LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

APRIL 2020

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CRIMINAL JUSTICE TRAINING COMMISSION'S "LAW ENFORCEMENT ONLINE TRAINING DIGEST" EDITIONS ARE AVAILABLE THROUGH FEBRUARY 2020 EDITION

The February 2020 LED Online Training edition was recently added on the CJTC LED web page, making the monthly online publication available there through the February 2020 edition.

In addition to appellate decision updates, the February 2020 edition includes links to:

(1) The King County Prosecutor's Office legal advisory regarding safe and legal service of Civil Protection Orders and DV No Contact Orders during the COVID-19 pandemic;

(2) The WSP Impaired Driving Section's best practices guide for breath testing suspected impaired drivers during the COVID-19 pandemic; and

(3) The WASPC list of COVID-19 resources.

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UNITED STATES SUPREME COURT

REASONABLE SUSPICION FOR VEHICLE STOP: WHERE (1) OFFICER RAN THE LICENSE PLATE ON A MOVING VEHICLE AND LEARNED THAT THE REGISTERED OWNER'S LICENSE HAD BEEN REVOKED, AND (2) THE OFFICER HAD NO INFORMATION INDICATING THAT THE REGISTERED OWNER WAS NOT THE DRIVER, THE OFFICER HAD REASONABLE SUSPICION SUPPORTING A STOP OF THE VEHICLE TO INVESTIGATE FOR DRIVING REVOKED

Kansas v. Glover, ___ S.Ct. ___ , 2020 WL 1668283 (April 6, 2020)

Facts and Proceedings below: (Excerpted from Supreme Court Majority Opinion)

> Kansas charged respondent Charles Glover, Jr., with driving as a habitual violator after a traffic stop revealed that he was driving with a revoked license. See Kan. Stat. Ann. §8-285(a)(3) (2001). Glover filed a motion to suppress all evidence seized during the stop, claiming that the officer lacked reasonable suspicion. Neither Glover nor the police officer testified at the suppression hearing. Instead, the parties stipulated to the following facts:
>
> "1. Deputy Mark Mehrer is a certified law enforcement officer employed by the Douglas County Kansas Sheriff's Office.
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> 2. On April 28, 2016, Deputy Mehrer was on routine patrol in Douglas County when he observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ.
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> 3. Deputy Mehrer ran Kansas plate 295ATJ through the Kansas Department of Revenue's file service. The registration came back to a 1995 Chevrolet 1500 pickup truck.
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> 4. Kansas Department of Revenue files indicated the truck was registered to Charles Glover Jr. The files also indicated that Mr. Glover had a revoked driver's license in the State of Kansas.
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> 5. Deputy Mehrer assumed the registered owner of the truck was also the driver, Charles Glover Jr.
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> 6. Deputy Mehrer did not observe any traffic infractions, and did not attempt to identify the driver [of] the truck. Based solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop.
>
> 7. The driver of the truck was identified as the defendant, Charles Glover Jr."
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> The District Court granted Glover's motion to suppress. The Court of Appeals reversed, holding that "it was reasonable for [Deputy] Mehrer to infer that the driver was the owner of the vehicle" because "there were specific and articulable facts from which the officer's common-sense inference gave rise to a reasonable suspicion." . . . .

> The Kansas Supreme Court reversed. According to the court, Deputy Mehrer did not have reasonable suspicion because his inference that Glover was behind the wheel amounted to "only a hunch" that Glover was engaging in criminal activity. The court further explained that Deputy Mehrer's "hunch" involved "applying and stacking unstated assumptions that are unreasonable without further factual basis," namely, that "the registered owner was likely the primary driver of the vehicle" and that "the owner will likely disregard the suspension or revocation order and continue to drive." . . . .

[Citations omitted]

ISSUE AND RULING: The Kansas law enforcement officer who stopped Charles Glover had learned from a license plate check that the moving vehicle in front of him was registered to Charles Glover as owner. The officer also learned that Charles Glover had a revoked Kansas driver's license. The officer assumed, based on common sense, that Glover, as the registered owner of the vehicle, was driving the vehicle in disregard of the revocation order. The officer did not have any contradicting information from his records check or his observation (for example, there was no apparent gender difference between registered owner and observed driver). Did the officer have reasonable suspicion justifying the stop for driving while license revoked? (ANSWER BY SUPREME COURT: Yes, rules an 8-1 majority of the U.S. Supreme Court)

Result: Reversal of Kansas Supreme Court ruling and remand for proceedings in the Kansas courts on the charge of driving as a habitual traffic offender.

ANALYSIS BY MAJORITY: (Excerpted from Majority Opinion; **subheadings added by Legal Update Editor**)

1. General propositions regarding the concept of "reasonable suspicion" that supports a traffic stop

> Under this Court's precedents, the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." . . . . Terry v. Ohio, 392 U.S. 1 (1968). "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." . . . .
>
> Because it is a "less demanding" standard, "reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause." . . . . The standard "depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." . . . . Ornelas v. United States, 517 U.S. 690, 695 (1996) (emphasis added).
>
> Courts "cannot reasonably demand scientific certainty . . . where none exists." Illinois v. Wardlow, 528 U.S. 119, 125 (2000). Rather, they must permit officers to make "commonsense judgments and inferences about human behavior." Wardlow. . . . An officer "'need not rule out the possibility of innocent conduct'" . . . .

We have previously recognized that States have a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed." Delaware v. Prouse, 440 U.S. 648, 658 (1979).

2. The facts in this case gave the officer reasonable suspicion based on the common sense conclusion that revoked drivers often continue to drive

With this in mind, we turn to whether the facts known to Deputy Mehrer at the time of the stop gave rise to reasonable suspicion. We conclude that they did.

Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop.

The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences. The reasonable suspicion inquiry "falls considerably short" of 51% accuracy, see United States v. Arvizu, 534 U.S. 266, 274 (2002), for, as we have explained, "[t]o be reasonable is not to be perfect," Heien v. North Carolina, 574 U.S. 54, 60 (2014).

Glover's revoked license does not render Deputy Mehrer's inference unreasonable either. Empirical studies demonstrate what common experience readily reveals: Drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians. *See*, *e.g.,* 2 T. Neuman et al., National Coop. Hwy. Research Program Report 500: A Guide for Addressing Collisions Involving Unlicensed Drivers and Drivers With Suspended or Revoked Licenses, p. III-1 (2003) (noting that **75% of drivers with suspended or revoked licenses continue to drive**); National Hwy. and Traffic Safety Admin., Research Note: Driver License Compliance Status in Fatal Crashes 2 (Oct. 2014) (noting that approximately 19% of motor vehicle fatalities from 2008-2012 "**involved drivers with invalid licenses**").

[LEGAL UPDATE EDITORIAL COMMENT: I added the bolding and underlining in the immediately preceding excerpted paragraph from the Glover Majority Opinion. Note that the studies cited in the Majority Opinion include both suspended and revoked drivers as being part of the demographic of scofflaws driving with invalid driver's licenses. This is important in light of the view expressed for two of the Justices signing the Concurring Opinion in Glover asserting that it may not be reasonable to think that a suspended – as opposed to a revoked – driver will keep driving. I think that most prosecutors will argue that if the officer in Glover had gotten a "suspended" driver hit, that would likewise have supported a stop in the absence of observation by the officer that contradicts the assumption that the registered owner is driving. As always, I urge law enforcement officer readers to consult their agency legal advisors or their local prosecutors' offices for guidance on matters discussed in the Legal Update.]

3. In addition to the common sense general conclusion that persons with revoked licenses often continue to drive their cars (which independently supports the Court ruling for the State of Kansas), the Kansas statutory provisions that trigger revocation of driver's licenses support the conclusion that persons whose Kansas licenses are revoked are likely to be scofflaws

Although common sense suffices to justify this inference, Kansas law reinforces that it is reasonable to infer that an individual with a revoked license may continue driving. The State's license-revocation scheme covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive.

The Division of Vehicles of the Kansas Department of Revenue (Division) "shall" revoke a driver's license upon certain convictions for involuntary manslaughter, vehicular homicide, battery, reckless driving, fleeing or attempting to elude a police officer, or conviction of a felony in which a motor vehicle is used. Kan. Stat. Ann. §§8-254(a), 8-252. Reckless driving is defined as "driv[ing] any vehicle in willful or wanton disregard for the safety of persons or property." §8-1566(a). The Division also has discretion to revoke a license if a driver "[h]as been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways," "has been convicted of three or more moving traffic violations committed on separate occasions within a 12-month period," "is incompetent to drive a motor vehicle," or "has been convicted of a moving traffic violation, committed at a time when the person's driving privileges were restricted, suspended[,] or revoked." §§8-255(a)(1)-(4). Other reasons include violating license restrictions, §8-245(c), being under house arrest, §21-6609(c), and being a habitual violator, §8-286, which Kansas defines as a resident or nonresident who has been convicted three or more times within the past five years of certain enumerated driving offenses, §8-285.

The concerns motivating the State's various grounds for revocation lend further credence to the inference that a registered owner with a revoked Kansas driver's license might be the one driving the vehicle.

4. Glover and the Dissent are wrong in denying that common sense, separate and apart from law enforcement training and experience, is part of the equation for reasonable suspicion as established in Fourth Amendment case law

Glover and the dissent respond with two arguments as to why Deputy Mehrer lacked reasonable suspicion. Neither is persuasive.

First, Glover and the dissent argue that Deputy Mehrer's inference was unreasonable because it was not grounded in his law enforcement training or experience. Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience. We have repeatedly recognized the opposite.

In [Navarette v. California, 572 U.S. 393 (2014)], we noted a number of behaviors – including driving in the median, crossing the center line on a highway, and swerving – that as a matter of common sense provide "sound indicia of drunk driving." 572 U.S., at 402. In [Illinois v. Wardlow, 528 U.S. 119 (2000)], we made the unremarkable observation that "[h]eadlong flight – wherever it occurs – is the consummate act of

evasion" and therefore could factor into a police officer's reasonable suspicion determination. 528 U.S., at 124. And in [United States v. Sokolow, 490 U.S. 1 (1989)], we recognized that the defendant's method of payment for an airplane ticket contributed to the agents' reasonable suspicion of drug trafficking because we "fe[lt] confident" that "[m]ost business travelers . . . purchase airline tickets by credit card or check" rather than cash. So too here. The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis.

The dissent reads our cases differently, contending that they permit an officer to use only the common sense derived from his "experiences in law enforcement." Such a standard defies the "common sense" understanding of common sense, *i.e.,* information that is accessible to people generally, not just some specialized subset of society. More importantly, this standard appears nowhere in our precedent. In fact, we have stated that reasonable suspicion is an "abstract" concept that cannot be reduced to "a neat set of legal rules," . . . ., and we have repeatedly rejected courts' efforts to impose a rigid structure on the concept of reasonableness . . . . This is precisely what the dissent's rule would do by insisting that officers must be treated as bifurcated persons, completely precluded from drawing factual inferences based on the commonly held knowledge they have acquired in their everyday lives.

The dissent's rule would also impose on police the burden of pointing to specific training materials or field experiences justifying reasonable suspicion for the myriad infractions in municipal criminal codes. And by removing common sense as a source of evidence, the dissent would considerably narrow the daylight between the showing required for probable cause and the "less stringent" showing required for reasonable suspicion. . . . Finally, it would impermissibly tie a traffic stop's validity to the officer's length of service. See Devenpeck v. Alford, 543 U.S. 146, 154 (2004). Such requirements are inconsistent with our Fourth Amendment jurisprudence, and we decline to adopt them here.

In reaching this conclusion, we in no way minimize the significant role that specialized training and experience routinely play in law enforcement investigations. . . . We simply hold that such experience is not required in every instance.

5. Glover and the Dissent are wrong in denying that combining database information and common sense judgment to establish reasonable suspicion is consistent with the Fourth Amendment case law

Glover and the dissent also contend that adopting Kansas' view would eviscerate the need for officers to base reasonable suspicion on "specific and articulable facts" particularized to the individual, see [Terry v. Ohio], because police could instead rely exclusively on probabilities. Their argument carries little force.

As an initial matter, we have previously stated that officers, like jurors, may rely on probabilities in the reasonable suspicion context. . . . Moreover, as explained above, Deputy Mehrer did not rely exclusively on probabilities. He knew that the license plate was linked to a truck matching the observed vehicle and that the registered owner of the vehicle had a revoked license. Based on these minimal facts, he used common sense to form a reasonable suspicion that a specific individual was potentially engaged in specific criminal activity – driving with a revoked license.

> Traffic stops of this nature do not delegate to officers "broad and unlimited discretion" to stop drivers at random. . . . Nor do they allow officers to stop drivers whose conduct is no different from any other driver's. . . . Accordingly, combining database information and commonsense judgments in this context is fully consonant with this Court's Fourth Amendment precedents.

6. If the officer had learned facts that dispelled reasonable suspicion, such as seeing a person in his mid-20s driving a car whose registered owner was in his 60s, then reasonable suspicion to stop the driver would not have been present

> This Court's precedents have repeatedly affirmed that "'the ultimate touchstone of the Fourth Amendment is "reasonableness." . . . . Under the totality of the circumstances of this case, Deputy Mehrer drew an entirely reasonable inference that Glover was driving while his license was revoked.
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> We emphasize the narrow scope of our holding. Like all seizures, "[t]he officer's action must be 'justified at its inception.'" . . . . "The standard takes into account the totality of the circumstances-the whole picture." . . . As a result, the presence of additional facts might dispel reasonable suspicion. . . .
>
> For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not "raise a suspicion that the particular individual being stopped is engaged in wrongdoing." . . . . Here, Deputy Mehrer possessed no exculpatory information – let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck – and thus the stop was justified.

[Some case citations omitted, some others revised for style; bolding added; subheadings added; some paragraphing revised for readability]

CONCURRING OPINION: Justice Kagan writes a Concurring Opinion that is joined by Justice Ginsburg. Justice Kagan's Opinion concedes that it was reasonable for the officer in Glover to assume that a driver whose license is revoked under Kansas law is a scofflaw. But she argues that, in light of the variety of statutory reasons in many states for suspending a driver's license – including simply failing to timely pay a traffic citation fine – it is not necessarily a generally reasonable or common sense assumption to conclude that every suspended driver is generally a scofflaw who will drive after suspension of his or her driver's license.

DISSENTING OPINION:

Justice Sotomayor is alone in arguing that the Court should have ruled in favor of defendant Glover. The discussion above in the Majority Opinion to which we assigned our own subheadings 4 and 5 describes and respond to her main arguments.

LEGAL UPDATE EDITORIAL COMMENT: I think that courts will read the Majority Opinion broadly and will conclude that it is reasonable – under "reasonable suspicion" analysis – to assume based on common sense that the registered owner of a vehicle is driving that vehicle despite the revocation or suspension of the person's license. Thus, I think that Justice Kagan's suggestion to the contrary will be rejected. She does raise a valid point

that one must factor into the analysis the circumstance where a car has two or more registered owners.

I also think that it is unlikely that the Washington Supreme Court will rule differently on this issue if a defendant raises the question under article I, section 7 of the Washington constitution. To date, Washington appellate courts squarely addressing the Fourth Amendment issue anticipated the U.S. Supreme Court's Glover ruling. See State v. Phillips, 126 Wn. App. 584 (2005). See also State v. Penfield, 106 Wn. App 157 (2001), where the Court of Appeals likewise declared that a vehicle stop was lawful in this categorical circumstance, but the Court went on to hold that once the officer determined as he approached the driver of the car on foot that the driver (a man with a ponytail) of the stopped vehicle was not the registered owner (a woman), then the Terry stop should have ended without further investigation of the operator.

LEGAL UPDATE EDITORIAL RESEARCH NOTE: For discussion of case law relevant to vehicle stops, see the discussion at page 125 of the Washington-focused law enforcement guide on the Criminal Justice Training Commission's LED Internet page: Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors, May 2015, by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys:

- **A vehicle may be stopped based upon DOL records which indicate that the driver's license of the registered owner of the vehicle is suspended. See State v. McKinney, 148 Wn. 2d 20, 60 P.3d 46 (2002); State v. Gaddy, 152 Wn.2d 64, 93 P.3d 872 (2004); State v. Lyons, 85 Wn. App. 268, 932 P.2d 188 (1997). The officer need not affirmatively verify that the driver's appearance matches that of the registered owner before making the stop, but the Terry stop must end as soon as the officer determines that the operator of the vehicle cannot be the registered owner. See State v. Phillips, 126 Wn. App. 584, 109 P.3d 470 (2005), review denied, 156 Wn.2d 1012 (2006); State v. Penfield, 106 Wn. App. 157, 22 P.3d 293 (2001).**

- **A vehicle may be stopped based upon an officer's recognition of the driver as someone whose license is suspended. State v. Harlow, 85 Wn. App. 557, 933 P.2d 1076 (1997).**

- **A vehicle may be stopped based upon the existence of an arrest warrant for the registered owner of the vehicle. The Terry stop must end, however, as soon as the officer determines that the operator of the vehicle and any passenger in the vehicle cannot be the registered owner. State v. Bliss, 153 Wn. App. 197, 222 P.3d 107 (2009); State v. Penfield, 106 Wn. App. 157, 22 P.3d 293 (2001).**

- **A vehicle may be stopped upon reasonable suspicion that a passenger in the vehicle has an outstanding warrant for his or her arrest. State v. Bonds, 174 Wn. App. 553, 299 P.3d 663, review denied, 178 Wn.2d 1011 (2013).**

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY IN CORRECTIONAL INSTITUTION: NO QUALIFIED IMMUNITY FOR CORRECTIONAL OFFICIALS IN FAILURE-TO-PROTECT CASE WHERE PLAINTIFF-INMATE ALLEGES THAT HE WAS NOT REASONABLY PROTECTED FROM ANOTHER INMATE WHO HAD THREATENED TO KILL HIM

In Wilk v. Neven, ___ F.3d ___ , 2020 WL ___ (9th Cir., April 23, 2020), a three-judge Ninth Circuit panel, viewing the factual allegations in the best light for the suing plaintiff, as is required at the summary judgment stage of the proceedings, reverses a U.S. District Court grant of summary judgment that had determined qualified immunity for prison officials in a Civil Rights Act lawsuit.

The lawsuit alleges that defendant correctional officials violated plaintiff's right to be free from cruel and unusual punishment when they failed to protect him from an attack by another inmate who had threatened the plaintiff-prisoner. The plaintiff-prisoner alleges that the prison warden, an associate warden and a caseworker participated in a full classification meeting to discuss plaintiff's housing assignment after plaintiff reported that an inmate had threatened to attack and kill him. Plaintiff alleges that after the meeting, despite knowing about the risk to plaintiff, defendants housed the violent, threatening fellow prisoner in such a way that the plaintiff-prisoner was vulnerable to the brutal attack that occurred. The allegations thus would support a jury verdict that the correctional officials failed to respond reasonably to protect plaintiff-prisoner.

The panel's Opinion holds that, taking plaintiff's evidence as true and viewing it in the light most favorable to him, the correctional officials violated plaintiff's Eighth Amendment right to be protected from serious harm while incarcerated. The Ninth Circuit panel concludes that a reasonable fact-finder would be able to conclude (1) that the correctional officials were aware of the substantial risk of serious harm to plaintiff, and (2) that they failed to respond reasonably.

The panel further rules that qualified immunity must be denied to the correctional officials. The panel Opinion cites the U.S. Supreme Court decision in Farmer v. Brennan, 511 U.S. 825 (1994) as having clearly established, for qualified immunity purposes, that the failure to act to protect the plaintiff-prisoner would violate the Eighth Amendment.

Result: Reversal of U.S. District Court (Nevada) grant of summary judgment to the correctional officials of the Nevada's High Desert State Prison; case remanded to the District Court for trial.

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WASHINGTON STATE SUPREME COURT

MIRANDA "CUSTODY" TEST: DETENTION FOR FIVE HOURS AT A U.S.-CANADA BORDER CROSSING IN A SECURED 11- BY-14-FOOT NON-PUBLIC LOCKED "LOBBY" HELD, UNDER ALL OF THE CIRCUMSTANCES, TO BE CUSTODY "TO A DEGREE ASSOCIATED WITH A FORMAL ARREST" AND THEREFORE TO TRIGGER MIRANDA WARNINGS REQUIREMENT PRIOR TO QUESTIONING

State v. Escalante, ___ Wn.2d ___ , 2020 WL ___ (April 23, 2020)

LEGAL UPDATE PRELIMINARY EDITORIAL NOTE: Pam Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys, summarized the holding in the Escalante case as follows in her April 24 "case note" on the WAPA internet site:

While a typical detention at a fixed border checkpoint will not render someone "in custody" for Miranda purposes, separating a person from the normal stream of traffic and routing them to a secondary inspection area at which the person was separated from all his belongings, had his documents confiscated, was subjected to a pat-down search, and was detained for five hours in a locked 11 x 14 foot lobby that was inaccessible to the public or other travelers will create the type of police-dominated environment that will require Miranda warnings. No bright line test, however, exists for when a person at a fixed border checkpoint is "in custody;" each case requires consideration of the totality of the circumstances.

Facts and Proceedings below:

In August 2017, Escalante and three friends went to a music festival in Canada. On their way home to the United States, they passed through the Frontier border crossing station, where border patrol agents were searching all vehicles coming from the festival as part of a drug enforcement operation. Since they told the first agent that they were coming from the festival, they were directed to the secondary inspection area, and border patrol agents took their documents.

At secondary, an agent told the men to leave all their belongings in the van and wait in the secondary lobby. The secondary lobby was an 11 x 14 foot secured room that was not accessible to the public or other travelers. The door to the lobby was locked, with entry and exit controlled by an agent who sat inside the lobby behind a glass partition. Multiple groups of travelers could be detained in the lobby at the same time if agents were searching multiple vehicles at once.

Once inside the secured lobby, those detained were not allowed to use the bathroom or access water without getting permission from agents and submitting to a pat-down search. Agents patted down all four men and found narcotics on the driver and one passenger, but not on Escalante or the other passenger. The driver and passenger with drugs were moved to 6 x 10 foot detention cells while Escalante and the other passenger continued to be held in the secured lobby.

Agents kept all the men secured, either in the locked lobby or in the detention cells, for five hours while they searched the van. During this time, the agent behind the glass partition watched Escalante and kept his documents. The search uncovered drug paraphernalia and personal items containing drugs, including a backpack with small amounts of heroin and lysergic acid diethylamide (LSD).

Without giving Miranda warnings, agents confronted the men with each item of drug paraphernalia and each item in which drugs were found and asked who owned it. Escalante admitted he owned the backpack. At that time, Escalante and his companion were the only travelers in the secured lobby.

Border patrol agents contacted the United States Attorney's Office through the Department of Homeland Security. After that office declined prosecution because the small quantity of drugs did not meet the threshold for federal prosecution, agents summoned local law enforcement and held Escalante until they arrived. These officers formally arrested Escalante and gave him Miranda warnings.

> Escalante was charged in state court with possession of heroin and LSD. He moved to suppress his statement claiming ownership of the backpack because it was obtained in custody by interrogation without Miranda warnings. The State conceded that Escalante was interrogated but argued Miranda warnings were not required because he was not, in the State's view, in custody at any time while detained at secondary.
>
> The trial court admitted Escalante's incriminating statement. Escalante was convicted at a stipulated facts trial. The Court of Appeals affirmed [in an unpublished opinion].

[Citations to the record omitted; some paragraphing revised for readability]

ISSUE AND RULING: Where Escalante was detained for five hours by federal officers at a U.S.-Canada border crossing in a secured 11-by-14-foot non-public locked room, was he in custody to a "degree associated with a formal arrest" such that Miranda warnings were required by the federal agents prior to questioning of Escalante by the officers? (ANSWER BY UNANIMOUS WASHINGTON SUPREME COURT: Yes, under the totality of the circumstances, Escalante was in custody for Miranda purposes)

Result: Reversal of Stevens County Superior Court conviction of Alejandro Escalante for possession of controlled substances.

ANALYSIS:

Under the seminal 1966 U.S. Supreme Court decision in Miranda v. Arizona, the general constitutional rule is that where a government agent (1) interrogates a person who is (2) in custody, Miranda warnings are required. The State agrees in Escalante that interrogation by government agents occurred, and that the only Miranda issue is whether Escalante was in "custody" for Miranda purposes when the questioning occurred. In key part, the discussion of the custody issue by the Washington Supreme Court is as follows:

> The Miranda court defined "custody" as "all settings in which [a person's] freedom of action is curtailed in any significant way." Since then, the Court has narrowed "custody" to circumstances where "a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).
>
> Therefore, even if a person is "seized" within the meaning of the Fourth Amendment – such that a reasonable person in their position would not feel free to leave or otherwise terminate the encounter with law enforcement – they are not necessarily in "custody" for Miranda purposes. Ultimately, in Miranda case law, "'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." Howes v. Fields, 565 U.S. 499, 508-09 (2012).
>
> The custody inquiry is an objective one that asks how a reasonable person in the suspect's position would have understood the circumstances. To determine whether a reasonable person in the suspect's position would feel restrained to the degree associated with formal arrest, a court examines the totality of the circumstances. Relevant circumstances may include the nature of the surroundings, the extent of police control over the surroundings, the degree of physical restraint placed on the suspect, and the duration and character of the questioning. The subjective views of the interrogating officers are irrelevant, except to the extent those views are communicated

to the suspect in some way and would influence a reasonable person's perception of the situation. Stansbury v. California, 511 U.S. 318, 323- 25 (1994).

In Berkemer, the Court concluded that a person detained during a traffic stop was not in custody for Miranda purposes. The Court reasoned that "[t]wo features of an ordinary traffic stop mitigate the danger" that a person will be compelled to speak against their will. First, an ordinary traffic stop is "presumptively temporary and brief," in contrast to the frequently prolonged station house interrogations, which were addressed in Miranda. Second, the atmosphere surrounding an ordinary traffic stop is substantially less police-dominated than the interrogations in Miranda.

A driver is typically confronted by one or at most two police officers, and "most importantly, the typical traffic stop is public," so that "[p]assersby, on foot or in other cars, witness the interaction of [the] officer and motorist." The public nature of a typical roadside stop reduces the ability of a police officer to use improper means to elicit a confession and reduces a driver's fear that they will be abused if they do not cooperate.

Overall, the Court concluded the traffic stop in Berkemer, during which the individual was asked a modest number of questions by a single police officer and asked to perform a field sobriety test, did not subject him to restraints comparable to formal arrest and did not present the same inherently coercive pressures as the type of questioning in Miranda.

The United States Supreme Court has not addressed what circumstances render a person in custody at the border. The State essentially argues that because the detention was constitutional under the Fourth Amendment, Escalante was not in custody for Fifth Amendment Miranda purposes. But Escalante did not bring a Fourth Amendment challenge, and whether Escalante's detention was a reasonable seizure under the Fourth Amendment is not at issue. By relying on Fourth Amendment doctrine, the State's argument merges two distinct constitutional questions.

The Fourth Amendment protects individuals against unreasonable searches and seizures. . . . The touchstone for whether the circumstances of a border detention are permissible under the Fourth Amendment is reasonableness, which requires balancing an individual's privacy interest against the government's interest in protecting the border, keeping in mind that the balance is "struck much more favorably to the Government" at the border than in the interior.

In contrast to the Fourth Amendment reasonableness inquiry, the Miranda custody inquiry does not involve balancing the needs of the government against the interests of the individual. The inquiry simply asks, when examining the totality of the circumstances, whether an individual was put in an environment that "present[s] a serious danger of coercion." Howes, 565 U.S. at 508-09 . . . Accordingly, whether a seizure is reasonable under the Fourth Amendment is irrelevant to whether Miranda warnings are required. . . . Though the circumstances of a border detention may be reasonable given the government's interest in preventing contraband from entering the country, those circumstances may nevertheless inflict the type of pressures that were the concern of Miranda.

In the analogous context of Terry stops, many circuit courts have found a custodial environment requiring Miranda warnings even though the circumstances were

reasonable under the Fourth Amendment. . . . As the Court explained in Berkemer, an ordinary Terry stop generally does not render a person in custody for Miranda purposes because "the typical police-citizen encounter envisioned by the Court in Terry usually involves no more than a very brief detention . . . , a few questions relating to identity and the suspicious circumstances, and an atmosphere that is 'substantially less "police dominated" than that surrounding the kinds of interrogation at issue in Miranda.'" . . .

But if, during a valid Terry stop, police officers "take highly intrusive steps" that are justified under the Fourth Amendment by the need to protect themselves from danger, they may create the type of custodial environment that requires them to "provide protection to their suspects by advising them of their constitutional rights." In the same way, if federal agents take extensive measures to prevent contraband from entering our borders, and in so doing create a custodial environment, they must give Miranda warnings.

Indeed, circuit courts have concluded that while a traveler is generally not in custody during a typical detention at a fixed border checkpoint, a court must still evaluate the totality of the circumstances to determine if a border detention is custodial. . . . A typical detention at a fixed border checkpoint, like the ordinary traffic stop in Berkemer, is brief, subject to the scrutiny of other travelers, conducted by only one or two agents, and limited in scope. . . . Nevertheless, "[a]s in the traffic-stop context, the inquiry remains a holistic one in which the nature and context of the questions asked, together with the nature and degree of restraints placed on the person questioned, are relevant." . . .

. . . .

Examining the totality of the circumstances here, we conclude that Escalante was in custody when he was interrogated about the backpack. After answering questions at the primary inspection area, Escalante was separated from the normal stream of traffic and routed to a secondary inspection area, which would cause a reasonable person to feel subject to an increased level of suspicion. At [the secondary inspection area], agents separated him from all his belongings, confiscated his documents, subjected him to a pat-down search, and detained him for five hours in a locked 11 x 14 foot lobby that was inaccessible to the public or other travelers. . . . Agents controlled entry and exit of the lobby, and although agents had discretion to detain multiple groups in the lobby at the same time, other travelers could not come in at will. Escalante was not allowed to leave the lobby or to freely use the bathroom or access water.

These circumstances imposed a significant degree of physical restraint and created precisely the type of incommunicado police-dominated environment that was the concern of Miranda. Although the presence of other travelers at the discretion of agents may have rendered Escalante somewhat less isolated than the suspects in Miranda, their presence is not the type of meaningful "exposure to public view" that "reduces the ability of an unscrupulous [police officer] to use illegitimate means to elicit self-incriminating statements and diminishes the [suspect's] fear that, if he does not cooperate, he will be subjected to abuse." Berkemer, 468 U.S. at 438 (traffic stop on a public thoroughfare).

Escalante was detained in this secure setting for five hours, which also suggests he was in custody. . . . [T]he lengthy duration of Escalante's detention contributed to its coercive atmosphere. Further, while the agent's specific question about the backpack was not

> distinctly accusatory, agents confronted Escalante with each personal item from the van, including drug paraphernalia, one by one – a procedure that, under the circumstances, would communicate to a reasonable person that they were under increased suspicion. And, by the time of the questioning, the driver of the van had been restrained in a detention cell, leaving Escalante without a means to leave even if he had been permitted. A reasonable person in Escalante's circumstances would have felt their freedom was curtailed to the degree associated with formal arrest.
>
> . . . . Although Escalante was not handcuffed . . . , he was nevertheless subjected to significant restraint on his freedom of movement while detained in a small locked area without freedom to come and go. Given the degree of restraint on Escalante's freedom, the government cannot render this environment noncustodial merely by putting out brochures and calling the room a lobby instead of a holding cell.

[Some citations omitted, others revised for style; some paragraphing revised for readability]

THEFT OF MOTOR VEHICLE, A CLASS B FELONY UNDER RCW 9A.56.065, HELD IN 5-4 RULING AS APPLYING TO THEFT OF A SNOWMOBILE

In State v. Van Wolvelaere, State v. Tucker, ___ Wn.2d ___ , 2020 WL ___ (April 30, 2020), in a 5-4 vote, the Washington Supreme Court reverses a Court of Appeals decision (8 Wn. App. 2d 705 (2019)) that had reversed a superior court conviction for "theft of motor vehicle," a Class B felony, in a case involving theft of a snowmobile. The Majority Opinion for the Supreme Court declares that the categorical facts are distinguishable from those in the Washington Supreme Court decision in State v. Barnes, 189 Wn.2d 492 (2017), which held that a riding lawn mower is not a "motor vehicle" for purposes of the Washington theft statute, RCW 9A.56.065.

This case originally involved two defendants, Mr. Imra Green Van Wolvelaere and Ms. Julie Elizabeth Tucker. But Mr. Van Wolvelaere's case was resolved prior to trial, and he ceased to be an active party in the case.

In the 2017 decision in Barnes, the Supreme Court Justices split into three 3-Justice factions in their analyses of RCW 9A.56.065, which uses the term "motor vehicle" that is also found in the traffic code. Three Justices asserted that the theft statute is not ambiguous and that the B felony theft statute clearly does not apply to the lawnmower theft. Three other Justices agreed on the result, but they based their conclusion on the history and spirit of the legislation, as well as a concern about an unraised Washington constitutional issue. They concluded that, while the statute is ambiguous, legislative intent is best reflected in a determination that the statute does not include as a B felony the theft of a riding lawnmower. The other Justices would have held: (1) that the statute's language is not ambiguous, (2) that the language includes theft of a riding lawnmower, and (3) that courts in future cases could simply choose to avoid "absurd" results, such as applying RCW 9A.56.065 to theft of "an iRobot Roomba robotic vacuum" that might come about in reading the statute so broadly as to reach absurdity.

In Tucker, the five Justices signing the Majority Opinion Justices assert that to determine whether a device is a "motor vehicle" requires an analysis of "[1] the device's mechanics (is it self-propelled?) as well as [2] the device's function (is it capable of moving and transporting people or property on a public highway?)" The Majority Opinion declares that a snowmobile meets both requirements, whereas a riding lawn mower, per the Barnes case, does not fully meet the second requirement.

Along the way, the Majority Opinion notes that golf carts are expressly excluded from the statutory definition of "motor vehicle" in RCW 46.04.320(3), except for purposes of chapter 46.61 RCW. That means that a golf cart is not a motor vehicle for purposes of the theft statutes, but is a "motor vehicle" for purposes of a traffic citation or arrest (e.g., DUI).

Result: Reversal of Court of Appeals decision that reversed the Kittitas County Superior Court conviction of Julie Elizabeth Tucker for the Class B felony of theft of a motor vehicle in violation

LEGAL UPDATE EDITORIAL COMMENT: The bottom line of Tucker is that a *snowmobile* qualifies as a "motor vehicle" under both the theft statutes and the traffic code. Also, as I have previously stated, I believe that the 2017 Barnes decision does not preclude prosecution for DUI or other traffic infractions/crimes committed while driving a *riding lawn mower*. The same goes for *golf carts*. Readers should check with their legal advisors and/or local prosecutors on this and other matters addressed in the Legal Update.

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WASHINGTON STATE COURT OF APPEALS

REASONABLE SUSPICION FOR A TRAFFIC STOP: OFFICER'S OBSERVATION OF VEHICLE – (A) MAKING JERKY MOVEMENTS WITHIN ITS LANE, (B) CROSSING THE LANE DIVIDER LINE TO THE RIGHT AND CAUSING ANOTHER VEHICLE TO CHANGE LANES, AND (C) THEN CROSSING THE FOG LINE TO THE LEFT – SUPPORTED THE OFFICER'S STOP OF THE VEHICLE

State v. Tysyachuk, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. II, April 14, 2020)

Facts: (Excerpted from Court of Appeals Opinion)

> At 1:40 AM on December 31, 2017, [a] Washington State Patrol trooper was driving northbound on Interstate 5 near the Tacoma Dome when he noticed a car driving in the far left lane that was making some "jerking movements." [The trooper] observed the right two tires of the car cross over the lane divider to the right and saw a vehicle in the adjoining lane slow down and move away into the next lane. The car then braked and moved back into the left lane and crossed over the solid fog line on the left that separated the roadway from the shoulder.
>
> th then decided to stop the car because the driver was not driving safely. And he believed the swerving – failure to maintain straight travel in a lane – was consistent with possible driving under the influence.
>
> The driver, later identified as Tysyachuk, showed signs of intoxication so [the trooper] asked him to perform field sobriety tests. Tysyachuk refused. [The trooper] placed Tysyachuk under arrest and transported him to the hospital for a blood draw to test his blood-alcohol concentration. Tests showed a result of 0.20 grams of ethanol per 100 milliliters, which is over twice the legal limit.

Proceedings below:

Because Tysyachuk had three or more prior DUI convictions, the State charged Tysyachuk with felony driving under the influence, first degree driving while in revoked status, and failure to have an ignition interlock. The trial court denied the defendant's suppression motion challenging the traffic stop, and a jury convicted the defendant as charged.

[Some paragraphing revised for readability]

ISSUE AND RULING: Did the trooper, in light of his training and experience, have reasonable suspicion for a traffic stop where the trooper observed the vehicle he was following (a) making jerky movements within its lane, (b) crossing the lane divider line to the right and causing another vehicle to change lanes, and (c) then crossing the fog line to the left? (ANSWER BY COURT OF APPEALS: Yes)

NOTE REGARDING UNPUBLISHED PORTION OF OPINION: In an unpublished portion of its Opinion that is not addressed in the Legal Update other than in this note, the Court of Appeals holds that the trial court did not abuse its discretion in determining that a proper evidentiary foundation was made for admitting the results of the blood alcohol test. In the unpublished portion of the Opinion, the Court describes the evidence that was presented to the trial court regarding the blood draw procedure.

Result: Affirmance of Pierce County Superior Court convictions of Artur Veniamin Tysyachuk for (A) DUI, (B) first degree driving while suspended or revoked, and (C) failure to have an ignition interlock.

ANALYSIS:

Warrantless vehicle stops are lawful, among other circumstances, where an officer has reasonable suspicion that the driver is committing a crime or traffic violation. The officer's experience and training is a factor in determining whether reasonable suspicion exists. The Tysyachuk Court explains that the State and the defendant focused in their arguments on three Washington Court of Appeals precedents, and the Court then discusses those three precedents:

> In State v. Prado, a police officer stopped Prado after observing his vehicle cross by approximately two tire widths for one second an eight-inch wide line dividing the exit lane from the adjacent lane. 145 Wn. App. 646 (2008). Division One of this court noted that RCW 46.61.140(1) required a vehicle to stay within a single lane "as nearly as practicable." The court believed that this language demonstrated the legislature's recognition that "brief incursions over the lane lines will happen." The court concluded, "A vehicle crossing over the line for one second by two tire widths on an exit lane does not justify a belief that the vehicle was operated unlawfully." However, the court also noted that "there was no other traffic present and no danger posed to other vehicles." Because this brief incursion over the line was the sole basis for the officer's stop, the court held that the stop was illegal.
>
> In State v. McLean, a trooper observed the defendant weave from side to side within the left lane of travel and then cross the fog line three times. 178 Wn. App. 236 (2013). The trooper suspected the driver was impaired and initiated a traffic stop. The trooper testified that he had training and experience in identifying impaired drivers. He estimated that he had made over 200 arrests for driving under the influence.

> This court held that the stop was lawful because the trooper had a reasonable suspicion that the driver was under the influence. The [McLean] court stated,
>
> > From the articulable fact of [the trooper's] observation, and from his training and experience identifying driving under the influence, it was rational for [the trooper] to infer that there was a substantial possibility that Mclean was driving under the influence. That substantial possibility establishes a reasonable suspicion permitting [the trooper] to make a warrantless traffic stop.
>
> In State v. Jones, a police officer stopped Jones after observing his vehicle pass over the fog line about an inch three times, each time correcting its travel with a slow drift. 186 Wn. App. 786 (2015). There were no other vehicles on the road at the time. A police officer initiated a traffic stop because of erratic lane travel. Division One held that the traffic stop was unlawful even though the vehicle crossed the fog line three times instead of only once as in Prado. The [Jones] court concluded that the record did not support a finding that the officer made the traffic stop based on a reasonable suspicion of criminal activity. The [Jones] court explained its decision in Prado:
>
> > [O]ur Prado decision did not depend on the fact that the driver crossed the lane line only once. Rather, we used a totality of the circumstances analysis that included factors such as other traffic present and the danger posed to other vehicles. This represents a more sophisticated analysis than a simple tally of the number of times a tire crossed a line.
>
> The [Jones] court also distinguished McLean based on the evidence in that case that the trooper had extensive training and experience identifying impaired drivers and the trial court's finding that the trooper made the stop based on a reasonable suspicion that the driver was under the influence. By contrast, in Jones there was no evidence about the officer's training and experience in identifying impaired drivers, the officer did not testify that she suspected the driver was impaired, and there was no evidence of dangerous driving. In addition, the trial court did not find that the officer stopped the driver because of a reasonable suspicion that he was driving under the influence.

[Some citations omitted; others revised for style]

The Tysyachuk Court then explains its view that the three precedents do not support the defendant's position, and that the totality of the circumstances support the lawfulness of the traffic stop in this case:

> Tysyachuk argues that Prado, Jones, and cases from other jurisdictions establish that his driving did not create a reasonable suspicion to justify the traffic stop. But we conclude that this case is more similar to McLean and is distinguishable from Prado and Jones.
>
> First, as in McLean, [the trooper] testified to and the trial court made an unchallenged finding regarding [the trooper's] extensive training and experience in recognizing impaired driving. [The trooper] testified that based on his training and experience, he believed that Tysyachuk's driving was consistent with driving under the influence. This court in McLean found similar evidence significant in establishing a reasonable suspicion. As noted above, facts that appear innocuous to an average person may appear suspicious to an officer in light of past experience. By contrast, the court

in Jones emphasized that there was no evidence in that case regarding the officer's training and experience.

Second, in McLean the trooper observed the driver "weave within its lane" in addition to crossing the fog line three times. And this court concluded that based on the trooper's experience, it was reasonable for him to infer that the driver was under the influence. Similarly, [the trooper] observed Tysyachuk's car making jerking movements and swerving and determined that Tysyachuk's driving was consistent with driving under the influence. Therefore, as in McLean, it was reasonable for [the trooper] to infer that Tysyachuk was driving under the influence. By contrast, in Jones the officer did not testify that she suspected that the driver was impaired.

Third, the trial court found that Tysyachuk's unsafe driving affected another driver, causing that driver to change lanes to avoid a possible collision. By contrast, the court in Prado emphasized that "there was no other traffic present and no danger posed to other vehicles." In Jones, the court noted that "[t]here were no other vehicles on the roadway at the time." And the court in Jones expressly recognized that the totality of circumstances analysis included "factors such as other traffic present and the danger posed to other vehicles."

We evaluate the reasonableness of [the trooper's] suspicion that Tysyachuk was engaged in criminal activity or a traffic violation based on the totality of the circumstances. State v. Fuentes, 183 Wn.2d 149 (2015). Here, the totality of the circumstances included the nature of Tysyachuk's driving, [the trooper's] training and experience regarding the detection of impaired driving and his conclusion that Tysyachuk's driving was consistent with impairment, and the fact that Tysyachuk potentially posed a danger to another driver. Based on these circumstances, we conclude that [the trooper] had a reasonable suspicion that Tysyachuk was engaged in criminal activity or a traffic violation.

Accordingly, we hold that the trial court did nor err in concluding that [the trooper's] traffic stop of Tysyachuk was lawful.

[Some citations omitted; other citations revised for style]

CCO'S SEARCH OF VEHICLE OF PERSON UNDER COMMUNITY CUSTODY CONDITIONS IS HELD TO MEET STATE CONSTITUTIONAL "NEXUS REQUIREMENT" WHERE, AFTER ARREST OUT OF HIS PICKUP ON A DOC WARRANT, THE PERSON ADMITTED TO HIS CCO TO RECENTLY USING METHAMPHETAMINE

State v. Godwin, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, April 20, 2020)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

Godwin was previously convicted of first degree robbery with a deadly weapon, second degree robbery, intimidating a witness, third degree assault, and felony possession of a controlled substance. Conditions of his community custody supervision required him to report to his Community Custody Officer (CCO) and prohibited him from possessing or consuming any controlled substance without a lawful prescription.

The Department of Corrections (DOC) issued a felony arrest warrant for Godwin's violation of supervision and failure to report. Godwin's CCO [] had information about the residence where Godwin was staying in Marysville and developed a surveillance plan to find and apprehend Godwin. In May 2017, [the CCO] drove by the residence and saw a green pickup truck that Godwin was known to drive backed into the front yard. Within minutes of observing the residence, [the CCO] saw Godwin exit the house and walk across the front yard to the pickup truck.

Snohomish County Sheriff's Deputy [A] approached the pickup truck in his patrol car and turned on the emergency lights. Godwin was seated in the driver's seat with the engine running. When Godwin observed [Deputy A], he exited the pickup truck and began walking back to house. [Deputy A] apprehended Godwin before he could get back to the house and arrested him.

[The CCO] read Godwin the Miranda warnings. Godwin indicated that he understood his rights and was willing to talk with officers. Snohomish County Sheriff's Deputy [B] had spoken with Godwin on the phone a couple of weeks earlier about his warrant and recommended that Godwin turn himself in. [The CCO] asked Godwin why he had not turned himself in and Godwin responded that he had been using meth and messing up.

Godwin told officers that the pickup truck belonged to his friend "Craig" and that he was just moving the pickup truck for Craig when officers arrived. After checking the records for the pickup, it showed a bill of sale from Godwin to Craig Norris in February 2017, but the title never transferred.

[The CCO] asked Godwin if he left anything inside the pickup truck and Godwin indicated he left a black bag, beanie cap, and some change in the pickup truck. [The CCO] observed numerous items in the pickup truck, including clothing consistent with Godwin's size and a grey sweatshirt that looked like one that Godwin wore during a prior arrest.

Because Godwin admitted using methamphetamine, which was a violation of his community custody conditions, [the CCO] searched the pickup truck and Godwin's inoperable Volvo parked in the backyard. Upon searching the pickup truck, [the CCO] located methamphetamine, heroin, a loaded handgun, a glass pipe, and a digital scale. Godwin admitted the drugs and paraphernalia were his, but denied ownership of the gun.

The State charged Godwin with one count of possession of a controlled substance and one count of unlawful possession of a firearm in the first degree. Both charges were allegedly committed while he was on community custody. Godwin moved to suppress the evidence found in the pickup truck . . . . [The motion was denied.] The case proceeded to a bench trial and the trial court found Godwin guilty of possession of a controlled substance and unlawful possession of a firearm, sentencing him to 87 months.

[Footnote omitted; some paragraphing revised for readability]

ISSUE AND RULING: At the point in time when the CCO searched Godwin's vehicle, did the CCO have reasonable suspicion based on Godwin's admission to the CCO of recently using methamphetamine (A) that Godwin had committed a community custody violation of being in

possession of methamphetamine, and (B) that there was methamphetamine in Godwin's vehicle? (ANSWER BY COURT OF APPEALS: Yes, the search of the vehicle therefore meets the constitutional "nexus requirement" of the Washington constitution for searches by CCOs of the property of persons subject to community custody conditions)

Result: Affirmance of Snohomish County Superior Court conviction of Shawn Lee Godwin for possession of a controlled substance and unlawful possession of a firearm in the first degree.

ANALYSIS:

Under case law interpreting both the Washington constitution and the federal constitution privacy protections, it is constitutionally permissible for a CCO to search an individual based only on a well-founded or reasonable suspicion of a probation violation, rather than needing a warrant supported by probable cause. However, in State v. Cornwell, 190 Wn.2d 296 (March 15, 2018), the Washington Supreme Court held that article I, section 7 of the Washington constitution contains a heightened requirement that, in order for a community corrections officer to lawfully search the vehicle (or other property) of a person released on community custody conditions, there must be a nexus between (1) a suspected violation of the conditions, and (2) the person's vehicle (or the person's other property).

The Godwin Court analyzes the lawfulness of the CCO's search under Cornwell's nexus requirement as follows:

> . . . . [The CCO] had an arrest warrant for Goodwin for failure to report. After Godwin's arrest, the CCO read him the Miranda warnings. Godwin agreed to talk and admitted he had been using methamphetamine. When officers approached the pickup truck, Godwin exited and quickly moved away from the pickup truck. The [trial] court concluded that this was an attempt to distance himself from the pickup truck.
>
> Godwin's admission and attempt to distance himself from the pickup truck as officers approached him provided a nexus to search Godwin's pickup truck. The trial court did not err in its conclusions of law.
>
> Godwin analogizes to the facts in State v. Jardinez, 184 Wn. App. 518 (2014), arguing that [the CCO] had no actual or articulable facts to suggest that Godwin was storing methamphetamine in the pickup truck. Jardinez failed to report for a meeting and admitted marijuana use, both of which were violations of his conditions of release. The CCO used those violations as a basis to search Jardinez's iPod, where the CCO found a photo of Jardinez with a firearm. During the suppression hearing, the CCO admitted that "the iPod interested him because parolees occasionally take pictures of themselves with other gang members or 'doing something they shouldn't be doing.'" The CCO did not search the iPod because he believed he would find evidence of Jardinez's failure to report for a meeting or marijuana use, rather the CCO searched it because believed he would find evidence of other violated conditions.
>
> Division Three of this court [in Jardinez] affirmed the trial court's suppression of the firearm, concluding that RCW 9.94A.631 did not authorize the CCO's warrantless search of the iPod. [The Washington Supreme Court in] Cornwell discussed and approved the outcome of Jardinez. Cornwell specifically disavowed the type of "fishing expedition" that occurred in Jardinez.

> While Jardinez and Godwin violated similar community custody conditions, the area searched, evidence searched for, and the articulated reasons for the search differ. Unlike Jardinez, Godwin admitted using methamphetamine and Woodruff believed that Godwin was using his pickup truck to store drugs. Thus, under the facts of this case, the nexus requirement was satisfied.

[Some citations omitted; others revised for style; some paragraphing revised for readability]

ENTRAPMENT DEFENSE UNDER RCW 9A.16.070 IN RESPONSE TO CRAIGSLIST STING TO CATCH A CHILD-SEX CRIME VIOLATOR: DEFENDANT IS HELD NOT ENTITLED TO AN ENTRAPMENT INSTRUCTION WHERE THE STATE MERELY AFFORDED THE DEFENDANT THE OPPORTUNITY TO COMMIT THE CRIME

State v. Johnson, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. II, January 28, 2020) (on April 7, 2020, the Court of Appeals ordered the previously unpublished Opinion to be published)

Facts and Proceedings below: (Excerpted from Court of Appeals Opinion)

> Law enforcement created a posting in the Craigslist casual encounters section. The posting was titled, "Crazy and Young. Looking to Explore. W4M Bremerton" and stated, "Bored and home alone. Been watching videos all day. Really looking to meet a clean DDF guy that can teach me what it's like to be an adult. HMU if interested, winking smiley face. I'm lots of fun." [Court's footnote 4: *"W4M" stands for woman for man. "DDF" stands for drug and disease free. "HMU" stands for hit me up*.]
>
> Johnson responded to the ad, "I'm real and very interested. . . . I lappy [sic] . . . 'to trade pics. I lope [sic] to hear from you. I want to make you feel amazing." Law enforcement replied with an e-mail address under the name "Brandi," asking, "Do you want to teach me to [be] a grown up?" and attached a photograph of a female. Johnson responded affirmatively and asked how old she was, where she was located, and if they could "use" her place. "Brandi" stated, "I'm 13 and on my own." She said she was staying with a friend in Bremerton whose mother was gone for a few days, so Johnson could come over.
>
> Johnson replied, "Who all will be at the house. I'm just trying to be cautious as you are underage." Johnson suggested the two meet in public, and they arranged to meet at a minimart near "Brandi's" location. "Brandi" asked what Johnson would teach her. Johnson replied, "I want to teach you how to suck my c**k, how to c*m, how to ride my c**k, how to take my c**k deep. I'll show you many things. Is this what you're looking for?"
>
> "Brandi" responded affirmatively and asked if Johnson could "help out with" money. Johnson said, "I can help out a little that way. Have to be honest, I'm already nervous because of your age, and now you're asking for this. . . . I get it. Don't get me wrong. As long as everything you're telling me is true, I'm just trying to let you know what I'm thinking." Johnson said that he had to make sure work would not conflict with their meet up. When "Brandi" asked if later would be better, Johnson replied, "Nope. I got it all worked out." Johnson drove to the designated minimart. "Brandi" then gave Johnson the address of the house and he drove toward that location. Law enforcement

apprehended Johnson while on his way from the minimart to the house. At the time of his arrest, Johnson was carrying forty dollars.

The State charged Johnson with (1) attempted second degree rape of a child, (2) attempted commercial sexual abuse of a minor, and (3) communication with a minor for immoral purposes. During the trial, witnesses testified to the above facts.

Johnson testified on his own behalf. He stated that he believed the Craigslist posting was an "age-role-play fetish." Johnson testified that he wanted to meet the person and was "playing detective" to discern who this person was because he did not believe the person was a thirteen-year-old girl. He also acknowledged that no one forced him to respond to the posting.

The trial court denied Johnson's request to include a jury instruction on the affirmative defense of entrapment. The jury found Johnson guilty as charged.

. . . . The trial court placed community custody restrictions on Johnson, including, "Do not use or access the World Wide Web unless specifically authorized by CCO (community corrections officer) through approved filters."

[Citations to the trial court record omitted; one footnote omitted]

ENTRAPMENT STATUTE:

RCW 9A.16.070 provides (bolding added):

> (1) In any prosecution for a crime, it is a defense that:
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
> (2) **The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.**

ISSUE AND RULING: Is there substantial evidence to support the giving of an entrapment instruction to the jury in this case? (ANSWER BY COURT OF APPEALS: No, because law enforcement merely afforded Johnson the opportunity to commit his crimes)

Result: Affirmance of Kitsap County convictions (1) attempted second degree rape of a child, (2) attempted commercial sexual abuse of a minor, and (3) communication with a minor for immoral purposes.

The Court of Appeals also affirms the community custody restriction the barred Johnson from using or accessing the World Wide Web unless authorized by his CCO through approved filters. The Division Two panel notes in a footnote that in an unpublished decision a Division One panel "recently came to a different conclusion regarding a similar community custody condition. State v. Forler, No. 79079-0-I, slip op. at 27-28 (Wash.Ct.App. June 10, 2019) (unpublished), *http://www.courts.wa.gov/opinions/pdf/790790.pdf*"

ANALYSIS:

In key part, the analysis of the Court of Appeals on the entrapment issue is as follows:

> Here, Johnson points to no evidence to support an entrapment instruction. Law enforcement created a Craigslist posting purporting to be a woman looking for a man to teach her how to be an adult. Johnson initiated contact by answering the posting. Johnson testified that no one forced him to answer the posting.
>
> Although Johnson stated he wanted to be cautious because "Brandi" was underage, he steered the conversation into explicitly sexual territory by graphically explaining his sexual desires to the purported thirteen-year-old. When "Brandi" suggested meeting at a later time, Johnson declined, stating that he was available to meet. There is no evidence that law enforcement lured or induced Johnson.
>
> Johnson argues that he was entitled to an entrapment instruction because the State failed to show he had a predisposition to commit the crimes against children, and there was no evidence of a history regarding perverse activity towards children. But pointing to the State's absence of evidence does not meet Johnson's evidentiary burden for his affirmative defense. . . .
>
> Instead, the evidence shows that law enforcement merely afforded Johnson the opportunity to commit his crimes. Johnson willingly responded to the posting, steered the conversation to explicitly sexual topics, testified that he wanted to meet the person, and drove to the agreed locations. Because Johnson failed to show any evidence entitling him to a jury instruction on entrapment, we hold that the trial court did not err by refusing to instruct the jury on entrapment.

[Case citation omitted; some paragraphing revised for readability]

LEGAL UPDATE EDITORIAL NOTE: The facts in Johnson do not indicate any over-reaching by the undercover detective, so the Johnson Opinion does not discuss State v. Solomon, 3 Wn. App. 2d 895 (Div. I, May 29, 2018), where the Court of Appeals ruled that a detective doing a Craigslist sting violated constitutional Due Process protections in the detective's extensive, persistent communications to the very cautious target in that case.

REGISTERED SEX OFFENDER DOES NOT CEASE TO HAVE A "FIXED RESIDENCE" UNDER RCW 9A.44.130(6)(a) WHERE THE OFFENDER IS ONLY TEMPORARILY GONE FROM HIS RESIDENCE FOR SEVEN TO 12 DAYS

State v. Cathers, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. III, April 14, 2020)

Facts and Proceedings below: (Excerpted from Court of Appeals Opinion)

> Glen Cathers is a level 1 sex offender and is required to register in Klickitat County. He first registered in Klickitat County in 1998 and was compliant with his registration requirements for 20 years.
>
> The Klickitat County Sheriff's Department checks the residential status of level 1 sex offenders, such as Cathers, once per year. In June 2018, the Department's criminal records technician directed a deputy to verify Cathers was residing at his registered address on Jenkins Creek Road.

> On June 20, 2018, [a deputy sheriff] went to Cathers's registered address. He arrived at the address after 5:00 p.m., and no one was there. He left a business card in the door. The next day, [the deputy] returned to the address. Cathers was not there, but the deputy did speak with a person who was there, Kathleen O'Brennan. On June 27, 2018, [the deputy] returned once again to the address. Cathers was not there, but Ms. O'Brennan was. The deputy did not notice any evidence that Cathers had or was in the process of moving out.
>
> Ms. O'Brennan is a friend of Cathers and his partner, Naomi Fisher. The couple hires her once or twice per year to watch their cats when they travel. Ms. O'Brennan was watching their cats when the deputy came by in June. She watched their cats for a 12-day period. The trial court found that Cathers was "gone from his residence" between 7 and 12 days.
>
> Several months later, the State charged Cathers with felony failure to register as a sex offender. Cathers waived his right to a jury trial. On the above facts, the trial court found Cathers guilty. The trial court entered a judgment of conviction, sentenced Cathers to 30 days in jail, and approved a $10,000 appeal bond.

[Citations to trial court record omitted; footnote omitted]

ISSUE AND RULING: RCW 9A.44.130(6)(a) requires a registered sex offender who lacks a fixed residence to notify the appropriate sheriff's department within three business days after ceasing to have a "fixed residence." Failure to do this constitutes failure to register. RCW 9A.44.128(5) defines "fixed residence" as "a building that a person lawfully and habitually uses as living quarters a majority of the week."

Does a registered sex offender cease to have a "fixed residence" simply because the offender is temporarily gone from his residence for 7 to 12 days? (ANSWER BY COURT OF APPEALS: No, rules a unanimous Court of Appeals)

Result: Reversal of Klickitat County Superior Court conviction of Glen Lindsay Cathers for failure to properly register as a registered sex offender.

ANALYSIS: (Excerpted from Court of Appeals Opinion)

> The State charged Cathers for failure to register as a sex offender, citing RCW 9A.44.132(1), which provides:
>
> > A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.
>
> The State relied on [the notice requirement of] RCW 9A.44.130(6)(a), which provides:
>
> > Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence. . . .

(Emphasis added.)

[RCW 9A.44.128(5) provides the following definition of "fixed residence":]

> "Fixed residence" means a building that a person lawfully and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage. . . .

The State argues Cathers ceased having a fixed residence when he did not use his living quarters a majority of one week. It further argues, because Cathers did not provide signed written notice to the sheriff within three business days after ceasing to have a fixed residence, as required by RCW 9A.44.130(6)(a), he was guilty of failure to register. We disagree.

The State's construction of "fixed residence" ignores the word "habitually." . . .

"Habitually" is not defined [in the statute]. "When a statute fails to define a term, a court may rely on the ordinary meaning of the word as stated in a dictionary." . . . . "Habitually" means "consistently, persistently, repeatedly, usually." . . . WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1017 (1993). A person who uses a building as his or her living quarters, yet is occasionally away for one or two weeks, still "habitually" lives there a majority of the week. This is because the person is consistently and usually there.

The trial court was concerned that a convicted sex offender might evade the registration requirements by listing an address but never or rarely using it. Under our construction of RCW 9A.44.130(6)(a), a person who never or rarely uses the listed residence would be guilty of failure to register.

But those are not the facts here. The trial court found that Cathers was gone from his residence between 7 and 12 days. We conclude the trial court's findings were insufficient to establish that Cathers ceased having a fixed residence within the meaning of RCW 9A.44.130(6)(a).

[Court's footnote 2: *We invite the legislature to provide greater detail in this area. How long may level 1, 2, or 3 sex offenders be absent from their residences? Should registered sex offenders be required to notify the sheriffs office before being absent for more than three days? Should registered sex offenders be required to disclose where they plan on staying each day, and be required to be reachable by telephone for efficient verification? Courts are ill-equipped to fill in these gaps*.]

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BRIEF NOTES REGARDING APRIL 2020 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 very 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 probably not sufficiency-of-evidence-to-convict issues).

The 20 entries below are April 2020 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.

1. State v. Marco Gerardo Meza: On April 6, 2020, Division One of the COA rejects the appeal of Marco Gerardo Meza from his King County Superior Court conviction for *possession of methamphetamine*. He claims the trial court should have suppressed evidence of methamphetamine police found in a car he was driving. The Court of Appeals rules that (1) Meza, who signed a written consent-to-search form, **lawfully consented to a search of the car** without limiting the scope of the search; (2) **did not revoke that consent during the course of the search**; and (3) the officer who searched the car found the methamphetamine in **plain view**.

2. State v. Jonathan Jaymes Wallin: On April 7, 2020, Division Two of the COA rejects the appeal of Wallin from his Grays Harbor Superior Court convictions for *(A) two counts of second degree assault with firearm enhancements, (B) one count of second degree malicious mischief with a firearm enhancement, (C) one count of second degree unlawful possession of a firearm, (D) one count of possession of a controlled substance, and (E) two counts of witness tamper*ing. Among other rulings, Court of Appeals concludes that the **"doctrine of forfeiture by wrongdoing"** – as recognized by the Washington Supreme Court in State v. Mason, 160 Wn.2d 910 (2007) – **precludes application of the Sixth Amendment right to confrontation regarding hearsay testimony**, where Wallin made multiple requests, even though non-threatening, to the hearsay declarant to not testify at his trial, and she then absented herself from his trial.

3. State v. Dhena Rayne Albert: On April 7, 2020, Division Two of the COA rejects the appeal of Albert from her Clark County Superior Court convictions for *(A) possession with intent to deliver a controlled substance (methamphetamine), and (B) unlawful possession of a firearm in the first degree*. Among other rulings, the Court of Appeals concludes that **the trial court did not err in denying Albert's motion for a hearing under Franks v. Delaware**, 438 U.S. 154 (1978) to determine the identity of a confidential informant (Albert made a showing that the CI may have lied, but she did not present evidence that the officer-affiant lied or recklessly disregarded the truth in a search warrant affidavit).

4. State v. Matthew Ruiz: On April 13, 2020, Division One of the COA rejects the appeal of Ruiz from the the pre-trial order of the Seattle Municipal Court requiring that Ruiz, charged with DUI and having a history of two prior negligent driving convictions originally charged as DUIs, have as *a condition of pre-trial release the conditions of installation of an ignition interlock device (IID)*

and electronic home monitoring with random breath testing (EHMB). **The Court of Appeals rejects his argument that these pre-trial conditions of release violated his privacy rights under article I, section 7 of the Washington constitution**.

5. State v. Ayan Abdirahim Mumin: On April 13, 2020, Division One of the COA agrees with the appeal of the State from a King County Superior Court order that reversed the District Court conviction of Mumin for *DUI*. The Court of Appeals rules, contrary to the Superior Court, that the **officer who arrested Mumin for DUI had probable cause** in light of the following facts: (A) the officer had observed Mumin's car weave frequently and significantly within its own lane, and cross over once into a neighboring lane; (B) upon contact, Mumin's eyes were bloodshot and watery, and her breath smelled like alcohol, which she admitted drinking; (C) The smell of alcohol continued when Mumin got out of the car, indicating that it was not coming from the car itself or Mumin's passenger; (D). Mumin moved slowly and deliberately to the front of her car, appearing to the officer as though she were struggling with her footing; (E) Mumin swayed while talking with the officer; (F) although the officer explained to Mumin several times how to perform the horizontal gaze nystagmus test, Mumin was unable to follow his instructions.

6. State v. David Lawrence Hoar: On April 13, 2020, Division One of the COA rejects the appeal of Hoar from his Snohomish County Superior Court conviction for *second degree felony murder predicated on assault in the second degree*. Among other rulings, **the Court of Appeals rejects Hoar's arguments that he was too drunk to waive his Miranda rights and/or too drunk to give investigators a voluntary statement**. The Court of Appeals rules on these issues that, given Hoar's severe and chronic alcoholism, a blood alcohol test result of .252 at the time of booking, "does not in and of itself, given the direct testimony that he was able to understand the questioning, indicate that he was unable to understand his rights or answer coherently." The Court of Appeals finds support in the record for the trial court determinations that (1) the recording of Hoar's custodial interview demonstrated that he was properly advised of his constitutional rights and wanted to discuss the incident; and (2) that the "interaction between [the detective] and the defendant is consistent with [the detective's] testimony that [Hoar] was able to understand the questioning and answer coherently."

7. State v. Joseph M. Arnone: On April 13, 2020, Division One of the COA rejects the appeal of Arnone from his Snohomish County Superior Court conviction for *unlawful possession of heroin*. **The Court of Appeals rules that two officers who approached Arnone's publicly parked truck did not seize Arnone** by approaching on both the passenger and driver sides, where one of the officers saw a piece of aluminum foil with burnt black residue on the truck's front bench seat before the officers made any contact with Arnone. The Court of Appeals concludes that the officer's open view of the drug paraphernalia occurred prior to any seizure of Arnone, and the observation justified the seizure that followed.

8. State v. David Michael Kalac: On April 13, 2020, Division One of the COA rejects the appeal of Kalac from his Kitsap County Superior Court convictions for *(A) first degree murder, (B) theft of a motor vehicle, and (C) possession of stolen property*. The Court of Appeals explains as follows that, **where detectives entered Kalac's apartment immediately after a responding sheriff's deputy had entered lawfully (as conceded by Kalac) under emergent circumstances, the detectives were not required to obtain a search warrant to enter and re-trace the steps of the initially-responding deputy**:

> Kalac concedes that [the deputy] lawfully entered the apartment under the community caretaking exception – he was responding to a 911 call reporting that someone in the apartment appeared to have been beaten and may be dead. Under State v. Bell, 108

> Wn.2d 193 (1987), and State v. Stevenson, 55 Wn. App. 725 (1989), the detectives' subsequent entry to observe evidence [the deputy] had seen in plain view did not exceed the scope of [the deputy's] lawful entry and was therefore lawful. Because [the deputy] had the authority to seize any evidence of the crime in plain view without a warrant, so too could the homicide detectives.

9. State v. Dejone Dewayne Michael Simpson: On April 13, 2020, Division One of the COA rejects Simpson's appeal from a Pierce County Superior Court conviction for *possession of a stolen vehicle*. Among other things, Simpson argued that a law enforcement officer unlawfully violated his constitutional privacy rights when the officer got close enough to read the license plate number of a vehicle parked in Simpson's driveway. **The Court of Appeals rules that the driveway area where the officer made his observation of the license plate was an area impliedly open to the public, and therefore the officer did not violate the constitutional privacy rights of Simpson**.

10. State v. M.P.: On April 13, 2020, Division One of the COA rejects the appeal of the juvenile defendant from her King County Superior Court (Juvenile Court) adjudication for *disclosing intimate images of another minor on Snapchat in violation of RCW 9A.86.010*. M.P. argued that her Miranda waiver was invalid because she was only 13 years old at the time of her custodial interview, and she did not have an attorney, parent, or other adult advocate present (her mother was directed to sit outside the interview room). Under RCW 13.40.140 and Dutil v. State, 93 Wn.2d 84 (1980), a totality-of-the-circumstances test applies to a Miranda waiver by a juvenile of age 12 or over. **The Court of Appeals concludes that the officer's low-key approach to questioning and M.P.'s cogent and careful answers evidenced on the audio-recorded interrogation support the trial court's determination that M.P. gave a voluntary waiver of Miranda rights and a voluntary statement**.

11. State v. Bryan Earle Glant: On April 14, 2020, Division Two of the COA rejects the appeal of Glant from his Thurston County Superior Court convictions for *two counts of attempted first degree rape of a child* arising from an online Craigslist sting operation. The sting operation was part of "Net Nanny" operations conducted by the WSP-directed Missing and Exploited Children Task Force (MECTF). The Court of Appeals rejects Glant's argument under chapter 9.73 RCW (the Privacy Act) regarding his e-mail and text messages. Based on established Washington appellate precedent, including State v. Racus, 7 Wn. App. 2d 287 (2019), the **Glant Court concludes that Glant impliedly consented to the recordings for purposes of chapter 9.73 RCW**. The Glant Court also rejects his claim of outrageous government conduct/Due Process violation regarding: (1) MECTF's acquisition and expenditure of funds, and how that acquisition was connected to Glant's charges; and (2) the nature of the interactions between law enforcement and Glant. **The Glant Court rejects his Due Process-based claims of outrageous government conduct in analysis guided in part by the general standards for such claims set by the Washington Supreme Court in State v. Lively, 130 Wn.2d 1 (1996)**.

12, State v. Adam Joseph Persell: On April 14, 2020, Division Two of the COA rejects the appeal of Persell from his Thurston County Superior Court convictions for *(A) two counts of attempted first degree rape of a child, and (B) one count of attempted second degree rape of a child*. The convictions followed an online Craigslist sting operation. **Among Persell's unsuccessful arguments was his claim, along the lines of the Glant case (see immediately preceding entry in this April 2020 Legal Update) that the government engaged in outrageous conduct based on MECTF's acquisition and expenditure of funds, and how that acquisition was connected to Persell's charges**.

13. State v. Nicco Daniel Blye: On April 20, 2020, Division One of the COA agrees with the appeal of Blye from his Snohomish County Superior Court conviction for *possession of heroin*. The Court of Appeals sets aside Blye's conviction. The Court of Appeals rules that **a social contact of Blye, who was contacted while sitting in a parked car, turned into an unlawful Terry seizure** when the officer held onto Blye's identification while running a records check. The Court also concludes that **the Terry v. Ohio reasonable suspicion standard is not met where the officer's only articulated basis for suspicion was that Blye's vehicle was parked in a high drug-crime-area at night, and Blye had turned his lights off as the officer's patrol car approached**.

14. State v. Steven Paul Thornton: On April 20, 2020, Division One of the COA rejects the appeal of Thornton from his Pierce County Superior Court convictions for *(A) possession of stolen firearms, (B) unlawful possession of firearms, and (C) unlawful possession of a stolen motor vehicle*. Among other things, the Court of Appeals rules that **a search warrant affidavit meets probable cause requirements** where the affidavit shows that investigation independently corroborated an informant's report. Also, citing State v. Witkowski, 3 Wn. App. 2d 318 (2018), the Court holds that the **execution of the search warrant did not exceed the scope of the warrant. Under Witkowski; even though the search warrant did not mention gun safes, "a premises search warrant to search for firearms authorizes entry into a locked safe."** (Note that footnote 25 indicates that the conviction for possession of stolen firearms was reversed, but in the body of the opinion the Court states otherwise.)

15. State v. Cheryl Ann Heath: On April 21, 2020, Division Two of the COA affirmed the Kitsap County Superior Court conviction of Heath for *possession of cocaine*. Among other issues, the Court of Appeals rules that **defendant Heath's own testimony supports the search of Heath's backpack as a search incident to arrest under the Washington "time of arrest" rule of State v. Byrd, 178 Wn.2d 611 (2013) and State v. Brock, 184 Wn.2d 148 (2015)**. The key part of the explanation by the Court of Appeals is as follows:

> Although Heath had already put the backpack down when she observed the patrol car's lights and when [the officer] actually contacted her, Heath, by her own admission, had actual possession of the backpack when [the officer] observed her make the illegal turn [on her motorcycle] while wearing the backpack and had set the backpack down mere seconds before [the officer] approached her on foot. Thus, Heath had actual possession of the backpack containing her personal items immediately before the arrest. . . .

16. State v. Aaron Maurice Mylan: On April 27, 2020, Division One of the COA reverses the Jefferson County Superior Court convictions of Mylan for *(A) possession of heroin with intent to deliver, (B) possession of methamphetamine, and (C) DWLS Third Degree*. The Court of Appeals orders suppression of evidence based on an officer emptying Mylan's pants pockets during a Terry seizure because **the search exceeded the scope of a permissible frisk. The Court of Appeals explains no arrest occurred prior to the search, so the search cannot qualify as a search incident to arrest, even if the officer had probable cause to arrest. See State v. O'Neill, 148 Wn.2d 564 (2003).**

17. State v. Frankie L. Stricklen: On April 27, 2020, Division One of the COA affirms the Pierce County Superior Court convictions of Stricklen for *(A) unlawful possession of a controlled substance with intent to deliver, (B) unlawful possession of a firearm*. The Court of Appeals concludes that (1) a search warrant affidavit's description of surveillance of Stricklen during controlled-buy procedures provided **probable cause to search Stricklen's apartment**; (2) the **probable cause was not stale** at the point when the search warrant was executed; and (3)

officers sufficiently complied with CrR 2.3(d) where they read the search warrant to Stricklen while they sat in a patrol car, and an officer left a physical copy of the warrant and receipt at the searched apartment (Stricklen was not present during the search); moreover, even if there was non-compliance with CrR2.3, the court rule is ministerial in nature, and any assumed noncompliance does not invalidate the search because he did not challenge a trial court finding of lack of prejudice on the issue.

18. State v. Lynell Avery Denham: On April 27, 2020, Division One of the COA reverses Denham's King County Superior Court convictions for *(A) burglary in the second degree, and (B) possession of stolen property in the first degree*. The Court of Appeals (1) holds that probable cause supported a search warrant for Denham's residence, but (2) relies in part on State v. Phillip, 452 P.3d 553, 561 (2019) in concluding that **an affidavit in support of a search warrant for cell site location information relating to Denham's phone was not supported by probable cause.**

19. State v. Timothy Afamsaga Vaivaimuli: On April 27, 2020, Division One of the COA affirms the Snohomish County Superior Court conviction of Vaivaimuli for *robbery in the first degree*. **The Court of Appeals rejects the defendant's argument that he clearly asserted his right to silence when officers Mirandized him**.

20. State v. Santiago Alberto Santos: On April 30, 2020, Division Three of the COA affirms the Yakima County Superior Court conviction of Santos for *first degree manslaughter*. The Court of Appeals rules that a detective did not violate Miranda initiation-of-contact restrictions where, shortly after Santos invoked his right to an attorney during a custodial interrogation, a detective presented and read a DNA search warrant to Santos. The Court of Appeals declares that **presentation of a DNA search warrant in this factual context is not "interrogation"** because it is not reasonably likely to trigger an incriminating response. The Court cites cases from other jurisdictions that made the same ruling as to a request for a DNA sample. **LEGAL UPDATE EDITORIAL RESEARCH NOTE: For an article by John Wasberg on "Initiation of Contact Rules Under the Fifth Amendment," go to the Criminal Justice Training Commission's internet LED page under "Special Topics."**

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the 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 (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 p[Officer B]cutors. 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 a ccessed (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 Criminal Justice Training Commission (CJTC) Law Enforcement Digest Online Training can be found on the internet at [cjtc.wa.gov/resources/law-enforcement-digest].