LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: ***Thank you for your service, protection and sacrifice***

SEPTEMBER 2023

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: ABSENCE OF CONTROLLING CASE LAW ON POINT UNDER THE FIRST AMENDMENT FREE SPEECH PROTECTIONS REQUIRES GRANTING QUALIFIED IMMUNITY TO LAW ENFORCEMENT DEFENDANTS WHO – ACCORDING TO PLAINTIFFS – RETALIATED AGAINST PLAINTIFFS BY PURSUING AN ARSON INVESTIGATION AND CONTACTING THE IRS BECAUSE OF (1) A SUSPECT'S ASSERTING OF HIS RIGHT TO SILENCE, (2) THE PLAINTIFFS' FILING OF A LAWSUIT, AND (3) THE PLAINTIFFS' PUBLIC DISCLOSURE REQUESTS

In Moore v. Garnand, ___ F.4th ___ , 2023 WL ___ (September 29, 2023), a three-judge Ninth Circuit panel is unanimous in reversing the U.S. District Court and granting qualified immunity to law enforcement defendants as to Plaintiffs' First Amendment-based theories in a section 1983 Civil Rights Act lawsuit. In Moore, Plaintiffs invoked First Amendment free speech protections and alleged that the law enforcement defendants violated their rights by investigating a man for arson and encouraging an IRS criminal investigation primarily because of (A) the man's invocation of his right to silence during an arson investigation, (B) the Plaintiffs' subsequent filing of a lawsuit against the government defendants, and (C) the Plaintiffs' requests for public disclosure of government documents.

Qualified immunity is required to be granted where, assuming plaintiffs' factual allegations to be true, either of two legal propositions are present, either: (1) the allegations by the plaintiffs do not establish a violation of a constitutional right under any constitutional theory claimed by plaintiffs, or (2) there is no case law on point factually that would establish that the government defendants violated the constitutional protection claimed by plaintiffs. The Moore Ninth Circuit panel does not address the first proposition in this case. Instead, the Moore Opinion concludes under the second proposition that qualified immunity must be granted because no U.S. Supreme Court decision and no Ninth Circuit decision has previously ruled against the government in a case with the same constitutional issues and facts closely on point to the facts alleged by Plaintiffs.

Result: Reversal of U.S. District Court (Arizona) ruling that denied qualified immunity to the law enforcement defendants on the Plaintiffs' First Amendment-based theories. However, in an unpublished memorandum Opinion issued on the same day, the Ninth Circuit panel affirms the District Court's denial of qualified immunity to the government defendants on some of the Fourth Amendment theories of the Plaintiffs relating to two search warrants obtained by the government defendants during their investigation.

LEGAL UPDATE EDITOR'S NOTE/COMMENT: As with many decisions that are grounded in the second, no-controlling-case-law prong of the qualified immunity standard, the analysis by the Ninth Circuit: (1) does not tell the government defendant's side of the story; (2) does not offer much, if any, guidance to law enforcement for best practices; and (3) does not constitute an endorsement of the alleged conduct of the law enforcement defendants.

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WASHINGTON STATE SUPREME COURT

MEANING OF "THING OF VALUE" UNDER SOLICITATION STATUTE, RCW 9A.28.030(1): UNANIMOUS SUPREME COURT REVERSES THE COURT OF APPEALS IN HOLDING THAT A MOTHER'S LOVE IS A "THING OF VALUE" UNDER THE STATUTE, AND THUS A MOTHER COMMITTED SOLICITATION TO COMMIT MURDER WHEN SHE PROMISED HER CHILD THAT SHE AND THE CHILD WOULD BE TOGETHER FOREVER IF THE CHILD WERE TO POISON A MAN WHO IS THE CHILD'S FATHER AND THE MOTHER'S EX-HUSBAND

In State v. Valdiglesias LaValle, ___ Wn.2d ___ , 2023 WL ___ (September 28, 2023), a unanimous Washington Supreme Court reverses a Court of Appeals decision and upholds a jury's verdict that a mother committed solicitation to commit murder when she promised her child that she and the child would be together forever if the child were to poison a man who is the child's father and the mother's ex-husband.

The opening three paragraphs of the Valdiglesias LaValle Opinion summarize the ruling as follows:

> RCW 9A.28.030(1) provides, in relevant part, that a person is guilty of criminal solicitation when, "with intent to promote or facilitate the commission of a crime, he or she offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime."
>
> A jury convicted Vanessa Valdiglesias LaValle of two counts of criminal solicitation after she told her minor son, S.G., that he could be with her "forever" if he poisoned his father. The Court of Appeals reversed the conviction on the ground that Valdiglesias LaValle's offer to live with S.G. "forever" if S.G. killed his father did not constitute a "thing of value" within the meaning of RCW 9A.28.030(1).
>
> We reverse the Court of Appeals. The plain meaning of "money or other thing of value" in RCW 9A.28.030(1) unambiguously includes both money and things that are not money but that, like money, possess utility, desirability, significance, and/or economic value. Nothing in the plain language or context of the statute indicates that "other thing of value" must be limited to things with a traditional economic or market value.

Result: Reversal of Division One Court of Appeals ruling, and thus reinstatement of the Skagit County Superior Court conviction of Vanessa Valdiglesias Lavalle for solicitation to commit murder.

SHERIFFS WIN 5-4 RULING FROM WASHINGTON SUPREME COURT THAT LEGISLATURE VIOLATED CONSTITUTIONAL SEPARATION OF POWERS LIMITS IN REQUIRING THAT SHERIFFS OF NON-CHARTER COUNTIES RECEIVE AUTHORIZATION FROM CHAIR OF COUNTY COMMISSIONERS' BOARD PRIOR TO DEPLOYING TEAR GAS

In Snaza v. State of Washington, ___ Wn.2d ___ , 2023 WL ___ (September 14, 2023), the Washington Supreme Court votes 5-4 in ruling unconstitutional RCW 10.116.030(3)(a) adopted in 2021 as part of legislation addressing police tactics. The statute would require a sheriff of a non-charter county to obtain permission of the board of county commissioners before deploying tear gas. Lewis County Sheriff Robert Snaza and other sheriffs and county officials filed suit challenging the constitutionality of this provision.

The Majority Opinion in Snaza concludes that the statutory provision relating to tear gas violates article XI, section 5, of the Washington constitution, which provides for separation of powers and precludes the State Legislature from interfering with core functions of the county sheriff.

Result: Affirmance of Lewis County Superior Court ruling for Sheriff Snaza and other sheriffs and county officials.

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BRIEF NOTES REGARDING SEPTEMBER 2023 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though generally not sufficiency-of-evidence-to-convict issues).

The three entries below address the September 2023 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and descriptions of the holdings/legal issues are bolded.

1. State v. Trinnel Anthony Dial: On September 6, 2023, Division Two of the COA affirms the Pierce County Superior Court conviction of defendant for *first degree unlawful possession (by a previously convicted person) of a firearm*. Two Miranda issues were raised by defendant on appeal: (1) Was he in custody for Miranda purposes when initially questioned by officers who were responding at an apartment to a 911 call regarding an altercation? & (2) When Dial

subsequently was Mirandized, was his waiver of his Miranda rights voluntary in light of his alleged methamphetamine intoxication? All of the police questioning had been captured on bodycams that were part of the evidence in the case.

The Opinion of the Court of Appeals in Dial explains as follows the Court's conclusions that Dial's Miranda-based arguments fail:

1) DIAL WAS NOT IN CUSTODY PRIOR TO THE MIRANDA WARNING

Prior to the Miranda advisement, the statement Dial made to the officers that he sought to exclude was responding yes to Officer [A's] question of whether Dial had a firearm on him. Dial argues that a reasonable person in his position would not have felt free to leave because Officer [B's] phrase "[w]e sat him down" implied that the officers commanded him to sit and that it was not Dial's choice, and because Officer [B] testified that the officers were "probably not going to let [Dial] walk away at this point."

Dial's argument takes the officer's latter statement out of context. Officer [B[testified that the officers were "probably not going to let him walk away at this point, just to be sure of what's going on" because they knew Dial had a firearm and were investigating whether there was a domestic violence incident. Moreover, demonstrating that Dial was subjected to a Terry stop does not equate to showing he was in "custody" for purposes of Miranda. [State v. Heritage, 152 Wn.2d 210, 218 (2004)].

Furthermore, the fact that Dial sat on the bench outside of the apartment after the officers "sat him down," although it may not have necessarily been his choice to do so, by no means curtailed Dial's freedom "to the degree associated with a formal arrest." [State v. Heritage, 152 Wn.2d 210, 218 (2004)]. As noted in the trial court's order, simply asking Dial whether he had a firearm in his pocket, which was visible to the officers, was important for the officers' safety.

We hold that Dial was not in custody prior to being advised of his Miranda rights, and that the trial court did not err by denying Dial's motion to exclude his statement that he had a firearm in his pocket.

2) DIAL'S WAIVER WAS VOLUNTARY

After Dial was advised of his Miranda rights, the statement Dial made to the officers that he sought to exclude was responding yes to Officer [B's] question of whether Dial knew he was not supposed to have a firearm. Dial argues that he experienced delusions due his methamphetamine use when speaking with Officers [B] and [A], as evidenced by his referring to an imaginary person named Timmy, and that the trial court disregarded Dial's mental state when ruling on the admissibility of his statement. He further argues that the officers "capitalized on Mr. Dial's vulnerability" by reading him his rights too quickly.

As an initial matter, Dial's response to the question of whether he knew he was not supposed to have a firearm did not satisfy any element of the crime for which he was arrested. It was not necessary that Dial knew he was not supposed to have a firearm in order to be guilty for first degree unlawful possession of a firearm, and the jury was instructed as such. See RCW 9.41.040(1)(a).

> **Nevertheless, the trial court did take Dial's mental state into account. However, the trial court concluded that the evidence did not support a finding that Dial's mental state rendered his statements involuntary, considering the officers were able to have a conversation with him and that the officers and Dial did not have any issues understanding each other.**
>
> **Officer [B] testified that Dial was forming coherent sentences and was speaking normally, with the exception of referring to Timmy. The trial court was able to watch video footage of Officer [B] advising Dial of his Miranda rights and, although it was concerned about the speed (17 seconds), it ruled that Dial's waiver was voluntary.**
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> **Looking at the totality of the circumstances, substantial evidence supports the trial court's ruling. Accordingly, we affirm the trial court's CrR 3.5 orders.**

[Footnotes and some citations omitted; some paragraphing revised for readability]

The Court's Opinion in State v. Dial can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2057109-9-II%20Unpublished%20Opinion.pdf

2. State v. Sara M. Beal: On September 21, 2023, Division Three of the COA *reverses* the Spokane County Superior Court conviction of defendant for *gross misdemeanor harassment* and *affirms* her conviction for *fourth degree assault*. The reversal of the gross misdemeanor harassment conviction is grounded in the U.S. Supreme Court's ruling in Counterman v. Colorado, 143 S.Ct. 2106 (2023) in which the Supreme Court interpreted the First Amendment free speech right and held that the legal standard for a "true threat" is not purely objective (as most lower courts had held in the past). Instead, under the Counterman interpretation of the First Amendment, the fact-finder must consider the subjective perspective of the accused.

Counterman thus held that, in prosecutions where "true threat" is at issue, the First Amendment requires the prosecution to prove that (1) the defendant had some subjective understanding of the threatening nature of the defendant's statements; and (2) the defendant had at least a mental state of recklessness, whereby the defendant consciously disregarded a substantial and unjustified risk that the conduct would cause harm to another.

The evidence in the Beal case included testimony that during an altercation with her daughter, Ms. Beal manifested paranoia, and, among other things, she ripped a wall-mounted air conditioning unit out of the wall, believing there were cameras inside it, and she said "it's all a set up," and she accused her daughter of helping with "it." **The Court of Appeals holds in Beal that the evidence in the case was sufficient to prove harassment under Counterman's subjective standard, but that the jury should have been instructed on that standard so that the jury could decide if the standard had been met. The Beal Court explains as follows that a jury could rationally find that defendant Beal was not subjectively aware of the threatening nature of her otherwise-threatening statements:**

> **The record shows that Ms. Beal was not lucid and was upset her daughter was recording her. One does not kill a person, much less a daughter, for secretly recording them. Even K.L. [the daughter] testified she did not think her mother's threats were literal. A rational trier of fact could find that Ms. Beal's statements were not literal and that she was subjectively unaware of their threatening nature.**

The Court's Opinion in State v. Beal can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/390225_unp.pdf

3. Personal Restraint Petition of Michael Anthony Feola: On September 26, 2023, Division Two of the COA rejects defendant's challenges to his Kitsap County Superior Court convictions for *(1) attempted first degree rape of a child, (2) attempted second degree rape of a child, (3) commercial sexual abuse of a minor, and (4) communicating with a minor for immoral purposes.*

The convictions arose from a 2017 on-line-sex-crime sting operation by the Missing and Exploited Children Task Force (MECTF). The MECTF uses undercover personas and Internet sites with MECTF personnel. Those personnel pose at some point in the course of posting on the Internet and follow-up communications with responders as either (A) adults who offer to provide children for sex acts, or (B) underage children seeking sex with adults. In this case, the undercover persona was that of a 13-year-old girl seeking sex with an adult male.

The Feola Opinion first explains why the Court rejects defendant's argument that his communications with the fictitious underage girl were not crimes at all. His rationale was that a fictitious persona is not a real human being, and one cannot commit a crime in communicating with a fictitious persona. Relying on established Washington appellate case law and on statutory construction principles, the Court concludes as to each count that a rational trier of fact could conclude beyond a reasonable doubt that defendant committed the crimes for which he was convicted. Under established Washington case law (and case law elsewhere), stings using a fictitious persona can result in a real conviction.

The Feola Opinion next explains as follows why the Court rejects defendant's argument that all of his convictions must be overturned on the rationale that the trial court should have instructed the jury on entrapment:

> Feola argues that he was entitled to an entrapment instruction because there was some evidence of both required elements, including the second element—that he was lured or induced and that he was not predisposed to commit the crime. Citing to our Supreme Court's recent decision regarding the right to a jury instruction on the statutory affirmative defense of entrapment [State v. Arbogast, 199 Wn.2d 356 (2022)]. Feola claims that the trial court abused its discretion by, in part, tying the entrapment instruction to the admission of Feola's post-arrest statements.
>
> Assuming, without deciding, that the trial court erred by failing to give the entrapment instruction, Feola must still show actual and substantial prejudice. . . . This means Feola must show it is more likely than not that the jury would not have found him guilty of the charged crimes if the instruction had been given. . . .
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> **Feola simply claims that because entrapment is a complete defense to the charged crimes, it is more likely than not that had the jury been properly instructed, they would not have found him guilty. But he makes no attempt at demonstrating how the instruction would have influenced the jury's decision, especially in the face of strong evidence of guilt from the State. Indeed, throughout his numerous texts, Feola shows a predisposition to commit the crimes, not the opposite. For example, Feola repeatedly expressed concern that**

"Sam" might actually be law enforcement, but still engaged in the behavior—showing deliberateness notwithstanding his perception of the risk.

In the face of such strong evidence, an entrapment instruction would not likely have been helpful to him. Feola has established at most a mere possibility of prejudice arising from the trial court's failure to instruct the jury on entrapment, and that is not enough. . . .

Therefore, even if the trial court erred by failing to give the instruction, we hold that Feola is not entitled to collateral relief on this claim because he did not establish that he was actually and substantially prejudiced.

[Some case citations have been omitted, and the citation to State v. Arbogast has been revised]

The Court's Opinion in the Feola case can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056032-1-II%20Unpublished%20Opinion.pdf

LEGAL UPDATE EDITOR'S NOTE: The key case on entrapment cited by the defendant is State v. Arbogast, 199 Wn.2d 356 (2022), another on-line-child-sex-crime sting case. In Arbogast, the Washington Supreme Court ruled for the criminal defendant on his argument that he had a right to a jury instruction on the statutory affirmative defense of entrapment.

The Majority Opinion in the Supreme Court March 2022 decision in Arbogast can be accessed on the Internet at:

https://www.courts.wa.gov/opinions/pdf/994528.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case

law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND 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 "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, 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]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].

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