MAY 2019

LAW ENFORCEMENT DIGEST

CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

LAW ENFORCEMENT ONLINE TRAINING DIGEST

Welcome to the May 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 May training covers the cases issued in May 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

MAY 2019 EDITION

Covering select case opinions issued in May 2019

1. State v. Tucker: Theft of a Motor Vehicle; Snowmobile; Motor Vehicle Definition
2. Barr v. Snohomish County Sheriff: Firearm Rights; Concealed Pistol License; Juvenile Conviction
3. State v. Johnson: Seizure; Ruse; Vehicle Contact; Identification
4. State v. Melland: Domestic Violence; Substantial Bodily Harm; Hearsay
5. State v. Morgan: Plain View; Search and Seizure
6. State v. Connors: Attempt to Elude; "Uniform" Definition
7. ADDITIONAL RESOURCE LINKS: Legal Update for Law Enforcement (WASPC, John Wasberg) & Prosecutor Caselaw Update (WAPA, Pam Loginsky)

1 "MOTOR VEHICLE" DEFINED

Theft of a Motor Vehicle; Snowmobile
State v. Tucker, COA No. 35530-6-III (May 2, 2019)
Court of Appeals, Division III

FACTS:

Defendant and her co-defendant broke into a cabin and stole several items, including a snowmobile. The defendant was charged with Theft of a Motor Vehicle for the taking of the snowmobile. The defendant's pretrial motion to dismiss was initially denied by the trial court under the rationale that a snowmobile is licensed and has a motor, thus making it closer to an automobile. The defendant now appeals her conviction for the charge, asserting that prior caselaw restricts "motor vehicle" to a "car or other automobile," and the snowmobile doesn't meet that definition.

1 "MOTOR VEHICLE" DEFINED

Theft of a Motor Vehicle; Snowmobile
State v. Tucker, COA No. 35530-6-III (May 2, 2019)
Court of Appeals, Division III

TRAINING TAKEAWAY:

A snowmobile is not a "motor vehicle" for purposes of RCW 9A.56.65, Theft of a Motor Vehicle, because it is not a "car or other automobile."

NOTE:

The WA Supreme Court also previously held that a riding lawn mower did not meet the definition of "motor vehicle," and found that the correct definition was any "car or other automobile." **State v. Barnes, 189 Wn.2d 492 (2017)**

2 FIREARM RIGHTS; JUVENILE CONVICTIONS

Firearm Rights; Concealed Pistol License; Juvenile Conviction

Barr v. Snohomish County Sheriff, No. 96072-1 (May 9, 2019)
Washington State Supreme Court

FACTS:

The petitioner applied to the Sheriff's Office for a concealed pistol license. He had previously been granted orders restoring his firearm rights as to his three adult convictions, and one of his three juvenile convictions under RCW 9.41.040(4). No restoration occurred as to his final two juvenile convictions because they were Class A felonies, and therefore not eligible for restoration. The court instead granted the petitioner's request for an order sealing the two Class A felony juvenile convictions, and included in the order a statement that so long as the case remain sealed, the offenses would not prohibit Barr from possessing firearms under RCW 9.41.040. He took that order and applied for a Concealed Pistol License from the Snohomish County Sheriff's Office.

The Sheriff's Office denied his application because he had a sealed juvenile record that included a class A felony conviction. The Court of Appeals ruled that he was eligible for a CPL, and now the county appeals to the WA Supreme Court.

2 FIREARM RIGHTS; JUVENILE CONVICTIONS

Firearm Rights; Concealed Pistol License; Juvenile Conviction

Barr v. Snohomish County Sheriff, No. 96072-1 (May 9, 2019)
Washington State Supreme Court

TRAINING TAKEAWAY:

A sealed juvenile conviction still exists even when it is sealed by court order, and the conviction for a qualifying class A felony therefore makes the applicant ineligible for a CPL regardless of whether a court order had sealed the records.

Under RCW 9.41.070 and federal law, an applicant is ineligible to possess a firearm and therefore ineligible for a CPL if they have been convicted in any court for a crime punishable by a term of confinement over a year. Any conviction which has been expunged, or set aside, or for which a person has been pardoned or has had their civil rights restored will not be considered a conviction.

An order sealing a conviction is not the same as an expungement, exoneration, or pardon. The conviction remains after the order is issued, but it is sealed from public view.

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

FACTS:

Officers on late night routine patrol in a high crime officer saw a car pull into a motel parking lot and pull into a stall. After approximately a minute and a half, the officers observed no one get in or out of the car, and suspected that the occupants may be doing drugs. The officers approached the vehicle, one on either side, and shined their flashlights into the interior of the car. There were cars parked on either side of the suspect vehicle, so the officers' positions meant that the driver and passenger would be unable to exit the vehicle or move the vehicle without striking them, and a grassy berm in front of the car prevented it from moving forward.

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

FACTS:

One officer used a ruse to initiate conversation, asking the driver if the car was Taylor's, and then repeating the question. The driver indicated it was his car. The officer then asked whether the driver had a driver's license, and if the officer could take a look at it. When he indicated he had an identification card, the officers suspected that the driver may have a suspended license. The second officer, who was leaning over the driver's door, noticed a handgun between the driver and the car door. He pulled his weapon, announced the gun, and then seized it from the car. The driver was told to exit the vehicle. The first officer ran the driver's information from the ID card, and learned that the driver's license was suspended, that he had an active warrant, and was a convicted felon. The driver was then arrested for Unlawful Possession of a Firearm in the 1st Degree. He successfully moved for suppression of the firearm. The State now appeals the suppression to the Court of Appeals.

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY – SOCIAL CONTACT:

The Court of Appeals clarifies that the original trial court's basis for granting the defendant's motion to suppress the gun – that the officers lacked a sufficient basis on which to initiate the social contact - was an incorrect interpretation of the law.

There is no constitutional requirement for police officers to have articulable reasons for simply engaging in conversation with members of the public.

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY – SOCIAL CONTACT:

"**Social Contact**" is a concept lawyers and judges have come up with to describe situations that fall "someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., Terry stop)." The correct inquiry isn't "was this a social contact," but "was this a seizure."

- **Social contact is simply a term for an encounter that does not amount to a seizure.**
- **An articulable suspicion of wrongdoing is NOT required for a social contact, but it IS for a seizure.**

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY – SEIZURE TIPPING POINT, FREE TO LEAVE:

A person is not seized unless unless—objectively viewed and under the totality of the circumstances—a reasonable person would not believe they were free to terminate the encounter or decline the officer's requests. *State v. Young*, 135 Wn.2d 498 (1998).

- A social contact may evolve into a seizure.
- The court looks at the totality of the circumstances to determine whether there's a tipping point at which the social contact becomes a seizure.

The test is whether a reasonable, innocent person faced with similar circumstances would feel free to leave or otherwise terminate the encounter.

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY – SEIZURE & RESTRICTION OF MOVEMENT:

Total restriction of an individual's movements isn't necessary in order for a social encounter to develop into a seizure.

Here the officers were standing on either side of the suspect's car effectively blocking the doors, and their positions between the suspect's car and the cars in the parking stalls on either side, indicates the defendant was essentially unable to retreat from the contact.

Attempting to do so would've likely been perceived as an act of aggression by the officers, and/or the driver would've been at risk of hitting either one of the officers if he tried to pull out of the stall.

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY – SEIZURE & RUSE:

Officers have long been permitted to use a ruse to initiate contact with civilians. The effects of that ruse on the civilian's reasonable belief that he was (or wasn't) free to leave are viewed through the filter of a reasonable, innocent person.

Asking, "Is this Taylor's car?", was a ruse intended to initiate a conversation with the driver. It's reasonable that the effect of such a ruse would be to create an impression that the officers were conducting an ongoing investigation involving the car.

This reasonable belief was enhanced when the question was repeated, and when the officers asked whether the driver had a driver's license and would prove his identity. Any reasonable person (specifically an innocent reasonable person as the constitution provides) could reasonably believe they were a suspect in a crime.

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY – SEIZURE & REQUESTING IDENTIFICATION:

The court decided that the tipping point between a social contact and a seizure was when the officers asked for Johnson's name and proof of his identity.

- A reasonable, innocent person would take that as a sign that the officers weren't willing to take him at his word, either regarding the car's ownership or his identity.
- The person wouldn't feel free to leave the scene, to disregard the officers' requests, or otherwise terminate the contact.

At that point, the defendant was seized.

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY – *TERRY* STOP:

A *Terry* stop is justified if an officer can provide reasonable and articulable facts creating a reasonable suspicion that the person stopped has been or is about to be involved in criminal activity.

- *Terry* investigative stops require more than a mere hunch or speculation.
- Our Washington State constitution, Article 1, Section 7, requires an additional component – that the facts available to the officer connect the seized person to the particular crime.
- The courts make this determination by examining a totality of the circumstances.

3 SEIZURE; RUSE; VEHICLE CONTACT

SEIZURE; IDENTIFICATION; VEHICLE CONTACT; RUSE
State v. Johnson, COA No. 77720-3-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY – *TERRY* STOP:

The driver was observed for less than 2 minutes in a parking lot in a high crime area in the middle of the night. The officers noted that experience teaches that people remaining in parked cars in these circumstances may be using drugs.

This is too general – just a hunch.

The officers provided no evidence of a reasonable, articulable suspicion of potential criminal activity making the seizure of the driver unlawful.

4 DOMESTIC VIOLENCE; SUBSTANTIAL BODILY HARM; HEARSAY

Domestic Violence; Statements to Healthcare Provider; Substantial Bodily Harm
State v. Melland, COA No. 76617-1-I (May 6, 2019)
Court of Appeals, Division I

FACTS:

Couple lived together in what the victim's statements to medical professionals, law enforcement, and social workers was a long term abusive relationship. After an incident, a DV No Contact Order was put into place. The parties continued to live together and/or have contact.

A couple of months after entry of the no contact order, officers were alerted via a 911 call to a DV incident and possible violation of a no contact order. The officer noted the victim female was shaking and crying, and had a swollen and bruised pinky finger. The defendant was arrested for felony violation of a no contact order and interfering with DV reporting.

4 DOMESTIC VIOLENCE; SUBSTANTIAL BODILY HARM; HEARSAY

Domestic Violence; Statements to Healthcare Provider; Substantial Bodily Harm
State v. Melland, COA No. 76617-1-I (May 6, 2019)
Court of Appeals, Division I

FACTS:

15 days after the initial incident, the victim was treated in the ER for severe alcohol withdrawal where she reported to the doctor that she'd relapsed after dealing with a DV incident with her abusive boyfriend of 6 years. An x-ray of her hand confirmed that her pinky finger was fractured, and the doctor estimated that it was likely about 2 weeks prior. The victim told the doctor that her boyfriend had broken her finger when he grabbed her phone from her hand during an argument.

An amended charge adding Assault 2nd Degree DV was added prior to trial. Neither the victim nor defendant testified. The statements made by the victim to the medical staff were admitted through the Statements for Purposes of Medical Diagnosis or Treatment hearsay exception. The defendant was convicted of Assault in the 2nd Degree – DV and misdemeanor Violation of a No Contact Order – DV (the lesser included offense). He now appeals.

4 DOMESTIC VIOLENCE; SUBSTANTIAL BODILY HARM; HEARSAY

Domestic Violence; Statements to Healthcare Provider; Substantial Bodily Harm
State v. Melland, COA No. 76617-1-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY – Recklessly Inflict Substantial Bodily Harm:

The element of "recklessly inflicted substantial bodily harm" is not met in a trial for Assault in the 2nd Degree – DV where the state didn't prove beyond a reasonable doubt that the defendant inflicted the substantial bodily injury during an intentional assault.

- Assault in the 2nd Degree requires that the defendant intentionally assaults another and thereby recklessly inflicts substantial bodily harm. RCW 9A.36.021(1)(a)

- "Recklessly inflicted" means that the defendant knows of and disregards a substantial risk during an intentional assault.

The state established that the defendant fractured the victim's finger, but not that he knew of and disregarded the substantial risk of breaking her finger while grabbing for her phone during an intentional attack. The Assault 2nd conviction was overturned.

4 DOMESTIC VIOLENCE; SUBSTANTIAL BODILY HARM; HEARSAY

Domestic Violence; Statements to Healthcare Provider; Substantial Bodily Harm
State v. Melland, COA No. 76617-1-I (May 6, 2019)
Court of Appeals, Division I

TRAINING TAKEAWAY –Statements to Medical Providers

ER 803(a)(4) Statements for Purposes of Medical Diagnosis or Treatment:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

This exception to the hearsay rule was crucial in establishing the elements of the crime in a trial that didn't include participation of the victim.

It's important to remember that you can't guide the medical provider to ask specific questions of the patient. The questions must be relevant to the diagnosis or treatment, not asked with a primary intent of investigation of a crime.

5 PLAIN VIEW; SEARCH AND SEIZURE

Plain View; Search and Seizure; Arson
State v. Morgan, No. 96017-8 (May 16, 2019)
Washington State Supreme Court

FACTS:

Defendant was found out front of his burning home, hair singed and barely able to speak. A firefighter repeatedly asked him if anyone else was in the home, and he finally directed firefighters to the garage, where the defendant's ex-wife was nonresponsive and badly injured on the floor. She had multiple lacerations on her head, fractures, and severe burns on her upper body. The clothes of both people smelled of gasoline. Blood was observed on the defendant's clothes by medics. A supervising officer directed the responding officer to collect the defendant's clothes from the hospital and try to get an initial statement. A crime scene tech went to collect the victim's clothing from another hospital.

The officer spent several hours talking to the defendant's in the hospital. During this time, the defendant's clothing was sitting on the counter in the hospital room in plastic "gift-bag" like bags branded with the hospital logo. The crime scene technician eventually arrived and he and the officer collected the clothing as well as a bloody knife that was sitting on the counter beside the clothes. Hospital staff indicated they found the knife in the defendant's clothing.

5 PLAIN VIEW; SEARCH AND SEIZURE

Plain View; Search and Seizure; Arson
State v. Morgan, No. 96017-8 (May 16, 2019)
Washington State Supreme Court

FACTS:

At trial, the defendant moved to suppress the clothing and knife as unlawfully seized. The State argued that they were exempted under the plain view doctrine. The court denied that argument, instead ruling that exigent circumstances allowed the warrantless seizure of the clothes and knife because there are special bags used to preserve the unique evidence in an arson case.

The defendant appealed his conviction to the Court of Appeals who held that the state hadn't met its burden for establishing exigent circumstances because it had not shown how applying for a warrant would have resulted in a loss of evidence. The court also rejected the plain view doctrine because the officer didn't smell gasoline or see blood through the plastic hospital bags or come across it inadvertently. The State now appeals to the Supreme Court.

5 PLAIN VIEW; SEARCH AND SEIZURE

Plain View; Search and Seizure; Arson
State v. Morgan, No. 96017-8 (May 16, 2019)
Washington State Supreme Court

TRAINING TAKEAWAY – Plain View Doctrine:

The plain view exception to the warrant requirement doesn't have a separate element of inadvertent discovery of the evidence seized.

Plain View permits the warrantless seizure of evidence when officers:

(1) Have a valid justification for being in an otherwise protected area, provided they aren't there on pretext; and

(2) Are immediately able to realize the evidence they see is associated with criminal activity.

Officers are not restricted to seizing evidence solely when they come across the evidence unintentionally and inadvertently.

5 PLAIN VIEW; SEARCH AND SEIZURE

Plain View; Search and Seizure; Arson
State v. Morgan, No. 96017-8 (May 16, 2019)
Washington State Supreme Court

TRAINING TAKEAWAY – Plain View Doctrine:

An officer's warrantless seizure of bloody clothes from a defendant's hospital room was permitted where his presence in the hotel room was lawful, and it was a reasonable conclusion that the seized items were associated with the crimes being investigated.

- The officer was lawfully in the defendant's hospital room to get his statement, engaging in voluntary conversation with the defendant for hours, and there was no pretext to invalidate his presence.
- The officer could reasonably conclude that the clothing worn by the suspect at the time of the incident, on which medics had noted had blood and the odor of gasoline, was associated with a crime. He didn't need to see the blood or smell the gasoline himself through the plastic bags to make that reasonable conclusion.

In a footnote, the court points out that this case differs from one where an officer sees an expensive stereo in an otherwise rundown house and suspects that it's stolen. In that case, the officer would not have had legal justification to manipulate the stereo.

5 PLAIN VIEW; SEARCH AND SEIZURE

Plain View; Search and Seizure; Arson
State v. Morgan, No. 96017-8 (May 16, 2019)
Washington State Supreme Court

TRAINING TAKEAWAY – Exigent Circumstances:

It is insufficient to claim the exigent circumstances exception to the warrant requirement where officers had access to the evidence for hours, at times left the evidence alone with the defendant and hospital staff, and displayed no other urgency in collecting the evidence.

While there is a valid concern that the trace evidence on the defendant's clothing could be contaminated by the defendant or hospital staff, the officers showed no urgency sufficient to justify that applying for a warrant was impractical and/or impossible.

The warrant could easily have been drafted, applied for, and served within the hours that the officer sat talking to the defendant and the evidence sat within feet of them on the counter.

6 ATTEMPT TO ELUDE; UNIFORM

Attempt to Elude a Police Vehicle
State v. Connors, COA No. 35718-0-III (May 30, 2019)
Court of Appeals, Div. III

FACTS:

Defendant was arrested for Eluding based on his failure to stop the stolen vehicle he was driving when signaled by a pursuing officer, which culminated in a foot pursuit.

The officer's testimony described his uniform that day as a black external vest carrier, worn over "normal clothes," and containing all of his typical duty gear in lieu of a duty belt. He described the vest carrier's markings as a police badge patch on the front, and reflective block letters across the back spelling "police." He further described his gear as including a drop-down style holster with a shiny silver Spokane Police badge on the front of his leg.

Defendant was convicted of Eluding, and now appeals on the claim that an external vest carrier is not "in uniform" as required by the statute.

6 ATTEMPT TO ELUDE; UNIFORM

Attempt to Elude a Police Vehicle
State v. Connors, COA No. 35718-0-III (May 30, 2019)
Court of Appeals, Div. III

TRAINING TAKEAWAY:

A standard, labeled external vest carrier worn over "normal" clothes clearly communicates the officer's official status to members of the public, and is therefore a "uniform" for purposes of the Eluding statute.

RCW 46.61.024 Attempt to Elude Police Vehicle requires that the officer who signaled to stop the defendant be "in uniform," but doesn't provide any definition of what that means.

The court looked to the common dictionary definition, and the intent of the requirement (to signal to the fleeing defendant that the person attempting to stop them is a police officer with authority to do so), and found that an external vest carrier with clear police badges and markings is sufficiently a uniform even when worn over the officer's normal clothes.

6 ATTEMPT TO ELUDE; UNIFORM

Attempt to Elude a Police Vehicle
State v. Connors, COA No. 35718-0-III (May 30, 2019)
Court of Appeals, Div. III

PRACTICE POINTER:

Any report written for the charge of Eluding should contain a description of the uniform you were wearing at the time since it is an element of the crime.

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?

Courtney Popp
LED Online Training Program
cpopp@cjtc.state.wa.us