LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

MAY 2020

TABLE OF CONTENTS FOR MAY 2020 LEGAL UPDATE

****

CRIMINAL JUSTICE TRAINING COMMISSION'S "LAW ENFORCEMENT ONLINE TRAINING DIGEST" EDITIONS ARE AVAILABLE THROUGH THE MARCH 2020 EDITION

The March 2020 LED Online Training edition was recently added on the CJTC LED web page, making the monthly online publication available there through the March 2020 edition.

In addition to appellate decision updates, the February 2020 edition includes links to the list of COVID-19 resources provided by the Washington Association of Sheriffs and Police Chiefs.

****

2020 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 2020 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 2020 End of Session Report. Unless otherwise noted in the text of the legislation, bills generally become effective on June 11, 2020.

****

NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

FOURTH AMENDMENT ISSUES ADDRESSED RELATING TO (1) PRIVACY PROTECTION FOR RENTAL VEHICLE NOT RETURNED WITHIN THE RENTAL PERIOD; AND (2) PRIVACY PROTECTION RELATING TO VEHICLE LOCATION LEARNED THROUGH ACCESS TO PRIVATELY-ADMINISTERED ALPR DATABASE:

(1) TWO JUDGES ON THREE-JUDGE PANEL RULE THAT WHERE CRIMINAL SUSPECT HAD KEPT RENTED VEHICLE WITHOUT PERMISSION AFTER STRICTLY ENFORCED RENTAL PERIOD HAD EXPIRED, HE DID NOT HAVE FOURTH AMENDMENT PRIVACY PROTECTION AGAINST GOVERNMENT'S METHODS OF LOCATING OF THE VEHICLE;

(2) ONE OF THE JUDGES WOULD HAVE INSTEAD RULED THAT FOURTH AMENDMENT DOES NOT PROTECT AGAINST WARRANTLESS GOVERNMENT ACCESS TO A PRIVATELY-ADMINISTERED AUTOMATED LICENSE PLATE READER (ALPR) DATABASE TO GET REAL-TIME LOCATION INFORMATION ON A VEHICLE;

ANALYSIS ON THE SECOND ISSUE LIKELY WOULD DIFFER UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION – A SEARCH WARRANT OR RECOGNIZED EXCEPTION LIKELY WOULD BE REQUIRED FOR FINDING THE CURRENT LOCATION OF A VEHICLE THROUGH A PRIVATELY ADMINISTERED ALPR DATABASE

United States v. Yang, ___ F.3d ___ , 2020 WL 2110973 (9th Cir., May 4, 2020)

[LEGAL UPDATE INTRODUCTORY EDITORIAL COMMENT: The most significant law enforcement issue in this case is addressed in the Concurring Opinion, which concludes that a search warrant (or recognized warrant exception) is not required under the Fourth Amendment for obtaining current location on a vehicle through an automated license plate reader (ALPR) database that is administered by a private entity. I think that this is probably not the correct view under the Washington constitution. Although there is no Washington appellate case law directly on point, I think – based on CSLI ruling in State v. Muhammad, ___ Wn.2d ___, 451 P.3d 1060 (November 7, 2019) – that a request for location information on a vehicle through a privately administered ALPR database will be held under article I, section 7 of the Washington constitution to require a search warrant or a recognized search warrant exception. But, as always, I urge law enforcement readers to consult their agency legal advisors and/or local prosecutors.]

In U.S. v. Yang, a three-judge Ninth Circuit panel affirms a U.S. District Court order denying a suppression motion in a case in which the defendant entered a guilty plea (conditioned on the right to appeal) to (A) receiving stolen mail and (B) being a prohibited person in possession of a firearm. Two of the three judges join in a Lead Opinion that uses one Fourth Amendment rationale (no privacy protection in rented vehicle after expiration of the rental period), while the third judge writes a Concurring Opinion that uses a different Fourth Amendment rationale (no privacy protection against access to ALPR database to locate a vehicle at a particular point in time) to reach the same pro-government result.

In April 2016, Yang was seen on surveillance cameras driving a rented GMC Yukon and stealing mail out of post office collection boxes. Using a GPS locator, the rental company had tried to track the Yukon after the rental period ended, but the GPS unit had been deactivated.

The Ninth Circuit's lead opinion describes as follows some of the the facts of the further investigation, as well as some facts relating to the ALPR technology and database (note that the Lead Opinion elsewhere contains a more extended and detailed description of the ALPR technology and database):

> Inspector Steele [of the United States Postal Service] queried the largest license plate-location database in the country, operated by a private company called Vigilant Solutions, with hopes of locating the Yukon and Yang. This database receives license plate images and GPS coordinates from digital cameras mounted on tow truck, repossession company, and law enforcement vehicles.
>
> These camera-mounted vehicles photograph any license plate they encounter while driving around in the course of business. The Automatic License Plate Recognition ("ALPR") technology loaded on a laptop inside the camera-mounted vehicles interprets the alphanumeric characters depicted on the plate into machine-readable text and records the latitude and longitude of a vehicle the moment it photographs a license plate. The software also generates a range of addresses estimated to be associated with these

> GPS coordinates. This information is uploaded to the database and is searchable by law enforcement agencies that pay a subscription fee.
>
> In December 2016, there were approximately 5 billion license plate scans and associated data stored in the [Vigilant Solutions] database. The database continues to grow as these camera-mounted vehicles go about their daily business capturing images and location data at thirty frames per second, and as the use of these cameras and technology becomes more ubiquitous. It was estimated that as of March 2019, the database contained over 6.5 billion license plate scans and affiliated location data.
>
> When Inspector Steele inputted [in April 2016] the license plate number for the Yukon in the LEARN database, his query revealed that it had been photographed on April 5, 2016, at approximately 11:24 p.m., after the deadline to return the Yukon had passed. Inspector Steele promptly proceeded to the gated condominium complex that had been identified by the ALPR software as most closely associated with the GPS coordinates of the repossession vehicle at the time it photographed the Yukon's plate.
>
> In short order, Inspector Steele located Yang at his residence as well as the Yukon. After further investigation and visual surveillance, Inspector Steele obtained a warrant to search Yang's residence. There, he found devices known to be used for stealing mail out of mailboxes, numerous pieces of stolen mail, and a Phoenix Arms model HP22 pistol. After waiving his Miranda rights, Yang spoke to law enforcement and admitted to stealing mail from collection boxes in the area and to owning the firearm.

[Some paragraphing revised for readability]

Defendant Yang later moved to suppress the evidence seized from his residence and the statements he made to law enforcement. He argued that the government's locating of the Yukon through the Vigilant Solutions ALPR database without a warrant violated his Fourth Amendment right to privacy in the whole of his movements under Carpenter v. United States, 138 S. Ct. 2206 (2018). In Carpenter, the U.S. Supreme Court ruled under the Fourth Amendment as to cell phones that individuals have a right to privacy in cell-site location information (CSLI), at least where, as in Carpenter, such information relates to a cell phone's location at various places over an extended period of time.

As noted above, the U.S. District Court denied Yang's motion to suppress and accepted his guilty plea conditioned on his ability to appeal the suppression ruling.

The Lead Opinion by two of the three judges on the Ninth Circuit panel in Yang does not address the Carpenter privacy issue. Instead, the Lead Opinion concludes in analysis under the Fourth Amendment that Yang did not have a continuing reasonable expectation of privacy in the historical location data of the rental vehicle because he failed to return the vehicle by the point of the strictly enforced rental contract due date. Crucial to the two judges was the fact that there was no policy or practice of the rental company permitting lessees to keep cars beyond the rental period and simply charging customers for the extra time.

The Lead Opinion's discussion of case law indicates that if, on the other hand, a car rental company has a relaxed policy or practice that allows lessees to keep cars past the rental period, then generally the lessees will continue to have an expectation of privacy for some period after expiration of the lease period. Similarly, the Lead Opinion notes, if motel/hotel management has a policy or practice of allowing guests to extend their stays without notice to the motel/hotel,

then generally the guests will continue to have a privacy interest, but not if there is a strictly enforced timely-checkout policy and practice. **[LEGAL UPDATE EDITORIAL NOTE: In contrast, where a rented apartment or rental house is involved, the general rule appears to be that a not-yet-evicted tenant has a continuing right of privacy in the residence after a lease expires, except where there is compelling evidence that the tenant has abandoned the premises. See State v. Christian, 95 Wn.2d 655 (1981) (a case where there was compelling evidence that the tenant had abandoned the premises).]**

The third judge on the Ninth Circuit panel in Yang disagrees with the Majority Opinion's view that Yang had no privacy right in the Yukon based on the rental company's strict rental period policy. Instead, the third judge's Concurring Opinion states that suppression of the evidence should be denied on the alternative rationale that the facts in Yang relating to the ALPR information were distinguishable from the facts in Carpenter relating to the cell site location information (CSLI).

The Yang Concurring Opinion thus argues that, unlike in the U.S. Supreme Court Fourth Amendment decision in Carpenter, where the CSLI revealed almost the whole range of defendant's locations over an extended period of time, the search of the ALPR database did not reveal anything near the whole of the defendant's physical movements. Rather, the search of the ALPR database in Yang revealed only the location of the vehicle at a single point in time. Therefore, the Concurring Opinion in Yang concludes, the ALPR access did not infringe on that reasonable expectation of privacy recognized in Carpenter that would require a search warrant or exception to the search warrant requirement.

LEGAL UPDATE EDITOR'S FURTHER COMMENTS ON YANG: For the reason stated in my comments below, I think that the Washington Supreme Court would interpret article I, section 7 of the Washington constitution as requiring a different result on the Carpenter privacy issue that is addressed in the Yang Concurring Opinion. Please note that, as always, my expression of personal thoughts in the Legal Update are not legal advice. I urge law enforcement readers to consult their own legal advisors and/or local prosecutors on the issues addressed in the Legal Update.

(1) Privacy protection in a rented vehicle kept past the rental period

I have not found any published Washington appellate decisions directly on point factually with Yang, but my best guess based on other relevant Washington case law is that the Washington appellate courts would take the same fact-based approach as the Lead Opinion in Yang, i.e., determining privacy protection for a holdover vehicle lessee based on the policy or practice of the leasing company relating to rental period enforcement.

(2) Privacy protection for vehicle location information accessed through a privately administered ALPR database

In State v. Muhammad, ___ Wn.2d ___, 451 P.3d 1060 (November 7, 2019), seven justices of the Washington Supreme Court agreed through a combination of two opinions analyzing the Washington and federal constitutions that any obtaining of CSLI from a wireless carrier – whether to determine current location in real time or to determine historical CSLI or to determine both – requires a search warrant or a recognized exception to the search warrant requirement. I think that the analysis in Muhammad on this point would also require a search warrant or warrant exception for getting location

information from a privately-administered ALPR database, such as occurred in Yang. Thus, I think that the Fourth Amendment analysis in the Concurring Opinion in Yang is in conflict with the Fourth Amendment analysis of the seven Washington Supreme Court justices. And, in any event, the analysis in Muhammad of the seven Washington Supreme Court justices regarding article I, section 7 is the controlling analysis for Washington officers.

LEGAL UPDATE EDITOR'S NOTE:

Note also that for cell phone pinging, RCW 9.73.260 requires prosecutor approval for pinging. The statutory requirement was not addressed in State v. Muhammad.

LOS ANGELES SHERIFF'S DEPARTMENT DEPUTIES HELD IN 2-1 DECISION IN CRIMINAL APPEAL TO HAVE PRETEXTUALLY VIOLATED THE FOURTH AMENDMENT WHERE THEY HAD CRIMINAL INVESTIGATION AS THEIR "PRIMARY PURPOSE" WHEN THEY ENTERED A PRIVATE PREMISES FOR THE PURPORTED PURPOSE OF ASSISTING AND ENSURING THE SAFETY OF A CONTRACT CITY'S HOUSING CODE INSPECTORS IN THE EXECUTION OF THE CITY'S ADMINISTRATIVE INSPECTION WARRANT

In United States v. Grey, ___ F.3d ___ , 2020 WL ___ (9th Cir., May 27, 2020), a three-judge Ninth Circuit panel votes 2-1 to affirm the U. S. District Court's order granting a criminal defendant's motion to suppress evidence seized by Los Angeles County Sheriff's Department (LASD) deputies. At the time of incidents at issue, LASD contracted with the City of Lancaster, California, for, among other services, most criminal law enforcement services.

The Majority Opinion holds that where LASD was asked by a City of Lancaster housing code enforcement agency to ensure safety and assist in the execution of an administrative warrant authorizing the inspection of the private residence of Franz Grey, the LASD deputies violated the Fourth Amendment because their "primary purpose" in helping to execute the administrative inspection warrant was not to assist the inspectors in the administrative inspection.

Instead, according to the Ninth Circuit panel's Majority Opinion, the deputies' primary purpose in aiding the execution of the inspection warrant was to gather evidence in support of a criminal investigation for which the LASD previously had concluded in a written report that LASD did not have either (1) probable cause to arrest the suspect for a crime or (2) probable cause to search the suspect's premises for evidence of criminal activity.

The Grey Majority Opinion sets out the following key findings of fact by the U.S. District Court:

> (a) LASD had initiated a criminal investigation of Grey on April 4, 2018, a month before the May 3, 2018 search;
>
> (b) LASD had concluded that Grey was a felon in possession of a firearm and ammunition, that he was in the possession of a controlled substance, and that he had negligently discharged firearms multiple times;
>
> (c) LASD had concluded that it did not have probable cause to arrest Grey or obtain a warrant to search his home;

(d) LASD knew that the City was going to obtain an inspection warrant for Grey's home and to request LASD assistance at the inspection;

(e) LASD took no further action to investigate Grey – or to develop probable cause for a search or arrest – until the inspection warrant was executed;

(f) [LASD] Deputy Chappell, who led the criminal investigation, was also put in charge of assisting the City with the execution of the inspection warrant;

(g) [LASD] Sergeant Wolanski intended to interview Grey about the LASD's criminal investigation during the execution of the inspection warrant and instructed LASD deputies to arrest Grey;

(h) although the usual City policy was to have at least one LASD deputy accompany the City during an inspection, LASD sent nine armed deputies to assist with this inspection warrant;

(i) LASD deputies arrested and questioned Grey before initiating the [housing inspection] search;

(j) the nine deputies spent 15 to 20 minutes (and perhaps significantly longer) conducting the search;

(k) desk drawers were opened and closed and items were touched and moved inside of the home at some point before the criminal search warrant was executed; and

(l) the deputies took photographs of incriminating evidence during their initial search.

The Majority Opinion concludes that because the initial search by the officers was unreasonable, evidence obtained in that search was inadmissible under the Exclusionary Rule for the Fourth Amendment. And, because the evidence gathered by LASD deputies when they initially entered defendant's home and swept the premises served as the basis for the criminal search warrant that they obtained later that day, the evidence LASD deputies later obtained under the criminal search warrant is also inadmissible under the Exclusionary Rule.

The Dissenting Opinion in Grey asserts, given that there was a California Superior Court inspection warrant authorizing sheriff's deputies to accompany the housing inspectors, the deputies would have entered the defendant's house regardless of their subjective motivations. The Dissent argues that the correct inquiry therefore is whether, once inside the home, the deputies' actions exceeded the permissible scope of a protective sweep. The Grey Dissent argues that the case should be remanded to the District Court to look at whether the officers exceeded the proper scope of a protective sweep.

Result: Affirmance of U.S. District Court (Central District of California) order granting the motion of defendant Franz Grey to suppress evidence seized by Los Angeles County Sheriff's Deputies.

LEGAL UPDATE EDITORIAL NOTE: The Majority Opinion and Dissenting Opinion in Grey are each lengthy, totaling together over 14,000 words. I have only digested the facts and legal analysis addressed in the two opinions. Legal Update readers may wish to check the opinions on the Ninth Circuit website or other research source.

CIVIL LIABILITY OF EMPLOYERS UNDER THE AMERICANS WITH DISABILITIES ACT: EMPLOYER ESCAPES LIABILITY WHERE, AFTER EMPLOYEE SUED ALLEGING THAT SHE WAS FIRED BECAUSE OF HER DISABILITY, THE EMPLOYER LEARNED THAT, CONTRARY TO WHAT SHE REPORTED ON HER APPLICATION, SHE LACKED A BACHELOR'S DEGREE REQUIRED FOR THE JOB

In Anthony v. Trax International Corporation, ___ F.3d ___ , 2020 WL ___ (9th Cir., April 17, 2020), a three-judge Ninth Circuit panel rules in favor of a private employer in a disability discrimination action under Title I of the Americans with Disabilities Act (ADA). The ruling would apply equally to public employers and employees.

After the employee filed suit alleging that her employer terminated her from her position as a technical writer because of her disability, the employer learned that, contrary to her representation on her employment application, the employee lacked the bachelor's degree required of all technical writers under the employer's contract. Under the "qualified individual" test of the Equal Employment Opportunity Commission and federal appellate court precedent, an individual who fails to satisfy the job prerequisites cannot be considered "qualified" under the ADA unless she shows that the prerequisite is itself discriminatory in effect.

The panel disagrees with the Seventh Circuit Court of Appeals and agrees with some other circuits in holding that a limitation imposed by the U.S. Supreme Court in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) on the use of after-acquired evidence of misconduct to justify a discriminatory act in a case under the Age Discrimination in Employment Act, does not extend to evidence used to show that an Americans with Disabilities Act plaintiff is not a "qualified individual" under the ADA.

Result: Affirmance of U.S. District Court (Arizona) ruling that granted summary judgment in favor of the employer.

LEGAL UPDATE EDITORIAL COMMENT: I generally do not address private employment litigation in the Legal Update, and I do not claim to know much about disabilities-discrimination or age-discrimination case law. But I included this brief note about the Anthony case because I think that it provides a cautionary tale for job applicants.

****

WASHINGTON STATE COURT OF APPEALS

OBSTRUCTING: EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION WHERE THE SUBJECT OF AN ARREST WARRANT HINDERED OFFICERS DURING THE ARREST PROCESS BY NOT FOLLOWING THE COMMANDS OF THE OFFICERS

State v. Canfield, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. III, May 21, 2020)

Facts: (Excerpted from April 3, 2018 Unpublished Court of Appeals Opinion that remanded this case to be re-tried)

> Mr. Canfield was arrested in the town of Asotin on the basis of an outstanding arrest warrant. Law enforcement officers saw Mr. Canfield lying down inside his pickup truck when they made contact to arrest him on the warrant [at one point in the Court of

> Appeals Opinion, the Court indicates that it was reasonable for the officers to suspect that he was feigning sleep at this point]. One officer called out "Tommy" and Mr. Canfield sat up. He attempted to start the truck despite an officer's direction to keep his hands in sight. He then attempted to leave the truck and was detained.
>
> The officers sought verification of his identity, but Mr. Canfield provided a false name and denied that he was Tommy Canfield. Officers eventually identified him, after checking with dispatch, through his tattoos. When an officer tried to handcuff him prior to removing him from the scene, Mr. Canfield temporarily delayed the process by locking his hands in an effort to prevent the handcuffing. He was then placed in a patrol car without first being searched.
>
> During the drive to the jail, Mr. Canfield was repeatedly moving around and "squirming" in the back seat to the point that he was told to sit still because the officer feared he was attempting to release his seatbelt or the handcuffs. He continued his movements, attempting to get his hands in his back pockets, even after arriving at the jail. Officers then searched his pockets and discovered two packets of suspected controlled substances. They also discovered eight gun cartridges in his front pockets. He denied having a gun and insisted that he had the ammunition for an unspecified different reason. When the officer checked the back seat of the patrol vehicle, she discovered a "very large" and fully loaded .357 Colt Python revolver underneath the divider between the front and rear seats.

Proceedings:

Canfield was convicted in a November 2016 trial for (A) unlawful possession of a firearm, (B) possession of a stolen firearm, (C) possession of methamphetamine with a firearm enhancement, and (D) obstructing a public servant. In an April 3, 2018 Unpublished Opinion, Division Three of the Court of Appeals affirmed all of the convictions except for the obstructing conviction, which the Court reversed on a jury instruction issue. The Court of Appeals remanded the case to superior court for possible re-trial of the obstructing charge.

In a September 2018 re-trial of the obstructing charge, Canfield was again convicted.

ISSUE AND RULING: In a sufficiency of evidence appeal from a conviction, the evidence must be viewed in the best light for the State. Where Canfield hindered his own arrest by apparently feigning sleep and by not obeying the officers' directives as the officers were in the process of arresting him on a warrant, is his conviction for obstructing supported by the evidence? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Asotin County Superior Court conviction of Tommy D. Canfield for obstructing (note that for procedural reasons not addressed in this Legal Update entry, Canfield's September 2018 convictions for giving a false statement and attempted tampering with physical evidence are vacated by the Court of Appeals).

ANALYSIS: (Excerpted from May 21, 2020 Division Three Published Opinion)

> Here, sufficient evidence supported the judge's determination that Mr. Canfield hindered a public servant in the performance of his duties. Indeed, Mr. Canfield does not truly dispute the sufficiency of the evidence and does not challenge any finding, but attempts

to liken his situation to that in State v. D.E.D., 200 Wn. App. 484 (2017). The comparison fails.

D.E.D., also a prosecution for obstructing a public servant, involved a defendant who passively resisted an investigatory detention. Noting that no one has a duty to cooperate with a police investigation, we concluded that passive resistance to an investigatory detention was simply another form of declining to cooperate.

"Passive resistance consistent with the lack of a duty to cooperate, however, is not criminal behavior." [D.E.D.]. Thus, the defendant's resistance to being handcuffed did not constitute obstructing a public servant [where the passive resistance was to an investigatory detention]. However, we cautioned "against extending our narrow holding, which is simply that resisting handcuffing when a suspect is not under arrest does not constitute obstructing a law enforcement officer." That caution was warranted because only slight additional activity on top of passive resistance could amount to a crime.

This case falls directly into the D.E.D. caution and fails because of it. The law imposes a duty to cooperate with an arrest and makes it a crime to resist arrest. RCW 9A.76.040(1). Actions that hinder an arrest short of resisting can constitute obstructing a public servant. E.g., State v. Holeman, 103 Wn.2d 426 (1985) (assisting another person to resist arrest constituted obstructing).

Passive resistance to a lawful arrest can constitute obstructing by itself. Here, there was additional evidence beyond the handcuffing incident, including the repeated refusals to obey commands and feigning sleep.

Mr. Canfield did not merely refuse to cooperate with the police. He actively tried to hinder them. The trial court had ample basis for concluding that Mr. Canfield was guilty of obstructing a public servant.

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

POSSESSING STOLEN PROPERTY: EVIDENCE HELD SUFFICIENT TO SUPPORT A PSP CONVICTION WHERE: (A) DEFENDANT TOOK EVASIVE MANEUVERS WHEN AN OFFICER TRIED TO MAKE A TRAFFIC STOP, (B) DEFENDANT TOLD THE OFFICER THAT HE GOT THE VEHICLE "FROM A FRIEND" AND "AROUND THE CORNER," (C) THE 1981 EL CAMINO HAD NO LICENSE PLATE DISPLAYED, (D) IT DISPLAYED A SUSPICIOUSLY IRREGULAR TRIP PERMIT, AND (E) IT WAS BEING IGNITED WITH A SOCKET EXTENSION

State v. Jones, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. III, May 19, 2020)

Facts relating to the "knowingly" element of the crime of possessing stolen property:

The facts of this case are complicated (especially as to ownership of the vehicle), but the key facts are that in September 2019 a law enforcement officer on patrol observed defendant driving a 1981 El Camino at night, apparently speeding with a malfunctioning headlight. The officer saw that the vehicle had no license plates displayed. When the officer tried to stop the El

Camino with the patrol car's overhead lights and siren, the El Camino initially accelerated and took some evasive turns, and it did not stop until the officer activated his siren a second time.

After the driver, Alex Jones, stopped, Jones lacked ownership papers for the El Camino. The car had two trip permits bearing the same serial number, in the name of "Jhon Doe," one in Jones' backpack and one taped to the rear window. Both trip permits were incomplete in several respects.

The officer saw the vehicle's license plate lying on a floorboard in the passenger compartment. The officer observed that the vehicle's motor was being ignited with a socket extension, rather than an ignition switch and key. The original ignition switch plus screwdrivers were in open view inside the vehicle. Shaved keys were later found in the glove box. And when the officer asked Jones how he acquired the El Camino, Jones said "from a friend" and "around the corner."

Proceedings below:

Jones was convicted by a jury of possession of a stolen vehicle.

ISSUE AND RULING: Defendant took evasive maneuvers when an officer tried to make a traffic stop; defendant told the officer that he got the vehicle "from a friend" and "around the corner;" the 1981 El Camino had no license plate displayed; (d) the El Camino displayed a suspiciously irregular trip permit; and (e) the El Camino was being ignited with a socket extension. In a sufficiency of evidence appeal from a conviction, the evidence must be viewed in the best light for the State.

Is there sufficient evidence in the trial court record on the "knowingly" element to support the defendant's conviction for possessing stolen property under chapter 9A.56 RCW? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal (on grounds of improper government argument to the jury regarding the meaning of "knowingly") of Spokane County Superior Court conviction of Alex Michael Jones for possession of a stolen vehicle; case remanded for re-trial.

LEGAL UPDATE EDITORIAL NOTE: The Court of Appeals reverses the defendant's conviction on grounds that the trial prosecutor incorrectly argued to the jury a subjective, "should have known," legal standard (as opposed to the legally required "actual knowledge standard) for the "knowingly" element of knowing possession of a stolen vehicle. This Legal Update entry does not otherwise address that issue or ruling.

KEY STATUTORY LANGUAGE:

RCW 9A.56.140(1) defines "possessing stolen property" as follows:

> "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

ANALYSIS:

There is considerable discussion in the Court of Appeals Opinion, both in the facts section and in the legal analysis section, regarding the evidence relating to who owned the subject vehicle,

which had been involved in some informal transactions. This Legal Update entry does not address that discussion, other than to note that the Court of Appeals concludes that there is sufficient evidence in the trial court record to support the conclusion that ownership in someone other than the defendant was established.

In a sufficiency of evidence appeal from a conviction, the evidence must be viewed in the best light for the State. As for the "knowingly" element of the crime, the Court of Appeals explains as follows the Court's view that there is sufficient evidence in the record of the defendant's knowledge that the vehicle was stolen:

> [Jones] contends that the jury could not reasonably conclude he ever touched or even knew of the shaved keys in the glove box. He attacks the evidence of the socket extension in the ignition, claiming that [James Banks, the person who testified at trial that he transferred the vehicle to Jones] told him the car had been abandoned and there was no key. Jones also argues that no evidence showed he improperly filled out the trip permits, and so the State's reliance on the two improperly filled out permits to help the jury infer knowledge that the car was stolen is insufficient.
>
> When arguing insufficient evidence to establish his knowledge of the El Camino being stolen, Alex Jones emphasizes the testimony of James Banks. Nevertheless, the jury remained free to discount or totally ignore Banks's testimony if it deemed Banks lacked credibility. Also when arguing the insufficiency of evidence, Jones draws inferences from the evidence in a light favorable to him, not to the State.
>
> Mere possession of stolen property is insufficient to support a conviction for possession of a stolen vehicle under RCW 9A.56.068. . . . But possession of recently stolen property combined with slight corroborative evidence of other inculpatory circumstances tending to support guilt will sustain a conviction for possession of stolen property. . . . Such corroborative evidence may include a false or improbable explanation of possession, flight, or the presence of the accused near the scene of the crime. . . . In State v. Hudson, 56 Wn. App. 490, 495 n.1 (1990), this court found flight from the police to be a sufficient corroborating circumstance.
>
> Taken in a light most helpful to the State, sufficient evidence supports a finding of Alex Jones' knowledge of the El Camino being stolen. When [the arresting officer], while in uniform and in a fully marked police car, passed the El Camino in a barren industrial area, Jones sped away and made multiple turns down side streets. When [the officer] activated his patrol car's emergency lights and sirens, Jones was slow to pull to the side of the road and did not stop until [the officer] activated his siren a second time. The jury could conclude that Jones executed the elusive maneuvers because he knew the El Camino was stolen.
>
> The State presented evidence that Alex Jones lacked ownership papers for the El Camino. The car had two trip permits bearing the same serial number, in the name of "Jhon Doe," one in Jones' backpack and one taped to the rear window. Someone removed and secreted the license plate in the passenger compartment. A thief knows that law enforcement read license plate numbers to determine if a car is stolen. The vehicle's motor ignited with a socket extension, rather than an ignition switch and key. The original ignition switch, screwdrivers, and shaved keys lay inside the vehicle. And when Deputy Garrett Spencer asked Jones how he acquired the El Camino, Jones said "from a friend" and "around the corner."

[Some citations omitted; one citation revised for style]

FORGERY: EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS WHERE THERE WAS EVIDENCE THAT DEFENDANT'S TWO BANK ACCOUNT APPLICATIONS HAD LEGAL EFFECT AND WERE FALSELY COMPLETED BY FRAUDULENTLY USING A SOCIAL SECURITY NUMBER BELONGING TO ANOTHER PERSON

State v. Smith, ___ Wn. App. 2d ___ , ___ WL ___ (Div. II, May 27, 2020)

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

> Smith, James, and Broussard each registered businesses with the Secretary of State [of Washington] . . . .
>
> On June 23, Smith opened a Wells Fargo business banking account for A.J. Motors using a social security number belonging to a child from Indiana. Around the same time, James and Broussard also opened bank accounts for their businesses.
>
> On June 24, James obtained a $14,840 loan from Inspirus Credit Union to purchase a car from Smith's business, A.J. Motors. James applied for the loan using the social security number of a child in Ohio. On June 28, the credit union issued a check for $14,840 payable to A.J. Motors. On June 29, the check was deposited into A.J. Motors' bank account. This deposit was the first and only deposit of funds into the account.
>
> On July 1, Smith returned to the Wells Fargo branch where he had opened the A.J. Motors account and asked a banker to stop payment on an unauthorized deposit to the account for $14,840. The banker was unable to do so because of the status of the deposit. The banker offered to initiate a procedure involved opening a new account, transferring all the funds from the old account to the new account, and closing the old account. Smith opened another Wells Fargo business banking account for A.J. Motors, again using the social security number of the Indiana child. With Smith's authorization, the bank transferred all of the $14,840 in the old account to the new account.
>
> On July 11, surveillance footage showed Smith making two withdrawals from the new account, the first in the amount of $5,000 and the second in the amount of $9,800. Without the prior transfer from the initial account, there would not have been sufficient funds in the new account to make these withdrawals. There was no indication that James ever purchased the car for which he obtained the loan.
>
> Tacoma Police investigated the transactions involving Smith, James, and Broussard. The State later charged Smith with two counts of forgery, one count of first degree theft, and one count of money laundering.
>
> [Smith was convicted as charged in a jury trial.]

ISSUE AND RULING BELOW: Is there sufficient evidence to support Smith's convictions for two counts of forgery where Smith made two bank account applications that had legal effect and that were falsely completed by fraudulently using a social security number belonging to another person? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Pierce County Superior Court convictions of Anthony Jerrod Smith for (A) one count of first theft, (B) one county of money laundering, and two counts of forgery.

ANALYSIS:

Smith argued both (1) that the account applications that he completed with the bank were not "written instruments" for purposes of the forgery statute, and (2) that even if the applications constitute "written instruments," his providing of false information on the applications did not qualify as falsely competing the instruments for purposes of forgery. The Court of Appeals rejects Smith's argument.

1. The bank account applications are written instruments for purposes of the forgery statute

Under RCW 9A.60.020(1),

> A person is guilty of forgery if, with intent to injure or defraud: (a) He or she falsely makes, completes, or alters a written instrument or; (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

The Court of Appeals explains that under Washington case law, a "written instrument" as used in the forgery statute, RCW 9A.60.020 is defined as a writing that has legal efficacy (i.e., legal effect). Under this definition, a writing can support a forgery charge only if the writing would have legal efficacy if genuine.

The Court of Appeals then notes that bank account applications, which include a Certificate of Authority," initiate a contractual relationship between the bank and the depositor that, once accepted by the bank, create rights in and impose obligations on both parties. Depositors give money to the bank in exchange for the bank's services. The bank services the depositor's account in exchange for fees and the use of the depositor's funds.

The Court of Appeals holds that a bank account application has legal efficacy and thus constitutes a "written instrument" for purposes of the forgery statute.

2. Smith "falsely completed" the written instruments for purposes of the forgery statute when he fraudulently used the social security number of another person

On the false completion issue, the Court of Appeals explains as follows why the Court rejects Smith's argument:

> "To 'falsely complete' a written instrument means to transform an incomplete written instrument into a complete one by adding or inserting matter, without the authority of anyone entitled to grant it." RCW 9A.60.010(4). Forgery does not include making false entries in an otherwise genuine document but instead involves "the manufacture of a false or spurious document made to appear to be other than what it actually is." State v. Esquivel, 71 Wn. App. 868, 870-71 (1993).
>
> Smith analogizes his case to State v. Mark, 94 Wn.2d 520 (1980). In Mark, a pharmacist completed Medicaid claim forms by writing a physician's name in a space marked "physician's signature" in cases where he had received prescriptions from physicians over the phone or where the prescriptions were renewable. The Supreme Court granted

review to determine "whether the writing in of a physician's name on the claim form was an act of forgery if no prescription had in fact been received by the defendant."

The [Mark] court concluded that the filling in of blank prescription billing forms without the doctor's authorization did not constitute forgery.

> [T]he physician's name, when filled in by the defendant, did not purport to be the signature of the physician; rather it was a representation that the physician had prescribed the drugs for which claim was made. . . . [T]here was no showing that the defendant forged any prescriptions. His offense was in representing to the Department the number and kind of prescriptions which he had received. A misrepresentation of fact, *so long as it does not purport to be the act of someone other than the maker*, does not constitute forgery.

Smith argues that as in Mark, the account applications at issue here are genuine documents that he as the owner of A.J. Motors had the authority to complete; they simply contained a piece of false information. He contends that merely providing false information in this context cannot be the basis for a forgery charge.

But Mark is distinguishable because Smith did not simply provide false information when completing the applications. He also provided the social security number of another person, a child in Indiana. The court in Mark specified that "[a] misrepresentation of fact, so long as it does not purport to be the act of someone other than the maker, does not constitute forgery." And RCW 9A.60.010(4) states that to falsely complete a written instrument means to complete it "by adding or inserting matter, *without the authority of anyone entitled to grant it*." (Emphasis added). A social security number is a form of identification, and Smith's use of the Indiana child's social security number misrepresented that someone with that social security number was opening a bank account. Smith also did not have the authority to use the social security number of the child in Indiana.

[In footnote 1, citing several decisions from other jurisdictions, the Court of Appeals notes that courts in some other jurisdictions have held that unauthorized use of another's social security number supports a forgery conviction.]

[Some citations omitted, other citations revised for style]

CITY OF SEATTLE HELD TO HAVE VIOLATED THE "HOMESTEAD ACT" (CHAPTER 6.13 RCW) WHERE THE CITY WITHHELD POSSESSION OF A TRUCK THAT WAS THE OWNER'S RESIDENCE, AND THE CITY THREATENED A FORCED SALE OF THE TRUCK IF THE OWNER DID NOT SIGN A PAYMENT PLAN

In City of Seattle v. Long, ___ Wn. App. 2d ___ , 2020 WL ___ (Div. I, May 4, 2020), Division One of the Court of Appeals rules that the City of Seattle violated Washington's Homestead Act by withholding an impounded truck under the threat of a forced sale if he did not sign a payment plan. The truck had been impounded based on a City of Seattle ordinance authorizing impoundment of unlawfully parked vehicles not moved within 72 hours of being properly tagged. The Court of Appeals summarizes the ruling in the Opinion's introduction, which reads as follows:

The Washington State Constitution mandates that the legislature protect portions of homesteads from forced sale. Accordingly, over a century and a half ago, Washington passed its first homestead law. And over 25 years ago, our state legislature expanded homestead protection to "personal property that the owner uses as a residence," including automobiles. The law requires Washington courts to construe the "Homestead Act" (Act), chapter 6.13 RCW, broadly due to "the sanctity with which the legislature has attempted to surround and protect homestead rights." Baker v. Baker, 149 Wn. App. 208, 212, 202 P.3d 983 (2009).

Here, the city of Seattle (City) properly concedes that Steven Long's truck, which constituted his principal residence, may constitute a homestead. State and Seattle laws, however, allow for the forced sale of a vehicle after impoundment, regardless of whether such personal property constitutes a homestead. This case concerns whether the City violated Long's homestead rights when it towed his truck and withheld it under the threat of forced sale unless he paid the impoundment costs or signed a payment plan.

Long concedes that the City could have ticketed him, towed his truck, and required him to pay for towing and storage costs and an administrative fee without violating his rights. The problem, Long argues, is that the City withheld the truck under the threat of a forced sale if he did not sign a payment plan. We agree.

As noted above, the law requires us to construe the Homestead Act broadly in favor of the homeowner, so that it may achieve its purpose of protecting homes. In doing so, we determine that the Act protected Long's truck as a homestead and the City violated the Act by withholding the truck subject to auction unless he paid the impoundment costs or agreed to a payment plan. We therefore affirm the superior court's decision to void the payment plan.

This case also presents the following constitutional issues: First, whether impounding a vehicle that serves as a home and requiring the registered owner to pay the associated costs constitutes excessive punishment under the federal constitution's Eighth Amendment. Second, whether a vehicle owner may assert the state-created danger doctrine under the due process clause to obtain relief from impoundment. And third, whether Long may raise for the first time on appeal that towing a vehicle that serves as a home violates the private affairs guarantee of our state constitution.

We conclude these additional constitutional arguments fail. As for the Eighth Amendment, assuming without deciding that the impoundment and associated costs constitute penalties, they are not excessive because they directly and proportionally relate to the offense of illegal parking and are the exact penalties the City Council authorized. We also determine that Long cannot assert the state-created danger doctrine to seek relief from the impoundment, and he cannot raise his claim under the private affairs guarantee for the first time on appeal.

Our decision does not affect the City's authority to tow and impound an illegally parked vehicle.

[Court's footnote 1: *We note here that recently, the City passed Ordinance No. 126042 to permit the creation of 40 transitional encampments as an interim use where people living in their cars may camp indefinitely. Seattle Ordinance 126042, § 1 (Feb. 28, 2020)*]

> Nor does it prohibit the City from charging a vehicle owner for costs associated with the towing and impounding of a vehicle. But if that vehicle serves as the owner's principal residence, the City may not withhold the vehicle from the owner under the threat of forced sale. We affirm in part and reverse in part.

[Some paragraphing revised for readability]

Result: Affirmance of that part of King County Superior Court order that voided a payment plan that Steven Gregory Long agreed to in order to regain possession of his truck; reversal in part of other elements of the Superior Court order that are not addressed in this Legal Update entry.

COURT OF APPEALS PROVIDES SOME GUIDANCE FOR SUPPORTING A TRIAL COURT ORDER ALLOWING AN INTERPRETER TO TESTIFY BY VIDEO CONFERENCE

In State v. Sweidan, ___ Wn.. App. 2d ___ , 2020 WL ___ (Div. III, April 21, 2020), the Court of Appeals addresses defendant's claim on appeal that the trial court denied him his Sixth Amendment right to face-to-face confrontation by allowing an Arabic interpreter, who overheard Sweidan mutter incriminating statements while Sweidan received medical treatment at a hospital emergency room, to testify by video conference. The interpreter resided in Michigan, where she was tending to a sick family member.

The Sweidan Court declares that the trial court failed to adequately conduct a hearing and explain its ruling when authorizing video conference testimony. The Court of Appeals concludes, however, that any constitutional error was harmless. Then, in order to provide guidance in the future for trial courts asked to permit remote testimony in criminal prosecutions, the Sweidan Court provides a detailed analysis of the procedures to be followed and standards to be met in such circumstances.

Result: Affirmance of Benton County Superior Court conviction of Abdul Rahman Sweidan for attempted second degree murder and exceptional sentence.

LEGAL UPDATE EDITORIAL NOTE: For an excellent brief summary of the principles set forth in the Sweidan opinion, see the April 24, 2020 "case notes" by WAPA staff attorney Pam Loginsky on the website of the Washington Association of Prosecuting Attorneys.

****

BRIEF NOTES REGARDING MAY 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 15 entries below are May 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. Joseph Anthony Ballou: On May 4, 2020, Division One of the COA rejects the appeal of Ballou from his King County Superior Court conviction for *one count of possession of a stolen vehicle*. **Ballou argued unsuccessfully on appeal that he was so impaired by intoxication that his waiver of Miranda rights was not knowing, intelligent and knowing**. The Court of Appeals notes that the record reflects that Ballou's responses to the police were cogent and detailed, thus supporting the trial court's determination that Ballou lawfully waived his Miranda rights.

2. State v. Danielle M. Aylward, a/k/a Danielle M. Meadows: On May 5, 2020, Division Two of the COA rejects the appeal of the defendant from her Pacific County Superior Court conviction for *possession of methamphetamine*. On appeal, the defendant raised a challenge, not raised in the trial court, to a search of her purse (and an unlocked pouch inside the purse) incident to arrest. The Court of Appeals rules that the facts support a search of the purse, (1) whether the court accepts the officer's report that the purse was on the defendant's lap when he arrested her following a traffic stop; or (2) whether the court instead accepts defendant's claim that she never had the purse on her lap during the encounter with the arresting officer, but that she did move the purse from the passenger-side floorboard to the center console during the contact with the officer. **Under either version of the facts, the circumstances fit the "time of arrest rule" for searches incident to arrest**.

3. State v. Derrick Francis Salas: On May 5, 2020, Division Two of the COA rejects the appeal of Salas from his Kitsap County Superior Court convictions for (*A) possession of a controlled substance (methamphetamine); (B) obstructing a law enforcement officer; and (C) third degree driving while license suspended*. **The Court of Appeals holds to be lawful (1) a stop of defendant's vehicle and (2) a detention of defendant while running a records check for his driver's license status.** The Court of Appeals rules, among other rulings: (1) that an officer had a reasonable basis for believing that the person the officer saw operating a vehicle was *Eric* Salas (who was the subject of an arrest warrant), even though the operator was actually *Derrick* Salas; (2) that the officer's stop of the vehicle was not pretextual because the officer knew prior to the stop that there was an outstanding warrant for *Eric* Salas (see, for example, State v. Quezados-Gomez, 165 Wn. App. 593 (2011)); and (3) the officer did not act unreasonably in extending the traffic stop where *Derrick* gave the officer an identification card when asked for his driver's license, because the failure to present a valid driver's license upon request aroused a reasonable, articulable suspicion that *Derrick* was driving without a valid driver's license (a field records check confirmed that *Derrick's* driver's license was suspended).

4. State v. Brandon Antonio Scalise: On May 5, 2020, Division Three of the COA rejects the appeal of Scalise from his Stevens County Superior Court conviction for *(A) possession of a stolen motor vehicle, and (B) possession of stolen property in the second degree*. Among other rulings, **the Court of Appeals rules that officers were in a location where they had authority to be when they arrested Scalise, and they observed serial numbers of a stolen**

generator in plain view (without having to move or tip of otherwise manipulate the generator) during the course of their arrest of Scalise.

5. State v. Jason Lee Borseth. a/k/a Jason Lee Fishel: On May 5, 2020, Division Three of the COA rejects the appeal of Borseth/Fishel from his Spokane County Superior Court conviction for *(A) attempted first degree rape of a child; (B) attempted commercial sexual abuse of a minor; and (C) possession of a controlled substance*. The facts arose out of a Craigslist sting. The Court of Appeals rejects the defendant's argument under chapter 9.73 RCW (the Privacy Act) regarding his e-mail and text messages. Based on established Washington appellate precedent, including State v. Racus, 7 Wn. App. 2d 287 (2019), the **Court of Appeals concludes that the defendant impliedly consented to those recordings for purposes of chapter 9.73 RCW**. The Court of Appeals also rejects his claim of outrageous government conduct/Due Process violation regarding the nature of the interactions between law enforcement and the defendant. **The Court rejects his Due Process-based claims of outrageous government conduct in analysis distinguishing the facts of this case from those in State v. Solomon, 3 Wn. App. 2d 895 (2018).**

6. State v. Arthur Alekseevych Shchukin: On May 12, 2020, Division Three of the COA rejects the appeal of Shchukin from his Clark County Superior Court conviction for *vehicular homicide* based on causing the death of a passenger while operating a motor vehicle under the influence. The Court of Appeals rules that **(1) Shchukin was not in custody when a deputy sheriff asked him questions at the fatality-accident scene, and therefore the deputy was not required to Mirandize the defendant; and (2) a detective did not recklessly or intentionally omit material information from a search warrant affidavit for blood.** In relation to the search warrant issue, the Court of Appeals states that even if the detective knew that the on-scene deputy had not observed slurring of words or unsteadiness of Shchukin at the accident scene, these alleged facts were not material where the affidavit included the fact that Shchukin told the on-scene deputy that "he had been drinking wine, was driving too fast, was showing off, and had killed Pozhar." **LEGAL UPDATE EDITORIAL NOTE: Best practice would be to include information about absence of slurring of words or unsteadiness if known when presenting an affidavit for a search warrant in this situation.**

7. State v. Dwight Eldon Backherms: On May 12, 2020, Division Three of the COA agrees with the appeal of Backherms from his Okanogan County Superior Court convictions for *two counts of delivery of controlled substances*, and the Court of Appeals reinstates his two previously-dismissed convictions for *two counts of possession of controlled substances*. The dismissal of the two delivery counts is based upon a jury instruction glitch. In regard to reinstatement of the convictions on the two possession counts, the Court of Appeals rejects Blackherms' argument that a law enforcement officer unlawfully entered his mobile home residence after the officer, while standing at the mobile home doorway, observed Blackherms hand off baggies containing apparent illegal drugs to another person in the residence. **The Court of Appeals holds that exigent circumstances justified the law enforcement entry of Blackherms' residence**.

8. State v. Kenneth Leroy Stephens: On May 12, 2020, Division Three of the COA agrees with the appeal of Stephens from his Chelan County Superior Court convictions for *unlawful possession of a controlled substance, methamphetamine*. **The Court of Appeals rules that a law enforcement officer arrested Stephens without probable cause** where the officer did not tell a theft suspect that he was under arrest until after all of the following things occurred: (A) the officer handcuffed Stephens as a theft suspect during a street contact; (B) the officer did not have any apparent safety concern at the point of handcuffing; (C) the officer did not tell Stephens at the point of the handcuffing that Stephens was not under arrest; (D) the officer

Mirandized Stephens and told him that witnesses could identify him in video footage; (E) Stephens confessed; and (F) a store employee arrived at the scene of the street contact and identified Stephens as the thief.

9. State v. David Raymond Mullins: On May 14, 2020, Division Three of the COA rejects the appeal of Mullins from his Stevens County Superior Court convictions for *(A) forgery, (B) resisting arrest and (C) obstructing a law enforcement officer*. The Court of Appeals rules, among other rulings, that **an officer did not give improper opinion-of-guilt testimony** when the officer gave lay testimony regarding his physical observations of a $100 bill and his personal knowledge and experience with physically handling money (it "felt different" from other bills the officer had handled previously, it had some differing dash lines and writing, and it "appear[ed] slightly smaller than typical U.S. currency [the officer has] handled."

10. State v. Brian K. Terwilleger: On May 19, 2020, Division Two of the COA rejects the appeal of Terwilleger from his Grays Harbor County Superior Court convictions for *(A) third degree assault and (B) second degree malicious mischief*. Among other rulings, the Court of Appeals rules that **the trial court record supports the trial court findings that Terwilleger, who does have some mental health issues, (1) voluntarily waived his Miranda rights while speaking to police on two occasions while in custody, and (2) made his statements to police voluntarily**. The Court of Appeals notes that it is significant that when an officer attempted to question Terwilleger a third time, Terwilliger invoked his right to silence, thus indicating Terwilleger's awareness of the rights that he waived during the previous two custodial interviews. See State v. Athan, 160 Wn.2d 354, 381 (2007). The Court of Appeals also notes that there is no evidence that interrogating officers exploited any of his mental health issues such as to make his statements involuntary.

11. State v. Samuel David Schmittler: On May 19, 2020, Division Two of the COA rejects the appeal of Schmittler from his Kitsap County Superior Court conviction for *second degree assault of a child with domestic violence and use of a position of trust aggravators*. Among other rulings, the Court of Appeals rules (on an issue that Schmittler did not raise in the trial court) that **the trial court record does not support Schmittler's assertion that he did not voluntarily consent to officers' entry and search of his home**. The Court of Appeals rejects his unsupported claim that he was under duress because of fear that denying the officers entry would be treated as obstruction of justice.

12. State v. Christopher Lee Murphy: On May 21, 2020, Division Three of the COA rejects the appeal of Murphy from his Benton County Superior Court conviction for *second degree unlawful possession of a firearm*. The Court of Appeals rules that (1) **reasonable suspicion** (Murphy was under investigation for trespass for having refused several request by a motel clerk to leave the motel premises) **justified an initial police stop**; and (2) **continued noncompliance and suspicious behavior** (Murphy took an aggressive step toward investigating officers and he failed to stop putting his hand in his pockets) **justified prolonging the Terry stop and expanding the scope of the investigation to the point where Murphy was frisked and arrested for being a felon in possession of a handgun**.

13. In re Personal Restraint of Christopher Lee Cobb: On May 27, 2020, Division Two of the COA denies Cobb relief from his Pierce County Superior Court convictions for *(A) two counts of unlawful possession of a controlled substance with intent to deliver, and (B) one count of first degree unlawful possession of a firearm*. The Court of Appeals rules that **a search warrant's descriptions of controlled buys using a confidential informant establish probable cause for the warrant under the two-pronged PC test of Aguilar-Spinelli**.

14. State v. J. Leonor Salazar Dimas: On May 27, 2020, Division Two of the COA rejects the appeal of Dimas from his Thurston County Superior Court conviction for *possession of cocaine*. Dimas argued on appeal in this case that developed out of a joint federal-local task force investigation that a search warrant for evidence relating to tax evasion did not support an officer's seizing of small pill bottles that contained, among other things, small plastic wrappers that turned out to contain cocaine. **The Court of Appeals rules that the search warrant supported searching for small items such as small pill bottles because the warrant authorized searching for electronic storage cards, which can be tiny. The Court of Appeals also concludes that when officers saw inside the bottles small plastic wrappers containing white powder, they had probable cause (for purposes of the plain view doctrine) to believe that the powder was cocaine even before any tests were performed on the powder**.

15. State v. Robbie Lee Fitch: On May 27, 2020, Division Two of the COA rejects the appeal of Fitch from his Cowlitz County Superior Court convictions for *(A) two counts of possession of methamphetamine; (B) two counts of possession of heroin; and (C) two counts of bail jumping*. The Court of Appeals rules that **a search warrant was not expired where the warrant was issued on February 7, 2017 and executed on February 17, 2017. The Court of Appeals explains that under the applicable Washington Court Rules, a warrant must be executed within 10 days of issuance, but that in computing the period, the day of issuance is not included. Accordingly, the 10th day was February 17, 2017, so the 10-day rule was met**.

****

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.

****

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].

****