LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

February 2017

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

LANGUAGE OF MIRANDA WARNINGS HELD TO BE CLOSE ENOUGH IN CONVEYING FIFTH AMENDMENT RIGHTS, BUT COURT HAS A WORD OF CAUTION ABOUT GOING OFF SCRIPT ON THE WARNINGS

In United States v. Loucious, 847 F.3d 1146 (9th Cir., February 7, 2017), a three-judge panel of the Ninth Circuit rejects a defendant's argument that the Miranda warnings he received from a Las Vegas PD officer did not adequately advise him of his Fifth Amendment right to consult an attorney before any questioning. The panel's ruling is summarized as follows in a staff summary (which is not part of the panel's opinion):

> The panel reversed the district court's order suppressing the defendant's statements in a case in which the defendant argued that the Miranda warnings he received were constitutionally deficient because they did not explicitly tell him of his right to consult with an attorney before questioning.
>
> Before the start of custodial interrogation, the defendant received warnings informing him he had the right to remain silent; he had the right to the presence of an attorney during questioning; and that if he could not afford an attorney, an attorney would be appointed before questioning. The panel explained that Miranda warnings need not follow a precise formulation, and held that the warnings given to the defendant adequately conveyed that he had the right to consult with an attorney before questioning even though they did not explicitly inform him of that right. The panel wrote that this right was reasonably to be inferred.

Result: Reversal of U.S. District Court (Las Vegas) suppression order; case remanded for trial of Larry Loucious for the federal crime of possession of a firearm as a convicted felon.

LEGAL UPDATE EDITORIAL COMMENT: I here state the obvious. I assume that officers everywhere have heard it from trainers and legal counsel more than once. The appellate courts, including the Ninth Circuit panel here in Loucious, have consistently advised that the legally safest way to give Miranda warnings is to read word-for-word from a Miranda card that has been approved by legal counsel and/or a prosecutor as being up to date with case law. Not reading verbatim from an up-to-date vetted card and bringing that card to court if testimony is required: (1) creates the risk that warnings will be incorrectly given; and, almost as important, (2) gives the criminal defense attorney the chance to argue that the warnings were incorrectly given, even if that is not so.

Strangely, the Ninth Circuit panel gives this advice in Louscious even though, according to the panel's recitation of the facts, the Las Vegas PD officer did read from an agency Miranda card. Not a great Miranda card, in my humble opinion.

SEXUAL HARASSMENT IN VIOLATION OF TITLE VII OF FEDERAL CIVIL RIGHTS ACT: FACTUAL DISPUTE IS PRESENTED, AND THEREFORE JURY MUST DECIDE WHETHER REPEATED HUGGING OF A CORRECTIONAL OFFICER BY A MALE SHERIFF OVER A 12-YEAR PERIOD WAS SO SEVERE OR PERVASIVE AS TO ALTER CONDITIONS OF THE OFFICER'S EMPLOYMENT SUCH AS TO CREATE AN OBJECTIVELY ABUSIVE WORKING ENVIRONMENT IN VIOLATION OF TITLE VII

In Zetwick v. County of Yolo (CA), 850 F.3d 436 (9th Cir.,. Feb 24, 2017), a three-judge Ninth Circuit panel rules that the case must be tried to a fact-finder on the issue of whether evidence of repeated hugging by a male sheriff of a female correctional officer over a 12-year period establishes a fact question for a jury in a sexual harassment case brought under Title VII of the Federal Civil Rights Act. A staff summary of the panel's ruling (which summary is not part of the ruling) reads as follows:

> The panel filed . . . . an opinion reversing the district court's summary judgment in favor of the [Yolo County] defendants in an action under Title VII [Federal law, Title VII of the Civil Rights Act provisions against sex discrimination] and the California Fair Employment and Housing Act.
>
> A county correctional officer alleged that the county sheriff created a sexually hostile work environment. The panel held that a reasonable juror could conclude that differences in the sheriff's hugging of men and women were not, as the [county] defendants argued, just "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and the opposite sex."
>
> In addition, the district court's contrary conclusion may have been influenced by application of incorrect legal standards. The panel held that hugging can create a hostile or abusive workplace when it is unwelcome and pervasive, and summary judgment on a hostile work environment claim is appropriate only if the defendant's conduct was neither severe nor pervasive enough to alter the conditions of the plaintiff's employment. The panel remanded the case to the district court for a trial on the merits of the plaintiff's federal and state sexual harassment claims and her state claim of failing to prevent sexual harassment.

The actual Opinion of the Ninth Circuit contains a lengthy description of the factual allegations in the case, as well as lengthy analysis of how the law on sex harassment applies to those factual allegations. The Opinion concludes that a jury could determine that the hugging was unwanted and was either "severe" or "pervasive." Ninth Circuit opinions are accessible to the public on the internet site of the Ninth Circuit, which can be found with a natural word search or by going to [http://www.ca9.uscourts.gov/].

Result: Reversal of U.S. District Court (Eastern District of California) order that had granted summary judgment to the County of Yolo; case remanded for trial.

LEGAL UPDATE EDITORIAL COMMENT: **Of course, not every touch, hug, or kiss in the workplace will create a sexually hostile work environment. But if the conduct is (1)**

unwanted and (2) either "severe" or "pervasive," an employer may be liable for a claim of sexual harassment.

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WASHINGTON STATE COURT OF APPEALS

2-1 MAJORITY OF COURT OF APPEALS PANEL HOLDS THAT IMPOUND OF CAR WAS NOT LAWFUL UNDER BOTH CONSTITUTIONAL AND STATUTORY ANALYSIS BECAUSE THE STATE FAILED TO PROVE THAT OFFICER CONSIDERED REASONABLE ALTERNATIVE TO IMPOUNDMENT BY ASKING OPERATOR OF WRECKED CAR, BEFORE OR AFTER SHE LEFT THE SCENE BY AMBULANCE, WHETHER SHE WANTED TO ARRANGE FOR TOWING OF CAR

State v. Froehlich, 197 Wn. App. 831 (Div. II, February 14, 2017)

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

> On July 8, 2013, Froehlich was driving a car southbound on State Route 3 in Mason County when she collided with a pickup truck waiting at a stop sign at a very busy intersection. She was alone in the car. After the collision, the car came to rest on the right shoulder of the highway approximately 100 feet from the intersection. The car was approximately one to two feet from the fog line and its right side was up an embankment, but it was not obstructing traffic.
>
> When Washington State Patrol Trooper [A] arrived at the scene, Froehlich was seated in the pickup truck that she had hit. [Trooper A] observed the car's position on the side of the road. He also noted that the sunroof and driver's side window of Froehlich's car were open and the driver's door could not be opened. Froehlich was cooperative and gave [Trooper A] permission to look in her car for the registration. He could not find the registration, but he did find a title showing that Froehlich was not the car's owner. When [Trooper A] asked about the car's owner, Froehlich replied that it was not her vehicle.
>
> [Trooper A] questioned Froehlich about potential drug use and did not believe her denials. [Trooper B] arrived to administer field sobriety tests. Froehlich then requested an ambulance, which arrived about five minutes later. Froehlich left the scene in the ambulance. [Trooper B] followed Froehlich to the hospital and ultimately determined that she was not impaired.
>
> During his interactions with Froehlich before she left in the ambulance, [Trooper A] did not ask her what she wanted to do with the car or inquire about her ability to arrange for the car's removal.
>
> At some point, [Trooper A] determined that the car's location presented a traffic hazard because it impeded the visibility of drivers approaching a very busy intersection and created a distraction. But he believed that it was impossible to remove the car without a tow truck. [Trooper A] also observed valuables located in plain view in the car. He concluded that he could not secure the car in its current location.
>
> Because of his concerns about leaving an unsecured car that contained exposed valuables and the fact that the car was a traffic hazard, [Trooper A] decided to impound

Froehlich's vehicle. He made this decision without asking Froehlich what she wanted to happen to the car or discussing any alternatives to impound with her. Both the trial court's findings and the record are unclear whether [Trooper A] made these observations and decisions before or after Froehlich left the scene.

[Trooper A] testified that he considered reasonable alternatives to impoundment. But the trial court did not enter any finding of fact that Trooper A] in fact considered reasonable alternatives.

[Trooper A] began an inventory of the vehicle. He retrieved a purse in plain view, intending to take it to Froehlich at the hospital if it was hers or to include it in the inventory if it was not. He unzipped the purse and discovered a bag of white powder he suspected was methamphetamine. Field testing confirmed his suspicions and he ceased the inventory search and applied for a search warrant. After obtaining the warrant, [Trooper A] completed his search and a tow truck removed the vehicle from the scene.

The State charged Froehlich with unlawful possession of a controlled substance with intent to manufacture or deliver. Froehlich filed a motion to suppress the methamphetamine, arguing in part that Trooper A] had no lawful basis for impounding the car and failed to consider reasonable alternatives to impoundment. The trial court heard testimony and entered findings of fact and conclusions of law.

The trial court ruled that [Trooper A] did not lawfully impound the vehicle as part of his community caretaking function because he did not ask Froehlich about her ability to arrange for the removal of her car despite her ability to respond to such an inquiry. The trial court also ruled that [Trooper A] had no statutory authority to impound the vehicle. Therefore, the trial court concluded that the State failed in its burden of showing a lawful impoundment and granted the motion to suppress. The trial court then entered an order dismissing the unlawful possession charge against Froehlich.

ISSUES AND RULINGS: (1) Was the impounding of Froehlich's car unlawful under the constitution, because the officer doing the impound did not consider the reasonable alternative to impoundment of asking Froehlich if she wanted to arrange for towing of her wrecked car? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority)

(2) Was the impounding of Froehlich's car unlawful under the Washington statutory scheme because the officer doing the impound did not consider the reasonable alternative to impoundment of asking Froehlich if she wanted to arrange for towing of her wrecked car? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority)

Result: Affirmance of Mason County Superior Court suppression order and affirmance of the Superior Court's dismissal of charge of unlawful possession of methamphetamine against Martha E. Froehlich.

Status: The Court of Appeals decision is final; no petition for Supreme Court review was filed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

One exception to the warrant requirement is a noninvestigatory, good faith inventory search of an impounded vehicle. State v. Tyler, 111 Wn.2d 690, 700-01 (2013) **Aug 13**

LED:08. However, an inventory search of an impounded vehicle is lawful only if the officer lawfully impounded the vehicle. State v. Duncan, 185 Wn.2d 430, 440 (2016) **April 16 LED:09**. The State has the burden of establishing this exception.

Law enforcement may lawfully impound a vehicle for three reasons: (1) as evidence of a crime, (2) under the community caretaking function, or (3) when the driver has committed a "traffic offense for which the legislature has expressly authorized impoundment." . . . .

But even if one of these reasons exists, an officer may impound a vehicle only if there are no reasonable alternatives. "[I]f. . . a reasonable alternative to impoundment exists, then it is unreasonable to impound a citizen's vehicle." Duncan. Therefore, an officer must consider alternatives to impoundment, although the officer "does not have to exhaust all possible alternatives." Duncan. Considering reasonable alternatives may include obtaining a name from the driver of someone in the vicinity who could move the vehicle. State v. Coss, 87 Wn. App. 891, 899 **98 LED:17**. Whether an impoundment is reasonable depends on the facts of each case. Tyler.

Impoundment Standard Under Constitution: Community Caretaking Function

The State argues that [Trooper A's} impoundment of Froehlich's car was lawful under the community caretaking function. We disagree.

1. Legal Principles

The community caretaking function allows law enforcement to lawfully impound a vehicle when both (1) "the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft;" and (2) "the defendant, the defendant's spouse, or friends are not available to move the vehicle." Tyler. In addition, as noted above, there must be no reasonable alternative to impoundment for the impoundment and the subsequent search to be lawful. Tyler.

The trial court ruled that the first community caretaking requirement was satisfied because the car impeded traffic and threatened public safety. Froehlich does not dispute this ruling. The issue here involves the second requirement, whether Froehlich, her spouse, or her friends were available to move the vehicle.

2. Defendant's Ability to Arrange for Removal

How strictly the second community caretaking requirement stated in Tyler should be applied is somewhat unclear. We can conceive of circumstances where it would be reasonable for an officer to impound a vehicle even though he or she may not know the availability of the defendant or the defendant's spouse or friends to remove a vehicle or when removal by those persons would be impractical. However, Tyler suggests that an officer should at least consider whether the defendant can make arrangements for someone to remove the vehicle before impounding it. Otherwise, the second community caretaking requirement would be superfluous.

Here, the trial court made unchallenged findings of fact that during [Trooper A's] interactions with Froehlich at the scene, he did not ask her what she wanted to do with

the car – including her ability to arrange for its removal – or discuss with her any alternatives to impoundment. There also is no indication in the trial court's findings or in the record that [Trooper A] attempted to contact his fellow trooper, who was at the hospital with Froehlich, to have him ask Froehlich about removing the car.

The State argues that under the facts of this case, specifically the hectic accident scene and Froehlich being taken away by ambulance, [Trooper A] had no opportunity to consider Froehlich's ability to arrange for the car's removal. But the trial court's unchallenged findings of fact show that [Trooper A] was able to converse with Froehlich on several issues when he arrived at the scene, and that she remained available at the scene for five minutes after an ambulance was called. And the record shows that another trooper had contact with Froehlich even after she left the scene.

The dissent references the fact that the car had to be towed from the scene because it was not drivable, apparently suggesting that [Trooper A] had no choice but to impound the car. But under Tyler, even though the car had to be towed, [Trooper A] should have at least considered whether Froehlich could arrange for the towing.

We hold that under the circumstances of this case, the trial court's findings of fact support its conclusion of law that the State did not satisfy the second community caretaking requirement.

3. Availability of Vehicle Owner

The State suggests that [Trooper A] was not required to ask Froehlich about removing the car because she did not own the car and that he had no duty to seek out the registered owner. The State relies on State v. Peterson, 92 Wn. App. 899 **Jan 99 LED:11**, and State v. Ferguson, 131 Wn. App. 694 (2006) **April 06 LED:17**, two cases in which impoundments were deemed lawful even though the police officers did not contact the registered owners of the vehicles when no one was available on the scene to drive the vehicles.

But these cases are distinguishable. Peterson involved an officer's statutory authority to impound a vehicle when the driver had a suspended license and the owner was not at the scene, not the community caretaking function. Therefore, the State was not required to establish, as here, that the driver's spouse and friends were not available to move the vehicle. And the questions in Ferguson involved the first community caretaking requirement – whether the vehicle needed to be towed – and whether waiting for the vehicle's out-of-state owner to come and remove the vehicle was a reasonable alternative to impoundment. The court [in Ferguson] did not address the second community caretaking requirement at issue here.

More fundamentally, as the community caretaking rule is stated in Tyler, ownership of the vehicle is not necessarily material when a non-owner is driving. The second community caretaking requirement is that "the defendant, the defendant's spouse, or friends are not available to move the vehicle." Tyler. Froehlich is the defendant here. Therefore, under Tyler the State was required to show that Froehlich or Froehlich's spouse or friends were unavailable to move the car, not merely that the owner was unavailable.

4. Summary

For the impoundment of Froehlich's car to be lawful under the community caretaking function, [Trooper A] was required to at least consider whether Froehlich, her spouse, or her friends were available to move the car from the scene. Froehlich was unavailable after she left the scene in an ambulance. But the evidence is undisputed that [Trooper A] never asked Froehlich about arranging to have someone else remove the car as an alternative to impoundment, and the State presented no evidence that [Trooper A] considered Froehlich's ability to arrange for the car's removal. As a result, we hold that [Trooper A's] impoundment of Froehlich's car was not lawful under the community caretaking function.

Impoundment Standard Under Statutory Authority

The State argues that even if impoundment was improper under the community caretaking function, [Trooper A] had statutory authority under RCW 46.55.113 for impounding Froehlich's car because it was unattended. We agree. But we hold that despite the statutory authority, the impoundment of Froehlich's car was unlawful under Tyler because [Trooper A] did not consider reasonable alternatives.

1. Legal Principles

a. Impoundment Statute

The legislature has expressly authorized impoundment in RCW 46.55.113 under several circumstances. RCW 46.55.113(2) provides:

> [A] police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances:
>
> (b)Whenever a police officer *finds a vehicle* unattended upon a highway where the vehicle constitutes an obstruction to traffic or jeopardizes public safety;
>
> (c) Whenever a police officer finds an unattended vehicle at the scene of an accident or when the driver of a vehicle involved in an accident is physically or mentally incapable of deciding upon steps to be taken to protect his or her property.

RCW 46.55.113(2)(b), (c) (emphasis added).

This statute seems to fall within the express statutory authorization reason for impoundment identified in Tyler. Tyler's third reason for impoundment refers to statutory authorization for impoundment when the driver has "committed a traffic offense." RCW 46.55.113(2)(b) and (c) do not necessarily involve traffic offenses. But we interpret Tyler's third reason as referring to any express statutory authorization for impoundment.

However, as noted above, even if the statute applies there must be no reasonable alternative to impoundment for the impoundment and the subsequent search to be lawful.

. . . .

2. Applicability of RCW 46.55.113(2)(b) and (c)

Here, the vehicle Froehlich had been driving was not unattended when [Trooper A] arrived at the scene. At that point, RCW 46.55.113(2)(b) and (c) clearly did not apply. But the vehicle became unattended once Froehlich left in the ambulance. The State argues that these provisions apply when a vehicle becomes unattended during the course of an accident investigation through circumstances the officer does not create.

Froehlich focuses on the word "finds," claiming that this word refers to the time when an officer first encounters a vehicle. She argues – and the trial court ruled – that because she was present, [Trooper A] did not "find" an unattended vehicle when he arrived on the scene.

However, the statute does not state that impoundment is limited to situations where a vehicle is unattended when an officer initially encounters it. The statute does not expressly preclude impoundment for unattended vehicles that previously were attended. Instead, both subsections authorize impoundment "[w]henever" an officer finds an unattended vehicle. After Froehlich left the scene, [Trooper A] "found" that her car was unattended regardless of whether it was attended earlier.

In interpreting these provisions we must give effect to the legislature's intent. . . . The stated intent of RCW 46.55.113(2)(b) is to avoid traffic obstructions and to promote public safety by allowing an officer to clear unattended vehicles from highways. Presumably, RCW 46.55.113(2)(c) has a similar purpose. If the goal is public safety, it makes no difference whether a vehicle was unattended when the officer arrived at the scene or became unattended later. In both situations, an unattended vehicle may present a public safety risk. There is no indication in the statutory language that the legislature intended to authorize impoundment only when the vehicle is unattended when the officer first arrives.

There are no cases addressing *when* a vehicle must be unattended for RCW 46.55.113(2)(b) and (c) to apply. However, the court in Tyler suggested without discussion that RCW 46.55.113(2)(b) applied to authorize impoundment even though in that case the vehicle's driver was present at the scene before being arrested.

Froehlich's car became unattended when she left for the hospital through circumstances that [Trooper A] did not create. The car was upon a highway and had been involved in an accident. Therefore, we hold that RCW 46.55.113(2)(b) and (c) provided statutory authority for [Trooper A] to impound the vehicle and that the trial court erred in ruling that these provisions did not apply.

3. Reasonable Alternatives to Impoundment

Even though the trial court erred in ruling that RCW 46.55.113(2)(b) and (c) did not apply here, we can affirm a trial court's decision on any correct basis. . . . Froehlich argues that [Trooper A's] impoundment of her vehicle was unlawful under Tyler because [Trooper A] did not consider reasonable alternatives to impoundment. We agree.

> The trial court did not make an express finding or conclusion on the existence of a reasonable alternative, but did tangentially address the issue. The trial court found that [Trooper A] did not discuss any alternatives to impoundment with Froehlich. And in its conclusion of law regarding the second community caretaking requirement, the trial court distinguished this case from Tyler because in Tyler the officer explored reasonable alternatives to impoundment.
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> [Trooper A] testified that he explored alternatives to impounding Froehlich's car, although he did not explain what alternatives he explored. But the trial court did not make any finding that [Trooper A] considered alternatives. And [Trooper A] also admitted that this process did not include asking Froehlich about any other alternatives. One of the alternatives that an officer should consider is asking the driver if arrangements can be made for someone to move the vehicle. "Although an officer is not required to exhaust all possibilities, the officer must at least consider alternatives; attempt, if feasible, to obtain a name from the driver of someone in the vicinity who could move the vehicle." Coss. [Trooper A's] failure to ask Froehlich about alternatives showed that he did not consider reasonable alternatives to impoundment.
>
> We acknowledge that there may be situations when an officer has no obligation to ask a driver about reasonable alternatives to impoundment. But here, the trial court entered unchallenged findings that [Trooper A] had the opportunity to have discussions with Froehlich on several issues before she left the scene. Under the specific facts of this case, we hold that [Trooper A] had an obligation to ask Froehlich about other alternatives to impounding the car and therefore that the State did not satisfy its burden under Tyler of establishing that [Trooper A] considered reasonable alternatives to impoundment.
>
> Accordingly, we hold that even though [Trooper A's] impoundment of Froehlich's car was authorized under RCW 46.55.113(2)(b) and (c), the impoundment was not lawful because [Trooper A] did not consider reasonable alternatives.

[Some citations omitted; other citations revised for style; bolding added; some subheadings revised for clarity]

DISSENTING OPINION: Judge Richard Melnick authors a dissent that disagrees with much of the analysis by the majority judges on both the constitutional issue and the statutory issue. Among other things, Judge Melnick's dissents asserts that:

> [Under the circumstances of this case,] it is clear that "the defendant, the defendant's spouse, or friends [were] not available to move the vehicle." [as in Tyler] and I would uphold the impoundment and inventory search. The majority, however, changes the test of Tyler to read the second requirement as "whether Froehlich, her spouse or her friends were available to move the vehicle." [Quoting majority opinion]. Changing the law to put an affirmative duty on the police to see if people are available to move the vehicle is without precedent and contrary to Tyler. [Dissent's Footnote: *Assuming that the majority is correct that* Tyler *suggests an officer should consider whether Froehlich could make arrangements to remove the vehicle, it is clear that [Trooper A] did make these considerations. The fact he did not ask her does not mean he did not consider the alternative. The fact he did not call the trooper who went to the hospital also does not mean he did not consider alternatives. It is unclear if the trooper remained with or had access to Froehlich at the hospital. Even if the trooper had such access, it would be*

unreasonable to have [Trooper A] wait at the scene for an undetermined amount of time after Froehlich voluntarily abandoned the vehicle.

LEGAL UPDATE EDITORIAL NOTES ABOUT OTHER RESEARCH SOURCES: For general information on impound-inventory issues for Washington law enforcement officers and prosecutors, see pages 329-336 of "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors," May 2015, a collection of case law by Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys. The collection of cases is accessible both on the website of WAPA and on the Criminal Justice Training Commission's Internet LED page.

Also accessible on the CJTC LED page is the "Law Enforcement Legal Update Outline" by your Legal Update editor with cases on arrest, search, seizure, and other topical areas of interest to Washington law enforcement officers, plus a chronology of independent grounds rulings under Article I, Section 7 of the Washington Constitution. See pages 49-50 for some case citations and brief summaries of rulings in impound-inventory cases.

LEGAL UPDATE EDITORIAL NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ON THE FROEHLICH DECISION: The February 2017 LED from the Washington Attorney General's Office and placed on the Criminal Justice Training Commission website addresses the Froehlich decision at pages 1-3.

EVIDENCE HELD SUFFICIENT TO PROSECUTE UNDER RCW 69.50.402(f) FOR MAINTAINING A DRUG DWELLING WHERE DRUG USE IN HOUSE WAS A SUBSTANTIAL PURPOSE OF THE HOUSE, EVEN IF DRUG USE WAS NOT THE PRIMARY PURPOSE OF THE HOUSE; SUPERIOR COURT DISMISSAL ORDER IS REVERSED

State v. Menard, 197 Wn. App. 90 (Div. III, February 23, 2017)

Facts: (Excerpted from Court of Appeals opinion)

> Respondent Rodney Menard owns and lives at 810 N. 26th Avenue, in Yakima, a home where he has resided since the age of five. Menard rented rooms to five individuals, occasionally received methamphetamine from tenants as rent payment, consumed twenty dollars' worth of methamphetamine per day, and possessed drug pipes. Menard knew his tenants imbibed methamphetamine, but denied knowledge of the use of his home for methamphetamine sales.
>
> The Drug Enforcement Agency (DEA) received numerous complaints regarding recurrent drug traffic to and from 810 N. 26th Avenue. On July 15, 2015, a DEA confidential informant purchased approximately a gram of methamphetamine at Rodney Menard's home.
>
> On July 23, 2015, at 6:45 a.m., the DEA Task Force conducted a narcotics search of Yakima's 810 N. 26th Avenue. The front door was unlocked. Rodney Menard and thirteen other individuals were present when law enforcement officers entered the residence. In a basement bedroom, a lady rested on a small couch with a bag of methamphetamine next to her pillow.

Law enforcement officers spoke with Rodney Menard and other denizens of the home. When asked if people who visit take drugs, Menard answered: "most people do." Two renters informed the officers that ten to fifteen different people came daily to the house to use drugs. Menard claimed he unsuccessfully tried to end the heavy traffic at the house. Officers confiscated drug paraphernalia and 25.5 grams of drugs inside the home.

Proceedings below: (Excerpted from Court of Appeals opinion)

> The State of Washington charged Rodney Menard with maintaining a drug dwelling under RCW 69.50.402. Menard filed a [motion to dismiss]. Menard argued that any drug-related activity at his house was incidental to the primary purpose of the residence and the statute proscribed his conduct only if the drug activity constituted the residence's major purpose. The State responded that Menard knew drug users employed his house for the purpose of enjoying controlled substances. In turn, the State contended that drug activity, for purposes of the crime, need only be a substantial purpose, not the primary one. The trial court granted Menard's motion to dismiss.

ISSUE AND RULING: There is substantial evidence in the record that use of Menard's house was a substantial purpose of the house, even if not the primary purpose of the house. Is the evidence sufficient to support Menard's conviction for maintaining a drug dwelling? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal of Yakima County Superior Court order that dismissed a charge against Rodney Clifford Menard for maintaining a drug dwelling; case remanded for trial.

Status: Defendant has requested Washington Supreme Court review; petition awaits action.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> RCW 69.50.402(1), known colloquially as the drug house statute, declares: It is unlawful for any person:
>
> > (f) Knowingly to keep or maintain any . . . dwelling, building . . . or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.
>
> (Emphasis added.)
>
> Note that the statute refers to the purpose under which the drug users employ the residence, not the owner's purpose for the residence. The statute does not insert the word "primary" or any other term similar in meaning.
>
> To convict under RCW 69.50.402(f), the totality of the evidence must demonstrate more than a single isolated incident of illegal drug activity in order to prove that the defendant "maintains" the premises for keeping or selling a controlled substance. State v. Ceglowski, 103 Wn. App. 346, 350 (2000) **Jan 01 LED:09**
>
> Sporadic or isolated incidents of drug use do not suffice to prove criminal conduct under the drug house statute. Ceglowski. The requirement that the defendant "maintain" the

premises necessarily connotes a course of continuing conduct. Ceglowski. Since "maintain" is not specifically defined in the statute, we employ the plain and ordinary meaning of the word as found in a dictionary. Ceglowski. Black's Law Dictionary defines "maintain" as '"hold or preserve in any particular state or condition;" and "sustain" or "uphold." Ceglowski. The ordinary meaning of "maintain" encompasses this concept of continuing conduct: "to keep or keep up; continue in or with; carry on." Ceglowski.

"Knowingly maintaining" a place under the federal crack house statute, former 21 U.S.C. § 856(a)(1) (1986), includes acts evidencing control, duration, and continuity. [Federal case citations omitted]. Still, a small quantity of drugs or evidence found on only a single occasion can be sufficient to show a crime of a continuing nature. Ceglowski. Federal courts have held that this element requires proof that a substantial purpose for maintaining the premises was to conduct the drug activity. [Federal case citations omitted]. State v. Ceglowski followed the test of "substantial purpose."

In Ceglowski the St*ate* charged Michael Ceglowski with utilizing a tackle and bait shop for using and selling drugs. Officers found .9 grams of methamphetamine in Ceglowski's desk drawer. Still, the State presented evidence of only a single drug sale being conducted in the shop. The State also produced "pay and owe" sheets, which may or may not have been drug related. Nevertheless, nothing tied the records to sales on the premises. This court reversed Ceglowski's conviction.

In State v. Fernandez*,* 89 Wn. App. 292 (1997) **May 98 LED:14**, the State prosecuted three defendants for operating a drug house. During trial, officers testified about five controlled buys at the defendants' residence, and three neighbors testified to a dramatic increase in pedestrian and vehicular traffic on their street after the defendants occupied the home. Visitors stayed inside the house for two to ten minutes. One neighbor estimated as many as fifteen cars an hour coming and going from the house. The defendants leaned into cars that stopped on the street. The police executed a search warrant and discovered twenty-four grams of cocaine, a scale, sandwich bags, and weapons. The Fernandez court found sufficient evidence to prove the defendants maintained the house to sell or store drugs, but no evidence to support a finding that drug users resorted to the house for the purpose of using cocaine. The record contained insufficient evidence that anyone other than those maintaining the house used drugs on the premises.

The case on review includes substantial evidence that people other than Rodney Menard used drugs in the house. The evidence supports ongoing drug use and the use of controlled substances being a substantial purpose for the home. Two witnesses testified that ten to fifteen people each day entered the home to imbibe drugs. When police executed the search warrant, fourteen people, some of whom admitted to use of methamphetamine, occupied the premises. One resident rested methamphetamine near her pillow. Officers found drug devices scattered throughout the home. When asked if people who visit take drugs, Menard answered: "most people do."

[Some citations omitted; other citations revised for style]

LEGAL UPDATE EDITORIAL NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ON THE MENARD DECISION: The February 2017 LED from the Washington Attorney General's Office addresses the Menard decision at pages 4-5.

FELON LOSES ARGUMENT THAT, BECAUSE HE CANNOT POSSESS A FIREARM WHILE UNDER COMMUNITY CUSTODY CONDITIONS, HE CAN SUE DOC FOR AN ATTACK BY A THIRD PARTY WHILE HE WAS IN THAT STATUS

In Hopovac v. Department of Corrections, ___ Wn. App. ___ , 2017 WL ___ (Div. III, February 14, 2017), Division Three of the Court of Appeals upholds a superior court dismissal of a lawsuit against the Department of Corrections (DOC) by a convicted felon who was under community custody supervision when he was abducted and assaulted by gang members. The felon loses his argument that, for civil liability purposes, DOC owed him a legal duty of protection from the gang members. He argued that the duty exists because he could not defend himself in light of the terms of his supervision (1) prohibiting him from leaving Grant County, and (2) possessing a firearm.

The Hopovac Court summarizes the Court's ruling in the opening paragraph of the Opinion of the majority:

> We answer the question of whether the Department of Corrections (Department) owes a duty of care to protect felons under its supervision from the intentional torts of third parties. For such a duty to exist, Restatement (Second) of Torts § 314A(4) (Am. Law Inst. 1965) would require felons to be in the custody of the Department under circumstances such as to deprive them of their normal opportunities for protection. We determine that standard community custody conditions, such as those here, do not deprive felons of their normal opportunities for protection. We, therefore, answer the question in the negative and affirm the summary dismissal of Mr. Hopovac's claim.

Court of Appeals Judge Fearing dissents in part, arguing that a community custody condition barring a person from leaving a county could give DOC a duty for civil liability purposes to protect that person.

Result: Affirmance of Grant County Superior Court order dismissing lawsuit by Ahmet Hopovac against the Washington State Department of Corrections.

Status: Hopovac has requested Washington Supreme Court review; petition awaits action.

SIXTH AMENDMENT RIGHT OF CONFRONTATION: STATE'S DIRECT EXAMINATION OF CHILD RAPE VICTIM HELD TO HAVE BEEN BROAD ENOUGH TO ALLOW DEFENDANT TO CROSS-EXAMINE THE VICTIM ON ALL DAMAGING INFORMATION

State v. Bates, 196 Wn. App. 65 (Div. III, September 22, 2016), a panel of Division Three of the Court of Appeals rejects a rape-of-a-child defendant's argument that his Sixth Amendment right of confrontation was violated. The Court rejects his argument that the State's direct examination of his alleged child victim at trial was not broad enough to allow him to cross-examine the witness on all damaging content in her testimony.

The Bates Court summarizes the case and the Court's ruling as follows in the first several paragraphs of its opinion:

> Our Supreme Court has long held that before offering the testimonial out-of-court statement of a witness against a criminal defendant, "the confrontation clause's

indispensable component of cross-examination 'requires the State to elicit the damaging testimony from [a] witness so the defendant may cross-examine if he so chooses.'" In re Pers. Restraint of Grasso, 151 Wn.2d 1, 29 (2004) (Sanders, J., dissenting) (quoting State v. Rohrich, 132 Wn.2d 472, 478 (1997). Following the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, (2004) **May 04 LED:20,** our Supreme Court reaffirmed Rohrich, holding that Crawford "left intact the governing case law analyzing the sufficiency of a witness's testimony for confrontation clause purposes." State v. Price, 158 Wn.2d 630, 650 (2006) **Jan 07 LED:07**. Sean Bates appeals his conviction of two counts of first degree child rape, complaining for the first time on appeal that the State's examination of his child victim was not sufficient for confrontation clause purposes.

The rationale for requiring the State to sufficiently elicit damaging information is so the defense can cross-examine the witness about that information, whether it is contained in in-court or out-of-court statements. In a case such as this, it spares the defendant the risk of inflaming the jury if he calls a child as a direct witness. It safeguards the defendant's right to rely on the State's burden of proof in a criminal case.

In this case, the State's direct examination of the child victim was broad enough to open the door to cross-examination of all of the damaging information provided by the child victim, in court or out of court. For purposes of his confrontation clause challenge, Mr. Bates fails to demonstrate manifest constitutional error.

[Some citations omitted; others revised for style]

Result: Affirmance of Benton County Superior Court conviction of Sean Joseph Bates on two counts of first degree child rape.

Status: Decision final; defendant's request for review by Washington Supreme Court denied.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement will be placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the current and three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents and past LED treatment of these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law

enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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

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

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

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

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