Law Enforcement Digest

June 2016

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

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UNITED STATES SUPREME COURT

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SEARCH AND SEIZURE: WARRANTLESS BREATH TESTS FALL UNDER THE SEARCH INCIDENT TO ARREST EXCEPTION TO THE WARRANT REQUIREMENT; BUT, WARRANTLESS BLOOD TESTS DO NOT FALL UNDER THE SEARCH INCIDENT TO ARREST EXCEPTION. Birchfield v. North Dakota, 136 S.Ct. 2160 (June 23, 2016).

This case involved three impaired driving arrests from two different states - Danny Birchfield (North Dakota), William Robert Bernard (Minnesota), and Steve Michael Beylund (North Dakota). Both North Dakota and Minnesota have implied consent warning statutes that impose criminal penalties when an arrested driver refuses to submit to a breath or blood test for alcohol. Birchfield refused to submit to a blood test. Bernard refused to submit to a breath test. Beylund consented to a blood test. They appealed to the United States Supreme Court.

The Supreme Court considered whether the Fourth Amendment authorizes warrantless breath or blood tests. If it does, then a state may criminalize a suspect's refusal to consent to the breath or blood test. If it does not, then a state may not criminalize a suspect's refusal to submit to these tests.

The Supreme Court separately analyzed whether breath or blood tests fall within the search incident to arrest exception to the warrant requirement. The Fourth Amendment prohibits warrantless searches unless an exception to the warrant requirement applies. A search incident to arrest is a recognized exception to the warrant requirement. The Supreme Court concluded that a warrantless breath test is a valid search incident to arrest. The Supreme Court reasoned: (1) breath tests involve little physical intrusion; (2) humans do not have "a possessory interest in or any emotional attachment to any of the air in their lungs"; (3) "breath tests are capable of revealing only one bit of information" (i.e., the arrestee's BAC level); and (4) "participation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest."

However, the Supreme Court found that warrantless blood tests do not fall under the search incident to arrest exception. The Supreme Court reasoned: (1) blood tests involve "piercing the skin'; (2) unlike breath, "humans do not continually shed blood"; (3) a blood test "is significantly more intrusive than blowing into a tube"; and (4) "it is possible to extract [from a blood sample] information beyond a simple BAC result."

Based on these holdings, the Supreme Court found that a state could criminalize an impaired driving arrestee's refusal to submit to a breath test. However, a state could not criminalize an impaired driving arrestee's refusal to submit to a blood test.

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LED EDITORIAL NOTE:

Unlike North Dakota and Minnesota's implied consent statutes, Washington's implied consent statute does not criminalize an arrested driver's refusal, and does not require the arrested driver to submit to a blood test. Rather, Washington's implied consent statute, RCW 46.20.308, is limited to breath tests of vehicle drivers and sanctions the arrested driver's license (i.e., suspends, revokes, or denies the license for a period of time).

Nonetheless, this case supports Washington's implied consent warnings for breath as a valid search incident to arrest under the Fourth Amendment. This case also supports breath tests incident to arrest for individuals arrested for operating a vessel under the influence. Washington's implied consent statute does not apply to requests for breath tests from individuals arrested for operating a vessel under the influence. *See* RCW 79A.60.040; RCW 46.20.308. *Birchfield* allows an officer to demand a breath test in these cases as a search incident to arrest. An officer may not use force to compel a suspect to provide the breath sample. A suspect who refuses to provide a breath sample will be issued a class 1 civil infraction under RCW 7.80.120. *See* RCW 79A.60.040(5). As always, officers are encouraged to discuss these issues with their agencies' legal advisors.

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WASHINGTON STATE SUPREME COURT

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SEARCH AND SEIZURE: PRE-ARREST FIELD SOBRIETY TESTS ARE A SEIZURE, BUT NOT A SEARCH. State v. Mecham, __ Wn.2d __, __ P.3d __, 2016 WL 3408871 (June 16, 2016).

A police officer pulled over Mark Tracy Mecham's vehicle because he had an outstanding arrest warrant. The officer arrested Mecham based on the arrest warrant. During the arrest, Mecham exhibited indicia of impairment. The officer asked whether Mecham would perform field sobriety tests (FSTs). The officer told Mecham that the tests were voluntary. Mecham refused to perform the FSTs. The officer obtained a search warrant for Mecham's blood. A subsequent blood test reported a .05 BAC result.

Since Mecham had four prior impaired driving convictions within 10 years, the prosecution charged him with felony DUI. Mecham's refusal to perform the FSTs was admitted into evidence. During closing argument, the prosecutor argued that Mecham's refusal indicated that "he was trying to frustrate the [DUI] investigation." The jury convicted Mecham.

Before trial, Mecham moved to suppress his refusal to perform FSTs. The trial court denied that motion. On appeal, Mecham argued that the trial court should have suppressed his refusal because the FST is an unreasonable search under the federal and state constitutions. The Washington State Supreme Court issued a split opinion on this issue.

The lead opinion (signed by four justices) found that FSTs are a seizure, but not a search. This opinion reasoned that the officer had reasonable suspicion (based on Mecham's indicia of impairment) to seize and ask Mecham to perform FSTs. This opinion then found that FSTs are not a search under the Washington State constitution's article I, section 7. Under the state constitution, a "search" occurs when an officer "disturbs those privacy interests which citizens of

this state have held, and should be entitled to hold, safe from government trespass absent a warrant."

The lead opinion found that FSTs do not disturb privacy interests (and are not a search) because: (1) FSTs involve an arrestee "visually follow[ing] a moving object while the officer looks for involuntary eye movements, walk heel to toe in a line, and stand on one leg while counting out loud" and these actions are not "private in nature"; (2) FSTs involve observing an arrestee's "physical characteristics that any observer might see upon casual observation of a person under the influence of drugs or alcohol"; (3) FSTs are not a "classic" search of a person, place, or object for evidence such as "documents, books, or papers"; (4) FSTs "do not reveal information analogous to private electronic information such as cell phone records or pen registers"; and (5) FSTs do "not invade or penetrate an individual's bodily integrity as does a blood draw or a breath test." Based on this reasoning, the lead opinion found that FSTs are not a search, and Mecham's refusal to perform FSTs could be admitted into evidence.

As a result, the Supreme Court affirmed Mecham's felony DUI conviction.

LED EDITORIAL NOTE:

There are four separate opinions in this case - a lead opinion (signed by four justices), a concurring opinion (signed by one justice), and two dissenting opinions (each signed by two justices). The concurring opinion agreed that FSTs are not a search if the officer requests the driver to perform the FSTs before the arrest. The concurring opinion found that the FSTs were a search, in this case, because the officer had already arrested Mecham on the outstanding warrant. The concurring opinion reasoned that "the reasonable suspicion needed to justify the officer's continued investigation under [*Terry v. Ohio*] must arise at the *inception* of the contact and the continued seizure must be tied to the justification underlying that *initial* contact." As a result, the officer's "sole purpose in seeking to compel Mecham to perform FSTs, postarrest, was to gather evidence of Mecham's guilt for" DUI, and the officer "needed a warrant, or an exception to the warrant requirement, in order to compel Mecham to perform the FSTs." Accordingly, the concurring opinion found that "Mecham had a constitutional right to refuse the search for evidence and the [prosecution] should have been precluded from introducing evidence of the refusal at trial."

The majority of justices (lead opinion and concurring opinion) held that pre-arrest FSTs are not a search, and a suspected impaired driver has no constitutional right to refuse to perform FSTs. Since a suspected impaired driver (pre-arrest) has no constitutional right to refuse to perform FSTs, the prosecution may use the suspect's (pre-arrest) refusal as evidence of guilt. As always, officers are encouraged to discuss these issues with their agencies' legal advisors.

SUFFICIENCY OF EVIDENCE: NOTE DEMANDING BANK TELLER TO GIVE OVER MONEY WITHOUT DYE PACKS IS SUFFICIENT EVIDENCE OF THREATENED FORCE TO SUPPORT FIRST DEGREE ROBBERY CONVICTION.
State v. Farnsworth, __ Wn.2d __, __ P.3d __, 2016 WL 3546034 (June 23, 2016).

Charles Farnsworth and James McFarland decided to rob a bank. Farnsworth waited in the car while McFarland went into the bank. McFarland handed the bank teller a note that read: "No die [sic] packs, no tracking devices, put the money into the bag." The bank teller, scared and in shock, "instantly knew she was being robbed when she read the note." The bank teller handed McFarland $300. Later that day, the police arrested Farnsworth and McFarland. The

prosecution charged them with first degree robbery, RCW 9A.56.200(1)(b). A jury convicted Farnsworth of first degree robbery.

Farnsworth appealed his conviction and argued "that the evidence was insufficient to support robbery because (1) there was no threat of force and (2) he agreed to aid only a theft, not a robbery." The Washington State Supreme Court disagreed.

The Supreme Court held that there was sufficient evidence to find a threat supporting the robbery conviction. A "distinguishing element between robbery and theft is the use of threatened force." Under RCW 9A.56.190, a person commits robbery when he "takes the property of another by the use or threatened use of immediate force, violence, or fear of injury to that person[.]" RCW 9A.04.110(28) defines "threat" as "'to communicate, directly or indirectly the intent' to take a certain action." Here, the Supreme Court reasoned the note constituted a threat to support the robbery conviction:

> When a person demands money at a bank, with no explanation or indication of lawful entitlement to money, it can imply a threat of force because without such a threat, the teller would have no incentive to comply. An ordinary bank teller could reasonably infer an implied threat of harm under these circumstances.

As a result, the Supreme Court affirmed Farnsworth's first degree robbery conviction.

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WASHINGTON STATE COURT OF APPEALS

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SEARCH AND SEIZURE: SEARCH WARRANT LACKED PROBABLE CAUSE BECAUSE THERE WAS NO NEXUS BETWEEN THE EVIDENCE SOUGHT AND THE PLACE SEARCHED. Matter of 13811 Highway 99, Lynnwood, Washington, __ Wn. App. __, __ P.3d __, 2016 WL 3190511 (June 6, 2016).

Police sought a search warrant to obtain evidence for a prostitution investigation. The police had already obtained and executed a search warrant on a Wellness Clinic in Fife. Based on records found during that search, the police had reason to believe that Su H. Jones (the clinic's owner) was also promoting prostitution at King's Massage located in Lynnwood. The police decided to seek a warrant to search King's Massage. The police submitted a search warrant affidavit stating that: (1) financial information seized at the Wellness Clinic in Fife connected Jones to King's Massage in Lynnwood (the place to be searched); (2) officers used internet searches to locate King's Massage; (3) undercover officers conducted surveillance of King's Massage; (4) women at "King's Massage were from Korea, which is not normal"; and (5) a Department of Revenue database search showed that Jones was the sole proprietor of King's Massage. The court issued the search warrant.

During the warrant's execution, "officers seized two Lexus SUV vehicles, U.S. currency, financial documents, and other personal property[.]" The police department then notified the property owners "of the seizure and intended forfeiture[.]" The property owners moved the superior court to return their property. At issue was whether probable cause supported the search warrant for King's Massage that resulted in the seizure. Both the superior court and Court of Appeals found that there was no probable cause to support the search warrant.

A search warrant must be based on probable cause. "An affidavit that particularly identifies the place to be searched and items to be seized must support the warrant." "To establish probable

cause, this affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched."

In this case, the Court of Appeals found there was no probable cause because: (1) "there is nothing in the affidavit that shows either Jones or other women from the Wellness Clinic at the Fife location were at King's Massage"; (2) there was no "nexus between Jones promoting prostitution in Pierce County and the activities that undercover officers observed at King's Massage in Snohomish County"; (3) "the surveillance by undercover officers never established that either Jones or any of the women at the Fife location were at King's Massage"; and (4) "the financial documents purporting to link the two locations are not sufficiently described to show they were not stale information."

As a result, the Court of Appeals found that there was no probable cause to issue the search warrant and the seized property should be returned to its owners.

JUVENILE TEXTING PICTURE OF HIS GENITALS TO ADULT FEMALE IS A VIOLATION OF RCW 9.68A.050(2)(A) (SECOND DEGREE DEALING IN DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT ACTIVITY). State v. E.G., __ Wn. App. __, __ P.3d __, 2016 WL 3361187 (June 14, 2016).

E.G., a 17-year-old male, texted a picture of his genitals to T.R., a 22-year-old woman. T.R. reported the text to the police. The police questioned E.G. and he admitted that he texted T.R. a picture of his genitals. The prosecution charged E.G. in juvenile court with second degree dealing in depictions of minors engaged in sexually explicit conduct (RCW 9.68A.050(2)(a)).

Before trial, the defense moved to dismiss the charge and argued "that the dealing in depictions statute could not be applied to a minor who was also the 'victim' of the offense." The trial court disagreed and denied the motion. After the parties stipulated to the facts, the trial court found that E.G. committed the crime of second degree dealing in depictions of a minor engaged in sexually explicit conduct. E.G. appealed the trial court's denial of his motion to dismiss. The Court of Appeals agreed with the trial court.

The Court of Appeals found that RCW 9.68A.050(2)(a) could be applied to E.G.'s conduct. RCW 9.68A.050(2)(a) provides:

> A person commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the second degree when he or she:
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> (i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g); or
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> (ii) Possesses with intent to develop, duplicate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).

RCW 9.68A.011(4)(f) defines "sexually explicit conduct" as including:

> Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer.

The Court rejected E.G.'s arguments that: (1) the statute violated his First Amendment rights; and (2) "the statute is vague because it does not provide notice that sending self-produced images of one's own genitalia to others is included within the scope of the statute."

First, the United States Supreme Court has held "that *all* child pornography is exempt from First Amendment protection." As such, "[t]here is no basis for creating a right for minors to express themselves in such a manner, and, therefore, no need to place a limiting construction on a statute that does not impinge on a constitutional right." Second, the statute is plain that any "person" is prohibited "from disseminating sexually explicit pictures of a minor." Even if teenagers are ignorant of this law such ignorance "is not proof that they do not understand it."

As a result, the Court of Appeals affirmed the E.G.'s juvenile adjudication.

SEARCH AND SEIZURE: ARREST WARRANT SHOULD NOT ISSUE BASED ONLY ON THE DEFENDANT'S FAILURE TO SCHEDULE A COURT APPEARANCE REGARDING PAYMENT OF HER LEGAL FINANCIAL OBLIGATIONS. State v. Sleater, __ Wn. App. __, __ P.3d __, 2016 WL 3361183 (June 14, 2016).

Jaclyn Sleater was convicted of felony drug offenses and owed legal financial obligations (LFOs) on three case numbers. Sleater entered into a payment program that "required her to make her LFO payments every month or appear to schedule a hearing to explain why she could not make the payments." The program warned Sleater that if she failed to make a payment and did not schedule a hearing, "a warrant [would] be issued for the Defendant's arrest."

Sleater's mother made the payments through an on-line system. But, the system did not apportion the payment for the three case numbers. As a result, two of Sleater's case numbers were in arrears. The court issued an arrest warrant for Sleater's failure to pay on those two cause numbers and failure to schedule a hearing to explain why she was not making those payments. Officers arrested Sleater based on the arrest warrant. During the search incident to her arrest, the officers found methamphetamine on her person. The prosecution charged Sleater with possession of a controlled substance.

Before trial, Sleater moved to suppress the methamphetamine by arguing that the court should not have issued the arrest warrant for a failure to schedule a hearing. The trial court denied the motion and convicted Sleater. Sleater appealed the trial court's decisions. The Court of Appeals agreed with Sleater.

A court enforcing payment of a defendant's LFOs is a civil proceeding. RCW 10.01.180(1) "authorizes issuance of an arrest warrant for a person who fails to pay her" LFOs. But, an arrest warrant for a civil proceeding "must comport with the Fourth Amendment's requirements for civil cases." These requirements include a court issuing a summons for the defendant to appear *before* issuing the arrest warrant. Since the court did not issue a summons, or an order for Sleater to appear, the arrest warrant did not comply with the Fourth Amendment. Consequently, the arrest warrant was invalid and the trial court should have suppressed the methamphetamine evidence. As a result, the Court of Appeals reversed Sleater's conviction.

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SEARCH AND SEIZURE: SINCE OFFICER HAD A REASON TO BELIEVE THAT A BACKPACK'S LOCKED POCKET CONTAINED A SHARP KNIFE THAT COULD INJURE JAIL PERSONNEL, SEARCH OF THE BACKPACK'S LOCKED POCKET WAS A VALID INVENTORY SEARCH. State v. Dunham, __ Wn. App. __, __ P.3d __, 2016 WL 3577382 (June 28, 2016).

Jason Dunham attempted to shoplift merchandise at a department store. Loss prevention officers called the police. When a police officer arrived, the loss prevention officers told her that "Dunham had multiple knives in his backpack and that they had removed the backpack from Dunham's reach." When the officer frisked Dunham, she found two knives on his person. The officer arrested, handcuffed, and transported Dunham to jail.

At the jail, the officer searched Dunham's backpack to inventory his possessions before placing them in the jail's storage facility. The police department's policy is "to inventory items to be held in its storage facility for any dangerous items." This policy also requires placing knives "in secure containers, preventing them from puncturing anything." "This policy was established several years ago after a sharp object pierced its container and cut an evidence custodian."

"The front pocket of the backpack was locked with a luggage lock on the zippers." In the backpack's unlocked compartments, the officer found two knives. The officer "lightly touched the outside of the locked pocket and felt a hard object that resembled one of the knives she had already found inside the backpack." The officer "used Dunham's keys to unlock the backpack pocket." The officer found a butane torch and a glass pipe in the pocket. The glass pipe had methamphetamine residue.

The prosecution charged Dunham with possession of a controlled substance. Dunham moved to suppress the glass pipe and argued that the officer opening the locked backpack pocket violated the constitution. The trial court denied the motion. The trial court then found him guilty. Dunham appealed the trial court's denial of his suppression motion. The Court of Appeals agreed with the trial court.

In general, officers may not search locked containers without a search warrant or an exception to the warrant requirement. An inventory search is an exception to the warrant requirement. "The purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function." "The principal purposes of an inventory search are to (1) protect the owner's property, (2) protect the police against false claims of theft by the owner, and (3) protect the police from potential danger." "The scope of an inventory search should be limited to those areas necessary to fulfill its purpose." In Washington, an officer must show "manifest necessity" to conduct an inventory search of a locked container.

In this case, the officer had a manifest necessity to search the backpack's locked compartment because:

> (1) several knives were found on Dunham's person, (2) additional knives were found in the unlocked portion of Dunham's backpack, (3) one of the knives found in the backpack was unsheathed, and (4) [the officer] felt what she believed to be another knife in the locked pocket of the backpack.
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> Additionally, [the officer's] search had nothing to do with procuring evidence. Rather, the [police department's] policy was to inventory items that would be held in their storage facility for any dangerous items. The police specifically required that knives be kept in secure containers to prevent them from puncturing anything. The policy was instituted

> several years prior when a person in the evidence storage facility was cut by a sharp object piercing the item in which it was contained. [The officer's] search of the locked pocket was in accordance with an established policy in furtherance of officer safety, which is a purpose within the scope of a valid inventory search.

As a result, the Court of Appeals affirmed Dunham's conviction.

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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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