

**SELECTED FOURTH  
AMENDMENT ISSUES IN  
WISCONSIN**

**Legislative Judicial Symposium**

**Judge Mark J. McGinnis**

**October 8, 2013**

“I would urge the Judicial Council, the Legislative Council, the Office of the State Public Defender, the Attorney General, and the Criminal Law Section of the State Bar, either separately or jointly, to study the Fourth Amendment issues raised by GPS devices and other technological developments and make proposals to the legislature or to this court (if appropriate for rule making).”

Chief Justice Abrahamson

# OVERVIEW

Our discussion will include the following topics:

1. The Fourth Amendment to the United States Constitution.
2. Article I, Section 8 of the Wisconsin Constitution
3. Case law.
4. Statutory law.
5. Hot topics.

# Fourth Amendment (Part 1)

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...

# Fourth Amendment (Part 2)

...and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

# Article I, Section 11, Wisconsin Constitution

“The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”

# COMPARING THE LANGUAGE OF THE TWO CONSTITUTIONS

The only differences are the following:

- 1) No “,” after “effects”.
- 2) No “,” after “seizures”.
- 3) A “;” after “violated”.

# FOURTH AMENDMENT

## OVERVIEW

### THREE ISSUES IN EVERY FOURTH AMENDMENT CASE

1. Does the 4<sup>th</sup> Amendment (and Art. I, Section 11 of the Wisconsin Constitution) apply?
  - a. Government activity (search/seizure).
  - b. Protected interest (liberty, possession, privacy).
2. Is the 4<sup>th</sup> Amendment satisfied?
3. What is the remedy?



# THE FRAMEWORK

- 1) Was there a search or seizure?
- 2) Was there government activity?
- 3) Was the LE search/seizure in a protected area by the D?
- 4) Was there a warrant for the search or seizure?
- 5) If no warrant, do one of the exceptions apply?
- 6) If no warrant and no exception, then what is the proper remedy?

# PRIVACY??

Do we expect privacy in the following:

- 1) Homes/residences?
- 2) Vehicles?
- 3) Diaries?
- 4) Telephone conversations?
- 5) Text messages?
- 6) Our location?
- 7) Our movements?
- 8) The movements of our personal property?
- 9) Records – medical records? Shopping records? Cell phone records? Bank records?
- 10) Digital devices?

# EXCEPTIONS TO SEARCH WARRANT REQUIREMENT

- 1) Search Incident To Arrest;
- 2) Terry Stops/Frisks;
- 3) Plain View/Plain Feel;
- 4) Consent;
- 5) Exigent Circumstances;
- 6) Emergency Aid Doctrine;
- 7) Community Caretaking Function;
- 8) Inventory Searches;
- 9) Protective Sweeps;
- 10) Automobile Exception.

# U.S. SUPREME COURT CASES

- 1) Katz v. United States (1967) – electronically listening to a telephone booth conversation constitutes a search and seizure.
- 2) Kyllo v. United States (2001) - (1) use of sense-enhancing technology to gather any information regarding interior of home that could not otherwise have been obtained without physical intrusion into constitutionally protected area constitutes a “search,” and (2) use of thermal imaging to measure heat emanating from home was search.

# GPS TRACKING CASES

# United States v. Jones, U.S. Supreme Court 1/23/2012

**Issue:** Is it a “search” under the Fourth Amendment when the Government attaches a GPS device to a vehicle and then uses the GPS device to monitor the vehicle’s movement?

**Holding:** Yes.

# State v. Brereton

## 2013 WI 17 (February 6, 2013)

Facts: Burglaries to homes in Rock County and Walworth County. LE had description of vehicle, description of two males, and the MO. A similar vehicle was spotted in Beloit. LE decided to execute a traffic stop based on expired registration, missing rearview mirror, and loud exhaust. All parties stipulate the traffic stop was legal. D and Conway provided ID and neither had a valid DL. The VIN did not match the IL plates on vehicle.

# State v. Brereton

## 2013 WI 17 (February 6, 2013)

Defendants taken to a nearby Dollar Store. Vehicle towed to a private impound lot where a GPS device could be installed. LE obtained a signed court order allowing installation of a GPS device. GPS put inside the hood. Four days later, the vehicle was near a reported burglary. LE stopped the vehicle. LE searched the vehicle incident to arrest and found stolen items.



# State v. Brereton

## 2013 WI 17 (February 6, 2013)

WSC concluded the following:

- 1) A stop of an auto is a seizure of the auto and its occupants.
- 2) The towing of the vehicle to another location is a seizure.
- 3) The “automobile exception” allows LE to conduct seizures involving automobiles without first obtaining a warrant.

# State v. Brereton

## 2013 WI 17 (February 6, 2013)

- 4) LE had PC to believe that the vehicle is evidence of a crime or contained evidence of a crime.
- 5) The seizure must be conducted reasonably.
- 6) The use of a GPS device on a vehicle to monitor a person's movement is a search.
- 7) LE needs a warrant to install the GPS device because it includes a search that extends beyond the automobile exception.
- 8) The execution of the warrant in real-time updates was reasonable.

# SEARCH OF A CELL PHONE

**State v. Carroll, 314 Wis.2d 690**  
**Wisconsin Supreme Court (2/3/10)**

**Facts:** Officer and an FBI Agent had house under surveillance as part of an armed robbery investigation. Carroll was driving a vehicle that officer thought may have been related to the armed robbery. Carroll slowed down, saw officers, and sped away. Officers followed. Carroll drove as fast as 60 mph in a 25 mph zone. Carroll pulled into gas station and quickly exited vehicle with something in his hand.

# State v. Carroll, (continued)

**Facts:** Officer ordered him to drop the item and Carroll dropped it. The officer handcuffed Carroll and patted him down. The officer then went to retrieve the item dropped, which was a cell phone. The cell phone was open and displayed a picture of Carroll smoking a blunt. A records check indicated that Carroll's license was suspended. He was arrested and placed in squad car. Officer then scrolled through the cell phone's photo gallery and saw several pictures of what he believed to be illegal drugs, firearms, and large amounts of US currency. The officer also answered the phone, posed as Carroll, and understood the caller to request 4 ½ ounces of cocaine.

## State v. Carroll, (continued)

**Facts:** The officer then applied for a search warrant to retrieve from the cell phone “stored telephone numbers, address book names, video clips, photographs, and related information”. Carroll was a convicted felon without the right to possess a firearm. The officer received the warrant, retrieved the photos including Carroll with a semi-automatic firearm and a revolver, and Carroll was charged.

# State v. Carroll, (continued)

The WSC issued a 5-2 decision, with Chief Justice Abrahamson and Justice Prosser dissenting.

The WSC held:

- 1) The officer was justified in seizing the cell phone (all 7 justices agreed that the seizure was lawful).
- 2) The officer was justified in viewing the marijuana image based on plain view (all 7 agreed).

## State v. Carroll, (continued)

- 3) The officer was justified in continuing to maintain possession of the cell phone. The cell phone is like “luggage”. LE had PC. Also, EC justified continued possession.
- 4) The officer was not justified in opening and browsing through the cell phone image gallery. That information is “tainted” and could not be used to obtain a warrant. No EC.



## State v. Carroll, (continued)

- 5) The officer was justified in answering the incoming call based on exigent circumstances. There was PC to believe that the device contained evidence of a crime.
- 6) There was sufficient PC from the untainted evidence to authorize a warrant.

## State v. Carroll, (continued)

The WSC expressly refused to address the Fourth Amendment issues involving cell phones when there is a lawful arrest (Footnote 5).

There is no guidance from *Carroll* when the item is lawfully seized and possessed after a lawful arrest. Federal cases (*United States v. Ortiz*) still rely on EC when there is a lawful arrest.

**TWO PENDING CASES  
BEFORE THE WISCONSIN  
SUPREME COURT**

# WISCONSIN SUPREME COURT

## PENDING CASE

### 2012AP336-CR State v. Bobby L. Tate

Whether obtaining a cell phone's location constitutes a "search" within the meaning of the Fourth Amendment.

If so, what probable cause standard applies before police can obtain location information?

Whether statutory authorization is necessary before a court can permit a cell phone location search, and whether such statutory authorization exists.

# WISCONSIN SUPREME COURT

## PENDING CASE

### 2010AP3016-CR State v. Nicolas Subdiaz-Osorio

Whether police may track the real-time location of a cell phone user without a warrant.

Whether a criminal suspect made an unequivocal and unambiguous request for counsel during interrogation.

Whether evidence obtained from cell phone tracking and statements made during interrogation should be suppressed or whether the admission of such evidence and statements constitutes harmless error.

**CURRENT DEVELOPMENT  
REGARDING THE  
VALIDITY OF A SEARCH  
WARRANT**

# SEARCH WARRANT STATUTES

## Wisconsin Statute Section 968.12

This statute addresses “search warrants”.

## Wisconsin Statute Section 968.13

This statute is argued in Tate (pending WSC case).

## Wisconsin Statute Section 968.15

# Missouri v. McNeely, U.S. Supreme Court 4/17/2013

The U.S. Supreme Court held that the natural metabolization of alcohol in the bloodstream does not represent a per se exigency that justifies an exception to the Fourth Amendment's search warrant requirement for nonconsensual blood testing in all drunk-driving cases. The exigency must be determined by the totality of circumstances on a case-by-case basis.



# WARRANTS

The *McNeely* decision has created many issues for law enforcement and trial judges:

- 1) Can warrants be done electronically?
- 2) Can the signatures be done electronically?
- 3) What are the acceptable procedures for assuring a valid warrant?
- 4) What statutes are needed to affirm the warrant application process?

# PENDING LEGISLATION

- 1) 2013 Wisconsin Assembly Bill No. 383.
- 2) 2013 Wisconsin Assembly Bill No. 203.
- 3) 2013 Wisconsin Senate Bill 196.

# QUESTIONS?

Thank you!

