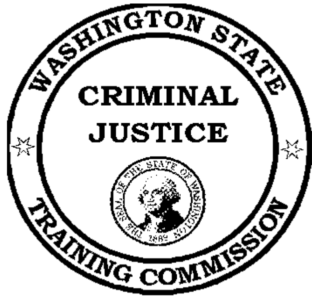

Law Enforcement Digest

DECEMBER 2014

Law enforcement officers: Thank you for your service, protection and sacrifice.

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HONOR ROLL

705th Basic Law Enforcement Academy – July 9 through November 13, 2014

President:	Wally Noel, Olympia PD
Best Overall:	Curtis J. Whitman, Washington State University PD
Best Academic:	Curtis J. Whitman, Washington State University PD
Patrol Partner Award:	Derek C. Butz, Spokane PD
Tac Officer:	Mark Best, Tacoma PD

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT: OFFICERS ENTITLED TO QUALIFIED IMMUNITY FOR DETAINING AND TRANSPORTING AN UNRESPONSIVE, 11-YEAR OLD STUDENT FROM SCHOOL GROUNDS, BUT ARE NOT ENTITLED TO QUALIFIED IMMUNITY FOR HANDCUFFING THE STUDENT C.B. v. City of Sonora, __ F.3d __, 2014 WL 5151632 (October 15, 2014).

An 11-year old sixth-grader, with attention-deficit and hyperactivity disorder (ADHD), did not take his medicine one morning. While he was at school, he became unresponsive and appeared to "shut down" during recess on the playground. The school had developed a safety plan for the student to go to a coach's office when he "shut down." When the coach asked the student to go to her office to calm down, the student was unresponsive and did not leave the playground. While the student was on the playground with the coach, he "reared up" three times. The coach told that student that she would call the police. The student replied "call them."

The coach was concerned for the student's safety because he had previously stated, two years earlier, that "he was tired of feeling the way he felt and wanted to go out into traffic and kill himself." The schoolyard was located next to a busy street.

The coach called the police. Police dispatch advised officers that the school had "an out of control juvenile." When the first officer arrived on the scene, the coach told him "runner, no medicine." The officer then sat down next to the student and tried to talk with him. The student remained quiet and unresponsive.

A few minutes later, a second officer arrived at the playground. The second officer attempted to converse with the student, but the student remained unresponsive. The first officer then signaled to the second officer to handcuff the student. The second officer handcuffed the student. The student was then transported in a patrol car to his uncle's business. Even though the patrol car had safety locks that prevented the student from leaving the patrol car, the student remained in handcuffs.

The student then filed a 42 U.S.C. § 1983 lawsuit against the school, coach, and officers. The lawsuit alleged that the officers violated the student's Fourth Amendment rights by illegally seizing the student, and used excessive force by handcuffing the student.

The Ninth Circuit Court of Appeals found that the officers were entitled to qualified immunity for seizing the student. However, the majority found that the officers were not entitled to qualified immunity for handcuffing the student.

An officer is entitled to qualified immunity when: (1) the officer did not violate a constitutional right; or (2) when the constitutional right was not clearly established. The majority applied the United States Supreme Court's precedent that searches of children at school need to be reasonable in inception and in scope.

The majority reasoned that the officers did not violate any clearly established constitutional right when they took the student into custody:

> The circumstances facing the officers when they decided to take [the student] into temporary custody are as follows. First, officers knew that school officials had reported that [the student] was a "runner" and "out of control." Second, . . . [the student] himself admitted that he completely ignored [the second officer's] questions for three and a half minutes. Third, the officers did not know exactly which medication [the student] had failed to take. But a reasonable officer would have evaluated [the coach's] statements in context, and would likely have believed that [the coach] stated that [the student] did not take his medication because it was related to his behavior – the very reason why the officers were called to the school in the first place.
>
> A reasonable officer in this situation, faced with a juvenile who (a) was reportedly a "runner," (b) was "out of control," (c) ignored the officer's questions, and (d) had not taken his medication, would not have known that taking such a juvenile into temporary custody in order to transport him safely to his uncle was an "obvious" violation of his constitutional rights.

However, the majority found that the officers were not entitled to qualified immunity for handcuffing the student, and that the handcuffing constituted excessive force. The majority found that under either the reasonableness standard for students in school, or the use of force standards under *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed.2d 443 (1989) handcuffing the student violated clearly established constitutional principles. The majority reasoned:

> Other than an assertion that [the officers] were told [the student] might run away, [the officers] offer no justification for their decision to use handcuffs on [the student]. During the entire incident, [the student] never did anything that suggested he might run away or that he otherwise posed a safety threat. He weighed about 80 pounds and was approximately [four feet, eight inches] tall . . . Moreover, he was surrounded by four or five adults at all times. . . . The further decision to leave [the student] in handcuffs for the duration of the half-hour commute to his uncle's business – a commute that took place in a vehicle equipped with safety locks that made escape impossible – was clearly unreasonable.

<u>LED EDITORIAL NOTE:</u> Since the Court granted qualified immunity on the officer's decision to detain the student because the "law was not clearly established," it is unclear whether a future court would grant qualified immunity in similar circumstances. It is also unclear whether the Ninth Circuit will continue to apply a reasonableness standard to law enforcement officers responding to calls involving students on school property, or will apply a standard Fourth Amendment analysis (i.e., probable cause that the student committed a crime to justify seizure and transportation from school property, or reasonable suspicion of unlawful activity to temporarily detain a student). Despite this uncertainty, prudent practices include corroborating a teacher's statements about a student's behavior, and articulating facts on why the student presented a disruption to

the school or danger to self or others. Courts focus on specific facts when considering qualified immunity under the "clearly established law prong." Consequently, law enforcement officers need to be able to articulate the facts justifying the use of handcuffs on a juvenile in a school setting. As always, officers are encouraged to consult with their agency's legal advisors.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

PUBLIC RECORDS ACT: BASED ON DETAILED DECLARATIONS, PRE-PRINTED INFORMATION ON A CONFIDENTIAL INFORMATION REPORT QUALIFIES AS SPECIFIC INTELLIGENCE INFORMATION AND NON-DISCLOSURE IS ESSENTIAL TO EFFECTIVE LAW ENFORCEMENT Haines-Marchel v. Dep't of Corr., __ Wn. App. __, 334 P.3d 99 (September 16, 2014).

The wife of an inmate at a correctional facility submitted a public records request for documents regarding her husband's "dry cell search." The responsive records included a Confidential Information Report (Report) and a Guide to the Evaluation of Reliability of Confidential Informant Information (Guide). The Department of Corrections withheld these records from production and claimed RCW 42.56.240 as an exemption. The wife filed a Public Records Act lawsuit against the Department seeking to compel production of these records. The Department submitted detailed declarations that described the purposes of the records and the potential harms resulting from public disclosure.

The Court of Appeals evaluated whether these records qualified as either a "specific investigative record" or "specific intelligence information" the nondisclosure of which is essential to effective law enforcement. The Court found that information about the informants qualified as "specific investigation records" because it "was compiled as the result of this specific investigation [of Marchel] into this specific alleged crime." However, the Court found that the pre-printed material on the forms did not qualify as "specific investigative records" because it did not focus on the investigation of any particular individual. Rather, this information qualified as "specific intelligence information" because "much of the pre-printed information on the forms would disclose its methods of evaluating and responding to informants' tips."

Finally, the nondisclosure of this information is essential to effective law enforcement for many reasons including: (1) disclosure could allow other inmates to figure out the identity of informants and retaliate against the informants; (2) disclosure would result in a "chilling effect" on potential informants; and (3) disclosure would reveal the Department's investigative techniques for evaluating an informant's reliability and enable inmates to submit deceptive tips.

However, the Court found that the inmate's name and number, name of the alleged crime, pre-printed material on whether an infraction was written, and the investigator's signature on the reports were not exempt. In part, the Court noted that the Department did not provide evidence nor argument on why this information should be exempt.

LED EDITORIAL NOTE: **This is an excellent example of why detailed declarations are important to justify an agency withholding a record based on RCW 42.56.240's investigative records or specific intelligence information exemptions. The applicability of these exemptions depends on specific facts showing that the information is part of an investigative or would reveal law enforcement investigative techniques. In these situations, an agency must show how disclosure of any piece of information would**

compromise an important law enforcement objective, such as creating a safety risk or unreasonably invading a person's privacy. Additionally, an agency must be able to justify each redaction. As shown in this case, there is no categorical exemption for specific intelligence information and certain information, such as the inmate's name and signature, did not constitute exempt information.

PUBLIC RECORDS ACT: SINCE ALLEGATIONS AGAINST PUBLIC EMPLOYEE WERE NOT "HIGHLY OFFENSIVE", THE EMPLOYEE'S NAME SHOULD NOT HAVE BEEN REDACTED FROM AN UNSUBSTANTIATED INTERNAL INVESTIGATION West v. Port of Olympia, __ Wn. App. __, 333 P.3d 488 (August 26, 2014)

A requestor submitted a public records request to the Port of Olympia for "records relating to the Port's investigation of a whistleblower complaint[.]" The responsive records included an internal investigation and report by the Port's attorney. The report addressed several allegations against a Port employee: (1) "whether the employee . . . had derived personal gain from Port activities"; (2) "whether the employee exceeded his or her scope of authority and failed to follow establish accounting procedures, disposed of environmentally sensitive materials improperly, and violated Port polices regarding work on holidays." The investigation found these allegations unsubstantiated. Since this internal investigation resulted in unsubstantiated allegations, the Port redacted the employee's personal identifiers in response to the public records request under RCW 42.56.240(2)'s exemption (i.e., disclosure would be highly offensive to a reasonable person and there is no legitimate public interest in the information). The requestor then filed a Public Records Act lawsuit against the Port.

The Court of Appeals found that the Port wrongfully withheld the accused employee's personal identifiers because the allegations may have been offensive, but they were not highly offensive to a reasonable person. Relying on Washington State Supreme Court precedent, the Court noted that allegations of sexual misconduct are highly offensive while allegations of obnoxious behavior were not highly offensive. The Court found that "allegations of improperly profiting from a public business, while potentially embarrassing, generally do not involve the type of sensitive, very personal information contained in employee evaluations." The Court reasoned that while the allegations of misuse of public funds could constitute criminal misconduct, "unsubstantiated allegations regarding the misuse of what appears to be fairly small amounts of government funds do not rise to the level of *highly* offensive." Finally, the Court determined "the strong public policy favoring disclosure compels [the Court] to define offensive narrowly and rule in favor of disclosure."

LED EDITORIAL NOTE: **While the Court made clear that disclosure of allegations of sexual misconduct or personnel evaluations is "highly offensive," the Court provided no factors to determine what allegations constitute as "highly offensive." Without clear factors to determine "highly offensive," the determination is highly subjective, and needs to be made on a case by case basis. The Port has petitioned the Supreme Court to accept review of this decision.**

SUFFICENCY OF EVIDENCE: ORDINARY PLIERS USED TO REMOVE A SECURITY TAG WERE NOT A "DEVICE DESIGNED TO OVERCOME SECURITY SYSTEMS" UNDER FORMER RCW 9A.56.360(1)(b) State v. Reeves, __ Wn. App. __, 2014 WL 5358320 (October 21, 2014)

A Walmart employee saw the defendant "use pliers to cut the cables of a spider wrap security device that encased a surveillance camera set." The defendant then "placed the surveillance camera set into a backpack and left the store." The defendant was charged with third degree retail theft with extenuating circumstances. The prosecution argued that the defendant using "pliers to remove the spider wrap was an extenuating circumstance." The trial court rejected the argument and dismissed the case.

The Court of Appeals, Division Two, agreed with the trial court. Former RCW 9A.56.360(1)(b) [**LED Editorial Note: In 2013, the Legislature amended this statute and changed the term "extenuating" to "special." The language in subsection (1)(b) remains the same.**] provided that a person commits retail theft with extenuating circumstances when: "[t]he person was, at the time of the theft, in possession of an item, article, implement, or device designed to overcome security systems including, but not limited to, lined bags or tag removers[.]" Applying principles of statutory construction, Division Two reasoned that ordinary pliers do not fall under this provision:

> The fact that the legislature provided . . . specific examples [i.e., lined bags or tag removers] suggests that the general terms should be given a similar interpretation: devices that have a primary purpose of facilitating retail theft. This interpretation would not include ordinary pliers, which have many purposes independent of retail theft. . . . Accordingly, we hold that former RCW 9A.56.360(1)(b) does not apply to [the defendant's] use of ordinary pliers to remove a security device.

SEARCH AND SEIZURE: *FERRIER* WARNINGS NOT REQUIRED WHEN OFFICERS' SUBJECTIVE INTENT WAS TO EXECUTE ARREST WARRANT State v. Westvang, __ Wn. App. __, 335 P.3d 1024 (October 10, 2014).

Officers received an informant's tip that a fugitive with an active arrest warrant was at the defendant's home. The officers then went to the home. The officers informed the defendant that they were looking for a fugitive and asked permission to enter the home to look for him. The officers did not provide full *Ferrier* warnings, but did inform the defendant that she was not required to consent to the search. The defendant consented. The officers then found illegal drugs on a desk in the living room. The prosecution charged the defendant with possession of a controlled substance with intent to deliver.

The defendant challenged the search by claiming the officers should have provided complete *Ferrier* warnings. The Court of Appeals, Division Two, disagreed.

Relying on Washington State Supreme Court precedent, Division Two held that officers do not need to provide *Ferrier* warnings when entering a residence to execute an arrest warrant. The Court reasoned: "Since the officers sought to enter the home to execute an arrest warrant, rather than to 'circumvent the requirements of the search warrant process,' this procedure was not a knock and talk,' and the objective amount of evidence that [the fugitive] was present [in the home] is irrelevant."

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO 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 current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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