Law Enforcement Digest

May 2015

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

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HONOR ROLL

710th Basic Law Enforcement Academy – November 18, 2014 through April 1, 2015

Best Overall:	Michael A. Boone, WA State Gambling Commission
Best Academic:	Michael A. Boone, WA State Gambling Commission
Patrol Partner Award:	Michael A. Boone, WA State Gambling Commission
Tac Officer:	Steve Grossfeld, Seattle Police Department
	Karim Boukabou, Washington State Patrol

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

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SEARCH AND SEIZURE: OFFICER CANNOT EXTEND A COMPLETED TRAFFIC STOP FOR A DOG SNIFF WITHOUT REASONABLE SUSPICION OF ANOTHER CRIME
Rodriguez v. U.S., __ U.S. __, __ S.Ct. __, 2015 WL 1780927 (April 21, 2015).

A K-9 officer observed a vehicle swerve onto the highway's shoulder and back onto the road. Driving on the shoulder is illegal under Nebraska law. Based on his observations, the officer stopped the vehicle for driving on the shoulder. The officer ran a records check on the driver's license and registration, and then wrote a warning ticket for driving on the shoulder. The officer returned the driver's documents.

At this point, the officer asked the driver for permission to walk the narcotics canine around the vehicle. The driver refused. The K-9 officer then detained the driver for a second officer to arrive at the scene. After the second officer arrived, the K-9 officer walked the narcotics canine around the vehicle. The canine alerted to the presence of drugs. A subsequent search found methamphetamine in the vehicle. Seven or eight minutes passed from the time the K-9 officer issued the written warning to when the canine alerted to narcotics.

The driver then moved to suppress the canine alert by arguing that the K-9 officer impermissibly extended the detention without reasonable suspicion. The United States Supreme Court agreed.

An officer may stop a vehicle to investigate a traffic infraction. During the stop, the "officer's mission includes ordinary inquiries incident to [the traffic] stop . . . [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."

"Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate [that] purpose." Consequently, "[a]uthority for the seizure ends when tasks tied to the traffic infraction are - or reasonably should have been - completed." "An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop[;] [but,] he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."

In this case, extending the traffic stop to conduct a narcotics canine sniff was beyond the stop's mission to issue the traffic infraction and preserve officer safety.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

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SEARCH AND SEIZURE: FACTS IN SEARCH WARRANT AFFIDAVIT DESCRIBING THE SUSPECT DRIVING A STOLEN VEHICLE, THE NON-INCRIMINATING AND BULKY STOLEN ITEMS IN THE STOLEN VEHICLE, AND THE SUSPECT'S RESIDENCE ESTABLISHED A REASONABLE NEXUS BETWEEN THE STOLEN PROPERTY AND THE SUSPECT'S RESIDENCE State v. Dunn, __ Wn. App. __, __ P.3d __, 2015 WL 1590471 (April 9, 2015).

An officer responded to a report of an abandoned pickup truck on private property. The officer spoke to the property owner. The property owner stated that he saw Steven Long driving the truck the day before with an ATV and camouflage packs in the bed of the truck. The property owner confirmed that the truck abandoned on his property was the same truck he saw Mr. Long driving the day before. The property owner had known Mr. Long for six or seven years.

The officer contacted the truck's registered owner. The registered owner confirmed that he owned the pickup truck and stated he last saw it a few days before. The registered owner also reported a burglary at his cabin, and reported that his ATVs, generators, rifle, and camouflage packs were missing.

Based on these witness statements, the officer submitted an affidavit for a search warrant for Mr. Long's residence for the stolen property. A judge issued the search warrant. During the search, the officers found the stolen property and methamphetamine.

Mr. Long and Ms. Casey Dunn (who also lived at the residence) were criminally charged. They moved to suppress the search by arguing "that the warrant was not supported by probable cause because the affidavit failed to establish a reasonable nexus between the criminal activity and the place to be searched." The Court of Appeals, Division III, disagreed.

A search warrant must be based on probable cause. "Probable cause . . . requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." In this case, the Court of Appeals held that the officer's affidavit describing Mr. Long as driving the stolen truck with the bulky and non-incriminating stolen property in the truck's bed established a reasonable nexus between the stolen property and Mr. Long's residence.

The Court of Appeals reasoned that "it may be proper to infer that stolen property is at a perpetrator's residence, especially if the property is bulky, and if the perpetrator had an opportunity to return home before his apprehension by police." In this case, "it was reasonable to conclude that the missing items would likely be found at Mr. Long's residence[.]" The officer's search warrant affidavit stated that: (1) "Mr. Long was seen in possession of a truck carrying an ATV;" (2) this truck belonged to the registered owner; (3) the ATV with the camouflage packs matched the registered owner's description of his missing property; and (4) witnesses saw Mr. Long driving the truck with the missing ATV on the road to his residence." The Court of Appeals also noted "the items stolen were not inherently incriminating in the same way as narcotics, and many of the items were bulky and, therefore, likely to be hidden inside a

building." Consequently, the affidavit established a reasonable nexus between Mr. Long's residence and the stolen property (i.e., the stolen property was likely to be found at his residence).

RIGHT TO REMAIN SILENT: IN RESPONSE TO OFFICERS ASKING A 15-YEAR OLD IN-CUSTODY SUSPECT IF HE WAS WILLING TO TALK, SUSPECT SHAKING HIS HEAD IN THE NEGATIVE WAS UNEQUIVOCAL INVOCATION OF HIS RIGHT TO REMAIN SILENT State v. I.B., __ Wn. App. __, __ P.3d __, 2015 WL 1944974 (April 28, 2015).

Officers arrest a 15-year old suspect for residential burglary and take him to a police station for questioning. The two officers read the suspect his *Miranda* rights and "special warnings for juveniles." One officer asked the suspect "if he was willing to talk with police about 'some things, why we were here.'" The suspect shook his head from side to side. One officer, in his experience, understood the gesture to mean "no," but since the suspect did not say "no," the officer "didn't know what was going through his mind." The other officer understood the suspect's "head shake to mean 'no'."

At this point, the officers leave the room "to discuss whether they should stop their questioning." The officers "decided that [the suspect's] head shaking did not sufficiently indicate his desire for the interview to cease." The officers continued questioning the suspect about another burglary and the suspect made incriminating statements. The trial court suppressed these statements based on the suspect's head shake as an unequivocal assertion of his right to remain silent. The Court of Appeals, Division III, agreed.

"Once a suspect invokes his right to remain silent, police may not continue the interrogation or make repeated efforts to wear down the suspect." "A suspect need not verbally invoke his right to remain silent." "The test as to whether a suspect's invocation of his right to remain silent was unequivocal is an objective one, asking whether a reasonable police officer in the circumstances would understand the statement to be an invocation of *Miranda* rights."

In this case, the suspect shaking his head in the negative was not ambiguous. Both of the interviewing officers understood the suspect's head shake to mean "no." Additionally, the suspect's negative head shake was in direct response to the officer's question about the right to remain silent (i.e., did the suspect want "to talk about why we were here"?). Consequently, the suspect's "affirmative conduct [in shaking his head in the negative] unambiguously signaled" that the suspect wanted the questioning to stop. "At that point, police were required to honor his request and immediately cease their questions."

SEARCH AND SEIZURE: VEHICLE CROSSING THE FOG LINE THREE TIMES DID NOT PROVIDE REASONABLE SUSPICION OF ILLEGAL ACTIVITY TO JUSTIFY OFFICER STOPPING THE VEHICLE State v. Jones, __ Wn. App. __, __ P.3d __, 2015 WL 1540421 (April 6, 2015).

While on traffic patrol, an officer observed a vehicle "pass over the fog line approximately an inch three times, each time correcting its position with a slow drift." At the time, no other vehicles were on the road. The officer stopped the vehicle and informed the driver "that she had stopped his vehicle due to erratic lane travel." During the stop, a second officer arrived for assistance. The second officer observed a rifle in the vehicle. The officers learned that the driver had a felony conviction and was in unlawful possession of a firearm. The State charged the driver with unlawful possession of a firearm in the second degree. The driver moved to suppress the stop by arguing that the officer did not have reasonable suspicion to stop his vehicle. The Court of Appeals, Division I, agreed.

"An officer may make a warrantless investigative stop based on a reasonable, articulable suspicion of unlawful conduct by a driver." In this case, the Court of Appeals found that the vehicle crossing the fog line three times did not provide reasonable suspicion that the driver violated RCW 46.61.140(1). That statute provides:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

The Court of Appeals, Division I, uses "a totality of the circumstances analysis" to determine whether a driver violated this statute. This analysis considers "factors such as other traffic present and the danger posed to other vehicles." Consequently, a vehicle's "brief incursion" over the fog line does not violate this statute.

The Court of Appeals also distinguished the situation from the driver crossing the fog line three times in State v. McLean, 178 Wn. App. 236, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026, 320 P.3d 719 (2014). In McLean, the officer stopped the vehicle for crossing the fog line three times based on "his training and experience in identifying impaired drivers and the inferences he drew from his personal observations." In that case, the Court of Appeals, Division II, found "that because of the articulable fact of this observation and the [officer's] training and experience identifying impaired drivers, it was rational for [the officer] to infer that there was a substantial possibility that [the driver] was driving under the influence, which justified a warrantless stop."

In contrast, the officer in this case did not testify about her "training and experience in identifying impaired drivers", nor did she "testify that she suspected [the driver] was impaired or that she stopped him for this reason." Consequently, the officer lacked reasonable suspicion that the driver violated RCW 46.61.140(1) or was driving under the influence.

SEARCH AND SEIZURE: DETECTIVE USING AN ENHANCED PEER TO PEER FILE SHARING SOFTWARE PROGRAM TO REMOTELY ACCESS SHARED FILES ON A SUSPECT'S COMPUTER DID NOT VIOLATE THE FEDERAL OR STATE CONSTITUTIONS BECAUSE THE SUSPECT DID NOT HAVE A CONSTITUTIONALLY PROTECTED PRIVACY RIGHT IN THE COMPUTER FILES HE SHARED WITH THE PUBLIC
State v. Peppin, __ Wn. App. __, __ P.3d __, 2015 WL 1592442 (April 9, 2015).

A detective used a peer to peer sharing software program to conduct an online investigation of persons possessing and sharing child pornography. This is how the peer to peer file sharing program works:

> [P]eer to peer file sharing is a method of Internet communication that allows users to share digital files. User computers link together to form a network; the network allows direct transfer of shared files from one user to another. Peer to peer software applications allow users to set up and share files on the network with others using compatible peer to peer software.
>
> To gain access to shared files, a user must first download peer to peer software, which can be found on the Internet. Then, the user opens the peer to peer software on his or

her computer and conducts a keyword search for files that are currently being shared on the network. The results are displayed and the user selects a file for download. The downloaded file is transferred through a direct connection between the computer wishing to share the file and the user's computer requesting the file. The Gnutella network gives users the ability to see a list of all files that are available for sharing on a particular computer.

For example, a person interested in obtaining child pornographic images opens the peer to peer software application on his or her computer and conducts a file search using keyword terms such as "preteen sex." The search is sent out over the network of computers to those using compatible peer to peer software. The results of the search are returned and displayed on the user's computer. The user selects the file he or she wishes to download. The file is then downloaded directly from the host computer onto the user's computer. The downloaded file is stored on the user's computer until moved or deleted.

According to a defense expert, the software used by law enforcement is more sophisticated than that available to the general public. "For instance, law enforcement software can search all user files on the Gnutella network, regardless of what client interface is being used." "Also, the software provides law enforcement with a computer's IP address and gives the ability to identify files by hash value."

In this case, the detective used the software to "search[] the Gnutella network for 'pthc,' the commonly used term for preteen hard core Internet pornography." As a result of the search, and subsequent search warrant to search the host computer for child pornography, "a complete forensic investigation uncovered over 100 videos of what appeared to be minors engaged in sexually explicit conduct" on the suspect's computer.

The suspect "moved to suppress the computer files downloaded by [the detective] during his Internet search" with the peer to peer sharing software. The suspect argued that the warrantless use of this software violated his federal and state constitutional rights. The suspect also argued that law enforcement's use of the enhanced software was akin to using an "infrared thermal device" on a home. The Court of Appeals, Division III, disagreed.

First, under the Washington state constitution Article I, section 7, law enforcement officers cannot intrude upon a person's private affairs without authority of law. In this case, the Court of Appeals held "that a person's private affairs are not disturbed when law enforcement uses peer to peer software to view files that the person voluntarily shares with the public on his or her computer."

The Court reasoned that since the suspect "voluntarily offered public access to the computer files" on his computer, the detective using the peer to peer file sharing software did not intrude upon his private affairs. "The inherent nature of peer to peer software is the public sharing of digital computer files." "[I]ndividuals using file sharing software cannot expect a privacy interest in files they hold open to the public."

Second, the Court rejected the argument that law enforcement's enhanced software to search the peer-to-peer file sharing systems is the same as law enforcement using an infrared thermal device on a home. The Court reasoned "the peer to peer software was not an enhancement device that allowed law enforcement to view what was hidden to the public." "Law enforcement simply used a more efficient method for finding this publicly shared information." "The government's software allowed them to efficiently view what was already exposed to the public."

LED EDITORIAL COMMENT: **In this case, the Court of Appeals relied on the fact that the suspect voluntarily made his computer files open to the public. This is not a case where law enforcement officers accessed files that were not otherwise open to the public.**

SEARCH AND SEIZURE: WHEN A PAT-DOWN SEARCH OF A RUN-AWAY JUVENILE DOES NOT INDICATE THAT HE HAS ANY WEAPONS, OFFICER CONTINUING TO SEARCH THE INSIDE OF THE JUVENILE'S POCKETS IS AN UNLAWFUL SEARCH State v. A.A., __ Wn. App. __, __ P.3d __, 2015 WL 1966306 (April 30, 2015).

A mother called police to report that her 15-year-old son had run away from home. The mother told the responding officer that she thought her son's probation officer would issue a warrant for her son's arrest. The mother asked the responding officer to take her son to a secure facility for juveniles if the police found him.

The responding officer then found the juvenile. The officer stopped the juvenile and intended to transport him to the secure juvenile crisis facility. The officer knew that the facility had a policy of searching all juveniles before admitting them. The officer then searched the juvenile and found illegal drugs in his pockets. The State charged the juvenile with two counts of unlawful possession of a controlled substance.

The juvenile moved to suppress the evidence found in his pockets. The juvenile argued that while "the officer could lawfully conduct a pat-down search for weapons" before taking him to the juvenile crisis facility, the officer searching "his pockets exceeded the scope of a reasonable pat down for weapons." The Court of Appeals, Division III, agreed.

The search at issue occurred under the Washington Family Reconciliation Act. That law "authorizes a police officer to take a juvenile into custody if a law enforcement agency has been contacted by the parent of the child that the child is absent from parental custody without consent." This law "does not contain provisions specifying how, when, or to what extent searches may be conducted."

The Court of Appeals reasoned that this law authorizes an officer to pat-down the juvenile (taken into protective custody) for weapons to preserve officer safety. However, if the initial pat-down (or other facts) do not show that there is additional danger to the officer, the juvenile, or others, this law does not provide authority for a more extensive search:

> [I]n the context of a warrantless search stemming from noncriminal conduct, the search must be limited in scope by the circumstances of the particular encounter and "strictly" relevant to the community caretaking function.

In this case, since the initial pat-down search did not indicate that the juvenile had weapons, the community caretaking exception justifying the pat-down ended. The juvenile did not "exhibit signs of dangerousness to himself or others." As such, there was no justification to search the juvenile's pockets under the community caretaking exception to the warrant requirement.

LED EDITORIAL COMMENT: **In this case, the officer did not arrest the juvenile for a crime, and there were no facts suggesting that the juvenile had a dangerous weapon, or posed a danger to himself or others. As such, this was not a search incident to arrest that would authorize the officer to search the juvenile's pockets. However, as noted by the Court of Appeals, if there are facts suggesting that the juvenile poses a danger to himself, the officer, or others (e.g., "exhibited signs of acute mental instability"), a more**

extensive search (e.g., searching the pockets) may be justified under the community caretaking exception to the warrant requirement. 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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