LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

AUGUST 2021

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WASHINGTON STATE SUPREME COURT

SUPREME COURT ADDRESSES WASHINGTON'S HOMESTEAD ACT AS APPLIED TO AN OTHERWISE HOMELESS PERSON'S USE OF A VEHICLE AS HIS PRMARY RESIDENCE

City of Seattle v. Long, ___ Wn.2d ___ , 2021 WL ___ (August 12, 2021), the Washington Supreme Court rules in favor of Steven Long, a vehicle owner who sought protection of the Washington Homestead Act in relation to an impoundment of a vehicle that he was using as his primary residence. Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys, described in her August 13, 2021 "Weekly Roundup" of Case Law on the WAPA website the key holdings in the Supreme Court Majority Opinion:

> **Homestead Act and Impoundment of Vehicles.** RCW 6.13.040(1) automatically protects occupied personal property, such as a vehicle being used as a person's primary residence. The homestead exemption protects such a vehicle up to the sum of fifteen thousand dollars. The homestead act does not prohibit the impoundment of an illegally parked vehicle, but it does apply to the attachment, execution, or forced sale of the vehicle to pay any costs related to the impoundment. "Homestead protections are resolved upon enforcement, not issuance, of a parking ticket or impoundment of a vehicle."
>
> Impoundment of a vehicle that has been unlawfully parked for a period of time pursuant to a statute that authorizes an impoundment is reasonable and lawful under article I, section 7 [of the Washington constitution] when the vehicle is inoperable. Impoundment of a vehicle and associated costs are subject to the federal excessive fines clause because both are partially punitive. Critical to the proportionality analysis under the excessive fines clause is a person's ability to pay. The actual cost associated with the

> impoundment and storage of the vehicle will not insulate the charges from being excessive. . . . .
>
> Justices González, Yu, and Whitener concurred in the result but would hold that the homestead act precludes the towing of the vehicle in the first instance.

[Paragraphing revised for readability in this format]

Result: Affirmance of King County Superior Court's conclusion that Steven Long's truck automatically qualifies as a homestead and that no declaration was required of him. RCW 6.13.040(1). However, because Seattle has not yet attempted to collect on Long's debt, former RCW 6.13.070 does not apply, and Long's Homestead Act claim is held to be premature.

Thus, the Supreme Court reverses (arguably on a technicality) the Superior Court's decision that Seattle violated the Homestead Act. As to Long's excessive fines claim, the Washington Supreme Court rules (1) that the impoundment and associated costs are fines, (2) that an ability- to-pay inquiry is necessary, and (3) that Long has shown that he lacks the ability to pay the imposed costs. Finally, the Washington Supreme Court concludes that the payment plan as imposed by the City of Seattle was excessive, but that a reasonable fine may still be constitutional, and hence the case is remanded to the trial court for further proceedings consistent with the Supreme Court Majority Opinion.

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WASHINGTON STATE COURT OF APPEALS

AFTER RECONSIDERING A JUNE 1, 2021, OPINION, DIVISION ONE AGAIN RULES IN A CRIMINAL CASE THAT A PRIVATE PERSON'S ACTIONS OF RETRIEVING A SUSPECT'S DISCARDED ITEMS AND TURNING THEM OVER TO A DETECTIVE FOR DNA TESTING WAS NOT INSTIGATED BY THE DETECTIVE AND THEREFORE DID NOT TRIGGER ANY CONSTITUTIONAL PROTECTION OF THE DEFENDANT AGAINST SEARCHES AND SEIZURES BY THE GOVERNMENT OR BY AGENTS OF THE GOVERNMENT

State v. Bass, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, August 16, 2021)

LEGAL UPDDATE EDITOR'S INTRODUCTORY EDITORIAL NOTE: Division One of Court of Appeals has reconsidered its June 1, 2021 decision addressed in the June 2021 Legal Update. I did not find any language revision in the August 16, 2021 Opinion relating to the issue addressed in the June and August 2021 Legal Updates.

Facts:

In early 2015, a detective leading a cold case investigation of a 1989 rape and murder was trying to get DNA of Timothy Forrest Bass, a suspect in the case who was ultimately convicted of felony murder in the first degree. The Bass Opinion describes relevant facts relating to the detective's eventual acquisition of the DNA:

> At this time [early 2015], Bass was working as a delivery truck driver for Franz Bakery. [The detective] reached out to Kim Wagner, the manager of the Franz Bakery outlet store, hoping to obtain company consent to swab the delivery trucks for "touch DNA," or DNA left behind when people touch or use something. [The detective] did not identify

the employee he was investigating. Wagner told [the detective] he would need to talk with the corporate offices in order to get permission for any such search and provided him with a phone number for the corporate office. The company refused to give permission to law enforcement to search its vehicles.

Over two years later, in May 2017, [the detective] contacted Wagner [the store manager] again and asked her for the general areas of Bass's delivery route. Wagner asked if he was investigating Stavik's murder. He confirmed he was. She asked if his investigation was related to Bass; he again confirmed it was. The detective informed Wagner he was looking for items that Bass might cast off that may contain his DNA. Wagner provided [the detective] information regarding Bass's normal route, and [the detective] agreed to update her if he found anything.

Shortly thereafter, [the detective] surveilled Bass as he drove his route, hoping to collect anything Bass discarded, like "cigarette butts, bottles, anything he might have drank from, anything he might have eaten or half eaten and thrown away." He later told Wagner that Bass had not discarded any items. **Wagner indicated that she would see if he discarded any items at work, such as water bottles, and asked if that would help. [The detective] said "okay," but told her that he was not asking her to do anything for him.**

In August 2017, Wagner saw Bass drink water from a plastic cup and throw the cup away in a wastebasket in the bakery's employee break room. She collected that cup and stored it in a plastic bag in her desk. Two days later, she saw Bass drink from a soda can and, again, after he discarded it in the same trash can, she retrieved it and stored it with the cup. [The detective] did not direct Wager to take any items and did not tell her how to handle or package these items.

Wagner contacted [the detective] via text to let him know she had two items Bass had discarded in the garbage. [The detective] met Wagner in the Franz Bakery parking lot, picked up the items, and sent them to the Washington State Crime Lab for analysis. The Crime Lab confirmed that the DNA collected from Bass's soda can and cup matched the male DNA collected from the semen in [the victim's] body.

Proceedings below:

Bass was charged with first degree felony murder. He lost a suppression motion to suppress the DNA that was collected from the soda can and the cup that Wagner gave to the detective. Bass was found guilty in a jury trial.

ISSUE AND RULING: Was the store manager Wagner acting as a State agent such that Bass can argue that his privacy rights were violated by the government under article I, section 7? (ANSWER BY COURT OF APPEALS: No, because the trial court found Wagner was not an agent at the time that she pulled Bass's cup and soda can from the trash, and there is substantial evidence supporting this finding.

Result: Affirmance of Whatcom County conviction of Timothy Forrest Bass for first degree felony murder.

ANALYSIS:

To prove a private citizen was acting as a government agent, the defendant must show "that the State in some way 'instigated, encouraged, counseled, directed, or controlled' the conduct of the private person." . . . The "mere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterrent action [is] insufficient to turn the private search into a governmental one." . . . For an agency relationship to exist, there must be "a manifestation of consent by the principal [the police] that the agent [the informant] acts for the police and under their control and consent by the informant that he or she will conduct themselves subject to police control." . . . .

. . . .

The trial court heard live testimony from both [the detective] and Wagner. At the conclusion of this hearing, the trial court found that Wagner was not acting as an agent of [the detective] when she retrieved the plastic cup and soda can from the garbage can at the Franz Bakery outlet store because it was Wagner who conceived the idea to search the garbage, and [the detective] did not direct, entice, or instigate Wagner's search. Bass assigns error to this finding.

Bass also assigned error to Findings Nos. 12, 13, and 16, to the extent the court found that Wagner "acted independently to further her own ends in seizing Bass's plastic cup and soda can." The challenged findings are:

> 12. Ms. Wagner indicated that she would see if he discarded any items at work such as water bottles and asked if that would help. [The detective] indicated okay, but that he was not asking her to do anything for him.
>
> 13. Ms. Wagner testified that she felt a moral obligation to assist in this investigation. . . . .
>
> 16. [The detective] had not directed Ms. Wagner to take any items and did not tell her how to handle these specific items or how to package them.
>
> . . . .

We conclude the challenged findings are supported by substantial evidence. Det. Bowhay and Wagner both testified that [the detective] did not ask or encourage Wagner to look for items to seize and did not tell her what type of items to take. Wagner testified [the detective] did not instruct her to find an item containing Bass's saliva; she made that assumption based on her husband's experience in doing an ancestry DNA test and on watching television crime shows. Wagner confirmed that [the detective] did not encourage her to find Bass's DNA and gave her no guidance in how to do so.

Bass argues that because [the detective] knew of and acquiesced to Wagner's search for items Bass might discard at work, the trial court had insufficient evidence supporting its finding of agency. But it is well-established in Washington that an agency relationship requires more than mere knowledge or acquiescence in a private citizen's actions; our courts require evidence the government in some way prompted or motivated the actions of the would-be government agent. **[LEGAL UPDATE EDITOR'S NOTE: Here, the Bass Court cites and briefly describes the rulings in three Washington Court of Appeals precedents.]** . . . . Because there is no evidence of police instigation,

encouragement, or control over Wagner's activities, the trial court's findings are substantially supported by the record before us.

Bass alternatively argues [the detective] instigated and encouraged Wagner's search by asking her for information about Bass's delivery route, by having repeated contacts with her to keep her updated on the outcome of police surveillance of Bass, and then not discouraging Wagner when she volunteered to look for items Bass may have discarded.

[The detective] did ask Wagner for Bass's delivery route. But as Wagner [the store manager] testified, the route is public knowledge. "[Y]ou can sit on a street corner and you can see the same person drive by the same time every day." **A reasonable trial court could find a material difference between asking a private citizen to disclose publicly available information and asking that same person to search garbage bins for discarded items potentially containing a suspect's DNA.**

With regard to the argument that repeated contacts with law enforcement transformed Wagner into a state agent, Wagner testified she had "very few" contacts with the police over a period of two years and estimated that she talked to them "[l]ess than ten" or "[m]aybe less than five" times." **[T]he mere fact that there are contacts between the private person and police does not make that person an agent." . . . . A reasonable trial court could find that the number of contacts Wagner had with [the detective], over a period of two years, was insufficient to make her an agent of law enforcement.**

Finally, [the detective] conceded he did not discourage Wagner from looking for items Bass might discard at work. But as Bass admitted at the suppression hearing, "the State has no requirement to dissuade" a private citizen from searching for evidence. On appeal, Bass asks this court to deem [the detective's] failure to dissuade Wagner as the equivalent of implied encouragement because "law enforcement could encourage private citizens to conduct illegal searches so long as they uttered the words, 'I cannot tell you to do that.'" But the trial court rejected Bass's argument that [the detective], through his conduct and words, made it clear to Wagner that he needed her help to find Bass's DNA. And Wagner testified she was acting on her own. The trial court clearly found this testimony credible and we will not review on appeal the trial court's credibility determinations. . . .

Bass insists that "Wagner would never have been involved in the investigation or known the police wanted Bass's DNA except for the fact that [the detective] sought her out." Even if true, Bass cites no authority for the proposition that a police officer, by merely sharing information with a private citizen about an ongoing investigation, "recruited" that person into helping with the investigation. And it is contrary to the trial court's finding that [the detective] did not "direct" Wagner to take any items discarded by Bass.

[Citations omitted; footnote omitted]

<u>LEGAL UPDATE EDITORIAL NOTE</u>: The State's briefing in this case also argued that defendant Bass abandoned the items that he tossed into the trash, but the Court of Appeals does not address that argument. Check this link: https://www.courts.wa.gov/content/Briefs/A01/801562%20Respondent%20's%20.PDF for

the State's Brief of Respondent (Court of Appeals # 80156-2-I on the Washington Courts website.

"Abandonment" for search and seizure purposes is different from abandonment under property law. Leaving/discarding an item in a public area (e.g., in the bushes in the park) with subjective intent to return and retrieve the item may not be abandonment of one's property interest in the item, but it may be abandonment for search and seizure purposes because it is abandonment of any reasonable expectation of privacy as against members of the public or the police discovering and seizing the item. See discussion in LaFave, Search and Seizure, A Treatise on the Fourth Amendment, section 2.6 (4th Ed., 2004). This assumes that the "abandonment" was not caused by unlawful police conduct. Some Washington appellate court abandonment cases are State v. Whitaker, 58 Wn. App. 851 (Div. I, 1990) and State v. Samalia, 186 Wn.2d 262 (July 28, 2016). A complication in the Bass case for the abandonment theory is that a corporate representative had previously denied permission to the detective to search the company's trucks, and there was no corporate consent to search the trash cans that were inside the business premises. Also, while defendant appears to lack standing to raise this issue under Washington case law on standing, the Court of Appeals was able to avoid these issues when it ruled that no governmental search occurred.

SIXTH AMENDMENT RIGHT TO CONFRONTATION: FORFEITURE BY WRONGDOING EXCEPTION APPLIES WHERE DEFENDANT'S PRE-TRIAL CONDUCT PROBABLY INDUCED THE ABSENCE OF THE VICTIM AT THE TIME OF TRIAL

In State v. Brownlee, ___ Wn. App. 2d ___, 2021 WL ___ (Div. II, August 10, 2021 ordering publication of an April 20, 2021, unpublished opinion), Division Two of the COA rejects the challenge of defendant to his convictions for multiple crimes based on the Court's conclusion that, because of defendant's pre-trial conduct toward the victim, the "forfeiture by wrongdoing" equitable exception to the Sixth Amendment Right to Confrontation was correctly applied by the trial court. Thus, a prior sworn written statement by the victim was admissible at trial even though the State failed after diligent efforts to produce the victim as a witness at trial.

The Brownlee Court describes the key facts on the forfeiture by wrongdoing issue as follows:

> In making its decision, the trial court reviewed White's statement and Brownlee's phone calls from jail. Specifically, the trial court considered the phone calls Brownlee made before the May 2019 incident and arrest while he was in jail for a prior domestic violence charge also involving White.
>
> On January 30, 2019, Brownlee called a person by the name of Sierra and learned that White was staying with Martisha Eckles, Brownlee's cousin. Brownlee requested help from Sierra but conveyed that there was "only so [] much" he could say over the phone. Brownlee said that there are things that can be done to get him out of jail, and that Sierra should "fix" his situation by contacting Maurina Thomas, Brownlee's mother, about White. While asking Sierra for assistance, Brownlee repeatedly confirmed with, "You know what I'm saying?"
>
> On February 3, Brownlee called Thomas and told her he was not worried about White testifying. He also told Thomas that they should not talk about the case over the phone anymore and that he would write her a letter.

On February 19, Brownlee again called Thomas and told her that he had sent her letters. He asked her to be his eyes and ears and to forward his comments "down the pipeline."

On March 8, Brownlee called Thomas. He mentioned that he did not want to speak on the phone about his case. He also told Thomas that she should pay attention to the letters he sent to her, that she knows what to do, and added, "'Ya know what I'm sayin'?" He also said that everyone should be "on the same page."

On March 11, Brownlee spoke with Thomas. He stressed that everyone is "on point" and continued, saying that Eckles "knows her stuff" and would not testify. Brownlee referred to White and said she will not appear at trial, will not be found, and that "she'll deal with [Brownlee] later." Brownlee ended the call by asking Thomas to ensure everyone is on the same page.

On March 20, Brownlee called Thomas and said that "[t]hings need to be taken care of" and "whoever's important" should call the State. Brownlee asked Thomas to inform Eckles that she should ignore a subpoena and refuse to cooperate in the case. He instructed Thomas to have Eckles call the State to inform them that she will not testify.

In considering forfeiture by wrongdoing, the superior court also reviewed evidence other than the phone calls stemming from the May 2019 incidents. During Brownlee's arrest for the May 2019 incidents, he made a spontaneous comment that White would recant. Brownlee also attempted to send White a text message telling her to recant, but he accidentally sent the message to a police officer instead.

Result: Affirmance of Kitsap County Superior Court convictions of Alphonson Curtis Brownlee for (A) two counts of residential burglary, (B) two counts of assault in the second degree, (C) two counts of violation of a no contact order, and (D) two counts of tampering with a witness.

THE PROSECUTION VIOLATED DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION BY ASKING A LAW ENFORCEMENT OFFICER ABOUT DEFENDANT'S DECISION TO REMAIN SILENT AFTER ARREST AND A NIGHT IN JAIL

In State v. Palmer, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. II, August 19, 2021), Division Two rules in favor of defendant on a number of issues and remands his case for re-trial. One of the issues on which defendant prevailed was a ruling that the State violated his Fifth Amendment right to self-incrimination when the prosecution was allowed to ask a detective about defendant's exercise of his right to silence after the defendant had been arrested and had spent a night in jail.

In key part, the analysis by the Palmer Court on the Fifth Amendment issue is as follows:

> Here, the State unequivocally elicited a comment from [the detective] about Palmer's decision to remain silent. The State asked [the detective] if he had spoken to Palmer after Palmer's arrest and overnight confinement. [The detective] testified, "I went back the next morning, thinking that, you know, a day sitting in the county jail, you know, there's some time to think, and maybe Mr. Palmer would want to do the right thing here."

> [The detective] further testified that he told Palmer, "You've had some time to think. Do you want to talk?" and that Palmer responded that he did not want to talk.
>
> [The detective's] testimony was a comment on Palmer's right to remain silent. See State v. [Easter, 130 Wn.2d 228, 236 (1996)]. More pointedly, contrary to Easter, the State suggested that Palmer was guilty due to his silence. Indeed, [the detective] testified that Palmer remained silent after being given a chance to "do the right thing" by admitting criminal conduct.
>
> This statement presupposed Palmer's guilt and created an impossible choice: Palmer could either do right by confessing to molesting a child or do wrong by remaining silent. Implicit in the "silence equals wrongfulness" notion is that silence withholds the "truth"—that "truth" being one's criminal conduct, even if there was no criminal conduct. In this context, a defendant cannot maintain their presumption of innocence by remaining silent.
>
> A detective's belief on this front may assist with their investigative duty, but established authority prohibits using a defendant's right to remain silent to suggest guilt to the jury. Easter. Alone, this violation may warrant reversal and a new trial. However, because we reverse on other grounds, we remind the State that it is forbidden from eliciting comments about Palmer's silence during his new trial.

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

LEGAL UPDATE EDITOR'S COMMENT: I wonder if the Court meant to say in the next-to-last sentence of the final paragraph of the quote above that the violation "Alone, this violation may not warrant reversal." Regardless, the lesson of the ruling is that prosecutors must avoid asking questions that violate the defendant's Fifth Amendment right to silence.

Result: Reversal of Grays Harbor County Superior Court conviction of Michael Leon Palmer for child molestation in the first degree, assault in the fourth degree, and assault of a child in the second degree

MOPED MEETS THE STATUTORY DEFINITION OF "MOTOR VEHICLE" FOR PURPOSES OF THE ROBBERY, THEFT AND POSSESSIONG STOLEN PROPERTY STATUTES

In State v. Level, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. III, August 24, 2021), Division Three of the Court of Appeals rules in a prosecution for unlawfully possessing a stolen motor vehicle that a moped meets the statutory definition of a "motor vehicle" under chapter 9A.56 RCW and is not subject to any exceptions.

The Court of Appeals rules in defendant's favor on his separate argument that the State's amended information failed to adequately allege the required element of knowledge. Even under the liberal standard applicable to unpreserved informational errors, the charging document's allegation that Mr. Level "unlawfully" possessed a stolen vehicle was insufficient to convey an inference Mr. Level knew he both possessed the vehicle and that it was stolen. The Court of Appeals concludes, however, that because a moped comes within the statutory definition of a motor vehicle for purposes of chapter 9A.56 RCW, the case is subject to retrial on remand.

Result: Reversal of Stevens County Superior Court conviction of Jacob Daniel Level for unlawfully possessing a stolen motor vehicle; remand of case for re-trial.

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WASHINGTON ATTORNEY GENERAL OPINION REQUEST

Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys, reported in her August 27, 2021 "Weekly Roundup" of Case Law on the WAPA website regarding a pending formal request for an opinion from the Washington Attorney General.

E2SHB 1310 [Chapter 324, Washington Laws of 2021] (Officer Use of Force). Opinion Docket No. 21-08-02. Request by Representatives Roger Goodman and Jesse Johnson. The Attorney General's Office seeks public input on the following questions:

1. What constitutes "physical force" in the context of the standard in E2SHB 1310?

2. Does the standard in E2SHB 1310 preclude an officer from using physical force in the context of an investigatory detention (based on reasonable suspicion and not probable cause) when it becomes apparent that an individual will not otherwise comply with the request to stop?

3. In light of the standard in E2SHB 1310, are the provisions of Chapter 71.05 RCW, Chapter 13.34 RCW, Chapter 43.185C RCW, and other statutes and court orders (civil or criminal) authorizing or directing a law enforcement officer to take a person into custody to be interpreted as authorizing the officer to use physical force when necessary for that purpose?

4. In light of the standard in E2SHB 1310, is a law enforcement officer authorized to use physical force pursuant to the emergency aid doctrine, where there is no "imminent threat of bodily injury to the officer, another person, or the person against whom force is being used"? Does using physical force in this manner breach a legal duty to leave the scene, and would an officer's efforts constitute an exception to the Public Duty Doctrine under the rescue doctrine?

5. Read together, does section 3(3) of E2SHB 1310 effectively authorize a law enforcement officer to use a chokehold or neck restraint "to protect against his or her life or the life of another person from an imminent threat" despite the specific prohibition of such tactics in section 2 of Engrossed Substitute House Bill 1054 (2021)?

6. How should the terms "possible, "available," and "appropriate" in section 3 of E2SHB 1310 be interpreted? Should those terms be interpreted according to their common definitions or according to the "reasonable officer" standard established under Graham v. Connor, 490 U.S. 386 (1989), which provides that "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"?

Comments that address the interpretation of the law are welcomed. Although there is no deadline for submitting comments, comments are the most helpful if received by September 25, 2021.

The Attorney General's website contains the following additional information:

You may notify the Attorney General's Office of your intention to comment by:

- Writing to the Office of the Attorney General, Solicitor General Division, Attention: Jeff Even, Deputy Solicitor General, P.O. Box 40100, Olympia, Washington 98504-0100; or
- Emailing opinioncomments@atg.wa.gov.

When you notify the office of your intention to comment, you may be provided with:

- A copy of the opinion request in which you are interested;
- Information about the Attorney General's Opinion process;
- Information on how to submit your comments; and
- A due date by which your comments must be received to ensure that they are fully considered.

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BRIEF NOTES REGARDING AUGUST 2021 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

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

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

The seven entries below address the August 2021 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 descriptions of the holdings/legal issues are bolded.

1. State v. Kevion Maurice Alexander: On August 2, 2021, Division One of the COA rejects the challenge of defendant to his King County Superior Court convictions for (A) *one count of first degree murder*, and (B) *two counts of witness tampering*. **The Court of Appeals rules against defendant's challenge to admission of historical cell site location information. Defendant cited Frye v. U.S., 293 F. 1013 (D.C. Cir., 1923), arguing that cell site location information evidence is not generally accepted in the relevant scientific community. The Court of Appeals disagrees, citing State v. Ramirez, 5 Wn. App. 2d 118 (Div. III, 2018).**

The unpublished Opinion in State v. Alexander is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/804766.pdf

2. State v. Terrell Trayshawn Johnson: On August 2, 2021, Division One of the COA rejects the challenge of defendant to his King County Superior Court conviction for *one count of first degree unlawful possession of a firearm*. The Court of Appeals rejects defendant's argument that officers unlawfully searched a jacket that he apparently took off and hung over a fence near a stranger's premises during a foot chase by police. **The Court of Appeals rules that the defendant had no privacy right in the jacket or its contents because he abandoned the jacket.** The abandoned property constitutional analysis by the Court of Appeals includes the following discussion:

> A critical factor in determining whether someone has abandoned property is the status of the area where the item was located. State v. Hamilton, 179 Wn. App. 870, 885 (2014). "Generally, no abandonment will be found if the searched item is in an area where the defendant has a privacy interest." . . . Here, officers found Johnson's jacket "hanging over a [metal] fence" near a tool shed in a yard Johnson passed through while fleeing police. Johnson had no privacy interest in the area. **We agree with the trial court that Johnson relinquished his reasonable expectation of privacy by discarding the jacket.** The warrantless search of Johnson's abandoned jacket was lawful.

The unpublished Opinion in State v. Johnson is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/810197.pdf

3. State v. Jodie Lee Dean aka Jody Lee Dean, Vincent Ray Dean, Vincent Ray Molzan: On August 3, 2021, Division Two of the COA rejects defendant's challenge to his Pierce County Superior Court conviction for *second degree burglary*. **The Court of Appeals rejects defendant's argument that a fenced construction yard that he entered did not qualify as a "building" under Title 9A RCW.** Defendant posed a technical argument grounded in his theory that the fence did not surround the curtilage of a building. Part of the analysis by the Court of Appeals is as follows:

> **Both [of the controlling Washington Supreme Court decisions, State v. Wentz, 149 Wn.3d 342 (2003) and State v. Engel, 166 Wn.2d 572 (2009)] agree that under the plain language of RCW 9A.04.110(5), a "fenced area" constitutes a "building" if the fencing completely encloses the area. Here, the undisputed evidence was that a high fence completely enclosed the Atkinson Construction storage yard. We conclude that this constituted sufficient evidence that the area Dean entered constituted a "building" under the plain meaning of RCW 9A.04.110(5).**
>
> Even under Dean's interpretation of "fenced area," the fence here enclosed other structures that fell within the definition of "building." There was undisputed evidence that there were large storage containers, referred to as conexes, within the fenced yard. RCW 9A.04.110(5) defines "building" to include a "cargo container." The conexes fall within the definition of "cargo container," meaning that they constituted "buildings" for purposes of RCW 9A.04.110(5). And these were relatively permanent structures – two of the conexes had roofs. Therefore, the storage yard was "the curtilage of a building or structure that itself qualifies as an object of burglary." Engel, 166 Wn.2d at 580.

> Dean argues that the Atkinson storage yard cannot be considered the curtilage of the conexes because the yard and the cargo containers must be so intimately associated with each other as to be the equivalent of a house and its backyard. However, the [Supreme Court] in Engel stated only that the fenced area be the curtilage of "an object of burglary (as defined in RCW 9A.04.110(5))." 166 Wn.2d at 580. RCW 9A.04.110(5) defines a cargo container as being a building capable of being burglarized. Neither the statute nor Engel add the requirement that the cargo container be intimately tied to a surrounding fenced area.

The unpublished Opinion in State v. Dean is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2054673-6-II%20Unpublished%20Opinion.pdf

4. State v. Zyion Donntiste Houston-Sconiers: On August 17, 2021, Division Two of the COA rejects the challenge of defendant to his Pierce County Superior Court conviction for *unlawful possession of a firearm*. In lengthy analysis of four search-and-seizure issues, the Court of Appeals rules that: **(1) a stop of a car in which defendant was a passenger was not a pretext stop because the traffic patrol-assigned officers making the stop were reasonably found by the trial court to have mixed motives, including enforcement of the NVOL statute against the recognized driver of the vehicle; (2) before opening the car's glove box and discovering a firearm, an officer had reasonable suspicion that the vehicle's glove box contained a firearm based on furtive gestures of the car's occupants, plus other suspicious facts, and therefore the scope of the stop and the protective sweep were justified; (3) removing the occupants of the car was justified by safety reasons; (4) a consent by defendant to a search of the defendant's backpack was voluntary in light of all of the circumstances, including the officer's giving of both Miranda warnings and an admonition that defendant had a right to refuse consent to search the backpack**.

The Court of Appeals agrees with defendant that, based on the Washington Supreme Court decision in State v. Blake, 197 Wn.2d 170 (2021) striking down as unconstitutional the former Washington drug possession prohibition, the defendant's conviction for *unlawful possession of a controlled substance (UPCS) with a firearm enhancement* must be dismissed.

The unpublished opinion in State v. Houston-Sconiers is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2054029-1-II%20Unpublished%20Opinoin.pdf

5. State v. James Lee Miller: On August 24, 2021, Division two of the COA rejects the challenge of defendant to his Grays Harbor County Superior Court convictions for one count each of (A) *first degree rape of a child*, and (B) *first degree child molestation*. **The Court of Appeals rules under the following facts that a private search, not a governmental search occurred, and therefore the defendant's unlawful governmental search argument fails**:

> On June 23, 2019, Jennifer Miller made a report to law enforcement that [defendant] had been sexually abusing her daughter, M.R. [A detective] of the Grays Harbor County Sheriff's Office was assigned to investigate the case. During the course of his investigation, [the detective] learned that [the defendant] was also being investigated for failing to register as a sex offender for a previous conviction and had a warrant issued for his arrest.
>
> On July 18, Jennifer contacted [the detective] and advised that she had a current GPS location on [defendant]. Jennifer had [defendant's] GPS location from the shared cellphone plan she had with [defendant], which allowed her to see where [defendant]

was in real-time through her cellphone. [The detective] advised that he would contact Jennifer the next day for an updated location.

On July 19, [the detective] contacted Jennifer. Jennifer advised that she believed [defendant] was at a dentist's office in Puyallup, Washington; Jennifer kept [the detective] updated as to [the defendant's] location. [The detective] drove from Montesano, Washington, to [the defendant's] location in Puyallup.

[The detective] found [defendant] in Puyallup and took [the defendant] into custody.

The unpublished Opinion in State v. Miller. is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2054494-6-II%20Unpublished%20Opinion.pdf

6. State v. Jessica A. Turnbough: On August 24, 2021, Division Two of the COA rejects the challenge of defendant to her Thurston County Superior Court convictions for (A) *felony driving under the* influence, and (B) *bail jumping*. **She argued that she was deprived of her rights under CrR 2.3(d) when an officer refused to provide a physical copy of a search warrant before conducting a blood draw. In key part, the analysis by the Court of Appeals rejecting her argument on this issue is as follows:**

> **CrR 2.3(d) states in relevant part, "Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken." (Emphasis omitted.) CrR 2.3(d) does not require an officer to provide a copy of the warrant prior to conducting a search. State v. Ollivier, 178 Wn.2d 813, 852, 312 P.3d 1 (2013).**

The unpublished Opinion in State v. Turnbough is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2054494-6-II%20Unpublished%20Opinion.pdf

7. State v. Marty Leshawn Kime: On August 30, 2021, Division One of the COA rejects the challenge of defendant to his King County Superior Court convictions for (A) *murder in the second degree* and (B) *two counts of assault in the first degree*. The prosecution arose from a gang-related shooting that resulted in the death of a one-year-old child. **Defendant raised numerous challenges on appeal, including a challenge under Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923) in which he argued that he is entitled to a hearing with regard to his theory that there is no scientific statistical reality to the assertion of the State's expert that recovered bullets and shell casings in the case are a match. The Kime Court declares this argument fails because it is the same Frye-based argument that was rejected in State v. DeJesus, 7 Wn. App. 2d 849 (2019).**

The unpublished Opinion in State v. Kime is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/794396.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are

issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

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

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

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth 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 [cjtc.wa.gov/resources/law-enforcement-digest].

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