Law Enforcement Digest

October 2016

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

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HONOR ROLL

738TH Basic Law Enforcement Academy - July 18, 2016 to November 22, 2016

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Best Academic:	Deputy Matthew Houghtaling, Snohomish County SO
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	Officer Paul Evers, Olympia PD

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WASHINGTON STATE SUPREME COURT

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CIVIL LIABILITY: COUNTY NOT SUBJECT TO STRICT LIABILITY FOR POLICE DOG BITING ANOTHER OFFICER DURING A BURGLARY INVESTIGATION.
Finch v. Thurston County, __ Wn.2d __, 381 P.3d 46, (October 13, 2016).

A police officer responded to a burglary call. The officer requested a canine unit to assist with searching the building for the suspected burglar. A canine deputy with the county sheriff's office responded to the call with a police dog. The officers decided that the police officer would accompany the deputy and police dog into the brewery.

After entering the building, the deputy unleashed the police dog to search the brewery. The police dog located the room where the suspect was hiding. The deputy called the police dog back saying "here, here, here." When the police dog returned to the deputy, the dog bit the officer. The deputy had to pull the police dog off of the officer. The officer underwent surgery for his injuries.

The officer sued the county for his injuries from the dog bite. The officer argued that the county was strictly liable for the dog bite under RCW 16.08.040. That statute provides that dog owners are strictly liable for dog bites. However, the statute has an exception for "the lawful application of a police dog." RCW 4.24.410(1)(a) defines "police dog" as " a dog used by a law enforcement agency specially trained for law enforcement work and under the control of a dog handler."

The Washington State Supreme Court found that the "lawful application of a police dog" exception applied to this situation, and the county was not strictly liable for the police dog biting the officer. The Supreme Court reasoned:

> In this case, the trained police dog . . . was on duty and was dispatched to the scene to be used for a specific purpose: to perform a building search for a suspect. At this point, [the police dog] had been lawfully applied for this particular situation. Although [the police dog] bit someone who was not a "suspect" while he was lawfully applied, the county is not strictly liable for those injuries.

While RCW 16.08.040's strict liability provision does not apply to lawful applications of police dogs, the Supreme Court noted that a plaintiff bitten by a police dog may pursue "other causes of actions against municipalities, such as negligence, civil rights violations, or assault, along with or in lieu of a strict liability claim." For example, "there could be situations where municipalities were negligent in adequately training or certifying a police dog for use in the field."

As a result, the Supreme Court affirmed dismissal of the lawsuit.

SUFFICIENCY OF EVIDENCE: JUVENILE'S STATEMENTS TO A COUNSELOR AND SHERIFF'S DEPUTY THAT HE INTENDED TO KILL CLASSMATES WAS A TRUE THREAT AND CONSTITUTED FELONY HARASSMENT.
State v. Trey M., __ Wn.2d __, __ P.3d __, 2016 WL 6330476 (October 27, 2016).

Trey M., a high school student, regularly attended therapy sessions. During a therapy session, Trey told his counselor:

> Trey was upset because three boys had teased him at school. Trey [said] that he thought about taking a gun to school and shooting the boys. He also said he wanted to kill them and for them to know the pain that he felt. He described a specific plan to shoot the three boys and then himself. First, he would get a gun from his grandfather's gun safe and shoot one boy at the boy's house before school. He would then go to the school and shoot the other two boys and end by shooting himself. He [said] that if he couldn't get access to firearms, he would use bombs against the boys.

During this session, the counselor observed that "Trey was angry, gesturing, short in his speech, and raising his voice at the time." The counselor reported Trey's threats to law enforcement.

A sheriff's deputy interviewed Trey. During the interview, Trey "methodically and without emotion" told the deputy:

> [H]e had thought about and was thinking about killing other students at the [high school]. . . . He indicated to [the deputy] that he would either find the key to the gun cabinet or he would use an ax and break open the door to the gun cabinet. . . . He would then take the 9 millimeter pistol of his grandpa's, and he would go to his friend's house who lives in the near area and kill him first. He would then ride the bus [to the high school] like normal. He would then wait at school until the other students were at lunch or everyone was in the cafeteria because that's when . . . there would be the gathering of the individuals he wanted to shoot, at which point he said that he would shoot them and then he would shoot himself.

The prosecution charged Trey with three counts of felony harassment. The students (who Trey intended to kill) testified that they were scared after learning they were on Trey's "hit list." Trey was convicted on all counts.

Trey appealed his convictions and argued (in part): (1) his statements were not "true threats" under a reasonable speaker standard; and (2) the prosecution presented insufficient evidence of felony harassment. The Washington State Supreme Court disagreed.

First, the Supreme Court held that Trey's statements constituted true threats under a reasonable speaker standard because: (1) Trey's counselor was concerned that his demeanor changed when discussing his plan to kill his classmates; (2) Trey had a detailed plan to kill the classmates who had teased him; (3) Trey was upset about being bullied and suspended from school; (4) Trey failed to recognize that killing his classmates is wrong; (5) Trey repeated the plan to the sheriff's deputy; and (6) Trey had no misgivings about his plan. Given this context, "a reasonable speaker in Trey's place would foresee that [these] statements concerning his plan to kill [his classmates] would be interpreted by a listener as a serious expression of intention to inflict bodily harm."

Second, the Supreme Court found that the prosecution presented sufficient evidence to support the felony harassment convictions. Under the felony harassment statute, RCW 9A.46.020, the prosecution must present evidence:

> [T]hat the perpetrator knowingly threaten to inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury; the person threatened must find out about the threat although the perpetrator need not know nor should know that the threat will be communicated to the victim; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out.

In this case, the Supreme Court found that the prosecution presented sufficient evidence that the classmates had a reasonable fear that Trey would carry out his threats because: (1) the targeted classmates testified that they were scared when they heard they were on Trey's "hit list;" and (2) the classmates had heard about the threats before they learned that Trey was in custody.

As a result, the Supreme Court affirmed the convictions.

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WASHINGTON STATE COURT OF APPEALS

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SUFFICIENCY OF EVIDENCE: A RIDING LAWNMOWER IS NOT A "MOTOR VEHICLE" UNDER THE THEFT OF A MOTOR VEHICLE STATUTE. State v. Barnes, __ Wn. App. __, 382 P.3d 729 (October 6, 2016).

Joshua Barnes attempted to steal a riding lawnmower. The prosecution charged Barnes with theft of a motor vehicle. Before trial, Barnes moved to dismiss the charge based on insufficient evidence. Barnes argued that a riding lawnmower is not a "motor vehicle" for the purposes of the theft of a motor vehicle statute. The trial court granted the motion to dismiss. The prosecution appealed. The Court of Appeals agreed with the trial court.

The theft of a motor vehicle statute, RCW 9A.56.065, provides:

> (1) A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.

The Court of Appeals reasoned that a riding lawnmower is not a vehicle for the purposes of that statute because:

> The Washington Legislature's findings adopted when enacting RCW 9A.56.065 show that the legislature did not consider a riding lawnmower to be a motor vehicle for purposes of the theft statute. The legislature adopted the 2007 statute because of a rash of automobile thefts and because of the importance of a car in our mobile society. A riding lawnmower does not constitute essential family transportation. Purchase of the lawnmower is not a huge investment. . . . The statute's findings interchangeably used the nouns "auto," "automobile," "motor vehicle," "car," and "vehicle," suggesting that the legislature only intended to encompass automobiles, or at least transportation designed for public roads.

As a result, the Court of Appeals affirmed dismissal of the theft of a motor vehicle charge.

SEARCH AND SEIZURE: OFFICERS WAITING SIX TO NINE SECONDS BETWEEN "KNOCK AND ANNOUCE" AND FORCED ENTRY INTO A HOUSE TO EXECUTE A SEARCH WARRANT VIOLATED THE "KNOCK AND ANNOUNCE" RULE BECAUSE IT WAS REASONABLE TO EXPECT THE RESIDENTS TO BE ASLEEP IN THE EARLY MORNING AND UNABLE TO ANSWER THE DOOR WITHIN SIX SECONDS.
State v. Ortiz, __ Wn. App. __, __ P.3d __, 2016 WL 5947204 (October 13, 2016).

An officer obtained a warrant to search a house for marijuana plants. At approximately 6:47 a.m., the officers arrived at the house to execute the warrant. The officers knocked on the door three times and waited approximately six to nine seconds before breaching the front door. During the warrant execution, the officers found 41 marijuana plants. The prosecution charged the defendant with one count of manufacture of a controlled substance, and one count of involving a minor in an unlawful controlled substance transaction.

During trial, the officer who executed the warrant testified that, given the early hour, it was not a surprise that the residents were unable to get up in time to open the front door within six to nine seconds. The jury found the defendant guilty. The defendant then appealed and argued that his attorney provided ineffective assistance of counsel by not moving to suppress the evidence based on the officers' failure to comply with the knock and announce rule. The Court of Appeals, Division Three, agreed that the officers did not comply with the knock and announce rule, and the warrant execution violated the U.S. Constitution's Fourth Amendment, the Washington State Constitution's Article I, section 7, and RCW 10.31.040.

The Fourth Amendment and Article I, section 7 require that officers act reasonably when executing search warrants. When executing a search warrant, the knock and announce rule requires "that a nonconsensual entry by the police be preceded by an announcement of identity and purpose on the part of the officers." RCW 10.31.040 codifies the knock and announce rule and provides:

> To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his or her office and purpose, he or she be refused admittance.

In practice, "[t]o comply with the statute, the police must, prior to a nonconsensual entry, announce their identity, demand admittance, announce the purpose of their demand, and be explicitly or implicitly denied admittance." Officers must strictly comply with the knock and announce rule unless: (1) exigent circumstances exist; or (2) compliance would be futile.

Whether an officer waited a reasonable period of time "is evaluated in light of the purposes of the rule, which are: (1) reduction of potential violence to both occupants and police arising from an unannounced entry, (2) prevention of unnecessary property damage, and (3) protection of an occupant's right to privacy."

In this case, the Court of Appeals found that the officers did not comply with the knock and announce rule, and that neither exception applied to the situation, because: (1) "due to the early hour of the search, the [residents] were foreseeably asleep"; (2) there was no evidence to suggest the residents were awake (e.g., hearing noise from a television); (3) six to nine seconds is not a reasonable amount of time for sleeping residents to answer the door, and the officers could not infer that the residents denied admittance; and (4) the forced entry caused property damage.

In short, the Court of Appeals found that the defendant's lawyer provided ineffective assistance of counsel by not challenging the search warrant execution based on a knock and announce rule violation. The Court of Appeals reversed the convictions and remanded to the trial court with instructions to suppress the evidence.

SUFFICIENCY OF EVIDENCE: DEFENDANT USING A SPY APPLICATION TO ACCESS DATA ON HIS GIRLFRIEND'S CELL PHONE AND RECORD FROM THE CELL PHONE'S MICROPHONE CONSTITUTED COMPUTER TRESPASS AND RECORDING PRIVATE COMMUNICATIONS.
State v. Novick, __ Wn. App. __, __ P.3d __, 2016 WL 6216209 (October 25, 2016).

David Novick dated Lisa Maunu. Novick purchased a new cell phone for Maunu. Without Manu's knowledge, Novick installed "Mobile Spy" on the cell phone. The Mobile Spy application "allowed a person to log onto the Mobile Spy website and monitor the phone on which the application was installed. From the Mobile Spy website, a user could access all the information stored on the monitored phone, including text messages, call logs, and e-mails." The Mobile Spy application also "allowed a user to activate the phone's microphone and recording feature and record audio into a file that could then be downloaded from the website."

A few months later, Maunu contacted Novick's employer, Kaiser Permanente, and expressed concerns that Novick had accessed her medical records. A forensic review was conducted on Novick's work computer. That review "found a pattern of Novick accessing websites associated with Mobile Spy from Novick's computer account at Kaiser." The review also found that "Novick had downloaded over 500 audio files from Mobile Spy, searched for GPS (global positioning system) locations, and searched for particular telephone numbers."

The prosecution charged Novick with first degree computer trespass and recording private communications. The jury found Novick guilty. Novick appealed the verdict and argued that insufficient evidence supported the convictions. The Court of Appeals, Division Two, disagreed.

Under former RCW 9A.52.110, a person commits first degree computer trespass when he/she "intentionally gains access without authorization to a computer system or electronic database of another and the access is made with the intent to commit another crime." Here, the other crime was recording private conversations in violation of the Privacy Act, chapter 9.73 RCW. Under RCW 9.73.030, "[a] person commits the crime of recording private communications when he intercepts or records private communications transmitted by any device designed to record and/or transmit said communications."

In this case, the Court of Appeals found that sufficient evidence supported the first degree computer trespass and recording private communications convictions:

> The forensic review of Novick's computer activity revealed substantial circumstantial evidence that Novick sent the commands. [The forensic reviewer] testified that "every bit of information" confirmed that in order to activate the surround recording feature of the Mobile Spy program, a user must visit the Mobile Spy website and send a command through the program's live control panel. And the computer records showed that Novick visited the live control panel on Mobile Spy's website and subsequently downloaded audio files.

As a result, the Court of Appeals affirmed the convictions.

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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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