LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

FEBRUARY 2019

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UNITED STATES SUPREME COURT

EIGHTH AMENDMENT BAN ON EXCESSIVE FINES APPLIES TO STATES; DRUG DEALER WHO OWNED SUV THAT HE BOUGHT WITH INSURANCE MONEY MUST BE ALLOWED TO RAISE EXCESSIVE FINES CHALLENGE TO FORFEITURE OF CAR

In Timbs v. Indiana, ___ S.Ct. ___ , 2019 WL ___ (February 20, 2019), the United States Supreme Court is unanimous in ruling in a forfeiture case that a constitutional prohibition on "excessive fines" applies to state and local public agencies in the same way that federal agencies may not impose "excessive fines." Seven Justices sign on to an opinion concluding that the Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. The remaining two Justices each write separate concurring opinions that either suggest or rely on different constitutional provisions and analysis to get to the same result.

The Lead Opinion of the Supreme Court describes the facts and lower court procedural circumstances of the case as follows:

> Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchased for $42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's

vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction, the trial court denied the State's request. The vehicle's forfeiture, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions.

The Supreme Court does not address the merits of the truck owner's argument that the forfeiture of his truck was indeed "excessive." The fact-based issue of excessiveness must be addressed by the lower courts.

Result: Reversal of Indiana Supreme Court decision in favor of the State of Indiana; remand of case to the Indiana courts for resolution of the fact-based legal issue of whether the forfeiture order violates the constitutional bar on excessive fines.

LEGAL UPDATE EDITOR'S COMMENTS:

This ruling does not seem surprising in light of the historical fact that over time most protections under the Federal constitution have been held by the U.S. Supreme Court to be applicable to state and local governmental entities. I would assume that the Timbs ruling will spark an increase in "excessive fines" legal challenges to forfeitures, fines, restitution orders, etc. I have not researched the "excessive fines" case law in any depth but my understanding is that excessiveness (sometimes defined as "gross disproportionality" of the sanction to gravity of the wrongdoing) is somewhat in the eye of the deciding beholder. Note that in a "case note" on the website of the Washington Association of Prosecuting Attorneys, staff attorney Pam Loginsky stated the following about the Timbs decision:

> **"This case is likely to have little impact in Washington. Article I, section 14 of the Washington Constitution already prohibits the imposition of excessive fines and the Washington Supreme Court assumed the application of the Eight Amendment [excessive fines] clause to states in 1999. See State v. WWJ Corp., 138 Wn.2d 395 (1999)."**

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

"OPEN CARRY" AND THE SECOND AMENDMENT: ELEVEN-JUDGE NINTH CIRCUIT PANEL WILL ADDRESS WHETHER THE FEDERAL CONSTITUTION PROVIDES A QUALIFIED RIGHT TO OPENLY CARRY A HANDGUN; NOTE: THE WASHINGTON CONSTITUTION DOES PROVIDE A QUALIFIED RIGHT OF "OPEN CARRY"

A half year ago, in Young v. State of Hawaii, 896 F.3d 1044 (9th Cir., July 24, 2018), a three-judge Ninth Circuit panel voted 2-1 that the federal constitution's Second Amendment provides a qualified right to openly carry a handgun in public. On February 11, 2019, as predicted in the July 2018 Legal Update, the Ninth Circuit granted further review before an 11-judge panel. A

future issue of the Legal Update will report on the further decision from the "en banc" panel of 11 judges. There is no timetable for a decision in such en banc review in the Ninth Circuit.

LEGAL UPDATE EDITOR'S COMMENT: It is generally recognized that the Washington constitution, article I, section 24, provides a qualified right to openly carry a loaded firearm in public. In the interplay between the power to grant individual rights under state constitutions and the federal constitution, the Washington constitution lawfully may grant greater open-carry rights than does the Second Amendment.

CIVIL RIGHTS ACT CIVIL LIABILITY IN CORRECTIONAL SETTING: ABSENCE OF CLEARLY ESTABLISHED APPELLATE CASE LAW ENTITLES OFFICER TO QUALIFIED IMMUNITY FOR ARRESTEE'S SUICIDE ATTEMPT WHILE IN A HOLDING CELL

In Horton v. City of Santa Maria, ___ F.3d ___ , 2019 WL ___ (9th Cir., February 1, 2019), a three-judge panel of the Ninth Circuit grants qualified immunity to a correctional officer who was sued for failing to check on an inmate in time to prevent him from hanging himself. A staff summary (not part of the panel's opinion) summarizes the qualified immunity ruling as follows):

> The panel reversed in part and affirmed in part the district court's order denying summary judgment to defendants in an action brought pursuant to 42 U.S.C. § 1983 and California law by a pretrial detainee who alleged that defendants violated his Fourteenth Amendment right to be safeguarded from injury and his state law right to medical care while in custody.
>
> After being arrested, plaintiff was detained in a temporary holding cell and left unattended for around half an hour, during which time he attempted suicide, causing permanent and severe injury. With his mother acting as guardian ad litem, plaintiff filed suit alleging, in part, that defendants were deliberately indifferent to his safety because they failed to take appropriate action after plaintiff's mother had warned a police officer over the phone that plaintiff was suicidal.
>
> The panel held that defendant Officer Brice was entitled to qualified immunity as a matter of law because a reasonable officer would not have known that failing to attend to plaintiff immediately after the phone call would be unlawful under the [controlling appellate case] law at the time of the incident. The panel therefore reversed the district court's denial of summary judgment in favor of Officer Brice on the § 1983 claim.

Result: Reversal of U.S. District Court (Los Angeles) ruling that denied qualified immunity to Office Brice. Rulings by the Ninth Circuit panel on other issues will not be addressed in the Legal Update.

LEGAL UPDATE EDITOR'S NOTE: The facts and issues relating to the issue of the granting of qualified immunity to Officer Brice are complicated, and there are other issues in the case. The issue of failure to prevent suicide by an arrestee in a holding cell is obviously an important issue. Interested readers should go to the Ninth Circuit's internet Opinions page to read the decision.

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WASHINGTON STATE SUPREME COURT

INDEPENDENT GROUNDS RULING UNDER ARTICLE I, SECTION 7 OF WASHINGTON CONSTITUTION: ATTENUATION DOCTRINE THAT LIMITS REACH OF EXCLUSIONARY RULE IS HELD TO APPLY UNDER WASHINGTON CONSTITUTION, BUT TO BE LESS FORGIVING OF UNLAWFUL SEARCHES AND SEIZURES THAN IS THE ATTENUATION DOCTRINE OF FOURTH AMENDMENT; GIVING FERRIER WARNINGS IN REQUEST FOR CONSENT FOR A VEHICLE SEARCH DOES NOT ATTENUATE THE EXCLUSIONARY CONSEQUENCES OF AN UNSUPPORTED CONTEMPORANEOUS TERRY SEIZURE

State v. Mayfield, ___ Wn.2d ___ , 2019 WL ___ (February 7, 2019)

LEGAL UPDATE INTRODUCTORY EDITOR'S COMMENT: Historically, because Exclusionary Rule issues are not the focal point of law enforcement efforts to comply with constitutional requirements, I generally have been relatively summary in addressing Exclusionary Rule issues. I decided to be more expansive in this case in order to provide something of a broad-based overview of the differing approaches to the Exclusionary Rule (1) by the U.S. Supreme Court under the Fourth Amendment of the U.S. constitution, and (2) by the Washington Supreme Court under article I, section 7 of the Washington constitution.

Facts: (Excerpted from Supreme Court lead opinion)

> On January 3, 2015, Derek Salte came home to find an unfamiliar truck parked in his driveway, with a man (later identified as Mayfield) asleep in the driver's seat. Salte told Mayfield to leave, threatening to call the police if he did not. Mayfield started the truck's engine and tried to put it in reverse, but the truck would not move. Eventually, Mayfield got out of the truck through the passenger door and ran away, leaving the door open with the engine and windshield wipers still running. Salte called the police, and [Deputy A] responded.
>
> [Deputy A] turned off the truck's engine, placed the keys on the driver's seat, and closed the passenger door. He "did not search for or observe anything within the truck's passenger compartment." He then determined that the truck was registered to Mayfield and had not been reported stolen. Around this time. [Deputy A] spotted Mayfield walking on the other side of the street, and Salte identified him as the person who was in the truck. [Deputy A] believed that Mayfield was trying to walk past them without making contact, which [Deputy A] thought was odd behavior for the truck's apparent owner. He therefore crossed the street to talk to Mayfield.
>
> Mayfield initially said he was parked in Salte's driveway because he needed to use the restroom in the church next door but later said he was there because he was having vehicle problems. Mayfield explained that he ran away because he was afraid that Salte was about to assault him. At the suppression hearing. [Deputy A] testified that he did not suspect Mayfield of committing any crime, of being under the influence of alcohol or other drugs, or of being armed or dangerous. Nevertheless, [Deputy A] thought the situation seemed strange.
>
> A second officer, [Sergeant B], arrived to assist while [Deputy A] asked for Mayfield's identification and checked for outstanding warrants. No warrants were discovered, but

> [Deputy A] learned that Mayfield "was a convicted felon, was on active [Department of Corrections] supervision, and had prior contacts in regards to controlled substances."
>
> [Deputy A] then asked Mayfield about recent drug use, which Mayfield denied. [Deputy A] asked for consent to conduct a pat-down search and told Mayfield he could refuse. Mayfield consented, and [Deputy A] found $464 in cash, bundled in a way that made him suspect "the money was the result of drug transactions." [Deputy A] then asked for consent to search the truck, informing Mayfield he had the right to refuse and the right to limit or revoke his consent. Mayfield consented. [Deputy A] discovered methamphetamine in the truck and arrested Mayfield.

Proceedings below: (Excerpted from Supreme Court lead opinion)

> Mayfield was charged with one count of possession of a controlled substance with intent to deliver. He moved to suppress the money and the methamphetamine, arguing that [Deputy A] unlawfully seized him without reasonable suspicion and that his consent to search was vitiated by the unlawful detention. The State contended that the attenuation doctrine provided an exception to the exclusionary rule in this case.
>
> The trial court concluded that Mayfield was unlawfully seized "when Deputy Nunes began asking questions about [his] drug use, whether he would have anything illegal on his person, and when he sought permission to conduct a pat down search." \

LEGAL UPDATE EDITOR'S NOTE: The trial court here was probably correct on the "seizure" question under the Washington constitution. In State v. Harrington, 167 Wn.2d 656 (2009), the Washington Supreme Court held that a "social contact" developed into a Terry "seizure" at the point during the contact when the officer, with another officer standing nearby, requested consent to frisk. Harrington was an "independent grounds ruling under the Washington constitution. Under the Fourth Amendment, this would probably be deemed not to be a seizure.]

> However, the [trial court in this case] denied the motion to suppress, concluding that the evidence was attenuated from the unlawful seizure because [Deputy A] gave Ferrier warnings before Mayfield consented to the search of his truck. . . . . The jury convicted Mayfield as charged.
>
> On appeal, Mayfield argued that the attenuation doctrine is incompatible with article I, section 7 [of the Washington constitution]. In the alternative, he argued that Ferrier warnings alone are insufficient to satisfy the attenuation doctrine. In a split opinion, the Court of Appeals declined to reach Mayfield's state constitutional argument because he did not conduct [a properly structured analysis for the appellate courts to address an "independent grounds" issue].

ISSUES AND RULINGS: 1. Does the Exclusionary Rule of the Washington constitution include in all respects the Attenuation Doctrine applied by the U.S. Supreme Court under the Fourth Amendment of the federal constitution? (ANSWER BY WASHINGTON SUPREME COURT: No, rules a unanimous Court)

2. Does the Exclusionary Rule of the Washington constitution include any form of an Attenuation Doctrine, albeit a more limited version of the Attenuation Doctrine than is applied by

the U.S. Supreme Court under the Fourth Amendment of the federal constitution? (ANSWER BY WASHINGTON SUPREME COURT: Yes, rules an 8-1 majority)

3. A law enforcement officer made a Terry seizure of Mayfield without reasonable suspicion of criminal activity by Mayfield. The officer then gave him some of the Ferrier warnings in asking Mayfield for consent to search Mayfield's nearby truck. Does the giving of Ferrier warnings attenuate the unlawfulness of the seizure that occurred just a few minutes earlier, such that the evidence seized in the consent search of the truck should not be suppressed under the Exclusionary Rule of the Washington constitution? (ANSWER BY WASHINGTON SUPREME COURT: No, rules a unanimous Court)

Result: Reversal of Cowlitz County Superior Court conviction of John Douglas Mayfield for possession of a controlled substance with intent to deliver.

BACKGROUND OF WASHINGTON SUPREME COURT "INDEPENDENT GROUNDS" RULINGS REGARDING EXCLUSIONARY RULE OF WASHINGTON CONSTITUTION'S ARTICLE I, SECTION 7

Since 1980, majorities on the Washington Supreme Court have repeatedly shown in Search & Seizure and Exclusionary Rule decisions that the collective value systems of a majority of the nine Washington State Justices differ from the value systems demonstrated historically in decisions in those subject area by majorities on the U.S. Supreme Court. In Exclusionary Rule decisions of the U.S. Supreme Court, several exceptions to exclusion have been created because the common sense view of the U.S. Supreme Court majority has been that the primary purpose of the federal Exclusionary Rule is to deter officers from failing to follow Fourth Amendment rules for Search and Seizure, and that where deterrence value does not outweigh the always-considerable cost to society of excluding reliable inculpatory evidence, then exclusion should not occur.

Thus, the U.S. Supreme Court has recognized qualified exceptions, with reasonableness limits, to the Exclusionary Rule for (simplistically stated): (1) *good faith execution of a facially reasonable search warrant*; (2) *good faith enforcement of a statute or ordinance*, (3) circumstances where evidence unlawfully obtained *inevitably would have been discovered* by lawful means without reliance on the fruits of the unlawful search, (4) circumstances where the causal connection between the police error and the discovery of evidence is "*attenuated*" (i.e., the causation link is remote or some other causation factor has intervened), and the police error is not egregious; and (5) circumstances where *an independent source* for a lawful search existed and was known to exist prior to the unlawful search.

The Washington Supreme Court has concluded under article I, section 7 of the Washington constitution that, unlike the Fourth Amendment, while deterrence may be a factor, the primary purpose of the Washington constitution's Exclusionary Rule is *not* deterrence of unlawful law enforcement actions. Instead, our high court has held, based on their own collective value systems that differ from those of a majority of the U.S. Supreme Court, that the primary purpose of the exclusionary remedy of article I, section 7 is to *protect the rights of persons* when law enforcement has been deemed to have violated those rights.

For this stated reason, the Washington Supreme Court has concluded that there are no broad *"good faith"* exceptions to exclusion in the Washington constitution; and that there is no *"inevitable discovery"* exception (as for the "inevitable discovery" theory, the Washington

Supreme Court also declared, as further reason not to adopt the "inevitable discovery" exception to exclusion, that the theory is too speculative and vague to be predictably applied).

The Washington Supreme Court has, however, accepted an *"independent source"* exception to exclusion because that exception is not inconsistent with protecting privacy rights and need not be hinged on the deterrence rationale. See State v. Gaines, 154 Wn.2d 711, 717-22 (2005) (recognizing the independent source doctrine under the Washington constitution).

Now, in the Mayfield case, the Washington Supreme Court has chosen to include a very narrow version of the Attenuation Exception to exclusion under the Washington constitution. In key part, the Washington Supreme Court's lead opinion (signed by eight of the nine Justices) explains that ruling as follows:

> We now explicitly adopt a state attenuation doctrine that is satisfied if, and only if, an unforeseeable intervening act genuinely severs the causal connection between official misconduct and the discovery of evidence. If such a superseding cause is present, then the evidence is not properly viewed as "fruit of the poisonous tree" but, instead, as "fruit" of the superseding cause. In such a case, the State derives no benefit from its officers' unconstitutional actions. And because a superseding cause must, by definition, be unforeseeable, this narrow attenuation doctrine will not encourage officials to violate article I, section 7 in the hopes of discovering evidence.
>
> We caution that the attenuation doctrine we adopt today must be narrowly and carefully applied. The State bears the burden of proving that the attenuation doctrine applies and that evidence is admissible despite a violation of article I, section 7. . . . . To meet its burden, the State must prove that unforeseen intervening circumstances genuinely severed the causal connection between official misconduct and the discovery of evidence. The State cannot meet its burden by merely showing that there are one or more *additional* proximate causes of the discovery of evidence. The question of whether intervening circumstances constitute a superseding cause is a highly fact-specific inquiry that must account for the totality of the circumstances, just as it is in the context of tort law. . . .
>
> We also caution that the narrow attenuation doctrine we adopt today is entirely independent of the modern attenuation doctrine used by federal courts. As such, it is irrelevant to our state attenuation doctrine whether suppression in one case will deter similar misconduct in the future. It is also irrelevant whether the officer's misconduct was merely negligent or was instead flagrant and purposeful. The only question is whether unforeseeable intervening actions genuinely severed the causal connection between official misconduct and the discovery of evidence. If not, then the attenuation doctrine does not apply, and the evidence must be excluded in accordance with article I, section 7 and our state exclusionary rule.
>
> C. The Washington attenuation doctrine is not satisfied here
>
> Although the trial court did not have the opportunity to rule on Mayfield's suppression motion in accordance with the narrow attenuation doctrine we adopt today, its findings of fact are sufficient for us to decide the issue as a matter of law. It is plain that the State cannot carry its burden of proving that the causal chain between the official misconduct and the discovery of evidence was genuinely severed by intervening circumstances in this case. We therefore hold that Mayfield's motion to suppress must be granted.

As related in the facts section above, [Officer A] illegally seized Mayfield and requested consent to search his person and his truck while the illegal seizure was ongoing. The requests to search were certainly not unforeseeable intervening circumstances. As found by the trial court, these requests were a purposeful component of "a drug investigation that was not based upon any reasonable and articulable suspicion of actual criminal conduct."

Mayfield's consents to the two searches were also not independent acts of free will sufficient to establish a superseding cause. The State relies heavily on the fact that Mayfield was told he could refuse, limit, or revoke consent to the search of his truck, arguing that these Ferrier warnings made Mayfield's consent "an informed decision" and thus '"an independent act of free will'" sufficient to satisfy the attenuation doctrine. We cannot agree.

First, as the State acknowledges, Mayfield was not given full Ferrier warnings before consenting to the search of his person. He was merely told he could refuse consent. We have previously considered an almost indistinguishable case applying the federal attenuation doctrine. In [State v. Armenta, 134 Wn.2d 1 (1997)], the defendant was unlawfully seized, was asked for consent to search his car, and was told he could refuse. He consented and the search yielded cocaine, which the trial court suppressed. We affirmed the trial court.

First, we noted that although the defendant "freely and voluntarily consented to the search of his vehicle," it was a separate question "whether the prior illegal detention vitiated that consent." We then concluded that it did, based on federal precedent holding that a "confession following issuance of Miranda warnings [was] nevertheless tainted by illegal arrest and therefore inadmissible." . . . . Because we have already held that warning a person of the right to refuse consent is insufficient to satisfy the broad federal attenuation doctrine, we easily conclude that it is insufficient to satisfy our narrow state attenuation doctrine. And because [Deputy A] asked to search Mayfield's truck based, in part, on the money he found when searching Mayfield's person, the two searches are directly causally linked.

Second, giving consent to search upon request during an unlawful seizure is very different from independently volunteering to be searched or giving a confession as an act of free will. Mayfield had no time to reflect on his options and was not free to leave. Ferrier warnings alone cannot change the fact that Mayfield's consent to search was the direct, foreseeable result of [Officer A's] unconstitutional actions. Indeed, it would be unreasonable to expect a person to believe that he or she actually can refuse consent when the Ferrier warnings are given by the same officer who is currently subjecting the person to an ongoing unlawful seizure. A reasonable person might well believe that the officer would commit further constitutional violations, regardless of consent, so there would be no benefit to refusing. Therefore, consent to search during an ongoing unlawful seizure, even if preceded by Ferrier warnings, is entirely foreseeable and not an independent act of free will. Such consent, without more, cannot be a superseding cause sufficient to satisfy the attenuation doctrine.

Finally, it is clear that if the state attenuation doctrine is satisfied solely by an unlawfully detained suspect's consent to search after Ferrier warnings, then the attenuation doctrine would not be a narrow exception to the exclusionary rule at all. To the contrary,

it would be broadly applicable to any case where officials remember to use the appropriate "magic words" after violating a person's article I, section 7 rights. Such a broad rule would do little to protect individual privacy and would thus be inconsistent with article I, section 7 and our state exclusionary rule. It would also distort the purpose of Ferrier, which is to ensure that a person who has *not* been illegally seized can make an informed decision as to whether to consent to a search of his or her home. Ferrier warnings were never designed to "purge the taint" of ongoing unlawful seizures for purposes of the attenuation doctrine.

[LEGAL UPDATE EDITOR'S NOTE: In a footnote, the Mayfield lead opinion states that the Court is not deciding one way or the other whether Ferrier warnings are required for a vehicle consent search. Note that in State v. Witherrite, 184 Wn. App. 859 (2014) (review denied by Washington Supreme Court in 2015), Division Three of the Court of Appeals ruled 2-1 that it is not mandatory to give Ferrier warnings to obtain a voluntary vehicle search. Note, however, that the majority opinion for Division Three stated in that case that "undoubtedly best practice to give full Ferrier warnings before any consent search in order to foreclose arguments" that the consent was not knowingly given. Witherrite, 184 Wn. App. at 864. Also note that one of the appellate judges argued in Witherrite that Ferrier should apply to vehicle search requests.]

It is clear from the trial court's findings that there were no intervening circumstances here that severed the causal connection between Mayfield's unlawful seizure and the discovery of the money and methamphetamine used against him at trial. Without such intervening circumstances, our state attenuation doctrine cannot apply. Therefore, the evidence must be suppressed.

[Case citations, footnotes omitted]

Justice Charles Johnson writes a concurring opinion in which he states that he would have preferred that the Court interpret article I, section 7 as totally precluding any theory of an Attenuation Exception to the Exclusionary Rule. No Justice signs on to Justice Johnson's concurrence.

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WASHINGTON STATE COURT OF APPEALS

SCOPE AND DURATION LIMITS ON DETAINING PASSENGER AFTER A TRAFFIC STOP: AFTER MAKING A LAWFUL TRAFFIC STOP AND ARRESTING THE DRIVER FOR DRIVING WHILE LICENSE SUSPENDED, OFFICERS WHO HAD OBTAINED CONSENT FROM THE DRIVER TO SEARCH THE CAR ACTED REASONABLY: (1) IN CHECKING IDENTITY OF PASSENGER TO SEE IF SHE WAS QUALIFIED TO DRIVE THE VEHICLE; AND (2) IN REQUESTING CONSENT FROM THE PASSENGER TO SEARCH HER PURSE THAT SHE HAD LEFT INSIDE CAR WHEN SHE GOT OUT OF THE CAR TO ALLOW CAR SEARCH

State v. Lee, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, February 25, 2019)

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

On July 7, 2015, Michael Peterman was driving a car, and Lee was the front seat passenger. [A detective] initiated a traffic stop for two traffic infractions. [The detective]

asked Peterman for his identification, learned his license was suspended, and arrested him for first degree driving while license suspended or revoked. Peterman consented to a search of the car.

[Detective A] told Lee [the front seat passenger] to step out to facilitate his search of the car. She left her purse inside the car. [Detective A] ran Lee's identification information to determine if she had a driver's license so she could drive the car if it was not impounded. He learned Lee had a valid driver's license and a conviction for possession of a controlled substance. Lee began to pace back and forth near the car. At some point, [Detective B] directed Lee to sit on a nearby curb. During a conversation, Lee told [Detective A] the purse in the car was hers. [Detective A] asked Lee for permission to search her purse, telling her that he was asking "due to her prior drug conviction." He also gave Lee warnings pursuant to [State v. Ferrier, 136 Wn.2d 103 (1998)] that she was not obligated to consent and that she could revoke consent or limit the scope of the search at any time. Lee consented to the search.

[Court's footnote: *Both detectives testified that [Detective A] provided* Ferrier *warnings, and that Lee never revoked her consent or asked the officer to stop or to limit the scope of the search*.]

When [Detective A] asked Lee if there was anything in her purse he should be concerned about, she said there was some heroin inside. Detectives found heroin and methamphetamine in her purse, advised Lee of her Miranda rights, and arrested her for possession of a controlled substance with intent to manufacture or deliver.

Lee moved to suppress the evidence obtained from the search of her purse. Lee testified she did not consent to the search and that a detective told her "he didn't care if there was a little bit of dope in my bag and he just searched the car and searched my stuff." Lee also testified she "probably" had been using heroin that day.

[Detective A] testified he did not suspect Lee of a crime when he requested her consent to search her purse. He and [Detective B] confirmed that [Detective A] first obtained Lee's consent to search the purse, gave Ferrier warnings, and then Lee disclosed there were narcotics in the purse. Neither detective recalled telling Lee she was free to leave during the stop. Dispatch time log records suggest the traffic stop commenced at 7:23 p.m. and [Detective A] conducted his search at 7:41 p.m.

The trial court denied Lee's motion to suppress the results of the search of her purse. The court found "the testimony of the [detectives] involved [was] more credible than the defendant's testimony." The court also noted the detectives inquired about Lee's identity "to determine if she was a licensed driver so that the vehicle could be released to her as an alternative to impoundment." The trial court determined that all of Lee's statements were voluntary and that none were coerced. The court concluded that Lee validly consented to a search of her purse.

At the bench trial on stipulated facts, the judge found Lee guilty of possession of a controlled substance with intent to deliver.

[Some footnotes omitted; paragraphing revised for ease of reading]

ISSUE AND RULING: Officers stopped and arrested Michael Peterson for driving while license suspended. Peterson consented to a search of the car. Ms. Lee was a front-seat passenger in the car when it was stopped. She left her purse in the car when an officer directed her to get out of the car to facilitate the search of the vehicle. An officer asked Ms. Lee for identification information and for consent to search the purse.

Did the officer exceed the duration and scope-of-investigation limits on Terry seizures when, after arresting the driver, the officer asked the passenger, Ms. Lee, for identification information and for consent to search her purse? (ANSWER BY COURT OF APPEALS: No, both requests were reasonable under the totality of the circumstances following the arrest of the driver and the driver's consent to search the car)

Result: Affirmance of Snohomish County Superior Court conviction of Carmen Rose Lee for possession of controlled substances with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> When police conduct a traffic stop, "it is now well established that '[f]or the duration of a traffic stop. . . a police officer effectively seizes everyone in the vehicle.'" If the traffic stop is valid, then seizure of the driver and passengers is also valid. A passenger's seizure "ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave."
>
> At oral argument, Lee asserted that article I, section 7 of the Washington Constitution controls. She contends the portions of [the U.S. Supreme Court decision in Arizona v. Johnson, 555 U.S. 323, 333 (2009) and Rodriguez v. United States, 135 S.Ct. 1609 (2015)] regarding Fourth Amendment analysis of unrelated questions during a traffic stop do not apply here. Accepting Lee's premise without deciding it, the key question then becomes what standard applies under article!, section 7 of the Washington Constitution to analyze the impact of an officer's question unrelated to the justification for the traffic stop. We are guided by a long line of well accepted Washington Supreme Court decisions.
>
> The Fourth Amendment and article 1, section 7 both recognize an investigative stop exception to the warrant requirement as set forth in Terry v. Ohio. The rationale of Terry applies by analogy to traffic stops.
>
> At oral argument, Lee acknowledged the Terry standards for scope and duration of a stop apply and are the same when analyzed under either the Fourth Amendment or article 1, section . Lee's concession is consistent with our Supreme Court's recognition in [State v. Z.U.E., 183 Wn.2d 610, 617 (2015)] that "[i]n a challenge to the validity of a Terry stop, article I, section 7 generally tracks the Fourth Amendment analysis."
>
> The standards for a Terry stop, including the appropriate scope of such a stop, are well established in Washington. We analyze such stops on a case-by-case basis. "[C]ourts must review an officer's actions under the totality of the circumstances to determine if a [Terry stop] seizure is made with the authority of law and is of reasonable scope and duration."

"Similar to the analysis for determining the initial validity of the stop, the proper scope of a Terry stop depends on 'the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained.'" "A lawful Terry stop is limited in scope and duration to fulfilling the investigative purpose of the stop." Once that purpose is fulfilled, the stop must end. An officer may lawfully extend the stop's scope and duration based on information obtained by officers during the traffic stop. "There is no rigid time limitation on Terry stops."

Washington courts also recognize that officers may conduct routine law enforcement procedures during traffic stops "as long as they do not unreasonably extend the initial valid stop." For example, officers may request a vehicle's occupants "to step out of and away from their vehicles, and to perform other limited movements." Officers may require passengers to get out of a vehicle to facilitate a search of the vehicle. Apart from general officer safety concerns, we note the presence of a passenger in a car during a search of the car would frustrate the efficiency and effectiveness of the search and would place both the passenger and the officer in an awkward position. Officers are obligated to consider reasonable alternatives to impoundment such as determining whether the driver's spouse or friends are available to move the vehicle. [State v. Tyler, 177 Wn.2d 690, 698, 302 P.3d 165 (2013)]. And while an officer in a traffic stop may not request identification from a passenger for investigatory purposes absent an independent reason to justify the request, an officer may check the passenger's identification to determine if the passenger has a valid driver's license when considering whether to allow the passenger to drive the car from the scene. [State v. Larson, 93 Wn.2d 638, 642-45 (1980); State v. Rankin 151 Wn.2d 689, 699 (2004); State v. Mennegar, 114 Wn.2d 304, 309 (1990)].

Because Lee was lawfully seized at the beginning of the traffic stop and remained reasonably seized when she was asked to consent to a search of the purse she left in the car, our inquiry is whether police exceeded the reasonable scope and duration of the traffic stop by asking her consent to search her purse while mentioning her prior drug conviction.

The totality of the circumstances here includes a valid traffic stop for a cracked windshield and an inoperative brake light, in violation of RCW 46.37.070 and RCW 46.37.410. Detectives lawfully checked Peterson's identification and lawfully arrested him once they determined he was driving with a suspended license. Peterson consented to a search of the car, and a detective lawfully requested that Lee exit while he searched the car.

The detectives legitimately checked Lee's identification to determine whether she was a licensed driver and could drive the car from the scene following Peterson's arrest. And the search of the purse occurred roughly 18 minutes after the traffic stop began.

Lee provides no authority, and we find none, indicating that merely asking a lawfully seized person if they consent to a search of a container voluntarily left in a car somehow renders their seizure unlawful or exceeds the reasonable scope and duration of a traffic stop. The purpose of this traffic stop reasonably expanded to include the arrest of the driver and consensual search of the car. Under these changing circumstances, it was not unreasonable for the detective to

ask Lee if she consented to a search of the purse she left in the car after she knew the detectives would be searching the car.

The mention of Lee's prior drug conviction must also be considered as part of the totality of the circumstances. Here, there was a single mention of the conviction in passing. There was no physical intrusion upon Lee. And the time required to say the words "prior drug conviction" was inconsequential.

The word "reasonable" implies a measure of flexibility and practicality. If the reasonable scope and duration standard could be exceeded by the single reference to a prior conviction in this case, it would prove too rigid and brittle a standard for the realities of police work. We conclude that the police did not exceed the reasonable scope or duration of the expanded traffic stop under the totality of the circumstances. Therefore, Lee fails to establish that under article I, section 7, her voluntary consent to search her purse was vitiated by police conduct.

[Court's Footnote: *Lee's premise is that article!, section 7 governs and that the portions of* [the U.S. Supreme Court decisiosn in] *Johnson and Rodriguez regarding unrelated questions during traffic stops have no application here. Therefore, we need not engage in any alternative Fourth Amendment analysis under those cases. But we note that there is Washington authority suggesting that a single question unrelated to the traffic stop does not measurably extend the duration of the stop or prolong the stop beyond the time reasonably required to complete the stop's mission for purposes of the Fourth Amendment. See State v. Pettit, 160 Wn. App. 716, 720 (2011) (asking a question unrelated to the justification for traffic stop "was brief and did not significantly extend the duration beyond that of a typical traffic stop"); State v. Shuffelen, 150 Wn. App. 244, 257 (2009) ("Nor was this question violative of Ms. Shuffelen's rights simply because it was unrelated to [the officer's] justification for the initial traffic stop."*).]

[LEGAL UPDATE EDITOR'S COMMENT: I am not convinced that the Washington Supreme Court would, even where unsupported questioning is very brief, allow expanding the scope of investigation without independent articulable suspicion. Ideally, officers who want to explore additional topics will be able point to a valid reason for expanding the scope of inquiry beyond the standard inquiries related to the traffic stop. In this case, the expansion was reasonable, as the Lee Court notes above in the text that I have bolded, including in the following explanation by the Court:

"The purpose of this traffic stop reasonably expanded to include the arrest of the driver and consensual search of the car. Under these changing circumstances, it was not unreasonable for the detective to ask Lee if she consented to a search of the purse she left in the car after she knew the detectives would be searching the car."]

The trial court mentioned officer safety concerns because the purse could have concealed a weapon. Although officer safety during traffic stops is always a serious concern, we do not rely on the abstract potential for a weapon in a purse. The only testimony was that Lee had not demonstrated any risk of being armed or dangerous. Any concerns that she might obtain possession of her purse when the traffic stop ended and that her purse was big enough to contain a weapon are abstract. If that is the standard, then virtually every traffic stop with a modestly sized container inside a car would justify a search of the container, no matter how benign the circumstances. The

State cites no authority supporting such a sweeping view of officer safety as a rationale for a warrantless search."

Lee also suggests the trial court relied on the theory that police conducted an inventory search of the car. We do not read the record to reflect that the police conducted an inventory search, or that the trial court relied on an inventory search exception.

As discussed at oral argument, in [State v. O'Day, 91 Wn. App. 244 (1998), Division Three of this court found that a passenger was illegally seized when an officer ordered her out of the car, kept her purse out of reach, asked if she had drugs or weapons, and asked if she would consent to a search. The court held the illegal investigative detention vitiated the defendant's consent. O'Day is distinguishable because of factual differences and is inapposite because it is now clear that a passenger in a traffic stop is necessarily seized when the stop begins, and ordinarily, that seizure continues and remains reasonable for the duration of the stop.

We conclude Lee's voluntary consent to search her purse was not vitiated by police conduct at the traffic stop. Specifically, under the totality of the circumstances, the police did not exceed the reasonable scope and duration of the traffic stop.

[Some footnotes omitted; some case citations omitted, other citations revised for style; bolding added; paragraphing revised for ease of reading]

LEGAL UPDATE EDITOR'S RESEARCH NOTE: Note the January 2019 Legal Update entry (beginning at page 13) on the Ninth Circuit decision in U.S. v. Landeros, ___ F.3d ___ , 2018 WL ___ (9th Cir., January 11, 2019) (holding that law enforcement officers violated the Fourth Amendment when (1) they extended a lawfully initiated vehicle stop merely because a passenger refused to identify himself, and (2) at that point, the officers lacked reasonable suspicion that he had committed an offense.)

BASED ON WASHINGTON SUPREME COURT'S 2016 BAIRD DECISION, DIVISION THREE OF THE COURT OF APPEALS RULES 2-1 THAT BREATH SAMPLE WAS CONSTITUTIONALLY OBTAINED INCIDENT TO THE ARREST OF AN IMPAIRED DRIVER

State v. Nelson, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. III, February 14, 2019)

Thomas Nelson was arrested for DUI. After receiving implied consent warnings, he agreed to submit to breath testing. He was charged with DUI. He moved to suppress the results of the breath testing on grounds that the implied consent warnings were coercive. The district court denied his motion, and a jury convicted him of DUI and first degree negligent driving. The superior court rejected his appeal, and the Court of Appeals accepted review of the case.

By a 2-1 vote, Division Three of the Court of Appeals has now rejected Nelson's challenge, concluding that the case is controlled by the Washington State Supreme Court decision in State v. Baird, 187 Wn.2d 201 (December 22, 2016).

Baird was two cases consolidated for appeal purposes. In Baird, a 6-3 majority of the Washington Supreme Court, reversed on direct review two King County District Court suppression orders in DUI prosecutions. In the DUI case involving Dominic Baird, the District Court had suppressed a breath alcohol test on the theory that implied consent warnings

essentially made his compliance with a breath alcohol test coerced in violation of the constitution. In the DUI case involving Collette Adams, the District Court ruled that her refusal of a breath test could not be admitted because she was exercising her constitutional right in refusing a breath test.

The 6-member Supreme Court majority broke into two factions, with four Justices joining a lead opinion, and two other Justices joining a concurring opinion that takes a less complicated route in its analysis than did the lead opinion. Neither of the opinions was written at the level of detailed point-by-point analysis that one might hope for on such an important issue.

[Legal Update Editor's Note: I commented at the in the Legal Update at the time of the Baird decision that differences in what appeared to be the legal analysis in the lead and concurring opinions in Baird was not significant in terms of how future cases might be decided. So the Legal Update entry on Baird in 2016 did not attempt to explore any differences between the analysis in the lead opinion and the analysis in the concurring opinion. I believe that I was correct in that 2016 assessment.]

The thrust of the core analysis of the lead and concurring opinions in Baird was that, under both the Washington constitution's article I, section 7 and the federal constitution's Fourth Amendment:

(1) a breath alcohol test is a search;

(2) neither breath nor blood alcohol searching/testing is per se justified as exigent despite the fact that alcohol dissipates fairly rapidly in the human bloodstream (see the U.S. Supreme Court decision in Missouri v. McNeely, 133 S.Ct. 1552 (2013) holding that there is no per se exigency justification for blood alcohol testing);

(3) the breath alcohol search, unlike a blood alcohol search, is such a minimal intrusion that it is always per se justified as a search incident to a lawful arrest for DUI (see the U.S. Supreme Court decision in Birchfield v. North Dakota, 136 S.Ct. 2160 (June 23, 2016)); and

(4) there is no constitutional right to refuse a lawful search incident to arrest, and, while there is a statutory right under Washington's implied consent statute to refuse a breath test, this refusal has consequences, including loss of license and admissibility at DUI trial of the refusal.

In Baird, a dissenting opinion by Justice Gordon McCloud was joined by Justices Stephens and Fairhurst. The dissent argued that the Washington Supreme Court had misinterpreted the Washington constitution, article I, section 7, and that the Washington constitution provides greater privacy protection against breath alcohol testing than was held by the U.S. Supreme Court in Birchfield v. North Dakota to be provided under the Fourth Amendment.

As noted above, in Nelson, the two majority judges of Division Three conclude in an opinion written by Judge Korsmo that the Baird decision controls and, as Washington Supreme Court precedent, precludes defendant Nelson's "independent grounds" argument under the Washington constitution. The dissenting judge in Nelson argues that the "independent grounds" issue was not actually addressed in the lead opinion in Baird, and that under the Washington constitution, "[a]bsent evidence preservation concerns, a warrant should be required breath and blood searches for alcohol."

Result: Affirmance of Grant County Superior Court conviction of Thomas J. Nelson for driving under the influence.

LEGAL UPDATE EDITOR'S NOTE:

Judge Korsmo's opinion for the Nelson majority notes as follows the troubling implications of the independent grounds argument by defendant Nelson and by the dissenting judge in Nelson:

> **We are not unmindful of the consequences of accepting Mr. Nelson's argument for rejecting application of the search incident to arrest doctrine in this context. Requiring a warrant for each breath test would render the current implied consent warnings of RCW 46.20.308(2) inaccurate, leading to the suppression of test results in all pending cases. E.g., State v. Whitman County Dist. Court, 105 Wn.2d 278, 286-87 (1986). Very little of the implied consent law would remain valid – and even less of it would be useful – and it is difficult to conceive of how a revised law could be crafted if there is indeed a state constitutional right to refuse the search. It also is questionable how well a search warrant could compel a valid breath sample if there were no valid consequences for refusing to comply. As a practical matter, blood would probably be drawn in every instance where a search warrant was obtained. These concerns do not factor into our analysis, but they do provide a further caution against a radical reversal of 50 years of precedent and practice.**

RESTITUTION ORDER THAT IS BASED ON POSSESSING STOLEN PROPERTY CONVICTION MUST BE TIED TO PROOF OF A CONNECTION BETWEEN THE DEFENDANT'S CONDUCT AND DAMAGE TO PROPERTY OR OTHER LOSSES

In State v. Romish, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. III, February 7, 2019), the Court's Majority Opinion summarizes the ruling in the Opinion's first three paragraphs as follows:

> Restitution is a penalty applicable to the crime of possession of stolen property. But because possession of stolen property is different from the underlying crime of theft, the scope of permissible restitution for mere possession is generally more limited than it would be for theft. When it comes to a conviction for unlawful possession of stolen property, the State must prove a specific connection between the defendant's conduct and damage to property or other losses. The State is not relieved of its burden simply because the property possessed by the defendant was stolen recently.
>
> David Romish pleaded guilty to possessing recently-stolen property. The State sought restitution for all losses associated with the property, including physical damage. There was no specific evidence of when Mr. Romish came into possession of the stolen property or when the damage occurred. Nevertheless, the State reasoned that one could infer Mr. Romish caused the damage based on the short time between the theft and when the stolen property was discovered in Mr. Romish's possession.
>
> We reject the State's retrospective theory of causation. Without specific evidence that Mr. Romish's offense preceded the victim's losses, the trial court lacked authority to impose restitution for all of the victim's losses. The order of restitution is therefore reversed

Judge Korsmo dissents in an Opinion in which he summarizes his views as follows:

> I believe it was within the trial judge's fact-finding authority to infer that Mr. Romish was responsible for the need to repaint the Bobcat and the other expenses associated with the defendant's possession of it. Most certainly, the restitution order was justified under the court's authority to double the victim's proven losses. Accordingly, I would affirm.

Result: Reversal in part of Spokane County Superior Court restitution order against David Michael Romish.

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BRIEF NOTES REGARDING FEBRUARY 2019 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 February 2019, seven 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. In the Matter of the Personal Restraint Petition of Kevin Wayne Franklin: On February 5, 2019, Division Three of the COA rules for the State in upholding the Pierce County Superior Court conviction of Kevin Wayne Franklin for *drive-by shooting, first degree assault, and first degree unlawful possession of a firearm*. The Court of Appeals declines to address the defendant's argument, among several other arguments, that a **search warrant for his phone was overbroad (the State did not concede this argument, and the Court does not address the argument**). The Court concludes that even assuming for argument's sake that he is correct in that regard, the **defendant cannot show that the evidence obtained under the warrant prejudiced him**.

2. State v. Timothy Carsell Ketchum: On February 6, 2019, Division Two of the COA rules for the State in its appeal from a Clallam County Superior Court suppression ruling in a prosecution for *methamphetamine possession*. The trial court ruled that evidence discovered in a vehicle inventory search was inadmissible on grounds that a WSP trooper unlawfully impounded Ketchum's vehicle that was located on the shoulder of State Route 101. The trial judge so ruled because the trooper did not expressly give Ketchum, a suspended driver with a suspended-driver arrest warrant, an opportunity to have a friend or other person come and move the vehicle. The Court of Appeals rules that the **impound was lawful**, and the Court opines that a

different legal standard applies for (1) impounding vehicles of suspended drivers (as in this case) per statutory authority vs. (2) impounding vehicles based on a community caretaking rationale. The Court of Appeals explains its view as follows:

> Here, the trial court found, "The trooper told Ketchum he had to impound his vehicle because he was driving with license suspended and had warrants for driving with license suspended." This finding specifies that [the trooper] was impounding according to statutory authority and not based on the community caretaking function. The facts here align with the statutory authority exercised in [State v. Peterson, 923 Wn. App. 899, 902-03 (1998)]. As a result, [the trooper] was not obligated to meet the additional requirements of inquiring about or contacting a spouse or friend to remove the vehicle because the community caretaking function was not implicated. Rather, here, the State needed to prove only that [the trooper] considered alternatives to impoundment and made the decision to impound after determining none of the alternatives were reasonable.
>
> The trial court noted that "[t]he trooper testified he had no reasonable alternatives to impounding the vehicle, since it would have been unsafe to leave the vehicle where it was due to hazardous road conditions and it would have been unsafe for the officers to attempt to move the vehicle." Put another way, the trial court found that [the trooper] considered two alternatives: (1) leaving the vehicle on the side of the road and (2) moving the vehicle with his fellow officer. After considering the road and weather conditions and the time of day, [the trooper] concluded leaving the vehicle on the side of the state highway was unreasonable. Further, because only two officers were available, it was unreasonable for the officers to move the vehicle themselves. Doing so would leave a law enforcement vehicle unattended and it was not feasible to fit two officers plus Ketchum in one law enforcement vehicle. After considering the options, [the trooper] concluded no reasonable alternatives to impoundment existed.
>
> The trial court concluded that "[h]ere the record does not establish that the trooper considered alternatives to impoundment, since he did not ask Mr. Ketchum about the availability of anyone he might know who could move the vehicle." Although a reasonable alternative could have also included asking Ketchum for the name of someone in the vicinity who could move the vehicle, see State v. Hardman, 17 Wn. App. 910, 914 (1977), the State was not required to do so here. An officer need not consider all possible alternatives to impoundment, and [where the impoundment is based on statutory authority] we assess reasona bleness by the facts of each case. [State v. Tyler, 177 Wn.2d 690 (2013)].
>
> Here, the trial court misapplied the law by using the incorrect legal standard. The trial court concluded that contacting someone to move the vehicle is a required reasonable alternative for a statutorily authorized impoundment. This conclusion impermissibly applies a community custody standard to statutory authority to impound, a separate category of impoundment. Moreover, the correct test – that the officer need only consider reasonable alternatives before impounding the vehicle – is met. We hold that the trial court's conclusions regarding reasonable alternatives in this case erroneously apply the law.

LEGAL UPDATE EDITOR'S COMMENT: I am not sure whether the Court of Appeals is correct in its legal distinction between community caretaking and statutory authority for justifying impound, in terms of whether an officer should give the operator an

opportunity to request that a friend or other agent move the vehicle when that option is a reasonable one. As always, I urge that law enforcement actors should check with their legal advisors and/or local prosecutors on this and other legal issues addressed in the Legal Update.

3. State v. Miguel Trujeque-Magana (aka Jorge Ricardo Gongora-Chi) and Luciano Molina Rios: On February 6, 2019, Division Two of the Court of Appeals rules for the State in rejecting the appeals of the two defendants from their Clark County Superior Court convictions for *multiple drug and firearms offenses*. Among other rulings, the Court of Appeals holds that the totality of the circumstances, including the expertise of the surveilling officers, officers had **reasonable suspicion to stop the defendants** based on suspicion that the officers had observed, over the course of extended surveillance, at least an attempt to make a purchase of illegal drugs. The Court of Appeals also rules that a consent to **a purse search was voluntary** even though the officer requesting the search did not provide full Ferrier warnings.

4. State v. Shane Pedersen: On February 6, 2019, Division Two of the COA rules against the State in defendant's appeal, and the Court reverses his Lewis County Superior Court convictions for *possession of methamphetamine* and for *violation of a DV court order*. The Court of Appeals rules that the State failed to establish the reliable updating of the WACIC database where the database was the source of the **"reasonable suspicion" theory of the State in support of a vehicle stop that led to Pedersen's arrest**. The Court of Appeals relies on the precedent of State v. Mance, 82 Wn. App. 539, 542 (1996).

5. State v. Jean Paul Whitford: On February 7, 2019, Division Three of the COA rejects defendant's appeal from his Spokane County Superior Court conviction for *DU*I. The COA rules that **a law enforcement officer complied with the Court Rule, CrR 2.3(d), where, although the officer did not give a copy of a blood-draw search warrant to Whitford before executing the search warrant, the officer satisfied the Court Rule requirement by showing a copy of the search warrant to Whitford, reading the key provision of the warrant authorization to Whitford, and leaving a copy of the warrant with jail staff to be delivered to Whitford upon his release from jail in the short term.** The Court of Appeals rules in the alternative that Whitford's Court Rule argument fails because he cannot show that the officer acted in deliberate violation of the Court Rule, nor can Whitford show that he was prejudiced by any assumed violation of the Court Rule.

6. State v. Tammie Ann Elliott: On February 14, 2019, Division Three of the COA rejects the appeal of defendant from her Asotin County Superior Court conviction for *second degree theft* and *money laundering*. She was an intermediary in an advance-fee scam (aka "Nigerian scam") in which defendant cashed victim money orders and then forwarded the funds to the scam's leader. **The Court of Appeals rules that she is correct that law enforcement officers should not have been allowed by the trial court to testify to their beliefs that defendant did not act unwittingly in the scam. But the Court of Appeals rules that she was not prejudiced by the trial court's admission of this testimony because other, untainted, evidence in the case established her guilt beyond a reasonable doubt.**

7. State v. Viater Twiringiyimana: On February 21, 2019, Division Three of the COA rejects defendant's appeal from his Spokane County Superior Court conviction for one count of *first degree child molestation*. The Court of Appeals rules (on one of several issues on appeal) that that the trial court did not err or abuse its discretion in determining that **out-of-court statements of a seven-year-old victim to her mother and to a law enforcement forensic interviewer**

were reliable and admissible as child hearsay under the multi-factor test of State v. Ryan, 103 Wn.2d 165 (1984) and subsequent appellate court decisions.

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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 Circu it 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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