WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

January 2016

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

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CIVIL RIGHTS LAWSUIT: NO QUALIFIED IMMUNITY FOR OFFICERS WHO BOOKED ARRESTEE ON FELONY ARREST WARRANT WITHOUT FURTHER INQUIRY WHEN: (1) THERE WERE SIGNIFCANT DISCREPANCIES BETWEEN THE WARRANT'S BIOMETRIC IDENTIFIERS AND THE ARRESTEE'S PHYSICAL APPEARANCE; AND (2) THE ARRESTEE PROTESTED THAT HE WAS NOT THE PERSON NAMED IN THE ARREST WARRANT. Garcia v. County of Riverside, __ F.3d __, 2016 WL 424707 (February 3, 2016).

Mario A. Garcia was arrested for driving under the influence and booked into the county jail. During booking, jail staff electronically scanned his fingerprints. Jail staff also queried the state's Wanted Persons System with "Mario Garcia." The search yielded a felony arrest warrant for a "Mario L. Garcia." The arrest warrant included the subject's first and last name, date of birth, height, and weight. While Garcia's first and last name matched the warrant, he claimed

that his middle name did not match, his height and weight differed significantly from the warrant's subject (Garia is 5'10" and 170 pounds while the warrant's subject was listed as 5'1" and 130 pounds), and his other biometric data (such as fingerprints) differed from the warrant's subject. Garcia told the officers that he was not the same person listed in the felony warrant.

Garcia sued under 42 U.S.C. § 1983 [Section 1983] and claimed that the jail's policy to ignore prisoner's complaints that they are not the person identified in the warrant and relying on outside agency records (rather than independently verifying that the person is the subject of the warrant) violated his constitutional Due Process rights. The federal district court found that the officers did not have qualified immunity. The Ninth Circuit Court of Appeals agreed.

In a Section 1983 lawsuit, an officer has qualified immunity if: (1) there was no constitutional violation; or (2) the constitutional right was not clearly established at the time of the alleged violation.

In terms of a constitutional violation, Garcia alleged that the officers' conduct violated his Due Process rights. In a Section 1983 lawsuit involving mistaken incarceration, the plaintiff must show: "(1) the circumstances indicated to the [officers or jail staff] that further investigation was warranted, or (2) the [officers or jail staff] denied the plaintiff access to the courts for an extended period of time." In this case, Garcia "must allege that further investigation was warranted based on the facts of his detention."

The Ninth Circuit found that Garcia alleged sufficient facts that the officers should have conducted further investigation. The Ninth Circuit reasoned:

> Although Garcia's arrest for driving under the influence was valid, the warrant on which he was later held matched only his first and last name and date of birth. Garcia is nine inches taller and forty pounds heavier than the warrant subject. Even a cursory comparison of Garcia to the warrant subject should have led officers to question whether the person described in the warrant was Garcia. Information that raised questions about Garcia's identity should have prompted [the officers] to investigate more deliberately.
> . . .
> [A]n obvious physical discrepancy between a warrant subject and a booked individual, such as a nine-inch difference in height, accompanied by a detainee's complaints of misidentification, should prompt officers to engage in readily available and resource-efficient identity checks, such as fingerprint comparison, to ensure that they are not detaining the wrong person.

The Ninth Circuit further found that Garcia's Due Process right was clearly established at the time of the alleged violation. Accordingly, the Ninth Circuit affirmed the district court's denial of qualified immunity for the officers.

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WASHINGTON STATE COURT OF APPEALS

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PRIVACY ACT: DISTRICT COURT HAS AUTHORITY TO AUTHORIZE INTERCEPTION AND RECORDING OF TELEPHONE CONVERSATION. State v. Bliss, __ Wn. App. __, __ P.3d __, 2015 WL 9295295 (December 22, 2015).

A sergeant with a sheriff's department received a report from a minor girl that David Bliss had sexually abused her. The sergeant them applied to his county's District Court for an authorization under the Privacy Act, RCW 9.73.090(2), to intercept and record a telephone conversation between the minor girl and Bliss. The District Court granted the application and authorized the recording of telephonic conversations between the minor girl and Bliss from July 30, 2013 and August 6, 2013. During that period, the minor girl called Bliss from the sheriff's department. "During the recorded call, Bliss admitted to sexually abusing [the minor girl] when [she] was a small child." Bliss was then arrested and charged with child rape and incest.

Bliss moved to suppress the recorded statement before his trial and argued that the District Court did not have authority to authorize recording of telephonic conversations under the Privacy Act. The trial court agreed and granted the motion to suppress. The Court of Appeals, Division Two, disagreed.

In general, Washington's Privacy Act prohibits recording private conversations absent two-party consent. Under RCW 9.73.050, private conversations recorded in violation of the Privacy Act are inadmissible in court. An exception to this rule is when a judge or magistrate authorizes the interception and recording of a telephone conversation pursuant to RCW 9.73.090(2). The Court of Appeals held, based on the statute's plain language and reading the statute as a whole, that District Court judges have authority to authorize interception and recording of telephone conversations under RCW 9.73.090(2). Accordingly, the Court of Appeals reversed the trial court's suppression ruling and remanded the case for further proceedings.

PRIVACY ACT: TRIAL COURT ADMITTING INTO EVIDENCE A RECORDING OF A VOICEMAIL FROM AN INADVERTANT POCKET DIAL WAS HARMLESS ERROR. State v. Sinclair, __ Wn. App. __, __ P.3d __, 2016 WL 393719 (January 27, 2016).

Alan Sinclair was home alone with his minor granddaughter. Sinclair kissed his granddaughter "tongue to tongue." During the episode, "Sinclair unintentionally dialed the girl's mother with his cell phone." The call went to voicemail and recorded Sinclair saying, "I love that tongue . . . I don't know if you love mine." The voicemail also record "Sinclair making veiled threats that his dead ancestors would inflict physical injury on the girl for not being nice." After the mother heard the voicemail, the prosecution filed criminal charges against Sinclair and a jury found him guilty.

Before trial, Sinclair moved to suppress the voicemail as being recorded in violation of the Privacy Act without his consent. The trial court denied the motion "concluding the privacy act did not apply because of the absence of any unlawful act by anybody." The Court of Appeals affirmed the trial court by reasoning that any error in denying the suppression motion was harmless. Specifically, the granddaughter's testimony was corroborated by photographs and video seized from Sinclair's computer. Accordingly, there is no reasonable probability that suppressing the voicemail recording would have resulted in the jury reaching a different verdict.

LED EDITORIAL NOTE: **The Court of Appeals did not address whether or not a voicemail (resulting from an inadvertent pocket dial) is inadmissible under the Privacy Act. In general, a recording obtained in violation of the Privacy Act is inadmissible in court. The Court of Appeals noted that the scenario of an unintended voicemail raises "interesting and novel" issues such as whether the conversation was private, whether an individual recorded it, and whether a person may incur criminal liability for an unintentional recording. However, the Court of Appeals left these issues to be decided for another day. As always, officers are encouraged to discuss these issues with their agencies' legal advisors and local prosecutors.**

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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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