LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

FEBRUARY 2023

TABLE OF CONTENTS FOR FEBRUARY 2023 LEGAL UPDATE

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS……01

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: HECK V. HUMPHREY DOES NOT BAR LAWSUIT FOR FALSE ARREST AND EXCESSIVE FORCE WHERE (1) PLAINTIFF HAD PLED "NO CONTEST" TO PRIOR OBSTRUCTING CHARGE THAT AROSE FROM HIS CONTACT WITH THE POLICE, BUT (2) THE CHARGES WERE SUBSEQUENTLY DISMISSED ON THE PROSECUTOR'S MOTION AFTER A SIX-MONTH PERIOD OF COURT-DIRECTED "ABEYANCE"
Duarte v. City of Stockton, ___ F.4th ___ , 2023 WL ___ (9th Cir., February 16, 2023)..01

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: ELEVEN-JUDGE NINTH CIRCUIT PANEL WILL RECONSIDER AN AUGUST 2, 2022, PRO-GOVERNMENT 2-1 RULING IN A CASE INVOLVING A VOMITING ARRESTEE
J.K.J. v. City of San Diego……03

The Ninth Circuit 3-judge panel Opinions in 2021 and 2022, as well as the February 17, 2023, order in J.K.J. v. City of San Diego can be accessed on the Internet at:

https://cdn.ca9.uscourts.gov/datastore/opinions/**2023**/02/17/20-55622.pdf
https://cdn.ca9.uscourts.gov/datastore/opinions/**2022**/08/02/20-55622.pdf
https://cdn.ca9.uscourts.gov/datastore/opinions/**2021**/11/15/20-55622.pdf

BRIEF NOTES REGARDING FEBRUARY 2023 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES……03

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: HECK V. HUMPHREY DOES NOT BAR LAWSUIT FOR FALSE ARREST AND EXCESSIVE FORCE WHERE (1) PLAINTIFF HAD PLED "NO CONTEST" TO PRIOR OBSTRUCTING CHARGE

THAT AROSE FROM HIS CONTACT WITH THE POLICE, BUT (2) THE CHARGES WERE SUBSEQUENTLY DISMISSED ON THE PROSECUTOR'S MOTION AFTER A SIX-MONTH PERIOD OF COURT-DIRECTED "ABEYANCE"

In Duarte v. City of Stockton, ___ F.4th ___ , 2023 WL ___ (9th Cir., February 16, 2023), a three-judge Ninth Circuit panel rules unanimously that the U.S. District Court should not have dismissed the section 1983 Civil Rights Act lawsuit of Plaintiff against City of Stockton law enforcement for false arrest and excessive force. That is because in the section 1983 action the District Court judge erroneously applied the U.S. Supreme Court rule of Heck v. Humphrey, 512 U.S. 477 (1994) in treating as a previous conviction the circumstances where the Plaintiff had pled "no contest" in California state court to an obstructing charge that had arisen out of his alleged actions in a less-than-mutually-cordial contact with police. The California state court had subsequently dismissed the obstructing charge against the Plaintiff after a period of abeyance. No judgment of guilt had ever been entered in the state court obstructing case.

A Ninth Circuit staff summary (which is not part of the Ninth Circuit Opinion) provides the following synopsis of the portion of the Ninth Circuit's Opinion addressing the above-noted issue relating to Heck v. Humphrey:

> Plaintiff pled "no contest" or "nolo contendere" to willfully resisting, obstructing, and delaying a peace officer in violation of section 148(a)(1) of the California Penal Code. Although plaintiff entered the equivalent of a guilty plea, the state court never entered an order finding him guilty of the charge to which he pleaded. Instead, the court ordered that its acceptance of plaintiff's plea would be "held in abeyance," pending his completion of ten hours of community service and obedience of all laws. After the six months of abeyance elapsed, the charges against plaintiff were "dismissed" in the "interest of justice" on the prosecutor's motion.
>
> The district court held that plaintiff's false arrest and excessive force claim were barred by Heck v. Humphrey, 512 U.S. 477 (1994), which holds that § 1983 claims must be dismissed if they would "necessarily require the plaintiff to prove the unlawfulness of his conviction." . . . .
>
> The panel held that the Heck bar does not apply in a situation where criminal charges are dismissed after entry of a plea that was held in abeyance pending the defendant's compliance with certain conditions. The panel rejected [the argument of the City of Stockton civil defendants] that by pleading no contest and completing the conditions of his agreement with the prosecution, plaintiff was functionally convicted and sentenced. The panel held that the Heck bar requires an actual judgment of conviction, not its functional equivalent.

Plaintiff's lawsuit was brought against several individual officers of the Stockton Police Department, as well as against the City of Stockton and its police department. In addition to erroneously dismissing the lawsuit based on Heck v. Humphrey, the District Court had separately dismissed the part of the section 1983 action against the municipal entities on the mistaken rationale that federal law does not allow section 1983 lawsuits against municipalities. The Ninth Circuit panel notes that the U.S. Supreme Court precedent of Monell v. Department of Social Services, 436 U.S. 658, 690 (1978) permits lawsuits against municipalities. The panel does not address the heavy burden that plaintiffs bear in section 1983 actions against municipalities. Under Monell, plaintiffs are required to establish that unconstitutional policies or practices of the municipality led to the incident that harmed the plaintiff.

Result: Reversal of rulings of the U.S. District Court (Eastern District of California) summary judgment rulings in favor of the government defendants; case remanded for trial.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: ELEVEN-JUDGE NINTH CIRCUIT PANEL WILL RECONSIDER AN AUGUST 2, 2022, PRO-GOVERNMENT 2-1 RULING IN A CASE INVOLVING AN ARRESTEE WHO VOMITED IN A POLICE CAR

On February 17, 2023, the Ninth Circuit announced that a majority of all of the non-recused Ninth Circuit judges have voted to have an en banc panel (a panel of 11 Ninth Circuit judges) rehear arguments and reconsider an August 2, 2022, three-judge panel ruling in J.K.J. v. City of San Diego, that dismissed a Civil Rights Act section 1983 lawsuit against defendants with the City of San Diego Police Department. Any further ruling by the Ninth Circuit in the case will be reported in the Legal Update.

The factual basis for the lawsuit is the failure of the two officers to call for a paramedic after a warrant arrestee vomited in the back seat of a patrol car. The woman told the officers that she was vomiting because of pregnancy, not withdrawal from drugs. The officers apparently believed her, and they did not call for a paramedic at that point. Within the hour, she became unconscious, and paramedics were called to help her. She died nine days later.

A brief history of the prior rulings in the case is as follows:

The November 15, 2021, Majority Opinion for the three-judge panel declared that, viewing the U.S. District Court record in the best light for the Plaintiff (who is a successor in interest to the deceased) the officers were entitled to qualified immunity under both prongs of the qualified immunity test, i.e., (Prong 1) their acts and omissions did not violate the constitutional protections of the Fourth Amendment (failure to summon emergency medical aid for an arrestee) or Fourteenth Amendment (a Due Process claim of deliberate indifference); and (2) (Prong 2) even if their acts and omissions violated the constitution, the case law had not clearly established such a constitutional standard as of point in time when they were dealing with vomiting deceased.

The August 2, 2022, Majority Opinion for the same three-judge panel cut the Prong One analysis out of the panel's November 15, 2021, Opinion. The revised (and thus shortened) Majority Opinion limited the qualified immunity analysis to the second prong. The revised Majority Opinion in 2022 was limited to concluding that, even if one assumes for the sake of argument that the officers' acts and omissions violated the constitution, the case law had not clearly established the constitutional standard at the time that they were dealing with vomiting arrestee. The revised Majority Opinion did not opine on whether the officers violated the constitution.

Now, an 11-judge will reconsider and the appeal, the 11-judge panel is not limited by either of the prior rulings of the 3-judge panels as to the scope of the resolution of the case.

****

BRIEF NOTES REGARDING FEBRUARY 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 six entries below address the February 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. Jenell Corbin Thompson v. WA Department of Licensing: On February 7, 2023, Division Two of the COA *reverses a ruling of the Pierce County Superior Court that agreed with a driver's challenge to DOL's revocation of her driver's license for refusing to submit to a breath test after being arrested for DUI.* **Her argument was that a rhetorical question/retort that she had made to the arresting officer upon receiving implied consent warnings could not be interpreted as a refusal of a breath test.** The key facts and legal analysis by the Court of Appeals is as follows:

> At the scene of the accident, Thompson had a blood alcohol level of .206 and was unaware that she had even been in an accident. The backup officer noted that she tried to resist arrest and that both officers had to detain her. At the police station, [the arresting officer] informed Thompson of Washington's implied consent laws and that her license would be revoked if she refused to submit to an official breath test. Thompson expressed no confusion over this information. **[The arresting officer] asked Thompson if she would be willing to blow into the breathalyzer machine at the police station, [and] she responded, "Why would I blow in that if you know I drank." She did not express any intent to breathe into the machine and did not take the test.**
>
> After her license was revoked, Thompson claimed she was merely asking [the officer] a question and did not actually intend to refuse the test. In Department of Motor Vehicles v. McElwain, 80 Wn.2d 624, 628 (1972), the Supreme Court held that if a driver "does not willingly submit and cooperate in the administration of a test, he must be deemed to have refused." Division Two of this court further clarified that a driver must "objectively and unequivocally manifest[] that he did not understand his rights and the warning concerning the consequences of refusal and was denied clarification. A lack of understanding not made apparent to the officer is of no consequence." Strand v. Dep't of Motor Vehicles, 8 Wn. App. 877, 878). Moreover, in [Medcalf v. Dep't of Licensing,

133 Wn.2d 290, 302 (1997)], the Supreme Court held that the purposes of the implied consent statute "will not be furthered by permitting a driver to show, at a later hearing, that he subjectively wanted to take the breath test but . . . was unable to do so."

Here, Thompson was intoxicated and combative at the scene of the accident. At the police station, she made a statement about not taking the test because the officer knew she had been drinking. She did not further question the test and ultimately did not take the test.

The facts of this case support the hearing examiner's conclusion that Thompson's claim that she was merely asking a question about taking the breathalyzer test was not credible and that her recollections and perceptions were unreliable given her level of intoxication at the time of the incident. The facts also support the hearing examiner's conclusion that Thompson declined the breathalyzer test after being advised of the consequences. Because Thompson refused the breathalyzer test, the Department properly revoked her driving privileges under our State's implied consent laws.

[Some citations omitted, others revised for style]

The unpublished Opinion in Thompson v. DOL can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056646-0-II%20Unpublished%20Opinion.pdf

2. State v. Alan Merton Ladd: On February 7, 2023, Division Two of the COA rejects defendant's arguments and affirms the defendant's Clallam County Superior Court convictions for *two counts of violating a no-contact order prohibiting the defendant from contacting his daughter, who at the time of the contacts was living in foster care*. An issue in the appeal is whether the officers were lawfully allowed to obtain a search warrant to search the daughter's cell phone where the daughter had given her foster mother the phone to allow the foster mother to search it, and the foster mother had then agreed to turn the phone over to law enforcement to search under a search warrant. **Among other things, the Ladd Court rules that the defendant did not have standing to challenge the search of his daughter's phone under these circumstances. The Ladd Court distinguishes the case of State v. Hinton, 179 Wn.2d 862, 876-77 (2014).**

In the Washington Supreme Court's 2014 decision in Hinton, the Supreme Court held under article I, section 7 of the Washington constitution that the sender of an unopened text message has a State constitutional expectation of privacy in the communication. That was because a law enforcement officer – rather than the non-law enforcement intended recipient of the message – opened the text message without the consent of the intended recipient and communicated by text with the sender using the non-consenting intended recipient's phone. This law enforcement action was held in the Hinton Majority Opinion to have violated the rights of privacy of the person who sent the initial message (or at least could be lawfully and successfully challenged by the original sender**). In Ladd, on the other hand, the daughter of the defendant had consented to the search of her phone, so the Ladd Court rules that defendant could not invoke Hinton to challenge the warrant-authorized search of the daughter's phone to look for the defendant's calls and messages to her.**

The Ladd Court finds solid support for its ruling in State v. Bowman, 198 Wn.2d 609 (2021), in which the Washington Supreme Court held for the State in a case where a law enforcement officer performed a ruse on a drug dealer. The officer in Bowman used an undercover cell

phone to communicate through text messages with a suspected drug dealer, and the officer (1) claimed to be a named recent customer of the suspect, (2) falsely claimed (so as to explain the different number appearing of the suspect's phone) to be using that recent customer's replacement phone, and (3) made a deal with the targeted suspected drug dealer to buy methamphetamine.

The unpublished Opinion in State v. Ladd can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056051-8-II%20Unpublished%20Opinion.pdf

3. State v. Bernard Gordon: On February 13, 2023, Division One of the COA rejects defendant's arguments and affirms the defendant's King County Superior Court convictions for *once count of second degree human trafficking, two counts of first degree promoting prostitution, one count of second degree promoting prostitution, and one count of leading organized crime* (note that venue in this case was transferred from Snohomish County Superior Court). An issue in the case is whether Everett PD officers had reasonable suspicion to support a Terry stop of defendant on suspicion that he committed the Everett Municipal Code crime of prostitution loitering. **The Court of Appeals rules that reasonable suspicion includes consideration of the experience and training of officers, and that the following circumstances provided reasonable suspicion for the stop:**

> **Before detaining Gordon, the police knew Gordon was in a location well known for prostitution activity, and that he had approached [the undercover female decoy officer], who was walking in a manner intended to look like a prostitute waiting for customers. They also knew [the Gordon] asked [the undercover officer] who she worked for and if she would consent to an "appointment" with him. [The undercover officer's] experience led her to conclude that Gordon was either soliciting sex or trying to recruit her to work for him as a prostitute, testimony the trial court found credible. Also, before detaining Gordon, police were aware that he had a recent criminal conviction for promoting prostitution and luring.**

In several pages of analysis, the Court of Appeals distinguishes factually the reasonable suspicion analysis in State v. Diluzio, 162 Wn. App. 585 (2011) and State v. Doughty, 170 Wn.2d 57 (2010).

The Court of Appeals also provides lengthy analysis supporting the Court's ruling that there was sufficient evidence that defendant committed *leading organized crime* under RCW 9A.82.060(1) where the evidence established that he actively promoted the prostitution of three different women over the course of the charging period alleged by the State.

The unpublished Opinion in State v. Gordon can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/827847.pdf

4. State v. Alan Barrett Jonathan Myers: On February 14, 2023, Division Two of the COA rejects defendant's arguments and affirms the defendant's Pierce County Superior Court conviction for *possession of a controlled substance with intent to deliver*. The Court of Appeals rules that the stop of defendant for driving with a suspended license was not pretextual, and (2) consent by defendant to a search of his vehicle was voluntary.

On the pretext stop issue, defendant argued that the officer stopped his car because the officer knew that someone had been arrested on a warrant out of that car a few weeks previously. **The Myers Court responds that the stop was not pretextual where the officer did not stop the**

car until after learning through a check that defendant Myers was the registered owner connected to the car's license plate, and that the physical appearance of the driver of the car was a reasonable match to a photograph of defendant Myers, the registered owner. The Myers Court also notes that, even assuming a mixed motive for the stop, a mixed motive stop is generally justified under State v. Arreola, 176 Wn.2d 284 (2012). Finally on the pretext issue, the Myers Court rejects defendant's theory that the stop was pretextual for the reason that the officer, while in a law enforcement agency uniform and driving his agency-assigned vehicle and wearing his agency-assigned uniform, was working off duty for a homeowners' association.

On the voluntariness-of-consent issue, the Myers Court describes the key facts as follows:

> Crawford noticed several hypodermic needles in the door pocket of the driver's door. After confirming Myers's license was suspended, Crawford read Myers his Miranda rights, which Myers acknowledged and waived. Myers told Crawford that the needles were his and that he used them to ingest methamphetamine earlier in the night. Myers denied that there were any other drugs in the vehicle. When Crawford ran the license plates on the vehicle, he noticed that there had been an arrest associated with the vehicle a few weeks prior. He asked Myers if he was the one arrested, and Myers answered that it was another person who had been arrested. Crawford asked Myers if he consented to a search of the vehicle, and Myers verbally consented but wanted to limit the scope of the search to exclude a locked box located under the front passenger seat, which he claimed belonged to someone else. Myers said he did not know what was inside.
>
> Crawford told Myers that the vehicle would be impounded and a search warrant requested. Myers then agreed to allow a search of the entire vehicle, including the locked box. Crawford read Myers Ferrier warnings including his rights to refuse the search, restrict the scope of the search, and to revoke consent at any time, which Myers both acknowledged and waived.

Defendant's main argument regarding the voluntariness-of-consent issue was that informing him that the vehicle would be impounded while a warrant was sought was coercive. Citing State v. Smith, 115 Wn.2d 775, 790 (1990), the Myers Court concludes that "the trial court could legitimately conclude that Myers knew what he was doing, weighed the options of consenting to the full search against having the vehicle impounded and a search warrant requested, acknowledged his right to refuse or limit his consent to search, and nonetheless consented."

The unpublished Opinion in State v. Myers can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056451-3-II%20Unpublished%20Opinion.pdf

5. State v. Shane Daniel Brewer: On February 22, 2023, Division Two of the COA rejects defendant's arguments and affirms the defendant's Thurston County Superior Court convictions for *one count of first degree burglary, three counts of first degree unlawful possession of a firearm, four counts of theft of a firearm, one count of second degree malicious mischief, and one count of possession of a stolen vehicle* (the Court of Appeals notes that the jury could not reach a verdict on a murder charge and a robbery charge; and those matters were subsequently retried). One issue on appeal was whether search warrants were supported by probable cause to believe that evidence relating to the murder of Loren VerValen would be found in records relating to the defendant's two phones. In rejecting defendant's probable cause nexus argument, the Court of Appeals relies on the Washington State Supreme Court decision in State

v. Denham, 197 Wn.2d 759, 768 (July 1, 2021) (the original version of the Denham decision can be accessed on the Internet at https://www.courts.wa.gov/opinions/pdf/985910.pdf). The Court of Appeals Opinion summarizes the reasoning as follows:

> Here, the trial court stated that police were seeking evidence of Brewer's location at the time of the homicide. It found a sufficient nexus between that information and the phone records "in light of the fact that it is well known that individuals keep their cell phones on or about their persons at all times, and as a result, a person's location or close location may be determined through the use of cell phone records." We agree.
>
> **The evidence supporting the warrants is similar to that in Denham. The affidavit here explained that the murder victim's car had been found at Brewer's house along with weapons and possible stolen property from the victim's house. And a witness told police that Brewer reported killing the car's owner. This was sufficient evidence to link Brewer to the murder. There was also evidence that Brewer used both phones in the days immediately after the murder, and the trial court acknowledged that people tend to keep their phones nearby. The affidavit explained that Brewer's call records and location could corroborate witnesses' statements, including Brewer's explanation of where he was during the murder.**
>
> **There was a reasonable basis to conclude that the cell site location information from Brewer's phones would provide evidence of Brewer's location at the time of the murder. There was sufficient probable cause and sufficient nexus between the cell phone provider records and evidence of the crime. The trial court did not err by denying the motion to suppress.**

LEGAL UPDATE EDITOR'S NOTE:

In the July 2021 Legal Update, I included information about an email listserv advisory from King County Senior Deputy Prosecuting Attorney Kristin Relyea addressed the Denham decision. As always in her advisories, Sr. DPA Relyea cautioned the "purpose of [such advisories] is to provide information to our law enforcement partners about recent court decisions . . . [and that the advisories are] not intended as legal advice. Sr. DPA Relyea followed her brief summary of the Denham decision with the following "Note:"

> ***Sr. DPA Gary Ernsdorff offered this helpful advice in the wake of Denham, "[W]hen reviewing applications for warrants for cell phone records, please make sure you include every bit of information you can that connects the phone number to the suspect. Be very clear and precise. Consistent use and possession over time, and/or use and possession close in time to the crime, should be considered a necessity. Simply relying on the fact that a number is associated with the suspect to get CSLI will lead to trouble (although will likely still get approved by many judges). If you have questions on a specific set of facts, feel free to reach out to the Special Operations Unit.)***

The Legal Update notes that the King County Special Operations Unit may be contacted at (206) 477-3733.

The unpublished Opinion in State v. Brewer can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2055821-1-II%20Unpublished%20Opinion.pdf

6. State v. Richard L. Purves: On February 28, 2023, Division Two of the COA rejects defendant's arguments and affirms the defendant's Jefferson County Superior Court convictions under RCW 69.50.401(1) of *two counts of possession with intent to manufacture or deliver a controlled substance (heroin and fentanyl)*.

The Purves Opinion summarizes the facts and the Court's legal analysis as follows:

> In November 2020, Purves was driving with a suspended license when he was stopped for speeding, and officers found drug paraphernalia and heroin on his passenger's person. The officers looked into the window of the car and saw what they suspected to be drugs and drug paraphernalia. The officers sought and obtained a search warrant for the vehicle, and were granted that warrant, based on a finding of probable cause that Purves was in violation of statutes outlawing simple possession of a controlled substance and use of drug paraphernalia. When they executed the warrant, officers found drugs, paraphernalia, cash, and a logbook in Purves' car.
>
> Purves was charged with two counts of possession with intent to manufacture or distribute heroin and fentanyl. **He moved to suppress the fruits of the warrant, arguing that under State v. Blake [197 Wn.2d 170 (2021) (holding that Washington's statute criminalizing simple drug possession was unconstitutional and void because it lacked a mens rea element).] decided in February 2021, there was no legal basis to search his car for evidence of simple drug possession, and that the paraphernalia portion of the warrant was not severable from the drug possession portion. Purves makes the same argument in this appeal.**
>
> **We affirm the trial court's denial of the suppression motion. The warrant here was based on two criminal statutes, one of which remains valid—RCW 69.50.412(1), criminalizing use of drug paraphernalia. Officers had sufficient probable cause to believe that Purves had violated the drug paraphernalia statute, so it is immaterial that RCW 69.50.4013, criminalizing simple drug possession, was later invalidated under Blake.**

In key part, further analysis by the Purves Court in rejecting the defendant's non-severability argument is as follows:

> Although the parties center their arguments on the severability doctrine, we agree with the trial court that this is not the correct analysis because the warrant here was not overly broad and it described with particularity the area to be searched and the items to be seized. [Legal Update Editor's Note: In a lengthy footnote the Purves Court also explains that even under severability analysis, defendant's argument fails.]
>
> The evidence sought under each crime was essentially identical and was contained within the same location. This is because the illegal drugs observed in Purves' car were necessary not only to the State's ability to prove the crime of unlawful possession of a controlled substance under former RCW 69.50.4013 (2017), but also to prove the crime of use of drug paraphernalia under former RCW 69.50.412(1) (2019). . . .
>
> First, possession of a controlled substance required a showing that a defendant (1) "possess[ed]" (2) "a controlled substance" (3) without having "a valid prescription" or other authorization. Former RCW 69.50.4013 (2017). Second, use of drug

paraphernalia required showing the defendant (1) "use[d]" (2) "drug paraphernalia" as defined in RCW 69.50.102 (a) "to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana." Former RCW 69.50.412(1) (2019). Under the second element, courts consider both "[t]he proximity of the object to controlled substances" and "[t]he existence of any residue of controlled substances on the object" "in addition to all other logically relevant factors" to determine whether a particular item is drug paraphernalia. RCW 69.50.102(b)(4), (5).

Here, officers looking into Purves' car could see a brown substance inside a plastic baggy—the baggy qualifies as paraphernalia only if the brown substance inside is an illegal drug. Thus, both the baggy and the substance are evidence that Purves violated the drug paraphernalia statute. The same can be said of the tooters, black case, and tin foil that officers observed from outside the car. Therefore, when the warrant authorized seizure of "[a]ll controlled substances including but not limited to methamphetamine, prescription pills, and heroin" as well as "[a]ll drug paraphernalia including but not limited to pipes, lighters, syringes, foil, baggies, straws, and spoons" it authorized seizure of items supporting the drug paraphernalia offense. Without an overbroad warrant, we need not consider severability.

The Division Two panel in Purves declines to address defendant's argument under the 2021 Blake decision. Thus, the Purves Court does not discuss State v. Moses, ___ Wn. App.2d ___ (Div. I, June 27, 2022). The Division One June 27, 2022, published Moses Opinion held under a broad principal that Blake did not retroactively invalidate an otherwise valid 2017 warrant to search for controlled substances in support of an investigation for possession of controlled substances. The Moses Opinion can be accessed on the Internet at https://www.courts.wa.gov/opinions/pdf/827341.pdf

The unpublished Opinion in State v. Purves can be accessed on the Internet at: https://www.courts.wa.gov/opinions/pdf/D2%2056600-1-II%20Unpublished%20Opinion.pdf

****

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.

****

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].

****