LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

OCTOBER 2024

TABLE OF CONTENTS FOR OCTOBER 2024 LEGAL UPDATE

WASHINGTON STATE SUPREME COURT…….02

"ATTENUATION" EXCEPTION TO THE EXCLUSIONARY RULE OF ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION IS HELD IN A 5-4 RULING TO NOT APPLY UNDER THE FACTS OF THIS CASE WHERE INFORMATION THAT WAS THE FRUIT AN UNLAWFUL SEIZURE IN A DRUG INVESTIGATION WAS USED IN A SEARCH WARRANT IN A MURDER INVESTIGATION
State v. McGee, ___ Wn.2d ___ , 2024 WL ___ (October 24, 2024)……02
Here is a link to the Majority Opinion and Dissenting Opinion in State v. McGee:
https://www.courts.wa.gov/opinions/pdf/1021348.pdf

WASHINGTON STATE COURT OF APPEALS……..03

CONSTITUTIONAL RIGHT TO SILENCE: RIGHT HELD TO HAVE BEEN VIOLATED BY DEPUTY PROSECUTOR'S (1) ELICITING OF TESTIMONY FROM INTERROGATION DETECTIVE ABOUT DEFENDANT'S FAILURE TO RESPOND TO CERTAIN QUESTIONS, AND (2) ARGUMENTS TO JURORS THAT THAT THEY SHOULD CONSIDER THE REASONS DEFENDANT MIGHT NOT HAVE WANTED TO ANSWER THE QUESTIONS
State v. Chuprinov, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. I, October 7,2024)……03
Here is a link to the Opinion in State v. Chuprinov:
https://www.courts.wa.gov/opinions/pdf/851454.pdf

RCW 9.96.060(2)(d) PRECLUDES THE VACATION OF A MISDEMEANOR CONVICTION FOR DRIVING UNDER THE INFLUENCE
City of Bremerton v. Bright, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. II, October 26, 2024)…….06
Here is a link to the Opinion in City of Bremerton v. Bright:
https://www.courts.wa.gov/opinions/pdf/D2%2058623-1-II%20Published%20Opinion.pdf

BRIEF NOTES REGARDING OCTOBER 2024 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES……..06

****

WASHINGTON STATE SUPREME COURT

"ATTENUATION" EXCEPTION TO THE EXCLUSIONARY RULE OF ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION IS HELD IN A 5-4 RULING TO NOT APPLY UNDER THE FACTS OF THIS CASE WHERE INFORMATION THAT WAS THE FRUIT OF AN UNLAWFUL SEIZURE IN A DRUG INVESTIGATION WAS USED IN A SEARCH WARRANT IN A MURDER INVESTIGATION

In State v. McGee, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, May 30, 2023), a 5-4 majority of the Washington Supreme Court affirms a ruling of Division One of the Court of Appeals that reversed defendant's conviction for second degree murder.

The State conceded in this case that a sheriff's deputy on patrol unconstitutionally seized Malcolm McGee based on suspicion that McGee was violating drug laws. The deputy then questioned McGee, searched him, seized illegal drugs from him, and collected his phone number and other information. The fruits of these actions by the patrol deputy would clearly have been inadmissible in a prosecution of McGee for the possession of drugs.

In a later murder investigation, the State relied on some of the evidence that the deputy had unconstitutionally gathered and reported in the earlier unlawful seizure. That evidence was used by detectives to connect McGee to the murder and to obtain at least four warrants for his phone records, cell site location information, and other evidence. These fruits of the earlier unlawful seizure led to evidence that helped convict McGee of second degree murder.

In the trial court in the murder prosecution of McGee, the State successfully argued to the trial court that the "attenuation" exception (also referred to as the "Attenuation Doctrine") to the Exclusionary Rule of the Washington constitution (article I, section 7) applies in this case because the murder occurred after the earlier unlawful seizure in an unrelated investigation. The Majority Opinion for the Washington Supreme Court concludes in McGee that the trial court was mistaken in applying the Washington constitution's attenuation exception that is narrower in scope (and thus less forgiving of law enforcement constitutional error) in its exclusionary application than is the Fourth Amendment attenuation exception to exclusion.

The Majority Opinion for the Supreme Court includes the following summary of the reason for this ruling:

> Here, police undisputedly violated McGee's privacy without authority of law and gained valuable evidence that was recorded in the June 3 police report. The value of this evidence to a murder investigation was not apparent until later, when different officers—themselves blameless for the manner in which the evidence was obtained and apparently unaware they were relying on tainted evidence—parlayed the evidence from the June 3 report into a series of progressively intrusive search warrants. Our attenuation doctrine focuses on remedying the constitutional harm flowing from this use of illegally obtained evidence, regardless of whether we can impute the misconduct of one officer to others who had no role in the illegality or whether they knew the evidence was tainted.
>
> The fact remains that police relied directly on the fruits of the illegal arrest to obtain further warrants, thereby benefiting from the violation of McGee's privacy rights. The State does not demonstrate any superseding event that produced new evidence used in the warrant application, only a new reason to make the illegally obtained evidence

useful. Recognizing the strong privacy protections granted in article I, section 7, we will not extend our narrow attenuation doctrine to such circumstances.

. . . .

The underlying purpose of the attenuation doctrine is to prevent the exclusionary rule from operating on an artificial "but for" basis that potentially excludes lawfully obtained evidence. [State v. Mayfield, 192 Wn.2d 871, 882 (2019)]. At the same time, a broadly defined attenuation exception could allow the State to benefit from the fruits of illegal conduct and encroach on individual privacy.

To prevent the kind of slippage observed in federal attenuation case law, which has eroded the exclusionary rule's protection over time, this court in Mayfield limited attenuation to cases where "an unforeseeable intervening act genuinely severs the causal connection between official misconduct and the discovery of evidence." That test is not met here, as the State cannot point to a superseding event that broke the causal chain between McGee's illegal detention and the discovery of evidence relied on in the subsequent search warrant applications. We decline the State's invitation to expand our attenuation doctrine based on new reasons to use illegally obtained evidence.

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

Result: Affirmance of the reversal by the Court of Appeals of the King County Superior Court conviction of Macolm Otha McGee for second degree murder; case remanded to Superior Court for possible re-trial where the evidence that is the fruit of the unlawful seizure will be inadmissible.

****

WASHINGTON STATE COURT OF APPEALS

CONSTITUTIONAL RIGHT TO SILENCE: RIGHT HELD TO HAVE BEEN VIOLATED BY DEPUTY PROSECUTOR'S (1) ELICITING OF TESTIMONY FROM INTERROGATION DETECTIVE ABOUT DEFENDANT'S FAILURE TO RESPOND TO CERTAIN QUESTIONS, AND (2) ARGUMENTS TO JURORS THAT THAT THEY SHOULD CONSIDER THE REASONS DEFENDANT MIGHT NOT HAVE WANTED TO ANSWER THE QUESTIONS

In State v. Chuprinov, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. I, October 7, 2024), the Court of Appeals addresses constitutional right to silence issues relating to a defendant's implicit exercise of that right during an interrogation, and a deputy prosecutor's infringement on that right (1) by asking a detective at defendant's trial to comment on that exercising of the right by defendant during the detective's earlier attempt to interrogate the child-sex-crime defendant, and (2) by pointing out to the jury the defendant's exercising of the right.

The Court of Appeals sets forth as follows some of the relevant testimony:

Q: Did he confirm or would he tell you when this all started?

A: I believe he said that it was a few months. When we tried to get specific details he would only say that the last occurrence was about a month prior to that, but it had been -- it had been recent.

Q: And then he wouldn't answer further questions about that?

A: Correct. . . . .

Q: Was he asked about whether or not any of the sex was forceful with her?

A: Yes. He didn't answer.

Q: What do you mean "he didn't answer"?

A: He just sat quietly.

Q: How long did he sit there quietly?

A: Difficult to say. Throughout the interview there were times it was a minute or two and probably other times up to four to five minutes. But towards the end of the interview when he became increasingly quiet, then that was ultimately when we terminated the interview or just ended the interview.

Q: He kind of just stopped being willing to speak?

A: Yes. . . . .

Q: When there were yes-or-no answers, did you or [Detective B] try and follow up and get more detail?

A: Yes.

Q: Was that successful?

A: Not really.

Q: And you said the interview concluded. Tell us more about that, how it concluded?

A: Well, just at the end of the interview when we, you know, were kind of just not getting anywhere, we were asking questions and getting non answers -- or I'm sorry -- him just being quiet. It just got to the point where it was like I believe I said something to the effect of I'm just trying to get your side of this, but if you're not going to talk, then we might as well just finish things up.

Q: And there was no concern expressed from him about that? A: No.

Included in the legal analysis by the Chuprinov Court is the following:

> During trial, the State may not elicit comments from witnesses or make closing arguments relating to or inferring guilt from a defendant's silence. [State v. Easter, 130 Wn.2d 228, 236 (1996)]. "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." [State v. Lewis, 130 Wn.2d 700, 707 (1996)]. As

this court has summarized, there are four ways to unconstitutionally comment on a defendant's silence:

> Several principles are apparent. First, it is constitutional error for a police witness to testify that a defendant refused to speak to him or her. Similarly, it is constitutional error for the State [i.e., the prosecutor] to purposefully elicit testimony as to the defendant's silence. It is constitutional error also for the State to inject the defendant's silence into its closing argument. And, more generally, it is constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt.

[State v. Romero, 113 Wn. App. 779, 786 (2002)]. These uses of a defendant's silence are fundamentally unfair and violate due process.

Here, the State unconstitutionally commented on Chuprinov's silence in all four ways. The State elicited evidence about Chuprinov's silence from the detective sergeant who conducted the interview, asking, "What do you mean 'he didn't answer'?" and "he kind of just stopped being willing to speak?" In response, the detective sergeant testified about Chuprinov's refusal to speak to him at certain times.

The State then relied heavily on this testimony for closing argument, mentioning Chuprinov's silence and encouraging the jury to consider that silence when deliberating, with statements such as: "you are allowed discuss and debate over why someone might get very tight-lipped all of a sudden with the police," "you are allowed to use the fact that he is the one in trouble and he is the one charged with crimes in discussing and debating why he stopped talking to law enforcement in that interview room," and "you are allowed to talk about the reasons why he didn't want to answer questions, why there were questions that they asked him that he wouldn't answer."

The State linked Chuprinov's silence with his guilt and instructed the jury it could do the same.

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

Result: Reversal of some of Andrey Chuprinov's Skagit County Superior Court convictions for sex crimes against children, and affirmance of his convictions for rape of a child in the third degree and incest in the first degree.

LEGAL UPDATE EDITOR'S NOTE: Trial prosecutors and law enforcement witnesses should avoid testimony that a defendant asserted (explicitly or implicitly) his right to silence or to consult an attorney under circumstances where the defendant had such right. Some Washington appellate decisions in this area of law include State v. Cook, 17 Wn. App. 2d 96 (Div. III, April 6, 2021) and State v. Palmer, 24 Wn. App. 2d 1 (Div. II, October 11, 2022).

For an article discussing aspects of this area of law, see an article that can be found in an internet search for "References to the Defendant's Assertion of Miranda Rights". The author of the August 4, 2011, article with that title in a University of North Carolina "Criminal Law Blog" is Jeffrey B. Welty, Professor of Public Law and Government; Senior Associate Dean for Faculty Affairs, University of North Carolina School of Government, UNC Chapel Hill, NC 919.445.1082 welty@sog.unc.edu I reviewed the article, and I

believe that the discussion is useful and consistent with applicable law in state and federal courts in Washington.

See also the entry regarding the unpublished Opinion in State v. Zane Eugene Lumpkin below at page 12 of this edition of the Legal Update.

RCW 9.96.060(2)(d) PRECLUDES THE VACATION OF A MISDEMEANOR CONVICTION FOR DRIVING UNDER THE INFLUENCE

In City of Bremerton v. Bright, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. II, October 26, 2024), Division Two of the Court of Appeals reverses a Kitsap County Superior Court order that reversed a City of Bremerton Municipal Court order that denied Rochelle Bright's motion to vacate her conviction for driving while under the influence (DUI). The Court of Appeals rules as a matter of law that, regardless of the facts, vacation of a DUI is simply not authorized by law.

The Court of Appeals explains in Bright as follows regarding the no-vacation ruling:

> The only reasonable interpretation of the plain language of RCW 9.96.060(2)(d) is that vacation of a misdemeanor or gross misdemeanor conviction is prohibited if the conviction is either (1) a violation of RCW 46.61.502 (DUI), RCW 46.61.504 (physical control), and RCW 9.91.020 (operating a railroad, etc. while intoxicated); or (2) the offense is considered a "prior offense" under RCW 46.61.5055 (other than offenses in violation of RCW 46.61.502 or RCW 46.61.504) and the applicant has had a subsequent alcohol or drug violation within 10 years of the date of arrest for the prior offense or less than 10 years has elapsed since the date of the arrest for the prior offense. Therefore, under the plain language of RCW 9.96.060(2)(d), Bright is not entitled to a vacation of her DUI conviction.

Result: Reversal of Kitsap County Superior Court order that reversed the order of the Bremerton Municipal Court that denied the request of Rochelle Bright for vacation of her DUI conviction.

****

BRIEF NOTES REGARDING OCTOBER 2024 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 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 generally not sufficiency-of-evidence-to-convict issues).

The eight entries below address the October 2024 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. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and brief descriptions of the holdings/legal issues are bolded.

1. Barbara Kanta v. WDOL: On October 1, 2024, Division Two of the COA rejects the arguments of a driver who challenged *suspension of her driver's license by Washington DOL*. The Kanta Court summarizes the ruling as follows in the introduction of the Opinion:

> Barbara Kanta was arrested for driving under the influence in July 2021. Shortly after her arrest, a phlebotomist drew a sample of Kanta's blood which was sent to a laboratory for analysis. The laboratory tested Kanta's blood for alcohol in May 2022, and issued a report in September 2022 stating that Kanta's blood sample contained 0.18% alcohol. In November 2022, the Department of Licensing (the department) suspended Kanta's driving license.
>
> Kanta contested the suspension, arguing that because the vial used to store her blood expired in November 2021 (according to the manufacturer's certificate of compliance), the blood was not properly preserved and therefore did not comply with the Washington Administrative Code (WAC). A hearing examiner rejected Kanta's argument and affirmed the suspension.
>
> Kanta appealed to the superior court. The superior court found that substantial evidence supported the hearing examiner's conclusion that the blood test complied with the necessary criteria, and was therefore properly admitted.
>
> **Kanta appeals to this court, arguing that the hearing examiner erred in admitting the results of her blood test into evidence because the vials were expired at the time of testing. As such, Kanta argues, the superior court erred in affirming the suspension of her license.**
>
> **The department [Washington Department of Licensing] responds that the blood test complied with all necessary criteria as designated by the state toxicologist and the administrative code, and therefore, the hearing examiner did not err in admitting the test. We agree with the department.**

[Paragraphing revised for readability]

Here is a link to the Opinion in Kanta v. WDOL:
https://www.courts.wa.gov/opinions/pdf/D2%2058434-4-II%20Unpublished%20Opinion.pdf

2. State v. Erick Brandon Struthers: On October 7, 2024, Division One of the COA affirms the Whatcom County Superior Court conviction of defendant for *assault in the second degree* for strangling his mother. The Court of Appeals rejects the defendant's argument, among others, that the trial court erred in allowing law enforcement to testify that they had probable cause to arrest him.

The Struthers Court recognizes that trial courts must not allow witnesses to opine that a defendant is guilty because allowing such testimony, particularly where the testimony is that of a law enforcement officer, invades the province of the jury. However, the Court concludes that the challenged testimony did not do that:

> **Here, . . . as in [State v. Kirkman, 159 Wn.2d 918, 933 (2007)], these witnesses "did not come close to testifying on any ultimate fact. [They] never opined that [Erick] was guilty, nor did [they] opine that [Susan] was [strangled] or that [they] believed [Susan's] account to be true."**

[Citation revised for style]

Here is a link to the Opinion in State v. Struthers:
https:// www.courts.wa.gov/opinions/pdf/855107.pdf

3. State v. Anthony Allen Crouch: On October 14, 2024, Division One of the COA affirms Whatcom County Superior Court conviction of defendant for *assault in the second degree* for strangling his mother. The Court of Appeals rejects the defendant's argument, among others, that an officer's testimony about defendant's statement to the officer that defendant "didn't do anything [with the alleged victim until] after she was 18" was inadmissible hearsay.

The Crouch Court rejects that argument because, for one reason, the statement was admissible as a statement by a party opponent, i.e., the defendant. See ER 801(d)(2)(i) (a party's own statement that is offered against the party is not hearsay).

Here is a link to the Opinion in State v. Crouch:
https://www.courts.wa.gov/opinions/pdf/849531.pdf

4. State v. Cameron Scott Ownbey: On October 22, 2024, Division Three of the COA affirms the Chelan County Superior Court conviction of defendant for *assault in the second degree with sexual motivation*. The case arose from allegations of N.F. that, after she consumed alcohol and went to bed at a motel room in Leavenworth, she awoke to find herself undressed and Mr. Ownbey spooning her while holding a substance to her face. The Court of Appeals rejects the defendant's argument, among others, that the trial court misapplied the rape shield statutory provisions in RCW 9A.44.020.

Among other proffered evidence, defendant sought to introduce evidence that N.F. had a sexual encounter with other persons during a previous trip to Las Vegas. Part of the Ownbey Court's analysis that agrees with the trial court's exclusion of evidence reads as follows:

> RCW 9A.44.020(2) states that when the "perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense." This provision of the statute is inapplicable here because N.F. and Mr. Ownbey undisputedly did not have a sexual relationship prior to their time in Leavenworth.
>
> Here, Mr. Ownbey seems to argue that his proffered evidence is relevant because it tended to undermine N.F.'s credibility. N.F. testified that there was never any discussion of starting a sexual relationship between she and Mr. Ownbey. However, the evidence Mr. Ownbey sought to introduce, specifically evidence of an alleged sexual encounter

with "another couple" in Las Vegas, does not contradict N.F.'s testimony about her discussions with Mr. Ownbey and is therefore inadmissible.

Whether N.F. had a sexual encounter with another couple while she and Mr. Ownbey were in Las Vegas is the type of evidence RCW 9A.44.020 mandates is inadmissible as it is evidence of "the victim's past sexual behavior," which is "inadmissible on the issue of credibility." RCW 9A.44.020(2).

Further, Mr. Ownbey has not demonstrated that this evidence was relevant for any reason, including to impeach N.F.'s credibility. Whether N.F. had a sexual relationship with another couple while on a trip to Las Vegas is immaterial to her credibility. Because the evidence was not relevant, Mr. Ownbey's constitutional rights [to defend himself at tria] were not violated when the court declined to admit it.

[Some paragraphing revised for readability]

Here is a link to the Opinion in State v. Ownbey:
https://www.courts.wa.gov/opinions/pdf/394701_unp.pdf

5. Personal Restraint Petition of Kenneth Zimmerman: On October 22, 2024, Division Two of the COA rejects the personal restraint petition of Zimmerman in which he seeks relief following his February 2018 convictions for *attempted second degree child rape and four counts of felony communication with a minor for immoral purposes (CMIP)*.

Zimmerman's convictions arose from a sting operation involving the Washington State Patrol (WSP). Zimmerman posted an ad on a website looking for a young little girl for play. A law enforcement officer responded to the ad posing as a 13-year-old girl, and Zimmerman exchanged multiple emails and text messages of a sexual nature with the fictional girl.

Zimmerman was arrested after he drove near an address that the fictional girl had provided as her address. In his personal restraint petition (PRP), Zimmerman argued, among other theories, that his constitutional Due Process rights were violated by outrageous government conduct. The Zimmerman Court's analysis rejecting Zimmerman's Due Process argument includes the following analysis:

> The court in [State v. Lively, 130 Wn.2d 1, 195 (1996)] identified five factors that this court should consider when determining whether government conduct violates due process:
>
> > [1] whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; [2] whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation; [3] whether the government controls the criminal activity or simply allows for the criminal activity to occur; [4] whether the police motive was to prevent crime or protect the public; and [5] whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."
>
> Lively at 22 (citations omitted) . . .

> Two published Court of Appeals cases address outrageous government conduct claims relating to undercover operations similar to the one here: [State v. Glant, 13 Wn. App. 2d 356 (2020)] and State v. Solomon, 3 Wn. App. 2d 895 (2018).
>
> . . . . [Discussion of Glant omitted]
>
> In Solomon, law enforcement posted an ad in the Craigslist casual encounters section stating that a young woman was looking for sex with a man or a woman. . . . Solomon responded to the ad, but he said that he would not contact the person again after not hearing back. . . . The person then contacted Solomon four days later, but after learning that the person was only 14 years old Solomon twice stated that he was not interested. . . . . Despite this, the person continued to send Solomon explicit messages expressing an interest in a sexual encounter. . . .After briefly engaging in sexual conversation, Solomon again rejected the person's advances. . . . The trial court found that Solomon attempted to discontinue the conversation seven times, but the person persisted. . . . Solomon eventually agreed to meet the person for sex, and was arrested. . . .
>
> The trial court, after considering the totality of the circumstances, granted Solomon's motion to dismiss all charges based on outrageous government conduct. . . .The court entered extensive oral findings of fact, finding that law enforcement (1) instigated the criminal activity by posting the Craigslist ad and messaging Solomon after he discontinued contact, (2) engaged in persistent solicitation that overcame Solomon's reluctance to commit a crime, (3) controlled the criminal conduct by stringing Solomon along over four days of messages, and (4) engaged in conduct that was repugnant to a sense of justice by using graphic and sexualized language to manipulate Solomon. . . . Division One affirmed, finding no abuse of discretion. . . .
>
> . . . .
>
> We hold that because the trial court did not abuse its discretion in concluding that each of the Lively factors weighed in favor of the government, the trial court did not abuse its discretion when it denied Zimmerman's motion to dismiss for outrageous government misconduct.

[Some citations omitted, others revised for style]

Here is a link to the Opinion in State v. Zimmerman:
https://www.courts.wa.gov/opinions/pdf/D2%2056946-9-II%20Unpublished%20Opinion.pdf

6. State v. Sammuel Bernard Miller: On October 22, 2024, Division Two of the COA rejects the challenges of defendant to his Pierce County Superior Court conviction for *third degree assault* for spitting on a law enforcement officer as she was helping to handcuff him.

The jury heard the officer's testimony that Miller spat in her face after being warned not to do so, that the spit covered her face and glasses, and that she took steps to prevent him from spitting in her face again. In her testimony, the officer described the reasons why she generally avoided being spit on by strangers. Miller did not deny spitting on the officer.

On appeal, defendant argued that the jury's verdict is unsupported by substantial evidence in the record because the officer did not specifically testify that she was personally offended when defendant spat on her. The Court of Appeals concludes, however, that the jury could infer,

based on the officer's testimony and the jury's common sense and experience, that the spitting was offensive.

Here is a link to the Opinion in State v. Miller:
https://www.courts.wa.gov/opinions/pdf/D2%2059438-2-II%20Unpublished%20Opinion.pdf

7. State v. Sammy Eric Petersen: On October 28, 2024, Division One of the COA rejects the Miranda-based challenges of defendant to his Pierce County Superior Court conviction for *vehicular homicide*. The Court of Appeals rules on the Miranda-based issues that:

(1) defendant was not in Miranda "custody" at a point when defendant was lying inside an ambulance and an officer (without giving Miranda warnings) talked to defendant through an open side door of the ambulance and asked defendant if he had been drinking; and

(2) that at the point when the defendant was Mirandized at the hospital, he had the capacity to knowingly, voluntarily, and intelligently waive his rights.

ISSUE 1: On the Miranda-custody issue, a key part of the Court's analysis is as follows:

> Considering the totality of the circumstances, we conclude that Petersen was not in custody for Miranda purposes when questioned by [the officer] while on a gurney in the back of an ambulance.
>
> Similar to the defendants in Kelter and Butler, Petersen was restricted at the time of questioning not by police, but because of his own medical needs. Even though there were numerous other people present at the accident scene, including WSP investigators, they were there to address other aspects of the accident.
>
> Petersen's environment was not "police-dominated"; [the officer] was the only officer directly engaged with questioning Petersen, and he was outside the ambulance approximately four feet away from Petersen. Petersen was not under any physical restraint by police, such as handcuffs, nor was he formally arrested.
>
> [The officer] asked minimal questions. The presence of other non-police personnel, approximately three paramedics who were working on him, and the public nature of the questioning further reduced the likelihood of improper means to elicit a confession. A reasonable person under these circumstances would not believe they were in custody to a degree associated with formal arrest.
>
> Thus, the [trial] court properly admitted [the officer's] testimony about Petersen's responses to questioning while he was in the ambulance.

[Paragraphing revised for readability; footnote omitted]

ISSUE 2: On the issue of whether defendant had the capacity and understanding to give a valid waiver of his Miranda rights prior to the hospital questioning, a key part of the Court's analysis is as follows:

> Petersen was not repeatedly questioned while "barely conscious," as was Mincey [in the U.S. Supreme Court precedent of Mincey v. Arizona, 437 U.S. 385 (1978)]. The only

> indication of the severity of Petersen's injuries was the amount of time he spent in the hospital, which was around two hours.
>
> Given the brevity of the visit, Petersen's verbal acknowledgment of receiving and understanding the Miranda warnings, and his agreement to speak to [the officer], the unchallenged facts support the trial court's conclusion that Petersen voluntarily, knowingly, and intelligently waived his rights before speaking to [the officer]. Thus, the court did not err by admitting testimony about Petersen's statements to [the officer].

[Paragraphing revised for readability]

Here is link to the Opinion in State v. Petersen:
https://www.courts.wa.gov/opinions/pdf/866141.pdf

8. State v. Zane Eugene Lumpkin: On October 29, 2024, Division Three of the COA rejects the challenges of defendant to his Spokane County Superior Court conviction for *first degree robbery*. One issue in the case is whether a detective prejudicially violated the defendant's constitutional right to remain silent by mentioning during the detective's testimony that that defendant had exercised his right to an attorney. The context for the detective's statement was the detective's description of considering of the option of doing a photo montage to find accomplices of the defendant. The detective said that was not able to ask defendant about his accomplices because defendant, who at that point was already in custody, had exercised his right to an attorney.

The Court of Appeals concludes under the following analysis that, while the detective should not have made that statement about the defendant's exercising of his right to an attorney, the failure of defendant's attorney to object to this isolated statement by the detective did not require a reversal of defendant's conviction because the statement was not a prejudicial comment on the defendant's right of silence:

> Law enforcement witnesses are prohibited from commenting on a defendant's exercise of the right to silence under the Fifth Amendment to the United States Constitution. . . . "A comment on an accused's silence occurs when used to the State's advantage as either substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." State v. Lewis, 130 Wn.2d 700, 707 (1996). "'[M]ere reference'" to a defendant's silence does not amount to a comment on the defendant's right to silence and requires reversal only upon a showing of prejudice. State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008).
>
> **Here, the law enforcement testimony did not amount to an impermissible comment on Mr. Lumpkin's silence. The State [i.e., the prosecutor] did not intentionally elicit testimony regarding Mr. Lumpkin's exercise of his constitutional rights. Instead, the detective volunteered that Mr. Lumpkin had exercised his right to counsel and did not want to speak with law enforcement during questioning on a second photo montage.**
>
> **This was not substantive evidence and did not tend to suggest Mr. Lumpkin was guilty of the robbery. The detective's remark was brief. It was not repeated, and it was not referenced by the State in summation or at any other point in trial. Given the detective's testimony amounted to nothing more than a passing remark on the**

issue of silence, it was not prejudicial, and Mr. Lumpkin cannot show that he is entitled to relief based on his trial counsel's failure to object.

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

LEGAL UPDATE EDITOR'S NOTES: See also State v. Chuprinov, the October 7, 2024, Division One decision by published Opinion that is digested above beginning at page 3 of this edition of the Legal Update.

Here is a link to the Opinion in State v. Lumpkin:
https://www.courts.wa.gov/opinions/pdf/396673_unp.pdf

****

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal U pdate 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 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 Assist ant 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 of opinions 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 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 accessed (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]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to https://www.cjtc.wa.gov/resources/law-enforcement-digests

****