THE TRAFFIC BEAT

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Message From The Director

Welcome to the Spring Issue of *The Traffic Beat.* The snow and ice melted just in time for the *16th Annual Traffic and Impaired Driving Law Program.* This year's program had over 150 people in attendance; namely, law enforcement officers, prosecutors, general practitioners and others concerned with traffic safety. Attendees also had an opportunity to meet Julia Sherman who joined the Resource Center in January as coordinator of the Wisconsin Alcohol Policy Project (WAPP).

The Wisconsin Alcohol Policy Project's mission complements the Resource Center on Impaired Driving by providing community leaders and law enforcement officers with evidence based tools and technical assistance on policies and practices that prevent and reduce alcohol misuse. Improving the community alcohol environment will support appropriate alcohol consumption.

Very few states, including Wisconsin, regulate alcohol locally. As a result, information drawn from the experience of other states or created for a nationwide audience is often difficult to adopt or implement in Wisconsin. The Wisconsin Alcohol Policy Project will help bridge this gap by providing evidence based policies and practices framed for Wisconsin and the political landscape of local government.

Ms. Sherman has worked on alcohol related policy issues since 2001, first at the American Medical Association's Reducing Underage Drinking through Coalitions project and later as national field director for the Center on Alcohol Marketing and Youth at Georgetown University. Most recently she worked at the Wisconsin Clearinghouse for Prevention Resources where she provided technical assistance to communities and coalitions on preventing and reducing underage drinking. Feel free to contact Ms. Sherman by email jsherman2@wisc.edu or phone 608-220-1998.

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OWI-RELATED CASE LAW UPDATE

Below is a summary of OWI-related cases. For a more exhaustive case law summary, or to read the decisions in their entirety, visit our website at **www.law.wisc.edu/rcid.**

Michigan v. Fisher

558 U.S. ____ (2009)
Decided: December 7, 2009

The Court found that based on ***Brigham City v. Stuart***, officers in this case had an objectively reasonable belief that someone was either seriously injured or immediately threatened with an injury, therefore the police did not violate the defendant's 4th amendment rights by entering his home without a warrant.

Police officers responded to a complaint of a disturbance at Fisher's home. Upon arrival, the officers found Fisher's pick-up truck in the driveway with its front smashed in, damaged fence posts along the side of the property, and three broken house windows. The officers also found blood on the hood of the pickup and on clothes inside the truck. The officers could see Fisher through an open window, screaming and throwing things. One of the officers pushed the front door open and went inside, at which time he saw Fisher pointing a gun at him and quickly retreated. Fisher was charged under Michigan law with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The trial court concluded that the officer violated the Fourth Amendment when he entered Fisher's house, and suppressed the evidence obtained as a result, as well as the officer's statement that Fisher had pointed a gun at him. The Michigan Court of Appeals affirmed. The Supreme Court granted certiorari because the court of appeals' decision was contrary to ***Brigham City v. Stuart***, 547 U.S. 398 (2006).

"Searches and seizures inside a home without a warrant are presumptively unreasonable." ***Groh v. Ramirez,*** 540 U.S. 551, 559 (2004). However, that presumption can be overcome by exigent circumstances that show the warrantless search was objectively reasonable. ***Mincey v. Arizona,*** 437 U.S. 385, 393-394 (1978). In ***Brigham City,*** the Supreme Court held that the need to assist persons who are seriously injured or threatened with injury, was a compelling situation, an exigent circumstance, which did not depend on the officers' subjective intent or the seriousness of any crime in which the officers are investigating when the emergency arises. 547 U.S. 398, 403-405 (2006). Law enforcement officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." ***Id.*** For this exception to apply, it requires "an objectively reasonable basis for believing, ***Id***. at 406, that "a person within [the house] is in need of immediate aid." ***Mincey,*** at 392.

Just as in ***Brigham City***, the officers in this case were responding to a report of a disturbance inside a residence, and when they arrived they encountered a "tumultuous situation in the house." The officers found signs of a recent injury and perhaps a car accident. And like ***Brigham City,*** the officers saw violent behavior inside the house. It was objectively reasonable to believe that Fisher's throwing of items around the house might have a human target or that Fisher would hurt himself in the course of his rage. Officers do not need "ironclad proof of a 'likely serious, life-threatening' injury to invoke the emergency aid exception." Therefore, the officers' entry was reasonable under the Fourth Amendment, based on the reasoning in ***Brigham City.***

State v. Carter

The Wisconsin Supreme Court accepted review on March 9, 2010, of the court of appeals decision in ***State v. Carter,*** 2009 WI App 155. The two issues presented are: (1) Do the violations of Illinois' zero tolerance law count as prior offenses for sentence enhancement purposes under Wis. Stat. §§ 346.63 and 346.65? and (2) What methodology are trial courts to employ to determine whether to count out-of-state OWI-related offenses

for sentence enhancement purposes under Wis. Stat. § 343.307?

The state alleged that Carter's three prior Illinois offenses were countable for sentencing purposes. Specifically, the state alleged two violations of Illinois' zero tolerance law and one violation of Illinois' OWI law. Carter plead guilty to OWI and the State agreed to dismiss but read in the PAC offenses. Carter argued that his current offense was not a fourth offense because the two Illinois zero tolerance suspensions cannot be counted for sentence enhancement.

The circuit court found that Carter's two Illinois zero tolerance violations counted as prior convictions under Wis. Stat. § 343.307(1)(d) as defined by § 340.01(9r); they were "convictions" under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle with a prohibited alcohol concentration. The court of appeals reversed and ruled that Carter's zero tolerance suspensions cannot be counted as "convictions," *citing* ***State v. Machgan,*** 2007 WI App 263, 306 Wis. 2d 752, 743 N.W.2d 832.

The Supreme Court is expected to interpret the Wisconsin statutes in light of ***Machgan, Esposito*** and other cases addressing similar questions of how out-of-state OWI offenses may apply to sentencing.

State v. Fischer

2010 WI 6
Decided: February 2, 2010

The court upheld the appellate court's decision that affirmed the trial court's ruling that excluded an expert's report and opinion testimony based in part on preliminary breath test (PBT) results.

An officer pulled Fischer over on suspicion of driving while intoxicated. After Fischer failed a field sobriety test, the officer administered a PBT, which registered a .112 percent. A chemical blood test, administered an hour later, resulted in a .147 percent BAC. Fischer was charged with OWI and OWI-PAC. At trial, Fischer retained an expert witness who, by comparing the PBT result to the blood test result, extrapolated a probable BAC at the time Fischer was initially pulled over. The expert planned to testify that Fischer's BAC may have been below 0.08 when he was first stopped. The State filed a motion to exclude the testimony, specifically the use of the PBT result. Acknowledging that PBT results are inadmissible evidence in prosecutions for OWI, Fischer argued he had a Sixth Amendment right to present the expert's evidence. In rejecting Fischer's claim, the circuit court looked to the legislative intent behind Wis. Stat. § 343.303 and found that the legislature never intended a PBT result to be an evidentiary test. While the legislature deemed the PBT reliable enough for a probable cause determination, it did not consider it reliable enough to be admitted into evidence for purposes of determining guilt or innocence.

The questions before the Wisconsin Supreme Court were: (1) whether Wis. Stat § 343.303 creates an absolute bar on the admission of PBT results in OWI cases, even when used as the basis for an expert's opinion offered under Wis. Stat. § 907.03; (2) if so, whether such an application of the statute violates a defendant's constitutional right to present a defense; and (3) whether the court should revisit and reject Wisconsin case law that establishes that "the reliability of the evidence is a weight and credibility issue for the fact finder." The supreme court found that the circuit court properly granted the State's motion to exclude the report and the expert opinion testimony.

The court concluded that Wis. Stat.§ 343.303 expressly bars the admission of PBT results in OWI cases, and courts cannot allow Wis. Stat. § 907.03 to trump that prohibition in § 343.303 because it would present needless obstacles in the investigation, prosecution, and defense of drunk driving cases.

Case Law Update continued

Fischer argued that excluding the expert's opinion violates his constitutional right to present a defense. The court did not agree, citing ***United States v. Scheffer*** which held that the exclusion of defense evidence is constitutionally valid "so long as they are not 'arbitrary' or 'disportionate to the purposes they are designed to serve.' " The Wisconsin Supreme Court turned the ***Scheffer*** holding into a two-part test in ***State v. St. George***, 2002 WI 50, ¶52, 252 Wis. 2d 499, 643, N.W.2d 777; the second part of the ***St. George*** test involves weighing the defendant's right against the State's interest in excluding the evidence. The Wisconsin Supreme Court found that the state's compelling interest in excluding the PBT results promotes efficient investigations of suspected drunk drivers and successfully outweighs Fischer's right to present this evidence.

Note 1: The court's holding does not speak to the reliability of the PBT results in general.

Note 2: Wis. Stat. § 343.303 states in relevant part: "The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under § 343.305(3).

State v. Puchacz

2010 WI App 30
Decided: January 20, 2010

The court held that out-of-state convictions count under Wis. Stat. § 343.307(1), if the out-of-state statute upon which the conviction is based, is substantially similar to the prohibited conduct of the Wisconsin statute at issue. The court also held that the officer had probable cause to stop defendant because he saw him crossing the center line, which is a violation of Wis. Stat. § 346.05.

A police officer observed Puchacz's vehicle veer several times within its lane and ultimately cross the center line. Puchacz appeals from a judgment convicting him of OWI and OWI-PAC, both fifth offenses. The circuit court denied Puchacz's motion to strike three of his four prior OWI offenses from Michigan, so they could not be used for sentencing enhancement. The circuit court also denied Puchacz's motion to suppress all evidence obtained as a result of the traffic stop. The State argues that a Michigan conviction under Michigan Comp. Laws Ann. § 257.625(3), operating-while-visibly-impaired, can be counted in Wisconsin under Wis. Stat. § 343.307(1). The court of appeals agreed with the State, affirming the circuit court's decisions.

Wis. Stat. § 343.307(1)(d) sets forth the criteria to determine whether prior conduct may be used to calculate a defendant's prior drunk driving convictions. Section 343.307(1)(d) includes:

Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

In Wis. Stat. § 343.307(1)(d), "substantially similar" emphasizes that the out-of-state statute need only prohibit conduct similar to the list of prohibited conduct in the statute. Michigan Comp. Laws Ann. § 257.625(3), operating-while-visibly-impaired due to consumption of alcohol, is "substantially similar" to the prohibited conduct listed in Wis. Stat. § 343.307(1)(d).

As for the motion to suppress evidence, the court of appeals agreed with the circuit court's denial of the motion. Under ***State v. Popke,*** 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569, when the officer observed Puchacz crossing over the center line, he had probable cause to believe that Puchacz had committed a traffic violation, justifying a traffic stop. A momentary swerve across the center line is sufficient for probable cause for a traffic stop. ***Popke,*** ¶¶17-18

LEGISLATIVE SUMMARY

2009 Wisconsin Act 163

Effective March 30, 2010

Amends Wis. Stat. § 343.305, to allow a law enforcement officer to get a chemical test sample from a suspected intoxicated driver without placing the person under arrest in either of the following two circumstances:

(1) If a person is the operator of a vehicle that is involved in an accident that causes substantial bodily harm to any person and the officer detects any presence of alcohol, a controlled substance, or combination thereof, the law enforcement officer may request chemical test samples of breath, blood, or urine, without placing the operator of the vehicle under arrest;

OR

(2) If a person is the operator of a vehicle that is involved in an accident that causes the death or great bodily harm to any person and the law enforcement officer has reason to believe that the person violated any state or local traffic law, the officer may request the operator provide a chemical test sample of breath, blood or urine, without placing the operator of the vehicle under arrest.

Note: The Informing the Accused form will be revised to reflect the additional information required under Wis. Stat. § 343.305(4).

A Closer Look at 2009 Wis Act 100

Effective July 1, 2010

Penalty Increases:

- Criminalizes 1st offense OWI if there is a child under age 16 in the vehicle.
  - -5-days to 6-months in jail; $350-$1,100 fine (same as current penalties for OWI 2nd)
  - -Creates s. 346.65(2)(f).
  - -Criminalizes Underage Absolute Sobriety violations if there is a passenger under 16 years of age in the vehicle.
  - -No jail time, but $400 forfeiture becomes a "fine." (Applies to drivers under age 21 with BAC between 0.0 and 0.08. s. 346.65(2q)).

- Increases mandatory minimum jail time for 3rd offense OWI from 30-days to 45-days. 346.65(2)(am)3.

- Makes 4th offense OWI a felony if committed within 5 years of a prior offense
  - -Class H Felony; $600-$10,000 fine, 6-months to 6-years imprisonment. s. 346.65(2)(am)4m.
  - -(The provision of SB66 that would have repealed the requirement that the person serve the felony time in jail, and therefore would have eliminated house arrest for the offense by sending the person to prison, did not survive into the final act and is not law).

Act 100 continued

● Requires 7th—8th—9th OWI offenders to serve mandatory minimum prison term of 3 years. s. 346.65(2)(am)6.

● Requires 10th and subsequent OWI offenders to serve mandatory minimum prison term of 4 years. s. 346.65(2)(am)7.

●Makes OWI-Causing Injury a felony if offender has a prior OWI conviction.
-Class H Felony $600-$10,000 fine; 6-months to 6-years imprisonment.
-Applies to any driver with an AC > .08, AND
-Applies to any CMV operator with AC > 0.04 s. 346.65(3p).

● Go to Jail, Directly to Jail…
-Court may not stay OWI sentences for 3rd and subsequent OWI offenses. s. 973.15(8)(a)3. (Court may stay 1st and 2nd offenses up to 60 days).

New Type of OWI:

● Establishes PAC of 0.02 for persons subject to an IID order for the duration of the order. s. 340.01(46m).

● 340.01(46m) "Prohibited alcohol concentration" means one of the following:
-(a) If the person has 2 or fewer prior convictions, suspensions, or revocations, as counted under s. 343.307 (1), an alcohol concentration of 0.08 or more.
-(c) If the person is subject to an order under s. 343.301 or if the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1), an alcohol concentration of more than 0.02.

Ignition Interlock Devices (IIDs)

● Section 343.301 is completely rewritten.

● Ignition Interlock Devices (IIDs) will be MANDATORY on:
-ALL repeat OWIs
-ALL refusals.
-ALL 1st offense OWI with AC of 0.15 or higher. s. 343.301(1g).
- IID must be installed on every vehicle owned by defendant, unless doing so would cause an undue financial hardship: "A court… shall order that each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration be equipped with an ignition interlock device…" s. 343.301(1g).

● Length of IID restriction period (minimum=1-year, maximum = maximum possible rev. period + actual imprisonment sentence) s. 343.301(2m).

● IID Restriction begins on date DOT issues the offender any operator's license.

● Court has authority to impose IID installed on VEHICLE immediately or as of a later date. s. 343.301(2m).

● Requires OWI-offenders granted Huber law work-release privileges to show proof of IID installation within 2 weeks of sentencing. s. 303.08(10r).

● Occupational licensing:
-No occupational license unless OWI offender:

Act 100 continued

°Pays $50 IID Surcharge to clerk of courts. s. 343.10(2)(f).

°Installs an IID in each vehicle subject to the court's IID order. s. 343.10(2f).

-Occupational License restriction for IIDs restricts only Class D vehicle operation. s. 343.10(5)(a)3.

● Costs:

-Creates $50 IID Surcharge (paid to the clerk of court, with all revenue retained by the county) s. 343.301(5)

-Offender "liable" for reasonable cost of equipping and maintaining. s. 343.301(3)(a).

°343.301(3)(a) Except as provided in par. (b), if the court enters an order under sub. (1g), the person shall be liable for the reasonable cost of equipping and maintaining any ignition interlock device installed on his or her motor vehicle.

-Low Income OWI Offenders (at/below 150% of federal poverty level):

°343.301(3)(b)- If the court finds that the person who is subject to an order under sub. (1g) has a household income that is at or below 150 percent of the nonfarm federal poverty line for the continental United States, as defined by the federal department of labor under 42 USC 9902 (2), the court shall limit the person's liability under par. (a) to one-half of the cost of equipping each motor vehicle with an ignition interlock device and one-half of the cost per day per vehicle of maintaining the ignition interlock device.

-Does not prohibit vendor from charging normal fees.

-Seems to provide a possible defense in any collection action brought by a vendor.

● Non-Compliance/Violation of Order:

-Failing to install, removing, disconnecting, circumventing IID all constitute "violations of the court order."

°343.301(4) A person to whom an order under sub. (1g) applies violates that order if he or she fails to have an ignition interlock device installed as ordered, removes or disconnects an ignition interlock device, requests or permits another to blow into an ignition interlock device or to start a motor vehicle equipped with an ignition interlock device for the purpose of providing the person an operable motor vehicle without the necessity of first submitting a sample of his or her breath to analysis by the ignition interlock device, or otherwise tampers with or circumvents the operation of the ignition interlock device.

NOTE: 2009 Wis Act 121: Provides corrective language to impose penalties for failing to install, remove, disconnect or otherwise circumvent an IID order under 343.301(4).

● Failure to install, removal, disconnection, tampering or circumvention criminalized.

-347.413(1) No person may remove, disconnect, tamper with, or otherwise circumvent the operation of an ignition interlock device installed in response to the court order under s. 346.65 (6), 1999 stats., or s. 343.301(1) [s. 343.301(1g)], or fail to have the ignition interlock device installed as ordered by the court. This subsection does not apply to the removal of an ignition interlock device upon the expiration of the order requiring the motor vehicle to be so equipped or to necessary repairs to a malfunctioning ignition interlock device by a person authorized by the department.

-Violation of 347.413(1) $150-$600 fine and/or up to 6 months in jail at court's discretion; mandatory 6-month extension of IID order period. 347.50(1s) and (1t).

► *This summary was adapted from a document originally created by Dennis Hughes, Chief of the Safety Programs Section at WISDOT, Tara Schipper, TSRP, Wisconsin Department of Justice, and Attorney John Sabotik, Office of the General Counsel, WISDOT.*

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