**NEW LAWS**

**LIMITED SCOPE REPRESENTATION BY ATTORNEYS,** Effective 1/1/15

This rule was approved by the Supreme Court and allows attorney to limit the scope of their representation to clients in certain legal proceedings, including municipal court proceedings. The applicable rules are listed below:

**800.035 (1m)** An attorney may provide limited scope representation to a person involved in a municipal court action as provided in ss. 802.045 and 802.05.

**801.14 (2m)** When an attorney has filed a limited appearance under s. 802.045 (2) on behalf of an otherwise self-represented person, anything required to be served under sub. (1) shall be served upon both the otherwise self-represented person who is receiving the limited scope representation and the attorney who filed the limited appearance under s. 805.045 (2). After the attorney files a notice of termination under s. 802.045 (4), no further service upon that attorney is required.

**802.045 LIMITED SCOPE REPRESENTATION PERMITTED – PROCESS.**

**(1) AUTHORIZED.** An attorney's role in an action may be limited to one or more individual proceedings or issues in an action if specifically so stated in a notice of limited appearance filed and served upon the parties prior to or simultaneous with the proceeding. Providing limited scope representation of a person under this section does not constitute a general appearance by the attorney for purposes of s. 801.14.

**(2) NOTICE OF LIMITED APPEARANCE**. The notice of limited appearance shall contain the following information:

(a) The name and the party designation of the client.

(b) The specific proceedings or issues within the scope of the limited representation.

(c) A statement that the attorney will file a notice of termination upon completion of services.

(d) A statement that the attorney providing limited scope representation shall be served with all documents while providing limited scope representation.

(e) Contact information for the client including current address and phone number.

**(3) SERVICE**. Service shall be made under s. 801.14 (2m).

**(4) TERMINATION OF LIMITED APPEARANCE**. At the conclusion of the representation for which a notice of limited appearance has been filed, the attorney's role terminates without further order of the court upon the attorney filing with the court, and serving upon the parties, a notice of the termination of limited appearance. A notice of termination of limited appearance shall contain all of the following information:

(a) A statement that the attorney has completed all services within the scope of the notice of limited appearance.

(b) A statement that the attorney has completed all acts ordered by the court.

(c) A statement that the attorney has served the notice of termination of limited appearance on all parties, including the client.

(d) Contact information for the client including current address and phone number.

**(5) FORMS.** The director of state courts shall provide the clerk of circuit court in each county forms for use in filing notices required under this section.

**802.05 (2m) ADDITIONAL REPRESENTATIONS TO COURT AS TO PREPARATION OF PLEADINGS OR OTHER DOCUMENTS**. An attorney may draft or assist in drafting a pleading, motion, or document filed by an otherwise self-represented person. The attorney is not required to sign the pleading, motion, or document. Any such document must contain a statement immediately adjacent to the person's signature that "This document was prepared with the assistance of a lawyer." The attorney providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false, or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

**809.19 (1) (h) of the statutes is amended to read:**

**809.19 (1) (h)** The signature of the attorney who files the brief, or, if the party who files the brief is not represented by an attorney, the signature of the party. If the brief was prepared with the drafting assistance of an attorney under s. 802.05(2m), the brief must contain a statement that "This document was prepared with the assistance of a lawyer."

**809.80 (2) (a) of the statutes is amended to read:**

**809.80 (2) (a)** A person shall serve and file a copy of any paper required or authorized under these rules to be filed in a trial or appellate court as provided in s. 801.14 (1), (2), (2m), and (4).

**Wisconsin Committee Comment to Supreme Court Rule 11.02, Appearance by attorney, is created to read:**

Lawyers should consult s. 802.045, stats., for guidance in limited scope representation situations.

**Wisconsin Committee Comment to Supreme Court Rule 20:1.1, Competence, is created to read:**

When a lawyer is providing limited scope representation, competence means the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the limited scope representation.

**SCR 20:1.2 (c) of the Supreme Court Rules is amended to read: SCR 20:1.2 (c)** A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. The client's informed consent must be in writing except as set forth in sub. (1).

**SCR 20:1.2 (c) (1) and (2) of the Supreme Court Rules are created to read:**

**SCR 20:1.2 (c) (1)** The client's informed consent need not be given in writing if:

**a.** the representation of the client consists solely of telephone consultation;

**b.** the representation is provided by a lawyer employed by or participating in a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms;

**c.** the court appoints the lawyer for a limited purpose that is set forth in the appointment order;

**d.** the representation is provided by the state public defender pursuant to Ch. 977, stats., including representation provided by a private attorney pursuant to an appointment by the state public defender; or

**e.** the representation is provided to an existing client pursuant to an existing lawyer-client relationship.

**(2)** If the client gives informed consent in writing signed by the client, there shall be a presumption that:

a. the representation is limited to the lawyer and the services described in the writing, and

b. the lawyer does not represent the client generally or in matters other than those identified in the writing.

**Wisconsin Committee Comment to Supreme Court Rule 20:1.2 (c) is created to read:**

With respect to subparagraph (c), a lawyer providing limited scope representation in an action before a court should consult s. 802.045, stats., regarding notice and withdrawal requirements. The requirements of subparagraph (c) that require the client's informed consent, in writing, to the limited scope representation do not supplant or replace the requirements of SCR 20:1.5 (b).

**SCR 20:1.2 (cm) of the Supreme Court Rules is created to read:**

A lawyer may prepare pleadings, briefs, and other documents to be filed with the court so long as such filings clearly indicate thereon that "This document was prepared with the assistance of a lawyer." A lawyer shall advise the client to whom the lawyer provides assistance in preparing pleadings, briefs, or other documents for filing with the court that the pleading, brief, or other document must contain a statement that it was prepared with the assistance of a lawyer.

**Wisconsin Committee Comment to Supreme Court Rule 20:1.2 (cm) is created to read:**

A lawyer may prepare pleadings, briefs, and other documents to be filed with the court so long as such filings clearly indicate thereon that said filings are "prepared with the assistance of a lawyer." Such actions by the lawyer shall not be deemed an appearance by the lawyer in the case.

**Wisconsin Committee Comment to Supreme Court Rule 20:1.16, Declining or terminating representation, is created to read:**

With respect to subparagraph (c), a lawyer providing limited scope representation in a matter before a court should consult s 802.045, stats., regarding notice and termination requirements.

**SCR 20:3.1 (am) of the Supreme Court Rules is created to read:**

A lawyer providing limited scope representation pursuant to SCR 20:1.2 (c) may rely on the otherwise self-represented person’s representation of facts, unless the lawyer has reason to believe that such representations are false, or materially insufficient, in which instance the lawyer shall make an independent reasonable inquiry into the facts.

**SCR 20:4.2 of the Supreme Court Rules is renumbered 20:4.2 (a).**

**SCR 20:4.2 (b) of the Supreme Court Rules is created to read:**

An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20:1.2 (c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer otherwise.

**SCR 20:4.3 of the Supreme Court Rules is renumbered 20:4.3 (a).**

**SCR 20:4.3 (b) of the Supreme Court Rules is created to read:**

An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20:1.2 (c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer otherwise.

**NEW PUBLISHED CASES**

**IS A TRAFFIC STOP BASED ON REASONABLE SUSPICION VALID WHEN THE OFFICER WAS MISTAKEN ABOUT THE LAW UPON WHICH HE BASED THE STOP?**

**Heien v. North Carolina**, **— U.S. —, 135 S. Ct. 530 (2014) (PUBLISHED)**

Following a suspicious vehicle, the officer noticed that only one of the vehicle's brake lights was working and pulled the driver over. While issuing a warning ticket for the broken brake light, the officer became suspicious of the actions of the two occupants and their answers to his questions. Consent was given to search the vehicle, which yielded cocaine, which led to charges of attempted trafficking.

The trial court denied Heien's motion to suppress the seized evidence on Fourth Amendment grounds, concluding that the vehicle's faulty brake light gave the officer reasonable suspicion to initiate the stop. The North Carolina Court of Appeals reversed, holding that the law only requires that a car be equipped with a single stop lamp—which Heien's vehicle had—and therefore the justification for the stop was objectively unreasonable. The State Supreme Court reversed, holding that, even assuming no violation of the state law had occurred, the officer’s mistaken understanding of the law was reasonable, and thus the stop was valid.

The U.S. Supreme Court agreed, holding that the Fourth Amendment requires government officials to act reasonably, not perfectly, and gives those officials fair leeway for enforcing the law. Reasonable men make mistakes of fact, and of law, too. And such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The Court held that an officer may be reasonably mistaken on either ground.

Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law. To the Court, mistakes of law are no less compatible with the concept of reasonable suspicion, which arises from an understanding of both the facts and the relevant law. Whether an officer is reasonably mistaken about the one or the other, the result is the same. And neither the Fourth Amendment's text nor court precedent offered any reason why that result should not be acceptable when reached by a reasonable mistake of law.

***Heien***, 135 S. Ct. 536.

Heien argued that officers in the field deserve a margin of error when making factual assessments on the fly, but should know the laws they are enforcing. The Court held that an officer may also be suddenly confronted with a situation requiring application of an unclear statute. While the Court did not want to be perceived as discouraging officers from learning the law, it believed that an officer can gain no advantage through poor study because the Fourth Amendment tolerates only objectively reasonable mistakes. In other words, the standard of reasonable suspicion in reviewing a traffic stop requires that the mistake, whether of law or of fact, be objectively reasonable, such as the question of whether one stop lamp or two is required by a statute.

Heien raised the well-known maxim, “Ignorance of the law is no excuse,” and argued that it was fundamentally unfair to let police officers get away with mistakes of law when citizens are not accorded such leeway. The Court found this to not be an applicable situation for the maxim. Just as an individual cannot escape criminal liability based on a mistaken understanding of the law, so too the government cannot impose criminal liability based on a mistaken understanding of the law. But the case did not involve whether Heien violated the brake light statute, and just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop.

**State v. Houghton, 2015 WI 79 (PUBLISHED)**

A police officer pulled Houghton over after he observed Houghton's vehicle traveling on a highway without a front license plate and with an air freshener and a GPS unit visible in the front windshield. Upon approaching the vehicle, the officer detected the odor of marijuana, which led him to conduct a search of Houghton's car. The search revealed approximately 240 grams of marijuana as well as various paraphernalia commonly used for packaging and distributing marijuana and Houghton was charged with possession of THC with the intent to deliver. Houghton filed a motion to suppress the evidence obtained during the traffic stop. The motion was denied in circuit court but upheld in the appellate court. The Wisconsin Supreme Court agreed to review the decision of the appellate court.

Houghton argued that the stop was not an investigatory stop, and thus probable cause was required. Houghton contended that the officer lacked probable cause to stop Houghton's vehicle, making the subsequent search unlawful. The State countered that reasonable suspicion was sufficient for police officers to initiate any type of traffic stop, and that the officer had reasonable suspicion to pull Houghton over for a violation of Wis. Stat. § 346.88(3)(b), "Obstruction of operator's view or driving mechanism." The State argues in the alternative that any mistake by the officer as to whether Houghton was operating his vehicle illegally was objectively reasonable, and that under the holding of the recent United States Supreme Court case of *Heien v. North Carolina*, 574 U.S. \_\_\_, 135 S. Ct. 530 (2014), the officer had reasonable suspicion to stop Houghton's vehicle for the perceived violation.

The Wisconsin Supreme Court held that an officer's reasonable suspicion that a motorist is violating or has violated a traffic law is sufficient for the officer to initiate a stop of the offending vehicle. The Wisconsin Supreme Court also adopted the Supreme Court's holding in *Heien* that an officer's objectively reasonable mistake of law may form the basis for a finding of reasonable suspicion. The Court also ruled that Wis. Stat. § 346.88 did not create an absolute prohibition on any object being present in the front windshield of a vehicle, but it must be a material obstruction. However it held that the officer’s interpretation that the statute did create an absolute prohibition was objectively reasonable.

The Wisconsin Supreme Court also made a ruling on the issue of Houghton's "missing" front license plate. His vehicle only had a rear license plate because it was registered in Michigan and it did not require a front license plate. Although the State conceded that the officer's interpretation of the license plate statute was not objectively reasonable, the Court wanted to address that issue to provide guidance in future cases and because it was the basis of the circuit court's decision. Wis. Stat. § 341.15 requires a vehicle to display a front license plate only when two license plates are issued for that vehicle. Whether a vehicle is required to display a front plate is both a question of law and a question of fact——the operative fact being whether the vehicle was issued two plates. In this case there was no initial indication that Houghton's vehicle was from Wisconsin. Once the officer was behind Houghton's vehicle, it would have become apparent from the rear plate that the vehicle was registered in Michigan. Therefore the Court ruled that the officer’s belief that Houghton was violating the law by not having a front license plate displayed was neither a reasonable mistake of law nor a reasonable mistake of fact.

Since the officer did have reasonable suspicion to stop Houghton's vehicle for the reasonable mistake of law regarding the front windshield obstructions, the Wisconsin Supreme court reversed the court of appeals.

**IF A TRAFFIC STOP ENDS WITHOUT ARREST, MUST AN OFFICER HAVE REASONABLE SUSPICION IN ORDER TO ASK A DRIVER FOR CONSENT TO A SEARCH OF HIS OR HER VEHICLE?**

**State v. Hogan, 2015 WI 76 (PUBLISHED)**

In what Justice Prosser called a fact-intensive case, the issues for the Wisconsin Supreme Court involved the reasonableness of police conduct **after** a lawful traffic stop. Hogan was stopped by a sheriff’s deputy for a seat belt violation. While having contact with Hogan, the deputy observed what he believed to be indicia of drug use. Hogan’s pupils appeared restricted, he was nervous, and his upper body was shaking. With this in mind, the deputy called for backup as he started to write the citation. Before he had finished, a local officer who knew Hogan arrived and told the deputy that his department had received tips that the defendant had drug issues including making methamphetamine.

With his suspicions about drug use somewhat confirmed, the deputy asked for a K-9 unit. When he learned none was available, the deputy decided to ask Hogan to perform field sobriety tests. Hogan passed all tests, and the deputy told him he was free to leave. At this point about 24 minutes had elapsed.

Approximately 16 seconds later, the deputy re-approached Hogan and said, "Hey, sir, can I talk to you again?" Hogan got out of his truck and the deputy asked if there were any weapons or drugs in the truck. Hogan said no, and the deputy asked if he could search the vehicle. Hogan replied "Why not. Yeah. Go ahead."

The officers found methamphetamine, equipment and supplies commonly used to manufacture methamphetamine, and two loaded handguns.

Hogan sought to suppress the evidence. He argued first that the deputy did not have a reasonable suspicion to extend a lawful traffic stop about seat belts to investigate whether Hogan was under the influence by having him perform field sobriety tests. The Supreme Court agreed that the deputy did not, and held that the deputy unlawfully extended the traffic stop.

Hogan also argued that if the traffic stop was unlawfully extended to investigate drug use, his subsequent consent to the search was tainted by prior illegality, so that the evidence seized was inadmissible. The Court disagreed, holding that Hogan's subsequent consent to the search came after the traffic stop had ended and Hogan had been told he was free to leave. Because the deputy did not exploit the unlawful extension of the stop in order to gain Hogan's consent, any argument that the deputy attenuated or took advantage of the situation was deemed unnecessary.

The final issue Hogan raised was an argument that he was constructively seized without reasonable suspicion when the deputy re-approached to request consent to search the vehicle. The Court held that Hogan was not constructively seized and, therefore, no suspicion was needed. After a traffic stop has ended, police may interact with the driver as they would with any citizen on the street. ***State v. Williams***, 2002 WI 94, ¶35, 255 Wis. 2d 1. That is, if a person is not seized, police may request consent to search even absent reasonable suspicion. See ***Florida v. Bostick***, 501 U.S. 429, 431 (1991). In a sense, the end of a traffic stop places the officer and driver back on equal footing, with the driver free to leave if he wishes (because if the driver were not free to leave, the traffic stop would not in fact have ended

**DOES TRANSPORTING A DRIVER TEN MILES FROM THE SCENE OF THE STOP VIOLATE HIS OR HER RIGHTS IF ALL THE OFFICER HAS IS A SUSPICION OF ILLEGAL CONDUCT?**

**State v. Blatterman**, **2015 WI 46 (PUBLISHED)**

Blatterman’s case is fact driven. His wife called 911 claiming he was bringing gas into the house through a stove or fireplace to try to blow up the house or light it on fire. She later said Blatterman was leaving the house in a white minivan and dispatch said that he was possibly intoxicated and had, in the past, mentioned "suicide by cop."

Deputy Nisius conducted a high‑risk traffic stop. Blatterman’s driving had been fine, and he stopped immediately. Officers surrounded the van and drew their weapons. Instead of following directions, Blatterman opened the driver's side door and began walking toward the officers with his hands in the air. One officer threatened to use his Taser. Blatterman stopped and was then told to turn away and get down onto the ground. He did not turn away, but did kneel down. He was handcuffed and searched.

Nisius asked if Blatterman was okay. He said that his chest hurt, and EMS was called. Blatterman was wearing only a short‑sleeve shirt and jeans with boots despite the cold weather at the time of the stop. He was placed in a squad but not arrested. Nisius smelled alcohol on Blatterman and noticed his eyes were watery. When EMS arrived, Blatterman refused medical attention.

Because of possible carbon monoxide poisoning, his chest pain, and that he was potentially suicidal, Nisius decided Blatterman "should get checked out at the hospital." Before Blatterman was moved from the scene of the stop, Nisius checked the driving record and found that Blatterman had three prior OWI convictions. Nisius had observed that Blatterman was behaving strangely by not responding to officers who were pointing weapons at him, had an odor of alcohol, watery eyes, and dispatch said he may be intoxicated.

Nisius took Blatterman to a hospital which was approximately ten miles away. He asked the staff to check for physical and psychological concerns, and said he would potentially need a phlebotomist to do a legal blood draw. Blatterman remained handcuffed, was checked and medically cleared. Blatterman denied being suicidal and claimed his wife was just trying to get him in trouble.

Nisius removed the handcuffs and had him perform field sobriety tests in the exam room. Hospital staff drew Blatterman's blood, which tested at 0.118%, well over the threshold of 0.02% for the PAC imposed by his prior OWI convictions. Blatterman was charged with OWI 4th offense. He moved to suppress. The trial court considered whether the hospital was within the vicinity of the stop, relying on the standard stated in ***State v. Quartana***, 213 W2d 440 (Ct. App. 1997) (transportation must be to a place within "a surrounding area or district" or "locality.") and whether Nisius's purpose in transporting Blatterman was reasonable. The trial court concluded ten miles was within the vicinity and that the deputy acted reasonably.

The court of appeals focused on whether transportation outside the vicinity of the stop transformed the initial investigatory detention into a "de facto arrest" in violation of the Fourth Amendment. They court concluded that transportation to the hospital was not within the vicinity and exceeded the scope of investigatory detention. The State appealed.

The Wisconsin Supreme Court held that the information from dispatch provided reasonable suspicion that Blatterman had committed a crime, and that the officers could temporarily detain Blatterman for questioning. Also, the duration of the stop was reasonable, as seeking medical attention is a valid reason to extend an investigatory detention. ***State v. Colstad***, 2003 WI App 25, ¶17, 260 W2d 406.

On the issue of transporting Blatterman from the location of the stop, the Supreme Court held that ten miles was too distant to be “within the vicinity” when the person is only being temporarily detained on nothing more than a reasonable suspicion. The court declined to determine the precise outer limits of the "vicinity" for purposes of transportation during an investigatory detention.

However, the Court held that by the time Nisius transported Blatterman to the hospital, Nisius had probable cause to arrest. Nisius had ascertained Blatterman's prior OWI conviction record and, together with information from dispatch and his own observations, had established probable cause to arrest Blatterman for a 0.02% PAC violation. Accordingly, Blatterman's arrest when he was transported to the hospital was lawful and did not violate his rights under the Fourth Amendment.

And further, the Court held that the community caretaker exception provided an alternative ground for transporting Blatterman to the hospital, assuming arguendo, that the officer's arrest of Blatterman was unsupported by probable cause. When the State asserts a community caretaker function as the basis for a seizure, the circuit court must determine: "(1) that a seizure within the meaning of the [F]ourth [A]mendment has occurred; (2) if so, whether the police conduct was [a] bona fide community caretaker [function]; and (3) if so, whether the public. . . interest outweigh[s] the intrusion [on] the privacy of the individual."

**IS EXPUNCTION POSSIBLE FOR CIVIL FORFEITURE VIOLATIONS?**

**Kenosha County v. Frett,**  **2014 WI App 127** **(PUBLISHED)**

The defendant was cited for “underage consumption/possession of alcohol” pursuant to a Kenosha County ordinance. She pled to an amended charge of littering pursuant to a different Kenosha County ordinance in circuit court and was ordered by a court commissioner to pay a forfeiture. Approximately one year after paying the forfeiture, the defendant moved the circuit court to expunge the record. The court denied the motion after a hearing and the defendant appealed.

The appellate court referenced the law on expunctions. Wis. Stat. § 973.015 provides in relevant part as follows:

**Special disposition. (1)** (a) … [W]hen a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law *for which the maximum period of imprisonment is 6 years or less*, the court may order at the time of sentencing that the record be expunged *upon successful completion of the sentence* if the court determines the person will benefit and society will not be harmed by this disposition…

The appellate court interpreted the law to read that where there is no “period of imprisonment” associated with a law, that law is not one to which expunction applies. The county ordinance included no potential period of imprisonment, so expunction was not an option in this case. The court rejected the argument that the revised statute applied to civil forfeiture violations because the revision changed the title of the provision from “Misdemeanors, special disposition” to just “Special disposition” and with that change “there is nothing in the plain language of § 973.015 limiting its application to only misdemeanor offenses.” *See* ***Melody P.M.***, No. 2009AP2994, unpublished slip op. ¶7. The appellate court agreed the statutory revision expanded application of § 973.015 beyond just misdemeanors but concluded that the expansion did not include forfeitures. Rather, the revision to the title as well as changes to language within the statute appears to have been for the purpose of expanding application from solely misdemeanors to also providing expunction as an option for certain felony convictions for which the maximum period of imprisonment is six years or less. The appellate court ruled there is no authority for courts to expunge the record related to civil forfeiture violations.

**IS A “MOTOR BICYCLE” A “MOTOR VEHICLE” UNDER THE OWI LAW?**

**State v. Koeppen, 2014 WI App 94, (PUBLISHED)**

A criminal complaint charged Koeppen with a 5th offense OWI. The complaint alleged that Koeppen was observed operating a motor bicycle. The officer observed that “Koeppen’s feet were dangling off the sides of his bike and not on the pedals.” The officer observed that while on “flat” ground, Koeppen was accelerating without pedaling. The complaint alleged that when Koeppen was stopped, the officer observed that the motor bicycle’s ignition switch was in the “on” position and the motor “was functional.”

Koeppen moved to dismiss the complaint because it did not provide probable cause to believe he had been operating a “motor vehicle” as defined in § 340.01(35). The circuit court agreed and dismissed the complaint. The State appealed.

The Court of Appeals reversed the circuit court. § 340.01(35) states a “Motor Vehicle” is a vehicle, …., which is self-propelled, … “ The Court of Appeals noted “if we consider only the words and definitions used in the OWI/PAC statute and the statutes defining “vehicle,” “motor vehicle,” and “motor bicycle,” it is a simple matter to conclude that a “motor bicycle,” at least when operated in a self-propelled manner, is a “motor vehicle” for purposes of the OWI/PAC statute.”

The Court of Appeals did not rule on whether a motor bicycle is always a “motor vehicle” within the meaning of Wis. Stat. § 340.01(35) and the OWI/PAC statute. When a motor bicycle is being propelled by the rider pedaling, rather than by the power unit is a question left for another day.

**DOES A TENANT HAVE “AN EXPECTATION OF PRIVACY” IN AN UNDERGROUND PARKING GARAGE SERVING A 30 UNIT APARTMENT BUILDING?**

**State v. Dumstrey, 2015 WI App 5, (PUBLISHED)**

An off duty police officer observed Dumstrey driving recklessly. On several occasions he pulled up alongside Dumstrey and told him he was a police officer and he should wait for on-duty officers to arrive. Dumstrey proceeded to drive into his underground parking garage. The off-duty officer pulled up to the garage door to block the door from closing. An on-duty officer arrived, entered the garage and contacted Dumstrey. One thing led to another and Dumstrey was arrested for OWI. Dumstrey challenged his arrest. He contended the police committed a warrantless entry to his parking garage without probable cause or exigent circumstances. Dumstrey testified that his apartment building had approximately 30 units and that there were 30 stalls in the parking garage. He used a garage door opener to get into the garage and otherwise “ha[d] a key for a locked door.” Dumstrey testified that the parking garage was not a common area for all the tenants. Dumstrey said an elevator would take him to get to his apartment from the parking garage. He said it is a locked building and you had to live there to use the elevator. Further, tenants had to pay to use the parking area. The circuit court disagreed and found the arrest to be lawful. Dumstrey appealed.

The Court of Appeals agreed that Dumstrey did not have a valid expectation of privacy in the apartment parking garage. Although it is clear that a garage serving a one family home is curtilage of that home, the Court noted that whether a parking garage in a multiunit apartment complex was curtilage of an apartment home appears to be an unanswered question in Wisconsin.

“Whether a person has a reasonable expectation of privacy depends on (1) whether the individual has exhibited an actual, subjective expectation of privacy in the area inspected and … (2) whether society is willing to recognize such an expectation of privacy as reasonable.”  State v. Trecroci, 2001 WI App 126, ¶35. Whether society is willing to recognize the defendant’s expectation of privacy as reasonable is determined by the totality of the circumstances.

The Court of Appeals concluded, “Applying the guiding principles and factors discussed above, we conclude that under the totality of circumstances the parking garage was not curtilage. The common or shared area analysis applies to this case. There was unrefuted testimony that there were thirty stalls in the parking garage, an area that was used exclusively for parking cars. While the underground garage was connected to Dumstrey’s apartment building, and the outside access was limited to tenants and shielded from the general public with entry by remote control, Dumstrey shared the garage with the landlord and the other tenants who park there and their invitees. Many others, including strangers to Dumstrey, regularly had access.  Given Dumstrey’s lack of complete dominion and control and inability to exclude others, including the landlord and dozens of tenants and their invitees, we conclude that the parking garage was not curtilage of Dumstrey’s home.”

**DOES THE TESTIMONY OF AN ANALYST WHO DID NOT TEST THE BLOOD SAMPLE VIOLATE THE CONFRONTATION CLAUSE OF THE U.S. CONSTITUTION?**

**State v. Griep, 2015 WI 40 (PUBLISHED)**

Griep was arrested for third offense OWI and transported to a nearby hospital for a blood draw. The blood sample was submitted to the Wisconsin State Laboratory where an analyst tested the sample and found that the defendant’s alcohol level was over the legal limit. At the trial the analyst who tested the blood sample was unavailable so the State called Patrick Harding, the section chief of the toxicology section of the Wisconsin State Laboratory, as an expert witness.

Harding testified that he had reviewed the analyst’s work and examined the data produced by her testing, as well as other records associated with the tests she performed. Harding said that he was familiar with the process of obtaining blood samples for ethanol testing, shipping them to the laboratory, processing them for analysis, and the analysis of the samples. When the State asked Harding's opinion on whether the analyst tested Griep's blood sample consistently with laboratory procedures, defense counsel objected on Confrontation Clause grounds. Harding testified that all indications were that the analyst followed the laboratory procedures and that the instrument was working properly. Harding concluded that after reviewing all of the available data, he came to an independent opinion that the alcohol concentration in Griep's blood was 0.152 grams of ethanol per 100 milliliters of blood. Harding also testified as to laboratory procedures and that if there had been irregularities with the sample, they would have been noted on a form by the analyst. None were noted. During cross-examination, Harding acknowledged that an analyst could commit misdeeds, possibly without detection. Harding also acknowledged that it is important that the analyst be competent and honest.

Griep sought to preclude Harding's testimony because of a violation of the Confrontation Clause but that request was denied by the circuit court and he was ultimately found guilty of the OWI. The court of appeals affirmed the circuit court'sruling and the Wisconsin Supreme court agreed to take the case.

Griep argues that Harding's testimony violated his rights under the Confrontation Clause. The Sixth Amendment Confrontation Clause provides "In all **criminal prosecutions**, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In ***State v. Williams****,* the Supreme Court ruled that a laboratory unit leader's trial testimony, based in part on a report authored and tests conducted by an analyst who did not testify at trial, did not violate the Confrontation Clause. 253 W2d 99 (2002). Regarding the independent expert's opinion, the Court stated that "an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others" are quite different because in that later instance, the expert would be "a mere conduit for the opinion of another." ***Id.,*** ¶¶21-22.

The Supreme Court concluded that the expert witness in ***Williams*** was highly qualified to render an expert opinion and was closely connected to the tests and procedures involved in the actual tests. ***Id.,*** ¶¶21-22.

The Supreme Court also referred to a court of appeals case that focused on whether a unit leader at the state crime laboratory could testify based in part on tests performed by another analyst. ***State v. Barton***, 289 W2d 206, ¶¶9, 20. In that case the unit leader at the state crime laboratory testified about chemical tests performed by an analyst who was unavailable at trial. ***Id., ¶4.*** The expert witness conducted peer review of the analyst's tests and testified as to his independent expert opinion. ***Id., ¶¶4, 16***. Both ***Willams*** and ***Barton*** established that an expert witness does not violate the Confrontation Clause when his or her opinion is based in part on data created by a non-testifying analyst if the witness "was not merely a conduit." ***Williams***, 253 W2d 99, ¶¶20, 25; ***accord Barton***, 289 W2d 206, ¶¶13-14.

The Wisconsin Supreme court ruled that Harding formed an independent opinion based upon a review of the test results from an analyst who was unavailable for trial, and that his testimony did not violate Griep's right of confrontation. The Supreme Court affirmed the court of appeals decision that affirmed the circuit court's admission of Harding's testimony.

**DID THE STATE VIOLATE A DEFENDANT'S DUE PROCESS RIGHTS BY DESTROYING A BLOOD SAMPLE BEFORE THE DEFENDANT HAD THE OPPORTUNITY TO INDEPENDENTLY TEST IT?**

**State v. Luedtke**, **2015 WI 42** **(PUBLISHED)**

This case actually involves the appeal of two defendants with similar fact situations. Both Luedtke and Weissinger were convicted in separate cases of criminal offenses involving Operating with a Restricted Controlled Substance (ORCS). In both cases the State Lab of Hygiene destroyed their blood samples, in accordance with the Lab's routine procedures, before either defendant had the opportunity to test the samples. Both filed motions claiming that this violated their Due Process rights to a fair trial. In addition, Luedtke alleged that (ORCS) was NOT a strict liability offense and the State must prove knowledge or intent as an element of the offense.

Luedtke and Weissinger's challenges were denied by their respective circuit courts. Both also lost in the Court of Appeals. Ultimately, the Wisconsin Supreme Court addressed both of these issues.

First, the WI Supreme Court held that the Wisconsin Constitution does not provide greater due process protection than the United States Constitution when analyzing the destruction of evidence. Consequently, the US Supreme Court case of ***Arizona v. Youngblood,*** 488 U.S. 51 (1988) provides the proper standard of review. Did the State fail to preserve evidence that was apparently exculpatory and did the State act in bad faith by failing to preserve evidence that was potentially exculpatory. The WI Supreme Court determined that Luedtke and Weissinger's blood samples were not apparently exculpatory. Further, the Court held that the samples were not destroyed in bad faith. Consequently, the State did not violate Luedtke or Weissinger's due process rights by destroying their blood samples.

Second, the Supreme Court held that ORCS is a strict liability offense (even when charged as a criminal offense) that does not require proof of intent or knowledge.

**UNPUBLISHED CASES**

Beginning on July 1, 2009, an unpublished opinion issued on or after that date may be cited for its persuasive authority. Persuasive authority is not, binding precedent and an opinion rendered by a court that relies on such persuasive authority is not binding on any other court in this state.

**REASONABLE SUSPICION/PROBABLE CAUSE CASES**

**WAS THERE REASONABLE SUSPICION TO STOP THE VEHICLE AND WAS IT REASONABLE TO WAIT FOR 10 MINUTES FOR A BACK-UP OFFICER BEFORE PERFORMING FIELD SOBRIETY TESTS?**

**State v. Harris**, 10/8/14 **(UNPUBLISHED)**

A police officer observed the defendant’s vehicle swerve within its lane. The officer then observed him accelerate and close within one-car length of the vehicle ahead of his while traveling at a speed of sixty-five to seventy miles per hour. The officer followed the defendant’s vehicle, which continued to swerve within its lane, then cross over the dashed line dividing the northbound lanes, swerve within its lane again, and cross onto or slightly over the fog line. The officer stopped the vehicle. When he approached the vehicle he observed glassy eyes and an overwhelming cigarette smell but no odor of alcohol. The defendant had some difficultly retrieving his driver’s license and touched his fingers out of order when performing a finger dexterity test. The officer returned to his squad to write warnings for unsafe lane deviation and following too closely andrequested a back-up officer to respond to the scene to assist in administering field sobriety tests. Eventually he was charged with OWI and PAC, as third offenses. He moved to suppress the results of the field sobriety tests and physical evidence removed from his vehicle on the basis that the police officer did not have reasonable suspicion to investigate him for drunk driving before conducting field sobriety tests. The circuit court granted his motion and the State appeals.

The court noted that a police officer may lawfully stop a vehicle to investigate so long as the officer has “specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that” the driver has committed an offense. ***State v. Rutzinski***, 241 W2d 729 (2001). The legal determination of whether the officer has such reasonable suspicion is not dependent upon the subjective belief of the officer, but must be evaluated objectively. ***State v. Anagnos***, 341 W2d 576 (2012). The appellate court held that the officer had reasonable suspicion to stop the vehicle for possible impaired driving based upon the defendant’s driving behavior. As reasonable suspicion for the stop existed, the remaining question was whether the ten-minute wait for the back-up officer to arrive to perform the field sobriety tests was a reasonable period of time. For an investigatory stop to pass constitutional muster, “the detention must be temporary and last no longer than is necessary to effect the purpose of the stop.” ***State v. Wilkens***, 159 W2d 618, 625, (Ct. App. 1990). Courts should not second-guess an officer and must consider the totality of the circumstances in assessing whether the duration of a stop is reasonable. ***Id.*** at 626. The court stated that the erratic driving and “glassy” eyes provided reasonable suspicion that his driving was impaired so as to warrant further investigation, including field sobriety tests. The ten-minute period to await the back-up officer was a reasonable period of time under the totality of the circumstances. The order to suppress was reversed and the case was remanded back to the circuit court.

**WAS THERE PROBABLE CAUSE TO ARREST A DRIVER FOR OWI FOLLOWING AN ACCIDENT WITHOUT FIELD SOBRIETY TESTS OR A PBT?**

**State v. Geyer,** 04/23/15 **(UNPUBLISHED)**

At approximately 9:30 in the evening Geyer was driving his vehicle and went off the roadway striking the guardrail on the passenger side. He called a friend to help remove the vehicle from the scene. The police received a report of the incident and information that the vehicle had been towed to a nearby commercial parking lot. Two officers with significant experience in OWI arrests ultimately responded to the parking lot. The first officer to arrive observed that Geyer was lethargic and slow in answering questions. Geyer dropped his ID card on the ground and appeared to be moving “in slow motion” when he picked it up. Geyer did not appear to be physically injured. The officer observed an odor of intoxicants on Geyer. He appeared to have problems with hand and eye coordination. When asked about any alcohol consumption, he said he had consumed one beer that day. When asked about what caused him to run into the guardrail, Geyer initially said he did not know what the deputy meant. The second officer to arrive made similar observations concerning Geyer. He also observed a strong odor of intoxicants. Further, he noted that Geyer had glassy and blood shot eyes. Neither officer asked Geyer to perform field sobriety tests or administered a preliminary breath test (PBT). Geyer was arrested for OWI. Geyer challenged his arrest and claimed that there was not probable cause to believe he had been operating while under the influence. The trial court denied the motion to suppress and Geyer appealed.

The Court of Appeals outlined the standard for reviewing a warrantless arrest:

A warrantless arrest is not lawful except when supported by probable cause.  Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting officer’s knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. The burden is on the state to show that the officer had probable cause to arrest.

The question of probable cause must be assessed on a case-by-case basis, looking at the totality of the circumstances.  Probable cause is a “flexible, common-sense measure of the plausibility of particular conclusions about human behavior.”  When the facts are not disputed, whether probable cause to arrest exists in a given case is a question of law that this court determines independently of the circuit court and court of appeals but benefiting from their analyses.  In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer’s training and experience. ***State v. Lange***, 2009 WI 49.

The Court of Appeals rejected Geyer's argument that the arrest lacked probable cause and that the officers should have administered field sobriety tests and/or a PBT. The Court stated the two experienced officer's observations “while not the equivalent of failed field sobriety tests or a high measurement on a preliminary breath test—all point in the same direction as those tests.... (G)iven significant factors here indicating impairment to the deputies, these pre-arrest tests were not necessary. That is, even without these tests, the officers were presented with sufficient evidence from which reasonable officers in their positions would believe that Geyer had operated a motor vehicle while under the influence of an intoxicant.”

**MAY AN OFFICER CONDUCT A TRAFFIC STOP UPON AN OBSERVATION THAT SOMEONE IN THE VEHICLE LITTERED - A VIOLATION OF A NON-CRIMINAL, NON-TRAFFIC RELATED LAW?**

**State v. Qualls**, 10/8/14 **(UNPUBLISHED)**

**State v. Iverson**, 10/9/14 **(UNPUBLISHED)**

Two cases involving the question of whether a traffic stop may be based upon a violation of a non-criminal, non-traffic related ordinance. In both cases, the vehicle was stopped because the officer believed someone in the vehicle had littered. In both cases, after hearings on suppression motions resulted in the motions being denied, the drivers were convicted of impaired driving offenses. Two different results were reached in the Court of Appeals. Each may be cited by counsel as persuasive authority.

In ***Iverson***, at 1:00 a.m., a State Patrol officer observed a car drift within its lane and stop twice at flashing yellow lights. There was no question in the case that these observations did not justify a traffic stop. When the trooper saw a cigarette butt being thrown out the passenger window he conducted a traffic stop. At a hearing on the defendant’s suppression motion, the state argued that the stop was justified because the trooper had probable cause to believe the driver violated Wis. Stat. §287.81, a state law prohibiting littering, which is punishable by a forfeiture.

The Court of Appeals recognized that littering is neither a crime, nor a traffic regulation. The question for the Court was whether an articulable suspicion or probable cause of violation of a forfeiture that is **not** a crime or traffic regulation was sufficient justification for a warrantless seizure of a citizen. Judge Sherman of the District IV Court of Appeals determined that it was not, and reversed the trial court’s denial of the suppression motion. The Court held that both Wis. Stat. §968.24 (which permits stops based on less than probable cause) and **Terry v. Ohio**, 392 U.S. 1(1968), require a suspicion of **criminal** conduct and that they do not apply to a non-criminal, non-traffic regulation forfeiture.

In **Qualls** however, Judge Neubauer of District II held that an officer who had a reasonable belief that someone in a vehicle had littered **did** have probable cause to conduct a traffic stop of the vehicle. Judge Neubauer was not confronted with precisely the same argument about a traffic stop based upon a non-traffic regulation or crime. However, the underlying assumption in the

opinion was that the officer had every right to stop the car for a non-traffic related ordinance violation.

NOTE: The decision in ***Iverson*** is subject to further review. The State filed a motion for reconsideration in the Court of Appeals, and later a petition for review in the Supreme Court. There has been no action on either.

**CAN A VEHICLE BE STOPPED IF AN OFFICER OBSERVES THEM DRINKING OUT OF A BOTTLE THAT RESEMBLES A BEER BOTTLE?**

**State v. Relyea** 06/18/15 **(UNPUBLISHED)**

An officer was driving on a street with a 25-miles-per-hour speed limit when the officer observed a pickup truck, operated by Relyea, traveling in the opposite direction. The driver’s side window of the pickup was down. The officer saw that Relyea was “guzzling” from what appeared to be a bottle of “microbrew” beer. While expensive root beer is sometimes sold in bottles that resemble microbrew beer bottles, the officer believed this was more likely a beer bottle. The officer stopped the defendant and he ended up getting arrested for an OWI second offense. He filed a motion to suppress the evidence based upon an improper stop and that motion was denied in circuit court. He appealed arguing there was no reasonable suspicion to stop his truck.

“When a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.” ***State v. Waldner***, 206 Wis. 2d 51, 60 (1996); *see also* Wis. Stat. § 968.24. “Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.” ***Waldner***, 206 Wis. 2d at 60.It is sufficient that “a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn.” ***Id***.

The appellate court in this case concluded that there was reasonable suspicion to stop Relyea’s truck for a possible violation of a non-criminal traffic law, namely, consuming an alcoholic beverage while he was in a vehicle on a highway. Even though it was not a criminal violation it was still a permissible basis for a stop. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, (1999) (“[A]n officer may make an investigative stop if the officer ‘reasonably suspects’ that a person has committed or is about to commit a crime, or reasonably suspects that a person is violating the non-criminal traffic laws ....”). The appellate court affirmed the judgment of the circuit court.

**WHAT LEVEL OF TRAINING AND EXPERIENCE SUPPORTS A TRAFFIC STOP BASED UPON A REASONABLE SUSPICION THAT THE CAR’S WINDOWS WERE ILLEGALLY TINTED?**

**State v. Wingo**, 12/16/14 **(UNPUBLISHED)**

Wingo appealed his conviction for operating a vehicle without the owner's consent, arguing that his 4th Amendment rights were violated by a traffic stop based upon a belief that his car windows were illegally tinted. Wingo argued that the deputy did not have a reasonable suspicion that Wingo was engaged in criminal activity. A police officer's reasonable suspicion “must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.” ***State v. Allen***, 226 W2d 66 (Ct. App. 1999). “Reasonable suspicion... is dependent upon both the content of the information possessed by police and its degree of reliability.” ***State v. Williams***, 2001 WI 21, ¶ 22, 241 W2d 631.

At the suppression hearing, the deputy testified that he has been a police officer for sixteen years and has received training to identify by sight windows that are illegally tinted too dark. Streicher explained that during his training he tested cars with various levels of window tint with a tint meter to learn how to recognize windows that are tinted in violation of the law. He testified that he has stopped around 200 vehicles during his career based on his suspicion that windows were excessively tinted. He also testified that he performed a window tint test on ninety percent of the cars he stopped and his suspicion that the windows were excessively tinted was confirmed in the vast majority of those cases.

Based on the deputy's testimony about his knowledge and experience the Court concluded that he did not violate Wingo's rights because he reasonably suspected that Wingo's windows were excessively tinted. The Court distinguished ***State v. Conaway***, 2010 WI App 7, ¶ 1, 323 Wis.2d 250, because the officer in that case did not explain at the suppression hearing how his prior training and experience gave him the ability to differentiate between legally tinted and illegally tinted car window glass and he did not address whether, when he previously stopped cars to investigate window tint violations, his suspicions were verified by subsequent testing.

**WAS THERE REASONABLE SUSPICION TO STOP A VEHICLE AT 3:00 A.M. FOR DRIVING BELOW THE SPEED LIMIT, COMING CLOSE TO THE FOG LINE, AND HITTING A DEER?**

**Village of Chenequa v. Schmalz,** 04/22/15 **(UNPUBLISHED)**

A Village of Chenequa Police Officer was driving his squad car about 3:00 a.m. on a Sunday when he observed a Chevy Tahoe traveling nine miles per hour below the thirty-five-mile-per-hour speed limit. The officer further observed that the Tahoe was “traveling very close to the fog line” and decided to follow the vehicle. When he was about three- to four-car lengths behind the Tahoe, the officer saw a deer cross in front of the Tahoe, colliding with the driver’s side corner of the vehicle. The officer saw the Tahoe’s brake lights go on just before impact with the deer. But the Tahoe did not immediately stop after hitting the deer, which the officer believed was “not normal driving behavior” as a driver would normally stop to check whether his or her vehicle was safe for travel after hitting an animal as large as a deer. He did not observe any damage to the Tahoe from his position nor did he see the vehicle swerve or exhibit any visible signs of distress. The officer stopped the vehicle, identified the driver as Schmalz, and subsequently cited Schmalz for OWI and PAC.

Following his conviction in municipal court, Schmalz requested a trial before the circuit court, where he filed a motion to suppress the evidence on the basis that the stop was unlawful. The court granted Schmalz’s motion, finding that none of the observed driving behavior prior to the stop either individually or cumulatively amounted to reasonable suspicion that a crime was being committed. The court found that Schmalz’s slow speed was reasonable, given the darkness and the presence of deer in the area, and that driving next to the fog line also was not suspicious. The court found no evidence from which it could infer that Schmalz saw the deer until hitting it and noted that there is no traffic law that requires a driver to stop after striking a deer. The court concluded that the stop was based on “conjecture” and “perhaps a good guess” but stated that “I don’t think a guess is enough.” Finding the Village would not be able to meet its burden of proof without the evidence obtained following the stop, the court dismissed the charges. The Village appeals.

The Village argued that the officer had reasonable suspicion to justify the stop based on the accumulation of these facts: (1) the time of day and day of the week, (2) Schmalz’s slow rate of speed, (3) the vehicle’s closeness to the fog line, and (4) Schmalz’s failure to avoid a collision with the deer and subsequent failure to stop. The appellate court rejected those arguments and agreed with the circuit court that those facts were insufficient to meet the Village’s burden to show that the stop of Schmalz’s vehicle was reasonable.

The Village next argued that even if the stop was not supported by reasonable suspicion, it was justified by the officers’ “community caretaker” role. To justify a seizure under a law enforcement officer’s community caretaker function, the Village needed to show that the seizure was in the exercise of a “bona fide community caretaker activity” and that the public need and interest outweighed the intrusion upon the seized person’s privacy. ***State v. Kramer***, 315 W2d 414 (2009). For the seizure to constitute a “bona fide community caretaker activity,” it must be based upon the officer’s function to render assistance and not for the purpose of conducting a criminal investigation. ***Id.***, ¶¶23, 39. The court noted that the Village did not point to any facts that could give rise to a reasonable belief that Schmalz required assistance. The court stated that hitting a deer that jumps in front of your vehicle and failing to stop to inspect for possible damage to the vehicle were insufficient grounds upon which to assert a bona fide community caretaker function. The appellate court affirmed the order of the circuit court.

**MISCELLANEOUS LEGAL ISSUES**

**WHEN IS A MINOR CONSIDERED TO BE “ACCOMPANIED” BY A PARENT/GUARDIAN WHEN CONSUMING OR POSSESSING ALCOHOL?**

**City of Monroe v. Koch,**  10/09/2014 **(UNPUBLISHED)**

The defendant, who was under the legal drinking age, hosted a party at his father’s house. Two Monroe police officers were dispatched to the residence to investigate a complaint by a neighbor of loud noise coming from a group of individuals in a garage. One of the officers had contact with the defendant and smelled the odor of intoxicants emanating from him. The defendant admitted to consuming alcohol that night and one of the officers observed open containers of alcohol in plain view in the garage. The police issued a citation to the defendant for underage possession or consumption of alcohol.

The defendant contested the citation and at the trial raised the affirmative defense that at the time he possessed and consumed alcohol he was accompanied by his father. At the trial one of the officers testified that he did not see any person around or near the garage over the age of twenty-one. The defendant’s father did not come out to the garage until ten to fifteen minutes after the police had arrived there and when the officers met with the father it appeared to them that he had been recently sleeping. The court found the defendant not guilty of underage drinking on the ground that he was “accompanied” by a parent, his father, within the meaning of a statutory exception to the prohibition to underage drinking. The issue on appeal was whether the circuit court properly interpreted and applied the term “accompanied” within the meaning of the law to the facts.

Wis. Stat. § 125.07(4)(b) provides, “[e]xcept as provided in par. (bm), any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age who knowingly possesses or consumes alcohol beverages is guilty of a violation.”

There are no cases in Wisconsin where a court has interpreted the term “accompanied” within the meaning of Wis. Stat. § 125.07(4)(b). However, the appellate court has construed the same term in the context of § 125.07(1)(a), which, like § 125.07(4)(b), governs and regulates the use and possession of alcoholic beverages by underage persons. *See, e.g.*, ***Mueller v. McMillian Warner Ins. Co.***, 2005 WI App 210, 287 W2d 154. In ***Mueller***, the court considered the meaning of “accompanied” in the context of Wis. Stat. § 125.07(1)(a). Section 125.07(1)(a) states that “[n]o person may procure for, sell, dispense, or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.” The issue in that case was whether the parents of a nineteen-year-old boy had “accompanied” him when he drank alcohol that the parents procured for the son. ***Id***. ¶11 In that case the parents contended that to meet the statutory meaning of “accompanied,” it was unnecessary for the parents to be in the same room with their son while he was drinking. ***Id.***, ¶12. The parents argued that it was sufficient that he drank “in their proximity” and on the same premises, with their knowledge. ***Id.*** The appellate court rejected that argument and concluded that “underage drinkers are not accompanied by a parent merely because the parent and child are on the same premises.” ***Id.***

The appellate court stated they could see no reason why the term “accompanied” found in Wis. Stat. § 125.07(1)(a) could not have the same meaning in § 125.07(4)(b) because both statutes are within the context of the statutory scheme governing underage and intoxicated persons, the court held that the term “accompanied” requires individualized supervision and control of the underage drinker while the person is drinking. The case was reversed and remanded directions to the circuit court to find the defendant guilty of violating the ordinance.

**IS IT CONSTITUTIONAL FOR A MUNICIPALITY TO ONLY CHARGE BAR OWNERS WHEN THEIR BARTENDERS ARE CAUGHT SERVING UNDERAGE PATRONS?**

**City of Waukesha v. Boehnen,** 04/29/15 **(UNPUBLISHED)**

The City of Waukesha Police engages in sting operations to catch the serving of underage patrons in local bars and taverns. The ordinance restricts the holders of liquor licenses and their employees from serving anyone under the legal drinking age. The ordinance adopted language from the State Statutes verbatim. When caught doing so, the City has a policy to ONLY charge the bar owners and NOT the bartenders engaged in the actual sale. Boehnen was the owner of a bar who received such a citation. After a trial in municipal court Boehnen was convicted. He appealed to Circuit Court and after a trial de novo was convicted again. He appealed to the Court of Appeals claiming that the City's policy was discriminatory and unconstitutional. He also claimed that the ordinance required the City to prove that he had knowledge or intent to serve the underage drinker.

The Court of Appeals denied both of Boehner’s arguments. First, in order to prevail on a claim of selective prosecution, Boehnen must make a prima facie showing that the prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose. ***State v. Kramer***, 2001 WI 132. Boehnen did not show that he was singled out for prosecution while others similarly situated were not (discriminatory effect) and that the City of Waukesha's policy was based on an impermissible consideration such as race, religion or another arbitrary classification (discriminatory purpose). Boehnen clearly did not establish a prima facie case of selective prosecution.

Second, the language of the ordinance and respective State Statute regarding the illegal sale of alcohol contains no language about scienter. The Court of Appeals acknowledged a long history of strict liability offenses for persons that violate a statute relating to serving of alcohol to minors. Strict liability in such instances is warranted because of the public policy to provide protection for minors and the public. The ordinance does not require that the charged person commit an illegal act, but rather it transfers liability from an employee to the employer. The law specifically provides liability for either the person holding the liquor license or one of his or her employees. This language indicates that the ordinance considers both bar owners and their employees as potential violators. Therefore, Boehnen’s lack of knowledge or intent is irrelevant. The Court of Appeals held that the municipal court and the circuit court properly imputed vicarious liability to Boehnen for the actions of his bartender.

**WAS THE SPEED LIMIT SIGN AN “OFFICIAL SIGN” OR AN INVALID SIGN?**

**County of Barron v. Adams,** 01/13/15 **(UNPUBLISHED)**

The defendant was stopped and cited Adams for driving fifty-four miles per hour in violation of the posted, thirty-five miles-per-hour speed limit. He was charged with speeding in violation of Wis. Stat. § 346.57(5).

Section 346.57(5) reads: “**Zoned and posted limits.**  In addition to complying with the speed restrictions imposed by subs. (2) and (3), no person shall drive a vehicle in excess of any speed limit established pursuant to law by state or local authorities and indicated by official signs.”

The defendant argued the posted speed limit sign was not official because there was no law, ordinance, or regulation in the City of Rice Lake or the Township of Rice Lake that set a thirty-five miles-per-hour speed limit at that location. As a result, he asserted the applicable speed limit was fifty-five miles per hour, pursuant to Wis. Stat. § 346.57(4)(h), which states: “[N]o person shall drive a vehicle at a speed in excess of the following limits unless different limits are indicated by official traffic signs: ... In the absence of any other fixed limits or the posting of limits as required or authorized by law, 55 miles per hour.”

The circuit court observed that City and Town officials discussed changing 19th Street’s speed limit. The court determined the meeting participants agreed to recommend raising the limits at various parts of 19th Street. However, it found no evidence that the City or Town had acted beyond agreeing to make a recommendation. The court made a finding of fact that the meeting minutes referred to a thirty-five miles-per-hour speed limit that had been set by town ordinance. The circuit court determined the posted sign was “official” and held that the County proved he was traveling nineteen miles per hour over the speed limit. The defendant appealed.

On appeal the defendant argued that he did not exceed the speed limit because the evidence presented at trial showed that no local ordinance nor state statute authorized the 35 mph speed limit sign on 19th Street. He argued the sign did not conform to the requirements of the Federal Manual of Uniform Traffic Control Devices and it was therefore not an ‘official sign” The appellate court rejected that argument. The Wisconsin Supreme Court has instructed that “[t]he posting of state speed-limits signs makes applicable the common-law presumption that state authorities properly performed their official duties in establishing such speed limits.” ***State v. Zick***, 44 W2d 546, 551 (1969). None of his arguments overcame the presumption that public officials complied with all statutory requirements in performing their duties. The appellate court also noted that WIS. STAT. § 346.01(1), defines “Official traffic control device” as “all signs, signals, markings and devices, not inconsistent with chs. 341 to 349, placed or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning or guiding traffic; and includes the terms ‘official traffic sign’ and ‘official traffic signal.’” Therefore, an official traffic sign is one erected by the proper authority. There was no evidence in the record that the proper authority did not erect the speed-limit sign at issue such that it was not an official sign. There also was no evidence that the sign at issue deviated from the design and installation requirements mandated by the Federal Manual on Uniform Traffic Control Devices. The judgment was affirmed.

**IS FAILURE TO MAKE A VIDEOTAPE RECORDING OF A TRAFFIC STOP A VALID REASON TO DISMISS CHARGES OR SUPPRESS EVIDENCE?**

**State v. Dolajeck,** 1/21/1015(**UNPUBLISHED)**

At 2 a.m. a sheriff deputy observed Dolajeck's vehicle drift back and forth from the fog line to the left of the center line. Her vehicle crossed the center line on at least two occasions. After her vehicle crossed the center line on the first occasion, the deputy attempted to turn on the squad video. Unfortunately, he pressed the wrong button. He subsequently stopped Dolajeck. One thing led to another and she was charged with OWI. She filed motions to dismiss and suppress including an argument that the failure to properly record the incident deprived her of material evidence and due process in presenting her defense. The circuit court denied her motions. She appealed.

The Court of Appeals rejected her arguments. In particular, the Court stated that absent a statutory requirement or other mandatory duty, police have no duty to create documentary evidence. Failure to make a videotape recording of the events prior to her arrest does not require dismissal of charges or suppression of evidence. The Court curtly concluded “Dolajuck's argument fails legally and logically.”

**THE DEFENDANT CLAIMS THE SQUAD VIDEO CONTRADICTS A DEPUTY’S TESTIMONY. WHAT IS A JUDGE TO DO?**

**County of Fond du Lac,** 12/30/14 **(UNPUBLISHED)**

Krueger appeals his conviction for OWI. He claims there was no reasonable suspicion for the stop of his vehicle. He claims the squad video contradicts the deputy’s testimony that his vehicle swerved 3 feet over the center line while taking a curve in the road. The trial court found the video inconclusive and the deputy’s testimony to be credible. The trial court stated:

Well, the Court [has] looked at the video and notes that the taillights went on of the vehicle operated by the defendant. You could see the defendant’s vehicle negotiating the turn. But it was very difficult to discern on the video the extent to which the vehicle crossed the center line or where, in fact, the center line even was relative to the vehicle.

The officer, based upon the video, was relatively close to the vehicle. I believe he would have had a clear view of the defendant’s vehicle where it sat in relation to the center line. His eyes would not have been affected like the video camera was[,] given the brake lights ….  So I don’t find that there is anything in the video that specifically discredits or is contrary to the testimony of the officer.  I simply find that it is a video that shows the vehicle going around the corner but doesn’t depict the location of that vehicle relative to the center line.…I do find that the observation of the officer that the defendant crossed the center line as he went around the corner was sufficient basis to stop the vehicle ….

The Court of Appeals refused to find that the trial courts findings of fact were “clearly erroneous”. The Court of Appeals pointed out that “Krueger is not the fact-finder. The trial court is.”

**IS A TRAFFIC STOP IMPERMISSIBLY PROLONGED WHEN IT WAS BASED UPON A MISTAKE OF FACT AND THE OFFICER DECIDES TO DO MORE THAN SIMPLY EXPLAIN THE MISTAKE AND, AT MOST, CHECK FOR A VALID LICENSE?**

**State v. Carstensen,** 3/12/15 **(UNPUBLISHED)**

At approximately 3:30 a.m., Deputy Sabot began following a white truck which had stopped at an intersection and remained for at least ten seconds, despite the absence of any other traffic. Sabot could not see a license plate on the truck’s rear bumper. No other traffic violations were observed. Eventually, the white truck pulled over on its own, so Sabot pulled behind the truck and activated his emergency lights. Upon exiting his vehicle and approaching the truck, Sabot discovered that there was a temporary tag from Colorado displayed in the rear windshield.

Sabot then spoke with Carstensen and explained why he had stopped behind the truck. He asked Carstensen why he had stopped so long at the stop sign, and Carstensen stated he had dropped a cigarette. Sabot asked where he had bought the vehicle, and the two had a discussion before Sabot asked whether had any paperwork to support his claim that he had recently purchased the truck. Carstensen said he was not sure, and began to look through an armrest. When Carstensen opened the armrest, Sabot observed an open wine cooler and a glass pipe. Sabot asked Carstensen if he had any marijuana, and Carstensen admitted that he did.

The circuit court granted the motion to suppress, determining that Sabot’s reasonable suspicion that Carstensen’s truck was missing a rear license place was dispelled prior to Sabot making contact with Carstensen, and that, at that point, Sabot could have either walked back to his squad car and left without making contact with Carstensen, or could have made contact with Carstensen for the limited purpose of explaining his mistake. The court determined that Sabot’s actions exceeded what was reasonable under the circumstances.

The State appealed, arguing that Sabot acted in good faith and that once he legally initiated the traffic stop, it would have been unreasonable to leave without making contact. The State also argued that Sabot’s conduct subsequent to his initial contact with Carstensen, leading to the discovery of incriminating evidence, was within the scope of the initial legal detention. Carstensen argued that Sabot’s investigation was complete when Sabot discovered that Carstensen’s truck displayed temporary tags in the rear windshield, before Sabot even made contact with Carstensen and that when an officer discovers that a stop was based on a mistake of fact, the only reasonable contact with the driver is for the officer to explain the mistake, thank the driver, and let the driver leave.

The Court of Appeals agreed. When Sabot asked Carstensen for paperwork showing that he had purchased the truck, Sabot unreasonably extended Carstensen’s detention. The facts did not justify extending the investigation to the point where Sabot asked for proof that Carstensen had purchased the truck. Sabot’s subsequent conduct in asking Carstensen for paperwork related to his purchase of the truck was outside the scope of the initial lawful detention, constituted an additional intrusion on Carstensen’s liberty interest by extending the duration of the detention, and served no public interest related to the initial detention.

**WHEN AN OFFICER MAKES A MISTAKE OF FACT IN STOPPING A VEHICLE, MAY THE OFFICER STILL REQUEST THE DRIVER’S LICENSE AND IDENTIFICATION OF THE DRIVER?**

**State v. Huck**, 2/3/15 **(UNPUBLISHED)**

Rachel Huck was a passenger in a vehicle driven by Brandon Schultz. The car was registered to Huck, and her license was suspended. An officer following the car ran the plates and learned that its owner had a suspended license. The officer could not see whether the driver was a male or female, and conducted a traffic stop. Upon approaching the car, the officer quickly determined that the driver, who was a male, was not Rachel Huck.

The officer explained his reason for stopping the vehicle and his inability to see who was driving. He said that he still needed to determine if the driver was validly licensed, so he asked Schultz to produce his license. Schultz said that he did not have a license. Based on an ID card Schultz provided the officer, he ran Schultz’ name and learned that he was on probation. Because the probation agent requested a hold, the officer placed Schultz under arrest.

Returning to Huck, the officer issued her a citation for owner’s liability for not having insurance and for permitting an unauthorized person to drive her car. He told Huck someone was on their way to pick Huck up. After beginning to walk away from Huck, the officer turned around and re-approached. He asked Huck if she had anything illegal in her car. She said she did not. He asked if he could search, and she gave consent. The officer found marijuana and paraphernalia.

At her suppression hearing, Huck argued that the officer had no legitimate reason for asking Schultz to produce his license, because the justification for the traffic stop dissipated as soon as the officer saw that the driver was male. Huck argued that any seizure beyond that point was unreasonable and without any justification. On appeal, the Court distilled the issue into one question: whether the officer could lawfully continue to detain the vehicle in order to ask Schultz for his license. The Court held that the officer did not violate Huck’s rights because the small intrusion in asking for Schultz’ license was a minimal liberty intrusion that took a matter of seconds. The Court held that the intrusion was outweighed by the public’s interest in the identification of individuals so the police can make a full report of their activities, and in the need to gather minimal information in case it is needed later (such as if there was a later claim that the vehicle had been stolen).

**DEFENDANT IS CHARGED AND CONVICTED OF A FIRST OFFENSE OWI. LATER IT IS DETERMINED THAT THE DEFENDANT ACTUALLY HAD A PRIOR OWI CONVICTION. CAN THE DEFENDANT REOPEN AND VACATE THAT CONVICTION?**

**State v. Navrestad,**  7/2/15 (**UNPUBLISHED)**

This case does not give us the details, but Navrestad must be in a heap of trouble. Clearly, he must be charged with a repeat OWI offense... probably his fourth or fifth offense. That new current offense alleges his record of prior convictions. The list includes Navrestad's prior conviction for a first offense OWI in 1992 in Monroe County circuit court. Navrested would like to eliminate that conviction from his record so that his current charge would not be as serious. If successful, he would have one less conviction for OWI on his record. Consequently, Navrestad moved the Monroe County circuit court to vacate this prior 1992 conviction. The Monroe County Circuit Court denied his motion. Navrestad appealed.

The Court of Appeals broke Navrestad's argument down into four separate assumptions:

(*1) Under* ***County of Walworth v. Rohner****, 108 W2d 713, 324 N.W.2d 682 (1982), when a defendant has a countable prior intoxicated driving offense, a state statute directs that a subsequent offense be charged as a crime; if the subsequent offense is incorrectly charged as a first offense ordinance violation, the circuit court lacks “subject matter jurisdiction.”*

*(2) At the time of his 1992 prosecution, Navrestad had a countable prior offense, but was charged with and convicted of a first offense ordinance violation.*

*(3) The circuit court thus lacked subject matter jurisdiction under* ***Rohner****, and, as a result, the 1992 conviction was void.*

*(4) Although Navrestad did not object on subject matter jurisdiction grounds during the 1992 prosecution, Navrestad may move now to void and vacate the 1992 conviction on those grounds because objections to subject matter jurisdiction cannot be forfeited or waived.*

The Circuit Court and the Court of Appeals both concluded that the 1982 Rohner case was usurped by a more recent 2004 Supreme Court decision i*n* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, 273 W2d 76, 681 N.W.2d 190. In Mikrut the Supreme Court proclaimed “a circuit court is *never* without subject matter jurisdiction.” ***Mikrut***, 273 W2d 76, ¶1 (emphasis added). The ***Mikrut*** court concluded that, although a circuit court’s “competency,” or power to *exercise* jurisdiction, can be limited by statute, a circuit court's subject matter jurisdiction cannot. The ***Mikrut*** court further concluded that objections to competency can be forfeited.

The Court of Appeals concluded that Navrestad could not reopen his prior “first offense” conviction in Monroe County. His argument that the circuit court did not have subject matter jurisdiction over the offense at the time was not valid because ***Mikrut*** tells us that Circuit Courts are **NEVER** without subject matter jurisdiction.

Would Navrestad have been able to successfully vacate his 1992 prior conviction if it had been in a municipal court rather than a circuit court?

**MUST A MUNICIPAL COURT REOPEN AND VACATE AN OWI CONVICTION IF IT APPEARS THAT THE DEFENDANT HAD A PRIOR CONVICTION COUNTABLE UNDER 343.307?**

**DOES THE LAW REQUIRE A DEFENDANT IN MUNICIPAL COURT ON A 1ST OFFENSE OWI TO VOLUNTEER THE EXISTENCE OF A PRIOR OWI CONVICTION?**

**State v. Strohman,** 2/5/15 **(UNPUBLISHED)**

Mr. Strohman had OWI arrests in 1999, 2005, and 2012. Each was a countable offense under Wis. Stat. §343.307. Further, each was within ten years of the other, so that only the 1999 offense should have been a first offense. See Wis. Stat. §346.65(2). Yet, the case arising out of the 2012 arrest will soon have to be amended from a third to a first offense.

In 1999 Strohman was convicted of an OWI-related offense in Illinois. In 2005 he was cited for OWI 1st in Brown County. The citation was written to the Green Bay Municipal Court upon a plea of no contest he was convicted by the court. In March of 2012, Strohman was arrested in Portage County and charged with OWI offenses. Because the driving record showed two prior OWI convictions, the case was brought in Portage County Circuit Court as a criminal 3rd offense.

Some time after his 2012 arrest in Portage County, Strohman moved the Green Bay Municipal Court to reopen and vacate his 2005 conviction. He argued that the court had no jurisdiction over the matter since it should have been filed in circuit court as a criminal 2nd offense. The municipal court agreed that it did not have jurisdiction over the matter because Strohman already had a countable 1st offense, and municipal courts have no jurisdiction over 2nd offenses. The municipal court vacated the conviction because the matter should have been charged as a 2nd offense in circuit court.

The State subsequently filed a criminal traffic complaint in Brown County Circuit Court, charging Strohman with an OWI 2nd offense based upon the citation issued to him in 2005. This criminal misdemeanor case was filed on October 15, 2013 - more than 8 years after the date of the arrest. Strohman moved to dismiss, arguing that the three year statute of limitations had run. The circuit court agreed with the State that Strohman had violated a duty to inform the municipal court of his prior countable conviction, and that he was thus equitably estopped from using the statute of limitations to defeat the charge.

The Court of Appeals reversed, noting that throughout its brief, “the State mischaracterizes Strohman’s no-contest plea as a “misrepresentation” that the State “relied upon” to its detriment. Under the facts of record, however, Strohman never made any “representation,” much less a misrepresentation, regarding his prior offenses. Rather, Strohman was charged with an OWI offense to which he merely pleaded no contest. **Defendants have no obligation to disclose prior offenses, and the establishment of prior offenses is unquestionably a duty belonging to the State.**”Citing State v. Wideman, 206 W2d 91 (1996).

So, with no conviction in the municipal court nor a criminal 2nd offense in Brown County Circuit Court, Strohman’s arrest in Portage County in 2012 can only proceed as a 1st offense since his only prior conviction of record, in Illinois in 1999, is more than ten years before the 2012

Portage County arrest. If convicted, he will at least be subject to an IID requirement under 343.301(1g)(b)2.

**IF A DRIVER WHO MISSES THE DEADLINE TO REQUEST A REFUSAL HEARING CLAIMS THAT HE DID FILE A TIMELY REQUEST CAN HE GET A HEARING ON A MOTION TO REOPEN, AND WHAT EVIDENCE MUST HE PRODUCE?**

**Ozaukee County v. Sheedy,** 6/3/15 **(UNPUBLISHED)**

Sheedy was arrested on September 20, 2014, for operating a motor vehicle while intoxicated (OWI). He refused to submit to a blood test and was given the notice of intent to revoke operating privilege, informing him that he had ten days to request a hearing. The trial court found that he did not request a hearing within ten days, and what the court referred to as a default judgment was entered because Sheedy’s failure to request a hearing was deemed a no contest plea.

About three weeks later, Sheedy wrote the court and asked to reopen his case. He did not assert that he was not in default. Sheedy maintained that he did not refuse the test and that he requested a hearing on September 29, 2014, within the ten‑day period. The trial court denied the request. The Court of Appeals noted that even construing Sheedy’s October 28, 2014 letter liberally as a motion to reopen his case, Sheedy did not assert that he was not in default, much less set forth any explanation or include any supporting documents to show that he was not in default. Sheedy did not provide any proof that he mailed the request for a hearing and there was nothing in the record to support Sheedy’s assertion that he mailed a request for a hearing within ten days of his arrest.

The Court held that Sheedy’s failure to timely request a hearing within ten days caused the trial court to lose competence to hear the matter. *See* ***Village of Elm Grove v. Brefka***, 348 W2d 282 (2013). A court’s competence refers to the ability of a court to adjudicate the case before it. A “court’s loss of power due to the failure to act within statutory time periods cannot be stipulated to nor waived.*”* ***Green Cnty. DHS v. H.N.***, 162 W2d 635, 657 (1991). Under Wis. Stat. §343.305, failure to bring the matter before the circuit court within the ten‑day period results in a loss of competence, preventing the court from even addressing the case. And, even construing Sheedy’s letter to the court liberally as a motion to reopen, Sheedy did not assert that he was not in default.