

# Suppress It!

## Effective Fourth Amendment Litigation

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*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 warrants 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*

### *-Fourth Amendment to the United States Constitution-*

- I. Standing – When is there an expectation of privacy?
  - A. General Test: *Rakas v. Illinois*, 439 U.S. 128 (1978); *State v Fillyaw*, 104 Wis.2d 700 (1981).
    - 1. Is there complete dominion and control, including right to exclude others;
    - 2. Whether one takes precautions consistent with seeking privacy;
    - 3. Is property put to private use;
    - 4. Is the claim consistent with historical notions of privacy.
  - B. Burden of proof is on defendant to establish standing.
- II. Reasonable Expectation of Privacy in the Home
  - A. Guest:
    - 1. Overnight guest in home may claim the protection of Fourth Amendment, *Minnesota v. Olson*, 495 U.S. 91 (1990) but guest merely present with consent of householder may not. *Minnesota v. Carter*, 525 U.S. 83 (1998).
    - 2. Guest who did not stay overnight, but used property regularly and had firmly rooted relationship with host and property, had

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reasonable expectation of privacy. *State v. Trecroci*, 2001 WI App 126.

3. Guest who exceeded authorized stay by occupying basement while waiting to sell cocaine lacked standing. *State v. McCray*, 220 Wis.2d 705 (Ct. App 1998).

B. Threshold

1. When one stands in doorway and exposes self to public view, no warrant requirement. *U.S. v. Santana*, 427 U.S. 38 (1976).
2. Police officer's stepping into the threshold of an apartment, preventing the occupant from closing the door, amounted to an "entry," thereby triggering the Fourth Amendment warrant requirement. *State v. Johnson*, 177 Wis. 2d 224(Ct. App 1993); *State v. Larson*, 2003 WI App 150.

C. Curtilage

1. Fourth Amendment protects the curtilage of a house from unreasonable searches and seizures. *Oliver v. U.S.*, 466 U.S. 170, 180 (1984). Curtilage is defined as the proximity of the areas claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by passers by. *U.S. v. Dunn*, 480 U.S. 294 (1987).
2. Garage is part of the curtilage of home and subject to the warrant requirement. *State v. Leutenegger*, 2004 WI App 127; *Bies v. State*, 76 Wis.2d 457 (1977).
3. Unlawful for police to invade curtilage of home and smell marijuana. Extent of a home's curtilage is determined by factors that bear upon whether a person reasonably believes that the area in question should be treated as the home itself. *State v. Wilson*, 229 Wis.2d 256 (Ct. App. 1999).
4. Helicopter flight over defendant's greenhouse did not violate right to privacy; defendant did not have a reasonable expectation of privacy in greenhouse where sides and roof of greenhouse were open to inspection from routine private and commercial flights in navigable airspace at similar altitudes. *Florida v. Riley*, 488 U.S. 445 (1989); also *California v. Ciraolo*, 476 U.S. 207 (1986).

D. Abandoned property.

1. Garbage. Two-prong test. *State v. Sigarroa*, 2004 WI App 16.
  - a. Whether the individual by his or her conduct has exhibited an actual, subjective expectation of privacy; and
  - b. Whether that expectation is justifiable in that it is one which society will recognize as reasonable.
2. Garbage placed for collection in front of joint garage on shared driveway or sidewalk may be searched; no reasonable expectation of privacy exists. *California v. Greenwood*, 486 U.S. 35 (1988); *U.S. v. Redmon*, 138 F.3d 1109 (7<sup>th</sup> Cir. 1998).
3. Files turned over by attorney to secretary for destruction not protected. When a person turns material over to a third party, that person has no Fourth Amendment protection if the third party reveals it or conveys it to governmental authorities, regardless of the person's subjective belief or expectation that the third party would not betray him or her. *State v. Knight*, 2000 WI App 16.
4. When unlawful substance is discarded by defendant (e.g. contraband discarded pursuant to unlawful pat-down) after unlawful police conduct, abandonment doctrine inapplicable because abandonment is compelled by police misconduct. *State v. Hart*, 2001 WI App 283 (*overruled on other grounds*).

E. Multi-Unit Dwellings

1. Basement. A tenant's expectation of privacy in the common areas of multiple unit buildings is decided on a case-by-case basis. When third parties had unfettered access to the basement of multi-unit building, no subjective expectation of privacy. *State v. Eskridge*, 2002 WI App 158.
2. Stairway. Existence of reasonable expectation of privacy in a stairway leading to the upper levels of a dwelling is decided case-by-case, rather than under bright-line rule. Privacy interest found when defendants were the only ones with unlimited access to the stairway, which they regulated with a deadbolt lock. *State v. Trecroci*, 2001 WI App 126.

F. Use of Sensory Devices.

1. Use of generally available devices such as flashlights, standard binoculars or camera with zoom lenses to look into home permitted. *Anderson v. State*, 66 Wis.2d 233 (1974); *State v. Lange*, 158 Wis.2d 609 (1990).
2. Unconstitutional to use technology such as thermal imaging device to obtain information regarding the interior of a home that could not otherwise be obtained without physical intrusion. *Kyollo v. U.S.*, 533 U.S. 27, 37 (2001).

III. Vehicles

- A. When police stop a vehicle, all of the occupants of that vehicle are seized and have standing to challenge the stop *State v. Robinson*, 206 Wis. 2d 243 (1996).
- B. Vehicle passengers lack standing to challenge police questioning of driver in traffic stop where officer notices suspicious items in car. *State v. Malone*, 2004 WI 108.
- C. No expectation of privacy in abandoned vehicle. *State v Roberts*, 196 Wis.2d 445 (Ct. App. 1995); *State v. Knight*, 232 Wis.2d 305 (Ct. App. 1999).
- D. Sole occupant found asleep in vehicle who did not have registered owner's consent to be in car and couldn't produce evidence to show why he was in car or that he had authorization to be in car lacked expectation of privacy in car and in closed containers therein. *State v. Bruski*, 2006 WI App 53
- E. Drug Sniffing Dog. Use of dog to sniff airspace around vehicle permitted, no expectation of privacy in open and accessible parking lot. *State v. Garcia*, 195 Wis.2d 68 (Ct. App. 1995).

IV. Other Areas of Privacy Interests

- A. Mail. When the state searches mail prior to delivery to a residence, and the addressee is not a resident, resident has a ("minimal") burden of establishing some reasonable expectation of privacy in the package. Defendant must present some reason as to why he would expect that the package, when it came, was intended for him. *State v. Ramirez*, 228 Wis.2d 561 (Ct. App. 1999).

B. Luggage

1. A traveler's personal luggage is an "effect" protected by the Fourth Amendment. *U.S. v. Place*, 462 U.S. 696 (1983).
2. Police may not conduct probing tactile examination of soft sided luggage stored in overhead bin. *Bond v. U.S.*, 529 U.S. 334 (2000).

C. Hospitals.

1. Police may collect evidence at hospital ER or operating room. *State v. Thompson*, 222 Wis.2d 179 (Ct. App. 1998).
2. Hospital may not perform nonconsensual drug testing of pregnant women for drug use when policy developed for law enforcement purposes. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).
3. Giving laxative for treatment that resulted in drugs being recovered held not to be a search prompted by law enforcement. *State v. Payano-Romano*, 2006 WI 47.

D. Public Rest Room Stall: No reasonable expectation of privacy when person occupies stall with another individual, leaves the door slightly ajar and unlatched, and evinces no indication that the stall is being used for its intended purpose. *State v. Orta*, 2003 WI App 93.

E. Commercial Property

1. Fourth Amendment applies to business property. *State v. Schwegler*, 170 Wis. 2d 487 (Ct. App. 1992). However a business owner has a reduced expectation of privacy in commercial property in a "closely regulated" industry. Where the owner's privacy interests are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises, if it meets certain criteria, is reasonable within the meaning of the Fourth Amendment. *New York v. Burger*, 482 U.S. 691(1987).
2. Warrantless and unannounced inspections were necessary to further the State's interest in regulating dairy farms and to preserve the public health and safety. *Lundeen v. Wisconsin Dep't of Agric., Trade & Consumer Protection*, 189 Wis. 2d 255 (Ct. App. 1994). Following criteria must be met:

- a. The inspection must relate to a regulatory scheme that furthers a substantial government interest.
- b. Second, the inspection must be necessary to further the regulatory scheme.
- c. The inspection scheme, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

#### F. Inventory Searches

1. Inventory search rule applies to jailhouse inventories of a defendant's possessions. *Illinois v. Lafayette*, 462 U.S. 640 (1983).
2. Police may lawfully seize a notebook on defendant's person as part of an inventory search and once seized, notebook may be read without securing a warrant. *State v. Gaines*, 197 Wis.2d 102, 110 (Ct. App. 1995).
3. *State v. Clark*, 2003 WI App 121. Need to justify decision to tow.

#### G. Private Parties

1. Generally search or seizure by private party doesn't implicate Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).
2. If private party is acting as instrument or agent of government, Fourth Amendment applies. *U.S. v. Shahid*, 117 F. 3d 322 (7<sup>th</sup> Cir. 1997); *State v. Knight*, 232 Wis.2d 305, 310 (Ct. App. 1999).
3. Hospital nonconsensual testing of pregnant women for drug use violated Fourth Amendment when policy developed with help of law enforcement and intended to force women into treatment. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

#### H. Schools

1. Public school officials may search without warrant upon reasonable grounds when they believe student has violated the law or school policy. *New Jersey v. TLO*, 469 U.S. 325 (1985); In balancing the student's legitimate expectation of privacy and the school's need to maintain a safe environment, school officials

did not need a warrant or probable cause before searching a student who was under their authority. *Interest of Angelina D.B.*, 211 Wis.2d 140 (1997).

2. When police initiate search or school officials act at behest of police, probable cause required. *Angelina D. B., Id.*
3. However students retain legitimate interest of privacy in personal non-contraband items such as school supplies and items of personal hygiene. *TLO, Id.*

## V. Probable Cause for Arrest

### A. General:

1. Police officer must have facts and circumstances within their knowledge to believe that an offense has been committed or is being committed and probably committed by the arrestee. *State v. Richardson*, 156 Wis.2d 128 (1990); Probable cause is information which leads a reasonable officer to believe that guilt is more than a possibility. *State v. Pasek*, 50 Wis.2d 619 (1971). Test for warrantless arrest is whether a warrant could have been obtained based on the information in officer's possession. *Id.*
2. Actual or subjective belief of officer irrelevant in probable cause analysis.
  - a. Officer's good faith but mistaken belief there is probable cause for arrest, arrest invalid. *Henry v. U.S.*, 361 U.S. 98(1959).
  - b. When officer articulates invalid basis for arrest but other objective facts support a correct legal theory for arrest, then arrest is lawful. *State v. Baudhuin*, 141 WIs.2d 642 (1987).
  - c. When officer was subjectively motivated to arrest defendant for a nonexistent crime, arrest was nonetheless legal because police had probable cause to arrest him for an actual crime. *State v. Repenshek*, 2004 WI App 229.
  - d. When officer had probable cause to arrest defendant for trespass prior to the search of defendant's wallet, whether the officer intended to arrest defendant for criminal trespass prior to search, or *whether* defendant was actually arrested

for and charged with criminal trespass not dispositive of whether the search was lawful. Search held lawful because law enforcement had probable cause to arrest defendant for a crime prior to the search. *State v. Sykes*, 2005 WI 48.

3. Police officer may rely on collective information in possession of the department. *State v Cheers*, 102 Wis.2d 367 (1981).
  - a. If the police department does not communicate the police data to the arresting officer, then the collective-knowledge theory cannot apply. *State v. Kueht*, 2003 WI App 1.
  - b. Includes information about reliability of informant. *State v. Black*, 2000 WI App 175.
  - c. Rule extends from one department to another. *Schaffer v. State*, 75 Wis.2d 673 (1977), *overruled on other grounds*.
4. Arrest can be lawfully made for non-criminal traffic or ordinance violation. *State v. King*, 142 Wis.2d 207 (1987).
5. Burden on state to demonstrate probable cause for a warrantless arrest. *Cheers, Id.*

B. Reliability of Information Leading to Probable Cause

1. When probable cause based on information from an informant, then informant's veracity, reliability and the basis for the informant's knowledge are relevant, but not only factors in assessing whether or not there is probable cause – court looks to totality of circumstances. *Illinois v. Gates*, 462 U.S. 213 (1983).
2. Ordinary persons who answered questions and provided information in response to a police investigation of a crime are considered reliable as are other citizen informants. *State v. Ritchie*, 2000 WI App 136.
3. Police were entitled to rely on information from a known and reliable informant without independently determining the reliability of the informant's source or the source's information. *State v. McAttee*, 2001 WI App 262

4. Arrest based on anonymous tip requires corroborating information. *Alabama v. White*, 496 U.S. 325 (1990); *State v. Richardson*, 156 Wis.2d 128 (1990).
- C. Definition of “under arrest”: When a reasonable person in the defendant’s position would consider themselves to be in custody given the degree of restraint, the circumstances of the situation and words or actions by police. *State v. Swanson*, 164 Wis.2d 437 (1991); *overruled on other grounds*. Person held for several hours in locked interrogation room held to be effectively under arrest. *State v. Farias-Mendoza*, 2006 WI App 134.
- D. Arrest Based on Drug Odors
1. Strong odor of marijuana coming from the direction of the defendant inside an automobile gave rise to probable cause to arrest. *State v. Secrist*, 224 Wis.2d 201(1999).
  2. All occupants of vehicle may be arrested when contraband found in vehicle, all persons have accessibility and none admitted possession. *Maryland v. Pringle*, 540 U.S. 366 (2003).
  3. When officer detected odor of raw marijuana, and eliminated two of three vehicle occupants as the possessors of marijuana, probable cause existed to search and arrest defendant. *State v. Mata*, 230 Wis.2d 567 (Ct. App. 1999).
  4. Odor of a controlled substance may provide probable cause to arrest suspect in their home when:
    - a. The odor is unmistakable;
    - b. May be linked to a specific person or persons because of the circumstances in which the odor is discovered or because other evidence links the odor to the person or persons. *State v. Hughes*, 233 Wis.2d 280 (2000); and
    - c. Exigent circumstances also existed based on resident’s awareness of police presence and opportunity to destroy evidence. *Hughes, Id.*
  5. When there is no greater basis to believe that a person was the source of the odor than any of the other individuals present, no probable cause to arrest. *State v. Wilson*, 229 Wis.2d 256 (Ct. App. 1999).

E. OWI Issues

1. Officer's decision to arrest driver on OWI without performing of field sobriety tests was reasonable when in light of injuries to driver in light of other facts (accident caused by driver, red eyes, odor of intoxicants) supporting probable cause. *State v. Pfaff*, 2004 WI App 31.
2. When driver in accident admitted drinking and smells strongly of alcohol, probable cause to arrest on OWI and perform warrantless blood draw. *State v. Erickson*, 2003 WI App 43.
3. Officer lacked probable cause to arrest when he knew only that two tipsters had called dispatch, alleging that the driver of a vehicle was driving while intoxicated and officer had not yet smelled the odor of intoxicants on driver's breath, detected his slurred speech, or even obtained his concession that he had been driving. *State v. Larson*, 2003 WI App 150.
4. Probable cause not required before asking driver to submit to a PBT. *County of Jefferson v. Renz*, 231 Wis.2d 293 (1999).

VI. Entry into the Home

- A. In-home warrantless arrest unlawful absent probable cause and exigent circumstance. *Payton v. New York*, 445 U.S. 573 (1980); *State v. Rodriguez*, 2001 WI App 206.
- B. Warrantless entry into home to arrest for OWI first offense unlawful. Also unlawful to obtain breath or blood sample from defendant. *Welsh v. Wisconsin*, 466 U.S. 740 (1984); But, see *State v. Hughes*, 233 Wis.2d 280, 299-300 (2000) permitting entry in first offense possession of marijuana case.
- C. Parolees
  1. Warrant not required for entry into parolee's home due to diminished expectation of privacy; only apprehension request from parole agent required. *State v. Pittman*, 159 Wis.2d 764 (Ct. App. 1990).
  2. When search of defendant's residence was performed by his probation agent and police officers were present only for protection it is a permissible probation and not a law enforcement search. *State v. Wheat*, 2002 WI App 153; *U.S. v. Knights*, 534 U.S. 112 (2001).

D. Exigent Circumstances permitting warrantless entry into home to arrest.

1. Hot Pursuit.

- a. A person may not retreat from a public place into a private home to avoid arrest. *U.S. v. Santana*, 427 U.S. 38 (1976).
- b. Must be immediate or continuous pursuit of suspect from scene of crime, continuous pursuit may be by citizen witness who transmits information to police. *State v. Richter*, 235 Wis.2d 524 (2000).
- c. When police approached defendant in an alley, and he fled into his mother's house, no probable cause and police may not chase into home. *State v. Rodriguez*, 2001 WI App 206.
- d. Applies only to felonies and does not justify entry for a misdemeanor. *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *State v. Mikkelsen*, 2002 WI App 152.

2. Emergency Doctrine and threat to safety of others. Police officers may make warrantless entries and searches when they reasonably believe that a person is in need of aid. *Brigham City v. Stuart*, 547 U.S. \_\_\_\_ (2006); *State v. Pires*, 55 Wis.2d 597(1972); *Laasch v. State*, 84 Wis.2d 587 (1982); *State v. Richter*, 235 Wis.2d 524 (2000).

- a. Situation need not necessarily be life threatening to constitute an emergency. Checking on welfare of child permitted. *State v. Rome*, 2000 WI App 243.
- b. Domestic violence. *State v. Mielke*, 2002 WI App 251.
- c. Belief there is an emergency not reasonable when premised simply on presence of firearms without further information. *State v. Kiekhefer*, 212 Wis.2d 460 (Ct. App. 1997).
- d. Entry is judged by an objective test: whether a police officer under the circumstances known to the officer at the time of entry reasonably believes that delay in procuring a warrant would gravely endanger life. A

court may consider the subjective beliefs of police officers involved, but only insofar as such evidence assists the court in determining objective reasonableness. *State v. Kyles*, 2004 WI 15; *Richter, Id.*

3. Imminent destruction of vital evidence. *Laasch, Id.*
  - a. When officers fear imminent destruction of evidence, test is whether the facts at the moment of entry would lead a reasonable experienced officer to believe the evidence would be destroyed before a warrant could be obtained. *State v. Kiekhefer*, 212 Wis.2d 460 (Ct. App. 1997).
  - b. Flight from a police officer in a drug-trafficking area may constitute reasonable suspicion to conduct a *Terry* stop; it does not rise to the level of probable cause. *Illinois v. Wardlow*, 528 U.S. 119 (2000); *State v. Rodriguez*, 2001 WI App 206.
4. Crime in Progress. Warrantless entry permitted when officers reasonably believed that a burglary was in progress. *State v. Harwood*, 2003 WI App 215. See also *Stuart*, 547 U.S. \_\_\_\_.
5. Exigency cannot be of officer's own making, *State v. Kiekhefer, Id.* at 476 (Ct. App. 1997).

E. Community Caretaker

1. Definition: A police function totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal law. *Cady v. Dombrowski*, 413 U.S. 433 (1973); *State v. Ellenbecker*, 159 Wis.2d 91 (Ct. App. 1990).
2. Three-step test to determine whether a particular activity qualifies under the community caretaker exception. *State v. Ziedonis*, 2005 WI App 249:
  - a. Whether a search or seizure, within the meaning of the Fourth Amendment, has taken place;
  - b. If the Fourth Amendment is implicated, whether the police conduct was bona fide community caretaker activity;

c. If the conduct was bona fide community caretaker activity, whether the public need and interest outweigh the intrusion upon the privacy of the individual. In evaluating this, following four considerations should be taken into account:

- (1) Degree of public interest and exigency of the situation;
- (2) Attendant circumstances surrounding the seizure, including time, location and degree of overt authority and force displayed;
- (3) Whether an automobile is involved;
- (4) Availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

3. Examples where community caretaker found:

- a. Police become alarmed when responding to loose animal complaint and when unable to locate owner, become concerned about owner's welfare. *Ziedonis, Id.*
- b. Entry into garage to check on welfare of elderly intoxicated man. *State v. Leutenegger*, 2004 WI App 127.
- c. Opening the closet door was to confirm that no highly intoxicated person was hiding there when police called to possible fight encountered highly intoxicated teens in home. *State v. Ferguson*, 2001 WI App 102.
- d. Suicide prevention. *State v. Horngren*, 2000 WI App 177.

## VII. Searches of the Home

### A. Incident to Arrest

- 1. Search incident to arrest for officer's protection must be limited to room or area under arrestee's control. *Chimel v. California*, 395 U.S. 752 (1969). Limited to area from which arrestee might gain possession of weapons and destructible evidence. *State v. Fry*, 131 Wis.2d 153 (19986).
- 2. Protective sweep. Post-arrest protective sweep permitted if reasonable belief exists based on specific and articulable facts &

rational inferences facts that the area may harbor an individual posing a danger to officers or others. *Maryland v. Buie*, 494 U.S. 325 (1990). Sweep is to be a cursory inspection only and isn't to last longer than time needed to make arrest and leave premises.

3. Protective sweep of the closet 32 feet from where defendant arrested held reasonable in that officer could have reasonably believed that an individual was hiding in the closet, the search was narrowly confined to the closet where such an individual could be found, and the sweep was narrowly confined to a brief visual inspection of the closet. Court noted that suspect had just fled from room where closet was located. *State v. Garrett*, 2001 WI App 240.
  4. Search of crawl space in bathroom ceiling upheld as protective sweep when space was only secured by four screws and police heard noise near area of crawl space. *State v. Blanco*, 2000 WI App 119.
  5. Protective sweep not limited to arrest; permitted when police act community caretaker capacity. *State v. Horngren*, 2000 WI App 177.
- B. Plain View. Police may seize evidence which they come across when lawfully in the home which has apparent evidentiary value. *Horton v. California*, 496 U.S. 128 (1990); *State v. Johnson*, 187 Wis. 2d 237 (Ct. App. 1994):
1. Evidence must be in plain view of the officer;
  2. Officer must have lawful right of access to the object;
  3. Incriminating character of the object must be immediately apparent, meaning the police must show they had probable cause to believe the object was evidence or contraband.
- C. Plain view includes items which can be smelled, touched, heard or tasted; sight is not only sense implied. *State v. Washington*, 134 Wis.2d 108 (1986); *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *State v. Hughes*, 233 Wis.2d 280 (2000).
- D. Emergency. Reasonable expectation of privacy is forfeited when authorities respond to an emergency and find property known or believed to be dangerous to investigators. *State v. Milashoski*, 159 Wis.2d 99 (1990).

VIII. Search of person incident to arrest

- A. Anything on a person may be seized and searched incident to lawful arrest. *U.S. v. Robinson*, 414 U.S. 218 (1973).
- B. Once item is seized pursuant to arrest, police may investigate item without securing a warrant. *State v. Gaines*, 197 Wis.2d 102 (Ct. App. 1995).
- C. When officer had probable cause to arrest defendant for a crime but did not and instead conducted search and arrested defendant on crime resulting from search, search found lawful. Whether defendant actually arrested on or charged with original matter not dispositive; search lawful because probable cause to arrest on other offense existed. *State v. Sykes*, 2005 WI 48.
- D. Post-arrest administration of laxative to recover substance swallowed by arrestee held unreasonable. *State v. Payano-Roman*, 2005 WI App 118, Petition for review granted 10/3/05.
- E. Strip Search. These may only be conducted pursuant to requirements of sec. 968.255 Wis. Stats. However, violating the statute does not result in suppression unless court determines there was also a violation of a constitutional right. *State v. Wallace*, 2002 WI App 61.

IX. Vehicle Searches

- A. Incident to Arrest
  - 1. Passenger compartment of car may be searched in entirety when car is searched pursuant to lawful arrest. *New York v. Belton*, 453 U.S. 454(1981); includes locked glove compartment. *State v. Fry*, 131 Wis. 2d 153 (1986). No search incident to citation. *Knowles v. Iowa*, 525 U.S. 113 (1998).
  - 2. Search incident to arrest also applies to vehicle passenger's property when driver is arrested. *State v. Pallone*, 2000 WI 77.
  - 3. When vehicle is not within an arrestee's immediate presence, it may not be searched incident to arrest. *State v. Tompkins*, 144 Wis. 2d 116 (1988).
- B. Terry Frisk of Vehicle

1. “Terry” search for weapons authorized when police stop vehicle and have reasonable suspicion to believe vehicle may contain weapons potentially dangerous to officer. *Michigan v. Long*, 463 U.S. 1032 (1983); *State v. Moretto*, 144 Wis.2d 171 (1988).
2. Terry frisk of vehicle permitted when police saw drug dealing suspect extend his hand behind the passenger seat. Because police knew dealers to carry guns, they reasonably suspected that the suspect had dropped or hidden a weapon while his hand was concealed. *State v. Williams*, 2001 WI 21.
3. Furtive gesture or suspicious movements do not automatically justify search of car under Terry theory. *State v. Johnson*, 2006 WI App 15.

C. Warrantless Probable Cause Searches – the “Automobile Exception”

1. An automobile may be searched without a warrant if there is probable cause to search the vehicle and the vehicle is readily mobile. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Thompson v. State*, 83 Wis.2d 134(1978); *State v. Marquardt*, 2001 WI App 219.
2. Irrelevant if car is in a private driveway, automobile exception not limited to private places. *Marquardt, Id.*
3. Vehicle may be searched when probable cause exists to believe there is contraband in vehicle. *U.S. v. Ross*, 456 U.S. 798 (1982). Scope of search is limited by nature of article for which probable cause exists. Search is not limited to contraband, may search for evidence of a crime as well. *California v. Carney*, 471 U.S. 386 (1985).
4. Police may conduct warrantless search of container in car when they have probable cause. *California v. Acevedo*, 500 U.S. 565 (1991). Packages need not be searched immediately. *U.S. v. Johns*, 469 U.S. 478 (1985).
5. Police had probable cause to search the automobile, including a purse in automobile once dog trained in drug detection alerted them to presence of drugs. *State v. Miller*, 2002 WI App 150.
6. When police have probable cause to believe that a vehicle contains evidence of a crime, warrantless search of the vehicle without a showing of exigent circumstances, includes the trunk. *State v. Stankus*, 220 Wis. 2d 232 (Ct. App. 1998).

7. Probable cause to search vehicle may arise as result of anonymous tipster provided that corroboration of several details by the police officer demonstrated that a reasonable police officer could believe that the anonymous caller was a person familiar with defendant's activities. *State v. Sherry*, 2004 WI App 207.

D. Drug Sniffing Dog

1. Use of dog to sniff airspace around parked vehicle permitted. No expectation of privacy in open and accessible parking lot. *State v. Garcia*, 195 Wis.2d 68 (Ct. App. 1995); Officer not required to have probable cause or reasonable suspicion before walking a dog around defendant's vehicle for the purpose of detecting drugs in the vehicle's interior. *State v. Miller*, 2002 WI App 150.
2. Once dog alerts on drugs from sniff outside vehicle, probable cause exists for officer to enter vehicle and search containers inside for drugs. *Miller, Id.*
3. Dog sniff of car during lawful traffic stop permitted. *Illinois v. Caballes*, 543 U.S. 405 (2005).
4. Initially lawful seizure can become unlawful if seizure is prolonged beyond time necessary to conduct traffic stop. If dog sniff conducted while defendant is being unlawfully detained, suppression may be the result. *Caballes, Id.*

E. Inventory Searches

1. Police may inventory contents of impounded vehicles when this is done pursuant to standard police department policies. *South Dakota v. Opperman*, 428 U.S. 364 (1976).
2. Inventory search is not motivated by search for evidence but is a disinterested cataloguing of car's contents. Justification does not rest upon probable cause. *Thompson v. State*, 83 Wis.2d 134 (1978); *State v. Weber*, 163 Wis.2d 116 (1991).
3. Impoundment of vehicle must be based on something other than suspicion of criminal activity; inventory exception will not apply if it was not police policy to impound vehicles for operating after revocation violations or when operator of vehicle would be in custody for less than a few days. *State v. Gaines*, 197 Wis.2d 102,111-112 (Ct. App. 1995). *State v. Clark*, 2003 WI App 121.

4. Police may search closed containers in inventory search. *Colorado v. Bertine*, 479 U.S. 367 (1987). *Florida v. Wells*, 495 U.S. 1 (1990) permits opening of all closed containers as part of inventory search when consistent with standardized police policy.
5. Police policy regarding inventory searches needn't be in writing and inventory search rule applies with equal force to containers that come into police custody even though vehicle itself not impounded and defendant not arrested. *State v. Weide*, 155 Wis.2d 537 (1990).
6. Existence of, and compliance with, a police policy on conducting an inventory search relates only to the reasonableness of the search and not the seizure of the item searched. *State v. Clark*, 2003 WI App 121.
7. Police may play contents of unmarked cassette tape in order to inventory it. *State v. Weber, Id.*

X. Consent

- A. General Rule: Consent to enter a home or to search a person or property must be given freely and voluntarily. *U.S. v. Mendenhall*, 446 U.S. 544 (1980); State has burden to show by clear and convincing evidence that consent was freely and voluntarily given. *State v. Johnston*, 184 Wis.2d 806 (1994). Voluntariness is determined from totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).
- B. Specific Circumstances:
  1. Consent to search need not be given verbally; it may take the form of gestures, actions or conduct. *State v. Phillips*, 218 Wis.2d 180 (1998); *State v. Tomlinson*, 2002 WI 91.
  2. Lawfully seized detainee does not have to be informed of their right to leave before their consent to search is found to be voluntary. *Ohio v. Robinette*, 519 U.S. 33 (1996).
  3. Law enforcement must ask for permission to search in order for consent to be given. *State v. Kiekhefer*, 212 Wis.2d 460 (Ct. App. 1997).

4. Law enforcement may not threaten to obtain search warrant where valid grounds do not exist to obtain warrant; but when expressed intention to obtain warrant is genuine and not a pretext to induce submission, it does not vitiate consent. *Kiekhefer, Id.*
5. Police do not have to disclose secondary reasons for search when they truthfully disclose primary reason for search and there is no deception or false pretext. *State v. Kelley*, 2005 WI App 199.
6. When arresting officer correctly states the truth about consequences for refusal to submit to OWI breath or blood test, consent is voluntary. *Village of Little Chute v. Walitalo*, 2002 WI App 211.
7. Officer may request a PBT before establishing probable cause for arrest; consent to take PBT was voluntary. *County of Jefferson v. Renz*, 231 Wis.2d 293 (1993).
8. Police may request consent to search one's property without having any grounds to believe that the person has committed any wrongdoing. *State v. Stout*, 2002 WI App 41; *U.S. v. Liss*, 103 F.3d 617 (7th Cir. 1997).

C. When consent found involuntary

1. Acquiescence under false pretenses, to police entry of motel room vitiated any consent for their subsequent search of that room. *State v. Munroe*, 2001 WI App 104.
2. When police made misrepresentation as to existence of warrant, consent was procured by outright and material lie and thus not valid. *Hadley v. Williams*, 368 F.3d 747 (7<sup>th</sup> Cir. 2004).
3. When owner's consent to search his apartment, given in response to police threat to obtain a search warrant even though no probable cause existed, consent was involuntary. *State v. Trecroci*, 2001 WI App 126.

D. Who May Consent

1. Persons with co-equal rights
  - a. When two persons have equal rights to the use or occupancy of premises either has common authority and may give consent to search. *Embry v. State*, 46 Wis.2d 151 (1970).

- b. Police may not search premises when one occupant with common authority over premises gives consent to and co-occupant is present and objects to search. *Georgia v. Randolph*, 547 U.S. \_\_\_\_; 126 S. Ct. 1515 (2006).

## 2. Minor children

- a. There are situations where the child may reasonably consent to police entry; this depends on the child's age, intelligence and maturity, and scope of the search or seizure. Five-year-old child found unable to give consent to enter home. *Laasch v. State*, 84 Wis. 2d 587 (1978).
- b. Teenager found to have given consent when upon opening door, child walked into home and parent did not say anything. *State v. Tomlinson*, 2002 WI 91.
- c. Questioning of three-year-old child left alone with police by parent permitted. Parent did not assert any reasonable expectation of privacy prohibiting officer from speaking with his son and the question asked did not constitute a search. *State v. Ragsdale*, 2004 WI App 178.

3. Drivers for Passengers. Driver's consent to search vehicle justified warrantless search of passenger's property left in vehicle when passenger was asked to step out of vehicle by police. *State v. Matejka*, 2001 WI 5.

## E. Limits of Consent

1. One may not consent to search of another's private area, even when both persons reside in same home. *State v. Kiekhefer*, 212 Wis.2d 460 (Ct. App. 1997) *State v. Kieffer*, 207 Wis.2d 462 (Ct. App. 1996).
2. Occupant's request that search warrant be obtained negates any third party consent to search premises. *Kieffer, Id.*
3. Landlord may not give consent to search tenant's residence or property.
4. Hotel proprietor or employee may not give consent to search room. *Stoner v. California*, 376 U.S. 483 (1964).

F. Apparent Authority. Consent search may be valid notwithstanding absence of actual authority to consent if the police reasonably believe that such authority did exist. *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *State v. Kieffer*, 207 Wis.2d 462 (Ct. App. 1996).

G. Scope of Consent

1. Consent to search garage does not implicitly authorize search of adjoining house. *Walter v. U.S.*, 447 U.S. 649 (1980).
2. Suspect who consents to search can limit its scope. *Florida v. Jimeno*, 500 U.S. 248 (1991).
3. Consent to look for weapons does not allow officer to look into containers that are too small to hold weapon (film canister in this case). *State v. Johnson*, 187 Wis.2d 237 (Ct. App. 1994). By requesting permission to search for weapons, law enforcement officer limits the scope of the consent. *Id.*
4. Consent to strip search does not imply consent to body cavity search. *State v. Wallace*, 2002 WI App 61.
5. Informing officer that the trunk did not open failed to limit the scope of consent to search the trunk when the driver also gave explicit consent to look in trunk. *State v. Stankus*, 220 Wis.2d 232 (Ct. App. 1998).

H. Attenuation Doctrine. Be aware of the attenuation doctrine. *State v. Richter*, 2000 WI 58. See page 29 of this outline for attenuation cases.

XI. Stops and Seizures Lacking Probable Cause: The Reasonable Suspicion Doctrine

A. Definition of seizure: A detention of an individual for almost any reason is a seizure within the meaning of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968).

B. When a seizure occurs

1. Person is deemed “seized” when a reasonable person would have believed that he was not free to leave. *U.S. v. Mendenhall*, 446 U.S. 544 (1980).
2. Belief one is seized is reasonable when police take actions such as activating sirens, commanding person to stop, display

weapons, block travel, or otherwise restrict person's movement, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Michigan v. Chesternut*, 486 U.S. 567 (1988); *State v. Williams*, 2002 WI 94.

3. No seizure occurs when a police officer approaches an individual, identifies themselves and asks questions concerning criminal activity - In these circumstances, the person is free to refuse to answer and leave. If surrounding conditions are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, then a seizure occurs. *Florida v. Royer*, 460 U.S. 491 (1983); *State v. Williams*, 2002 WI 94.
4. Police show of authority only constitutes seizure once person voluntarily stops or police accompany show of force by application of physical force. *California v. Hodari D.*, 499 U.S. 621 (1991); subject who fails to yield to police show of authority not seized and when police give chase and later discover evidence, it may not be suppressed. *State v. Young*, 2006 WI 98. But, backing away from officer does not constitute fleeing, thus person is seized. *State v. Washington*, 2005 WI App 123.
5. Stopping automobile and detaining occupants, even only briefly and for limited purpose, is a seizure within the meaning of Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Whren v. U.S.*, 517 U.S. 806 (1996).

#### C. Seizures require reasonable suspicion

1. *Terry* stops. A law enforcement officer may stop an individual upon "reasonable suspicion" that the person has, is or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1 (1968).
2. Reasonable suspicion involved a level of cause greater than a mere hunch but is less than probable cause. Police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Terry, Id.*
3. Six factor test for reasonableness of investigatory stop. *State v. Guzy*, 139 Wis.2d 663

- a. the particularity of the description of the offender or the vehicle in which he fled;
- b. the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred;
- c. the number of persons about in that area;
- d. the known or probable direction of the offender's flight;
- e. observed activity by the particular person stopped; and
- f. knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation

D. Permissible *Terry* Reasons for a Stop

1. Unprovoked flight from presence of police officer. *Illinois v. Wardlow*, 528 U.S. 119 (2000); *State v. Anderson*, 155 Wis. 2d 77 (1990).
2. A lawful stop of a vehicle is lawful as to any occupant of the vehicle. *State v. Harris*, 206 Wis. 2d 242, 260 (1996). Officer may ask passenger for identification during the stop. *State v. Griffith*, 2000 WI 72. Passenger is free to decline to answer, and refusal to answer does not give rise to any reasonable suspicion of wrongdoing. *Id.*
3. Observation of what officers believe is aborted drug transaction in area known for drug dealing where landlord had requested police presence to stop trespassing and drug activity. *State v. Amos*, 220 Wis.2d 793 (Ct. App. 1998).
4. Observation by police officers at night in a known drug neighborhood of defendant standing around, getting in and out of a car quickly, and walking toward a pay phone. *State v. Allen*, 226 Wis.2d 66 (Ct. App. 1999).
5. Erratic, although not illegal driving, at an early morning hour, combined with driver stopping and pouring a drink onto the road justified officer's suspicion that driver could have been intoxicated. Fact that driver's actions were not unlawful was not determinative. *State v. Waldner*, 206 Wis. 2d 51.

6. Observation of at least seven air fresheners hanging from the vehicle's rearview mirror, combined with inconsistent stories by nervous vehicle occupants as to where they were going. *State v. Malone*, 2004 WI 108.
7. Stop for traffic law violation permitted even if stop is pretextual and officer is actually seeking to accomplish other law enforcement objective. *Whren v. U.S.*, 517 U.S. 806 (1996).
8. Vehicle being driven in unusual manner, back and forth, in a remote area of seasonal cabins at 2:30 a.m. in recreational and hunting area, which had recently experienced a number of break-ins. *State v. Croell*, 2005 WI App 59 (note: unpublished decision)
9. Detention of suspected runaway teen sitting alone in high crime area who fled from the police after being told to “stay put”. *In the Interest of Kelsey C.R.*, 2001 WI 54.
10. Furtive gestures contribute to reasonable suspicion. *State v. Grandberry*, 156 Wis. 2d 218 (Ct. App. 1990).

E. Cases where investigatory stops held unlawful

1. Vehicle stopped at stop sign a few seconds longer than usual; no evidence to indicate that driver saw, or would be able to see that he was facing a squad car late at night. *State v. Fields*, 2000 WI App 218.
2. Presence in high drug trafficking area and short contact with another person on sidewalk in early afternoon without any observation of actual exchange by officer. *State v. Young*, 212 Wis.2d 417 (Ct. App. 1997).
3. Only specific articulable information police possessed was that defendant’s vehicle pulled away from the curb close to the robbery suspect's address, and that the vehicle contained several black males. *State v. Harris*, 206 Wis. 2d 243 (1996). Person in area who matched description of suspect but 26 hours later not lawfully seized. *State v. Alexander*, 2005 WI App 231.
4. Observation of picture of a mushroom on defendant's wallet during the course of officer writing him a speeding ticket. *State v. Betow*, 226 Wis. 2d 90 (Ct. App. 1999).

5. Exceeding permissible scope of routine traffic stop when occupants tell officer no drugs and denies permission to search. *State v. Gammons*, 2001 WI App 36.
  6. An anonymous tip that a person carrying a gun is, without more, insufficient to justify a police officer's stop and frisk of that person. The tip was from "an unknown, unaccountable informant and contained only information readily observable by passersby- suspect's location in a bus stop, and a very general description - young black man wearing a plaid shirt. *Florida v. J.L.*, 529 U.S. 266 (2000).
- F. Community Caretaker. Three Step test to determine if a seizure based on the community caretaker function is reasonable. *In the Interest of Kelsey C.R.*, 2001 WI 54.
1. That a seizure within the meaning of the Fourth Amendment has occurred;
  2. If so, whether the police conduct was bona fide community caretaker activity; and
  3. If so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.
- G. What source of information is acceptable for a stop
1. Unidentified motorist's cell phone call when motorist observed truck driving erratically contained sufficient indicia of reliability and alleged a potential imminent danger to public safety. *State v. Rutzinski*, 2001 WI 22.
  2. Probable cause to conduct warrantless vehicle search found when anonymous caller provided predictive information demonstrating a special familiarity with defendant and her illegal activities. *State v. Sherry*, 2004 WI App 207.
  3. Store clerk citizen informant is inherently reliable and officer could rely upon their assessment that defendant was drunk. Information given by the clerk and the police officer's corroboration of the information before the investigatory stop were sufficiently reliable to provide the officer with a reasonable suspicion of criminal activity. *State v. Powers*, 2004 WI App 143.

4. Anonymous tip by citizen informant who observed crime in progress, calls 911 and gives her address as location from which she observed crime had sufficient indicia of reliability to support stop. *State v. Williams*, 2001 WI 21.
5. Anonymous tip not required to include predictive information. *Williams, Id.*
6. The corroborated actions of the suspect, as viewed by police acting on an anonymous tip, need not be inherently suspicious or criminal in and of themselves. *State v. Richardson*, 156 Wis.2d 128,142 (1990).
7. An anonymous tip that a person carrying a gun is, without more, insufficient to justify a police officer's stop and frisk of that person. The tip was from "an unknown, unaccountable informant and contained only information readily observable by passersby- suspect's location in a bus stop, and a very general description - young black man wearing a plaid shirt. *Florida v. J.L.*, 529 U.S. 266 (2000).

#### H. Permissible Scope & Duration of Stop

1. Stop for traffic law violation permitted even if stop is pretextual and officer is actually seeking to accomplish other law enforcement objective. *Whren v. U.S.*, 517 U.S. 806 (1996).
2. Questioning can transform a reasonable seizure into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop. *U.S. v. Sharpe*, 470 U.S. 675 (1985).
3. When an officer has fulfilled the purpose of a lawful stop, request for permission to search the vehicle does not, in itself, transform the stop into an unlawful one. *State v. Gaulrapp*, 207 Wis. 2d 600 (Ct. App. 1996). See also *State v. Jones*, 2005 WI App 26. *State v. Luebeck*, *State v. Williams/Matthews*, 2001 WI App 249.
4. Incremental intrusion that results from questioning vehicle passenger about identity is permissible. *State v. Griffith*, 2000 WI 72.

5. Officers from different law enforcement agencies may both participate in investigatory stop. *State v. Gruen*, 218 Wis.2d 581 (Ct. App. 1998).
6. Reasonable for the police to detain and transport defendant to the scene of the accident in order to determine if defendant's intoxication contributed to the accident and permissible under sec. 968.24 Wis. Stats. *State v. Quartana*, 213 Wis. 2d 440 (Ct. App. 1997).
7. Detention was permitted on reasonable suspicion grounds when it lasted one hour and subject was handcuffed because police were awaiting arrival of search warrant. *State v. Vorburger*, 2002 WI 105.
8. Detaining driver for 30-45 minutes at serious traffic accident before administering field sobriety tests was reasonable. *State v. Colstad*, 2003 WI App 25.
9. Officer may ask defendant questions outside the scope of the initial traffic stop when officer had become aware of specific and articulable facts giving rise to the reasonable suspicion that a crime had been, was being, or was about to be committed. *State v. Malone*, 2004 WI 108.
10. Police officer exceeded the permissible scope of routine traffic stop when he continued to detain the vehicle after the driver told him there were no drugs in the vehicle and that he could not search it. *State v. Gammons*, 2001 WI App 36.

I. Traffic Checkpoints.

1. Sobriety checkpoints to curb drunk driving are permissible. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).
2. Absent special circumstances, the Fourth Amendment forbids police to make stops without individualized suspicion at a checkpoint set up primarily for general "crime control" purposes. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).
3. Checkpoint permissible when stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask the occupants, as members of the public, for help in providing

information about a crime in all likelihood committed by others. *Illinois v. Lidster*, 540 U.S. 419 (2004).

J. Frisk/Plain Feel

1. Terry frisk of suspect is a limited pat down for weapons when officer is justified in belief that suspect may be armed and dangerous to officer or others. *Terry, Id.* at 30-31.
2. *Terry* does not, however, authorize officers to conduct a protective frisk as a part of every investigative encounter. Protective frisk limited to situations in which the officer is "justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others". *State v. McGill*, 2000 WI 38. Frisks which are a general precautionary measure, not based on the conduct or attributes of defendant, are not permissible. *State v. Mohr*, 2000 WI App 111
3. A court may consider an officer's belief that his or others' safety was or was not in danger in determining whether the objective standard of reasonable suspicion was met. *State v. Kyles*, 2004 WI 15.
4. Suspect behavior. Courts have declined to adopt bright lines rules concerning factors in decision to frisk. Courts examine facts in a case-by-case analysis, looking at totality of circumstances in deciding whether frisk justified. *Kyles, Id.* <sup>2</sup>Some of the factors courts have considered are:
  - g. Individual's failure to obey the direction of an officer to keep hands in the officer's sight. *Kyles, Id.*
  - h. Failure to immediately stop for police in routine traffic stop. *McGill, Id.*
  - i. Nervousness, such as hand twitches, in excess of most traffic suspects *McGill, Id*

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<sup>2</sup> Supreme Court in Kyle upheld trial court's finding that police lacked reasonable suspicion to frisk and issued order suppressing seized marijuana. Kyles was stopped in a "pretty active" crime area, had hands in pockets of large stuffy overcoat on cold winter day, removed hands from pockets when instructed to but put them back in what officer characterized as a "nervous habit" and promptly complied with second request to remove hands. Officer testified that he "didn't feel any particular threat before searching" the defendant and four to eight seconds elapsed between initial stop and the frisk.

- j. Apparent alcohol and drug intoxication justified pat down. *McGill, Id.*
  - k. Large fluffy coat in winter *Kyles, Id.*
  - l. High crimes area. *Kyles, Id.*; *State v. Morgan*, 197 Wis.2d 200 (1995).
  - m. Time of stop in high crime area, *Morgan, Id.*; *State v. Mata*, 230 Wis.2d 567 (Ct. App. 1999).
  - n. Area known for gang, drugs and weapon activity combined with odor of marijuana. *Mata, Id.*
  - o. Failure to yield to the police officers' show of authority by running away after being told to "stay put". *In the Interest of Kelsey C.R.*, 2001 WI 54
- K. Permissible Scope of Protective Frisks: Manipulation of defendant's waistband during frisk was permissible when defendant had bulky frame and heavy clothing, thereby impeding effective pat down. It was a minimally intrusive exploration of outer clothing designed to discover whether defendant had a weapon. *State v. Triplett*, 2005 WI App 255.
- L. Plain Feel Doctrine. When officer conducting a Terry frisk feels something which is clearly contraband, may seize it; plain view doctrine extends to plain touch or feel. *State v. Guy*, 172 Wis. 2d 86 (1992).
- M. When officer does not feel anything that resembles weapon or contraband, may not conduct further search. Shining flashlight down defendant's pants impermissible. *State v. Ford*, 211 Wis.2d 741 (Ct. App. 1997).
- N. Identification Searches. When police legitimately stop suspect and can't confirm identity through police records, they may conduct an identification search, limited to uncovering wallet or other repository for identifying papers. *State v. Black*, 2000 WI App 175.
- O. Automobile Frisk
- 1. "Terry" search for weapons authorized when police stop vehicle and have reasonable suspicion to believe vehicle may contain weapons potentially dangerous to officer. *Michigan v.*

*Long*, 463 U.S. 1032 (1983); *State v. Moretto*, 144 Wis.2d 171 (1988).

2. Terry frisk of vehicle permitted when police saw drug dealing suspect extend his hand behind the passenger seat. Because police knew dealers to carry guns, they reasonably suspected that the suspect had dropped or hidden a weapon while his hand was concealed. *State v. Williams*, 2001 WI 21.

## XII. Fruit of the Poisonous Tree and the Attenuation Doctrine

A. In general the remedy for unlawful police conduct such as illegal arrest, entry into home, stop, etc. is suppression of the evidence. *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

1. Illegal police conduct may taint consent to search. *Brown v. Illinois*, 422 U.S. 590 (1975); *State v. Anderson*, 165 Wis.2d 441 (1991).
2. Identification evidence may be suppressible if derived from an unlawful seizure. *State v. Walker*, 154 Wis.2d 158 (1990).

B. Attenuation Doctrine: When a search or seizure of evidence is sufficiently attenuated from the unlawful police conduct, court is not to suppress the evidence. *State v. Richter*, 2000 WI 58. Court is to evaluate three factors:

1. The temporal proximity of the official misconduct and seizure of the evidence;
2. The presence of intervening circumstances; and
3. The purpose and flagrancy of the official misconduct.

C. Statements

1. Statements made pursuant to an unlawful arrest and/or entry may be suppressed if not sufficiently attenuated from unlawful police conduct. *State v. Kiekhefer*, 212 Wis.2d 460 (Ct. App. 1997); *State v. Tobias*, 196 Wis.2d 537 (Ct. App. 1995).
2. Length of time alone is an insufficient basis to find attenuation, and non-confrontational interviews with police during

intervening period are not significant intervening events. *United States v. Reed*, 349 F.3d 457 (7<sup>th</sup> Cir. 2003).

### XIII. Probation Searches

- A. When search of defendant's residence is performed by his probation agent and police officers are present only for protection, this is a probation, not a law enforcement search. *State v. Wheat*, 2002 WI App 153.
- B. Police may search probationer's home for evidence of a crime upon reasonable suspicion when probationer consents to such searches as probation condition. *U.S. v. Knights*, 543 U.S. 112 (2001).

### XIV. Search Warrants

- A. General Rule: When all the circumstances set forth in the affidavit before a magistrate sets forth a fair probability that contraband or evidence of a crime will be found in a particular place, search warrant to be issued. *Illinois v. Gates*, 462 U.S. 213 (1983). Courts must consider whether, when objectively viewed, the information before the magistrate provided sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched. *State v. Marquardt*, 2001 WI App 219.
- B. Probable Cause. The quantum of evidence required to establish probable cause to issue a search warrant is less than that needed to bind over for trial at a preliminary hearing. *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). Examples where probable cause found:
  - 1. Search of defendant's home for evidence of murders committed years earlier because defendant was an alleged serial killer, and a unique characteristic of serial killers is to keep mementoes of their murders indefinitely. *State v. Multaler*, 2002 WI 35.
  - 2. Search of defendant's home for drugs because defendant was a allegedly a large scale drug dealer, reasonable to infer that he would keep drugs at his home, which was likely place of business. *State v. Ward*, 2000 WI 3.
  - 3. Probable cause in arson case to search defendant's home based on earlier sighting of turpentine at home. *Higginbotham, Id.*
  - 4. Probable cause to search defendant's home for child pornography based on information that defendant was a pedophile and child molester. *State v. Schaefer*, 2003 WI App 164.

5. Anticipatory search warrants may be issued even when there is not probable cause to believe that contraband or evidence of a crime will currently be found in a location, as long as there is probable cause to believe contraband or evidence will be there at the time the warrant is issued. *U.S. v. Grubbs*, 547 U.S. \_\_\_\_; 126 S. Ct. 1494 (2006).

### C. Scope

1. Warrant must particularly describe the place to be searched and the persons or things to be seized and search is to be carefully tailored to its justifications, not an exploratory search. Scope of a lawful search is defined by the object of the search and the places in which there is probable cause to believe that it may be found *United States v. Ross*, 456 U.S. 798 (1982).
2. Validity of warrant must be judged in light of the information available to the officers at the time they obtained the warrant. When warrant is overbroad but validly obtained and officers' failure to realize overbreadth of the warrant is objectively reasonable, evidence seized is admissible in court. *Maryland v. Garrison*, 480 U.S. 79 (1987).
3. Officers are required to discontinue search once they discover they are not operating within the scope of a search warrant. *State v. Herrmann*, 2000 WI App 38.
4. Under the "physical proximity" test it is reasonable for officers executing search warrant to search all the items on the premises that could have contained contraband or the evidence sought under the warrant, except those items worn by or in the exclusive possession of persons whose search not authorized, irrespective of the person's status in relation to the premises. *State v. Andrews*, 201 Wis.2d 383 (1996). Items in close proximity to home and within curtilage of home may be searched pursuant to search warrant of the home. *State v. O'Brien*, 223 Wis.2d 303 (1999).
5. Plain view doctrine applies to seizures conducted pursuant to search warrant. *State v. Schroeder*, 2000 WI App 128.

### D. Good Faith

1. Federal Rule: The exclusionary rule doesn't bar the admission of evidence seized in reasonable, good-faith reliance on a search

warrant that was subsequently held to be defective. *U.S. v. Leon*, 468 U.S. 897 (1984).

2. Good faith exception recognized by Wisconsin in *State v. Eason*, 2001 WI 98. The Wisconsin Constitution requires the State to show that the process used in obtaining a search warrant includes a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney. *Id.*
3. Good-faith exception does not extend to a warrant issued on the basis of a statement that totally lacks an oath or affirmation. *State v. Tye*, 2001 WI 124.
4. The good-faith exception is inapplicable when indicia of probable cause are so lacking as to render official belief in its existence unreasonable. This inquiry is distinct from the question of whether the supporting facts are clearly insufficient. *State v. Marquardt*, 2005 WI 157.
5. Police action in good faith reliance on supreme court pronouncements insulate that conduct from the exclusionary rule. *State v. Ward*, 2000 WI 3; *State v. Loranger*, 2002 WI App 5.

E. No Knock

1. Fourth Amendment incorporates the common law requirement that police knock on a dwelling's door and announce their identity and purpose before attempting forcible entry. *Wilson v. Arkansas*, 514 U.S. 927 (1995). Courts are to determine on a case-by-case basis whether or not whether unannounced entry is reasonable under the Fourth Amendment. *Id.*
2. Fourth Amendment does not permit a blanket exception to rule of announcement for particular category of cases. *Richards v. Wisconsin*, 520 U.S. 385 (1997).
3. The knock-and-announce rule does not apply when the target premises are unoccupied. *State v. Moslavac*, 230 Wis. 2d 338, 602 N.W.2d 150 (Ct. App. 1999).
4. Good faith exception to exclusionary rule applies to no-knock warrants. *State v. Eason*, 2001 WI 98.

5. No-knock entry may not be sustained merely on the information in the warrant application. When the reasonableness of a no-knock entry is challenged, the State must present evidence of the circumstances known or reasonably suspected by police to exist at the time of warrant execution that would justify a no-knock entry. *State v. Whiting*, 2003 WI App 103.
6. A reviewing court may consider evidence beyond that which was included in the warrant application in evaluating the reasonableness of a no-knock execution of a search warrant. *State v. Henderson*, 2001 WI 97.

F. Challenges to Search Warrants

1. Courts give great deference to a court's determination of probable cause to issue a warrant, and the defendant bears the burden of challenging probable cause. *State v. Multaler*, 2002 WI 35.
2. Defendant is entitled to an evidentiary hearing on validity of search warrant when defendant can make a preliminary showing that a witness deliberately lied or testified with disregard for the truth of his or her statements in search warrant affidavit. *Franks v. Delaware*, 438 U.S. 154(1978); *State v. Mann*, 123 Wis.2d 375 (1985).
3. Defendant is not entitled to an evidentiary hearing to challenge the credibility of the witness upon whose testimony a court relies on in issuing a warrant. *State v. Stank*, 2005 WI App 236.
4. "All persons" warrants. Search warrants that permit officers to search all persons on the premises not necessarily invalid; the test is not whether innocent persons might be present on the premises, but rather whether the presence of likely guilty persons is demonstrated to a reasonable probability in the warrant. *State v. Hayes*, 196 Wis. 2d 753 (Ct. App. 1995). Note: the Supreme Court has not ruled on this issue.
5. Staleness. Passage of time does not alone render probable cause stale; the warrant-issuing court may consider various factors, for example whether there is an ongoing criminal activity such as drug dealing. *State v. Stank*, 2005 WI App 236. When the type of criminal behavior being investigated is recurring, entrenched, and continuous, warrants may be upheld even after lengthy period of time has passed since crime occurred. *State v. Multaler*, 2002 WI 35.

6. Overbreadth. In search of a business, when defendant challenged breadth of a warrant and whether search and seizure was supported by probable cause, court considered whether business had a pervasive scheme to defraud and thus it was reasonable to seize all business records. *State v. DeSmidt*, 155 Wis.2d 119 (1990).

#### XV. Inevitable discovery

- A. Courts have held there is an “inevitable discovery” exception to the exclusionary rule. *Nix v. Williams*, 467 U.S. 431 (1984); *State v. Weber*, 163 Wis. 2d 116 (1991).
- B. If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means -- here the volunteers' search -- then the deterrence rationale has so little basis that the evidence should be received. *Id.*

#### XVI. Racial Profiling

- A. Fourth Amendment does not bar pretextual stops. *Whren v. U.S.*, 517 U.S. 806 (1996)
  1. Pretext stops of individuals are permitted as long as there is probable cause to believe the person is violating the (traffic) law.
  2. Courts will not delve into the subjective state of mind of the police officer and look at why he “really” stopped the person.
  3. Opinion points out that selective enforcement of the law based on race is prohibited and that the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.
- B. Some Differences between Fourth Amendment and Equal Protection Law.
  1. In a Fourth Amendment motion the state has the burden of proof; they have to call the cop and prove the reasonableness of the stop.
  2. In an Equal Protection claim the moving party has the burden of proof.

3. Consensual encounters can violate Equal Protection Clause. Fourteenth Amendment protects citizens from police action, including the decision to interview an airport patron based solely on racial considerations. The stage of investigation is irrelevant under an equal protection analysis. *United States v. Avery*, 137 F.3d 343, 353 (6<sup>th</sup> Cir. 1997).
4. State of mind of officer irrelevant in Fourth Amendment challenge whereas intent is a crucial issue in Equal Protection claim.