessary," in the words of *Dubose*, only when "police lack probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array."

So, the *Dubose* case made it clear that if an officer detains a suspect as part of an investigation and has probable cause to arrest him/her for the offense being investigated, a showup is not permissible. What was left unclear was the scenario where an officer detains a suspect without probable cause for the offense being investigated, but where probable cause for another, unrelated offense exists.

This was the issue addressed by the *Nawrocki* decision. The court stated:

> We therefore conclude that a showup is unnecessary and thus inadmissible under *Dubose* when probable cause exists to justify an arrest, regardless whether it exists on the particular offense under investigation.

The *Nawrocki* court concluded that the officers had probable cause to arrest him for several potential violations (obstructing an officer, disorderly conduct, and a probation violation—because he had been drinking in violation of his probation rules), even though the officers did not actually arrest him for these offenses.

So, if officers detain a suspect but do not have probable cause to arrest him/her for the offense being investigated, a showup will only be permissible if the officers do not have probable cause to arrest the suspect for **any** offense. The *Nawrocki* decision suggests that this will apply even if the other offense is a very minor one, and that the suspect could readily post bail to be released. The case also suggests that courts will review such incidents and make an independent conclusion as to whether probable cause existed to arrest the suspect for some other offense; it is apparently not relevant whether the officers considered arrest for another offense.

An updated procedure to accommodate these types of situations is being developed, so that officers will have the ability to perform some type of alternative identification process before a suspect in a significant crime who has been arrested for a minor offense is released. More details on this will be forthcoming. In the meantime, officers should make every effort to develop probable cause for the offense being investigated (or some other non-bailable offense). Probable cause to arrest the suspect (for the offense being investigated) can arise in a variety of ways:

- Locating evidence of the crime (weapons, stolen items/ currency, etc.) on or near the suspect.
- Locating distinctive items of clothing that tie the suspect to the crime.
- Proximity of the stop to the scene of the crime (time and location).

Remember that even when a show-up is permissible, officers must take steps to reduce suggestiveness:

- Obtain and document a complete description of the suspect from the witness, separately from other witnesses if possible. 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.
- Do not confirm a witness's positive identification.
- Document the identification and the witness's degree of certainty.
- If there are additional potential witnesses, instruct the witness not to discuss their identification with those persons.
- If possible, do not show the suspect handcuffed or in a squad car. If handcuffed, take measures to conceal this fact from the witness.
- If there are multiple suspects, only show one suspect at a time to the victim/witness.
- Document the process with in-car video.