

LAW ENFORCEMENT DIGEST - November 2020



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Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- Washington Courts of Appeal
- Washington State Supreme Court
- Federal Ninth Circuit Court of Appeals
- United States Supreme Court

Cases are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges.

The materials contained in this course are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.

TOPIC INDEX

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- CONSTRUCTIVE POSSESSION
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- DUTY TO INSPECT
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CASES

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2. Perillo v. Island County, COA No. 80055-8-I (Nov. 30, 2020)
3. State v. Koeller, COA No. 79914-2-I (November 2, 2020)
4. State v. Listoe, COA No. 52893-2 (Nov. 10, 2020)

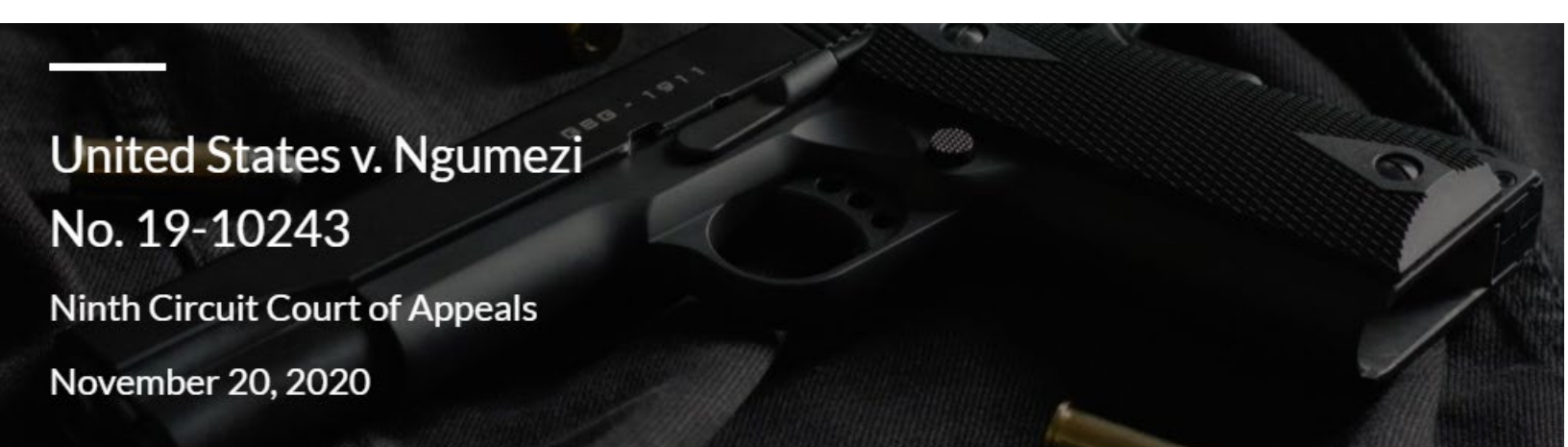
WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- [Legal Update for WA Law Enforcement](#) authored by retired Assistant Attorney General, John Wasberg
- [Caselaw Update](#) authored by WA Association of Prosecuting Attorneys' Senior Staff Attorney, Pam Loginsky

QUESTIONS?

- Please contact your training officer if you need to have this training reassigned to you.
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United States v. Ngumezi

No. 19-10243

Ninth Circuit Court of Appeals

November 20, 2020

Facts Summary

TOPIC: TRAFFIC STOPS

One early morning in San Francisco, Officer Williams saw Ngumezi's car parked at a gas station with Ngumezi in the driver's seat. The car had no license plates. Ngumezi had recently purchased the car, and a bill of sale was affixed to the lower passenger side corner of the windshield. Williams approached the passenger side of the car to investigate because a gas pump blocked access to the driver side. According to Ngumezi, Williams then opened the passenger door, leaned into the car, and asked Ngumezi for his driver's license and vehicle registration.

Ngumezi produced a California identification card but not a driver's license. Williams asked Ngumezi if his license was suspended, and Ngumezi admitted that it was. Another officer then ran a license check and confirmed that Ngumezi's license was suspended and that Ngumezi had three prior citations for driving with a suspended license. San Francisco Police Department policy requires officers to inventory and tow a vehicle when a driver lacks a valid license and has at least one prior citation for driving without a valid license.

Consistent with that policy, the officers prepared to have Ngumezi's car towed. In conducting the inventory search, they found a loaded .45 caliber handgun under the driver's seat. The officers then ran a background check and learned that Ngumezi was prohibited from possessing firearms because of a previous felony conviction. Ngumezi was charged with one count of being a felon in possession of a firearm. He moved to suppress the firearm as fruit of an unlawful search. The trial court denied the motion to suppress and convicted Ngumezi. Ngumezi appealed to the Ninth Circuit. The Ninth Circuit reversed and vacated on the grounds that the opening of the car door and leaning into the car constituted an unlawful search.

Training Takeaway

The Ninth Circuit Court of Appeals considered whether police officers who have reasonable suspicion sufficient to justify a traffic stop—but who lack probable cause or any other particularized justification, such as a reasonable belief that the driver poses a danger—may open the door to a vehicle and lean inside.

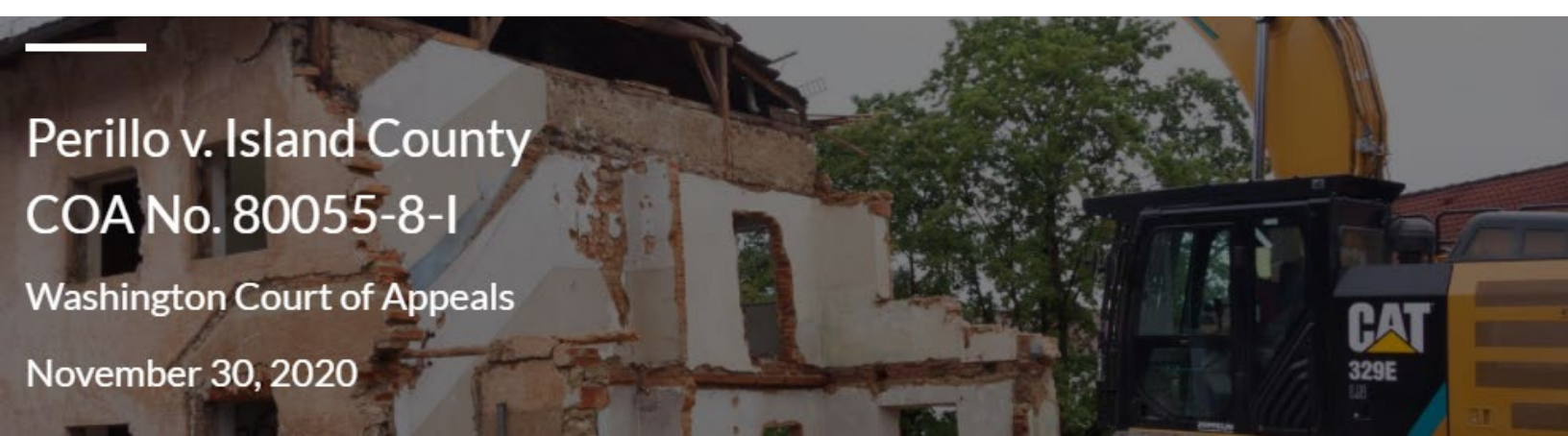
A physical intrusion into the interior of a car constitutes a search. The government failed to point to

justification for a search. It did not argue that Williams had probable cause, nor did it suggest that Williams had any reason to fear that Ngumezi might be dangerous. Instead, the government relied on the general principle that a driver has a “diminished” expectation of privacy in a vehicle. While that is true, the Court made clear that a driver retains important privacy interests which is why, in most circumstances, probable cause is necessary to conduct a warrantless search of a vehicle.

The court also rejected the government’s position that opening the door and leaning in was “minimally intrusive” because, as a practical matter, it “did not alter Ngumezi’s circumstances—it merely facilitated communication.” The government compared Williams’s action to that of shining a flashlight into a car, which the Supreme Court has held is not a search. The court considered that reasoning flawed because it ignored that Williams entered the interior space of the vehicle when he leaned in across the plane of the door. The court noted that physical intrusion is constitutionally significant because when “the Government obtains information by physically intruding on persons, houses, papers, or effects, a ‘search’ within the original meaning of the Fourth Amendment has undoubtedly occurred.”

Based upon these considerations, the Court reversed the trial court’s decision, vacated the conviction, and remanded for further proceedings.

EXTERNAL LINK: <https://cdn.ca9.uscourts.gov/>



Perillo v. Island County

COA No. 80055-8-1

Washington Court of Appeals

November 30, 2020

Facts Summary

TOPIC: DUTY TO INSPECT AND PUBLIC DUTY DOCTRINE

In 2017, the Perillos bought a newly renovated home on Camano Island. As they were preparing to move in, service providers and neighbors warned them of the property's history as a known drug house. Through new neighbors, the Perillos learned of extensive law enforcement activity at the house and of multiple complaints to law enforcement and the local health department about the property.

The Perillos' real estate agent contacted Island County Public Health and filed a public records request. The records from Island County Public Health and the Island County Sheriff's Office revealed years of reports of drug activity on the property, including suspected manufacturing of methamphetamine. Reports of drug activity and likely manufacturing began in 2010 after the owner went to prison and continued until the professional renovation and subsequent purchase. Prior to the Perillos' purchase, the home remained vacant, but for squatters and others who appeared impaired or intoxicated. During renovation, contractors reported experiencing negative physical symptoms and finding drug related paraphernalia such as syringes and even a firearm. Island County Public Health and Island County Sheriff's Office's report logs show multiple calls to the agencies about the property, including complaints about strong chemical smells and drug manufacturing.

After purchase, testing revealed levels of methamphetamine contamination so high that the house was not habitable and needed to be demolished.

The Perillos sued the seller of the property for breach of contract, fraud, and violation of the Consumer Protection Act and brought a claim for negligence against Island County for breaching its statutory duty to inspect the property and inform potential occupants of hazardous chemical contamination.

Island County moved for summary judgment. Summary judgment is granted when the law or facts are so clear or undisputed that the party is entitled to a judgment in its favor without the need for a trial. Island County argued that summary judgment should be entered in its favor against the Perillos because the "public duty doctrine" barred the Perillos' claim. The trial court granted Island County's motion and dismissed the claim. The Perillos sought review. Upon review, the Court of Appeals reversed the motion for summary judgment and permitted the Perillos to proceed with their case against Island County.

Training Takeaway

Lawsuits can assert claims under statutory law (legislature-enacted rules such as those published in the Revised Code of Washington called the RCW) or under common law (law that arises from judicial decisions or “case law”) or both. In this case, the Perillos brought a common law negligence claim (a tort claim) against Island County. One preliminary element required to prove a negligence claim is to show a duty owed to the person claiming an injury or damages. The Perillos asserted that Island County owed them a duty arising under statutory law.

The pertinent statute that the Perillos claim created a duty is [RCW 64.44.020](#) (the “Statute”). The Statute provides:

Whenever a law enforcement agency becomes aware that property has been contaminated by hazardous chemicals, that agency shall report the contamination to the local health officer. The local health officer shall cause a posting of a written warning on the premises within one working day of notification of the contamination and shall inspect the property within fourteen days after receiving the notice of contamination. . .

Island County argued that under the plain language of the Statute, law enforcement must have “actual knowledge of contamination” to trigger its mandatory duty to report to a local health officer. Island County asserted that the Statute did not require law enforcement agencies to report potential contamination nor follow up on all complaints of drug activity that might lead to knowledge of contamination.

The Court said that its role was to interpret the Statute “to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then [we] must give effect to that plain meaning as an expression of legislative intent.” The Court added that it avoided a literal reading of the Statute that results in unlikely, absurd, or strained consequences. The Court observed that the Statute mandates the Island County Sheriff’s Office to report contamination to a local health officer “[w]hensoever [it] becomes aware that property has been contaminated by hazardous chemicals.”

The statute did not define the term “becomes aware.” The Court reasoned that when the legislature has not defined a term, the Court may look to dictionary definitions, as well as the Statute’s context, to determine the plain meaning of the term. The dictionary defines “aware” as “marked by realization, perception, or knowledge.” Thus, the Court held that the plain meaning of the Statute did not demand “actual knowledge” of contamination to trigger law enforcement’s duty to report the contamination to local health officers. Instead, the Statute mandated that once law enforcement comes to the realization or perception that hazardous chemicals are polluting a property, it must report the contamination to local health officers.

The Court concluded that the plain meaning of the Statute imposes a duty on law enforcement to report to local health officers when it has information that causes it to realize or perceive that hazardous chemicals are polluting a property.

The inquiry did not end there. Determining that a duty exists then required the Court to consider if that duty applied to the Perillos as individuals or merely to the community or public at large. Island County argued that any duty of care it owed under the Statute to report on contamination was solely to the public at large, not

individual occupants of property. Accordingly, it asserted that the public duty doctrine barred the Perillos' individual claim.

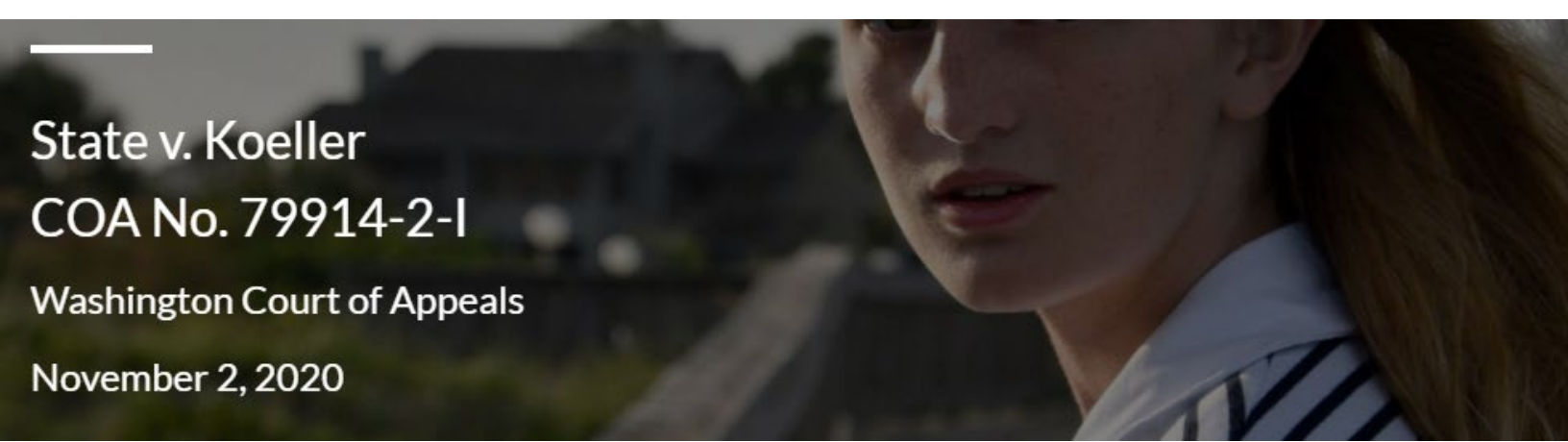
The Court recognized that to establish a duty in tort (as in this case) against a governmental entity, a plaintiff must show that the duty breached was owed to an individual and was not merely a general obligation owed to the public. The public duty doctrine provides a tool to analyze whether a mandated government duty was owed to the public in general or to a particular class of individuals. Four named exceptions to the public duty doctrine provide for liability of a government entity even in the face of performing otherwise public duties. The exceptions are:

- (1) legislative intent,
- (2) failure to enforce,
- (3) the rescue doctrine,
- (4) special relationship.

The legislative intent exception to the public duty doctrine recognizes that the legislature may impose legal duties on persons or other entities by proscribing (requiring) or mandating certain conduct. The exception applies when the terms of a statute show a clear legislative intent to identify and protect a particular class of persons. Consequently, a member of a statutorily identified class may bring a tort action against a governmental entity for violating the statute.

The Perillos argued that the legislative intent exception to the public duty doctrine applied to their claim because they were among the class of people the Statute protects. The Court agreed with the Perillos. The Court held that the Perillos were innocent purchasers of a contaminated property and clearly within the class of people that the Statute protected, therefore, the public duty doctrine did not bar their negligence claim against Island County. The Perillos were permitted to pursue their civil negligence lawsuit against Island County.

EXTERNAL LINK: <https://www.courts.wa.gov/>



State v. Koeller

COA No. 79914-2-1

Washington Court of Appeals

November 2, 2020

Facts Summary

TOPIC: GOVERNMENT DESTRUCTION OF EVIDENCE

In 2017, a woman in her 20s referred to as A.R.C. in court proceedings, first reported to law enforcement that Defendant Koeller, her stepfather, sexually abused her from the age of 4 until her early teens. Koeller allegedly abused A.R.C. at least once per month when he was home from deployment. The abuse became more sporadic as A.R.C. got older and stopped when she was a teenager.

Koeller was charged with one count of forcible compulsion, four counts of first-degree child molestation, two counts of second-degree child molestation, and one count of third-degree child molestation. The State also alleged aggravating circumstances of domestic violence and of an ongoing pattern of sexual abuse.

In 2007, ten years before making her allegations against Koeller, A.R.C., was interviewed by Detective Gardner of the Oak Harbor Police Department as part of an investigation into allegations Koeller sexually abused other children. A.R.C. disclosed no sexual abuse and denied Koeller sexually abused her.

The police department recorded and stored that 2007 interview on a DVD until 2012, when it was destroyed pursuant to routine procedures.

Koeller moved to dismiss for governmental misconduct pursuant to [Superior Court Criminal Rule 8.3](#) (b). Koeller alleged the DVD recording was materially exculpatory evidence, so its destruction violated his due process rights and warranted dismissal of all charges against him. The court denied Koeller's motion to dismiss.

Training Takeaway

To protect a defendant's due process rights, the State has a duty to preserve and disclose exculpatory evidence. But this is not "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." The State's duty extends only to material exculpatory evidence and to "potentially useful" evidence destroyed in bad faith by the State. Material exculpatory evidence must possess "an apparent exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

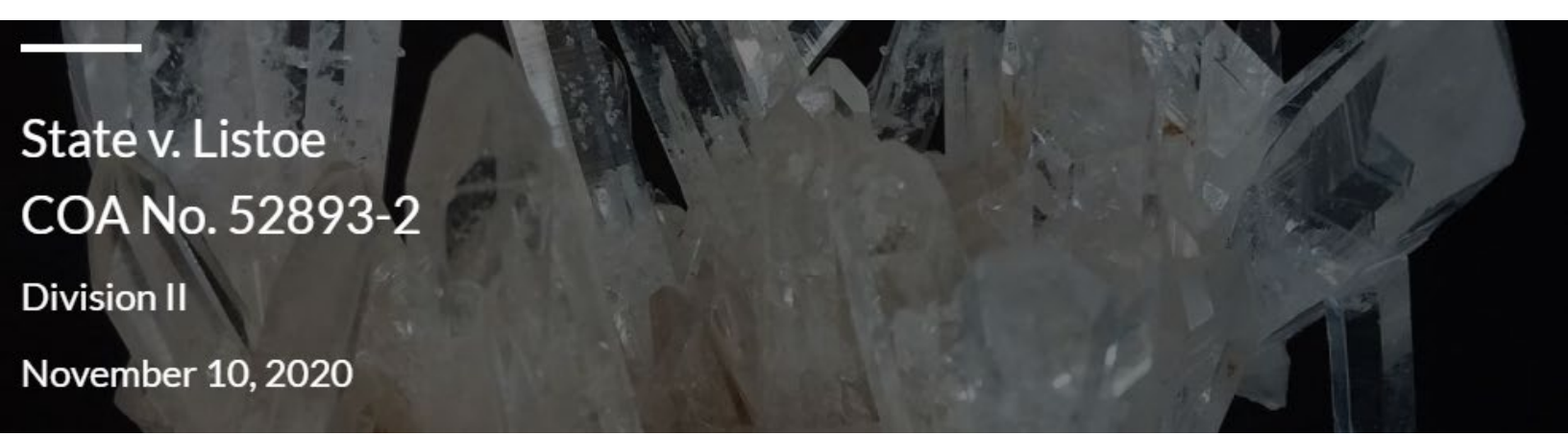
Whether the State acted in bad faith depends upon its knowledge of the exculpatory value of the evidence when it was destroyed. Koeller failed to show the recording was material exculpatory evidence. The DVD was destroyed in 2012, and A.R.C. did not disclose being abused until 2017. Thus, in 2012, the recording could not exculpate Koeller from abusing A.R.C. because nothing had inculpated him in her abuse.

Even though the police were investigating Koeller for crimes against other children before 2012, “[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” Because the DVD had no apparent exculpatory value when it was destroyed, it was not material.

The Court determined that Koeller also failed to show the State destroyed the DVD in bad faith. Koeller contended “delayed reporting is such an inherent and common reality in child abuse cases” that destruction of the 2007 video should be considered evidence of bad faith because it was made when there were concerns Koeller had multiple victims.

The Court reasoned that even if the DVD’s exculpatory value were apparent in 2012, Koeller was still able to obtain comparable evidence because A.R.C. testified to the contents of the 2007 interview, and Detective Gardner was available to testify to the same. The Court held that because the DVD was not material exculpatory evidence or destroyed in bad faith, Koeller failed to show the court abused its discretion by denying his motion to dismiss.

EXTERNAL LINK: <https://www.courts.wa.gov>



State v. Listoe
COA No. 52893-2

Division II

November 10, 2020

Facts Summary

TOPIC: CONSTRUCTIVE POSSESSION

In May 2018, Deputy Hren of the Kitsap County Sheriff's Office observed a black car parked at a convenience store. On running the license plate, Hren discovered that the car's registration had expired. The car pulled out of the parking lot, and Hren pulled it over. Listoe, who was driving the car, did not pull over immediately but traveled for about 1,000 feet first, which Hren believed was uncommon. As Hren approached the car, he could see Listoe making "a bunch of movements with his hands."

Listoe opened the door and began to step out, but Hren ordered him to get back in the car. Hren observed Listoe making additional "furtive movements" in his lap area. Hren then ordered Listoe to place his hands on the steering wheel, and Listoe complied. Hren informed Listoe of the reason for pulling him over, and Listoe responded that the car was not his and that he did not know the registration was expired.

Lemon was sitting in the car's passenger seat. After briefly speaking to Lemon, Hren told Lemon that she was free to leave, and she left. Lemon was not searched during the encounter.

Hren ordered Listoe out of the vehicle and placed Listoe under arrest. During the search incident to Listoe's arrest, Hren found a plastic bag that contained a white crystalline substance on Listoe's person. The substance appeared to be methamphetamine. Listoe was arrested on an unrelated warrant.

A K-9 unit alerted to the presence of controlled substances in the car Listoe was driving. Due to the K-9 alert, Hren obtained a search warrant to search the interior of the vehicle for additional evidence of controlled substances. Hren and Deputy Stanley Langlow searched the vehicle. Behind the driver's seat, Hren discovered a white bag containing fresh groceries, among other items, including a black zipper pouch with shards of a white crystalline substance that Hren believed was methamphetamine. The substance weighed approximately six and a half grams.

Hren and Langlow also searched the car for any indication of Listoe's "possession and control" over the vehicle. They did not find any evidence specifically tying Listoe to the vehicle. The deputies did not obtain fingerprints off the zippered pouch. The white crystalline substance found on Listoe's person during the search incident to arrest was tested at the crime lab and confirmed to be methamphetamine. Listoe was charged with one count of possession of methamphetamine with intent to manufacture or deliver and one count of possession of a controlled substance (Suboxone). The jury found Listoe guilty on these charges.

Listoe appealed on the grounds that there was insufficient evidence that he had constructive possession over the methamphetamine and Suboxone discovered on the back floorboards of the car he was driving. Listoe asserts that evidence was insufficient because:

- (1) the car was not his,
- (2) the officers did not find evidence proving that Listoe had dominion and control over the car and its contents, and
- (3) the drugs on the rear floor of the car could have reasonably belonged to Lemon (the passenger the police had permitted to leave).

The Court of Appeals held that the evidence was sufficient to establish that Listoe had constructive possession over the items the officers discovered in the back of the car. The Court referenced the facts that:

- (1) Listoe was driving the vehicle
- (2) Listoe had methamphetamine on his person, which is one of the same drugs found in the back of the vehicle, and
- (3) Deputy Hren observed Listoe making furtive movements while taking an uncommonly long time to pull over,

provide sufficient evidence of constructive possession to support Listoe's convictions.

Training Takeaway

Possession can either be actual or constructive. Actual possession requires an individual to have physical custody of a given item, but constructive possession may be shown where the individual has "dominion and control" over that item. Control need not be exclusive to establish possession, and more than one person can be in possession of the same item. Courts examine the totality of the circumstances and look to a variety of factors to determine whether an individual has dominion and control over an item. Courts may also consider whether the defendant had dominion and control over the broader premises in which the item was located.

In cases where the defendant was driving a vehicle that the defendant owned, courts have found sufficient evidence that the defendant had dominion and control over the vehicle's premises and its contents. The Court recognized that the fact that Listoe was driving the car weighed in favor of finding that Listoe had dominion and control over the vehicle and its contents. It observed that in other cases, the court has found sufficient evidence of dominion and control over a vehicle even where the vehicle did not belong to the driver, but the contraband was in plain sight and within reach.

The Court surmised:

The fact that fruits and vegetables, which are perishable items, were discovered in the same ... grocery bag as the white bag containing the contraband, shows that these items likely belonged to either Listoe or Lemon. It is unlikely that perishable items were left in the car by a prior driver or passenger. Further,

Listoe's furtive hand movements on two occasions, as well as the fact that Listoe drove an uncommonly long distance before pulling over, raise an inference that he was handling the contraband at that time, or possibly strategizing about where to hide it. . . . In addition, because Hren found methamphetamine on Listoe's person during the search incident to arrest, and methamphetamine was also discovered in the back of the vehicle, a rational trier of fact could infer that the methamphetamine in the back of the vehicle belonged to Listoe as well.

While the above facts may not have been sufficient to establish constructive possession in isolation, taken together, they would lead a rational trier of fact to find that Listoe had constructive possession over the items in the back of the vehicle he was driving.

EXTERNAL LINK: <http://www.courts.wa.gov/>