Law Enforcement Digest – February 2023

COVERING CASES PUBLISHED IN FEBRUARY 2023

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Cases in the Law Enforcement Digest are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges. Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- **Washington Courts of Appeals**. The Washington Court of Appeals is the intermediate level appellate court for the state of Washington. The court is divided into three divisions. Division I is based in Seattle, Division II is based in Tacoma, and Division III is based in Spokane.
- **Washington State Supreme Court**. The Washington Supreme Court is the highest court in the judiciary of the U.S. state of Washington. The court is composed of a chief justice and eight justices. Members of the court are elected to six-year terms.
- **Federal Ninth Circuit Court of Appeals.** Headquartered in San Francisco, California, the United States Court of Appeals for the Ninth Circuit (in case citations, 9th Cir.) is a federal court of appeals that has appellate jurisdiction over the district courts in the western states, including Washington, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada and Oregon.
- **United States Supreme Court:** The Supreme Court of the United States is the highest court in the federal judiciary of the United States of America.

TOPIC INDEX

CASES

WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** - WA Association of Prosecuting Attorneys [2018-2021] | [2022]

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- Please contact your training officer if you want this training assigned to you.
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- Questions about this training? Linda J. Hiemer, JD| Program Administration Manager Legal Education Consultant/Trainer | lhiemer@cjtc.wa.gov

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

United States v. Barrogo

No. 21-10228

United States Court of Appeals for the Ninth Circuit

February 2, 2023

TOPICS: False Pretenses, authentication features/access devices

Factual Background

Marites Barrogo was the owner and operator of Laguna Best Restaurant and Catering in Harmon, Guam. Between 2015 and 2020, Barrogo purchased Supplemental Nutrition Assistance Program benefits (federal food stamps program) from various individuals at a substantial discount and used the benefits to buy bulk food items for her restaurant.

Between 2015 and 2018, Barrogo would pay a SNAP beneficiary $400 per month. In exchange, the beneficiary gave Barrogo their EBT card and their Personal Identification Number ("PIN"), which could be used to purchase around $600 in food. During this time, Barrogo is believed to have had similar arrangements with five different individuals.

In June of 2018, the Guam Department of Public Health and Social Services (DPHSS) began investigating Barrogo for benefits theft. Barrogo admitted to paying SNAP beneficiaries cash in exchange for their benefits and provided DPHSS with a signed statement detailing her transactions with SNAP beneficiaries.

After learning of the investigation, Barrogo continued to traffic SNAP benefits using a different scheme. Rather than taking the EBT cards, Barrogo would give shopping lists to SNAP beneficiaries who would purchase food for the restaurant in exchange for cash.

An informant provided DPHSS with photos of SNAP beneficiaries unloading food items at Barrogo's restaurant. DPHSS later discovered video footage of the SNAP beneficiaries buying the same bulk food each month and linked these purchases to Barrogo. DPHSS concluded that between 2018 and 2020, SNAP beneficiaries provided a total of $21,879.20 in SNAP benefits to Barrogo.

Barrogo was indicted on two counts of the unauthorized use of SNAP benefits and one count of conspiracy to use, transfer, acquire, alter, or possess SNAP benefits without authorization.

Barrogo pled guilty to the conspiracy count and stipulated to a two-level authentication feature sentencing enhancement based on her use of EBT cards and PINs to purchase food. Barrogo was sentenced to ten months' imprisonment and three years of supervised release.

Barrogo appealed the two-level authentication feature enhancement under the federal Sentencing Guidelines.

Analysis of the Court

The Ninth Circuit (the Court) considered whether the district court correctly applied the federal two-level authentication feature enhancement based on the defendant's use of SNAP beneficiaries' EBT cards and PINs.

The Court observed that an "authentication feature" is defined as a feature used by the issuing authority on an identification document or means of identification to determine if the document is counterfeit or altered. **Authentication features can be any hologram, watermark, certification, symbol, *code*, image, *sequence of numbers* or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or *means of identification* to determine if the document is counterfeit, altered, or otherwise falsified.** 18 U.S.C. 1028(d)(1).

The term "means of identification" includes **any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual.** 18 U.S.C. 1028(d)(7) (this federal statute includes many subsections that expand on this definition, as does RCW 9.35.005(3) where "means of identification" is defined under Washington law). This includes typical means of identification such as social security and drivers' license numbers, but the Court pointed out that it also includes access devices such as EBT cards.

An "access device" is defined as **any card… account number… or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds** (other than a transfer originated solely by paper instrument). 18 U.S.C. 1029(e)(1) (note that "access device" is defined similarly in RCW 9A.56.010(1)).

The Court concluded that a PIN qualifies as an **"authentication feature" because it is a code or sequence of numbers used by the issuing authority on a means of identification, such as an EBT card or account number**. The requirement that the authentication feature be "used by" the issuing authority as a means of identification does not require a physical presence of the feature on the card. The

definition of "means of identification" encompasses both physical and non-physical elements.

The Court noted that in a previous case the authentication feature enhancement was applied to forged notary seals and signatures on deeds, even though the seals were not physically on the deeds. This supported the interpretation that the authentication feature can be associated with a means of identification without a physical connection.

Barrogo argued that the purpose of an authentication feature is to determine if the document is counterfeit, altered, or otherwise falsified. But the Court disagreed. The argument that the EBT cards were genuine does not exempt a defendant from the authentication feature enhancement. The purpose of a PIN is not only to prevent unauthorized use but also to verify the authenticity of the document. Falsely using a PIN and EBT card to access benefits qualifies as falsifying the means of identification and falls within the scope of the authentication feature enhancement.

The court held that the PIN used by Barrogo on the EBT card or account number qualified as an authentication feature, and the district court correctly applied the two-level enhancement.

The Ninth Circuit affirmed the two-level identification feature enhancement.

Training Takeaway

Relying on the plain meaning of "document," the Court determined that a debit-type Electronic Benefits Transfer (EBT) card for a participant in the Supplemental Nutrition Assistance Program (SNAP) is a document, within the meaning of the statute criminalizing fraud and related activity in connection with authentication features.

In Washington State, the fraud statute defines a written instrument as "any paper, *document*, or other instrument containing written or printed matter or its equivalent; or *any access device*, token, stamp seal, badge, trademark, or other evidence or symbol of value, right privilege, or identification. RCW 9A.60.010(7). While this case is not binding on how Washington courts define state crimes, it is possible that this decision could offer guidance for the challenges law enforcement will face as it encounters and attempts to classify new and innovative ways of committing digital crimes using access devices, PINs, and "written instruments" to electronically steal funds.

An authentication feature can be a hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either

individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified. A means of identification can be physical or non-physical, and need not be physically connected to the document it authenticates.

In this case, Barrogo used a PIN as a means of authentication to authenticate EBT cards (the document). As this behavior fell squarely within the two-level authentication feature enhancement, her sentencing enhancement was affirmed.

EXTERNAL LINK: View the Court Document

In Re the Matter of the Personal Restraint of Glant

No. 56383-5 II

Court of Appeals of Washington, Division 2

February 7, 2023

TOPICS: Attempt, double jeopardy

Factual Background

The Washington State Patrol's Missing and Exploited Children Task Force (MECTF) conducts undercover stings, known as Net Nanny operations. In 2016, as part of a Net Nanny operation, a detective made a Craigslist post titled, "Family Play Time!?!? – w4m." The post advertised, "Mommy/daughter, Daddy/daughter, Daddy/son, Mommy/son... you get the drift. If you know what I'm talking about hit me up [and] we'll chat more about what I have to offer you."

Defendant Glant responded to the post and engaged in conversation with the MECTF detective posing as the mother of a teenage boy and two younger girls. Glant asked, "what are your rules?" Glant also indicated that he was interested in engaging the poster's fictional daughters in oral sex. Glant asked about anal penetration with fingers, to which the fictitious mother responded, "If you promise to bring lube and put lube on your finger, yes you can put one to two fingers in their bum." After exchanging photos with the fictitious poster, Glant agreed to meet up with the poster the following afternoon.

Glant exchanged messages with the undercover officer for two days before driving from Mercer Island to Tumwater to meet the children. He was arrested after entering the apartment where he thought the children would be. He had a bottle of personal lubricant on him when he was arrested.

Glant was charged with two counts of attempted first-degree rape of a child. He waived his right to a jury trial and agreed to a bench trial on stipulated facts. The trial court found that the elements of attempted first-degree rape of a child were met based on the acts Glant described in text messages with the fictitious mother.

The trial court found that Glant "took at least one 'substantial step' toward committing rape of a child when he drove from Mercer Island to Thurston County and had in his pocket lubricant, which was needed to engage in sexual activity with the daughters, as referenced in the text message." Glant was found guilty of both counts of attempted first-degree rape of a child.

Glant filed a personal restraint petition.

Analysis of the Court

For law enforcement purposes, we will focus on the issues of attempt and double jeopardy as presented in this case.

The defendant argued that he was convicted twice for a single unit of prosecution, violating his double jeopardy protections. Essentially, his contention was that his single and unified course of conduct in his attempt to have sex with his fictional victims was only one attempt for which he could not then be charged for two separate counts of Attempted Rape of a Child. The Court of Appeals for Division 2 (the Court) disagreed.

The Court noted that, **a person is guilty of an attempt to commit a crime if, with intent to commit a specific crime**, they do any act that is **a substantial step toward the commission of that crime**. RCW 9A.28.020(1). **Mere preparation to commit a crime is not an attempt.** The Court observed that **a substantial step requires conduct that is strongly corroborative of the defendant's criminal purpose.**

It also observed that when the Legislature defines the scope of a criminal act (what is known as the unit of prosecution), **double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime**. However, where there are two separate attempts involving the same victim and the same crime, the unit of prosecution was **the act necessary to support the inchoate (or incomplete) offense, not the underlying crime**. Additionally, in a previous case, the Appellate Court for Division 1 held that **where a substantial step was taken toward engaging in sexual contact with two separate (albeit fictional) children, double jeopardy did not bar the defendant's convictions for two counts of attempted child molestation.**

The prosecution argued that this case was similar to *State v. Canter*. Canter was also a Net Nanny case with two fictitious victims. The Court of Appeals for Division One concluded that the legislature intended for the child molestation statute to protect each child from sexual contact, holding that the facts established two units of prosecution because Canter took substantial steps to have sexual contact with two different (fictional) children.

In this case, Glant had the intent to commit two specific crimes. Glant was told that the fictitious mother had a son and two daughters, and he expressed interest in sexual contact with the two daughters. Moreover, the Court reasoned that he **took at least one substantial step when he drove from Mercer Island to Thurston County and had in his pocket a bottle of lubricant, which was needed to engage in sexual activity with the *two* daughters.**

Because Glant took a substantial step toward engaging in the first-degree rape of a child, his convictions for the attempted first-degree rape of a child was upheld. And, because Glant intended two potential victims, his argument that those convictions violated his protections against double jeopardy was denied.

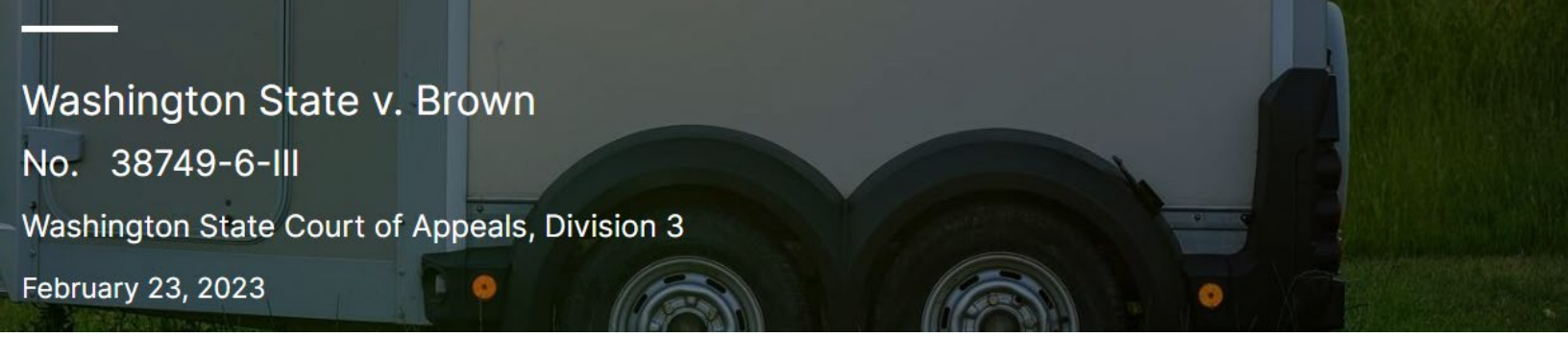
Training Takeaway

The Court affirmed that a person is guilty of an attempt to commit a crime if, with the intent to commit a specific crime, they do any act that is a **substantial step** toward the commission of that crime. However, the mere preparation to commit a crime is not an attempt. A substantial step must be conduct that strongly corroborates the defendant's criminal purpose.

In this case, the defendant drove from Mercer Island to Thurston County with a bottle of lubricant in his pocket. This was a substantial step that was strongly corroborative of his criminal purpose because the trip and possession of the lube were necessary for the completion of the criminal act.

Additionally, when there is more than one victim of an attempt, there are more than one attempts, even if the substantial step is the same for both victims. Here, Glant attempted to commit two crimes, one on each of the two fictional daughters. Therefore, there were two attempts. Double jeopardy did not apply.

EXTERNAL LINK: View the Court Document



Washington State v. Brown

No. 38749-6-III

Washington State Court of Appeals, Division 3

February 23, 2023

TOPICS: Burglary, trespass

Factual Background

On the morning of March 23, 2020, defendant David Brown sat inside a truck he owned. The truck was parked inside a tennis court surrounded by a 12 foot fence. The tennis court was often used by an auto dealership to store vehicles. Hitched to the truck was a trailer, owned by a separate dealership.

A tow truck driver arrived at the dealership to help move the dealership's vehicles to a new location. The tow truck driver saw Brown sitting in his truck hitched to a trailer that the tow truck driver knew belonged to a separate dealership. The tow truck driver blocked Brown in by parking his tow truck outside the gate to the fenced area and called the owner of the trailer.

Brown insisted that he owned the trailer and implored the tow truck driver to move out of the way so that he could leave. Brown even threatened to ram the tow truck. Several minutes later, the owner of the trailer arrived, as did an auto detailer that worked for the dealership that used the tennis court to store vehicles. The detailer noticed that a different lock was on the gate than the one used by the dealership.

About five minutes later, the manager of the dealership arrived and asked Brown to explain his presence. The manager also insisted that Brown unlock the gate. Brown eventually unlocked the gate, but still insisted that he owned the trailer. The manager demanded Brown unhook the trailer, and eventually Brown conceded that he did not own the trailer and unhitched it from his truck.

A Spokane Police Department detective, James Stewart, arrived at the scene. Upon arrival, Stewart noticed red paint on Brown's hands. The detective also noticed that the trailer had recently been spray painted red. The remote control for the trailer's winch was found in Brown's truck, despite it having been locked in a box inside the trailer. The detective also found a crowbar in Brown's truck.

Brown was charged with second-degree burglary. At trial, Brown argued that he had committed second-degree trespass, not second-degree burglary, but did not

propose any jury instructions permitting the jury to convict Brown of a lesser included offense.

The jury found Brown guilty of second-degree burglary.

Brown appealed.

Analysis of the Court

On appeal, Brown argued ineffective counsel because his attorney had not requested a jury instruction allowing the jury to convict him of second-degree trespass as a lesser included offense of the charged crime of second-degree burglary. However, the Court of Appeals (the Court) noted that Brown's contention assumed that second-degree trespass constitutes a lesser included offense of second-degree burglary. The Court concluded that this was not the case.

The Court noted that, although common law recognizes the right to a lesser included offense jury instruction, it must first answer two questions to determine whether the lesser included offense instruction is warranted. First, **a court must determine whether each of the lesser included offense elements are also necessary to convict on the greater, charged offense.** Second, **it must determine whether the evidence presented in the case supports an inference that only the lesser offense was committed to the exclusion of the greater, charged offense.**

Here, the Court compared the elements of second-degree burglary and second-degree trespass.

To be found guilty of second-degree burglary, a defendant must (1) enter or remain unlawfully in a building other than a vehicle or dwelling, (2) with the intent to commit a crime against a person or property therein. (It is worth noting that a "building" includes any fenced area, see RCW 9A.04.110(5)).

For a defendant to be found guilty of second-degree trespass, they must, (1) enter or remain unlawfully on the premises of another, and (2) knowingly do so.

The Court observed that the elements of second-degree trespass do not consist solely of the elements necessary for a conviction of second-degree burglary. To be guilty of second-degree trespass, the defendant must enter the building knowingly or with knowledge that the entry is unlawful. The defendant does not need to knowingly enter the premises or know that the entry is unlawful in order to be guilty of second-degree burglary. They must only enter a building with the intent to

commit a crime. To illustrate the difference, the Court conceived of a person who enters a building lawfully and only later develops the intent to commit a crime. They would be guilty of second-degree burglary, but not of second-degree trespass.

Because second-degree trespass is not a lesser included offense of second-degree burglary, the Court of Appeals affirmed Brown's conviction for second-degree burglary.

Training Takeaway

A person is guilty of burglary in the second-degree if, with intent to commit a crime against a person or property therein, they enter or remain unlawfully in a building other than a vehicle or dwelling.

A person is guilty of criminal trespass in the second-degree if they knowingly enter or remain unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first-degree.

In this case, the defendant wanted the court to instruct the jury on second-degree trespass as a lesser included offense. However, because the defendant was charged with second-degree burglary, and the elements of second-degree trespass are not necessary for the conviction of second-degree burglary, the defendant was not entitled to the instruction.

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – February 2023

TOPICS

1. False pretenses
2. Authentication features/access devices
3. Burglary
4. Trespass
5. Attempt
6. Double Jeopardy

CASES & REFERENCES

1. United States v. Barrogo 21-10228 (February 2, 2023)
    - **a.** 18 U.S.C. 1028
    - **b.** 18 U.S.C. 1029
    - **c.** RCW 9A.56.010
    - **d.** RCW 9A.60.010
    - **e.** RCW 9.35.005
2. In Re the Matter of the Personal Restraint of Glant 56383-5 II (February 7, 2023)
    - a. RCW 9A.28.020
    - b. *State v. Canter*
3. Washington State v. Brown 38749-6-III (February 23, 2023)
    - a. RCW 9A.04.110

WA Legal Updates

For further reading, the following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** by WA Association of Prosecuting Attorneys [2018-2021] | [2022-present]