Law Enforcement Digest

September 2017

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

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753 Basic Law Enforcement Academy – May 31, 2017 through October 6, 2017

President:	Deputy Kyle Corcoran, King County SO
Best Overall:	Officer Gregory Jago, Seattle PD
Best Academic:	Officer Gregory Jago, Seattle PD
Best Practical Skills:	Officer Gregory Jago, Seattle PD
Patrol Partner:	Officer Gregory Jago, Seattle PD
Tac Officer:	Officer Steve Grossfeld, CJTC
	Officer Stephanie Bennett, Auburn PD

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NINTH CIRCUIT COURT OF APPEALS

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Sharp v. County of Orange, 871 F.3d 901 (September 19, 2017).

FACTS: (portions excerpted from the opinion):

Merritt L. Sharp, IV (Sharp IV) was released from prison and subject to probation conditions. The probation conditions required him to submit his person and property to search and seizure by any law enforcement officer. Sharp IV's parents, Merritt L. Sharp, III (Sharp III) and Carol Sharp, agreed to let Sharp IV live with them. When released from prison, Sharp IV informed the probation office that he was living with his parents. A few weeks later, Sharp IV's parents kicked him out of their house.

A month later, a state court issued two arrest warrants for Sharp IV. Deputy A reviewed Sharp IV's probation and driver's license records to check that his residential address matched his parent's address. Deputy A, Deputy B, and Deputy C went to the Sharp residence to execute the search warrant. While Deputy A and Deputy B were on the front porch, Deputy C radioed that the subject was fleeing out the backyard: "He's wearing a *black shirt, tan pants,* white shoes." Deputy A and Deputy B rushed around the back of the house to assist in the pursuit, but nobody could locate the subject.

Deputy D responded to the other officers' radio calls. Deputy A reported that a man in the backyard yelled something at the deputies, turned around, and re-entered the home through the backdoor. Deputy A radioed to the other officers "suspect's ganna be back in the house, just went in the back door." Deputy A directed Deputy D, "I need you to go to the front of the house."

Deputy D and Deputy E arrived at the Sharp residence. They had not seen a photograph of the warrant subject, nor did they know the subject's name. Deputy D recalled from an earlier radio transmission that the suspect fleeing the residence was described as a white male wearing a *black shirt* and *tan pants*. Deputy D and Deputy E also knew that the suspect was last seen in the area of the house and may have run back into the house.

When Deputy D and Deputy E arrived at the residence, Sharp III walked out of the front door wearing a *light blue shirt* and *blue jeans*. Deputy D and Deputy E began shouting commands with their weapons drawn: "Get down on the ground!" and "put your hands up." The deputies arrested Sharp III. Deputy D searched Sharp III incident to arrest, and instructed him to empty out his

pockets on the front lawn. Deputy D then handcuffed Sharp III. According to Sharp III, the handcuffs were so tight that he still has scars on his wrists. Deputy D placed Sharp III in the back of the patrol car.

Several deputies went back to search the house based on Sharp IV's probationary search condition. At the front door, Sharp III's wife, Carol, informed the deputies that they had arrested the wrong man, and her son Sharp IV did not live there anymore.

At this time, the deputies did not release Sharp III. Instead, they kept him handcuffed and locked in the patrol car. Sharp III was furious and adamantly protested his detention, loudly swearing at the deputies and threatening to sue them. In response, Deputy D told Sharp III: "*If you weren't being so argumentative, I'd probably just put you on the curb*."

The deputies then searched the home. During the search, the deputies opened kitchen cabinets and pantry doors, removed the air-conditioning cover in the attic, and searched various drawers in Carol's bedroom. After the search concluded, Sharp III was released from the patrol car – twenty minutes after the deputies realized Sharp III was not the subject of the arrest warrant.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

Sharp III filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the deputies. In the lawsuit, Sharp III claimed: (1) violation of his Fourth Amendment rights based on the seizure of his person (including the initial mistaken arrest and the continuing detention in the patrol car), the search of his person, and the use of excessive force against him; (2) First Amendment retaliation because the deputies refused to release him on account of his "argumentative" demeanor; and (3) violation of his Fourth Amendment rights based on the search of his home.

The deputies moved for summary judgment based on qualified immunity. The district court denied the motion. The deputies appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit agreed that the deputies were not entitled to qualified immunity on the First Amendment retaliation claim because the law was clearly established. However, the Ninth Circuit held that the deputies were entitled to qualified immunity on the other Section 1983 claims because the law was not clearly established at the time of the incident.

ANALYSIS: (portions excerpted from the opinion):

In a Section 1983 lawsuit, an officer is entitled to qualified immunity if: (1) the officer did not violate the plaintiff's constitutional rights; or (2) the constitutional right was not clearly established at the time of the incident.

Arrest Based on Mistaken Identity: The Ninth Circuit found that the deputies violated Sharp III's Fourth Amendment rights by arresting him based on mistaken identity. In a case of mistaken identity, the question is whether the arresting officers had a good faith, reasonable belief that the arrestee was the subject of the warrant. In this case, the mistake of identity was unreasonable because: (1) Deputy D and Deputy E had heard radio communications that the suspect was wearing a black shirt and tan pants, but Sharp III was wearing a light blue shirt and blue jeans; and (2) Sharp III walked towards the deputies, rather than fleeing like the described suspect. However, the deputies' actions were not an obvious constitutional violation, and the deputies did not violate clearly established Fourth Amendment rights. Accordingly, the deputies were entitled to qualified immunity.

Detention of Sharp III *After* Deputies Realized He Was Not Named In The Arrest Warrant: The Ninth Circuit found that the deputies violated Sharp III's Fourth Amendment rights by detaining him in the patrol car *after* they discovered that he was not the warrant subject. The Ninth Circuit held that an arrest warrant does not provide categorical authority to detain home occupants in the immediate vicinity of the home (who are not named in the arrest warrant) while executing an arrest warrant. As such, there were no specific circumstances justifying Sharp III's continued detention.

The Ninth Circuit noted that there are circumstances where detention of persons on, or immediately near, the premises is objectively reasonable. Entry into a home for the purpose of arresting an occupant can be a dangerous effort, and officers should have reasonable tools to protect their own safety and the safety of others. Those tools might include detention of occupants to stabilize the situation while searching for the subject of an arrest warrant or conducting a lawful protective sweep of the premises. But the deputies in this case were not presented with circumstances that justified detaining Sharp III in the patrol car. However, the law was not clearly established at the time of the incident, and the deputies were entitled to qualified immunity.

Use Of Force Claim: The Ninth Circuit found that Deputy D was entitled to qualified immunity on Sharp III's use of force claim (i.e., the handcuffs were too tight) because there is no controlling constitutional principle or case that is specific enough to alert Deputy D that the degree of force he used was unreasonable.

Search Incident To Arrest: The Ninth Circuit found that the deputies were entitled to qualified immunity on the search of Sharp III's person incident to arrest because the law was not clearly established that the arrest violated Sharp III's constitutional rights.

Entry Into The Sharp Residence: The Ninth Circuit found that the deputies' entry into the Sharp residence did not violate the Fourth Amendment. An arrest warrant authorizes the police to enter the warrant subject's home to execute the arrest of that subject when there is reason to believe he is within the home. When the home is owned by a third party, an officer must have a reasonable belief that the suspect named in the arrest warrant resides in the third party's home.

In this case, the officers reasonably believed that Sharp IV resided in the home because: (1) Sharp IV's probation response form, driver's license records, and arrest warrants all confirmed that he lived with Sharp III; and (2) it was not unreasonable to rely on those official documents rather than Carol's contrary statement, made in the heat of a stressful moment, which could have reasonably been discounted as an effort to protect her son from capture. Accordingly, the deputies' entry into the Sharp residence did not violate the Fourth Amendment, and the deputies were entitled to qualified immunity.

Search Of The Sharp Residence: The Ninth Circuit found that the deputies' search of the Sharp residence did not violate the Fourth Amendment. The authority to search a home does not ordinarily extend to the search of areas where the subject of a warrant would not be found. But a condition of probation that requires an offender to submit his property to suspicionless searches gives officers more latitude in searching the offender's property. In this case, Sharp IV's probation condition required him to submit his property to suspicionless searches, and authorized the deputies' search of other areas in the residence where Sharp would not be found (e.g., a kitchen drawer). It is also not unreasonable for the police to expect probationers to hide contraband in non-obvious places (e.g., Carol's bedroom drawers). There is also no clearly established law that the search violated the Fourth Amendment. Accordingly, the deputies were entitled to qualified immunity.

First Amendment Retaliation: The Ninth Circuit found that Deputy D unconstitutionally retaliated against Sharp III by keeping him in the patrol car based on his argumentative conduct. To establish a retaliation claim, the evidence must show that: (1) the officer's conduct would chill or silence a person of ordinary firmness from future First Amendment activities; and (2) the officer's desire to chill speech was a "but-for-cause" of the adverse action.

In this case, Sharp III (while detained in the patrol car) was visibly angry at the deputies, swore at them, and threatened to sue them. In response, Deputy D told him, "If you weren't being so argumentative, I'd probably just put you on the curb." The Ninth Circuit found that Deputy D violated clearly established law by continuing to detain Sharp III based on his argumentative conduct. In *Ford v. City of Yakima*, a police officer pulled over a driver who was blasting loud music, and because the driver would not stop "running his mouth" and exhibited an uncooperative "attitude," the officer arrested him and booked him in jail – rather than merely issuing a citation. The officer repeated that he was arresting the man because the man would not "shut up" and had "diarrhea of the mouth." These facts are similar to this case and Deputy D was on notice that this particular conduct was unconstitutional. Accordingly, Deputy D was not entitled to qualified immunity.

RESULT: The Ninth Circuit affirmed the district court's denial of qualified immunity for Sharp III's First Amendment retaliation claim. The Ninth Circuit reversed the district court's denial of qualified immunity for the other constitutional claims.

CIVIL RIGHTS LAWSUIT: DEPUTIES ARE NOT ENTITLED TO QUALIFIED IMMUNITY FOR USING DEADLY FORCE.
Estate of Lopez, 871 F.3d 998 (September 22, 2017).

FACTS: (portions excerpted from the opinion):

Deputy A and Deputy B were on routine patrol in a marked police car. Deputy A was aware that they were patrolling an area known for gang activity and violent crime. However, Deputy A had not worked in the area in the last few years, it was the middle of the day, and there was no activity on the police radio.

When the deputies approached a stop sign, Deputy A noticed Andy Lopez walking in a direction away from the officers. Andy was walking at a normal speed and his motions did not appear aggressive. Deputy A could not determine Andy's age because he was about 100 feet away and wore a hooded sweatshirt. To Deputy A, Andy appeared to be in his mid to late teens, and did not appear to be a gang member.

Deputy A noticed Andy carrying gun, which he believed to be an AK-47. Deputy A believed this in part because he had previously confiscated an AK-47 within one mile of Andy's location. But he had never seen a person walk down the street in broad daylight carrying an AK-47. Deputy A had also confiscated what turned out to be toy guns on three prior occasions.

Deputy B drove the police car past the stop sign and crossed the intersection. Once the police car cleared the intersection, Deputy B stopped the car at a forty-five degree angle with the sidewalk. As the car was slowing down, Deputy A removed his seatbelt, drew his pistol, and opened the passenger side door. The deputies were parked approximately 40 feet behind Andy. Once stopped, Deputy A situated himself at the V of his open door, and knelt on the ground.

Deputy A aimed his pistol at Andy and yelled loudly at least one time, "Drop the gun!" Andy was now about 65 feet from the officers. Andy did not drop his gun. Andy paused a few second and

began to rotate his body clockwise. Deputy A then saw the gun come around as Andy's torso turned.

Deputy A thought he saw the barrel of the weapon coming up. Deputy A fired 8 shots in rapid succession, seven of which hit Andy. The total time from when the police car crossed the intersection to Deputy A firing the shots was about 20 seconds. Deputy A hit Andy in the chest, so Andy was facing the officers when Deputy A opened fire. Deputy A acknowledges that he does not know where Andy was pointing the rifle at the time he was shot, or if Andy's gun was actually pointed at him. Andy collapsed after the shots, and died on the scene. Andy was holding a plastic designed to replicate an AK-47.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

Andy's estate filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against the deputies. The lawsuit claimed that Deputy A used excessive force and violated Andy's Fourth Amendment rights. Deputy A moved for summary judgment based on qualified immunity. The district court denied the motion. Deputy A appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit agreed with the district court.

ANALYSIS: (portions excerpted from the opinion):

In a Section 1983 lawsuit, an officer is entitled to qualified immunity if: (1) the officer did not violate the plaintiff's constitutional rights; or (2) the constitutional right was not clearly established at the time of the incident. An unreasonable use force violates the Fourth Amendment.

Courts consider the *Graham* factors to evaluate whether an officer used reasonable force: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The most important factor is whether the suspect poses an immediate threat to the safety of the officers or others. Court also consider other factors such as whether the officer gave proper warnings, and the availability of less intrusive force.

The Ninth Circuit found that a reasonable jury could conclude that Deputy A's use of deadly force was not objectively reasonable because Andy did not pose an immediate threat to the safety of the officers or others. The Court reasoned:

- The officers came across Andy while on routine patrol, not in response to a crime or report of someone acting erratically;

- When Deputy A saw Andy, he looked like a teenager, and not like a gang member;

- Andy was walking normally and his motions did not appear aggressive;

- Andy was carrying a weapon that looked like an AK-47, but given Deputy A's prior confiscations of toy guns, Deputy A knew that there was some possibility that it was a toy gun;

- Andy was holding the gun by the pistol grip, down at his side, with the muzzle pointed towards the ground;

- Andy was carrying the weapon in broad daylight in a residential neighborhood at a time when children of his age reasonably could be expected to be playing;

- After parking behind Andy, Deputy A shouted "drop the gun" one time, and that shout was the first moment that Andy became aware that someone was behind him;

- Within seconds, Andy began to turn around naturally in a clockwise direction, still holding the gun;

- Andy did not know until he turned that the person who shouted was a police officer, and Deputy A was aware of that fact because he had not seen Andy look back prior to that time;

- As Andy turned, the weapon turned with him;

- The gun barrel might have raised slightly as Andy turned, but given that it started in a position where Andy's arm was fully extended and the gun barrel never rose at any point to a position that posed any threat to either of the officers;

- Deputy A deployed deadly force without knowing if Andy's finger was on the trigger, without having identified himself as a police officer, and without ever having warned Andy that deadly force would be used;

- Andy was shot while standing next to an open field with no other people around; and

- Deputy A knew it was possible to use less intrusive force given his prior experience at the park.

The Ninth Circuit also found that it was clearly established at the time of the incident that deadly force is unreasonable where: (1) the officers were not responding to a potential crime, but were on routine patrol; (2) the subject was not erratic, but was composed and non-threatening; (3) the subject did not disobey commands; (4) the officers failed to warn the subject that they would use deadly force even though they had the time to do so; (5) the barrel of the weapon was pointing down and did not threaten the officers; and (6) the subject did not take other actions that would have been objectively threatening. Accordingly, the Deputy was not entitled to qualified immunity.

RESULT: The Ninth Circuit affirmed the district court's denial of qualified immunity to Deputy A.

***MIRANDA*: DETECTIVES DID NOT HONOR SUSPECT'S REQUEST FOR AN ATTORNEY BECAUSE THE OFFICERS CONTINUED THE INTERROGATION, AND, AS A RESULT, THE SUSPECT DID NOT KNOWINGLY, INTELLIGENTLY, OR VOLUNTARILY WAIVE HIS RIGHT TO COUNSEL WHEN HE LATER CONFESSED TO THE CRIME.**
Rodriguez v. McDonald, 872 F.3d 908 (September 29, 2017).

FACTS: (portions excerpted from the opinion):

Detectives investigated a drive-by shooting. About two hours after the shooting, police stopped a van that matched the description of the shooter's vehicle. The detectives interviewed the van's

driver and passenger. The driver and passenger implicated a person named "Husky" in the shooting. The detective determined that "Husky" was the gang moniker of Jesse Rodriguez. The victim later identified Rodriguez in a six-pack photographic lineup.

A month later, the detectives arrested Rodriguez and brought him to the police station for an interview. Rodriguez was 14 years old at the time and had completed the ninth grade.

The detectives read Rodriguez *Miranda* warnings. Rodriguez responded that he understood his rights. The detectives then questioned Rodriguez about his involvement in the drive-by shooting. Eventually, Rodriguez asked for attorney. Rather than stop the interrogation, the detectives continued the questioning:

> Rodriguez: Can I speak to an attorney?
>
> Detective: You tell me what you want.
>
> Rodriguez: That is what I want.
>
> Detective: That's fine bro we stop because we can't talk to you anymore, okay, so.
>
> Detective: You're going to be charged with murder today.
>
> Rodriguez: Why?
>
> Detective: Why?
>
> Detective: We already told you why, man, we've already told you why. Remember when we came in we told you we were investigating. This is what's been said about you. We asked you to tell us the truth; you were going to tell us what happened? That's what we meant tell us what's—tell us what's going on, so we can put—so we can put your story on paper. That is the reason we're asking you this. If you want to talk to an attorney you can talk to an attorney. To us we're just doing our job.
>
> Detective: If you don't want to talk to us just tell us you don't want to talk to us if you don't, that's it.
>
> Detective: Yeah. I mean, you know, it's nothing personal here, bro, we're just doing our job, man, that's all, okay. Like I said, you tell me now that's exactly what I'm gone put on paper that's exactly what I can do for you, man, that's it—that's it. We can go on to other cases and other things. We'll just see you in court. I just want you to remember that I tried to give you the opportunity. I tried to give you the opportunity to straighten things out.
>
> Detective: Yeah, I guess we can. I got to take him downtown and process him.
>
> Rodriguez: You're not going to charge me?
>
> Detective: You're going to East Lake.
>
> Rodriguez: What am I going to East Lake for?
>
> Detective: Cause they're going to charge you with murder.

The detective then transported Rodriguez to a juvenile detention facility. Shortly after their arrival, Rodriguez asked the detective, "what's going to happen?" The detective replied that the case was going to the prosecutor's office. Rodriguez then requested the detective's business card, explaining that he might want "to talk" to the detective. In response, the detective explained that because Rodriguez had invoked his right to counsel, the detective could not speak to him until Rodriguez had spoken to an attorney, unless Rodriguez "changed his mind" about exercising his right to counsel. Rodriguez replied that he wanted to talk to the detective. The detective requested an interview room. Once inside the interview room, Rodriguez narrated what happened during the shooting incident. At the detective's request, Rodriguez wrote his own statement. In that statement, Rodriguez confessed to the drive-by shooting.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

The prosecution charged Rodriguez with second-degree murder and attempted murder. Before trial, the defense moved to suppress the confession based on a *Miranda* violation. The trial court denied the motion. The jury convicted Rodriguez on both counts. Rodriguez appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit disagreed with the trial court.

ANALYSIS: (portions excerpted from the opinion):

Under *Miranda v. Arizona*, a suspect must be informed of his right to have an attorney present during custodial interrogation. If the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. If the interrogation continues without the presence of an attorney and a statement is taken, the government must demonstrate that the suspect knowingly and intelligently waived his privilege against self-incrimination and his right to counsel.

Once a suspect has invoked his right to counsel, he may not be subject to further interrogation until counsel has been made available to him *unless* the suspect himself initiates further communication, exchanges, or conversations with the police. If the suspect initiates the communication with the police, the government must show that the suspect first waived his right to counsel knowingly, intelligently, and voluntarily.

In this case, the Ninth Circuit found that Rodriguez did not knowingly, intelligently, and voluntarily waive his right to counsel when he provided the written confession. The Court reasoned:

(1) Rodriguez was 14 years old at the time, and youth are particularly susceptible to pressure from police. Rodriguez also had Attention Deficit Hyperactivity Disorder and a borderline IQ of 77. As such, Rodriguez's age and intellectual limitations made him susceptible to suggestion and coercion.

(2) The detectives suggested to Rodriguez that cooperation would result in leniency. The detectives also suggested that cooperating was the only way to "save his life."

(3) After Rodriguez asked for a lawyer, the detectives continued to pressure him. Though Rodriguez had repeatedly denied participating in the shooting, the detectives told him he would be charged with murder later that day, increasing the urgency of cooperation. This is the type of threat that makes a subsequent reinitation of interrogation involuntary.

(4) When the detective took Rodriguez to the juvenile detention facility, Rodriguez asked the detective what was going to happen next. Though the detective explained that he could not

speak to him until Rodriguez had spoken to an attorney, anyone in Rodriguez's shoes would have understood that no attorney would arrive before he was charged with murder. Given what the officers had told him, Rodriguez also would have believed that speaking to the detective without counsel was his last, best chance to help himself. Thus, when the detective told him that he could "change his mind" about exercising his right to counsel, Rodriguez's subsequent waiver was not made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

RESULT: The Ninth Circuit reversed the convictions.

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WASHINGTON STATE SUPREME COURT

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SUFFICENCY OF EVIDENCE: A MINOR, WHO TEXTED AN IMAGE OF HIS OWN PENIS TO AN ADULT WOMAN, VIOLATED RCW 9.68A.050 (SECOND DEGREE DEALING IN DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT).
State v. Gray, __ Wn.2d __, 402 P.3d 243, 2017 WL 4052371 (September 14, 2017).

FACTS: (portions excerpted from the opinion):

T.R., a 22 year-old woman, reported to the Sheriff's Office that she had received two text messages. The first contained a photograph of an erect penis and the words "Eric Gray picture message sent from Pinger." The second message read "Do u like it babe? It's for you. And for Your daughter babe." The Sheriff's Office traced the messages to Eric Gray.

A deputy went to Gray's house to question him about the text messages. At the time, Gray was 17 years-old and lived with his parents. Gray had a prior sex offense adjudication and was required to register as a sex offender. Gray admitted to the Deputy that he had sent the text messages.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

The prosecution charged Gray in juvenile court with one count of second degree dealing in depictions of a minor engaged in sexually explicit conduct under RCW 9.68A.050. The defense moved to dismiss the charges based on insufficient evidence. The trial court denied the motion and found Gray guilty of the charge. Gray appealed to the Court of Appeals, Division Three. The Court of Appeals agreed with the trial court. Gray sought review by the Washington State Supreme Court. The Supreme Court also agreed with the trial court.

ANALYSIS: (portions excerpted from the opinion):

RCW 9.68A.050 prohibits dealing in depictions of a minor engaged in sexually explicit conduct. The relevant statutes state:

> RCW 9.68A.050(2)(a): 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 . . . knowingly develops, . . . publishes, [or] disseminate[s] . . . any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct . . .

RCW 9.68A.011(4) defines "sexually explicit conduct" as a depiction "of the genitals or unclothed pubic or rectal areas of any minor . . . for the purpose of sexual stimulation of the viewer."

RCW 9.68A.011(5) defines "minor" as any "person under eighteen years of age."

RCW 9A.04.110(17) defines "person" as any "natural person," whether an adult or minor.

Based on the statutes' language, the Supreme Court concluded when any person, including a juvenile, develops, publishes, or disseminates a visual depiction of any minor engaged in sexual conduct, then that person has violated RCW 9.68A.050(2)(a).

Gray violated RCW 9.68A.050(2)(a) by taking a picture of his erect penis and sending it to T.R. First, Gray is a person. Second, Gray was a minor when he took the photo of his penis. Third, the text message with the picture stated "Do u like it, babe?," indicating an attempt to arouse the recipient.

RESULT: The Supreme Court affirmed the Court of Appeals and trial court's rulings that sufficient evidence supported the finding that Gray violated RCW 9.68A.050(2)(a).

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WASHINGTON STATE COURT OF APPEALS

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SUFFICENCY OF EVIDENCE: A SUBJECT WHO RESISTS HANDCUFFING, WHERE THE SUBJECT IS DETAINED BUT NOT UNDER ARREST, DOES NOT VIOLATE RCW 9A.76.020(1) (OBSTRUCTION OF A LAW ENFORCEMENT OFFICER).
State v. D.E.D., __ Wn. App. __, 402 P.3d 851, 2017 WL 4273738 (September 19, 2017).

FACTS: (portions excerpted from the opinion):

A woman called the police complaining about a group of youths who did not belong in her neighborhood. An officer responded to the location. The officer did not see a group of youths. Instead, the officer saw D.E.D., a juvenile, walking down the street.

The officer pulled up his patrol car and asked D.E.D., "what's going on." D.E.D. responded with profanity and accused the officer of bothering him. D.E.D.'s body was tense with his fists clenched and arms flexed tight. The officer parked his car to speak further with D.E.D.

As the officer was getting out of his car, police dispatch advised that another caller had reported a group of kids, one of whom displayed a gun, outside his front yard. The officer then detained D.E.D. while indicating that the he was not under arrest. The officer attempted to handcuff D.E.D., but the younger man refused to comply. D.E.D. attempted to stiffen his body and pull away from the officer to avoid being handcuffed. After two minutes, the officer handcuffed D.E.D.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

The prosecution charged D.E.D. with obstructing a public servant. The juvenile court concluded that D.E.D. had hindered the officer in the course of his official duties by struggling and resisting the detention, along with attempting to kick the officer in the groin. This resistance had cost the officer several minutes of time. Accordingly, the juvenile court found that D.E.D. committed the

crime of obstructing a public servant. D.E.D. appealed to the Court of Appeals, Division Three. The Court of Appeals disagreed with the trial court.

ANALYSIS: (portions excerpted from the opinion):

Under RCW 9A.76.020(1), a person obstructs an officer when he "willfully hinders, delays, or obstructs" the officer "in the discharge of his or her official powers or duties." In general, there is no obligation to cooperate with the police. As such, passive resistance consistent with the lack of a duty to cooperate is not criminal behavior.

In this case, D.E.D.'s resistance to being handcuffed and his ensuing struggle to prevent handcuffing did not amount to obstructing a public servant. D.E.D. did not hinder or obstruct the officer since he had no obligation to cooperate with the officer. The Court of Appeals cautioned that the holding in this case is narrow - resisting handcuffing when a suspect is not under arrest does not constitute obstructing a public servant. More active resistance, such as flight, could rise to the level of obstructing a public servant.

RESULT: The Court of Appeals reversed D.E.D.'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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