Waukesha County Technical College (WCTC)

2015-16 Law Enforcement In-Service

LEGAL UPDATE

This year, we will cover,,,

- Case law changes that directly affect cops.
- New statutory changes in Wisconsin Law.

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

Legal topics in this case:

- Arrest without a warrant from a home
- Curtilage
- Consent Search
- Protective Sweep
- Exclusionary Rule
- Fruit of the Poisonous Tree

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- Milwaukee Police develop probable cause that the suspect (McMillian) has been involved in a double homicide.
- Police go to his home to arrest him.
- They did ***not*** have an arrest warrant or a search warrant.
- They bring in the tactical team and additional officers to assist in the arrest.

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- The officers surrounded the house.
- An officer knocked and announced that he was a police officer.
- The suspect's cohabiting girlfriend, came to the door and confirmed that the suspect was inside the house.

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- She stepped outside, and the Officer called for the suspect to come out.
- When McMillian came to the door, he came outside and the Officer arrested him.
- *Is this arrest legal?*

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- Tactical officers then conducted a protective sweep ***inside*** the house.
- During the sweep, officers observed a single **rifle case** in one of the bedrooms.
- *Is this a legal protective sweep?*

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- The officers ask the suspect McMillian, who was barefoot, if he wanted his shoes.
- The suspect said yes and that his flip flops were in the back bedroom.
- The officer took this exchange as a **request** by the suspect to get his flip flops from the back bedroom.
- *Is this legal consent?*

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- After the protective sweep was completed, the officers went into the back bedroom to get the flip flops.
- The girlfriend walked with the officer to the back bedroom.
- The officer bent to pick up the flip flops next to the bed, and he saw ***two gun cases*** between the bed and the nightstand.

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- After the arrest, the suspect admitted to his involvement In two homicides.
- A detective drafted an affidavit for a warrant to search suspect's residence.
- The affidavit said that an AK-47 assault rifle had been observed during the protective sweep (the government admitted this was wrong and that it should have stated that the officers observed a rifle case).
- **A state court judge issued the search warrant.**

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- When the officer arrived at the suspect's residence with the search warrant, he noticed a typographical error in the warrant and affidavit.
- He called the judge, who instructed him to correct the mistake by hand.
- Officers searched the house and recovered firearms and ammunition.

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- McMillian was indicted for various crimes to include federal firearms violations.
- Suspect filed a motion to suppress the firearms.
- The district court denied the motion.
- He was convicted, and he appealed the denial of his motion to suppress to the Seventh Circuit Court of Appeals.
- *What do you think?????*

United States v. McMillian

No. 14-1537 (7th Cir. Decided May 22, 2015)

- The state conceded that the protective sweep of McMillian's residence when he was arrested outside his door was a *violation* of his Fourth Amendment rights (illegal).
- The 7th Circuit Court of Appeals said the protective sweep **violated the Fourth Amendment**, because the officers did not reasonably believe *"that the area swept harbored an individual posing a danger to the officer or others."* Maryland v. Buie, 494 U.S. 325, 327 (1990).[iii]

Answers

- Since this protective sweep is what enabled the officers to observe the rifle case, the court held it was properly *stricken from consideration* (**Exclusionary Rule**).
- The suspect's consent to enter the residence to retrieve his shoes was *tainted* by the prior unlawful entry during the protective sweep (**Fruit of Poisonous Tree**).

Answers

- *Was the search warrant supported by probable cause?*
- The court stated that they had to ***exclude*** information about the rifle case observed during the protective sweep, since that was obtained illegally.

Answers

- The court excluded the information regarding the suspect possibly being involved in two homicides since the officers did not *verify or independently corroborate* this information.
- The only information left to support the probable cause for the search warrant was the officer's observation of the two gun cases when they retrieved suspect's shoes.

Answers

- The court then held that, since they were in suspect's residence *with valid consent* to retrieve his shoes, the observation of the gun cases can be considered for probable cause in support of the search warrant.
- The 7th Circuit upheld the search and evidence recovered during the search.

United States v. McMillian, No. 14-1537 (7th Cir. Decided May 22, 2015)

Rodriguez v. United States, 135 S. Ct. 1609 (2015);

Decided April 21, 2015 (US Supreme Court)

Traffic Stops—K9 Sniffs

Rodriguez v. United States, 135 S. Ct. 1609 (2015);

Decided April 21, 2015 (US Supreme Court)

- Rodriguez was stopped for a traffic violation (driving on the highway shoulder).
- The officer—a K9 handler—spoke to Rodriguez, collected his license, registration and proof of insurance, then returned to his squad.
- After requesting a second officer, the K9 officer ran a records check on Rodriguez, then completed a written warning for driving on the shoulder of the road.

Rodriguez v. United States, 135 S. Ct. 1609 (2015);

Decided April 21, 2015 (US Supreme Court)

- The officer returned to the vehicle, gave Rodriguez his documents back and issued him the written warning (though he did not release Rodriguez or tell him he could leave).
- He then asked for consent to walk around the vehicle with his K9; Rodriguez declined. The officer then instructed Rodriguez to exit the vehicle and stand near the squad.

Rodriguez v. United States, 135 S. Ct. 1609 (2015);

Decided April 21, 2015 (US Supreme Court)

- After the second officer arrived, the K9 officer sniffed the exterior of the vehicle. The K9 alerted, and a search yielded a large bag of methamphetamine.
- About eight minutes had elapsed from the time the officer gave Rodriguez the warning until the time that the K9 alerted.

Rodriguez v. United States, 135 S. Ct. 1609 (2015);

Decided April 21, 2015 (US Supreme Court)

- Rodriguez challenged the search of his vehicle, claiming that the justification to detain him ended when the officer issued him the written warning, and that the K9 sniff was therefore unreasonable.
- The case reached the U.S. Supreme Court, and the court agreed with Rodriguez.

Rodriguez v. United States, 135 S. Ct. 1609 (2015);

Decided April 21, 2015 (US Supreme Court)

- The court pointed out that the duration of a traffic stop is limited to the time needed *"to address the traffic violation that warranted the stop."*
- Because addressing the (traffic) infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose…authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.

Rodriguez v. United States, 135 S. Ct. 1609 (2015);

Decided April 21, 2015 (US Supreme Court)

- These tasks include checking the driver's license, checking the vehicle registration, running the driver for warrants, completing a citation/warning, etc.
- Prior court decisions had made it clear that a K9 sniff or questioning about things unrelated to the traffic violation were permissible as long as they did **not** *"measurably extend the duration of the stop."*

Rodriguez v. United States, 135 S. Ct. 1609 (2015);

Decided April 21, 2015 (US Supreme Court)

- The court concluded that his detention was unreasonably extended and that the K9 sniff was unreasonable.
- Once the first officer completes the tasks related to the original stop, the justification for the detention ends.
- ***Bottom Line:*** *There can be no wait, no matter how slight, during a traffic stop to accommodate a "fishing expedition" dog sniff. The police must stay on task in executing their traffic stop mission.*

Rodriguez v. United States, 135 S. Ct. 1609 (2015);

Decided April 21, 2015 (US Supreme Court)

Two Options for Officers:

- Asking for consent, performing a K9 sniff, etc. before the first officer finishes his actions related to the stop. ***OR***
- Conclude the traffic stop prior to asking for consent or performing additional investigative steps, *make a clean break* while making it clear that the detention is over and that the *driver is free to go*. The officer can then seek to transition to a consensual encounter.

Terry Stop – release – re contact then consent search

State v. Hogan

(July 10, 2015, Wisconsin Supreme Court)

- This case involved a traffic stop that morphed into a drugged driving investigation.
- The police stopped the defendant for a seat belt violation.
- The officer observed what he believed to be indicia of drug activity and called for back-up. The officer then wrote out a seat belt citation for the defendant and for his wife.
- Before the officer had finished the citation paper work, a local officer who knew the defendant arrived on the scene.

State v. Hogan

(July 10, 2015, Wisconsin Supreme Court)

- The arriving officer advised that his department had received tips that the defendant had a drug issue and was a "shake and bake" methamphetamine cooker.
- The police officer who had stopped the defendant then asked him to perform a series of field sobriety tests. The defendant passed all the tests.

State v. Hogan

(July 10, 2015, Wisconsin Supreme Court)

- At this point, *24 minutes* after the original stop, the officer told the defendant that he was free to leave.
- The defendant then started to leave and after 16 seconds, the officer re-approached the defendant and asked the defendant if he would consent to a search of his trunk.

State v. Hogan

(July 10, 2015, Wisconsin Supreme Court)

- The defendant granted consent and the police found in the trunk, methamphetamine, equipment and supplies commonly associated with manufacturing methamphetamine, and two loaded handguns.
- They were arrested and appealed.
- ***What do you think? Legal?***

State v. Hogan

(July 10, 2015, Wisconsin Supreme Court)

- The defendant argued that his traffic stop was unlawfully extended to last 24 minutes.
- He argued that the police did not have reasonable suspicion to hold him for anything other than a seat belt violation.
- The state argued that the detention was permissible because the police had reasonable suspicion that the defendant had engaged in "***drugged driving***".
- The high court agreed with the defendant that the *police did not have the requisite reasonable suspicion to extend the traffic stop* beyond the time necessary to process the seatbelt violations.

State v. Hogan

(July 10, 2015, Wisconsin Supreme Court)

- ***But*** the court agreed with the state that the consent to search the vehicle was the product of a consensual encounter.
- In other words, the court reasoned that the unlawful stop was no longer relevant, *once the stop was ended* and the police told the suspect that he was free to go. Therefore, the evidence was admissible.

State v. Hogan

(July 10, 2015, Wisconsin Supreme Court)

- ***Remember:*** Proving driving with a controlled substance in your system does *not* require impairment, and thus the reasonable suspicion standard can be rather easily met.
- Also, once a defendant is released from an improper seizure, the impropriety of the original seizure is no longer relevant.

State v. Hogan

(July 10, 2015, Wisconsin Supreme Court)

- Just like in the *Rodriguez* Supreme Court case, ending a traffic stop and then re-initiating contact with the defendant as a consensual encounter is still permissible.

Use of Force Cases

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015);

(US Supreme Court)

- In this case the US Supreme Court for the first time expanded the *Graham v. Connor* standard which officers should consider when deciding what level of force to use.

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015);

(US Supreme Court)

- Kingsley was in a county jail, awaiting trial. He refused to comply with a number of orders given by deputies, and they eventually entered his cell to remove him.
- A physical altercation ensued, and an ECD was deployed. Kingsley subsequently sued the deputies, alleging an excessive use of force.

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015);

(US Supreme Court)

- The main point in the case was what legal standard should apply to judging the deputies' use of force.
- Officers are most familiar with the "objective reasonableness" standard as originally articulated in *Graham v. Connor*.
- This standard applies to the application of force when effecting an arrest or detention. It is an objective test, and the subjective mindset/intent of the officer(s) involved is not relevant.

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015);

(US Supreme Court)

- However, different constitutional standards have applied to other situations, depending on the legal status of the person against whom force is applied.
- Force used against a confined inmate—convicted of a crime—is judged not by the objective reasonableness standard, but rather by the 8th Amendment's prohibition against cruel and unusual punishment (and it is quite different than the objective reasonableness test).

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015);

(US Supreme Court)

- Kingsley was a pretrial detainee; one who has been arrested and is confined, but has not been convicted.
- Courts have historically applied a distinct standard to pretrial detainees (based on the 14th Amendment's Due Process clause).
- Both of these standards require an examination/determination of the officer(s) subjective mindset/intent.

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015);

(US Supreme Court)

- The Kingsley court concluded that the standard of objective reasonableness should also apply to force used against a pretrial detainee.
- So, the same evaluation of a force application during an arrest/detention—based on *Graham v. Connor*—will now also apply to force applied to a pretrial detainee.

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015);

(US Supreme Court)

Remember that *Graham v. Connor* articulated three specific factors relevant to evaluating objective reasonableness:

1. The severity of the crime at issue;
2. Whether the suspect poses an immediate threat to the safety of the officers or others;
3. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015);

(US Supreme Court)

The Kingsley court outlined a number of additional factors for consideration when dealing with a pretrial detainee:

1. The relationship between the need for the use of force and the amount of force used.
2. The extent of the (suspect)'s injury.
3. Any effort made by the officer to temper or to limit the amount of force.
4. The severity of the security problem at issue.
5. The threat reasonably perceived by the officer.
6. Whether the (suspect) was actively resisting.

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015);

(US Supreme Court)

- The court made it clear that this list is not exclusive, but only intended to "*illustrate the types of objective circumstances potentially relevant to a determination of excessive force.*"
- While these factors are all consistent with current training and practice, this appears to be the Court's first effort to expand on the three factors outlined in *Graham*.

Plumhoff v. Rickard, 134 S.Ct 2012 (2014)

(US Supreme Court)

- This case started with a vehicle pursuit. The pursuit reached speeds in excess of 100 miles per hour, and involved extremely dangerous driving by the suspect.
- The suspect vehicle spun out in a parking lot and struck one of the squads, then came to a stop (pinned up against the squad).

Plumhoff v. Rickard, 134 S.Ct 2012 (2014)

(US Supreme Court)

- The officers exited their vehicles to attempt and contact the driver, however the suspect vehicle began spinning its tires and trying to move.
- During the subsequent encounter the officers fired 15 shots as the suspect vehicle tried to push away from the squads.

Plumhoff v. Rickard, 134 S.Ct 2012 (2014)

(US Supreme Court)

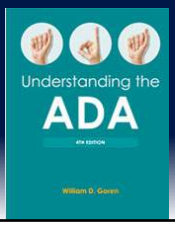
- The vehicle did eventually get free, and crashed a short distance away, The driver and passenger both died, from a combination of gunshot wounds and injuries suffered in the crash.
- The estate of the driver sued the officers, alleging excessive force.
- The Supreme Court, consistent with a prior ruling in *Scott v. Harris*, 550 U.S. 372 (2007), concluded that the officers' use of deadly force had been constitutional.

Plumhoff v. Rickard, 134 S.Ct 2012 (2014)

(US Supreme Court)

- The court rejected the argument by the estate that the 15 shots fired by the officers was unreasonable under the circumstances.
- For the *first time* the U.S. Supreme Court addressed this specific issue: *"It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat as ended."*

Police use of force against disabled people



City and County of San Francisco v. Sheehan, 135 S.Ct. 1765 (2015).

(US Supreme Court)

- This case involved police response to a group home for people with mental illness.
- One of the residents had threatened to kill a staff member with a knife.
- Officers responded, and determined that the resident needed to be taken into custody for mental health evaluation and treatment.

City and County of San Francisco v. Sheehan, 135 S.Ct. 1765 (2015).

(US Supreme Court)

- The encounter eventually resulted in officers shooting the resident after she approached them with a knife.
- She survived, and sued the officers.
- A component of the lawsuit was an assertion that the Americans with Disabilities Act (ADA) applied to the actions of the officers in attempting to take Sheehan into custody.

City and County of San Francisco v. Sheehan, 135 S.Ct. 1765 (2015).

(US Supreme Court)

- Sheehan argued that it did, and the lower courts agreed, concluding that the *"reasonable accommodations"* required by the ADA extended to police efforts to take someone into custody.
- *What? Really?*

City and County of San Francisco v. Sheehan, 135 S.Ct. 1765 (2015).

(US Supreme Court)

- *Unfortunately*, the Supreme Court did **not** answer the question of whether the ADA applies to police activities (due to some procedural issues with the case).
- The Court did conclude that the officers were entitled to qualified immunity for their actions, however.

City and County of San Francisco v. Sheehan, 135 S.Ct. 1765 (2015). *(US Supreme Court)*

- Federal courts are split on the issue of whether the ADA applies to the actions of police officers attempting to take a mentally ill subject into custody.
- The Seventh Circuit (which includes Wisconsin) *has not ruled on the issue*.
- *Where are we headed?????*

Reasonable Suspicion – Does an officer have to be correct?

Heien v. North Carolina, 134 S.Ct. 1872 (2014)

Review

(December 15, 2014, US Supreme Court)

- We covered this case in last year's in-service.
- An officer made a traffic stop for a broken tail light.
- During the course of the stop, the officer noted some suspicious behavior. This eventually led to a consent search and the discovery of cocaine and an arrest.
- North Carolina law actually only required vehicles to have one rear stop light.
- The officer made a mistake of law.

Heien v. North Carolina, 134 S.Ct. 1872 (2014)

Review

(December 15, 2014, US Supreme Court)

- The Supreme Court pointed out, a reasonable factual mistake by a police officer does not make a stop/arrest/search unreasonable.
- *"Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground."*

State v. Houghton,

Wisconsin Supreme Court (July 2015)

- The Wisconsin Supreme Court recently applied *Heien* in *State v. Houghton*.
- In Houghton an officer observed a driver operating with an air freshener hanging from the rear view mirror and a GPS device on the dashboard.
- The stop eventually resulted in a search and the discovery of marijuana and an arrest.

State v. Houghton,

Wisconsin Supreme Court (July 2015)

- The officer indicated that *his belief* was that Wisconsin law (346.88(3)(b)) prohibited the presence of any object in front of the windshield of a vehicle.
- The driver argued that this interpretation was incorrect, and that the fruits of the stop should be suppressed.

State v. Houghton,

Wisconsin Supreme Court (July 2015)

- The Houghton court concluded that the statute did not have as broad a meaning as the officer thought.
- *"We conclude that WI Stat. 346.88(3)(b) - which requires that an object "obstruct" a driver's clear view to be a violation—does not mean that every object in a driver's clear view is a violation."*

State v. Houghton,

Wisconsin Supreme Court (July 2015)

- But while the officer's interpretation of the statute *was mistaken*, it was reasonable.
- As a result, the court concluded that the stop and subsequent search were valid.

United States v. Webster,

775 F3d 897 (7th Cir. 2015)

- Officers received a tip of drug activity at a house and find both Webster and Jones there with a strong order of marijuana.
- Both suspects Webster and Jones were placed inside of a squad car while the officers proceeded to obtain a search warrant for the house.

United States v. Webster,

775 F3d 897 (7th Cir. 2015)

- While in the back of the squad, and after an officer who had been inside the squad left, Jones and Webster talked and made phone calls – for approximately 8 minutes; all of the conversations were recorded by the internal video camera in the squad.
- The recording was introduced into evidence.

United States v. Webster,

775 F3d 897 (7th Cir. 2015)

- On appeal, Webster maintained that the recording of his conversation in the back seat of the squad car violated his 4th Amendment right to be free from an unreasonable search and seizure.
- The court held that *"conversations in a squad car such as the one in this case are **not** entitled to a reasonable expectation of privacy, and therefore the recording of the conversation is **not a violation** of the Fourth Amendment."*

New Wisconsin Statutes

Handgun Purchases

- 2015 Act 22: This act removed Wisconsin's 48-hour waiting period for handgun purchases.
- *175.35* Purchase of handguns

Guns in School Zones

- **2015 Act 23:** This act clarified the law regarding active but off-duty law enforcement personnel going armed in school zones (948.605).

948.605 (c) **"School zone"** means any of the following:

1. In or on the grounds of a school.

2. Within 1,000 feet from the grounds of a school.

- The following are now *exceptions* to the prohibition of a firearm in a school zone:

Federal Exceptions to Firearms on School Grounds

- 18 USC 922 (q) (2) (B) (i), (iv), (v), (vi), or (vii). School zone firearm prohibition exceptions:
  - On private property not part of school grounds
  - The individual possessing the firearm is licensed to do so
  - The firearm that is not loaded; and in a locked container, or a locked firearms rack that is on a motor vehicle
  - Firearm for use in a program approved by a school in the school zone
  - Contracted school security officers
  - A law enforcement officer acting in his or her official capacity
  - Is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting

State Exceptions to Firearms on School Grounds

- Except if the person is in or on the grounds of a school, a CCW licensee, or an out–of–state licensee
- A person who is employed in this state by a public agency as a law enforcement officer and ,,,
- A *qualified* out–of–state law enforcement officer
- A former officer if they have a photographic identification document issued by the law enforcement agency *(must shoot a qualification course within 12 months)* specific to the gun.

State Exceptions to Firearms on School Grounds

- A state–certified commission warden acting in his or her official capacity.
- A person who is legally hunting in a school forest if the school board has decided that hunting may be allowed in the school forest

Lights under Motorcycles

- **2015 Act 27:** This act applies to lighting underneath motorcycles.
- 347.07 (3) A motorcycle may be equipped with a lighting device that illuminates the ground directly beneath the motorcycle if all of the following apply:

(a) The lighting device is not visible to approaching vehicles.

(b) The lighting device does not display a red, blue, or amber light

(c) The lighting device does not display a flashing, oscillating or rotating light.

False claims of Military Service

- **2015 Act 30:** This act makes it a crime to falsely claim military service or honors for the purpose of receiving a tangible benefit.
- 946.78 False statement regarding military service.
- Whoever knowingly and with the intent to receive a tangible benefit falsely claims to … *(be a military vet or medal winner)*
- Any person with the intent to commit or aid or abet the commission of a crime other than a crime under this section is guilty of a Class H felony.

Global Positioning Devices

- **2015 Act 45:** This act makes it a crime to use GPS devices under certain circumstances.
- 940.315 Global positioning devices. Class A misdemeanor. Whoever:
- Places a global positioning device or a device equipped with global positioning technology on a vehicle owned or leased by another person without that person's consent.

Global Positioning Devices

- Intentionally obtains information regarding another person's movement or location generated by a global positioning device or a device equipped with global positioning technology that has been placed without that person's consent.

Review 948.31 – Class I Felony

- Unmarried parents with no formal court ordered custody agreement in place can still be in violation of 948.31 (Interference with custody by parent or others).
- The statute basically gives the mother default authority over the child if the parents are unmarried and in the absence of a court ordered custody arrangement.
- There are some exceptions in the statute, such as a reasonable belief that there is a threat of physical harm or sexual abuse to the child.

Thank you for your time!

Presented by WCTC instructors Mark G. Stigler, Mark Baganz and the Waukesha County District Attorney's Office

Sources:
Madison Police Department, Captain Victor Wahl, summer 2015 Legal Update
Dave Perlmann, Wisconsin Department of Justice