

THE TRAFFIC BEAT

Volume 4, Issue 2

Summer/Fall 2009



UNIVERSITY of
WISCONSIN
LAW SCHOOL

Published by:

**The Resource Center
on Impaired Driving**

with grant funding provided by the
Bureau of Transportation Safety,
Wisconsin State Patrol, Wisconsin
Department of Transportation.

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WELCOME to *The Traffic Beat*, a newsletter brought to you by the University of Wisconsin Law School's Resource Center on Impaired Driving. *The Traffic Beat* is distributed to key players in the traffic safety arena and is designed to provide readers with a variety of information relevant to traffic safety. If you have suggestions for future topics or would like further information, please contact Nina Emerson via e-mail at ninaj@wisc.edu or by telephone at (608) 265-3411 or toll free at (800) 862-1048.

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.

Melendez-Diaz v. Massachusetts

129 S. Ct. 2527

Decided: June 5, 2009

The United States Supreme Court held that affidavits used at trial to report results of forensic analysis are "testimonial" in nature and subject to defendant's right of confrontation under the Sixth Amendment.

The State charged Melendez-Diaz with distributing and trafficking in cocaine. At trial, the prosecution submitted into evidence affidavits signed by state laboratory analysts which certified that the substance in question was cocaine. Melendez-Diaz objected to the admission of the affidavits alleging that it violated his right under the Sixth Amendment to confront the analysts. Under Massachusetts law, authors of "certificates" of forensic analysis are not subject to confrontation under the Sixth Amendment. Mass. Gen. Laws, ch. 111, § 13. The court of appeals agreed.

However, the United States Supreme Court found that the documents in question were not just certificates but were affidavits made for the purpose of establishing or proving the fact that the substance in Melendez-Diaz's possession was cocaine. Affidavits fall into the category of "testimonial statements" and the analysts are "witnesses," and therefore are subject to the Confrontation Clause. The Court stated that under *Crawford v. Washington*, a "witness's testimony against a defendant is thus inadmissible unless the witness appears at the trial or, if the witness is unavailable, the defendant has had a prior opportunity for cross-examination." 541 U.S. 36, 54, 124 S. Ct. 1354. In *Crawford*, the Court described the type of testimonial statements covered by the Confrontation Clause. These statements include, "ex

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The Traffic Safety Resource Prosecutor position has a new home. See page 7 for info.

parte in-court testimony or its functional equivalent, that is, material such as affidavits.” In *Melendez-Diaz*, the “certificates” are the functional equivalent to live-in-court testimony. The Sixth Amendment does not allow the prosecution to prove its case via ex parte out-of-court affidavits, and therefore the admission of the evidence against *Melendez-Diaz* violated his constitutional rights.

Arizona v. Gant

129 S. Ct. 1710

Decided: April 21, 2009

The United States Supreme Court rejected the automatic application of the search incident to arrest doctrine as it relates to searching the passenger compartment of a vehicle.

The police received an anonymous tip that a particular residence was being used to sell drugs. When the police went to the residence they made contact with *Gant* who identified himself and told them the owner would return later. After the police left, a records check revealed that *Gant*'s driver license was suspended and there was an outstanding warrant for his arrest for driving while suspended. When the officers returned to the residence later in the evening, they arrested a man near the back of the house for providing a false name and a woman parked in front for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars. *Gant* then drove to the house where police arrested and handcuffed him pursuant to the warrant. After *Gant* was handcuffed and locked in a patrol car, police conducted a search incident to arrest of his vehicle. Police found a gun and a bag of cocaine.

Gant argued that the evidence found in his vehicle should be suppressed because the search violated the Fourth Amendment in that he could not have posed a threat to the officers after he was handcuffed and placed in the squad car. The State argued that the search was constitutional under *New York v. Belton*, 453 U.S. 454 (1981). In *Belton*, the Court held that when an officer lawfully arrests the occupant of a vehicle, the officer may, as a contemporaneous incident of the arrest, search the passenger compartment of the vehicle. The underlying rationale was to prevent an arrestee from having access to a weapon or destructible evidence inside the vehicle.

The Supreme Court recognized that the search incident to arrest doctrine, based on a broad reading of *Belton*, had become embedded in police practice having been widely taught in police academies for 28 years. However, the Court concluded, “The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely ‘within the area into which an arrestee might reach,’ and blind adherence to *Belton*'s faulty assumption would authorize myriad unconstitutional searches.” Thus, the Supreme Court held that police may search a vehicle incident to a recent occupant's arrest under one of two scenarios:

1. When the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, *or*
2. When it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”

Unless one of these justifications exists, absent a warrant or another exception to the warrant requirement, a search of an arrestee's vehicle will be unreasonable.

State v. Lange

2009 WI 49

Decided: June 16, 2009

The Wisconsin Supreme Court held that based on the totality of the circumstances known to the officers at

State v. Lange Continued

the time, a reasonable officer could believe that Lange was OWI even though evidence of intoxicants was not present.

Officers observed Lange driving unlawfully and erratically, ultimately crashing his vehicle into a utility pole at around 3:00 a.m. on a Sunday morning. Lange caused substantial injuries to himself and damage to his vehicle. The officers on the scene did not detect an odor of intoxicants, as Lange was unconscious, bloody, and lying in a gasoline-soaked crash scene. At the hospital, the officers learned that Lange had a prior OWI conviction. The officer formally placed Lange, still unconscious, under arrest for operating a vehicle while under the influence of an intoxicant before the blood draw was done.

Lange challenged the blood draw evidence, alleging he was not lawfully arrested for operating a motor vehicle while under the influence when his blood was taken. He asserts that the officer did not have probable cause to believe that he was driving while intoxicated. The circuit court denied Lange's motion to suppress the evidence but on appeal, the court of appeals agreed with Lange that the state failed to meet its burden of showing probable cause at the time of the arrest.

The Wisconsin Supreme Court reversed, stating, "A warrantless blood draw is not lawful unless it is supported by probable cause" and there was probable cause in the case at bar. *State v. Secrist*, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999). Establishing probable cause to arrest for operating while under the influence of an intoxicant is based on the quantum of evidence known to the arresting officer at the time of the arrest, that would lead a reasonable law enforcement officer to believe the defendant was under the influence. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W. 2d 687 (Ct. App. 1996). The court found the state met its burden of establishing that at the time of Lange's arrest the police officer had probable cause. Based on the totality of circumstances, the court considered the following five factors in its totality of circumstances determination: 1) the officers' observations of Lange's reckless driving, 2) the officers' combined experience, 3) the time of night, 4) the officers' knowledge that Lange had a prior conviction for OWI, and 5) the fact that the seriousness of the crash prevented the officers from taking any further investigative steps. The court concluded that the reasonable inference to be drawn from the facts presented in the case is that the defendant was impaired by intoxicants.

State v. Popke

2009 WI 37

Decided: May 27, 2009

The Wisconsin Supreme Court held that the stop was constitutional because the police had probable cause that a traffic violation had occurred when the defendant swerved left of center. The police also had reasonable suspicion, under the totality of circumstances, that the defendant was operating the vehicle while intoxicated.

A police officer observed Popke's vehicle swerve left of center after making a turn, being three-quarters left of center and then proceeded to "overcompensate" almost hitting the curb on the right hand side of the road before "fading back" towards the middle of the road and almost striking the median. After viewing these actions the police officer initiated a traffic stop. The officer found Popke was intoxicated. Popke was arrested and charged with third-offense operating a motor vehicle while intoxicated and operating with a prohibited blood alcohol concentration of .255.

Popke moved to suppress any evidence from the traffic stop alleging the officer did not have probable cause that a traffic violation had occurred when the vehicle swerved left of center nor did the officer have reasonable suspicion of operating while intoxicated. The circuit court denied Popke's motion finding that the of-

State v. Popke Continued

icer had probable cause that a traffic violation occurred, namely driving left of center. The court of appeals reversed, concluding that based on a plain language reading of Wis. Stat. § 346.05, a “momentary” swerve across the center would not constitute the traffic offense of failure to drive on the proper side of the road.

The Wisconsin Supreme Court agreed with the circuit court, finding there was probable cause to believe a violation of the traffic code had occurred when the vehicle swerved left of center in the road. Popke had control over the speed and the direction of his vehicle when he crossed left of center; therefore he violated Wis. Stat. § 346.05, unlawfully driving on the wrong side of the road. The court also found that the officer had reasonable suspicion, based on the totality of the circumstances, which include the fact it was late at night, the officer had direct observation of Popke’s actions, and had years of experience as a police officer, to conclude the defendant was operating the vehicle while intoxicated. “An officer may conduct a traffic stop where he or she has grounds to reasonably suspect that a traffic violation has occurred or will occur” *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). The officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.” *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. In this case, the officer’s observations of Popke’s vehicle were sufficient to give rise to reasonable suspicion that he was operating his vehicle while intoxicated. The defendant’s motion to suppress the evidence was denied.

State v. Schoelgel

2009 WI App 85

Decided: May 13, 2009

The court of appeals held there was no *Miranda* violation because Schloegel was not in “custody” before his *Miranda* rights were given and that the search of his vehicle was reasonable and constitutional because it satisfied the two-prong test from *New Jersey v. T.L.O.*

An informant told high school officials that defendant Schloegel, a high school student, was in possession of drugs on school grounds. Schloegel consented to having a school official accompanied by local police officer, search his person, his book bag and his locker. No contraband was found. The school official also wanted to search Schloegel’s vehicle. All students who park on school grounds give consent at the beginning of the school year for any school official to conduct a search of a vehicle when there is “a reasonable suspicion to believe the search will produce evidence of a violation of a particular law, a school rule, or a condition that endangers the safety or health of the student driver or others.” During the search of Schloegel’s car, a container of marijuana, a pipe, Oxycontin, and cash were found. After discovering the evidence, the school police liaison asked Schloegel a series of questions in which he responded to some. He was then placed under arrest and read his *Miranda* rights.

Schloegel moved to suppress all statements he made before and after his arrest arguing that he was in custody at the time of the police liaison’s questioning before his *Miranda* rights were read and that the pre-*Miranda* statements tainted his post-*Miranda* statements to the point that all statements should be suppressed. He also moved to suppress the items discovered during the search of his car arguing that the minimal expectation of privacy in a school extends to the parking lot for the purpose of a search conducted by school officials or a school police liaison.

The court found there was no *Miranda* violation. *Miranda* warnings are only required when a person is in custody. See, *State v. Morgan*, 2002 WI App 124, ¶10, 254 Wis. 2d, 602, 648 N.W.2d 23. To determine whether Schloegel was in custody at the time of the questioning, the court looked at the totality of the

State v. Schoelgel Continued

circumstances to see whether he “suffered a restraint on freedom of movement of the degree associated with a formal arrest.” *State v. Goetz*, 2001 WI App 294, ¶11, 249 Wis. 2d 380, 638 N.W.2d 386. The court determined he was not in police custody before the *Miranda* warnings because he was not handcuffed or placed in a police car to be detained. Therefore, at most he was in school custody, not police custody which does not constitute a *Miranda* violation.

The court then addressed Schloegel’s second allegation that the minimal expectation of privacy in a school extends to the school parking lot. In *New Jersey v. T.L.O.*, the Supreme Court set forth the standard for a search on school grounds by public officials, weighing the interest of student privacy with the substantial interest of teachers and administrators in maintaining discipline in the school. 469 U.S. 325, 339 (1985). The Court found that a school search is legal when it satisfies a two-prong test: “(1) the search must be “justified at its inception,” and (2) “reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 341-42. The court in this case found that the search was justified at its inception because school officials were put on alert that Schloegel had possession of illegal drugs and he had a prior drug arrest on record. Furthermore, the search of Schloegel’s vehicle was reasonably related to the scope of the search for contraband. Since drugs were not found on Schloegel’s person, backpack and locker, his car was a reasonable next step in the search.

State v. Truax

2009 WI App 60

Decided: May 8, 2009

The court of appeals held that the officer’s conduct was a bona fide community caretaker function.

Defendant Truax’s vehicle had abruptly pulled over to the side of the road, after seeing a police officer’s car going in the opposite direction on the same road. The officer noticed the vehicle’s abrupt pull over and monitored the vehicle in his review mirror to see if the driver would signal for assistance. Since it was late at night the officer decided to turn his car around to see if the vehicle was having mechanical difficulty or if the driver was suffering from a medical condition. When the officer made contact with the driver, defendant Truax, he immediately noticed that Truax had red, watery eyes, slurred speech, and a very strong odor of intoxicants. Truax admitted to consuming alcohol and then failed a field sobriety test. He was charged with operating a motor vehicle while intoxicated and operation with a prohibited alcohol concentration, both as a fifth and subsequent offense. Truax filed a motion to suppress evidence obtained during the stop based on lack of reasonable suspicion. The trial court granted Truax’s motion to suppress as well as a subsequent motion to dismiss the complaint.

The court of appeals reversed the trial court’s dismissal and remanded with instructions to reinstate the complaint, finding the officer engaged in a bona fide community caretaker function when he approached Truax’s vehicle and reasonably performed this function. The community caretaker function was first described by the United States Supreme Court in *Cady v. Dombrowski* 413 U.S. 433, 441 (1973): “Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. In *State v. Anderson*, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987), the Wisconsin Supreme Court adopted a three-part test for determining when a seizure is justified by an officer acting in a community caretaker function: (1) that the seizure within the meaning of the Fourth Amendment has occurred, (2) the police activity must be a bona fide community caretaker activity, and (3) the public need and interest must outweigh an intrusion upon the privacy of the individual.

In the case at hand, the court found a seizure occurred, but the officer's conduct, based on the totality of the circumstances, was a bona fide community caretaker function. The officer approached Truax's vehicle out of concern that the driver was in need of assistance not to investigate a traffic violation or suspicion of drunk driving. The court also determined the officer's conduct with Truax was reasonable, for the same reasons provided in *State v. Kramer*; the public has a substantial interest in police offering assistance to motorists who may need assistance, especially after dark and in less urban areas. 2009 WI 14, ¶42. The court found it is in the public interest to have police attend to drivers in need of roadside assistance, therefore the officer's actions with Truax were reasonable bona fide community caretaker activity. The three-part test of *Anderson* was satisfied in this case.

New Primary Seat Belt Law

July 2009

Wisconsin has adopted a primary safety belt law, effective July 1, 2009. Law enforcement can now stop and ticket vehicles in which the driver or a passenger is noticed without a seat belt regardless if the officer observes another traffic or vehicle equipment violation. Previously, officers would have had to stop a motorist for another vehicle or traffic violation and then issue a seat belt citation.

Currently, Wisconsin's seat belt use rate is approximately 74 percent, which is one of the lowest in the nation. Studies conducted by the National Highway Safety Administration (NHTSA) found that when states changed to primary enforcement, the safety belt use rate increased approximately 10 percent.

A change to primary enforcement does not increase the cost of a safety belt citation in Wisconsin, which is \$10 and does not include a point assessment on a driver's license. By enacting a primary enforcement seat belt law, Wisconsin is now eligible to receive \$15.2 million in federal funding.

For more information or to view the entire article see: http://www.dot.wisconsin.gov/opencms/export/nr/modules/news/news_1424.html_786229440.html

National Highway Traffic Safety Administration Survey

July 2009

A roadside survey released by the National Highway Traffic Safety Administration (NHTSA) found that the number of drunk drivers on the roads has fallen during the past 30 years. 2.2 percent of drivers surveyed by NHTSA had blood-alcohol levels of 0.08 or higher in 2007, which is in sharp contrast to 1973 when 7.5 percent of the drivers surveyed were legally intoxicated.

Also, in a separate government survey, 16.3 percent of nighttime weekend drivers reported testing positive for drugs. (The most commonly detected drugs were marijuana (8.3 percent), cocaine (3.9 percent) and methamphetamine (1.3 percent).) The last survey done on driving while under the influence of drugs was in 1996, and 4.3 percent of drivers surveyed were found to be legally intoxicated.

The decline today coincides amid tougher laws as well as increased efforts by law enforcement and advocacy groups.

The entire article can be found on <http://www.channel3000.com/news/20041116/detail.html>. Copyright 2009 by The Associated Press. All rights reserved. This material may not be published, broadcast, rewritten or redistributed.

OAD: Civil or Criminal???

2009 Wisconsin Act 28 (Budget Act) has amended the basis for what makes an OAD a crime. Operating after revocation is only a crime if the revocation resulted from an OWI or a chemical test refusal.

Section 343.44(2)(as) now states, "Any person who violates sub. (1)(b) after July 27, 2005, shall forfeit not more than \$2,500, except that if the revocation identified under sub. (1)(b) resulted from an offense that may be counted under s. 343.307 (2), the penalty under par. (b) shall apply."

Effective date: Applies to offenses committed on or after July 1, 2009.

Under previous law: 1st offense OAD was either civil or criminal, depending on the reason a person had a revoked status.

As of July 1, 2009, ALL OADs are either civil or criminal, depending on the reason a person has a revoked status. If the revoked status results from an OWI type conviction counted under s. 343.307(2), the OAD is criminal. If the status is revoked for another reason, the OAD is civil.

NOTE: If a revoked driver causes property damage, injury, great bodily harm or death, the penalties under s. 343.44(2)(e) to (h) apply. No changes were made to this section of the statute.

Note:

The Traffic Safety Resource Prosecutor position has moved to the Wisconsin Department of Justice. Contact Tara Jenwold-Schipper for more information. phone: 608-266-8908, cell: 608-220-1529, fax: 608-267-2778, email: jenswtm@doj.state.wi.us

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Have Training, Will Travel

Are you up to speed on the impaired driving and traffic laws?
Is your agency or office in need of a legal update or refresher course?
Is there other OWI-related training you need?

If so, The Resource Center may be able to help. The Resource Center frequently conducts training as part of scheduled in-service or as stand-alone training sessions. Contact Nina Emerson at 608-265-3411, ninaj@wisc.edu, for more information.



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