Law Enforcement Digest

October 2015

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

****

OCTOBER 2015 LED TABLE OF CONTENTS

****

THE WASHINGTON STATE SUPREME COURT

****

MIRANDA: SHERIFF DEPUTY'S CONTRADICTORY AND CONFUSING ADVISEMENTS ON SUSPECT'S RIGHT TO COUNSEL BEFORE AN INTERROGATION VIOLATED *MIRANDA*

State v. Mayer, __ Wn.2d __, __ P.3d __, 2015 WL 6388248 (October 22, 2015).

Two hooded gunmen rob a restaurant at gunpoint. The police suspected that a person with "inside knowledge" of the restaurant planned the robbery. The restaurant's owner told police about a disgruntled former employer and her brother – Nicholas Mayer. Additionally, an anonymous 911 caller stated that he had heard Mayer bragging about the robbery. Based on this information, police picked up Mayer and took him to a police station.

A sheriff's deputy met with Mayer in an interview room at the police station. Before beginning questioning, the deputy read Mayer *Miranda* rights and asked whether he could record the interview. Mayer waived his *Miranda* rights and agreed to have the interview recorded.

The deputy started recording and again read *Miranda* rights. This exchange then took place:

> Mayer: "Um, If I wanted an attorney and I can't afford one, what – what would?"
>
> Deputy: "If you wanted an attorney – you know, if you were charged with a crime and arrested, if you wanted an attorney and couldn't afford one, the Court would be willing to appoint you one. Do you want me to go over that with you again?"
>
> Mayer: "Yeah, but how would that work? Will you be – how it – how I –"
>
> Deputy: "You're not under arrest at this point, right?"
>
> Mayer: "Oh, okay. Okay"
>
> Deputy: "So, if you were, then you would be taken to jail and then you'd go before a judge and then he would ask you whatever at that point, if you were being charged, you would [be] afforded an attorney if you couldn't hi – you know, if you weren't able to afford one."
>
> Mayer: "All right. I understand."
>
> Deputy: "Understand?"
>
> Mayer: "Yeah."
>
> Deputy: "Okay. So you understand your rights?"
>
> Mayer: "Yeah."

The Deputy then began questioning Mayer, and he made incriminating statements. Based, in part, on his statements and other witness testimony (including accomplice testimony), Mayer was convicted of first degree robbery. On appeal, Mayer argued that the deputy's answers to his questions were confusing and violated his *Miranda* rights. The Washington State Supreme Court agreed, but found that since there was overwhelming evidence of guilt, the trial court's admission of Mayer's incriminating statements was harmless.

When a suspect is in custody, an officer must read the suspect *Miranda* warnings before questioning the suspect. A suspect may waive his or her *Miranda* rights, but the waiver must be "voluntarily, knowingly and intelligently" made. An effective *Miranda* warning "cannot link the right to appointed counsel to future events that would occur, if ever, only after interrogation." In this case, the Court found that the deputy made confusing and contradictory statements regarding Mayer's right to speak with an attorney before questioning:

> [S]econds after [the deputy] said that Mayer could exercise [his *Miranda* rights] "at any time," he stressed that Mayer was not yet under arrest and told Mayer that he could not exercise at least one of his rights – his right to appointed counsel – unless several contingent future events occurred. These later statements contradicted the "at any time"

> warning and suggested that at least dome of Mayer's *Miranda* rights had not yet attached – and that they would not attach until he was, at the very least, arrested.
> . . .
> [The deputy] also did not offer curative clarifications . . . Because of this, the apparent contradiction in [the deputy's] instructions rendered the explanation of Mayer's *Miranda* rights unclear.
> . . .
> Of course, police officers may inform a suspect facing interrogation that appointed counsel is not immediately available. But if they tell a suspect that appointed counsel is not available until a future point in time, they must also clarify that this does not affect the suspect's right to have counsel present during interrogation and his right to remain silent unless and until a lawyer can be present. Without such a clarification, the suspect may perceive the officer's statement that appointed counsel is not yet available as contradicting the earlier *Miranda* warnings and as suggesting that his *Miranda* right had not yet attached.

Since the deputy's "linkage of Mayer's right to appointed counsel to conditional future events (arrest, jail, charge, and arraignment) contradicted his earlier statements that Mayer could have access to appointed counsel before questioning and that he could exercise his rights at any time," Mayer did not knowingly, voluntarily and intelligently waive his *Miranda* rights. As such, the deputy's subsequent questioning violated *Miranda* and Mayer's incriminating statements should have been suppressed by the trial court. However, given the overwhelming and untainted additional evidence (i.e., testimony by other witnesses including accomplices and DNA evidence), the trial court's error in admitting Mayer's incriminating statements was harmless and the conviction stands.

<u>LED EDITORIAL COMMENT</u>: The Court noted that the deputy's statements to Mayer about the appointment of counsel in that county may have been accurate. The problem was that the deputy first told Mayer he had the right to counsel, and then, in response to Mayer's questions about how to get an attorney, told Mayer that an attorney would not be appointed unless and until he was arrested and charged.

When officers are faced with this situation, it is prudent to tell the suspect "if you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer." Here, the Court noted that if the deputy provided this clarification to Mayer, then it would have cured the contradictory statements, and Mayer would have been able to knowingly, voluntarily and intelligently waive his *Miranda* rights. As always, officers are encouraged to speak with their agencies' legal advisors on these issues.

****

THE WASHINGTON STATE COURT OF APPEALS

****

SEARCH AND SEIZURE: COMMUNITY CUSTODY OFFICER'S SEARCH OF BEDROOM THAT PERSON ON COMMUNITY CUSTODY SHARED WITH THE DEFENDANT VIOLATED THE STATE CONSTITUTION BECAUSE THE DEFENDANT OBJECTED TO THE SEARCH; BUT, SEARCH OF THE DEFENDANT'S PANTS WAS BASED ON REASONABLE SUSPICION OF A WEAPON THAT COULD JEOPARDIZE OFFICER SAFETY AND WAS VALID UNDER THE STATE CONSTITUTION State v. Rooney, __ Wn. App __, __ P.3d __, 2015 WL 5935471 (October 13, 2015).

Alexandria White, a woman serving a term of community custody, moves into Norman Rooney's residence. White and Rooney had a previous relationship. White does not notify her Community Corrections Officer (CCO) that she moved in with Rooney and changed her address. Her failure to update her address violates her community custody conditions.

The CCO learns that White is living with Rooney. The CCO previously supervised Rooney on community custody, but Rooney was no longer under supervision. The CCO goes to Rooney's residence to arrest White for violating her community custody conditions.

When the CCO arrives at the residence, he finds White in Rooney's bedroom with Rooney laying on the bed. In the bedroom, the CCO "saw a pink backpack, a purse, and a baby carrier" in addition to "swords and axes hanging on the bedroom wall and a couple of knives laying on the shelves" and "additional weapons on Rooney's nightstand." White's infant child was also on the bed.

The CCO told White that he was arresting her for failing to update her address and violating her terms of community custody. After the CCO arrested White, he told her that he planned to search the bedroom. RCW 9.94A.631(1) authorizes a CCO to search a probationer's residence when "the CCO has a well-founded suspicion that the person has violated a condition of his or her community custody."

White denied that she lived in the bedroom and instead stayed in the living room. However, the CCO "did not see any sleeping arrangements or anything that appeared to be White's belongings in the living room." The CCO asked about White's relationship with Rooney. White said "that they were trying to work it out."

The CCO went back to the bedroom and told Rooney to leave because the officers planned to search the room. While "Rooney objected to the search because he was not currently on community custody," he did not resist the order.

Rooney was only dressed in boxer shorts and asked to put on his pants. The CCO told Rooney "that he would have to search the pants for safety reasons before Rooney could put them on and leave the room." Based on observing the various weapons in the bedroom, the CCO "was concerned that Rooney might have a weapon in the pants." Rooney chose a pair of pants. The CCO immediately felt a firearm when he took the pants to search them. A search of the bedroom found illegal drugs. Rooney was charged and convicted of unlawful possession of a firearm and unlawful possession of controlled substances.

On appeal, Rooney argued that the trial court should have suppressed the evidence of the illegal drugs and the firearm because the searches violated article I, section 7 of the Washington State constitution. The Court of Appeals, Division II, agreed that the CCO did not have authority to search the bedroom, but did have authority to search the pants based on reasonable suspicion that Rooney might have a weapon he could have used against the CCO.

First, the Court found that since Rooney was a cohabitant of the bedroom, he "had a right to object to a search of the bedroom that he shared with White." In this case, the Court analogized the CCO's authority to search a probationer's residence under RCW 9.94A.631(A) to cases involving consent and multiple cohabitants of a residence. "In searches involving a cohabitant who consents to a warrantless search, Washington has adopted the common authority rule, which provides that a cohabitant may grant consent to search a residential area that each cohabitant has equal authority to control." But, a cohabitant's authority to consent to the search is limited "when multiple cohabitants are present[.]" When one cohabitant objects to the search, the officer may not search the area based on the other cohabitant's consent. Consequently, since Rooney objected to the search of the bedroom, the CCO did not have authority to search the bedroom and the search violated article I, section 7. Accordingly, the Court reversed Rooney's convictions for unlawful possession of a controlled substance.

Second, the CCO did have authority under *Terry* to search Rooney's pants for a weapon. "An officer may conduct a nonconsensual protective *Terry* frisk for weapons if the officer can articulate specific facts that create an objectively reasonable belief that the person is armed and dangerous." In this case, the CCO had "specific and objective facts that led to a reasonable suspicion that Rooney may have been armed." The room had "several swords, an axe, and multiple knives." The CCO told Rooney that he would search the pants "for weapons for safety reasons." After this warning, Rooney took the pants and the CCO searched them and found the firearm. As such, the CCO had authority to search the pants for a weapon, and the Court affirmed Rooney's conviction for unlawful possession of a firearm.

SEARCH AND SEIZURE: SEARCH OF TIN BOX PURSUANT TO A SEARCH WARRANT WITHOUT ANOTHER PERSON TO WITNESS THE INVENTORY VIOLATED CrR 2.3(d) AND SUPPRESSION OF THE EVENDENCE IS THE PROPER REMEDY State v. Linder, __ Wn. App. __, __ P.3d __, 2015 WL 5933732 (October 13, 2015).

A police officer arrests Aaron Linder for driving with a suspended license. While searching Linder's person incident to arrest, the police officer finds "a small tin box." After being read *Miranda* warnings, "Linder admitted [to] being a daily user of hard drugs and that the tin box contained drug paraphernalia." Linder did not consent to a search of the tin box.

After arresting Linder and taking him to the police station, a canine officer "deployed his drug dog" and dog alerted on the tin box. The canine officer then applied for a search warrant. A judge signed the warrant late in the evening. Later that evening, the canine officer "without anyone else present, executed the warrant by opening the metal box and photographing and inventorying its contents." For this police department, "[i]t was typical for the department's night shift officer to work alone" because this "department has a total of only five sworn officers."

The canine officer searched and inventoried the tin box's contents. During the search, the canine officer found a "cigarette wrapper [that] contained a crystalline substance that appeared to be methamphetamine." A field test and testing at the crime laboratory confirmed that the substance was methamphetamine. Linder was charged with violating the Uniform Controlled Substances Act.

Before trial, Linder moved to suppress the evidence because the officer failed to follow CrR 2.3(d)'s requirement that the inventory occur in the presence of another person. The trial court and Court of Appeals, Division III, agreed.

CrR 2.3(d) "provides that a return of the search warrant shall be made promptly, shall be accompanied by a written inventory of any property taken, and – relevant here – that the inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer."

When an officer violates a ministerial court rule, courts consider whether the violation prejudiced the defendant. When the violation can be cured, there is no prejudice and suppression is not a proper remedy. In this case, however, the search and inventory without another person could not be cured and prejudiced the defendant. Consequently, the Court of Appeals affirmed the trial court's suppression of the evidence.

****

The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

****