Law Enforcement Digest

December 2015

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

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WASHINGTON STATE SUPREME COURT

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SUFFICIENCY OF EVIDENCE: ORDINARY WIRE CUTTERS ARE NOT A DEVICE DESIGNED TO OVERCOME SECURITY SYSTEMS WITHIN THE MEANING OF RCW 9A.56.360(1)(b). State v. Larson, __ Wn. 2d. __, __ P.3d __, 2015 WL 9460073 (December 24, 2015).

Zachary Larson used wire cutters to cut off a security tag from a pair of shoes in a store. Since Larson used wire cutters to cut off the security tag, he was then charged with third degree retail theft with extenuating circumstances under RCW 9A.56.360(1)(b). Under that statute, a person who uses a "device designed to overcome security systems" is charged with a class C felony rather than the gross misdemeanor of third degree theft. Both the trial court and Court of Appeals, Division One, found that the wire cutters were "a device designed to overcome security systems" within the meaning of the statute. The Washington State Supreme Court disagreed.

The statute at issue, RCW 9A.56.360(1)(b) reads:

> (1) A person commits retail theft with extenuating circumstances if he or she commits theft of property from a mercantile establishment with one of the following extenuating circumstances:
>
> . . .
>
> (b) The person was, at the time of the theft, in possession of an item, article, implement, or *device used to overcome security systems* including, but not limited to, lined bags or tag removers.

The Washington State Supreme Court found that ordinary wire cutters are not a "device used to overcome security systems." First, under the statute's plain meaning, ordinary wire cutters are not specially designed to overcome a security system. Second, the illustrative examples of lined bags or tag removers shows that the Legislature "intended to limit the scope of the statute." Specifically, "[l]ined bags and tag removers are highly specialized tools with little to no utility outside the commission of retail theft." Consequently, the Court held "that an item, article, implement or device is 'designed to overcome security systems' within the scope of RCW 9A.56.360(1)(b) if it was created – whether by a manufacturer or a defendant – with the specialized purpose of overcoming security systems, lawfully or otherwise."

As a result, there was insufficient evidence to convict Larson of third degree retail theft with extenuating circumstances and the conviction is reversed.

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NINTH CIRCUIT COURT OF APPEALS

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CIVIL RIGHTS LAWSUIT: ORGANIZERS OF MUSIC EVENT WERE IN "POSSESSION" OF THE VENUE AND HAD STANDING TO CHALLENGE OFFICERS' WARRANTLESS ENTRY; BUT, ATTENDEES OF THE EVENT HAD NO REASONABLE EXPECTATION OF PRIVACY AND LACKED STANDING TO CHALLENGE THE WARRANTLESS ENTRY. Lyall v. City of Los Angeles, __ F.3d __, 2015 WL 7873413 (December 4, 2015).

Javier Cortez and Elizabeth Lopez organized a music event to raise money for an anarchist book fair. They received permission from Josh Haglund, a friend, to use a warehouse (that he was subletting) to host the event. Cortez and Lopez advertised the event through social media and email lists. About 100 people attended the event on a Sunday evening.

That night, police received a report of suspects "wearing rocker type clothing" stealing beer from a convenience store. The report included a description and license plate number of the suspects' truck. The responding officers found the "truck parked around the corner from the warehouse." The officers thought it was unusual for a party to be held on Sunday night. The officers also "observed people wearing what they deemed to be rocker type clothing going inside." The officers "decided to investigate the warehouse."

The officers encountered Cortez at the warehouse entrance. "Cortez told the officers that the event was a private party and that they could not come in unless they had a search warrant" and he backed into the warehouse. The officers observed that Cortez matched the "general description of the theft suspects and ordered him to stop." Cortez ran into the warehouse and the officers followed. The officers requested assistance. Ultimately, the event organizers, a filmmaker who paid to use the warehouse as a film set, and other attendees were arrested.

The Plaintiffs (who were arrested at the event) filed a 42 U.S.C. § 1983 lawsuit and alleged that the officers' entry into the warehouse was a warrantless search. The federal district court granted summary judgment to the defendant officers. The federal district court reasoned that the plaintiffs did not have a reasonable expectation of privacy in the warehouse.

The Ninth Circuit Court of Appeals found that the event organizers had standing to challenge the search, but the attendees did not have standing to challenge the search. The Ninth Circuit placed the plaintiffs into three categories: "(1) the five plaintiffs who were merely attending the event, (2) [the filmmaker] who paid Haglund for the right to work on film sets in the warehouse, and (3) Cortez and Lopez, who organized the event and received permission from Haglund to use the warehouse."

A Fourth Amendment violation can be based on an officer trespassing on the property (i.e., physically occupying private property to obtain information), or invading a person's reasonable expectation of privacy. In either case, "[t]o be shielded by the Fourth Amendment, a person needs some joint control and supervision of the place searched, not merely permission to be there."

For the attendees, "[t]he officers' warrantless entry into the warehouse did not infringe any protected Fourth Amendment interest of [those] merely attending the event[.]" The attendees could not claim a violation of the Fourth Amendment under a trespass theory because they did "not assert[] any ownership interests in the places searched." Additionally, the attendees did not

have a reasonable expectation of privacy because mere presence in a place being searched is insufficient to have standing to challenge the search under the Fourth Amendment. As such, the attendees could not assert a Section 1983 claim against the officers for the warrantless search of the warehouse.

Likewise, the filmmaker also lacked standing to challenge the warrantless search of the warehouse. Specifically, on the night of the search, the filmmaker "was not in possession of the warehouse [because] he had moved his film sets out of the way to allow space to be used for the event, and he was there solely as an attendee."

However, the event organizers did have standing to challenge the warrantless search under the Fourth Amendment. The event organizers "were in charge of the property that night. The organizers had possession of the warehouse, the right to control it, and the right to bring an action in trespass against the intruders." Accordingly, the organizers' Section 1983 lawsuit could proceed against the officers.

LED EDITORIAL NOTE: **Under the Fourth Amendment, there are two analyses to determine whether an officer's search violated constitutional rights: (1) trespass analysis; and (2) reasonable expectation of privacy analysis. Recent U.S. Supreme Court cases applying a trespass analysis include *U.S. v. Jones*, 132 S.Ct 945 (2012) (officers placing a GPS tracking device on suspect's own vehicle was a trespass that violated the Fourth Amendment), and *Florida v. Jardines*, 133 S.Ct 1409 (2013) (officers trespassed on home's curtilage with a narcotics canine and violated the Fourth Amendment).**

However, neither the trespass nor reasonable expectation of privacy analysis is used by Washington courts to evaluate a violation of the state constitution. Under Article I, section 7 of the Washington state constitution, Washington courts evaluate whether an officer disturbed a person's private affairs without authority of law.

***MIRANDA*: 17-YEAR-OLD, IN-CUSTODY SUSPECT'S STATEMENT THAT HIS STEP-FATHER HAD RETAINED A LAWYER FOR HIM AND REQUEST FOR OFFICER TO CALL HIS STEP- FATHER AND HAVE THE LAWYER MEET HIM AT THE POLICE STATION WAS UNAMBIGUOUS INVOCATION OF RIGHT TO COUNSEL AND OFFICER SHOULD HAVE ENDED INTERROGATION.** Mays v. Clark, __ F.3d __, 2015 WL 8117079 (December 8, 2015).

A man and his girlfriend were sitting in a car at a fast-food drive-through to order food. The man was shot several times by a person wearing either an orange jacket or a grey jacket.

Darious Antoine Mays, 17-years old, was arrested for this crime and taken into custody for questioning. At the police station, the Detective read Mays *Miranda* rights. Mays asked to take a polygraph test. The detective doubted that Mays could pass a polygraph test. Mays then stated:

> MAYS: Look. Can I – can I call my dad so I can have a lawyer come down 'cause I'm – I'm telling you, I'm –
>
> DETECTIVE: Call who?
>
> MAYS: My – my step-dad 'cause I'm – I'm going to tell you I'm going to pass that [polygraph] test a hundred percent.

DETECTIVE: Okay. Well, we don't need your step-dad right now.

MAYS: I know. He got my lawyer.

DETECTIVE: Who's your lawyer?

MAYS: My – my step-dad got a lawyer for me.

DETECTIVE: Okay. So what do you want to do with him?

MAYS: I'm going to – can – can you call him and have my lawyer come down here?

Mays continued to insist on taking a polygraph test. The detective left the room and when he returned stated:

> DETECTIVE: Looks like I may have found somebody to [administer a polygraph test]. Okay? Give you the polygraph. . . . But I just want to clarify and make sure that I'm not violating your *Miranda* Right or anything like that. Um, do you want to do the polygraph and talk to the person? Answer questions? Is that what you want to do?
>
> MAYS: Yes, sir.
>
> DETECITVE: Okay. Well, you – you had mentioned something about your step-dad having an attorney for you and so I said I don't want to violate your *Miranda* Rights and do all that. But it seems like you're being cooperative, so I just want [to] get a clear idea of where you're coming from.

Mays agreed to take a polygraph test. But, there was no polygraph examiner available to administer a polygraph. So, another officer administered a "mock polygraph" test and told Mays that he failed the test. Mays then confessed to the shooting.

Mays was charged with murder. Before trial, Mays moved to suppress his confession and argued that the detective violated *Miranda* by continuing with questioning after Mays asked the detective to call his step-dad who had a lawyer for him. The trial court denied the motion and the California Court of Appeals affirmed. Mays then sought habeas corpus relief in federal court. The federal district court found that the California Court of Appeals unreasonably applied *Miranda* by not finding a violation, but the error was harmless. The Ninth Circuit Court of Appeals agreed.

Miranda requires officers to inform in-custody suspects that they have a right to have a lawyer present during the interrogation. A suspect must "voluntarily, knowingly, and intelligently" waive his right to have a lawyer present during the interrogation. Even if a suspect waives his right to counsel, the police must stop the interrogation when the suspect unambiguously and unequivocally requests lawyer. "If the police do not cease questioning, the suspect's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel."

In this case, the Ninth Circuit found that this statement was an unambiguous and unequivocal request for a lawyer: "My – my step-dad got a lawyer for me . . . I'm going to – can – can you call him and have my lawyer come down here?" "A reasonable officer would have understood that Mays's father had retained a lawyer, and Mays wanted the lawyer to be sent to the

interrogation to represent him." Since the detective did not stop the interrogation, and instead arranged for a mock polygraph examination, Mays's *Miranda* rights were violated.

While the California Court of Appeals erred in finding no *Miranda* violation, the Ninth Circuit found the error harmless. Specifically, another witness identified Mays as the shooter. Consequently, the Ninth Circuit did not grant habeas relief and the conviction stands.

***MIRANDA*: SUSPECT'S RESPONSE OF "NO" TO POST-*MIRANDA* QUESTION OF WHETHER HE WANTED TO TALK TO THE DETECTIVE WAS UNAMBIGUOUS AND UNEQUIVOCAL REQUEST TO REMAIN SILENT.** Garcia v. Long, 808 F.3d 771, (December 21, 2015).

A sixteen-year-old girl told Child Protective Services that her step-grandfather, Francisco Alaniz Garcia, had molested and sexually assaulted her. Based on the subsequent report by Child Protective Services, a detective took Garcia to the police station for questioning.

The interrogation was tape-recorded. Before questioning Garcia about the allegations, the detective read *Miranda* warnings:

> Q: Okay, you have the right to remain silent. Anything you say may be used against you in court, okay. You have the right to an attorney before and during any questioning, and if you cannot afford to hire an attorney, one will be appointed for – to you free of charge.
>
> A: Okay.
>
> Q: Okay? Do you understand that?
>
> A: Right.
>
> Q: **Okay, now having that [i.e., your *Miranda* rights] in mind, do you wish to talk to me?**
>
> A: **No.**

However, the detectives continued to question Garcia. During the questioning, Garcia ultimately admitted to three incidents and then wrote a letter of apology to the victim.

The prosecution charged Garcia with forcible rape of a minor and other offenses. At trial, the defense moved to suppress Garcia's taped confession and argued that the detectives violated his *Miranda* rights by continuing with the interrogation after he replied to the detective's question of wanting to talk to them with "no." The trial court denied the motion. During closing argument, the prosecutor heavily relied on the taped confession. The jury found Garcia guilty. The California Court of Appeals affirmed and found no *Miranda* violation. Garcia sought habeas corpus relief in federal court. The federal district court granted the relief by finding that the California courts erred in finding no *Miranda* violation and that the error was not harmless. The Ninth Circuit Court of Appeals agreed.

Miranda requires officers to inform in-custody suspects that they have a right to remain silent. After being read these warnings, if a suspect wants to stop the questioning, the officers must "scrupulously honor" that request. "If the [suspect] indicates *in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." "[T]he

suspect's right to cut off police questioning is triggered only when the suspect *unambiguously and unequivocally* invokes it, by invoking either the right to remain silent or the right to counsel."

In this case, Garcia unequivocally and unambiguously invoked his right to remain silent by answering "no" to this question by the detective: "now, having [your *Miranda* rights] in mind, do you wish to talk to me?" The Ninth Circuit noted that Garcia did not use equivocal language like "maybe," "might", or "I think." As such, the detectives should have ended the interrogation. Accordingly, the California courts erred by finding no *Miranda* violation.

The Ninth Circuit also found that the error was not harmless. Garcia's confession was the only evidence that corroborated the victim's testimony, and was heavily relied on by the prosecutor during closing argument. Consequently, the Ninth Circuit directed the State to release Garcia or grant a new trial.

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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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