LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

December 2018

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WASHINGTON STATE SUPREME COURT

CIVIL LIABILITY FOR FAILURE TO ADEQUATELY SUPERVISE PERSON IN COMMUNITY CUSTODY STATUS: DOC HELD ENTITLED TO SUMMARY JUDGMENT IN CASE IN WHICH DOC REASONABLY RELIED ON PROMISES FROM THE VICTIM AND FROM THE PERPETRATOR'S MOTHER THAT THEY WOULD PROVIDE NOTICE TO THE STATE REGARDING VIOLENT CONVICT'S DOMICILE AND ANY CONTACTS THAT THEY WOULD HAVE WITH THE CONVICT

In Harper v. State of Washington Department of Corrections, ___ Wn.2d ___ , 2018 WL ___ (November 21, 2018), the Washington Supreme Court rules unanimously that summary judgement was properly granted to DOC in a failure-to-adequately- supervise case. The burden of proof on the plaintiff in such a case is to prove that DOC was grossly negligent in its supervision of a convict on community supervision.

The Supreme Court rules that there is no evidence that DOC acted with gross negligence where the violent convict, Scottye Miller, murdered his long-time girlfriend 15 days after he was released from prison. The Supreme Court rules that the evidence is uncontroverted that DOC did not act with gross negligence by relying upon the girlfriend's explicit false assurances that she was not in a relationship with Mr. Miller, that she was moving to a place where he could not find her, and that she would call the police if she saw him. In fact, they were living together. Likewise, DOC could rely on the convict's mother, who had falsely verified in writing that the convict was sleeping at the mother's home, when in fact he was living with the girlfriend.

The Harper Court explains as follows the legal standard under which the Court makes its fact-bound legal ruling in this case:

> To survive summary judgment in a gross negligence case, a plaintiff must provide substantial evidence of serious negligence. In determining whether the plaintiff has provided substantial evidence, the court must look at all the evidence before it, evidence that includes both what the defendant [here, the State] failed to do and what the [State] did. If a review of all the evidence suggests that reasonable minds could differ on whether the [State] may have failed to exercise slight care, then the court must deny the motion for summary judgment. But if a review of all the evidence reveals that the [State] exercised slight care, and reasonable minds could not differ on this point, then the court must grant the motion.

Result: Reversal of decision of Division One of the Court of Appeals that had reversed the summary judgment ruling of the King County Superior Court in favor of the State; remand of case to the King County Superior Court for entry of summary judgment in favor of the State.

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WASHINGTON STATE COURT OF APPEALS

SCHOOL SEARCH EXCEPTION TO WARRANT REQUIREMENT: IN A DEBATABLE RULING, APPEALS PANEL RULES THAT VICE PRINCIPAL'S WARRANTLESS, NON-CONSENTING, NON-EXIGENT SEARCH ON MIDDLE SCHOOL GROUNDS OF 14-YEAR-OLD SUSPECTED TRESPASSER'S BACKPACK WAS NOT JUSTIFIED BY THE MERE ODOR OF MARIJUANA WHERE, PURPORTEDLY, NO OTHER FACTS SUPPORTED THE INTRUSION BY THE VICE PRINCIPAL

State v. A.S., ___ Wn. App. 2d ___ , 2018 WL ___ (Div. I, December 3, 2018)

PRELIMINARY LEGAL UPDATE EDITORIAL COMMENT ABOUT THE COMMENTS THAT I HAVE SPRINKLED THROUGH THE EXCERPTS OF ANALYSIS BELOW: I have inserted my editorial comments at relevant points in the excerpted analysis, as well as here and at the end of this Legal Update entry. I am critical of this school search opinion by the Division One panel for a number of reasons, as stated in the comments below. The Snohomish County Prosecutor has filed a persuasive petition asking the Washington Supreme Court to grant discretionary review. I have hope that the Washington Supreme Court will grant review and will at least modify the analysis in favor of a more reasonable approach to the school search doctrine.

The Opinion determines to be unreasonable a school search based on at least reasonable suspicion that 14-year-old was in possession of marijuana. I believe that almost all appellate courts in the nation would find such a search to be reasonable under the Fourth Amendment's school search rule, at least if the student being searched were an enrolled student at that school. I believe that the Washington constitution does not require a result that is different from the Fourth Amendment result in these circumstances, i.e., a bag search based on at least reasonable suspicion that an enrolled student possesses illegal drugs.

For an excellent article on "Searches and Detentions on School Grounds" under the Fourth Amendment, see the article with that title in the Alameda County (CA) District Attorney's excellent Internet publications website, Point of View. A natural word search with "Point of View + Alameda" will produce the Point of View Home Page, which has a link to a 2007 article (sufficiently up to date on this doctrine) in the category, "Searches: Special," plus links to a number of other articles on Fourth Amendment subjects. Washington readers must always remember when considering discussions of Fourth Amendment issues that the Washington constitution may provide a greater restriction on law enforcement. But on this issue, I think that the doctrines have remained aligned so far.

Note that no mention is made in the A.S. Opinion of the legislative provisions authorizing searches involving K-12 students. The Washington Legislature has determined categorically in RCW 28.A.600.210 that "illegal drug activity and weapons in schools threaten the safety and welfare of school children and pose a severe threat to the state educational system . . . ." I have set forth the relevant provisions of chapter 28A.600.210-240 in Legal Update Editor's Final Comments and Notes at pages 13-14 of this Legal Update entry.

I hope that I am being properly respectful and professional in the manner that I am expressing my disagreement with the analysis in the A.S. Opinion. I remind readers that my comments are exclusively my own personal views, and that nothing in the Legal

Update constitutes legal advice. Law enforcement readers are urged to consult their own agency legal advisors and local prosecutors for direction on legal questions.

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

> On April 11, 2016, Meadowdale [Middle School] staff received information about an alleged threat involving then 14-year-old A.S., who was not a Meadowdale student. Meadowdale staff looked up A.S.'s picture using the district's computer system so that they would be able to identify her should she appear on campus.
>
> Later that day, Joseph Webster, Meadowdale's vice principal, saw A.S. walk by the school's office. Webster approached A.S., called out her name, and asked her to come with him to the office. Webster later testified that if he were to encounter an individual he thought did not have a reason to be on campus, he ordinarily would ask that person to leave. He did not do so here because he believed A.S. was there for a "negative reason."
>
> A.S. complied with Webster's request to accompany him to the school office. Webster brought A.S. to Principal Jennifer Kniseley's office, where Kniseley began asking A.S. questions about why she was on the Meadowdale campus. A.S. was not very cooperative.
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> After about five minutes, Kniseley remarked to Webster that A.S. was not being very cooperative and decided to call the police. A.S. was told that the police were being called. Webster later testified that had A.S. gotten up and decided to leave, she would have been allowed to do so. Webster also testified that because A.S. was not a student at Meadowdale, he and Kniseley did not have any ability to issue any discipline to A.S.
>
> At some point while A.S. was in Kniseley's office, Webster noticed an odor that he recognized as marijuana emanating from A.S. Webster then searched A.S.'s backpack, which was sitting next to her, and found suspected marijuana and drug paraphernalia. A.S. did not say or do anything to resist Webster's search of her backpack.

[LEGAL UPDATE EDITORIAL COMMENT: The briefs by the State and the defendant to the Court of Appeals both make note that one of the school officials had noted, prior to the backpack search, that A.S. appeared from the official's observation in the school office, to be "high" or "under the influence." It is troubling that the A.S. Opinion makes no mention of that fact, even if only to explain that the appellate court is aware of the factual allegation but for some reason chooses to totally ignore what I think is an important fact. Another fact that is made clear in the briefing but is omitted from the Opinion is that the school is well-posted as a drug-free school. Also note that nothing in the Opinion suggests that the backpack was locked or otherwise secured.]

> A police officer responded at 2:29 p.m. – less than half an hour after Webster first observed A.S. on campus – and A.S. was later charged by information with possession of drug paraphernalia and possession of a controlled substance.
>
> Prior to trial, A.S. moved to suppress the evidence of the suspected marijuana and drug paraphernalia found in her backpack, arguing that the evidence was the fruit of an unlawful search and seizure. Specifically, A.S. argued that the "school search exception" to the warrant requirement did not apply to her because she was not a

Meadowdale student when Webster searched her backpack, and even if the exception did apply, the search was not reasonable.

[LEGAL UPDATE EDITORIAL NOTE: The analysis portion of the A.S. Opinion contains the following description of what I find, at least without more context, to be head-in-the-sand testimony provided in the suppression hearing by the vice principal. The testimony was to the effect that his urban middle school has no drug problem (which I don't believe can be confidently stated for any Washington middle school or high school; maybe the prosecutor should have called an additional witness to testify on the subject of youth use of illegal drugs). The vice principal's testimony regarding drug problems was as follows:

> **"[W]hen asked whether Meadowdale had a drug problem, Webster responded, "I don't believe so." He also testified that he did not deal with drugs on a regular basis as a school administrator and that Meadowdale had only "occasional incidents" on its campus involving students bringing drugs or drug paraphernalia on campus."]**

The trial court denied A.S.'s motion and, following a stipulated bench trial, convicted A.S. of both possession of drug paraphernalia and possession of a controlled substance.

[Some paragraphs broken up to make passages easier to read]

ISSUES AND RULINGS: A middle school principal and vice principal questioned Ms. A.S. in the principal's office. She was a 14-year-old who was not a student at the middle school. This questioning occurred during school hours. The school officials suspected the non-student of trespassing. During the questioning, the vice principal smelled marijuana and suspected that the smell was emanating from A.S. and the area immediately around her and her nearby backpack that she had put down beside her. The vice principal searched the backpack and found marijuana and drug paraphernalia. **[LEGAL UPDATE EDITORIAL NOTE: My statement here of the key facts omits the fact that a school official observed that A.S. appeared to be "high." Even though I believe that the fact is relevant under the school search doctrine, I have omitted that fact from my description of the issue that the Court of Appeals purported to decide; I do so because the Court of Appeals did not mention the fact in its Opinion.]**

(1) Does the school search exception apply to a search of a nonstudent under these circumstances? (ANSWER BY COURT OF APPEALS: The A.S. Opinion declares that the Court is declining to answer the question of whether the school search doctrine can apply to the search of a non-student youth, but the Opinion then appears in its Analysis, see below, to use as a factor in rejecting the search the fact that A.S. was not a student at Meadowdale).

(2) Assuming for the sake of argument that the school search exception applies to the search of a nonstudent youth suspected of trespassing in the school, was the search of A.S.'s backpack by the vice principal – based on the odor of marijuana emanating from A.S. – lawful under the relaxed standard of the school search exception to the search warrant requirement? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of Snohomish County Superior Court conviction/adjudication of juvenile A.S. for possession of a controlled substance.

ANALYSIS: [Excerpted from Court of Appeals opinion]

The School Search Exception To The Constitutional Warrant Requirement

> One of [the] exceptions [to the warrant requirement of the federal and Washington constitutions] is the "school search exception," which allows school authorities to conduct a search of a student without probable cause if the search is reasonable under all the circumstances. State v. B.A.S., 103 Wn. App. 549, 553 (2000). "A search is reasonable if it is: (1) justified at its inception; and (2) reasonably related in scope to the circumstances that justified the interference in the first place." B.A.S. (citing New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)). "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." T.L.O., 469 U.S. at 341-42 (footnote omitted). And, a search will be permitted in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."
>
> Washington courts have established the following factors (McKinnon factors [per State v. McKinnon, 88 Wn.2d 75, 79 (1977)]) as relevant in determining whether school officials had reasonable grounds for conducting a warrantless search:
>
> > "[T]he child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." State v. Brooks. 43 Wn. App. 560, 567-68 (1986)
>
> Although all of the foregoing factors need not be found, their total absence will render the search unconstitutional. Brooks at 568.

[LEGAL UPDATE EDITOR'S COMMENT: It is important to note that not all of the McKinnon factors need be present, so long as one or more of the factors are present, and so long as the search is deemed reasonable under the totality of the circumstances. The A.S. Opinion does not appear to fully grasp this concept. The Opinion seems to suggest by its overall tenor and its divide-and-conquer approach that all factors must be present to some extent, which is not correct under the case law. For instance, in T.L.O. itself and under the case law nationally (admittedly, my research of other-jurisdiction decisions was far from exhaustive), true exigency has generally not been present in cases where school searches were allowed. In my understanding of the school search rule, all that is required for exigency is the need to act on the spot to maintain order and discipline, analogous to the need for a sports official to have authority to take immediate action in order to maintain control of a sports contest. If actual exigent circumstances were required, virtually no school search of a purse or backpack would be justified because the purse or backpack could be secured and police brought in and a search warrant sought. But such an approach has generally not been required under the school search rule where there was clear reasonable suspicion or probable cause for a search for contraband, which was the situation in this case.]

Warrantless Search of A.S.'s Backpack

As an initial matter, A.S. urges this court to conclude that the school search exception cannot apply to searches of nonstudents. We decline to adopt such a bright-line rule because doing so would reach beyond the facts here: Even assuming that the exception applies to nonstudents, the search conducted by [Vice Principal] Webster does not pass muster under the McKinnon factors.

[LEGAL UPDATE EDITOR'S COMMENT: This approach is troubling and seems to me to be contrary to a "judicial restraint" approach. I believe that most appellate jurists would actually limit themselves to the facts of the case before them and would decide the case based on the totality of the circumstances, including, as one of the many balancing factors, the fact that A.S. was not a student at the school, leaving to future courts the determination of whether the other facts here would support a school search of a backpack of an enrolled student, as opposed to a 14-year-old suspected of trespassing.

It is surprising and disappointing to me that all three judges signed this opinion. The odor of marijuana emanating from a 14-year-old who appears to be "high" and is a student sitting in an administrative office of a middle school should generally support the vice principal's search of the student's backpack that is located next to the student, at least where the youth is enrolled in that school. Of course, two problematic facts in this case (along with the fact that A.S. was not a student at Meadowdale) are (1) that the Opinion ignores the evidence that A.S. was high, and (2) the vice principal testified that there is no drug problem in his urban middle school. Maybe with consideration of the fact that a student appears to be high, and with more realistic testimony from a school official or other witness about youth/student drug use, as well as judicial notice being taken of youth drug usage, this case would have a different outcome from a court applying the school search rule in the appropriate spirit of the rule. Or, if there really is no drug problem in the particular middle school involved, maybe that fact can be attributed in testimony by a school official to the school's vigilance in ensuring that the drug-free closed school is posted as such and maintained as such.]

Specifically, nothing in the record suggests that Webster, who guessed that A.S. was middle school aged, knew anything about A.S.'s history or school record. Indeed, Webster testified that when he looked up A.S. in the district database, he was only interested in her picture. Furthermore, there was no evidence that drug use was a problem at Meadowdale. Rather, when asked whether Meadowdale had a drug problem, Webster responded, "I don't believe so." He also testified that he did not deal with drugs on a regular basis as a school administrator and that Meadowdale had only "occasional incidents" on its campus involving students bringing drugs or drug paraphernalia on campus.

Additionally, there was no exigency to conduct the search without delay, given that the police had been called, and A.S. – who had been told that the police were called – gave no indication that she was trying to leave the principal's office. And finally, the odor of marijuana alone did not create an exigent circumstance, particularly where Webster had no other reason to believe that A.S. used marijuana or that her backpack would contain marijuana. For these same reasons, the search of A.S.'s backpack was not justified at its inception.

The State argues that the search of A.S.'s backpack was reasonable because courts have generally "'recognized students have a lower expectation of privacy because of the nature o[f] the school environment." But this quote from [York v. Wahkiakum Sch. Dist.

No. 200, 163 Wn.2d 297, 308 (2008)). is no more than a restatement of one of the justifications underlying the school search exception. That exception still demands that, consistent with both the federal and state constitutions, searches be reasonable, and "what is reasonable depends on the context within which a search takes place."

To this end, the underlying rationale for the school search exception is that "'teachers and administrators have a substantial interest in maintaining discipline in the classroom and on school grounds' which often requires swift action." [State v. Meneese,174 Wn.2d 937, 944, (2012)] (quoting State v. Slattery, 56 Wn. App. 820, 824 (19900)). Here, Webster searched the backpack of A.S., a 14-year-old nonstudent he had no ability to discipline.

[**LEGAL UPDATE EDITOR'S COMMENT: I find it interesting that the Opinion mentions in the paragraph immediately above the non-student status of A.S. after the Opinion appears to state at the outset that the search is being evaluated under the standard school search factors for searches of students enrolled at an administrator's school.]**

[Vice Principal Webster] based his search solely on an odor of marijuana emanating from A.S. as she sat in the principal's office waiting for a police officer to arrive.

[LEGAL UPDATE EDITORIAL COMMENT: The search was not based solely on the odor of marijuana emanating from A.S., though that is compelling justification by itself. As I have noted above, the briefs by the State and the defendant to the Court of Appeals both make note that one of the school officials had noted, prior to the backpack search, that A.S. appeared from the official's observation in the school office, to be "high" or "under the influence."]

A.S. gave no indication that she planned to leave, and her backpack was merely sitting next to her. Under these circumstances, no "swift action" was required, nor did the search further any interest in "maintaining discipline. Compare Meneese at 944-45 (declining to extend the school search exception to a school resource officer acting in the capacity of a law enforcement officer and observing that (1) the school resource officer had no authority to discipline students and (2) there was no need for swift discipline because the student was already under arrest and about to be removed from campus at the time of the search).

The facts at bar are readily distinguishable from cases where we have applied the McKinnon factors and concluded that a school search was reasonable. For example, in Brooks, where the vice principal had received information from a student that Steve Brooks was selling marijuana out of a school locker, we upheld the warrantless search of student Brooks' locker.

There, the vice principal had received reports from three teachers that Brooks appeared to be under the influence. Indeed, the vice principal herself had confronted Brooks about drug use on three occasions and each time believed that Brooks was under the influence. Additionally, Brooks was known to spend time during school hours at a place believed by school authorities to be the site of drug trafficking. We reasoned that under those facts, there were reasonable grounds for school officials to suspect that a search of Brooks' locker would turn up evidence that Brooks was violating either the law or the rules of the school,

Similarly, in Slattery, we upheld the search of a locked briefcase in student Mike Slattery's car where another student had notified the vice principal that Slattery was selling marijuana in the school parking lot. The vice principal believed this information to be reliable based on the vice principal's past experience with the informant and because the vice principal had received other reports that Slattery was involved with drugs,

Additionally, Slattery was carrying $230 cash in small bills and his car also contained a notebook with names and dollar amounts, as well as a pager. In applying the McKinnon factors, we also observed that drug use was a "serious, ongoing problem" at the school and that an exigency existed because Slattery or a friend could have removed Slattery's car from school grounds.

Here, unlike Brooks or Slattery. nothing in the record suggests that before his encounter with A.S., Webster had any information about A.S.'s prior conduct that would lead him to believe that A.S. used or possessed marijuana, or that a search of A.S.'s bag would reveal marijuana. Indeed, Webster testified that he did not do any investigation into the alleged threat involving A.S. and that when he looked up A.S. in the district computer system, he was only interested in her picture.

[**LEGAL UPDATE EDITOR'S COMMENT: My rhetorical question to the Court about the immediately preceding paragraph: Why are such additional factual bases for suspicion needed under the school search rule where the vice principal had not just reasonable suspicion but likely probable cause to search the backpack based on the fact that the school officials smelled the odor of marijuana emanating from the apparently high A.S.?]**

Furthermore, there is no evidence that drug use was a serious, ongoing problem at Meadowdale. Rather, Webster testified that he did not believe that Meadowdale had a drug problem and that Meadowdale had only "occasional incidents" involving students bringing drugs on campus.

Additionally, no exigency was present because unlike Slattery, there was no car involved. At the time of the search, A.S. was sitting in the principal's office, waiting for the police to arrive. The State argues that A.S. could have walked away and then school officials would have had no control over her, but this argument is not persuasive given that A.S. never indicated that she wanted to leave **[LEGAL UPDATE EDITOR'S COMMENT: As noted above, actual exigency has not generally been required under the case law where there is at least reasonable suspicion for a search for contraband.]** and given that she had been told that the police were being called. The facts in Brooks and Slattery are sufficiently dissimilar to the facts here that they do not control.

The State next argues, citing State v. Brown, 158 Wn. App. 49 (2010), that in the context of a school search, the exigency component of the McKinnon factors is satisfied when there is "any threat to the order and discipline of the school." Although the State accurately quotes Brown, the State's reliance on Brown is misplaced. In Brown, a parent went to Moses Lake High School to look for her son, Taylor Duke, after he did not come home one night. There, she told the assistant principal that her son had been with his friend, Joshua Brown, the night before and that Brown's car was in the school parking lot.

When the assistant principal did not find Brown or Duke in class, he and the school's resource officer checked Brown's car and found both boys asleep inside. The assistant principal knocked on the window, and both boys woke up and got out of the car. The resource officer saw a knife on the floor behind the front passenger seat as Duke climbed out of the car and told the assistant principal what he had seen. The assistant principal then asked Brown if he could retrieve the knife, and Brown agreed.

The assistant principal searched Brown's car, where he found a shotgun and a .22 caliber pistol with bullets in a case. Brown was later arrested and convicted of firearms charges. In concluding that the search of Brown's car fell within the school search exception, the trial court wrote:

> "The presence of weapons in a school environment is a serious problem in schools throughout the country and has specifically impacted the Moses Lake School District (e.g., Barry Loukitas [sic]). That a Moses Lake school administrator would be concerned about the presence of weapons on the campus of a school in the Moses Lake School District is to be expected. There was an exigency in that lunch was fast approaching and students would be returning to the parking lot. A student could have removed the knife (or any other weapon) from the vehicle. The probative value and reliability of the information used to justify the search, i.e., Officer Lopez's visual observation of a weapon in Respondent Brown's vehicle, was high. Given these considerations and given the circumstances, the 'school search' exception to the warrant requirement applies in this case, and the school administrators' search of Respondent Brown's vehicle was reasonable."

On appeal, Division Three of this court upheld the search, noting again that "[t]his school district has had serious problems with weapons on campus in the past." . . . The court concluded that the threat a weapon posed to discipline and order was an exigency sufficient to support a school search.

Brown is distinguishable from this case. The suspected possession of marijuana by a 14-year-old child sitting in the principal's office waiting for the police to arrive and giving no indication that she plans to leave – and who school officials have no reason to believe is selling drugs to other students – does not pose the same threat to the discipline and order of a school that is posed by a gun with bullets found in a high school student's car in the school parking lot just before the lunch hour. .

[**LEGAL UPDATE EDITOR'S COMMENT: But allowing students to have marijuana on their persons or in their backpacks or lockers does threaten the order and discipline of the schools. The U.S. Supreme Court in T.L.O. recognized that law-abiding students have a right to be protected against law-violating students, and school officials have a societal obligation to protect the law-abiding students. This is also recognized in the RCW provisions that are set forth at the close of this Legal Update entry.]**

The State next argues that the search was justified because A.S. was acting suspiciously when she did not report to the main office as directed by signage at the school and when she refused to state her business on campus. The State urges that these circumstances indicate that A.S. was hiding something "and that something could include marijuana." The State also argues that A.S.'s presence at Meadowdale when she should have been in school was "alarming" and that "[t]he search of the bag was

necessary to ensure that any additional marijuana would not be a factor in a potential conflict on campus." In short, the State attempts to draw a nexus between A.S.'s alleged truant status and Webster's search of A.S.'s bag.

Even if A.S. was in fact truant and did in fact intend not to check in with the mainoffice, the State's arguments are not persuasive. [Court's footnote 1: *The record does not indicate whether A.S. had a valid excuse to be away from school that day. The record also does not indicate how long A.S. was on the Meadowdale campus before Webster approached her.*] B.A.S.*,* is instructive. B.A.S. involved Auburn Riverside High School, which had a "closed campus" policy. That policy "prohibited] students from leaving campus during school hours without permission from the school." The school also had a policy that "any student seen in the parking lot without permission or a valid excuse [would be] subject to search." The purpose of the policy was to "promote safety by ensuring that students do not bring prohibited items, such as drugs and weapons, onto school grounds."

When a school attendance officer saw B.A.S. and three other students by the parking lot and concluded that they had been off campus without permission, the attendance officer invoked the school's search policy and asked B.A.S. to empty his pockets. The contents of B.A.S.'s pockets included several plastic baggies filled with marijuana,

In reversing B.A.S.'s subsequent conviction, we rejected the State's argument that by violating school rules, a student necessarily draws individualized suspicion on himself. We reasoned:

> There is no indication that B.A.S. habitually broke the law or school rules, or that he or his friends had ever brought contraband onto the school's campus. The record is also silent on whether B.A.S. had either academic or behavioral difficulties in school. In short, there was nothing about B.A.S.'s age, history or school record that justified the search. Finally, there were no exigent circumstances present here. In sum, there was no basis articulated in the record for suspecting B.A.S. was carrying proscribed items, and the search was therefore unreasonable.

Here, as in B.A.S., nothing in the record suggests [Vice Principal] Webster believed that A.S. habitually broke the law or school rules, had ever brought contraband onto Meadowdale's campus, or had academic or behavioral difficulties. Indeed, Webster had only secondhand knowledge about the alleged threat involving A.S. and confirmed that he did not do any further investigation into the alleged threat.

[**LEGAL UPDATE EDITOR'S COMMENT: But the school officials did in fact smell the odor of marijuana emanating from the apparently high A.S., and those circumstances should justify a search of a student's backpack under the school search rule, at least as to a student enrolled in the searching administrator's school. The B.A.S. decision, where a search was conducted without an articulable nexus to any item of contraband being searched for, is readily distinguished from this cases where the vice principal smelled marijuana emanating from the person of an apparently high student.]**

And, as discussed above, there were no exigent circumstances present. Furthermore, the fact that A.S. did not – or perhaps had not yet had time to – check in with Meadowdale's main office is not a justification for searching her bag for marijuana:

Nothing in the record suggests that A.S. acted suspiciously or that she was questioned – much less deceptive – about any marijuana use. Compare State v. E.K.P., 162 Wn. App. 675, 677 (2011) (search of student's backpack upheld where student acted suspiciously by trying to hide her backpack and denied that the backpack contained "'anything [the assistant principal] need[ed] to know' about") (internal quotation marks omitted); T.L.O., 469 U.S. at 325 (search of student's purse upheld where teacher had seen student smoking in lavatory and student denied doing so when questioned about it).

And although Webster recognized the smell of marijuana on A.S., that alone does not make the search reasonable given that as discussed above, none of the other McKinnon factors were present.

This case is also distinguishable from United States v. Aguilera, 287 F.Supp.2d 1204 (E.D. Cal. 2003), the only case discussed by the parties in which the court evaluated the reasonableness of a school search involving a nonstudent. There, an informant who identified herself as the parent of a Franklin High School student called the secretary at Franklin from her car near the side entrance of the school. The caller reported observing a group of young men pass close to her car on the way into campus and seeing one of them lift his T-shirt above his waist to reveal a weapon tucked into his shorts. The caller stayed on the phone with the school secretary and continued to update the secretary as to the group's location until the caller's view was obscured by the school. Meanwhile, the secretary relayed the caller's observations to the school principal, who in turn alerted campus security monitors.

Based on the information provided by the caller, including a description of the young man seen with a weapon, campus security monitors located Gustavo Aguilera with a group of young men on the school campus. A security monitor radioed the principal to let her know that the group had been located, and the principal directed the security monitor to search Aguilera. The security monitor ordered Aguilera to place his hands on the wall of a portable classroom, and the security monitor patted Aguilera's outer clothing and discovered a 20-gauge shotgun in the waistband area of Aguilera's shorts,

Aguilera argued to the trial court that the shotgun discovered in his waistband should be suppressed, contending, among other things, that Aguilera's status as a nonstudent took him outside the parameters of the school search exception. The trial court disagreed, reasoning:

> [T]o extend the [school search exception] to non-student visitors who present a credible threat of physical harm to students on campus would seem a small and logical step. In short, the court finds that defendant's status as a non-student should not determine the response of school administrators to the threat of gun violence.

Here, A.S., who was sitting in the principal's office – not roaming the campus as Aguilera was – did not present a credible threat of physical harm when she was searched. Indeed, Webster never indicated that he searched A.S. because he thought that her use or possession of marijuana presented a credible threat of physical harm. Aguilera is not persuasive here.

> If anything, Aguilera suggests that if the school search exception is to be extended to a nonstudent, it should be extended only when the nonstudent presents a credible threat of physical harm to students on campus and when the scope of the search conducted (in the case of Aguilera, a frisk for dangerous weapons) is directly related to that threat. That was not the case here, and Aguilera does not control. . . .

[**LEGAL UPDATE EDITOR'S COMMENT: I repeat my criticism that the Court addresses the non-student status after the Opinion states at the outset that the non-student status of A.S. is not the basis for the suppression ruling, and that the search is being evaluated under the standard school search factors for searches of enrolled students at an administrator's school.]**

> As a final matter, the State cites State v. Marcum, 149 Wn.App. 894 (2009), for the proposition that the odor of marijuana alone constitutes probable cause. But Marcum is distinguishable from this case. In Marcum, the detective detained the defendant based on a tip reliable informant that the defendant would be carrying a quarter pound of marijuana in his car. In contrast, [Vice Principal] Webster had no reason to believe that A.S. would have marijuana in her possession prior to detecting an odor of marijuana on A.S.
>
> Furthermore, Marcum is not a school search case, and "what is reasonable depends on the context within which a search takes place." T.L.O., 469 U.S. at 337. We recognize that in the educational context, school officials have a substantial interest in maintaining discipline and order on school grounds. But, the search conducted in this case did not promote that interest.

[Some citations omitted, others revised for style; some paragraphs broken up to make passages easier to read or to aid presentation of Legal Update Editor's Comments; one of the subheadings revised for clarification]

LEGAL UPDATE EDITOR'S FINAL COMMENTS AND NOTES:

In my opinion, the very restrictive tenor of the A.S. Opinion seems to support the troubling idea that there are major constitutional restrictions on school officials despite that broad discretion that they have been granted under RCW 28A.600.210-240, which statutes provide as follows:

RCW 28A.600.210 School locker searches—Findings.

> The legislature finds that illegal drug activity and weapons in schools threaten the safety and welfare of school children and pose a severe threat to the state educational system. School officials need authority to maintain order and discipline in schools and to protect students from exposure to illegal drugs, weapons, and contraband. Searches of school-issued lockers and the contents of those lockers is a reasonable and necessary tool to protect the interests of the students of the state as a whole.

RCW 28A.600.220 School locker searches—No expectation of privacy.

> No right nor expectation of privacy exists for any student as to the use of any locker issued or assigned to a student by a school and the locker shall be subject to search for

illegal drugs, weapons, and contraband as provided in RCW 28A.600.210 through 28A.600.240.

RCW 28A.600.230 School locker searches—Authorization—Limitations. [and searches of students and their possessions; see text that I have bolded in subsection 1]

(1) A school principal, vice principal, or principal's designee **may search a student, the student's possessions, and the student's locker, if the principal, vice principal, or principal's designee has reasonable grounds to suspect that the search will yield evidence of the student's violation of the law or school rules.** A search is mandatory if there are reasonable grounds to suspect a student has illegally possessed a firearm in violation of RCW 9.41.280.

(2) Except as provided in subsection (3) of this section, the scope of the search is proper if the search is conducted as follows:

(a) The methods used are reasonably related to the objectives of the search; and

(b) Is not excessively intrusive in light of the age and sex of the student and the nature of the suspected infraction.

(3) A principal or vice principal or anyone acting under their direction may not subject a student to a strip search or body cavity search as those terms are defined in RCW 10.79.070.

RCW 28A.600.240 School locker searches—Notice and reasonable suspicion requirements. [and searches of containers in lockers]

(1) In addition to the provisions in RCW 28A.600.230, the school principal, vice principal, or principal's designee may search all student lockers at any time without prior notice and without a reasonable suspicion that the search will yield evidence of any particular student's violation of the law or school rule.

(2) If the school principal, vice principal, or principal's designee, as a result of the search, develops a reasonable suspicion that a certain container or containers in any student locker contain evidence of a student's violation of the law or school rule, the principal, vice principal, or principal's designee may search the container or containers according to the provisions of RCW 28A.600.230(2).

TRAFFIC CODE AUTHORITY TO MAKE A TRAFFIC STOP: OFFICER'S STOP UPHELD BY 2-1 VOTE WHERE (1) CAR'S RIGHT-SIDE TIRES WENT OVER FOG LINE, AND (2) NO STATUTORY PROVISION EXPRESSLY AUTHORIZED THAT DEVIATION BY THE DRIVER; COURT OF APPEALS CONSTRUES RCW 46.61.670 AND RCW 46.61.140

State v. Alvarez, ___ Wn. App. 2d ___ , 2018 WL ___ (Div. III, December 4, 2018)

Facts and Proceedings below:

Erica Alvarez was stopped by a Washington State Patrol trooper after he observed her car's right-side tires briefly travel over the fog line by a foot and onto an area not designated as a roadway. This stop led to her being arrested and charged with DUI.

The Benton County District Court held that this minor deviation over the fog line did not justify a traffic stop and therefore dismissed the DUI charge. The Benton County Superior Court agreed with the District Court.

ISSUE AND RULING: Erica Alvarez was stopped by a Washington State Patrol trooper after the trooper observed her car wheels briefly travel over a fog line and onto an area not designated as a roadway. Did the WSP trooper make a lawful stop based on RCW 46.61.670? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority, the stop was lawful because the violation the incursion is automatically an infraction with no room for excuses)

Result: Reversal of Benton County Superior Court and District Court orders; case remanded to the District Court for prosecution of Erica C. Magallan Alvarez for DUI.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

> RCW 46.61.670 provides:
>
> > *Driving with wheels off roadway*.
> >
> > It shall be unlawful to operate or drive any vehicle or combination of vehicles over or along any payment or gravel or crushed rock surface on a public highway with one wheel or all of the wheels off the roadway thereof, except as permitted by RCW 46.61.428 or for the purpose of stopping off such roadway, or having stopped thereat, for proceeding back onto the pavement, gravel or crushed rock surface thereof.
>
> We recently addressed RCW 46.61.670 in State v. Brooks, 2 Wn. App. 2d 371 (2018). In Brooks, we began our analysis by focusing on the definition of "roadway." The legislature has defined "roadway" as "'that portion of the highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles.'".
>
> Based on the "roadway" definition, Brooks announced the following two-step inquiry. First, the court determines whether the area driven on meets the triggering definition of a "roadway." "[I]s the area improved, designed, or ordinarily used for vehicular travel?" .If not, the inquiry stops; it is not a "roadway" under the definition. If one of the three triggering definitions applies, the court will next determine whether the area is excluded from the "roadway" definition because it constitutes a sidewalk or shoulder. Brooks.
>
> The area to the right of a fog line does not meet the first part of the Brooks standard. Although this area is ordinarily an improved space, it is not improved "for the purpose of facilitating travel." Pavement itself is not sufficient evidence that an area has been improved for travel. The area to the right of the fog line is not designed for vehicular travel, nor is the area to the right of the fog line ordinarily used for vehicular travel.

[Court's footnote: *The area to the right of the fog line may be designated for vehicular traffic when authorized by state or local authorities and accompanied by appropriate signage. See RCW 46.61.428*.]

Therefore, RCW 46.61.670 prohibits driving with one or more wheels across the fog line. State v. Kocher, 199 Wn. App. 336, 344 (2017) ("[D]riving over the fog line is a traffic infraction unless one of the enumerated exceptions in [the] statute applies.").

Ms. Alvarez argues that we should not end our analysis with RCW 46.61.670 because RCW 46.61.140(1) only requires that a vehicle be driven "as nearly as practicable" within a single lane of travel. As pointed out in Prado, this language encompasses "brief, momentary and minor deviations of lane lines." Because Ms. Alvarez's car crossed over the fog line only once and did not create any safety concerns, Ms. Alvarez argues that RCW 46.61.140(1) protected her from the possibility of a law enforcement stop.

We find RCW 46.61.140(1) inapplicable. Ms. Alvarez may be correct that [the WSP Trooper] could not have relied on RCW 46.61.140(1) as a basis for his traffic stop. But that does not mean he was barred from considering other statutes.

RCW 46.61.670 is separate from RCW 46.61.140(1). The former statute governs the unique situation of a vehicle's wheels departing a designated roadway, not the more general scenario of movement into another lane of travel. Unlike RCW 46.61.140(1), RCW 46.61.670 does not contain language indicating a vehicle must be driven "as nearly as practicable" with wheels on the roadway. Instead, RCW 46.61.670 affords no exceptions. Even a minor deviation violates the plain terms of the statute. [State v. Kocher, 199 Wn. App. 336, 344-45 (2017)].

The fact that RCW 46.61.140(1) is inapplicable here does not render the statute a nullity. RCW 46.61.140(1) applies in circumstances where a vehicle momentarily crosses from one lane of traffic into a neighboring lane traveling the same direction. State v. Hoffman, 185 Wn. App. 98, 104-05 (2014). Such minor lane deviations are different from the circumstance here where a vehicle's wheels momentarily leave the designated roadway.

Whether the legislature should allow some room for minor deviations of a vehicle from the roadway under RCW 46.61.670 is a matter for the legislature, not this court. We are not at liberty to add language to RCW 46.61.670 regardless of whether we think a minor intrusion off the roadway presents no greater safety concern than a minor intrusion into an adjacent lane of travel.

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

DISSENTING OPINION:

Judge Robert Lawrence-Berrey dissents. He argues that 46.61.140(1), RCW 46.61.670 and RCW 46.51.100 should all be read together so that a brief incursion across the fog line is not an infraction.

LEGAL UPDATE EDITORIAL COMMENT: The analysis by the majority judges in Alvarez agrees with the analysis at pages 126-127 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. Ms. Loginsky points out the following at pages 126-127 of her Guide:

> **RCW 46.61.670 states that it is "unlawful to operate or drive any vehicle or combination of vehicles over or along any pavement or gravel or crushed rock surface on a public highway with one wheel or all of the wheels off the roadway thereof, except as permitted by RCW 46.61.428 or for the purpose of stopping off such roadway, or having stopped thereat, for proceeding back onto the pavement, gravel or crushed rock surface thereof." The term "roadway" excludes shoulder. See RCW 46.04.500 ("Roadway" means that portion of a highway . . . ordinarily used for vehicular travel, exclusive of . . . shoulder even though such . . . shoulder is used by persons riding bicycles.") There is no "as nearly as practicable" defense to a violation of RCW 46.61.670. The only "defense" that is contained in RCW 46.61.428 is that contained in RCW 46.61.428 which allows slow-moving vehicles to drive on shoulders where signs are in place that authorize the same.**

"SMITH AFFIDAVIT" UNDER EVIDENCE RULE 801(d)(1)(i): RECANTING DV ASSAULT VICTIM'S SWORN AND SIGNED STATEMENT THAT OFFICER WROTE OUT FOR VICITM CONTEMPORANEOUSLY AT CRIME SCENE IS HELD ADMISSIBLE AS AN INCONSISTENT STATEMENT MADE IN A "PRIOR PROCEEDING"

State v. Phillips, ___ Wn. App. 2d ___ , 2018 WL ___ (December 17, 2018)

Facts and Proceedings below:

King County Sheriff's deputies responded to a 911 call about a domestic violence assault. Inside the home, Sara, the reported victim of an attack by her husband, was crying. A deputy interviewed Sara and wrote out a victim statement based on what she told him about the attack. The statement included a declaration by Sara that the statement was made under the penalty of perjury. Sara told the deputy, among other things, that her husband had tried to take her baby from her, had punched her in the chin, had choked to the point of her passing out, and had then tried to throw her down a stairway.

At trial, Sara claimed not to remember a number of the details that were in the statement (the Court of Appeals notes that her "forgetfulness was sporadic"), and she also expressly denied that some of the assaultive behaviors had occurred. She testified that the statement was not in her words, and that she did not read the statement at the time that she signed it. However, on the other hand, she also testified that she had told the deputy the information that he had put in the statement. But, in her sporadic "forgetfulness," she testified that she did not remember being told by the deputy that the statement was being made under the penalty of perjury.

The deputy testified at trial to (1) writing down in the statement what Sara told him, and (2) reading back to Sara the statement, including her declaration that the statement was made under penalty of perjury. The deputy also testified to having Sara read over the statement for herself at the time. The trial court admitted Sara's statement as evidence.

A jury found Phillips guilty of second degree assault with domestic violence aggravators, and he got a very long sentence.

ISSUE AND RULING: Did the trial court act within its discretion in admitting Sara's statement into evidence as a "Smith affidavit"? (ANSWER BY COURT OF APPEALS: Yes, the statement was justifiably admitted into evidence)

Result: Affirmance of King County Superior Court conviction of David Levice Phillips for second degree assault with domestic violence aggravators.

ANALYSIS:

State v. Smith, 97 Wn.2d 856 (1982) was a case about the proper interpretation of ER 80l(d)(1)(i), an evidentiary rule concerning the definition of "hearsay." "Hearsay" is defined generally as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801 (c).

ER 802 provides that "[h]earsay is not admissible except as provided by these [evidentiary] rules, by other court rules, or by statute." ER 801(d)(1) provides, howeer, that an out-of-court statement is not hearsay if (1) the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, (2) the statement is inconsistent with the declarant's testimony, and (3) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

Because such a statement is not hearsay, it is admissible at trial as substantive evidence to prove the truth of matter asserted in the statement. In Phillips, the victim, Sara, testified at the defendant's trial and she was subject to cross-examination. She was a reluctant witness and recanted a number of assertions that were in the written statement. Sara claimed at trial that the statement that the officer wrote was not an accurate version of what she told him, although her testimony was not totally consistent in this regard (or other regards). Thus, the prior written statement was inconsistent with Sara's trial testimony. There was also substantial evidence that the prior written statement was given under oath and subject to the penalty of perjury.

The only question is whether Sara's police interview was an "other proceeding" within the meaning of ER 801(d)(1)(i). When confronted with the same question in 1982 in Smith, the Washington Supreme Court court declined to issue a categorical ruling that a police interview is either always or never considered an "other proceeding." Rather, the Smith Court held that "[t]he purposes" of the the rule and the facts of each case must be analyzed.

In determining whether evidence should be admitted, reliability is the key. Applying this approach to the facts presented, Smith held that the police interview at issue in that case was an "other proceeding" because "the complaining witness-victim voluntarily wrote the statement herself, swore to it under oath with penalty of perjury before a notary, admitted at trial she had made the statement and gave an inconsistent statement at trial where she was subject to cross examination." The victim's sworn statement was therefore admissible as substantive evidence.

Based on Smith, the subsequent case law has formulated a four-factor test for determining whether an out-of-court statement by a nonparty witness is admissible: (1) whether the witness voluntarily made the statement, (2) whether there were minimal guaranties of truthfulness, (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause (which includes a police investigation), and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

The Phillips Court concludes that the four-factor test was met in this case. One of defendant's challenges to the statement was based on the fact that the deputy, not Sara, did the writing of the statement. In rejecting defendant's challenge, the Court of Appeals points to State v. Nelson, 74 Wn. App. 380 (1994), where the Court of Appeals held that the mere fact that the victim did not write the statement herself does not, by itself, render the statement unreliable.

LEGAL UPDATE EDITOR'S NOTE: Some of the wording of the above analysis is not my own and was taken from the analysis by the Washington Supreme Court in State v. Otton, 185 Wn.2d 673 (2016).

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BRIEF NOTES REGARDING DECEMBER 2018 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).

In December 2018, five unpublished Court of Appeals opinions fit these 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 case results.

1. State v. Brian J. Smith: On December 3, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his Whatcom County Superior Court convictions for *vehicular homicide and obstructing a law enforcement officer*. A key issue relates to his **challenge to forcible taking of blood under a search warrant, including the necessary administration of a sedative (not expressly addressed in the warrant) in order to make it possible to safely administer the blood test to the violently objecting DUI arrestee**. The Court of Appeals also rejects another argument by defendant and holds that law enforcement **officers did not violate his right under CrR 3.1 to timely contact an attorney following arrest**.

2. State v. Pamela E. Bell: On December 3, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from her King County Superior Court conviction for *driving under the influence*. The Court of Appeals rules that the trial court was justified in denying her motion to suppress evidence gathered as a result of a traffic stop. The Court of Appeals rules that substantial evidence supports the trial court's findings in support of the **reasonable suspicion justification for the stop** (i.e., a report to dispatch from a Port of Seattle toll plaza worker that

Ms. Bell was operating her vehicle in an unusual and possibly impaired manner, plus a POS officer's subsequent observation that corroborated the tip).

3. State v. Jeffrey David Conaway: On December 3, 2018, Division One of the COA rules for the defendant and reverses his Island County Superior Court conviction for *felony indecent exposure with sexual motivation*. The trial court allowed the State to present evidence of a prior incident of indecent exposure by defendant from 10 years earlier. **The Court of Appeals rules that under Evidence Rule 404(b) this was improper propensity evidence the probative value of which was outweighed by its prejudicial impact**.

4. State v. D.W.C.: On December 17, 2018, Division One of the COA rules for the State in rejecting the appeal of defendant from his King County Superior Court conviction for *first degree robbery*. The Division One panel rules that **the arrest of the defendant on his front porch was constitutional** under the Washington Supreme Court ruling in State v. Solberg, 122 Wn.2d 688 (1993) and under the U.S. Supreme Court ruling in Florida v. Jardines, 569 U.S. 1 (2013). The panel's opinion indicates that the Ninth Circuit ruling in U.S. v. Lundin, 817 F.3d 1151 (9th Cir. 2016) is contrary to the panel's ruling here, but that the D.W.C. panel chooses not to follow the reasoning by the Ninth Circuit panel in Lundin. The Court declares in the alternative that even if the arrest on the porch was unconstitutional any error in admitting the defendant's confession was harmless in light of other evidence in the case.

5. State v. William Manuel Alvarez Calo: On December 27, 2018, Division Two of the COA rules for the State in rejecting defendant's challenges to his Pierce County Superior Court convictions for *first degree felony murder and first degree burglary (and his conviction for attempted first degree robbery merging with the first degree felony murder conviction*). Among other things, the Court of Appeals holds: (1) that officers followed the law when they questioned Calo without Mirandizing him, because Calo was **not in police "custody" for purposes of Miranda** where he contacted officers while incarcerated on unrelated charges and where the officers responded to him in talking to him in a manner and under circumstances that were not coercive; (2) that officers were not required to Mirandize him even though they had probable cause to arrest him at the time of the questioning (i.e., **there is not a "focus/PC trigger" to Miranda**); (3) that **officers did not violate the Sixth Amendment** in talking to the defendant because they were talking to him about criminal activity for which he had not yet been charged. **LEGAL UPDATE EDITORIAL COMMENT: For discussion of case law relevant to this case, see the discussion at pages 1-21 of the following 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.**

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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 past LED treatment of these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) Law Enforcement Digest Online Training is [https://fortress.wa.gov/cjtc/www/led/ledpage.html].

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