



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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I—06—08

Mr. Frederick J. Mohr
Brown County Interim Corporation Counsel
414 East Walnut Street
Post Office Box 1015
Green Bay, WI 54305-1015

Dear Mr. Mohr:

You have requested an opinion regarding the authority of private security guards employed by Brown County to detain persons suspected of committing a crime. The guards work at Austin Straubel International Airport, which is owned and operated by Brown County. The guards are armed and licensed pursuant to Wis. Stat. § 440.26, but they are not sworn or deputized by the Brown County Sheriff.

You indicate that Brown County does not station a sworn deputy on the airport premises. However, the sheriff has agreed to maintain a response time of not more than ten minutes for any law enforcement-related calls at the airport. On occasion, employees of the U. S. Transportation Security Administration (TSA), who conduct security screening of passengers and carry-on baggage, will stop a passenger for possessing contraband, attempting to board with a weapon or other similar offenses. In such a situation, the TSA officer summons a private security guard, who then detains the subject until a sworn law enforcement officer arrives to make an arrest.

Based on the above facts, you pose two questions:

1. May a private security guard retained by the County detain a suspect for up to ten minutes if that security guard does not personally witness the commission of a crime?
2. May a private security guard retained by the County detain a suspect up to ten minutes when the security guard witnesses the commission of a crime on a video monitor?

For the reasons that follow, a private security guard may, in some circumstances where an alleged felony is involved, detain a person for up to ten minutes even if the guard does not personally witness the felony being committed. With regard to misdemeanors, I agree with your conclusion that a private security guard may not detain a suspect – for any amount of time – if

the guard does not personally witness a crime being committed. Whether a private security guard is authorized to detain a suspect for up to ten minutes based on the guard viewing a previously recorded videotape of a misdemeanor being committed is unclear. In light of this uncertainty, a guard who detains a person on this basis may be acting illegally.

A law enforcement officer is entitled to arrest a person whenever the officer has reasonable grounds to believe the person has committed a crime. *See* Wis. Stat. § 968.07(1)(d). A law enforcement officer can also 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." *See* Wis. Stat. § 968.24. Wisconsin Stat. § 967.02(5) defines a "law enforcement officer" as:

[A]ny person who by virtue of the person's office or public employment is vested by law with the duty to maintain public order or to make arrests for crimes while acting within the scope of the person's authority.

As you recognize, merely working as a private security guard does not vest a person with the status of a law enforcement officer. *See, e.g., Lemon v. State*, 868 N.E.2d 1190, 1196 (Ind. Ct. App. 2007). Thus, a private security guard has only the authority of a private person to make a citizen's arrest.

While some states have statutes governing a citizen's arrest,¹ in Wisconsin a citizen's arrest is governed by the common law. *See, e.g., Bergeron v. Peyton*, 106 Wis. 377, 82 N.W. 291 (1900); *Radloff v. National Food Stores*, 20 Wis. 2d 224, 237a, 123 N.W.2d 570 (1963) (on rehearing); *State v. Slawek*, 114 Wis. 2d 332, 336-38, 338 N.W.2d 120 (Ct. App. 1983). The only exception is found in the retail theft statute, Wis. Stat. § 943.50. Subsection (3) of this statute provides that

[a] merchant, a merchant's adult employee or a merchant's security agent who has reasonable cause for believing that a person has violated this section in his or her presence may detain the person in a reasonable manner for a reasonable length of time to deliver the person to a peace officer, or to his or her parent or guardian in the case of a minor.

Except for the situation described in § 943.50(3), the common law sets the requirements for a valid citizen's arrest.

In *Bergeron v. Peyton*, the Wisconsin Supreme Court cited with approval the principle that "[w]hen a felony has been committed . . . a private individual may justify the arrest of a suspected person without a warrant, for the purpose of bringing him before an examining

¹*See, e.g.,* Indiana Code § 35-33-1-4.

magistrate, if done upon proof of probable cause." 106 Wis. at 381. In *Radloff*, the supreme court concluded that as a matter of policy, a person who is not an officer should be allowed to arrest for a misdemeanor only if it is committed in his presence and constitutes a breach of the peace. 20 Wis. 2d at 237a-237b. In *Slawek*, the Wisconsin Court of Appeals held that Chicago police officers while in Wisconsin could effect a citizen's arrest of defendants whom they observed committing a burglary – a felony offense – in the officers' presence. 114 Wis. 2d at 338. Read together, these cases establish that a citizen can make a felony arrest without a warrant based on probable cause but can make a warrantless arrest for a misdemeanor only if the misdemeanor is committed in the citizen's presence and constitutes a breach of the peace. In *Radloff*, 20 Wis. 2d at 237b, the court determined that shoplifting does not constitute a breach of the peace. In *City of Waukesha v. Gorz*, 166 Wis. 2d 243, 247, 479 N.W.2d 221 (Ct. App. 1991), the court held that operating a motor vehicle while intoxicated amounts to a breach of the peace.

In view of the requirement that a misdemeanor be committed "in the presence of" a citizen for the citizen to make a valid citizen's arrest, you correctly conclude that a private security guard employed at the airport could not make a citizen's arrest for a misdemeanor – and detain a person for up to ten minutes while awaiting the arrival of a sheriff's deputy – based on a report from a TSA officer who has witnessed the crime. Thus, with respect to misdemeanor offenses, the answer to your first question is no. If the crime in question is a felony, the private security guard can make a citizen's arrest based on information received from a TSA officer, if the information rises to the level of probable cause. In that situation, I believe a detention period of ten minutes while the guard awaits the arrival of a law enforcement officer would be considered reasonable. See *Johnson v. K-Mart Enterprises, Inc.*, 98 Wis. 2d 533, 541, 297 N.W.2d 74 (Ct. App. 1980) ("a merchant's interest in detaining suspected shoplifters is such that a 20-minute detention is reasonable").

The answer to your second question – whether a private security guard can make a citizen's arrest based on viewing the commission of an offense captured on an airport security monitor – is not as clear-cut. Although you refer to "a video monitor," you later explain that you mean a videotape of an offense that is subsequently replayed by the private security guard.² Therefore, your question does not appear to envision a guard witnessing via a monitor the commission of a crime as it unfolds.

In the case of a felony, the guard could make a warrantless arrest if viewing the commission of the crime on videotape was sufficient to establish probable cause. With respect to misdemeanors, whether a citizen's arrest is authorized when a security guard views the commission of a crime on videotape depends on how the phrase "in the presence of" is defined. Although no Wisconsin case has interpreted the term, courts in other jurisdictions have weighed

²Specifically, your letter states: "Presumably, if the offense was taped by the video camera and the private security guard replayed the tape, the guard would have sufficient grounds to effect a citizen's arrest."

in on the issue, often in the context of construing statutes involving warrantless arrests by peace officers.

In *Forgie-Buccioni v. Hannaford Bros., Inc.*, 413 F.3d 175, 180 (1st Cir. 2005), the First Circuit rejected the proposition that "a videotape alone provides a sufficient basis to satisfy the 'presence' requirement for warrantless arrests" by peace officers under a New Hampshire statute. The statute in question provided as follows:

I. An arrest by a peace officer without a warrant on a charge of a misdemeanor or a violation is lawful whenever:

(a) He has probable cause to believe that the person to be arrested has committed a misdemeanor or violation in his presence.

413 F.3d at 179. Similar to the situation you posit, the arresting officer in *Forgie-Buccioni* had watched a partial videotape of the plaintiff allegedly shoplifting but had not observed the actual crime as it was being committed. *Id.* at 180.

Under a very different set of facts, the court in *City of Everett v. Rhodes*, No. 48098-I, 2002 WL 31863477 (Wash. Ct. App. Dec. 23, 2002), held that the "in the presence of" requirement for warrantless misdemeanor arrests by police officers does not include observations made via remote surveillance camera. There an officer was on duty at the Everett police station monitoring a remote surveillance camera covering an area of downtown. The officer's observation of Rhodes apparently smoking crack cocaine was not recorded on videotape because the officer did not know how to use the video equipment. *Id.* at n.1. The court held that the same officer's arrest of Rhodes five days later was invalid because the language "'in the presence of' requires actual physical presence or proximity of an officer." *Id.* at *2.

The results in *Forgie-Buccioni* and *Rhodes* are consistent with the statement in 2 Wayne R. LaFave, et al., *Criminal Procedure* § 3.5(a), at 204 (3d ed. 2007), that pursuant to the "in the presence of" requirement for warrantless misdemeanor arrests by police officers, "the officer's senses need not directly detect the misdemeanor so long as they reveal facts providing the reasonable belief that the offense is *now* occurring."

The foregoing authorities suggest that the "in the presence of" requirement for citizen arrests is lacking when a security guard is not physically present during the commission of a crime but instead views a videotape of the crime being committed (*Forgie-Buccioni*) or watches from a remote location while the crime is taking place (*Rhodes*). Other cases, however, take a broader view of this language.

For example, in *Roynon v. Battin*, 132 P.2d 266, 269 (Cal. Dist. Ct. App. 1942), the court said it was a question of fact for the jury to determine whether a crime was committed in the

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presence of the arresting officer where he viewed the defendants through a telescope at a distance of two and one-half miles. Apparently the court did not view the geographical distance between the officer and the crime as a bar to finding that the crime was committed in the officer's presence. And as a general matter, the court in *State v. Bergeron*, 326 N.W.2d 684 (N.D. 1982), decided that the language "in his presence" appearing in a North Dakota statute authorizing citizen's arrests "should be liberally construed" and that "presence should be determined by whether or not the citizen detected commission of the offense through use of his senses." *Id.* at 686.

While the above cases are not binding on a Wisconsin court, they illustrate that with regard to misdemeanors, your second question does not have a definitive answer because it is unclear whether the "in the presence of" requirement would be satisfied by a security guard replaying the videotape of a crime being committed. Rather, a court deciding this question would likely consider a variety of factors, including the time lapse between the commission of the crime and the guard's viewing of the crime on videotape, as well as the physical proximity of the guard to the crime in progress. Thus, the answer to your second question is not controlled by existing case law but instead hinges on the factors a reviewing court deems important and the relative weight the court accords those factors.

Sincerely,



J.B. Van Hollen
Attorney General

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