
APRIL 2019
LAW ENFORCEMENT
DIGEST
CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

LAW ENFORCEMENT ONLINE TRAINING DIGEST

Welcome to the April 2019 **Law Enforcement Digest Online Training**! This LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select court rulings from the month of the edition (ex – this February training covers the cases issued in April 2019) are summarized briefly, arranged by topic, with emphasis placed on the practical application of legal changes to law enforcement practices.

Each cited case includes a hyperlinked title for those who wish to read the court's full opinion, as well as references to select RCWs. Links to additional Washington State prosecutor and law enforcement case law reviews and references are also included.

The materials contained in this document are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.

LAW ENFORCEMENT ONLINE TRAINING DIGEST

APRIL 2019 EDITION

Covering select case opinions issued in APRIL 2019

1. ACCESS DEVICE; POSSESSION OF STOLEN PROPERTY
2. SEARCH & SEIZURE; *TERRY* STOP
3. COMMUNITY CARETAKING; WARRANTLESS ENTRY; OBSTRUCTION
4. ADDITIONAL RESOURCE LINKS: Legal Update for Law Enforcement (WASPC, John Wasberg) & Prosecutor Caselaw Update (WAPA, Pam Loginsky)

CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

1 ACCESS DEVICE; POSSESSION OF STOLEN PROPERTY

POSSESSION OF STOLEN PROPERTY
State v. Sandoval, COA No. 50814-1-II (Apr. 2, 2019)
COURT OF APPEALS, DIV. II

FACTS:

The defendant entered into an agreement with a car dealership to take a car home for 3 days to decide whether she wanted to purchase it. The dealership reported the car stolen when it was unable to make contact with the defendant or retrieve the car at the end of the 3 days.

Nearly a month later, law enforcement found the defendant and her husband in the stolen vehicle at the address listed in the original agreement. They arrested the defendant for Possession of a Stolen Vehicle. While searching the defendant incident to arrest, the officer found a credit card with someone else's name on it, her sister's birth certification, and a pipe with methamphetamine residue. The credit card had been stolen 2 months prior. At the time it was stolen, the card was active and could have been used to buy goods. The card's owner cancelled the card shortly after discovering it was missing/stolen.

The defendant was charged with Possession of a Stolen Vehicle, Possession of Stolen Property in the 2nd Degree, Identity Theft in the 2nd Degree, and Possession of a Controlled Substance. She was convicted at trial of all charges with the exception of the Identify Theft.

1 ACCESS DEVICE; POSSESSION OF STOLEN PROPERTY

POSSESSION OF STOLEN PROPERTY
State v. Sandoval, COA No. 50814-1-II (Apr. 2, 2019)
COURT OF APPEALS, DIV. II

TRAINING TAKEAWAY – DEFINITION OF "ACCESS DEVICE":

RCW 9A.56.010(1) defines "access device" as any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument

1 ACCESS DEVICE; POSSESSION OF STOLEN PROPERTY

POSSESSION OF STOLEN PROPERTY
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COURT OF APPEALS, DIV. II

TRAINING TAKEAWAY – TIMING OF "CAN BE USED" ELEMENT:

An "access device" satisfies the element of "can be used" under RCW 9A.56.010(1) Possession of Stolen Property if it was active and capable of obtaining something of value at the time the rightful owner last possessed it.

The access device need not be capable of use at the time of arrest/retrieval of the card to qualify with the statutory definition. See, State v. Schloredt, 97 Wn. App. 789 (1999)

- Although by the time the credit card was recovered from this defendant – 2 months after the rightful owner had discovered it was missing – the card had been shut off, the relevant fact is that the card WAS active and able to be used to retrieve something of value at the time it was last in the possession of the rightful owner.

1 ACCESS DEVICE; POSSESSION OF STOLEN PROPERTY

POSSESSION OF STOLEN PROPERTY
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COURT OF APPEALS, DIV. II

TRAINING TAKEAWAY – UNACTIVATED ACCESS DEVICE:

An access device that was NEVER capable of use does not satisfy the requirement of "[could] be used," and cannot form the basis of a charge of Possession of Stolen Property in the 2nd Degree/Access Device. See, State v. Rose, 175 Wn.2d 10 (2012)

- In *Rose*, the victim testified that she received a credit card offer which included an unactivated credit card in her name. The victim threw the card away without ever activating it.
- The court held that the unactivated card wasn't an access device per RCW 9A.56.010 because it was never linked to an existing, active account, and therefore couldn't be used by either the original cardholder (or the defendant) to obtain something of value

1 ACCESS DEVICE; POSSESSION OF STOLEN PROPERTY

POSSESSION OF STOLEN PROPERTY
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PRACTICE POINTER – PROOF OF LAST USE:

When charging for the unlawful possession or use of an access device, be sure to have the victim provide information in their witness statement to show the access device was usable:

- When did the rightful owner last have possession of the access device?
- When was it last active?
- How was it able to access "something of value" – what was it linked to?
- What steps did they take when they realized the access device had been stolen or compromised?

2 SEARCH & SEIZURE; *TERRY* STOP

UNLAWFUL POSSESSION OF A FIREARM
State v. Carriero, COA No. 35560-8-III (Apr. 25, 2019)
COURT OF APPEALS, DIVISION III

FACTS:

At 2 o'clock in the morning, an unidentified resident made a 911 call to report that they lived adjacent to an alleyway and were concerned about a suspicious vehicle with lights off parked at the dead end of the alley. Officers knew the area to be plagued with burglaries, vehicle prowls, and gang violence. Two officers responded to the area, pulling into the dark, narrow alleyway with headlights, but not emergency lights or sirens, activated. At the end of the alleyway, the officers saw a car facing their direction. The engine was off, it wasn't lit, and was occupied by two adults. Although the officers testified that their approach into the area wasn't safe, they felt they lacked options for another way to approach the car due to the constraints of the location. Their patrol cars blocked any potential means of exit for the civilian's car. At a pretrial hearing, one officer conceded that the alleyway technically had enough space for 2 vehicles to pass, but stated that when they left the scene, he had to pull in his side mirror in order for his partner's to pass him (following the partner's own 5 or 6 point turn to turn around).

2 SEARCH & SEIZURE; *TERRY* STOP

UNLAWFUL POSSESSION OF A FIREARM
State v. Carriero, COA No. 35560-8-III (Apr. 25, 2019)
COURT OF APPEALS, DIVISION III

FACTS, CONT.:

The officers testified that although there is always potential for a crime, they had no reason to believe there was anything criminal occurring in the car. As they approached the car with their flashlights, the officers were able to see that there was a male in the driver's seat and a female in the front passenger seat. Neither occupant was observed behaving suspiciously or engaging in furtive movements. The officers stood on opposite sides of the car. The officer on the passenger side greeted the car's occupants with a casual, friendly "hi guys." When asked, the occupants denied living in the area, and they just wanted to be alone together. The male driver stated that he owned the car. The officer explained that a neighbor had called 911 to report an unfamiliar car in the alley. He then asked the occupants if either of them had identification. Neither officer told the occupants that they were free to leave. The female handed over her ID to the officer, and the driver handed his ID to the officer positioned at the driver's window.

2 SEARCH & SEIZURE; *TERRY* STOP

UNLAWFUL POSSESSION OF A FIREARM
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COURT OF APPEALS, DIVISION III

FACTS, CONT.:

The officer ran the driver's name and date of birth through dispatch. He learned that the driver was a convicted felon with a conviction for unlawful possession of a firearm, but had no outstanding warrants. He then returned the ID to the driver. The other officer ran the female passenger's name through dispatch and handed back ID. She returned with outstanding warrants. He asked the passenger to exit the car. She was handcuffed and sat near the rear of the car.

Meanwhile, the first officer remained standing on the driver's side of the car and shined his flashlight into it. He saw a handgun in a pouch behind the driver's seat. He ordered the driver to keep his hands on the steering wheel, and both officers ordered him to exit the vehicle, and he was placed under arrest.

A search warrant was later secured for the car, resulting in the retrieval of a loaded semiautomatic pistol from the seat pouch. The defendant was charged and convicted of one count of Unlawful Possession of a Firearm.

2 SEARCH & SEIZURE; *TERRY* STOP

UNLAWFUL POSSESSION OF A FIREARM
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COURT OF APPEALS, DIVISION III

TRAINING TAKEAWAY – SEIZURE:

A person is seized when officers position themselves on either side of a driver's vehicle, preventing his exit from either side while they speak to him and request information and identification from the driver and his passenger, effectively blocking the exit path for his vehicle by parking their patrol cars in a staggered position across the width of a narrow alleyway.

2 SEARCH & SEIZURE; *TERRY* STOP

UNLAWFUL POSSESSION OF A FIREARM
State v. Carriero, COA No. 35560-8-III (Apr. 25, 2019)
COURT OF APPEALS, DIVISION III

TRAINING TAKEAWAY – SEIZURE BASICS:

Police contact is only a seizure if, due to an officer's use of physical force or display of authority, a reasonable person wouldn't feel free to leave, terminate the encounter, refuse to answer the officer's questions, decline a request, or otherwise go about his business. See, State v. Beito, 147 Wn. App. 504 (2008)

- There is no absolute situation that transforms a contact into a seizure. The issue is weighed on the totality of the circumstances: the **officer's actual conduct** and **whether the conduct appears coercive**.
- The officer's subjective intent as to whether a suspect is seized **doesn't matter** (unless it has been expressed to the suspect.) See, State v. O'Neill, 148 Wn.2d 564 (2003)

2 SEARCH & SEIZURE; *TERRY* STOP

UNLAWFUL POSSESSION OF A FIREARM
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COURT OF APPEALS, DIVISION III

TRAINING TAKEAWAY – SOCIAL CONTACT VERSUS SEIZURE:

A law enforcement officer needs no cause to question a civilian unless the officer seizes that person.

A social contact is a fluid concept ranging from an officer saying hello to a stranger, to an investigative detention (*Terry* stop). Social contacts in the field aren't limited to casual "small talk" – they may include an investigative component. (See, State v. Harrington, 167 Wn.2d 656 (2008))

EXAMPLES OF A PERMISSIBLE SOCIAL CONTACT:

- Engaging a civilian in consensual conversation
- Identifying themselves as officers
- Requesting (but not demanding) identification, including date of birth
- Checking for outstanding warrants.

EXAMPLES OF SEIZURE provided by the US Supreme Court in US v. Mendenhall, 446 U.S. 544 (1980) include:

- The threatening presence of several officers,
- The display of a weapon by an officer (different than merely possessing one),
- Some physical touching of the person,
- Use of language or tone of voice indicating that compliance with the officer's request might be compelled.

2 SEARCH & SEIZURE; *TERRY* STOP

UNLAWFUL POSSESSION OF A FIREARM
State v. Carriero, COA No. 35560-8-III (Apr. 25, 2019)
COURT OF APPEALS, DIVISION III

TRAINING TAKEAWAY – SOCIAL CONTACT DEVELOPS INTO SEIZURE:

An initial social contact may transform into a seizure if the officer's actions ultimately create a situation where the person no longer feels free to leave.

Examples of a social contact morphing into a seizure:

- Ordering a person to sit or wait while the officer checks warrant status. See, State v. Ellwood (1988)
- Commanding a person to halt.
- Demanding information from the person. See, State v. O'Neill (2003)
- Immobilizing a person without any other action. See, State v. Beito (2008)
- Blocking the defendant from leaving, such as operating a patrol car in an aggressive manner to block the defendant's course or otherwise control the direction of his movement may be a seizure. See, Michigan v. Chesternut (1988)

Although the court declines to set a per se rule that blocking the exit of an accused's car is always a seizure, it's clear that such an action constitutes a "significant, if not decisive" factor in finding that a seizure has occurred.

2 SEARCH & SEIZURE; *TERRY* STOP

UNLAWFUL POSSESSION OF A FIREARM
State v. Carriero, COA No. 35560-8-III (Apr. 25, 2019)
COURT OF APPEALS, DIVISION III

TRAINING TAKEAWAY – WAS THE SEIZURE UNLAWFUL?

The officers lacked reasonable and articulable suspicion that the driver of the car was or was about to be engaged in criminal activity when they seized him. Merely being in an alley in a car late at night is not enough to justify a seizure.

A brief, warrantless, investigatory seizure (*Terry* stop) is permitted if the officer has reasonable and articulable suspicion that the person is or is about to be engaged in criminal activity.

- **A person's presence in a high-crime area late at night does not, by itself, give rise to a reasonable suspicion to detain that person.** See, State v. Fuentes, 183 Wn.2d 149 (2015);
  - Reasonable suspicion must be individualized to the person being stopped.
  - Police can't justify a suspicion of criminal activity based solely on a person exiting a known drug house or other high-crime area. See, State v. Weyand, 188 Wn.2d 804 (2017)
- **An inarticulate hunch or innocuous facts will NOT justify a warrantless seizure.**

2 SEARCH & SEIZURE; *TERRY* STOP

UNLAWFUL POSSESSION OF A FIREARM
State v. Carriero, COA No. 35560-8-III (Apr. 25, 2019)
COURT OF APPEALS, DIVISION III

TRAINING TAKEAWAY – OFFICER SAFETY:

Although an officer conducting a valid investigatory stop based on reasonable suspicion may take steps to ensure officer safety, first it requires that there has been a valid stop.

With no lawful basis to stop the person, officer safety concerns don't come into play. Officers can't create reasonable suspicion by claiming officer safety. See, State v. Kennedy, 107 Wn.2d 1 (1986)

- The officers testified that their entry into the alleyway wasn't a best practice for officer safety.
- The court suggests they could have avoided any risk to their safety by declining to enter the alleyway since they lacked cause to believe any criminal activity was occurring.
- They could have alternatively monitored the activity of the car/occupants from a safe distance until they observed criminal activity or additional reasonable and articulable facts to justify a contact.

3 COMMUNITY CARETAKING; WARRANTLESS ENTRY

OBSTRUCTING
City of Shoreline v. McLemore, No. 95707-0 (Apr. 18, 2019)
WASHINGTON STATE SUPREME COURT

FACTS:

Officers responded to 911 callers reporting a loud, late night verbal argument between a man and woman in an apartment. On arrival, police heard a woman shouting, "'[Y]ou can't leave me out here,"' "'I'm going to call the police,"' and "something along the lines of 'I'm reconsidering our relationship'." Officers knocked on the door, rang the doorbell, announced they were police, and demanded to be let in. No one in the apartment replied, but the yelling stopped. Officer announced that they would break the door down if they weren't let in. The man told them to leave, that everything was fine, and that he was recording the incident. He prompted the woman to tell the officers that he was fine, and she did. After several minutes, officers heard the sound of breaking glass and began to break in the door.

Officers broke down the door to enter the home, arrested the defendant, and placed both parties in separate patrol cars. The female confirmed she was not injured, and told officers that the couple had refused to open the door because they were worried one of them would be arrested. The officers charged the defendant with one count of RCW 9A.76.020 - Obstructing a Law Enforcement Officer, and no other crime. He was convicted at trial, and has appealed the conviction up to the Supreme Court.

3 COMMUNITY CARETAKING; WARRANTLESS ENTRY

OBSTRUCTING
City of Shoreline v. McLemore, No. 95707-0 (Apr. 18, 2019)
WASHINGTON STATE SUPREME COURT

Having only 8 instead of the usual 9 justices ruling on this case due to a justice recusing herself but not being replaced on the panel, the final result was a 4/4 split.

This scenario results in the judgment of the original trial court standing (that the defendant was guilty of Obstruction), and the issue remains unsettled at the Supreme Court level.

The Supreme Court's opinion is nevertheless relevant to how the issue could be decided on future cases that follow this fact pattern.

3 COMMUNITY CARETAKING; WARRANTLESS ENTRY

OBSTRUCTING
City of Shoreline v. McLemore, No. 95707-0 (Apr. 18, 2019)
WASHINGTON STATE SUPREME COURT

The Supreme Court is not reviewing whether the officers' entry into the defendant's home was lawful. The community caretaking exception to the warrant requirement clearly justified the entry where there was ample suspicion of an ongoing domestic violence situation. See, Danny v. Laidlaw Transit Services, 165 Wn.2d 200 (2008)

- A verbal argument was reported by a 911 caller, officers heard the ongoing argument on their arrival, the defendant told them to leave and refused to answer the door, was heard instructing the woman to tell the cops she was fine, and then there was a sound of glass breaking.

The issue for the Supreme Court in this case doesn't include the possible DV incident because the defendant was charged only with Obstructing.

The Question Answered by the Court:
Does the act of refusing to open the door for police who already have a lawful right to enter a residence under the community caretaking exception to the warrant requirement satisfy the elements of Obstruction of a Law Enforcement Officer?

3 COMMUNITY CARETAKING; WARRANTLESS ENTRY

OBSTRUCTING
City of Shoreline v. McLemore, No. 95707-0 (Apr. 18, 2019)
WASHINGTON STATE SUPREME COURT

TRAINING TAKEAWAY – PASSIVE, PRIMARILY "SPEECH" V. REFUSAL TO ACT:

The primary opinion justices concluded that a defendant cannot be convicted of Obstruction where his actions amounted to refusing to open the door when commanded by police officers who already had a lawful right to enter the residence under the community caretaking exception to the warrant requirement.

- These justices believe the defendant's conduct in this situation amounts only to passive resistance, which alone will NOT satisfy a charge of Obstruction.

The dissenting justices felt that a defendant could be guilty of Obstruction when he refuses to obey law enforcement's lawful commands to take a specific action, and that the officers' orders to open the door were lawful under the community caretaking exception.

- These justices conclude that no constitutional or free speech rights allowed the defendant to refuse the officers' demand to open the door under the facts of this case.

3 COMMUNITY CARETAKING; WARRANTLESS ENTRY

OBSTRUCTING
City of Shoreline v. McLemore, No. 95707-0 (Apr. 18, 2019)
WASHINGTON STATE SUPREME COURT

TRAINING TAKEAWAY – OBSTRUCTION BASICS:

The Obstruction statute, RCW 9A.76.020, states:

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

In order to prevent 1st Amendment challenge to the breadth of the Obstruction statute, Washington courts have narrowly interpreted the crime.

Obstruction statutes may not be used to limit a citizen's right to express verbal criticism, even abusive criticism, at police officers. There must be conduct.

3 COMMUNITY CARETAKING; WARRANTLESS ENTRY

OBSTRUCTING
City of Shoreline v. McLemore, No. 95707-0 (Apr. 18, 2019)
WASHINGTON STATE SUPREME COURT

TRAINING TAKEAWAY – LACK OF COOPERATION:

Lack of cooperation doesn't become obstruction of justice merely because it causes the police a delay. There is no obligation to cooperate with the police.

- A juvenile repeatedly opening a door and standing behind a screen door on a porch, shouting obscenities and abusive language at officers who were arresting his juvenile sister was NOT Obstruction. *See*, State v. E.J.J. (2015)
- Refusal to allow an officer into a home without a warrant wasn't sufficient to sustain an obstruction conviction. *See*, State v. Bessette (2001)
- Passively causing delay is **different than active conduct** such as: locking a door, holding it closed, or physically resisting.

The majority opinion justices felt there was no evidence of active conduct to prevent the officers' entry. They focused on the defendant's 1st Amendment speech rights for his belligerent comments, and their belief that a mere refusal to open the door amounted only to passive delay because the defendant didn't close the door on police, and the female wasn't prevented from opening it.

3 COMMUNITY CARETAKING; WARRANTLESS ENTRY

OBSTRUCTING
City of Shoreline v. McLemore, No. 95707-0 (Apr. 18, 2019)
WASHINGTON STATE SUPREME COURT

TRAINING TAKEAWAY – ENTRY INTO HOME V. ENTRY INTO VEHICLE:

LOCATION MATTERS:
There is a higher constitutional bar for intruding on a person's privacy interest in their home than there is for their vehicle. See, State v. Ferrier (1998)

Courts have previously held that this distinction creates a greater likelihood that delaying officers' execution of their lawful duties is more likely to justify an Obstruction charge when the location in question is the defendant's vehicle.

- Defendant's refusal to exit his vehicle, put his hands on the top of the car, and provide his name constituted obstruction. *See*, State v. Contreras, 1998

3 COMMUNITY CARETAKING; WARRANTLESS ENTRY

OBSTRUCTING
City of Shoreline v. McLemore, No. 95707-0 (Apr. 18, 2019)
WASHINGTON STATE SUPREME COURT

TRAINING TAKEAWAY – THE DISSENT: SPEECH VS. ACTION:

The dissenting justices found that the defendant's conduct was a willful refusal to act per an officer's lawful request, and that such refusal was more than a passive inaction causing the delay in the officers' ability to act.

- The defendant was heard telling the female to tell the officers she was find and to act mad. That would seem to veer more into an intentional intrusion into the officers' ability to investigate a potential DV crime by preventing them from establishing that all occupants of the home were safe and unharmed.
- On cross-examination, the defendant "grudgingly acknowledged" that he did tell her that, and also admitted that he told her if she opened the door and went outside, he was going to jail.

3 COMMUNITY CARETAKING; WARRANTLESS ENTRY

OBSTRUCTING
City of Shoreline v. McLemore, No. 95707-0 (Apr. 18, 2019)
WASHINGTON STATE SUPREME COURT

PRACTICE POINTER:

Although the law on this issue isn't settled because of the 4/4 ruling, it's clear that you should be cautious in evaluating the strength of an Obstruction charge under similar circumstances.

Generally you're going to need something other than just verbal criticism or belligerence, or a failure to act when there's no duty to do so.

- A person who is yelling at you from a distant porch or behind a closed door might be frustrating or distracting, but that behavior alone isn't sufficient for a charge of Obstruction.
- If you have a legal justification other than consent for entering a residence, the fact that an occupant refuses to *let* you in but doesn't engage in any other active resistance should be taken as more of an inconvenience than a criminal act.

FURTHER READING

For further cases of interest to law enforcement, please see the comprehensive monthly Legal Update for Law Enforcement prepared by Attorney John Wasberg (former longtime editor of the original LED), which is published on the WASPC Law Enforcement Resources webpage:

http://www.waspc.org/legal-update-for-washington-law-enforcement

The Washington Prosecutor's Association publishes a comprehensive weekly summary of a wide range of caselaw geared toward the interests of Washington State Prosecutors. This resource is authored by WAPA Staff Attorney Pam Loginsky.

http://70.89.120.146/wapa/CaseLaw.html

Questions?

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1 SEARCH & SEIZURE; CONSENT TO ENTER; MIRANDA; INTERVIEW OF CHILD ABUSE VICTIM

ASSAULT 2ND DEGREE; CHILD ABUSE
State v. Ho, **COA No. 76519-1-I (March 25, 2019)**
COURT OF APPEALS, DIV. I

FACTS, cont.:

A short time later, the stepmother and child arrived to the house. Neither parent objected to the social worker's request to interview the boy in his bedroom. The deputy stood by while the social worker conducted her interview. The deputy reported that the child seemed hesitant and reserved during the conversation. After some introductory questions, the social worker asked the child how he was disciplined. He stated that his mom "accidentally gets mad, she accidentally slaps my hand." He claimed this was done with an open hand, and stated that he falls down a lot and was not being careful.

When asked about bruising, the child claimed he had bruising on his bottom because he fell from a tree. He was unable to identify what tree he fell from, and when the social worker asked if he would show the bruises to the deputy, the boy refused to continue speaking.

The social worker and the deputy returned to the living room to speak with the parents. The social worker requested that the parents take the child to the hospital for an evaluation. The stepmother made several excuses as to why she couldn't take him.