Law Enforcement Digest

DECEMBER 2011

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

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CORRECTION TO NOVEMBER 2011 LED ENTRY ON STATE V. ARREOLA: Our LED entry on State v. Arreola included an "issue and ruling" statement with an "answer by Court of Appeals" of "no, rules a 2-1 majority." However, the issue and ruling statement clearly leads to an answer of "yes." A corrected version of the LED has been posted to the CJTC's LED webpage.

Thank you to Commander Scott Near and officers at the Auburn Police Department for catching this and bringing it to our attention!

ISSUE AND RULING: Does the evidence establish as a matter of law that the officer made an unlawful pretext stop in violation of the Washington constitution, article I, section 7, where the officer testified that: (1) he erroneously thought that he had justification for a DUI stop based on a citizen's conclusory report of a possible drunk driver, and (2) while he had observed a vehicle noise/muffler violation and made the stop in part because of that violation, the primary subjective reason for the stop was to investigate a possible DUI? (ANSWER BY COURT OF APPEALS: Yes, ~~No,~~ rules a 2-1 majority; Judges Siddoway and Sweeney are in the majority, and Judge Brown dissents)

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2011 LED SUBJECT MATTER INDEX

2011 LED SUBJECT MATTER INDEX – LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2011 through and including this December 2011 LED. Since 1988, we have published an annual index each December. Also, since establishing the LED as a monthly publication in 1979, we have published several multi-year subject matter indexes: a 10-year index of LEDs from January 1979 through December 1988; and 5-year subject matter indexes every five years thereafter. The 1989-1993, 1994-1998, 1999-2003, and 2004-2008 indexes, as well as monthly issues of the LED starting with January of 1992, are available on the "Law Enforcement Digest" internet page of the Criminal Justice Training Commission (CJTC).

ARREST, STOP AND FRISK (See also topic "Searches")

Police contact with drug suspect was lawful social contact, and officer's request to take his hands from his pockets did not make contact a seizure; show-up ID was not too suggestive; Crawford Sixth Amendment confrontation rule does not apply to suppression hearings. State v. Fortun-Cebada, 158 Wn. App. 158 (Div. I, October 25, 2010) – January 11:15

Standing, Miranda, scope-of-stop, and spousal privilege issues addressed in pro-state rulings in case where officer asked female driver protected by a no-contact order to identify male passenger. State v. Shufelen, 150 Wn. App. 244 (Div. I, April 13, 2009) – February 11:15

Civil Rights Act lawsuit: no bright line rule for time of Terry detention; officers must diligently pursue investigations. Liberal v. Estrada, 632 F.3d 1064 (9th Cir. January 19, 2011) – March 11:11

Civil Rights Act lawsuit: Ninth Circuit approves of Seattle officers' arrest and detention of mentally unstable woman on crack cocaine. Luchtel v. Hagemann, 623 F.3d 1078 (9th Cir. October 7, 2010) – March 11:14

Defendant's Terry, Miranda, consent, and curtilage arguments rejected in case involving officers' investigation of previous evening's gunfire at campsite on national forest service land. U.S. v. Basher, 629 F.3d 1161 (9th Cir. January 20, 2011) – April 11:02

Arrest for violation of Seattle drug loitering ordinance held under special facts to meet RCW 10.31.100 misdemeanor presence requirement, but court declares that collective knowledge, or police team, rule generally does not apply in analyzing misdemeanor-presence question. State v. Ortega, 159 Wn. App. 889 (Div. I, February 7, 2011) – April 11:17 (NOTE: The Washington State Supreme Court has granted review, 171 Wn.2d 1031 (July 13, 2011))

Appeals court reverses district court's ruling that traffic stop was pretextual in DUI case where officer followed speeding driver for 3 blocks after seeing him unlawfully exit parking lot by driving over a sidewalk without stopping, and where officer did not cite him for either of the traffic infractions. State v. Weber, 159 Wn. App. 779 (Div. III, February 3, 2011) – April 11:20

Officer did not improperly exceed the scope of traffic stop when with justification he checked on no-contact order protecting passenger. State v. Pettit, 160 Wn. App. 716 (Div. II, January 11, 2011) – May 11:12

In a split decision, the Court of Appeals holds that where an officer erroneously believed that a citizen's conclusory report provided justification to stop a vehicle for DUI, and the officer's primary reason for his stop was to investigate the possible DUI, the stop was unlawfully pretextual even though the officer observed a minor traffic violation and based the stop in part on the latter violation. State v. Arreola, ___ Wn. App. ___, 260 P.3d 985 (Div. III, September 15, 2011) – November 11:06

In a split decision, the Court of Appeals holds that an officer who activated patrol car's emergency lights, pulled in behind parked van, and got out and asked nearby driver of van what he was doing in neighborhood seized the driver without required reasonable suspicion or community caretaking basis. State v. Gantt, 163 Wn. App. 133 (Div. III, August 16, 2011) – November 11:10

In a split decision, the Court of Appeals holds that officer did not have reasonable suspicion for a Terry stop where the officer saw an unknown male driver in a vehicle stopped in a known prostitution area talk to a female pedestrian unknown to the officer and allow her to get into his vehicle. State v. Diluzio, 162 Wn. App. 585 (Div. III, July 12, 2011) – November 11:17

ARSON

For purposes of first degree arson statute, RCW 9A.48.020, "valued at" refers to value for insurance purposes, not market value; court finds sufficient evidence to establish mobile home was "valued at" greater than $10,000. State v. Sweany, 162 Wn. App. 223 (Div. III, June 14, 2011) – November 11:22

ASSAULT AND RELATED OFFENSES (Chapter 9A.36 RCW)

Floor held not to be an "instrument or thing likely to produce bodily harm" under third degree assault statute where defendant had his arm around victim's neck and they went to the floor together. State v. Marohl, 170 Wn.2d 691 (December 20, 2010) – February 11:07

Evidence sufficient to support conviction for attempted drive-by shooting even though gun was improperly loaded and would not fire. State v. Oakley, 158 Wn. App. 544 (Div. II, October 19, 2010) – February 11:18

Assault on law enforcement officer is Assault Three even if assailant does not know the victim is an officer. State v. Williams, 159 Wn. App. 298 (Div. I, January 10, 2011) – May 11:19

Evidence held sufficient to support conviction of special education teacher for Fourth Degree Assault against student. State v. Jarvis, 160 Wn. App. 111 (Div. II, February 11, 2011) – May 11:20

Evidence held sufficient to meet "injury" and "impairment" elements of second degree assault under RCW 9A.36.021(1)(a) and RCW 9A.04.110(4)(b). State v. McKague, 159 Wn. App. 489 (Div. II, January 19, 2011) – September 11:15 (NOTE: The Washington State Supreme Court affirmed this decision in State v. McKague, ___ Wn.2d ___, 2011 WL 4599634 (October 6, 2011))

ATTEMPT (Chapter 9A.28 RCW)

Evidence in sex sting case held sufficient to support substantial step and intent elements of attempted child rape. State v. Wilson, 158 Wn. App. 305 (Div. I, November 1, 2010) –

February 11:22

BAIL JUMPING (RCW 9A.76.170)

Bail jumping is classified for sentencing purposes based on charge existing at time of jump, not on ultimate disposition of that charge. State v. Coucil, 170 Wn.2d 704 (December 30, 2010) – February 11:06

BURGLARY (Chapter 9A.52 RCW)

"Residential burglary": tool room of apartment building held to be part of a "dwelling." State v. Neal, 161 Wn. App. 111 (Div. I, April 11, 2011) – September 11:10

Evidence that defendant stood on front porch, punched across the threshold, and hit a person inside the home is sufficient to support his conviction for first degree burglary. State v. Koss, 158 Wn. App. 8 (Div. III, August 19, 2010) – February 11:17

Locomotive held to be "railroad car" and, in any event, a "building" under second degree burglary statute and related Chapter 9A RCW definitions. State v. Johnson, 159 Wn. App. 766 (Div. II, February 1, 2011) – May 11:14

Knife possessed during burglary was not proven to have been used, attempted to be used, or threatened to be used, and therefore First Degree Burglary conviction must be reversed. In re Personal Restraint of Martinez, 171 Wn.2d 354 (April 28, 2011) – August 11:13

CIVIL LIABILITY

Under rationale that officers engaged in affirmative act of "taking control" of scene, and did so negligently, rather than merely negligently failing to act in the first place, lawsuit against city of Seattle and named officers can go forward on negligence theory not precluded by the "public duty" doctrine. Robb v. City of Seattle, 159 Wn. App. 133 (Div. I, December 27, 2010) – February 11:13 (NOTE: The Washington State Supreme Court has granted review, 171 Wn.2d 1024 (June 8, 2011) **Aug 11 LED:03**; see entry below)

Civil Rights Act lawsuit: officers' warrantless entry into home to investigate possible school-threat not justified by exigent circumstances; two officers are entitled to qualified immunity based on their reasonable belief that they had consent to enter, and two officers are not. Huff v. City of Burbank, 632 F.3d 539 (9th Cir. January 11, 2011) – March 11:02

Civil Rights Act lawsuit: no bright line rule for time of Terry detention; officers must diligently pursue investigations. Liberal v. Estrada, 632 F.3d 1064 (9th Cir. January 19, 2011) – March 11:11

Civil Rights Act lawsuit: under the facts of this case, where no emergency existed and several male correctional officers stood by, 6-5 majority rules that the "strip search" of a male pretrial detainee by a female cadet violated the Fourth Amendment. Byrd v. Maricopa County Sheriff's Department, 629 F.3d 1135 (9th Cir. January 5, 2011) – March 11:12

Civil Rights Act lawsuit: claim based on alleged Brady violation cannot be brought where the plaintiff was not convicted of a crime. Smith v. Almada, 623 F.3d 1078 (9th Cir., October 19, 2010) – March 11:12 (NOTE: The Ninth Circuit subsequently issued a revised set of opinions in Smith v. Almada, 640 F.3d 931 (9th Cir. March 21, 2011) – **Oct 11 LED:07**, though

reaching the same result; see entry below)

Civil Rights Act lawsuit: Ninth Circuit approves of Seattle officers' arrest and detention of mentally unstable woman on crack cocaine. Luchtel v. Hagemann, 623 F.3d 1078 (9th Cir. October 7, 2010) – March 11:14

Deadly force case must go to jury on a negligence theory where, among other things, no officer gave warning before fatal shooting. Hayes v. County of San Diego, 638 F.3d 688 (9th Cir., March 22, 2011) – May 11:05 (NOTE: The Ninth Circuit subsequently issued an order withdrawing the March 22, 2011 decision in Hayes and certifying the issue to the California State Supreme Court, Hayes v. County of San Diego, ___ F.3d ___, 2011 WL 2315191 (9th Cir. June 14, 2011) – **Oct 11 LED:04**; see entry below)

Civil Rights Act lawsuit: officers' forcible entry of home of driver who minutes earlier had been involved in minor car collision held not justified by possibility that other driver's belief she had smelled alcohol was actually evidence of first driver being near diabetic coma. Hopkins v. Bonvicino, 573 F.3d 752 (9th Cir. July 16, 2009) – May 11:06

Civil Rights Act lawsuit: action under 42 U.S.C. § 1983 may not be pursued if suit indirectly challenges validity of criminal conviction. Szajer v. City of Los Angeles, 632 F.3d 607 (9th Cir. February 11, 2011) – May 11:07

Civil Rights Act lawsuit: jail inmate in beating case entitled to trial based on claim of individual supervisory liability of Los Angeles County Sheriff under Eighth Amendment on a deliberate indifference theory. Starr v. Baca, 633 F.3d 1191 (9th Cir. February 11, 2011) – May 11:08

Common law civil liability: to prove "special relationship" between crime victim and government as exception to "public duty doctrine," 911 operator's statements to caller need not be shown by plaintiffs to have been false or inaccurate. Munich v. Skagit Emergency Communications center, 161 Wn. App. 116 (Div. I, April 11, 2011) – July 11:22

Washington State Supreme Court accepts review in Robb v. City of Seattle. Robb v. City of Seattle, 159 Wn. App. 133 (Div. I, December 27, 2010) – August 11:03 (NOTE: See entry above)

Civil Rights Act lawsuit: Supreme Court sets aside 2009 Ninth Circuit ruling that an unlawful Fourth Amendment "seizure" occurred when a social services caseworker and a law enforcement officer interviewed a possible child sex abuse victim at her elementary school without parental consent, court order, or exigent circumstances. Camreta v. Greene, 131 S. Ct. 2020 (May 26, 2011) – August 11:12

Civil Rights Act decision: federal act protecting religion in institutions applies to county courthouse holding facility, so U.S. District Court must address whether act was violated by ordering Muslim woman to remove headscarf. Khatib v. County of Orange, 639 F.3d 898 (9th Cir. March 15, 2011) – September 11:06

District attorney's office may not be held liable under 42 U.S.C. §1983 for failure to train its prosecutors based on a single Brady violation. Connick v. Thompson, 131 S. Ct. 1350 (March 29, 2011) – October 11:03

County jails might be required to distribute unsolicited publication (Crime, Justice &

America) to inmates. Hrdlicka v. Reniff, 631 F.3d 1044 (9th Cir. January 31, 2011) – October 11:09

Ninth Circuit withdraws opinion in Hayes v. County of San Diego and certifies issue to California State Supreme Court. Hayes v. County of San Diego, ___ F.3d ___, 2011 WL 2315191 (9th Cir. June 14, 2011) – October 11:04 (NOTE: See entry above)

Qualified immunity for elected sheriff who transferred lieutenant out of policy-making position for supporting opponent does not protect sheriff from claim for alleged retaliation after transfer. Bardzik v. County of Orange, 635 F.3d 1138 (9th Cir. March 28, 2011) – October 11:06

Panel muddies water in Civil Rights Act lawsuit, equivocates on whether claim based on alleged Brady violation can be brought where the plaintiff was not convicted of a crime. Smith v. Almada, 640 F.3d 931 (9th Cir. March 21, 2011) – October 11:07 (NOTE: See entry above)

Civil Rights Act lawsuit: split 3-judge panel holds that affidavit did not add up to probable cause to search home computer for child pornography in describing (1) teacher's molesting and other misbehavior with female students, plus (2) detective-affiant's training and experience. Dougherty v. City of Covina, 654 F.3d 892 (9th Cir. August 16, 2011) – November 11:03

Civil Rights Act lawsuit: officer who fatally shot driver, who rammed her vehicle into police vehicles at end of high speed chase, is entitled to qualified immunity from due process-based liability. A.D. v. Markgraf, California Highway Patrol, 636 F.3d 555 (9th Cir. April 6, 2011) – November 11:03

CJTC INTERNET LED PAGE

ANNOUNCEMENT: Law Enforcement Digest co-editor, John Wasberg, is retiring; current co-editor, Shannon Inglis, will continue as the LED editor – May 11:03

ANNOUNCEMENT: The 2011 edition of "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors" by Washington Association of Prosecuting Attorneys (WAPA) Staff Attorney Pamela B. Loginsky, is now available on the LED webpage under the special topics heading – August 11:02

ANNOUNCEMENT: Materials by John Wasberg have been updated as of July 25, 2011 and are available on the Criminal Justice Training Commission's internet LED page under "special topics." – October 11:02

CONSPIRACY (RCW 9A.28.040)

Evidence that people provided guns to defendant knowing of her ongoing strife with her estranged husband is evidence of agreement and supports a murder-conspiracy charge against her. State v. Stark, 158 Wn. App. 952 (Div. III, December 16, 2010) – February 11:19

CORPUS DELICTI RULE

Corpus delicti of first-degree child molestation established. State v. Grogan, 158 Wn. App. 272 (Div. III, October 28, 2010) – August 11:22

CRIMINAL RULE 3.1 (and CrRLJ 3.1)

Arrestee who had initially invoked his right to an attorney under Criminal Rule 3.1 held to have waived that right where he initiated a conversation with officers and made volunteered statements. State v. Mullins, 158 Wn. App. 360 (Div. II, November 1, 2010) – January 11:20

DISCOVERY IN CRIMINAL CASES

Pre-trial defense interviews with police officers are not "private conversations" within the meaning of chapter 9.73 RCW (Privacy Act) so consent is not required to tape record; however, officers' refusal to have conversations tape recorded does not constitute refusal to discuss the case and does not justify the court ordering a deposition. State v. Mankin, 158 Wn. App. 111 (Div. II, October 19, 2010) – March 11:22

DOMESTIC VIOLENCE PROTECTION ACT ORDERS (chapter 26.50 RCW)

Collateral bar rule prohibits challenges to validity of orders issued under chapter 26.50 RCW; language in defendant's order provided adequate notice that violation was a crime. City of Seattle v. May, 171 Wn.2d 847 (June 23, 2011) – October 11:20

DUE PROCESS, INCLUDING BRADY RULE

Civil Rights Act lawsuit: claim based on alleged Brady violation cannot be brought where the plaintiff was not convicted of a crime. Smith v. Almada, 623 F.3d 1078 (9th Cir., October 19, 2010) – March 11:12 (NOTE: The Ninth Circuit subsequently issued a revised set of opinions in Smith v. Almada, 640 F.3d 931 (9th Cir, March 21, 2011) – **Oct 11 LED:7**, though reaching the same result; see entry below)

Panel muddies water in Civil Rights Act lawsuit, equivocates on whether claim based on alleged Brady violation can be brought where the plaintiff was not convicted of a crime. Smith v. Almada, 640 F.3d 931 (9th Cir. March 21, 2011) – October 11:07 (NOTE: See entry above)

DURESS DEFENSE (RCW 9A.16.060)

Evidence in prosecution of confidential informant for several crimes supports jury instruction on recklessness exception to duress defense under RCW 9A.16.060(3). State v. Healy, 157 Wn. App. 502 (Div. I, August 16, 2010) – May 11:24

ELECTRONIC SURVEILLANCE (Chapter 9.73 RCW)

Pre-trial defense interviews with police officers are not "private conversations" within the meaning of chapter 9.73 RCW (privacy act) so consent is not required to tape record; however, officers' refusal to have conversations tape recorded does not constitute refusal to discuss the case and does not justify the court ordering a deposition. State v. Mankin, 158 Wn. App. 111 (Div. II, October 19, 2010) – March 11:22

EVIDENCE LAW

Standing, Miranda, scope-of-stop, and spousal privilege issues addressed in pro-state rulings in case where officer asked female driver protected by a no-contact order to identify male passenger. State v. Shufelen, 150 Wn. App. 244 (Div. I, April 13, 2009) –

February 11:15

State may not lawfully question defendant outside scope of direct testimony either (1) on cross exam or (2) as a rebuttal witness. State v. Epefanio, 156 Wn. App. 378 (Div. III, May 27, 2010) – February 11:20

No privilege for child molester's admissions to his therapist, and no problem with use of search warrant to obtain therapist's records. State v. Hyder, 159 Wn. App. 234 (Div. II, January 4, 2011) – February 11:23

EXCESSIVE FORCE (See topic "Civil Liability")

EXCLUSIONARY RULE (See subtopic under "Searches")

FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION (See also topic "Interrogations and confessions")

Officer's testimony that defendant was "evasive" during interrogation did not violate Fifth Amendment right to silence; but remark did violate Sixth Amendment by invading province of jury; that error, however, was cured by timely trial court jury instruction. State v. Hager, 171 Wn.2d 151 (March 10, 2011) – May 11:09

FIREARMS LAWS AND OTHER WEAPONS LAWS (Primarily chapter 9.41 RCW)

Constructive possession of drugs and firearm established where defendant was sole occupant of truck registered to him. State v. Bowen, 157 Wn. App. 821 (Div. II, September 21, 2010) – February 11:19

FISH AND WILDLIFE CRIMES, VIOLATIONS, ENFORCEMENT (Title 77 RCW)

Wildlife trafficking statute held not to contain value-aggregation rule. State v. Yon, 159 Wn. App. 195 (Div. III, December 28, 2010) – May 11:20

FORFEITURE (See also topic "Uniform Controlled Substances Act")

City ordinance held lawful in mandating "holds" of vehicles impounded after arrests for certain specified offenses. City of Kent v. Mann, 161 Wn. App. 126 (Div. I, April 11, 2011) – July 11:24

FREEDOM OF SPEECH (FIRST AMENDMENT)

"True threat" requirement of First Amendment free speech protection requires special jury instruction in harassment prosecution. State v. Schaler, 169 Wn.2d 274 (July 29, 2010) – May 11:10

GAMBLING (Chapter 9.46 RCW)

RCW 9.46.240's ban on internet gambling does not violate Federal Constitution's Dormant Commerce Clause. Rousso v. State of Washington, 170 Wn.2d 70 (September 23, 2010) – February 11:05

HARASSMENT (RCW 9A.46.020)

"True threat" requirement of First Amendment free speech protection requires special jury instruction in harassment prosecution. State v. Schaler, 169 Wn.2d 274 (July 29, 2010) –

May 11:10

IMPLIED CONSENT BREATH AND BLOOD TESTS FOR ALCOHOL (RCW 46.20.308)

Enrolled member of Yakama Nation who drove car on public highway on Yakama reservation – until he veered off into a canal – is subject to blood draw requirement of the implied consent statute, RCW 46.20.308. State v. Yallup, 160 Wn. App. 500 (Div. III, March 10, 2011) – May 11:24

INDECENT EXPOSURE (RCW 9A.88.010)

Indecent exposure conviction held to be supported by evidence that defendant was seen walking through neighborhood while nude except for shoes and a stocking cap, even though no witness saw his genitals. State v. Vars, 157 Wn. App. 482 (Div. I, August 16, 2010) – February 11:20

INDIANS (NATIVE AMERICANS) AND LAW ENFORCEMENT

Enrolled member of Yakama Nation who drove car on public highway on Yakama reservation – until he veered off into a canal – is subject to blood draw requirement of the implied consent statute, RCW 46.20.308. State v. Yallup, 160 Wn. App. 500 (Div. III, March 10, 2011) – May 11:24

Court reverses its previous two opinions in this case and holds: where a non-tribal member commits a traffic infraction on the reservation, tribal police officers do not have inherent authority to pursue the violator outside of the reservation, stop the vehicle, and, upon observing signs of intoxication, detain the driver while waiting for city, county or state law enforcement to arrive. State v. Eriksen, ___ Wn.2d ___, 259 P.3d 1079 (September 1, 2011) – November 11:04

INTERROGATIONS AND CONFESSIONS (See also topic "Sixth Amendment Right to Counsel")

Arrestee who had initially invoked his right to an attorney under Criminal Rule 3.1 held to have waived that right where he initiated a conversation with officers and made volunteered statements. State v. Mullins, 158 Wn. App. 360 (Div. II, November 1, 2010) – January 11:20

Standing, Miranda, scope-of-stop, and spousal privilege issues addressed in pro-state rulings in case where officer asked female driver protected by a no-contact order to identify male passenger. State v. Shufelen, 150 Wn. App. 244 (Div. I, April 13, 2009) – February 11:15

Defendant's Terry, Miranda, consent, and curtilage arguments rejected in case involving officers' investigation of previous evening's gunfire at campsite on national forest service land. U.S. v. Basher, 629 F.3d 1161 (9th Cir. January 20, 2011) – April 11:02

Deliberate two-step interrogation method without curative warning at step two violates Miranda rule of Missouri v. Seibert. Thompson v. Runnel, 621 F.3d 1007 (9th Cir. September 8, 2010) – March 11:06 (NOTE: Opinion withdrawn and superseded on denial of rehearing en banc, ___ F.3d ___, 2011 WL 2279451 (9th Circ. June 9, 2011) **Dec 11 LED:19** (NOTE: see entry below)

Officer's testimony that defendant was "evasive" during interrogation did not violate Fifth Amendment right to silence; but remark did violate Sixth Amendment by invading province of jury; that error, however, was cured by timely trial court jury instruction. State v. Hager, 171 Wn.2d 151 (May 10, 2011) – May 11:09

Miranda "custody" test: where an officer knows or should reasonably know that the suspect being questioned is a juvenile, the suspect's age is an objective factor that must be considered – the question is how a typical juvenile of that age would perceive the detention. J.D.B. v. North Carolina, 131 S. Ct. 2394 (June 16, 2011) – August 11:03

Confession by inexperienced 17-year-old suspect in mass murder case again held involuntary by majority of Ninth Circuit where, among other things, (1) officers significantly downplayed the Miranda warnings, (2) questioned the suspect through the night for 12 hours straight, (3) for an extended period continued asking him essentially the same questions over and over despite his silence, and (4) told him numerous times that he "had to" answer their question. Doody v. Ryan, 649 F.3d 986 (9th Cir. May 4, 2011) – September 11:05

Defendant's custodial statements were voluntary even though she may not have understood the full consequences of her decision to talk to detectives. State v. Curtiss, 161 Wn. App. 673 (Div. II, May 6, 2011) – September 11:22

Detectives' conversation with defendant regarding his suspected new crime committed while in jail held not to violate Washington Constitution's provision protecting right to counsel. State v. Hahn, 162 Wn. App. 885 (Div. II, August 3, 2011) – November 11:20

Order denying petition for panel rehearing and rehearing en banc revises previous opinion ever so slightly in Ninth Circuit Miranda-Seibert 3 judge panel opinion. Thompson v. Runnels, ___ F.3d ___, 2011 WL 2279451 (9th Cir. June 9, 2011) – December 11:19. (NOTE: see entry above)

JAILS AND PRISONS

Civil Rights Act decision: federal act protecting religion in institutions applies to county courthouse holding facility, so U.S. District Court must address whether act was violated by ordering Muslim woman to remove headscarf. Khatib v. County of Orange, 639 F.3d 898 (9th Cir. March 15, 2011) – September 11:06

County jails might be required to distribute unsolicited publication (Crime, Justice & America) to inmates. Hrdlicka v. Reniff, 631 F.3d 1044 (9th Cir. January 31, 2011) – October 11:09

KIDNAPPING, UNLAWFUL IMPRISONMENT AND RELATED OFFENSES (Chapter 9A.40 RCW)

RCW 9A.40.060(2)'s phrase, "court-ordered parenting plan," receives pro-state interpretation in custodial interference case. State v. Veliz, 160 Wn. App. 396 (Div. III, March 8, 2011) – May 11:22 (NOTE: The Washington State Supreme Court has granted review, 171 Wn.2d 1028 (July 12, 2011))

LEGISLATIVE UPDATE FOR 2011

Part One of the 2011 Washington Legislative Update – June 11:01

Part Two of the 2011 Washington Legislative Update – July 11:02

2011 Washington Legislative Update Subject Matter Indexes – July 11:16-19

LINEUPS, PHOTO IDENTIFICATIONS AND SHOWUPS

Police contact with drug suspect was lawful social contact, and officer's request to take his hands from his pockets did not make contact a seizure; show-up ID was not too suggestive; Crawford Sixth Amendment confrontation rule does not apply to suppression hearings. State v. Fortun-Cebada, 158 Wn. App. 158 (Div. I, October 25, 2010) – January 11:15

LOSS OF, DESTRUCTION OF, FAILURE TO PRESERVE EVIDENCE (See also topic "Due process, including Brady rule")

In prosecution for Second Degree Theft, the fact that computer does not work is not material exculpatory evidence such that the state is required to preserve it. State v. Valdez, 158 Wn. App. 626 (Div. III, November 18, 2010) – March 11:21

MALICIOUS MISCHIEF (Chapter 9A.48 RCW)

For purposes of malicious mischief statute "property of another" includes property in which the defendant possesses anything less than exclusive ownership. State v. Newcomb, 160 Wn. App. 184 (Div. II, February 11, 2011) - November 11:24

MEDICAL USE OF MARIJUANA ACT (Chapter 69.51A RCW)

Washington's medical use of marijuana act ("MUMA") (Chapter 69.51A RCW) does not prevent an employer from discharging an employee for drug use and does not provide a private cause of action against the employer. Jane Roe v. TeleTec Customer Care Management (Colorado) L.L.C., 171 Wn.2d 736 (June 9, 2011) – August 11:16

MUNICIPAL COURT AUTHORITY

State criminal statute that is not adopted by city or incorporated by reference in city's code may not be prosecuted in city's municipal court. City of Auburn v. Gauntt, 160 Wn. App. 567 (Div. I, March 14, 2011) – May 11:22 (NOTE: The Washington State Supreme Court has granted review, 171 Wn.2d 1004 (August 9, 2011))

MURDER AND OTHER NON-TRAFFIC CRIMINAL HOMICIDES (Chapter 9A.32 RCW)

Evidence that people provided guns to defendant knowing of her ongoing strife with her estranged husband is evidence of agreement and supports a murder-conspiracy charge against her. State v. Stark, 158 Wn. App. 952 (Div. III, December 16, 2010) – February 11:19

No invasion of province of jury occurred with detective's testimony that during interrogation, in order to see if defendant would change his story, he told defendant he was lying; also, evidence is sufficient to support premeditation element of first degree murder. State v. Notaro, 161 Wn. App. 654 (Div. II, May 6, 2011) – September 11:21

OBSTRUCTING (RCW 9A.76.020 and related or similar offenses)

Words alone cannot constitute obstructing. State v. Williams, 171 Wn.2d 474 (May 12, 2011) – July 11:19

POSSESSING STOLEN PROPERTY (Chapter 9A.56 RCW)

Defense of good faith claim of title does not apply to possession-of-stolen-property cases. State v. Hawkins, 157 Wn. App. 739 (Div. III, September 9, 2010) – March 11:24

In possessing stolen vehicle case, defendant loses argument that he possessed only stolen car parts, not a stolen car. State v. Acevedo, 159 Wn. App. 221 (Div. III, December 9, 2010) – April 11:25

Knowingly possessing a stolen, unsolicited, unactivated credit card taken without permission from a trash can inside another's home is second degree possession of stolen property under RCW 9A.56.010(1)(c). State v. Rose, 160 Wn. App. 29 (Div. III, February 8, 2011) – May 11:16

PROSECUTOR MISCONDUCT

Prosecutor's improper injection of racial prejudice into trial found not harmless. State v. Monday, 171 Wn.2d 667 (June 9, 2011) – August 11:16

PUBLIC RECORDS ACT (Chapter 42.56 RCW)

Under "privacy prong" of investigative records exemption, RCW 42.56.240(1), employee personal information exemption, RCW 42.56.230(2), and the Criminal Records Privacy Act, chapter 10.97 RCW, officer's name may be redacted from non-adverse internal administrative investigation and from criminal investigation where charges were not filed, but remainder of the investigation records must be disclosed. Bainbridge Island Police Guild v. City of Puyallup, ___ Wn.2d ___, 259 P.3d 190 (August 18, 2011) – October 11:09

Prison surveillance video recordings held exempt from public disclosure as "essential to effective law enforcement." Fischer v. Department of Corrections, 160 Wn. App. 722 (Div. I, January 24, 2011) – October 11:24

Court of Appeals upholds constitutionality of RCW 42.56.565 (inspection or copying of public records by persons serving criminal sentences); affirms order permanently enjoining disclosure of records. King County Department of Adult and Juvenile Detention v. Parmelee, 162 Wn. App. 337 (Div. I, June 27, 2011) – November 11:22

Court may appropriately consider the identity of a public records requestor when determining whether to issue injunctive relief under the Public Records Act; RCW 42.56.565 (inspection or copying of public records by persons serving criminal sentences) applies retroactively. Franklin County Sheriff's Office v. Parmelee, 162 Wn. App. 289 (Div. III, June 21, 2011) – November 11:22

There is no "standing" or "continuing" request under the Public Records Act; the investigative records exemption, RCW 42.56.240(1), does not cease to apply once the final witness interview has occurred and does apply to records of internal administrative investigation. Sargent v. Seattle Police Department, ___ Wn. App. ___, 260 P.3d 1006 (Div. I, September 19, 2011) – December 11:19

RAPE AND OTHER SEX OFFENSES (Primarily chapter 9A.44 RCW)

Defendant may be convicted of attempted child rape for communications and actions in relation to a fictional underage person created by an undercover law enforcement officer. State v. Patel, 170 Wn.2d 476 (November 10, 2010) – February 11:05

Evidence in sex sting case held sufficient to support substantial step and intent elements of attempted child rape. State v. Wilson, 158 Wn. App. 305 (Div. I, November 1, 2010) – February 11:22

Consenting sexual intercourse between a high school teacher and his 18-year-old student held criminal; 5-4 majority of Supreme Court reverses Court of Appeals and reinstates charge of First Degree Sexual Misconduct with a minor (note: in 2009, legislature amended RCW 9A.44.093 to eliminate claimed loophole). State v. Hirschfelder, 170 Wn.2d 536 (November 18, 2010) – April 11:09

Corpus delicti of first-degree child molestation established. State v. Grogan, 158 Wn. App. 272 (Div. III, October 28, 2010) – August 11:22

First degree child rape: sufficient evidence held to support stepfather's convictions on four counts despite some inconsistencies between the victim's testimony and her earlier out-of-court accounts. State v. Corbett, 158 Wn. App. 576 (Div. II, November 16, 2010) – September 11:23

ROBBERY (Chapter 9A.56 RCW)

Evidence of robbery with a realistic toy gun held sufficient for first degree robbery statute. State v. Webb, 162 Wn. App. 195 (Div. III, June 7, 2011) – November 11:23

SEARCHES (See also topic "Arrest, Stop and Frisk")

Border search

Despite ICE's lack of reasonable suspicion of criminal conduct by the previously convicted child molester coming back to the United States from Mexico, border search doctrine held to justify taking laptop computer 170 miles to lab and searching it over a two-day period for child porn. United States v. Cotterman, 637 F.3d 1068 (9th Cir. March 30, 2011) – October 11:04

Community caretaking, emergency, and exigent circumstances exceptions to warrant requirement

Civil Rights Act lawsuit: officers' warrantless entry into home to investigate possible school-threat not justified by exigent circumstances; two officers are entitled to qualified immunity based on their reasonable belief that they had consent to enter, and two officers are not. Huff v. City of Burbank, 632 F.3d 539 (9th Cir, January 11, 2011) – March 11:02

No exigent circumstances justified entering curtilage of home: officers should not have entered without a warrant based solely on neighbor's report that homeowners were at work and an individual had thrown a backpack over the fence and climbed into the backyard. U.S. v. Struckman, 603 F.3d 741 (9th Cir. May 4, 2010) – March 11:15

Warrant requirement does not justify non-consenting warrantless entry under the facts of this domestic violence case. State v. Schultz, 170 Wn.2d 746 (January 13, 2011) – March 11:16

Civil Rights Act lawsuit: officers' forcible entry of home of driver who minutes earlier had been involved in minor car collision held not justified by possibility that other driver's belief she had smelled alcohol was actually evidence of first driver being near diabetic coma. Hopkins v. Bonvicino, 573 F.3d 752 (9th Cir. July 16, 2009) – May 11:06

Fourth Amendment argument that officers created exigency in knocking and announcing their presence at drug suspect's door is rejected in categorical ruling that apparently precludes such a theory if officers did not otherwise act unlawfully; Washington Constitution might be interpreted more restrictively against law enforcement. Kentucky v. King, 131 S. Ct. 1849 (May 16, 2011) – August 11:08

Consent exception to search warrant requirement

Warrant requirement does not justify non-consenting warrantless entry under the facts of this domestic violence case. State v. Schultz, 170 Wn.2d 746 (January 13, 2011) – March 11:16

Defendant's Terry, Miranda, consent, and curtilage arguments rejected in case involving officers' investigation of previous evening's gunfire at campsite on national forest service land. U.S. v. Basher, 629 F.3d 1161 (9th Cir. January 20, 2011) – April 11:02

Exclusionary rule

Fourth Amendment exclusionary rule does not apply to vehicle search incident to arrest conducted in objectively reasonable reliance on pre-Gant case law; different result under article 1, section 7 of Washington Constitution and State v. Afana. Davis v. U.S., 131 S. Ct. 2419 (June 16, 2011) – September 11:04

Split court does not resolve whether the concept of "attenuation" is part of the exclusionary rule of Washington's Constitution. State v. Eserjose, 171 Wn.2d 907 (June 30, 2011) – September 11:06

Incident to arrest (motor vehicle) exception to warrant requirement

2-1 majority concludes in the alternative that search-incident exception and "open view" justified entry of car to seize gun case following arrest of driver for felony harassment; dissenter argues that neither search-incident exception nor "open view" support vehicle entry or search in absence of true exigent circumstances. State v. Barnes, 158 Wn. App. 602 (Div. II, November 16, 2010) – January 11:03

2-1 majority concludes in the alternative that search-incident exception and "open view" justified entry of car to seize drug paraphernalia after arrest of apparently intoxicated driver; dissenter argues that neither search-incident exception nor "open view" supports vehicle entry or search in absence of actual exigent circumstances; court appears to be in agreement that arrest was supported by probable cause. State v. Louthan, 158 Wn. App. 732 (Div. II, November 30, 2010) – January 11:08

Open view, search incident, and waiver issues decided against state in 2-1 decision suppressing evidence seized in car search. State v. Swetz, 160 Wn. App. 122 (Div. II, February 11, 2011) – April 11:11

Issues of 1) waiver/failure-to-preserve constitutional arguments, 2) frisk, 3) vehicle search incident to arrest, and 4) impound-inventory-theory touched on and resolved against the state in a 2-1 decision. State v. Abuan, 161 Wn. App. 135 (Div. II, April 12, 2011) – September 11:11

Court of Appeals applies Arizona v. Gant rule to search of purse (on person) incident to arrest. State v. Byrd, 162 Wn. App. 612 (Div. III, July 19, 2011) – October 11:21

Incident to arrest (non-motor vehicle) exception to warrant requirement

Search of container found on defendant's person at time of arrest but not searched until after he was secured held unlawful; Ninth Circuit decision conflicts with Washington case law. U.S. v. Maddox, 614 F.3d 1046 (9th Cir. August 12, 2010) – February 11:03

Open view (See also subtopic "Privacy expectations, scope of constitutional protections")

2-1 majority concludes in the alternative that search-incident exception and "open view" justified entry of car to seize gun case following arrest of driver for felony harassment; dissenter argues that neither search-incident exception nor "open view" support vehicle entry or search in absence of true exigent circumstances. State v. Barnes, 158 Wn. App. 602 (Div. II, November 16, 2010) – January 11:03

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Open view, search incident, and waiver issues decided against state in 2-1 decision suppressing evidence seized in car search. State v. Swetz, 160 Wn. App. 122 (Div. II, February 11, 2011) – April 11:11

Plain view authority to seize evidence

There is no longer a Ninth Circuit precedential opinion containing the extensive detailed standards that were set forth in an earlier majority decision regarding drafting and executing computer search warrants in order to limit "plain view" seizures of computer evidence. U.S. v. Comprehensive Drug Testing, Inc., 621 F.3d 1162 (9th Cir. September 13, 2010) – February 11:04

Privacy expectations, scope of constitutional protections (see also subtopic of "Open view")

No privilege for child molester's admissions to his therapist, and no problem with use of search warrant to obtain therapist's records. State v. Hyder, 159 Wn. App. 234 (Div. II, January 4, 2011) – February 11:23

Defendant's Terry, Miranda, consent, and curtilage arguments rejected in case involving officers' investigation of previous evening's gunfire at campsite on national forest service land. U.S. v. Basher, 629 F.3d 1161 (9th Cir. January 20, 2011) – April 11:02

Cheek swab to obtain DNA sample while charges are pending constitutes search requiring warrant; court order under CrR 4.7 for swab may be okay if supported by probable cause and other safeguards, but record in this case held insufficient to make that determination. State v. Garcia-Salgado, 170 Wn.2d 176 (October 7, 2010) – April 11:10

Majority of court concludes that a search warrant is not needed for law enforcement officers to look at motel registry with motel staff's OK, so long as officers have relevant reasonable individualized suspicion of criminal activity by the subject of their inquiry. In re Personal Restraint of Nichols, 171 Wn.2d 370 (April 28, 2011) – June 11:24

Deputy sheriff's computer check of jail visitor's name for outstanding warrants and driver license information did not violate her state or federal constitutional privacy rights; also, evidence held sufficient to support her conviction for possession of

methamphetamine. State v. Hathaway, 161 Wn. App. 636 (Div. II, May 3, 2011) – September 11:08

Probable cause to search (see also subtopic of "Staleness of probable cause")

Search warrant probable cause affidavit gets benefit of the doubt and is held to establish confidential informant's recent observation of defendant's marijuana grow operation. State v. Lyons, 160 Wn. App. 100 (Div. III, February 10, 2011) – April 11:11 (NOTE: The Washington State Supreme Court has granted review, ___ Wn.2d ___, 259 P.3d 1110 (September 8, 2011))

Credibility prong of 2-pronged Aguilar-Spinelli test for probable cause met by registered sex offender-informant; also, defective service of search warrant is held not prejudicial under facts of case. State v. Ollivier, 161 Wn. App. 307 (Div. I, April 18, 2011) – September 11:20

Probationer, parolee searches

Rulings: 1) deputy sheriffs didn't use community corrections specialist pretextually as "stalking horse"; 2) trial court should have applied probable cause test to determine if officers reasonably concluded probationer resided in premises from which they arrested him; 3) evidence sufficient on possessing marijuana with intent to deliver. State v. Reichert, 158 Wn. App. 374 (Div. II, November 2, 2010) – February 11:07

School search exception to search warrant requirement

Search by school resource officer held to qualify as school search under the lower standards for school searches of the state and federal constitutions. State v. J.M., 162 Wn. App. 27 (Div. I, May 23, 2011) – August 11:17

Assistant principal's informant-based search of evasive high school student's backpack upheld under relaxed constitutional standard for searches by K-12 school staff. State v. E.K.P., 162 Wn. App. 675 (Div. II, July 19, 2011) – November 11:16

Staleness of probable cause

Search warrant probable cause affidavit gets benefit of the doubt and is held to establish confidential informant's recent observation of defendant's marijuana grow operation. State v. Lyons, 160 Wn. App. 100 (Div. III, February 10, 2011) – April 11:11 (NOTE: The Washington State Supreme Court has granted review, ___ Wn.2d ___, 259 P.3d 1110 (September 8, 2011))

Strip search in prison or jail

Civil Rights Act lawsuit: under the facts of this case, where no emergency existed and several male correctional officers stood by, 6-5 majority rules that the "strip search" of a male pretrial detainee by a female cadet violated the Fourth Amendment. Byrd v. Maricopa County Sheriff's Department, 629 F.3d 1135 (9th Cir. January 5, 2011) – March 11:12

Waiver of constitutional argument by failure to timely raise

Open view, search incident, and waiver issues decided against state in 2-1 decision suppressing evidence seized in car search. State v. Swetz, 160 Wn. App. 122 (Div. II,

February 11, 2011) – April 11:11

State's waiver/failure-to-preserve-argument theory rejected in vehicle search incident cases. State v. Robinson, 171 Wn.2d 292 (April 14, 2011) – July 11:19

SELF DEFENSE AND DEFENSE OF OTHERS (Chapter 9A.16 RCW)

Defendant in shooting should have been permitted to argue both self-defense and accident where he was facing seven snarling dogs. State v. Werner, 170 Wn.2d 333 (2010) – April 11:10

SENTENCING

Court of Appeals finds inadequate support for, and therefore sets aside, jury's finding of sentence-enhancing gang aggravator. State v. Bluehorse, 159 Wn. App. 410 (Div. II, January 10, 2011) – May 11:19

Sentencing court lacks discretion to allow defendant to possess a firearm "in military formation or in combat" where firearm restriction is statutorily mandated. State v. Damiani, 162 Wn. App. 1 (Div. II, February 1, 2011) – November 11:25

SEXUALLY VIOLENT PREDATOR LAW

Media-dubbed "south hill rapist" loses challenge to his commitment as a sexually violent predator. In re the Detention of Kevin Coe, 160 Wn. App. 809 (Div. I, March 24, 2011) – May 11:20 (NOTE: The Washington State Supreme Court has granted review, 171 Wn.2d 1001 (August 8, 2011))

SIXTH AMENDMENT RIGHT TO CONFRONTATION

Police contact with drug suspect was lawful social contact, and officer's request to take his hands from his pockets did not make contact a seizure; show-up ID was not too suggestive; Crawford Sixth Amendment confrontation rule does not apply to suppression hearings. State v. Fortun-Cebada, 158 Wn. App. 158 (Div. I, October 25, 2010) – January 11:15

Sixth Amendment confrontation: Crawford-Davis standard clarified in favor of state in case involving ongoing-emergency statements by dying shooting victim in gas station parking lot; objective look at purposes of both the victim and the questioning officers required. Michigan v. Bryant, 131 S. Ct. 1143 (February 28, 2011) – May 11:03

Sixth Amendment right to confrontation: in prosecution for violation of no-contact order, it was OK to admit certified copy of alleged victim's driver's license as evidence of her identity. State v. Mares, 160 Wn. App. 558 (Div. I, March 14, 2011) – May 11:22

Confrontation clause requires that a defendant be permitted to confront the specific analyst who certifies blood alcohol analysis report. Bullcoming v. New Mexico, 131 S. Ct. 2705 (June 23, 2011) – September 11:02

SIXTH AMENDMENT RIGHT TO JURY TRIAL

Officer's testimony that defendant was "evasive" during interrogation did not violate Fifth Amendment right to silence; but remark did violate Sixth Amendment by invading

province of jury; that error, however, was cured by timely trial court jury instruction. State v. Hager, 171 Wn.2d 151 (March 10, 2011) – May 11:09

No invasion of province of jury occurred with detective's testimony that during interrogation, in order to see if defendant would change his story, he told defendant he was lying; also, evidence is sufficient to support premeditation element of first degree murder. State v. Notaro, 161 Wn. App. 654 (Div. II, May 6, 2011) – September 11:21

TRAFFIC (Title 46 RCW) (See also topic of "Implied consent")

RCW 46.61.024(1)'s felony eluding "willfully" element means that state must prove defendant knew pursuing vehicle was police vehicle. State v. Flora, 160 Wn. App. 549 (Div. I, March 14, 2011) – May 11:18

RCW 46.61.210's failure-to-yield provisions apply only to emergency passing efforts, not to traffic stop circumstances; driver who pulled over to left, instead of right, shoulder of I-5 when signaled to stop for speeding did not violate the statute (or any other statute, it appears). State v. Weaver, 161 Wn. App. 58 (Div. II, April 5, 2011) – July 11:20

Reckless driving is not a lesser included offense of attempt to elude. State v. Hunley, 161 Wn. App. 919 (Div. II, May 17, 2011) – November 11:23

TRESPASS (Chapter 9A.52 RCW)

Trespass conviction against K-12 public school student's mother set aside based on: (1) school's failure to fully inform her of her appeal rights at the time the school gave her a notice of trespass, and (2) absence of proof of adequate basis for notice of trespass. State v. Green, 157 Wn. App. 833 (Div. I, September 27, 2010) – February 11:18

UNIFORM CONTROLLED SUBSTANCES ACT (Chapter 69.50 RCW) AND OTHER DRUG LAWS (See also topic of "Forfeiture")

Rulings: 1) deputy sheriffs didn't use community corrections specialist pretextually as "stalking horse"; 2) trial court should have applied probable cause test to determine if officers reasonably concluded probationer resided in premises from which they arrested him; 3) evidence sufficient on possessing marijuana with intent to deliver. State v. Reichert, 158 Wn. App. 374 (Div. II, November 2, 2010) – February 11:07

Constructive possession of drugs and firearm established where defendant was sole occupant of truck registered to him. State v. Bowen, 157 Wn. App. 821 (Div. II, September 21, 2010) – February 11:19

Proximate cause element of controlled substances homicide, RCW 69.50.415(1), explained in decision affirming conviction. State v. Christman, 160 Wn. App. 741 (Div. III, March 14, 2011) – May 11:21

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BRIEF NOTE FROM THE NINTH CIRCUIT U.S. COURT OF APPEALS

ORDER DENYING PETITION FOR PANEL REHEARING AND REHEARING EN BANC REVISES PREVIOUS OPINION EVER SO SLIGHTLY IN NINTH CIRCUIT MIRANDA-SEIBERT 3-JUDGE PANEL OPINION – In Thompson v. Runnels, ___ F.3d ___, 2011 WL 2279451 (9th Cir. June 9, 2011), the majority and dissenting Ninth Circuit opinions in a split 2-1

decision are revised in minor respects that do not materially affect the analysis in the opinions or the result of the decision previously reported in the LED. The withdrawn decision was reported at: Thompson v. Runnel, 621 F.3d 1007 (9th Cir. September 8, 2010) **Mar 11 LED:06.** A petition for review by the United States Supreme Court is pending.

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WASHINGTON STATE COURT OF APPEALS

THERE IS NO "STANDING" OR "CONTINUING" REQUEST UNDER THE PUBLIC RECORDS ACT; INVESTIGATIVE RECORDS EXEMPTION, RCW 42.56.240(1), DOES NOT CEASE TO APPLY ONCE THE FINAL WITNESS INTERVIEW HAS OCCURRED; INVESTIGATIVE RECORDS EXEMPTION APPLIES TO RECORDS OF INTERNAL ADMINISTRATIVE INVESTIGATIONS

Sargent v. Seattle Police Department, ___ Wn. App. ___, 260 P.3d 1006 (Div. I, September 19, 2011)

Facts: (Excerpted from the Court of Appeals opinion)

> On July 28, 2009, Evan Sargent had an altercation with [an] off-duty Seattle Police Department (SPD) Officer . . . . Sargent was arrested for assault and released pending charges.
>
> On July 30, [a detective] submitted the case to the King County Prosecuting Attorney's Office (KCPA) for rush filing. KCPA declined to proceed and returned the case for further investigation.
>
> On August 31 and September 1, 2009, Sargent filed requests under the PRA seeking documents related to the incident. In letters dated September 4 and 9, SPD denied Sargent's requests on grounds that under RCW 42.56.240(1), the requested documents were exempt from disclosure as records of an open and active law enforcement investigation. SPD suggested Sargent resubmit his request in six to eight weeks.
>
> Sargent challenged the denial. In response, SPD provided the name and badge number of [the officer] but otherwise continued to deny Sargent's request. Sargent did not file suit.
>
> On October 22, 2009, Sargent submitted a complaint to SPD's Office of Professional Accountability (OPA), which began a disciplinary investigation of [the officer].
>
> Meanwhile, [the detective] continued to investigate the allegations against Sargent. [The detective] conducted his last witness interview on October 23, 2009. On either November 17, 2009 or January 13, 2010 (the record is unclear), [the detective] referred the case to the Seattle city attorney for prosecution. On January 20, 2010, the city attorney declined to file charges. SPD notified Sargent of this determination.
>
> On February 5, 2009, Sargent resubmitted and clarified his requests for information about the July incident, seeking (1) the investigative file, including the incident report and all references or related witness statements or other investigation documentation or materials; (2) all associated 911 tapes; (3) the associated computer aided dispatch system (CAD) log. Additionally, Sargent

requested (4) all written or recorded communications (including electronic) by or concerning [the officer or detective] regarding Sargent or the investigation of the July 28, 2009 incident; and (5) all information regarding any disciplinary investigation of [the officer] and/or other personnel arising from the investigation of the July 28, 2009 incident.

On March 10, SPD provided the 911 tapes. It also provided the investigative file and CAD log, both with names of witnesses redacted for their safety (citing RCW 42.56.240(2)). SPD withheld the disciplinary file under the open and active investigation exemption and suggested Sargent resubmit his request in four to six weeks, and stated it needed additional time to do research before responding to his request for all written communications regarding the event or the investigation thereof. On April 5, SPD provided written communications and additional documents from the investigative file, but redacted jail records (citing RCW 70.48.100), [*Court's Footnote: SPD withheld nonconviction criminal history, later citing the Washington State Criminal Records Privacy Act, chapter 10.97 RCW.*] the names of the witnesses and alleged victim, and documents containing Sargent's social security number and vehicle identification information on grounds that nondisclosure was essential to effective law enforcement or for the protection of privacy or safety (citing RCW 42.56.230, .240(1), (2)).

On April 30, 2010, OPA determined that Sargent's complaint against [the officer] was not sustained. OPA informed Sargent the investigation was closed. Sargent did not submit a new request for the records.

Sargent filed a complaint in King County Superior Court alleging violation of the PRA. After a show cause hearing, the court ruled that SPD violated the act in numerous ways.

ISSUES AND RULINGS: 1) Was the plaintiff's public records act (PRA) request a "standing" or "continuing" request? (ANSWER: No)

2) Does the investigative records exemption, RCW 42.56.240(1), which provides an exemption from disclosure for records of an open and active law enforcement investigation, cease to apply once the final witness interview has occurred? (ANSWER: No)

3) Does the investigative records exemption apply to internal administrative investigations by police departments? (ANSWER: Yes)

4) Did SPD properly justify its claimed exemptions for witness identities, reasons for charging decision, and jail records? (ANSWER: No)

5) Did the trial court err in its award of penalties against SPD? (ANSWER: Yes) (NOTE: we do not analyze the penalty award in this LED entry)

Result: Affirmance in part and reversal in part of King County Superior Court order.

ANALYSIS:

Standing PRA Requests

The plaintiff in this case argued that his PRA request was a "standing" or "pending" request and accordingly, even after SPD had responded to the PRA request, it was required to search for

and disclose additional records if and when the basis for a claimed exemption ceased to apply. The Court of Appeals rejects this argument, explaining:

> . . . The purpose of the PRA is to provide full public access to existing, nonexempt records. The legislature requires agencies of government to respond to requests in a timely and clear fashion. But it does not require that agencies provide updates to previous responses, or monitor whether documents properly withheld as except may later become subject to disclosure. [*Court's Footnote: According to the responsible official, SPD receives over 3,000 PRA requests per year. The trial court remarked that standing requests in the law enforcement context would not pose an unreasonable burden because the onus would fall not on the city attorney but on the detectives in each case. This suggestion overlooks several practical realities, including personnel changes, the passage of time, and the fact that the request log is unlikely to be maintained in the squad room.]*
>
> . . .
>
> This is a sensible, bright-line rule. Agencies are required to respond to requests in a timely fashion by disclosing all nonexempt documents. Nothing in the language or history of the statute indicates the legislature intended to impose on agencies an endless monitoring of old requests, or to require updated responses indefinitely to people who may have long since lost interest.
>
> . . .
>
> SPD responded to each of Sargent's requests as it came in. Sargent was able to appeal those responses. When the status of the records changed, he was notified and had the opportunity to refresh his request. He did so, at least for the investigation file, and the records were, with minor exceptions, properly disclosed.
>
> The PRA does not provide for standing records requests. An agency is not required to monitor whether newly created or newly nonexempt documents fall within a request to which it has already responded. . . .

[Some footnotes and citations omitted]

Exemption For Open and Active Law Enforcement Investigations

The investigative records exemption, RCW 42.56.240(1) exempts:

> Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline member of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

The plaintiff in this case argued that the criminal investigation was subject to disclosure once it was submitted to the KCPO for a charging decision. The Court of Appeals disagrees, holding that the criminal investigation was exempt from disclosure until the time that it was submitted to the city attorney's office for a charging decision. The Court explains:

As established in Newman v. King County, 133 Wn.2d 565, 574-75 (1997), this exemption applies categorically to all records of open and active police investigations. In Newman, a journalist requested police records in the unsolved murder of prominent civil rights leader Edwin Pratt, who was killed in 1969. Two government agencies were still investigating the murder and denied the request under the "essential to effective law enforcement" exemption. The Washington Supreme Court agreed, and held the effective law enforcement prong of RCW 42.56.240(1) constitutes a categorical exemption for all records of open and active police investigations; such records are not subject to in camera review by judges. The court reasoned that whether disclosure would compromise an open investigation is best determined by law enforcement, not courts.

The categorical exemption applies if the investigation is leading towards "an enforcement proceeding." The parties do not dispute that the records were categorically exempt as long as SPD's investigation of the July incident remained open and active.

The first question is when the categorical exemption ceased or was interrupted. In Cowles Publishing Co. v. Spokane Police Department, 138 Wn.2d 472 (1999), the court clarified that the categorical exemption ends when police refer a case to a prosecuting agency: "[W]here the suspect has been arrested and the matter referred to the prosecutor, any potential danger to effective law enforcement is not such as to warrant categorical nondisclosure." After referral, the exemption must be justified as applied to the particular case.

Here, the case was twice referred to a prosecutor. First, two days after the incident, it was referred to the KCPA for rush filing. King County declined to file and returned the case for further investigation. Then, some months later, SPD referred the case to the city attorney.

Sargent contends, and the trial court agreed, that when the case was sent to the KCPA in late July, the records submitted lost their categorical exemption. This would be true had nothing else occurred, but it ignores the subsequent events: before Sargent filed his first records request, the KCPA had returned the file for further work and SPD had resumed its investigation.

Newman and Cowles both rest on the premise that disclosure of records during an open investigation is a judgment best left to law enforcement. The suggestion that the records initially submitted should have been disclosed, despite the prosecutor's implicit conclusion that the investigation was incomplete, amounts to a judicial declaration that disclosure would not have interfered with the remaining investigation. As the Newman court pointed out, judges are not equipped to make such a determination. [*Court's Footnote: The parties do not brief, and we do not address, what procedure should obtain where a records request is filed while the case is still in the hands of the prosecutor, who thereafter returns the file for further investigation.*] At the time of Sargent's request, the entire case file constituted an open investigation within the categorical exemption. The trial court erred in ruling SPD violated the act by failing to disclose the documents submitted for rush filing in July.

> Eventually, the file was referred to the city attorney, at which point the categorical exemption for open investigations ceased under Cowles.
>
> The trial court ruled, however, that the investigation ceased to be open and active, and the exemption ceased to apply, as of the date of the last witness interview, October 23. From that date forward, the court imposed the maximum penalty of $100 per day for nondisclosure.
>
> We disagree with this analysis for several reasons. First, it is plainly unworkable. It would require police agencies to recognize that an interview or other activity is the last step in an ongoing investigation. The fact that a particular event turns out to be the last will not necessarily be obvious at the time. And whether to investigate further or whether the file is ready for referral to a prosecuting agency will often be a collective or command decision and not solely the judgment of the officer who happens to collect the last piece of evidence. The trial court's ruling subjects police agencies to penalties both for lack of prescience and for internal collaboration in determining the sufficiency of an investigation.
>
> This approach also does not conform to Newman, which instructs that documents in an open and active law enforcement investigation are not subject to disclosure when the investigation is leading toward an enforcement proceeding, or to Cowles, which holds an investigation is no longer open and active as of the time law enforcement refers the case to the prosecutor. Just as whether effective law enforcement requires that records of an open investigation be exempt from disclosure is a judgment best left to law enforcement, so is deciding whether an investigation is ready for referral to the prosecutor. The trial court erred by substituting its judgment for that of the police department.
>
> The categorical exemption expired when the case was referred to the city attorney for prosecution. SPD did not violate the PRA or act in bad faith by declining disclosure before that date.

[Some citations and footnotes omitted]

Disclosure Of Disciplinary Investigative Records

The plaintiff also argued that the internal administrative investigation was subject to disclosure. SPD responded that the investigation was "categorically exempt as essential to effective law enforcement under RCW 42.56.240(1) while the disciplinary investigation was open and active, and that after it concluded on April 30, 2010, Sargent failed to submit a new request despite being notified of the disposition." The Court agrees with SPD, explaining:

> . . . The Newman court's reasoning applies equally to disciplinary investigations: "The ongoing nature of the investigation naturally provides no basis to decide what is important . . . . The determination of sensitive or nonsensitive documents often cannot be made until the case has been solved." A disciplinary investigation could lead to criminal charges, and disclosure of the records while the investigation is underway could compromise both the investigation and any subsequent actions. The files were categorically exempt when Sargent made his request. [*Court's Footnote: We do not address what disclosure would have been called for had a request been submitted after the investigation closed. A*

recent decision of our Supreme Court rejected the personal privacy exemption in this context except as to the officer's name, but did not address the essential to effective law enforcement exemption. See Bainbridge Island Police Guild v. City of Puyallup, ___ Wn.2d ___, 259 P.3d 190 (2011).]

Exemptions

The plaintiff in this case did make a subsequent request for the criminal investigation (but not for the internal administrative investigation) once it was closed. SPD disclosed the records of the criminal investigation, with redactions, citing exemptions. The Court analyses the claimed exemptions at issue in this case as follows:

Nondisclosure Of Witness Identities.

In disclosing the investigative file, SPD redacted the names of witnesses, citing the exemption for the protection of witnesses and victims of a crime in RCW 42.56.240(2):

> Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern.

The trial court rejected this exemption, ruling that absent a specific request from a witness for nondisclosure of personal information, the agency must make an affirmative showing that disclosure entails a potential threat to safety or property, which SPD failed to do.

We agree. SPD made no showing that disclosure of identifying information would "endanger any person's life, physical safety, or property." The safety exemption did not justify nondisclosure.

SPD also contends the identifying information falls within the categorical exemption as essential to effective law enforcement, because the prospect of disclosure would have a chilling effect on witnesses who would not come forward for fear of retaliation, thus impeding the ability of law enforcement to gather first-hand accounts of an incident.

We do not agree there is a categorical exemption, but there is case law supporting SPD's argument.

Both Cowles Publishing Co. v. State Patrol, 109 Wn.2d 712 (1988) and Koenig v. Thurston County, 155 Wn. App. 398 (2010), review granted, 170 Wn.2d 1020 (2011), addressed disclosure of witness and officer identities after investigations closed. . . .

. . .

> We conclude there is no clear categorical exemption for witness identification under the effective law enforcement prong of RCW 42.56.240(1). The question thus turns upon the adequacy of the agency's showing that the exemption applies in the particular case. SPD relied upon its claim of categorical exemption and made no showing that redaction of names was needed to ensure effective law enforcement. Because SPD may reasonably have relied upon the strong language in Cowles suggesting a categorical exemption, we remand for an opportunity for SPD to justify redaction of witness identifying information here.
>
> Whether nondisclosure is essential to effective law enforcement is a question of fact.

[Some citations and footnotes omitted]

Reasons For Refusal To File Charges.

SPD redacted an entry from [the detective's] investigation log reflecting his opinion that disclosure of information to Sargent before he had made a statement to police would "undermine[ ] the suspect's credibility, for if he has all of the information known to law enforcement, he can tailor his statement to match the known facts," and withheld the "filing decline memo" from the city attorney. The Court of Appeals concludes that SPD failed to sufficiently justify these exemptions under the essential to effective law enforcement prong of the investigative records exemption.

Sargent's Jail Records And Nonconviction Criminal History

SPD withheld the plaintiff's jail records, citing the jail records statute, RCW 70.48.100(2). The Court of Appeals holds that the statute does not apply when the subject of the records seeks their disclosure. Accordingly, the Court concludes that SPD improperly withheld plaintiff's jail records.

The Court also holds that SPD appropriately withheld plaintiff's non-conviction criminal history record information under chapter 10.97 RCW (Criminal Records Privacy Act).

Metadata

The Court of Appeals also concluded, citing O'Neill v. City of Shoreline, 170 Wn.2d 139, 151-52 (2010), that SPD provided hard copies of the records requested by the plaintiff and was not obligated to produce electronic versions unless the request clearly indicated a preference for that format, which the plaintiff did not do.

LED EDITORIAL COMMENTS: 1. Records of an open criminal investigation – As discussed above, Newman v. King County provided a categorical exemption for open criminal investigations. Cowles Publishing Company v. Spokane Police Department narrowed that exemption, providing that it no longer applied once a case had been referred to the prosecutor for a charging decision. However, because Cowles involved a DUI (rarely returned for additional investigation) the unanswered question was – what happens if the prosecutor returns the case for additional investigation? (We think that most agencies would continue to assert the exemption in such a circumstance.) Although Sargent answers that question, the Court specifically declines to opine on what happens if the request is made once the investigation has been forwarded to the

prosecutor, but before the prosecutor has made the charging decision. (Again, we think that most agencies would continue to assert the exemption in that circumstance.)

2. Records of an open internal administrative investigation – The Sargent Court correctly holds that the investigative records exemption applies to open internal administrative investigations. However, because the plaintiff in this case did not submit a subsequent request for the internal investigation once it was complete, the court did not consider whether the non-sustained internal administrative investigation would be subject to disclosure. The court did, however, cite Bainbridge Island Police Guild v. City of Puyallup, ___ Wn.2d ___, 259 P.3d 190 (2011). See discussion and comments regarding Bainbridge Island Police Guild reported in the October 2011 LED beginning at page 9.

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NEXT MONTH

The January 2012 LED will include the Ninth Circuit Court of Appeals decision in Mattos v. and Maui County; Brooks v. City of Seattle, ___ F.3d ___, 2011 WL 4908374 (9th Cir. October 17, 2011), where a majority of a 10-judge panel holds that taser use by officers was not reasonable, but that the officers are entitled to qualified immunity in both cases.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill

information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. 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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