LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JANUARY 2023

TABLE OF CONTENTS FOR JANUARY 2023 LEGAL UPDATE

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

TWO RULINGS: (1) TERRY STOP FOR SUSPECTED TRESPASSING DID NOT JUSTIFY TAKING KEY FOB FROM SUSPECT TO TRY TO CONNECT A VEHICLE TO HIM; AND (2) HIS DENIAL THAT HE HAD A CAR DID NOT CONSTITUTE ABANDONMENT OF HIS FOURTH AMENDMENT PROTECTIONS FOR THE KEY FOB

In U.S. Baker, ___ F.4th ___ , 2023 WL ___ (9th Cir., January 30, 2023), a three-judge Ninth Circuit panel rules that officers violated the Fourth Amendment right of defendant when, during a Terry stop and frisk, the officers removed a key fob that was hanging from the defendant's belt loop, pressed an activator on the key fob and thus activated flashing headlights on a red Buick (a follow-up look into the Buick from the outside yielded an open view of a handgun).

The Ninth Circuit Opinion apparently assumes for the sake of argument that the officers had reasonable suspicion that the suspect was trespassing when they contacted him (but not probable cause to arrest him), but the panel concludes that nothing in the circumstances – in light of the limited authority of law enforcement during a Terry stop and frisk – justified taking the key fob and activating the flashing lights on the red Buick.

The federal attorney argued in the alternative that Baker abandoned any Fourth Amendment interest that he had in the key fob, and thus had no standing to challenge the ultimate search of the car. The abandonment argument was based on the fact that Baker had denied to the officers that he had a car. The Ninth Circuit panel rejects this abandonment argument under the following analysis:

> The Government's standing argument fails to persuade because Baker's statements concerning the car did not constitute abandonment of a possessory interest in the key hanging from his belt. Because abandonment is "a question of intent," we must consider the totality of the circumstances to determine whether an individual, by their words, actions, or other objective circumstances, so relinquished their interest in the property that they no longer retain a reasonable expectation of privacy in it at the time of its search or seizure. [Citing cases] see also United States v. Lopez-Cruz, 730 F.3d 803, 809 (9th Cir. 2013) ("[N]one of our 'abandonment' cases has held that mere disavowal of ownership, without more, constitutes abandonment of a person's reasonable expectation in that property.")
>
> Based on the totality of the circumstances, we conclude that Baker did not objectively demonstrate his intent to abandon the car key. Baker never disclaimed any ownership or possessory interest in the key itself, nor did he voluntarily relinquish possession or control over the key. Instead, Officer Byun removed the key from Baker's belt loop without his consent. That the key was hanging from Baker's belt manifests an objective intent to maintain possession of it.
>
> According to the Government, Baker's assertion that he had no car operated to deny any ownership interest in the car key. The Government identifies no precedent in support of the proposition that a person abandons an item in his possession by stating he does not own a different, related item.
>
> Even if such a claim had a basis in law, an individual does not relinquish a possessory interest in an item merely by stating he does not own the item. See Lopez-Cruz, 730 F.3d at 808–09 (concluding the defendant did not abandon cell phones in his possession when he told police the phones belonged to a friend because the defendant "did not disclaim use of them or otherwise disassociate himself from them"). No evidence in the record suggests that Baker disassociated himself from the car key even if the key belonged to someone else.

[Some citations omitted; other citations revised for style; footnote omitted]

Result: Reversal (based on suppression of evidence that was the fruit of the unlawful search noted above) of the U.S. District Court (Central District of California) conviction of Terrance Douglas Baker for brandishing a firearm in violation of federal law; affirmance of federal law convictions for robbery and conspiracy to commit robbery based on substantial evidence that was not the fruit of the unlawful search.

****

WASHINGTON STATE SUPREME COURT

CIVIL LIABILITY OF GOVERNMENT BASED ON NEGLIGENCE: 5-4 MAJORITY OPINION INTERPRETS WASHINGTON CASE LAW ON THE PUBLIC DUTY DOCTRINE AS LIMITING IMMUNITY UNDER THE DOCTRINE TO GOVERNMENT AGENCY BREACHES OF STATUTORY DUTIES; THUS, BECAUSE PLAINTIFFS DID NOT HINGE THEIR LAWSUIT AGAINST THE SEATTLE FIRE DEPARTMENT ON A STATUTORY DUTY, THEY MAY PURSUE THEIR NEGLIGENCE-BASED LAWSUIT CLAIMING THAT SFD WAS NEGLIGENT IN TAKING ABOUT 15 MINUTES TOO LONG TO GET TO A MEDICAL EMERGENCY THREE BLOCKS FROM THE STATIONHOUSE

[LEGAL UPDATE EDITOR'S PRELIMNARY NOTES ABOUT THE COMMON LAW PUBLIC DUTY DOCTRINE IN WASHINGTON STATE: There are four elements to a lawsuit for negligence: (1) duty of care that was owed to the plaintiff, (2) breach of that duty, and (3) causation of (4) damages to the plaintiff. The public duty doctrine addresses only the first element, i.e., duty of care to the plaintiff. It is generally accepted that the public duty doctrine is a vestige of the English common law concept of sovereign immunity.

Sovereign immunity for governmental entities was derived by the U.S. courts from the British common law doctrine that was based on the idea that the monarch could do no wrong, and therefore the government could not be sued for negligence. The doctrine of sovereign immunity has been essentially eliminated by legislatures (see, e.g., RCW 4.96.010(1), which is quoted below in a second editor's note) and by case law. However, a vestige of the concept of governmental immunity from lawsuits remains under the "public duty doctrine" that has been developed in case law. Under the public duty doctrine, in relation to emergency services, past case law in Washington had appeared to hold that the providing of these emergency services derives form a duty owed to the general public, not a duty to a particular individual. Under that rationale, it appears to be the general holding of the past decisions that, because the duty was not owed to the individual victim of tortious government conduct, a negligence lawsuit against governmental entity for negligence in providing emergency services was barred. Over time there has been some significant pruning of the protections of government agencies under the public duty doctrine by Washington Supreme Court decisions that have expanded four categories of exceptions to the public duty doctrine: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) special relationship.

The Majority Opinion in Norg, over the strenuous opposition in the Norg Dissenting Opinion, dispenses with the need for the plaintiffs in that case to invoke an exception to the public duty doctrine. The Norg Majority Opinion purports to interpret Washington case law as having limited the "duty" element of the public duty doctrine to circumstances where the government service is being provided under the strictures of statute.]

Thus, in Norg v. City of Seattle, ___ Wn.2d ___ , 2023 WL ___ (January 12, 2023), a 5-4 Majority Opinion makes what the Dissenting Opinion strenuously asserts is a strained reading of past Washington Supreme Court decisions on the public duty doctrine The Majority Opinion allows a lawsuit to proceed against the Seattle Fire Department in a case where there was an allegedly negligent response to a 911 call for medical assistance. The Majority Opinion declares that the public duty doctrine protects a public entity from liability only where the cause of action arises from the government entity's alleged breach of a specific statutory duty. The Majority Opinion concludes that the lawsuit in this case was not based on any particular statutory duty of the Seattle Fire Department, but that the lawsuit instead was based on a common law duty to exercise reasonable care in responding to for emergency medical assistance.

The introductory paragraphs of the Norg Majority Opinion's summarize the ruling as follows:

> This case asks whether the public duty doctrine shields the city of Seattle (City) from potential liability for its allegedly negligent response to a 911 call. In this case, it does not.

> Delaura Norg called 911 seeking emergency medical assistance for her husband, Fred. She gave the 911 dispatcher her correct address, which the dispatcher relayed to emergency responders from the Seattle Fire Department (SFD). The Norgs' apartment building was three blocks away from the nearest SFD station, but it took emergency responders over 15 minutes to arrive. This delay occurred because the SFD units failed to verify the Norgs' address and, instead, went to a nearby nursing home based on the mistaken assumption that the Norgs lived there. The Norgs sued the City for negligence, alleging that SFD's delayed response aggravated their injuries.
>
> The City pleaded the public duty doctrine as an affirmative defense and both parties moved for summary judgment on the question of duty. The trial court granted partial summary judgment in the Norgs' favor and struck the City's affirmative defense. The Court of Appeals affirmed on interlocutory review. We granted review and now affirm.
>
> The undisputed facts establish that once the City undertook its response to the Norgs' 911 call, the City owed the Norgs an actionable, common law duty to use reasonable care. The Norgs' claim is based on the City's alleged breach of this common law duty and is therefore not subject to the public duty doctrine as a matter of law. As a result, we hold that the trial court properly granted partial summary judgment to the Norgs on the question of duty. In doing so, we express no opinion on the remaining elements of the Norgs' claim (breach, causation, and damages). We thus affirm the Court of Appeals and remand to the trial court for further proceedings.

Arguably, a key element in the analysis in the Norg Majority Opinion is the Opinion's statement that "[p]rivate ambulance service providers, providing emergency medical services, have historically been subjected to civil suit for negligence" and that barring the Norgs' claim solely because it is made against a governmental ambulance service would mean that the governmental entity (Seattle Fire Department) is subject to less tort liability than a comparable private entity, rather than "the same" tort liability, as required by our legislature. RCW 4.96.010(1) (emphasis added); see also RCW 4.92.010."

LEGAL UPDATE EDITOR'S ADDITIONAL NOTE:

RCW 4.96.010(1), cited as noted above by the Norg Majority Opinion, provides: "All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation."

RCW 4.92.010, which relates to venue, provides in the first unnumbered sentence: "Any person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court."

LEGAL UPDATE EDITOR'S COMMENT: Only time will tell regarding the extent which the Norg ruling expands the exposure of law enforcement agencies to negligence-based lawsuits. In my personal thinking, it seems inevitable that this will happen. As always, I caution that any views that I express in the Legal Update are my own personal views, not those of any other person or entity.

****

WASHINGTON STATE COURT OF APPEALS

SECOND DEGREE ASSAULT CONVICTION IS OVERTURNED BASED ON PANEL'S HIGHLY-FACT-BASED RULING THAT DEFENDANT'S DISPLAY OF A RIFLE AND HIS OTHER BEHAVIOR DURING A ROAD RAGE INCIDENT DID NOT SUPPORT THE STATUTORY REQUIREMENTS FOR PROOF OF BOTH (1) SPECIFIC INTENT TO CREATE REASONABLE FEAR AND APPREHENSION OF BODILY INJURY," AND (2) IN FACT THE CREATION IN THE WOULD-BE VICTIM OF "A REASONABLE APPREHENSION AND IMMINENT FEAR OF BODILY INJURY"

In In the Matter of the Personal Restraint Petition of State v. Arntsen, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, January 3, 2023), a three-judge Division One panel sets aside the 2017 conviction of Ricky Arntson on the rationale that the evidence at 2017 trial was not sufficient to support his conviction for assault in the second degree arising from a road rage incident. The Court of Appeals does not set aside Arntsen's conviction for unlawful display of a weapon and some other convictions that were not at issue in Personal Restraint Petition.

In the opening paragraph of its Opinion, the Arntsen Court summarizes the Court's ruling:

> Ricky Arntsen, through a personal restraint petition (PRP), once again challenges his conviction for assault in the second degree. Unlike unlawful display of a weapon, assault in the second degree required the jury to find both that Arntsen [1] had the specific intent to create reasonable fear and apprehension of bodily injury and [2] in fact did create a reasonable apprehension and imminent fear of bodily injury. While intent may be inferred from pointing a firearm at another, that did not occur here. **We are left to determine whether the evidence sufficiently established that Arntsen did more than merely display a rifle, allowing a jury to infer, without speculating, that he had the requisite intent. We hold that it did not. We also hold that the evidence did not establish that Arntsen did in fact create an imminent fear of bodily injury.** We grant the petition, reverse the conviction, and remand to the trial court to vacate

[Bolding and bracketed numbers added by Legal Update Editor]

Facts and Key Testimony

After describing how a road-rage incident began with Ricky Arntsen screaming and yelling from his moving car and aggressively maneuvering his car toward the moving car of Kim Koenig, the Arntsen Opinion describes some of the additional key facts and testimony in the case as follows:

> Arntsen then sped up, positioned his car in front of Koenig's, "threw his car into a turn," slammed his brakes and came to a stop diagonally, blocking the lanes of traffic. Koenig stopped on the road, putting "as much distance" as she could between herself and Arntsen's vehicle.
>
> Arntsen then opened his driver's side door and exited. Arntsen had covered his face with a kerchief like an "old bank robber movie" and was holding a rifle. Arntsen walked toward Koenig's car carrying the rifle, but never pointed it at her. Koenig immediately called 911 and averted her eyes and focused on talking to the 911 operator. Based on just peripheral vision and her feelings, she "felt like he had come up on the driver's side" very close to her vehicle before looking up and seeing him walk back towards his car.

> Witness Robert Morrill, who was trying to drive around the backed-up traffic on the right, saw Arntsen's actions from the time [Arntsen] stepped out of his vehicle until he left the scene. Arntsen had the gun held straight up in one hand as [Arntsen], according to Koenig, walked up to the driver's side door of the passenger car. Arntsen then moved the rifle from its upward position in one hand down to his waist where he held it with two hands. Morrill saw the driver of the jaguar run up to the driver's side of the passenger car that was blocked by the jaguar, turn around, run back to his car, jump in and "t[ake] off." It happened very quickly, and Morrill could not hear what, if anything was said. Morrill never saw the driver of the vehicle point the rifle at anyone in the car.
>
> . . . .
>
> Koenig testified at trial that when Arntsen first exited his vehicle with the rifle, Koenig's initial thought was that she was going to get shot because she saw Arntsen had a rifle and Koenig thought "Why in the world would you have a gun unless you were going to use it?" She further explained that though she believed Arntsen meant to do her harm, "What kind of harm he meant to do, I don't know. Whether or not I was going to be shot, whether or not he was going to assault me, steal my vehicle, I had no idea." When Arntsen approached and got close to Koenig's car, she explained that "he was not looking to shoot me, he did the [sic] not raise the gun like, you know, he wanted to shoot me. He had something else in mind. I have no idea what it was. I still don't know what it was."
>
> In addition to Morrill testifying that he observed Arntsen run up to the passenger car, the State asked Morrill if he could "describe the demeanor or the appearance of the individual that got out of the car with the firearm?" Morrill said, "Aggressive. Scary Aggressive."

[Footnotes omitted]

Legal Analysis

The Arntsen Opinion discusses several relevant Washington appellate court decisions addressing the sufficiency of evidence of second degree assault where a defendant displayed or pointed a gun at someone. This is a highly fact-intensive legal issue. This Legal Update entry will not include that discussion. Then, the Arntsen Opinion applies the case law to the particular factual circumstances of this case:

> Following a road rage incident, Arntsen got out of his car with his face partially covered and holding a rifle. He approached Koenig's car without ever pointing the rifle at her, walked or ran up to the driver's side door and then walked or ran back to his own vehicle and left. To conclude that this evidence sufficiently supports assault in the second degree dangerously allows unconscious bias to creep into the process. Without any evidence as to what Arntsen said, the jury is left with what he did and what he looked like. When evidence of someone's conduct leaves an unanswered question as to what the person actually intended, what is left is what the person looked like. The State elicited from Morrill, without any further explanation, that he thought Arntsen appeared "[s]cary aggressive."

> As this court previously explained, which is worth repeating here, the law "recognizes that display of a weapon, without any required intent, could be done in a manner to cause reasonable apprehension, fear, or alarm. There is no necessary nexus between reasonable apprehension and the defendant's actual intent." . . . .
>
> **The State was required to prove beyond a reasonable doubt that Arntsen assaulted Koenig, meaning in this circumstance that he specifically intended to create in Koenig apprehension and fear of bodily injury. We hold that the evidence did not sufficiently allow the jury, without speculating, to find that Arntsen had such intent.**
>
> **Also, in order to find that Arntsen committed assault, the State not only had to prove that Arntsen had the intent to create in another apprehension and fear of bodily injury, but that he in fact created in another a reasonable apprehension and imminent fear of bodily injury. When Koenig first saw Arntsen step out of his car with a rifle, she testified that she initially believed he meant to do her "harm" but had "no idea" what type of harm. She further explained that when Arntsen approached her vehicle, she said Arntsen "was not looking to shoot" her, and that "[h]e had something else in mind," though she had "no idea what it was." The evidence did not sufficiently support that Arntsen did in fact create in Koenig an imminent fear of bodily injury.**

[Citation omitted; bolding added]

Result: Grant of Personal Restraint Petition of Ricky Marvin Arntsen, reversal of his 2017 King County Superior Court conviction, and remand of case to the Superior Court for vacation of the conviction.

OPINION TESTIMONY/EVIDENCE FROM LAW ENFORCEMENT: TRIAL COURT SHOULD NOT HAVE ADMITTED FOR THE JURY'S CONSIDERATION THE PART OF A DETECTIVE'S RECORDED INTERROGATION WHERE THE DETECTIVE SAID THAT "THIS IS PROBABLY YOUR LAST CHANCE TO TRY TO MAKE YOURSELF NOT LOOK SO COLD-HEARTED"

In State v. Fleeks, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, January 23, 2023), defendant prevails in his appeal from a second degree murder conviction, convincing the Court of Appeals that his trial attorney provided a constitutionally deficient defense by not seeking a jury instruction on the theory of revived self-defense. The Legal Update will not address that issue.

An additional theory on which defendant prevailed on appeal is that the trial court should not have been exposed to certain of a detective's statements to the defendant during interrogation. The jury was allowed to review a transcript of the detective's interrogation. Defendant did not contend that the detective's interrogation method or words were improper, but he did argue that some of the statements in the interrogation expressed opinions as to defendant's guilt.

Defendant argued that allowing the jury to consider those statements infringed on defendant's right to have a jury determine whether he was guilty. Case law has sometime referred to this right as part of the Sixth Amendment right to a jury trial. The Fleeks Opinion agrees, first summarizing the legal standard:

> "Opinion testimony" is testimony that is "based on one's belief or idea rather than on direct knowledge of the facts at issue." BLACK'S LAW DICTIONARY 1779 (11th ed. 2019). Witnesses may not testify in the form of opinions about the defendant's guilt or innocence. State v. Montgomery, 163 Wn.2d 577, 594 (2008). Opinions on guilt are improper because they impede the jury's ability to make an independent determination of the facts. State v. Kirkman, 159 Wn.2d 918, 927 (2007). Testimony given by police officers possess an aura of reliability that make them particularly problematic. Montgomery.
>
> "Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence, is not improper opinion testimony." State v. Smiley, 195 Wn. App. 185, 190 (2016). Opinion testimony is improper when it comments on the veracity or intent of a witness, tells the jury what decision to reach, or "leaves no other conclusion but that a defendant is guilty." State v. Cruz, 77 Wn. App. 811, 815 (1995).

[Some citations omitted, other citations revised for style]

The Fleeks Opinion then applies the legal standard to the facts of the case before it:

> After arrest, the police interviewed Fleeks, and he denied any connection with George's death. When the police showed Fleeks surveillance footage, he continued to deny being the person in the footage. [The detective] continued to ask Fleeks to explain the encounter and shooting. [The detective] asked whether George was "fucking with you or . . . something like that[?]" Fleeks continued to deny any involvement. [The detective] made the following comment:
>
> > Do you wanna explain anything to me? This, this is probably your last chance to try to make yourself not look so cold-hearted and stuff like that. We have witnesses that put you there, that identified you there. We have those pictures, that's off a video, dude . . . I, I mean you're 19 . . . was there an argument was there a disturbance, a fight, anything . . . so do you wanna explain what happened?
>
> Defense counsel objected to the jury hearing the interview recording. Fleeks argued that the comment was an improper opinion of guilt, specifically, referring to Fleeks as "cold-hearted." Conversely, the State argued that [the detective] was referring to his casual demeanor and unwillingness to cooperate, in conflict with Fleeks's claim of self-defense. The trial court found the interview admissible:
>
> > It is relevant to demonstrate the demeanor of Mr. Fleeks, which is relevant especially in light of the fact that [the] defense expert is retained to explain the behavior.
> >
> > Beginning on Page 33 at the top, that portion is also relevant. And given that Mr. Fleeks is specifically asked really to indicate whether there was any kind of a disturbance or a fight, kind of inviting an offer of a self defense explanation, it's highly relevant. And that relevance outweighs the prejudice. I'll allow it.
>
> We disagree with the trial court. While [the detective's] statement is an observation that Fleeks did not appear remorseful, it improperly commented on Fleeks's intent and

effectually directed the jury to not believe Fleeks's self-defense theory. [The detective's] opinion that Fleeks should make himself "look not so cold-hearted" could easily appear to the jury as a belief that Fleeks was guilty of murder, not acting in self-defense. This testimony could interfere with the jury's ability to determine every fact beyond a reasonable doubt.

But because we reverse Fleeks's conviction on other grounds and remand for a new trial, on retrial [the detective's] testimony should be redacted to exclude the "cold-hearted" statement.

Result: Reversal of King County Superior Court second degree murder conviction and remand for trial; affirmance of conviction for unlawful possession of a firearm in the second degree.

****

BRIEF NOTES REGARDING JANUARY 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 two entries below address the January 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. Jeffrey Lee Antee: On January 23, 2023, Division One of the COA rejects the defendant's challenges to his Pierce County Superior Court conviction for *one count of first degree rape of a child*. He did not challenge his convictions from the same trial for *one other count of first degree rape of a child, one count of first degree child molestation, one count of second degree assault of a child, and one count of third degree assault of a child*. Defendant contended that admission of child hearsay statements violated his constitutional right to confrontation. **The Court of Appeals concludes that, because, among other reasons, the child declarant testified and Antee had ample opportunity for cross-examination, admission of the statements did not infringe on his right to confrontation**.

The alleged victim testified at trial when she was seven years old. She denied the occurrence of the alleged events that she had reported to others when she was four years old. Defendant was convicted primarily based on the child hearsay testimony of the child's mother, a family friend, and a police officer. Defendant argued that his Sixth Amendment Right to Confrontation of witnesses against him was somehow violated in this circumstance, even though he was able to fully cross examine the child at his trial. The Court of Appeals disagrees, citing Washington State Supreme Court decisions in State v. Clark, 139 Wn.2d 152 (1999), and State v. Price, 158 Wn.2d 630, 642 (2006).

The Court of Appeals Opinion in State v. Antee can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/845900.pdf

2. State v. Jamal Lewis Alexander: On January 30, 2023, Division One of the COA reverses defendant's Snohomish County Superior Court conviction for *first degree murder* and remands the case for a new trial. **Among other errors found by the Court of Appeals was the failure of the trial court to conclude that police exceeded the scope of a search warrant by looking at photographs on defendant's phone outside the warrant's specified date range**. The Court of Appeals rules that the police should have first obtained judicial permission to conduct such a broader search.

The Court of Appeals provides a necessarily complicated explanation covering over four pages regarding the technical difficulties encountered by the police in trying to stay within date limitations in searching the defendant's phone using software for such searching of defendant's particular type of phone. That complex explanation of the software difficulties encountered by the police is not summarized or excerpted in this Legal Update entry.

The Court of Appeals ultimately concludes as follows:

> We conclude that a warrant to search a cell phone is analogous to a warrant to search a person's computer. As the Ninth Circuit held in United States v. Hill, 459 F.3d 966, 975 (9th Cir. 2006), "the government [does not have] an automatic blank check when seeking or executing warrants in computer-related searches. Although computer technology may in theory justify blanket seizures . . . , the government must still demonstrate to the magistrate factually why such a broad search and seizure authority is reasonable in the case at hand."
>
> **Here, the police could have explained to the issuing magistrate why they needed to conduct a broad search of all photographs stored on Alexander's device to find those that would fit within the specified date range. They did not do so. The warrant itself permitted seizure only of photographs falling within a specified date range. The police exceeded the permissible scope of the search by looking at all photographs on the cell phone."**

The Court of Appeals Opinion in State v. Alexander can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/827031.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].

****