



BY PETER R. HEYNE

Traffic Stops: **Driver and Passenger Rights & Responsibilities**



What should drivers and passengers do and not do when a law enforcement officer pulls over a vehicle? This article explores in four segments police roadside encounters for both drivers and passengers, so lawyers can assist their clients in avoiding pitfalls both criminal and civil.

When a law enforcement officer pulls over a vehicle, what are the rights and responsibilities of the driver and any passengers, once the officer approaches and starts asking questions and giving orders? This article explores police roadside encounters for both drivers and passengers, so lawyers can assist their clients in avoiding pitfalls both criminal and civil. (The terms “police” and “officer” are used generally in this article to refer to police officers, sheriff’s deputies, and state patrol officers.)

First is a review of the constitutional case law on traffic stops and vehicle searches. Second is a discussion of the legal duration of a traffic stop, with emphasis on the stop’s mission and officer questions for both driver and passengers. Third is an analysis of officer commands to exit the vehicle, driver and passenger reactions, and possible claims of excessive force by police officers. Fourth is an examination of police inquiries unrelated to the original stop, such as dog sniffs and questions about weapons. The article closes with a list of practical pointers.

Constitutional Law 1A: Traffic Stop for Law Violation

Both federal and state courts have consistently held that a traffic stop, even briefly for a non-criminal traffic violation (such as speeding), is a seizure for Fourth Amendment purposes.¹ The U.S. Supreme Court has likened a routine traffic stop that is a “relatively brief encounter” to be “more analogous to a *Terry* stop than to a formal arrest.”² For a traffic stop to be constitutional, the police must have reasonable, articulable suspicion (less than probable cause but more than a hunch) of a law violation, either civil or criminal.³ These constitutional provisions protect not only the driver

but also all passengers: when police stop a vehicle, all occupants of that vehicle are seized and have standing to challenge the stop.⁴

Pretextual traffic stops, that is, stops designed to investigate violations not related to the observed violation, are not per se unreasonable under the Fourth Amendment.⁵ For example, the police can pull over a vehicle for littering (for example, a person flicking a cigarette out of a vehicle) when they are fishing for drunk drivers or contraband like drugs or weapons.⁶ The police can also pull over a vehicle for violation of local ordinances that incorporate administrative code equipment rules, like those prohibiting excessive tinting of vehicle windows.⁷ Police can also stop a vehicle for issues with the license plate – if the plate is illegible because of foreign matter such as mud or snow⁸ or because the black lettering of the license plate is fading or the reflective paint is peeling (so the plate cannot be easily read at night).⁹

The burden of establishing that an investigative stop is reasonable falls on the state.¹⁰ If the state cannot meet this burden, all derivative evidence from this illegal seizure and likely subsequent search must be suppressed.¹¹ However, searches and seizures can be based on objectively reasonable mistakes of fact¹² and objectively reasonable mistakes of law.¹³

Constitutional Law 1B: Vehicle Searches

The Fourth Amendment also protects against unreasonable vehicle searches. The driver or passenger has the initial burden to prove standing, that is, that the person had a reasonable expectation of privacy in the vehicle.¹⁴ If the vehicle is stolen, for example, the driver (and *a fortiori* any passenger) lacks standing.¹⁵ Even if the vehicle is not stolen, the driver still has to show some property interest, such as consent of the owner to drive the vehicle.¹⁶

Even if there is a valid traffic stop and arrest, the police cannot then per se search the entire vehicle; a vehicle search incident to arrest is authorized only if 1) “the arrestee is within reaching distance of the passenger compartment at the time of the search” or 2) “it is reasonable to believe the vehicle contains evidence of the offense of arrest.”¹⁷ There is also the long-standing “automobile exception”: police can search a vehicle if they have “probable cause to believe that a vehicle contains evidence of a crime.”¹⁸

There are also plain-view and plain-smell exceptions. If police can see contraband inside through the vehicle windows or an open door, then they can search the vehicle and seize that evidence without a warrant.¹⁹ The same goes for odor of drugs from an even partially open window. The Wisconsin Supreme Court recently held that after smelling marijuana during a traffic stop, officers had probable cause to conduct a warrantless search of the vehicle and then arrest the driver, who was the vehicle’s sole occupant, for possession of tetrahydrocannabinols found inside.²⁰ Notably, even though hemp and delta-8 THC are legal in Wisconsin, the supreme court rejected the defense claim that the search was invalid because legal CBD used in a vape pen smells the same as illegal delta-9 THC.²¹

Constitutional Law 2: Duration of the Traffic Stop: Follow the Mission

Beyond the constitutional law on



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vehicle stop and searches, there are also constitutional protections about the duration of a traffic stop. Both federal and state courts have ruled that the legal duration of the stop is determined by the “mission”: 1) addressing the traffic violation that warranted the stop, 2) conducting ordinary inquiries incident to the stop, and 3) taking negligibly burdensome precautions to ensure officer safety. Authority for the seizure ends when these tasks are, or reasonably should have been, completed.²²

This mission can include ordinary inquiries such as checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.²³ These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.²⁴ Police can perform these basic duties even though reasonable suspicion for the stop dissipated as the officer approached the car; for example, the officer now discovers that the driver is not the suspect whom the officer was seeking.²⁵

Identify Yourself and Answer Questions

Drivers. Assuming a valid traffic stop, the driver’s refusal to obey lawful police commands could be grounds for an arrest and prosecution for the criminal charge of obstructing an officer, a Class A misdemeanor.²⁶ Giving false information is also grounds for an obstructing charge. If the person gives false information with intent to mislead an officer (such as providing the name of another person who has nothing to do with the situation, like an innocent twin or relative), the offense is now a Class H felony.²⁷

Commonsense advice for all drivers includes the following:

- Even if you think that there was no good reason that you were pulled over, do not argue with the officer about the reason for the stop.

- When asked, promptly give the officer your real name and your license, registration, and proof of insurance.

- If the police ask questions such as where you are coming from, where you are headed, and what you are doing, you should answer directly and honestly, or risk giving police reasonable suspicion for further investigation.²⁸

- Contrary to popular YouTube videos, if there are genuine concerns for the stop’s legality it is not prudent to reach for and hold up your cell phone, point it at the officer’s face, start recording, and be obnoxious doing so (such as loudly declaring to the officer that you are live streaming and “exposing tyranny”).

There are two things to keep in mind for drivers concerned about the legality of traffic stops. First, there is no need to declaim the viral refrain “Am I being detained?” A traffic stop is a Fourth Amendment seizure. Second, especially if a stop occurs at night or during inclement weather with limited visibility, the officer might interpret sudden hand movements as malign, for example, that the driver is reaching for a weapon. The situation could escalate to a “high-risk” traffic stop, with officers drawing their service firearms and the encounter going sideways fast.²⁹ The entire episode, starting when the officer turns on emergency lights, likely will be recorded on both the nearly ubiquitous police squad cameras and the increasingly common police body cameras. If the authorities file citations or criminal charges, these videos must be turned over during the discovery process.³⁰

Passengers. Considerations for passengers differ because they have fewer legal responsibilities and thus more legal rights than the driver.

- Unlike the driver, a passenger has the right to decline to answer police questioning about their identity, and the refusal to answer cannot result in arrest or prosecution for obstructing.³¹

- The refusal to answer by itself will not give rise to any reasonable suspicion of wrongdoing.³²



• The brief period that it takes to ask a passenger a question about their identity does not unreasonably prolong a temporary detention (this issue of delay is discussed more below).³³

• If instead of keeping quiet, a passenger chooses to answer but gives the officer false information, the passenger can be charged with obstructing (either a misdemeanor or a felony charge, as explained above).³⁴

The bottom-line advice for passengers: Either don't say anything or give your real name.

“Please Step Out of the Vehicle”

Beyond road safety, courts have also recognized concerns for officers' safety on the roadside. Thus, assuming a valid stop, even for only a traffic violation, the officer can order both the driver and any passengers out of the vehicle pending completion of the stop.³⁵ The refusal to obey such a lawful police command to exit the vehicle (as always, assuming a valid stop) could be grounds for the police to arrest the person(s) for obstructing.

Likewise, the police have a right to a face-to-face encounter with a driver during a lawful traffic stop.³⁶ Thus, if the driver-side door and window are inoperable, the officer can open the passenger-side door, especially if the driver's movements or statements indicated that the driver was willingly opening (or attempting to open) the passenger door.³⁷

It remains less clear whether officers can open a door and either “help” or outright forcibly remove the driver from the vehicle. As with most Fourth Amendment situations, it depends on the totality of the circumstances. After a valid stop, if the officer orders the driver or passenger out of the vehicle, and the person refuses that lawful order, then even if there is not probable cause of a different law violation (such as operating while intoxicated), the officer now has more than enough probable cause to make an arrest for

ALSO OF INTEREST

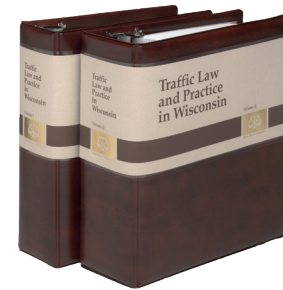
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the offense of obstructing. If the person being removed from the vehicle against their will offers physical resistance (for example, by trying to push the officer's hand away or by offering resistive tension when grabbed³⁸), then the person also can be arrested and prosecuted for the offense of resisting an officer, also a Class A misdemeanor.³⁹

If, however, the police use excessive force when dealing with a person in a vehicle, the person might be able to make a federal civil rights claim, which could result in the officer(s) being found civilly liable and being ordered to pay damages. A plaintiff in such a case, however, must overcome the significant burden of qualified immunity for police officers.⁴⁰

Legal Defense to Resisting and Obstructing but Not to Threat or Battery to Police

In contrast, if the officer violates the Fourth Amendment by reaching into the vehicle and removing the person from the vehicle without cause (for example, before the officer ever gives the order to leave the vehicle and there

is not independent probable cause to arrest), and if the person offers physical resistance, then there cannot be a valid obstructing or resisting charge. Even though Wisconsin courts have abrogated the old common-law privilege of resisting arrest, both obstructing and resisting have a “with lawful authority” element.⁴¹ If the officer acts without lawful authority, then there cannot be resisting or obstructing.

However, if the person being illegally removed from the vehicle threatens or hurts the officer (a Class H felony offense), there is no defense, because neither threat nor battery to law enforcement has a “with lawful authority” element.⁴²

The bottom-line advice for drivers and passengers: If the police order you out of the vehicle, exit the vehicle immediately; do not physically resist, and do not threaten to or attempt to hurt the police.

Unrelated Inquiries and Delays

In addition to asking the driver routine questions, while the traffic stop's mission is still being completed, police can also do concurrent investigation unrelated to

the original reason (or pretext) for the stop, such as a dog sniff of the vehicle's exterior.⁴³ Likewise, in Wisconsin, even if the original justification for the traffic stop did not involve weapons, the police can ask the driver whether the driver is carrying any weapons and whether the driver has a concealed carry permit, as long as such question or permit check does not measurably extend the stop.⁴⁴ That is the rule: inquiries unrelated to the original mission cannot "measurably extend the nature of the stop."⁴⁵ "If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete [the stop's] mission."⁴⁶ The crucial question is not whether the dog sniff or other unrelated inquiry, such as about firearms, occurs before or after the officer issues a ticket but whether conducting the sniff or asking the other questions adds time to the stop.⁴⁷ Courts have not given a magic number about what counts as "measurably extends," but generally a short delay (for example, 10 minutes) after the completion of the original traffic mission is not constitutionally problematic.⁴⁸

Practical Pointers

In summary, roadside encounters with police can present drivers and passengers with pitfalls, both civil and criminal. Here is some advice for avoiding tickets and criminal charges.

- Don't engage in behavior that gives police reasonable suspicion to pull you over, especially on a pretext, such as breaking traffic laws like speeding, littering, crossing the center line, or blowing through a stop sign or a red light.
- Always have a valid license and up-to-date vehicle registration.
- Don't violate even what appear to be minor equipment regulations, like having burned-out tail lamps, excessive window tinting, or a license plate illegible with snow or mud or fading or peeling paint.
- Don't leave suspicious items, not to mention contraband, in plain view inside the vehicle.
- Don't smoke or vape legal CBD or delta-8 THC, especially with all the windows up.
- If pulled over, don't make sudden or furtive movements, like reaching for your cell phone.

- Don't get out your cell phone and start recording or live streaming the officer.

- Don't argue loudly or rudely with the police about the reason for the traffic stop and don't demand to know whether you are being detained.

- Obey police orders (if you are the driver) to identify yourself and hand over required documents.

- Obey police orders to step out of the vehicle (driver and passengers).

- Don't threaten or harm the police, even if the traffic stop is blatantly illegal.

- Don't try to drive off or run away.

If drivers and passengers avoid these pitfalls, then they can stay safe and out of trouble when pulled over and approached by the police. **WL**

ENDNOTES

¹See *Rodriguez v. United States*, 575 U.S. 348, 354 (2015); *State v. Floyd*, 2017 WI 78, ¶ 20, 377 Wis. 2d 394, 898 N.W.2d 560; *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996) ("The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the Fourth Amendment.")).

²*Rodriguez*, 575 U.S. at 354, cited in *State v. Wright*, 2019 WI 45, ¶ 8, 386 Wis. 2d 495, 926 N.W.2d 157. *Terry* held that police can briefly detain a person and do a patdown ("stop and frisk") of the outer clothing, if police have reasonable suspicion (less than probable cause), not just an "inchoate and unparticularized suspicion or hunch," that the person is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

³*Popke*, 2009 WI 37, ¶ 23, 317 Wis. 2d 118 ("Even if no probable cause existed, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed."). An officer's "inchoate and unparticularized suspicion or hunch," however, will not give rise to reasonable suspicion. *Id.* ¶ 10.

⁴*State v. Harris*, 206 Wis. 2d 243, 257, 557 N.W.2d 245 (1996) (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) ("stopping an automobile and detaining its occupants constitute a 'seizure'")).

⁵*State v. Houghton*, 2015 WI 79, ¶ 25, 364 Wis. 2d 234, 868 N.W.2d 143 (citing *Whren*, 517 U.S. at 808, 818-19).

⁶See *State v. Iverson*, 2015 WI 101, 365 Wis. 2d 302, 871 N.W.2d 661 (police lawfully pulled over drunk driver based on probable cause that an occupant of the vehicle had violated Wis. Stat. section 287.81 by throwing cigarette butt onto highway).

⁷*State v. Bailey*, 2009 WI App 140, 321 Wis. 2d 350, 773 N.W.2d 488. The *Bailey* court cited Milwaukee Ordinance section 101-4.5,

which incorporated Wis. Admin. Code section Trans. 305.32; and Wis. Stat. section 349.02(2)(a) and (b), which expressly allows a police officer to stop a vehicle for violation of a traffic statute or ordinance.

⁸See *State v. Ullrich*, No. 2009AP88-CR, 2009 WL 2615246, ¶ 7 (Wis. Ct. App. Aug. 27, 2009) (unpublished) ("[Wis. Stat.] § 341.15(2) requires that vehicle registration plates must be 'maintained in a legible condition and shall be so displayed that they can be readily and distinctly seen and read' at all times. Section 341.15(3)(c) provides that individuals 'who operate[] a vehicle with a registration plate in an illegible condition due to the accumulation of dirt or other foreign matter' may be subject to a forfeiture not to exceed \$200. The plain language of the statute makes clear that it is a violation of the statute to operate a vehicle with a registration plate covered with any foreign matter that renders the plate illegible. Snow, like dirt, is 'foreign matter.'").

⁹See *State v. Lozano*, Nos. 2024AP1540-CR, 2024AP1541-CR, 2025 WL 1091223 (Wis. Ct. App. April 9, 2025) (unpublished) (affirming traffic stop based on illegible license plate: lower half of last two digits on plate had been rubbed down to bare aluminum and plate frame or bracket almost completely obscured fact that vehicle was registered as a truck); *State v. Braun*, No. 2022AP1764, 2025 WL 602613 (Wis. Ct. App. Feb. 25, 2025) (unpublished) (affirming traffic stop because officer could not read license plate until he was within 45 feet of vehicle due to peeling reflective paint).

Drivers whose license plates are not in great shape should consider paying the modest fee to order replacement plates (\$4 for non-personalized motorcycle/moped, trailer, or tractor plates, and \$8 for non-personalized standard auto, truck, or motorhome plates). See <https://wisconsin.gov/pages/dmv/vehicles/title-plates/license-plates.aspx>. The form is available online at <https://wisconsin.gov/Documents/formdocs/mv2118.pdf>.



¹⁰*State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

¹¹*Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

¹²*Houghton*, 2015 WI 79, ¶ 75, 364 Wis. 2d 234 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 183-86 (1990)).

¹³*Id.* ¶ 52 (adopting *Heien v. North Carolina*, 574 U.S. 54 (2014)). It was not reasonable for a police officer in Wisconsin to believe that, if a vehicle is operating on a Wisconsin road, it must have been issued two license plates. “Wisconsin borders four other states, and residents from those and many other states pass through Wisconsin on a regular basis. That most vehicles on Wisconsin roads might be registered in Wisconsin and most vehicles registered in Wisconsin might be issued two plates is not enough to conclude that a stop of a vehicle solely because it lacks a front license plate passes constitutional muster.” *Id.* ¶¶ 75-76.

¹⁴*Rakas v. Illinois*, 439 U.S. 128, 130 n. 1 (1978).

¹⁵See, e.g., *Byrd v. United States*, 584 U.S. 395, 409 (2018) (“No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.”).

¹⁶See, e.g., *State v. Bruski*, 2007 WI 25, ¶ 29, 299 Wis. 2d 177, 727 N.W.2d 503 (“He did not own the vehicle. He did not establish any possessory interest in the vehicle. As mentioned above, but also relevant to this factor, his only connections to the vehicle were that he passed out in it and claimed to know the owner’s daughter. His lack of knowledge about how he got to his current location also undermines his authority to exclude others from the vehicle.”).

¹⁷*Arizona v. Gant*, 556 U.S. 332, 350-51 (2009); *State v. Dearborn*, 2010 WI 84, ¶ 27, 327 Wis. 2d 252, 786 N.W.2d 97 (adopting *Gant* in Wisconsin).

¹⁸*State v. Pozo*, 198 Wis. 2d 705, 710, 544 N.W.2d 228 (Ct. App. 1995). Probable cause to search exists when, under the totality of the circumstances, including the knowledge and experience of the officer conducting the search, sufficient facts exist to “excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.” *State v. Laffer*, 2013 WI App 22, ¶ 8, 346 Wis. 2d 220, 827 N.W.2d 650. For example, the police could find evidence that the person sold his house and might intend to rob a bank or steal a plane.

¹⁹*State v. Buchanan*, 2011 WI 49, ¶ 23, 334 Wis. 2d 379, 799 N.W.2d 775 (“objects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence”).

²⁰*State v. Moore*, 2023 WI 50, 408 Wis. 2d 16, 991 N.W.2d 412.

²¹*Id.* ¶ 15.

²²*Wright*, 2019 WI 45, ¶ 9, 386 Wis. 2d 495 (citing *Rodriguez*, 575 U.S. at 354; *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)).

²³*Rodriguez*, 575 U.S. at 355.

²⁴*Id.*

²⁵*State v. Smith*, 2018 WI 2, ¶ 2, 379 Wis. 2d 86, 905 N.W.2d 353.

²⁶Wis. Stat. § 946.41(1) (punishable by up to nine months in jail and a \$10,000 fine).

²⁷Wis. Stat. § 946.41(2m) (punishable by up to six years in prison and a \$10,000 fine). For a person to be convicted of obstructing under this subsection, there also must have been a criminal trial at which the trier of fact considered the false information, and the trial must have resulted in the conviction of an innocent person.

²⁸See Wis. Stat. § 968.24: “After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand *the name and address of the person and an explanation of the person’s conduct*” (emphasis added).

²⁹A person should avoid giving the police reason to think that every little thing the person does is malice. Every move you make, every word you say, the police will be watching.

³⁰See, e.g., Wis. Stat. § 971.23(1). Large-file storage is less of an issue these days with cloud storage and increasing synchronicity between law enforcement agencies and prosecutors. Sometimes, though, videos are not available or are “lost,” a ghost in the machine.

³¹*State v. Griffith*, 2000 WI 72, ¶ 56, 236 Wis. 2d 48, 613 N.W.2d 72 (citing *Henes v. Morrissey*, 194 Wis. 2d 338, 353-54, 533 N.W.2d 802 (1995) (explaining that Wis. Stat. section 946.41 does not criminalize refusal to give information)).

³²*Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (noting that refusal to cooperate, without more, does not furnish the objective justification needed for a detention or seizure)).

³³*Griffith*, 2000 WI 72, ¶ 56, 236 Wis. 2d 48.

³⁴*Id.*

³⁵*Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Maryland v. Wilson*, 519 U.S. 408, 413-15 (1997).

³⁶*Smith*, 2018 WI 2, ¶ 35, 379 Wis. 2d 86 (citing *Mimms*, 434 U.S. 106).

³⁷*Id.*

³⁸A person cannot demand of the police, “Don’t stand so close to me.”

³⁹Wis. Stat. § 946.41(1) (also punishable by up to nine months in jail and a \$10,000 fine).

⁴⁰42 U.S.C. § 1983. Compare, e.g., *Phillips v. Community Ins. Corp.*, 678 F.3d 513 (7th Cir. 2012) (reversing jury verdict in officers’ favor and finding that officers used excessive force and were not entitled to qualified immunity) and *McAllister v. Price*, 615 F.3d 877 (7th Cir. 2010) (affirming district court’s denial of summary judgment for officer, who should have known that driver was having medical emergency but nevertheless dragged driver out of vehicle and inflicted serious injuries on him, including a broken hip and a bruised lung); with *Lawrence v. Kenosha Cnty.*, 391 F.3d 837 (7th Cir. 2004) (affirming district court’s grant of summary judgment in officers’ favor) and *Smith v. Ball State Univ.*, 295 F.3d 763 (7th Cir. 2002) (distinguishing *McAllister* and affirming district court’s grant of summary judgment in officers’ favor: driver who was in diabetic shock ran his vehicle onto sidewalk, and officers were unable to communicate with him and thought he was intoxicated, and driver sustained only minor injuries from being pulled out, so it was not excessive force to pull him out of vehicle).

See also *Martin v. Short*, No. 23-1588, 2024 WL 3200715 (4th Cir. June 27, 2024) (unpublished) (affirming district court’s rejection of appellants’ qualified-immunity contentions and denying them summary judgment). In this case, the plaintiff alleged that her vehicle had issues: the driver-side and front passenger-side doors and windows did not open. She further alleged that during a traffic stop, an officer broke both the driver-side and passenger-side windows, using his ASP, and dragged her out of the broken driver-side window by her hair and arm. (“The term ‘asp’ appears to be a colloquial reference to a telescopic police baton, and although the term is derived from the original manufacturer – Armament Systems and Procedures, Inc. – the term is used to refer to telescopic police batons generally. See Peter R. Heyne, *Hit Points: Regulating Less-Than-Lethal Weapons*, 95 Wis. Law. 26, 29 (July-Aug. 2022).” *Id.* at *2 n.2.)

⁴¹*State v. Hobson*, 218 Wis. 2d 550, 577 N.W.2d 825 (1998). See Wis. JI-Criminal 795 Law Note: Privilege: Resisting an Unlawful Arrest (2003): “*Hobson* was concerned with a privilege that was a true ‘affirmative defense’ in the sense that it provided a defense that prevented conviction even though all the elements of the crime charged were present. That is, *Hobson* did commit a battery against a law enforcement officer, but claimed a defense to that crime based on facts that were not inconsistent with the presence of any of the elements of the crime. Notwithstanding the *Hobson* decision, the fact that a police officer was acting unlawfully in making an arrest would prevent a conviction for certain offenses because it may be inconsistent with the proof of an element of the crime. For example, if the charge is resisting or obstructing an officer, an element of the crime is that the officer was acting ‘with lawful authority.’ See § 946.41. An officer making an unlawful arrest would not be acting with lawful authority, thus negating an element of the crime. Battery to a law enforcement officer, the offense charged in *Hobson*, does not have a ‘with lawful authority’ element.”

⁴²Wis. Stat. § 940.203(2) (punishable by up to six years in prison and a \$10,000 fine). See also Wis. JI-Criminal 1240D (2019). If the police break up the fight, then what can happen next is a taser, which can bring a real stand-alone sting, the king of pain.

⁴³*Caballes*, 543 U.S. at 409.

⁴⁴*Wright*, 2019 WI 45, ¶¶ 45-46, 386 Wis. 2d 495.

⁴⁵*Rodriguez*, 575 U.S. at 354; *State v. Brown*, 2020 WI 63, ¶ 29, 392 Wis. 2d 454, 945 N.W.2d 584.

⁴⁶*Rodriguez*, 575 U.S. at 357.

⁴⁷*Id.* at 357.

⁴⁸See *Caballes*, 543 U.S. at 406 (“While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent’s car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent. The entire incident lasted less than 10 minutes.”). And that time was concurrent to the original mission. For time after the mission completion, see *United States v. Rodriguez*, 799 F.3d 1222, 1224 (8th Cir. 2015) (“the seven- or eight-minute delay in this case constituted a *de minimis* intrusion on *Rodriguez*’s personal liberty”) (on remand from 575 U.S. 348 (2015)). **WL**