LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

OCTOBER 2019

TABLE OF CONTENTS FOR OCTOBER 2019 LEGAL UPDATE

WASHINGTON STATE SUPREME COURT……………………………………………2

VEHICLE IMPOUNDS UNDER ARTICLE I, SECTION 7 OF WASHINGTON CONSTITUTION: RCW 46.55.360 MANDATING IMPOUNDING OF VEHICLE IN DUI ARREST VIOLATES THE CONSTITUTION BECAUSE THE STATUTE DOES NOT REQUIRE THAT OFFICERS CONSIDER REASONABLE ALTERNATIVES TO IMPOUNDMENT
State v. Villela, ___ Wn.2d ___ , 2019 WL ___ (October 17, 2019)………………………2

PUBLIC DISCLOSURE ACT: NO STATUTORY OR CONSTITUTIONAL PRIVACY PROTECTION FOR BIRTH DATES OF GOVERNMENT EMPLOYEES IN WASHINGTON STATE
Washington Public Employees Association, et al. v. Evergreen Freedom Foundation, ___ Wn.2d ___ , 2019 WL ___ (October 24, 2019)…………………………………………6

WASHINGTON STATE COURT OF APPEALS…………………………………………....6

WASHINGTON'S SEARCH INCIDENT TO ARREST RULE: BACKPACK WAS NOT LAWFULLY SEARCHED INCIDENT TO ARREST WHERE, AT OR IMMEDIATELY PRECEDING THE POINT OF ARREST, THE BACKPACK WAS IN *CONSTRUCTIVE POSSESSION* OF THE ARRESTEE, BUT THE BACKPACK WAS NOT OBSERVED TO BE OR REPORTED TO OFFICERS TO HAVE BEEN IN *ACTUAL AND EXCLUSIVE POSSESSION* OF THE ARRESTEE
State v. Alexander, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, October 7, 2019)……6

SEARCH INCIDENT TO ARREST RULE UNDER WASHINGTON CONSTITUTION AND FOURTH AMENDMENT: HOLDING OF COURT IS THAT CLOSED, ZIPPERED POUCH IN ARRESTEE'S PURSE WAS PROPERLY SEARCHED INCIDENT TO ARREST BECAUSE, AT OR IMMEDIATELY PRIOR TO THE POINT OF ARREST, THE PURSE WAS IN *ACTUAL AND EXCLUSIVE POSSESSION* OF THE ARRESTEE, AND THE CLOSED, ZIPPERED POUCH INSIDE THE PURSE WAS NOT A CELL PHONE OR A LOCKED CONTAINER
State v. Richards, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. II, October 29, 2019)….11

DUI CONVICTION IS REVERSED BASED ON TRIAL COURT: (1) ALLOWING EVIDENCE OF DRIVER'S REFUSAL TO SUBMIT TO A PRELIMINARY BREATH TEST PRIOR TO HER ARREST FOR DUI, AND (2) ALLOWING OFFICER'S TESTIMONY THAT DEFENDANT'S REFUSAL OF PBT TEST REFLECTED HER KNOWLEDGE THAT SHE WAS GUILTY
State v. Kaufman, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. II, October 15, 2019)…..13

DEFENDANT SHOULD HAVE BEEN ALLOWED TO DEFEND HIS SHOOTING OF DOG BASED ON RCW 16.08.020, WHICH MAKES IT LAWFUL TO KILL A DOG SEEN CHASING, BITING, OR INJURING A "DOMESTIC ANIMAL" IN CERTAIN CIRCUMSTANCES
State v. Wilson, ___ Wn. App. 2d ___ , 2019 WL ___ (Division II, October 8, 2019)….19

STALKING CONVICTION DOES NOT VIOLATE DEFENDANT'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH
State v. Nguyen, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, October 21, 2019)……19

STATE IS NOT REQUIRED TO PROVE THAT A FIREARM IS OPERABLE IN ORDER TO PROSECUTE FOR UNLAWFUL POSSESSION OF A FIREARM BY A CONVICTED PERSON
State v. Olsen, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. II, October 8, 2019)………..21

VACATION OF JUVENILE COURT DISPOSITION FOLLOWING SUCCESSFUL COMPLETION OF DEFERRED DISPOSITION DOES NOT RESTORE FIREARM RIGHTS
State v. S.G., ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, October 28, 2019)……..…22

BRIEF NOTES REGARDING OCTOBER 2019 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES……………………………………………………………………………………23

****

WASHINGTON STATE SUPREME COURT

VEHICLE IMPOUNDS UNDER ARTICLE I, SECTION 7 OF WASHINGTON CONSTITUTION: RCW 46.55.360 MANDATING IMPOUNDING OF VEHICLE IN DUI ARREST VIOLATES THE CONSTITUTION BECAUSE THE STATUTE DOES NOT REQUIRE THAT OFFICERS CONSIDER REASONABLE ALTERNATIVES TO IMPOUNDMENT

State v. Villela, ___ Wn.2d ___ , 2019 WL ___ (October 17, 2019)

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

> Late one night in January 2018, [a law enforcement officer] stopped a jeep driven by Joel Villela for speeding. [The officer] smelled alcohol on Villela's breath and, after Villela declined a roadside field sobriety test, arrested him on suspicion of driving

> while under the influence of intoxicants (DUI). [The officer] also impounded Villela's jeep under RCW 46.55.360. Following the dictates of RCW 46.55.360, [The officer] did not consider whether there was a reasonable alternative to impounding Villela's jeep, such as releasing it to one of Villela's two passengers.
>
> After the jeep was impounded, [the officer] did an inventory search of its contents. [The officer] found sandwich bags, digital scales, black cloth, pipes, and $340 in cash, all of which he believed was associated with drug dealing. A search incident to arrest discovered cocaine on Villela himself. Villela was charged with DUI and possession with intent to deliver controlled substances.
>
> Villela moved to suppress the fruits of the inventory search on the grounds that the mandatory impound of his jeep (which was the only grounds for the search) was not a lawful seizure under article I, section 7 [of the Washington constitution]. At the hearing, the trial judge noted that this issue had come up several times before in the Grant County Superior Court, including in his own courtroom. Villela offered evidence that the costs associated with even a brief vehicle impound can easily exceed $1,000 and may result in the loss of the vehicle. The trial judge granted the suppression motion . . .

<u>ISSUE AND RULING</u>: Does the mandatory impound statute for DUI arrests violate article I, section 7 of the Washington constitution such that the impounding of DUI arrestee Villela's jeep without considering reasonable alternatives to impoundment violated his rights under article I, section 7? (<u>ANSWER BY UNANIMOUS WASHINGTON SUPREME COURT</u>: Yes)

<u>Result</u>: Affirmance of Grant County Superior Court order suppressing the results of an inventory search in a case where Joel A. Villela is charged with DUI and possession of cocaine with intent to deliver.

<u>ANALYSIS</u>:

The Supreme Court summarizes the key part of its ruling as follows in the introduction to the Court's opinion:

> Our state constitution protects our right to privacy. Const, art. I, § 7. Under our constitution, the State and its agents may not disturb our "private affairs . . . without authority of law." "Authority of law" generally means a warrant issued by a neutral magistrate or a long standing exception to the warrant requirement.
>
> We are asked today whether the legislature has created "authority of law," as understood in our constitution, by passing RCW 46.55.360. Laws OF 2011, ch. 167, § 3. Under RCW 46.55.360, officers are required to impound a vehicle any time they arrest its driver for driving under the influence. This impound is mandatory, regardless of whether the vehicle is safely off the roadway or whether another person is able to safely drive it away. The trial court below found that RCW 46.55.360 violates our constitution because it requires what the constitution allows only under limited circumstances. We agree. Our constitution cannot be amended by statute, and while the legislature can give more protection to constitutional rights through legislation, it cannot use legislation to take that protection away. Accordingly, we affirm.

The <u>Villela</u> Opinion concludes that the statute violates the Washington constitution because the statute does not require that officers consider reasonable alternatives to impoundment. The

following key precedents are relied on by the Washington Supreme Court in this decision imposing greater restrictions on impounds under article I, section 7 of the Washington constitution than are imposed by the U.S. constitution's Fourth Amendment are: State v. Houser, 95 Wn.2d 143 (1980), State v. Williams, 102 Wn.2d 733 (1984) State v. Coss, 87 Wn. App. 891 (1997), and State v. Tyler, 177 Wn.2d 690 (2013).

************GUEST SUMMARY OF VILLELA BY MOSES GARCIA***********

With permission, I quote in its entirety the summary regarding Villela by Moses Garcia, Legal Consultant for the Traffic Safety Resources Program of Washington's Municipal Research & Service Center in Seattle. The MRSC phone number is (206) 625-1300. The direct line for Mr. Garcia is (206) 625-0916 x 133. The TSRP website is at https://duienforcers.wildapricot.org

MOSES GARCIA RE: STATE V. VILLELA

Our State Supreme Court today struck down as unconstitutional the mandatory impound requirement of Hailey's law. State v. Villela - Oct. 17, 2019 The decision was unanimous. We now default back to having law enforcement exercise their discretion as to whether or not to impound following a DUI arrest.

In terms of guidelines for LEOs on impoundment following today's ruling, we have some useful material in *State v. Bales*, 15 Wn. App. 834 (1976):

"Reasonable cause for impoundment may for example, include the necessity for removing:

(1) an unattended-to car illegally parked or otherwise illegally obstructing traffic;

(2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver;

(3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary;

(4) an abandoned car;

(5) a car so mechanically defective as to be a menace to others using the public highway;

(6) a car impoundable pursuant to ordinance or statute which provides thereof as in the case of forfeiture.

I think we can also reasonably include circumstances where:

7) the officer is [reasonably] seeking a warrant to search the vehicle (drugged drivers, Felony collision cases, any reconstruction case, etc.)

8) the officer has reasonable bases to believe the driver will return and attempt to drive the vehicle while intoxicated or illegally (e.g. DWLS or IID violations)

Some gray areas include:

9) A commercial motor vehicle is involved. They are a "heavily regulated industry." Villela's reasoning does not apply.

LEOs need direction on how long is "reasonable" time for awaiting assistance in taking possession of defendant's vehicle. The court plainly regards friends and family as reasonable alternatives for moving the defendant's vehicle to safety. For LEOs however, such persons present a safety threat similar to that faced in DV circumstances. Such "assistance" should not be called while the investigation is ongoing unless the LEO is assisted by other law enforcement. The defendant's call for assistance may yield uncooperative, belligerent, or impaired person(s) who pose a safety threat. Accordingly, LEOs should only contact private persons once the investigation is largely complete. That means the investigation will be delayed from the time the call for assistance is made until the assistance arrives. How long a delay in the investigation is warranted? It may depend on the type of impairment (drug or alcohol) and whether the officer can reliably assess how quickly the drug will fall below per se thresholds (if it is a minor or a CMV operator with a PBT of .03, haste is required to capture that concentration. Likewise, with any THC or huffing suspicions.)

LEOs also need direction on what the limits of their actions should be regarding moving private vehicles.

For example, if the driver is arrested and the defendant's car is in a private lot but not in a stall—should the LEO be allowed to drive the private vehicle into a stall? What if the vehicle is illegally parked, but there is a lot 200 feet away? What if the lot requires payment? In *Bales*, the court referred with approval to the idea the vehicle could "easily [have] been moved a short distance to a legal parking area and secured against theft." Plainly the impaired defendant cannot drive their vehicle and should not be left alone after the arrest. Perhaps a "line-of-sight" between the LEO and their patrol vehicle limits the maximum reasonable distance an arresting officer can move a stranded vehicle when no other LEO is available to assist?

Consult with your Legal Advisers

LEOs should consult with their legal advisers as soon as possible on the questions this case raises and the best methods to use while policy guidelines are developed. In the short term, carefully document your reasoning for both impounding and NOT impounding--as both decisions have liability attached. Recall that Hailey's law resulted from a case with a $5.5 million verdict because the jury found the LEO did not take sufficient measures to prevent the driver from returning to her vehicle and driving while impaired after the DUI arrest.

Pass Along Your Thoughts

As new issues and considerations arise, feel free to pass along your thoughts to your Traffic Safety Resource Prosecutors. Mgarcia@mrsc.org Miriam.Norman@seattle.gov Juliad@co.yakima.wa.us We will be working on new training to assist agencies in adjusting to the new decision.

***************END OF GUEST SUMMARY BY MOSES GARCIA*************

PUBLIC DISCLOSURE ACT: NO STATUTORY OR CONSTITUTIONAL PRIVACY PROTECTION FOR BIRTH DATES OF GOVERNMENT EMPLOYEES IN WASHINGTON STATE

In Washington Public Employees Association, et al. v. Evergreen Freedom Foundation, ___ Wn.2d ___ , 2019 WL ___ (October 24, 2019), the Washington Supreme Court rules 5-4 that government employees in Washington do not have a protected privacy interest against disclosure of public records containing employee birth dates associated with their names. The majority opinion is authored by Justice Stephens and signed by Justices Fairhurst, Johnson, Madsen and Yu.

The Majority Opinion concludes: (1) that the Public Records Act (PRA), chapter 42.56 RCW, does not exempt these records from disclosure; and (2) that the Washington Constitution, article I, section 7, does not preclude disclosure, "given that names and birth dates are widely available in the public domain and that their disclosure here does not violate privacy rights."

Result: Reversal of decision of Division Two of the Court of Appeals and reinstatement of Thurston County Superior Court decision that denied the motion of state employee unions for a permanent injunction that would have prevented named state agencies from disclosing information about the unions' employees in response to a public records request by the Evergreen Freedom Foundation.

****

WASHINGTON STATE COURT OF APPEALS

WASHINGTON'S SEARCH INCIDENT TO ARREST RULE: HOLDING OF COURT IS THAT BACKPACK WAS NOT LAWFULLY SEARCHED INCIDENT TO ARREST BECAUSE, AT OR IMMEDIATELY PRECEDING THE POINT OF ARREST, THE BACKPACK WAS IN *CONSTRUCTIVE* POSSESSION OF THE ARRESTEE, BUT THE BACKPACK WAS NOT OBSERVED TO BE OR REPORTED TO OFFICERS TO HAVE BEEN IN *ACTUAL AND EXCLUSIVE POSSESSION* OF THE ARRESTEE

State v. Alexander, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, October 7, 2019)

****

LEGAL UPDATE PRELIMINARY EDITORIAL NOTES/COMMENTS: This Court of Appeals decision interprets and applies the Washington Supreme Court decisions in State v. Byrd, 178 Wn.2d 611 (2014), State v. MacDicken, 179 Wn.2d 936 (2014), and State v. Brock, 184 wn.2d 148 (Sept. 3, 2015). The combined effect of those decisions, in the view of your Legal Update editor (a view open to debate in some respects in this increasingly murky area of the law) was to establish a Washington constitutional rule under article I, section 7 for the scope of searches of the person (not vehicles) incident to arrest for items and containers associated with the person of a custodial arrestee. The Washington rule is:

- **Under the first part of a bright line rule, officers may automatically make a contemporaneous search of any item or container that (1) is on the person of the**

arrestee or (2) is actually and exclusively in the possession of the arrestee at the point of or immediately prior to the point of arrest (this part of the rule appears to allow searches that are allowed under U.S. Supreme Court Fourth Amendment precedents),

Note that under this rule, both the Washington constitution and the Fourth Amendment do not permit automatic searches of cell phones incident to arrest, and that the Washington constitution was held in State v. VanNess, 186 Wn. App. 148 (2015) to not allow automatic searches of locked containers seized incident to arrest from arrestees.

- **But under the second part of the bright line Washington rule, automatic search authorization does not extend to items or containers that are only *constructively* possessed by the arrestee (even if located within the lunge/grab area) at the point of or immediately prior to the point of arrest. For such items, officers must be able to articulate reasonable belief that an item or container was searched in order to prevent access to a weapon or to prevent destruction of evidence. On the other hand, I think that the Fourth Amendment U.S. Supreme Court precedents do not create such an "actual vs. constructive possession" distinction (although there are federal circuit court decisions to the contrary, and the Washington Supreme Court stated in State v. Byrd, 178 Wn.2d 611, 617 (2013)) that there is such a Fourth Amendment distinction). Under the Fourth Amendment bright line rule as I understand it, automatic search authorization extends to items or containers that were in the lunge/grab area at the point of arrest. Of course, Washington officers are required to follow the narrower constraints of the Washington bright line rule, and therefore must be able to point to articulable and reasonable justification (re destruction of evidence or obtaining of a weapon) for searching an item or container that was in the lunge/grab area at or immediately preceding the point of arrest.**

Note again that under this rule, special restrictions, no warrantless search incident to arrest is allowed for cell phone searches under both the Washington constitution and the Fourth Amendment. A warrant is generally required, and pursuit of a warrantless search theory based on a consent or exigent circumstances theory for a warrantless cell phone search is legally risky in essentially uncharted waters.

Note also that the Washington Supreme Court in Byrd, MacDicken and Brock has declined to apply to searches of the person and personal effects and containers the rationale of the motor vehicle search incident rule of Arizona v. Gant, 556 U.S. 332 (2009) (creating a Fourth Amendment rule limiting vehicle searches incident to arrest) and State v. Snapp, 174 Wn.2d 177 (2012) (imposing a more restrictive article I, section 7 rule for such searches). Under Gant and Snapp, once a person has been removed from a vehicle following custodial arrest, the vehicle is not subject to warrantless search incident to arrest except under special circumstances. Under those decisions, automatic or per se warrantless searching is not allowed. Also note that the Washington car search rule under Snapp for car search incident to arrest is more restrictive than the Fourth Amendment rule under Gant.

Some federal circuit courts have relied on the Gant decision to impose a similar restriction on searches of containers incident to arrest, i.e., barring an automatic search of a container once it has been secured and there is no real risk that the arrestee will gain access to destroy evidence or get access to a weapon. But some federal courts have declined to so extend Gant, recognizing that extending Gant to searches of the

person could essentially eliminate searching of all closed items taken from arrestees and secured during the process of search incident to arrest. And, as noted above, the Washington Supreme Court (in <u>Byrd</u>, <u>MacDicken</u> and <u>Brock</u>) has, to date, not extended the car search-incident rationale of <u>Gant/Snapp</u> to searches of personal effects and containers taken from the control of the arrestee incident to arrest.

As always, I urge law enforcement to consult legal advisors and local prosecutors for guidance on issues addressed in the <u>Legal Update</u>.

****

<u>Facts and Proceedings below</u>: (Excerpted from Court of Appeals decision)

> On July 15, 2017, [a law enforcement officer] responded to a trespass report at 901 West Casino Road in Everett. There, he observed a man and a woman, later identified as Delane Slater later and Heather Alexander, sitting in an undeveloped field marked with "no trespass" signs.
>
> [The officer] identified himself as law enforcement at some distance and observed Slater and Alexander manipulating some unknown items on the ground. [The officer] approached Slater and Alexander, who remained seated by a log approximately three or four feet apart from each other.
>
> [The officer] informed Slater and Alexander that they were trespassing and obtained their identification. When [the officer] conducted a records check on Alexander, he learned that she had an active Department of Corrections (DOC) warrant. A records check on Slater yielded no results.
>
> While interacting with Alexander, [the officer] observed a pink backpack sitting directly behind Alexander. The backpack was close enough to Alexander that it appeared to be touching her back. When [the officer] asked Alexander whether the backpack belonged to her, she indicated that it did.
>
> [The officer] confirmed the DOC warrant and placed Alexander under arrest. At this point, [the officer] did not believe that he had probable cause for any other offense. Because Alexander was being arrested, Slater later offered to take Alexander's backpack with him. Alexander indicated to [the officer] that it was her desire for Slater to take the backpack.
>
> [The officer] informed Slater that Alexander's personal property would be searched incident to arrest and that it would remain with her at that time. He asked Slater to leave the scene and indicated that "Slater did not do anything to cause [the officer] safety concern." Slater left without incident.
>
> [The officer] took Alexander into custody and walked Alexander and her backpack to his patrol vehicle. Alexander was cooperative throughout this course of action. [The officer] seated Alexander in his patrol vehicle and placed her backpack on top of the trunk.
>
> [The officer] then searched the backpack and located items containing what he believed to be a controlled substance. [The officer] informed Alexander that he was additionally

arresting her for possession of a controlled substance and advised her of her Miranda rights.

The State charged Alexander with possession of a controlled substance, committed while on community custody. Prior to trial, Alexander moved to suppress the evidence found during [the officer's] warrantless search of her backpack, arguing that the search did not fall within any valid exception to the warrant requirement. The trial court denied Alexander's motion and entered findings of fact and conclusions of law.

A jury later found Alexander guilty as charged.

[Some paragraphing revised for readability]

ISSUE AND RULING: The Washington Supreme Court has established under article I, section 7 of the Washington constitution that the bright line rule for automatic search of a person's effects incident to arrest is limited, as to containers, to containers in *actual and exclusive possession* of the arrestee at or immediately preceding the point of arrest. For containers that are in only *constructive possession* of the arrestee at or immediately prior to arrest, search of the contents is permitted only if there is reasonable and articulable suspicion that the arrestee could destroy evidence or obtain a weapon from the container.

In this case, officers did not observe and did not have evidence that Alexander had been in possession of the backpack at or immediately prior to the point when they arrested her. They did observe that the backpack was sitting immediately behind her and appeared to be touching her. There was no evidence presented in this case that the officer had an articulable and reasonable suspicion that the arrestee could obtain a weapon from or destroy evidence in the backpack. Was the backpack subject to a lawful, bright line, automatic search of the container that was taken from behind the arrestee incident to her arrest? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of Snohomish County Superior Court conviction of Heather Anne Alexander for possession of a controlled substance, committed while on community custody.

ANALYSIS:

The Court of Appeals begins its analysis with a lengthy discussion of three Washington Supreme Court decisions issued from 2013 to 2015. This Legal Update entry summarizes those three Washington Supreme Court decisions in the next four paragraphs.

In State v. Byrd, 178 Wn.2d 611 (Oct. 10, 2013), the Washington Supreme Court determined to be lawful a contemporaneous warrantless search of a purse simply, and automatically as a bright line time-of-arrest rule, because the purse was in the actual possession of the arrestee at the time of the arrest.

The Bryd Court warned that Washington's constitution does not authorize search incident based merely on constructive possession of an item. In other words, where the person arrested was merely in constructive possession of an item at the time of arrest, something more is required to justify a search of the item. Where constructive possession is involved, the Washington rule is that there must be evidence that there was a reasonable and articulable concern that the arrestee could access a weapon or destroy evidence.

The Washington Supreme Court confirmed its Byrd ruling in State v. MacDicken, 179 Wn.2d 936 (February 27, 2014) when the Court held that immediately after officers arrested and handcuffed a suspect in a parking lot, a bright line, time-of-arrest rule authorized the officers, incident to the arrest, to search a bag that was taken from his actual possession at the time of arrest. Under this bright line rule, the Court deemed it irrelevant whether the arrestee, who had not yet been fully secured by placement in a patrol car at the time of the search of the bag, could or could not have broken free and accessed the bag to obtain a weapon or destroy evidence.

And in State v. Brock, 184 Wn.2d 148 (Sept. 3, 2015), an 8-1 majority of the Washington Supreme Court held that a backpack taken from a suspect at the beginning of a Terry stop automatically became subject to search incident to arrest under the time-of-arrest rule when the Terry stop ripened into a lawful arrest over a period of ten minutes.

The Court of Appeals then explains as follows that the Alexander case is not like Byrd, MacDicken and Brock because defendant Alexander was in constructive possession, not actual possession, of the backpack at or immediately prior to the time of arrest:

> This case is readily distinguishable from Byrd, MacDicken, and Brock. Unlike in Byrd (where the defendant's purse was in her lap at the time of arrest), MacDicken (where the defendant was carrying a laptop bag and pushing a rolling duffle bag when officers saw him), and Brock (where the defendant was wearing his backpack when he was stopped), Alexander's backpack was merely sitting behind her at the time of her arrest.
>
> The State points to no evidence that Alexander was holding, wearing, or carrying the backpack at any time during her contact with [the officer], and [the officer] himself testified that no one had reported seeing Alexander carrying the backpack at any earlier time. Indeed, the trial court made no finding that Alexander had actual and exclusive possession of her backpack at the time of or immediately preceding her arrest. The absence of such a finding is not surprising given that the backpack only "appeared" to be touching Alexander, and Slater was seated just a few feet away.
>
> Put another way, the trial court's findings establish, at most, that Alexander could immediately have reduced the backpack to her actual possession, i.e., that Alexander had dominion and control – and thus constructive possession – over the backpack. . . . But actual and exclusive possession, not merely constructive possession, is required under the time-of-arrest rule. . . . And in the absence of a finding that Alexander had actual and exclusive possession of her backpack at the time of or immediately preceding her arrest, we must indulge the presumption that the State, which bore the "heavy burden" of proof on this issue, failed to sustain its burden. . . .
>
> Furthermore, as our Supreme Court has explained, the scope of a warrant exception "must track its underlying justification." Brock, 184 Wn.2d at 158. To this end, the justification for warrantless searches of an arrestee's person (which require no justification beyond the validity of the arrest) – as distinct from grab area searches (which require "some articulable concern that the arrestee can access the item in order to draw a weapon or destroy evidence") – is that "there are presumptive safety and evidence preservation concerns associated with police taking custody of those personal items immediately associated with the arrestee, which will necessarily travel with the arrestee to jail." Brock, 184 Wn.2d at 155 (emphasis added).

> Here, as discussed, the State failed to establish that Alexander's backpack was in her actual and exclusive possession at or immediately preceding the time of her arrest. Furthermore, Slater, about whom [the officer] expressed no safety concerns, offered to take the backpack, and Alexander desired that Slater take it. Under these circumstances, Alexander's backpack was not an item immediately associated with her person that would necessarily travel to jail with her.
>
> Rather, the only reason the backpack traveled to jail with Alexander was because [the officer] decided that it would. But the scope of the arrestee's person is determined by what must necessarily travel with an arrestee to jail, not what an officer decides to take to jail.

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

<u>LEGAL UPDATE EDITORIAL NOTES ABOUT OTHER RESEARCH SOURCES REGARDING THE SEARCH-INCIDENT-TO-ARREST EXCEPTION TO THE SEARCH WARRANT REQUIREMENT</u>: As noted above, the Washington Supreme Court has interpreted the Washington constitution as imposing restrictions on searches of the person (and effects) differing in some respects from those imposed by the Fourth Amendment. For general information on this subject area for Washington law enforcement officers and prosecutors, see discussion starting at page 305 in "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors," May 2015, a collection of case law by Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys. The collection and discussion of cases is accessible both on the website of WAPA and on the Criminal Justice Training Commission's internet <u>LED</u> page. Note also the discussion at pages 310-311 to the effect that special restrictions apply for cell phones seized in search of the person incident to arrest.

Also accessible on the CJTC internet <u>LED</u> page is the "<u>Law Enforcement Legal Update Outline</u>" by your <u>Legal Update</u> editor with cases on arrest, search, seizure, and other topical areas of interest to Washington law enforcement officers, plus a chronology of independent grounds rulings under Article I, Section 7 of the Washington Constitution. See pages 36-42 for some case citations and brief summaries of rulings in this subject area. Note the discussion at pages 41-42 to the effect that special restrictions apply for cell phones seized in search of the person incident to arrest, and that the Court of Appeals ruled in <u>State v. VanNess</u>, 186 Wn. App. 148 (2015) that <u>locked</u> items seized in search of the person incident to arrest are not subject to warrantless searches.

SEARCH INCIDENT TO ARREST RULE UNDER WASHINGTON CONSTITUTION AND FOURTH AMENDMENT: HOLDING OF COURT IS THAT CLOSED, ZIPPERED POUCH IN ARRESTEE'S PURSE WAS PROPERLY SEARCHED INCIDENT TO ARREST BECAUSE, AT OR IMMEDIATELY PRIOR TO THE POINT OF ARREST, THE PURSE WAS IN *ACTUAL AND EXCLUSIVE POSSESSION* OF THE ARRESTEE, AND THE CLOSED, ZIPPERED POUCH INSIDE THE PURSE WAS NOT A CELL PHONE OR A LOCKED CONTAINER

<u>State v. Richards</u>, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. II, October 29, 2019)

<u>Facts and Proceedings below</u>: (Excerpted from Court of Appeals opinion)

On November 11, 2017, a loss protection officer at a retail store in Woodland, observed Richards placing store merchandise into her purse. The officer approached Richards after she left the store without paying for the items in her purse. Two police officers, who were waiting outside, detained Richards and escorted her to the loss protection office. There, the officers arrested Richards and searched her purse.

During the search of the purse, the officers discovered the stolen merchandise and a closed, zippered pouch. They opened the pouch and searched it, looking for theft tools used for removing secure access devices. The pouch contained drug paraphernalia, foil residue, straws, and syringes.

The State charged Richards with unlawful possession of heroin. Richards filed a motion to suppress the contents of the pouch found in her purse. The trial court considered the evidence set out above and denied the motion. The court gave an oral ruling, but did not enter written findings of fact and conclusions of law.

Richards subsequently was convicted of possession of heroin.

ISSUE AND RULING: At or immediately prior to the point of arrest, Richards was observed to be carrying a purse. When an officer searched the purse, the officer discovered a closed, zippered pouch inside the purse. Was the search of the closed, zippered pouch a lawful search incident to arrest under the Washington constitution and under the Fourth Amendment? (ANSWER: Yes)

Result: Affirmance of Cowlitz County Superior Court conviction of Rachel Darshell Richards for possession of heroin and of third degree theft (she did not appeal her theft conviction).

ANALYSIS:

The Richards Opinion begins its analysis with extended discussion of federal and Washington appellate court decisions addressing the search incident to arrest exception to the warrant requirement. We have omitted that discussion from this Legal Update entry because much of it covers the same ground as discussion in the Legal Update entry immediately above regarding the Alexander case.

The concluding key part of the Court's analysis in Richards is as follows:

> Here, there is no question that the officers could search Richards's purse incident to her arrest because it was in her possession. [State v. Byrd, 178 Wn.2d 611, 622 (2013)]. Under [State v. VanNess, 186 Wn. App. 148, 162 (2015)] the officers would have been precluded from searching a locked container in that purse absent concerns about officer safety or an indication that a locked container contained evidence relevant to the crime of arrest. The issue here is whether the same rule applies to a closed, unlocked container in Richards's purse. We conclude that it does not.
>
> Washington courts addressing searches of purses incident to arrests have expressed no concern about officers searching closed, unlocked containers inside a purse or bag [that were in the actual, exclusive possession of the arrestee at or immediately prior to the time of arrest]. In [Sate v. Brock, 184 Wn.2d 148 (2015)] the court held that a search incident to an arrest was lawful when officers found drugs in a wallet inside a backpack searched incident to an arrest. In Byrd, the court held that a search incident to an arrest

was lawful when officers found drugs in a sunglasses case inside a purse. 178 Wn.2d at 615, 625. See also State v. Whitney, 156 Wn. App. 405, 409 (2010) (pill bottle); State v. Jordan, 92 Wn. App. 25, 31 (1998) (film canister and pill bottle); State v. Gammon, 61 Wn. App. 858, 863 (1991) (pill bottle); State v. White, 44 Wn. App. 276, 280 (1986) (cosmetics case).

None of these cases specifically addressed whether officers could lawfully search closed, unlocked containers. But Richards cites no cases in which a court has held that opening a closed, unlocked container during a lawful search of a purse or bag incident to an arrest is prohibited. She references State v. Wisdom, in which the court held that the search of an unlocked shaving kit in an arrestee's car was unlawful. 187 Wn. App. 652, 670-73 (2015). However, in that case the court found that the search of the car in which the shaving kit was found was not a lawful search [of the car] incident to arrest. Here, the search of Richards's purse was lawful.

We note the court's comment in VanNess that a search of a locked container may "implicate[] an arrestee's significant privacy interests" and therefore may preclude application of the search incident to arrest exception. 186 Wn. App. at 160. But the search of a closed, unlocked pouch in a purse in the arrestee's possession simply does not implicate the type of significant privacy interests that would render the search of the pouch unlawful.

We conclude that officers searching a purse or bag incident to arrest may lawfully search closed, unlocked containers within that purse or bag.

[Some citations omitted, others revised for style]

DUI CONVICTION IS REVERSED BASED ON TRIAL COURT: (1) ALLOWING EVIDENCE OF DRIVER'S REFUSAL TO SUBMIT TO A PRELIMINARY BREATH TEST PRIOR TO HER ARREST FOR DUI, AND (2) ALLOWING OFFICER'S TESTIMONY THAT DEFENDANT'S REFUSAL OF PBT TEST REFLECTED HER KNOWLEDGE THAT SHE WAS GUILTY

State v. Kaufman, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. II, October 15, 2019)

**********GUEST SUMMARY BY MOSES GARCIA REGARDING PBT ISSUE**********

With permission, I quote in its entirety the summary regarding the PBT refusal issue in Kaufman by Moses Garcia, Legal Consultant for the Traffic Safety Resources Program of Washington's Municipal Research & Service Center in Seattle. The MRSC phone number is (206) 625-1300. The direct line for Mr. Garcia is (206) 625-0916 x 133. The TSRP website is at https://duienforcers.wildapricot.org

MOSES GARCIA RE STATE V. KAUFMAN

On Tuesday October 15, 2019 of this week, our Court of Appeals Div. II held that admission of a Portable Breath Test (PBT) refusal at trial was error and reversed the DUI conviction. While we had an earlier decision in State v. Sosa from the Court of Appeals Div. III stating a directly contrary conclusion – the Kaufman case is likely to be the majority view for our courts.

The Kaufman ruling does not affect consent to take the PBT cases. If the defendant consented to the PBT, the result is fully admissible provided you can establish the defendant "knowingly, intelligently, and voluntarily" agreed to take the PBT.

Recommendation

I recommend prosecutors NOT admit into evidence PBT refusals in their case-in-chief (it may be admissible in rebuttal or if the door is opened).

Law Enforcement Officers need not change their process but realize that consent to the PBT is admissible if the proper warnings and calibration procedure are followed. However, if the driver refuses the PBT, the refusal is not admissible unless the driver is first placed under custodial arrest. (You could re-ask for a PBT after the custodial arrest to make that refusal admissible).

Consult with your legal advisors regarding the effect of Kaufman, but it should a modest impact on our cases.

Summary of Kaufman Analysis

A PBT is a breath test. A breath test is a search under both the State Supreme Court's decision in Baird and our Court of Appeals decision in Nelson. Unlike SFSTs, which are not a search (Meacham 2016), we must have an exception to the warrant requirement to permit a search via the PBT. If the PBT is offered to the driver before their custodial arrest, we cannot rely upon the Search Incident to Arrest exception. State v. O'Neill (2003).

Using a different theory, Sosa relied upon the Implied Consent Statute to admit the PBT refusal at trial. But if implied consent could be applied to the PBT, we would need to actually read the ICW warnings to the suspect before demanding the PBT. We have never done that for the PBT; it would be a very bad idea (you could not also demand an evidential breath sample from the same defendant later because they only need to provide one breath test, so we would be stuck with just a PBT). In real life, the ICW is not helpful for admitting the PBT.

Because there is no exception to the warrant requirement (that I have been able to find anyway), the PBT is inadmissible under traditional search analysis. Until a good solution is found, I would avoid raising appeal issues and omit the PBT refusal at trial unless it occurs after a custodial arrest and Miranda warnings.

**************END OF GUEST SUMMARY BY MOSES GARCIA*****************

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

> At approximately 6:45 AM on March 11, 2016, [an officer] of the Vancouver Police Department was patrolling within the city limits of Vancouver, Washington. [The officer] observed Kaufman driving past his patrol car in an adjacent lane. [The officer] visually approximated that Kaufman was driving between 25 and 28 miles per hour; the speed limit in that location was 20 miles per hour.
>
> [The officer] turned his "warning" lights on, and Kaufman slowed her vehicle down. [The officer] then observed Kaufman move her vehicle into a turn lane without using her turn signal for at least 100 feet before she made the turn. [The officer] contacted Kaufman

and asked for her license, registration, and proof of insurance. [The officer] did not smell an odor of intoxicants on Kaufman at this time.

When [the officer] ran the registration of Kaufman's vehicle, he found that Kaufman had an outstanding misdemeanor warrant. [The officer] returned to Kaufman's vehicle and arrested her on the warrant.

The first time [the officer] noticed an odor of intoxicants on Kaufman was when he placed her in handcuffs. Kaufman was upset and crying at that point. [The officer] also noticed that her eyes were "a little bloodshot" and her eyelids were "a little droopy." [The officer] decided he would begin a DUI investigation once they arrived at the jail.

At the jail, [the officer] offered to administer a PBT, which is a test he uses "to establish probable cause." Kaufman refused to take the test. [The officer] then asked Kaufman if she would be willing to take a series of voluntary standardized field sobriety tests (FSTs), and she refused.

[The officer] read Kaufman her Miranda rights and prepared a "Pre-arrest Observations" report. [The officer] reported that Kaufman's eyes were "watery and bloodshot," her speech was a little slow but "fair," her face was "flushed," her coordination was "fair," she displayed mood swings, and her level of impairment was "slight." [The officer] then read Kaufman the implied consent warning for breath and asked Kaufman if she would submit to a Datamaster breath test. Kaufman refused.

The City charged Kaufman with DUI. Kaufman's case proceeded to trial in Vancouver Municipal Court. Kaufman brought a pretrial motion to exclude evidence of her refusal to submit to the PBT and the FST but the court ruled this evidence was admissible. [Court's footnote 2: *Kaufman was also charged with and pleaded guilty to one count of operating a vehicle without using ignition interlock device as required by RCW 46.20.740(2), but this conviction is not at issue in this appeal*.] [Court's footnote 3: *Although Kaufman objected to the admission of her refusal to perform FSTs, she does not raise this issue on appeal*.]

At trial, [the officer] confirmed that Kaufman was not arrested for DUI. During an offer of proof made outside the presence of the jury, [the officer] admitted that he did not have probable cause to believe Kaufman had driven under the influence of intoxicants at the time of her arrest on the unrelated warrant. [The officer] also admitted that he had to make a decision "with very little information" because his observations at the scene were insufficient to support probable cause and Kaufman refused to perform the tests normally administered during a DUI investigation.

[The officer] testified that Kaufman refused to submit to either the PBT or the Datamaster breath test or to perform FSTs. During cross-examination, [the officer] was asked whether he gathered any further evidence of Kaufman's impairment at the jail, and he answered, "Any new no." He said his investigation at the jail "reinforced" his observations about Kaufman's odor of alcohol, her bloodshot and watery eyes, and her flushed face.

On redirect examination, the City had the following exchange with [the officer]:

> [Prosecutor]: Counsel asked you if you [gathered any new] evidence . . . once the defendant was at jail. Is it evidence if someone's under the influence of alcohol if they refuse to do the field sobriety tests?
>
> [Defense Counsel]: Objection.
>
> [Court]: Overruled.
>
> [Prosecutor]: So if you ask someone to do the field sobriety tests and they refuse to do that does that indicate . . . something to you?
>
> [The officer]: Yes it usually shows me that they are under the influence because they don't want the tests to fail.
>
> [Prosecutor]: Same thing you offered the defendant PBT to see if there was alcohol in her system, she refused that, what does that indicate to you?
>
> [The officer]: That she didn't want to take the tests because the result would show that she's under the influence.
>
> [Prosecutor]: And last thing is you offered the defendant a chance to give a breath sample on the BAC Datamaster and she forego giving a sample knowing her license would be suspended?
>
> [Tthe officer]: Yes.
>
> [Prosecutor]: Is that further evidence to you that she was under the influence on that date?
>
> [Tthe officer]]: It's usually an indication yes.

The City repeatedly commented on Kaufman's refusal to submit to the PBT, FSTs, and the Datamaster breath test in its opening statement and closing arguments. The City suggested that Kaufman's refusal to perform these tests was the primary evidence that Kaufman had driven under the influence of intoxicants.

The jury found Kaufman guilty of DUI. Former RCW 46.61.502 (2013).

Kaufman appealed her conviction to the superior court. The superior court affirmed, holding that the PBT refusal evidence was properly admitted under State v. Baird, 187 Wn.2d 210 (2016), and State v. Mecham, 186 Wn.2d 128 (2016). The court also held that [the officer's] opinion on the guilt of the defendant was improper under State v. Black, 109 Wn.2d 336 (1987), but concluded that the admission of the improper opinion testimony was harmless beyond a reasonable doubt due to the overwhelming untainted evidence of guilt.

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

ISSUES AND RULINGS: (1) After a law enforcement officer arrested Alexander on a warrant, but before the officer arrested her for DUI, the officer asked Alexander if she would submit to a portable breath test (PBT). She refused. The trial court later allowed the State to submit as

evidence of guilt her refusal to take the PBT. Was that a violation of her constitutional rights? (ANSWER BY COURT OF APPEALS: Yes)

(2) The law enforcement officer testified that a refusal to submit to alcohol testing reflects guilt. This violated the right of Alexander to have the jury decide her case. Was the error by the trial court in allowing the officer's testimony harmless under the totality of the circumstances? (ANSWER BY COURT OF APPEALS: No)

Result: Reversal of City of Vancouver Municipal Court conviction of Melissa Nicole Kaufman.

ANALYSIS:

(1) *PBT refusal by person not under arrest for DUI is not admissible*

In Birchfield v. North Dakota, 136 S.Ct. 2160 (June 23, 2016) the U.S. Supreme Court declared that under the Fourth Amendment, warrantless breath testing is allowed as a search incident to DUI arrest, but stated further that warrantless blood testing is not allowed as a search incident to DUI arrest. And the U.S. Supreme Court announced that a driver may be sanctioned for refusing a warrantless breath test in some circumstances, but not for refusing a warrantless blood test (exigency must be shown for blood test).

In State v. Baird, State v. Adams, 187 Wn.2d 201 (December 22, 2016), the Washington State Supreme Court held, based on the interplay of the Washington implied consent statute and constitutional limits on searches, that refusal of breath tests by DUI arrestees may be admitted against them in DUI trials because: (1) constitutionally, the breath test is per se a lawful search incident to arrest; and (2) statutorily, telling the jury about exercise of the right to refuse is a lawful consequence of the refusal.

In the Kaufman case, the Washington Court of Appeals rules that the prosecution is not aided by the rulings in Birchfield and Baird because defendant Kaufman was not under arrest for DUI when the officer asked her to take a PBT test. The Court of Appeals rules that where she was not under arrest for DUI at the time of being asked to take the test, the test could not be characterized as a search incident to arrest.

The Court of Appeals opinion includes the following footnotes:

Footnote 8:

> We note that even if the arrest in this case had been for DUI, it is questionable whether the City could rely on the search incident to arrest exception for admission of Kaufman's refusal to submit to the PBT. Former WAC 448-15-020 permits the use of the PBT to determine that a subject has consumed alcohol and to establish probable cause to place a person under arrest for alcohol related offenses. However, a PBT performed to establish probable cause for arrest is administered before an arrest. In contrast, a search incident to arrest must occur subsequent to the arrest. under [State v. Baird, 187 Wn.2d 210 (2016)], State v. O'Neill, 148 Wn.2d 564, 585 (2003); State v. Byrd, 178 Wn.2d 611, 617 (2013) ("'a search may be made of the person of the arrestee by virtue of the lawful arrest'") (quoting [U.S. v. Robinson, 414 U.S. 218, 224 (1973)]. A search that precedes an arrest, as a PBT must be conducted under former WAC 448-15-020, cannot be justified under the search incident to arrest exception to the warrant requirement.

Footnote 9:

State v. Smith, 130 Wn.2d 215, 222 (1996), held that "in the absence of a Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), hearing on the PBT, or specific approval of the device and its administration by the state toxicologist, the result garnered from the PBT is inadmissible for any purpose." 130 Wn.2d at 222. The state toxicologist has approved two PBT instruments for the uses outlined in former WAC 448-15-020. See former WAC 448-15-010 (2008). The City produced no evidence that the instrument it intended to use for Kaufman's preliminary breath test was one of the two instruments approved for use by the state toxicologist under former WAC 448-15-010.

(2) *Allowing officer to opine as to defendant's guilt was prejudicial error*

During [the officer's] testimony, the City asked [the officer], "Is it evidence [that] someone's under the influence of alcohol if they refuse to do the field sobriety tests?" [The officer] responded by stating that if someone refuses to do the field sobriety tests, "it usually shows me that they are under the influence because they don't want the tests to fail." When the City asked [the officer] what Kaufman's refusal to take the PBT indicated to him, he responded that it indicated that "she didn't want to take the tests because the results would show that she's under the influence." When asked if someone refusing to provide a breath sample on the Datamaster breath test is further evidence the person is under the influence, [the officer] responded, "[I]t's usually an indication yes."

The City concedes this testimony was improper, and we accept the City's concession. "Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant 'because it invad[es] the exclusive province of the [jury].'" State v. Demery, 144 Wn.2d 753, 759 (2001) . . .

Some opinions, "particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses," are clearly inappropriate in criminal trials. . . . Improper opinion testimony from a law enforcement officer may be especially prejudicial because the officer's testimony "often carries a special aura of reliability." Demery, 144 Wn.2d at 765.

Here, the parties agree that [the officer's] opinion testimony was improper and also agree that the error is constitutional. But the City argues that this error was harmless beyond a reasonable doubt because [the officer's] testimony was "based on his training and experience" and the evidence presented and his testimony were simply explaining why someone may refuse to comply with a DUI investigation, which is a "straight-forward interpretation" and "any lay person could easily come up with the same inference."

In other words, despite conceding that [the officer's] testimony was improper, the City predicates its harmless error argument on the idea that the testimony was not, in fact, improper. However, because we have accepted the City's concession, all that remains is for us to determine whether the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. . .

> This error, like the erroneous admission of Kaufman's refusal to submit to the PBT, warrants reversal. As noted above, at trial the City relied heavily on the inference of guilt arising from Kaufman's refusal to perform any tests, which was bolstered by [the officer]'s improper and prejudicial opinion testimony. Neither the City's untainted evidence pointing to Kaufman's intoxication nor the City's untainted evidence tending to show that Kaufman exhibited impaired driving, was so overwhelming that it necessarily leads to a finding of guilt.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO DEFEND HIS SHOOTING OF DOG BASED ON RCW 16.08.020, WHICH MAKES IT LAWFUL TO KILL A DOG SEEN CHASING, BITING, OR INJURING A "DOMESTIC ANIMAL" IN CERTAIN CIRCUMSTANCES

In State v. Wilson, ___ Wn. App. 2d ___ , 2019 WL ___ (Division II, October 8, 2019), Division Two of the Court of Appeals rules in a defendant's appeal from his conviction for first degree animal cruelty that the defendant is entitled to a new trial in which the jury is to consider his defense under RCW 16.08.020.

The case arose from an incident at an archery club when Wilson shot a large dog with an arrow after that dog had attacked Wilson's small dog. Wilson argues that his action was lawful under RCW 16.08.020, which states that it is lawful for a person to kill a dog seen chasing, biting, or injuring a "domestic animal" on real property that person owns, leases, or controls.

The Court of Appeals holds that although the trial court did not err in denying Wilson's motion to dismiss under RCW 16.08.020, the trial court erred in refusing to give Wilson's proposed jury instruction based on RCW 16.08.020. The Court of Appeals concludes that a pet dog is a "domestic animal" within the meaning of the statutory defense. The Court rules that the error in not instructing the jury on the statutory defense was not harmless error where the trial court's to-convict instruction contained a "reasonably necessary [to defend the dog]" requirement. The Court of Appeals declares that reasonable necessity is not an element of the defense under the statute, and therefore that the jury did not receive adequate instruction for defendant to make his statutory defense.

Result: Reversal of Grays Harbor County Superior Court conviction of Robert Ernest Wilson, Jr., for first degree animal cruelty; case remanded for re-trial.

STALKING CONVICTION DOES NOT VIOLATE DEFENDANT'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH

In State v. Nguyen, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, October 21, 2019), Division One of the Court of Appeals rejects the defendant's argument that convicting him of stalking for his harassing of the victim violated his right to free speech. The Court of Appeals concludes that, in light of the defendant's particular conduct and in light of the mental state element of the stalking statute, the free speech protections of the First Amendment of the U.S. constitution are not violated by defendant's conviction. In key part, the Court's analysis is as follows:

> The stalking statute prohibits conduct, with speech incidentally regulated. "When 'speech' and 'non-speech' elements are combined in the same course of conduct, sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." U.S. v. O'Brien, 391 U.S.

367, 376 (1968) (holding that the purpose of the statute was to criminalize the conduct of destruction of draft cards and was unrelated to the suppression of free expression).

Furthermore, "where matters of purely private significance are at issue, First Amendment protections are often less rigorous" because "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest." Snyder v. Phelps, 562 U.S. 443, 452 (2011). A statute aimed at punishing criminal conduct, such as repeated harassment associated with stalking, is not punishment on the basis of the expression of beliefs and ideas, or the "robust debate of public issues." See Snyder, 562 U.S. at 452 (distinguishing speech on matters of public interest and matters of private concern, finding the former occupies the highest rung of the hierarchy of First Amendment values, while regulating the latter does not risk interfering with a meaningful dialogue of ideas).

For example, in State v. Hegge, 89 Wn.2d 584 (1978), our Supreme Court addressed a First Amendment overbreadth challenge to Washington's former witness tampering statute, RCW 9.69.080 [crimes now addressed in RCW 9A.72.090-120]. While the defendants argued that the statute proscribed speech, the Court disagreed, explaining:

> We do not agree with defendants that RCW 9.69.080 is a pure speech statute, as it encompasses illegal conduct. For example, either forcefully detaining a witness from appearing in court, or payment of money to a witness for refraining from appearing, if done with intent to obstruct the course of justice, is clearly within the purview of the statute. Therefore, . . . overbreadth "must not only be real, but substantial" in order for the statute to be struck down. RCW 9.69.080 is clearly not substantially overbroad.
>
> But regardless of whether the statute is deemed to regulate only spoken words, or speech and conduct both, defendants cannot properly invoke the doctrine of facial overbreadth. [F]acial overbreadth has no applicability where, as here, the statute has been given a limiting construction.
>
> The limiting factor in RCW 9.69.080 is that, to constitute a crime, an endeavor to prevent a witness from appearing must have been made with the intent to obstruct the course of justice.

Hegge, 89 Wn.2d at 590-91. See also State v. CLR, 40 Wn. App. 839, 844-45 (1985) (affirming obstruction of police officer statute, RCW 9A.76.020(3), because of limiting element of intent).

Similarly, in State v. Alexander, 76 Wn. App. 830, 832-33 (1995), this court rejected an overbreadth challenge to the telephone harassment statute that makes it unlawful to call another person "with intent to harass, intimidate, torment, or embarrass." RCW 9.61.230. We concluded that the "telephone harassment statute primarily regulates conduct, with minimal impact on speech." . . . We reiterated:

> The government has a strong and legitimate interest in preventing the harassment of individuals. The telephone, a device used primarily for communication, presents to some people a unique instrument through which to harass and abuse others. Because the telephone is normally used for communication does not preclude its use in a harassing course of conduct...

> Prohibiting harassment is not prohibiting speech, because harassment is not a protected speech. Harassment is not communication, although it may take the form of speech. The statute prohibits only telephone calls made with the intent to harass. Phone calls made with the intent to communicate are not prohibited. Harassment, in this case, thus is not protected merely because it is accomplished using a telephone.

Alexander, 76 Wn. App. at 837 (emphasis added).

Here, as with the telephone harassment statute, the harassment provision of the stalking statute does not proscribe pure, protected speech. Instead it proscribes a course of conduct where the defendant "intentionally and repeatedly harasses . . . another person," and either "[i]ntends to frighten, intimidate, or harass the person," or "knows or reasonably should know that the person is afraid, intimidated or harassed." RCW 9A.46.110(1).

The jury heard testimony about Nguyen and Stinson's relationship and Nguyen's physical abuse of Stinson. Stinson testified that, based on her past experiences with Nguyen, which included several incidents of physical assaults and breaking down her front door twice, that she was fearful he would harm her or her daughter. Nguyen's course of conduct included repeated and unwanted calls, text messages, and visits to her house. These actions formed the basis for the felony stalking conviction, not the words contained in the text messages. Based on Stinson's past experiences with Nguyen, her fear was objectively reasonable.

There is sufficient evidence to support Nguyen's conviction for felony stalking.

[Footnotes omitted; some citations omitted, some revised for style]

Result: Affirmance of King County Superior Court convictions of Thanh Pham Nguyen for two counts of violation of a court order and for felony stalking.

STATE IS NOT REQUIRED TO PROVE THAT A FIREARM IS OPERABLE IN ORDER TO PROSECUTE FOR UNLAWFUL POSSESSION OF A FIREARM BY A CONVICTED PERSON

In State v. Olsen, ___ Wn. App. 2d ___ , 2019 WL ___ (Div. II, October 8, 2019), Division Two of the Court of Appeals rules, in a prosecution for first degree unlawful possession of a firearm, that the Court's prior decision in State v. Pierce, 155 Wn. App. 701 (2010) was incorrect under the controlling Washington case law. The Olsen Court declares that Pierce incorrectly required that a firearm must be proven to have been operable at the time of possession for it to be considered a "firearm" under the chapter 9.41 RCW provisions prohibiting possession of firearms by previously convicted persons. The Olsen Court rules that the following facts and evidence support the conviction of defendant for unlawful possession of a firearm:

> On June 15, 2017, Olsen, who had prior felony convictions, attempted to sell a gun at a local gun shop. After rejecting the gun shop employee's offer, Olsen left the shop with the gun. The gun shop employee contacted the police to verify that the gun was not stolen.

After determining that Olsen was prohibited from possessing firearms, the police contacted and arrested Olsen. The gun was never recovered. The State charged Olsen with first degree unlawful possession of a firearm.

Before trial, while discussing jury instructions, the State alerted the trial court that the focus of the case was going to be whether the gun "was in perfect, working order when the defendant tried to sell it." The State argued that it had to prove that the unrecovered gun was only a "gun in-fact" and that it could be rendered operational quickly and easily. The trial court deferred ruling on how to instruct the jury on this matter.

. . . .

At trial, the State presented testimony from Steven Vetter, the gun shop employee to whom Olsen had tried to sell the gun. Olsen's sole witness was a firearms expert, Marty Hayes.

. . . .

Vetter testified that he worked at the gun shop and was responsible for purchasing used guns. Olsen came into the gun shop and attempted to sell a .22 caliber Ruger revolver that he had been carrying in a shoulder holster for $250. Olsen did not say there was anything wrong with the gun.

Olsen told Vetter that the gun was loaded. After unloading the gun, Vetter, who was very familiar with this type of gun, visually inspected the gun "to make sure that all the parts were intact in the firearm, that there was no visible missing components, springs, hammer, transfer bar, things that could be removed." Concluding that the gun was in "[p]retty good" condition and not observing any problems with the gun, Vetter offered Olsen $125. Olsen rejected this offer, reloaded and holstered the gun, and left.

In addition to testifying about his encounter with Olsen, Vetter testified that he had extensive experience with guns, that he was trained to "tear guns down" and able to clean and fix them, and that although he did not work as a gunsmith, he regularly worked on his own guns. Vetter said that he would not have considered purchasing the gun unless he was satisfied that it was in working condition. Vetter also described his examination of the gun in detail, but he stated that he did not test fire the gun because he did not have the ability to do so at the shop.

Hayes, president and director of the Firearms Academy of Seattle, testified on Olsen's behalf. He reviewed the video from the store, the police report and statements, and the photograph of the gun that Olsen had attempted to sell. Hayes confirmed that the gun was a real gun rather than a toy or replica and opined that test firing the gun was the only way to determine for sure whether the gun would fire.

Result: Affirmance of Grays Harbor County Superior Court conviction of Michael Shawn Olsen for first degree unlawful possession of a firearm.

VACATION OF JUVENILE COURT DISPOSITION FOLLOWING SUCCESSFUL COMPLETION OF DEFERRED DISPOSITION DOES NOT RESTORE FIREARM RIGHTS

In State v. S.G., ___ Wn. App. 2d ___ , 2019 WL ___ (Div. I, October 28, 2019), Division One of the Court of Appeals rejects defendant's appeal from the King County Juvenile Court's denial of his motion to restore his firearm rights after he successfully completed a juvenile deferred disposition for second degree malicious mischief. The S.G. Court rejects S.G.'s contentions that: (1) the firearms statute, RCW 9.41.040, does not prohibit those with dismissed juvenile deferred dispositions from owning a firearm; and (2) that his firearm rights were "automatically" restored when his underlying conviction was vacated following his successful completion of the deferred disposition.

Result: Affirmance of King County Juvenile Court (Superior Court) denial of S.G.'s motion for restoration of his firearm rights based on his successful completion of the deferred disposition.

****

BRIEF NOTES REGARDING OCTOBER 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 October 2019, six 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 issues and case results.

1. State v. Enriqu Murillo, Jr.: On October 1, 2019, Division Three of the COA unanimously rejects the appeal of defendant from his Benton County Superior Court conviction for *possession of a controlled substance*, but the Court of Appeals votes 2-1 to re-classify his crime from a felony to a misdemeanor. Methamphetamine was found on defendant's person during a search incident to arrest. On the defendant's challenge to his conviction, Judge Fearing writes a very lengthy analysis that ultimately concludes that officers **had probable cause to arrest the defendant based in significant part on an in-person report from an informant providing incriminating information about the defendant, as well as an informant's information that was provided against the penal interest of the informant.** A 2-1 majority of the Court of Appeals (Judge Korsmo in dissent) rules that because the to-convict jury instruction did not identify the possessed controlled substance as methamphetamine, the classification of the crime must be the lowest level of crime for unlawful possession of a controlled substance, i.e., a misdemeanor for unlawful possession of less than 40 grams of marijuana.

2. State v. Christopher Johnson: On October 7, 2019, Division One of the COA rejects the appeal of defendant from his Snohomish County Superior Court conviction for *possession of a controlled substance while on community custody*. The Court of Appeals rules for the State on Terry and Miranda arguments raised by defendant.

On the Miranda issue, the Court of Appeals rules that the State proved by a preponderance of the evidence that an officer properly read Johnson his rights from a department-issued card, even though the officer testified only that he read Johnson his rights from "the normal Washington State Criminal Justice Training Commission Miranda warning card," and no evidence was presented as to the wording of the CJTC Miranda card (the Court of Appeals also rules in the alternative that any error by the trial court on this issue was harmless).

On the Terry issue, the Court of Appeals rules the investigatory stop that culminated in Johnson's arrest on an outstanding warrant was supported by reasonable suspicion, per the following facts, as described by the Court of Appeals:

> [The officer] noticed a black Audi while responding to a citizen complaint regarding abandoned vehicles. The car initially drew his attention because it did not have license plates and because he recognized it as being associated with a recent eluding incident involving Quinn, an individual known to carry weapons. Although [the officer] knew Quinn had been arrested in that incident, he did not know whether Quinn was still in custody. When [the officer] observed the man and woman sleeping in the car, he did not know their identities or whether they were connected with the recent eluding incident. [The officer] then observed a glass pipe on the center console of the car within reach of the man and woman. The pipe was consistent in his experience with the type used to ingest illegal drugs. When he knocked on the window, the woman woke up, grabbed the pipe, and threw it in the back seat.

3. State v. Adrian Allen Coleman: On October 17, 2019, Division Three of the COA rejects the appeal of defendant from his Benton County Superior Court conviction for *possession of a controlled substance, methamphetamine*.

The charges arose from a traffic stop on a warrant for Coleman's arrest and the subsequent impounding of his vehicle and searching of his vehicle under a search warrant. The Court of Appeals summarizes as follows its constitutional ruling relating to privacy and police canine sniffs around the exterior of vehicles in public areas:

> After a controlled substance detection dog detected the odor of controlled substances in Coleman's impounded vehicle, an officer obtained a search warrant. During the search, officers discovered a glass pipe with methamphetamine residue. The trial court denied Coleman's motion to suppress the evidence found in his vehicle. We hold that . . .the trial court did not err in denying Coleman's motion to suppress because **the controlled substance detection dog's sniff around the exterior of his vehicle was not a search in that Coleman did not have a reasonable expectation of privacy in the air outside his impounded vehicle.**

Note that Coleman could not challenge the use of the dog based on the duration of the dog sniff process because Coleman was already lawfully in custody based on the earlier arrest on the warrant.

4. State v. Gloria N. Iniguez Gonzalez: On October 22, 2019, Division Two of the COA rejects the appeal of defendant from her Lewis County Superior Court conviction for *possession of methamphetamine with intent to deliver*. At trial, a law enforcement officer testified, based on his training and experience, about the typical hierarchy of drug trafficking networks, including different levels of drug dealers. That was proper testimony. **But, at one point the officer testified that the majority of methamphetamine and heroin in Washington comes from Mexico. Defendant objected on the grounds that the testimony was prejudicial given defendant's heritage. The trial court agreed and twice instructed the jury to ignore that part of the testimony.** The Court of Appeals rules that in light of the judge's instructions and in light of the properly admitted evidence in the case, **the defendant was not prejudiced** by the officer's inappropriate statement about country of origin of the majority of methamphetamine and heroin.

5. State v. Kevin Arthur Stanfield: On October 22, 2019, Division Two of the COA rejects the appeal of defendant from his Pierce County Superior Court conviction for *attempting to elude a pursuing police vehicle*. The Court rejects defendant's arguments, among others, that (1) the manner of the police pursuit and use of a PIT maneuver violated his rights under the **Fourth Amendment**; and (2) his post-accident medical condition precluded a **voluntary, intelligent and knowing waiver of Miranda rights** at the hospital following his wrecking of his vehicle. The Court of Appeals also rejects defendant's argument that a **restitution order** was not supported; he unsuccessfully claimed that his conduct was not the legal cause of the nearly $25,000 damage to a police vehicle.

6. State v. Jerome Lionel Pleasant: On October 24, 2019, Division Three of the COA rejects the appeal of defendant from his Franklin County Superior Court convictions for *(1) possession of a controlled substance (cocaine) with intent to deliver, and (2) possession of a controlled substance (hydrocodone)*. The Court of Appeals rules that a law enforcement officer's **mixed-motive stop of defendant**, who had failed to stop before driving over a sidewalk to enter a roadway from a gas station pump area, was **not unlawfully pretextual**. The Court of Appeals makes this ruling despite the officer's admitted hunch/suspicion that moments earlier he had observed the driver possibly taking part in a drug transaction. The Court of Appeals applies the mixed-motive approach of State v. Arreola, 176 Wn.2d 284 (2012) and explains:

> The record supports the stop here. [The officer] had stopped over 39 cars for the sidewalk infraction during the past 12 months and had issued 13 citations. There is no evidence that some or most of these stops were made only after witnessing suspicious activity unrelated to driving. [The officer's] practice of enforcing the sidewalk infraction evidences an independent and conscious determination that he believed the stop was reasonably necessary to ensure traffic safety and the general welfare.

The Court of Appeals also rules that **the officer complied with the inventory process required for search warrants under CrR 2.3(d)** where the officer signed an inventory form in the presence of two other officers who had been involved in the search of Pleasant's car under a search warrant that was issued after the above-noted traffic stop.

****

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.

****

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 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 Criminal Justice Training Commission (CJTC) Law Enforcement Digest Online Training can be found on the internet at [cjtc.wa.gov/resources/law-enforcement-digest].

****