LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

MAY 2019

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CORRECTION TO APRIL 2019 LEGAL UPDATE CITATION TO PENFIELD CASE

In the April 2019 Legal Update at page 3, I made a clerical error in the citation to the 2001 Court of Appeals decision in State v. Penfield. In Penfield, it was ruled that, although a vehicle stop was lawful based on information that the registered owner of a moving vehicle had a suspended license, once the officer determined upon contact with the driver that the driver of the stopped vehicle was not the registered owner, then the Terry stop should have ended without further investigation. The correct "Wn. App." cite to the decision is State v. Penfield is 106 Wn. App. 157 (Div. III, 2001). The April 2019 Legal Update entry noted that the U.S. Supreme Court has granted review in Kansas v. Glover, Docket No. 18-556, to address the issue of whether the Fourth Amendment allows a vehicle stop based on: (1) information that the registered owner of a moving vehicle has a suspended license, and (2) no clearly conflicting information.

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2019 WASHINGTON LEGISLATIVE SUMMARIES FROM THE WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS

Readers may wish to review the excellent review by staff of the Washington Association of Sheriffs and Police Chiefs (WASPC) of 2019 Washington legislation of interest to law enforcement. Go to WASPC Home Page, click on Programs & Services, scroll down and click on Legislation, and scroll down and click on 2019 End of Session Report.

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CRIMINAL JUSTICE TRAINING COMMISSION'S "LAW ENFORCEMENT ONLINE TRAINING DIGEST" EDITIONS FOR FEBRUARY AND MARCH 2019

Readers of this Legal Update are no doubt aware that the Law Enforcement Digest Online Training, which was introduced to the Criminal Justice Training Commission's Law Enforcement Digest page over a year ago. The CJTC has explained that this refreshed edition of the LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select recent court rulings are summarized, with emphasis placed on the practical application to law enforcement practices. Each cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links are also provided to two additional Washington State prosecutor and law enforcement case law reviews and references (one of which is this Legal Update). The February and March 2019 LED Online Training editions were recently placed on the CJTC LED web page.

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: PANEL UPHOLDS JURY VERDICT FOR FORMER CITY OF SCAPPOOSE POLICE CHIEF WHO SUED CITY MANAGER FOR RETALIATION FOR VIOLATING THE POLICE CHIEF'S FIRST AMENDMENT PROTECTED RIGHT TO FREE SPEECH "AS A PRIVATE CITIZEN"

In Greisen v. Hanken, ___ F.3d ___ , 2019 WL ___ (9th Cir., May 31, 2019), in a lengthy and complex opinion, a three-judge Ninth Circuit panel upholds a Civil Rights Act jury verdict for a former police chief who sued his former city manager for retaliating in 2013 incidents against the police chief for his protected Free Speech.

The following is the Ninth Circuit staff's summary of the panel's ruling (the summary is not part of the panel's lengthy opinion on the complicated topic of the Free Speech right of a public employee to speak out on matters in the role of a private citizen):

> The panel affirmed the district court's judgment following a jury verdict in favor of Doug Greisen, a former chief of police for the City of Scappoose, Oregon, in his action brought pursuant to 42 U.S.C. § 1983 alleging that Jon Hanken, the former city manager, violated the First Amendment by subjecting Greisen to adverse employment actions in retaliation for his protected speech.
>
> After Greisen discussed his concerns with city council members and government officials about the city's accounting and budgeting practices under Hanken, Hanken initiated investigations of Greisen, suspended him, placed him on an indefinite leave and prevented him from speaking publicly, even as Hanken was releasing information about the investigations to the media. After a city review committee recommended retraction of Greisen's suspension, Hanken resigned.
>
> The panel held that: (1) Greisen provided sufficient detail about his speech to establish that it substantially involved a matter of public concern; (2) he spoke [in his criticisms of the city manager] as a private citizen rather than a public employee; (3) the district court properly concluded that Greisen's retaliation claim could be based in part on Hanken's own speech acts, in the form of defamatory communications to the media; (4) Hanken waived his argument that his actions were supported by adequate justification; and (5) sufficient evidence supported the conclusion that Hanken's retaliatory actions proximately caused Greisen's termination, and any error in instructing the jury on proximate cause was harmless. The panel further held that Hanken was not entitled to qualified immunity.

Result: Affirmance of U.S. District Court (Oregon) judgment on jury verdict for Doug Greisen.

LEGAL UPDATE EDITORIAL NOTE: Interested readers who want the full context of facts and complex legal analysis will, of course, want to read the Ninth Circuit's full opinion. Among the facts in this complicated case is the fact that the former city manager obtained an "outside agency's" investigation that a city committee subsequently sharply criticized. The facts section of the Ninth Circuit opinion describes this factual element in part as follows (note that there is more to the facts and review process in the case):

> **Greisen appealed his discipline to the city's Personnel Review Committee (PRC), which absolved him of wrongdoing. The PRC characterized the outside agency's report as "an erroneous mischaracterization of the events . . . that also purposely omitted pertinent and material facts, to arrive at a conclusion that the PRC finds untenable, out of context and an egregious lack of professionalism." In the PRC's view, the outside agency's report was "not an objective review, but a prosecutorial document that was colored to arrive at a predetermined result." The PRC further found that "the degree of discipline issued to Police Chief Doug Greisen, for minor discrepancies of best practices, is entirely out of proportion based on the totality of the circumstances," and it recommended that "the City Manager retract, and the Scappoose City Council oversee the retraction [of], all discipline issued to Chief Greisen."**

CIVIL RIGHTS ACT CIVIL LIABILITY: NINTH CIRCUIT PANEL HAS REVERSED ITSELF AFTER JUDGE REINHARDT DIED AND WAS REPLACED ON PANEL; RECONSTITUTED PANEL VOTES 2-1 TO GRANT QUALIFIED IMMUNITY TO CITY OFFICIALS IN CASE WHERE CITY DISMISSED A PROBATIONARY EMPLOYEE WHO ALLEGED THAT (1) DISMISSAL WAS BASED IN PART ON HER PRIVATE SEXUAL CONDUCT (WITH A MARRIED CO-WORKER), AND (2) THAT CITY WAS REQUIRED TO DEMONSTRATE THAT SUCH ALLEGED CONDUCT NEGATIVELY AFFECTED ON-THE-JOB PERFORMANCE OR VIOLATED A CAREFULLY DRAWN POLICY OR REGULATION

In Perez v. City of Roseville, ___ F.3d ___ , 2019 WL ___ (9th Cir., May 21, 2019), a three-judge panel of the Ninth Circuit Court of Appeals reconsiders a February 9, 2018 decision, and a 2-1 majority grants qualified immunity to City of Roseville officials in a case where a former probationary female police officer sued the City for violation of her constitutional rights to privacy and intimate association. The reconsideration came following the death of the famous liberal judge, Judge Stephen Reinhardt, who had authored the original opinion. The dissenting judge in the 2019 decision criticizes the other two members of the panel for reaching a new decision following a panel member's death, rather than asking for review of the February 9, 2018 ruling by an 11-judge Ninth Circuit panel.

The probationary officer had been discharged after an internal affairs investigation into her romantic relationship with a fellow officer. She claimed in her lawsuit that her termination violated her constitutional rights to privacy and intimate association because it was impermissibly based in part on disapproval of her private, off-duty sexual conduct.

In the original 2018 opinion authored by Judge Reinhardt, he and another judge disagreed with the Fifth and Tenth Circuits, holding that the constitutional guarantees of privacy and free association prohibit the government from taking adverse employment action on the basis of private sexual conduct unless the government demonstrates that such conduct negatively affects on-the-job performance or violates a constitutionally permissible, narrowly tailored regulation. The original 2018 opinion concluded that summary judgment for the City was not proper because a genuine factual dispute existed as to whether the City terminated the probationary officer at least in part on the basis of her extramarital affair without such justification.

The 2018 Reinhardt opinion further concluded that the rights of privacy and intimate association were clearly established such that any reasonable governmental official would have been on notice that, viewing the facts in the light most favorable to her, the probationary officer's termination was unconstitutional. The original panel therefore reversed the district court's grant of qualified immunity on the privacy claim and remanded that claim for further proceedings.

Now, the reconstituted panel (with Judge Ikuta replacing deceased Judge Reinhardt), has concluded in its 2-1 May 21, 2019 decision that the City of Roseville defendants are entitled to qualified immunity. A Ninth Circuit staff summary (which is not part of the Ninth Circuit opinion) describes the 2019 majority and dissenting opinions of the panel as follows:

> The panel filed (1) an order withdrawing the opinion and concurring opinion filed on February 9, 2018, and ruling that a sua sponte en banc call and a motion for attorneys' fees were moot; and (2) a new opinion and dissenting opinion. In the new opinion, the panel affirmed the district court's summary judgment in favor of the defendants on a former City of Roseville probationary police officer's claims under 42 U.S.C. § 1983 for (1) violation of her rights to privacy and intimate association under the First, Fourth, and

Fourteenth Amendments; and (2) deprivation of liberty without due process of law in violation of the Fourteenth Amendment.

The panel held that the individual defendants were entitled to qualified immunity on the first claim because it was not clearly established that a probationary officer's constitutional rights to privacy and intimate association are violated if a police department terminates her due to participation in an ongoing extramarital relationship with a married officer with whom she worked, where an internal affairs investigation found that the probationary officer engaged in inappropriate personal cell phone use in connection with the relationship while on duty, resulting in a written reprimand for violating department policy.

It also was not clearly established that there was a legally sufficient temporal nexus between the individual defendants' allegedly stigmatizing statements and the probationary officer's termination. The individual defendants were therefore also entitled to qualified immunity on the probationary officer's claim that the lack of a name-clearing hearing violated her due process rights. The plaintiff also appealed the district court's summary judgment on her claims against the City of Roseville, and the Roseville Police Department for sex discrimination in violation of Title VII and the California Fair Employment and Housing Act, but she conceded that the alleged discrimination was not actually based on her gender. Accordingly, the panel affirmed the district court.

The majority rejected the dissent's argument that it was improper to substitute a different judge following the post-publication death of the original decision's author [the late Judge Stephen Reinhardt] and to change a previously published opinion except as part of an en banc decision. The majority wrote that Carver v. Lehman, 558 F.3d 869 (9th Cir. 2009), is directly applicable here. The majority explained that because the opinion issued by the prior majority was only part way through its finalization process, a replacement judge was drawn, en banc proceedings were suspended, and the new panel had the authority to reconsider and withdraw the opinion filed by the prior panel and to substitute a different opinion.

Dissenting, District Judge Molloy wrote that the majority in the prior published opinion, Perez v City of Roseville, 882 F.3d 843 (9th Cir. 2018), correctly resolved the issues, and the majority opinion of a quorum of judges should stand for the reasons stated therein. District Judge Molloy [sitting by designation on the Ninth Circuit panel] wrote that the substitution of a judge who legitimately disagrees with the original opinion should not change the outcome except as part of an en banc court decision.

Result: Affirmance of order of summary judgment by U.S. District Court for the Eastern District of California granting qualified immunity to the government defendants on all issues.

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WASHINGTON STATE SUPREME COURT

PLAIN VIEW DOCTRINE IS APPLIED IN THIS CASE: ALL NINE JUSTICES AGREE THAT DOCTRINE DOES NOT REQUIRE "INADVERTENCE," AND A 7-2 MAJORITY AGREE THAT THE SEIZING OFFICER HAD SUFFICIENT INFORMATION TO JUSTIFY SEIZING AN ASSAULT-ARSON SUSPECT'S OPAQUE CLOTHING BAG AT THE HOSPITAL AND REMOVING THE CLOTHES

State v. Morgan, ___ Wn.2d ___ , 2019 WL ___ (May 16, 2019)

Facts and Proceedings below: (Excerpted from Supreme Court's majority opinion)

> Morgan and his ex-wife, Brenda, shared custody of their daughter. About the time Brenda came to pick up their daughter from Morgan's house, Morgan's house was in flames. Firefighters found Morgan kneeling in his driveway, hair singed and barely able to speak. A firefighter repeatedly asked Morgan if anyone was in the burning house. After a period of silence, Morgan directed firefighters to the garage, where Brenda was lying in a pool of blood.
>
> Brenda was nonresponsive and badly injured, with multiple lacerations on her head, fractures, and severe burns on her upper body. Morgan and Brenda's clothing smelled of gasoline. Medics transported them to separate hospitals, observing blood on Morgan's clothing.
>
> A supervising [law enforcement] officer promptly told [Officer A] to "collect Morgan's clothing [from the hospital] and try to get an initial statement." A crime scene technician was also dispatched to collect Brenda's clothing. [Officer A] spoke with Morgan in his hospital room for hours. Morgan disclosed that his daughter was safe at Morgan's mother's home during the fire. Morgan said he woke up to find his house on fire. He said he then found Brenda in his house with her sweater burning and tried to help her remove it.
>
> At some point during their conversation, [Officer A] noticed that hospital staff had put Morgan's clothing in "several plastic shopping like bags" and left his clothing on the counter in Morgan's hospital room. The officer later testified that it "was almost like [the clothing was] in like some sort of gift bag; it looked like it had a hospital logo on it. And they were just regular plastic bags that you could get at a store."
>
> When the crime scene technician arrived with arson bags designed to preserve evidence, he and [Officer A] secured Morgan's clothing. [Officer A] also secured a utility knife with dried blood on the handle from a counter near the clothing. Hospital staff told [Officer A] they found the knife in Morgan's clothing.
>
> Morgan was charged with attempted first degree murder, first degree arson, and first degree assault. He unsuccessfully moved to suppress the seized clothing. The trial court rejected the State's plain view argument because [Officer A] did not find it inadvertently and he could not examine the clothing without removing it from the plastic hospital bags. Nonetheless, the trial court found that the removal of Morgan's clothing was justified by exigent circumstances because "there are special bags that have been designed and are available to put clothing and other items into so as to preserve that particular evidence."
>
> The Court of Appeals found the State had not met its burden of establishing exigent circumstances because it had not shown applying for a warrant would have resulted in a loss of evidence. It also rejected the State's claim that the plain view doctrine applied because [Officer A] did not smell gasoline or see blood through the plastic hospital bags or come across it inadvertently.

[Paragraphing revised for readability; record citations omitted; footnotes omitted]

ISSUES AND RULINGS: (1) Defendant Morgan's house became involved in a fire. Firefighters observed at the scene that his hair was singed and that his clothes smelled of gasoline. His ex-wife was in the garage. Firefighters observed that she was nonresponsive and badly injured, with multiple lacerations on her head, fractures, severe burns on her upper body; her clothes smelled of gasoline. Defendant Morgan was taken to a hospital. Transporting medics observed that Morgan had blood on his clothes. A police officer was sent by a supervisor to the hospital to get Morgan's clothes and to question Morgan. While in Morgan's hospital room, an officer saw that some opaque hospital bags were on a counter. The officer believed that the bags contained the clothes that Morgan had been wearing at the time that he was taken from his house to the hospital.

Do the facts establish exigent circumstances that would justify seizing and the hospital clothing bags and removing their contents without obtaining a search warrant? ANSWER BY SUPREME COURT: No; the Court appears to be unanimous on this issue)

(2) Is inadvertent discovery an element of the plain view doctrine? (ANSWER BY SUPREME COURT: No; the Court appears to be unanimous on this issue)

(3) Under the plain view doctrine, an officer may seize an item if the officer is lawfully located within an area, and the officer, based on the officer's senses and knowledge, has probable cause to believe that the item is contraband or is evidence of a crime. Did Officer A's senses give him sufficient information to justify seizing and removing the contents from the hospital clothing bag that contained the arson-assault suspect's clothing that the suspect apparently had been wearing at the time of the suspected assault and arson? (ANSWER BY SUPREME COURT: Yes, rules a 7-2 majority)

Result: Reversal of unpublished decision of Division One of the Court of Appeals, which in previous turn had reversed the Snohomish County Superior Court convictions of David Zachery Morgan for first degree assault, attempted murder and arson. The case is remanded to the Court of Appeals, which presumably will remand the case to the Superior Court to reinstate the defendant's convictions.

ANALYSIS: (Excerpted from Supreme Court majority opinion; subheadings added)

1. *The facts of this case do not meet the exigent circumstances exception to the search warrant requirement*

> We agree with the Court of Appeals' conclusion that the State did not meet its burden to show that exigent circumstances existed when [Officer A] seized Morgan's clothing. The State "must establish the exception to the wan-ant requirement by clear and convincing evidence." . . . Critically, the exigent circumstance "exception requires a compelling need for officer action and circumstances that make the time necessary to secure a warrant impractical." . . . While the State had a legitimate concern that trace evidence on Morgan's clothing could be contaminated by Morgan or hospital staff, the officers exhibited no urgency in collecting the clothing. which sat undisturbed on the counter for hours, including when Morgan was alone with hospital staff.

2. *The plain view doctrine does not have inadvertence as an element*

We have been inconsistent in articulating the elements the State must establish to justify a warrantless intrusion under the plain view doctrine . We have said the plain view doctrine applies "when the police (1) have a valid justification to be in an otherwise protected area and (2) are immediately able to realize the evidence they see is associated with criminal activity." . . . But in some cases, we have also articulated a third element, inadvertence. . . . We take this opportunity to clarify the law. Properly understood, there is no separate inadvertence requirement in the plain view doctrine. Officers are not restricted to seizing evidence solely when they come across the evidence unintentionally and inadvertently. As the United States Supreme Court held, "jnadvertence is a characteristic of most legitimate 'plain-view' seizures" but "it is not a necessary condition." Horton v. California, 496 U.S. 128, 130 (1990).

3. *Officer A's senses gave him sufficient information under the plain view doctrine to justify seizing the hospital bag as evidence*

Officers are "entitled to keep [their] senses open to the possibility of contraband, weapons, or evidence of a crime." . . . There is, however, an article I, section 7 requirement that a seizure not be based on pretext. . . .. 'Put simply, the law does not vest in police the discretion to seize first and decipher a piece of evidence's incriminating nature later." . . . Thus, a plain view seizure is legal when the police (1) have a valid justification to be in an otherwise protected area, provided that they are not there on a pretext, and (2) are immediately able to realize the evidence they see is associated with criminal activity.

Here, Morgan challenged the seizure of his clothing. Morgan does not dispute that "the officers had a lawful reason to be in the hospital room." The State need show only that it was immediately apparent that the clothing was associated with criminal activity, which it aptly does.

Objects are immediately apparent under the plain view doctrine "when, considering the surrounding circumstances, the police can reasonably conclude" that the subject evidence is associated with a crime. . . . Certainty is not necessary.

> [Court's Footnote*: As the United States Supreme Court has noted, "[T]he use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for application of the 'plain view' doctrine." Texas v. Brown, 460 U.S. 730, 741 (1983).*]

Morgan's clothing was expected to be in the hospital room and was detectable in the plastic hospital bags on the counter. [Officer A]'s supervising officer, having become aware of the evidentiary value of Morgan's clothing – including that it smelled like gasoline – instructed [Officer A] to collect it. Without examining the clothing. [Officer A] reasonably concluded that Morgan's clothing would have evidentiary value given the conversation he had had with Morgan and observations he made during that time, including a knife with dried blood on the handle.

In light of the fire, Brenda and Morgan's respective injuries, the supervising officer's knowledge, and observations by [Officer A] and others, there were more surrounding circumstances than necessary. [Officer A] did not have to manipulate the bags to know what they contained. He reasonably concluded that the clothing contained evidence

associated with suspected criminal activity. Nothing in this record suggests any ambiguity; it is clear from context that the plastic hospital bags contained the clothing hospital staff removed in treating Morgan. Thus, the State met its burden to show that [Officer A] lawfully seized Morgan's clothing under the plain view doctrine.

[Some citations omitted, others revised for style, some footnotes omitted]

LEGAL UPDATE EDITORIAL COMMENTS REGARDING THE PLAIN VIEW DOCTRINE'S IMMEDIATELY APPARENT REQUIREMENT:

1. The State's brief in Morgan best explains the immediately apparent element

The Majority Opinion in Morgan has a correct grasp on how the "plain view" doctrine has been historically applied and how it should reasonably continue to be applied. But the explanation of the "immediately apparent" element of "plain view" is more clearly explained in the State's Supplement Brief to the Supreme Court in Morgan. The State explains as follows in its Supplemental Brief in Morgan:

> **The Court of Appeals also believed that the third requirement was not satisfied. The court reasoned that "the incriminating character of the evidence was not in plain view because neither blood nor other relevant crime information could be seen through the plastic bag." This is incorrect analysis.**
>
> **This court has used varying language to describe the third requirement. According to some cases, police must be "immediately able to realize the evidence they see is associated with criminal activity." . . . According to others, an officer must have "immediate knowledge . . . that he had evidence before him." . . . . There is no substantial difference between these formulations. They are satisfied if "considering the surrounding circumstances, the police can reasonably conclude that the substance before them is incriminating evidence." . . . .**
>
> **The Court of Appeals seems to have believed that a "plain view" seizure is justified only if the police observe something incriminating about the items themselves, such as blood or other apparent evidence. Prior case law does not support such a limitation.**
>
> **For example, in one case a victim told police that she had been raped at a particular house. She said that the rape had occurred on a sleeping bag, and that she was menstruating at the time. Police went to the house and were invited inside. They saw a sleeping bag and seized it. This was held to be a valid plain view seizure. . . .**
>
> **There is nothing inherently incriminating about a sleeping bag in a house. Nevertheless, police were entitled to consider what they knew from other sources in deciding whether the evidentiary nature of the sleeping bag was obvious.**
>
> **In another case, police investigated a child beating. While lawfully present in the suspect's garage, they saw a board. The victims told the officers that they had been beaten with that board. This information justified the seizure of the board as potentially incriminating evidence. State v. Weller, 185 Wn. App. 913, 926 (2015).**

> **Again, there was nothing inherently incriminating about the board. It nonetheless became incriminating when viewed in light of other information available to police.**
>
> **The situation in the present case is similar. Police knew that a victim had been seriously injured in a fire. The defendant had described pulling a burning sweater off of her. . . . Gasoline had been smelled on the defendant's clothing, as well as that of the victim. Based on these facts, police could reasonably conclude that the defendant's clothing had evidentiary value. No examination of the clothing was necessary to establish that fact. Because probable cause existed, the "immediate knowledge" requirement was satisfied.**

[Most citations omitted; one citation included and revised for style]

2. Justice Madsen's Dissent is off track on the immediately apparent element

Justice Madsen writes a Dissenting Opinion that is joined by Justice Gordon Mcloud. The Dissent appears to misinterpret both (1) the Majority Opinion's analysis, and (2) the facts of this case. Admittedly, however, it appears from the discussion of the facts in the parties' briefs and their oral argument presentations that the factual record is quite sparse and is open to interpretation. I don't want to waste space or to confuse readers, so I leave it to the curious to read the Dissenting Opinion on-line.

3. Defense counsel in Morgan urged restriction of plain view seizure to contraband

In oral argument to the Supreme Court in Morgan, defense counsel, for the first time in the appellate process I believe, shockingly (in my view) urged the Supreme Court (1) to consider the decision in State v. Weller, 185 Wn. App. 913, 926 (2015) to be an "outlier," and (2) to establish a plain view rule under article I, section 7 of the Washington constitution that would apply the plain view doctrine only to seizure of contraband, never to seizure of mere evidence. Neither the Majority Opinion nor the Dissent in Morgan mentions this revolutionary theory that is contrary to case law and defies common sense.

4. Maybe a better record could have been made for the State

From my review of the appellate briefs and my watching (on the TVW website) of the Supreme Court oral argument, I got the impression that the record was very sparse in establishing what/when/where/how/why relating to what the involved officers saw/heard/said. Law enforcement officers (in writing reports and testifying) and deputy prosecutors (in responding to vague and multi-faceted suppression motions by defense attorneys) never know when a case will work its way to the Supreme Court.

PETITION TO OBTAIN CONCEALED PISTOL LICENSE (CPL): UNANIMOUS STATE SUPREME COURT REVERSES COURT OF APPEALS DECISION AND RULES THAT THE JUVENILE SEALING-OF-RECORDS STATUTE DOES NOT PROVIDE FOR EXPUNGEMENT OF JUVENILE FELONY ADJUDICATIONS OR FOR RESTORATION OF FEDERAL FIREARMS RIGHTS, AND THEREFORE SHERIFF IS NOT REQUIRED TO ISSUE A CPL TO A PERSON WHO HAS A SEALED RECORD ON A JUVENILE FELONY ADJUDICATION

In State v. Barr, ___ Wn.2d ___ , 2019 WL ___ (May 9, 2019), the Washington Supreme Court is unanimous in ruling that a sheriff has no authority under Washington statutes to issue a concealed pistol license to a man: (1) who was convicted in juvenile court in December 1992 of two class A felonies, and (2) who in 2016 obtained a juvenile court/superior court order sealing his juvenile records for the two adjudications.

Under the sealing statute, RCW 13.50.260, a sealing order requires that the sealed adjudications be "treated as if they never occurred." However, this provision in the Juvenile Code is not an expungement provision, and for purposes of issuance of a concealed pistol license, which looks in part to federal firearms law, a sealed felony adjudication remains a disqualifying conviction. The Supreme Court's Barr Opinion explains as follows:

> RCW 9.41.070(l)(a) provides in relevant part that "the sheriff of a county shall within thirty days after the filing of an application of any person, issue a license to such person to carry a pistol concealed on his or her person, "unless the applicant "is prohibited from possessing a firearm under federal law." The issuing authority is required to perform a criminal history background check and "shall deny a permit to anyone who is found to be prohibited from possessing a firearm under federal or state law." RCW9.41.070(2)(b).
>
> Federal law provides that if a person "has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," then it is unlawful for that person to "possess in or affecting commerce, any firearm or ammunition."^ 18 U.S.C. § 922(g). "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921(a)(20). In addition, "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction."
>
> Our inquiry is thus straightforward. First, we ask whether Barr has been convicted of a crime punishable by over one year of imprisonment pursuant to Washington law. . . . As detailed subsequent events (expungement, setting aside, pardon, or restoration of civil rights) have occurred. Again as detailed below, we conclude they have not. Therefore, the Sheriff correctly determined that Barr is prohibited from possessing firearms pursuant to federal law. As a result, the Sheriff is not required to issue Barr a CPL.
>
> 1. *Barr's sealed juvenile adjudications are convictions*
>
> The parties do not dispute that Barr's juvenile adjudications qualified as "convictions" before they were sealed. We agree with the parties on this point. Our state firearms statute provides that "a person has been 'convicted', whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed." RCW 9.41.040(3) (emphasis added). The legislature has thus made it clear that in the context of firearm possession, an unsealed juvenile adjudication carries the same consequences as an adult conviction. . . .
>
> The parties' disagreement focuses on what happens to disqualifying juvenile adjudications after they are statutorily sealed. Barr argues that once the records of his juvenile adjudications were sealed, they were no longer "convictions" because the record-sealing statute provides that once the records are sealed, "the proceedings in the case shall be treated as if they never occurred." RCW 13.50.260(6)(a). Barr reasons that if the proceedings are treated as if they never occurred, the result – a conviction –

must also be treated as if it never occurred. Therefore, a sealed juvenile adjudication is no longer a "conviction."

The problem with this argument is that it sidesteps the required federal statutory analysis. Under that analysis, the question is not how a conviction is currently treated by state law. Instead the question is whether there was a conviction and, if so, whether a subsequent event has occurred such that the conviction is no longer "considered a conviction" that prohibits firearm possession pursuant to the federal statute. 18 U.S.C. § 921(a)(20). Thus, our inquiry at the first step is limited to asking whether there was, in fact, a conviction of a crime punishable by over one year of imprisonment as a matter of state law. Siperek v. United States, 270 F. Supp. 3d 1242, 1248 (W.D. Wash. 2017).

Washington State law clearly provides that Barr's juvenile class A felonies are convictions punishable by over one year imprisonment. While the sealing order makes those convictions invisible to most people, they do still exist. . . . This conclusion is evident from the simple fact that the sealing order will be nullified by "[a]ny charging of an adult felony subsequent to the sealing. RCW 13.50.260(8)(b). If that happens, the convictions do not somehow come back into existence; they merely come back into public view.

Moreover, it is evident that the Sheriff was required to consider Barr's juvenile class A adjudications when deciding whether to issue him a CPL. The Sheriff was required by statute to check "the Washington state patrol electronic database," RCW 9.41.070(2)(a), and the state patrol database must "provide[ ] criminal justice agencies access to sealed juvenile records information," RCW 13.50.260(8)(d). If the legislature requires law enforcement to search a database that must contain information on sealed convictions, then the legislature must have intended that law enforcement use information about the sealed convictions in determining whether to issue a CPL.

Barr's juvenile adjudications are clearly convictions that do still exist as a matter of state law, the sealing order notwithstanding. We must therefore ask whether Barr has obtained expungement, setting aside, pardon, or restoration of civil rights in relation to those convictions.

2. *None of the subsequent events specified by 18 U.S.C. § 921(a)(20) for relief have occurred*

As a matter of federal law, "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter." 18 U.S.C. § 921(a)(20). A sealing order is not equivalent to an expungement, and Barr does not argue that his class A felonies have been set aside or pardoned, or that he has had his civil rights restored in relation to those convictions. Therefore, they remain disqualifying predicate convictions for purposes of 18 U.S.C. § 922(g).

> [Court's footnote: *As noted above, Barr did obtain an order in relation to his class A felonies declaring that "[s]o long as this case remains sealed, the offenses . . . do not prohibit respondent from possessing firearms under RCW 9.41.040." However, this order does not restore his civil rights for purposes of 18 U.S.C. § 921(a)(20) because "the civil rights relevant under [that] provision are the rights to vote, hold office, and serve on a jury." Logan v. United States, 552*

U.S. 23, 28 (2007). Barr's order purports only to allow him to possess a firearm on a conditional basis as a matter of state law.]

Barr relies heavily on In re Firearm Rights of Nelson, 120 Wn. App. 470 (2003), and at first glance, the underlying facts of Nelson appear similar to this case. In 1992, Nelson pleaded guilty as a juvenile to unspecified serious offenses that would have prohibited him from possessing a firearm. In 2000, he applied for and received an order "sealing and expunging" his juvenile convictions. Based on this order. Nelson held "that RCW 9.41.040 does not make it unlawful for Nelson to carry a firearm so long as he has no convictions other than those expunged." However, Barr's reliance on Nelson is misplaced for two reasons.

First, the issue in Nelson was whether, as a matter of state law, "carrying a firearm is unlawful for a person who committed serious offenses as a juvenile, but has since obtained a court order expunging the record of those offenses." Here, we do not need to decide whether state law prohibits Barr from possessing or carrying a firearm, and we expressly decline to do so. The only issue in this case is whether the Sheriff is required to issue Barr a CPL. The Sheriff declined to issue Barr a CPL after determining that federal law prohibited Barr from possessing firearms. Therefore we can and do decide this case based solely on the federal firearms statutes.

Second, Nelson explicitly states that the juvenile records at issue there were expunged, while Barr's were merely sealed. Some courts have read Nelson to mean that "the sealing of a juvenile case constitutes expungement of the juvenile offense," but that is not the case. Siperek, 270 F. Supp. 3d at 1249. As detailed above, sealing merely hides a record from the view of the general public. Nelson, meanwhile, "had a full expungement, and the records have been destroyed." Nelson, 120 Wn. App. at 474. Therefore, "there [were] no longer official records of any such [disqualifying] offense." That is clearly not the case here, so Nelson does not apply.

[Court's footnote: *The parties disagree on whether Nelson was qualified to have his records expunged pursuant to the sealing and expungement statutes in place at the time. We need not decide that question. It is clear from the opinion that properly or not, Nelson's records were in fact expunged and destroyed.*]

For purposes of the federal firearms statutes, Barr's juvenile class A felonies are convictions punishable by over one year of imprisonment as a matter of state law. They remain convictions even though they have been sealed because they unquestionably still exist and the Sheriff was required to access them through the Washington State Patrol electronic database to determine whether to issue Barr a CPL. Barr's convictions have not been expunged or set aside, and Barr has not received a pardon or restoration of civil rights for these convictions. The Sheriff therefore correctly determined that it was not required to issue Barr a CPL and Barr is not entitled to a writ of mandamus.

[Some footnotes omitted; some case citations omitted, other case citations revised for style; emphasis added; citations to the record omitted]

Result: Reversal of decision of Court of Appeals, thus reinstating the order of the Thurston County Superior Court declining to order the Snohomish County Sherriff to grant the CPL to Jerry L. Barr III.

LEGAL UPDATE EDITORIAL COMMENT: The Supreme Court in Barr expressly declines to opine on whether a person in Barr's situation is committing the crime of unlawful possession of a firearm under RCW 9.41.040. It is conceivable that a federal prosecution would be pursued in this situation. Law enforcement agencies in Washington should consult their local prosecutors.

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WASHINGTON STATE COURT OF APPEALS

TERRY SEIZURE: TOTALITY OF CIRCUMSTANCES IN 2 A.M. CONTACT OF TWO PERSONS IN PARKED CAR BY TWO OFFICERS, INCLUDING ONE OFFICER'S RUSE QUESTIONS ASKING THE PERSON BEHIND THE STEERING WHEEL IF THE VEHICLE BELONGED TO SOMEONE ELSE, CONSTITUTED A SEIZURE OF THE MAN THAT WAS NOT SUPPORTED BY REASONABLE SUSPICION

State v. Johnson, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, May 6, 2019)

Introduction by Court of Appeals to its Opinion:

> Our society and the law that reflects its organizing principles assume that citizens will trust law enforcement and believe the things that police officers tell them. For instance, when a police officer enters a schoolhouse and announces that an active shooter is nearby, society desires that those so informed believe the officer and act accordingly. Similarly, when a homeowner is awakened in the night by a police officer at the front door who announces that a wildfire is fast approaching, society desires that the officer be believed and that the homeowner acts accordingly. Indeed, examples of this societal desire seem endless.
>
> Nevertheless, case law makes clear that a police officer, in the course of investigating criminality, does not violate either the federal or state constitution by lying to a potential suspect or witness. The need to sometimes do so has been repeatedly accommodated by the courts. But when police officers do choose to lie, they must recognize and accept the logical consequences of that decision.
>
> One such consequence arises in the context of constitutional seizure analysis. This jurisprudence provides that, in a police-citizen encounter, no seizure of the person occurs unless – objectively viewed and under the totality of the circumstances – a reasonable person would not believe that he or she was free to terminate the encounter or decline the officer's requests. In analyzing the circumstances of such an encounter, a reasonable person is an innocent person. And reasonable innocent persons may be assumed to believe the truth of that which the police tell them.
>
> In this case, Louis Johnson Jr. was found to be in unlawful possession of a firearm. Prior to that discovery, however, the police encounter with him had reached the point where – under the totality of the circumstances and objectively viewed – he had been seized. And, at the time of his seizure, the police lacked a lawful basis to seize him. Thus, the trial court properly granted his motion to suppress evidence of the gun found in his possession. We affirm.

Facts: (Excerpted from Court of Appeals opinion)

Two Lynnwood police officers, [A and B] were engaged in a proactive patrol late at night in an area known to have a high rate of criminal activity. The officers observed a silver vehicle enter a motel parking lot and park in a stall. After the vehicle came to rest, about a minute and a half passed without any person entering or leaving the vehicle. The officers became suspicious that its occupants were using drugs.

The officers, both of whom were armed and in uniform, approached the vehicle on foot and stood on opposite sides adjacent to the driver's and passenger's doors. They shined flashlights into the vehicle's interior to enable them to see the vehicle's occupants and ensure that neither was holding anything that could put the officers in danger. Because the vehicle was also flanked on both sides by cars parked in adjoining stalls, the officers had minimal space to move. [Officer A] did not see any drugs or drug paraphernalia when he shined his flashlight inside the passenger compartment. Inside were Johnson and a female passenger.

[Officer A] stood on the passenger side while [Officer B] stood adjacent to the driver's door. [Officer A] sought to start a conversation with Johnson, who was in the driver's seat, and did so by asking, "Hey, is this Taylor's vehicle?" In fact, there was no "Taylor;" the ruse was intended to make Johnson feel more comfortable, in the hope that he would talk with the officer. Johnson appeared confused by the question, and [Officer A] asked, again, whether the vehicle was "Taylor Smith's vehicle." In response, Johnson stated that the vehicle was his own and that he had recently purchased it.

[Officer A] then asked for Johnson's name, whether Johnson had a driver's license, and if he would mind whether the officer looked at it. When Johnson stated that he had an identification card, both officers became suspicious that his license might be suspended. [Officer A] received the identification card from Johnson and used information from it to request a check of Johnson's warrant history and license status from police dispatch. Meanwhile, [Officer B], who was leaning over the driver's side door, noticed a handgun placed between the driver's seat and the door.

[Officer B] alerted [Officer A] to the presence of the firearm, drew his own handgun, opened the driver's door and removed the weapon from Johnson's vehicle. Subsequently, Johnson was removed from the vehicle. Meanwhile, police dispatch informed the officers that Johnson's driver's license was suspended in the third degree, and that he had an outstanding arrest warrant and a felony conviction. The officers then informed Johnson that he was being detained but not placed under arrest and advised him of his Miranda rights.

Procedures below: (Excerpted from Court of Appeals opinion)

Eventually, Johnson was charged with unlawful possession of a firearm in the first degree. Before trial, Johnson moved to suppress the evidence of the gun found in his possession, contending that it was found attendant to his unlawful seizure. After an evidentiary hearing, the trial court granted Johnson's motion. However, the judge did not make a determination as to whether Johnson was seized prior to the discovery and removal of the firearm, instead ruling that the encounter was a "social contact" and that "law enforcement had an insufficient basis to initiate a social contact." The trial court further acknowledged that granting the motion to suppress essentially terminated the State's case. The State appeals from the order granting Johnson's motion. **[LEGAL**

UPDATE EDITORIAL NOTE: The Johnson opinion of the Court of Appeals notes, in discussion that is not excerpted or otherwise summarized in this Legal Update entry, the recognizes that the trial court erred in its approach to social contacts by officers. No factual basis is required to justify a law enforcement social contact. The correct legal inquiry in this case is whether the officers elevated the extent of intrusion from a mere social contact into a seizure of Johnson.]

ISSUES AND RULINGS: 1. At 2 a.m., two officers contacted a man and a woman who had been sitting in the front seat of a vehicle that had pulled in and parked in a motel parking lot about 90 seconds earlier. The man was defendant Johnson, who was sitting in the driver's seat. One officer asked defendant Johnson if the vehicle belonged to "Taylor Smith," even though this was a ruse question (allegedly asked merely to get a conversation started), and the officer had no information about who was the owner of the vehicle. Johnson seemed initially confused by the question but when asked a second time answered that he, Johnson, had recently purchased the vehicle. The officer then asked for Johnson's name, whether Johnson had a driver's license, and if Johnson would mind whether the officer looked at it. When Johnson stated that he had an identification card, both officers became suspicious that his license might be suspended. The officer received the identification card from Johnson and used information from it to request a check of Johnson's warrant history and license status from police dispatch. During this activity, the other officer noticed a handgun placed between the driver's seat and the door.

Considering the totality of the circumstances, including the officer's ruse questions indicating a belief that the vehicle was owned by someone other than Johnson, was Johnson seized at a point in time just prior to the discovery in open view of the handgun located between the driver's seat and the door? (ANSWER BY COURT OF APPEALS: Yes)

2. At 2 a.m., the officers observed a silver vehicle enter a motel parking lot and park in a stall. After the vehicle came to rest, about a minute and a half passed without any person entering or leaving the vehicle. The officers became suspicious, based solely on the passage of 90 seconds at that time of night, that its occupants were using drugs. During a contemporaneous subsequent contact with the vehicle's occupants, the officers did not observe or learn anything reasonably suspicious, other than the fact that, when asked if he had a driver's license, the man behind the wheel stated that he had an "identification card."

Did the totality of the circumstances at this point in time (immediately prior to one of the officers seeing a handgun in open view inside) add up to reasonable suspicion supporting the seizure of Johnson? (ANSWER BY COURT OF APPEALS: No)

Result: Affirmance of suppression ruling by Snohomish County Superior Court.

ANALYSIS:

1. Johnson had been "seized" at the point when one of the officers observed the handgun in open view inside the vehicle

The Court of Appeals begins its analysis of the "seizure" question by explaining that the Washington constitution and federal constitution have been interpreted similarly on the "seizure" issue, except that under the Washington constitution, if a person does not yield to the seizure-level assertion of authority by an officer (note that on-cooperation was not involved in this case), the person is nonetheless deemed to have been "seized."

The Johnson Court notes that the question of "seizure" in this case does not look at the subjective intent of the officer or at the subjective thinking of the object of police attention. Instead, the test is an objective one that looks the perception of a hypothetical "reasonable innocent person." Case law has established that police contact with members of the public constitutes a seizure only if, due to an officer's use of physical force or display of authority, a reasonable person would not feel free to leave, terminate the encounter, refuse to answer the officer's question, decline a request, or otherwise freely go about his business.

The Johnson Court discusses several previous Washington appellate court decisions that have addressed the issue of whether a person was seized by law enforcement for constitutional analysis purposes. The Court then turns to analysis of the facts of this case:

> Johnson was seated in a parked vehicle with a passenger at 2:00 in the morning. Because a grass median was in front of the vehicle, the vehicle could only have exited the stall by backing out. Two police officers approached Johnson's vehicle, with one standing on each side of the vehicle adjacent to the vehicle doors. Cars were parked in each of the adjoining spaces, limiting the space available for movement. The two uniformed officers approached the vehicle less than two minutes after it had been parked. The officers shined flashlights inside the passenger compartment. In the substantially full parking lot, with vehicles parked on either side of Johnson's vehicle, there was minimal space for either officer to move. Because the officers were standing adjacent to the vehicle's doors, neither Johnson nor his passenger would have been able to open the doors and walk from the vehicle without the officers moving or giving way. The testimony did not indicate whether any other people were present in the lot.
>
> [Officer A] asked Johnson whether the vehicle belonged to 'Taylor." When Johnson appeared confused by this question, the officer repeated the question, inquiring whether the vehicle belonged to "Taylor Smith." Johnson then stated that the vehicle was his and that he had recently purchased it. In response [Officer A] asked Johnson for his name. He then asked Johnson to prove his identity, by requesting his driver's license.
>
> Although asking the question, "Is this Taylor's car?" was a ruse made for the sake of initiating a conversation, its effect on a reasonable person in these circumstances would be to create the impression that the police were conducting an ongoing investigation concerning the vehicle. Indeed, Johnson manifested confusion as a result of the question, likely because he had no reason to believe that the question was not sincere. The repetition of the question underscored its apparent sincerity. The further inquiries into Johnson's name, whether Johnson had a driver's license, and whether Johnson would prove his identity by presenting his identification document to [Officer A] further advanced the impression that a police investigation was ongoing and that Johnson was a suspect.
>
> It is so that the police do not violate either the state or federal constitutions simply by lying to potential suspects or witnesses. . . . [Citing decisions] Indeed, courts have repeatedly accommodated the legitimate law enforcement interest in employing subterfuge or untruths. . . .[Citing decisions] However, when the police do choose to lie, they must accept both the benefits and the detriments of that choice.
>
> We have previously noted that the police are not required to distrust ordinary citizens, and "[c]ourts are not required to sever the relationships that citizens and local police

forces have forged to protect their communities from crime." [Citing decisions]. A corollary to this principle is that ordinary citizens are not required to distrust the police, and a reasonable innocent person is entitled to believe that he or she is being dealt with honestly by law enforcement. In the context of constitutional seizure jurisprudence, one consequence of a police lie is plain: whether a person has been seized is a purely objective inquiry; an objective inquiry focuses on the perceptions of a reasonable person; a reasonable person is an innocent person; and reasonable innocent people can be assumed to believe that which the police tell them.

Taken in their totality, the circumstances existing at the moment [Officer A] requested possession of Johnson's identification document would have caused a reasonable innocent person to believe that ignoring the officer's requests, terminating the encounter, or leaving the scene were not viable options. The sudden presence of two uniformed officers so soon after the vehicle had parked, the shining of flashlights into the vehicle, the question, repeated, as to whether the vehicle belonged to Taylor Smith, and the request for the driver's name and proof of his identity would lead a reasonable innocent person to believe that the vehicle, and by extension its driver, was the subject of an ongoing criminal investigation.

Johnson was not at that time in the presence of other members of the public – the parking lot, although filled with vehicles, was not a scene of activity at 2:00 in the morning. The presence of two officers flanking the vehicle in a tight spot affording limited movement meant that neither Johnson nor his passenger would have been able to open a vehicle door and walk away from the vehicle without either making physical contact with an officer or requiring the officer to give way. Johnson also could not drive forward due to the berm. Neither could he move his vehicle in reverse without risking his car making contact with one or both of the officers. Indeed, such vehicle movement would likely seem – to a reasonable innocent person under the circumstances – to constitute an aggressive move of a type that would promote an aggressive response from the officers. The shining of flashlights by both officers, while possibly a benign practice by itself, would further a reasonable innocent person's impression that the police were conducting an active investigation centering on the vehicle. Finally, in addition to the ruse, the request for Johnson's name and for proof of his identity would indicate to a reasonable innocent person that the officers were unwilling to take that person at his word – ether as to his statement concerning the vehicle's ownership or as to his identity.

A totality of the circumstances analysis is a cumulative analysis, not a "divide-and-conquer" analysis. . . . Thus, the State's reliance on cases in which a single circumstance was deemed insufficient to constitute a seizure – be it the use of a flashlight . . . the questioning of a suspect in a parked car . . . or the request for a suspect's identification . . . – is uncompelling.

Under the totality of the circumstances then existing, the request for proof of Johnson's identity became the tipping point at which the weight of the circumstances transformed a simple encounter into a seizure. At that stage of the encounter, a reasonable innocent person in Johnson's position would not have felt free to leave the scene, to disregard the officer's requests, to ignore the officers, or to otherwise terminate the encounter. . . . Johnson was seized at that time.

> [Footnote by Court of Appeals: *Johnson, citing United States v. Smith,794 F.3d 681 (7th Cir. 2015), also argues that we should consider racial dynamics as part of the totality of the circumstances, because Johnson, as a black man in a high-crime area, would not feel free to ignore the two white officers standing next to his vehicle. The court in Smith ultimately found that a seizure existed based on an objective reasonable person analysis without accounting for the defendant's race. The standard utilized to determine whether a seizure took place is an objective one, based on a reasonable innocent person's perceptions – not the subjective impressions of the defendant. While we would not assert that race could never be a factor, here it is clear that the officers had no idea as to Johnson's race when they made the decision to initiate the encounter.*

[Citations omitted]

2. The officers did not have reasonable suspicion to seize Johnson at the point when one of the officer observed the handgun in open view inside the vehicle

The Johnson Opinion points out that under Terry v. Ohio, 392 U.S. 1 (1968), an officer, without a warrant may briefly detain an individual for questioning if the officer has a reasonable and articulable suspicion that the person is or is about to be engaged in criminal activity. A valid Terry stop requires that, on the totality of the circumstances, the officer have a well-founded, reasonable suspicion that criminal activity is afoot. The suspicion must be based on specific and articulable facts. The courts look at the totality of the circumstances known to the officer at the time of the stop when evaluating the reasonableness of the officer's suspicion. A person's mere presence in a high-crime area late at night does not, by itself, give rise to a reasonable suspicion to detain that person.

After discussing a number of decisions on the question of "reasonable suspicion," the Johnson Opinion concludes in the following discussion that the reasonable suspicion standard is not met under the totality of the circumstances of the case:

> The period of observation before [Officers A and B] chose to approach Johnson was less than two minutes. In those two minutes, the following was known to the officers: the immediate area – the Rodeo Inn parking lot – was in a high crime area and Johnson parked and remained in his vehicle for over one minute. In the officers' experience, they testified, people who remained in parked vehicles could be using illegal drugs. This is a generalization that amounts to nothing more than a hunch. When the officers approached the vehicle and initiated a conversation with Johnson, they saw him seated with a female passenger. Neither officer observed any signs of drug use. Johnson was cooperative with [Officer A] and answered his questions. Beyond the aforementioned hunch, the officers were aware of nothing that constituted a reasonable, articulable suspicion of potential criminal activity.

LEGAL UPDATE EDITORIAL COMMENT: The factual circumstances in Carriero (in which the Court of Appeals decision is final) and in Johnson presented close questions on whether the contacted person was seized for purposes of constitutional analysis. Maybe the results in those cases would have been different if the officers had explained to the persons in the vehicles that the persons were not required to talk to the officers.

SUBSTANTIAL EVIDENCE STANDARD FOR ASSAULT SECOND DEGREE: EVIDENCE THAT DEFENDANT FRACTURED VICTIM'S FINGER WHEN HE GRABBED PHONE FROM HER HAND HELD INSUFFICIENT BY ITSELF TO PROVE THAT HE RECKLESSLY INFLICTED SUBSTANTIAL BODILY HARM DURING AN INTENTIONAL ASSAULT

In State v. Melland, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, May 6, 2019), Division One of the Court of Appeals rules that the trial record does not contain sufficient evidence to support defendant's conviction for second degree assault.

The only evidence on the issue was that Melland grabbed a phone from his girlfriend during an argument and in doing so broke her finger. The Court of Appeals explains as follows why the evidence does not support his conviction for second degree assault:

> A person is guilty of assault in the second degree if he "intentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). To convict Melland of assault in the second degree, the State has the burden of proving beyond a reasonable doubt that Melland "recklessly inflicted substantial bodily harm on [DJ]." The State must prove "an intentional assault, which thereby recklessly inflicts substantial bodily harm." State v. R.H.S.,94 Wn. App. 844, 846 (1999) (citing RCW 9A.36.021(1)(a)).
>
> RCW 9A.08.010(1)(c) defines "recklessness" as follows:
>
> > A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> There is both a subjective and an objective component to the mens rea of "recklessness." . . . . Whether sufficient evidence supports finding a defendant acted recklessly "depends on both what the defendant knew and how a reasonable person would have acted knowing these facts." State v. Graham,153 Wn.2d 400, 408 (2005) (quoting [other decisions]). "The trier of fact is permitted to find actual subjective knowledge if there is sufficient information that would lead a reasonable person to believe that a fact exists." . . . .
>
> Viewing the evidence and all reasonable inferences in the light most favorable to the State, the evidence showed Melland fractured D.J.'s finger. But nothing in the record shows what Melland knew or that he disregarded a substantial risk that a wrongful act may occur. The only evidence that describes the assault is from the Virginia Mason medical record that states, "During domestic dispute with boyfriend, he grabbed the phone from patient's hand which hurt her finger. Found in . . . to be nondisplaced fracture." The evidence does not support finding that Melland knew of and disregarded a substantial risk that he would fracture D.J.'s finger when he grabbed the phone from her hand.
>
> Contrary to the repeated assertions of the prosecutor in opening and closing argument, there was no evidence that Melland "grabbed her right hand so hard, squeezed, and twisted it that the bone broke" or that Melland grabbed D.J.'s hand "really hard and twist[ed] it and turned it so hard that it breaks."

> The State argues the severity of the injury to D.J.'s finger shows Melland acted recklessly. The State's argument ignores the mens rea of recklessness. Evidence of the seriousness of the injury supports finding the infliction of substantial harm on D.J. but does not support finding that Melland "acted recklessly in inflicting those injuries." State v. Hayward, 152 Wn. App. 632, 648 (2009).
>
> We conclude no reasonable trier of fact could find beyond a reasonable doubt that Melland disregarded a substantial risk that a wrongful act may occur and recklessly inflicted substantial bodily harm. . . .

[Some citations omitted, others revised for style and brevity]

Result: Reversal of King County Superior Court conviction of Tristan James Melland for second degree assault. The Court of Appeals leaves in place Melland's conviction of misdemeanor violation of a no-contact order.

FELONY ELUDING UNDER RCW 46.61.024(1): WEARING OF OFFICIAL SPOKANE PD VEST CONSTITUTES BEING "IN UNIFORM"

State v. Michael E. Connors, Jr., __ Wn. App. 2d ___ , 2019 WL ___ (Div. III, May 30, 2019)

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

> Mr. Connors was driving a stolen car when he failed to respond to a signal to stop issued from a police vehicle. Instead of stopping, Mr. Connors sped away to an apartment complex. He then abandoned the stolen car and fled on foot until he was apprehended by the pursuing officer. The officer described his own attire at the time of the incident as including
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> > a black external vest carrier, so it actually goes over normal clothes, has all my normal duty gear, I just carry it on a vest in front of me instead of on a belt. It has a Spokane Police badge on the front; it's a patch. And then it has clear block reflective letters across the back that say police. Then I wear a drop-down style holster and it has a shiny silver Spokane Police badge on the front of my leg.
>
> Mr. Connors was charged with, and convicted of, attempting to elude a police vehicle and possession of a stolen motor vehicle.

ISSUE AND RULING: RCW 46.61.024(1) prohibits driving recklessly while attempting to elude a pursuing police vehicle that is equipped with lights and sirens where an officer has signaled the person to stop, but only if the officer giving the signal is "in uniform"? In this case, the defendant argues that the officer was not "in uniform," because the officer was wearing what the defendant characterizes as mostly "normal clothes," though the officer was wearing a Spokane PD "police vest."

Was the officer "in uniform" for purposes of RCW 46.61.024(1)? (ANSWER BY COURT OF APPEALS: Yes)

Result: Spokane County Superior Court conviction of Michael E. Connors, Jr. for felony eluding is affirmed (defendant did not appeal from his conviction for possession of a stolen vehicle).

ANALYSIS: (Excerpted from Court of Appeals opinion)

The pertinent language of the eluding statute is as follows:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light or siren. The officer giving such a signal shall be *in uniform* and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1) (emphasis added)

Mr. Connors argues the State's evidence was insufficient to meet this standard because the officer who signaled Mr. Connors to stop was predominantly dressed in "normal clothes," accompanied by a police vest and badges. Br. of Appellant at 1, 4; RP (Nov. 13, 2017) at 86. The merits of Mr. Connors's argument turns not on the nature of the State's proof (the facts are uncontested), but on the meaning of the word "uniform."

. . . .

Because the term "uniform" is not defined by RCW 46.61.024, we look to the dictionary for assistance. A "uniform" is defined as a "dress of a distinctive design or fashion adopted by or prescribed for members of a particular group . . . and serving as a means of identification," and "a garment or outfit of a widely copied style or prescribed design." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2498 (1993). In the context of the eluding statute, this definition appears to contemplate that the signaling or pursuing officer is wearing department-issued clothing that clearly communicates the officer's official status to members of the general public.

The clothing described during Mr. Connors's trial readily meets the ordinary definition of a "uniform." The vest worn by the officer was specific to the Spokane Police Department. It served to notify the public that the officer was an official member of the police department. The fact that the officer wore "normal clothes" under his police vest does not mean he was not wearing a uniform. Some uniforms are comprehensive from head to toe. Others are not. See, e.g., People v. Estrella, 31 Cal. App. 4th 716, 724, 37 Cal. Rptr. 2d 383 (1995) (marked police vest constituted distinctive police uniform). The eluding statute makes no preference. So long as an officer deploying the signal to stop is attired in a distinctive garment that clearly identifies him as a member of law enforcement, the statutory requirement of a "uniform" is met.

VEHICLE THEFT: BASED ON SUPREME COURT HOLDING IN STATE V. BARNES THAT THE "THEFT OF MOTOR VEHICLE" STATUTE, RCW 9A.56.065, DOES NOT APPLY TO THEFT OF RIDING LAWNMOWER, COURT OF APPEALS RULES THAT THE STATUTE LIKEWISE DOES NOT APPLY TO THEFT OF A SNOWMOBILE

In State v. Tucker, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. III, May 2, 2019), the Court of Appeals reverses a superior court conviction for "theft of motor vehicle" in a case involving theft

of a snowmobile. The Majority Opinion for the Court of Appeals declares that the case is controlled the Washington Supreme Court decision in State v. Barnes, 189 Wn.2d 492 (2017), which held that a riding lawn mower is not a "motor vehicle" for purposes of the Washington theft statute, RCW 9A.56.065, making such theft a Class B felony.

In Barnes, the Supreme Court Justices split into three 3-Justice factions in their analyses of RCW 9A.56.065, which uses the term "motor vehicle" that is also found in the traffic code. Three Justices (Owens, Johnson and Madson) asserted in the Lead Opinion that the theft statute is not ambiguous and that the B felony theft statute clearly does not apply to the lawnmower theft.

Three other Supreme Court Justices (Wiggins, Gordon McCloud and Stephens) agreed in a Concurring Opinion in Barnes on the result, but they based their conclusion on the history and spirit of the legislation, as well as a concern about a Washington constitutional issue (relating to requirements for legislative bill titles) that would be raised by the State's interpretation. They concluded that, while the statute is ambiguous, and that legislative intent is best reflected in a determination that the "Elizabeth Nowack-Washington Auto Theft Prevention Act" of 2007 does not include as a B felony the theft of a riding lawnmower.

The other three Supreme Justices (Gonzales, Yu and Fairhurst) disagreed in Barnes with the other six Justices on the result. The latter three Justices would have held: (1) that the statute's language is not ambiguous, (2) that the language includes theft of a riding lawnmower, and (3) that courts in future cases could simply choose to avoid "absurd" results (such as applying RCW 9A.56.065, for instance, applying the statute to theft of "an iRobot Roomba robotic vacuum" that might come about in reading the statute broadly.

In Tucker, two of the Court of Appeals judges conclude that reasoning in both the Barnes Majority Opinion and the Barnes Concurring Opinion requires that a snowmobile cannot be deemed to be a motor vehicle for purposes of the theft statute. The dissenting judge in Tucker offers a narrow interpretation of the Concurring Opinion in Barnes that allows for his argument that a snowmobile is a "motor vehicle" for purposes of RCW 9A.56.065.

Result: Reversal of Kittitas County Superior Court conviction of Julie Elizabeth Tucker for the Class B felony of theft of a motor vehicle in violation of RCW 9A.56.065; Ms. Tucker did not appeal from her conviction for first degree criminal trespass, and apparently that conviction is allowed to stand.

LEGAL UPDATE EDITORIAL COMMENT: I believe that the Barnes and Tucker decisions do not preclude prosecution for DUI for driving a riding lawn mower or a snowmobile while under the influence of alcohol or drugs and under other circumstances covered by the DUI and physical control statutes. But readers should check with their legal advisors and/or local prosecutors.

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BRIEF NOTES REGARDING April 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 May 2019, eight unpublished Court of Appeals opinions fit these categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of case results.

1. State v. Alejandro Escalante: On May 7, 2019, Division Three of the COA rules for the State in rejecting the defendant's appeal from his Steven County Superior Court convictions for two counts of unlawful possession of controlled substances. The Court of Appeals rules that the defendant was not in custody that was the functional equivalent of arrest for Miranda purposes where he was interrogated without Miranda warnings after being frisked and detained for five hours in a border crossing lobby.

2. State v. Kathleen Mancini: On May 13, 2019, Division One of the COA rules for the City of Tacoma in overturning a King County Superior Court jury verdict of negligence against the City in relation to an incident where Tacoma police officers raided Ms. Mancini's home under the mistaken belief that it was the home of a suspected drug dealer. The Court of Appeals agrees with the City's argument that Ms. Mancini's negligence claim should not have been submitted to the jury because, as tried, it was a claim for negligent investigation, which is not recognized in Washington. The Court of Appeals concludes that the case that Ms. Mancini presented to the jury concerned alleged negligence committed during the evidence-gathering aspects of the police investigation, and therefore that Mancini's negligence claim, as tried, was a claim of negligent investigation, was not cognizable, and should not have been allowed to go to the jury.

3. Kerns v. Washington State Patrol: On May 13, 2019, Division One of the COA rules for the WSP under the Public Duty Doctrine in affirming the ruling of a judge of the Pierce County Superior Court dismissing a lawsuit against the WSP. The Estate of Christopher Kerns contends that a WSP trooper should have arrested Joseph Schaffer for DUI during a traffic stop. After the traffic stop, Mr. Shaffer drove his car through a red light and crashed into and killed Christopher Kerns. The Court of Appeals rules that there is no evidence that the WSP trooper knew Schaffer was driving under the influence, and therefore that the Estate's claims are barred by the public duty doctrine.

4. State v James Elliot Theodore Harris: On May 14, 2019, Division Two of the COA rules for the State in rejecting the appeal of defendant from his Pierce County Superior Court convictions for first degree unlawful possession of a firearm, unlawful possession of a controlled substance, obstruction of a law enforcement officer, and making a false or misleading statement to a public servant (with the firearm and drug offenses alleging that Harris was on community custody at the time of the commission of the offense). One issue raised by Harris (in the context of an argument of ineffective assistance of counsel) was that an officer was not justified in seizing him by ordering him to remain inside a vehicle that a records check showed as reported stolen. The

Court of Appeals rules that, given the officer's knowledge that the car Harris was in had been reported stolen, asking Harris to remain in the car while the officer waited for assistance was justified. Thus, the initial seizure was valid under the Terry doctrine.

5. State v. Noel Wichman: On May 14, 2019, Division Two of the COA rules for the State in rejecting the appeal of defendant from her Jefferson County Superior Court convictions for possession of methamphetamine with intent to deliver and first degree criminal trespass. One issue raised by Wichman (in the context of an argument of ineffective assistance of counsel) was that her consent to search her vehicle was not voluntary. The Court of Appeals rules voluntary her consent given after an officer gave her Ferrier warnings.

6. State v. Eric Shawn Thomas; On May 28, 2019, Division One of the COA rules for the State in rejecting the appeal of defendant from his King County Superior Court convictions for two counts of voyeurism. Among other rulings, the Court of Appeals rules that a search warrant for defendant's phone meets constitutional particularity requirements. The Court factually distinguishes constitutional-particularity rulings against the State in State v. Keodara, 191 Wn. App. 305 (2015) and State v. McKee, 3 Wn. App. 2d 11 (2018).

7. State v. Gabriel Joseph Morales: On May 29, 2019, Division Two of the COA rejects the appeal of defendant in affirming his Pierce County Superior Court convictions for possessing controlled substances with intent to deliver, unlawful possession of controlled substances, unlawful possession of a firearm, and possession of a stolen firearm. Among other rulings on the many issues raised on appeal, the Court of Appeals rules (1) a search warrant affidavit's description of known informants establishes their reliability in the probable cause assessment, and (2) a CCO was justified under the totality of the facts in conducting a warrantless search of the vehicle of the probationer defendant.

8. State v. Christopher Eric Burton: On May 29, 2019, Division Two of the COA agrees with appeal of the defendant from his Cowlitz County Superior Court conviction for residential burglary (with deadly weapon enhancement). The Court of Appeals agrees with the defendant that the trial court committed prejudicial error in admitting, in this case of prosecution for a residential burglary in Longview, two phone call recordings that related to incidents in Seattle, but that had some motive-related or intent-related relevancy to the Longview residential burglary. The Court of Appeals rules that any probative value (i.e., any relevancy) of the evidence is outweighed by the prejudicial effect of presenting the phone call recordings to the jury.

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NEXT MONTH

The June 2019 Legal Update will include an entry digesting the U.S. Supreme Court's May 28, 2019 decision in Nieves v. Bartlett in which the majority opinion for the Court rules that, with one exception, probable cause to arrest will bar a Civil Rights Act lawsuit claiming that the arrest was made in retaliation for exercising the constitutional right to Free Speech. The exception is where plaintiff can meet a threshold test by "present[ing] objective evidence that [plaintiff] was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." (Emphasis added to quote)

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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].