LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JULY 2021

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2021 WASHINGTON LEGISLATIVE SUMMARIES FROM THE WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS

Readers who have not already done so will want to review the excellent and comprehensive listing and summaries by staff of the Washington Association of Sheriffs and Police Chiefs (WASPC) of 2021 Washington legislation of interest to law enforcement. Go to the WASPC Home Page, click on Programs & Services, scroll down and click on Legislation, and scroll down and click on 2021 End of Session Report. Or go to the Internet address:
https://waspc.memberclicks.net/assets/legislative/2021%20WASPC%20End%20of%20Session%20Report.pdf

Unless otherwise noted in the text of the legislation, bills generally became effective on July 25, 2021.

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2021 LEGISLATIVE SUMMARIES FROM THE WASHINGTON ADMINISTRATIVE OFFICE OF THE COURTS

The Washington Administrative Office of the Courts has issued legislative summaries for the enactments of the 2021 Washington State Legislature. The summaries are accessible on the Internet on the "Resources" page of the Washington Courts website. Or go to the following Internet address:
https://www.courts.wa.gov/newsinfo/content/pdf/2021%20Legislative%20Summary.pdf

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ANNOUNCEMENT: THE FOLLOWING RESEARCH MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED THROUGH JULY 1, 2021 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS"

The LED page is at: https://www.cjtc.wa.gov/resources/law-enforcement-digest

OUTLINE: "Law Enforcement Legal Update Outline: Cases On Arrest, Search, Seizure, And Other Topical Areas Of Interest to Law Enforcement Officers; Plus A Chronology Of Independent Grounds Rulings Under Article I, Section 7 Of The Washington Constitution"

OUTLINE: "Initiation of Contact Rules Under The Fifth Amendment"

ARTICLE: "Eyewitness Identification Procedures: Legal and Practical Aspects"

These documents compiled by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year, and they are now updated through July 1, 2021. Several 2020 and 2021 court decisions were added to the "Law Enforcement Legal Update Outline" (the first item), but it was not necessary to add any recent court decisions or any substantive revisions to the other two items. In both of the first two items, brief notes are included to refer readers to some of the law enforcement reform legislation adopted by the 2021 Washington State Legislature, but no summaries or discussion of the legislation is provided.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY IN CORRECTIONS: IN A CASE WHERE A HEROIN ADDICT DIED WITHIN 30 HOURS OF JAIL INTAKE, A THREE-JUDGE PANEL ADDRESSES THE RIGHT OF DETAINEES TO "*DIRECT-VIEW SAFETY CHECKS*" AND GRANTS QUALIFIED IMMUNITY TO THE GOVERNMENT DEFENDANTS ON THE ISSUE, BUT THE PANEL RECOGNIZES A DUE PROCESS RIGHT ON THIS ISSUE GOING FORWARD

In Gordon v. County of Orange, ___ F.3d ___ , 2021 WL ___ (9th Cir., July 28, 2021), a three-judge Ninth Circuit panel addresses several corrections-context Due Process liability issues, including the issue of whether the Orange County Central Men's Jail had a constitutional Due Process duty to have an employee make *direct-view safety checks* of an arrestee who at intake was known by staff to be a heroin addict and to be suffering medical issues.

The Ninth Circuit panel rules the County of Orange deputy who was sued on this issue is entitled to qualified immunity on the direct-view safety checks issue because no controlling case-law precedent expressly recognizes a detainee's right to direct-view safety checks sufficient to determine whether the detainee's presentation indicated the need for medical treatment.

The panel goes on, however, to hold in this case and for purposes of cases arising after this decision, that pre-trial detainees do have a right to direct-view safety checks sufficient to determine whether the detainees' presentations of behaviors and symptoms indicates the need for medical treatment. The panel states that law enforcement and prison personnel should heed this warning because the recognition here in Gordon of this constitutional right will protect future detainees and will expose the government actors to section 1983 Civil Rights Act liability.

Result: Reversal in part (remand for trial on plaintiff's clam of improper medical screening) and affirmance in part (dismissal based on qualified immunity on plaintiff's claim of failure to do adequate direct-view safety checks) of the summary judgment ruling for the government defendants of the U.S. District Court (Central District of California).

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WASHINGTON STATE SUPREME COURT

5-4 MAJORITY OF WASHINGTON SUPREME COURT REJECTS THEIN-BASED CHALLENGE TO PROBABLE CAUSE/NEXUS SUPPORT FOR SEARCH WARRANT FOR CELL PHONE RECORDS, INCLUDING CELL SITE LOCATION INFORMATION; MAJORITY OPINION IDENTIFIES PC IN AFFIDAVIT'S (1) DESCRIPTION OF DEFENDANT'S USE OF CELL PHONES SHORTLY BEFORE AND SHORTLY AFTER A JEWELRY STORE BURGLARY, AND (2) STRONG EVIDENCE – INCLUDING POST-BURGLARY FENCING ACTIVITY AND THE WEARING OF AN UNUSUAL JEWELRY ITEM MATCHING A STOLEN ITEM – THAT DEFENDANT WAS THE BURGLAR

State v. Denham, ___ Wn.2d ___ , 2021 WL ___ (July 1, 2021)

Case in a nutshell: A valuable diamond was stolen from a jewelry store. Within days, defendant Denham fenced the diamond, along with certification papers for the diamond. He was also seen wearing an identifiable piece of the stolen jewelry. Police thus developed compelling evidence that Denham committed the burglary, and that he owned two cell phones and used both of them in the days before and after the burglary. Police got a warrant for his cell phone records. Cell site location information included in those records placed Denham's phones near the jewelry store around the time of the burglary. Denham argued that the search warrant affidavit was unconstitutionally dependent on general assumptions about people having their cell phones on them at all times in their lives when they are awake.

By a 5-4 vote, the Supreme Court rules for the State, but the Majority Opinion states that the Opinion does not rely entirely on such a broad general assumption as stated by defendant (and also as stated in the (1) Dissenting Opinion and (2) the briefing by the ACLU and others supporting the defendant's position).

Facts: (Excerpted from the Supreme Court Majority Opinion)

> Someone burgled Mallinak Designs Jewelers over Veterans Day weekend in 2016. Mallinak Designs had an elaborate security system and stored a great deal of valuable jewelry in a large, heavy safe. Before the burglary, someone had removed an interior lock on a utility room that was accessible through a roof hatch, and the burglar entered through that roof hatch while the store was closed.
>
> Doors were cut or sabotaged, the alarm system was deactivated, and the safe's locking mechanisms were disabled. The burglar made off with a great deal of jewels and jewelry, including a 5.29 carat diamond with certification papers from the Gemological Institute of America. No suspect fingerprints were left, but Frank Mallinak, the store owner, did find a small plastic piece that he did not recognize.
>
> Within days of the burglary, Denham sold the stolen 5.29 carat diamond, along with its certification paperwork. This sale was the basis of a trafficking charge. Denham used one of his own cell phones several times to negotiate the sale of the diamond.
>
> Over the next few weeks Denham pawned or sold jewels and jewelry stolen from Mallinak Designs at various jewelry and pawn shops and purchased a new Range Rover

with a large cash down payment. He also took to wearing "a huge blue stone gem necklace" that matched one taken in the burglary.

Meanwhile, [a detective] ran a search through a database that tracked sales at pawn shops and saw Denham had been pawning jewelry stolen from Mallinak Designs. Based on discussions with Frank Mallinak, the shop operators, and one of Denham's probation officers, [the detective] successfully applied for a search warrant for Denham's registered address in Tacoma.

The original warrant application was very detailed about the burglary and the sale of stolen jewels. [The detective] also successfully sought authority to seize the Range Rover and to seize and image cell phones for a later search.

Denham was not home when the warrant was served. Police found drawings and schematics of safes, and new headlamps, one of which was missing a piece similar to that found at Mallinak Designs. They also seized the Range Rover. They did not find any cell phones.

After the search, the detective wrote an addendum to the warrant affidavit seeking five months of records associated with two phone numbers Denham had given to his probation officers and to the purchaser of the diamond. According to the original affidavit, the purchaser of the diamond had reached Denham at one of those numbers.

The addendum sought subscriber information, payment details, billing records, inbound and outbound call records, stored communications, stored images, location data, physical addresses of cell towers used by the phones, connection logs, and much more. The State acknowledges, correctly, that this was overbroad both in time and scope. Both the original warrant application and the addendum contained what appeared to be boilerplate language describing the role of cell phones in people's lives and the information that can be gleaned from the phones and the phone records. The expanded warrant was granted.

The phone company's records included cell site location information that established multiple calls to or from Denham's phone were relayed through a cell phone tower that was about 550 feet from Mallinak's store around the time of the burglary. Denham lived in Tacoma, some distance away.

[Footnote omitted; some paragraphing revised for readability]

Proceedings below: (Excerpted from Supreme Court Majority Opinion)

Denham was arrested and charged with second degree burglary and first degree trafficking in stolen property. . . .

. . . .

Denham was convicted of second degree burglary and first degree trafficking in stolen property at a bench trial. The trial judge specifically cited the fact that Denham had made phone calls that were routed through the cell tower in the parking lot of Mallinak Designs around the time of the burglary. She also cited the lengthy interviews Denham had given on burglary techniques and his specialized knowledge on burglary.

ISSUE AND RULING BY WASHINGTON SUPREME COURT: The search warrant affidavit in this case contains the following factual allegations and reasonable inferences from the factual allegations relating to Denham's cell phones: (1) Denham had used two cell phones variously with his probation officer and with various businesses around the time of the burglary; (2) inferences could be drawn that Denham had the phones on his person around the time of the burglary in light of specific facts suggesting that he had the phones a short while before and a short while after the date in question; (3) Denham trafficked distinctive pieces stolen from the store, using one of the phones to negotiate one of the deals; (4) Denham began wearing an item of jewelry matching a distinctive item stolen in the burglary; (5) shortly after the burglary, Denham purchased a new Range Rover with a large cash down payment.

Do the facts and reasonable inferences from those facts in the search warrant affidavit provide probable cause to support the search warrant's authorization to search for and seize cell site location information for Denham's phones? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 majority)

Majority Opinion's Footnote 2 Regarding Overbreadth of Search Warrant:

> *The State properly concedes that the warrant was overbroad because there was no probable cause supporting the conclusion that evidence of a crime would be found in all of the categories of information listed. There is nothing in the affidavits that suggests billing records, pictures, or location data acquired after the charging period, for example, would be germane to any criminal activity. But Denham has not challenged the warrant as overbroad and does not contend that evidence seized under the overbroad portions of the warrant was admitted. If it had been, the remedy would have been suppression of any evidence seized due to the overbreadth. . . . [citations omitted]*

Result: Reversal of Division One Court of Appeals decision (unpublished) and reinstatement of King County Superior Court conviction of Lynell Avery Denham for second degree burglary and first degree trafficking in stolen property.

ANALYSIS: (Excerpted from Supreme Court Majority Opinion)

> [Privacy protection under the Fourth Amendment and the Washington constitution, article I, section 7] extends to cell phone location information held by cell phone companies. . . . As the United States Supreme Court observed, "[T]he time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" . . . .
>
> Here, officers had a search warrant. Denham challenges the adequacy of the affidavits supporting the application for that warrant. He contends the affidavits were based on generalizations and did not establish that evidence of wrongdoing would likely be found in his phone records.
>
> "A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched." State v. Neth, 165 Wn.2d 177, 182 (2008) (citing State v. Thein, 138 Wn.2d 133, 140 (1999)). There must be "a nexus between criminal

activity and the item to be seized and between that item and the place to be searched." Id. at 183 (citing Thein, 138 Wn.2d at 140).

. . . .

Search warrants may not be based only on generalizations. . . . "[Probable cause to believe that a man has committed a crime . . . does not necessarily give rise to probable cause to search his home." Thein, 138 Wn.2d at 147-48 . . . ; see also State v. Keodara, 191 Wn. App. 305, 310, 316, 364 P.3d 777 (2015) (generalized statements that gang members take inculpatory pictures of themselves not sufficient to search a suspect's seized telephone).

Denham contends that the search warrant affidavits supporting the seizure of Denham's phone records relied on the same sort of generalizations rejected in Thein. We disagree.

These affidavits present reasonable grounds to believe that the phones associated with the phone numbers belonged to Denham based on Denham's own use of the numbers with his probation officers and with various businesses, that Denham had the phones around the time of the burglary because of specific facts suggesting he had the phones days before and after the date in question, that Denham burgled the store, and that Denham trafficked distinctive pieces stolen from the store.

[The affidavits] also allege that Denham had both phones at the time of the burglary and used one to arrange the sale of the diamond that was the basis of the trafficking charge.

> [Majority Opinion's Footnote 3: *We respectfully disagree with the dissent that there is nothing in the affidavits linking the cell site location information to the crime. The warrant affidavits support an inference that Denham had at least one of the cell phones on him when he committed the burglary. That in turn supports an inference that evidence would be found in the cell site location information for the weekend of the burglary*.]

Taken together, [the affidavits provide information] sufficient to raise a reasonable inference that evidence of burglary would be found in the cell site location information under Neth, 165 Wn.2d at 182 (citing Thein, 138 Wn.2d 140). The fact that there are some generalizations in the inferential chain does not defeat the reasonableness of the inference.

> [Majority Opinion's Footnote 4: *We also respectfully disagree with the dissent that this opinion overrules Thein. Thein remains good law and stands for the proposition that a search warrant cannot be based on generalizations about the supposed common habits of drug dealers. Thein, 138 Wn.2d at 147-48. There must be "a factual nexus between the evidence sought and the place to be searched." . . . . There was such a nexus between Denham's location on the weekend of the burglary and his cell site location information*.]

We find illustrative Illinois v. Gates, 462 U.S. 213 (1983). In Gates, Illinois police had received an anonymous letter accusing a couple of dealing drugs. The letter contained a great deal of specifics about the couple's methodology. Police surveilled the couple, confirmed many of the seemingly innocuous details in the letter, and, based on both the

letter and the investigation, successfully applied for a warrant to search the couple's car. The United States Supreme Court affirmed. While it suggested the anonymous letter alone would likely not be enough, the totality of the circumstances created probable cause to believe evidence of a crime would be found in the car. It observed:

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." . . . . Our observation in United States v. Cortez, 449 U.S. 411, 418 (1981), regarding "particularized suspicion," is also applicable to the probable cause standard:
>
> > "The process [of determining the existence of probable cause] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers." Gates, 462 U.S. at 231-32 (first alteration in original).

The judge did not abuse her discretion in approving the warrant. Reading the affidavits as a whole, the judge could reasonably infer that evidence of the burglary would be found in Denham's cell site location information. While we do not countenance how overbroad this warrant was, no overbreadth challenge is before us, and nothing in the trial judge's findings of fact suggests she relied on evidence seized under overbroad portions of the warrant.

> [Majority Opinion's Footnote 5: *If it was properly before us, we might be inclined to agree with our dissenting colleague that the admission of evidence that most of Denham's calls were relayed through the cell tower closest to his Tacoma residence was error. Denham, however, has not brought this challenge, perhaps because the trial judge did not mention the fact in her oral ruling and the written rulings (prepared by the prosecutor's office) did not make it a central fact but simply one of 39 findings of fact.*

The phone records were not improperly used to show Denham's associations, pictures, musical tastes, or the content of his communications. See State v. Juarez DeLeon, 185 Wn.2d 478, 489 (2016) (admission of music found on cell phone to show gang affiliation improper).

> [Majority Opinion's Footnote 6: [*Joint friend-of-the-court briefing by the ACLU and criminal defender organizations] contends that cell phones and cell phone records often contain material that is protected by the First Amendment and ask us to impose the scrupulous exactitude standard used for warrants on warrants seeking to seize such material. Items presumptively entitled to First Amendment protection must be described with exacting scrutiny in warrants. . . . But given that Denham has not challenged the warrant on this ground, the record and argument for extending the scrupulous exactitude standard has not been developed. We decline to consider it here and await a case where it is more fully presented.*]

Accordingly, we reverse the Court of Appeals.

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

Justices Whitener, Johnson, Madsen, and Stephens dissented on most all of the points made in the Majority Opinion that is excerpted above.

LEGAL UPDATE EDITOR'S COMMENTS:

1. ***Commentary from the King County Prosecutor's Office***

Recently, an email listserv advisory from King County Senior Deputy Prosecuting Attorney Kristin Relyea addressed the Denham decision. As always in her advisories, Sr. DPA Relyea cautioned the "purpose of [such advisories] is to provide information to our law enforcement partners about recent court decisions . . . [and that the advisories are] not intended as legal advice. Sr. DPA Relyea followed her brief summary of the Denham decision with the following "Note:"

> ***Sr. DPA Gary Ernsdorff offered this helpful advice in the wake of Denham, "[W]hen reviewing applications for warrants for cell phone records, please make sure you include every bit of information you can that connects the phone number to the suspect. Be very clear and precise. Consistent use and possession over time, and/or use and possession close in time to the crime, should be considered a necessity. Simply relying on the fact that a number is associated with the suspect to get CSLI will lead to trouble (although will likely still get approved by many judges). If you have questions on a specific set of facts, feel free to reach out to the Special Operations Unit.)***

The Legal Update notes that the King County Special Operations Unit may be contacted at (206) 477-3733.

2. ***More discussion of State v. Thein***

[I]n State v. Thein, 138 Wn.2d 133 (1999), relying on the Fourth Amendment, the Washington Supreme Court rejected the theory that, taken alone, a probable cause nexus to a drug-dealer's residence is established by conclusory language in an affidavit about the general habits of drug dealers of keeping some evidence of their criminal activity in their homes. Thein may not be dictated by Fourth Amendment case law, but after 20-plus years of Thein standing essentially unquestioned by the Washington appellate courts, I have to concede that Washington law enforcement is stuck with Thein, and that law enforcement must gather the additional evidence beyond drug-dealer's habits for an affidavit to establish a nexus between a drug-dealer's activity and the drug-dealer's residence. If there is possible federal law enforcement authority in a particular case, it may be useful to explore whether the federal agency wishes to pursue a search warrant and prosecution in the federal courts.

The King County Prosecutor's briefing in this case did not ask the Supreme Court to overrule State v. Thein, 138 Wn.2d 133 (1999). Instead, the Prosecutor wisely argued persuasively that the facts make Thein distinguishable. See State's Supplemental Brief of the State in the Washington State Supreme Court, accessible on the Internet at https://www.courts.wa.gov/content/Briefs/A08/985910%20Pet'r's%20Supp%20Brief.pdf

In key part, the King County Supplemental Brief argued as follows:

> **[I]n State v. Thein, this Court rejected conclusory language about the general habits of drug dealers; specifically, that drug dealers will always keep evidence of their criminal activity in their homes . . . . The warrant affidavit established that just prior and just after the burglary, Denham possessed and used two cellphones, and the police had the cellphone numbers. The affidavit also established that within days of the burglary, Denham used his cellphones in trafficking the stolen jewelry.**
>
> **From this, and with the common understanding that virtually all individuals with cellphones – whether persons engaged in criminal activity, detectives, supreme court justices, or ordinary civilians -- keep them on their person or close as hand at all hours of the day, it was reasonable to infer that Denham possessed his cellphones – either on his person or in a nearby vehicle – during the commission of the burglary. And from this, it was reasonable to infer that proof of Denham's location would be found in his cellphone records.**
>
> **These reasonable inferences do not depend on a police officer's generalized conclusions about criminal behavior. Rather, these inferences rely on common sense and a common understanding of the prevalence and use of cellphones – an understanding recognized by the [United States Supreme Court in the Riley and Carpenter decisions]. Twenty years ago, these inferences might not have been reasonable. But in today's modern world of cellphones and social media, it is entirely reasonable to conclude that a person possessing and using a cellphone prior to a weekend, and possessing and using the cellphone after the weekend, likely possessed the cellphone over the weekend.**
>
> **It is true that in a specific case, there may be facts that negate these otherwise reasonable inferences. For example, if a crime took place in a remote area during a hiking trip it might not be reasonable to infer that the person had their cellphone with them, or that the cellphone records would contain location data. But the finding of a nexus between the crime and place to be searched is fact specific, and there are no facts here that negate the reasonable inference Denham possessed or was near his cellphone during the lengthy period of time it took to complete the burglary.**

NECESSITY DEFENSE: WASHINGTON SUPREME COURT ALLOWS PROTESTER AGAINST CLIMATE CHANGE TO USE NECESSITY DEFENSE IN PROSECUTION FOR CRIMINAL TRESPASS AND OBSTRUCTION OF A TRAIN

In State v. Spokane County District Court, ___ Wn.2d ___ , 2021 WL ___ (July 15, 2021), the Washington Supreme Court holds that a defendant who has unsuccessfully attempted to challenge perceived societal harms through the political process may present a necessity defense in a prosecution if the defendant also establishes that (1) he reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm he sought to avoid was greater than the harm resulting from his violation of the law, and (3) the threatened harm was not brought about by the defendant.

The common law (i.e., court created, not statutorily codified) defense of necessity is centuries old, but its application to politically-motivated violations of law is more recent in the history of legal jurisprudence. Seven Justices sign the Lead Opinion in this case to make the above-described holding. Another Opinion is signed by two Justices who argue on a procedural question (1) that the Court should have ruled in favor of the defendant's argument that he should have been permitted a change of superior court judges, and (2) that the Court should not have addressed the "necessity defense" issue before the superior court addressed the issue.

Result: Reversal of Division Three Court of Appeals ruling that affirmed a Spokane County Superior Court order that in turn reversed an order of the Spokane County District Court. The Supreme Court ruling allows defendant George E. Taylor to argue to the jury a defense of necessity in relation to his prosecution for the misdemeanors of trespassing in the second degree and obstruction of a train.

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WASHINGTON STATE COURT OF APPEALS

BY BOARDING A PUBLIC BUS AND ACCEPTING TRANSPORTATION, DEFENDANT CONSENTED TO THE CONDITIONS OF RIDERSHIP, WHICH INCLUDE COMPLYING WITH A FARE ENFORCEMENT OFFICER'S REQUEST FOR PROOF OF PAYMENT

In State v. Meredith, ___ Wn. App. 2d ___ , ___ P.3d ___ (Div. I, July 26, 2021), a three-judge Division One panel rejects defendant's argument that he was unlawfully seized when a fare enforcement officer, and that therefore evidence obtained during the fare enforcement contact must be suppressed. The introductory paragraph of the Court's Opinion summarizes the ruling as follows:

> Article 1, section 7 of the Washington constitution prohibits warrantless seizures, save for narrow exceptions. Consent is one well-established exception. By boarding a public bus and accepting transportation, Zachery Meredith consented to the conditions of ridership. Those conditions include paying bus fare and complying with a fare enforcement officer's request for proof of payment.
>
> Even assuming that Meredith was seized when an officer requested that he provide proof of payment, the officer's request remained within the scope of Meredith's consent. Because Meredith consented to the conditions of ridership and failed to provide proof of payment when requested, the trial court did not err by denying Meredith's motion to suppress evidence gathered by the officer conducting fare enforcement

The Court's analysis explaining its constitutional ruling is complex and lengthy, including a number of footnotes that contain more than mere citations to supporting court decisions. The Legal Update will not excerpt or try to break down the analysis.

Result: Affirmance of Snohomish County Superior Court ruling that upheld a Snohomish County District Court conviction of Zachery K. Meredith for making a false statement to a public servant.

RCW 9.41.171 PROHIBITION ON ALIEN POSSESSION OF A FIREARM IS HELD TO NOT BE A STRICT LIABILITY CRIME, AND INSTEAD TO HAVE AN IMPLIED ELEMENT OF KNOWING POSSESSION

In State v. Flores, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, July 26, 2021), Division One of the Court of Appeals rules that a jury instruction in defendant's prosecution for alien possession of a firearm should have been worded so that defendant could argue that he did not know that he was in possession of firearm. Even though RCW 9.41.171 does not expressly include an element of knowledge, the Court of Appeals bases its ruling in significant part on the rationale that the statute must be construed to contain that element so that an alien cannot be convicted of the Class C felony on a theory of "constructive possession."

The Flores Court remands the case for re-trial on the charge under RCW 9.41.171. The Court notes that re-trial on the charge will not violate double jeopardy protections because there is clear evidence in the record that the alien defendant knowingly possessed a firearm. That evidence is the victim's testimony at trial that the defendant had an AK-47 in his possession when he threatened to kill her and another person who was present.

Result: Reversal of Skagit County Superior Court conviction of Pedro Barrera Flores for violation of RCW 9.41. 171; case remanded for re-trial with a to-convict jury instruction that contains a "knowing possession" element.

RCW 9A.36.150(1)(b): PROHIBITION AGAINST INTERFERING WITH THE REPORTING OF DOMESTIC VIOLENCE IS A STRICT LIABILITY CRIME

In State v. Christian, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, July 6, 2021), Division One of the Court of Appeals issues a revised Opinion from that issued by the Court on June 1, 2021, but the Court of Appeals does not change the result or the holding on the issue that was addressed in the June 2021 Legal Update. The Court rejects the argument of defendant that the trial court should have instructed the jury that the crime of interfering with the reporting of domestic violence (RCW 9A.36.150(1)(b)) contains a mental state element of either intentional or knowing prevention of reporting. The Christian Opinion declares, as did the June 1, 2021, Opinion, that the crime is a strict liability crime.

Result: Affirmance of Snohomish County Superior Court convictions of Charles Freeman Christian for three domestic violence-related crimes: (1) assault in the second degree by strangulation or suffocation, (2) assault in the fourth degree, and (3) interfering with the reporting of domestic violence.

FIRST DEGREE ROBBERY: EVIDENCE HELD SUFFICIENT TO PROVE THAT DEFENDANT OR HIS ACCOMPLICE WAS ARMED WITH A DEADLY WEAPON DURING A ROBBERY

In State v. Sullivan, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, July 6, 2021), a three-judge panel of Division One of the Court of Appeals rejects defendant's sufficiency-of-evidence challenge to his convictions by a jury of armed robbery in the first degree and unlawful possession of a firearm in the first degree.

The Court of Appeals describes a set of circumstances where a robbery occurred that did not involve a shooting, and the robbery was followed about 25 minutes later by a shooting in the same vicinity. The prosecution in the case was for the robbery, but some of the evidence relating to whether the alleged robber was armed came from the scene of the subsequent shooting.

The Court rules that the evidence in the record is sufficient to establish that the defendant or his accomplice was armed with a deadly weapon during the earlier robbery where: (1) an enlarged image from a video captured by a bystander would allow a rational trier of fact to infer that, during the charged robbery, the defendant had a firearm located on the exterior of his shirt that was pressed against his stomach; (2) approximately 25 minutes later, shortly after the subsequent shooting, another video captured the defendant with his right arm extended forward, holding an object that resembled a pistol in his right hand; (3) some of the bullet casings recovered from the scene of the subsequent shooting were for .40 caliber ammunition and did not match any of the firearms recovered at the scene of the shooting; and (4) five days after the shooting, police officers found, inside a garbage bag at an apartment inhabited by the defendant's girlfriend, three .40 caliber Hornady bullets (an expert tied such bullets to bullets extracted from the shooting victim), an empty box of ammunition, and mail addressed to the defendant.

The Court of Appeals rules that this and additional evidence was sufficient to support the jury's determination that the defendant was an accomplice to the robbery because he was armed with a deadly weapon during the robbery, and video evidence established that he moved to a position at the victim's feet as his accomplice beat the robbery victim while the victim was lying on the ground.

Result: Affirmance of King County Superior Court convictions of Brandon Rashad Sullivan for robbery in the first degree and unlawful possession of a firearm in the first degree.

LEGAL UPDATE EDITOR'S NOTE: Some of the language for the summary above was taken from a "Case Note" by Staff Attorney Pamela Loginsky on the website of the Washington Association of Prosecuting Attorneys. The facts in this case are complicated and are described in great detail by the Court of Appeals.

ACCOMPLICE-LIABILITY-BASED CONVICTIONS FOR PRACTICING MASSAGE WITHOUT LICENSES (RCW 18.130.190(7)) UPHELD AGAINST CHALLENGE THAT PROSECUTION SHOULD HAVE BEEN UNDER LESSER OFFENSE OF ALLOWING EMPLOYEES TO GIVE UNLICENSED MASSAGES (RCW 18.108.035)

In State v. Zheng, ___ Wn. App. 2d ___ , ___ WL ___ (Div. II, July 7, 2021), Division Two of the Court of Appeals rejects the contention of defendants that the general gross misdemeanor/felony statute making it a crime to practice a licensed profession without a license, (RCW 18.130.190(7)) under which they were charged, is "concurrent with" a specific misdemeanor statute that applies to business owners who permit their employees to give unlicensed massages (RCW 18.108.035).

The defendants argued that, where two statutes are concurrent, Washington law requires the State to charge the specific offense. The defendants further argued in the alternative that even if the statutes are not concurrent, they conflict with each other, which means the State should have charged them under the more specific misdemeanor statute.

The Court of Appeals holds that the statutes are not concurrent, and that they do not conflict.

Result: Affirmance of Pierce County Superior Court convictions of Guang None Zheng and Dan Yu for four counts under the gross misdemeanor prong of RCW 18.130.190(7) and four counts under the felony prong of RCW 18.130.190(7).

PUBLIC DUTY DOCTRINE DOES NOT BAR LAWSUIT FOR ALLEGED GOVERNMENTAL NEGLIGENCE IN RESPONDING TO A 911 CALL FOR EMERGENCY MEDICAL ASSISTANCE

In Norg v. City of Seattle, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, July 19, 2021), Division One of the Court of Appeals rules that the "public duty doctrine" does not protect the City of Seattle from negligence liability in a case where (A) Seattle Fire Department paramedics went to the wrong address on a 911 call after a man suffered a heart attack, and (B) the delay allegedly worsened the effect of the heart attack.

In the introduction to the Norg Opinion's analysis, the Opinion states that there are three reasons why the public duty doctrine (which protects the government from some negligence lawsuits arising out of duties owed by the government to the general public) does not apply in the circumstances before the Court:

> First, the source of the duty [of the government] in this case is neither a statute nor an ordinance but a common law duty to exercise reasonable care in providing emergency medical services. Second, most of the [Washington] Supreme Court's prior 911 call cases involved requests for police protection from a third party, not a request for emergency medical services – a key distinguishing factor. Third, the {Washington] Supreme Court's recent public duty doctrine cases, Beltran-Serrano v. City of Tacoma, 193 Wn.2d 537, 549 (2019) [holding that mentally ill plaintiff may sue a law enforcement officer for intentional use of force based on plaintiff's negligence-based theory that the officer did not follow accepted de-escalation practices in interactions with the plaintiff that led up to the officer's use of deadly force on the plaintiff], and Mancini v. City of Tacoma, 196 Wn.2d 864, 879 (2021) [jury verdict upheld in wrong-apartment search warrant case based on theory of negligent execution of the warrant] support the conclusion that the doctrine does not apply here.

[Some case citations revised; bracketed text added]

Result: Affirmance of King County Superior Court order denying the City of Seattle summary judgment motion.

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BRIEF NOTES REGARDING JULY 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 six entries below address the July 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. M.B., DOB: 08/04/2002: On July 12, 2021, Division One of the COA rejects the challenge of defendant to his King County Superior Court convictions for (A) *rape in the second degree* and (B) *felony harassment*. The Court of Appeals rejects defendant's argument that the trial court should not have allowed into evidence some of the statements that the victim made to medical personnel. **The Court of Appeals rules that there was no abuse of discretion in the trial court's determination that the statements at issue were admissible under ER 803(a)(4), the hearsay exception for statements made for purposes of medical diagnosis or treatment.** In the concluding paragraph of the ER 803(a)(4) analysis, the Court of Appeals Opinion explains

> [The victim's] statements to the [sexual assault nurse examiner] and doctor are quite similar to those in State v. Burke, 196 Wn.2d 712 (2021). Here, the admitted statements focus on the details of the incident, which could have helped the providers determine injuries or [the victim's] mental condition, either of which might have required treatment or diagnosis. We find the admission of these statements under ER 803(a)(4) does not constitute an abuse of discretion.

The unpublished Opinion in State v. M.B. is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/811436.pdf

2. State v. Dustin Alan Griffin: On July 13, 2021, Division Two of the COA rules against the appeal of defendant from his Cowlitz County Superior Court conviction for *premeditated first degree murder with aggravating circumstances*. Defendant Griffin used a baseball bat and a rifle stock to murder a homeowner who returned home while defendant and an accomplice were burglarizing the man's home. During an interrogation of Griffin's accomplice, law enforcement officers presented the accomplice with a fake written confession, purportedly from Griffin, that put much of the blame for the killing on the accomplice. The accomplice confessed to being involved in the crime, but he put essentially all of the blame for the killing on Griffin. At trial, the accomplice, who had been given a plea deal, testified consistently with his confession, putting the blame on Griffin for the killing. **One of defendant Griffin's arguments on appeal was that the case should be dismissed on constitutional Due Process grounds based on the fictitious confession that law enforcement used to trick the accomplice into confessing. After extended analysis, the Griffin Court rules under the totality of the circumstances of this case that the law enforcement tactic does not "shock the universal sense of**

fairness" nor is this a "most egregious" case. On this issue, the Court of Appeals discusses State v. Athan, 160 Wn.2d 354 (2007) and State v. Lively, 130 Wn.2d 1 (1996).

The unpublished Opinion in State v. Griffin is is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2054224-2-II%20Unpublished%20Opinion.pdf

3. State v. Pavel Kanyushkin: On July 20, 2021, Division Three of the COA rejects the challenge of defendant to his Spokane County Superior Court convictions for (A) *vehicular homicide*, and (B) *failure to remain at the scene of a fatal traffic accident*. **The Court of Appeals rules that defendant's consent to search his truck during a non-custodial meeting with an officer was voluntary even though: (1) defendant was not provided Miranda warnings as part of the consent request; (2) he was not informed that he could refuse to consent; (3) he is the 21-year-old son of immigrants; (4) the officer did not fully explain the purpose of his investigation; (5) the officer twice asked for defendant's consent; and (6) the officer, who had probable cause for a search warrant, stated that he could seize the vehicle and seek a search warrant.**

The unpublished Opinion in State v. Kanyushkin is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/374467_unp.pdf

4. State v. Shane Mathew Brown: On July 26, 2021, Division One of the COA rejects the challenges of defendant to his King County Superior Court convictions for (A) *interfering with domestic violence reporting*, and (B) *violation of a no-contact order*. **The Court of Appeals rules that the defendant's Sixth Amendment right to confront witnesses against him was not violated by admission of hearsay statements from the victim, who did not testify at trial**. The Court of Appeals relies on Michigan v. Bryant, 562 U.S. 344 (2011) in ruling that the initial statements of the victim to responding police were not "testimonial" because the primary purpose of police questioning in the beginning of the contact was to meet an ongoing emergency.

The unpublished Opinion in State v. Brown is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/809431.pdf

5. State v. Thomas Philip Leae: On July 26, 2021, Division One of the COA rejects defendant's challenge to his Clark County Superior Court convictions for (A) *murder in the first degree*, and (B) *rendering criminal assistance in the third degree*. **The Court of Appeals rules that a detective's testimony was not improper testimony of the defendant's guilt** where the detective explained, as prompted by the deputy prosecutor: (A) what evidence led law enforcement to see the defendant as a suspect in the case, and (B) what evidence led law enforcement to believe that the defendant had an accomplice in the suspected crime.

The unpublished Opinion in State v. Leae is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/825313.pdf

6. State v. Myron Lynn Woods, Jr.: On July 27, 2021, Division Three of the COA rejects the challenges of defendant to his Pierce County Superior Court convictions of (A) *five counts of unlawful possession of a controlled substance (UPCS) with intent to deliver*, and (B) *two counts of unlawful possession of a firearm*. The Court of Appeals Opinion addresses several search and seizure issues, including making a ruling that **an affidavit here to search defendant's cell phone data for evidence of violation of the sex offender registration statute is distinguishable from the affidavit in State v. Thein, 138 Wn.2d 133 (1999). The 1999**

Washington Supreme Court decision in Thein held that probable cause to search a residence is not established by a generalized statement from a detective that drug dealers commonly store contraband in their residences. In contrast, in the Woods case, in addition to general statements about the common violative residency practices of some sex offenders, the affidavit here included the following case-specific allegations, as described by the Court of Appeals:

> Woods was not at his registered address on 15 separate occasions despite attempts to verify on different days and at different times to accommodate his work schedule. Further, Woods's community corrections officer suspected he was living with Ms. Johnson because [Woods] would arrive at his registered address 30 minutes after being called, and Ms. Johnson lived that far away. [And the detective] saw Woods outside Ms. Johnson's house one morning, supporting this suspicion.

The unpublished Opinion in State v. Woods is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/379850_unp.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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