LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Washington Law Enforcement Officers: Thank you for your service, protection and sacrifice

JUNE 2020

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UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT SEX DISCRIMINATION: AN EMPLOYER WHO FIRES AN INDIVIDUAL MERELY FOR BEING GAY OR TRANSGENDER COMMITS SEX DISCRIMINATION IN VIOLATION OF TITLE VII OF THE FEDERAL CIVIL RIGHTS ACT OF 1964

In Bostock v. Clayton County, GA, ___ S.Ct. ___ , 2020 WL ___ (June 15, 2020), the U.S. Supreme Court rules in a 6-3 vote that dismissing an employee based in any part on the employee merely being gay or transgender violates Title VII of the federal Civil Rights law against sex discrimination. The decision resolves that issue in three consolidated federal court cases. The Eleventh Circuit held in the Bostock case that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of a gay plaintiff and a transgender plaintiff, respectively, in those cases to proceed.

A staff summary of the Majority Opinion notes that three U.S. Supreme Court precedents provide support for the Bostock decision. In Phillips *v.* Martin Marietta Corp., 400 U. S. 542 (1971) a company was held to have violated Title VII by refusing to hire women with young children, despite the fact that the discrimination also depended on being a parent of young children and the fact that the company favored hiring women over men. In Los Angeles Dept. of Water and Power *v.* Manhart, 435 U. S. 702 (1978) an employer's policy of requiring women to make larger pension fund contributions than men because women tend to live longer was held to violate Title VII, notwithstanding the policy's evenhandedness between men and women as groups. And in Oncale *v.* Sundowner Offshore Services, Inc., 523 U. S. 75 (1998), a male plaintiff was held to have alleged a triable Title VII claim for sexual harassment by co-workers who were members of the same sex.

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WASHINGTON STATE COURT OF APPEALS

TERRY AUTHORITY AND COMMUNITY CARETAKING EXCEPTION TO WARRANT REQUIREMENT HELD NOT TO JUSTIFY REMOVING A SPOON FROM A SLEEPING MAN'S COAT POCKET, RATHER THAN PATTING THE POCKET

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

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

> On December 11, 2017, at 8:27 a.m., [a law enforcement officer] responded to a 911 call from a Starbucks employee, requesting assistance with the removal of a sleeping person inside the store. When [the officer] arrived, he saw Martin sleeping in a chair. [The officer] gestured to the Starbucks employee and received a responsive gesture from the employee that Martin was the person identified in the 911 call.
>
> When [the officer] approached Martin, he noticed Martin was wearing multiple jackets that had pockets. [The officer] attempted to wake Martin, first by raising his voice and then by squeezing and shaking his left shoulder. Martin remained unresponsive. Trying not to startle Martin, [the officer] then performed a "light sternum rub," using his knuckles to rub Martin's sternum. While [the officer] attempted to wake Martin, he would briefly

gain consciousness, but quickly lose consciousness before [the officer] could communicate with him.

[The officer] began to suspect that Martin was under the influence of drugs. [The officer] determined that he would need to use a "hard sternum rub," but feared Martin might react violently because hard sternum rubs can be painful and startling for a person sleeping. During this encounter, [the officer] noted that there were Starbucks customers sitting within four feet of [the officer] and Martin and there were between seven and eight people, not including staff, in Starbucks.

Before [the officer] proceeded with the hard sternum rub, [the officer] noticed the end of a metal utensil sticking out of Martin's pocket. [The officer] worried that the metal utensil could be a knife or another utensil sharpened into a weapon. [The officer] also expressed concerns about sharp needles. Without feeling the outside of the pocket, [the officer] removed the utensil. The utensil was a cook spoon, had burn marks on the bottom, and a dark brown residue on the inside. At that point, [the officer] determined that he had probable cause to arrest Martin for possession of drug paraphernalia and continued searching Martin. While searching Martin, [the officer] found methamphetamine, heroin, cocaine, and other drug paraphernalia.

After removing the drugs from Martin, [the officer] conducted a hard sternum rub. Once Martin woke up, [the officer] told him that he was under arrest, proceeded to handcuff him, and brought him to an aid car. Because Martin did not wake up easily, he was transported to the hospital. [The officer] called the aid car sometime prior to waking up Martin.

Martin moved to suppress all evidence collected as a result of the unlawful detention and search. The court heard testimony from [the officer] and denied Martin's motion to suppress concluding, "[c]ommunity caretaking and Terry authorized [the officer] to take necessary precautions to protect himself and others from a potentially dangerous situation. [The officer] was authorized to pat the Defendant down for potential weapons."

Martin proceeded to a stipulated bench trial on the charge of unlawful possession of a controlled substance. The court found Martin guilty. The court sentenced Martin to 30 days of confinement.

ISSUES AND RULINGS: (1) Did the officer's removal of the spoon from Martin's coat pocket fail to qualify as a protective frisk under Terry v. Ohio for three separate reasons: (A) There was no reasonable suspicion that a crime (i.e., trespass) had been committed, (B) There was not a reasonable safety concern under the circumstances, and (C) The search exceeded the lawful scope of a frisk? (ANSWER BY COURT OF APPEALS: Yes, for all three reasons, the removal of the spoon from Martin's pocket was not justified under Terry v. Ohio)

(2) Was removal of the spoon from Martin's coat pocket justified under the community caretaking exception to the search warrant requirement? (ANSWER BY COURT OF APPEALS: No, because the officer did not subjectively believe that an emergency existed, nor would a reasonable person have believed that an emergency existed; also, removal of the spoon was not necessary even if the community caretaking exception were applicable to the facts of this case)

Result: Reversal of Snohomish County Superior Court conviction of Kristopher Charles Martin for possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals Opinion; Subheadings added)

1. The officer's removing of the spoon from Martin's coat cannot be justified as a Terry frisk

> We accept the State's concession that the search was not valid as a Terry stop. Terry stops are an exception to the warrant requirement. In a Terry stop, "[o]fficers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct." State v. Day, 161 Wn.2d 889, 895 (2007). "While Terry does not authorize a search for evidence of a crime, officers are allowed to make a brief, nonintrusive search for weapons if, after a lawful Terry stop, 'a reasonable safety concern exists to justify the protective frisk for weapons' so long as the search goes no further than necessary for protective purposes." Day. In making this determination, "we consider the totality of the circumstances, including the officer's subjective belief." Day.
>
> A protective frisk does not violate a defendant's rights when (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify a protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purpose. State v. Collins, 121 Wn.2d 168, 173 (1993). . . . "A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" Collins. Further, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety or that of others was in danger." Collins.
>
> This search fails to meet the requirements under Terry. Starbucks is open to the public. The record does not support the trial court's finding that [the officer] was conducting a criminal investigation for trespass because there is no evidence in the record that Starbucks had trespassed Martin from the premises.
>
> Also absent from the record is evidence supporting [the officer]'s claim that Martin sleeping created a reasonable safety concern. [The officer] performed a hard sternum rub with several people seated in close proximity to Martin. While [the officer] stated that, based on his training and experience as an officer, he feared Martin would react violently once awake, [the officer]'s actions do not support his attestation. [The officer] did not ask patrons sitting less than three feet from Martin to move away before using a hard sternum rub to wake Martin.
>
> Finally, even if [the officer] were conducting a criminal investigation for trespass, the search exceeded the scope of a frisk under Terry. An officer may "conduct a limited pat-down of the outer clothing of a person in an attempt to discover weapons that could cause harm." State v. Russell, 180 Wn.2d 860, 867 (2014). "The officer may not slide, squeeze or in any other manner manipulate the object to ascertain its incriminating nature. Such manipulation of the object will exceed the scope of a Terry frisk." State v. Garvin, 166 Wn.2d 242, 251 (2009). [The officer] did not pat down the outside of Martin's pocket where the utensil handle was protruding. Instead, [the officer] removed the utensil because he thought it could have been a knife or a metal utensil that had been sharpened into a weapon. Had [the officer] felt the outside of Martin's pocket, he

would have learned it was a spoon and not a sharp object. Removing the spoon without a pat down exceeded the scope of a Terry frisk.

2. The officer's removing of the spoon from Martin's pocket cannot be justified as emergency aid community caretaking

Recently, the Washington Supreme Court clarified the appropriate factors for determining whether an officer has exercised his or her emergency aid community caretaking function. [State v. Boisselle, 194 Wn.2d 1, 10 (2019)]. "[I]n order for the community caretaking exception to apply, a court must first be satisfied that the officer's actions were 'totally divorced' from the detection and investigation of criminal activity." Boisselle. The threshold issue for the court is "whether the community caretaking exception was used as a pretext for a criminal investigation before applying the community caretaking exception test." Boisselle.

Once the court is satisfied that officers did not use the exception as pretext for criminal investigation, the court must next determine whether the warrantless search was reasonable. Boisselle. "When a warrantless search falls within an officer's general community caretaking function, such as the performance of a routine check on health and safety, courts must next determine whether the search was reasonable." Boisselle. "Where . . . an encounter involves a routine check on health and safety, its reasonableness depends upon a balancing of a citizen's privacy interests in freedom from police intrusion against the public's interest in having police perform a 'community caretaking function.'" Boisselle.

"An officer's emergency aid function, however arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm." Boisselle. "Compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion." Boisselle. "Accordingly, courts apply additional factors to determine whether a warrantless search falls within the emergency aid function of the community caretaking exception." Boisselle.

In Boisselle, the court clarified that the three-part emergency aid test announced in State v. Kinzy, 141 Wn.2d 373, 386-87 (2000) is the applicable test, but amended the three-part test "to make clear that there must be a present emergency for the emergency aid function test to apply." Thus, the exception applies when "(1) the officer subjectively believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or to prevent serious injury, (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched." Boisselle. "If a warrantless search falls within the emergency aid function, a court resumes its analysis and weighs the public's interest against that of a citizen's." Boisselle.

In balancing Martin's privacy interests against the public's interest in having the police perform a community caretaking function, we conclude that removing the spoon from Martin's pocket was unreasonable. There is insufficient evidence in the record to find that [the officer] was conducting a routine check on health and safety or rendering emergency aid.

> [The officer] stated that he was dispatched to Starbucks "for an individual they wanted to leave, who was sleeping." Absent from the record is any evidence tending to show that [the officer] was dispatched to assist with an unresponsive customer or customer in need of emergency aid.
>
> [The officer] indicated that he could tell Martin was breathing and therefore, did not check his pulse. After [the officer] performed a light sternum rub, Martin opened his eyes, but fell back to sleep before [the officer] could communicate with Martin.
>
> [The officer] did not feel like he needed to perform lifesaving maneuvers. Other Starbucks customers sat a few feet away from Martin as he slept and [the officer] did not indicate that any customers or employees expressed concern that Martin was in danger of death or physical harm.
>
> Finally, [the officer] did not ask the other Starbucks customers to back away from the area where Martin slept before performing the hard sternum rub. [The officer] did not subjectively believe an emergency existed and a reasonable person in the same situation would not believe there was a need for assistance.
>
> Furthermore, even if the community caretaking exception applied to this search, a simple pat-down on the outside of Martin's coat pocket would have alleviated any concern that the metal utensil was a sharp object or weapon. . . . Removing the spoon violated Martin's right to be free from unreasonable searches and seizures.

[Some citations omitted, others revised for style; some paragraphing revised for readability; subheadings added by Legal Update editor]

EXIGENT CIRCUMSTANCES JUSTIFIED A WARRANTLESS BLOOD DRAW WHERE: (A) OFFICER TESTIFIED TO DAYTIME AVERAGE OF UP TO 45 MINUTES TO GET A SEARCH WARRANT ELECTRONICALLY; AND (B) DEFENDANT HAD CAUSED A HEAD-ON COLLISION, SMELLED OF ALCOHOL, ADMITTED TO THE OFFICER THAT SHE HAD BEEN DRINKING, SPOKE WITH A SLUR AND OVER-REPETITION, AND WAS SO BADLY INJURED THAT A PARAMEDIC TOLD THE OFFICER THAT IV FLUIDS WOULD BE ADMINISTERED PRIOR TO A TRIP TO THE HOSPITAL

State v. Rawley, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. II, on June 30, 2020, an unpublished March 23, 2020 Opinion was ordered published)

Facts: (Excerpted from Court of Appeals Opinion)

> At 2:55 PM, [a sheriff's deputy] responded to a two-car, head-on collision. Rawley had crossed the center line, causing her vehicle to collide with another vehicle. Rawley was trapped in her vehicle. As [the deputy] spoke to Rawley, he noted a strong smell of alcohol and that her speech was slurred and repetitive. Rawley admitted to drinking alcohol.
>
> During this time, paramedics were working to stabilize Rawley and get her out of the car. [The deputy] contacted one of the paramedics, who told him that they would be "transporting [Rawley], because obviously she's been involved in a very, very serious collision." The paramedic told [the deputy] that he "believed he was going to start an IV

> [intravenous fluids] on [Rawley], but he would know more once he got her in the back of the medic unit." [The deputy] was aware that if an IV is going to be administered, "generally there's concern about internal injuries."
>
> The paramedics freed Rawley from the vehicle and placed her in the ambulance. [The deputy] went to the ambulance and learned that IV fluids and medications were about to be administered to Rawley. [The deputy] did not ask the paramedics what IV fluids or medications they would be administering to Rawley. [The deputy] stated that it is possible that a different substance could affect the blood differently, but he is "not a medical expert."
>
> In [the deputy's] experience, the shortest time it had taken him to obtain a telephonic search warrant to draw blood was "[m]aybe 20 minutes." Also, the longest time it had taken him to obtain a telephonic search warrant to draw blood was "about 45 minutes to an hour." Furthermore, when requesting a warrant during the day "attorneys and judges tend to be busy, and sometimes they're available really quick. Sometimes they're not."

[LEGAL UPDATE EDITORIAL NOTE: In the analysis portion of the Court of Appeals Opinion, the Court states that the officer's testimony indicated that "a warrant request could take on average up to 45 minutes during the day."]

> [The deputy] felt exigent circumstances existed to draw Rawley's blood to check her blood alcohol content (BAC) before administering IV fluids. The paramedic drew Rawley's blood at 3:07 PM. IV fluids started at 3:23 PM. The ambulance left for the hospital at 3:23 PM. Rawley's BAC was .35 – over 4 times the legal limit under RCW 46.61.502(1)(a).
>
> The State charged Rawley with felony driving under the influence. Pretrial, Rawley made a CrR 3.6 motion to suppress the results of the blood draw. The trial court denied her motion, entering findings of fact and conclusions of law.
>
> The trial court found in finding of fact XV that, "[O]n average, it can take up to 45 minutes to obtain a telephonic blood draw warrant." The trial court then concluded in conclusions of law III and IV that, "[T]he warrantless blood draw was lawful under [the] exigent circumstances based on State v. Inman, 2 Wn. App. 2d 281, 409 P.3d 1138, review denied, 190 Wn.2d 1022 (2018)" and "no legal authority requires [the deputy] to inquire what IV fluids or medications paramedics would introduce in [Rawley]."
>
> Following a stipulated facts bench trial, the trial court found Rawley guilty of felony driving under the influence. . . .

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

ISSUE AND RULING: Did exigent circumstances justify a warrantless blood draw where (A) the officer testified that a daytime search warrant application could take on average up to 45 minutes; and (B) defendant had crossed the center-line and caused a head-on collision, smelled of alcohol, admitted to the officer that she had been drinking, spoke with a slur and over-repetition, and was so badly injured that a paramedic told the officer that IV fluids would be administered followed by a trip to the hospital? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Kitsap County Superior Court conviction of Rachel C. Rawley for felony DUI. Note also that in footnote 2, the Court of Appeals notes that Rawley did not appeal from convictions for the following additional crimes: second degree driving while license suspended or revoked; operation of a motor vehicle without ignition interlock device, and reckless driving.

ANALYSIS: (Excerpted from Court of Appeals Opinion)

> A court examines the totality of the circumstances to determine whether they exist. Missouri v. McNeely, 569 U.S. 141, 148-49 (2013). Exigent circumstances exist where "the delay necessary to obtain a warrant is not practical because the delay would permit the destruction of evidence." State v. Baird, 187 Wn.2d 210, 218 (2016).
>
> A blood test is a search and seizure. . . . But the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, for example, when delay results from the warrant application process. . . .
>
> . . . .
>
> In State v. Inman, Inman crashed his motorcycle on a rural road, injuring him and his passenger. "Inman had facial trauma, including bleeding and abrasions on the face, and a deformed helmet."
>
> A paramedic administered emergency treatment. A responding officer spoke with Inman and smelled intoxicants on him. Inman admitted that he had been drinking before driving his motorcycle. Responders at the scene conducted a warrantless blood draw.
>
> The State charged Inman with vehicular assault. Inman asked the trial court to suppress evidence of the blood draw, which the court declined to do, finding exigent circumstances existed. We affirmed, holding that the totality of the circumstances supported the existence of exigent circumstances. We considered that Inman received emergency medical services and treatment for possible spine injuries, helicopters were coming to medevac him to the nearest trauma center at the time of the blood draw, it would have taken at least 45 minutes to prepare and obtain a warrant, and obtaining a warrant by telephone was questionable because the responding officer lacked reliable cell phone coverage in the rural area.
>
> We held, "[u]nder the circumstances, obtaining a warrant was not practical" because of delay and because Inman's continued medical treatment could have impacted the integrity of the blood sample.
>
> The circumstances here are like those in Inman. Rawley was in a head-on collision and was trapped inside her vehicle. Her speech was slurred and [the deputy] could smell intoxicants on her breath. Rawley admitted to drinking.
>
> One of the paramedics told [the deputy] he would be administering IV fluids and then taking Rawley to the hospital. [The deputy] was aware that IV fluids are generally administered if there is concern for internal injuries. In [the deputy's] experience, a warrant request could take on average up to 45 minutes during the day.

> The Inman case is similar to the present case and was properly relied upon by the trial court. Accordingly, the trial court's findings of fact support the trial court's conclusion of law that exigent circumstances justified the warrantless blood draw based on Inman.
>
> . . . .
>
> Rawley argues that the State bears the burden of showing that the IV fluids would alter the blood test results in order to prove exigent circumstances to justify a warrantless blood draw. Rawley did not cite legal authority for this argument below. On appeal, she cites to a medical journal and an unpublished case neither of which provide binding legal authority that a police officer must inquire into the type of IV fluid being administered in order to show that exigent circumstance existed because the IV fluids would alter the blood test results.
>
> When defense counsel asked why he did not ask about the IV, [the deputy] responded that he was "not a medical expert." There is no binding legal authority requiring police officers to be knowledgeable of medicines and their effect on blood alcohol content. . . . We decline to establish such requirement here.

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

GOVERNMENT SUCCEEDS WITH STING TO INVESTIGATE SEX CRIMINAL WHO TARGETED CHILDREN: DEFENDANT LOSES CHAPTER 9.73 RCW CHALLENGE AND ARTICLE I, SECTION 7 CHALLENGE TO ADMISSIBILITY OF HIS EMAIL AND TEXT MESSAGES; HE ALSO LOSES DUE PROCESS CLAIMS OF OUTRAGEOUS GOVERNMENT CONDUCT REGARDING HOW STING WAS FUNDED AND CONDUCTED

In State v. Glant, ___ Wn. App.2d ___ , 2020 WL ___ (Div. II, on June 16, 2020, an unpublished April 14, 2020 Opinion was ordered published), Division Two of the Court of Appeals denies relief to Glant from his Thurston County Superior Court convictions for two counts of attempted first degree rape of a child. The convictions arose from an online Craigslist sting operation that was part of "Net Nanny" operations conducted by the WSP-directed Missing and Exploited Children Task Force (MECTF).

Facts and trial court proceedings

The Court of Appeals describes the facts in Glant as follows:

> The Washington State Patrol Missing and Exploited Children Task Force (MECTF) investigates sex crimes against children. RCW 13.60.110. Many MECTF investigations involve the internet and are dubbed "Net Nanny" operations. [Sergeant A] manages MECTF and oversees its undercover operations.
>
> RCW 13.60.110(4) states, "The chief of the state patrol shall seek public and private grants and gifts to support the work of the task force." MECTF receives donations from private citizens and organizations. One such donor is Operation Underground Railroad (O.U.R.). O.U.R. has contributed tens of thousands of dollars to support various Net Nanny operations across the State.

> Following each Net Nanny operation, the Washington State Patrol issues a press release. Some of these press releases acknowledge O.U.R.'s support of the Net Nanny operation. E-mails show that [Sergeant A] coordinated the financial donations from O.U.R. on behalf of MECTF. [Sergeant A] collected overtime pay while conducting Net Nanny operations.
>
> In September 2016, MECTF conducted a Net Nanny operation in Thurston County. As part of the undercover operation, MECTF posted an advertisement on the Casual Encounters section of Craigslist. "Family Play Time!?!?-w4m," the advertisement stated, "Mommy/daughter, Daddy/daughter, Daddy/son, Mommy/son. . . . you get the drift. If you know what I'm talking about hit me up we'll chat more about what I have to offer you."
>
> Glant responded to the advertisement by e-mail. Glant then began texting with a person whom he believed was Hannah, a mother of three children. "Hannah" told Glant that her son was 13 years old and her daughters were 6 and 11 years old. Glant stated he was "primarily interested in the daughters." CP at 773. Glant stated that he wanted to "use some toys with them and introduce some touching and then work towards oral." CP at 773. Hannah stated that her rules were "no pain, no anal." CP at 773.
>
> She asked Glant if he wanted to perform oral on the daughters or if he wanted the daughters to perform oral on him. Glant agreed to the rules and stated that he wanted both methods of oral. Glant asked, "What about like a finger in the bum though?" CP at 773. Hannah responded that this was acceptable if Glant brought lubricant.
>
> [Court's footnote: *Glant's and Hannah's messages occurred over three days. Hannah reinitiated contact with Glant the second day with a greeting of "hey hun . . . good afternoon . . . how are things?"*]
>
> After the pair arranged a time to meet on the second day, Hannah reinitiated contact on the third day. Over the course of their conversations, Hannah expressed interest in Glant's hobbies and complimented his looks.
>
> Glant drove from Mercer Island to Thurston County to meet Hannah and her daughters. When Glant arrived at the apartment, he had a bottle of lubricant in his pocket. Law enforcement officers arrested Glant, and the State charged him with two counts of attempted first degree rape of a child. Glant was 20 years old.

[Footnote and citations to the record omitted; some paragraphing revised for readability]

The Court of Appeals describes the key trial court proceedings as follows:

> Glant made two pretrial motions. **First, Glant moved to suppress his e-mails and text messages based on the Washington Privacy Act (WPA), chapter 9.73 RCW, and article I, section 7 of the Washington Constitution.** The trial court found that the e-mail and text message communications between Glant and Hannah were private, that the messages were recorded on the devices used to communicate the messages, and that Glant impliedly consented to the recording because Glant knew that these messages would be preserved. The trial court also found that Glant voluntarily disclosed information to the intended recipient.

Consequently, the trial court ruled that law enforcement officers did not violate the WPA or article I, section 7 of the Washington Constitution, and denied Glant's motion to suppress.

Second, Glant moved to dismiss his case based on [a claim of] outrageous government conduct. Glant alleged financial wrongdoing in managing and funding MECTF's Net Nanny operations. Specifically, Glant argued that law enforcement officers' conduct toward Glant in the sting, along with this financial arrangement with O.U.R., amounted to outrageous government conduct which violated Glant's right to due process. Glant argued that the Net Nanny operations were improperly funded through an alliance with O.U.R. Glant argued that this arrangement violated the law because [Sergeant A] solicited donations instead of the WSP chief. Glant alleged that [Sergeant A] solicited donations from O.U.R. for the purpose of funding officer overtime pay that resulted from the Net Nanny operations. Glant argued that the relationship between MECTF, WSP, and O.U.R. caused MECTF to generate more arrests and push the individuals targeted by the stings into more severe crimes that MECTF then used to solicit higher O.U.R. donations.

The trial court entered detailed findings of fact and conclusions of law regarding the motion to dismiss. The trial court concluded that the motion involved two issues: (1) the alleged misconduct regarding MECTF's acquisition of funds and how that acquisition was connected to Glant's charges, and (2) the nature of the interactions between Hannah and Glant.

The trial court examined these issues in the totality of the circumstances and weighed all factors [under State v. Lively, 130 Wn.2d 1 (1996)]. The trial court denied Glant's motion to dismiss for outrageous government conduct.

The case was tried to the bench based on stipulated facts. The trial court found Glant guilty of both counts of attempted first degree rape of a child.

[Footnote omitted; bolding added; some paragraphing revised for readability]

LEGAL ANALYSIS

ISSUE 1 (Washington Privacy Act): On the consent issue under the Washington Privacy Act, chapter 9.73 RCW, the three-judge panel of Division Two of the Court of Appeals concludes that the precedent of State v. Racus, 7 Wn. App. 2d 287, 299-300 (2019) is directly on point. Racus is a Craigslist sex sting decision holding that when a person sends e-mail or text messages, the sender does so with the understanding that the messages would be available to the receiving party for reading or printing (this is unlike engaging in a live, real-time phone conversation with a person, in which a person does not have the understanding that the message will be recorded for later review). Therefore, as with the defendant in Rakus, when Glant sent the text and email messages to the fictitious Hannah, Glant impliedly consented to the messages being recorded.

ISSUE 2 (Constitutional privacy protection): On the privacy issue under article I, section 7 of the Washington constitution, the Court of Appeals relies on the Washington Supreme Court precedent of State v. Goucher, 124 Wn.2d 778, 786-87 (1994) in ruling against Glant's claim that his text and email messages to the fictitious Hannah were private. The Glant Court explains:

E-mails and text messages are private communications. State v. Roden, 179 Wn.2d 893, 900 (2014). However, when a person voluntarily communicates with a stranger, that person assumes the risk that that the conversation will not be confidential. State v. Goucher, 124 Wn.2d 778, 786-87 (1994).

In Goucher, Goucher called the house of his drug dealer while law enforcement officers were searching the house pursuant to a warrant. A detective answered, and Goucher asked if he could come over to buy drugs. Because Goucher did not attempt to conceal his desire to buy drugs from a stranger, Goucher accepted the risk that his drug purchase would not be confidential. Our Supreme Court held, "We do not see how the conversation between the Defendant and the detective constituted an unreasonable intrusion into the Defendant's private affairs and thus we find no violation of the state constitution in this case."

Here, Glant argues that his messages were private communications that were unlawfully viewed by law enforcement officers. But, the trial court found that Glant voluntarily sent the messages to Hannah as the intended receiver.

Glant went on Craigslist and replied to a stranger's advertisement. Glant exchanged messages with a law enforcement officer, under the belief that he was communicating with Hannah, a stranger to him. Glant did not have a reasonable expectation of privacy in the messages he sent to Hannah. Moreover, Glant assumed the risk that his conversations would not be confidential.

[Some citations omitted, other citations revised for style]

[LEGAL UPDATE EDITOR'S COMMENT: Goucher is a constitutional ruling. And the facts of answering an incoming phone call did not implicate chapter 9.73 RCW, the Washington Privacy Act because the communications were not recorded. But if the officer in Goucher had secretly recorded the phone conversation, this would have violated chapter 9.73 RCW.]

ISSUES 3 & 4 (Constitutional Due Process protection)

The Court of Appeals Opinion concludes that the trial court did not abuse its discretion in considering the totality of the circumstances and determining that the government had not engaged in outrageous conduct, either: (1) in MECTF's acquisition of funds and how that acquisition of funds was allegedly connected to Glant's charges; or (2) in the nature of the interactions between Hannah and Glant (see the Glant Opinion excerpts above regarding the facts and trial court proceedings).

In regard to the interactions between the fictitious Hannah and Glant, the Court of Appeals Opinion cites but does not discuss in any detail the factually distinguishable 2018 Division One Court of Appeals ruling in State v. Solomon, 3 Wn. App. 2d 895 (Div. I, May 29, 2018). In Solomon, Division One held that, in a Craigslist sting to catch a child-sex crime violator, the detective did violate Due Process protections in the detective's extensive, persistent communications to the very cautious target.

Result: Affirmance of Thurston County Superior Court convictions of Bryan Earle Glant for two counts of first degree attempted rape of a child.

PRIVACY ACT'S EXCEPTION IN RCW 9.73.020(2) FOR "COMMUNICATIONS OR CONVERSATIONS . . . WHICH CONVEY THREATS OF EXTORTION, BLACKMAIL, BODILY HARM, OR OTHER UNLAWFUL REQUESTS OR DEMANDS" DOES NOT APPLY WHERE: (1) NON-CONSENTING PERSON DID NOT MAKE ANY THREATS, AND (2) HE ONLY SOUGHT SYMPATHY AND MADE AN OFFER OF REWARD FOR CONSENTING PARTY'S SILENCE REGARDING SEXUAL INCIDENT THAT WAS THE CENTRAL SUBJECT OF THE PHONE CALL

State v. Gearhard, ___ Wn. App. 2d ___ , 2020 WL ___ (June 4, 2020)

Facts: (Excerpted from Court of Appeals opinion)

> In the spring of 2016, J.C., who turned 15 at around that time, revealed to a psychiatrist that on the prior July 3 he had been sexually molested by James Gearhard, the 56-year-old neighbor of his grandfather. J.C. reported that he was helping Mr. Gearhard with work on his rural property, had stayed overnight, and awakened to discover Mr. Gearhard standing next to him, with his hand down J.C.'s pants, touching his genitals.
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> J.C. would later testify that he said to Mr. Gearhard, "[S]top, get off me," and Mr. Gearhard backed up and said, "[S]orry, I thought you'd like it." The psychiatrist, a mandatory reporter, notified Child Protective Services. Sometime later, [a detective] contacted J.C. and his mother.
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> The detective obtained J.C.'s agreement to participate in a pretext phone call to Mr. Gearhard. As later explained by the trial court, a pretext phone call is a "ruse[,] wherein the alleged victim of a crime would call a suspect . . . to try and get the suspect to make incriminating statements . . . while the suspect is talking to the alleged victim and while law enforcement is listening in."
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> During the call, [the detective] sat next to J.C., close enough to hear through the phone's earpiece, and took notes. **A recording device was placed on a table a couple of feet from J.C. and the detective. While allegedly not the detective's intention, the recording device captured not only J.C.'s side of the conversation, but also much of Mr. Gearhard's side of the conversation.** [The detective] did not have a warrant to record Mr. Gearhard.
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> During the call, J.C. told Mr. Gearhard he had told a friend about what happened at Mr. Gearhard's house on July 3, the friend told the police, and the police were coming to speak with J.C. about it. J.C. told Mr. Gearhard he was not sure what to do and asked Mr. Gearhard for advice.
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> **Although Mr. Gearhard would not talk about what had happened on July 3, he made incriminating statements by asking J.C. to say he had lied to his friend, telling J.C. this could ruin Mr. Gearhard's life, and telling J.C. that if he did him the favor of saying nothing happened, Mr. Gearhard would make it worth his while later.**

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

Proceedings below:

The State charged Gearhard with third degree child molestation, tampering with a witness and indecent liberties. Gearhard moved based on the Privacy Act (chapter 9.73 RCW) to suppress the tape recording and to suppress any testimony about the conversation that was recorded. The trial court denied the motion based on a Privacy Act exception in RCW 9.73.030(2) for "communications or conversations . . . which convey threats of extortion, blackmail, bodily harm, **or other unlawful requests or demands**."

At trial, the prosecution did not offer the recording into evidence but did offer testimony from the detective regarding the content of the conversation that was recorded. The jury found Gearhard not guilty of indecent liberties but could not reach a verdict on the other two charges. The trial court then dismissed the third degree child molestation charge because the jury had been incorrectly instructed on that issue.

The remaining charge of tampering with a witness was tried on stipulated facts, and the trial court found Gearhard guilty.

ISSUE AND RULING: The Washington Privacy Act generally requires all-party consent for the recording of private communications or conversations. Does the Privacy Act's exception in RCW 9.73.020(2) for "communications or conversations . . . which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands." apply where Gearhard did not threaten J.C., and he only sought sympathy and made an offer of reward for Gearhard's silence regarding the sexual incident? (ANSWER BY COURT OF APPEALS: **No, the exception does not apply because the requests by Gearhard were not similar to "threats of extortion, blackmail [or] bodily harm** . . . .")

Result: Reversal of Klickitat County Superior Court conviction of James Patton Gearhard for witness tampering.

ANALYSIS: (Excerpted from Court of Appeals Opinion)

> RCW 9.73.030(1)(a) prohibits the interception or recording of any private communication transmitted by telephone or other device between two or more individuals without the consent of all parties to the communication. Moreover, "[a]ny information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state." RCW 9.73.050.
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> Our Supreme Court has held this means courts "must exclude any information obtained . . . while . . . violating the statute." State v. Fjermestad, 114 Wn.2d 828, 836 (1990). As the trial court recognized in ruling on Mr. Gearhard's motion to suppress, unless his conversation with J.C. fell within an exception, neither the recording nor any testimony about the recorded conversation was admissible evidence.
>
> RCW 9.73.030(2) establishes three exceptions to the statutory prohibition for recordings made with one-party consent. The second of the three exceptions provides that with one party consent, a recording can be made of conversations "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands." **In State v. Williams, the Washington Supreme Court held that this second exception "must be interpreted as exempting from the act only communications or conversations 'which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands,' of a similar nature," lest "an overbroad interpretation of the**

'catchall' phrase . . . negate the privacy act protections whenever a conversation relates in any way to unlawful matters." 94 Wn.2d 531, 548 (1980) (quoting RCW 9.73.030(2)(b)).

The [Williams] court observed that the legislature intended to require suppression of recordings "of even conversations relate[d] to unlawful matters if the recordings were obtained in violation of the statutory requirements." The "threats . . . or other unlawful requests or demands" exception therefore "must be strictly construed to give effect to this legislative intention."

Discussion of the exception in Williams was mostly in the context of a defense argument that all three exceptions to the prohibition on recording should be construed to apply only in an emergency situation – an argument the court rejected. Williams involved threats of arson and murder and therefore bodily harm, so in its brief discussion of the need to strictly construe the exceptions, the court had no need to explain (and did not explain) the "similar nature" that would qualify conversations as "other unlawful requests or demands." In the 40 years since Williams was decided, no published Washington decision has articulated the "similar nature" that will bring unlawful requests or demands within the exception. . . .

Mr. Gearhard characterizes the exception as requiring the unwittingly recorded speaker to have conveyed some type of threat – arguing that "what Williams . . . essentially require[s] is an 'or else' for the 'unlawful request or demand[ ]' clause to apply." The State responds that Williams was wrongly decided, because limiting the "unlawful request or demand" clause to acts similar to threats of extortion, blackmail or bodily harm "thwarts the plain meaning of the statute and is a misapplication of basic rules of statutory construction." The State conceded at oral argument that we are bound by Williams.

Once our Supreme Court has decided an issue of state law, that interpretation is binding on this court. . . . It was the State's position, evidently accepted by the trial court, that it was enough that Mr. Gearhard made an unlawful request. No consideration was given to whether the request was of a similar nature to a threat of extortion, blackmail or bodily harm.

We question Mr. Gearhard's position that a threat is required, given the plainly different terms "request" and "demand." We need not engage in a close examination of the "similar nature" required to conclude that Mr. Gearhard's statements during the conversation do not fall within the exception, however.

He did ask J.C. to lie, but in the context of expressing fear and hinting at a reward – considered as a whole, it was in the nature of a request, or more aptly a plea, for a favor. It was not of a similar nature to a threat of extortion, blackmail, or bodily harm.

Mr. Gearhard's motion to suppress evidence of the recorded conversation should have been granted and his objection to its consideration in the stipulated facts trial should have been sustained. We reverse the witness tampering conviction . . . .

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

"ORGANIZED RETAIL THEFT" DOES NOT INCLUDE THEFT INVOLVING ORDERING ITEMS ONLINE FROM CATALOGS BECAUSE SUCH THEFT IS NOT THEFT FROM A "MERCANTILE ESTABLISHMENT"

In State v. Lake, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. II, June 30, 2020), in a part-published, part-unpublished Opinion, a three-judge Division Two panel reverses defendant's conviction for one count of second degree organized retail theft as prohibited by RCW 9A.56.350. The panel affirms her convictions for several other crimes.

The panel explains in the published part of the Lake Opinion that the defendant's criminal activity – obtaining merchandise through catalog orders using, without permission, the names and accounts of fellow residents in a senior living complex – did not qualify as theft "from a mercantile establishment" as prohibited by RCW 9A.56.350. The panel declares that "mercantile establishment" as used in the statute is limited to physical retail stores.

In the unpublished part of the Opinion, the Lake panel rejects all of the defendant's other arguments, including her argument that the defendant's apartment complex manager was acting as an agent of the police when, following defendant's arrest, he returned the defendant's walker to her apartment and observed inside some likely fruits of her criminal activity (he reported the observations to the police, leading to a search of the apartment under the warrant).

Result: Reversal of Clark County Superior Court conviction of Tycameron Lake (akas: Tianna Cameron, Ty Lake, Tyrone Cameron Lake, and Ty Cameron) for one count of second degree organized retail theft; affirmance of (A) two counts of first degree identity theft, (B) one count of second degree identity theft, and (C) two counts of second degree possession of stolen property.

TWO EVIDENTIARY RULINGS: (1) DEFENDANT IN DV ASSAULT CASE SHOULD HAVE BEEN ALLOWED TO ASK GIRLFRIEND-VICTIM IF SHE FELT PRESSURED OR THREATENED REGARDING HER TESTIMONY; (2) EXPERT WITNESS WAS OK IN TESTIMONY THAT IT IS SOMEWHAT COMMON FOR SURVIVORS OF DOMESTIC VIOLENCE TO RECANT OR MINIMIZE ALLEGATIONS

In State v. Case, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. II, June 23, 2020), a three-judge panel of Division Two of the Court of Appeals makes two evidentiary rulings, one favoring the defense and one favoring the State. The Court of Appeals ultimately does not give defendant any relief from his convictions for fourth degree assault and harassment, with domestic violence findings on both counts. The prosecution arose from an incident involving his girlfriend, Cindy Rothwell, who made a written, sworn statement to police shortly after the incident alleging that Case had hit, strangled, and threatened to kill her.

On the witness stand at trial, victim Rothwell recanted her allegations. Defense counsel asked Rothwell if she felt pressured or threatened regarding her testimony, but the State objected, and the trial court sustained the objection. The trial court did, however, allow her to testify that she was not afraid of Case and fear was not influencing her testimony at trial. The Court of Appeals rules that the trial court should have allowed Rothwell to testify more broadly that she did not feel pressured regarding her testimony, but the Court of Appeals also rules that the trial court error was harmless.

In response to victim Rothwell's recantation, the State called a mental health counselor, Jason Cain, as an expert witness. Mr. Cain testified that as a general matter it is somewhat common for survivors of domestic violence to later recant or minimize their allegations. The Court of Appeals rules that such testimony, if given only in limited general terms, is admissible because it is not an improper comment on the victim's credibility. The Division Two panel overrules a Division Two ruling that barred such generalized testimony in State v. Thach, 126 Wn. App. 297 (2005).

Result: Affirmance of Grays Harbor County Superior Court conviction of Kevin Ray Case for fourth degree assault and harassment with domestic violence findings on both counts.

FRYE TEST FOR ADMISSIBILITY OF SCIENTIFIC EVIDENCE IN A CRIMINAL CASE DOES NOT LIMIT EVIDENCE TO THAT ACCEPTED IN THE *CRIMINAL FORENSIC COMMUNITY*: COURT HOLDS THAT EVIDENCE REGARDING EXAMINATION OF NANOPARTICLES ON CRIME SCENE SHELL CASINGS BY A TRANSMISSION ELECTRON MICROSCOPE WAS ADMISSIBLE BECAUSE THE METHOD IS ACCEPTED IN THE *GENERAL SCIENTIFIC COMMUNITY* FAMILIAR WITH THE TECHNOLOGY

In State v. Murry, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. III, June 4, 2020), Division Three of the Court of Appeals addresses the "Frye Test" for admissibility of scientific evidence and rules for the State on the admissibility issue in a multiple murder prosecution. At issue on appeal was admissibility of evidence presented by the State regarding examination of nanoparticles recovered from shell casings at the crime scene by a Transmission Electron Microscope.

The "Frye Test" takes its name from a federal appellate court decision almost 100 years old, Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Under Frye, evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community. Evidence involving new methods of proof or new scientific principles is subject to a Frye hearing. After general acceptance of a methodology in the scientific community, application of the methodology to a particular case is a matter of weight and admissibility under Evidence Rule 702.

The Court of Appeals rules in Murry that: (1) the relevant scientific community for determining whether a scientific method is "accepted" is not limited to the "criminal forensic community" but instead extends to the general scientific community, so long as the experts are familiar with the use of the scientific technique in question; and (2) under the expert testimony presented by the State in this case, examination of nanoparticles recovered from shell casings at the crime scene by a Transmission Electron Microscope was accepted in the scientific community of experts familiar with the technology.

Result: Affirmance of Spokane County Superior Court convictions of Roy Howard Murry for (A) three counts of aggravated first degree murder, and (B) one count of first degree arson; reversal, based on a charging-document defect not addressed in the Legal Update, of conviction for attempted first degree murder (the reversal is without prejudice to the State's decision whether to re-try this charge).

NECESSITY DEFENSE: PROTESTER REGARDING CLIMATE CHANGE AND OIL AND COAL USE IS NOT ALLOWED TO ARGUE NECESSITY IN TRESPASSING AND OBSTRUCTION-OF-A-TRAIN PROSECUTION WHERE DEFENDANT DEFIED "NO

TRESPASSING" SIGNS BY GOING ONTO TRAIN TRACKS AND REFUSING TO LEAVE; DIVISION THREE OF THE COURT OF APPEALS DISAGREES WITH DIVISION TWO ON THE COMMON LAW NECESSITY DEFENSE

In State v. Spokane District Court (Taylor), ___ Wn. App. 2d ___ , 2020 WL ___ (Div. III, June 9, 2020), the Court of Appeals rules 2-1 that the environmentalist defendant, Reverend George E. Taylor, is not allowed to present a common law (non-statutory, case-law developed) affirmative defense of "necessity" to the jury in his prosecution for two misdemeanor charges of criminal trespass in the second degree (RCW 9A.52.080) and obstructing a train (RCW 81.48.020).

The Court of Appeals Majority Opinion in the Spokane District Court case notes that the courts of the State of Washington recognize a common law necessity defense. The Majority Opinion notes that in a case involving similar environmental protest circumstances – State v. Ward, 8 Wn. App. 2d 365, 372, review denied [by the Washington Supreme Court], 193 Wn.2d 1031 (2019) – Division Two of the Court of Appeals noted that Washington case law recognizes that the necessity defense may be presented at trial to the fact-finder when a defendant can demonstrate all four of the following propositions: (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; (3) the threatened harm was not brought about by the defendant; and (4) no reasonable legal alternative existed.

The primary focus in civil disobedience cases where necessity has been raised as a defense is the fourth element, i.e., that "no reasonable legal alternative existed." This fourth element was the focus in the 2019 Ward decision and in this 2020 Spokane District Court decision. The Majority Opinion in Spokane District Court does not expressly state that Ward was wrongly decided, but that is the essence of the Majority Opinion's analysis and decision.

In the Ward case, Defendant Ward broke into a Kinder Morgan pipeline facility and turned off a valve. His action stopped the flow of Canadian tar sands oil to refineries in Skagit and Whatcom Counties. Ward intended to protest (1) the continued use of tar sands oil, which he contends significantly contributes to climate change, and (2) the inaction by governments to meaningfully address the crisis of climate change. Ward argued that he was deprived of his Sixth Amendment right to present his only defense – necessity – after the trial court granted the State's motion to exclude all testimony and evidence of necessity.

In the 2019 Ward decision, a three-judge panel of the Division Two of the Court of Appeals Opinion explained the panel's view that there was sufficient evidence supporting all four elements of the defense for Ward to present his factual question of necessity to a jury.

Now, the Majority Opinion in the 2020 Spokane District Court case concludes under a similar fact pattern that the necessity defense is not available because the defendant cannot establish that "no reasonable legal alternative [to breaking the law] existed." The Majority Opinion explains in part the reasoning leading to a rejection of Division Two's 2019 ruling in Ward:

> The necessity defense does not apply to persons who engage in civil disobedience by intentionally violating constitutional laws. This is because such persons knowingly place themselves in conflict with the law and, if the law is constitutional, courts should not countenance this. There are always reasonable legal alternatives to disobeying constitutional laws. Examples of reasonable legal alternatives include protests on public property, educating the public, and petitioning elected officials. Should these legal alternatives not produce legislative changes, a protestor still may not engage in criminal

conduct. "People are not legally justified in committing crimes simply because their message goes unheeded." United States v. Montgomery, 772 F.2d 733, 736 (11th Cir. 1985).

In a very lengthy dissent in the Spokane District Court case, Court of Appeals Judge Fearing expands on Division Two's analysis in Ward as he argues that George Taylor presented sufficient evidence to support his motion to be allowed to present a necessity defense.

Result: Affirmance of Spokane County Superior Court order that reversed an order of the Spokane County District Court that would have allowed defendant George E. Taylor to argue to the jury a defense of necessity in relation to his prosecution for the misdemeanors of trespassing in the second degree and obstruction of a train.

LEGAL UPDATE EDITOR'S COMMENT: Defendant Taylor has requested review in the Washington Supreme Court. My guess is that the Supreme Court will accept review of Taylor's case. I will not try to predict how the Supreme Court will decide the case in these turbulent times if the Court accepts review.

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BRIEF NOTES REGARDING JUNE 2020 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though probably not sufficiency-of-evidence-to-convict issues).

The 17 entries below are June 2020 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results.

1. State v. Rushelle Renee Stoken: On June 2, 2020, Division Two of the COA rules against Stoken in her appeal from her Grays Harbor County Superior Court convictions for *(A) possession of a controlled substance (heroin) with intent to deliver and (B) for possession of a controlled substance (methamphetamine)*. The Court of Appeals rules that **an officer complied with the state and federal requirements for a community caretaking seizure in his contact with a possibly passed-out woman in a parked car, as well as in the officer's progressive intrusions under Terry v. Ohio as his observations developed into suspicion of criminal conduct by the woman**.

2. State v. David Garrett Michael Thomas: On June 8, Division One of the COA rules against Thomas in his appeal from his Clark County Superior Court convictions for (A) *attempted first degree assault while armed with a deadly weapon and (B) second degree assault while armed with a deadly weapon*. The jury rejected the insanity defense of Thomas. **The Court of Appeals that case law rule against allowing officers to opine on a defendant's guilt (see State v. Demery, 144 Wn.2d 753, 759 (2001)) was not violated** where an officer gave his lay witness opinion that, in light of his experience as an officer, he did not observe any behavior consistent with mental illness during his interaction with Thomas.

3. State v. Daniel Keen, Jr.: On June 8, 2020, Division One of the COA rules against Keen in his appeal from his Clark County Superior Court convictions for (A) *attempted rape of a child in the second degree* and (B) *communication with a minor for immoral purposes*. The case arose from a WSP Craigslist sting intended to catch child sexual predators. **The Court of Appeals rejects Keen's argument that the State engaged in "outrageous" behavior and thereby violated his Due Process rights by choosing the fictitious victim's age as 13, thus increasing the crime classification and attendant punishment for his criminal conduct**.

4. State v. Steven Allen Pemberton: On June 8, 2020, Division One of the COA rules against Pemberton in his appeal from his Kitsap County Superior Court convictions for (A) *attempted rape of a child in the second degree,* (B) *attempted commercial sexual abuse of a minor,* (C) *communication with a minor for immoral purposes*, and (D) *possession of a controlled substance*. The case arose from a WSP Craigslist sting intended to catch child sexual predators. **The Court of Appeals concludes that (1) the State did not engage in "outrageous" behavior in the sting in violation of Due Process protections, and (2) Pemberton's trial attorney did not render deficient defense by not raising an entrapment defense (the evidence shows that the government gave Pemberton an opportunity to commit the sex predator crimes but did not lure or induce him to commit the crimes; see RCW 9A.16.070's definition of the entrapment defense).**

5. State v. David Cornelius Conyers: On June 8, 2020, Division One of the COA rules against Conyers in his appeal from his King County Superior Court convictions for *six counts robbery in the second degree*. Among other rulings, the Court of Appeals rules that (1) **probable cause was established for a search warrant for usage records on the defendant's Seattle-area public transit smart card** (it was reasonable under the facts to believe that he used public transit in Seattle to commit one or more of his six robberies); and (2) **the trial court did not abuse its discretion in allowing detectives to give their lay opinions on the similarity of Conyers's appearance and clothing to photographic images from one of the robberies**.

6. State v. Garrett Adam Hooper: On June 8, 2020, Division One of the COA rules against Hooper in his appeal from his Snohomish County Superior Court conviction for *unlawful possession of a firearm in the second degree*. The Court of Appeals rules that **a search warrant for the home of Hooper, a known felon, established probable cause that one or more firearms would be found in Hooper's home at the time of the search**. Among many other things, the warrant application included time-stamped photographs on Hooper's Instagram account depicting Hooper holding firearms. The Court of Appeals also rules that **Hooper is not entitled to a hearing under Franks v. Delaware, 438 U.S. 154, 155-56 (1978) because there is no evidence that the search warrant affidavit contains false statements or omissions: (1) that are material to the probable cause question; and (2) that were made knowingly or intentionally, or were made in reckless disregard for the truth**.

7. State v. William Howard Thompson: On June 8, 2020, Division One of the COA rules against Thompson in his requests for review (one direct appeal and two personal restraint petitions) filed by Thompson from his Kitsap County Superior Court convictions for (A) *one count of rape of a child in the second degree* and (B) *three counts of incest in the first degree*. Among other rulings, the Court of Appeals rejects Thompson's argument that under chapter 9.73 RCW (the Privacy Act) the trial court should not have admitted evidence of a court-authorized recorded conversation between Thompson and his victim. **The Court rules (1) that the government's application for the court order met the requirements of RCW 9.73.130, and (2) that there is no merit to Thompson's argument that such a court-ordered recording cannot be admitted if the defendant did not admit to committing a crime during the recorded conversation**.

8. State v. Tanya Rae Griffith: On June 9, 2020, Division Two of the COA grants the relief (reverse and remand for further hearings) requested by the State in the State's appeal from a Lewis County Superior Court order that suppressed evidence and dismissed the prosecution of Griffith for *possession of methamphetamine*. The Court of Appeals accepts the concession by Griffith that the trial court erred in concluding that, after the point when a federal Social Security Administration security guard began a search of Griffith's purse for security screening, she could not stop the search by "withdrawing her consent" and trying to withdraw from the secured area of the premises. **The Court of Appeals relies in part on an airport search decision holding that "ongoing consent is not required for a search occurring for the administrative purpose of security screening once a person has attempted entry into a secured area. E.g., United States v. Aukai, 497 F.3d 955, 960 (9th Cir. 2007)."**

9. State v. Anthony Nguyen: On June 9, 2020, Division Two of the COA rules against Nguyen in his appeal from a Clark County Superior Court conviction for *possession of methamphetamine*. The Court of Appeals holds, among other things, that **the application for a search warrant for Nguyen's home established a probable cause nexus between (A) the object of the search under investigation in follow-up to a shot being fired inside the gang-members-occupied home, i.e., a search for firearms, bullet casings and fragments, "trace evidence," and personal property to establish identity of individuals in the premises, and (B) his second-floor bathroom where methamphetamine was discovered in plain view in a plastic baggie**.

10. State v. Margee Renee Thomas: On June 11, 2020, Division Three of the COA rules against Thomas in her appeal from a Jefferson County Superior Court conviction for *second degree assault with a finding that the assault was against a family member*. The Court of Appeals rules, among other things, that at trial **a law enforcement officer improperly opined that Thomas was guilty when the officer testified that Thomas was the "primary aggressor" in an altercation. However, the Court of Appeals rules further that this error in trial procedure was not prejudicial to Thomas in light of the other evidence against her**.

11. State v. Alfonso Villa-Morales: On June 15, 2020, Division One of the COA rules against Villa-Morales in his appeal from King County Superior Court convictions for *two counts of possession of a controlled substance*. The Court of Appeals summarizes its ruling in the concluding paragraph of the unpublished Opinion as follows:

> Here, officers tried to wake Villa-Morales to get identification but seized Villa-Morales because he kicked officers and ignored their commands. Further, **the Terry detention while officers tried to wake Villa-Morales was supported by a reasonable,**

articulable suspicion that Villa-Morales was using or in possession of illegal drugs [**based on open view through a car window of a glass pipe with white residue]. Once [the officers] attempted to wake Villa-Morales to ask for identification, he reacted violently, requiring the officers to use force to subdue Villa-Morales. At that point, officers saw a bag of suspected drugs sticking out from Villa-Morales's pants pocket. Villa-Morales was then arrested [on probable cause] for suspicion of drug possession. We conclude that Villa-Morales was not unlawfully arrested for possession of drug paraphernalia, rather he was seized when he reacted violently to officers waking him, arrested on suspicion of drug possession, and the Terry stop was lawful because [the arresting officer] had a reasonable, articulable suspicion that Villa-Morales was using or possessing a controlled substance.**

12. State v. Baron Del Ashley, Jr. aka Mike Allen, aka Michael Jones Ashley, aka Baron D. Edington:: On June 15, 2020, Division One of the COA rules against the appeal of Ashley from his Clark County Superior Court convictions for *two counts of felony violation of a domestic violence no-contact order*. The Court of Appeals rules that **there is no Washington or federal constitutional privacy protection against the admission into evidence of video evidence captured by equipment that was placed on a telephone pole and that captured images of defendant in an outdoor parking area for an apartment complex**.

13. State v. M.B.D., d.o.b. 05/02/04: On June 22, 2020, Division One of the COA rules against the appeal of M.B.D. from his King County Superior Court conviction for *first degree child molestation*. **In detailed, fact-intensive analysis under RCW 9A.44.120 and State v. Ryan, 103 Wn.2d 165 (1984), the Court of Appeals rules that the trial court did not abuse its discretion in admitting child hearsay testimony from the victim's father, mother, and a child forensic interviewer**.

14. State v. Aaron Mark Harrier: On June 23, 2020, Division Two of the COA rules against the appeal of Harrier from his Clark County Superior Court convictions for (A) *two counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, and* (B) *three counts of second degree possession of depictions of a minor engaged in sexually explicit conduct*. The Court of Appeals summarizes its Opinion as follows in the three introductory paragraphs of the Opinion:

> An internet cloud storage service provider, Synchronoss Technologies, Inc., ran a cursory search of all stored digital files and found six digital images with hash values matching those of known instances of child pornography. Synchronoss reported this information via CyberTip to the National Center for Missing and Exploited Children (NCMEC) who forwarded the information to local police for investigation.
>
> Harrier argues that the police, by opening and viewing the images from NCMEC, exceeded the scope of Synchronoss' lawful search of the images and thus, the opening and viewing of the images was unlawful, and the trial court erred by denying his motion to suppress. Harrier relies on the Fourth Amendment to the United States Constitution and argues that the police's opening of the files was an expansion of the lawful search. Whether the police expanded a lawful search is a factor that is considered under the private search doctrine, but the private search doctrine is applicable under the Fourth Amendment. Because Article 1, section 7 of the Washington Constitution is more narrow than the Fourth Amendment, we resolve this matter under our state constitution.

We hold that Harrier has no privacy interest in the images obtained by Synchronoss and delivered to the police. Therefore, the police's opening and viewing of the digital images was not an unlawful search. Thus, the trial court did not err by denying Harrier's motion to suppress. Accordingly, we affirm Harrier's convictions.

LEGAL UPDATE EDITOR'S NOTE: Under the federal constitution's "private search doctrine," a warrantless search by a state actor that does not expand the scope of a truly private search does not offend the Fourth Amendment even if the prior private search would have violated the Fourth Amendment if conducted by a government officer or the officer's agent. In State v. Eisfeldt, 163 Wn.2d 628, 636 (2008), the Washington Supreme Court ruled that the private search doctrine does not apply under article I, section 7 of the Washington Constitution. The Harrier case did not, however, require that the State rely on the "private search doctrine" because Harrier had no constitutional privacy protection for the digital images as issue.

15. State v. Kyla Marie Till: On June 23, 2020, Division Two of the COA rules against the appeals of Till from her Grays Harbor County Superior Court conviction for *second degree assault* for hitting and choking her six-year-old son. Among other rulings, the Court of Appeals concludes that **the trial court did not err in (1) ruling that the child victim was competent to testify, and (2) admitting child hearsay from three witnesses – a police officer, a day care employee, and a child advocacy center employee – under RCW 9A.44.120 and State v. Ryan, 103 Wn.2d 165 (1984).**

16. State v. Malek Kalid Ptah: On June 29, 2020, Division One of the COA rules against the appeal of Ptah from his King County Superior Court convictions for (A) *two counts of second degree assault with firearm enhancements and* (B) *two counts of theft of a firearm*. **One of the issues on appeal was whether Ptah should have been allowed under the all-party-consent standard of the Washington Privacy Act, chapter 9.73 RCW, to submit recordings of some phone conversations into evidence. The Court of Appeals declares that Ptah failed to establish that he informed his assault victim in any of several phone conversations at issue that he was recording the calls. Therefore, the Court of Appeals rules that he loses his argument that the victim consented to the recordings of the phone conversations.**

17. State v. Keith Bernard Threatts: On June 30, 2020, Division Two of the COA rules against the appeal of defendant from his Clark County Superior Court convictions for (A) *unlawful possession of a firearm (UPFA) in the first degree,* (B) *theft of a firearm, and* (C) *unlawful possession of a firearm in the third degree*. The Court of Appeals upholds trial court rulings: (1) denying defendant's CrR 3.5 motion to suppress his statements to police officers (**the Court of Appeals determines that defendant was not in Miranda custody when he made a non-coerced admission about possession of a gun to investigating officers; and that a uniformed officer's initial false identifying of himself as "Bill" when he knocked on defendant's door was not impermissibly coercive**); and (2) denying defendant's CrR 3.6 motion to suppress evidence seized under a search warrant (**the Court of Appeals rules that the properly obtained admission by the defendant to officers regarding presence of a gun in his residence provided probable cause to search the residence**).

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

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

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

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

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S.

Court of Appeals since September 2000 can be a ccessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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

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