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Appellate Court Decision Raises Questions about Appropriate Police Response to Weapons Calls

A recent case from the Court of Appeals for the Seventh Circuit discusses the permissible police response to weapons calls in light of Wisconsin's amended disorderly conduct statute and the recent expansion of individual gun rights in case law. The case, *United States v. Williams*, 12-3864 (7th Cir. 2013), considered whether City of Fitchburg police officers acted outside their legal authority when they stopped, frisked and arrested an individual after responding to a citizen call reporting a group of individuals displaying handguns in public.

On March 21, 2012 at 11:25 p.m., City of Fitchburg police received an anonymous 911 call reporting a group of 25 individuals acting loudly and displaying handguns in a parking lot outside a bar in Fitchburg. The police had often been called to this bar to respond to reports of violence, gang activity, drugs and weapons. Several officers responded to the call. When they arrived at the scene, they saw eight or ten individuals standing around a group of cars in the parking lot. There was no loud or disruptive behavior, and no weapons were displayed.

As the officers approached, the group began to disperse slowly, avoiding eye contact with the officers. The officers began to perform pat-downs on members of the group, including Andre Williams. Williams resisted the frisk initially and tried to escape. He was ultimately restrained and officers searched him, finding a handgun, several ecstasy pills and cash. Williams was arrested and charged with being a felon in possession of a firearm. The district court denied his motion to suppress the gun recovered during the frisk. Williams was ultimately convicted of possessing a firearm as a convicted felon. He appealed, arguing that the evidence used to obtain his conviction should have been suppressed because the police did not have a reasonable suspicion to stop or frisk him.

On appeal, the court considered whether the police officers violated Williams' constitutional rights by stopping and frisking him. The standards for evaluating the constitutionality of an investigatory stop and frisk are well established. Police officers may detain a suspect for a brief investigatory stop if they have a reasonable suspicion based on articulable facts that a crime is about to be or has been committed. Police officers may perform a subsequent frisk only if they can point to articulable facts suggesting that the subject is armed and dangerous. The government argued that the Fitchburg police officers had reasonable suspicion to stop Williams on the basis of the 911 call reporting that a large group of people was being loud and waving guns in a location at which violent crime and drug activity was regularly reported. The government argued that the subsequent frisk of Williams was lawful because he had avoided eye contact with the officers, had put his hands in his pockets or near his waistband and had begun to move away from the area

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when the police arrived.

In a decision issued September 24, 2013, the court of appeals concluded that the police's search of Williams was unlawful. As a result, the court reversed the denial of Williams's suppression motion and vacated his conviction. There were three judges on the panel, and each judge reached a different conclusion regarding the evidence. Judge Stadtmueller, a district judge from the Eastern District of Wisconsin sitting on the court of appeals by designation, concluded that the police's initial investigatory stop of Williams was constitutional because the anonymous 911 call provided the officers with reasonable suspicion that a "volatile emergency situation was underway." However, Stadtmueller concluded that the officers did not act lawfully in frisking Williams because there was nothing to suggest that Williams, personally, was armed and dangerous.

In his concurring opinion, Judge Hamilton agreed that the police acted unconstitutionally in frisking Williams. However, Hamilton stated that the police also likely acted unconstitutionally in stopping Williams at all. Hamilton's opinion should be of particular interest to law enforcement agencies in Wisconsin. Hamilton stated that five or six years ago he would have had little trouble concluding that the police were justified in stopping Williams. However, the recent expansion of statutory and case law relating to individual gun rights has now changed the calculus.

This "evolution" includes the 2011 amendments to Wisconsin's disorderly conduct statute. Prior to 2011, Wisconsin's disorderly conduct statute had provided that:

> Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provide a disturbance is guilty of a Class B misdemeanor.

Wis. Stat. § 947.01 (2010). In 2011, the disorderly conduct statute was amended as part of Wisconsin's passage of a concealed carry law, Act 35. The disorderly conduct statute now states that:

> (2) Unless other facts and circumstances indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

Wis. Stat. § 947.01(2) (2012).

Judge Hamilton stated that in light of the "evolving" understanding of an individual's right to possess and display arms, as set forth in this disorderly conduct statute and case law, law enforcement must "reevaluate" their thinking about gun possession and must adapt their practices to the new understanding of gun rights. Hamilton stated that under current standards, the police could not have arrested the individuals at the parking lot in Fitchburg for disorderly conduct "for displaying guns," even if the display was disturbing or frightening to others, because there was no indication of "criminal or malicious intent." He noted that it was appropriate for the police to respond to the call with a "strong and visible police presence," but that going beyond that was likely unconstitutional. Hamilton acknowledged that these changes in the law would "make the work of police officers more difficult and more dangerous," but nonetheless, police departments needed to adjust their standards.

Judge Hamilton's opinion is not the majority opinion and is not a binding interpretation of Wisconsin's disorderly conduct statute. Nonetheless, his interpretation of Wisconsin's amended disorderly conduct law and his opinion about the permissive level of response by law enforcement officers to weapons calls suggests that law enforcement departments need to consider the effect that recent changes to gun laws have on department policies.

Judge Ripple wrote a strong dissent, stating that the constitutional and statutory protections of an individual's right to bear arms do not negate a police officer's authority to investigate potentially dangerous situations. Ripple criticized the opinions written by Stadtmueller and Hamilton on the grounds that they failed to provide any clear guidelines for police officers responding to weapons calls. Additionally, Ripple stated that the majority decision was a major departure from established case law and would subject officers to an unacceptable level of risk when responding to weapons calls in dangerous areas. He would have concluded that the police were well within the bounds of the constitution when they stopped and frisked Williams.

— Sarah B. Painter

Boardman & Clark Welcomes New Associate

Boardman & Clark is pleased to announce that Sarah Painter has joined the firm as an associate. Sarah graduated summa cum laude in May, 2009 from the University of Illinois College of Law. She graduated magna cum laude in 2004 from Utah State University, Logan, Utah with degrees in History; Political Science and Biology. Prior to joining the firm, Sarah worked for four years as a judicial law clerk to Judge Barbara B. Crabb in the United States District Court for the Western District of Wisconsin. Before attending law school, Sarah worked as a volunteer English teacher in China, teaching both kindergarten and high school students.

Sarah will be working in the municipal law practice group, as well as a number of other areas in the firm, including general litigation.

Firefighter Liable for Failing to Stop at Red Light

In a case involving governmental immunity, a volunteer firefighter was held liable for injuries caused when he failed to stop at a red light en route to the fire station in response to an emergency call. *Brown v. Acuity Mutual Insurance Company*, 2013 WI 60 (July 9, 2013).

Burditt is a volunteer firefighter. He received notice by pager that an emergency call had come in. He was driving his personal vehicle to the fire station to pick up the gear necessary to respond to the emergency. His personal vehicle was equipped with flashing lights, but by departmental rules it did not have a siren or whistle. He came to a stop at a red light, but then proceeded through the intersection and struck another car. The other driver sued him for injuries sustained in the accident. The circuit court granted summary judgment for Burditt on immunity grounds and the court of appeals affirmed. The supreme court reversed and remanded for trial.

The supreme court addressed two issues: whether Burditt was operating within the scope of his employment when he was driving to the fire station and whether the ministerial duty exception to immunity applied.

Addressing the scope of employment, the court acknowledged the general rule that an employee going to and from the place of employment is not acting within the scope of his employment. There are exceptions where the employer dictates the method or mode of transportation. The court also noted that there is a distinction where there is no fixed place of employment. For example, a physical therapist traveling from one patient's house to another's was acting within the scope of her employment because the travel was part of the employer's requirements for the job. Here, the court held that Burditt was acting within the scope of his employment in traveling to the fire station. Although the station was the intermediate destination, he would be traveling on to the scene of the emergency, a location dictated by his employer. The court found it significant that Burditt was obligated to follow the commands of his officers once he responded to the page.

The supreme court reversed on the ministerial duty exception. It found that Burditt had violated specific rules of the road that were ministerial duties. Section 346.03 Wis. Stats. grants authorized vehicles the privilege to proceed through stoplights under certain circumstances. A condition of the privilege is that the vehicle be equipped with and using an audible signal as well as flashing lights. Burditt was using three separate flashing lights but had no audible signal. Accordingly, Burditt did not have any discretion to ignore the traffic lights.

— Mark J. Steichen

Wisconsin Federal Court Upholds Act 10

Judge William Conley of the United States District Court for the Western District of Wisconsin today issued a decision in the second case before him challenging the constitutionality of 2011 Wis. Act 10 ("Act 10"). *Laborers Local 23, AFL-CIO, et al v. Walker*, Case 11-cv-462. The plaintiffs in this case, two unions and a union member, alleged that Act 10 violated employees' federal constitutional rights of freedom of association and equal protection. Judge Conley held that Act 10 did not violate these federal constitutional provisions. In a separate case, Judge Conley previously held that Act 10's prohibition on dues deductions and requirement for annual certification elections violated the federal constitution; however, his decision was overturned by the Seventh Circuit Court of Appeals.

Based upon federal decisions decided at this time, Act 10 has been found not to violate the federal constitution.

In a case involving freedom of association and equal protection claims under the Wisconsin Constitutional parallel to those federal constitutional provisions interpreted by Judge Conley, Dane County Circuit Judge Juan Colas found that certain provisions of Act 10, including the prohibition on bargaining anything other than base wage rates, were unconstitutional. Judge Colas' decision is not binding on municipalities, except as to those parties to the Colas lawsuit, until such time as an appellate court issues a decision on the merits of the constitutional claims. The Colas decision was appealed to the Wisconsin Court of Appeals, which certified the case directly to the Wisconsin Supreme Court.

In certifying the case to the Supreme Court, the Court of Appeals made the following comment:

> In addition, as to both associational rights and equal protection rights, the representatives assert that the Wisconsin Constitution may be interpreted to provide greater protection than its federal counterpart. The representatives do not, however, present developed arguments supporting the conclusion that there should be more expansive protection under the Wisconsin Constitution under the particular facts in this case.

While the Wisconsin Supreme Court is not bound to interpret Wisconsin Constitutional provisions in the same manner as federal courts interpret parallel United States Constitutional provisions, the Wisconsin Supreme Court, as a general rule, follows such federal precedents. If the Wisconsin Court of Appeals assessment of the nature of the unions' arguments in *Laborers Local 23, AFL-CIO*, is accurate, such would suggest that the Wisconsin Supreme Court would likely follow Judge Conley's interpretation of the freedom of association and equal protection clauses as applied to Act 10.

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City of Monona Strikes Novel Solar Deal

A new agreement signed last month with Colorado solar developer Falcon Energy Systems, LLC (Falcon Energy) may enable the City of Monona (City) to become Wisconsin's first municipality to implement a major solar project utilizing third-party financing.

Under the proposed six-year arrangement, the City agrees to lease roof top space on four municipal buildings at a cost of $.10 per square foot, to allow installation of 382 solar panels, which are estimated to produce up to 271,000 kWhs of solar energy annually. The solar equipment will be paid for, installed by and owned by Falcon Energy, which will utilize federal tax credits otherwise not available to local governments. The facilities will be installed by Full Spectrum Solar, a Madison-based company that has been involved in a number of solar projects throughout the state, including residential installations and a 70 kW solar array at the Organic Valley headquarters facility in La Farge, Wisconsin.

In exchange for the leasehold, the developer will sell the City renewable energy credits at a price of $130.00 per credit. The term sheet does not expressly provide for the sale and purchase of the kilowatt hours to be generated by the facility. However, as distributed generation, it is contemplated that the energy will used to offset the City's purchases from its incumbent electric provider, Madison Gas & Electric (MG&E), and help meet the City's "25x25" Energy Independence goals. At the end of the six-year initial term, the City can exercise a buy-out option at depreciated cost or fair market value (whichever is higher), renew, or terminate the agreement and pay a removal penalty.

Third-party financing is widely recognized as a key element in the growth of new residential solar installations nation-wide. However, to this point, third-party financing of solar facilities in Wisconsin has been impeded by a concern over potential Public Service Commission regulation. Third-party renewable deals in other states, such as Iowa, have undergone lengthy legal challenges, usually initiated by the incumbent electric provider (see Municipal Law Newsletter Volume 19, May/June, 2013). The Monona purchase is, at least to this point, not being challenged by MG&E, which has actively supported solar development elsewhere in Dane County, but the deal will test whether or not a so-called "REC Service Agreement" can pass legal muster under the Wisconsin regulatory regime. Because of its scale (157 kW) and its novel financing structure, the Monona project is being closely watched by a variety of stakeholders.

While the Monona deal may test the viability of one model of solar energy project development, other Wisconsin municipalities appear to be moving forward with solar development, most notably, the City of Madison, which included in its capital budget a million dollar annual commitment to promote solar generation and overall energy reduction over the next five years. Madison is one of twenty-five cities receiving federal funding to become a so-called "Solar City" (along with the City of Marshfield and the City of Milwaukee), but has thus far eschewed third-party financing as a development model in favor of more traditional financing models.

— Richard A. Heinemann

Sanitary District Does Not Have Authority to Contest Annexation

A sanitary district does not have the authority to contest an annexation, according to the Court of Appeals. *Darboy Joint Sanitary District No. 1 and Town of Harrison v. City of Kaukauna*, Appeal No. 2012AP2639 (Ct. App., decided August 6, 2012) involved a direct unanimous annexation under Wis. Stat. § 66.0217(2). Both the Town and the Sanitary District challenged the annexation. The circuit court dismissed the challenge of both the Town and the Sanitary District.

The court concluded that the Town's challenge was specifically prohibited by the language of Wis. Stat. § 66.0217(11) as it existed at the time of the annexation. At the time of the annexation, § 66.0217(11) prohibited a town from bringing an action to contest the validity of a direct annexation. That subsection has since been revised by the legislature to allow towns to challenge a direct annexation on the grounds of either lack of contiguity or on the failure to obtain a town resolution approving the proposed annexation in the situation where the territory proposed to be annexed is located in a different county outside of the annexing city or village.

The court also concluded that the Sanitary District could not challenge the annexation. The court gave two reasons for this conclusion. First, the court concluded that the Sanitary District did not have a legally protected interest in the annexation that would be necessary in order to give the Sanitary District standing to bring a challenge. A legally protectable interest is one that is within the zone of interests that a statute or constitutional provision, under which the claim is brought, seeks to protect, said the court. Under the annexation statutory scheme, the legislature has extended standing to challenge annexations to affected towns in certain circumstances, but it has not expanded the right to challenge an annexation to sanitary district. According, the Sanitary District did not have standing to challenge the annexation.

Second, the court found that the Sanitary District had no authority to challenge the annexation. The court noted that sanitary districts have only those powers that are expressed conferred upon them by the legislation or are necessarily limited from the powers conferred. The court found no statute that expressly conferred upon sanitary districts the power to challenge annexations, and no persuasive argument was made that the ability to challenge an annexation is necessarily implied from the powers conferred upon sanitary districts.

— Lawrie Kobza

Wisconsin Supreme Court Debates Breadth of the Public Trust Doctrine

In the recent case of *Rock-Koshkonong Lake District v. Department of Natural Resources*, 2013 WI 74, decided July 16, 2013, the Wisconsin Supreme Court used a case involving an application to raise the water level behind a dam as an opportunity to debate the breadth of Wisconsin's constitutional public trust doctrine.

Under the public trust doctrine, the state is obligated to hold navigable waters in trust for the public. The public trust doctrine protects not just commercial navigation, but also extends its protection to boating, swimming, fishing, hunting, and the preservation scenic beauty.

In 2011, the public trust doctrine was discussed in *Lake Beulah Management District v. State*, 2011 WI 54, 335 Wis.2d 47, 799 N.W.2d 73, a case involving the approval of a high capacity groundwater well. In that case, the Court found that the DNR had a duty, and broad authority, under Wis. Stat. §§ 281.11 and 281.12 to consider the impact of a proposed high capacity well on State waters. According to the Court, Wis. Stat. §§ 281.11 and 281.12 reflected the legislature's delegation of the State's public trust duties to the DNR.

Sections 281.11 and 281.12, however, applied to "waters of the state" -- a term which includes more water resources than just navigable waters. Under § 281.01(18), "waters of the state" are defined to include "those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction." Although Lake Beulah involved a high capacity well's potential impact on navigable waters, the broad language used in the case raised the question of whether the Court was expanding the public trust doctrine to cover non-navigable waters.

In *Rock-Koshkonong Lake District*, a 4-3 decision, the Court used much more limited language when discussing the public trust doctrine. The case involved a petition to raise the DNR designated water levels of Lake Koshkonong. Wisconsin Statute § 31.02(1) authorizes the DNR to set water levels to be maintained by dams "in the interest of public rights in navigable waters or to promote safety and protect life, health and property." The Court discussed the authority granted to the DNR under § 31.02(1), and held that § 31.02(1) incorporates authority under both the public trust doctrine and the state's police power. According to the Court, authority under the public trust doctrine is provided by the reference to "public rights in navigable waters" in §31.02(1), while authority under the state's police power is provided by the reference to protection of "life, health and property."

The Court found that, under its interpretation of § 31.02(1), the State had police power authority (but not authority under the public trust doctrine) to consider the impact of water levels on wetlands adjacent to Lake Koshkonong, and to consider the state's wetland water quality standards when making its decision on whether to raise the designated water levels of the lake. The Court also found that the DNR was required to admit and consider evidence on the economic impact of lower water levels in the lake on the residents, businesses and tax bases adjacent to and near the lake, if such evidence was offered.

The distinction made by the Court between the DNR's authority under the public trust doctrine and its authority under the state's police power ultimately had no impact on the Court's decision in *Rock-Koshkonong Lake District*, but the Court's discussion will have an impact on future cases where violation of the public trust doctrine is alleged. As Justice Prosser, the author of the majority opinion, stated: "the distinction between the DNR's constitutionally based public trust authority and the DNR's police power-based statutory authority is that the latter is subject to constitutional and statutory protections afforded to property, may be modified from time to time by the legislature, and requires some balancing of competing interests in enforcement." Justice Crooks, the author of the dissenting opinion, described his concern over the distinction as follows: "[R]ights that are not protected by the constitution are easier to take away. In addition, the majority's interpretation transforms what was an affirmative duty on the state as trustee into a right to regulate when the legislature chooses to do so, allowing the state to ignore its duty with respect to things that impact navigable waters but are not physically located between the ordinary high water marks."

Expect this debate over the breadth of the public trust doctrine to continue as challenges over competing water uses continue.

— Lawrie Kobza

Wisconsin Federal Court Upholds Act 10

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From a bottom-line perspective, Judge Conley's decision does not change the current manner in which municipalities should operate relative to Act 10. Had Judge Conley ruled in a manner similar to Judge Colas, the federal court decision would be binding on Wisconsin municipalities, and they would have had to respond accordingly. That is not the case now, however, and Judge Conley's decision is one step further towards finalization of the legal challenges to Act 10. The unions have filed an appeal of Judge Conley's decision with the Seventh Circuit Court of Appeals. That decision will not be out until sometime next year. As indicated, the Seventh Circuit rejected all of the union arguments on different constitutional claims in an earlier case.

— Steven C. Zach

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