LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

April 2017

TABLE OF CONTENTS FOR APRIL 2017 LEGAL UPDATE

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CIVIL RIGHTS LAWSUIT FOR WRONGFUL DETENTION UNDER FOURTH AMENDMENT: FEDERAL AGENT IS DENIED QUALIFIED IMMUNITY FROM SUIT FOR DETAINING 74-YEAR-OLD WOMAN IN PUBLIC PARKING LOT FOR 1.5. TO 2 HOURS WHILE SHE STOOD IN URINE-SOAKED PANTS, TO QUESTION HER, INCIDENT TO SEARCH UNDER WARRANT, ABOUT HER POSSESSION OF A PAPERWEIGHT CONTAINING A SMALL AMOUNT OF LUNAR MATERIAL

Davis v. U.S., 854 F.3d 594 (9th Cir., April 13, 2017)

Facts and Proceedings below: (Excerpted from 3-judge Ninth Circuit panel's opinion)

Joann Davis, and her late husband Robert, worked together at North American Rockwell, which had a contract with the National Aeronautics and Space Administration (" NASA") in connection with the nation's space program. By all accounts, Robert was a brilliant engineer, and he ultimately became a manager of North American Rockwell's Apollo project. While working on the space program, he received many items of memorabilia, including two lucite paperweights. One contained a rice-grain-sized fragment of lunar material, or "moon rock;" the other contained a small piece of the Apollo 11 heat shield. According to unverified family lore, the paperweights were given to Robert by Neil Armstrong in recognition of Robert's service to NASA.

When Robert died in 1986, Joann retained possession of the paperweights. She married her current husband, Paul Cilley, in 1991. Davis began experiencing financial hardship in 2011. Her son was severely ill, having had over 20 surgeries and requiring expensive medical care. In addition, she unexpectedly had to raise several grandchildren when their mother, Davis's youngest daughter, died.

Her son suggested that the paperweights might have value, so Davis began contemplating selling them to cover some of his medical costs. She contacted some public auction houses, without success, so she then contacted NASA via email for assistance in "find[ing] a buyer for 2 rare Apollo 11 space artifacts." She explained that "[b]oth of these items were given to [her late husband] by Neil Armstrong," and that "[he] was very instrumental in all of the space programs right up until his death in February of 1986."

Davis's email was forwarded to the NASA Office of Inspector General at the Kennedy Space Center in Florida, where Norman Conley was a special agent and criminal investigator. Conley's supervisor instructed him to investigate whether Davis indeed possessed a moon rock and to obtain a Registered Confidential Source to initiate telephone contact with her. A few hours after Davis sent the email, Conley's source called her, posing as a broker named "Jeff" who previously worked on the "space-shuttle program," was well-known at NASA, learned of Davis's email to NASA, and would help her sell the paperweights.

Over the course of seven phone calls with "Jeff," all of which were recorded but the first, Davis expressed concern that the paperweights would be confiscated by NASA unless she could somehow prove they were actually a gift to her late husband; she told "Jeff" that she had spoken with her accountant regarding her tax liability for the sale because she could not "hide stuff" and was "not that kind of person;" and she explained that she wanted to "do[] things legally" because she is "just not an illegal person." "Jeff" responded, agreeing that "you and I are both legal people," but "the sale of a moon rock . . . can't be done publicly."

In a later call, Davis told "Jeff" that she heard of someone serving a prison sentence for selling lunar material, but she understood her situation to be different because her late husband received the paperweights as a gift. At no point did "Jeff" or Conley inform Davis that all lunar material is property of the U.S. government or that her possession of the paperweights was illegal. Davis also mentioned during these conversations that, because her former husband worked for the Bureau of Alcohol, Tobacco, Firearms, and Explosives, she had several firearms in her home that she was trying to sell.

Based on these phone calls, Conley obtained a warrant to search Davis and seize the moon rock paperweight. In his affidavit supporting the warrant, Conley stated that he believed Davis was "in possession of contraband, evidence of the crime, fruits, and instrumentalities of the crime concerning a violation of [18 U.S.C. § 641]."

To execute the warrant, "Jeff" made arrangements with Davis to meet around noon on May 19, 2011, at a Denny's Restaurant located in Lake Elsinore, California. Davis believed the purpose of this meeting was to finalize the sale of the paperweights. In fact, it was a government sting operation to seize the moon rock paperweight.

Davis proceeded to meet with "Jeff" at the restaurant. She was accompanied by Cilley, who was approximately 70 years old. At the time of the incident, Davis was 74 and 4'11" tall. Three armed federal agents and three Riverside County Sheriff's personnel were present, but not visible.

Once Davis, Cilley, and "Jeff" were seated in a booth inside the restaurant and exchanged pleasantries. Davis placed the paperweights on the table. "Jeff" said he thought the heat shield was worth about $2,000. Shortly thereafter, Conley announced himself as a "special agent," and another officer's hand reached over Davis, grabbed her hand, and took the moon rock paperweight. Simultaneously, a different officer grabbed Cilley by the back of the neck and restrained him by holding his arm behind his back in a bent-over position. Then, an officer grabbed Davis by the arm, pulling her from the booth. At this time, Davis claims that she felt like she was beginning to lose control of her bladder. One of the officers took her purse. Both Cilley and Davis were compliant. Four officers escorted them to the restaurant parking lot for questioning after patting them down to ensure that neither was armed. At some point before the escort, Conley left the restaurant and went to the parking lot.

Davis claims that she told officers twice during the escort that she needed to use the restroom, but that they did not answer and continued walking her toward an SUV where Conley was waiting. Davis subsequently urinated in her clothing. Although their accounts differ in some respects, Conley and Davis agree that he knew she was wearing urine-soaked pants as he interrogated her in the restaurant parking lot. Davis claims that she was not allowed an opportunity to clean herself or change her clothing, despite communicating to Conley several times that she was "very uncomfortable."

An officer read the search warrant aloud, and Conley then read Davis her Miranda rights. Conley asked Davis to sit inside the SUV, but Davis declined. Conley then proceeded to question Davis for one-and-a-half to two hours, during which time Davis remained standing in the same place. Davis was never handcuffed that day. Nonetheless, while Conley questioned her, another officer wearing a flack jacket stood behind her and pushed her each time she shifted her weight or stepped backwards. During the questioning, Conley kept Davis's purse and car keys and told her repeatedly that "they still really want to take you in," and that she needed to give him more information before he could release her. She was kept from going to her car. At least ninety minutes had passed when Conley told Davis she was free to leave.

After the sting operation was complete and NASA lunar experts were able to confirm the moon rock's authenticity, Conley opened a full investigation. The investigation was closed when the U.S. Attorney in Orlando, Florida, formally declined to prosecute Davis. Davis's son died seven months after the incident.

On August 7, 2013, Davis and Cilley filed their first amended complaint against the United States and the NASA officials involved in the incident. Davis and Cilley raised [among other claims], a Bivens claim against Conley for wrongful detention under the Fourth Amendment. See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 389 (1971) (establishing a private right of action for damages against federal officials who violate the constitutional rights of others). Conley sought summary judgment for the Bivens claim on the ground of qualified immunity. Concluding that genuine issues of material fact existed as to the lawfulness of Davis's detention, the district court denied Conley's summary judgment motion. Conley timely appealed.

ISSUE AND RULING: Viewing the factual allegations in the light most favorable to plaintiff Davis, should federal agent Conley be denied qualified immunity on the issue of whether, under Fourth Amendment analysis, the at-least-90-minute detention of Davis was unreasonably prolonged and degrading, particularly given that she is 74 years old and 4' 11"", her clothing was noticeably urine-soaked, the detention took place in a public parking lot, and the moon rock paperweight had long since been seized? (ANSWER BY 3-JUDGE NINTH CIRCUIT PANEL: The federal agent is not entitled to qualified immunity)

Result: Affirmance of order of U.S. District Court (Central District of California) that denied qualified immunity to Officer Conley; case remanded for trial.

ANALYSIS: (Excerpted from three-judge Ninth Circuit panel's opinion)

> Under the Fourth Amendment, "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Michigan v. Summers, 452 U.S. 692 (1981). Nevertheless, "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." Summers, 452 U.S. at 705 n.21; see also Muehler v. Mena, 544 U.S. 93, 101 (2005) (" [A] lawful seizure can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." For instance, search-related detentions that are "unnecessarily painful [or] degrading" and "lengthy detentions[] of the elderly, or of children, or of individuals suffering from a serious illness or disability raise additional concerns." Franklin v. Foxworth, 31 F.3d 873, 876 (9th Cir. 1994). . . .
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> In Foxworth, police officers executed a search warrant at a residence where a suspected gang member engaging in drug activity might be present at the home of his mother and the plaintiff. The plaintiff suffered from advanced multiple sclerosis, rendering him bedridden, unable to feed himself or sit up without assistance, and unable to control his bowels. As a result, he wore only a t-shirt in bed. After entering the plaintiff's bedroom with guns drawn and searching the room, officers cuffed his hands behind his back, carried him to the living room, and placed him on a couch with his genitals exposed. After complaining that the handcuffs were causing him pain and that he was cold and tired from sitting upright, the officers recuffed his hands in front of his body and gave him a blanket. The plaintiff was then forced to sit on the couch for over two hours until the search of the house was complete. We held that the detention was unreasonable.
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> Here, Conley does not dispute that he detained Davis in the parking lot for up to two hours. At the time of the detention, Conley was aware of several facts that color the reasonableness of his actions. First, Conley knew that Davis was a slight, elderly woman, who was then nearly seventy-five years old and less than five feet tall. Second,

he knew that Davis lost control of her bladder during the search and was wearing visibly wet pants. Third, he knew that Davis and Cilley were unarmed and that the search warrant had been fully executed by the time Davis was escorted to the parking lot. Fourth, Conley knew that Davis had not concealed possession of the paperweights, but rather had reached out to NASA for help in selling the paperweights. Finally, because all but the first of the phone calls between Davis and "Jeff" were recorded, Conley knew the exact content of most of those conversations, including that Davis was experiencing financial distress as a result of having to raise grandchildren after her daughter died, her son was severely ill and required expensive medical care, and Davis needed a transplant. Those conversations also revealed Davis's desire to sell the paperweights in a legal manner and her belief that she possessed them legally because they were a gift to her late husband.

Because the moon rock paperweight had been seized and both Davis and Cilley had already been searched for other weapons and contraband, Conley had no law enforcement interest in detaining Davis for two hours while she stood wearing urine-soaked pants in a restaurant's parking lot during the lunch rush. This is precisely the type of "unusual case" involving "special circumstances" that leads us to conclude that a detention is unreasonable. . . . Conley's detention of Davis, an elderly woman, was unreasonably prolonged and unnecessarily degrading.

Conley argues that the circumstances surrounding the detention in Foxworth are far more egregious and therefore distinguishable from Davis's detention. Specifically, Conley argues that, unlike the plaintiff in Foxworth, Davis was suspected of illegal activity and named in the search warrant, she consented to answering questions during the detention, and she was not partially nude or disabled during the detention. However, Foxworth does not require that a detention be so egregious to be found unreasonable. Here, Conley knew significantly more about Davis and the threat she posed – or, more accurately, did not pose – than the officers knew about the plaintiff in Foxworth.. Moreover, the search in Foxworth was incomplete, unlike the search here. And the fact that Davis consented to further questioning has no bearing on the reasonableness of the detention.

. . . .

Conley also argues that, because Davis mentioned during the phone calls with "Jeff" that she had several, possibly illegal, firearms in her home, he acted reasonably. But when Davis was detained, officers had already confirmed that neither she nor Cilley was armed. Further, Conley arranged the sting operation to take place over the lunch hour at a family restaurant. This fact undermines his contention that he possessed a legitimate concern that Davis and Cilley would come to the meeting armed.

The remaining circumstances leading up to the sting operation further support our conclusion that Conley's detention of Davis was unreasonable. Based on the conversations between Davis and "Jeff," Conley knew that Davis wanted to sell the paperweights because she was experiencing financial hardship, particularly in light of her adult son's medical condition. He also knew that she believed the paperweights were gifts to her late husband – a belief bolstered by the fact that the artifacts were each encased in a lucite globe, a common gift for honoring a person's service or accomplishments – and that she was thus in legal possession of them. Finally, he knew that she was elderly, that she intended to sell the paperweights legally, and that she

initiated contact with NASA for assistance in doing so. Despite all of this knowledge, Conley did not inform Davis that her possession of the paperweights was illegal or ask her to surrender them to NASA. Instead, he organized a sting operation involving six armed officers to forcibly seize a lucite paperweight containing a moon rock the size of a rice grain from an elderly grandmother.

[Footnotes omitted; some citations omitted, other citations revised for style]

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WASHINGTON STATE COURT OF APPEALS

UNLAWFUL POSSESSION OF FIREARM BY CONVICTED PERSON UNDER RCW 9.41.040: AFFIRMATIVE DEFENSE OF LACK OF KNOWLEDGE REQUIRES TRIAL COURT TO DETERMINE BOTH THAT DEFENDANT: (1) WAS NOT NOTIFIED BY CONVICTING COURT OF FIREARM PROHIBITION, AND (2) DID NOT OTHERWISE LEARN OF PROHIBITION

In State v. Garcia, ___ Wn. App. ___ , 2017 WL ___ (Div. I, April 3, 2017), the Washington Court of Appeals rules that the trial court erred in dismissing a charge of first degree unlawful possession of a firearm under RCW 9.41.040 based on the circumstance that evidence was undisputed that defendant Garcia did not receive the firearm prohibition notice required under RCW 9.41.047 when he was convicted in 1994 of rape of a child in the first degree. The Court of Appeals rules that the trial court was required to also determine as a matter of fact whether Garcia, despite the failure of the 1994 convicting court to give Garcia the statutory notice, had actual knowledge that the 1994 conviction (or, apparently, another conviction) barred him from possessing a firearm.

In key part, the Garcia Court's explanation is as follows:

> This case involves a charge of first degree unlawful possession of a firearm. The elements of this offense are: (1) the defendant knowingly owned a firearm or knowingly had a firearm in his or her possession or control, (2) the defendant was previously convicted, adjudicated guilty as a juvenile, or found not guilty by reason of insanity of a serious offense, and (3) the ownership or possession or control occurred in the state of Washington. RCW 9.41.040(1)(a) . . . .
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> Knowledge that possession of a firearm is illegal is not an element of the offense. State v. Sweeney. 125 Wn. App. 77 (2005). But, the defendant may raise the lack of the required notice under RCW 9.41.047(1) as an affirmative defense. State v. Breitung, 173 Wn.2d 393, 403 (2011) **Feb 12 LED:09**. RCW 9.41.047(1) requires that a convicting court "shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by the court."
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> . . . .
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> We conclude that State v. Breitung did not create a bright line rule [based on the notice provision of RCW 9.47.047(1)], but instead suggested that the State may overcome the lack of notice affirmative defense by presenting other evidence of actual knowledge of the law or the firearm prohibition. Here, the State provided records from Garcia's convictions subsequent to the 1994 conviction, which informed him of his ineligibility to

possess a firearm. It also pointed to the underlying facts of the current case. Garcia's girlfriend told the police that Garcia made her purchase firearms in her name, because he was aware that he could not buy them himself. And, police officers reported that Garcia repeatedly told them that he was a convicted felon who could not possess a gun. This evidence could support a determination that Garcia otherwise had actual knowledge of the firearm prohibition.

Result: Reversal of King County Superior Court order that dismissed the charge against Joaquin David Garcia of first degree unlawful possession of a firearm. Case remanded for the Superior Court to determine as a matter of fact whether Garcia knew that his prior conviction(s) barred him from possessing a firearm.

LEGAL UPDATE EDITORIAL COMMENT: Law enforcement officers should inquire of previously convicted persons and their acquaintances, and should of course report the answers to these inquiries, regarding awareness of the convicted persons of the prohibition on their possession of firearms under RCW 9.41.040.

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NOTE REGARDING MAY 2017 LEGAL UPDATE

The May 2017 Legal Update will include an entry on Spencer v. Peters, 857 F.3d 789 (9th Cir., May 18, 2017), a Civil Rights Act lawsuit for a due process violation. The Ninth Circuit panel holds in Spencer v. Peters that evidence that a detective fabricated child witness statements in a prior criminal case is sufficient to support a jury verdict against the detective in the subsequent Civil Rights Act case, regardless of whether the detective knew or should have known that the person charged in the criminal case was innocent.

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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 will be 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 current and 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 past LED treatment of these core-area cases; 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]. The internet address for the Criminal Justice Training Commission (CJTC) Law Enforcement Digest (LED) is [https://fortress.wa.gov/cjtc/www/led/ledpage.html].