Law Enforcement Digest

July 2017

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

****

HONOR ROLL

752 Basic Law Enforcement Academy – April 18, 2017 through August 23, 2017

President:	Officer Matthew Saul, Seattle PD
Best Overall:	Officer Michael Ballard, Wenatchee PD
Best Academic:	Officer Michael Ballard, Wenatchee PD
Best Practical Skills:	Officer Michael Ballard, Wenatchee PD
Patrol Partner:	Officer Patrick O'Keefe, Renton PD
Tac Officer:	Officer Karim Boukabou, WSP
	Officer Sabrina Kessler, Redmond PD

July 2017 LED TABLE OF CONTENTS

****

NINTH CIRCUIT COURT OF APPEALS

****

CIVIL RIGHTS LAWSUIT: IMPOUNDING A VEHICLE FOR 30 DAYS IS A SEIZURE AND IMPLICATES THE FOURTH AMENDMENT. Brewster v. Beck, 859 F.3d 1194 (June 21, 2017).

FACTS (excerpted from the opinion):

Lamya Brewster loaned her vehicle to Yonnie Percy, her brother-in-law. Percy was stopped by Los Angeles Police Department (LAPD) officers who learned that Percy's driver's license was suspended. The officers then seized the vehicle under California Vehicle Code section 14602.6(a)(1), which authorizes impounding a vehicle when the driver has a suspended license. Vehicles seized under this section must generally be held in impound for 30 days.

Three days later, Brewster appeared as a hearing before the LAPD with proof that she was the registered owner of the vehicle and her valid California driver's license. Brewster offered to pay all towing and storage fees that had accrued, but the LAPD refused to release the vehicle before the 30-day holding period had lapsed.

PROCEDURAL HISTORY (portions excerpted from the opinion):

Brewster filed a class action lawsuit under 42 U.S.C. § 1983 on behalf of all vehicle owners whose vehicles were subjected to the 30-day impound. Brewster claimed that the 30-day impound is a warrantless seizure that violates the Fourth Amendment. The district court concluded that the 30-day impound is a valid administrative penalty and granted the LAPD's motion to dismiss the lawsuit. Brewster appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit disagreed with the district court.

ISSUE: Is the 30-day impound a seizure that requires compliance with the Fourth Amendment?

ANALSIS: (portions excerpted from the opinion):

Impounding a vehicle is a seizure because it is a meaningful interference with an individual's possessory interests in his or her property. Under the Fourth Amendment, an officer may seize property with a warrant or an exception to the warrant requirement. The community caretaking exception to the warrant requirement justified the initial seizure in this case (i.e., impounding the vehicle because the driver's license was suspended). However, the community caretaking exception authorizes impounding vehicles that jeopardize public safety and the efficient movement of vehicular traffic. The community caretaking exception did not apply once the vehicle arrived in impound and Brewster showed up with proof of ownership and a valid driver's license. As such, the 30-day impoundment of Brewster's vehicle constituted a seizure that required compliance with the Fourth Amendment.

RESULT: The Ninth Circuit reversed the district court's order granting the LAPD's motion to dismiss.

LED EDITORIAL NOTE: This opinion did not hold that the 30-day impound violated the Fourth Amendment. Rather, the 30-day impound must comply with the Fourth Amendment (i.e., the impound is justified by a warrant or an exception to the warrant requirement).

***MIRANDA*: AFTER SUSPECT INVOKED HIS RIGHT TO COUNSEL, OFFICER'S ROUTINE BOOKING QUESTIONS WERE NOT AN INTERROGATION.** United States v. Zapien, 861 F.3d 971 (July 3, 2017).

FACTS (excerpted from the opinion):

Brigido Luna Zapien was arrested for his alleged involvement in an illegal drug sale. After being Mirandized, Luna Zapien invoked his right to counsel after Drug Enforcement Administration (DEA) agents accused him of being a drug dealer. Following his invocation, the agents began asking him biographical questions. Luna Zapien then said he wanted to provide further information. Again, the agents advised him of his rights under *Miranda*, but he explicitly said he wanted to talk without counsel and then told the agents that he had been involved in drug trafficking.

PROCEDURAL HISTORY:

The prosecution charged Luna Zapien with federal drug offenses. Before trial, he moved to suppress his statements made to the DEA officers, and argued that because he invoked his right to counsel, the DEA officer's biographical questions violated *Miranda*. The district court disagreed and denied the motion. A jury convicted Luna Zapien. una Zapien appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit agreed with the district court.

ISSUE: Whether an officer asking an in-custody suspect routine booking questions (after the suspect has invoked his right to counsel) violates *Miranda*.

ANALYSIS (portions excerpted from the opinion):

Under *Miranda v. Arizona*, an in-custody suspect has a right to counsel during an interrogation. Officers must read an in-custody suspect *Miranda* warnings before interrogating the suspect. Once a suspect invokes his right to counsel, the interrogation must stop unless the suspect has an attorney present during the interrogation, or the suspect initiates a conversation with the officer.

However, courts have recognized a "booking exception" to the *Miranda* rule. The "booking exception" permits officers to ask an in-custody suspect routine background biographical information, such as identity, age, and address. Whether an officer's questions fall under the "booking exception," or is an "interrogation," depends on the circumstances. Courts consider whether the officer should have known that his questions were reasonably likely to elicit an incriminating response.

In this case, the Ninth Circuit found that the officer's questions were not likely to elicit an incriminating response, and did not violate *Miranda*. The Court reasoned:

(1) The biographical questions had no relation to Luna Zapien's crime.

(2) The questions were asked in the context of routine booking procedures.

(3) The officer testified that he regularly asks DEA Form 202 questions to gather emergency contact information to provide to the United States Marshals. This explanation provides both the officer's subjective intent and an objective reason for asking the questions.

(4) From an objective point of view, the biographical questions did not amount to interrogation because they were not reasonably likely to elicit Luna Zapien's incriminating response.

RESULT: The Ninth Circuit found that the routine booking questions did not violate *Miranda*, and affirmed the district court's denial of Luna Zapien's suppression motion.

****

WASHINGTON STATE SUPREME COURT

****

FORFEITURE: SUBSTANTIAL EVIDENCE DID NOT SUPPORT FORFEITURE HEARING OFFICER'S FINDING THAT A SEIZED VEHICLE AND MONEY WERE CONNECTED TO DRUG MANUFACTURING. City of Sunnyside v. Gonzalez, 188 Wn.2d 600, 398 P.3d 1078 (June 29, 2017).

FACTS (portions excerpted from the opinion):

While driving in Sunnyside, Washington, Andreas Gonzalez was stopped for speeding by an officer. Gonzalez was driving a BMW with California license plates. The officer noted that Gonzalez had two cell phones with him. Although Gonzalez had a Washington driver's license, the car was registered in California in another person's name. When asked who owned the car, Gonzalez said it belonged to a friend and gave a name that did not match the registration.

The officer determined that Gonzalez's license was suspended and therefore placed him under arrest. While the officer was waiting for another officer to assist with impounding the car, one of Ganzalez's cell phones rang and, at Gonzalez's request, the officer answered it. The caller was Gonzalez's girlfriend, who asked if the car could be released to her, and the officer refused. Gonzalez asked that his girlfriend be allowed to take possession of the property left in the car, including about $6,000 in cash. At that point, the office] became suspicious that Gonzalez was involved in criminal activity.

A canine officer then arrived with his canine partner to assist in the impound process. Gonzalez gave consent to a search of the car, which turned up a street level, user amount of cocaine and $5,940. The canine alerted separately to both the cocaine and the money. Because the canine had not been trained to alert for cash, the canine officer believed that the alert indicated there were controlled substances on the money.

Believing that Gonzalez's car and money were involved in an illegal drug transaction, the officers seized both the car and the money.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

The City of Sunnyside sought forfeiture of Gonzalez's and money and car. At the forfeiture hearing, Gonzalez testified that he had borrowed the car from a friend, and had the $5,940 to

purchase the car from his friend. Gonzalez explained that he had the money from an insurance settlement and unemployment compensation benefits.

The hearing examiner found that the City had proved that Gonzalez's car and money were "used and/or intended to be used for a controlled substance violation, specifically the furtherance of the sale of an illegal drug." The hearing officer reasoned:

1. There were 2 cell phones found under the control of the claimant, Mr. Gonzalez, at the time he was stopped by officers;

2. Cocaine was found in the vehicle;

3. There was a large amount of cash in the vehicle, $5,940.00;

4. Officers testified that the cash was "coated" by enough cocaine so that the drug dog also alerted to the cash;

5. The vehicle, a 2001 BMW, was not in the name of the claimant at the time of the incident, however he had driven it from California just prior to being stopped;

6. The fact that Mr. Gonzalez states he received the money from an injury and from unemployment does not seem to explain all of the cash that was present.

Gonzalez sought review by the Washington State Supreme Court. The Supreme Court disagreed with the hearing examiner.

ISSUE: Did the City produce substantial evidence to support the hearing examiner's decision that Gonzalez's car and money were subject to forfeiture pursuant to RCW 69.50.505?

ANALYSIS (portions excerpted from the opinion):

The Uniform Controlled Substances Act, chapter 69.50 RCW, provides for forfeiture of property that is connected to an intended or completed controlled substances violation. RCW 69.50.505. To further its purpose, the statute generally does not contemplate forfeiture where the only violation is mere possession of a controlled substance. The violation usually must involve drug manufacturing or transactions. Property connected to such a violation is subject to seizure and forfeiture and no property right exists in it.

The forfeiture statute, RCW 69.50.505(1)(g), authorizes forfeiture of:

(1) All moneys, negotiable instruments, securities, or other tangible or intangible property of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this chapter;

(2) All tangible or intangible personal property, proceeds, or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter;

(3) All moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter.

The Supreme Court found that the City did not present adequate evidence that Gonzalez used the car or money in a drug transaction, and the hearing examiner should not have ordered the forfeiture. The Supreme Court reasoned:

(1) It is unreasonable to infer from the fact that the canine alerted to the money that the money specifically had cocaine on it. The drug dog was trained to alert for marijuana, cocaine, black tar, heroin, meth, and crack. There was no evidence that the canine would alert different to different kinds of drugs, and there is no indication the cash was ever tested for the presence of any specific drug. This is significant because the only controlled substance found in Gonzalez's car was cocaine, not marijuana, heroin, or methamphetamine.

(2) No one testified that Gonzalez's money was "coated" in anything.

(3) The cocaine was described as a street level amount, user amount.

(4) There was no other paraphernalia to indicate that Gonzalez had separated this cocaine from a distribution-level amount.

(5) Allowing forfeiture under these circumstances would mean that a person's property may be subject to forfeiture if it is connected to possession of even a small amount of a controlled substance. The forfeiture statute's plain language, however, targets the profits of drug manufacturers and distributors, not the property of end-level users who are guilty of nothing more than mere possession.

RESULT: The Supreme Court reversed the order forfeiting Gonzalez's money and car.

SEARCH AND SEIZURE: A SUSPECT WALKING QUICKLY AND LOOKING AROUND, EVEN AFTER LEAVING A HOUSE WITH EXTENSIVE DRUG HISTORY AT 2:40 A.M., DID NOT PROVIDE REASONABLE, ARTICULABLE SUSPICION FOR A *TERRY* STOP.
State v. Weyand, 188 Wn.2d 804, 399 P.3d 530 (July 20, 2017).

FACTS (portions excerpted from the opinion):

On December 22, 2012, at 2:40 in the morning, an officer saw a car parked near 95 Cullum Avenue, Richland, Washington, that had not been there 20 minutes prior.

After parking his car, the officer saw Wesley Weyand and another male leave 95 Cullum. As the men walked quickly toward the car, they looked up and down the street. The driver looked around once more before getting into the car. Weyand got into the passenger seat. Based on these observations and the officer's knowledge of drug history at 95 Cullum, he conducted a *Terry* stop of the car.

After stopping Weyand, the officer observed Weyand's eyes were red and glassy and his pupils were constricted. The officer is a drug recognition expert and believe that Weyand was under the influence of a narcotic. When the officer ran Weyand's name, he discovered an outstanding warrant and arrested Weyand. The officer searched Weyand incident to that arrest and found a

capped syringe. The officer advised Weyand of his *Miranda* rights, and Weyand admitted that the substance in the syringe was heroin that he had brought from a resident inside 95 Cullum.

PROCEDURAL HISTORY: (portions excerpted from the opinion):

The prosecution charged Weyand with one count of unlawful possession of a controlled substance. Before trial, the defense moved to suppress the evidence and statements, and argued that the officer lacked sufficient individualized suspicion for the *Terry* stop. The trial court disagreed and denied the motion to suppress. The trial court convicted Weyand. Weyand sought review by the Washington State Supreme Court. The Supreme Court disagreed with the trial court.

ANALYSIS (portions excerpted from the opinion):

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, an officer generally may not seize a person without a warrant. The *Terry* exception allows an officer to briefly detain a person for questioning, without a warrant, if the officer has reasonable suspicion that the person is or is about to be engaged in criminal activity.

To conduct a valid *Terry* stop, an officer must have reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop. A court looks at the totality of the circumstances to evaluate the reasonableness of the officer's suspicion. The totality of circumstances includes the officer's training and experience, the location of the stop, the conduct of the person detained the purpose of the stop, and the amount of physical intrusion on the suspect's liberty. The suspicion must be individualized to the person being stopped.

In this case, the Supreme Court found that the totality of the circumstances did not justify a warrantless seizure. The Supreme Court reasoned:

(1) The officer did not observe current activity that would lead a reasonable observer to believe that criminal activity was taking place or about to take place in the residence.

(2) Police identified 95 Cullum as a known drug location because of the residents' histories of drug possession and use, not for a history of selling or distributing.

(3) Reasonable suspicion must be *individualized* to the person being stopped. The officer identified 95 Cullum as a "known" drug house based on the history of police contacts, but he failed to articulate a reasonable suspicion that Weyand was involved in criminal activity at that house based on Weyand's conduct at the time of the stop. Police cannot justify a suspicion of criminal conduct based only on a person's location in a high crime area.

RESULT: The Supreme Court reversed the trial court's denial of the motion to suppress the evidence and statements.

/ / /

/ / /

/ / /

****

WASHINGTON STATE COURT OF APPEALS

****

SEARCH AND SEIZURE : CONCLUSORY AND GENERAL STATEMENTS IN AN AFFIDAVIT FOR A SEARCH WARRANT TO DRAW BLOOD ARE INSUFFICIENT TO SUPPORT PROBABLE CAUSE THAT THE IMPAIRED DRIVING SUSPECT DROVE THE VEHICLE.
State v. Youngs, 199 Wn. App. 472, 400 P.3d 1265 (July 3, 2017).

FACTS (portions excerpted from the opinion):

In the early morning hours of May 15, 2013, a magistrate issued a warrant authorizing the withdrawal of a blood sample from Anthony Youngs. A state patrol trooper had arrested Youngs on suspicion of driving while under the influence of intoxicants. The magistrate issued the warrant based on the Affidavit in Support of Search Warrant for Evidence of a Crime, to wit: Driving While Under the Influence, RCW 46.61.502. The affidavit is a largely preprinted form to which the affiant may add information.

Both the face page of the affidavit and its second page state that the alleged traffic infraction for which the warrant was sought was "Driving While Under the Influence, RCW 46.61.502." The boxes on both of these pages that next to the text state "Physical Control of Vehicle While Under the Influence, RCW 46.61.504" were left unchecked by the state patrol trooper.

In the affidavit, the trooper stated:

> Youngs was involved in a one car rollover collision. He was transported to Evergreen Hospital.
>
> A sample of Anthony Young's blood, if extracted within a reasonable period of time after he/she last operated, or was in physical control of, a motor vehicle, may be tested to determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive. This search warrant is being requested 2 hours 15 minutes after Anthony Youngs ceased driving/was found in physical control of a motor vehicle.
>
> The facts supporting my belief that Anthony Youngs is under the influence of intoxicants and/or drugs are as follows:
>
> Heavy odor of intoxicants on his breath and person, Youngs admitted to having approximately four beers. I observed his eyes to be bloodshot and watery. I observed his speech to be slurred and hard to understand at times. I observed 6 of 6 clues on the horizontal gaze nystagmus test. Youngs was strapped to a backboard and therefore unable to perform further certified tests. Youngs provided a PBT sample of .114.

PROCEDURAL HISTORY (portions excerpted from the opinion):

Following the blood draw authorized by the search warrant, the State charged Youngs with driving while under the influence (RCW 46.61.502). Youngs moved to suppress evidence obtained under authority of the warrant. The district court denied the motion. Youngs then agreed to a stipulated bench trial based on the police report and blood alcohol report. The district court found Youngs

guilty and sentenced him. Youngs appealed to the Washington State Court of Appeals. The Court of Appeals disagreed with the district court.

ISSUE: Whether the facts in the officer's affidavit supported probable cause that the impaired driving suspect had driven the vehicle.

ANALYSIS (portions excerpted from the opinion):

A magistrate may only issue a search warrant upon probable cause. The warrant must be supported by an affidavit identifying the place to be searched and the items to be seized. The affidavit must contain sufficient facts to convince an ordinary person that the defendant is probably engaged in criminal activity. The facts alleged in an officer's affidavit for a search warrant must not be conclusory.

In this case, the Court of Appeals found that the affidavit did not provide sufficient facts to support probable cause that Youngs was driving the car involved in the one car rollover collision. The Court reasoned:

(1) The affidavit states that Youngs "was involved in a one car rollover collision. He was transported to Evergreen Hospital." This statement fails to tell a magistrate whether Youngs was driving. It also fails to specify important details such as how Youngs was involved in the collision. If Youngs was observed driving, the affidavit could say so and explain the facts supporting the statement.

(2) The affidavit in this case states that Youngs was intoxicated, was "involved in a car accident," and taken to a hospital. What is missing is any showing that he was driving.

(3) This affidavit is insufficient to allow a magistrate to make an independent determination whether probable cause of ***driving*** under the infleucne of intoxicants existed to support a warrant for a blood draw.

(4) To be clear, the fault is not in the use of a largely preprinted form. Rather, it is the lack of sufficient factual information in the completed form to establish probable cause for the issuance of a warrant. For example, the factual information concerning intoxication is sufficient and unchallenged in this case. But the factual information to establish driving is insufficient.

RESULT: The Court of Appeals directed the district court to suppress the evidence obtained by the warrant.

****

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]

****