LEGAL UPDATE

City of Madison Police Department

Winter 2010 Captain Victor Wahl

Vehicle Searches

***State v. Williams*, 2009AP501-CR (Ct. App. 2010); Decided January 5, 2010 by the Wisconsin Court of Appeals.**

In *Williams*, two Milwaukee police officers were patrolling in a high crime area. The officers observed a parked van with no front license plate. As they drove past the van, the officers observed a subject—Williams—exit the van and enter a convenience store. About five minutes later, the officers returned to the area and saw that Williams had returned to the vehicle. The officers pulled behind the van and illuminated the interior with their squad's spotlight.

As the officers approached, they observed Williams lean down and appear to place an object under the vehicle's center console. Concerned that the object was a firearm, the officers had Williams exit the vehicle and frisked him. Williams was placed in the officers' squad while one officer searched the console area of the van. The officer located multiple bags of cocaine and a handgun. Williams was charged with possession of a controlled substance and being a felon in possession of a firearm.

Williams challenged his arrest, arguing that the officers did not justification to detain him or to search the van.

The *Williams* court quickly dispensed with the first argument, concluding that the lack of a front license plate provided the officers with a valid reason to approach the van and investigate.

Next, Williams—relying in large part on last year's *Arizona v. Gant* decision—argued that the search of the vehicle was improper. The *Williams* court recognized that the search of the console area was not a search incident to arrest (as had been the case in *Gant*), but was rather a protective search, or frisk, of the vehicle (based on reasonable suspicion that Williams was armed). The *Williams* court ruled that based on the facts available to the officers (they were in a high crime area, it was getting dark, and they had observed Williams place something under the center console of the vehicle as they approached) reasonable suspicion that Williams was armed existed.

The question of whether reasonable suspicion to justify a frisk exists is one frequently addressed by courts. The *Williams* case had two characteristics consistent with other cases in which courts have ruled that reasonable suspicion was present (justifying a frisk):

- The officers' testimony about their observations was very detailed. Rather than offering vague statements or phrases (like "furtive movement") the officers provided detailed descriptions of what the suspect's actions were and why they appeared suspicious.

- The officers immediately took action to secure the suspect and perform the frisk. As soon as the behavior leading to reasonable suspicion was observed, Williams was removed from the vehicle, secured and frisked.

Even though the court ruled that the search of his vehicle had been a frisk, based on reasonable suspicion, and not a search incident to arrest (controlled by *Gant*), Williams argued that *Gant* prohibited the search of the console. Recall that *Gant* limited vehicle searches incident to arrest to two situations: if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or if it is reasonable to believe the vehicle contains evidence of the offense of arrest. Williams argued that the first *Gant* justification precluded the search of his vehicle, because he did not have access to the vehicle at the time of the search.

The *Williams* court disagreed, concluding that the reasoning in *Gant* did not apply to vehicle frisk cases:

> Unlike Gant, Williams was not under arrest when the officers asked Williams to exit the car. The officers only had a reasonable suspicion of the presence of a firearm and, at best, would be able to issue Williams a ticket for a license plate violation. Therefore, there was a distinct possibility that Williams would return to the van. "In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed."…Because Williams was not under arrest, the officers had an immediate safety interest in verifying that Williams did not have a gun or other weapon under his immediate control.

The *Williams* decision confirms that *Gant* only spoke to vehicle searches incident to arrest, and did not eliminate the authority of officers to conduct a protective search (or frisk) of a vehicle for weapons, based on reasonable suspicion.

***Arizona v. Gant* Update**

Lower courts continue to hear challenges to vehicle searches based on the *Gant* decision, and to clarify the scope of the ruling. A few recent examples:

***United States v. Davis*, Eighth Circuit Court of Appeals;** An officer stopped a vehicle for speeding and noted the odor of marijuana coming from the vehicle. The driver was

removed from the vehicle and frisked; the officer located a bag of marijuana in the driver's pocket and he was arrested (and secured in a squad). There were three other passengers in the vehicle. They were ordered out of the vehicle but were not handcuffed. An officer searched the vehicle and discovered a handgun.

The court upheld the search as being a permissible search incident to arrest. The *Davis* court's discussion of *Gant* was noteworthy; the court pointed out that at the time of the search the vehicle's passengers were unsecured, and that therefore a search incident to arrest was permissible. The decision suggests that the first *Gant* justification for a vehicle search incident to arrest (if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search) also applies if non-arrestees are unsecured and within reaching distance of the vehicle. The *Davis* court also ruled that the search could have been justified as a search incident to arrest under the second *Gant* justification (as it was reasonable to believe that the vehicle contained evidence of the offense of arrest), or under the auto exception (based on probable cause, provided by the odor of marijuana and the marijuana located on the driver).

***State v. McKay*, Washington Court of Appeals;** An officer stopped a subject on foot while investigating a fireworks complaint. The officer subsequently determined the subject was wanted and arrested him. The suspect was carrying a bag that the officer searched, finding marijuana. The court expressly ruled that the *Gant* decision applied only to vehicle searches incident to arrest, and not to other search incident to arrest situations.

***United States v. Morillo*, U.S. District Court for the Eastern District of New York;** Contrary to the *McKay* decision, the *Morillo* court concluded that *Gant* does apply to searches incident to arrest outside the vehicle context. The court applied *Gant* to the search of a backpack that was within the area of immediate control of an arrested pedestrian. The court upheld the search

***United States v. Megginson*, Fourth Circuit Court of Appeals;** An officer stopped and arrested a subject for a domestic violence offense. The subject was cooperative, and was handcuffed and secured in a squad after being arrested. The officer then searched the vehicle, locating a handgun. The court concluded that the search was not a valid search incident to arrest, as the arrestee had already been secured in a squad, and there was no reason to believe the vehicle contained evidence of the offense of domestic abuse.

***State v. Harris*, Washington Court of Appeals;** An officer stopped a vehicle for a stop sign violation. A data check revealed that the driver's license was suspended. The officer arrested the subject and secured him in a squad car. The subject's vehicle was searched, and a handgun was discovered. The court ruled that the search was not a valid search incident to arrest, as the arrestee had been secured and there was no reason to believe the vehicle contained evidence related to the offense for which he was arrested.

***State v. Valdez*, Supreme Court of Washington;** An officer stopped a vehicle for an equipment violation and learned that the driver had an outstanding warrant. The driver was arrested and secured in a squad car. The vehicle was then searched, and two pounds of methamphetamine were located. The court concluded that the search was not a valid search incident to arrest since the arrestee had already been secured in a squad, and there was no reason to believe the vehicle contained evidence of the underlying offense. The court's decision did not specify what offense the warrant was for.

***United States v. Owen*, U.S. District Court for the Southern District of Mississippi;** An officer stopped a vehicle for a traffic violation, and learned that the driver had multiple warrants for various fraud and forgery charges. The driver was arrested and the vehicle was searched. The court concluded that the search was valid under *Gant*, as it was reasonable for the officers to believe that the vehicle contained evidence of the offense of arrest (the fraud/forgery warrants).

***United States v. Bradford*, U.S. District Court for the Eastern District of Wisconsin;** An officer stopped a vehicle for a traffic violation. The vehicle did not stop immediately; once the car stopped, the officer ordered the driver out of the vehicle and frisked him. During the frisk the officer discovered a crack pipe in the driver's pocket. A subsequent search of the vehicle yielded cocaine and a handgun. The concluded that the search was a valid search incident to arrest under *Gant*, because "it was reasonable for the officer to believe that the vehicle contained evidence relating to the possession of a crack pipe."

Post-*Gant* cases have demonstrated a few trends:

- If the offense of arrest is something for which physical evidence is relevant (OMVWI, drug offenses, open intoxicants, etc.) courts have consistently upheld vehicle searches incident to arrest without further analysis.
- If the offense of arrest is something for which physical evidence is not relevant (No DL, simple traffic violations, etc.) courts have not allowed vehicle searches incident to arrest.
- Courts have consistently ruled that *Gant* does not apply to other legal theories that can justify vehicle searches (inventory, frisk for weapons, probable cause search, etc.).
- It is not clear to what extent courts will apply *Gant* to searches incident to arrest outside the vehicle context.
- It is not clear how warrant arrests from vehicles will be treated under *Gant*.

Sixth Amendment Right to Counsel

***Montejo v. Louisiana*, 129 S.Ct. 2079 (2009); Decided May 26, 2009 by the United States Supreme Court.**

***State v. Forbush*, 2008AP3007-CR (Ct. App. 2009); Decided December 29, 2009 by the Wisconsin Court of Appeals.**

The *Montejo* and *Forbush* cases reflect a significant change to the scope of a criminal defendant's right to counsel under the Sixth Amendment. Both the Fifth and Sixth Amendments provide limitations on when and how officers may question suspects. While the rules stemming from each Amendment are distinct, they do overlap. A review:

Fifth Amendment: The Fifth Amendment provides the familiar *Miranda* protections. If police want to interrogate a suspect who is in custody, the suspect must be informed of his/her *Miranda* rights. Then, the suspect must make a valid waiver of those rights before any interrogation can take place. If the suspect invokes his/her rights, questioning must cease. If the suspect invokes the right to remain silent, then police may re-initiate questioning under certain circumstances; if the suspect invokes the right to counsel, police may not re-initiate questioning (for as long as the suspect remains in custody)—the suspect must re-initiate contact with police and waive his/her rights for any subsequent questioning to be permitted.

Sixth Amendment: The Sixth Amendment only applies once a suspect has been formally charged, through a criminal complaint or warrant. The protections provided by the Sixth Amendment have been broader than those provided by the Fifth Amendment through *Miranda*. While the Sixth Amendment protection is charge-specific (limited to questioning for the crime that has been formally charged), custody is not relevant. Instead, police are prohibited from deliberately eliciting any incriminating statement from a defendant once the Sixth Amendment applies. Wisconsin Court rulings have interpreted the Sixth Amendment to give broad protections to criminally charged defendants.

The *Montejo* case eliminated what had been one of the key aspects of the Sixth Amendment right to counsel. In a 1986 case (*Michigan v. Jackson*), the Supreme Court had ruled that once the Sixth Amendment applied and a defendant was represented by counsel, police were barred from initiating questioning with the defendant (again, this applied only to the specific offense for which he/she had been charged). This meant that the only way a charged defendant could be questioned about the offense for which he/she had been charged was if the defendant initiated questioning with police (and then waived his/her Sixth Amendment rights).

In 2000, the Wisconsin Supreme Court (in *State v. Dagnall*) ruled that if a criminal defendant had retained an attorney, officers could not initiate questioning (about the charged offense) without the attorney present. In *Dagnall*, an attorney had contacted police, indicated that he represented the defendant and directed that police not engage in any questioning. The *Dagnall* court ruled that this precluded police from questioning the client under the Sixth Amendment.

Montejo expressly overturned the *Michigan v. Jackson* decision. The *Montejo* court concluded that the safeguards of the Sixth Amendment will be sufficiently protected through means similar to the Fifth Amendment's *Miranda* protections:

> Under (*Miranda*), a defendant who does not want to speak with the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment…it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached.

In *Forbush*, the Wisconsin Court of Appeals reviewed a situation similar to that in *Dagnall*; a subject was criminally charged with an offense, and an attorney contacted law enforcement advising them not to interview his client. The *Forbush* court concluded that *Montejo* had effectively overruled the *Dagnall* decision: "police may interrogate a defendant charged with a crime who waives the right to an attorney."

While the *Montejo* decision did not attract as much attention as the *Gant* decision, it reflects a significant a change in constitutional law. In light of the *Montejo* and *Forbush* decisions:

- Officers are now permitted to initiate contact with a defendant who has been criminally charged and attempt to question him/her. The defendant must waive his/her Sixth Amendment right to counsel for questioning to be permitted; utilizing the familiar *Miranda* practice (informing the defendant of his/her *Miranda* rights and securing a waiver) will suffice.

- It is not entirely clear to what extent the *Montejo* court intended the Sixth Amendment waiver process to apply to noncustodial questioning or interactions other than interrogations. The Sixth Amendment right to counsel, however, is not restricted to custodial situations so officers seeking to question a charged defendant about the offense for which he/she has been charged should always secure a waiver, even if the defendant is not in custody.

- If the defendant invokes his/her right to counsel, questioning must cease and police may not re-initiate questioning. This prohibition on re-initiation is likely

to be effective for the duration of the prosecution. Questioning is only permitted if the defendant re-initiates contact with police.

- It is not clear what happens if the defendant's invocation is of the right to remain silent, rather than the right to counsel. However, officers should treat this situation just as if the defendant had invoked his/her right to counsel (cease questioning and do not attempt to re-initiate)..

- It appears that courts will now view the Sixth Amendment right to counsel similarly to the Fifth Amendment right to counsel: as one that can only be invoked by the suspect/defendant. So, under *Montejo* and *Forbush*, an attorney cannot invoke a criminal defendant's right to counsel.

- Remember that if a suspect invokes his/her right to counsel under *Miranda* prior to being charged, that invocation is in effect as long as the person remains in continuous custody. This will preclude attempts to question a charged defendant if he/she invoked the right to counsel (prior to being charged) and has remained in custody.

Remember that these changes are all limited to the Sixth Amendment; *Miranda* rules governing custodial interrogations are not affected.

Traffic Stops—Reasonable Suspicion

***State v. Popke*, 317 Wis.2d 118 (2009); Decided May 27, 2009 by the Wisconsin Supreme Court.**

In *Popke*, an officer, at 1:30am, observed a vehicle operating on a two-lane roadway. The vehicle swerved into the left lane so that three-quarters of the vehicle was left of the road's center. The vehicle then quickly moved back into the proper lane, but overcompensated and almost hit the curb on the right side of the road. The vehicle then began to "fade back" towards the center of the road, nearly striking the median.

The officer stopped the vehicle as a result of these observations. The driver was subsequently arrested for OMVWI and found to have a B.A.C. of .255. He challenged his arrest, arguing that since he had only crossed the center line momentarily he had not been driving on the wrong side of the road. The Court of Appeals agreed, concluding that the officer's observations did not provide reasonable suspicion for a traffic stop.

The Wisconsin Supreme Court reversed the Court of Appeals, concluding that the officer had both probable cause for a traffic violation (§346.05—vehicles to be driven on right side of roadway) and reasonable suspicion that the driver was operating while intoxicated.

OMVWI

A number of revisions to Wisconsin's OMVWI regulations were signed into law in December, and will take effect on July 1, 2010. Changes incorporated in the law include:

- 1st offense OMVWI will be a criminal offense if there is a child under 16 in the vehicle.

- An underage absolute sobriety violation will be a criminal offense if there is a minor under 16 years of age in the vehicle.

- 4th offense OMVWI will be a felony if committed within 5 years of a prior offense.

- Those convicted of 7th, 8th or 9th offense OMVWI will be required to serve a mandatory minimum prison term of 3 years. Those convicted of 10th and subsequent OMVWI offenses will be required to serve a mandatory minimum prison term of 4 years.

- OMVWI causing injury will be a felony if the offender has a prior OMVWI conviction.

- Required installation/use of ignition interlock devices is expanded to include all 2nd and subsequent OMVWI convictions and 1st offense convictions with a B.A.C. of .15 or higher.

Emergency Detentions

Last year, the legislature amended §51.15, the statute governing emergency detentions in Wisconsin. The amendment limits law enforcement authority with respect to placing subjects under emergency detention. The authority to initially take a person into custody under the emergency detention statute remains with law enforcement, and the criteria for taking someone into custody under §51.15(1) is unchanged.

However, prior to actually placing a person taken into custody under §51.15 into a detention facility, the "county department of community programs" must approve of the need for detention. So, if an officer takes a person into custody because he/she meets the criteria outlined in §51.15 (1), Dane County Crisis must approve of the emergency detention and the ultimate placement.

It is important to recognize that this does not impact the authority of officers to initially take someone into custody if the criteria outlined in §51.15(1) are met. It simply requires the approval of Crisis (in Dane County) before the person is placed in a detention facility. MPD officers should continue to consult with Crisis on all emergency detention cases, and should document the name of the Crisis worker who was consulted.