


June 2020 LAW ENFORCEMENT DIGEST



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COURSE INFORMATION



This course covers select court rulings issued by the three divisions of the Washington Courts of Appeal, the Washington State Supreme Court, the federal Ninth Circuit Court of Appeals, and the United States Supreme Court. The cases are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges.

Covering Cases Published in May & June 2020

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CASE MENU



LAW ENFORCEMENT DIGEST JUNE 2020 TOPIC INDEX



1

ORGANIZED
RETAIL THEFT;
ONLINE
SHOPPING



2

OBSTRUCTING;
ARREST



3

HOMESTEAD
ACT; VEHICLE
IMPOUND;
HOMELESSNESS



4

RAPE OF A
CHILD; ONLINE
STING
OPERATION; NET
NANNY; TASK
FORCE

2. STATE V. LANE

2.1 ORGANIZED RETAIL THEFT; ONLINE SHOPPING



2.2 FACTS

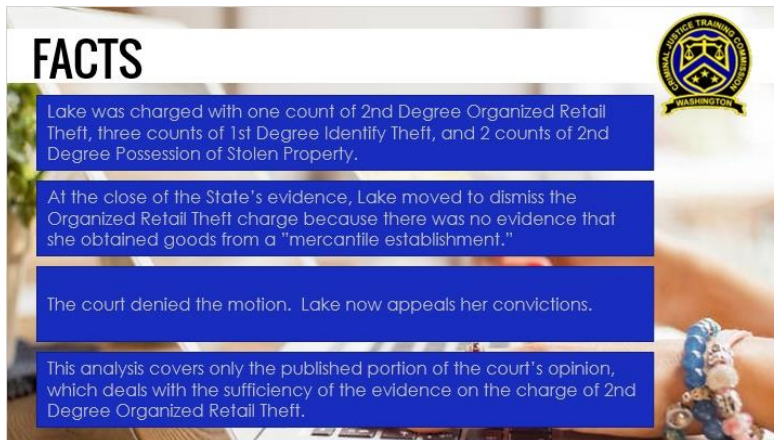
FACTS

- Lake was living in a senior living apartment complex.
- She placed 3 catalog orders with different companies using the names and accounts of other residents of the apartment complex.
- Lake had the items shipped to her as "gifts."
- One of the residents noticed that someone had placed an order using her credit account and reported it to the apartment front office and filed a fraud complaint with the local police.

- In 2017, Lake was living in a senior living apartment complex.
- She placed three catalog orders with different companies using the names and accounts of other apartment complex residents.

- Lake had the items delivered to her as “gifts.”
One of the residents noticed that someone had placed an order using her credit account.
- She reported the suspicious order to the front office and made a fraud complaint with the Vancouver police.

2.3 FACTS



FACTS

Lake was charged with one count of 2nd Degree Organized Retail Theft, three counts of 1st Degree Identity Theft, and 2 counts of 2nd Degree Possession of Stolen Property.

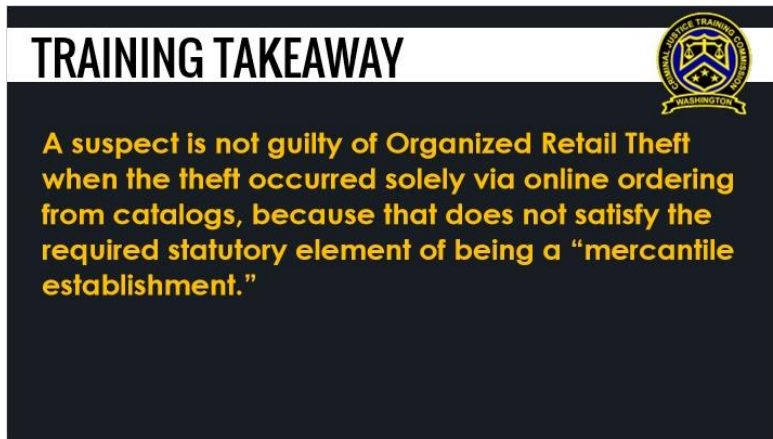
At the close of the State's evidence, Lake moved to dismiss the Organized Retail Theft charge because there was no evidence that she obtained goods from a "mercantile establishment."

The court denied the motion. Lake now appeals her convictions.

This analysis covers only the published portion of the court's opinion, which deals with the sufficiency of the evidence on the charge of 2nd Degree Organized Retail Theft.

- Lake was charged with one count of second degree organized retail theft, three counts of first degree identity theft, and two counts of second degree possession of stolen property.
- At the close of the State's case, Lake moved to dismiss the organized retail theft charge because there was no evidence that she obtained goods from a “mercantile establishment”.
- The court denied the motion. Lake now appeals her convictions.
- This analysis covers only the published portion of the court's opinion dealing with the sufficiency of the evidence on the charge of 2nd Degree Organized Retail Theft charge.

2.4 TRAINING TAKEAWAY

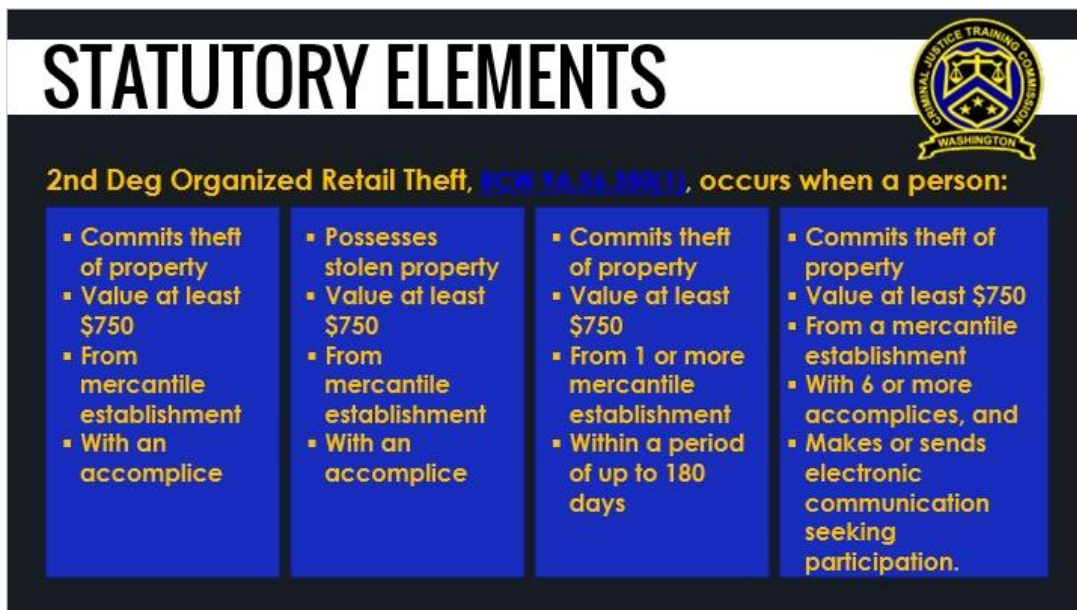


TRAINING TAKEAWAY

A suspect is not guilty of Organized Retail Theft when the theft occurred solely via online ordering from catalogs, because that does not satisfy the required statutory element of being a “mercantile establishment.”

A suspect is not guilty of Organized Retail Theft when the theft occurred solely via online ordering from catalogs, which does not satisfy the required statutory element of being a “mercantile establishment.”

2.5 STATUTORY ELEMENTS




STATUTORY ELEMENTS

2nd Deg Organized Retail Theft, RCW 9A.56.190(1), occurs when a person:

<ul style="list-style-type: none">▪ Commits theft of property▪ Value at least \$750▪ From mercantile establishment▪ With an accomplice	<ul style="list-style-type: none">▪ Possesses stolen property▪ Value at least \$750▪ From mercantile establishment▪ With an accomplice	<ul style="list-style-type: none">▪ Commits theft of property▪ Value at least \$750▪ From 1 or more mercantile establishment▪ Within a period of up to 180 days	<ul style="list-style-type: none">▪ Commits theft of property▪ Value at least \$750▪ From a mercantile establishment▪ With 6 or more accomplices, and▪ Makes or sends electronic communication seeking participation.
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2nd Degree Organized Retail Theft can be committed in 4 different manners, all requiring theft or possession of stolen property of a single or combined value of at least \$750, and either with an accomplice, from one or more mercantile establishments, and/or with multiple accomplices and including solicitation by electronic communication.

2.6 MERCANTILE ESTABLISHMENT

MERCANTILE ESTABLISHMENT 

When there's a question of interpretation of statutory language, the court looks to the plain language of the words/term, the dictionary definition, and legislative intent.

- Here the term is ambiguous, with the dictionary definition providing that a mercantile establishment is a "retail place of business," and no clear legislative intent other than language from a previous version of the statute which clearly referred to physical retail stores.

Where a term remains ambiguous, the rule of lenity requires that the definition most favorable to the moving party (Lake) is applied.

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Where a term remains ambiguous, the rule of lenity requires that the definition most favorable to the moving party (Lake) is applied.

2.7 MERCANTILE ESTABLISHMENT

MERCANTILE ESTABLISHMENT 

Under the legal rule of lenity, "mercantile establishment" in the Organized Retail Theft statute is held to refer to theft from a physical retail store, and does NOT apply to theft from an online retailer.

Under the **rule of lenity**, "mercantile establishment" in the Organized Retail Theft statute is held to refer to theft from a physical retail store and does not apply to theft from an online retailer.

3. STATE V. CANFIELD

3.1 SEARCH AND SEIZURE; LICENSE PLATE DATABASE; WARRANT



3.2 FACTS

FACTS

- Appeal from retrial of defendant's original Obstruction conviction
- Original Obstruction conviction previously reversed due to technical deficiencies in the charging document.
- Canfield's original felony convictions were upheld, but the Obstructing charge was reversed and retried.
- In the retrial, the prosecutor amended the charging document to also include charges of Making a False or Misleading Statement and Tampering with Physical Evidence.

- This appeal arises from a retrial of the defendant on an Obstruction conviction that was previously reversed due to technical deficiencies in the charging of the crime.
- Canfield's original felony convictions were upheld, but the Obstructing

charge was reversed.

- In the retrial on the Obstruction charge, the prosecutor amended the charging document to also include a charge of Making a False or Misleading Statement and Tampering with Physical Evidence.

3.3 FACTS

FACTS

Original incident stemmed from arrest of Canfield on an outstanding arrest warrant.

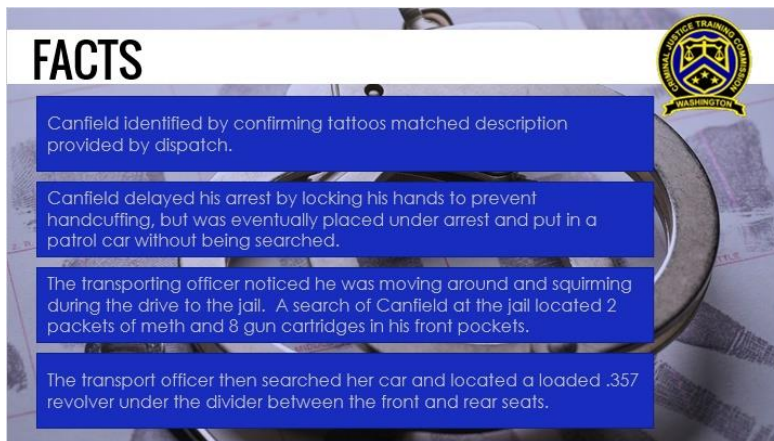
Canfield laying in pickup truck, pretended to sleep. Sat up in response to his first name being called out by an officer.

Canfield attempted to start the truck despite officer's direction to keep his hands in sight.

Canfield then attempted to leave the truck and was detained. He provided a false name and denied that he was Tommy Canfield.

- The original incident stemmed from an arrest of Canfield on an outstanding arrest warrant.
- Canfield was seen laying down inside his pickup truck and pretended to sleep. An officer called out his first name, and Canfield sat up.
- He attempted to start the truck despite the officer's direction for him to keep his hands in sight.
- He then attempted to leave the truck and was detained. He provided a false name and denied that he was Tommy Canfield.

3.4 FACTS



FACTS

Canfield identified by confirming tattoos matched description provided by dispatch.

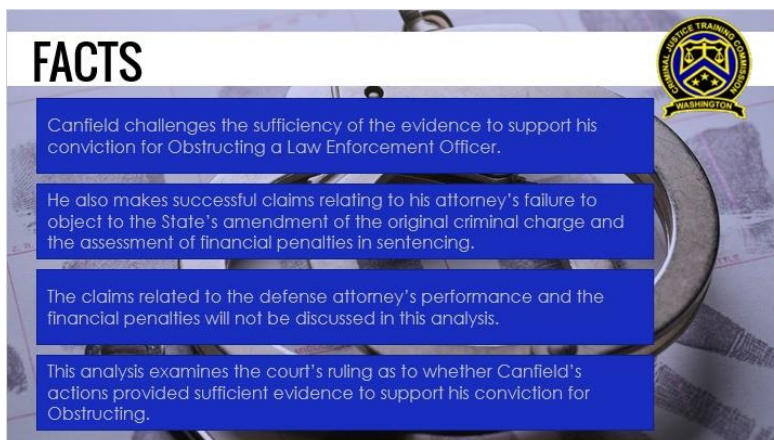
Canfield delayed his arrest by locking his hands to prevent handcuffing, but was eventually placed under arrest and put in a patrol car without being searched.

The transporting officer noticed he was moving around and squirming during the drive to the jail. A search of Canfield at the jail located 2 packets of meth and 8 gun cartridges in his front pockets.

The transport officer then searched her car and located a loaded .357 revolver under the divider between the front and rear seats.

- Officers identified Canfield after confirming his tattoos matched the description provided by dispatch.
- Canfield then delayed his arrest by locking his hands in an effort to prevent handcuffing. He was placed in the patrol car without being searched, and the transporting officer noted he was moving around and squirming during the drive to the jail. The jail search located 2 packets of meth and 8 gun cartridges in his front pockets.
- The transport officer searched her car and located a loaded .357 revolver under the divider between the front and rear seats.

3.5 FACTS



FACTS

Canfield challenges the sufficiency of the evidence to support his conviction for Obstructing a Law Enforcement Officer.

He also makes successful claims relating to his attorney's failure to object to the State's amendment of the original criminal charge and the assessment of financial penalties in sentencing.

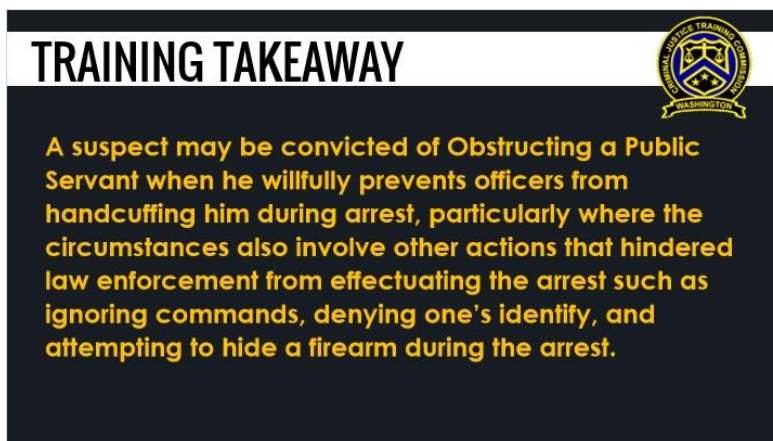
The claims related to the defense attorney's performance and the financial penalties will not be discussed in this analysis.

This analysis examines the court's ruling as to whether Canfield's actions provided sufficient evidence to support his conviction for Obstructing.


- Canfield challenges the sufficiency of the evidence on his conviction for Obstructing a Law Enforcement Officer.

- He also makes other successful claims relating to his attorney's failure to object to the State amending the original criminal charge and assessing financial penalties in sentencing.
- The claims related to the defense attorney's performance and the financial penalties will not be discussed in this analysis.
- This analysis examines the court's ruling as to whether Canfield's actions provided sufficient evidence to support his conviction for Obstructing.

3.6 TRAINING TAKEAWAY




TRAINING TAKEAWAY



A suspect may be convicted of Obstructing a Public Servant when he willfully prevents officers from handcuffing him during arrest, particularly where the circumstances also involve other actions that hindered law enforcement from effectuating the arrest such as ignoring commands, denying one's identify, and attempting to hide a firearm during the arrest.

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3.7 OBSTRUCTING STATUTE



OBSTRUCTING STATUTE

RCW 9A.76.020 – A person is guilty of Obstructing if they willfully hinder, delay, or obstruct any law enforcement officer in the discharge of their official powers or duties.

“Law Enforcement Officer” under this statute is any peace officer as defined in [RCW 10.93.020](#) and other public safety officers responsible for enforcement of fire, building, zoning, and life and safety codes.

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3.8 INVESTIGATORY DETENTION




RESISTING HANDCUFFING

In a purely **investigative detention** where the suspect is **not under arrest**, resisting handcuffing does NOT constitute Obstructing a Law Enforcement Officer. [State v. D.E.D.](#) (2017)

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3.9 INVESTIGATORY DETENTION

RESISTING HANDCUFFING



Unlike the current case, D.E.D. involved passive resistance to an investigatory detention.


- The court noted that **no one has a duty to cooperate with a police investigation.**
- Passive resistance to an investigatory detention is simply another form of declining to cooperate, and so doesn't amount to Obstructing.

Unlike the current case, D.E.D. involved passive resistance to an investigatory detention.

The court noted that no one has a duty to cooperate with a police investigation, and passive resistance to an investigatory detention is simply another form of declining to cooperate, and does not amount to Obstructing.

3.10 INVESTIGATORY DETENTION

RESISTING HANDCUFFING



D.E.D.'s ruling should be interpreted very narrowly.

- **Even slight additional activity on top of passive resistance may amount to a crime.**

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3.11 ARREST AND RESISTING CUFFS



RESISTING HANDCUFFING & ARREST

The law imposes a duty to cooperate with an arrest (versus an investigation), and makes resisting arrest a crime under [RCW 9A.76.040](#).

Actions short of resisting that hinder an arrest may constitute Obstructing


- Assisting another person to resist arrest. [State v. Holeman \(1985\)](#)
- Passive resistance to a lawful arrest.

The law imposes a duty to cooperate with an arrest (versus an investigation), and makes resisting arrest a crime under RCW 9A.76.040.

Actions short of resisting that hinder an arrest may constitute Obstructing

- Assisting another person to resist arrest. State v. Holeman (1985)
- Passive resistance to a lawful arrest.

3.12 OBSTRUCTING



EVIDENCE OF OBSTRUCTING

In addition to resisting handcuffing, which alone may have been enough for a charge of Obstructing, the defendant also repeatedly refused to obey commands, pretended to sleep, and otherwise actively engaged in behavior to hinder law enforcement from arresting him.

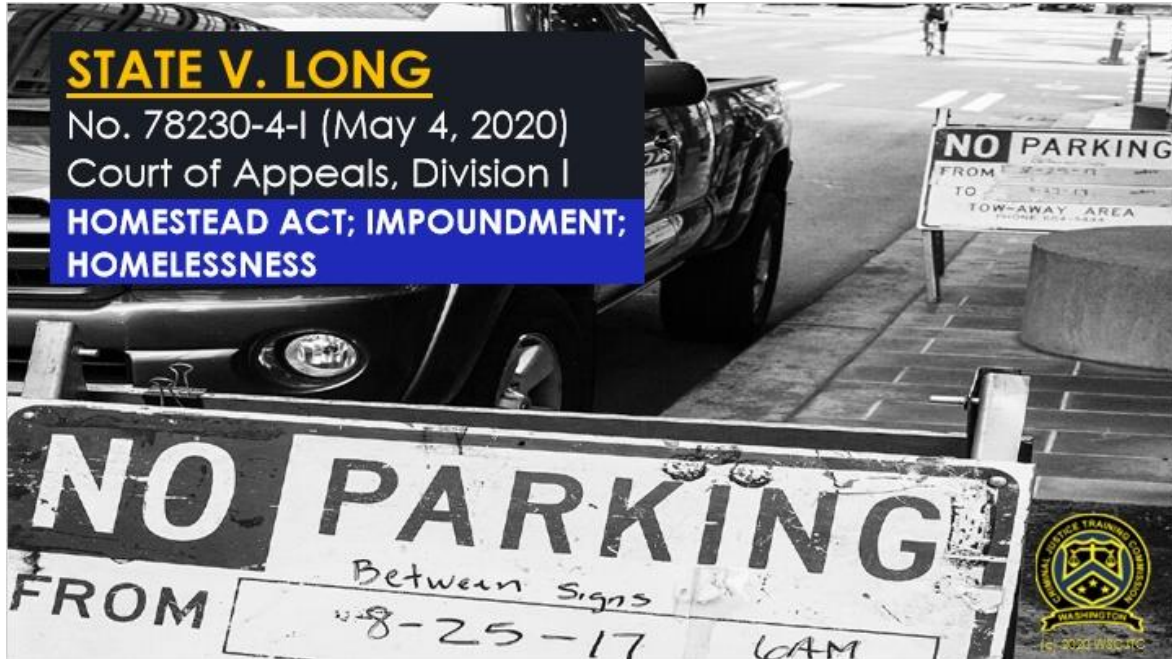
The evidence was sufficient to support the conclusion that Canfield was guilty of Obstructing a Public Servant.

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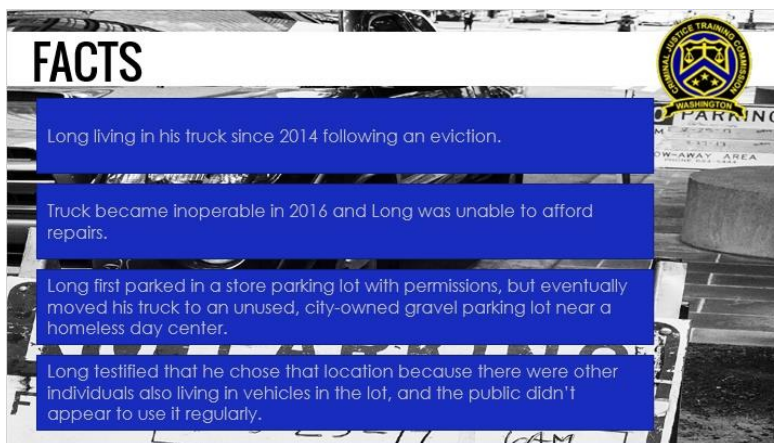
4. STATE V JONES

4.1 HOMESTEAD ACT; HOMELESSNESS; IMPOUNDMENT



State versus J.K.T.; Court of Appeals, Division 1

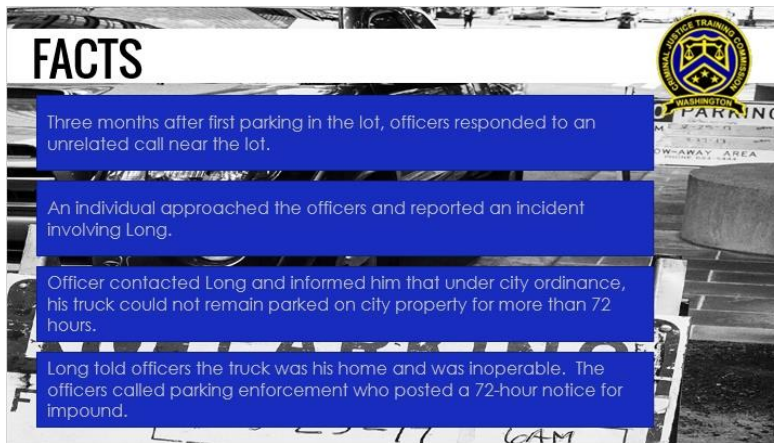
4.2 FACTS



- Long had been living in his truck since being evicted in 2014.
- In 2016 the truck became inoperable, and he was unable to afford the necessary repairs.

- Long first parked in a store parking lot with permission, but eventually moved to an unused city-owned gravel parking lot near a day center which provided services for those experiencing homelessness.
- Long testified that he chose that location because there were other individuals living in vehicles in the lot, and the public didn't appear to use it regularly.

*4.3 FACTS



- Three months later, officers responded to an unrelated call near the parking lot where Long lived.
- An individual approached the officers and reported an incident involving Long.
- This led officers to contact Long, subsequently informing him that under city ordinance, his truck could not remain parked on city property for more than 72 hours.
- Long told the officers that the truck was his home, and that the truck was inoperable, and he needed a part to repair it. Officers called a parking enforcement officer who posted a 72-hour notice for impound.

4.4 FACTS

FACTS

- Long didn't believe the truck was running well enough to drive.
- Four days later the truck was towed while Long was at work.
- The truck contained Long's winter jacket, clothes, sleeping bag, tools, mattress, cooking and toiletry supplies, laptop, and other personal items.
- Unable to find a shelter bed, Long spent the night sitting in a chair in the day center, and began to live outside.

- Long didn't believe the truck was running well enough to drive.
- Four days later the truck was towed from the lot while Long was away at work.
- The truck contained his winter jacket, clothes, sleeping bag, tools, mattress, cooking and toiletry supplies, laptop, and other personal items.
- Unable to find a shelter bed, he spent that night sitting in a chair inside the day center. Without his truck, Long began to live outside.
-

4.5 FACTS

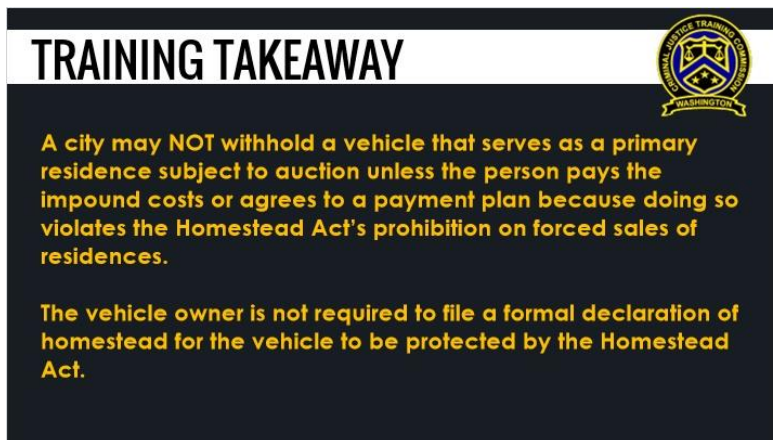
FACTS

- Long couldn't afford to redeem his truck from the tow lot. He requested an impound hearing.
- At the impound hearing Long told the judge the truck was his home, but didn't argue that his truck had been parked legally, so the magistrate upheld the ticket and impound, but reduced the fees.
- Long agreed to a \$50 per month payment plan which he felt he had to agree to because he needed his truck and didn't want the city to auction it. He retrieved it from impound and stored it.
- Long appeals the constitutionality of the impound and payment plan claiming that because the truck served as his home, it should've been protected from forced sale by the Homestead Act.

- Long was unable to afford the costs to redeem his truck from the tow lot. He requested an impoundment hearing.

- At the hearing Long told the magistrate judge that the truck was his home, but didn't argue that he had been parked legally, so the magistrate upheld the ticket and impound, but lowered the fees.
- Long agreed to a \$50 per month payment plan which he felt he had no real choice but to agree to because he needed his truck and didn't want the City to auction it. Long retrieved the truck from impound and drove it to a friend's property for storage. A year later, Long was still working in Seattle, experiencing homelessness, and living outside.
- He now appeals the constitutionality of the impound and payment plan claiming that because the truck served as his home, it should've been protected from forced sale by the Homestead Act.

4.6 TRAINING TAKEAWAY



TRAINING TAKEAWAY

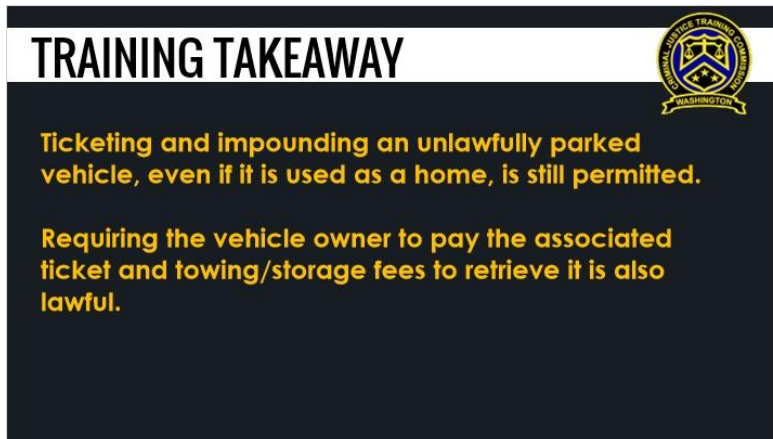
A city may NOT withhold a vehicle that serves as a primary residence subject to auction unless the person pays the impound costs or agrees to a payment plan because doing so violates the Homestead Act's prohibition on forced sales of residences.

The vehicle owner is not required to file a formal declaration of homestead for the vehicle to be protected by the Homestead Act.


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The vehicle owner is not required to file a formal declaration of homestead for the vehicle to be protected by the Homestead Act.

4.7 TRAINING TAKEAWAY



TRAINING TAKEAWAY



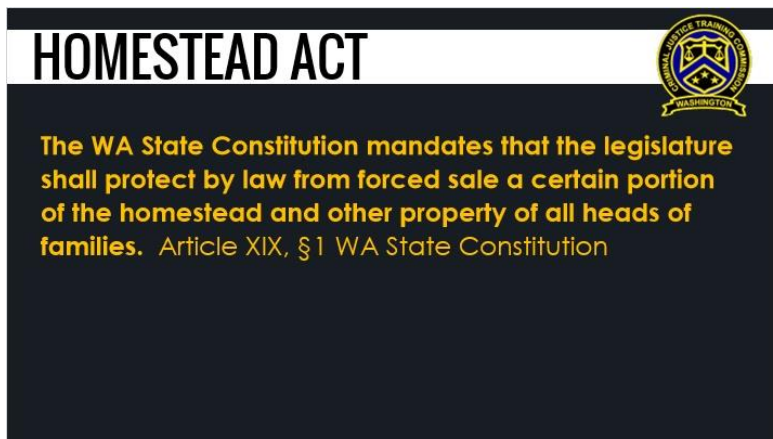
Ticketing and impounding an unlawfully parked vehicle, even if it is used as a home, is still permitted.

Requiring the vehicle owner to pay the associated ticket and towing/storage fees to retrieve it is also lawful.


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Requiring the vehicle owner to pay the associated ticket and towing/storage fees to retrieve it is permitted.

4.8 TRAINING TAKEAWAY



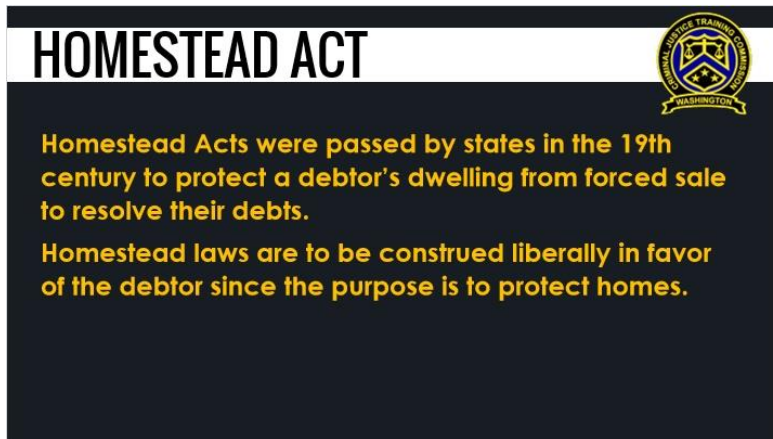
HOMESTEAD ACT



The WA State Constitution mandates that the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families. Article XIX, §1 WA State Constitution

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4.9 TRAINING TAKEAWAY



HOMESTEAD ACT

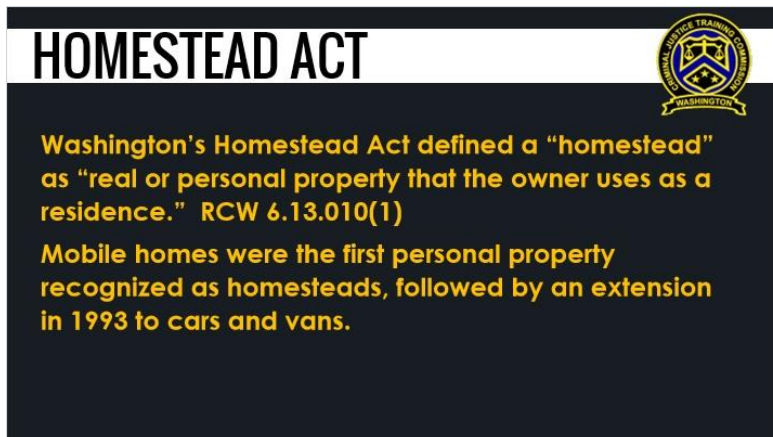
Homestead Acts were passed by states in the 19th century to protect a debtor's dwelling from forced sale to resolve their debts.

Homestead laws are to be construed liberally in favor of the debtor since the purpose is to protect homes.

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4.10 TRAINING TAKEAWAY



HOMESTEAD ACT

Washington's Homestead Act defined a "homestead" as "real or personal property that the owner uses as a residence." RCW 6.13.010(1)


Mobile homes were the first personal property recognized as homesteads, followed by an extension in 1993 to cars and vans.

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4.11 TRAINING TAKEAWAY

HOMESTEAD ACT



The facts establish the truck as Long's personal residence, and qualify it for protection against forced sale under the Homestead Act.


- Long has resided in his truck since 2014.
- He kept all of his personal belongings in the truck, and returned to it nightly to sleep after concluding his work day.
- Long told officers that the truck was his residence.

The facts establish the truck as Long's personal residence and qualify it for protection against forced sale under the Homestead Act.

- Long has resided in his truck since 2014.
- He kept all of his personal belongings in the truck, and returned to it nightly to sleep after concluding his work day.
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4.12 TRAINING TAKEAWAY

HOMESTEAD ACT




Once the owner occupies the property as a principal residence, a homestead exception is automatically established.

A declaration is not required to be filed in order for the occupied principal residence to qualify as a homestead.

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A declaration is not required to be filed in order for the occupied principal residence to qualify as a homestead.

4.13 TRAINING TAKEAWAY



FORCED SALE

Impoundment is not a consensual consumer transaction between the vehicle owner and the tow company.

Impounds are compelled by law, not by consent of the owner.


The city had no authority to threaten to sell Long's truck, which he had established was his primary residence, if he didn't agree to a payment plan.

Impoundment is not a consensual consumer transaction between the vehicle owner and the tow company.

Impounds are compelled by law, not by consent of the owner.

The city had no authority to threaten to sell Long's truck, which he established was his primary residence, if he didn't agree to a payment plan.

4.14 AUTHORITY TO TOW



CITY AUTHORITY TO TOW AND IMPOUND


This ruling does NOT affect the City's authority to tow and impound an illegally parked vehicle, or to charge a vehicle owner for costs associated with the tow and impound.

The ruling prohibits a city to withhold a vehicle under the threat of a forced sale if the owner doesn't pay the fees when that vehicle serves as the owner's principal residence.

This ruling does NOT affect the City's authority to tow and impound an illegally parked vehicle, or to charge a vehicle owner for costs associated with the tow and impound.

The ruling is only prohibiting the city from **withholding a vehicle under the threat of a forced sale** if the owner doesn't pay the fees **when that vehicle serves as the owner's principal residence**.

4.15 PRACTICE POINTER

ALTERNATIVES TO IMPOUND 


One issue touched upon in the ruling is whether there may have been a reasonable alternative to the impound.

The complicating factors here included that Long believed his truck was inoperable, and therefore couldn't be safely driven to a legal parking spot, and that he was not present when the PEO and tow truck arrived to enforce the 72-hour ordinance.

One issue touched upon in the ruling is whether there may have been a reasonable alternative to the impound.

The complicating factors here included that Long believed his truck was inoperable, and therefore couldn't be safely moved to a legal parking spot, and that he was not present when the PEO and tow truck arrived to enforce the 72-hour ordinance.

4.16 PRACTICE POINTER

COMMUNITY REPOSE TO HOMELESSNESS 


Effective June 11, 2020, [ESHB 1754](#) provides additional regulations for any newly established temporary encampments for the homeless being operated locally by religious organizations.

Law enforcement should work directly with their agency's legal advisor to understand the regulations.

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4.17 PRACTICE POINTER

COMMUNITY REPOSE TO HOMELESSNESS 

Agencies should proactively engage with their local social service providers to develop resources to guide officers' interactions with members of their community experiencing homelessness, as well as with community members and business owners who may also be affected by temporary encampments.

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4.18 PRACTICE POINTER

COMMUNITY REPOSE TO HOMELESSNESS 

Knowing where you can refer those in your community experiencing homelessness so they can seek shelter, legal assistance, social services, medical care, and safe vehicle parking, and where to direct concerns from neighbors and business owners, will make an officer's job easier.

The Department of Commerce maintains a statewide clearinghouse of information [here](#).

Knowing where you can refer those in your community experiencing homelessness so they can seek shelter, legal assistance, social services, medical care, and safe vehicle parking, and where to direct concerns from neighbors and business owners, will make an officer's job easier.

5. STATE V. GLANT

5.1 RAPE OF A CHILD; ONLINE STING; NET NANNY; MECTF



State versus J.K.T.; Court of Appeals, Division 1

5.2 FACTS

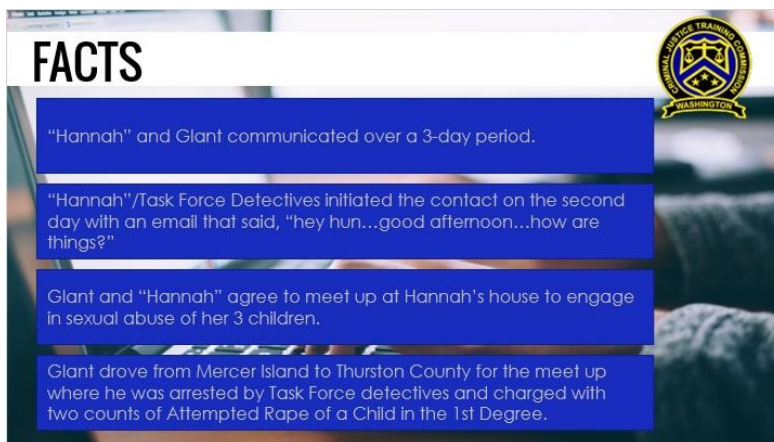
FACTS

- WSP Missing and Exploited Children Task Force conducted a “Net Nanny” online sting operation targeting adults using the internet to facilitate sex crimes against children
- Ad on Craigslist Casual Encounters offering “Family Play Time” and hinting at sexual abuse of children.
- 20 year old male, Glant, responded to ad, corresponded over email and text with Task Force member posing as “Hannah” – a mother of 3.
- Glant indicated sexual interest in the children, specifically the 6 and 11 year old daughters, and specified the sex acts he wanted to engage in with them.

- The WSP Missing and Exploited Children Task Force (“MECTF”) conducted a “Net Nanny” sting operation targeting adults using the internet to facilitate sex crimes against children.

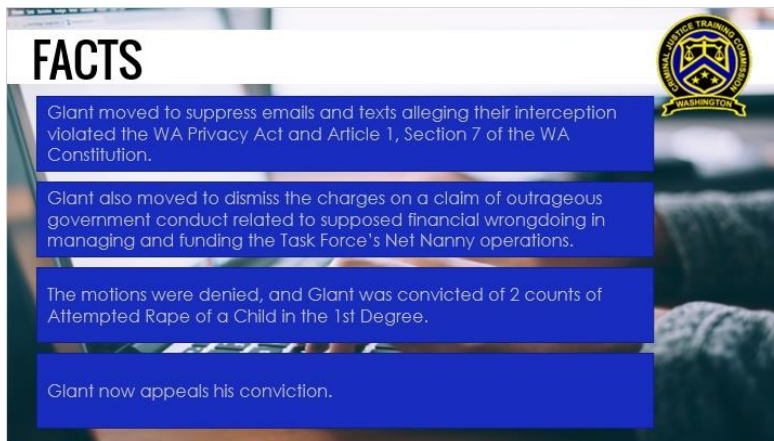
- The Task Force posted an ad on Craigslist's Casual Encounters section that read, *"Family Play Time!?!?...w4m. Mommy/daughter, Daddy/daughter, Daddy/son, Mommy/son...you get the drift. If you know what I'm talking about hit me up and we'll chat more about what I have to offer you."*
- The defendant, a 20-year-old male, responded via email to the ad. Glant then began corresponding over text message with MECTF who were posing as "Hannah," a mother of three young children.
- He indicated sexual interest in the children, specifically the 6- and 11-year-old daughters, and specified the sexual acts he wanted to engage in with them.

5.3 FACTS



- "Hannah" and Glant communicated over a 3-day period.
- The Task Force detective, as Hannah, initiated the contact the second day with a brief email that said, *"hey hun . . . good afternoon . . . how are things?"*
- They agreed to meet up at "Hannah's" house to engage in sexual abuse of her 3 children. Glant drove from Mercer Island to Thurston County for the meet up.
- He was arrested and charged with two counts of Attempted Rape of a Child in the 1st Degree.

5.4 FACTS

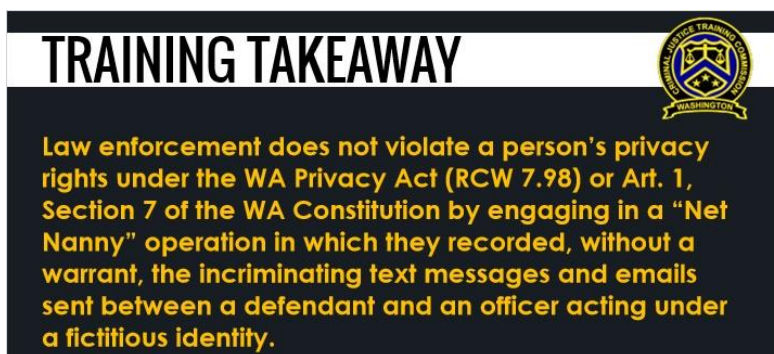


FACTS

- Glant moved to suppress emails and texts alleging their interception violated the WA Privacy Act and Article 1, Section 7 of the WA Constitution.
- Glant also moved to dismiss the charges on a claim of outrageous government conduct related to supposed financial wrongdoing in managing and funding the Task Force's Net Nanny operations.
- The motions were denied, and Glant was convicted of 2 counts of Attempted Rape of a Child in the 1st Degree.
- Glant now appeals his conviction.

- Glant moved the court to suppress his emails and texts alleging that their interception violated the WA Privacy Act, and Article 1, Section 7 of the Washington Constitution.
- He also moved to dismiss his case on a claim of outrageous government conduct related to supposed financial wrongdoing in managing and funding the Task Force's Net Nanny operations.
- Those motions were denied and Glant was convicted.
- He now appeals his conviction.

5.5 TRAINING TAKEAWAY




TRAINING TAKEAWAY

Law enforcement does not violate a person's privacy rights under the WA Privacy Act (RCW 7.98) or Art. 1, Section 7 of the WA Constitution by engaging in a "Net Nanny" operation in which they recorded, without a warrant, the incriminating text messages and emails sent between a defendant and an officer acting under a fictitious identity.

Law enforcement does not violate a person's privacy rights under the WA Privacy Act (RCW 7.98) or Art. 1, Section 7 of the WA Constitution by engaging in a "Net Nanny" operation in which they recorded, without a warrant, the incriminating text messages and emails sent between a defendant and an officer acting under a fictitious identity.

5.6 TEXT EMAIL PRIVATE COMMUNICATION

TEXT AND EMAIL PRIVATE COMMUNICATION 


Texts and emails are generally considered private communications.

When a person voluntarily communicates with a stranger, they assume the risk that the otherwise private conversation will not be confidential, and they hold no reasonable expectation of privacy in the communication. [State v. Goucher](#) (1994)

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5.7 PRIVATE COMMUNICATION

TEXT AND EMAIL PRIVATE COMMUNICATION 

In Goucher, the defendant was held to have assumed the risk that his conversation about a drug purchase wouldn't be confidential when he called the home of his drug dealer and directly asked an unverified party on the other end of the call (who happened to be a detective serving a search warrant) whether he could come over to buy drugs.


He wasn't attempting to conceal his desire to buy drugs, and there was no valid showing of privacy.

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He wasn't attempting to conceal his desire to buy drugs, and there was no valid showing of privacy.

5.8 PRIVACY IN EMAIL AND TEXT

PRIVACY IN EMAIL & TEXT



- Glant voluntarily and intentionally sent the messages to "Hannah."
- He read the Craigslist ad and intentionally responded to a stranger's ad.
- When he chose to email and text with that stranger, he therefore had no reasonable expectation of privacy in the communications.


Glant voluntarily and intentionally sent the messages to "Hannah."

He read the Craigslist ad and intentionally responded to a stranger's ad.

When he chose to email and text with that stranger, he had no reasonable expectation of privacy in the communications.

5.9 PRIVACY IN EMAIL AND TEXT

PRIVACY IN EMAIL & TEXT




- The fact that "Hannah" was actually a law enforcement officer doesn't change the fact that a stranger was his intended (and actual) recipient for the communications.
- By choosing to communicate with the stranger, Glant assumed the risk that those communications may not be confidential.

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By choosing to communicate with the stranger, Glant assumed the risk that those communications may not be confidential.

5.10 OUTRAGEOUS GOVERNMENT CONDUCT

OUTRAGEOUS GOVERNMENT CONDUCT



Glant claimed two sources of alleged outrageous government conduct:


- 1) The funding of task force activities and Net Nanny operations by a private foundation, and**
- 2) The recording of the texts and emails between Glant and "Hannah."**

The court looked at two separate claims by Glant as to how the government engaged in outrageous government conduct:

- (1) the funding of task force activities and Net Nanny operations by a private foundation
- (2) the recording of the texts and emails between Glant and "Hannah."

5.11 OUTRAGEOUS GOVERNMENT CONDUCT

OUTRAGEOUS GOVERNMENT CONDUCT



As to the first claim, the court found that the government conduct didn't rise to the level of outrageous government conduct because a private foundation funded some of the task force's work and the specific "Net Nanny" operations.

Most of the analysis will focus on the second claim - that the warrantless recording of the email and text messages Glant exchanged with "Hannah" violated his privacy.

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Most of the analysis will focus on the second claim - that the warrantless recording of the email and text messages Glant exchanged with "Hannah" violated his privacy.

5.12 OUTRAGEOUS GOVERNMENT CONDUCT

PRIVATE FUNDING



Private involvement in law enforcement may rise to a level of outrageous government conduct where the funding is tied directly to directing the specific law enforcement actions and/or is intended to target a particular defendant.


- In this case, nothing in the records indicates that Our Underground Railroad ("O.U.R." - the private organization that provided significant funds for the Net Nanny operations), attempted to commandeer or overrule the operations over the objections of MECTF, nor did it target the defendant in particular.

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5.13 OUTRAGEOUS GOVERNMENT CONDUCT

OUTRAGEOUS GOVERNMENT CONDUCT



Outrageous government conduct is based on the principle that "the conduct of law enforcement officers may be so outrageous that due process principles would bar the government from invoking processes to obtain a conviction." [State v. Lively](#) (1996)

The court looks at the totality of the circumstances to determine whether the **conduct is so shocking that it violates fundamental fairness and the universal sense of fairness.**

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5.14 OUTRAGEOUS GOVERNMENT CONDUCT



SOME DECEITFUL CONDUCT ALLOWED

Public policy allows for some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate criminal activity.

Such conduct must be motivated by proper the law enforcement objectives of (1) preventing crime and (2) apprehending violators.

An egregious case of outrageous government conduct will result in dismissal of the charges against a defendant.

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5.15 OUTRAGEOUS GOVERNMENT CONDUCT



LIVELY TEST FACTORS

To determine whether government conduct violated due process, the courts weigh:

- 1**
If police instigated a crime or merely infiltrated ongoing criminal activity;
- 2**
Whether pleas of sympathy, promises of excessive profits, or persistent solicitation were used to overcome defendant's reluctance to commit the crime;

In the Lively Test to determine whether government conduct violated due process, the courts weigh:

(1) If police instigated a crime or merely infiltrated ongoing criminal activity;

(2) Whether pleas of sympathy, promises of excessive profits, or persistent solicitation were used to overcome defendant's reluctance to commit the crime;

5.16 OUTRAGEOUS GOVERNMENT CONDUCT

LIVELY TEST FACTORS

3
If the government controlled the criminal activity or simply allowed for it to occur

4
Whether the police motive was to prevent crime or protect the public

5
If the government conduct amounted to criminal activity or conduct "repugnant to a sense of justice."

(3) If the government controlled the criminal activity or simply allowed for it to occur;

(4) Whether the police motive was to prevent crime or protect the public;

(5) If the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

5.17 LIVELY TEST 1



INSTIGATION VS. INFILTRATION

1 Did the actions of law enforcement amount to instigation of a crime or infiltration of ongoing criminal activity?

Posting a general Craigslist advertisement that wasn't aimed at any particular potential respondent and offers (or hints at offering) criminal activity does not amount to instigation of a crime.

The defendant was under no obligation to respond to the ad, and it was not aimed at him, barring any claim that the officers instigated the crime.

The court ultimately found this factor neutral because the trial court record didn't provide enough information about the level of criminal activity on Craigslist at the time of this operation.

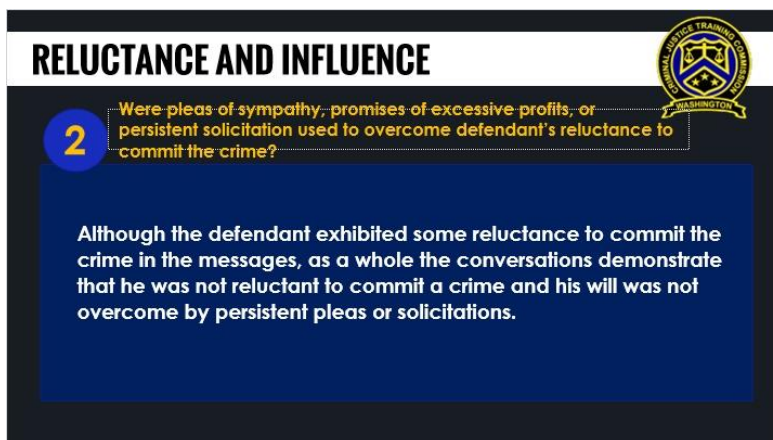
1st Question of the Lively Test: **Did the actions of law enforcement amount to instigation of a crime or infiltration of ongoing criminal activity?**

The court held that Posting a general Craigslist advertisement that wasn't aimed at any particular potential respondent and offers (or hints at offering) criminal activity does not amount to instigation of a crime.

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5.18 LIVELY TEST 2



RELUCTANCE AND INFLUENCE

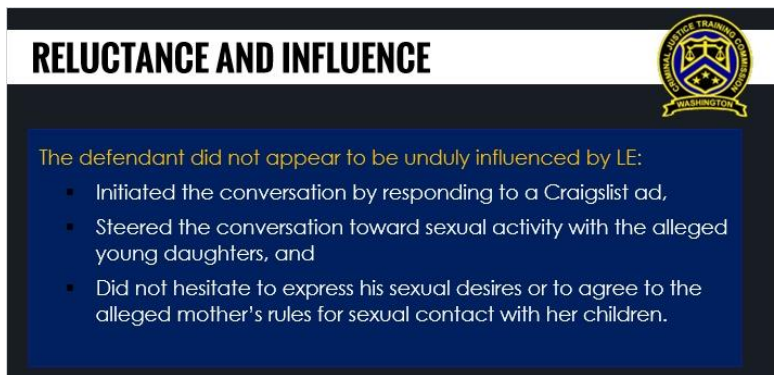
2 Were pleas of sympathy, promises of excessive profits, or persistent solicitation used to overcome defendant's reluctance to commit the crime?

Although the defendant exhibited some reluctance to commit the crime in the messages, as a whole the conversations demonstrate that he was not reluctant to commit a crime and his will was not overcome by persistent pleas or solicitations.

The second question the court asks is: **were pleas of sympathy, promises of excessive profits, or persistent solicitation used to overcome defendant's reluctance to commit the crime?**

Although the defendant exhibited some reluctance to commit the crime in the messages, as a whole the court found his conversations demonstrate that he was not reluctant to commit a crime and his will was not overcome by persistent pleas or solicitations.

5.19 LIVELY TEST 2



RELUCTANCE AND INFLUENCE

The defendant did not appear to be unduly influenced by LE:

- Initiated the conversation by responding to a Craigslist ad,
- Steered the conversation toward sexual activity with the alleged young daughters, and
- Did not hesitate to express his sexual desires or to agree to the alleged mother's rules for sexual contact with her children.

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5.20 LIVELY TEST 2



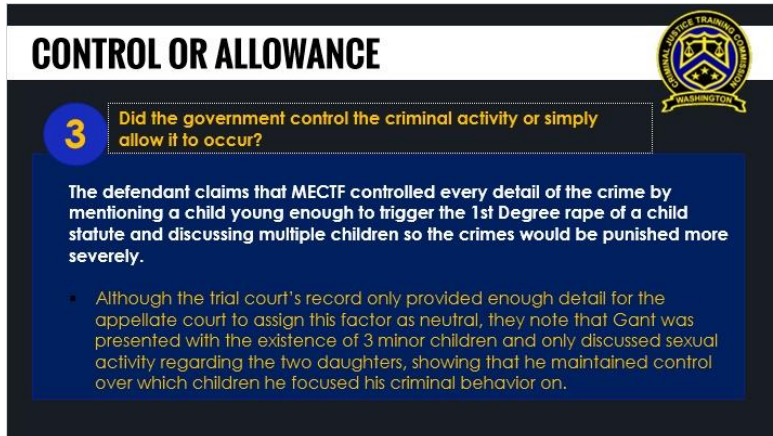
RELUCTANCE AND INFLUENCE

Although law enforcement reinitiated the conversation, flattered, and feigned interest in the defendant, those actions didn't amount to an undue influence that overcame his free will to act by driving to another county to meet the fictitious mother and children after agreeing to the rules of the (criminal) sexual activity.

Although law enforcement reinitiated the conversation, flattered, and

feigned interest in the defendant, those actions didn't amount to an undue influence that overcame his free will to act by driving to another county to meet the fictitious mother and children after agreeing to the rules of the (criminal) sexual activity.

5.21 LIVELY TEST 3



CONTROL OR ALLOWANCE

3 Did the government control the criminal activity or simply allow it to occur?

The defendant claims that MECTF controlled every detail of the crime by mentioning a child young enough to trigger the 1st Degree rape of a child statute and discussing multiple children so the crimes would be punished more severely.

- Although the trial court's record only provided enough detail for the appellate court to assign this factor as neutral, they note that Gant was presented with the existence of 3 minor children and only discussed sexual activity regarding the two daughters, showing that he maintained control over which children he focused his criminal behavior on.

The 3rd question of the court's Lively Test inquiry is **Did the government control the criminal activity or simply allow it to occur?**

The defendant claims that MECTF controlled every detail of the crime by mentioning a child young enough to trigger the 1st Degree rape of a child statute and discussing multiple children so the crimes would be punished more severely.

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5.22 LIVELY TEST 4



POLICE MOTIVE

4 Was the police motive to prevent crime or protect the public?

The overall motive for MECTF existing and for undertaking the Net Nanny operations is to prevent sexual crimes against children and to protect the public from that harm.

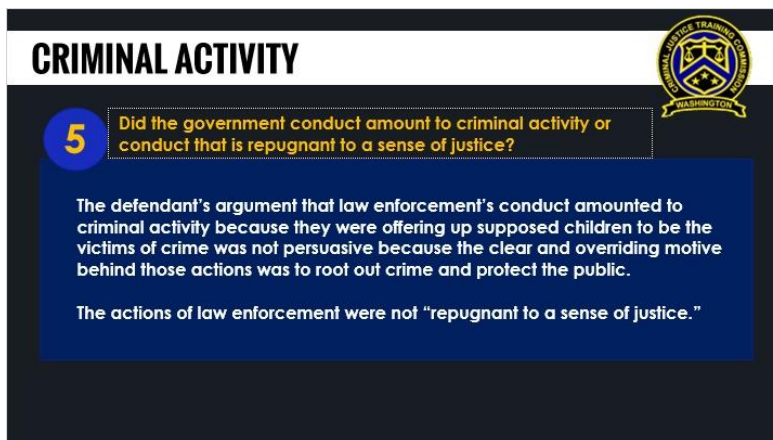
The defendant unsuccessfully claimed that because most of those arrested in the Net Nanny operations don't have prior criminal history and few children are actually rescued from exploitation as a result of the stings, the police aren't actually preventing crime or protecting the public.

For the 4th part of the Lively Test, the court asks **if the police motive was to prevent crime or protect the public?**

The overall motive for MECTF existing and for undertaking the Net Nanny operations is to prevent sexual crimes against children and to protect the public from that harm.

The defendant unsuccessfully claimed that because most of those arrested in the Net Nanny operations don't have prior criminal history and few children are actually rescued from exploitation as a result of the stings, the police aren't actually preventing crime or protecting the public.

5.23 LIVELY TEST 5



CRIMINAL ACTIVITY

5 Did the government conduct amount to criminal activity or conduct that is repugnant to a sense of justice?

The defendant's argument that law enforcement's conduct amounted to criminal activity because they were offering up supposed children to be the victims of crime was not persuasive because the clear and overriding motive behind those actions was to root out crime and protect the public.

The actions of law enforcement were not "repugnant to a sense of justice."

The final question in the Lively Test is **did the government conduct amount to criminal activity or conduct that is repugnant to a sense of justice?**

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The actions of law enforcement were not “repugnant to a sense of justice.”