Law Enforcement Digest

February 2017

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

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HONOR ROLL

743 Basic Law Enforcement Academy – October 4, 2016 through February 14, 2017

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Best Academic:	Officer Myra Pluschakov, Ferndale PD
Best Practical Skills:	Deputy Collin Foote, King County SO
Patrol Partner:	Officer Spencer Kurz, Seattle PD
Tac Officer:	Mathew Ludwig, Tukwila PD
	Shelly Hamel, Renton PD

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WASHINGTON STATE COURT OF APPEALS

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SEARCH AND SEIZURE: OFFICER DID NOT EXPLORE REASONABLE ALTERNATIVES BEFORE IMPOUNDING A VEHICLE, INVOLVED IN A COLLISION, UNDER COMMUNITY CARETAKING OR RCW 46.55.113.

State v. Froehlich, 197 Wn. App. 831, 391 P.3d 559, 2017 WL 586557 (February 14, 2017).

While driving on a state roadway, Martha Froehlich collided with a truck. The collision propelled Froehlich's car onto the highway's shoulder, one to two feet from the fog line, with the passenger side on the embankment. However, Froehlich's car did not block traffic.

A Washington State Patrol Trooper responded to the collision. The Trooper questioned Froehlich about the car's owner. Froehlich told the Trooper that she did not own the car. The Trooper asked Froehlich "about potential drug use and did not believe her denials." The Trooper "did not ask her what she wanted to do with the car or inquire about her ability to arrange for the car's removal." Froehlich left the scene in an ambulance.

The Trooper decided to have Froehlich's car impounded based on: (1) "the car's location presented a traffic hazard because it impeded the visibility of drivers approaching a very busy intersection"; (2) "it was impossible to remove the car without a tow truck"; and (3) the Trooper "observed valuables located in plain view in the car", but "could not secure the car in its current location." The Trooper decided to impound the car "without asking Froehlich what she wanted to happen to the car or discussing any alternatives to impound with her."

Before a tow truck impounded the car, the Trooper conducted an inventory of the vehicle. During the inventory, the Trooper "retrieved a purse in plain view, intending to take it to Froehlich at the hospital if it was hers or to include it in the inventory if it was not." The Trooper opened the purse and found methamphetamine.

Froehlich was charged with unlawful possession of a controlled substance with intent to manufacture or deliver. Before trial, the defense filed a motion to suppress the methamphetamine. The defense argued that the Trooper lacked a lawful basis to impound the vehicle and did not consider reasonable alternatives to impound. The trial court agreed and granted the suppression motion. The prosecution appealed the suppression order to the Court of Appeals, Division Two.

The Court of Appeals considered whether: (1) the Trooper lawfully impounded Froehlich's vehicle under the community caretaking exception to the warrant requirement; or (2) the Trooper lawfully impounded Froelich's vehicle under RCW 46.55.113. The Court of Appeals found that since the Trooper did not consider reasonable alternatives to impound, neither the community caretaking exception nor RCW 46.55.113 authorized the impound.

Under the federal and state constitutions, an officer may conduct a search with a warrant or under an exception to the warrant requirement. An inventory search of a lawfully impounded vehicle is an exception to the warrant requirement. "Law enforcement may lawfully impound a vehicle for three reasons: (1) as evidence of a crime, (2) under the community caretaking function, or (3) when the driver has committed a traffic offense for which the legislature has expressly authorized impoundment." In these circumstances, an officer must still consider reasonable alternatives to impound.

In considering reasonable alternatives to impound, an "officer does not have to exhaust all possible alternatives." Rather, an officer considers reasonable alternatives by asking the driver if another person is nearby and could move the vehicle. Since the Trooper did not ask Froehlich about reasonable alternatives to impound, the Court of Appeals held that the impound was unlawful.

First, "community caretaking allows law enforcement to lawfully impound a vehicle when both (1) the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft; *and* (2) the defendant, the defendant's spouse, or friends are not available to move the vehicle." The Court of Appeals reasoned that the impound did not satisfy the second prong

because the Trooper did not ask Froehlich whether another driver could move the car, or if she could arrange for a tow:

> [D]uring [the Trooper's] interactions with Froehlich at the scene, he did not ask her what she wanted to do with the car – including her ability to arrange for its removal – or discuss with her any alternatives to impoundment. There also is no indication . . . that [the Trooper] attempted to contact his fellow trooper, who was at the hospital with Froehlich, to have him ask Froehlich about removing the car.
> . . .
> [The Trooper] was able to converse with Froehlich on several issues when he arrived at the scene and that she remained available at the scene for five minutes after an ambulance was called. . . . [The Trooper] should have at least considered whether Froehlich could arrange for the towing.

Second, the Court of Appeals found that the Trooper had statutory authority to impound the car under RCW 46.55.113(2), but the Trooper should have considered reasonable alternatives to impound. RCW 46.55.113(2) provides:

> [A] police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances:
> . . .
> (b) Whenever a police officer *finds a vehicle unattended upon a highway* where the vehicle constitutes an obstruction to traffic or jeopardizes public safety;
>
> (c) Whenever a police officer *finds an unattended vehicle at the scene of an accident* or when the driver of a vehicle involved in an accident is physically or mentally incapable of deciding upon steps to be taken to protect his or her property.

The Court of Appeals found this statute applied to Froehlich's car. The Court of Appeals reasoned:

> The statute does not expressly preclude impoundment for unattended vehicles that previously were attended. Instead, both subsections authorize impoundment "[w]henever" an officer finds an unattended vehicle. After Froehlich left the scene, [the Trooper] "found" that her car was unattended regardless of whether it was attended earlier.
> . . .
> Froehlich's car became unattended when she left for the hospital through circumstances that [the Trooper] did not create. The car was upon a highway and had been involved in an accident. Therefore, we hold that RCW 46.55.113(2)(b) and (c) provided statutory authority for [the Trooper] to impound the vehicle[.]

However, even though the Trooper had statutory authority to impound the car, he still had to consider reasonable alternatives. Since the Trooper "did not discuss any alternatives to impoundment with Froehlich", the impound and inventory was unlawful.

As a result, the Court of Appeals affirmed the trial court's suppression of the methamphetamine found in Froehlich's purse during the inventory.

<u>LED EDITORIAL NOTE</u>: The Court of Appeals noted "that there may be situations when an officer has no obligation to ask a driver about reasonable alternatives to impoundment." However, in this case, since the Trooper had discussed other matters with Froehlich at the scene, the Court of Appeals found he "had an obligation to ask Froehlich about other alternatives to impounding the car[.]" If an officer is unable to ask a driver about

reasonable alternatives to impound, the officer may want to note the reasons in his or her report such as a situation when the driver is unconscious. When feasible, an officer should ask a driver about reasonable alternatives to impound including whether the driver could arrange for a private tow. As always, law enforcement officers are encouraged to discuss these issues with their agency legal advisors.

SUFFICIENCY OF EVIDENCE: ONGOING DRUG USE AND USE OF CONTROLLED SUBSTANCES IN A HOME IS SUFFICIENT EVIDENCE TO SHOW A VIOLATION OF RCW 69.50.402 (MAINTAINING A DRUG DWELLING).
State v. Menard, 107 Wn. App. 901, 392 P.3d 1105, 2017 WL 713658 (February 23, 2017).

Rodney Menard has lived in his home since he was five years old. In his home, "Menard rented rooms to five individuals, occasionally received methamphetamine from tenants as rent payment, consumed twenty dollars' worth of methamphetamine per day, and possessed drug pipes." Menard claimed he did not know that his tenants sold methamphetamine in his home, but admitted his tenants used methamphetamine in his home.

Neighbors complained to law enforcement about the drug activity at Menard's home. Law enforcement obtained a search warrant for Menard's home. When law enforcement executed the search warrant, they found fourteen people inside Menard's home and observed a bag of methamphetamine next to a woman resting on a couch. Menard informed the law enforcement officer that most of his visitors take drugs. Menard's tenants "informed the officers that ten to fifteen different people came daily to the house to use drugs."

The prosecution charged Menard with maintaining a drug dwelling under RCW 69.50.402. Before trial, the defense moved to dismiss the charge and "argued that any drug-related activity at [Menard's] house was incidental to the primary purpose of the residence and the statute proscribed his conduct only if the drug activity constituted the resident's major purpose." The trial court agreed and granted the motion to dismiss. The prosecution appealed to the Court of Appeals, Division Three. The Court of Appeals disagreed with the trial court.

RCW 69.50.402(1), also referred to as the "drug house statute," provides:

> It is unlawful for any person:
>
> …
>
> (f) Knowingly to keep or maintain any . . . dwelling, building . . . or other structure or place, which is resorted to by persons using controlled substances in violation of [chapter 69.50 RCW] *for the purpose of using these substances*, or which is used for keeping or selling them in violation of [chapter 69.50 RCW].

The Court of Appeals reasoned that Menard violated this statute because the evidence showed: (1) "two witnesses testified that ten to fifteen people each day entered the home to imbibe drugs"; (2) when the officers executed the search warrant, they found fourteen people in Menard's home and "some of whom admitted to use of methamphetamine"; (3) officers found a woman resting on a couch with a bag of methamphetamine next to her pillow; (4) officers found drugs and drug devices in Menard's home; and (5) Menard admitted that most of his visitors take drugs.

As a result, the Court of Appeals reversed the trial court's order dismissing the charges.

LED EDITORIAL NOTE: The Court of Appeals noted that "sporadic or isolated incidents of drug use" in a home is insufficient to prove a defendant violated the drug house statute. Rather, to establish a violation of this statute, "the totality of the evidence must demonstrate more than a single isolated incident of illegal drug activity."

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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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