Law Enforcement Digest

June 2015

Law enforcement officers: Thank you for your service, protection and sacrifice.

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HONOR ROLL

710th Basic Law Enforcement Academy – December 17, 2014 through April 28, 2015

Best Overall:	Jacob C. McKinney, Bellevue Police Department
Best Academic:	Luke T. O'Brien, Olympia Police Department
Patrol Partner Award:	Derek C. Nielsen, Pierce County Sheriff's Office
Tac Officer:	Trenton Chapel, Mountlake Terrace Police Department
	Shelly Hamel, Renton Police Department

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JUNE 2015 LED TABLE OF CONTENTS

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BRIEF NOTES FROM THE NINTH CIRCUIT COURT OF APPEALS

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BRADY: FAILURE TO DISCLOSE VICTIM'S RECOLLECTION THAT CONTRADICTS PROSECUTION'S THEORY OF THE CASE VIOLATES *BRADY* Comstock v. Humphries, __ F.3d __, 2015 WL 2214647 (May 12, 2015).

A detective routinely monitored transactions at pawn shops for "unusual property." While reviewing these transactions, the detective noticed the sale of a collegiate championship wrestling ring. The detective contacted the ring's owner, Randy Street. Mr. Street told the detective that the ring should be inside a seashell in his apartment (where he usually kept it). The detective told Mr. Street that "the ring had been sold to a local pawn shop." The pawn shop's records and surveillance showed that Stephen Comstock (defendant) sold the ring to the pawn shop.

The prosecution charged the defendant with knowingly possessing stolen property. At trial, Mr. Street testified "that he had never loaned the ring to anyone, it never fell off accidentally, and he only wore it once or twice each month." Mr. Street admitted that "he had misplaced it inside his apartment, [but] he did not recall ever losing it." Mr. Street "also testified that [the defendant], as the maintenance worker, had been in the apartment previously." A jury found the defendant guilty.

Mr. Street then submitted a victim impact statement:

> I am not convinced that my ring was stolen. . . . I can remember a time prior to the ring turning up missing that I took it off for fear of scratching the paint or chrome. I placed it either on the ground or on the air conditioner outside & I don't remember putting it back on. . . . I volunteered this info to [the detective] and [the prosecutor] but it never came up [at] trial.

The defense then moved for a new trial based on newly discovered evidence and a *Brady* violation. The state trial court, the state Supreme Court, and the federal district court found no *Brady* violation. The Ninth Circuit Court of Appeals disagreed.

"A *Brady* violation has three components: (1) the evidence at issue must be favorable to the accused, (2) the evidence must have been suppressed by the State, and (3) the suppression must have been prejudicial." In this case, the Ninth Circuit found all three elements amounting to a *Brady* violation.

First, Mr. Street's statements to the prosecutor and detective that he may have left the ring outside on an air conditioner were favorable to the defendant. Specifically, these recollections "impeached [his] credibility in terms of how he handled his ring, and more importantly, affirmatively cast serious doubt on whether there was a crime in the first place."

Second, Mr. Street's recollections were suppressed by the State. In this case, the prosecution did not argue "that it was unaware of Street's recollections and has instead consistently taken the position that its failure to disclose those recollections was not prejudicial[.]"

Third, the prosecution's failure to disclose Mr. Street's recollection of putting the ring on the air conditioner, and forgetting whether or not he put it back on, was prejudicial. "The suppression of favorable evidence is prejudicial if that evidence was 'material' for *Brady* purposes." To show

materiality, "the defendant need only establish 'a reasonable probability of a different result.'" "A reasonable probability exists if the government's evidentiary suppression undermines confidence in the outcome of the trial."

In this case, the prosecution's failure to disclose Mr. Street's recollection was material. The Ninth Circuit reasoned that this recollection could have impeached Mr. Street's testimony. Additionally, the prosecutor's closing argument heavily relied on Mr. Street's testimony that he never lost his ring. "Given that the State had no direct evidence of [the defendant's] guilt, its suppression of Street's expressed doubts and recollections was especially prejudicial." Consequently, the Ninth Circuit reversed the lower courts and set aside the conviction and sentence.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

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SEARCH AND SEIZURE: POLICE MUST HAVE A FACTUAL, PARTICULARIZED SUSPICISION OF A CRIME TO CONDUCT A *TERRY* STOP State v. Fuentes, __ Wn.2d __, __ P.3d __, 2015 WL 2145820 (May 7, 2015).

In this case, the Washington State Supreme Court reviewed two different investigations involving a *Terry* stop of suspected drug possession and delivery.

In *State v. Sandoz*, an officer had patrolled an apartment complex for four months and could recognize the tenants and their vehicles. The officer "also knew that four of the tenants had convictions for drug-related crimes - either possession or possession with intent to distribute."

While patrolling near this apartment complex one evening, the officer saw a white Jeep that he knew did not belong to the tenants. The vehicle contained three people. The vehicle was also parked illegally. As the officer drove past the Jeep, the driver slumped down "as if to hide from the officer's view[.]" The officer then "parked his marked patrol car about 20 yards away and observed the Jeep for about 15 minutes."

Observing that no one left the vehicle, the officer walked over to the vehicle and asked the driver why he was parked there. "The driver said he was there because his friend called him for a ride." The officer remained by the vehicle.

The officer then saw Steven Sandoz exit the apartment of a tenant who had a conviction for possession of narcotics with intent to distribute. For the past four months, "the officer had seen approximately 60 people coming and going from her apartment but observed none on the evening in question."

The officer observed Sandoz walking "with his head down and his hands in his pockets toward the Jeep." When Sandoz "looked up and saw the officer, [his] eyes got big as he entered the backseat of the Jeep." In response to the officer's question on what he was doing, Sandoz said "that his friend gave him a ride to collect $20 from" the apartment's tenant. "Sandoz was visibly shaking, and his face looked pale and thin." The officer did not believe that this was due "to drug use or to any specific cause."

The officer thought that "Sandoz's story for being at the apartment contradicted the driver's story." The "officer asked Sandoz if he would mind stepping out of the vehicle." "The officer

again asked Sandoz what was going on, and Sandoz said he was there to collect $20 from" the apartment's tenant. Sandoz then "admitted that he had a drug problem and said that he had a crack pipe in his pocket."

The officer then arrested Sandoz for possession of drug paraphernalia. After being read *Miranda* warnings and searched incident to arrest, "Sandoz admitted that he had two small envelopes of cocaine in his underwear." Sandoz was charged with possession of cocaine. Sandoz moved to suppress his statements and the cocaine by arguing "that a seizure occurred when the officer asked [him] to get out of the Jeep and that reasonable suspicion of criminal activity did not support the seizure." The Washington State Supreme Court agreed.

To conduct a *Terry* stop, an officer must have individualized, reasonable suspicion that the subject engaged in criminal activity. In this case, the officer had these facts to support reasonable suspicion that Sandoz was involved in illegal drug activity: "(1) Sandoz's surprise when he saw the officer, (2) the conflicting stories between Sandoz and the driver, (3) Sandoz's pale appearance and shaking, (4) the officer did not recognize the Jeep, and (5) the officer had authority [from the apartment complex's owner] to admonish nonoccupants for loitering under a trespass agreement."

The Supreme Court disagreed that these facts provided the officer reasonable suspicion to ask Sandoz to exit the vehicle and detain him for questioning. First, "Sandoz's surprise at seeing the officer did not suggest criminal behavior." Second, Sandoz's story did not conflict with the driver's story because the "driver said that his friend called him for a ride, and Sandoz said his friend gave him a ride to the apartment to collect $20." Third, "the officer did not attribute Sandoz's pallor or shaking to drugs or to any illicit conduct." Fourth, "the officer did not connect [the fact that he did not recognize the Jeep] with anything [he] observed about Sandoz." Finally, Sandoz's conduct did not amount to "loitering" because "he did not remain idle." Rather, Sandoz appeared to be "an invited guest" of the apartment's tenant. Consequently, the officer did not have reasonable suspicion to ask Sandoz to exit the vehicle, and Sandoz's statements and evidence found on his person should be suppressed.

In *State v. Fuentes*, the Supreme Court reached the opposite conclusion. In that case, officers went to an apartment complex "as part of an apprehension team to look for a wanted person." Within the last year, "police made controlled purchases of methamphetamine from" the apartment's tenant. "Police suspected that [the tenant] was still selling narcotics based on recent interviews with individuals arrested for narcotics-related offenses."

When no one answered the door, "the police left and returned that evening around 10 p.m. to set up surveillance on the apartment." "During two hours of surveillance, police observed approximately 10 people enter and leave the apartment, each person staying inside between 5 and 20 minutes." Based on the officer's training and experience, "this behavior indicated narcotics activity: people arrive, make a purchase, and leave." "This observed behavior especially indicated narcotics activity because of the recent search warrant that uncovered narcotics at this apartment and because of the late hour of the short visits on a weeknight."

During surveillance, the police observed:

> Marisa Fuentes park[ed] her car across the street from the apartment. She walked up to the apartment, entered, stayed for about five minutes, and returned to her car. She opened the trunk of her car and removed a small plastic bag. The bag contained something about the size of a small football. Then Fuentes reentered the apartment, stayed for about five minutes, and returned to her car with a bag that had noticeably less

> content then when she entered the apartment. [Based on what officers observed,] police stopped Fuentes' car on suspicion of narcotics activity. An officer advised Fuentes that he needed to talk with her. For safety reasons, the officer requested that Fuentes come to the police vehicle, which she did. The officer read Fuentes her *Miranda* rights. Fuentes waived those rights and admitted that she had just delivered marijuana to [the tenant's] apartment.

Fuentes was charged with delivery of marijuana. She moved to suppress the marijuana and statements by "arguing that the police lacked reasonable suspicion to justify the *Terry* stop of her vehicle." The Supreme Court disagreed.

The Supreme Court reasoned that the officers had an individualized, reasonable suspicion that Fuentes was involved in criminal activity because:

> Police [had] made controlled buys from [the apartment's tenant] and conducted a search of the apartment 11 months before and found drugs. The officers also testified they had recent information from individuals arrested on drug-related charges that [the tenant] was still dealing drugs. Additionally, officers observed short-stay foot traffic that morning (10 visits between 10 p.m. and midnight) that suggested ongoing drug transactions[.]
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> [I]n addition to short-stay traffic, officers could reasonably infer that Fuentes participated in the ongoing drug transactions: Fuentes entered the apartment briefly, then returned to her car. She then carried a plastic bag into the apartment, and she left with a bag that had noticeably less content. Her stay lasted approximately five minutes. From these observations, officers could form a reasonable suspicion that Fuentes made a delivery at the apartment. Given the context of her short-stay visit to an apartment with known drug use - after the officers observed short - stay traffic consistent with drug transactions - and her delivery, officers could reasonably suspect that Fuentes delivered drugs. Although the bag may have contained innocent content, officers do not need to rule out all possibilities of innocent behavior before they make a stop.

Based on these facts, the Supreme Court found that the officers conducted a proper *Terry* stop and the evidence seized from Fuentes and her statements were admissible.

LED EDITORIAL COMMENT: **A distinction between the *Sandoz* and *Fuentes* cases is that the officers directly observed Fuentes (and her actions in) entering and quickly leaving the apartment of a person with known involvement in illegal narcotics. On the other hand, suspicious behavior by others (such as the Jeep's driver in *Sandoz*) does not necessarily provide reasonable suspicion to detain a third person. Rather, an officer should have other individualized facts (as shown in *Fuentes*) such as how long the person stayed in the apartment, what the person took into the apartment, and what the person took out of the apartment. As always, officers are encouraged to discuss these issues with their agencies' legal advisors.**

MEDICAL MARIJUANA: RCW 69.51A.040 ONLY PROVIDES AN AFFIRMATIVE DEFENSE FOR QUALIFYING PATIENTS AND DOES NOT DECRIMINALIZE THE MEDICAL USE OF MARIJUANA AND DOES NOT INVALIDATE A SEARCH WARRANT BASED ON PROBABLE CAUSE THAT A SUSPECT IS GROWING MARIJUANA State v. Reis, __ Wn.2d __, __ P.3d __, 2015 WL 2145986 (May 7, 2015).

A detective investigated a possible marijuana grow operation in Burien. During his investigation, he observed marijuana plants on William Reis' porch, "heard a distinct humming sound coming from the northwest side of [Reis'] home", and learned that Reis had been previously involved in marijuana grow operations. The detective applied for a search warrant based on this (and other) information that Reis was growing marijuana at his home. A judge approved the search warrant and the subsequent search yielded 37 marijuana plants and 210.72 ounces of cannabis. "Reis moved to suppress the evidence found in his home, asserting that the search warrant was not supported by probable cause" because the 2011 amendments to the Medical Use of Cannabis Act (MUCA) decriminalized possession of medical marijuana. The Washington State Supreme Court disagreed.

The Supreme Court held that under the MUCA, as enacted after the Governor's veto of several sections that would have established a registry of qualifying medical marijuana patients, "the medical use of marijuana is not lawful because compliance with RCW 69.51A.040 is currently impossible." Rather, the MUCA only provides an affirmative defense for qualifying patients to have unlawful possession of marijuana. An "affirmative defense does not undermine probable cause for a search warrant." As such, the search warrant for Reis' residence was supported by probable cause.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

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SEARCH AND SEIZURE: SEARCH INCIDENT TO ARREST EXCEPTION AND INVENTORY SEARCH EXCEPTION TO THE WARRANT REQUIREMENT DID NOT APPLY TO OFFICER SEARCHING A SUSPECT'S SHAVING KIT BAG LOCATED ON A VEHICLE'S SEAT State v. Wisdom, __ Wn. App. __, __ P.3d __, 2015 WL 2405066 (May 19, 2015).

An officer arrested a driver because the vehicle is reported stolen. The driver told the officer that there is methamphetamine on the vehicle's front seat. The officer saw "a black shaving kit bag" on the front seat. The officer also saw a large amount of cash "through the mesh side of the bag." The officer opened the bag and found methamphetamine. The driver moved to suppress this evidence and argued that the search did not meet the search incident to arrest or inventory exceptions to the warrant requirement.

During the suppression hearing, the officer "testified that he opened and searched the black bag pursuant to department policy, and in order to protect against potential liability claims for loss of property." The officer further explained that the bag:

> [A]ppeared to be an item of high value. Which any time there is something of high value it's never left in an impounded vehicle. It's placed into property and then claimed by the rightful owner . . . it also appeared to be a narcotic sales type bag. Which contained a large amount of drugs.

In response to redirect questions about why he did not seek a telephonic warrant, the officer testified "that he did not seek a search warrant because he instead performed an inventory search of the vehicle and collected property during the inventory."

The trial court found that the officer properly search the bag because the driver "no longer had a reasonable expectation of privacy when he informed [the officer] of methamphetamine on the truck's seat." The Court of Appeals, Division III, disagreed and reversed.

First, the Court of Appeals found that the search incident to arrest exception did not apply. Under the Washington constitution, Article I, section 7, an officer may search items in a vehicle incident to arrest when: (1) the search is necessary to preserve officer safety; or (2) the search is necessary to prevent concealment or destruction of the evidence. Under the facts of this case, the officer's search of the black bag was not necessary to protect officer safety or prevent destruction of the evidence because the driver had already been handcuffed.

Second, the Court of Appeals found that the search of the bag did not qualify as an inventory search. When impounding a vehicle, an officer may conduct a limited search to inventory the vehicle's contents. An officer must conduct the inventory search "in good faith for the purposes of: (1) finding, listing, and securing from loss during detention property belonging to a detained person; or (2) protecting police and temporary storage bailees from liability due to dishonest claims of theft." In this case, however, the Court of Appeals found the officer "could have listed the [black] bag as a whole in his inventory and then sough a search warrant to open the bag." Consequently, the Court of Appeals found that the officer unzipping the bag exceeded the scope of an inventory search.

LED EDITORIAL COMMENT: **In this case, the officer may have had reason to believe that the black bag contained not only large amounts of cash, but also methamphetamine. Based on the facts of this case, the majority noted that the officer could have obtained a search warrant to search the bag for methamphetamine. It is unclear whether the same conclusion would be reached if the officer had no reason to believe that the bag contained illegal drugs, but still saw a large amount of cash in the bag that needed to be accounted for before taking the bag into evidence or safekeeping.**

If officers have a reason to believe, based on articulable facts, that an item contains contraband (and there are no officer safety concerns with waiting for a warrant), the prudent approach is to apply for a search warrant. As always, officers are encouraged to discuss these issues with their agencies' legal advisors.

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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