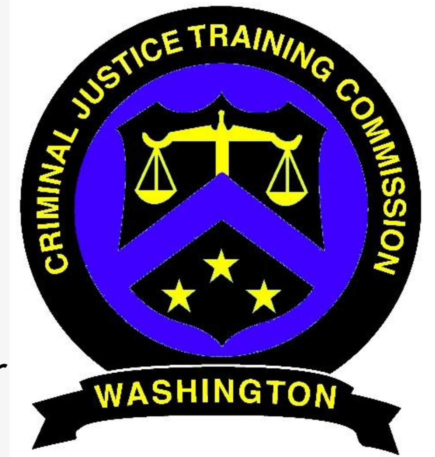
APRIL 2018

LAW ENFORCEMENT DIGEST

LAW ENFORCEMENT ONLINE TRAINING DIGEST

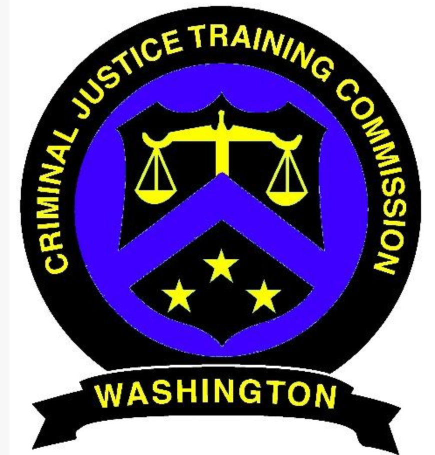


Welcome to the new **Law Enforcement Digest Online Training**! This refreshed edition of the LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select court rulings from the previous month are summarized briefly, arranged by topic, with emphasis placed on the practical application of legal changes to law enforcement practices.

Each cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links have also been provided to additional Washington State prosecutor and law enforcement case law reviews and references.

The materials contained in this document are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.

LAW ENFORCEMENT ONLINE TRAINING DIGEST



APRIL 2018 Edition

Covering Select Cases Issued in March 2018

- Use of Force; §1983 Action; Qualified Immunity
- Non-Testimonial Hearsay; Privileged Communication
- Vehicle Consent Search
- Cell Phone Records; Search Warrants; Independent Source Doctrine
- Search Warrants; Cell Phone Data
- Additional Resource Links: Legal Update for Law Enforcement (WASPC, John Wasberg) & Prosecutor Caselaw Update (WAPA, Pam Loginsky)

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

Thompson v. Copeland, No. 16-35301 (March 13, 2018)

Ninth Circuit Court of Appeals

Facts:

In December 2011, a driver was stopped for "multiple traffic infractions." When asked for his driver's license, the driver instead provided the deputy with a piece of mail he stated was his name and address. Running the driver revealed he had a suspended license, and was a convicted felon whose most recent conviction was for Unlawful Possession of a Firearm. The deputy decided to arres tthe driver for the suspended license. A local city ordinance mandated that the driver's car be impounded.

The deputy asked the driver to step out of the car, and then patted him down for weapons. Finding none, he asked the driver to sit on his patrol car's bumper and radioed for backup. The deputy then performed a pre-impound inventory of the car. During this inventory, the deputy observed a loaded revolver in an open garbage bag on the rear passenger side of the car. While the deputy conducted the inventory, the driver remained seated on the bumper of the patrol car, watched over by the deputy who had arrived as backup. The driver was 10-15 feet from his car/the gun, and was not handcuffed.

After seeing the gun, the deputy decided to arrest the driver for Unlawful Possession of a Firearm. He signaled to the second deputy, and then drew his gun.

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

Thompson v. Copeland, No. 16-35301 (March 13, 2018)

Ninth Circuit Court of Appeals

Facts, cont.:

What happened next is disputed by the parties. The deputy claims he unholstered his firearm and assumed a low-ready position, with his gun clearly displayed but not pointed directly at the driver. The driver, however, claims that the deputy pointed the gun directly at the driver's head and threatened to kill him if he did not surrender.

The driver complied with the deputy's directive to get on the ground, facedown, so that he could be handcuffed. The driver was charged for being a felon in possession of a firearm. The King County Superior Court dismissed the charge, finding that the initial stop of the driver was pretextual, as was the inventory of the car, and therefore the evidence had been gathered in violation of Art. 1, Sec. 7 of the WA Constitution.

The driver then sued the deputy and his employer, King County, in the Federal Court under 42 U.S.C. § 1983, alleging violations of his Fourth Amendment rights for use of excessive force.

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

Thompson v. Copeland, No. 16-35301 (March 13, 2018)

Ninth Circuit Court of Appeals

Facts and Procedure, cont.:

The Federal Magistrate Judge recommended dismissal with prejudice of the driver's §1983 Civil Rights claim, finding that the degree of force was objectively reasonable given the circumstances – unsecured suspect, felony arrest, relatively close proximity to a weapon, felony criminal history of unlawful possession of a firearm, and being substantially larger than the deputy. The Judge also recommended granting the deputy's motion for summary judgment on the basis of qualified immunity.

The Federal District Court adopted this report, dismissing the driver's claims with prejudice. That dismissal was then appealed to the Ninth Circuit Court of Appeals.

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

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Ninth Circuit Court of Appeals

FINDINGS:

The Ninth Circuit Court of Appeals held that the deputy's actions in arresting the driver (as viewed in the light most favorable to the driver – which would be that the deputy pointed his gun at the defendant's head and threatened to kill him) were not objectively reasonable, and constituted excessive force under the Fourth Amendment.

Despite this finding, the Court upheld dismissal of the driver's §1983 claims ruling that the deputy was entitled to qualified immunity because the constitutionality of his actions was not clearly established at the time of the incident.

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

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Ninth Circuit Court of Appeals

PROCEDURAL NOTE:

This opinion stems from an appeal on a **Summary Judgment Motion**, rather than a trial. In reviewing a Summary Judgment Motion, the court assumes the version of the facts in the light most favorable to the injured, non-moving party.

Here, the State was the moving party. That means for the purpose of deciding this motion, the court will interpret the facts to be as they were stated by the driver.

The primary disputed fact of where the deputy pointed his gun during the encounter is therefore interpreted according to what the driver claimed - at his head – rather than as the State claimed – the low ready position.

If there is a genuine issue of material fact – here the position of the deputy's gun – then the case is not appropriate for summary judgment, and must proceed to trial.

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

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Ninth Circuit Court of Appeals

TRAINING TAKEAWAY – QUALIFIED IMMUNITY:

An officer is not granted qualified immunity if the facts viewed in the light most favorable to the injured party show that the officers' conduct (1) violated a constitutional right that was (2) clearly established at the time of the alleged violation.

To be granted qualified immunity, an officer's actions must be objectively reasonable in light of the facts and circumstances of the contact, considered without regard to the officer's underlying intent or motivation.

While the Court's decision ultimately hinged on the procedural legal ruling (prong 2), the key training takeaways are best focused on the deputy's actions during the contact (prong 1).

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

Thompson v. Copeland, No. 16-35301 (March 13, 2018)

Ninth Circuit Court of Appeals

TRAINING TAKEAWAY – EXCESSIVE USE OF FORCE:

In determining whether a use of force is excessive, the court will assess:

(1) the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted;
(2) the government's interests by weighing the severity of the crime, whether the suspect posed an immediate threat to the safety of the officer or the public, and whether the suspect was resisting arrest or attempting to escape; and
(3) the gravity of the intrusion on the individual against the government's need for that intrusion.

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

Thompson v. Copeland, No. 16-35301 (March 13, 2018)

Ninth Circuit Court of Appeals

TRAINING TAKEAWAY – EXCESSIVE USE OF FORCE:

It is an excessive use of force to point a gun at a suspect's head and threaten to kill him following a traffic stop and felony arrest where the suspect has already been patted down for weapons, is compliantly sitting on the bumper of the deputy's car uncuffed, has given the deputies no reason to believe he would flee or resist arrest, and is being watched over by a second, armed deputy.

While the court didn't deny the potential concern for officer safety under these circumstances, it found that the actions in this particular case were unreasonable because there were other lesser steps that could have been taken by the deputy to mitigate those concerns (such as handcuffing the suspect and securing him in a patrol car).

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

Thompson v. Copeland, No. 16-35301 (March 13, 2018)

Ninth Circuit Court of Appeals

TRAINING TAKEAWAY – QUALIFIED IMMUNITY:

Qualified immunity is lost if an officer's use of force violates a suspect's clearly established constitutional right. Here, although the use of force was deemed unreasonable, the court found that the constitutional right was not clearly established law at the time of the arrest.

Previous cases examining similar excessive use of force claims could be reasonably distinguished, and therefore, other reasonable officers in the same situation may not have known that they were violating a suspect's rights by pointing a gun at them.

The court recognized that at the time of arrest, the deputy was engaged in both a traffic stop and a nighttime felony arrest (both of which have previous caselaw discussing their heightened risk to officer safety), and the situation was "tense, uncertain, and rapidly evolving." Other distinguishing facts of this case from the prior cases include the proximity and relative ease of access to a firearm, the fact that it occurred at night, and there was only one other deputy on scene.

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

Thompson v. Copeland, No. 16-35301 (March 13, 2018)

Ninth Circuit Court of Appeals

PRACTICE TIP – QUALIFIED IMMUNITY:

It is important to document all of the factors that led to your decision to employ force to make an arrest. These details, along with your clear articulation and understanding of the law, will be critically important in determining your eligibility for qualified immunity.

While the Court of Appeals found that the law at the time of the arrest (2011) was not clearly settled as to establish a firm right for a cooperative, apparently unarmed, suspect to not have a gun pointed at his head during a traffic stop and subsequent felony arrest, they have made it clear in this ruling that such an action is an unreasonable use of force.

1 USE OF FORCE; QUALIFIED IMMUNITY

Traffic Infraction; Unlawful Possession of a Firearm

Thompson v. Copeland, No. 16-35301 (March 13, 2018)

Ninth Circuit Court of Appeals

TRAINING REMINDER – VEHICLE INVENTORY VS. SEARCH:

The court will be suspicious of a vehicle inventory that appears to be pretext for an otherwise unjustified, warrantless search.

Think of a vehicle inventory as an administrative action you undertake at the natural end of your initial investigation. In contract, a vehicle search is an investigatory action you undertake during the evidence-gathering phase of an investigation.

If you locate potential evidence of criminal activity within the administrative portion of a contact, you should stop, secure the scene, and apply for a search warrant.

2 NON-TESTIMONIAL HEARSAY; PRIVILEGED COMMUNICATION

ASSAULT 2ND DEGREE; FELONY VIOLATION OF A COURT ORDER; UNLAWFUL IMPRISONMENT

State v. Scanlan, COA No. 74438-1-I (March 12, 2018)

Division I, Court of Appeals

Facts:

An 82-year old man was held captive in his own home, and severely beaten by a live-in female 30 years his junior. During the courses of medical treatment required for his many significant injuries, the victim discussed the assault with 5 medical personnel during his initial treatment at the hospital emergency room, and then with doctors during follow up visits. The victim did not testify in the defendant's trial. His statements were introduced through testimony by the medical personnel about the conversations they had with him during the course of treatment.

Defendant now appeals the admission of those statements at trial, claiming they were testimonial, and therefore violated the Confrontation Clause since the victim was not available to be cross-examined.

2 NON-TESTIMONIAL HEARSAY; PRIVILEGED COMMUNICATION

ASSAULT 2ND DEGREE; FELONY VIOLATION OF A COURT ORDER; UNLAWFUL IMPRISONMENT

State v. Scanlan, COA No. 74438-1-I (March 12, 2018)

Division I, Court of Appeals

TRAINING TAKEAWAY:

Statements made to independent medical personnel during the course of, and for the purpose of, medical treatment are not testimonial, even if the victim does not testify.

The Court applies a 3-prong test to determine if statements made to medical personnel are testimonial:

(1) Were the statements made for diagnosis or treatment purposes,
(2) Did the witness expect the statements to be used at trial, and
(3) Was the doctor employed by or working with the State

A medical records release signed by the victim does not make all subsequent statements testimonial.

3 VEHICLE CONSENT SEARCHES

Unlawful Possession of a Firearm; Possession of a Controlled Substance

State v. Vanhollebeke, No. 94054-1 (March 15, 2018)

WASHINGTON SUPREME COURT

Facts:

Defendant was stopped by an officer for driving the wrong way on a one-way street. Ignoring the officer's instructions to remain in the vehicle, the defendant got out of the truck and stated he had locked himself out and did not have a key. The primary officer called for backup as a result of this unusual behavior. The defendant was then issued a citation for Driving on a Suspended License.

The backing officer observed that there was a pipe with white crystal residue on the dashboard and that the truck's ignition was punched. Suspecting that the truck may be stolen and/or contain drugs, the officers asked the defendant for permission to search the truck. Defendant refused.

Officers then contacted the truck's registered owner. The RO indicated that he had given the defendant permission to use the truck, but was concerned when the officer relayed that they'd observed drug paraphernalia in the truck. The RO gave permission for the officers to search the truck, providing a key, but declining to go to the scene with the officers.

3 VEHICLE CONSENT SEARCHES

Unlawful Possession of a Firearm; Possession of a Controlled Substance

State v. Vanhollebeke, No. 94054-1 (March 15, 2018)

WASHINGTON SUPREME COURT

Facts, cont.:

Upon searching the vehicle, the officers located a gun under the driver's seat. The pipe on the dashboard tested positive for methamphetamine.

At his trial for 1st Degree Unlawful Possession of a Firearm and Possession of a Controlled Substance, Defendant moved to suppress the evidence gained from the warrantless consent search of the truck that was done over his objection, but with permission of the truck's registered owner. The trial court denied Defendant's motion, and the Court of Appeals affirmed that decision.

This opinion of the WA Supreme Court answers whether the driver of a borrowed car can, by expressly objecting to a search, override the consent of another person with "common authority" over the vehicle.

3 VEHICLE CONSENT SEARCHES

Unlawful Possession of a Firearm; Possession of a Controlled Substance

State v. Vanhollebeke, No. 94054-1 (March 15, 2018)

WASHINGTON SUPREME COURT

TRAINING TAKEAWAY:

The driver of a borrowed car may generally refuse consent to search the vehicle he is driving, and the driver's refusal will generally not be overridden by gaining consent to search from the vehicle's owner.

However, where circumstances (such as the punched out ignition and lack of key in this case) raise a significant question about whether the driver has a legitimate claim to a vehicle, officers may get consent from the absent owner of the vehicle to search the vehicle over the driver's objection.

3 VEHICLE CONSENT SEARCHES

Unlawful Possession of a Firearm; Possession of a Controlled Substance

State v. Vanhollebeke, No. 94054-1 (March 15, 2018)

WASHINGTON SUPREME COURT

TRAINING TAKEAWAY:

Driver of borrowed car, no evidence to indicate it is stolen = can object to a search of the vehicle, and the owner of the vehicle cannot override that objection and consent the search.

Driver of borrowed car, evidence indicating it may be stolen or otherwise not rightfully in the possession/use of the driver = driver's objection to a search can be overridden if consent is given by the vehicle's rightful owner.

4 INDEPENDENT SOURCE DOCTRINE; SEARCH WARRANTS; CELL PHONE RECORDS

1st Degree Assault
State v. Betancourth, No. 94208-1 (March 22, 2018)
Washington Supreme Court

Facts:

Defendant was involved in the assault and murder of a man he suspected of having broken his car windows. During the investigation, officers obtained the defendant's cell phone number, and requested a preservation of the records from the cell phone carrier. The detective then applied for and was granted a search warrant by a district court judge to retrieve the defendant's cell phone records from the out of state provider. Verizon, located in New Jersey, then provided the cell phone records to the detective. The cell phone records played a key role in eliciting the defendant's admission to participation in the crime.

Following the defendant's arrest, a superior court judge in the same county held on a separate case that RCW 10.96.060 authorizes only superior courts to issue warrants for the records of out-of-state companies. The prosecutor then asked the detective to apply for a new search warrant using the original content, but now from the superior court. The superior court granted the new warrant.

4 INDEPENDENT SOURCE DOCTRINE; SEARCH WARRANTS; CELL PHONE RECORDS

1st Degree Assault; 2nd Degree Felony Murder
State v. Betancourth, No. 94208-1 (March 22, 2018)
Washington Supreme Court

Facts, cont.:

The new search warrant was sent to Verizon noting that the prosecutor had requested the detective reapply instead to the Superior Court, but it did not request any records or information. Verizon later testified that there were no other records outside of those provided under the initial district court search warrant that they could or would have sent.

Defendant moved to suppress the text messages obtained via the initial, jurisdictionally invalid, district court warrant. The trial court and the Court of Appeals both denied the defendant's motion to suppress the evidence. The trial court found that requiring Verizon to provide the records again would be fruitless, and the deficiency of the original warrant was technical in nature. The Court of Appeals held that under the "invalidity correction corollary" to the Independent Source Doctrine, the records were admissible.

4 INDEPENDENT SOURCE DOCTRINE; SEARCH WARRANTS; CELL PHONE RECORDS

1st Degree Assault; 2nd Degree Felony Murder
State v. Betancourth, No. 94208-1 (March 22, 2018)
Washington Supreme Court

TRAINING TAKEAWAY:

An initial defective warrant may be remedied by a valid second warrant that is not tainted by the deficiency of the first warrant.

Because the officers weren't relying on any information learned from the initially obtained cell phone records in their application for the second warrant, it was untainted by the first invalid warrant. The second warrant was merely correcting the error of applying to the wrong court for the first warrant.

The evidence obtained pursuant to the initial defective warrant doesn't have to be destroyed and a new set requested following the issuance of a second, valid warrant.

5 SEARCH WARRANTS; CELL PHONE RECORDS

SEXUAL EXPLOITATION OF A MINOR

State v. McKee, COA No. 73947-6-I (March 26, 2018)

DIV. I, COURT OF APPEALS

Facts:

Defendant was a 40 year old drug dealer engaging in a sexual relationship with a drug-addicted 16 year old. Some of the sexual activity was captured in video and photographs on the defendant's cell phone. Upon learning that her daughter had left with the defendant, the girl's mother, long time father figure, and brother went to the defendant's house to retrieve the girl. When the defendant answered the door, the brother and "father" assaulted the defendant and took his cell phone.

The brother went through the defendant's phone and found the videos and photos of his sister engaging in sexual activity with the defendant. He gave the phone to their mother. The mother contacted police and described what she'd seen on the defendant's phone. She left the phone with the detective.

5 SEARCH WARRANTS; CELL PHONE RECORDS

SEXUAL EXPLOITATION OF A MINOR
State v. McKee, COA No. 73947-6-I (March 26, 2018)
DIV. I, COURT OF APPEALS

Facts, cont.:

The detective applied for a search warrant for the defendant's cell phone seeking evidence of Sexual Exploitation of a Minor and Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct. The affidavit relayed the facts given by the victim's mother, identified the make and model of the phone, and stated that it was currently in police possession having been provided to them by the mother.

The affidavit requested to search the cell phone for: "images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/Internet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes."

The affidavit went on to describe the process by which the compatible phone content would be copied using forensic hardware and software to retrieve the requested evidence. It stated it would be possible to perform a physical dump on some supported phones obtaining all of the memory of the phone for forensic examination, and if not supported, that the phone could be examined manually.

5 SEARCH WARRANTS; CELL PHONE RECORDS

SEXUAL EXPLOITATION OF A MINOR

State v. McKee, COA No. 73947-6-I (March 26, 2018)

DIV. I, COURT OF APPEALS

LEGAL ISSUE:

The defendant moved to suppress the evidence from the cell phone, claiming the search warrant violated the 4th Amendment requirement to describe with particularity the "things to be seized," and allowed the police to search an "overbroad list of items" unrelated to the identified crimes under investigation.

The trial court declined the motion to suppress finding that the affidavit's reference to the criminal statutes under investigation provided the necessary particularity, and that the warrant was not overbroad. The defendant now appeals to the Court of Appeals.

5 SEARCH WARRANTS; CELL PHONE RECORDS

SEXUAL EXPLOITATION OF A MINOR
State v. McKee, COA No. 73947-6-I (March 26, 2018)
DIV. I, COURT OF APPEALS

The 4th Amendment Right Against Unreasonable Search and Seizure Requires A Warrant Have Specificity, Which Is Made of 2 Parts:

(1) PARTICULARITY

The warrant must clearly state what is sought, so that discretion is removed from the officer executing the warrant

(2) BREADTH

The scope of the warrant must be limited by the probable cause on which the warrant is based

5 SEARCH WARRANTS; CELL PHONE RECORDS

SEXUAL EXPLOITATION OF A MINOR

State v. McKee, COA No. 73947-6-I (March 26, 2018)

DIV. I, COURT OF APPEALS

TRAINING TAKEAWAY:

A general cell phone search warrant for all phone data that authorized a "physical dump" of the data to be examined, without reference to limiting the search to evidence related to sex crimes against minors, violates the particularity requirement of the 4th Amendment.

The affidavit and search warrant must be specific and detailed enough to provide objective guidance to the officer executing the warrant so that they do not need to rely upon their own discretion to decide what should or should not be seized.

5 SEARCH WARRANTS; CELL PHONE RECORDS

SEXUAL EXPLOITATION OF A MINOR

State v. McKee, COA No. 73947-6-I (March 26, 2018)

DIV. I, COURT OF APPEALS

TRAINING TAKEAWAY:

A mere citation in the warrant to the relevant criminal statute's title is generally not specific enough to satisfy the particularity requirement.

Officers should precisely define the specific scope of the search, and not merely rely on incorporating the language in the affidavit by reference.

Here, the officers had very specific information from the victim's mother as to what evidence might be on the defendant's cell phone that supported probable cause for his arrest for the crimes involving his sexual relationship and filming of the teenage victim. Had that information been used to tailor the search to images and data relating to the crime of Sexual Exploitation of a Minor and Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct, that may have satisfied the court that legally possessed data/evidence would not be unjustifiably collected in the process.

5 SEARCH WARRANTS; CELL PHONE RECORDS

SEXUAL EXPLOITATION OF A MINOR
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DIV. I, COURT OF APPEALS

PRACTICE TIP:

As technology advances, the courts are increasingly aware that cell phones are now the equivalent of minicomputers that contain many intimate details of our lives, and will examine any invasion into that privacy with a critical eye.

It is important that you limit the scope of a proposed cell phone search to narrowly drawn, objective categories of evidence. Incorporate the facts supporting probable cause for the underlying crime to specifically define what the evidence is to be searched and seized.

The aim should be to remove discretion from the executing officer by using precise language in the affidavit and search warrant that makes it clear what evidence falls within the scope of the warrant authorization.

FURTHER READING

For further cases of interest to law enforcement, please see the comprehensive monthly Legal Update for Law Enforcement prepared by Attorney John Wasberg (former longtime editor of the original LED), which is published on the WASPC Law Enforcement Resources webpage:

http://www.waspc.org/legal-update-for-washington-law-enforcement

The Washington Prosecutor's Association publishes a comprehensive weekly summary of a wide range of caselaw geared toward the interests of Washington State Prosecutors. This resource is authored by WAPA Staff Attorney Pam Loginsky.

http://70.89.120.146/wapa/CaseLaw.html

Questions?

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