Law Enforcement Digest

September 2015

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

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HONOR ROLL

719th Basic Law Enforcement Academy – May 5, 2015 through September 10, 2015

Best Overall:	Michael J. Conrad, Vancouver Police Department
Best Academic:	Michael J. Conrad, Vancouver Police Department
Patrol Partner Award:	Shaun D. Van Eaton, Monroe Police Department
Tac Officer:	Steve Grossfeld, Seattle Police Department
	Melissa Deer, King County Sheriff's Office

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SEPTEMBER 2015 LED TABLE OF CONTENTS

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THE WASHINGTON STATE SUPREME COURT

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SEARCH AND SEIZURE: WASHINGTON STATE SUPREME COURT HOLDS: (1) WHEN THERE IS PROBABLE CAUSE THAT IMPAIRED DRIVING HAS BEEN CAUSED BY ALCOHOL, DRUGS, OR A COMBINATION OF BOTH, A SEARCH WARRANT DOES NOT NEED SEPARATE FINDINGS OF PROBABLE CAUSE FOR DRUG USE; AND (2) A SEARCH WARRANT AUTHORZING A BLOOD DRAW TO OBTAIN EVIDENCE OF IMPAIRED DRIVING AUTHORIZES TOXICOLOGICAL TESTING OF THE BLOOD FOR DRUGS AND ALCOHOL State v. Martines, __ Wn.2d __, 355 P.3d 1111 (August 27, 2015).

Jose Figeroa Martines erratically drove his vehicle on State Route 167. An off-duty police officer saw "Martines's car veer[] into another car, swerve into the median, and roll[] over." After the roll over, Martines exited the vehicle. The off-duty officer "observed that Martines was stumbling, had slurred speech, and smelled like beer."

A Washington State Patrol trooper responded to the scene. "The trooper observed Martines had red, bloodshot eyes and smelled of alcohol." The trooper applied for "a search warrant to extract a blood sample from Martines[.]"

A judge granted the "warrant authorizing the [extraction] of a blood sample from Martines." "The warrant indicated probable cause to believe Martines's blood contained evidence of the crime of DUI under RCW 46.61.502." However, "the warrant did not include any express reference to testing of the blood sample."

After the trooper obtained the search warrant, local hospital staff drew a blood sample from Martines. "The Washington State Patrol Toxicology Laboratory tested the sample for the presence of alcohol and drugs." The test results reported that "Martines had a BAC of 0.061 and 0.062 at the time of testing, which the toxicologist estimated would have been 0.121 two hours after the" roll over. The test results also reported the presence of drugs. Based on Martines's previous impaired driving convictions, the State charged him with felony DUI.

Before trial, "Martines moved to suppress all evidence of drugs or drug testing" by arguing that "there was no probable cause to test his blood sample for drugs because witnesses observed only signs of alcohol intoxication." The trial court disagreed and denied the suppression motion. Martines's case went to trial, the blood test results were admitted into evidence at trial, and "the jury found [him] guilty of felony DUI."

On appeal, Martines argued that the search warrant did not specifically authorize testing of the blood. The Court of Appeals agreed and reversed Martines's conviction. The State petitioned for review from the Washington State Supreme Court.

The Supreme Court considered two issues: (1) whether there was probable cause that Martines was under the influence of drugs at the time of the roll over; and (2) whether the warrant provided sufficient particularity to authorize toxicological testing of the blood sample.

First, the Supreme Court found that there were sufficient facts to support probable cause of alcohol and drug impairment. The Supreme Court reasoned:

> The warrant in this case was supported by probable cause to believe that Martines committed DUI and that evidence of alcohol or drug consumption would be found on his person. The trooper included the following observations in his affidavit of probable cause: (1) Martines had a "strong odor of alcohol coming from his breath," (2) "[Martines] said he had one Blue Moon [beer]," (3) Martines was observed throwing a bag into the bushes containing a six-pack container of beer with one unopened beer bottle, which the trooper later recovered, (4) Martines had "blood shot watery eyes," (5) Martines had "a flush face," (6) "[Martines] walked in a slow and deliberate manner," (7) "[Martines] seemed off balance and struck the door frame as he entered the [patrol] car."
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> [The observations that Martines had blood shot watery eyes, a flush face, and seemed off balance] support a finding of probable cause to believe that Martines was under the influence of intoxicants - alcohol or drugs, or a combination of both.

Based on this reasoning, the Supreme Court "reject[ed] Martines's argument that probable cause to suspect drug intoxication must always be identified separately from probable cause to suspect alcohol intoxication."

Second, the Supreme Court found that the warrant provided sufficient particularity to authorize the Toxicology Laboratory to test the blood sample for alcohol and drugs. Under both the federal and state constitutions, "warrants [must] describe with particularity the things to be seized." The purposes of the "particularity requirement" "include (1) preventing exploratory searches, (2) protecting against seizure of objects on the mistaken assumption that they fall within the warrant, and (3) ensuring that probable cause is present."

The Supreme Court reasoned that the search warrant provided sufficient particularity to authorize toxicological testing of the blood for alcohol and drugs:

> The warrant in this case authorized the extraction of a blood sample from Martines, indicating probable cause existed to believe his blood contained evidence of DUI. The purpose of the warrant was to draw a sample of blood from Martines to obtain evidence of DUI. It is not sensible to read the warrant in a way that stops short of obtaining that evidence. A warrant authorizing a blood draw necessarily authorizes blood testing, consistent with and confined to the finding of probable cause. The only way for the State to obtain evidence of DUI from a blood sample is to test the blood sample for intoxicants.

As a result, the Supreme Court found that the search warrant authorized the extraction and toxicological testing of blood for drugs and alcohol, and reversed the Court of Appeals.

BRADY: A FORENSIC SCIENTIST'S POOR JOB PERFORMANCE IS FAVORABLE EVIDENCE FOR THE DEFENSE; BUT, IN THIS CASE, THE EVIDENCE WAS NOT MATERIAL BECAUSE THERE WAS NO REASONABLE PROBABILITY OF DNA CONTANMINATION. State v. Davila, __ Wn.2d __, __ P.3d __, 2015 WL 5076293 (August 27, 2015).

In the wake of a murder, detectives collected DNA swabs from a baseball bat (the suspected murder weapon) and the victim's vehicle. A forensic scientist tested the swabs. The DNA testing yielded an unknown individual's DNA profile. The unknown individual's profile was entered into CODIS. Several years later, this profile "hit" on Julio Davila's DNA profile.

After receiving the CODIS hit, a crime laboratory supervising forensic scientist retested and analyzed the swab from the baseball bat and compared it to Davila's reference sample.

Davila's reference sample matched the swab from the baseball bat. Additionally, the supervising forensic scientist's testing confirmed the test results by the original forensic scientist. Davila was then charged with murder. A jury convicted Davila of second degree murder.

After trial, the defense learned that the original forensic scientist who had conducted the initial testing (before the hit in CODIS) was fired from the crime laboratory for deficient job performance. Additionally, the defense learned that during the same year the forensic scientist tested the swabs in this case, her forensic work had been subject to an audit "and that this audit had revealed errors in the vast majority of [the forensic scientist's] cases and had resulted in [potential impeachment disclosures] being sent to eleven prosecuting attorneys notifying them of [the forensic scientist's] problems and her faulty results."

Based on this information, the defense moved for a new trial and argued that the prosecution's failure to disclose the forensic scientist's deficient performance and ultimate firing violated *Brady*. The Supreme Court disagreed.

"In order to establish a *Brady* violation, a defendant must establish three things: (1) [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) that evidence must have been suppressed by the State, either willfully or inadvertently, and (3) the evidence must be material."

In this case, the Supreme Court found that the evidence of the forensic scientist's deficient performance and ultimate firing was favorable to the defense. Impeachment or exculpatory evidence is considered favorable evidence under *Brady*. The Supreme Court reasoned that the evidence was favorable because it showed the forensic scientist "made numerous mistakes in her forensic analytical work and that the [crime laboratory] nevertheless continued to employ her for several years after the mistakes first surfaced."

The Supreme Court also found that the prosecution suppressed the evidence of the forensic scientist's performance problems by not disclosing that information to the defense before trial. The Supreme Court rejected the prosecution's argument that since the defense knew that the forensic scientist no longer worked at the crime laboratory, the defense could "have discovered the facts of her termination through the normal expert-witness-vetting process." Rather, the Court found that since the forensic scientist was not listed as an expert witness, "the defense had no reason to investigate [her] reasons for leaving the [crime laboratory] just because she was a possible witness."

But, the Supreme Court found that the forensic scientist's performance problems were not material to the defense based on the specific facts in this case. "Evidence is material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Under this standard, a defendant "must show only that the government's evidentiary suppression undermines confidence in the outcome of the trial."

The defense theorized that the forensic scientist contaminated the swap from baseball bat with Davila's DNA. However, the defense did not present any evidence that supported such a theory. For example, "Davila didn't show where [crime laboratory] evidence is stored, how it is generally handled, whether that was different [at the time of testing in this case], or what could have occurred in this case [to contaminate the swab from the baseball bat]." Since the defense did not present facts to support its theory of contamination, the evidence of the forensic

scientist's performance problems was not material, and the prosecution not disclosing this information did not violate *Brady*.

LED EDITORIAL COMMENT: In a footnote, the Court noted that just because exculpatory or impeachment evidence may not be material in a specific case, "[t]his does not relieve prosecutors of the obligation to disclose impeachment evidence[.]" Specifically, a prosecutor failing to disclose favorable evidence (even if it is not material in a specific case) "might well violate a prosecutor's professional obligations" under Rule of Professional Conduct 3.8.

While a law enforcement agency is not subject to the Rules of Professional Conduct for lawyers, a law enforcement agency's failure to disclose favorable evidence (that is later found to be material) may result in civil liability under 42 U.S.C. § 1983. Materiality depends on a criminal case's specific facts. Impeachment evidence that is not material in one criminal case may very well be material in another criminal case. For example, if the defense in this case had shown that the forensic scientist had handled evidence with Davila's DNA before handling the baseball bat swab, the Court may have found that her performance problems were material evidence and reversed the conviction.

Materiality generally becomes an issue on appeal, after a nondisclosure has occurred. Materiality relates solely to whether the nondisclosure error was harmless, meaning that the conviction may be affirmed, or prejudicial, meaning that the nondisclosure error requires reversal of the conviction.

The prudent approach is for a law enforcement agency to disclose potential impeachment material on employees (who testify in court) to prosecutors. As shown in this case, impeachment evidence includes an employee's poor performance on key job competencies such as performing forensic tests. As always, law enforcement agencies and officers are encouraged to discuss these issues with their legal advisors.

PUBLIC RECORDS ACT: WORK-RELATED TEXT MESSAGES ON A PUBLIC EMPLOYEE'S PERSONAL CELL PHONE ARE PUBLIC RECORDS AND SUBJECT TO DISCLOSURE UNDER THE PUBLIC RECORDS ACT Nissen v. Pierce County, __ Wn.2d __, __ P.3d __, 2015 WL 5076297 (August 27, 2015).

A requester submitted a public records request asking for phone records and text messages from a prosecutor's personal cell phone. In response, the prosecutor provided a "call log" (similar to a cell phone bill listing the dates and times of calls to and from the cell phone), and a "text message log" that listed the date, time, and phone number of the text message but did not provide the text messages' content. The public agency reviewed these records and produced them (with redactions) to the requester.

The requester then sued the public agency and asked the trial court to review the text messages, call logs, and text message logs to determine if they were public records subject to disclosure under the Public Records Act (PRA). The trial court dismissed the lawsuit by finding that records on a public employee's personal cell phone are not public records under the PRA. The Washington State Supreme Court disagreed.

The Court found that work-related text messages are public records subject to disclosure under the PRA. The Court reasoned that since the prosecutor "prepares outgoing text messages by putting them into written form and sending them" and "use[s] incoming text message when he

reviewed and replied to them while within the scope of employment," these text messages meet the definition of a public record.

The Court also provided guidance to public agencies on how to search and gather public records on an employee's personal cell phone:

> [A]gency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant PRA request. Employees must produce any public records (e-mails, text messages, and any other type of data) to the employer agency. The agency then proceeds just as it would when responding to a request for public records in the agency's possession by reviewing each record, determining if some or all of the record is exempted from production, and disclosing the record to the requester.
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> Where an employee withholds personal records from the employer, he or she must submit an affidavit with facts sufficient to show the information is not a "public record" under the PRA.

LED EDITORIAL COMMENT: At times, a law enforcement officer may need to use his or her personal device for work-related purposes. For example, an officer may need to quickly contact a fellow officer regarding a case and a phone call or text message may be the quickest way to reach the other officer.

A phone call from one officer to another probably does not generate a public record subject to disclosure under the PRA. Unless the employing agency uses the officer's personal cell phone bill or call log for agency business (such as reimbursing the officer for using the personal cell phone), the billing records and call logs probably are not public records.

However, text messages related to an investigation (or other public business) likely are public records subject to disclosure under the PRA. There are several possible approaches to address public records on an employee's personal cell phone. An approach is to provide employees with agency-issued cell phones, or software that will send a copy of the text message or email to an agency server for retention. Another approach is establishing policies that outline the expectations for an employee who uses a personal cell phone to send work-related emails and text messages. These policies may range from prohibiting employees from using personal devices for work-related purposes to setting up a procedure for employees to produce work-related text messages in response to public records requests. As always, agencies and officers are encouraged to discuss these issues with their legal advisors.

SEARCH AND SEIZURE: BACKPACK ON ARRESTEE'S PERSON AT THE TIME OF THE STOP, BUT NOT ON HIS PERSON AT TIME OF THE ARREST BECAUSE THE OFFICER HAD THE ARRESTEE REMOVE IT DURING A *TERRY* STOP, IS SUBJECT TO SEARCH INCIDENT TO ARREST State v. Brock, __ Wn.2d __, 255 P.3d 1118 (September 3, 2015).

At about three in the morning, an officer was on patrol in Golden Gardens Park. The park closes at 11:30 p.m. each night. However, the officer observed that the door to the men's restroom was open and the lights were on. The officer saw someone in a stall. The officer waited outside until a man exited the restroom. The man carried a backpack.

The officer "identified himself as an officer and informed [the man] that he was not allowed in the park." While the officer could have arrested the man for trespass, he chose not to do so.

Rather, the officer had the man set down his backpack and then the officer conducted a *Terry* frisk. The officer did not feel a wallet and the man stated that he did not have identification with him. The man stated his name was "Dorien Halley" and provided a date of birth and Social Security number.

The officer told the man to follow him to the patrol truck to check his name through a Washington database. To protect his safety, the officer carried the backpack and placed it in the patrol truck's passenger seat. The man stood 12 to 15 feet away from the patrol truck. The officer told the man that he was not under arrest, but he could not leave.

The man told the officer that he had a California license. The officer checked both the California and Washington databases, but did not find any matches. The officer then arrested the man for providing false information and read him *Miranda*. The officer also told the man that "he wasn't necessarily going to jail."

The officer did not handcuff the man, and simply told the man to stay near the curb while the officer searched the backpack for identification. The officer "considered the backpack search a search of [the man's] person incident to arrest for providing false information." The officer's search of the backpack yielded two baggies of marijuana and methamphetamine, and a Department of Corrections inmate photo identification card that identified the man as "Antoine L. Brock." The officer then handcuffed Brock and placed him in the patrol truck. At this point, about ten minutes had passed since the officer stopped Brock.

The officer then searched the Washington database with Brock's actual identifying information and learned that he had a DOC felony arrest warrant. After the officer confirmed the arrest warrant, he had to book Brock into jail. Before taking Brock to jail, the officer "emptied the contents of the backpack in what he considered an inventory search [before] taking Brock to jail for booking." Based on officer and jail staff safety, the officer "could not bring the backpack to the jail without first performing a search of the arrestee's personal effects for weapons or explosives." During the inventory search of the backpack, the officer found "numerous checks, credit cards, mail, and more baggies possibly containing narcotics."

Based on this evidence, the State charged Brock with several counts of identity theft, forgery, and drug charges. Before trial, the defense moved to suppress the evidence found in the backpack. The trial court denied the motion and Brock was found guilty of most of the charges in a bench trial. On appeal, the defense argued that because the backpack was not on Brock's person at the time of arrest (and rather was in the patrol truck), the officer did not have authority to search the backpack incident to arrest. The Supreme Court disagreed.

Searches incident to arrest are a recognized exception to the warrant requirement. There are two "types of searches incident to arrest: (1) a search of the arrestee's person (including those personal effects immediately associated with his or her person - such as purses, backpack, or even luggage) and (2) a search of the area within the arrestee's immediate control."

The first type of search incident to arrest (person and personal effects immediately associated with that person) does not require the officer to articulate a safety or evidence preservation concern because "safety and evidence justifications exist when taking those personal items into custody as part of the arrestee's person." Specifically, there are two justifications for a search of an arrestee's person incident to arrest: (1) "the officer's authority to search [the arrestee's person] flow[s] from the authority of the custodial arrest itself;" and (2) "there are presumptive safety and evidence concerns associated with police taking custody of those personal items immediately associated with the arrestee, which will necessarily travel with the arrestee to jail."

However, the second type of search incident to arrest (the area within the arrestee's immediate control) does require "some articulable concern that the arrestee can access the item in order to draw a weapon or destroy evidence."

A backpack or other personal item is part of the arrestee's person (and subject to the first type of search incident to arrest) when "the arrestee had actual and exclusive possession at or immediately preceding the time of the arrest." "This is known as the time of arrest rule."

In this case, the Supreme Court found held "that when the officer removes the item from the arrestee's person during a lawful *Terry* stop and the *Terry* stop ripens into a lawful arrest, the passage of time does not negate the authority of law justifying the search incident to arrest." The Court reasoned:

> The proper inquiry is whether possession so immediately precedes arrest that the item is still functionally a part of the arrestee's person. Put simply, personal items that will go to jail with the arrestee are considered in the arrestee's "possession" and are within the scope of the officer's authority to search.
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> Under these circumstances, the lapse of time had little practical effect on Brock's relationship to his backpack. Brock wore the backpack at the very moment he was stopped by [the officer]. The arrest process began the moment [the officer] told Brock that although he was not under arrest, he was also not free to leave. The officer himself removed the backpack from Brock as a part of his investigation. And, having no other place to safely stow it, Brock would have to bring the backpack along with him into custody. Once the arrest process had begun, the passage of time prior to the arrest did not render it any less a part of Brock's arrested person.

Based on this reasoning, the Supreme Court found that the officer had authority to search the backpack incident to arrest.

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The Law Enforcement Digest (LED) 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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